EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 30.5.2018
C(2018) 3569 final

PUBLIC VERSION

To the notifying Parties

Subject: **Case M.7000 – LIBERTY GLOBAL / ZIGGO**
Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

1. INTRODUCTION

(1) On 14 March 2014, the European Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "Merger Regulation") by which Liberty Global plc ("Liberty Global", the United Kingdom, also the "Notifying Party"), acquired within the meaning of Article 3(1)(b) of the Merger Regulation sole control over Ziggo N.V. ("Ziggo", the Netherlands) by way of a public bid ("the Transaction") in order to form an entity which would take over the parties' respective activities in the Netherlands ("NewZiggo").

(2) On 10 October 2014, the Commission declared the Transaction compatible with the internal market subject to the fulfilment of certain conditions (the "Conditional Clearance Decision" or "the 2014 Decision").

(3) By judgment of 26 October 2017 (the "Judgment"), the General Court annulled the Commission's Conditional Clearance Decision on the ground that the Commission failed to state the reasons of its finding that the proposed merger would not lead to vertical anti-competitive effects on the possible market for

[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').

Commission européenne, DG COMP MERGER REGISTRY, 1049 Bruxelles, BELGIQUE
Europese Commissie, DG COMP MERGER REGISTRY, 1049 Brussel, BELGIË

Tel: +32 229-91111. Fax: +32 229-64301. E-mail: COMP-MERGER-REGISTRY@ec.europa.eu.

Premium pay TV sports channels.[3] The General Court found, in fact, that the Conditional Clearance Decision did not contain any analysis of the impact of the downstream structural changes, with the joining together of Liberty Global's and Ziggo's respective distribution platforms, on the relevant market in question. In addition, the Court argued, when discussing the ability and incentive of Liberty Global to engage in foreclosure of Sport1, the Commission should also have assessed the respective market positions and competitive relationships of Fox Sports and Sport1.[4]

(4) In order to comply with the Judgment, the Commission is undertaking a re-assessment of the entire Transaction, including all affected markets, under current market conditions as stipulated by the text of Article 10(5) of the Merger Regulation.

(5) On 4 April 2018, Liberty Global and Vodafone (the "Notifying Parties") submitted to the Commission a supplement Form CO providing information on the Transaction, on its effect on competition and on the changes in market conditions occurred since the Conditional Clearance Decision (the "Supplement Form CO").

(6) Since the Conditional Clearance Decision, Liberty Global and Vodafone have combined their telecommunications businesses in the Netherlands in VodafoneZiggo. This subsequent transaction was conditionally cleared by the Commission on 3 August 2016[5] and was completed on 31 December 2016. As of that date, the target (which had become part of NewZiggo), was contributed by Liberty Global to VodafoneZiggo and is now indirectly jointly controlled by Liberty Global and Vodafone.

2. THE PARTIES

(7) Liberty Global owns and operates cable networks and some mobile networks worldwide and offers television, broadband internet, mobile and telephony services as well as mobile services.

(8) At the time of the Conditional Clearance Decision, Liberty Global owned a regional cable network in the Netherlands under the brand UPC. This was then merged with the Ziggo business into NewZiggo. Today, Liberty Global is active in the Netherlands via its joint venture with Vodafone – VodafoneZiggo - into which the NewZiggo entity was contributed.

(9) The Conditional Clearance Decision found that John Malone, a United States citizen, is the largest shareholder (albeit a minority shareholder) of Liberty

---

3 Case T-394/15, *KPN* v *Commission*, EU:T:2017:756.

4 *KPN* v *Commission*, paragraphs 57-69.

5 Commission decision of 3 August 2016, in case M.7978, *Vodafone/Liberty Global/ Dutch JV*.

Global.[6] He also held significant minority shareholdings in Liberty Interactive Corporation ("LIC"), Liberty Media Corporation ("LMC") and Discovery Communications, Inc. ("Discovery"). John Malone also held the positions of Chairman of the respective boards of Liberty Global, LIC and LMC, as well as of director of Discovery. None of LIC, LMC or Discovery was found to be part of Liberty Global. Discovery was found to be active in the wholesale supply of TV channels, including in the Netherlands, and had recently acquired Eurosport SAS ("Eurosport").[7]

(10) The issue of whether John Malone controls Liberty Global, LIC or LMC was left open in the Conditional Clearance Decision given that the outcome of the competitive assessment was considered not to change whether or not John Malone controlled those companies.[8]

(11) Today, John Malone still holds significant minority shareholdings in Liberty Global, LMC, Discovery and LIC (which was renamed Qurate Retail, Inc. ("Qurate Retail") as of March 2018). In addition, John Malone today holds significant minority shareholdings in GCI Liberty, Inc ("GCI") and Liberty Broadband Corporation ("Liberty Broadband").[9]

(12) The Commission has assessed whether the exercise of voting rights or powers related to corporate offices enables John Malone to exercise either *de jure* or *de facto* control on, in particular, LMC and Discovery. The purpose of the assessment is to verify whether Liberty Global and LMC (with its Formula 1 broadcasting rights owned as of January 2017) may be subject to the control of the same individual, so that Liberty Global may be considered active in the supply of sports broadcasting rights in the Netherlands. The same analysis has been carried out in relation to Discovery, which controls the sports channel Eurosport.

(13) In this respect, the Commission has requested and examined all relevant information concerning the corporate governance of the companies in which Mr John Malone owns voting rights and/or holds corporate offices.

---

6 Liberty Global was (and is) listed on the NASDAQ stock exchange with the largest shareholder, John Malone, ultimately holding approximately 28% of voting power in Liberty Global. To Liberty Global's knowledge, no other stockholder had a significant equity interest in Liberty Global.

7 Commission's decision of 8 April 2014 in Case No M.7170 - Discovery Communications/Eurosport.

8 The issue of possible control by John Malone over Liberty Global, LMC or Discovery was left open in the Commission's decision of 14 April 2013 in Case No COMP/M.6880 - Liberty Global/Virgin Media, because the transaction did not raise competition concerns, even when assuming that such control were to exist. The same was considered to apply in the Conditional Clearance Decision given that LCI has no activities in the Netherlands and LMC's interest in relevant companies (Viacom and Time Warner) equated to less than 3% voting rights.

9 As of 31 March 2018, Mr John Malone controls 26.9% of the voting rights in GCI Liberty, a company that provides communication services in the United States. As of 28 February 2018, Mr John Malone controls 47.1% of the voting rights in Liberty Broadband, whose principal assets consist of its interest in Charter Communications, Inc. and its subsidiary TruePosition, Inc. Charter Communications, Inc. appears to be one of the largest providers of cable services in the United States. TruePosition, Inc. is a mobile positioning and contextual location intelligence solutions business.

(14) Mr John Malone holds, with his spouse and trusts, 28% of the voting rights in Liberty Global. Voter turnout percentages at the shareholders meeting of the company have been [...] in the years 2017, 2016 and 2015 respectively. Therefore, Mr Malone has less than 50% of the voting rights in the shareholders meeting. His voting shares allow him to block the approval of special resolutions that require a pass majority of 75% (and do not concern strategic commercial decisions), but do not allow Mr Malone to either pass or block the approval of ordinary resolutions that concern strategic commercial decisions.

(15) Based on information publicly available and information provided by the Notifying Parties, GCI, Qurate Retail and Liberty Broadband, where Mr Malone has minority shareholdings too, carry out business activities unrelated to the Netherlands.[10]

(16) With respect to LMC, where Mr Malone holds a minority shareholding of 47.7%, the Notifying Parties have not been able to provide updated voter presence data for the shareholders meeting. In any event, for completeness, the Commission will undertake an "even if" assessment of the hypothetical situation that John Malone *de facto* controls both Liberty Global and LMC in which case there would be indirect control between Liberty Global's activities and Formula 1.[11]

(17) With respect to Discovery, in the decision *Liberty Global/Discovery/All3Media*,[12] the Commission concluded that, based on the information available at the time, no single shareholder (including Mr John Malone) had the ability to exercise sole or joint control over Discovery. The Commission has found no evidence that the situation has changed since the adoption of that decision.[13] Moreover, according to the most recent SEC disclosure from Discovery, John Malone currently holds a 28.5% interest in

---

10 GCI, Inc. provides communications services in the United States. Its business carries out a range of wireless, data, video, voice, and managed services to residential customers, businesses, governmental entities, and educational and medical institutions. Qurate Retail Group is a group of eight retail brands, reaching approximately 370 million homes worldwide through 16 television networks and multiple ecommerce sites, social pages, mobile apps, print catalogs and in-store destinations. It has subsidiaries worldwide and in Europe, but not in the Netherlands. Liberty Broadband's principal assets consist of its interest in Charter Communications, Inc. and its subsidiary TruePosition, Inc. Charter Communications, Inc., according to the Notifying Parties, appears to be one of the largest providers of cable services in the United States, whose business includes a variety of entertainment, information and communications solutions to residential and commercial customers. TruePosition, Inc. is a mobile positioning and contextual location intelligence solutions business.

11 See section 5.1.1.3.

12 Commission decision of 19.09.2014, Case COMP/M.7282, Liberty Global/Discovery/All3Media, para 5 and footnote 7.

13 In the recent case Discovery/Scripps, the Commission has rejected the application of the Polish Competition Authority to refer the case to it. One of the reasons at the basis of the Commission decision was precisely that the Polish Competition Authority could not provide evidence of Mr Malone's (*de iure* or *de facto*) control over Discovery. See Commission decision of 06.02.2018, pursuant to Article 9(3) of the Merger Regulation, in case COMP/M.8665, Discovery/Scripps, para 44.

Discovery, which is slightly less than what he held at the time of the aforementioned decision.[14]

(18) In addition to the mentioned minority (although in some cases significant) shareholdings, the Commission has also taken into consideration the minority shareholdings of other natural and legal persons. It observes, in that respect, that certain members of Liberty Global's Board of Directors own shares in various companies (such as Liberty Global itself, LMC, Qurate Retail) in which Mr Malone is a shareholder. The same applies to investment funds and financial institutions, whose names recur in the shareholders' lists of the same companies. With specific respect to Liberty Global, the Commission notes that Mr John Malone is the chairman of the company's Board of Directors and, in the last ten years, has been one of the two members of the company's Executive Committee, to which the Board of Directors delegates some of its executive powers.

(19) At the same time, however, Mr Malone is not able, solely relying on his voting rights and corporate powers, to unilaterally appoint directors (whose appointment is based on the designation of a specific committee subject to the approval of the shareholders meeting)

(20) Based on the above considerations, the Commission concludes that there is not sufficient evidence that Mr John Malone is capable of exercising either *de jure* or *de facto* control over Liberty Global. In relation to his role in the companies in question, the Commission adds that, even if any form of "significant influence" (which is not "decisive influence") of Mr Malone over any of the companies at hand existed, it is a mere minority shareholding and there is no proof of a causal link between the business behaviour of each (otherwise independent) undertaking and the aforementioned minority shareholdings.

(21) Vodafone is the holding company of a group primarily involved in the operation of mobile telecommunications networks and the provision of mobile telecommunications services, such as mobile voice, messaging and data services.

(22) VodafoneZiggo is a provider of telecommunication services in the Netherlands. It was established on 31 December 2016 as a joint venture in which Liberty Global and Vodafone combined their respective telecommunication activities in the Netherlands. VodafoneZiggo operates a cable network under the Ziggo brand, which covers approx. 90% of households in the Netherlands. In addition, VodafoneZiggo provides retail mobile telecommunications services and mobile wholesale access and call origination services, under the Vodafone and the Hollandse Nieuwe brands, as one of the four mobile network operators (MNOs) active in the Dutch market. It provides digital and analogue cable video, broadband internet, and digital telephony services to 3,978,600 customers as of December 31, 2016. VodafoneZiggo has approx. 4.97 million mobile customers as of 30 September, 2017. In addition to its core cable and mobile operations,

14 The Notifying Parties mention this in Supplement to Form CO, para. 66.

VodafoneZiggo has limited broadcasting activities in the form of (i) a suite of Pay TV sports channels, Ziggo Sport Totaal ("ZST") (which until 11 November 2015, was called Sport1) and (ii) a basic package TV channel, Ziggo Sport ("ZSB", launched on 11 November 2015).

(23) The target, Ziggo, was established on 1 February 2007 and has operated under the Ziggo brand since May 2008. At the time of the Conditional Clearance Decision, Ziggo owned and operated a cable network that span more than half of the Netherlands, including the third and fourth biggest cities, Den Haag and Utrecht. Ziggo's cable network did not overlap with that of UPC. In 2013, Ziggo provided digital and analogue cable video, broadband internet, mobile telephony and digital telephony (VoIP) services.

(24) Liberty Global's UPC, Ziggo, NewZiggo or VodafoneZiggo have never been under any regulated access obligations in the Netherlands and has never granted access to its cable network on a commercial basis.

(25) For the purpose of this decision, Liberty Global and Vodafone are referred to as the "Notifying Parties". Liberty Global, Vodafone and VodafoneZiggo are together referred to as the "Parties".

3. THE OPERATION AND THE CONCENTRATION

(26) The concentration, which was notified on 14 March 2014, consisted of the acquisition of sole control over Ziggo by Liberty Global, which operated a non-overlapping regional cable network in the Netherlands under the brand UPC. For this purpose, in particular, Liberty Global would launch a public bid for the remaining shares in Ziggo that it did not already own. If the bid would be successful, Liberty Global would have a controlling interest in Ziggo.

(27) This therefore constituted a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

(28) At the time of the 2014 notification the intention to launch a public bid had been publicly announced. After receiving approval by the relevant securities markets authorities and clearance by the Commission on 10 October 2014, the tender offer was successfully completed on 21 November 2014.

4. EU DIMENSION

(29) The Transaction had an EU dimension at the time of the 2014 notification. The undertakings concerned at the time had a combined aggregate worldwide turnover of more than EUR 5 000 million in 2012 (Liberty Global: EUR 13 082 million; Ziggo: EUR 1 537 million). They each had a combined aggregate EU-wide turnover of more than EUR 250 million in 2012 (Liberty Global: EUR 11 260 million; Ziggo: EUR 1 537 million). While Ziggo achieved more than two-thirds of its aggregate EU-wide turnover in the Netherlands, Liberty Global did not. The Transaction therefore had a Union dimension. The Transaction may be considered to be of an EU dimension also today. Based

on 2016 data, the Parties have a combined aggregate world-wide turnover of more than EUR 5 000 million[15] (Liberty Global: EUR 18 076 million; Vodafone: EUR 47 631 million). Each of them has an EU-wide turnover in excess of EUR 250 million (Liberty Global: EUR 14 371 million; Vodafone: EUR 34 516 million), while neither achieved two-thirds of its aggregate EU-wide turnover within one and the same Member State.

(30) The Transaction therefore has an EU dimension.

5. RELEVANT MARKETS

(31) The Transaction gave rise to certain horizontal overlaps and vertical relationships between UPC's and Ziggo's activities in a number of relevant markets along the value chain for the distribution of audio visual TV content and the provision of telecommunication services (fixed and mobile telephony and broadband Internet) in the Netherlands.

5.1. Television services

(32) As regards the TV-related markets where the Parties are active, with respect to the licensing and distribution of content and channels, the Commission has in previous decisions made a distinction between the following markets:

- Licensing and acquisition of broadcasting rights for TV content;
- Wholesale supply and acquisition of TV channels; and
- Retail supply of TV services.

(33) With reference to the abovementioned TV-related markets, it is possible to identify several levels of activity in the product chain.

(34) Upstream, in the audio-visual chain, there are the holders of broadcasting rights for audio-visual content such as (i) films, (ii) sport events and (iii) other content (such as TV series and documentaries).[16]

(35) At the second level, the broadcasting rights are licensed to: (i) broadcasters which then incorporate them into linear TV channels; or (ii) content platform operators which retail the content to end users on a (non-linear) VOD/PPV basis. Licenses for sports broadcasting rights are typically granted through tenders on an exclusive basis for a specific geography and for a limited period.

(36) At the third level, TV channel suppliers (such as ZST or Fox Sports) license their channels to providers of retail TV services for incorporation into broader

---

15 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.4.2008, p. 1).

16 Commission decision of 21.12.2010, in Case COMP/M.5932, News Corp/BSkyB; Commission decision of 22.09.2006 in Case COMP/M.4353 Permira/All3Media Group and Commission decision of 15.04.2013 in Case COMP/M.6880, Liberty Global/Virgin Media.

TV channel bouquets that are in turn sold to viewers. Some TV channel suppliers (such as ZST) are vertically-integrated as they own a technical platform and/or are active as retail Pay TV operators. They broadcast their own channels together with third party channels via their own platform. Other TV channel suppliers (such as Fox Sports) are not vertically-integrated and depend on platform operators or retail pay-TV operators to broadcast their channels.

(37) FTA channels are mainly financed by advertising and sometimes, public funds. Pay-TV channels are primarily financed by subscription fees paid by viewers; other sources of finance are carriage fees paid by retail operators and advertising.

(38) At the final stage of the product chain, retail TV providers offer a TV subscription to end-users, which typically consist of a selection of packages combining a number of TV channels (different operators may package channels differently). In addition, certain TV channels may also be distributed on a standalone basis, either as an "add-on" to a traditional TV subscription or via an OTT service.

(39) In addition, these TV propositions may be offered standalone or as part of bundles with other fixed services (internet, telephony) and/or in combination with services via a mobile network ("mobile services") (known as "multi-play" bundles).

5.1.1. Licensing and acquisition of broadcasting rights for TV content

(40) Audio visual TV content comprises "entertainment products", such as films, sports, and TV programmes that can be broadcast via TV.[17] The broadcasting rights generally belong to the creators of the content. These rights owners, which constitute the supply side of this market, license them to broadcasters for linear broadcasting, as part of TV channels, or to platform operators for non-linear distribution through pay-per-view ("PPV") or video-on-demand ("VOD"). Those broadcasters and content platform operators, together, comprise the demand side of this market.

(41) In previous decisions, the Commission has divided the market for the licensing and acquisition of individual content in the following manner: (i) Pay TV versus Free-To-Air ("FTA") TV,[18] (ii) linear versus non-linear broadcast,[19] (iii) by exhibition window, that is to say subscription VOD ("SVOD"), transactional VOD ("TVOD"),[20] PPV, first Pay TV window,

---

17 Commission's decision of 26 August 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 28.

18 Commission's decision of 26 August 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 35.

19 Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraphs 27-36.

20 Subscription VOD designates a product where an end user obtains the right to watch multiple titles within a designated time frame (for example one month) through a single payment. Transactional VOD designates a product where an end user obtains the right to watch a single title within a designated time frame (for example 48 hours) through a single payment. PPV designates a product

second Pay TV window,[21] and FTA, (iv) by content type, that is to say films, sports, other content.

(42) As regards content type, the Commission has further distinguished between: (i) exclusive rights to premium films, (ii) rights to football events that are played regularly throughout every year (for example national league matches, national cup, UEFA Cup and UEFA Champions League), (iii) rights to football events that are played more intermittently, every four years, for example the FIFA World Cup and European Championship of Nations, and (iv) exclusive rights to other sport events,[22] and by type of supplier in respect of films, that is to say major Hollywood studios/smaller suppliers.[23]

5.1.1.1. Product market definition

The Notifying Party's views in 2014

(43) In the 2014 notification, the Notifying Party submitted that the exact definition of the market could be left open as the proposed concentration would not lead to a significant impediment to effective competition on any potential submarket.

(44) With respect to specific market sub-segments, in particular, the Notifying Party indicated that no distinction should be made between linear and non-linear broadcasting. The Notifying Party considered that, from a demand side perspective, providers of linear TV services were facing increasing competition from over-the-top ("OTT") players, that is to say operators providing audio visual services over the Internet, providing non-linear services. According to the Notifying Party there was also a high degree of supply side substitutability between the rights for linear and non-linear broadcast and those rights were often negotiated together and covered by a single agreement.

(45) The Notifying Party also indicated a certain degree of demand-side and supply-side substitutability between the broadcasting rights for the different exhibition windows, including SVOD and TVOD, pointing out that TV channels and VOD services often offered a mix of first Pay TV window, second Pay TV window and library content. In addition, the Notifying Party considered that substitutability also existed on the supply side, with some content right owners creating second Pay TV windows in response to the increased demand for exclusive windows created by the emergence of OTT providers thus blurring the distinction between the different exhibition windows.

---

where an end user obtains the right to watch a single title during a specific time frame (for example Sunday between 2.00 pm and 3.45 pm) through a single payment.

[21] Audio-visual content is typically sold separately for usage in different retail services or points in time. These different offers are generally referred to as broadcast windows.

[22] Commission's decision of 13 November 2001 in Case No COMP/M.2483 – Group Canal+/RTL/GJCD/JV, paragraph 21; Commission's decision of 2 April 2003 in Case No COMP/M.2876 - Newscorp/Telepiù, paragraphs 61, 69 and 71.

[23] Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 18.

(46) As to the distinction between various type of content (sports, films and other content), The Notifying Party submitted that a single market existed for all individual content due to the high degree of supply-side substitutability. The Notifying Party argued that it was not always possible to make a strict distinction between the different content segments as TV products are highly differentiated and a given product could be aimed at various types of target audience.

Commission's assessment and conclusions in 2014

(47) In its assessment, the Commission noted that the market investigation confirmed the traditional distinction between FTA and Pay TV content. At the same time, as the Dutch market was essentially a Pay TV market with only three FTA channels, the Commission concluded that the distinction between FTA and Pay TV was of little relevance and the definition could be left open, because the assessment of the Transaction would remain the same, whether the licensing and acquisition of broadcasting rights for FTA TV and Pay TV were considered to belong to the same product market or to two separate markets.

(48) In relation to the distinction between linear and non-linear broadcasting, the Commission noted that the information gathered during the market investigation, and in particular the differences in the pricing models and the licensing conditions, suggested the existence of separate markets for licensing and acquisition of broadcasting rights for (i) linear broadcasting and (ii) non-linear broadcasting. In any event, since the Transaction did not raise competition concerns under any possible market segmentation, the Commission considered that the exact scope of the relevant product markets could be left open in that respect.

(49) In relation to the market definition according to broadcasting windows, the Commission found that, given the different conditions for the acquisition of rights for each exhibition window, and the limited instances in which a window could be replaced by another, there were indications that a different market for each exhibition window could be distinguished.

(50) As regards VOD, the market investigation indicated a clear distinction between SVOD and TVOD, mostly due to the fact that both types of VOD services had different business models, different pricing conditions, and fell into separate and distinct viewing windows. Those differences in business models and pricing conditions suggested that SVOD and TVOD could constitute two separate product markets.

(51) Since the Transaction did not raise competition concerns under any possible market segmentation, the Commission left open the question whether licensing and acquisition of broadcasting rights for each exhibition window, including for SVOD and for TVOD, belonged to the same or to separate markets.

(52) As to a possible differentiation based on the type of content (sport, films, other content), the investigation revealed absence of interchangeability between the various types of content, different target audiences and the differences in licensing agreements as elements suggesting that the acquisition

of rights for films could be distinguished from the acquisition of rights for sport events and from the acquisition of rights for other types of content.

(53) Since, in any event, the Transaction did not raise competition concerns under any possible market segmentation, the Commission left open the exact scope of the relevant product market.

(54) The Commission also assessed the existence of possible separate markets for premium and non-premium content both in sports and in film right licensing. The market investigation revealed differences in price and ability to attract viewers (e.g. films with high box office success and popular sports, such as Formula 1, Uefa Champions League and Fifa World Cup) and suggested the existence of a distinction between the acquisition of rights for premium content and the acquisition of rights for non-premium content. In any event, the Commission considered that for the purposes of the decision, the question whether broadcasting rights for premium and for non-premium content constituted different markets could be left open.

(55) As regards a differentiation between United States and non-United States film productions, responses to the market investigation differed and it was unclear whether a differentiation between United States and non-United States films should indeed be made. However, this question was left open, since the Transaction did not raise competition concerns whether or not a differentiation was made between United States and non-United States film productions.

(56) The Commission also considered, based on its investigation, that the differences in pricing, production model and terms of acquisition of broadcasting rights for Dutch-language content (film and series) and other content did not seem to justify the delineation of a separate product market for Dutch-language content. In any event, the Commission concluded that even if a separate market for acquisition of Dutch-language content were to exist, the final commitments proposed by the Notifying Party would also address all possible concerns related to the acquisition of premium Dutch-language content.

(57) Based on the previous considerations, the Commission left open the exact definition of the relevant product market in the Conditional Clearance Decision.

The Notifying Parties' views in their Supplementary Notification

(58) With respect to the possible segmentation between Pay TV and FTA services, the Notifying Parties submit in the Supplement Form CO that there is no clear distinction between Pay TV and FTA services from Dutch consumers' perspective given that there are only three FTA channels (NPO 1, 2 and 3) broadcast via unencrypted terrestrial TV signals in a limited standard definition quality, while all other TV channels are available only through a Pay TV subscription.

(59) As to the difference between linear and non-linear broadcasting, in the Supplement Form CO, the Notifying Parties indicate, as a key development in the broadcasting and television markets since 2014, the ongoing shift of the

relative amount of time consumers spend watching linear television via "traditional" technologies versus accessing the internet and watching content on demand. More specifically, they submit that the growth of the offer of non-linear services, which was identified in 2014, has been very significant, with the penetration of Netflix in the Netherlands (with 2.6 million subscribers in 2017) being a key example.[24]

(60) The Notifying Parties further argue that, from a demand side perspective, linear TV services are to a very considerable extent substitutable with non-linear TV services. This is evidenced by the growth of non-linear services at the expense of linear services (in terms of viewing time). Several OTT players have successfully entered the market (e.g. NLZiet, Videoland, and Netflix) offering consumers a readily available, cost effective possibility to obtain high quality content. Actual competition in the acquisition of premium content is for instance exerted by players such as Netflix, which managed to secure exclusive deals for certain content with Disney and Sony. In the case of Netflix, that means that it secures linear rights together with the VOD rights, while it is of course only interested in the latter. Furthermore, they add, an increasing number of content creators are offering their content directly to consumers. An example is Netflix (with e.g. House of Cards), which creates its own content and broadcasts this directly to consumers via its OTT platform. This exerts even further competitive pressure on traditional linear services. Moreover, even though the terms under which linear and non-linear rights are licensed may differ to some extent, these rights are usually negotiated together and covered by a single agreement.

(61) In the Supplement Form CO, the Notifying Parties submit that, given the increased competitive pressure that non-linear services exert on linear services, this potential segmentation is no longer appropriate. This is further evidenced by the fact that, for the main types of content, the contractual structure for acquiring rights covers/typically involves both linear and non-linear distribution.

(62) In relation to sports, the Notifying Parties note that VodafoneZiggo's negotiations for sports rights are generally focussed on linear rights as from a commercial perspective the value of the rights is almost exclusively based on the linear content provided and non-linear rights are perceived as an add-on since non-linear sports broadcasting is in practice of little importance. Where rights-holders do make non-linear rights available, however, these are generally included in the same agreement.

(63) The Notifying Parties also note that they purchase sport rights separately for the Ziggo GO app (both linear and non-linear exhibition) due to the high level of technical details this app requires. In addition, after the divestiture of

[24] As further examples, in the Supplement Form CO, the Notifying Parties refer to the increased use of catch-up television and to the online (joint) efforts of broadcasters to offer this service via their own websites with key examples being Uitzending Gemist, RTLXL and NLZiet. Furthermore, they argue, these OTT players are also offering linear content via their OTT services. For instance, besides offering a variety of non-linear content (catch-up TV, VOD etc.) NLZiet also offers live (linear) TV channels via its OTT platform (the channels of NPO, RTL and SBS).

Film1, VodafoneZiggo focuses on the purchase of film rights for SVOD distribution and agreements for such rights may also include rights for linear distribution ([...]).

(64) As to a market definition based on exhibition windows, the Notifying Parties maintain the position they had in 2014 and submit that a degree of substitutability exists between these distribution modes on the demand and supply side of the market.

(65) As to a possible market segmentation based on the type of content (such as between sports, films and other TV content) the Notifying Parties argue that it is not always possible to apply a strict distinction between certain types of content.

(66) On a market distinction based on the language of the content, the Notifying Parties submit that indeed, the differences in market conditions are not such as to justify a separate market for Dutch-language content. The negotiation position of a content provider depends for a large part on the commercial success of the content, rather than the language of such content.

(67) In general, the Notifying Parties conclude, a single market exists for all individual content types due to the high degree of supply substitutability and because individual rights can be sold for use in different products or channels without any modification.

(68) As to a possible market segmentation based on the nature of the content supplier (such as Hollywood studios or small content producers), the Notifying Parties consider that no strict segmentation between "major" Hollywood studios and smaller suppliers can be made, particularly since the negotiation position of the relevant content supplier will depend mainly on the commercial success of the film that is being sold, rather than on the nature of the supplier.

(69) Concluding on the relevant product market for broadcasting rights on TV content, the Notifying Parties still consider that the possible segmentations of the market as discussed above can be left open, as the Transaction has not led and does not lead to any competition concerns on even the narrowest conceivable market.

Commission's assessment

(70) The results of the market investigation confirm the Notifying Parties' view in relation to the large penetration of Pay TV in the Dutch market. The market investigation also confirms that a distinction between basic Pay TV and Premium Pay TV would be more appropriate in the Netherlands than a **distinction between FTA and Pay TV**.[25] This market structure impacts the market for content, making a distinction of content licenced for FTA or Pay TV broadcasting irrelevant.

[25] Replies to Q2 to TV channel wholesale suppliers of 5 April 2018, question B.1. Replies to Q3 to retail Pay TV providers of 5 April 2018, question B.A.1

(71) In light of the limited significance of FTA TV in the Netherlands, since essentially, the Dutch TV market is a Pay TV market, the assessment of the Transaction would remain the same whether the licensing and acquisition of broadcasting rights for FTA TV and Pay TV are considered to belong to the same product market or to two separate markets. As a consequence, the Commission considers that the market definition can be left open for the purpose of this decision.

(72) As to the possible **distinction between linear and non-linear content**, the market investigation indicates that, on the demand side, content rights for the two distribution modes are not substitutable and, in some cases, are used as complementary offers by TV broadcasters.[26] At the same time, non-linear is increasingly constraining linear broadcasting, with viewers replacing linear broadcasting with a selection of their preferred non-linear content ("cord cutting"). On the supply side there is a degree of elasticity, as linear and non-linear rights for content are licensed together.[27] In any event, the Commission considers that, for the purposes of this decision, the question as to whether there exists a distinct market for linear and non-linear content can be left open, as the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

(73) As to the **distinction between different types of content**, the market investigation confirms the fundamental distinction, emerged already in the 2014 market investigation, between (i) sport, (ii) film; and (iii) other content.[28] The market investigation includes indications that the distinction between popular films and popular TV series is fading, as also the latter can be considered premium content.[29] The results of the market investigation indicate that US productions and non-US productions may not be considered alternatives.[30]

(74) Within these content types, the replies of TV retailers to the market investigation indicate the **existence of premium and non-premium content**.[31] The qualification of content as premium or not, however, seems to depend not solely on the nature of the content, but also on contingent

---

26 Replies to Q2 to TV channel wholesale suppliers of 5 April 2018, question B.2. Replies to Q3 to retail Pay TV providers of 5 April 2018, questions B.A.2 and B.A.2.1.

27 Replies to Q1 to content providers of 5 April 2018, question 6; replies to Q2 to TV channel suppliers of 5 April 2018, questions B.2 and B.2.1; replies to Q3 of 5 April 2018, questions B.A.2 and B.A.2.1.

28 Replies to Q1 to content providers of 5 April 2018, question 7; Replies to Q3 to retail Pay TV providers of 5 April 2018, questions B.A.7, B.A.7.1 and B.A.7.2.

29 Replies to Q2 to TV channels suppliers of 5 April 2018, question B.3.1 (particularly the explanation of TalpaTV); Replies to Q3 to retail Pay TV providers of 5 April 2018, question B.A.3.1.

30 Replies to Q2 to TV channels suppliers of 5 April 2018, question B.4.1; Replies to Q3 to retail Pay TV providers of 5 April 2018, questions B.A.4 and B.A.4.1.

31 Replies to Q3 to retail Pay TV providers of 5 April 2018, question B.A.3, B.A.3.1 and B.A.3.2.

circumstances (for instance the emergence of a national champion or talent in the case of sports).

(75) The Commission considers that the differences in price and ability to attract viewers suggest the existence of a **distinction between the acquisition of rights for premium content and the acquisition of rights for non-premium content**. In any event, the Commission considers that, for the purposes of this decision, the question as to whether broadcasting rights for premium and for non-premium content (and, within premium films, US and non-US productions) can be left open, as the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

(76) In the above respect, some complainants and third interested parties have indicated that certain sports events (such as the Formula 1 World championship, the English Premier League, the Spanish La Liga and the Eredivisie football league) are to be considered "essential" competitive factors, so important for the business that, in order to realise a level playing field, all competitors should have access to them.

(77) The Commission, however, considers that an essential factor is an input that forces out of the market (or prevents market entry of) those which do not have it. In the case at hand, the sport contents mentioned can attract viewers and generate revenues, but having access to them is not a requirement to continue to operate on the market for the wholesale supply of TV channels or of retail supply of Pay TV services. Operators in the Pay TV value chain (TV channels providers and retail Pay TV providers), in fact, still have the possibility to differentiate themselves by investing in alternative content which can be (or become over time) equally or more attractive for viewers and subscribers. The replies to the market investigation point to a number of premium sports events (some traditionally considered premium, others considered premium due to contingent circumstances, such as the presence of a Dutch athlete) that are substitutable among themselves.[32] The Commission therefore, considers that the narrowest plausible markets are those for broadcasting rights for premium and non-premium content, without any possible further distinction.

(78) For films, the market investigation has also indicated that, from the demand side, a difference exists **between various broadcasting windows for films** and, within VOD, **between SVOD and TVOD**. The replies to the market investigation, however, indicate a certain degree of supply side substitutability in offering various content.[33] In any event, the Commission considers that, for the purposes of this decision, the question as to whether the VOD market should be further segmented in SVOD and TVOD can be left open, as the Commission considers that the Transaction does not raise serious doubts as to

[32] See replies to Q2 of 5 April 2018 to TV channel suppliers, questions B.3.1 and B.9.1.; replies to Q3 of 5 April 2018 to retail Pay TV providers, questions B.A.3.1 and B.A.9.1.

[33] Replies to Q1 to content providers of 5 April 2018, questions 11 and 12; replies to Q2 to TV channel suppliers of 5 April 2018, questions B.5 and B.5.1 and B.6; replies to Q3 to retail Pay TV providers of 5 April 2018, questions B.A.5 and B.A.6.

its compatibility with the internal market irrespective of the conclusion on this point.[34]

Overall conclusion

(79) In light of the above, the Commission concludes that the relevant product markets for the purpose of this decision are the markets for licensing and acquisition of TV broadcasting rights in relation to (i) sports content, (ii) movies and series, and (iii) other content. The question as to whether these markets should be further segmented based on content for FTA or Pay TV, linear or non-linear broadcasting, premium or non-premium quality and broadcasting window can be left open, as the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

5.1.1.2. Geographic market definition

(80) At the time of the 2014 notification, the Notifying Party did not take a position on the geographic scope of the market but referred to the *SFR/Télé 2 France* case,[35] where the Commission had found that the market was national in scope.

(81) The Commission has previously considered that the market for the licensing/acquisition of broadcasting rights for audio visual TV content is either national in scope or potentially comprises a broader linguistically homogeneous area.[36]

(82) The Dutch Authority for Consumers and Markets (ACM) (previously the Nederlandse Mededingingsautoriteit (NMa)) concluded in its decision in *UPC-Canal+*[37] that, since licenses for exclusive rights to premium film content are limited to the Netherlands, the market is national in scope. In its later decisions in cases *Sanoma-SBS*[38] and *RTL NL-Radio 538*,[39] the ACM (NMa) stated that the geographic scope of the market for the licensing and acquisition of content is national in scope or relates to a linguistically homogeneous area. However, in each case, it ultimately left the question open, as the geographic market definition did not impact on the competitive assessment.

---

34 Today, following the divestment of Film1 and the dissolvement of the HBO joint venture (see paragraph 138 of the Supplement Form CO), the Parties are only active in the purchase of VOD rights for films and series.

35 Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraph 48.

36 Commission's decision of 2 April 2003 in Case No COMP/M.2876 - Newscorp/Telepiù, paragraph 62; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraphs 73-75.

37 ACM (NMa) decision of 28 June 2005 in case 4490/UPC-Canal+, paragraphs 42-43.

38 ACM (NMa) decision of 22 July 2011 in case 7185/Sanoma-SBS, paragraphs 62-63.

39 ACM (NMa) decision of 13 August 2007 in case 6126/RTL NL-Radio 538, paragraphs 39.

(83) The vast majority of respondents to the 2014 market investigation considered that the geographic scope of the market for licensing and acquisition of broadcasting rights in general, but also broken down by film, sport and other content is national.

(84) As regards the geographic scope of a potential market for the licensing and acquisition of broadcasting rights for Dutch-language audio visual content, around half of the respondents to the 2014 second phase market investigation that replied to the relevant question considered that the geographic scope of such a market should cover the Netherlands only (excluding Dutch-speaking Flanders). Some respondents highlighted the fact that Dutch-language content produced in the Netherlands in general did not have the same commercial success in Flanders and vice versa. The other half of the respondents stated that the geographic market should naturally comprise both the Netherlands and Flanders because of their linguistic homogeneity. That being said, the rights for the Netherlands and Flanders were still licensed and acquired separately and, as mentioned by one respondent, not all purchasers of broadcasting rights for Dutch-language content would even be interested in acquiring the rights for both the Netherlands and Flanders. This latter point was indeed confirmed by the fact that the majority of respondents confirmed that the scope of the licensing contracts concluded for Dutch-language audio visual content encompass the Netherlands only.

(85) In that regard, in 2014, the Commission noted that all of the relevant supply agreements covering (i) VOD rights, (ii) first and second window Pay TV rights, (iii) TVOD, as well as (iv) SVOD rights at the time in force between the Notifying Party and suppliers of individual audio visual content [reference to supply agreements between the Parties and suppliers of audio-visual content]. Similarly, all such supply agreements in force between Ziggo and suppliers of individual audio visual content [reference to supply agreements between the Parties and suppliers of audio-visual content].

(86) Based on the above elements the Commission considered in the Conditional Clearance Decision that the relevant markets for the licensing and acquisition of broadcasting rights were national in scope.

(87) In the Supplement Form CO, the Notifying Parties submit the market has a national dimension [reference to the geographic scope of supply agreements between the Parties and suppliers of audio-visual content]. Furthermore, they indicate that significant differences exist in Dutch language individual content produced for Dutch target audiences on the one hand and Flanders target audiences on the other hand. Although there is a degree of co-productions, most of the Dutch language series and programmes are targeted at either Dutch or Flemish audiences, but not both. The Notifying Parties therefore consider that there is no separate geographic market that covers both Dutch and Flemish individual content.

(88) The market investigation undertaken for the reassessment indicated that broadcasting rights for sport events are generally sold on a country-by-country basis. With some exceptions, linked to the fact that the broadcaster purchasing

content is active in multiple countries, film broadcasting rights are also licensed on a national basis.[40]

(89) Therefore, for the purposes of this decision, the Commission concludes that the relevant geographic market is national.

5.1.1.3. Affected market

(90) In 2014, as regards the acquisition of content, the Notifying Party could not rule out that the merged entity's market share would exceed 20% in the hypothetical market for the acquisition of film content and, in particular, the markets for the acquisition of first Pay TV window film content and TVOD film content. As such, those markets were considered to be affected for the purposes of that decision.

(91) Today, the Notifying Parties submit that the combined market share of Liberty Global and Ziggo in the market for the acquisition of all content to be broadcast in linear and VOD mode was [5-10]% in 2013 and that the estimated market share of VodafoneZiggo in the same market in 2017 is [5-10]%.[41]

(92) As indicated in paragraph (63) as a consequence of the divestiture of the Film1 channel, VodafoneZiggo only purchases rights for movies and series for non-linear, mainly SVOD, broadcasting. The Notifying Parties submit they are no longer active in the purchase of linear content rights, which may only still be licensed to VodafoneZiggo as a part of SVOD agreements.[42] Therefore, the hypothetical market for movies and series broadcast in linear mode is not an affected market.

(93) As to the acquisition of VOD rights only for movies and series (thus excluding sports), the Notifying Parties indicate that, while, in 2013, Liberty Global and Ziggo held a combined market share of [20-30]%, in 2017 the estimated market share of VodafoneZiggo in the same market is [5-10]%. Therefore, the market for movies and series broadcast in non-linear/VOD mode is not an affected market.

(94) If the market for non-linear broadcasting rights for movies and series is split between SVOD and TVOD, the 2017 market share of the Parties amounts to less than 20% in SVOD, while the Notifying Parties cannot exclude that the

---

[40] Replies to Q1 to content providers of 5 April 2018, question 14; replies to Q2 to TV channel suppliers of 5 April 2018, questions B.12; replies to Q3 of 5 April 2018, questions B.A.12.

[41] Such estimate, as indicated by the Notifying Parties, is conservative, as it includes the Parties' expenditure in VOD, while it excludes the expenditures of small broadcasters and VOD service providers. In relation to the supply of TV content, the Notifying Parties indicate that Liberty Global has, since 2014, become active in the market through the acquisition of All3Media in 2014. The Notifying Parties refer to that development as not being merger specific, but indicate that under current market conditions a potential vertical link exists between All3Media and what is now VodafoneZiggo. By virtue of very limited market shares of All3Media and VodafoneZiggo on the respective, potentially related markets, these cannot be considered vertically affected.

[42] See paragraphs (182) and (183) of the Supplement Form CO.

market share of VodafoneZiggo in TVOD exceeds 20%. The market for non-linear broadcasting rights for movies and series for TVOD distribution, therefore, is considered an affected marked.

(95) The Notifying Parties indicate that the expenditure for other broadcasting rights excluding sports (that is, documentaries, concert broadcasts, etc.) is negligible.

(96) As to the acquisition of sport content (where non-linear rights, according to the Notifying Parties, are generally included in the linear rights) the estimated market share of VodafoneZiggo is [10-20]% in 2017, while the combined market share of Liberty Global and Ziggo was [5-10]% in 2014. The market therefore is not horizontally affected.

(97) In a hypothetical scenario where Mr. John Malone were considered to *de facto* control both Liberty Global (and thereby jointly control VodafoneZiggo) and LMC (and thereby Formula 1), Liberty Global would be then active in the supply (or licensing) of content rights for broadcasting in the Netherlands. The Notifying Parties have therefore submitted the estimated market shares of Formula 1 in the hypothetical relevant markets. On the hypothetical market segment for supply of broadcasting rights for all premium and non-premium sports content rights in the Netherlands, the market share of Formula 1 would be 1.2%. Taking into account sports content supplied for premium sports channels, Formula 1's estimated market share would still be limited to approx. 2.2%. Formula 1's estimated market share would be even smaller (0.3%) in the market for the supply of all content for Pay TV and for linear and non-linear distribution. Therefore, the Commission concludes that, even if Mr John Malone were to be considered as *de facto* controlling both Liberty Global and LMC and, thus, the Parties were to be considered active in the market for the supply of sports content (and various sub-segments), this market would not be either horizontally or vertically affected.

(98) In the light of the figures and estimates provided by the Notifying Parties in the Supplement Form CO and subsequent submissions, the Commission concludes that the market for the acquisition of non-linear broadcasting rights for movies and series for TVOD distribution is an affected market.

5.1.2. Wholesale supply and acquisition of TV channels

(99) TV channels suppliers acquire or produce individual audio visual content and package it into TV channels. These TV channels are then broadcast to end users via different distribution infrastructures, for example cable, satellite, Internet, and mobile, either on a FTA basis or on a Pay TV basis, individually or as part of so-called "channel bouquets". Hence, the supply side of that market comprises TV channel suppliers. Its demand side comprises providers of retail TV services, which either limit themselves to "carrying" the TV channels and making them available to end users, or also act as channel aggregators, which also "package" TV channels.

5.1.2.1. Product market definition

The Notifying Party's views in 2014

(100) In the 2014 notification, the Notifying Party submitted that there was a separate wholesale market for the supply and acquisition of TV channels. Within the Netherlands, the traditional distinction between FTA and Pay TV channels appeared increasingly blurred and a more appropriate distinction could be made between Basic Pay TV channels, including FTA channels and ordinary commercial channels available in standard bundles, and Premium Pay TV channels. The latter market could be split into two broad segments, namely Premium Pay TV sports channels (carrying high-value sport rights) and Premium Pay TV film channels (featuring blockbuster films or series).

(101) The Notifying Party also indicated that a strict distinction between general interest and thematic Pay TV channels could not be made as a wide range of highly differentiated channels was available: although certain channels may not be always substitutable, depending on the content offered by the channel and viewers' preferences, channels in both segments overlapped in target audience and type of content.

(102) As regards a possible segmentation according to distribution infrastructure, the Notifying Party argued that distribution via satellite or Direct to Home (DTH) exerted a similar competitive constraint on the Parties as other distribution infrastructures such as Internet Protocol TV ("IPTV"), fibre and vDSL (very high bit-rate Digital Subscriber Line) in line with previous decisions of the Commission.

Commission's assessment and conclusions in 2014

(103) In light of the limited significance of FTA TV in the Netherlands (essentially, the Dutch TV market is a Pay TV market), the assessment of the Transaction would remain the same whether FTA TV channels and Pay TV channels are regarded as belonging to the same product market or to two separate markets. Therefore, for the purpose of the decision, the Commission decided to leave the exact market definition open.

(104) In light of the differences in content offering, pricing conditions and size of the audience attracted between Basic and Premium Pay TV channels, and for the purposes of the decision, the Commission considered that Basic Pay TV channels and Premium Pay TV channels belonged to separate product markets with the latter being possibly further segmented between Premium Pay TV film channels and Premium Pay TV sports channels. In any event, the Commission left open the question whether the market for Premium Pay TV channels could be further segmented into areas of interest as the assessment of the Transaction would have remained the same. The Commission also left open the question whether all general interest Pay TV channels and all thematic Pay TV channels belonged to separate product markets, as the assessment of the Transaction would have remained the same.

(105) As to a possible market segmentation based on distribution infrastructure, the market investigation at the time indicated interchangeability of the different infrastructures. Therefore, also in consideration of its precedents on this issue,

the Commission considered that at least cable, IPTV over DSL, fiber and possibly Satellite (DTH) were part of the same product market.

The Notifying Parties' views in their Supplementary Notification

(106) In the Supplement Form CO, the Notifying Parties refer to the Commission's precedents in defining the Dutch market for the wholesale supply and acquisition of TV channels. They agree with the distinction between Basic Pay TV channels and Premium Pay TV channels and indicate that Premium Pay TV sport channels were either being offered in the Basic Pay TV tier or increasingly subject to competition by Basic Pay TV sports channels.

(107) The Notifying Parties indicate that, even if there may be some competitive interaction between Premium Pay TV sports channels and Basic Pay TV sports channels, the exact market definition can be left open, since also on the more narrow segment for Premium Pay TV sports channels the Transaction has not led and will not lead to a significant impediment of effective competition.

(108) They refer to the fact that, until now, the Commission has left open the exact definition of the market and whether Premium Pay TV channels could be further segmented into areas of interest such as movies and/or sports. The Notifying Parties submit that also in this case the question whether Premium Pay TV channels should be further segmented into sports and film channels can be left open as the Transaction has not and does not lead to any competition concerns even on the narrowest markets.

(109) The Notifying Parties also submit that it can be left open whether all general interest Pay TV channels and all thematic Pay TV channels belong to separate product markets, as current market conditions demonstrate that the Transaction has not and does not lead to any competition concerns even on the narrowest markets.

(110) To conclude, the Notifying Parties submit that the exact definition of the relevant product market can be left open as the Transaction has not and does not lead to any competition concerns on even the narrowest market.

Commission's assessment

(111) The market investigation has confirmed that the Netherlands is essentially a Pay TV market.[43] Therefore, the difference between FTA and Pay TV channels has a reduced relevance and the question as to whether they belong to separate markets can be left open, as the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

[43] Replies to Q2 to TV channel suppliers of 5 April 2018, question B.B.3; replies to Q3 of 5 April 2018 to retailers, question B.B.2.

(112) The market investigation has confirmed the distinction between Basic and Premium Pay TV channels[44] and between Premium Pay TV film channels and Premium Pay TV sports channels.[45] With respect to sports channels, the market investigation has indicated that Premium Pay TV sports channels cannot be replaced by other (that is, non-sport) premium and/or thematic channels.[46] For the same reasons indicated in section 5.1.1.1, the Commission rejects the argument that the market can be further segmented in order to include certain "essential" channels alone. The fact that these channels can attract subscribers and generate revenue does not mean that there are no alternatives for them and that retail TV providers cannot differentiate their offers otherwise.[47] In any event, in section 6.3 the Commission carries out an assessment of the risk of foreclosure in relation to the channel ZST.

(113) A change in business model (Fox Sports has, since August 2016, shifted from a revenue-sharing model to a flat fee model with minimum guaranteed)[48] and the availability of premium content for channels distributed in the Basic Pay TV tier (ZSB)[49] seems to blur the distinction between Basic and Premium Pay TV sport channels to some extent.[50] However, the Commission considers that those changes in business model and in market positioning are not the effect of reduced differences between the two categories of channels, but rather the effect of the greater attractiveness of the Premium Pay TV sports channels (and of their content) and the related intention of the broadcasters to draw higher profits by offering them to a wider audience at a marginally lower rate. The Commission therefore considers that Basic Pay TV channels and Premium Pay TV channels belong to separate product markets.[51]

---

44 Replies to Q2 to TV channel suppliers of 5 April 2018, question B.B.5; replies to Q3 of 5 April 2018 to retailers, question B.B.5.

45 Replies to Q2 to TV channel suppliers of 5 April 2018, questions B.B.9.1, B.B.9.2.1, B.B.9.3.1, B.B.10.1, B.B.10.2.1; replies to Q3 of 5 April 2018 to retailers, questions B.B.10, B.B.10.1, B.B.10.2, B.B.10.2.1.

46 Replies to Q2 to TV channel suppliers of 5 April 2018, question B.B.10; replies to Q3 of 5 April 2018 to retailers, question B.B.10 and ss.

47 The replies to the market investigation refer not to a single, but to a number of premium channels (and premium sports channels) which the respondents consider equally attractive. See replies to questionnaire Q2 to TV channel suppliers of 5 April 2018, questions B.B.6.1, B.B.11; replies to Q3 of 5 April 2018 to retailers, questions B.B.10.1, B.B.10.2.1.

48 Under the revenue-sharing model, Fox was charging retail TV providers a fee per each subscriber to the channel. Under the model implemented since August 2016, retail TV providers pay a fixed fee and a minimum amount guaranteed calculated in proportion to their customer base with access to Fox Sports.

49 See Q3 of 5 April 2018 to retailers, non-confidential replies to question B.B.11.1.

50 See Q3 of 5 April 2018 to retailers, reply by M7 to question B.A.3.1, reply by CAIW to question B.B.5.1.

51 In case Basic Pay TV and Premium Pay TV channels were considered to be part of the same relevant product market, this market would include a large number of suppliers, including NPO, RTL, Eurosport, Fox Sports, SBS/Talpa, etc.

(114) As to a possible market segmentation based on distribution infrastructure, the market investigation revealed that cable and IPTV through DSL or fibre appear as interchangeable technical solutions, as they both allow TV distribution and interactivity. On the other hand, satellite (DTH) and digital terrestrial television (DTT) appear to be slightly less valid alternatives.[52] In any event, based on the results of the market investigation and on its own precedents, the Commission considers that at least cable, IPTV over DSL, fiber and possibly satellite (DTH) are part of the same product market.

Overall conclusion

(115) Based on the above considerations, therefore, the Commission considers that the market can be segmented in (i) Basic and Premium Pay TV channels, and, within the latter, between (ii) Premium Pay TV film channels and Premium Pay TV sports channels. The Commission also considers that at least cable, IPTV over DSL, fiber and possibly satellite (DTH) are part of the same product market. The question as to whether a distinction FTA *vis-à-vis* Pay exist can be left open, as the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

5.1.2.2. Geographic market definition

(116) In their notification of 2014, the Notifying Party submitted that the geographic market was national in scope.

(117) In a number of previous decisions, the Commission considered that the market for the wholesale supply and acquisition of TV channels was national in scope, or at most covering a single linguistically homogeneous area.[53] The exact geographic scope of the market was however ultimately left open.

(118) Based on the results of the market investigation and on other evidence available, the Commission concluded that the markets for the wholesale supply and acquisition of TV channels were national in scope.

(119) In the Supplement Form CO, the Notifying Parties submit that the geographic market in the present case is likely to comprise the Netherlands given the way the carriage agreements are concluded. Moreover, the Notifying Parties consider that generally, agreements in place for the acquisition of TV channels [reference to the geographic scope of supply agreements between the Parties and suppliers of audio-visual content]. As such, the Notifying Parties

---

[52] Replies to Q2 to TV channel suppliers of 5 April 2018, question B.B.2; replies to Q3 of 5 April 2018 to retailers, questions B.B.1 and B.B.1.2.

[53] Commission's decision of 2 June 2006 in Case No COMP/M.4217 - Providence/Carlyle/UPC Sweden, paragraph 19; Commission's decision of 6 September 2006 in Case No COMP/M.4338 - Cinven/Warburg Pincus/Casema/Multikabel, paragraph 31; Commission's decision of 26 February 2007 in Case No COMP/M.4521 - Liberty Global/Telenet, paragraph 35; Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraph 48 (French mainland); Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraph 88 and Commission's decision of 25 January 2010 in Case No COMP/M.5734 - Liberty Global Europe/Unitymedia, paragraph 30 (regional or national in Germany).

consider that no subnational or regional market for the acquisition of TV channels exists.

(120) The market investigation confirms that the geographic scope of the wholesale market for the supply and acquisition of Pay TV channels mainly consists of the territory of the Netherlands.[54]

(121) Therefore, the Commission concludes for the purpose of this decision that the relevant market is national in scope.

5.1.2.3. Affected market

(122) The divestiture of the Premium Pay TV film channel Film1, offered as a remedy by the Notifying Party and approved with the Conditional Clearance Decision has addressed the horizontal and vertical concerns the Commission had raised in the wholesale market for the supply and acquisition of Premium Pay TV film channels (supply side). Since that divestiture and the dissolution of the HBO NL joint venture, VodafoneZiggo is no longer active on the wholesale market for Premium Pay TV film channels (supply side).[55]

(123) Notwithstanding this, however, the Commission will still carry out[56] the assessment of the possible vertical concerns in relation to the HBO content, now distributed by VodafoneZiggo through the Movies&Series VOD service.

(124) The OTT remedies offered by the Notifying Party and accepted by the Commission in the Conditional Clearance Decision addressed the concern of the increased buyer power of the entity resulting from the merger.

(125) In the Supplement Form CO,[57] the Notifying Parties estimate at [50-60]% the market share of VodafoneZiggo in the acquisition of Basic Pay TV channels, of Premium Pay TV film channels and of Premium Pay TV sports channels. The markets for the acquisition of Basic Pay TV channels, Premium Pay TV film channels and Premium Pay TV sports channels are therefore horizontally affected markets. These are also vertically affected markets, as VodafoneZiggo has a 53% market share on the downstream market for the retail supply of Pay TV services.

(126) In the Supplement Form CO, in relation to the supply side of the wholesale market for the acquisition and supply of Premium Pay TV sports channels, the Notifying Parties argue that ZSB is not a premium channel and that the

54 Replies to Q2 to TV channel suppliers of 5 April 2018, question B.C.1; replies to Q3 of 5 April 2018 to retailers, questions B.B.12.

55 Some third parties have raised the issue that the linear TV channel is no longer available and that the dissolution of the HBO NL joint venture is a direct effect of the Transaction. However, there is no linear channel available to the merged entity's own retail customers either. In any event, the same arguments as discussed in section 6.2 also apply to linear distribution.

56 See section 6.2.5, below.

57 Supplement Form CO, paragraph 357.

market share of VodafoneZiggo in the wholesale supply of Premium Pay TV channels (where VodafoneZiggo only supplies ZST) is [10-20]%. In terms of subscribers at retail level, the penetration of ZST is just [5-10]% ([5-10]%, when disregarding subscribers on VodafoneZiggo's platform).Therefore, this is not a horizontally affected market.

5.1.3. Retail provision of TV services.

(127) In the market for the retail provision of TV services, the suppliers of linear and non-linear (mainly VOD) TV services serve end customers who wish to purchase such services.

5.1.3.1. Product market definition

The Notifying Party's views in 2014

(128) In the 2014 notification, the Notifying Party claimed that the retail market for FTA TV services did not exist in the Netherlands. Instead, the Notifying Party considered it appropriate to distinguish between the retail provision of Basic Pay TV channels and Premium Pay TV channels. As regards linear Pay TV services and non-linear services, the Notifying Party's view was that those should be considered to belong to the same product market given the competitive constraints which VOD services exercised on linear Pay TV services. As regards a possible distinction between the different distribution technologies for the provision of retail TV services, the Notifying Party recalled the different Commission and ACM (OPTA and NMa) precedents where no distinction between distribution technologies had been made.

Commission's assessment and conclusion in 2014

(129) In consideration of the limited offer of FTA channels in the Netherlands and given the fact that the assessment of the Transaction would remain the same whether FTA TV services and Pay TV services were considered to belong to the same product market or to two separate markets, the Commission considered that the market definition in that respect could be left open.

(130) In relation to the difference between linear and non-linear retail TV services, the Commission noted that the market investigation had highlighted a number of differences between the two distribution modes. In any event, the Commission considered that the exact scope of the relevant market for Pay TV services could be left open in that regard, as the Transaction did not raise competition concerns on the market for the retail provision of Pay TV services under any alternative product market definition considered.

(131) Taking into account the responses to the market investigation, and in particular considering the demand-side substitutability between retail Pay TV services provided through the different distribution technologies such as cable, DSL, Fibre-to-the-Home (FttH) and possibly DTH satellite, the Commission considered that the provision of retail Pay TV services through those different distribution technologies belonged to the same product market.

The Notifying Parties' views in their Supplementary Notification

(132) In the Supplement to the Form CO, the Notifying Parties argue that, in relation to the Dutch market, a distinction between Basic Pay TV channels and Premium Pay TV channels is most appropriate.

(133) With respect to the distinction between linear and non-linear technology, the Notifying Parties are of the view that a distinction between linear and non-linear Pay TV services is disappearing and is no longer appropriate, given the growing competitive constraint that VOD services exert on linear TV services and the continuing convergence between traditional linear Pay TV services and OTT services. They also refer to research conducted by Telecompaper, indicating that Dutch households spend approximately 38% of their daily viewing on linear TV channels and the remainder on VOD services (either TVOD, SVOD or other OTT services). The Telecompaper research also indicated that an increasing number of households had access to a Smart TV which could be used for streaming SVOD (e.g. Netflix) services.

(134) However, the Notifying Parties conclude that, given that the Transaction has not raised and does not raise any competition concerns, the market definition can be left open.

Commission's assessment

(135) The market investigation has confirmed that the Dutch market has a very limited offer of FTA TV services, which makes the distinction between Basic Pay TV and Premium Pay TV more appropriate.[58] The market investigation also indicated that some differences persist between linear and non-linear broadcasting, which are seen more as complements than as substitutes. Although the two distributions mode tend to converge and overlap, PPV/TVOD and OTT/SVOD do not yet seem as viable alternatives to Pay TV in case of switching.[59]

(136) As to different distribution technologies, the market investigation indicates that switching appears possible from cable to IPTV over fibre or DSL, much less to satellite (DTH) and terrestrial (DTT) technologies.[60]

(137) Based on the foregoing, the Commission considers that the question as to whether the TV retail market may be segmented in FTA TV and Pay TV, can be left open, as the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point. For the same reason, it can also be left open the question whether there is a distinction between linear and non-linear

58 Replies to Q2 to TV channel suppliers of 5 April 2018, question B.C.2 and B.C.2.1; replies to Q3 of 5 April 2018 to retailers, questions B.B.13 and B.B.13.1.

59 Replies to Q2 to TV channel suppliers of 5 April 2018, questions B.C.3, B.C.3.1, B.C.5 and B.C.5.1; replies to Q3 of 5 April 2018 to retailers, questions B.B.14, B.B.14.1, B.B.15 and B.B.15.1.

60 Replies to Q2 to TV channel suppliers of 5 April 2018, questions B.C.6, B.C.6.1, B.C.7 and B.C.7.1; replies to Q3 of 5 April 2018 to retailers, questions B.B.16, B.B.16.1, B.B.17 and B.B.17.1.

distribution. As to the different distribution technologies, the Commission considers that they are all part of the same product market.

5.1.3.2. Geographic market definition

(138) In the notification of 2014, the Notifying Party did not take a view on the exact geographic scope of the market. Based on the results of the market investigation, and considering that following the Transaction the merged entity would have had almost national coverage, the Commission considered that the relevant market was national in scope.

(139) In the Supplement Form CO, the Notifying Parties submit that the question of geographic market definition is not of decisive importance for the assessment of competition in the market for the retail supply of TV services. However, for the purpose of the Supplement, the Notifying Parties provide data for a national market.

(140) The market investigation indicates that the market for retail supply of TV services is national in scope.[61] The Commission, therefore, considers that the relevant market is national in scope.

5.1.3.3. Affected market

(141) The retail market for the provision of Pay TV services is an affected market considering that, as of Q3 2017, VodafoneZiggo holds a market share of 53% for services provided in linear mode (55% after the combination of Liberty Global/UPC's and Ziggo's networks) and of [20-30]% for VOD services.

5.2. Fixed telephony and Internet services

(142) The Parties provide fixed telephony and fixed Internet services in the Netherlands. In particular, they provide services on the following markets:

- fixed telephony/voice at retail level;
- call termination on fixed networks at wholesale level;
- fixed Internet access at retail level;
- fixed Internet access at wholesale level;
- business communication services; and
- carrier services at wholesale level.

61 Replies to Q2 to TV channel suppliers of 5 April 2018, question B.C.8; replies to Q3 of 5 April 2018 to retailers, questions B.B.18.

5.2.1. Fixed telephony/voice at retail level

5.2.1.1. Product market definition

(143) In the downstream market for the retail provision of fixed telephony and voice services, operators provide fixed voice services to end customers. Both Parties are active on this market offering fixed voice services bundled together with fixed broadband Internet access and TV.

The Notifying Party's view in 2014

(144) In the 2014 notification, the Notifying Party submitted that a product market existed for the retail provision of fixed telephony services, but that the definition of its exact scope and in particular whether it should be further segmented could be left open, as it would not significantly affect the competition assessment.

Commission's assessment and conclusion in 2014

(145) In its assessment, the Commission considered that the exact scope of the product market definition, and specifically, whether fixed line and VoIP telephony services belonged to the same product market, and whether there was a separate market for residential and non-residential customers, could be left open as the Transaction did not raise competitive concerns under any alternative product market definition considered.

The Notifying Parties' view in their Supplementary Notification

(146) In the Supplement Form CO, the Notifying Parties submit that the exact scope of the relevant product market can be left open as no competition concerns have arisen or will arise on any plausible market segment.

Commission's assessment

(147) The market investigation confirmed the Commission existing definition of the market (including VOIP) in 2014. According to some respondents, additional fixed services (such as for business customers and for international calls) should also be included in the same market.[62] In any event, the Commission considers that the exact scope of the product market may be left open for the purposes of this Decision.

5.2.1.2. Geographic market definition

(148) In the 2014 notification, the Notifying Party did not take any view on the geographic scope of the market. Consistently with its previous practice and with the results of the market investigation, the Commission considered that the market for the retail provision of fixed telephony services was national in scope.

---

62 Replies to Q3 of 5 April 2018 to retailers, questions B.C.1, B.C.2, B.C.3.

(149) In the Supplement Form CO, the Notifying Parties submit that no definite position has to be taken on the exact geographic scope of this market. However, in line with the previous approaches taken by the Commission and the ACM, the Notifying Parties will provide data for the smallest possible segment (a national market).

(150) The market investigation carried out by the Commission confirms that the market is national in scope.[63] The Commission, therefore, considers the market to be national in scope.

5.2.1.3. Affected market

(151) In the Conditional Clearance Decision, the Commission assessed all the retail markets jointly. The Commission noted that all retail services, such as fixed telephony, were provided by Liberty Global and Ziggo in the respective, non-overlapping footprints in the Netherlands. Therefore, no customer switching could take place between Liberty Global and Ziggo. Nonetheless, the Commission still considered whether Liberty Global and Ziggo took each other's actions into account before taking commercial decisions. The Commission found that there was insufficient evidence pointing to the risk of non-coordinated effects as a consequence of the elimination of an indirect constraint between Liberty Global and Ziggo.

(152) Under current market conditions (Q3 2017), VodafoneZiggo holds a market share of 41% in the retail market for fixed telephony services, which is therefore an affected market. The market is also technically a vertically affected market, due to its connection to the wholesale market for call termination on fixed network, where each operator holds by definition a 100% market share.

5.2.2. Call termination on fixed networks at wholesale level

(153) Call termination is a service provided by telephony operator B to telephony operator A, whereby a call originating on operator A's network is delivered to a user of B's network. This essentially allows users of different networks to communicate with each other.

5.2.2.1. Product market definition

(154) In the Supplement Form CO, the Notifying Parties recall that, in previous cases, the Commission found that there are no substitutes for call termination on each individual fixed network, since the operator transmitting the outgoing call can reach the intended recipient only through the operator of the network to which that recipient subscribed. Each individual fixed network therefore constitutes a separate market for call termination and each network operator has, by definition, a 100% market share on that market.

63 Replies to Q3 of 5 April 2018 to retailers, question B.C.4.

(155) The ACM has taken a similar view as the Commission and the Notifying Parties therefore submit that the relevant product market is the wholesale market for call termination on each individual fixed network.

(156) In view of the above, the Commission considers that each individual fixed network constitutes a separate market for call termination.

5.2.2.2. Geographic market definition

(157) As to the geographic scope of the relevant market, the Notifying Parties submit in the Supplement Form CO that the market is national in scope, due to regulatory reasons, namely the fact that the geographic scope of regulatory licenses do not extend beyond the territory of a Member State. The Commission shares such view.

5.2.2.3. Affected market

(158) The Commission concluded in its Conditional Clearance Decision that the concentration could have no impact on the market, as each network constituted a market on its own. For that reason, wholesale call termination on fixed networks was not discussed further in the Commission's Conditional Clearance Decision.

(159) For the purposes of the re-assessment of the Transaction, the Commission considers this reasoning still holds, because Liberty Global and Ziggo provide call termination services each in its own footprint with a market share of 100% and the Transaction does not thus bring about any horizontal overlap. The Commission, therefore, has granted a waiver to the Notifying Parties, in relation to the wholesale market for call termination on fixed network.

(160) The market for call termination on fixed network at wholesale level is also vertically related to the retail market for fixed telephony services. In this regard, the Commission notes that the markets of wholesale call termination services on fixed networks in the Netherlands are subject to *ex-ante* regulation by the ACM. The Commission therefore considers that the Transaction does not give rise to serious doubts as to the compatibility with the internal market and has granted a waiver to this vertical relation as well.

5.2.3. Fixed Internet access at retail level

5.2.3.1. Product market definition

(161) As regards the retail provision of fixed Internet access services, retail operators provide fixed Internet services to end customers.

The Notifying Party's views in 2014

(162) The Notifying Party submitted that both Parties' activities should be qualified as provision of broadband Internet access and that the nature of access services requested by large corporate customers was materially different from the services provided to residential and small businesses. The Notifying Party also claimed that mobile broadband Internet accessible at retail level via 4G

technology in the Netherlands exercised at least to a certain extent competitive constraint on fixed Internet access services.

Commission's assessment and conclusion in 2014

(163) In light of a large majority of responses indicating that the distinction between the different infrastructures, that is to say DSL, cable and fibre, was not appropriate, the Commission considered that there was no reason to divide the relevant market according to those different infrastructures. However, the Commission considered that a distinction between the market for mobile Internet and the market for fixed broadband Internet was justified. As regards the question whether fixed broadband Internet access services to residential and small business customers on one hand and large business customers on the other should be considered to belong to separate markets, the Commission left the question open given that the Transaction did not raise competition concerns whether those customer groups were considered together or separately.

The Notifying Parties' views in their Supplementary Notification

(164) In the Supplement Form CO, the Notifying Parties submit that the relevant product market is the market for retail internet access without it being necessary to define any hypothetical sub-segments. The Notifying Parties indicate that, from a demand-side perspective, the various internet offerings with various speeds are clear substitutes. There is also significant supply-side substitution in respect of internet offerings with various speeds, as confirmed by the ACM. The Notifying Parties submit that because of these demand-side and supply-side substitutability considerations, it is neither necessary nor appropriate to define separate markets based on download speed. Referring to the results of the 2014 market investigation, the Notifying Parties also submit that the retail market for fixed internet services should not be segmented according to distribution technology (i.e. DSL, cable or fibre) either. The Notifying Parties submit that also the question as to whether the market should be segmented by customer type can be left open by the Commission.

Commission's assessment

(165) The market investigation has confirmed that different technologies (cable, fibre, DSL) for the provision of retail fixed internet access are part of the same market.[64] It has also indicated that mobile and fixed internet access are not substitutable[65] and that residential business and small business customers belong to a separate product market from that for large business customers.[66]

(166) The Commission considers therefore that the relevant market for internet access at retail level includes all different technologies, while distinctions

64 Replies to Q3 of 5 April 2018 to retailers, question B.D.1.

65 Replies to Q3 of 5 April 2018 to retailers, question B.D.2.

66 Replies to Q3 of 5 April 2018 to retailers, question B.D.3.

exist between mobile and fixed internet access and between residential business and small business customers, on the one hand, and large business customers, on the other.

5.2.3.2. Geographic market definition

(167) In the 2014 notification, the Notifying Party did not express a view on the geographic scope of the relevant market. Based on the results of the market investigation, the Commission considered that the relevant market was national in scope.

(168) In the Supplement Form CO, in line with the Commission's and ACM's previous decision practice, the Notifying Parties consider that the retail market for fixed internet access is national in scope.

(169) Based on the results of the market investigation,[67] the Commission takes the position that the relevant market is national in scope.

5.2.3.3. Affected market

(170) Information provided by the Notifying Parties in the Supplement Form CO indicates that VodafoneZiggo holds (as at Q3 2017) a market share of 44% on the retail market for Internet access. Therefore the market shall be considered an affected market for the purposes of this decision.

5.2.4. Fixed Internet access at wholesale level

(171) In 2015, the ACM issued *ex ante* regulation requiring KPN to continue to provide access to its DSL and fibre-optic networks in the period 2016 - 2019 (LLU regulation). At the beginning of 2017, the ACM announced that it would perform an early revision of its 2015 analysis, given the significant change in market conditions following the creation of the joint venture VodafoneZiggo. The ACM has issued a draft decision on 27 February 2018,[68] from which it follows that the ACM intends to impose access obligations on VodafoneZiggo, in addition to access obligations on KPN. This is the result of perceived consumer harm resulting from, in the absence of regulation, the risk of joint dominance of KPN and VodafoneZiggo at retail level and the finding of joint dominance on the wholesale market including LLU, VULA and WBA.

(172) In the Conditional Clearance Decision, the Commission did not assess the wholesale market for fixed internet access because neither UPC nor Ziggo was active on that market. Only KPN provided regulated access to its copper and fiber-optic networks.

---

67 Replies to Q3 of 5 April 2018 to retailers, question B.D.4.

68 ACM draft decision of 27 February 2018, Market analysis Wholesale Fixed Access, Annex E Analysis of the retail market for (bundled) internet access, paragraphs 1048-1056.

(173) Today, VodafoneZiggo is still not providing wholesale access to its cable networks. Up to today, only KPN has been regulated to provide wholesale fixed internet access.

(174) The ACM finds in its draft decision of 27 February 2018, that there is a single wholesale market for access to copper, fiber-optic and cable networks in which KPN and VodafoneZiggo are both players. According to the ACM, a broader market definition is justified on the basis of technological developments, as physical unbundled access becomes less attractive and alternative providers opt for access to a higher level in the network. In the ACM's view, for comparable types of access, VodafoneZiggo's cable network is increasingly becoming a good alternative for offering services to end-users.

(175) The ACM has already consulted stakeholders on its proposal at national level and is analysing stakeholders' contributions.

(176) For completeness, the Commission, in section 6.6, will assess the impact of the Transaction on this potential market.

5.2.5. Business communication services

(177) Business-to-business (B2B) telecommunication services are value added corporate services offered by telecommunication providers to corporate business customers. Customers of business communication services in the Netherlands can be broadly categorised into three main groups: (i) Small office/home office (SOHO); (ii) Small and medium-sized enterprises (SME); and (iii) Large enterprise customers.

5.2.5.1. Product market definition

(178) In its 2014 notification, the Notifying Party estimated that the Parties combined market share on a national market for business connectivity services in the Netherlands would be [10-20]%. As a consequence, there was no affected market and those services were not discussed further in the Conditional Clearance Decision.

(179) In the Supplement Form CO, the Notifying Parties recall the Commission's previous practice in relation to telecommunication services provided to business customers and argue that voice services provided to corporate clients are part of the broader market for business connectivity services.

(180) As to a possible market segmentation, based on the type of customers, the Notifying Parties recall that in *Vodafone/Liberty Global/Dutch JV*,[69] the Commission ultimately left the question open, after the market investigation had indicated a difference between residential, SME and SoHo customers, on the one hand, and large businesses on the other.

(181) The Commission considers that, for the purposes of assessing the impact of the Transaction, the exact definition of the relevant product market may be

69 Commission decision of 03 August 2016, in case M.7978, *Vodafone/Liberty Global/Dutch JV*.

left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

5.2.5.2. Geographic market definition

(182) As to the geographic dimension of the market, the Notifying Parties recall that in previous cases the Commission found that the relevant market was national, if not wider, in scope. They submit that sometimes these services are provided cross-border, but that, however, the exact definition of the geographic scope of the market may be left open for the purposes of assessing the Transaction.

(183) The Commission considers that, for the purposes of assessing the impact of the Transaction, the exact definition of the relevant geographic market may be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

5.2.5.3. Affected market

(184) In assessing the Transaction in 2014, the Commission found that, based on the limited combined market share of the merging parties (less than 11%), there was no affected market and these services were thus not further discussed in the Conditional Clearance Decision.

(185) As to the present market conditions, in the Supplement Form CO, the Notifying Parties note that the current, estimated market share of VodafoneZiggo is approximately 27.4%, which would then lead to an affected market.

(186) In this respect, however, the Notifying Parties submit that VodafoneZiggo has achieved the current market share as a consequence of the combination with Vodafone, which held a market share of 10%-15% (such combination and the related impact of competition was assessed by the Commission in the *Vodafone/Liberty Global/Dutch JV* decision).

(187) The Commission, therefore, considers that such growth in market share is non-merger specific.[70]

(188) If the two segments for (i) single business customers (that is, individuals with a business subscription), SME and SoHo, and (ii) large businesses are considered, VodafoneZiggo has market shares of [10-20]% and [5-10]% respectively (excluding mobile services that the Notifying Parties indicate were added in 2016 and are thus not merger-specific). These, therefore, are not affected markets for the purpose of assessing the Transaction.

[70] In any event, based on the information provided by the Notifying Parties, the market leader in the sector is (by far) KPN, with an estimated market share of 51.7%. Therefore, even considering the market shares, the Transaction does not raise serious doubts as to its compatibility with the internal market.

5.2.6. Carrier services at wholesale level

(189) The market for carrier services at wholesale level involves the provision of transmission capacity on telecommunications infrastructure (typically international cable networks) to other telecommunications companies and business communications providers.

5.2.6.1. Product market definition

(190) In the Supplement Form CO, the Notifying Parties submit that, in order to operate their services, telecommunications companies such as internet service providers and mobile network operators lease transmission capacity on telecommunications infrastructure.

(191) The Notifying Parties further recall that the Commission has previously described this market as a market for "*the lease of transmission capacity and the provision of related services to third party telecommunication traffic carriers and service providers.*" The market investigation in *Vodafone/Liberty Global/Dutch JV*, they also argue, confirmed this product market definition, and the Commission therefore concluded that the market for wholesale international carrier services comprises the lease of transmission capacity and the provision of related services to third party telecommunication traffic carriers and service providers.

(192) For the purposes of the present decision, the Commission considers that the exact market definition may be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

5.2.6.2. Geographic market definition

(193) In the Supplement Form CO, the Notifying Parties argue that the relevant market is likely to be global in scope. In *Vodafone/Liberty Global/Dutch JV*, the Commission left open the exact definition of the geographic scope of the market. The Commission considers that in this case too, the exact geographic scope may be left open, as it will not affect the outcome of the Commission assessment.

5.2.6.3. Affected market

(194) In the Conditional Clearance Decision, on the basis of the Parties' limited market shares, the Commission concluded that there was no affected market and therefore did not further discuss the market in its assessment.

(195) In the Supplement Form CO, the Notifying Parties estimate at USD 47.8 billion the size of the global market for wholesale carrier services in 2016. In such market, VodafoneZiggo has an estimated market share of less than 0.2%. The market, therefore, would not be horizontally affected.

(196) The Notifying Parties also mention a small vertical relationship, created by the *Vodafone/Liberty Global/Dutch JV* transaction, in the upstream market for carrier services at wholesale level and, downstream, in the retail mobile and

business communication services markets. Based on the information provided by the Notifying Parties, such vertical relationship leads to an affected market.

(197) The Commission considers, in this respect, that, because the vertical relation between Vodafone and Ziggo is a result of the *Vodafone/Liberty Global/Dutch JV* transaction, such effect is not merger specific.[71]

5.3. Mobile services

(198) The Parties are also active in the following markets for mobile services in the Netherlands:

i. Mobile telecommunication services at retail level

ii. Call termination on mobile networks at wholesale level

5.3.1. Mobile telecommunication services at retail level

(199) Mobile telecommunication services to end customers, or "retail mobile services", encompass services for national and international voice calls, SMS (including MMS and other messages), mobile Internet with data services, access to content via the mobile network and retail international roaming services. Those services are provided on 2G/GSM, 3G/UMTS and 4G/LTE networks with the 2G network historically having better coverage and the 3G network being better adapted for larger amounts of data and faster download speeds. 4G/LTE, the last technology to be launched, is a mobile technology which increases the speed and capacity of the network and is adapted for improved voice quality and high speed data transmission from wireless devices, for example, to stream video, Internet TV and to use broadband Internet.

5.3.1.1. Product market definition

The Notifying Party's views in 2014

(200) The Notifying Party did not take a view on the exact product market definition.

Commission's assessment and conclusion in 2014

(201) In its previous decisions, the Commission had assessed the concentrations on the basis of a single market for mobile telecommunication services without segmenting according to the type of customers, services or network technology. In particular, the Commission had not defined separate markets for pre-paid and post-paid customers in light of supply-side substitution. Therefore, the Commission considered that the exact definition of the product

[71] In addition, based on information submitted by the Notifying Parties, the market share of VodafoneZiggo has remained modest and there are sufficient alternative suppliers which compete to provide wholesale access to downstream retail service providers. Therefore, even considering the market specific characteristics and structure, the Transaction would not raise serious doubts as to its compatibility with the internal market.

market could be left open as the Transaction did not raise competition concerns, regardless of the precise product market definition retained.

The Notifying Parties' views in their Supplementary Notification

(202) In the Supplement Form CO, the Notifying Parties agree with the Commission's previous assessment and submit that the relevant product market is the overall retail market for mobile telecommunications services. The Notifying Parties submit that it is not necessary for the Commission to further segment this well-established market, *inter alia* by reference to customer or service type, for the following reasons.

(203) First, with respect to the type of service, usually internet access, data services and content access are part of the same retail offering, or are separate components alongside voice and text services, which are invoiced or charged together in the same way as the other services. Monthly allowances or topped-up credit can be used to buy either service. It is therefore not useful or practical to distinguish mobile internet from voice and text services for market definition purposes;

(204) Second, with respect to the type of customer, there is no logical distinction between business and private users. While business customers are generally considered to be heavier users of mobile services than private customers, there is no significant difference between the types of services provided to both groups. Furthermore, business customers regularly use business phones for personal calls and private phones for business calls, which blurs the distinction between the two categories. In any event, on the supply side, the same mobile networks can be used to supply both business and private customers;

(205) Third, with respect to the type of tariff, although tariff plans for pre-paid and post-paid contracts may be different, customers can switch easily between them. Furthermore, the distinction between pre-paid and post-paid tariffs has become blurred due to, for example, the ability to automatically top-up and predetermined commitments to pay through monthly invoices; and, in post-paid, the ability to obtain lower cost "SIM only" contracts which are sold without a handset and which are an alternative to pre-paid SIM offers; and

(206) Fourth, with respect to the type of network technology, it is not possible to distinguish between services that are provided through different technologies. The choice of network technology used for a particular service is simply a function of the providing MNO's preference, although there is generally a preference to use 3G and 4G technology for the provision of data services. Moreover, all 3G phones have the capacity to support both 2G and 3G networks, while 4G phones have the capacity to support all networks.

Commission's assessment

(207) In the present case, the Commission has not detected any element justifying a departure from its previous position that there is an overall market for retail mobile telecommunication services. In any event, for the purpose of this case, the definition of the relevant product market may be left open.

5.3.1.2. Geographic market definition

(208) The Notifying Party did not take a view on the exact geographic market definition.

(209) The Commission had consistently found that the markets for the retail mobile services provided to end consumers were national in scope. Because nothing in the course of the investigation justified a deviation from previous findings, the Commission considered that the mobile telecommunication services market(s) was national in scope.

(210) In line with previous Commission decisions, in the Supplement Form CO, the Notifying Parties submit that the relevant geographic market is national in scope. The relevant criteria on which the Commission has based its past decisions are also directly relevant to the Netherlands: operating licences for mobile services (including spectrum licences) are granted by the Dutch government for the territory of the Netherlands and each of the operators active on the Dutch market sell, market and price their services on a national level.

(211) The Commission considers that the relevant market is national in scope.

5.3.1.3. Affected market

(212) At the time of the Conditional Clearance Decision (and before the completion of the Vodafone/Ziggo joint venture), Liberty Global and Ziggo operated as MVNOs with very modest market shares, which did not support the conclusion that the relevant market was a horizontally affected market. Technically, the market for mobile telephony was a vertically affected market as Liberty Global and Ziggo held more than 25% market share on the upstream market for wholesale call termination services on fixed networks. The Commission however granted a waiver in that respect, as there were no competitive concerns.

(213) For the purposes of this re-assessment, the Commission considers this reasoning still holds in relation to the retail market for mobile telephony services.

5.3.2. Call termination on mobile networks at wholesale level

(214) Call termination is a service provided by operator B to operator A, whereby a call originating on operator A's network is delivered to a user of B's network. This essentially allows users of different networks to communicate with each other.

5.3.2.1. Product market definition

(215) In the Supplement Form CO, the Notifying Parties submit, in line with previous Commission decisions, that each network constitutes a separate wholesale market for call termination. The Commission shares that view.

5.3.2.2. Geographic market definition

(216) In line with previous Commission decisions, the Commission considers that the relevant market should be considered as national in scope, consistently with the extension of the network of each operator.

5.3.2.3. Affected market

(217) In the Conditional Clearance Decision, the Commission considered that each mobile network constituted a separate market and that therefore there was no horizontally affected market. Still, from a vertical perspective, the relevant market for wholesale mobile call termination was connected to the retail mobile operations of Liberty Global and Ziggo. The Parties had already a monopoly on their respective networks and would have, after the Transaction, a monopoly on the combined network. The Commission therefore granted a waiver in relation to the wholesale market for call termination on mobile network, which was no longer discussed in the Conditional Clearance Decision.

(218) As nothing has changed in market conditions since 2014, the Commission considers this reasoning still holds and has granted a waiver to the Notifying Parties, in relation to the wholesale market for call termination on mobile network.

5.4. Hypothetical retail market for multi-play and triple play services

(219) “Multiple play" offerings comprise a bundle of usually three or more of the following retail services to end customers: fixed telephony services, mobile services, fixed Internet access services and TV services. Such packaged offers may consist of so-called "triple play" comprising three services or even "quadruple play" comprising all those services.

5.4.1.1. Product market definition

The Notifying Party's views in 2014

(220) In the 2014 case, the Notifying Party’s view was that multiple play did not constitute a separate market.

Commission's assessment and conclusion in 2014

(221) In its assessment of the case, in 2014, among other things, the Commission noted that, based on the results of the market investigation, TV services, along with Internet services, were key drivers for multiple play services and there was therefore a strong link between the strength of a market participant's TV offering (as well as its Internet offering) and its success in the provision of multiple play services. Finally, the Commission noted that the Netherlands in particular had a high penetration rate of multiple play customers with around 50% of the market being served through triple play subscriptions. In any event, the Commission considered that the exact product market definition could be left open since the Transaction did not raise competition concerns regardless of whether multiple play services were considered a separate market or included in the markets for unbundled offers.

(222) ACM has also consistently refrained from defining a market for multi-play services separate from its components.[72] Similarly, in their regulatory decisions, ACM and the OPTA have not found that multi-play services constitute a separate market.[73]

The Notifying Parties' views in the Supplementary Notification

(223) In this instance, the Notifying Parties submit that there is no separate retail market for multi-play services. In particular:

(224) First, also in light of the absence of pure bundling in the Netherlands, there is no indication of any lack of demand-side substitutability between multi-play offerings and the separate services which they comprise. Consumers can and do switch easily between purchasing their services as part of a multi-play offering (whatever the combination may be) or individually (i.e. "unpicking" the bundle), depending on their needs. Indeed, the most important reason for customers choosing to purchase different products as part of a mixed bundle is the reduction in price they achieve compared to purchasing the same products separately. Accordingly, from a demand-side perspective, multi-play offerings and the individual services they comprise are perfect substitutes.

(225) Second, there is no indication of any lack of supply-side substitutability, since suppliers offering all (or some) the individual services (either using their own networks or via wholesale access to other operators' networks) can start offering these services as part of a multi-play offering without incurring extra costs. Accordingly, also from a supply-side perspective, multi-play offerings and the individual services they comprise are perfect substitutes.

(226) Third, furthermore, from a practical perspective, given the large number of possible permutations of dual-play, triple-play, or quad-play offers that are increasingly being sold in the market, it is unclear which package of services should be taken as a possible candidate market and which different types of bundles are seen by customers as potential substitutes in the event of a price rise. For instance, in *Vodafone/ONO*[74] and *Vodafone/Kabel Deutschland*,[75] the Commission itself recognised that triple-play offers could combine either fixed telephony, fixed internet and TV, or mobile telephony, fixed telephony

---

72 ACM Decision of 8 December 2006 in case 5796 Cinven/Warburg Pincus/Essent Kabelcour; ACM Decision of 22 December 2006 in case 5807 KPN Telecom/Tiscali; ACM Decision of 19 December 2008 in case 6397 KPN/Reggefiber, para. 45.

73 See e.g. OPTA decision of 17 March 2006, De markten voor de doorgifte en verzorging van omroep transmissiediensten —Multikabel, OPTA/BO/2006/200536, para. 284; OPTA decision of 19 December 2008, Marktanalyse Vaste Telefonie, OPTA/AM/2008/202721, para. 337; OPTA decision of 19 December 2008, Marktanalyse Breedband, Wholesale-breedbandtoegang, OPTA/AM/2008/202717, para. 270; OPTA decision of 5 March 2009, Analyse van de wholesalemarkt voor doorgifte van rtv-signalen via en het op wholesale niveau leveren van de aansluiting op het omroeptransmissieplatform van CAIW in het verzorgingsgebied van CAIW, OPTA/AM/2009/200369-), para. 355.

74 Commission decision of 02 July 2014, in case COMP/M.7231, Vodafone/ONO.

75 Commission decision of 20 September 2013, in case COMP/M.6990, Vodafone/Kabel Deutschland.

and fixed internet. Similarly, in *Orange/Jazztel*,[76] the Commission considered that if multi-play services were to be regarded as a market separate from their components, there are five possible markets for multi-play services: (i) a general market for all multi-play services, (ii) separate markets for dual play services, (iii) triple-play services, (iv) quad-play services, and (v) a market combining triple and quad-play services. This is not yet possible considering the different combinations for each of the dual play, triple-play and quad play packages, nor are there any possible combinations with products such as Premium Pay TV.

(227) The Notifying Parties further argument that, in any event, even if the Commission were to define a market for multi-play services separate from the markets for unbundled offers, such a market would not include undiscounted joint purchasing. Adopting the approach of the Commission in *Liberty Global/Base*,[77] undiscounted joint purchasing should be excluded from the notion of multi-play services and should not be considered as a bundle in the sense of the Non-Horizontal Merger Guidelines. This is because if a customer does not benefit from purchasing components jointly, it is likely to switch to purchasing these components separately as a result of a small but permanent increase in the price of the joint offer.

(228) What ultimately matters, the Notifying Parties argue, is to take account of the competitive dynamics pre- and post-merger in the areas where the activities of the Parties overlap. In any event, even if one were to assume the existence of a hypothetical multi-play retail market, which is separate from its individual services, no competition concerns have arisen and would arise. As such, according to the Notifying Parties, the exact definition of the relevant product market can be left open.

Commission's assessment

(229) The market investigation does not appear to support the conclusion that a separate market for multi-play services exist.[78] Some respondents have highlighted the increasing penetration of bundled offers in the Netherlands and the competitive strength that such bundle have in attracting consumers and in providing them with discounted mobile services offers. It was noted, at the same time, that the transition to this new business model is by no means completed and that consumer still have and exercise the option to buy unbundled services.

(230) For such reasons, the Commission considers that the question whether separate product markets for multi-play or bundled services exist may be left open for the purposes of this decision.

---

76 Commission decision of 19 May 2015, in case COMP/M.7421, Orange/Jazztel.

77 Commission decision of 04 February 2016, in case COMP/M.7637, Liberty Global/Base Belgium.

78 Replies to Q3 of 5 April 2018 to retailers, questions B.E.7 and B.E.7.1.

5.4.1.2. Geographic market definition

(231) In the 2014 notification, the Notifying Party did not take view as to the definition of the geographic market for multiple play offers. Respondents to the market investigation mostly considered that the hypothetical market for multiple play services would be national in scope. Therefore, the Commission considered that the geographic scope of the possible market for multiple play offers is national.

(232) The market investigation does not appear to support the conclusion that a separate market for multi-play or bundled offers exist. In any event, respondents pointed out that bundles display their competitive effects on a national basis.

5.4.1.3. Affected market

(233) In the Conditional Clearance Decision, the Commission assessed the retail markets (that is, those for the supply of TV services, fixed telephony, Internet access and multiple play services) jointly. In this respect, the Commission noted that retail services (such as those provided in the hypothetical market for multiple play services) were only provided in Liberty Global's and Ziggo's respective footprints in the Netherlands, with no overlap or possibility for direct customer switching. In addition, indirect competitive pressure that would be removed as a result of the Transaction, would only cause a significant impediment to effective competition if it was particularly strong. The Commission also excluded other potential anticompetitive effects.

(234) Information submitted by the Notifying Parties in the Supplement Form CO shows that the market share of VodafoneZiggo has been decreasing since 2014. Nonetheless, VodafoneZiggo still holds a market share of 52.4% in the market for fixed triple-play subscriptions. Therefore, the hypothetical market for multi-play services shall be considered an affected market.

6. COMPETITIVE ASSESSMENT

Introduction

(235) Based on the analysis of the information and the market shares submitted by the Notifying Parties in the Supplement Form CO, the Commission considers that the following are the relevant product markets which are horizontally and/or vertically affected, as a consequence of the Transaction.

(a) Licensing and acquisition of broadcasting rights for movies and series content for non-linear distribution (and when segmented further into SVOD and TVOD);

(b) Markets for the supply and acquisition of Basic Pay TV channels, Premium Pay TV film channels and Premium Pay TV sports channels;

(c) Retail market for the provision of Pay TV services;

(d) Retail market for fixed telephony services;

(e) Retail market for fixed Internet access;

(f) Hypothetical retail market for multi-play and triple-play services;

Television services

6.1. Licensing and acquisition of broadcasting rights for TV content

(236) In 2014, there was a horizontal overlap between the activities of Liberty Global and Ziggo on the acquisition side of the market for licensing and acquisition of broadcasting rights for individual audio visual TV content in the Netherlands.

(237) Liberty Global owned the Premium Pay TV film channel Film1 and the Premium Pay TV sports channel Sport1 and Ziggo owned the Premium Pay TV film channel HBO NL jointly with HBO, Inc.

(238) Today, after the divestiture of Film1 and the dissolution of the HBO NL joint venture, VodafoneZiggo is no longer active in the purchasing of film content for linear distribution. It does, however, acquire content for the purpose of its downstream activities in the fields of VOD services (called Movies & Series) and Premium Pay TV sports offerings.

6.1.1. The Notifying Party's views in 2014

(239) In 2014, the Notifying Party submitted that the merged entity would have a market share of [5-10]% in the overall market for the acquisition of all individual audio visual TV content, if the geographic market is limited to the Netherlands.

(240) On the possible market for the acquisition of non-linear audio visual TV content only, Liberty Global and Ziggo would have a combined market share of around [20-30]%. The Notifying Party also submitted that if this product market were to be segmented further between non-linear SVOD and non-linear TVOD services, the merged entity's market share might exceed 20% on the segments of non-linear TVOD services. The Notifying Party was not able to provide the market share of the merged entity on the segment of non-linear SVOD services. Within the possible market segments for the acquisition of first Pay TV window and second Pay TV window film TV content, the merged entity would have a combined market share of 100% in both segments.

(241) The Notifying Party first submitted that the merged entity would not have increased buyer power *vis-à-vis* the suppliers of premium audio visual content, major producers operating on a global scale. Moreover, it also submitted that there were a number of OTT VOD services providers in the Netherlands that competed for the purchase of broadcasting rights for the first Pay TV window and second Pay TV window as well as for TVOD.

(242) In addition, the Notifying Party argued, TVOD services often provided access to both films and TV series on a non-exclusive basis prior to the first and

second Pay TV exhibition windows thus facilitating the access of consumers to films and TV series and reducing the importance of first Pay TV window. Finally, the Notifying Party stated that content right owners had a significant freedom in negotiating the level of exclusivity of their broadcasting rights for the different windows with different buyers, which further made the distinction between them unclear.

6.1.2. Commission's assessment in 2014

(243) The Commission noted that the increase post-Transaction would be very limited in the overall market for the acquisition of individual content, while it would be more significant in a number of possible narrower segments (first Pay TV window; non-linear broadcasting rights (VOD) and, in particular, TVOD rights). According to the Commission, this could have led to two potential negative effects on competition: (i) the merged entity might have an incentive to buy less audio visual content in order to obtain lower prices (ultimately resulting in consumer harm in the form of less choice and diversity) and; (ii) it could also have demanded stricter conditions for example over more content in order to limit the availability of premium content for its rivals in the downstream markets for the wholesale supply and acquisition of Pay TV channels and the retail provision of Pay TV services.

(244) The market investigation carried out in 2014 revealed that the majority of TV services retailers who replied to the Commission's market investigation were concerned that the Transaction could harm their position on the market. This could have happened because either the merged entity would have been able to negotiate more favourable price conditions from content owners and these would have charged higher prices to the other players in the market, in order to recoup any decrease in revenue or because the content owners would have had an incentive to deal exclusively with the merged entity, through which a substantial portion of potential viewers could be reached. The market investigation also showed that the majority of content owners who replied to the Commission's market investigation did not consider that the merged entity would have an incentive to acquire less content post-merger.

(245) The Commission noted that most of the licensors of premium content were large Hollywood film studios whose negotiating position *vis-à-vis* the merged entity was unlikely to deteriorate as a result of the Transaction. As for Dutch-language content, the market investigation carried out in 2014 revealed that some respondents considered that the ability to offer Dutch-language content to the local audience was an important advantage in terms of product differentiation. However, other respondents expressed the view that even though Dutch content was undoubtedly important, United States Hollywood film content was even more important.

6.1.3. Commission's conclusion in 2014

(246) The Commission held that it did not need to reach a conclusion on whether the Transaction would have been likely to impede effective competition on the market for the acquisition of Dutch-language content or on the markets for the acquisition of individual audio visual content for first and second Pay TV windows. Indeed, the remedies proposed by the Notifying Party would eliminate also the possible anti-competitive effects on these markets.

(247) As for VOD content the Commission held that the merged entity was unlikely to purchase less VOD content. In addition, the Commission considered also a further segmentation of the market into a market for TVOD and SVOD windows and held that TVOD deals were in general concluded on a non-exclusive basis to retailers and that there was no reason why this could change post-Transaction. With reference to SVOD rights, which could also be negotiated exclusively, the Commission held that the Transaction would not change the pre-merger situation. It concluded that the Transaction would not have led to a significant impediment to effective competition on the possible markets for acquisition of VOD, be it SVOD or TVOD and that in any event the commitments proposed by the Notifying Party would in any event remove also any increment added by the Transaction to the possible market for acquisition of SVOD rights.

6.1.4. The Notifying Parties' views in their Supplementary Notification

(248) The Notifying Parties submit that the overall market for the acquisition of all individual audio visual TV content would not be affected as Liberty Global's and Ziggo's combined acquisition expenditure for individual TV content in 2017 would amount to a combined market share of [5-10]% if the geographic market is limited to the Netherlands.

(249) The Notifying Parties have been unable to collect reliable estimates for the sizes of the various possible separate relevant product markets involving TV content that were previously identified by the Commission. However, on the possible market for the acquisition of non-linear audio visual TV content only, Liberty Global's and Ziggo's combined expenditure for VOD content rights in 2017 would give them a combined market share of around [5-10]% in the Netherlands. The Notifying Parties estimate that the market shares for the merged entity on the segment of non-linear SVOD is less than 20%, while the market share for non-linear TVOD services might exceed 20%.

(250) The Notifying Parties submit that since 2016, VodafoneZiggo has ceased to acquire individual content for first Pay-TV window and second Pay-TV window, *inter alia*, as a result of the divestment of Film1 and the termination of HBO NL, VodafoneZiggo is thus no longer active on the potential market segments for the acquisition of individual linear content for first Pay-TV window and second Pay-TV window.

(251) With reference to the acquisition of sports rights, the Notifying Parties were not able to provide actual information on the size of the market for the acquisition of sports content rights. However, it provides figures according to which the total of sport content spend by VodafoneZiggo has increased from EUR [...] in 2014 to EUR [...] in 2017. Moreover, VodafoneZiggo's market share based on spending on sports content increased from [5-10]% in 2014 to [10-20]% in 2017.

(252) According to the Notifying Parties, following the divestment of Film1, none of the possible segments within the market for the acquisition of individual content can be considered affected for the purpose of the reassessment of the Transaction. Moreover, the Notifying Parties submit that the market presence of OTT players increased since 2014 and they are actually concluding exclusive deals for first Pay-TV window. The proliferation of OTT players

(such as Netflix and Amazon, both of which have vast budgets) has led to rapidly increasing demand for quality content and reduced buyer power of the traditional market players, including VodafoneZiggo.

(253) The Notifying Parties also submit that their content acquisition activities are significantly reduced since 2014 and they are mainly focused on linear sports rights and non-linear movies/series content for VOD distribution. Furthermore, the Transaction has not led to any increase in buyer power in relation to sports content given the lack of horizontal overlap.

(254) With respect to the acquisition of broadcasting rights for movies and series for TVOD distribution, the Notifying Parties emphasise that this hypothetical market segment is rather competitive and is characterised by a wide variety of different types of players. Market players, in fact, include Pathé Thuis, iTunes, Amazon Prime, KPN, T-Mobile, M7 and Tele2. It must also be noted, the Notifying Parties argue, that broadcasters offer TVOD OTT services via their websites (such as RTL XL) and may therefore allocate some of their content acquisition costs to their TVOD services. The Notifying Parties finally indicate that they have no reliable estimates available on the individual TVOD spend of these players.

(255) Finally, the Notifying Parties submit that there are contractual limitations preventing issues arising due to exclusive content use. According to the Notifying Parties, the practice of granting exclusive licensing has not changed but more third party bidders have become active and this means that competition for these licence windows has increased over the past years.

6.1.5. Commission's assessment

(256) In response to the market investigation, a number of broadcasters and retail TV distributors indicated that the merged entity is in a better position to buy content due to the Transaction and that this bargaining position negatively affects smaller providers. [79·80]

(257) On the other hand, the majority of content owners who replied to the market investigation do not consider that the merged entity will be in a better bargaining position post-Transaction[81] and, in general, they did not see the Transaction as problematic.[82]

(258) Furthermore, the Commission notes that most of the licensors of premium content, which is the only content using first and second Pay TV windows, are large Hollywood film studios whose negotiating position *vis-à-vis* the merged entity is unlikely to deteriorate as a result of the Transaction.

---

79 Replies to Q2 to TV channel suppliers of 5 April 2018, questions D.1.1 and D.2.1.1.

80 Replies to Q3 to retail Pay TV providers of 5 April 2018, question D.2.1.1.

81 Replies to Q1 to content providers of 5 April 2018, question B.A.12.

82 Replies to Q1 to content providers of 5 April 2018, question C1.

(259) With reference to sports rights, the Commission observes that these rights come up for tender regularly and that the merged entity faces effective competition from a large number of TV channels as well as from major OTT operators, such as Amazon and Facebook (the Notifying Parties provide evidence of recent bids for sports rights).[83]

(260) Moreover, the increase in spending in sports content does not appear to be linked to the fact that the Transaction allowed the merged entity to spread the investment costs to acquire content over a larger customer base. Indeed, pre-Transaction, Ziggo already distributed Liberty Global's Sport1 channel to its subscribers. When bidding to acquire content for its Sport1 channel, Liberty Global must therefore already have taken into account the value it could extract from selling the channel to Ziggo. The Transaction would therefore not have led to any change in that respect (apart from the elimination of double-marginalisation). Given the different geographic footprints of Liberty Global and Ziggo it is easy to understand that Liberty Global had pre-Transaction every incentive to provide its Sport1 channel to Ziggo.

(261) With respect to the acquisition of movies and series for TVOD distribution, the Commission considers that the segment is highly competitive[84], also in consideration of the entry of new players in the market.

6.1.6. Overall conclusion

(262) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the market for licensing and acquisition of broadcasting rights for TV content in the Netherlands.

6.2. Market for the supply and acquisition of Premium Pay TV film channels (supply side)

6.2.1. The Notifying Party's views in 2014

(263) **Horizontal non-coordinated effects.** The Notifying Party acknowledged at the outset that if a separate product market for the supply and acquisition of Premium Pay TV film channels were to exist, the Transaction would combine the only two TV channels in this category in the Netherlands, namely Film1 and HBO Nederland.

(264) According to the Notifying Party, however, the two channels represented complementary, rather than competing entertainment offers, given that they had a different focus. Moreover, the Notifying Party submitted that Premium Pay TV film channels were competitively constrained by the growing number of SVOD and TVOD offerings, including Internet-based OTT services. In addition, the availability of wholesale offers for non-linear content would have rendered it relatively easy for providers of retail TV services to introduce

83 Supplement Form CO, paragraph 242.

84 There is a significant number of small and large players active in this market, such as Apple, Pathé Thuis, YouTube, or Google Play as well as several Dutch providers of retail Pay TV services.

or continue to expand their own VOD offerings, thus increasing the competitive constraint exerted on Film1 and HBO Nederland.

(265) The Notifying Party also submitted that Film1 and HBO Nederland constitute recent services, with a relatively low penetration rate with Dutch households. For this reason, the two TV channels would have an interest in not raising price, thereby aiming at generating additional profits by increasing subscriber numbers. Moreover, according to the Notifying Party, there is a large degree of price sensitivity for Premium Pay TV channels.

(266) In addition, the Notifying Party considered that the Transaction would not in any way influence that situation, suggesting that HBO Nederland had at most a limited effect on Film1 subscribers. The Notifying Party therefore contended that if post-merger, it could simultaneously raise both Film1 and HBO Nederland prices, the resulting decline in the Film1 and HBO Nederland subscriber base would not have been less significant than the decline that would have resulted, pre-Transaction, from an individual price increase for Film1.

(267) To conclude, the Notifying Party argued that the Transaction would not have given rise to either the ability or the incentive to increase the prices of either Film1 or HBO Nederland, which the Notifying Party claimed would have been unlikely due to the expected continuation of the HBO joint venture.

(268) **Foreclosure effects**. The Notifying Party submitted that Film1was neither a TV channel with significant market power, nor an important "must-have" TV channel. Moreover, in the case of HBO Nederland, the merged entity noted that it did not enjoy unilateral control, but only had joint control of the company and, as such, was unable to restrict the supply to its downstream rivals.

(269) As regards incentives to foreclose, the Notifying Party submitted that this would be both commercially unattractive and inconsistent with those channels' business strategies of enhancing overall viewership and market penetration. As regards HBO Nederland, the Notifying Party highlighted that even if a foreclosure strategy were theoretically attractive to the merged entity, would likely to be vetoed by Time Warner/HBO and could thus be disregarded. At the Commission's request, the Notifying Party performed a margin analysis for a merged entity strategy of complete foreclosure of Film 1 and/or HBO Nederland from rival platforms. According to the calculation of the Notifying Party, the critical level of switching that is required for such a foreclosure to be profitable is too high, and therefore, it is unlikely that this could be a commercially attractive option for the merged entity. As regards a scenario of 'partial' foreclosure, in which the merged entity continues to offer the retained Premium Pay TV channel to competitors but on worse terms, the Notifying Party submitted that competing TV platform operators have the option to continue offering the other Premium Pay TV channel as well as the presence of the premium OTT SVOD alternatives.

(270) As regards the overall competitive effect on competition, the Notifying Party contended that even if it were the case that the merged entity foreclosed for example KPN with respect to Film1, no anti-competitive effect could reasonably be envisaged. The Notifying Party did not regard Film1 channel as

having "must-have" content whose absence could prevent an operator from competing effectively.

6.2.2. Commission's assessment in 2014

(271) **Horizontal non-coordinated effects.** The Commission first noted that the Transaction would have combined the only two linear Premium Pay TV film channels (Film1 and HBO Nederland) that are present in the Netherlands. As a result of the merger, retail providers of Pay TV services would have no possibility of switching supplier for those services in that market, making them particularly vulnerable to price increases. Indeed, the merger would have likely resulted in higher wholesale prices for the retail providers of Pay TV services and this would have, in turn, likely resulted in higher subscription fees for subscribers of Premium Pay TV services in the Netherlands.

(272) The Commission then analysed the relationship between HBO and Film1, concluding that the two were substitutes, and not complements, pre-Transaction. According to the Commission, although both Premium Pay TV film channels were offering inherently largely complementary content, due to their generally exclusive distribution models, significant competitive pressure seemed to be exerted between them. Moreover, with reference to the potential competitive pressure exerted by providers of SVOD services such as Netflix, RTL's Videoland and Pathé Thuis on Film1 and HBO Nederland, the Commission concluded that Film1 and HBO Nederland constitute the only two linear Premium Pay TV film channels in the Netherlands which, as opposed to for instance Netflix, are only available as part of or an add-on to a retail TV services provider's Pay TV subscription. The Commission also noted that linear and non-linear Pay TV services are not fully substitutable. To conclude, the Commission expressed the view that OTT SVOD services were still nascent in the Netherlands and, therefore, it was not clear to what extent they could constrain post-merger price increases.

(273) With reference to the broader market for the wholesale supply of Premium Pay TV channels, the Commission noted that the Transaction would have brought together three out of the four Premium Pay TV channels in the Netherlands. However, the Commission considered that, in light of the competitive situation in the market for the wholesale supply of Premium Pay TV film channels, the conclusions reached with regard to the latter applied equally to the broader Premium Pay TV channels market.

(274) **Foreclosure effects.** As regards the ability to engage in complete or partial foreclosure, the starting point of the Commission's analysis was the fact that the merged entity would control the only two linear Premium Pay TV film channels in the Netherlands. Accordingly, the Commission considered that the merged entity would hold a significant degree of market power in the relevant upstream market (in effect, it arguably had the ability to prevent competitors from being able to provide any Premium Pay TV film channels).

(275) In terms of incentive, the Commission considered that there was more incentive to foreclose Film1 (over which the merged entity had sole control) than HBO given that the other controlling shareholder of the HBO Nederland joint venture, Time Warner/HBO, would advocate for the widest possible

distribution of its TV channels and would get no direct benefit from additional retail Pay TV subscribers to the merged entity.

(276) The Commission considered that the Transaction would increase the profitability of any foreclosure of Liberty Global's Film1 Premium Pay TV film channel due to the increase in the downstream footprint. The Commission assessed the margin analysis carried out by the Notifying Party and established that the critical level of switching was much lower than submitted by the Notifying Party. Therefore, the Commission considered that the margin analysis supported the finding of a likely financial incentive to foreclose Film1.

6.2.3. Commission's assessment and conclusion in 2014

(277) **Horizontal non-coordinated effects.** The Commission concluded that the Transaction as originally notified was unlikely to be compatible with the internal market in that it was likely to create a significant impediment to effective competition in the possible market for the wholesale supply and acquisition of Premium Pay TV film channels in the Netherlands as well as in any broader market for the wholesale supply and acquisition of Premium Pay TV channels in the Netherlands.

(278) **Foreclosure effects.** The Commission concluded that the Transaction as originally notified was likely to create a significant impediment to effective competition in the upstream market for the wholesale supply and acquisition of Premium Pay TV (film) channels on the one hand, and the downstream markets for the retail supply of Pay TV services which would also form part of the possible market for the retail supply of multiple play services in the Netherlands on the other hand.

Film1 Commitment

(279) In order to maintain effective competition in relation to Premium Pay TV film channels in the Netherlands, the Notifying Party committed to divest, or procure the divestiture of the Film1 Divestment Business, by the end of the Trustee Divestiture Period, as a going concern to a purchaser and on terms of sale approved by the Commission.

(280) To carry out the divestiture, the Notifying Party committed to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Film1 Divestment Business within the First Divestiture Period.

(281) The Notifying Party also committed to exercise reasonable efforts to ensure that the Film1 business would be remain viable in the future, e.g. by entering into a [...]year carriage agreement for the distribution of Film1 on the merged entity’s Pay TV platform in the Netherlands on reasonable commercial conditions or by transferring to the Purchaser all current Film1 main exclusive content licence agreements.

(282) In order to maintain the structural effect of the Commitments, the Notifying Party shall, for a period of 10 years after the Effective Date, not acquire, whether directly or indirectly, the possibility of exercising influence, as defined in paragraph 43 of the Remedies Notice, over the whole or part of the

Film1 Divestment Business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee, the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Film1 Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

(283) The Commission considered that the Final Commitments contained all necessary safeguards to ensure the successful transfer of the Film1 Divestment Business to a suitable purchaser.

(284) The Commission considered that the Film1 Divestiture Commitment was suitable and sufficient to remove the competition concerns expressed. The Commission also concluded that it could be implemented effectively within a short time period.

6.2.4. The Notifying Parties' views in their Supplementary Notification

(285) **Key developments.** The Notifying Parties explain the key developments that have taken place in the Premium Pay TV film channel segment since the Conditional Clearance Decision.

(286) Pursuant to the Conditional Clearance Decision, Film1 was divested to Sony in March 2015. The Notifying Parties consider that Film1 continues to compete as a Premium Pay TV film channel. Further, they note that this segment only includes the offers from Film1 since HBO is no longer offered as a Premium Pay TV channel.

(287) The HBO Nederland ("HBO NL") joint venture was terminated in December 2016. In 2017, VodafoneZiggo replaced its VOD service My Prime with the rebranded VOD service Movies & Series which contains some of the former HBO NL content. There are three different Movies & Series packages available. Movies & Series contains all SVOD content, except the exclusive HBO content, and is included in certain triple-play packages or available as paid subscription add-on. Movies & Series L includes all SVOD content, including the HBO content and is available as free-add on for quad-play customers only. Movies & Series XL additionally includes 50 linear TV channels and is included in a high-tier triple-play package or available as paid subscription add-on.

(288) **Horizontal non-coordinated effects.** The Parties argue that, following the divestment of Film1 in the context of the Transaction notified in 2014 and the winding up of the HBO NL joint venture, VodafoneZiggo is no longer active on the market for Premium Pay TV film channels. Therefore, any pre-merger overlap in relation to Premium Pay TV film channels has been removed.

(289) **Foreclosure effects.** The Parties argue that, following the divestment of Film1 in the context of the Transaction notified in 2014 and the winding up of the HBO NL joint venture, VodafoneZiggo is no longer active on the market for Premium Pay TV film channels. Therefore, any pre-merger vertical concerns in relation to Premium Pay TV film channels have been removed.

6.2.5. Commission's assessment

(290) **Horizontal non-coordinated effects.** According to the Horizontal Merger Guidelines, "increased market power" means the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition.[85] The Horizontal Merger Guidelines state, that in assessing the competitive effects of the merger, the Commission shall compare the competitive conditions that would result from the merger with the conditions that would have prevailed without the merger.[86]

(291) In this regard, the Commission considers that, following the divestment of Film1 in the context of the Transaction notified in 2014 and the winding up of the HBO NL joint venture, any overlap in relation to Premium Pay TV film channels has been removed. Therefore, the Transaction does no longer have an effect on the competitive conditions.

(292) In order to maintain the structural effect of the Film1 divestment, the Notifying Parties have re-committed not to acquire Film1 for the remaining period of the 10 years after the Effective Date. Film1 was divested to Sony in March 2015. The Notifying Party's Film1 non-acquisition commitment in the Final Commitments ensures that the divestiture of Film1 remains in effect until 11 October 2024 (see section 7.3).

(293) **Foreclosure effects.** During the pre-notification phase and the market investigation[87], competitors of the Parties in the market for retail TV services raised the concern that the merged entity foreclosed competing providers of retail TV services by withholding access to the HBO content which was formerly broadcast on the HBO NL linear Pay TV channels and is now available to the merged entity's customers with access to Movies & Series only. They claim that HBO produces very important content, such as the popular series "Game of Thrones".

(294) First of all, the Commission investigated the reasons for the termination of the HBO NL joint venture and the subsequent exclusive licensing agreement between HBO Inc. and VodafoneZiggo. At the request of the Commission, the Notifying Parties provided a detailed description of the chain of events that have led to the termination of the HBO NL joint venture and the inclusion of the HBO content in the merged entity's VOD service Movies & Series.[88]

---

85 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 05.02.2004, p.5), (the "Horizontal Merger Guidelines"), paragraph 8.

86 Horizontal Merger Guidelines, paragraph 9.

87 Replies to Q3 to retailers of 5 April 2018, question A.3 and C.D.7.2; Submission of T-Mobile Netherlands dated 15 May 2018.

88 Supplement Form CO, p. 34 ff.

(a) The HBO NL joint venture was not economically viable. In fact, HBO NL was loss-making; in the financial year 2014 for instance losses amounted to approx. EUR [...]. In that light, HBO Inc. and NewZiggo contemplated to end their joint venture.

(b) Subsequently, the change of control over Ziggo as a result of the acquisition of Ziggo by Liberty Global gave HBO Inc. the option to exercise its put option contained in the joint venture agreement.

(c) HBO Inc. contemplated exercising its put option and withdrawing from the joint venture by requiring NewZiggo to purchase its interests. In the event of such termination, Liberty Global would have had to pay at least EUR [...] (equivalent to HBO's initial capital contribution) to HBO Inc. in accordance with the agreement and as a direct result of their acquisition of Ziggo. In addition, it would have to take over the liabilities, debt and obligations of the joint venture; the total cost of which was estimated to amount to at least EUR [...].

(d) Meanwhile, HBO NL continued to be loss making (in financial year 2015 losses still amounted to approx. EUR [...] and in financial year 2016 losses amounted to approx. EUR [...]).

(e) The acquisition of the additional Hollywood studio first-pay movies at significant cost had resulted in a relatively high subscription fee for the linear HBO channel. The linear channel also required programming and editorial work and was labour intensive.

(f) In that light, NewZiggo considered its options to better monetise HBO content and HBO Inc. and NewZiggo decided to negotiate a settlement of the termination of the joint venture. Subsequently HBO Inc. and NewZiggo negotiated a separate contract on the exclusive rights to HBO content bilaterally, which resulted in the current agreement for the exclusive rights to HBO content.

(g) NewZiggo's rationale for seeking and agreeing a licence agreement with HBO after the termination of the joint venture was that it considered that including the HBO content in its SVOD service Movies &Series offerings would be a commercially viable alternative.

(h) [...].

(i) Consequently, the linear HBO NL Pay TV channels were terminated in December 2016 and some of the HBO content was subsequently broadcast on the merged entity's SVOD platform Movies & Series starting in 2017.

(295) The presented reasoning is consistent with the merged entity's internal documents.[89]

[89] Reply to RFI 1, questions 1 and 2, e.g. Annex B.87.

(296) In light of this reasoning, the termination of the HBO NL joint venture was linked to the Transaction as the change in ownership of Ziggo gave HBO Inc. the possibility to exercise its put option which led to the negotiation of the settlement agreement and the subsequent exclusive licensing agreement. The Commission found that the merged entity had the merger-specific opportunity to stop the distribution of the linear HBO NL Pay TV channels and to include some of the HBO content in its SVOD platform Movies & Series.

(297) The Commission investigated whether the termination of the HBO NL linear Pay TV channels as well as the withholding of the VOD service Movies & Series, which includes some of the HBO content, prevents downstream competitors from effectively competing in the market for retail Pay TV services.

(298) With regard to the HBO NL Pay TV channels, the Commission notes that it is no longer available in the Dutch Pay TV market, neither to VodafoneZiggo's own customers nor to customers of competing retail TV providers. Therefore, the merged entity is indeed no longer active in the supply of Premium Pay TV film channels.[90]

(299) With regard to the SVOD service Movies & Series, the Commission notes that some of the former content of the HBO NL Pay TV channels is made available exclusively to a part of the merged entity's own downstream subscriber base.

(300) For the withholding of the SVOD service Movies & Series to translate into an ability to foreclose competitors from the downstream market, the merged entity must have a significant degree of market power in the upstream market. It is only in those circumstances that the merged entity can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.[91] In this respect, the Commission concluded that Movies & Series is not a sufficiently important input to foreclose downstream competitors for the following reasons.

(301) First, the VOD market in the Netherlands is not concentrated. There are many different providers of VOD services active in the Netherlands, including both national players, such as public and commercial Dutch broadcasters, European players, such as Pathé Thuis, as well as international players, such as Apple.[92] The market share estimates provided by the Notifying Parties show that Movies & Series has a share of below 30% both in terms of revenues and subscribers as well as both in the overall VOD segment and

---

90 [Reference to distribution agreements with third parties]. Hence, any anti-competitive effects would arise from the exclusive distribution via the SVOD platform Movies & Series, which will be discussed in the following paragraphs. In addition, with regard to Premium Pay TV film channels, the divestment of Film 1 to Sony had fully addressed the Commission's concerns.

91 Commission's non-horizontal Guidelines, paragraph 35.

92 Reply to RFI 7, question 1.

narrower SVOD segment in 2017 and in previous years.[93] Looking at the potential market for SVOD services, there are several non-vertically integrated SVOD providers active in the Netherlands, such as the following ones:

(a) Netflix has been growing significantly over the last years and has increased its number of subscribers from 863 000 in 2014 to 2.6 million in 2017. Netflix is now the largest provider of SVOD services in the Netherlands.

(b) Videoland, owned by RTL Netherlands, increased its number of subscribers from 105 000 in 2014 to 435 000 subscribers in 2017.

(c) The Premium Pay TV film channel Film1, that was divested to Sony and had more than 230 000 subscribers in 2017, also offers SVOD services to its subscribers.

(d) Public and commercial broadcasters, such as NPO and RTL respectively, offer paid SVOD services in addition to their free advertisement-based VOD services.

(e) Other commercial providers of SVOD services, such as MUBI or Cinetree.

(302) Respondents to the market investigation generally confirmed that the movies and/or series offered by Netflix, Film1, RTL's Videoland and Pathé Thuis qualify as premium content competing with Movies & Series.[94]

(303) The above mentioned providers of VOD services are non-vertically integrated market players. While retail TV providers have the possibility to promote certain VOD services together with their retail Pay TV subscription, VOD services are generally offered on a stand-alone basis. Customers may complement their retail Pay TV subscription with a VOD service of their choice, irrespective of the provider of their retail TV subscription. Hence, customers of competing retail TV providers have access to a large pool of (S)VOD services offered by non-vertically integrated providers.

(304) Second, beyond the VOD offerings already established in the Netherlands, entry of further VOD players is ongoing. Examples include Amazon, which launched its "Prime Video" service in the Netherlands in November 2017.[95] Content available via Amazon Prime Video is overall high profile and considered very attractive by consumers.[96]

---

93 Reply to RFI 13, question 5.

94 Replies to Q3 to retailers of 5 April 2018, question B.A.3.1.

95 https://www.dutchnews nl/news/2017/11/online-retailer-amazon-launches-prime-in-netherlands/ [accessed on 25 May 2018].

96 Reply to RFI 12, question 6.

(305) Third, as explained in section 6.1.5, the upstream market for the licensing and acquisition of broadcastings rights is highly competitive. In particular, the merged entity itself has a market share of less than 20% in the acquisition of non-linear audio visual TV content for VOD and SVOD services. In addition, beyond the HBO content, the merged entity does not hold many exclusive broadcasting rights for distribution on Movies & Series.[97] The Commission notes that competing retail TV providers can launch their own VOD services either by entering into licencing agreements with content providers or by producing content themselves. For instance, KPN also offers SVOD services to its customers (KPN TV Plus, KPN Play). In addition, KPN produces its own content, such as the successful Dutch series "Brussel", for its TV channel and VOD service "KPN Presenteert"[98], which is exclusively offered to KPN customers. The ACM notes that retail TV operators also react to the loss of the HBO content by adding extra linear TV channels or giving price reductions.[99]

(306) In addition, respondents to the market investigation referred mainly to one popular HBO-produced content only, namely the series Game of Thrones (of which the final season will be broadcast in 2019). In this respect, the Commission refers to section 5.1.1.1 where it has explained that a narrower possible market definition with respect to allegedly particularly important content is not plausible. The attractiveness of one series is not sufficient to justify the "must-have" nature of a SVOD service. In addition, the popularity of film and series content changes over time. The next large commercial success may be broadcast on Netflix or KPN Presenteert.

(307) Even if the HBO content was particularly important to Dutch consumers, the Commission notes that the exclusive agreement between HBO Inc. and the merged entity only runs until [...]. It is uncertain what will happen with the HBO rights thereafter. Competing retail TV providers will have the possibility to enter into negotiations with HBO Inc.

(308) As regards the effects[100], the Commission notes that the merged entity was not able to foreclose downstream competitors by offering Movies & Series to its own customers and withholding it from downstream competitors. As shown in Table 1, the market share of the merged entity has further decreased in 2017 after the introduction of Movies & Series at the beginning of 2017. Therefore, the Commission considers that the exclusivity of the HBO content has not led to churn from other platforms.

(309) This view is confirmed by retail competitor M7 which stated: "*We do not think that the exclusivity of HBO content has le[a]d to churn from other*

---

97 Reply to RFI 12, question 2. Indeed, the list of exclusive content is very limited. Moreover, exclusivity is sometimes obtained for only one or two seasons and/or for a very limited period only.

98 https://www kpn.com/entertainment/kpn-presenteert htm [accessed on 25 May 2018].

99 ACM report of July 2017, "*Bundling of telecom services and content in the Netherlands*", p. 23 f.

100 Commission's non-horizontal Guidelines, paragraph 32.

platforms, as TV series and films are widely available through other channels and SVOD services."[101]

Table 1 - Market shares for retail TV distribution (subscribers)

	2011	2012	2013 Q3	2014	2015	2016	2017 Q3
VodafoneZiggo	-	-	-	-	-	-	53%
NewZiggo	-	-	-	55%	55%	54%	-
Ziggo	38%	36%	34%	34%	-	-	-
Liberty Global (UPC)	24%	22%	21%	20%	-	-	-
KPN	18%	23%	25%	27%	30%	31%	32%
Canal Digitaal	10%	10%	10%	10%	5%	5%	4%
Other	10%	9%	10%	8%	10%	10%	11%

Source: Form CO, p. 132.

(310) The Commission concludes that if the merged entity was engaging in a foreclosure strategy with regard to Movies & Series, it was not successful.

6.2.6. Overall conclusion

(311) **Horizontal non-coordinated effects.** The Commission concludes that, following the divestment of Film1 in the context of the Transaction notified in 2014 and the winding up of the HBO NL joint venture, any overlap in relation to Premium Pay TV film channels has been removed. Therefore, no horizontal non-coordinated effects can arise.

(312) **Foreclosure effects.** The Commission concludes that no vertical anti-competitive effects arise from the provision of the former HBO NL content on the merged entity's SVOD platform Movies & Series, and the downstream markets for the retail supply of Pay TV services the hypothetical market for the retail supply of multiple play services including Pay TV services in the Netherlands.

(313) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the market for the supply of Premium Pay TV film channels.

[101] Reply of M7 to Q3 to retailers of 5 April 2018, question C.D.7.2.

6.3. Market for the supply and acquisition of Premium Pay TV sports channels (supply side)

6.3.1. The Notifying Party's views in 2014

(314) **Horizontal non-coordinated effects.** The Notifying Party acknowledged that if a separate product market for the supply and acquisition of Premium Pay TV sports channels were to exist, this segment would only include the offers from Sport1 and Fox Sports.

(315) According to the Notifying Party, Sport1 realised total revenues of EU [...] million and had a subscriber base of around [...] in 2013. However, the Notifying Party was not able to obtain a reliable estimate of the size of the market for Premium Pay TV sports channels and was therefore not in a position to accurately determine the market share of Sport1. The Notifying Party provided market shares based on viewing share data. According to these, Sport1 had a viewing share of less than 15% in the sports segment.

(316) The Notifying Party concluded that irrespective of Sport1's market share, the Premium Pay TV sport channel segment could not be an Affected Market as Ziggo was not active in this market.

(317) **Foreclosure effects.** The Notifying Party submitted that the merged entity would not have the ability or the incentive to foreclose retail competitors with regard to Sport1.

(318) As regards ability to foreclose, the Notifying Party argued that Sport1 was neither a channel with significant market power nor an important ("must-have") channel. The Notifying Party estimated Sport1 to have a market share of less than 15% in the possible market for Premium Pay TV sports channels and a penetration of just 2% in the total Dutch Pay TV market. Therefore, the Notifying Party concluded that Sport1 would not have the market power required to foreclose competitors.

(319) In addition, the Notifying Party noted that the key sports content rights in the Dutch market, such as the Dutch football league Eredivisie, were held by Fox Sports and that its rights would remain under contract with Fox Sports until 2025.

(320) As regards incentive to foreclose, the Notifying Party explained that Sport1 was just breaking even in the face of competition from Fox Sport's superior content offer. With sports rights paid on a fixed-fee basis and operating expenses (marketing and play-out) anyway sunk, Sport1 would be best served by expanding its subscriber base by any means. Moreover, the Notifying Party submitted that Sport1 would be an unlikely candidate to drive switching onto the merged entity's network, given its negligible market penetration and lack of key sports content rights.

6.3.2. Commission's assessment in 2014

(321) **Horizontal non-coordinated effects.** The Commission found that there was no horizontal overlap with respect to the supply of Premium Pay TV sports channels, as Ziggo was not active in (that) possible market.

(322) **Foreclosure effects.** The Commission did not find vertical foreclosure concerns with respect to the supply of Premium Pay TV sports channels but did not explicitly state its reasoning for the absence of vertical anti-competitive effects in the Conditional Clearance Decision.

6.3.3. Commission's assessment and conclusion in 2014

(323) The Commission concluded that the Transaction would not lead to a significant impediment to effective competition in the possible market for the wholesale supply of Premium Pay TV sports channels.[102]

6.3.4. The Notifying Parties' views in their Supplementary Notification

(324) **Key developments.** The Notifying Parties explain the key developments that have taken place in the Premium Pay TV sports channel segment since the Conditional Clearance Decision.

(325) On 11 November 2015, Sport1 was rebranded to Ziggo Sport Totaal ("ZST"). At the same time, NewZiggo launched the Ziggo Sport basic ("ZSB") which it provides to subscribers to its retail basic package TV service. While ZST consists of six linear TV channels, ZSB is one single linear TV channel. ZSB includes only a selection of the content included in the ZST channels in addition to certain other sports related content (e.g. sports documentaries, the Dutch Field Hockey League and the Dutch Basketball League). ZSB has never been made available on a wholesale basis to retail competitors.

(326) Similar to ZST's distribution model, Fox Sports was initially offered to retail TV providers through a revenue share model. Under this model, the commercial risk in principle remains with the channel provider. In contrast, under the minimum wholesale guarantee model, which is applied by Fox Sports in relation to Fox Sports Eredivisie channels, as of August 2016, to contracts with retail TV providers, whose distribution contracts expire, retail TV providers pay a minimum fee per TV customer that could potentially subscribe to Fox Sports via their platform. This ensures that retailers have a greater incentive to distribute Fox Sports Eredivisie. VodafoneZiggo's contract with Fox Sports is still under the old revenue share model.

(327) The Notifying Parties note that the distinction between Premium and Basic Pay TV sports channels has become increasingly blurred. Market participants from both segments sometimes compete to acquire the same content and Basic Pay TV sports channels hold attractive sports rights. At the same time, Premium Pay TV sports channels have become available to a broader audience due to Fox's new business model and retail TV providers' practice of including them as free optional add-ons to multi-play bundles. This is the case for Fox Sports with multi-play offers of KPN and T-Mobile Netherlands and for ZST with multi-play offers of VodafoneZiggo.

[102] As explained in paragraph (3) above, the General Court annulled the Commission's Conditional Clearance Decision on the ground that the Commission failed to state the reasons of its finding that the proposed merger would not lead to vertical anti-competitive effects on the possible market for the wholesale supply of Premium Pay TV sports channels.

(328) **Foreclosure effects.** The Notifying Parties submit that the merged entity would not have the ability or the incentive to foreclose downstream competitors with respect to ZST and that any potential foreclosure strategy would not have a detrimental impact on competition.

(329) As regards ability to foreclose, the Notifying Parties argue that ZST, as previously Sport1, is not a sufficiently important input for the downstream product.

(330) First, the Notifying Parties highlight that ZST has a very limited subscriber base. According to the Notifying Parties, ZST had a subscriber base of about [...] in 2017, of which [...] subscribers are on third platforms. This corresponds to a market penetration of [5-10]% of Dutch households (and [5-10]% when disregarding the VodafoneZiggo base).

(331) Second, according to the Notifying Parties, any sports rights currently held by ZST are contestable. The Notifying Parties note that sports rights are generally acquired for a limited period of time only, made available to broadcasters via open tenders and often change hands. The Notifying Parties face competition from public and commercial broadcasters as well as dedicated sports channels in the acquisition of sports rights which then compete with ZST in the downstream market. In addition, the Notifying Parties point out that retail TV operators, that are not yet active in this segment, can themselves acquire sports broadcasting rights.

(332) Third, the Notifying Parties submit that there are a number of alternative TV channels to ZST with attractive content, such as Eurosport, NPO, RTL Netherland and SBS/Talpa.

(333) Fourth, the Notifying Parties highlight that Fox Sports, in particular, provides more attractive sports content and has more subscribers. The Notifying Parties point out that Fox Sports currently has more than double the amount of subscribers than ZST. Moreover, as a result of entering into a joint venture with Dutch football clubs in 2012, Fox Sports holds the Dutch football league broadcasting rights until 2025. The Notifying Parties explain that Fox Sports committed to the ACM to distribute the Eredivisie live channels on non-discriminatory terms to all distribution platforms at the creation of the joint venture. Therefore, the Fox Sports Eredivisie channels will be available to all retail TV operators until at least 2025.

(334) Fifth, the Notifying Parties refer to statements made by the ACM which confirm that ZST is not an important input. In its study into bundling of telecom services and content in the Netherlands, the ACM notes that "*Ziggo Sport and Ziggo Sport Totaal have not led to a significant shift in the television market*". In addition, in its investigation of Fox's new business model following a complaint by CAIW, the ACM found that there were insufficient indications that Fox Sports Eredivisie channels were an essential input for retail providers. For instance, the ACM found that Tele2 Netherlands, who had terminated its contract with Fox Sports, did not suffer any significant loss of customers as a result. The ACM also noted that other factors than content, including price and internet speed are more relevant to consumers when choosing retail telecommunications services.

(335) Finally, the Notifying Parties point out that ZST faces rights holders' pressure for maximal exposure which limits VodafoneZiggo's ability and incentive to foreclose retail competitors with regard to ZST.

(336) As regards incentive to foreclose, the Notifying Parties first of all notes that ZST, as previously Sport1, has always been offered to all retail TV providers in the Netherlands. In addition, the Notifying Parties give three key reasons for distributing rather than withholding ZST.

(337) First, the Notifying Parties submit that they benefit from the wholesale revenues gained from distributing ZST. The Notifying Parties acknowledge that in an internal assessment from August 2016, the modelling of the gains and losses associated with the decision whether to supply ZST to KPN showed a financial upside of about EUR [...] from a withholding strategy. The Notifying Parties note, however, that the financial gain is very limited compared to a total downstream fixed market size of EUR 114.2 million and that it was outweighed by the potential risks as explained below. In addition, the Notifying Parties emphasise that the underlying assumptions were not based on market research.

(338) Second, the Notifying Parties highlight the risk of reputational damage in the eyes of both customers and TV providers attached to withholding ZST.

(339) Third, the Notifying Parties highlight the risk of relational damage in discussion with content rights holders. The Notifying Parties explain that content rights holders consider broad distribution a key criterion for licensing sports content. Withholding ZST would create the risk that content rights holders would no longer be willing to license rights to ZST in the next round of negotiations.

(340) As regard the impact on competition, the Notifying Parties reiterate that ZST is not a sufficiently important input having a market penetration of only [5-10]% of the Dutch TV base. In addition, the Notifying Parties argue that while content differentiation is currently not an important factor of competition in the Dutch market as most content is widely available (as applied to ZST), content differentiation should not necessarily lead to any competition concerns. Differentiation at retail level follows from factors such as price, internet, speed, hardware and service. The availability of content could be one further means of differentiation.

(341) The Notifying Parties submit that the same reasoning also applies to any potential partial foreclosure strategies which would also not be achievable as ZST is not a sufficiently important input.

(342) Lastly, the Notifying Parties note that there are no input foreclosure concerns in relation to ZSB. The ZSB Pay TV channel includes only a selection of the content included in the ZST channels in addition to certain other less attractive sports related content. The Notifying Parties submit that the introduction of ZSB was not merger specific.

6.3.5. Commission's assessment

(343) **Foreclosure effects**. During the pre-notification phase and the market investigation[103], competitors of the Parties in the market for retail TV services raised the concern that the merged entity might foreclose ZST from competing providers of retail TV services. They claim that VodafoneZiggo controls very important exclusive sports content and that it has already engaged in partial input foreclosure in the past, by deteriorating the terms and conditions for distributing ZST.

(344) The Commission has investigated whether the merged entity would have the ability and the incentive to engage in an input foreclosure strategy in relation to ZST, in particular full input foreclosure by refusing to provide access to ZST to its retail competitors. The Commission has also assessed whether such foreclosure strategies would have a significant detrimental effect on competition downstream.[104] In the case of partial input foreclosure, that is to say an increase in the wholesale price for ZST channels, downstream competitors on the market for the retail provision of Pay TV services would likely pass on, at least partially, those increased costs to end consumers.[105] Partial input foreclosure can also take more subtle forms such as the degradation of the quality of the input supplied. Input foreclosure would hence result in ZST no longer being available or being available, at higher retail prices or at lower quality on competitors' platforms. The Commission considers that this would induce at least a proportion of customers valuing such services to switch away from the foreclosed competing retail Pay TV platforms to the merged entity's product. The Commission has also investigated if the merged entity has already made any attempts to withhold ZST from its retail competitors since the Transaction and if such attempts have had an impact on competition in the downstream market.

(345) In carrying out such assessment, the Commission must take into account only the changes brought about by the Transaction. In this respect, the Commission notes that Liberty Global already controlled Sport1, the predecessor of ZST, and could therefore, in theory, already have withheld the channel to downstream providers of retail TV services pre-Transaction. The change as a result of the Transaction is the addition of Ziggo's downstream customer base.

(346) The aim of such a foreclosure strategy would be to increase demand for the merged entity's own downstream retail Pay TV services simultaneously reducing demand for competitor's retail services thereby increasing the merged entity's downstream profits.

---

[103] Replies to Q3 to retailers of 5 April 2018, question C.B.6.1; Submission of KPN dated 20 December 2017; Submission of T-Mobile Netherlands dated 15 May 2018.

[104] In line with the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265,18.10.2008, p.6) (the "Commission's non-horizontal Guidelines"), paragraph 32.

[105] To achieve this, the merged entity could worsen wholesale conditions for ZST such that it increases downstream rivals' costs of serving ZST customers.

(347) In order for input foreclosure to be a concern, three conditions need to be met cumulatively post-merger: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the downstream market.[106]

Ability to engage in input foreclosure

(348) As prerequisite for the ability to engage in input foreclosure, the Commission has investigated whether the merged entity would have the technical ability to withhold ZST.

(349) The bilateral agreements between the merged entity and its retail competitors regarding the distribution of ZST are the outcomes of commercial negotiations. The merged entity has neither a legal obligation to supply ZST to its rivals nor a legal obligation to provide it at non-discriminatory terms and conditions. The Notifying Parties confirm that the distribution agreements concluded with retail TV providers, while being broadly similar, can differ with respect to pricing and other terms and conditions.[107]

(350) The Notifying Parties note that sports rights holders favour maximal exposure given the importance of sponsorship and advertisement income in addition to the income accrued through the licensing of the content. Therefore, some rights holders, [reference to third party], push broadcasters, such as VodafoneZiggo, to distribute their content as widely as possible.[108] However, the Notifying Parties acknowledge that [reference to distribution agreement with third party].[109] The Commission concludes that it remains in the hands of the merged entity whether to prioritise the future relationship with the sports rights holders or potential immediate financial upsides from withholding ZST.

(351) Therefore, the Commission considers that the merged entity has the technical ability to withhold ZST from its downstream competitors.

(352) For the technical ability to withhold ZST to translate into an ability to foreclose competitors from the downstream market, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market. It is only in those circumstances that the merged entity can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.[110] In the following paragraphs, the Commission analyses whether the merged entity holds a

---

106 Commission's non-horizontal Guidelines, paragraph 32.

107 Supplement Form CO, p. 101.

108 Supplement Form CO, p. 110.

109 Reply to RFI 4, question 14.

110 Commission's non-horizontal Guidelines, paragraph 35.

significant degree of market power in the relevant upstream market to foreclose its downstream competitors.

(353) If the product market were to encompass Premium Pay TV sports channels only, the Commission recalls that the merged entity controls one out of two Premium Pay TV sports channel in the Netherlands. While VodafoneZiggo controls ZST (previously Sport1), Fox Sports is the only other competitor active in this segment.

(354) Table 2 shows the market shares of ZST and Fox Sports for Premium Pay TV sports channels in terms of wholesale[111] subscribers and total subscribers from 2014 to 2017.

Table 2 – Market Shares of ZST and Fox Sports

	2014		2015		2016		2017	
	Subs ('000)	**Market Share**	**Subs ('000)**	**Market Share**	**Subs ('000)**	**Market Share**	**Subs ('000)**	**Market Share**
Wholesale subscribers to Premium Pay TV sports channels								
ZST	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Fox Sports	640	[80-90]%	645	[80-90]%	800	[80-90]%	1 190	[80-90]%
Total	[...]	100%	[...]	100%	[...]	100%	[...]	100%
Total subscribers to Premium Pay TV sports channels								
ZST	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
Fox Sports	640	[70-80]%	645	[70-80]%	800	[70-80]%	1 190	[70-80]%
Total	[...]	100%	[...]	100%	[...]	100%	[...]	100%

Source: Supplement Form CO, p. 103 f.

(355) With regard to wholesale subscribers of Premium Pay TV sports channels, that is excluding ZST subscribers on VodafoneZiggo's platform, ZST has a market share of [10-20]% in 2017, down from [10-20]% in 2014. As Fox Sports does not have its own distribution platform, all its subscribers are wholesale customers and it has a market share of [80-90]% in 2017, up from

[111] The term wholesale subscribers refer to ZST and Fox Sports subscribers on third party platforms. For ZST, this excludes subscribers that are VodafoneZiggo retail TV customers. Fox Sports does not have its own distribution platform and therefore by definition all of the Fox Sports channels are provided by external platforms.

[80-90]% in 2014. The Commission notes that the total number of ZST subscriptions on third-party platforms is only [...] in 2017 and has been increasing slowly while Fox Sports almost doubled its presence from 2014 to 2017. Overall, the Commission concludes that Fox Sports is by far the largest player in the possible market for Premium Pay TV sports channels.

(356) For completeness, the Commission also indicates ZST's market share in terms of total subscribers of Premium Pay TV sports channels. Although ZST's absolute number of subscribers increased strongly from 2016 to 2017, ZST's share of subscribers decreased from [20-30]% in 2014 to [20-30]% in 2017. At the same time, Fox Sports increased its market share from 71.1% in 2014 to 72.6% in 2017. The Commission notes that Fox Sports is still more than twice as large when taking into account ZST's subscribers on VodafoneZiggo's platform. Fox Sports has also been able to grow its total subscriber base by more than ZST between 2014 and 2017.

(357) The increasing number of total Premium Pay TV sports channel subscriptions is linked to two of the key market developments explained above. First, Fox Sports changed its distribution model in August 2016 to incentivise wider distribution of the Fox Sports Eredivisie channels. Second, since summer 2017, VodafoneZiggo's quadplay customers have the option to choose ZST as free add-on. [...] of ZST subscribers on VodafoneZiggo's network, that is [...] out of a total of [...] subscribers, receive ZST as free add-on.[112] It appears likely that a part of these customers would not be willing to pay for ZST if it was not offered for free. The Commission considers that these developments relativise the increase in the total market size and hence the importance of the Premium Pay TV sports segment as the increase in subscribers is supply- rather than demand-driven. It is also worth noting that VodafoneZiggo's customers who opted for the free ZST package only represent [20-30]% of their quad-play subscriptions while [40-50]% of eligible customers did not take up a free add-on at all.

(358) Table 3 shows the market penetration of ZST and Fox Sports channels in terms of Dutch TV customers over time. From 2014 to 2017, ZST's market penetration increased from [0-5]% to [5-10]% of all Dutch TV customers and to [5-10]% when excluding VodafoneZiggo's customer base.[113] By contrast, Fox Sports currently has a market penetration of [10-20]%. The overall market penetration of Premium Pay TV channels increased from [10-20]% to [20-30]%.[114] The Commission notes that ZST's market penetration remains low.[115]

---

112 Supplement Form CO, p. 105; Reply to RFI 7, question 3.

113 Supplement Form CO, p. 102.

114 The overall market penetration is overstated as some Dutch TV customers subscribe to both ZST and Fox Sports. This effect is not taken into account in the data shown in Table 3 and therefore the share of subscribers that have at least one Premium Pay TV sports channel is in fact lower than [20-30]% in 2017.

115 According to reply to RFI 9, question 2, the low penetration also holds on a per platform basis with the exception of M7 which has a ZST penetration of [10-20]% of its customer base. The Notifying Parties

Table 3 – Market Penetration of ZST and Fox Sports

	2014		2015		2016		2017	
	Subs ('000)	**Market Share**	**Subs ('000)**	**Market Share**	**Subs ('000)**	**Market Share**	**Subs ('000)**	**Market Share**
Total Dutch TV customers								
ZST	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%
Fox Sports	640	8.2%	645	8.6%	800	10.8%	1 190	16.1%
Com-bined	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[20-30]%
Total	7 758	100%	7 470	100%	7 420	100%	7 385	100%

Source: Supplement Form CO, p. 102.

(359) The Commission does not consider ZST to be a sufficiently important input that is required to be able to effectively compete on the downstream market for the following reasons.

(360) First, there are [...] subscribers to ZST ([...] on VodafoneZiggo and [...] on third party platforms) in 2017. These represent [5-10]% of Dutch TV customers only, despite ZST being widely available on all retail TV platforms. In addition, the Commission notes that the total number of ZST subscribers overstates the pool of customers that have a strong interest in watching ZST. The sudden increase in subscribers between 2016 and 2017 may be partly due to VodafoneZiggo's free marketing of ZST to quad-play subscribers. In 2017, more than [...] of ZST subscribers on VodafoneZiggo's platform received ZST as free add-on, including customers that otherwise might well not be willing to pay for ZST. The Commission concludes that the great majority of Dutch TV customers would not view a retail offering without ZST incomplete.

(361) Second, customers have attractive alternatives to ZST to which at least some of them would switch in case ZST was no longer available. Competing Premium Pay TV sports channel operator Fox Sports, with its Fox Sports Eredivisie and Fox Sports International channels, has meanwhile been able to further increase its subscriber base significantly. It holds the rights for the Dutch Premier football league (Eredivisie) as well as the Europa League, the German football league (Bundesliga), and ATP tennis tournaments. The following evidence underlines the attractiveness of Fox Sports in comparison to ZST:

---

explain that this is due to the fact that M7 used to include ZST in packages with other attractive channels. Therefore, the subscriber numbers appear relatively high while these subscribers did not necessarily opt for the package because of ZST.

(a) Fox Sports has 1 190 000 subscribers in 2017 and is hence more than twice as large as ZST.

(b) At the request of the Commission, the Notifying Parties have submitted a market research report ("SKIM report") from March 2017 that was commissioned in the context of discussions on the evolution of ZST's sports portfolio.[116] The SKIM report shows that the most appealing sports content in the Netherlands, in terms of the net score[117], is football, and in particular Dutch football. The top ranked sports content is World Cup football (49%), Euro Cup football (42%) and Dutch league football (41%), followed by winter sports (25%), Champions League football (23%), Formula 1 (19%) and Europa League (16%).[118] After the World and Euro Cup football content, which are more important in years when the Dutch national team participates, the most important content is the Dutch League football content which Fox Sports owns and distributes at least until 2025.

(c) Similarly, the market research report submitted by KPN ("Blauw report") from March 2018 underlines the stronger market position of Fox Sports compared to ZST.[119] While 28% of respondents receive the Fox Sports Eredivisie channel at home, 11% receive ZST.[120] Similarly, 22% of respondents indicate that they "*really want to watch*" Fox Sports Eredivisie, while 10% indicate the same for ZST.[121] The majority of TV customers has "*no interest*" to watch Fox Sports Eredivisie (53%) or ZST (65%). Fox Sports Eredivisie also ranks better in terms of prominence. 39% of respondents "*know well*" Fox Sports and 11% "*don't know it*", while ZST is well known by 18% and not known by 31% (the remaining 50% have heard of both channels respectively).[122]

(d) Retail TV providers responding to the market investigation agree that Fox Sports has very attractive content rights.[123] When referring to premium sports content and "must-have" sports content, the respondents consistently point to both content rights held by ZST, such as Formula 1, as well as content rights held by Fox Sports, such as Dutch football league Eredivisie.

---

116 Reply to RFI 5, question 5, Annex R5.11.

117 Presented on a scale of – 100 to +100%, indicating how appealing the content is.

118 SKIM report of March 2017,"*Premium content strategy*", slide 9.

119 Reply of KPN to Q3 to retailers of 5 April 2018, Annex 4.

120 Blauw report of March 2018, "*The role of (exclusive) content when choosing a TV provider*", slide 15.

121 Blauw report of March 2018, "*The role of (exclusive) content when choosing a TV provider*", slide 13.

122 Blauw report of March 2018, "*The role of (exclusive) content when choosing a TV provider*", slide 14.

123 Replies to Q3 to retailers of 5 April 2018, questions B.A.3.1 and B.A.9.

(e) These findings are also in line with the results of the market investigation in case *Vodafone/Liberty Global/Dutch JV*, where the majority of respondents noted that Fox Sports' channels have equally or more attractive and valuable content offers than ZST.[124]

(362) In this respect, the Commission notes that the ACM has in a recent decision rejected a complaint by Dutch cable operator CAIW, who contested Fox Sports' new distribution fees and claimed in particular that access to the channel was essential to compete on the market for retail TV services.[125] ACM observed among other factors that, based on the number of customers that terminated their relationship with Tele2 Netherlands since it stopped offering Fox Sports, the channel could not be considered as an important element for competition on market for retail TV services.[126] There is no reason to assume that the importance of ZST (which has a significantly lower number of subscribers than Fox Sports) would be different, or it would even appear that ZST's importance would be smaller.

(363) Third, next to ZST and Fox Sports, there are a number of Basic Pay TV sports channels as well as non-dedicated public and commercial channels broadcasting attractive sports content. In particular, the Commission notes the competitive pressure exercised by the following broadcasters:

(a) Eurosport[127], which amongst others has the rights to Wimbledon, the Italian and French football leagues, cycling and the Olympic Games (jointly with NPO);

(a) NPO, which holds the broadcasting rights to the Eredivisie football highlights, Dutch national football team matches, ice skating, cycling and the Olympic Games (jointly with Eurosport);

(b) SBS/Talpa, which holds the broadcasting rights for the Champions League matches of the Dutch teams;

(c) RTL Netherlands, which holds broadcasting rights for the Europa League, and darts; and

---

[124] Commission decision of 3 August 2016, in case M.7978, *Vodafone/Liberty Global/Dutch JV*, paragraph 501.

[125] ACM decision of 10 July 2017 in case *CAIW/Fox Sports*.

[126] ACM decision of 10 July 2017 in case *CAIW/Fox Sports*, paragraph 47.

[127] Eurosport is owned by Discovery in which John Malone holds a minority stake. As explained in section 2, John Malone does not *de jure* or *de facto* control Discovery. However, even if John Malone was able to jointly control both Liberty Global and Discovery, it would be highly unlikely that Eurosport would change its business model in the Netherlands as Eurosport is generally included in all basic tier TV packages throughout Europe. If Eurosport were to depart from this business model in the Netherlands, it would stand to lose sports content registered on the Dutch Events list to competing open channels. Hence, the position of the remaining Basic Pay TV sports channels would be strengthened.

(d) Foreign channels broadcasting attractive sports content, such as German (ARD, ZDF and RTL Germany), British (BBC One and Two), and Belgian (EEN, canvas) channels.

(364) Retail TV providers responding to the market investigation agree that these channels compete to a certain extent in the premium segment.[128] In particular, market respondents highlight the role of Eurosport. KPN states: *"At the same time, it should be noted that also basic (non-premium) sports Pay TV channels tend to acquire more and more rights which could be considered as must-have. Eurosport, for instance, acquired the rights to the Olympic Games, Giro, Ligue 1, and the Flemish classic cycling races."*[129] T-Mobile Netherlands states: "*To a (much) lesser extent other "Basic Pay TV" channels also offer sports that could sometimes be considered 'premium' (like Eurosport)."*[130] Similarly, M7's response reads: *"Eurosport only competes within the premium sport channels segment on specific sports content (cycling)."*[131] M7 also explicitly refers to non-dedicated sports channels: "*RTL and SBS/Talpa might compete in some areas of Premium as well as non-premium Sport*."[132] The foreign channels, irrespective of their sports content rights, are considered to mainly compete in the non-premium segment only.

(365) The sports content shown on the Dutch Basic Pay TV channels are partly registered on the Dutch Events List because they qualify as important sports events.[133] Pursuant to the Dutch Media Act, these events can only be broadcasted on an open channel reaching 75% of Dutch households. Premium Pay TV sports channels, such as ZST, are hence precluded from acquiring rights for these events.[134] ZST could hence in any case not foreclose the most important sports content in the Netherlands.

(366) Fourth, the Commission notes that there are counter-strategies available to providers of retail Pay TV services. For instance, the merged entity's retail competitors have the possibility to bid for sports rights themselves. At the request of the Commission, the Notifying Parties have provided a list of

128 Replies to Q3 to retailers of 5 April 2018, question B.B.11.

129 Reply of KPN to Q3 to retailers of 5 April 2018, question B.A.9.1.

130 Reply of T-Mobile Netherlands to Q3 to retailers of 5 April 2018, question B.A.3.1.

131 Reply of M7 to Q3 to retailers of 5 April 2018, question B.B.11.1.

132 Reply of M7 to Q3 to retailers of 5 April 2018, question B.B.11.1.

133 The most popular sports content in the Netherlands are subject to media regulation (based on the Media Decree 2008 - Mediabesluit 2008) and must be broadcast to at least 75% of Dutch households, on so called "open channels". The list covers, inter alia, the following sports and sports events: Dutch football league highlights, Dutch national football team matches; World and European football cups matches of national teams; World and European ice skate championship (all-round, sprint and distances); and tennis tournaments Wimbledon and Roland Garros.

134 Supplement Form CO, p. 66.

recent entries of European retail TV providers in the acquisition of sports rights and distribution of their own channels.[135]

(367) The examples listed below illustrate that entry in this market is possible:

(a) Telekom Sport, Germany: Retail TV provider Deutsche Telekom launched the Pay TV sports channel Telekom Sport (at the time: Telekom Basketball) in 2017. Telekom Sports initially mainly broadcasted basketball and has since included combat sports such as boxing, MMA and kickboxing, the 3rd division of the German football league (Bundesliga), the German ice hockey league, top games of the women's Bundesliga and Bayern München's own TV production to its content offering.

(b) SFR Sport, France: Retail TV provider SFR launched the Pay TV sports channel SFR Sport in 2016. SFR Sport broadcasts the English football league (Premier League), Premiership rugby, French Pro A and Pro B basketball, circuit WTA tennis, Champions League volleyball, and various other sports including extreme sports and combat sports.

(c) O2 Sport, Czech Republic: Retail TV provider O2 launched three Pay TV sports channels from 2015 to 2017, including a dedicated football channel and a dedicated tennis channel. O2 Sport broadcasts inter alia Champions League, the English football league (Premier League), WRC Rally, Euro league basketball, European Championship volleyball and a variety of martial arts sports.

(d) BT Sport, UK: Retail TV provider British Telecom launched the pay TV sports channel BT Sport in 2013. BT Sport acquired broadcasting rights for instance for Premiership Rugby, the German football league (Bundesliga), Scottish Premier League, the French (Ligue 1) and Italian (Serie A) football leagues, WTA Tennis as well as Champions- and Europa League.

(e) In addition, the Irish retail TV provider Eir purchased the Setanta Group, including sports TV channels Setanta Ireland and Setanta Sports, in 2016 and rebranded them as Eir Sport 1 and Eir Sports 2. This exemplifies that retail TV providers also have the option of purchasing established sports channels instead of bidding for sports rights and creating a sports channel themselves

(368) Retail providers of Pay TV services responding to the market investigation claimed that they would not be able to acquire broadcasting rights for sports events to launch a (Premium) Pay TV sports channel. First, some retailers were of the opinion that they were disadvantaged because their activities were limited to the Netherlands. However, as explained in section 5.1.1.1, broadcasting rights for sport events are generally auctioned on a country-by-country basis and therefore the Commission concluded that the relevant geographic market is national. Dutch providers of retail Pay TV services are

[135] Reply to RFI 4, question 12.

hence able to bid for the broadcasting rights for sports events for the Netherlands.

(369) Second, retail providers of Pay TV services claimed that they do not have the financial resources needed to bid for the acquisition of broadcasting rights for sports events. The investments needed to start a sports channel include expenses related to marketing, personnel (commentators etc.), and technical costs, such as hardware and application fees for a playout facility. These amount to about EUR [...] for ZST. However, the vast majority of upfront investments needed relate to the acquisition of sports content rights. For instance, the merged entity spent over EUR [...] on individual sports content rights in 2017.[136] In this regard, the Commission agrees that retail Pay TV providers' ability to enter the markets for the acquisition of broadcasting rights and for the supply of (Premium) Pay TV sports channels depends on their ability to finance the investments needed to acquire sports content. Therefore, this counter-strategy is more appropriate for incumbent players, such as KPN, but also subsidiaries of incumbents from other countries, such as T-Mobile Netherlands or Tele2 Netherlands. With regard to the latter, the Commission notes that Tele2 Netherlands held the rights for the Dutch football league Eredivisie from 2005 to 2008.[137]

(370) With regard to the downstream subscriber base, the Commission notes that it is easier for larger downstream players to monetarize a newly created sports channel. However, any market player with the required financial resources is able to set up a sports channel and sell it on the wholesale market for (Premium) Pay TV sports channels to providers of retail Pay TV services, hence reaching the total Dutch TV market.

(371) Moreover, sports content (and ZST in particular) is only one possible source of differentiation. Competing retail Pay TV providers have the ability to differentiate using other means such as by offering bundled products, better speed or other types of content. With regard to the latter, the Commission notes that KPN produces its own film and series content as explained in section 6.2.5. In addition, KPN and T-Mobile Netherlands have reacted to the merged entity's free ZST option for quad-play customers by offering the Fox Eredivisie channels as a freebie option to their quad-play customers.[138] This example shows that content differentiation may be in the interest of the consumers.

(372) A downstream rival can also differentiate itself by not offering a specific or any Premium Pay TV sports channel and thereby placing itself in the market as a “no frills” provider able to offer lower prices (which is what Tele2 Netherlands has chosen to do in 2016 when it decided to stop carrying Fox Sports). In this respect, M7 confirms the Commission's understanding that the availability of Premium Pay TV Sports channels is the key driver for sports

136 Supplement Form CO, p. 60.

137 Supplement Form CO, Annex 19.

138 Supplement Form CO, p. 76.

fans' decision only when they chose a Pay TV retailer: "*In general, consumers choose on the basis of their needs which are mainly a fast internet connection and a cheap bundle of TV with the main channels and telephony. Sports fans of course might also choose on the base of the availability of the sports channels."*[139]

(373) Recent findings of the ACM support the Commission's view that there are several possible ways of differentiation and that content differentiation can be pro-competitive.

(a) The results of a consumer survey carried out on behalf of the ACM confirm that price remains the most important reason to switch for multi-play customers.[140]

(b) ACM's *CAIW/Fox Sports* decision confirms that the main drivers for consumers switching between retail TV providers are rather the price of the package and the speed of the internet connection.[141]

(c) The ACM has analysed the possible consequences of bundling telecom services and content and has come to the following conclusion in a recent report of July 2017: "*In the short term, ACM believes it is more likely that competition based on content will have a pro-competitive effect on the market. This is what ACM is currently also seeing in the market, with ISPs endeavoring to distinguish themselves from each other with their content propositions. The responses from market participants do not lead to any different conclusion. In its analysis, ACM has examined the current market situation and, on that basis, has come to the conclusion that having regard to the content that is currently being offered exclusively, this is unlikely to lead to the exclusion of providers. Possible exclusionary effects of content will have to be analyzed on a case-by-case basis, and it cannot necessarily be assumed that exclusive content will lead to exclusion. At present, ACM notes that the content that is currently offered exclusively has not hitherto led to major shifts in the market. ACM also has no indications at present that this will be the case in the near future. ACM therefore believes a must-offer provision for premium content would currently be disproportionate."*[142] (emphasis added). In relation to the long-term risks of exclusive content, the ACM will continue to monitor the market, examine the availability of content and take action if particular conduct among market participants is a serious restriction of competition.

(374) Despite ZST's limited market share in the upstream market and its low market penetration in terms of subscribers, all retail Pay TV providers responding to the market investigation consider ZST to be a "must-have" in order to

---

139 Reply of M7 to Q3 to retailers of 5 April 2018, question C.B.5.1.

140 ACM report of 21 June 2017, "*Switch binnen de telecommarkt blijft gelijk: een op de vijf stapt over"*, p. 41.

141 ACM decision of 10 July 2017 in case *CAIW/Fox Sports*, paragraph 37.

142 ACM report of July 2017, "*Bundling of telecom services and content in the Netherlands*", p. 27 ff.

effectively compete on the market for the provision of retail TV services.[143] They consider that ZST contains very important content such as the English and Spanish football leagues, UEFA Champions League and Formula 1 (currently very popular in the Netherlands due to the success of Dutch driver Max Verstappen). In addition, the majority of respondents considers that the only other Premium Pay TV channel, Fox Sports, is complementary (not substitutable) to ZST as it offers a different portfolio of (premium) sports.[144]

(375) As explained in section 5.1.2.1, the Commission considers that the market for the wholesale supply of Pay TV (sports) channels can be segmented further in premium and non-premium, without any plausible further segmentation possible.

(376) Even if, as alleged by the retail Pay TV providers responding to the market investigation, ZST or certain sports content broadcast on ZST were considered to be particularly important, the Commission does not consider ZST to be a sufficiently important needed to effectively compete on the downstream market for the following reasons.

(377) First, ZST has [...] subscribers only, representing [5-10]% of Dutch TV customers.

(378) Second, VodafoneZiggo faces pressure from sports rights holders for maximal exposure. Although, as explained above (see paragraphs (348)-(351)), the merged entity is not legally impeded from and thus "technically" able to withhold ZST from other operators, nevertheless, [reference to distribution agreement with third party].[145] During the market investigation, Formula 1 confirmed that "*the reach of a channel is one of the factors that we consider when assessing a bid for our rights*"[146]. Hence, a strategy of withholding ZST may negatively impact the broadcasting rights VodafoneZiggo will be able to (re)acquire in the future.

(379) Third, the merged entity's position is contestable in the upstream market for the licensing and acquisition of broadcasting rights for TV content. The broadcasting rights are typically tendered by sports rights holders on an exclusive basis for a specific geography and for a limited period.[147] This allows both competing broadcasters and retail TV providers to regularly bid for sports content, including that currently aired by ZST.

(380) There are numerous examples of broadcasting rights that have changed hands in recent years:[148] the English Premier League was with Fox Sports and is

[143] Replies to Q3 to retailers of 5 April 2018, question C.D.3.

[144] Replies to Q3 to retailers of 5 April 2018, question C.B.1.

[145] Reply to RFI 4, question 14.

[146] Reply of Formula 1 to Q1 to content providers of 5 April 2018, question B.A.6.

[147] Reply to RFI 4, question 1.

[148] Supplement Form CO, Annex 19.

since mid-2016 with VodafoneZiggo; the German football league Bundesliga, the Italian football league Serie A and French football league Ligue 1 were with Sport1 and are since mid-2014 with Fox (Bundesliga) and since mid-2015 with Eurosport (Serie A and Ligue 1), and ATP tennis was with Sport1 and is since 2013 with Fox.

(381) The current agreements for VodafoneZiggo's football rights come to an end in [...] (English Premier league), [...] (Spanish football league La Liga) and [...] (Champions League). The outcome of the next tender process is uncertain and may change the alleged "must-have" nature of ZST.

(382) The Formula 1 contract expires at the end of 2018.[149] During the market investigation, Formula 1 has confirmed that the contract for 2016-2018 was awarded "*following a competitive tender process*"[150]. Formula 1 notifies all potential licensees of the availability of the content and invites them to indicate an interest, provides interested parties a broad specification of the rights available and invites them to submit a proposal. Formula 1 also confirmed that they *"could licence to other pay TV or FTA broadcasters including Fox, Eurosport, RTL Group. Talpa TV (SBS6, Net5, Veronica) and NOS"*[151] and are hence not bound to stay with ZST. However, some third parties consider that the Formula 1 rights are owned by Liberty Global following the purchase of Formula 1 by LMC in 2017 and given the minority stake held by John Malone in both Liberty Global and LMC.[152]

(383) Even if John Malone controlled both Liberty Global and LMC and consequently the merged entity kept the rights for Formula 1 for the next licensing periods, the Commission does not consider that this would give market power to the merged entity for the following reasons.

(384) First, as explained above, Formula 1 is less popular than the Dutch football league Eredivisie which was not found to be an essential input to compete.

(385) Second, the alleged "must-have" nature of sports fluctuates over time and heavily depends on the success of Dutch athletes. This is also acknowledged by the respondents of the market investigation. For instance, KPN notes: "*The must-have character of content is not fixed [for], for instance, cycling, athletics and Formula 1 racing, but became premium due to the successes by Dutch participants Dumoulin, Daphne Schippers, Max Verstappen and the Netherlands women's national football team.*"[153] Similarly, T-Mobile

---

149 Formula 1 is currently in discussion about the licensing of the broadcasting rights to Formula 1 for the period 2019-2020. While the Notifying Parties understand that several market players have confirmed their interest and placed a bid for these rights, the Parties are not aware of the identity of these market players [...] (Reply to RFI 2, question 13). Therefore, it is currently unclear which broadcaster will hold the broadcasting rights for Formula 1 in the next licensing period.

150 Reply of Formula 1 to Q1 to content providers of 5 April 2018, A.2.1 and B.A.2.

151 Reply of Formula 1 to question B.A.7 of Q1.

152 Reply of T-Mobile Netherlands to Q3 to retailers of 5 April 2018, question B.A.3.1.

153 Reply of KPN to Q3 to retailers of 5 April 2018, question B.A.3.1.

Netherlands refers to Max Verstappen as reason for the increased popularity of Formula 1 popular in the Netherlands[154], while Tele2 Netherlands mentions the "*Max Verstappen effect*"[155].

(386) Third, the Dutch Events List ensures that the most important sports content is shown on open channels. The list has last been amended in 2015, inter alia, to include certain swimming and tennis events. In 2016, after Max Verstappen had won his first Grand Prix, the Secretary of State for Education, Culture and Science was specifically asked by public broadcaster NOS to extend the events list to include Formula 1. In the written response, the Secretary of State explains that the Events List had been amended very recently and frequent changes should be avoided for sake of legal certainty. The written response further states that "*there has been an enormous increase of media-offer and individual choice for consumers with the ongoing digitalisation which distribution companies are engaged in. This means that more so than previously, access to the broadcasting of events of general importance can be safeguarded without intervention of the Events List. For Formula 1 this means that the races are not only offered to the customers of Ziggo, but that individual races are also offered for sale online*."[156] Given the State Secretary's reasoning, the Commission notes that it considers it likely that the Events List would be amended if the merged entity were to withhold ZST from consumers of competing retail TV competitors (and if popularity of Formula 1 continued). This also applies to any other sports content that may become popular in the future.

(387) Fourth, as pointed out by the State Secretary, there are indeed alternative ways to watch Formula 1.[157] Viewers in the Netherlands are able to watch Formula 1 via ZST either through (i) a subscription to ZST, (ii) a stand-alone subscription to the ZST Go app or (iii) online via Pay-Per-View (available for Formula 1 races and many other sports). This also applies to any other sports content that may become popular in the future.

(388) Assuming that the merged entity would also withhold the stand-alone subscriptions it currently offers directly to end customers, Formula 1 is also broadcast live on RTL Germany, which is part of the basic TV package of all retail Pay TV operators in the Netherlands, and UK SKY Sports (via satellite TV). In addition, the highlights of each race are shown on the Belgian Flemish speaking VRT, which is also part of the basic TV package in the Netherlands.

Conclusion: No ability to foreclose downstream competitors

---

154 Reply of T-Mobile Netherlands to Q3 to retailers of 5 April 2018, question B.A.8.

155 Reply of Tele2 Netherlands to Q3 to retailers of 5 April 2018, question C.D.3 of Q3.

156 Reply to RFI 4, question 3 (translation of Dutch text by Notifying Parties).

157 Reply to RFI 4, question 13.

(389) The Commission concludes that while the merged entity has the technical ability to stop providing ZST on a wholesale basis to third parties in the future, it would lack the ability to foreclose its downstream competitors. The market penetration of ZST is low, customers can switch to alternatives to ZST and retail TV providers have counter-strategies available. Even if particularly important sports content was broadcast on ZST, the Commission considers that this would not give a significant degree of market power to the merged entity. This is because the broadcasting rights for sports content are contestable in the upstream market and the popularity of certain sports content fluctuates over time. In addition, the most popular sports content is likely to be added to the Dutch Events List in the medium term, especially if there were attempts to withhold such content.

Incentive to engage in input foreclosure

(390) As regards the incentive of the merged entity to engage in a full foreclosure strategy in relation to ZST, that is to say a refusal to supply ZST to competing retail Pay TV distributors post-Transaction, it is important to recall that the merger increases the downstream footprint of the merged entity. Accordingly, the Transaction would increase the profitability of any foreclosure of ZST. Indeed, pre-merger, the Notifying Parties would stand to lose all revenues from ZST subscribers located outside its geographic footprint if it were to completely foreclose ZST from its retail competitors. By combining the respective geographic footprints of UPC and Ziggo, the Transaction ensures that a much greater proportion of subscribers of ZST in the Netherlands on retail competitors' networks could switch their subscription to the merged entity's network which covers about 90% of the Dutch territory.

(391) Following the Transaction, the merged entity has continued to provide its downstream retail competitors access to ZST. Therefore, four years after the Transaction, the merged entity has not engaged in any attempts to implement a full input foreclosure strategy.

(392) However, the Commission notes that the merged entity has carried out an internal assessment of the impact of no longer providing ZST to KPN in the context of the negotiations on a distribution contract starting in September 2016.[158] The Commission assessed the analysis carried out by the merged entity.

(393) As regards the profitability of withholding ZST from KPN, the Commission notes that the merged entity's analysis shows a financial upside of withholding ZST from KPN based on the following assumptions presented in Table 4:

[158] Supplement Form CO, Annex 24.

Table 4 – Financial impact of withholding ZST from KPN

[...]			

Source: Supplement Form CO, Annex 24.

(394) The Commission notes that the profitability analysis was carried out on an ad-hoc basis in the context of upcoming commercial negotiations and was not based on a detailed financial analysis or market research. Nevertheless, the calculation highlights that profitability of foreclosure is very likely:

(a) The average revenue per subscriber is much higher on the downstream level than on the upstream level. In addition, the profitability analysis indicates that the gross margin on the downstream level is [...]%.

(b) It is noted in the internal document that the assumption of [...]% of KPN's ZST subscribers switching to the merged entity is not supported by market research. However, the Commission notes that the Blauw report comes to similar results, which will be presented in paragraph (404). 29% of KPN's ZST viewers indicated that they would switch if ZST was no longer available. Given the merged entity's large downstream footprint, it can be expected that a large part of switchers would switch to VodafoneZiggo (if not all, in case the merged entity decided to foreclose all competing providers of retail Pay TV services). In addition, the Commission notes that the break-even point lies even below [...]%.

(c) The merged entity is able to recoup lost wholesale revenues to a certain extent, as switched subscribers may subscribe to ZST on the merged entity's platform. For these customers, the merged entity receives higher revenues as it no longer relies on a revenue share model with its downstream competitor. The Commission notes that the assumption of [...]% of switchers subscribing to ZST is conservative as ZST was the reason for switching in the first place. Therefore, the share of switchers subscribing to ZST may be expected to be higher than [...]%, which would further increase the financial upside of a withholding strategy.

(395) Besides the financial impact, the Commission notes that the merged entity's internal assessment also discusses several restrictions to a foreclosure strategy. While there is no contract law obligation to provide ZST, the merged entity sees the following risks associated with the withholding of ZST.

(a) Reputational risk: The merged entity expects exclusivity of ZST to have a negative impact on its reputation. Foreclosure strategies would take away content from existing ZST subscribers. In addition, 5-8% of all households

that are not covered by the merged entity's network would not have the possibility to switch to the merged entity to keep their subscription.

(b) Relational risk: [...], all content rights holders favour a wide distribution.

(c) Regulatory risk: The merged entity fears a regulatory reaction as there is a strong political, ministerial and regulatory preference for a wide distribution of sports content.

(396) The financial impact of the associated risks was not quantified. As regards the outcome of negotiations with KPN, it was decided not to withdraw ZST from KPN. However, this is no guarantor for the future that the related risks will always outweigh the financial upside.

(397) Therefore, the Commission concludes that it cannot be excluded that the merged entity would have the merger-specific incentive to engage in foreclosure of ZST on competing retail Pay TV platforms post-Transaction.

(398) The Commission has not assessed whether complete or partial foreclosure would be the most profitable strategy.

Impact of engaging in input foreclosure

(399) As to the effect of any full foreclosure of ZST, the Commission is not able to assess actual effects based on the past market evolution as the merged entity continued to offer ZST to all retail TV providers.

(400) In line with the Commission's non-horizontal Guidelines[159], the three limbs of the foreclosure test are closely intertwined, as they share the need for a sufficiently important input. Where the absence of the ability to foreclose competition from the retail TV market has been demonstrated because of the lack of a sufficiently important input, the impact of such a foreclosure strategy could not result in a significant detrimental impact on competition. Therefore, the reasoning proving that ZST is not a sufficiently input for the merged entity to have the ability to foreclose also serves to show that any attempts to foreclose downstream competitors with regard to ZST would have a very limited effect.

(401) The Commission recalls the following competitive characteristics of ZST and the market conditions in the wholesale market for the supply of Premium Pay TV sports channels that demonstrate that a withholding of ZST would have no detrimental impact on competition:

(402) In a full foreclosure scenario, the withdrawal of ZST by the merged entity would affect only a limited number of retail Pay TV customers. ZST has [...] subscribers only, representing [5-10]% of Dutch TV customers. [...] subscribers of ZST on third party platforms would be deprived of the channel. In addition, [...] subscribers on VodafoneZiggo may be less likely to change to a competing provider.

[159] Commission's non-horizontal Guidelines, paragraph 32.

(403) In addition, it has been demonstrated that only a part of this group of affected ZST customers would be likely to switch to or stay with the merged entity if ZST was no longer available on competing platforms. First, ZST subscribers can switch to similar alternatives, such as Fox Sports or the commercial and public non-dedicated sports channels that have been increasingly investing in sports content. Second, retailers have effective counter-strategies available to attract customers by replicating a similar sports offering or by competing based on other means of differentiation.

(404) The Blauw report submitted by KPN actually supports the Commission's view that the withholding of ZST would affect a limited share of ZST subscribers only. In its submission, KPN suggests that the results of the Blauw report indicate that withholding of ZST would have a large market impact.[160] However, this is not correct. According to the report, only 26% of ZST viewers (and 29% of ZST viewers among KPN's customers) would switch to another provider if ZST was no longer available while 41% of them would not readily consider an offer by a competitor not offering ZST (and 39% of ZST viewers among KPN's customers).[161] These results are based on and apply only to current ZST viewers who have shown to attach a greater importance to ZST. It is not conceivable that customers that do not subscribe to ZST would consider switching if ZST was no longer available. Given ZST's penetration of [5-10]%, the results from the Blauw report demonstrate that:

(a) Only about 1.5% of all TV customers would switch to another provider if ZST was no longer available on their current platform;

(b) Only about 2.5% of all TV customers would not consider an alternative retail Pay TV offer if ZST was not available on that alternative offer.[162]

(405) Therefore, the withholding of ZST may negatively impact the addressable market of competing retail TV providers, however, to a very limited extent only. As ZST is not a sufficiently important input, the Commission does not consider that the withholding of ZST could have a detrimental effect on competition in the downstream market for the provision of retail TV services, or the hypothetical market for the retail supply of multiple play services including Pay TV services in the Netherlands, for instance in form of higher prices or by raising barriers to entry.

Alleged partial foreclosure strategies

(406) As the Commission considers that the merged entity lacks the ability to foreclosure competing providers of retail Pay TV services with regard to ZST, the same conclusion holds for any attempts to partially foreclosure retail

160 Reply of KPN to Q3 to retailers of 5 April 2018, question C.B.5.

161 Blauw report of March 2018, "The role of (exclusive) conten when choosing a TV provider", slide 20.

162 The Commission did not receive the requested information on the quality of the online panel used by Blauw. With regard to ZST viewers, the sample size is only about 150 and the results may involve a significant margin of error. Nevertheless, the Commission shows that the obtained results, as presented in the report, do not raise any competition concerns.

competitors. As explained above, the merged entity lacks the ability to foreclose competing retail TV competitors and the impact of such a foreclosure strategy on retail TV competitors would be limited, irrespective of whether such foreclosure would be complete or partial.

(407) Some respondents to the market investigation have, however, alleged that the merged entity has been engaging in partial foreclosure strategies post-Transaction. In particular, respondents to the market investigation raised the following concerns:

(a) The merged entity increased the wholesale price of ZST to an anti-competitive level;[163]

(b) The merged entity withholds the ZST Go App from retail competitors for resale as stand-alone proposition and discriminates between retail competitors and OTT players such as Apple;[164]

(c) The merged entity's launch of ZSB has decreased the relative attractiveness of other retail providers' offering of ZST.[165] In addition, the merged entity refuses to supply ZSB to retail competitors.

(408) The Commission has investigated for each of these claims whether they are an accurate description of the merged entity's conduct, whether the merged entity's conduct represents an attempt to implement a partial foreclosure strategy and if so, which impact such strategy has had on the market.

(409) First, the Commission disagrees with the claim that the increase in wholesale prices for ZST is mainly attributable to a partial foreclosure strategy. At the request of the Commission, the Notifying Parties have provided the wholesale price evolution for ZST as well as the evolution of content costs.[166] The minimum cost per subscriber for ZST [...]. VodafoneZiggo's expenditure on the ZST offering has increased from EUR [...] in 2013 to EUR [...] in 2017; hence the merged entity's content costs have tripled. This was partly the result of the increase in price for content.[167] In addition, VodafoneZiggo's increase in content spend can further be explained by the fact that VodafoneZiggo has also extended the ZST content portfolio significantly. Compared to 2013, ZST has for instance added Premier League and UEFA World Qualifiers. Furthermore, VodafoneZiggo enhanced the quality of the service of the ZST offering, for instance the ZST Go App is now provided as part of ZST

163 Replies to Q3 to retailers of 5 April 2018, questions of A.3 and C.B.6; Submission of KPN dated 20 December 2017.

164 Replies to Q3 to retailers of 5 April 2018, questions A.3, B.A.3.1 and C.B.6; Submission of KPN dated 20 December 2017; Submission of T-Mobile Netherlands dated 15 May 2018.

165 Replies to Q3 to retailers of 5 April 2018, question C.B.2; Submission of KPN dated 20 December 2017; Submission of T-Mobile Netherlands dated 15 May 2018.

166 Reply to RFI 4, question 5.

167 […].

wholesale offering. The Commission considers that the increase in certain of the wholesale prices can be explained by the more significant increase in the cost of content of ZST.

(410) In addition, the Commission notes that the merged entity's retail price for paid ZST subscriptions is at the same level as those of its competitors. According to the latest information from May 2018, the merged entity offers ZST for EUR 14.95. While CAIW offers ZST for the same price, some competitors' prices lie slightly above the merged entity's retail price (KPN: EUR 14.99; Tele2 Netherlands: EUR 15.00) and other competitors below it (Delta: EUR 14.50; M7: EUR 13.95[168]).

(411) Second, the Commission disagrees with the claim that the merged entity's refusal to give retail competitors access to the ZST Go App on stand-alone basis is part of a partial foreclosure strategy.

(412) At request of the Commission, the Notifying Parties have explained in great detail which ZST related OTT services are available to retail competitors and directly to end customers:[169]

(a) First, any retail TV provider may – but is not obliged to – offer its ZST subscribers access to the **ZST GO App** as part of the ZST subscription. All larger retail competitors[170] offer the ZST GO App together with the linear subscription. However, a limited selection of small retail TV providers has not yet allocated sufficient technical resources to support the ZST GO App. For instance, in order to provide the ZST GO App (or any other app), a retail TV provider must ensure that its customers can create a ZST GO App account and that its administration can process all customer information required for the ZST GO App. VodafoneZiggo has always offered this combination on a wholesale level and never offered a more restrictive version of the ZST package (e.g. without the ZST GO App) to other retail TV providers. It is subsequently up to the distributors themselves whether to use it or not. To the best of VodafoneZiggo's knowledge, all parties who are technically able to do so, offer the ZST GO app as part of the ZST offering.

(b) Second, VodafoneZiggo provides all its ZST wholesale customers the possibility to offer **PPV services** in relation to ZST sports content, subject to VodafoneZiggo having been able to purchase a licence for PPV broadcasting from the rights holder (e.g. VodafoneZiggo does not have the rights to offer Premier League football matches on a PPV basis). However, at this point in time, KPN is the only retail TV provider which is interested in offering this service to its customers. VodafoneZiggo is not

168 Contrary to the other providers of retail TV services, M7 is the only company which also provides retail TV via satellite and faces capacity constraints. Therefore, VodafoneZiggo accepted M7's request to broadcast only three out of six ZST channels.

169 Replies to RFI 4 and RFI 7.

170 This includes KPN (including XS4all of Telfort), CAIW, Tele2 Netherlands, Delta, Kabelreus Helmond, Kabeltex, SKV, Solcon, Kabelnoord, T-Mobile Thuis, SKP, and M7 (Canal Digitaal).

aware of the reasons why other retail TV providers do not have an interest in offering the PPV services.

(c) Third, VodafoneZiggo confirms that it has **never granted any retail TV provider the right to offer the ZST GO App on a stand-alone basis.** However, TV customers of such providers can directly purchase the ZST GO App from VodafoneZiggo without the need to purchase or have a TV subscription with VodafoneZiggo as well. Hence, any customer in the Netherlands can access the ZST GO App irrespective of the retail provider.[171]

(d) Fourth, VodafoneZiggo does not price discriminate between retail competitors and OTT players. In fact, VodafoneZiggo does not have wholesale contracts in place with OTT players. These parties merely function as the "middle-man" or an agent. VodafoneZiggo determines the retail prices for these offerings of ZST GO App and directly contracts with the end user. The subscription offered in Apple's app store for EUR 9.99 only relates to the ZST OTT service, the ZST GO App. The ZST GO App does not guarantee the same "quality of service" as the ZST television service but is provided on a "best effort" basis. This means that the signal, quality of the broadcast and other factors are not guaranteed. By contrast, the regular TV ZST service does include such a quality of service guarantee. Moreover, as indicated, the monthly ZST subscription comprises both the higher quality ZST TV service and the ZST GO App. This is reflected in the higher subscription fee.

(413) The Commission concludes that the merged entity is currently not attempting to foreclose retail competitors with regard to the ZST GO App. Any individual in the Netherlands can view the ZST channels on devices with an internet connection, irrespective of whether they also acquire a traditional Pay TV subscription (or multi-play bundle) with VodafoneZiggo, KPN or any other provider.

(414) Third, as regards the claim that ZSB decreases the relative value of ZST as well as the claim that it is not offered to retail competitors, the Commission has investigated whether ZSB can be considered as attempt to foreclose retail competitors.

(415) The Commission notes that it is correct that ZSB has never been offered to third parties on wholesale basis.

(416) ZSB predominantly contains a best-of of the content available on ZST. It does not contain any attractive content that is not available on ZST.[172] This was

[171] Therefore, the Commission also does not consider that the merged entity's approach would discourage or prevent new OTT incentives (as claimed in reply of T-Mobile Netherlands to Q3 to retailers of 5 April 2018, question C.H.1.1), as the ZST Go App could always be purchased as stand-alone product.

[172] The following sports are only available on ZSB: Field Hockey Dutch League, Volleyball Dutch League, Basketball Dutch League, Netball (Kortbal) Dutch League and Netball European League. In addition, ZSB broadcasts some sport documentaries and films. Generally, if ZSB carries sports which are not available on ZST, this concerns less popular niche sports which are not sufficiently attractive for the Premium Pay TV sports channel ZST. These sports have very limited viewers.

also confirmed by the respondents of the market investigation.[173] On the contrary, as ZST has six linear TV channels and ZSB only one, ZST can broadcast much more content live and simultaneously than ZSB can.[174] ZSB has to make choices on which sport to broadcast in any given timeslot. In addition, certain broadcasting rights have restrictions in place with regard to the distribution on basic tier channel ZSB.[175] Overall, it follows that ZSB is significantly less attractive than ZST and not an important input in itself.

(417) However, ZSB is marketed for free by the merged entity as it is included in the basic tier Pay TV packages at no extra charge. In this regard, the Commission notes that ZSB may represent an attractive offer for ZST subscribers who are satisfied with the more limited content available on ZSB.

(418) While the Notifying Parties explain that ZSB was introduced to find a solution for Sport1, that was already barely breaking even before the Transaction, they also confirm that the idea behind ZSB was to reduce churn.[176]

(419) In addition, while the Notifying Parties submit that it is not unreasonable to assume that ZSB would have been introduced in the absence of the Transaction[177], the Commission considers that the introduction of ZSB may at least be partially linked to the Transaction. First, the merged entity introduced ZSB after the Transaction only. Second, the Transaction had increased the merged entity's downstream footprint and hence offered an even better possibility to generate value from the sports content rights.

(420) For these reasons, the Commission considers that the merged entity has attempted to engage in a potentially merger-specific partial foreclosure strategy with regard to ZSB, which reduces the relative value of ZST on third party platforms. As the Commission has found that the merged entity did not have the ability to fully foreclose its competitors with respect to ZST, the same holds for the introduction of the less attractive ZSB.

(421) This is also confirmed by the actual effects. These show that the merged entity's attempt to put competitors at a competitive disadvantage by only offering ZSB to its own customers, did not have an impact on the downstream market.

(422) First, the introduction of ZSB has not decreased the number of ZST subscribers on third party platforms (see Table 2). This suggests that the introduction of ZSB has not led to significant switching of ZST subscribers from third party platforms to the merged entity's platform.

---

[173] Replies to Q3 to retailers of 5 April 2018, questions C.B.1.2 and C.B.2.

[174] Supplement Form CO, p. 37.

[175] […].

[176] Supplement Form CO, p. 114.

[177] Reply to RFI 5, question 9.

(423) Second, the introduction of ZSB has not increased the market share of VodafoneZiggo in the retail market for the provision of Pay TV services as shown in Table 5.[178] While the market share of KPN has been stable (or even slightly increased) over the last couple of years since the Transaction, the market share of the merged entity has been declining between 2014 and 2017. The Commission concludes that if merged entity attempted to foreclose retail competitors, it was not successful.

Table 5 - Market shares for retail TV distribution (subscribers)

	2011	2012	2013 Q3	2014	2015	2016	2017 Q3
VodafoneZiggo	-	-	-	-	-	-	53%
NewZiggo	-	-	-	55%	55%	54%	-
Ziggo	38%	36%	34%	34%	-	-	-
Liberty Global (UPC)	24%	22%	21%	20%	-	-	-
KPN	18%	23%	25%	27%	30%	31%	32%
Canal Digitaal	10%	10%	10%	10%	5%	5%	4%
Other	10%	9%	10%	8%	10%	10%	11%

Source: Form CO, p 132.

(424) Third, despite ZSB being included in the merged entity's basic tier offer (with a market share of 53%), its market penetration remains limited:

(a) ZSB has had an average annual viewing share of less than 1% from 2015 to 2018.[179]

(b) The Top 100 most viewed programmes on TV in 2017 did not comprise any programmes broadcast by ZSB.[180]

(c) The viewing intensity of ZSB by VodafoneZiggo customers is limited. In 2017, more than half of the TV customers with access to ZSB are not interested in the channel, i.e. they never watch ZSB (36%) or very rarely watch ZSB (15%). 10% of customers occasionally watch ZSB and 19%

[178] This is confirmed by the submission of KPN dated 23 May 2018, which shows a decrease in VodafoneZiggo's market share in the TV market, including in Q1 2018. Likewise, the decreasing market share of VodafoneZiggo is confirmed by estimates of Telecompaper which also show a decrease of VodafoneZiggo's subscriber base in the TV market and the digital segment within that market (Dutch Television Market report).

[179] Reply to RFI 5, question 2.

[180] Reply to RFI 4, question 2. Note that similar viewing statistics are not available for ZST, as only ZSB is included in SKO's full audit report.

watch it frequently. Only 20% of customers watch ZSB 6 days a month or more.[181]

(425) Fourth, the ACM has come to a similar conclusion in its analysis of the bundling of telecom services and content: "*So far, however, Ziggo Sport and Ziggo Sport Totaal have not led to a significant shift in the television market* ".[182]

6.3.6. Overall conclusion

(426) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationship between the market for the supply and acquisition of Premium Pay TV sports channels and the market for the retail provision of Pay TV services, or the hypothetical market for the retail supply of multiple play services including Pay TV services, in the Netherlands. The merged entity may have the incentive but lacks the ability to foreclose downstream competitors from effectively competing in the downstream market. Even if the merged entity were to engage in a full or partial foreclosure strategy in the future, the impact on the market would be very limited. This finding is confirmed by the stable market share of the merged entity in the last four years.[183]

6.4. Markets for the supply and acquisition of Basic and Premium Pay TV channels (acquisition side)

6.4.1. Introduction

(427) The Transaction would combine the retail Pay TV operations of the two largest cable operators in the Netherlands. In 2014 the Commission found that the merged entity would control access to around [60-70]% of the Pay TV subscribers in the Netherlands. This could in turn strengthen the market power that the merged entity would have as a purchaser of the Basic and Premium TV channels that are included in such Pay TV subscriptions. Against that background, the Commission has assessed whether the merger would strengthen the merged entity's buyer power on the upstream markets for the supply and acquisition of Basic and Premium Pay TV channels, and whether this would significantly impede effective competition.

---

[181] Reply to RFI 5, question 2. The following definitions apply: Never (0 days per month); Rarely (1 day or less); Occasionally (2 days); Frequently (3 to 6 days); Heavily (6 days or more).

[182] ACM report of July 2017, "*Bundling of telecom services and content in the Netherlands*", p. 23.

[183] As the Commission concluded that the merged entity's sports channels (ZST, including ZSB) as well as its VOD platform Movies & Series are no sufficiently important inputs to foreclose downstream competitors, the Commission considers that also the combination the two inputs does not raise any competition concerns. The Commission has demonstrated that for both inputs customers can switch to attractive alternative offerings while providers of retail Pay TV services have counter-strategies available. Therefore, if the merged entity were to bundle these products for its own customers and withhold both inputs from downstream competitors, the discussed individual alternative offerings and counter-strategies could be employed jointly to react to such a foreclosure strategy.

(428) According to the Horizontal Merger Guidelines, "increased market power" means the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition.[184] Throughout the Guidelines, the expression "increased prices" is used to refer to those various ways in which a merger may result in competitive harm.

(429) The Horizontal Merger Guidelines expressly recognise that both suppliers and buyers can have market power that is likely to produce such effects.[185] Thus, the Commission has to assess whether a merger brings about a degree of buyer power in an upstream market that is likely to have negative effects on the availability of high-quality products, on the existence and availability a wide selection of services, and on innovation on a downstream market.

(430) As concerns buyer power in particular, the Horizontal Merger Guidelines state that the Commission may analyse to what extent a merged entity will increase its buyer power in an upstream market.[186] The Guidelines explain that increases in a buyer's bargaining power may be beneficial for competition. In particular, lower input costs resulting from increased buyer power are likely to at least partly be passed on to consumers in case neither downstream competition nor total output is restricted.[187]

(431) The Horizontal Merger Guidelines also make clear that a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position. Competition in downstream markets may be adversely affected if the merged entity were likely to restrict output in the downstream market, or to use its buyer-power vis-à-vis its suppliers to foreclose its rivals.[188]

6.4.2. Effect of the Transaction on the merged entity's bargaining power vis-à-vis broadcasters

6.4.2.1. The Notifying Party's views in 2014

(432) The Notifying Party disputed that it can exert market power vis-à-vis TV broadcasters.

[184] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 05.02.2004, p.5), (the "Horizontal Merger Guidelines"), paragraph 8.

[185] Horizontal Merger Guidelines, paragraph 8.

[186] Horizontal Merger Guidelines, paragraph 61.

[187] Horizontal Merger Guidelines, paragraph 62.

[188] Horizontal Merger Guidelines, paragraph 61.

(433) In that context, the Notifying Party submitted that the merged entity's share of expenditure on the acquisition of linear TV channels in the Netherlands would be [50-60]%.[189]

(434) The Notifying Party submitted that such share of expenditure on TV channels is not indicative of buyer power. It advanced a number of arguments to support that contention. It argued, first, that content rights are intangible assets that are not susceptible to economies of scale. It argued second, that there would be a mutual dependency between TV broadcasters, who rely on the widest possible distribution to secure advertising income, and retail TV service providers, who need attractive content in order to be competitive at retail level. It argued third, that the Transaction would have, if any, a limited impact on the negotiation position of TV broadcasters, as it would create an unavoidable trading partner for only a limited number of them. It also argued that in any event, many TV broadcasters are large multinational companies with significant bargaining power vis-à-vis retail TV providers.

(435) The Notifying Party also submitted that it would not be able to restrict the availability of TV content in the downstream market for retail TV services. In that context, the Notifying Party referred to the conclusion drawn by the Dutch competition authority in a previous case. In that case, the ACM found no link between the number of subscribers of a given TV service provider and the number of TV channels offered as part of the Basic Pay TV package in the Netherlands. Accordingly, the ACM concluded that there was no indication that an increase in the size of a given retail TV service provider would lead to a lower quality TV offering.[190] The Notifying Party has submitted further correlation analysis to argue that this is still the case.[191]

(436) Moreover, the Notifying Party argued that at most, the Transaction would create a new unavoidable trading partner for a very small number of TV channels only.[192] The Notifying Party further argued that the specific characteristics of the Transaction make it significantly less likely that bargaining power could be materially enhanced through the merger than in the (then) recent Universal/EMI case[193] and that the idea that becoming a

---

189 Form CO, paragraphs 289, 454 and Annex 33. The Notifying Party considered that the merged entity's share of expenditure on Basic Pay TV channels would be broadly in line with its share of the market for the retail provision of Pay TV. With respect to Premium Pay TV film channels and Premium Pay TV sports channels, the position of the merged entity would be different as there were a small number of retail Pay TV providers who did not offer Film1, Sport1 and/or HBO Nederland. As a result, the Notifying Party expected that the merged entity's share of spend on Premium Pay TV channels would be slightly higher than its market share on the market for the retail provision of Pay TV services.

190 Reference was made to the ACM (NMa) decision 5796/ Cinven – Warburg Pincus – Essent Kabelcom, of 8 December 2006.

191 Liberty Global submission "Comments on the European Commission's Decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004", prepared by Oxera, 21 May 2014.

192 Liberty Global submission "Comments on the European Commission's Decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004" prepared by Oxera 21 May 2014.

193 Commission's decision of 21 September 2012 in Case No COMP/M.6458 – Universal Music Group/EMI Music.

"pivotal" buyer would increase bargaining power is incorrect. It also argued that it would not be possible to empirically verify the relationship between the number of downstream customers served by TV services providers and their bargaining power vis-à-vis TV broadcasters because contracts with broadcasters vary along many dimensions and because there are too few contracts to systematically distinguish bargaining effects from other influences.[194]

6.4.2.2. Commission's assessment in 2014

(437) The Commission noted that the merging companies purchased TV channels to include those channels into the Pay TV packages that they offered to their subscribers. The Pay TV packages included both Basic Pay TV channels and Premium Pay TV channels (hereinafter referred to as "Pay TV channels"). The market position that the merged entity would have in the acquisition of both types of Pay TV channels was derived from similar market conditions, such as the position of the merged entity as a large distribution channel to reach subscribers, the size of their customer base and the scope of their network footprint. When assessing the likely competitive impact of the Transaction, the Commission undertook its analysis for both sets of Pay TV channels together.[195]

(438) The Commission considered that the Transaction would lead to the creation of a merged entity that would account for [50-60]%[196] of the market for the acquisition of Pay TV channels in the Netherlands. The increment that the merger brought was very sizeable, namely [10-20]%.[197] The Commission considered that this market share was likely to understate the degree of buyer power that the merged entity would have on this market. This was due to the fact that the merged entity would have a far more significant market position downstream, namely on the market for the retail provision of Pay TV services.

(439) Both the Commission[198] and the Dutch Competition Authority have in the past confirmed that the market position of purchasers of Pay TV channels is

---

194 Liberty Global submission "On the applicability of insights from bargaining models in Universal/EMI" prepared by Cristina Caffarra, Kai-Uwe Kühn, Perre Régibeau of CRA, 9 June 2014.

195 The Commission noted that this approach was favourable to the Parties. In relation to the acquisition of Premium Pay TV channels, the merged entity would itself own three out of four Premium Pay TV channels in the Netherlands. The operator of the remaining fourth Premium Pay TV channel, Fox, was also a TV broadcaster that would have to negotiate the distribution of its Basic Pay TV channels with the merged entity. The combination of the merged entity's position as a purchaser of Premium Pay TV channels and its ownership of competing Premium Pay TV content could only aggravate any negative impact that the proposed transaction may have on the merged entity's ability and incentive to exert its buyer power vis-à-vis the owner of the remaining Premium Pay TV channel in an anticompetitive manner.

196 Form CO, paragraphs 289, 454 and Annex 33.

197 Form CO, Annex 33.

198 Commission's decision of 16 April 2004 in Case No COMP/M.2876 - Newscorp/Telepiù, paragraphs 21, 42 and 186.

closely related to the number of households those purchasers serve as retail providers of TV services.

(440) In Liberty Media/Casema[199], the ACM assessed the then proposed merger between the Notifying Party and Casema Holding B.V. ("Casema"), which would later form Ziggo, together with Multikabel B.V. ("Multikabel") and Essent Kabelcom B.V. ("@Home"), in the Netherlands. In its decision to open in-depth proceedings, the ACM underlined that a combined Liberty/Casema would have served 60% of all cable subscribers in the Netherlands. According to the ACM, there were concerns that this could increase Liberty's market power in the market for the acquisition of Pay TV channels to such an extent that it could dictate the TV content that consumers in the Netherlands could access. The ACM did not take a final decision on the case since Liberty Media abandoned the proposed acquisition.[200]

(441) The Commission considered that the Notifying Party's reference to the ACM's decision in Essent Kabelcom/Multikabel/Casema[201], where that authority reached a different conclusion, was not relevant to this case. The ACM concluded that that merger of the companies that now form Ziggo was not likely to significantly impede effective competition on the market for the acquisition of Pay TV channels. However, first, the market position of those companies was significantly more modest than the market position that a merged Liberty/Ziggo would have.[202] Second, the ACM took its decision based on the market features as they existed in the Netherlands at the time. Most notably, the ACM concluded that Ziggo's alleged market power in the acquisition of Pay TV channels would be constrained by the potential competition from alternative digital distribution channels such as the Internet.[203] The ACM reached that conclusion whilst Liberty Global and Ziggo would still be active as independent competitors on the market. In this case, the Commission had to assess the likely impact that the proposed merger between Liberty Global and Ziggo would have on that potential competition, and needed to makes that assessment on the basis of the competitive situation in relation to Internet services as they exist today. Third, the ACM also distinguished Ziggo from Liberty insofar as Liberty Global is a vertically integrated undertaking that has interests in content providers as well and whose strategy it is to expand those upstream interests. The ACM considered that this vertical integration could give it a further incentive to limit the

199 Decision of the ACM of 6 November 2002 in Case 3052, *Liberty Media/Casema*, points 264-267, and 272.

200 http://online.wsj.com/news/articles/SB10376555917540774628 [accessed on 4 September 2014].

201 Decision of the ACM of 8 December 2006 in Case 5796, *Cinven/Warburg Pincus/Essent Kabelcom*.

202 At that time, the companies that now form Ziggo had an approximate [40-50]% share of the retail market for the provision of Pay TV services in the Netherlands.

203 Decision of the ACM of 8 December 2006 in Case 5796, *Cinven/Warburg Pincus/Essent Kabelcom*, paragraph 96.

availability of certain TV content, in particular competing TV content, to consumers in the Netherlands.[204]

(442) In this case, therefore, the Commission needed to make its own assessment of the likely market power of the merged entity on the market for the acquisition of Pay TV channels.

(443) The Commission noted that the theoretical framework used in Universal/EMI[205] could easily be applied to the present case and that a "pivotal" buyer does not always have increased bargaining power.

(444) The Commission also noted that, given in particular the limited number of contracts with TV broadcasters and their complexity, it is difficult to calculate the effect of the merger on the merged entity's bargaining power while fully accounting for other factors such as variations in contract terms. Nevertheless, data collected during the market investigation by the Commission on annual payments received by TV broadcasters from different TV services providers confirmed that there is a negative correlation between the price paid by TV services providers per TV household to TV broadcasters and the number of TV households served by the TV services providers. This is consistent with TV services providers' bargaining power increasing with the number of subscribers they serve.

(445) Furthermore, the merged entity's share of the downstream market would amount to [60-70]% by value[206] and to [60-70]% by TV homes controlled.[207] The merged entity would thus control at least twice if not three times as many TV subscribers as the second-largest market participant KPN, which had an estimated retail market share of between 20% and 25%.[208] The Commission considered that the fact that the Parties' combined share of expenditure on broadcasters' TV channels was significantly smaller than their combined share of revenue generated from reselling those same TV channels was an indication that they already held some degree of bargaining power vis-à-vis TV broadcasters in the Netherlands. It implied that the Parties paid less per subscriber than their rivals and that this relationship was not commensurate with the difference between the size of the customer base of the Parties and their competitors alone. Moreover, internal documents of Liberty Global confirmed that from 2011 onwards, it was already paying 40% under average

---

204 Decision of the ACM of 8 December 2006 in Case 5796, *Cinven/Warburg Pincus/Essent Kabelcom*, paragraph 84; Decision of the ACM of 6 November 2002 in Case 3052, *Liberty Media/Casema*, paragraph 266.

205 Commission's decision of 21 September 2012 in Case No COMP/M.6458 – Universal Music Group/EMI Music.

206 Form CO, Annex 33.

207 [Reference to the Parties' internal business documents].

208 22% in Q4 2012 and 25% in Q3 2013; Form CO, Table 36.

market cost for the TV channels that it included in its retail Pay TV packages.[209]

(446) Other evidence on the Commission's file equally confirmed that there is a close link between the number of households that a retail TV operator serves and the market power it exerts on the upstream market for the acquisition of TV channels.

(447) The Notifying Party noted the following in its internal business documents:

(i) [Reference to the Parties' internal business documents][210];

(ii) [Reference to the Parties' internal business documents][211];

(iii)[Reference to the Parties' internal business documents][212]

(448) The large majority of TV Broadcasters confirmed the direct relation between the number of TV subscribers served by a provider of retail TV services and the bargaining power that such a TV service provider exerts vis-à-vis TV Broadcasters.[213]

(449) One respondent during the Commission's 2014 investigation stated the following: "*Commercial income via advertising is dependent on the amount of viewers a channel attracts. As TV broadcasters are looking for distribution as wide as possible, cable operators can leverage the amount of subscribers they serve. The amount of subscribers served is therefore one of the most important determinants of bargaining power of the cable operators. Since the market shares of the merged entity become greater, it is logical that their market power will increase*".[214]

(450) SBS Broadcasting B.V. ("SBS") confirmed that "*The amount of TV households (eye-balls) a retail TV service provider serves is an important factor determining buyer power. The merged entity would serve more TV households, and thus exert more buyer power*."[215] NPO confirmed that the merged entity would exert significant buyer power vis-à-vis it and other TV

---

209 [Reference to the Parties' internal business documents].

210 [Reference to the Parties' internal business documents].

211 [Reference to the Parties' internal business documents].

212 [Reference to the Parties' internal business documents].

213 Replies to questionnaire Q4 to Phase II Questionnaire to Broadcasters of 28 May 2014, question 19.1; Document ID2270, non-confidential minutes of conference call between Commission's services and Fox International Channels of 25 June 2014, page 3; Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014, page 3.

214 Reply to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 55.1.

215 Document ID1400, non-confidential reply of SBS to Q4 Phase II Questionnaire to TV Broadcasters, question 19.

Broadcasters by merely re-stating the fact that the merged entity would serve around 70% of the joined cable, DSL and fibre market in the Netherlands.[216]

(451) The Commission was not convinced by the Notifying Party's argument that after the merger, there would be a balance of bargaining power between it and the TV broadcasters. The Notifying Party had indicated that the licence or carriage fees it paid to TV broadcasters had increased over the last year. Its own internal documents however confirmed that in its own view, this increase in licence or carriage fees resulted from those TV broadcasters' [Reference to the Parties' internal business documents], as they would be "[Reference to the Parties' internal business documents]" because their "[Reference to the Parties' internal business documents]" – especially in the Netherlands.[217] The Notifying Party itself predicted that the Transaction would allow the merged entity to prevent having to increase its payments to even the most powerful TV broadcasters in the Dutch market.[218]

(452) Respondents to the Commission's 2014 market investigation also confirmed that the merger would significantly enhance the merged entity's market power as a buyer of Pay TV channels.

(453) A large majority of TV broadcasters believed that in the market for the acquisition of Pay TV channels, retail providers of TV services already held the most bargaining power.[219] That majority considered that the Transaction would lead to an increase of the merged entity's market power to the extent that it would be able to dictate its prices and other conditions to them.[220] That conclusion was also shared by all providers of retail TV services that provided a response to the Commission's first phase market investigation.[221]

6.4.2.3. Commission's assessment and conclusion in 2014

(454) In light of that evidence from the 2014 market investigation and from the Notifying Party the Commission considered that the Transaction was likely to strengthen the merged entity's market power in the market for the acquisition of Pay TV channels.

(455) The Commission reiterated that increases in a buyer's bargaining power may generally be beneficial for competition. The Commission's Horizontal Merger

---

216 Document ID1424, non-confidential reply of NPO to Q4 Phase II Questionnaire to TV Broadcasters, question 19.

217 [Reference to the Parties' internal business documents].

218 RTL, SBS and NPO together accounted for an overall viewing share of 70% in 2013 in the Netherlands: Stichting KijkOnderzoek Jaarrapport 2013, available at: https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf.

219 Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 54.

220 Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 55.

221 Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services, question 64.

Guidelines explain that lower input costs resulting from increased buyer power are likely to, at least partly, be passed on to consumers in case neither downstream competition nor total output is restricted.[222]

(456) Nevertheless, an increase in the merged entity's bargaining power could have detrimental effects on effective competition. Respondents to the Commission's market investigation indicated that there could be several such detrimental effects on competition. Following those submissions, the Commission assessed in detail whether the increase in the merged entity's market power as a purchaser of Pay TV channels could:

- Increase its ability and incentive to hamper the emergence of innovative Pay TV services;
- Increase its ability and incentive to negatively influence the breadth and quality of the programming content that broadcasters offer in the Netherlands;
- Increase its ability and incentive to obtain terms and conditions from broadcasters that ultimately have a negative impact on the access of competing retail TV providers to that very same content;
- Increase its ability and incentive to block TV broadcasters' hybrid broadcast broadband TV signals.[223]

6.4.2.4. The Notifying Parties' views in their Supplementary Notification

(457) The Notifying Parties note that in 2013, Liberty Global's expenditure on the acquisition of linear channels for the Netherlands amounted to EUR [...] and Ziggo's expenditure amounted to EUR [...]. Currently, VodafoneZiggo's expenditure on the acquisition of linear Pay TV channels for the Netherlands amounts to EUR [...]. VodafoneZiggo's market share for retail TV is [50-60]%. While the Parties were unable to provide a third party estimate for the total expenditure on the acquisition of TV channels in the Netherlands, they consider that overall market shares for the acquisition of linear TV channels are similar to those for retail TV. Therefore, the Parties estimate that VodafoneZiggo's expenditure of EUR [...] represents a market share of approximately [50-60]%, in line with its position on the retail TV market. Since this market share is comparable to and in fact even lower than the combined share of Liberty Global and Ziggo in 2013 (which, as set out in the 2014 notification was approximately [50-60]%), the Notifying Parties submit that the Transaction has not led and will not lead to a substantial impediment to effective competition in relation to the acquisition of TV channels.

---

[222] Horizontal Merger Guidelines, paragraph 62.

[223] Through HbbTV signals TV broadcasters are able to allow retail TV customers that have a smart TV to directly connect to those broadcasters' own interactive OTT services via a linear broadcasting that encompasses so-called 'HbbTV triggers'.

6.4.2.5. Commission's assessment

(458) The Commission considers that, based on current market conditions, the Transaction is likely to strengthen the merged entity's market power in the market for the acquisition of Pay TV channels, for the following reasons:

(459) First, VodafoneZiggo's market share on the market for the acquisition of linear Pay TV channels in the Netherlands indeed appears to be around [50-60]%. In this regard, the Commission recalls that the increment brought was [10-20]%.[224]

(460) Second, VodafoneZiggo's share of the downstream market would amount to [50-60]% by value[225], to [50-60]% by subscribers and to [40-50]% by TV homes connected.[226] VodafoneZiggo's thus still controls significantly more TV subscribers as the second-largest market participant KPN, which had in 2017 Q3 an estimated retail market share of 32%.[227]

(461) Third, respondents to the Commission's investigation consider that, as a result of the merger, the market power of the merged entity in the market for the acquisition of TV channels has significantly changed *vis-à-vis* the wholesale suppliers of TV channels in the Netherlands to the extent that the merged entity is able to dictate its prices and other conditions to Pay TV channels.[228] A respondent noted:

> "*Commercial income via advertising is dependent on the amount of viewers a channel attracts. As TV broadcasters are looking for distribution as wide as possible, cable operators can leverage the amount of subscribers they serve. The amount of subscribers served is therefore one of the most important determinants of bargaining power of the cable operators. Since the market shares of the merged entity become greater (more than 50% of the dutch TV households), it is logical that their market power will increase*."[229]

6.4.3. Effect of increased bargaining power on the emergence of OTT services

(462) In the Commission's 2014 decision, the Commission noted that in (then) recent years, TV broadcasters that operated in the Netherlands had been

---

224 Form CO, Annex 33.

225 Notifying Parties' reply to the Commission's request for information of 24 May 2018 (RFI 13), 25 May 2018, paragraph 1.1.

226 Supplement to Form CO, Table 37.

227 Supplement to Form CO, Table 38.

228 Replies to questionnaire Q2 to TV channel wholesale suppliers of 5 April 2018, question C.B.16.

229 Reply from Talpa TV to questionnaire Q2 to TV channel wholesale suppliers of 5 April 2018, question C.B.16.

taking initiatives to allow Dutch consumers to access and view TV content in innovative ways. In particular, TV broadcasters had taken initiatives to offer the content that is shown on the linear Pay TV channels that are offered via the Parties' Pay TV platform also over the Internet via OTT services.

(463) The Commission noted that the Parties were active as buyers on the Dutch market for the acquisition of Pay TV channels. This market was to a certain extent characterised by the existence of agreements that restrict TV broadcasters in their ability to offer their TV channels and content via the Internet. As far as the Parties were concerned, this mainly concerned agreements that Liberty Global negotiated with TV broadcasters. Liberty Global concluded those agreements as part of, or together with, the agreement under which it carried the broadcasters' Pay TV channels on its Pay TV platform.

(464) Where TV broadcasters provided OTT services themselves, those agreements were between Liberty Global and providers that could compete with Liberty Global's Pay TV packages. Where TV broadcasters provided their content to third party providers of OTT services, those agreements could restrict the access of potential competitors of Liberty Global's Pay TV platform to the inputs that they needed in order to operate their services.

(465) Against that background, the Commission had to assess whether the merger between Liberty Global and Ziggo could increase the market power of Liberty Global to sustain such restrictive agreements, or to conclude agreements that are more onerous from the perspective of TV broadcasters and ultimately of consumers in the Netherlands.

6.4.3.1. The Notifying Party's views in 2014

(466) The Notifying Party argued that any claim that it sought to hold back the OTT distribution of TV channels and content of TV broadcasters is not specific to the Transaction, as Ziggo and UPC already had an incentive to attempt to get TV broadcasters to hold back such OTT distribution of linear channels and associated content.

(467) In order to support its arguments, the Notifying Party referred to the commercial negotiations that had taken place with NPO, which is its negotiation partner for the carriage of the TV channels of the Dutch public broadcasters. The Notifying Party submitted that NLkabel, a trade association that included both Liberty Global and Ziggo, had already asked NPO to hold back the OTT streaming of its linear TV channels.

(468) Also, the Notifying Party explained that the request to NPO was made in the context of contractual negotiations in which NPO requested a significantly higher fee for the carriage of the TV channels of the Dutch public broadcasters. This happened in light of a 2013 report prepared for the Dutch government, in which a suggestion was made that NPO could strengthen its bargaining position with the platform operators by expanding its OTT distribution of linear TV channels on the Internet. That hypothetical increase in bargaining power would be based on the threat that NPO could cease to offer its channels to cable operators and instead distribute nationally via OTT. In such situations – where TV broadcasters were demanding more

compensation for their content – UPC and Ziggo would naturally respond by attempting to raise their revenues by preventing the same content from being given away for free via the Internet. TV broadcasters' commercial choice to provide free OTT access to their content would risk degrading the value of their content and this would be the case irrespective of any perceived market power of the merged entity.

(469) The Notifying Party claimed that ultimately, its new 2014 agreement negotiated with NPO did not include any restriction on the broadcasters with respect to OTT service provision. The Notifying Party submitted that the same applied to the agreement that it had recently concluded with RTL. Finally, the Notifying Party stated that no such restriction was being sought in the ongoing negotiations with SBS.

(470) The Notifying Party also explained that, from a conceptual viewpoint, it strongly believed that restrictions on broadcasters with respect to OTT service provision in the context of TV transmission agreements should be seen as a normal outcome of commercial negotiations, and not as an anti-competitive exercise of market power. It continued by explaining that, in principle, there would be several ways in which a broadcaster could monetize its content, which would include: carriage fees paid by platform operators in return for the right to air a channel; subscription fees paid by consumers who subscribe to pay-for channels; advertising or sponsorship fees paid to broadcasters for including adverts alongside their programming; as well as other less significant revenue streams such as advertising on channel websites or OTT portals, or premium rate 'phone-ins'. The broadcaster's choice of business models from those would also have implications for its optimal strategy with respect to content distribution. In that respect, the Notifying Party explained that, for example, a broadcaster that chooses to rely solely on advertising income would be incentivised to distribute content freely and as widely as possible, including all platforms as well as OTT. Conversely, a platform choosing to rely on carriage income alone would be incentivised to maximise the value of its channels to its customers, the platform operators. This might include exclusive deals, which would allow the platform operators to pay a greater price for carriage rights. In practice, most channels derive income from a combination of sources and would be required to balance those opposing incentives.

(471) The Notifying Party claimed that, in the above context, a restriction with respect to OTT service provision can be seen as a simple commercial reality. By increasing the free distribution of content via OTT, broadcasters would necessarily be decreasing the value of that content for platform operators. It would follow that a widely available, free distribution model is therefore incompatible with a premium carriage fee model. This would not be unique to broadcasters: media owners of all kinds would struggle to trade-off the advantages versus the disadvantages of making content available for free. All of them would face the same choices and trade-offs, and, according to the Notifying Party, none of them can expect to charge high fees for content that is widely available for free on the internet. Again, in the Notifying Party's view, that market development was not related to any increase in market power that the Transaction would bring about.

6.4.3.2. Commission's assessment in 2014

(472) The Commission considered in the 2014 decision that in order to undertake its competitive assessment of the Transaction's likely impact on OTT services in the Netherlands, the Commission needed to take into consideration that the Parties and TV broadcasters deal with each other at multiple market levels.

(473) The Commission noted that the Parties and TV broadcasters negotiated the carriage of the broadcasters' Pay TV channels and associated content via the Parties' Pay TV platforms. This negotiation took place on the Dutch market for the acquisition of Pay TV channels. At the same time, TV broadcasters were increasingly offering their content via Internet-based OTT services. To the extent that this content was offered to third-party operators of OTT services, those operators competed with the Parties as buyers of that content. Those operators also potentially competed, on the downstream retail market for Pay TV services, with the Pay TV platforms of the Parties. To the extent that broadcasters themselves offered their content online, they too potentially competed with the Parties' Pay TV platforms on the downstream retail market for Pay TV services.

(474) In the 2014 decision, the Commission assessed whether the merged entity's increased market power as purchaser of TV channels could increase its ability to condition the carriage of TV broadcasters' linear TV channels (and associated catch-up services) on its Pay TV platform in the Netherlands on terms that would prevent those broadcasters from operating, or providing content to, Internet-based OTT services. The likely effects of such strategy would be felt beyond the Dutch market for the acquisition of Pay TV channels, namely on the retail market for Pay TV services on which those OTT services could compete with the merged entity's Pay TV platform.

(475) The Commission noted that OTT services were emerging services that constituted a significant competitive threat to traditional Pay TV. The Commission found evidence that suggested that the Notifying Party already had every incentive to prevent, delay or hamper such OTT innovation. By using its increased buyer power, the merged entity could prevent innovative new TV services from entering the markets for the acquisition of Pay TV channels and for the retail provision of Pay TV services, thereby degrading the quality and choice for Dutch consumers.

(476) The Commission's explanations from the 2014 decision on the role and importance of existing and future OTT services are set out in paragraphs (477) to (489) below, while the type of restrictive agreements that were in place in the Netherlands in relation to such OTT services are set out in paragraphs (505) to (544). The Commission's assessment of the likely impact that the Transaction would have on the continuation or the worsening of such restrictive agreements is set out in paragraphs (545) to (593).

Importance of OTT services

(477) In the Conditional Clearance Decision, the Commission noted that a TV broadcaster that acquires the broadcasting rights to TV content can deploy that content in various ways. First, it can include that content in the programming of its linear TV channels that it in turn offers to retail TV

services providers such as the Parties for distribution to consumers. Second, it can seek to offer that content, in a non-linear fashion, to retail TV services providers such as the Parties for inclusion into their VOD services. Third, it can seek to offer that content over the Internet. It can do so directly, or via the services of an aggregator that packages the content of different content owners in a broad Internet offer to consumers.

(478) The Commission understands that it is also feasible to offer TV channels in a linear fashion over the Internet, for instance, live streaming of TV programmes as shown on the TV channels over the cable, which NPO had (at the time) recently introduced.[230] However, as internal documents of the Parties also confirm[231], OTT services until then had focussed on offering non-linear content to Internet users. Such OTT services were emerging in the Netherlands. A number of them were already available to consumers.

(479) Various TV broadcasters in the Netherlands offer so-called "catch-up services" over the Internet. Consumers that use those services can re-watch the content that was available on their linear TV channels for a limited period of time after it was shown on such channels. Those catch-up services can be combined with "preview services", where consumers can watch individual TV programmes before they are shown on the linear TV channels.

(480) An example of that type of service is the kijk.nl service of SBS. That service offers catch-up content that was available on the SBS channels SBS6, Net5 and Veronica. With its "kijk eerder" service, it also allows consumers to watch certain films and series before they are shown on those channels.

(481) RTL has an OTT service called "RTLXL". That service includes content from RTL's main channels RTL 4, 5, 7 and 8, as well as its thematic channels RTL Crime, RTL Lounge and Telekids. In 2014, RTL also launched the Videoland Unlimited service. For a monthly payment of EUR 10, consumers obtain unlimited access to films and series. Through Videoland Unlimited, RTL also intended to produce its own series.[232]

(482) Public broadcasters in the Netherlands offer their catch-up content and certain previews online on "Uitzending Gemist." Their (then) more recent paid OTT service NPO Plus allows consumers to have access to a wider, more premium library of content offered by the Dutch public broadcasters.[233] Consumers can view this content in high quality.

---

230 http://www.npo nl/live.

231 [Reference to the Parties' internal business documents].

232 For March 2015, it plans to show the first episodes of a high-quality Dutch drama series called "Zwarte Tulp.": http://pressroom.rtl nl/videoland/persberichten/persbericht/sterrencast-in-eerste-eigen-serie-videoland-zwarte-tulp [accessed 08 August 2014]

233 Document ID1989, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014.

(483) Other OTT offers that are available in the Netherlands include the Eurosport Player service of Eurosport, which allows consumers to access live streamed sports events across the Internet connected devices that they use.

(484) In June 2014, the three main TV broadcasters in the Netherlands – NPO, RTL and SBS - commercially launched their joint venture NLZiet. For EUR 7.95 per month, consumers obtain Internet access to the content that is shown on the TV channels of each of those TV broadcasters. NLZiet is integrated with the three stand-alone OTT offers of those broadcasters, allowing consumers to search and access content across those platforms in a streamlined manner. NLZiet offers access to catch-up and pre-view content. NLZiet markets itself as a complete, all-encompassing service that offers consumers access to all content that is shown on the linear TV channels of the associated broadcasters. The aim is to include content that goes back as far as is feasible under the broadcasters' content agreements with content providers. NLZiet also offers additional service features. For instance, it allows consumers an easy way to search for and access content of their liking that is available from each of these broadcasters. It provides alerts if a new episode of a consumers' favourite TV series is on-line. The content on NLZiet can be accessed on any connected device. NLZiet guarantees that consumers can access the available content in high quality.

(485) The Commission considered in the Conditional Clearance Decision that those OTT offerings constituted important innovations, potentially changing the way in which consumers in the Netherlands can search for, and watch, TV content online. If such OTT offerings became successful, consumers would face a genuine choice between the Notifying Party's cable TV subscription, and the content that is available on the Internet. OTT services were hence (then) an emerging form of competition to the Parties' cable TV operations.

(486) For the same reason, the Notifying Party sees those offerings as a threat to its own cable TV operations. In its response to the Article 6(1)(c) decision in the current matter, Liberty Global explained that "*the use of OTT services has expanded rapidly and expectations are that this expansion will continue, to the detriment of 'traditional' video and television services offered by network operators such as UPC, Ziggo and KPN*".[234] Also in the Form CO, the Notifying Party noted that '*the increased availability of channels via the internet is expected to negatively impact the Parties' retail TV services activities*'.[235]

(487) Ultimately, the Notifying Party feared that consumers could choose to end their cable TV subscription and subscribe instead to an Internet offer of a player like KPN and possibly the OTT SVOD service of a content provider. In industry parlance, this is the threat that Pay TV consumers "cut the cable or cord".

---

[234] Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraph 37.

[235] Form CO, paragraph 464.

(488) […] this threat would be particularly credible if those OTT services offered a combination of […] and catch-up TV offers.[236] […] that an explosive growth of OTT providers constituted […].[237] The availability of TV broadcasters' content OTT […] for reaching the end consumer.[238]

(489) Therefore, the Commission considered that OTT services were a relatively new way for distributing content to end users and that they were growing in importance. If unhindered, OTT services were likely to exert a growing competitive constraint on the traditional distribution model of cable TV operators.

The Parties' approach towards OTT services in negotiations with TV broadcasters pre-merger

(490) The acquisition of linear Pay TV channels and the provision of OTT services are typically negotiated jointly between TV broadcasters and the Parties.

(491) This is mirrored in the contractual arrangements for those services. Typically, contractual clauses that govern the ability of TV broadcasters to offer their TV content OTT form part of the same agreement as the carriage agreements for their linear Pay TV channels. Irrespective of whether such contractual 'OTT' clauses are in the end contained in one and the same contract, or subject to a separate agreement, commercial negotiations on the TV broadcasters' OTT offers tend to take place simultaneously with, and form part of, the overall negotiations for the distribution of their Pay TV channels.

(492) There is thus a strong and direct link between the merged entity's bargaining position in the acquisition of Pay TV channels and its market power to prevent, delay or hamper OTT innovation of TV broadcasters.

(493) This link is strengthened by the fact that the agreements for, and the commercial negotiations of, the distribution of the TV broadcasters' Pay TV channels also cover the key content, namely the channels and attractive programming content, that could form part of the broadcasters' OTT offers.

(494) Paragraphs (496) to (504) contain first the Commission’s review in the Conditional Clearance Decision of the evidence from the market investigation regarding the link between OTT services and the acquisition of linear Pay TV channels in negotiations with TV broadcasters.

(495) Subsequently the Commission has reviewed the contractual conditions which the Parties have sought to impose on TV broadcasters pre-merger.

---

236 [Reference to the Parties' internal business documents].

237 [Reference to the Parties' internal business documents].

238 [Reference to the Parties' internal business documents].

The link between negotiations for the acquisition of linear TV channels and OTT services

(496) Virtually all TV Broadcasters confirmed that their commercial negotiations for the distribution of their linear TV channels simultaneously covered the distribution of non-linear TV content that is associated to those TV channels such as catch-up, preview and start-over TV content.[239] The Notifying Party's internal documents equally confirmed that negotiations for the distribution of linear TV channels simultaneously cover the rights to distribute those channels and the content contained therein over the Internet.[240]

(497) The Parties' internal documents also confirmed that negotiations may even cover individual content, that is to say specific series and film titles, which broadcasters could include in their OTT offerings.

(498) For instance, Ziggo had (then) been negotiating [references to the individual content covered by commercial negotiations between one of the Notifying Parties' and various third party broadcasters].[241] The Notifying Party had done the same for [references to the individual content covered by commercial negotiations between one of the Notifying Parties' and various third party broadcasters].

(499) The Notifying Party's internal business documents confirmed that [Reference to the Parties' internal business documents].

(500) Internal business documents of the Notifying Party confirmed that it would be willing to use the leverage that it had over broadcasters for the distribution of their linear Pay TV channels to prevent, delay or hamper such innovation. [Reference to the Parties' internal business documents]:

(i) [Reference to the Parties' internal business documents];

(ii) [Reference to the Parties' internal business documents][242]

(501) This document reveals that Liberty Global would be willing to use its bargaining power in the distribution of linear Pay TV channels fully to prevent, delay or hamper OTT innovation.

(502) Other internal business documents showed that the Notifying Party implemented that strategy in individual commercial negotiations with TV broadcasters. […].[243] […].[244] […]. The Notifying Party seemed to have

---

239 Non-confidential replies of TV Broadcasters to Q4 Phase II Questionnaire to TV Broadcasters, question 17.

240 [Reference to the Parties' internal business documents].

241 [Reference to the Parties' internal business documents].

242 [Reference to the Parties' internal business documents].

243 [Reference to the Parties' internal business documents].

purposefully made thematic TV channels part of the overall linear TV channel negotiations with TV broadcasters in order for those to be used as 'leverage'.[245]

(503) The same pattern emerged from the negotiations that the Notifying Party had been conducting with […] for the distribution of its linear […] Pay TV channels. In internal business documents, the Notifying Party indicated that it wished to hamper the ability of […] to offer the content of those channels via an OTT service online. If […] did not agree with the Notifying Party's position, Liberty Global stated that its distribution of its linear Pay TV channels "may very well have to be postponed".[246]

(504) Therefore, the Commission considered that there was a strong link between the Parties' market power in the acquisition of Pay TV channels and their market power to influence the manner in which broadcasters distribute their TV channels and their individual content over the Internet. Against this background, any increased market power that the merged entity would enjoy in the acquisition of Pay TV channels translates directly into increased market power to influence the distribution of those channels and the content contained therein over the Internet.

The Parties' approach to OTT services in their negotiations with broadcasters

(505) There were already at the time of the Conditional Clearance Decision, agreements in place between the Notifying Party and some of the TV broadcasters in the Netherlands that hampered the latters' ability, directly or indirectly, to launch and sustain OTT services for Dutch consumers. For instance, such agreements had been concluded with [...], which are important TV broadcasters in the Netherlands. The Commission has assessed in the Conditional Clearance Decision whether the proposed combination of Liberty Global and Ziggo could significantly increase the ability of the merged entity to sustain such restrictive agreements, or to apply them to more TV broadcasters, or to overall impose agreements that are more onerous from the perspective of the TV broadcasters and ultimately the Dutch consumers.

(506) The Commission considered that the Parties' ability to insist on such contractual clauses should be assessed in conjunction with the technical means the Parties have at their disposal to hamper or limit the distribution of OTT content over their respective Internet networks. This assessment is made in paragraphs (550) to (578).

(507) The Commission has assessed in the Conditional Clearance Decision the available evidence on the Notifying Party's negotiations and agreements with the broadcasters RTL, SBS, NPO, Fox, the Walt Disney Company ("Disney"),

---

244 [Reference to the Parties' internal business documents].

245 [Reference to the Parties' internal business documents].

246 [Reference to the Parties' internal business documents]

HBO and VIMN.[247] This approach was justified as together, those broadcasters accounted for over 80% of the TV content that was available in the Netherlands. In fact, RTL, SBS and NPO alone accounted for more than 70% of the TV content that is available in that country.

(508) That evidence revealed that the Notifying Party had sought to impose various direct and indirect restrictions on the ability of those broadcasters to offer their TV channels and individual content via OTT services in the Netherlands.

(509) A first restriction that the Notifying Party had sought to impose is an outright contractual ban for broadcasters to offer their content via OTT services in the Netherlands. This ban targeted OTT services that broadcasters could offer themselves. It also targeted OTT services of existing and potential third party suppliers, such as Smart TV (TV connected to the Internet) providers and aggregators of OTT content that is offered online. The ban finally targeted the individual content, especially premium content that broadcasters can make available OTT.

(510) An example is the clause that the Notifying Party sought to impose on [a third party TV broadcaster]. The proposed clause was as follows:

(a) During the term of the contract [a third party TV broadcaster] will not offer the linear channels and VOD content to so called OTT parties (among others: Netflix, Voddler, Zattoo, Lovefilm, Weepee and Magix)

(b) During the term [a third party TV broadcaster] will not offer the linear channels to so called Smart tv parties (among others: Samsung, Sony, LG and Philips). [a third party TV broadcaster] is however allowed to offer its VOD content to these parties but only if the content will be offered in a transactional way to the consumer (regardless whether content includes advertising)

(c) During the term [a third party TV broadcaster] will not offer the linear channels OTT by itself[248]

(511) If accepted, that clause would have banned [a third party TV broadcaster] from offering its content altogether to OTT service providers that were then already active in the Netherlands, such as Netflix. It would also have banned [a third party TV broadcaster] from dealing with OTT service providers that were active in other countries, but might wish to launch in the Netherlands in the future, such as Voddler Inc. and LoveFilm (the latter was then part of Amazon). It banned [a third party TV broadcaster] from dealing with players such as Magix that were then active in adjacent markets, but might wish to launch OTT services with film and other content geared towards consumers in

[247] [Reference to the Parties' internal business documents]; Document ID1985, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014, p. 3; [Reference to the Parties' internal business documents].

[248] [Reference to the Parties' internal business documents], and; Document ID1674, non-confidential submission by […].

the future. The ban would also apply to online broadcasters of linear TV channels.[249]

(512) In addition, that clause would have banned [a third party TV broadcaster] from dealing freely with Smart TV providers such as Samsung Electronics Co., Ltd. and Sony Corporation. If accepted, [a third party TV broadcaster] would not be allowed to distribute its linear channels to those providers. The VOD content that it would be allowed to distribute via them would be limited to TVOD services. That content would exclude potentially lucrative SVOD services.

(513) Finally, the ban would have precluded [a third party TV broadcaster] from offering its own linear channels over the Internet to consumers.

(514) A second type of restriction that the Notifying Party had sought to impose on the ability of broadcasters to launch OTT services was a contractual right for it to terminate the agreement for the carriage of the broadcasters' linear Pay TV channels, should those broadcasters offer their channels or the content contained therein via OTT services in the Netherlands. The Notifying Party had sought to impose such clauses in relation to both paid and free OTT services. This type of clause creates a strong disincentive for broadcasters to launch OTT services, as that launch would mean that a large part of the reach of their TV channels would fall away. In order to sustain that reach, they would have to re-negotiate the carriage of their linear Pay TV channels, for which they are heavily dependent on the Notifying Party.[250]

(515) That type of clause had been proposed to [a third party TV broadcaster], one of the largest commercial broadcasters in the Netherlands, as well as to other providers of TV channels and OTT services.[251] Internal business documents of the Notifying Party confirmed that the goal of such clauses would be to prevent the emergence of OTT providers that could deliver their TV channels in competition with its own cable TV offering.[252]

(516) A third category of restriction that the Notifying Party had sought to impose limited the possibility for broadcasters to offer their content to existing Pay TV platforms, such as competing cable companies, that might wish to broaden their offering in the future. For instance, the Notifying Party sought to ensure that broadcasters would limit the scope of the IPTV distribution right for other cable operators to the existing cable footprint of those operators. In that way, the Notifying Party sought to ensure that existing Pay TV operators could not

---

[249] Zattoo is an on-line distributor of linear TV channels. It had experienced legal difficulties with content right holders regarding its ability to re-broadcast their signals over the Internet. However, YouCa B.V., another company then wishing to enter the OTT market with a linear TV channels offering would also be covered by the contractual clause that Liberty Global sought to impose, which would have meant that it could not obtain the [a third party TV broadcaster] content for inclusion in its services.

[250] [Reference to the Parties' internal business documents].

[251] [Reference to the Parties' internal business documents].

[252] [Reference to the Parties' internal business documents].

expand their commercial presence through other means than their existing cable networks, for instance over the Internet.

(517) For instance, the Notifying Party asked [a third party TV content provider] to limit the scope of the IPTV distribution right that [a third party TV content provider] was about to grant another cable operator, CAIW. CAIW had publicly expressed its strategy to "expand their footprint through other means than traditional cable networks". The Notifying Party explained that it could not "*risk a potential OTT IPTV in our* [their] *footprint*" and accordingly required [a third party TV content provider] to limit CAIW's IPTV license to the latter's existing geographic footprint.[253]

(518) A fourth category of restrictions on the ability of broadcasters to offer their content via an OTT service concerned the obligation for those broadcasters to only offer OTT services in the Netherlands, if those services were tied technically to the cable TV offering of the Notifying Party. That would for instance mean that broadcasters could only offer OTT services in an unencrypted fashion to subscribers that also have a Pay TV subscription with the Notifying Party. Some services could not be available to consumers at all if those consumers did not take a Pay TV subscription with the Notifying Party, or only at lower quality.

(519) The following clause imposed on Fox is an example of that type of restriction.

Fox:

4. Content Commitments, Free-to-air provisions and holdbacks

Channel Provider shall not distribute, nor shall it grant any third party the right to distribute the Channels or any programming contained therein, including the Key Content, in the Territory via cable systems, DSL systems and/or any open or public access computer integrated networks such as the world-wide matrix of interconnecting computers known as the "Internet" on an unencrypted or free basis, unless the unencrypted or free basis distribution of a Channel(s) or any programming contained therein, is complementary to the distribution of such Channel on a pay tv basis via any television distribution system to subscribers authorized to receive the Channel via such television distribution system. It is understood that limited volumes of content (no more than 5 hours of content per month, but in no event live matches) contained in the Channel may be distributed on a non-linear unencrypted or free basis for promotional purposes only.

Channels Provider shall not make the FOX Sports EDL GO Interface or the Fox Sports International GO Interface, or any materially similar interface, nor any of the FOX Sports EDL GO Content or FOX Sports International GO Content directly available to end-consumers in the Netherlands by whatever means (including but not limited to by means of OTT or connected TV portals). Channel Provider shall only allow third party platform providers to enable their subscribers to access FOX Sports EDL GO and/or FOX Sports

[253] [Reference to the Parties' internal business documents].

International GO, if such subscribers does also receive Fox Sports EDL Channels or Fox Sports International Channels as part of a pay tv subscription.[254]

(520) That clause covered both the [a third party TV content provider] channels and the content that is shown on those channels. If both or either were included in an unencrypted or free Internet offer, it had to be limited to authorised subscribers that also took the channels as part of a Pay TV bouquet from the Notifying Party. [a third party TV content provider]'s existing [a third party TV content provider] services could not be available to any end-consumers that did not also subscribe to the TV channels as part of a cable subscription with the Notifying Party.

(521) The Commission noted that in the same document concerning [a third party TV content provider], the Notifying Party proposed to go even further, and to force [a third party TV content provider] to cease offering premium content to consumers directly altogether. Ultimately, the outcome of the negotiations between the Notifying Party and [a third party TV content provider] was that that particular clause was not agreed upon.

(522) […][255] [...].

(523) In fact, a similar tying arrangement to that with [third party broadcasters] had been considered for [third party broadcasters], associated to the main public broadcasters in the Netherlands[256], and for [third party TV content provider]. As concerns the latter (then) broadcaster, the Notifying Party wished to achieve the integration of the [third party TV content provider] GO service into its own TV services, thus preventing [third party TV content provider] from offering the GO services directly to consumers. In this regard, the Notifying Party wanted to achieve the same technical restrictions that [a foreign cable operator] had managed to impose on [third party TV content provider] in the [...].[257]

(524) […][258] [...].[259]

(525) Other clauses proposed to TV broadcasters in the Netherlands were a combination of the type of restrictions mentioned in paragraphs (505) to (523). […][260] […][261] [...].

---

254 [Reference to the Parties' internal business documents].

255 [Reference to the Parties' internal business documents].

256 [Reference to the Parties' internal business documents].

257 [Reference to the Parties' internal business documents].

258 [Reference to the Parties' internal business documents].

259 [Reference to the Parties' internal business documents].

260 [Reference to the Parties' internal business documents].

(526) A final category of restrictions on the ability of TV broadcasters to launch or sustain OTT services in the Netherlands relates to agreements that the merged entity would strike in relation to the TV content that can be included in such OTT offerings.

(527) As mentioned in paragraphs (497) and (498), the Parties already sought to conclude agreements with TV broadcasters for the non-linear use of the TV content on their Pay TV platforms. For instance, Liberty Global had sought [...] such as [...].

(528) In submissions to the Commission, the Notifying Party explained that it wished to obtain the exclusive right to certain films, shows, series and other content of TV broadcasters. Although those types of exclusive agreements were then not very prevalent, the Notifying Party saw them as an important tenet of its strategy in the near future.

(529) To the extent that those content agreements are entered into with operators that own premium film and series content, such as the Hollywood majors (main Hollywood studios, including Fox, Warner Brothers and Disney), those agreements are entered into in the market for the licensing of TV content, where the Commission had not identified competition concerns in the context of this case.

(530) However, to the extent that those content agreements were concluded with TV broadcasters that would be dependent on the merged entity to distribute their TV channels, concluding exclusivity agreements for the TV content that the TV broadcaster owned or for which it had the right to distribute it in the Netherlands, could seriously undermine the viability of the OTT offers that those TV broadcasters could make to Dutch consumers. As shown in paragraphs (497) and (498), the commercial negotiations for TV content deals with TV broadcasters take place in the context of, or at the very least are closely linked with, commercial negotiations for the carriage of the Pay TV channels of those same TV broadcasters. The market power that the merged entity would have vis-à-vis those TV broadcasters in the distribution of those Pay TV channels would then also translate into market power to pressure those TV broadcasters into exclusivity agreements for the content that is shown on those channels, or any other content that those TV broadcasters themselves own or for which they have the rights to distribute in the Netherlands. The Notifying Party itself underlined that the ultimate competitiveness of OTT services would depend on the attractive content, in particular recent films and series that those services offer to consumers. Allowing such exclusive deals to go ahead unfettered, would mean that the merged entity could use market power in a way that deprives the OTT services of the TV broadcasters of the attractive TV content they need in order to operate those services.

(531) Insofar as the merged entity pursued such exclusivity agreements in the context of, or together with, its negotiations for the distribution of linear Pay

---

261 [Reference to the Parties' internal business documents].

TV channels, those agreements were an indirect restriction of the TV broadcasters' ability to launch or sustain OTT services for Dutch consumers.

(532) The Commission considered in the Conditional Clearance Decision that the Transaction was likely to significantly increase the merged entity's market power to continue the restrictive agreements for OTT services of the types identified above, and to apply them to even more TV broadcasters. Overall, the merger was likely to significantly increase the Notifying Party's market power to make those restrictive agreements even more onerous.

(533) While the Notifying Party had sought to implement such clauses in its contracts with TV broadcasters, the Commission noted that [third party TV broadcasters] as well as [a third party TV broadcaster] had so far been able to resist, to a certain extent, attempts to conclude contractual bans for their OTT services.

(534) [a third party TV broadcaster], for example, was able to at least negotiate a change to the nature of the OTT clause that was initially proposed by the Notifying Party such that it was transformed from an outright prohibition on the provision of [a third party TV broadcaster]' content OTT to a unilateral right for the Notifying Party to terminate the carriage agreement in case [a third party TV broadcaster] were to provide its linear TV channels to OTT parties.[262] Similarly, [a third party TV broadcaster] managed to change an outright prohibition on the free provision of additional VOD content on its OTT catch-up TV service into a provision that would make the payment of certain minimum guarantees by the Notifying Party conditional upon [a third party TV broadcaster] refraining from doing so.[263]

(535) [a third party TV broadcaster], in turn, did not agree to include any text on OTT in its agreement with the Notifying Party. The Notifying Party therefore moved away from the aforementioned ban on OTT, that is to say that the distribution agreement would be terminated in case [a third party TV broadcaster] were to go OTT. Instead, it proposed that certain minimum guarantees and marketing commitments undertaken by it would be dropped in case [a third party TV broadcaster] were to launch an OTT product in the Netherlands.[264] [a third party TV broadcaster] was seemingly able to trade off a contractual prohibition on the provision of its VOD content OTT for one on the provision of its linear content OTT.[265]

---

[262] Document ID1674, […]. Document ID1908, non-confidential minutes of conference call between Commission's services and […] of 19 June 2014, p. 4. […].

[263] [Reference to the Parties' internal business documents].

[264] [Reference to the Parties' internal business documents].

[265] [Reference to the Parties' internal business documents].

(536) Finally, SBS, RTL and NPO had been able to jointly launch a standalone OTT catch-up TV service (NLZiet)[266] and NPO provided its linear TV channels free of charge OTT.[267]

(537) As regards Ziggo's approach to OTT services, the Commission found that, similarly to Liberty Global, Ziggo had also been proposing clauses to broadcasters to limit their freedom to offer OTT services. Ziggo's approach had however been more lenient than that of the Notifying Party. [...].[268]

(538) That policy of Ziggo was reflected in the documentation of its commercial negotiations with TV broadcasters. For instance, as regards [a third party TV broadcaster], Ziggo proposed that if [a third party TV broadcaster] were to make its content available on the Internet for free, Ziggo should also obtain the non-exclusive right to distribute that content for free.[269] Ziggo had not, as the Notifying Party had, sought to insist on a clause that would ban [a third party TV broadcaster] from such streaming entirely. During the market investigation, [a third party TV broadcaster] indicated that only one of the two Parties had demanded it to refrain from free OTT streaming. The evidence from the Parties shows that this party is the Notifying Party, and not Ziggo.[270]

(539) Likewise, the distribution agreement between [a third party TV broadcaster] and Ziggo did not contain any provision limiting [a third party TV broadcaster]'s ability to provide OTT services. Rather, it contained a clause whereby Ziggo was prohibited from transmitting [a third party TV broadcaster]'s TV channels via the open Internet.[271]

(540) The same pattern emerged in relation to [...]. Ziggo initially confronted [...] with the same [...] proposal that the Notifying Party made to [...]. However, [...] insisted on conducting separate negotiations with the Notifying Party and Ziggo, to which both parties seemingly agreed.[272] Ziggo's subsequent

---

266 Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014, p. 4; Document ID1985, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014, p. 3; https://www nlziet nl/ [accessed at 31 July 2014].

267 Document ID01424, NPO's non-confidential reply to questionnaire Q4 to Phase II Questionnaire to Broadcasters of 28 May 2014, question 16.

268 [Reference to the Parties' internal business documents].

269 This restriction was contained in the Deal Memo of 7 February 2011 and the ultimate agreement with SBS of 23 May 2011 (Doc ID336-11521). SBS also agreed that its free OTT offers would be at a maximum download speed, which would however be benchmarked against that of its competitors NPO and RTL.

270 Document ID1400, SBS' non-confidential reply to questionnaire Q4 Phase II Questionnaire to Broadcasters of 28 May 2014, question 18.1; Document ID1769, SBS' non-confidential submission of 30 June 2014.

271 Document ID366-11396, signed carriage agreement between Ziggo and RTL of 15 February 2012, Article 7(2).

272 [Reference to the Parties' internal business documents].

individual proposals were similar to the proposals that it made to [...]. In those proposals, Ziggo focussed on obtaining access to the OTT services that [...] chose to make available online, rather than seeking a ban on such OTT services altogether.[273] Thus, [...] was able to obtain more favourable draft clauses once it could avoid dealing with Liberty Global and Ziggo together.

(541) Ziggo's agreement with [a third party TV content provider] did not contain a clause banning [a third party TV content provider] from offering its TV channels over the Internet. As concerns [a third party TV content provider]' non-linear [that third party's OTT service], the agreement contained the right for Ziggo to obtain some monetary compensation for its subscribers using the [that third party's OTT service] service directly over the Internet, rather than as part of the VOD offering of Ziggo.[274] The Notifying Party's contract restricted such direct consumer access to the [that third party's OTT service] service.[275]

(542) In the distribution agreement currently in place between Ziggo and [a third party TV content provider], [a third party TV content provider] explicitly reserved to itself the right to freely exploit the rights granted therein via other means of distribution, including the Internet.[276]

(543) In sum, the Commission's investigation in the Conditional Clearance Decision had confirmed that the Dutch market was to a certain extent already characterised by the existence of agreements that restricted the TV broadcasters' ability to offer their TV channels and content via OTT services to Dutch consumers. However, some TV broadcasters had until then been able to resist the conclusion of such restrictive agreements, whilst others had been able to water down the restrictive nature of the initially proposed agreements. A factor that had played a role in those dynamics was that Ziggo has taken a more lenient approach to the OTT services of TV broadcasters.

(544) In light of this evidence, the Commission has assessed in the Conditional Clearance Decision the likely impact of the proposed combination of Liberty Global and Ziggo on the merged entity's market power to continue to enforce such restrictive agreements, or to apply them to more TV broadcasters or to make them more onerous overall, to the detriment of TV broadcasters and ultimately the Dutch consumers.

Ability to prevent, delay or hamper OTT innovation post-Transaction

(545) Paragraphs (546) to (578) contain the Commission's assessment in the 2014 decision of the ability of the merged entity, post-Transaction, to prevent, delay or hamper OTT innovation. As set out in paragraph (578), the Commission

[273] [Reference to the Parties' internal business documents].

[274] [Reference to the Parties' internal business documents].

[275] [Reference to the Parties' internal business documents].

[276] [Reference to the Parties' internal business documents].

concluded that the Transaction clearly increased the merged entity's ability to prevent, delay or hamper OTT services by contractual means resulting from the merged entity's increased buyer power. That increased ability was furthermore compounded by the merged entity's ability to hamper Internet traffic via technical means.

Ability to prevent, delay or hamper OTT innovation by contractual means

(546) As the merger of the Notifying Party and Ziggo was likely to significantly enhance the Notifying Party's market power vis-à-vis TV broadcasters, the merged entity was likely to have an increased ability to impose its stringent contractual OTT conditions on TV Broadcasters compared to the situation absent the merger.

(547) Moreover, the fact that Ziggo was present on the market with a relatively more lenient policy on OTT services, gave TV broadcasters a degree of leverage vis-à-vis the Notifying Party pre-merger. TV Broadcasters had explained that in terms of clauses on OTT services, they tended to benchmark the conditions of their supply agreements entered into with either the Notifying Party or Ziggo in subsequent negotiations with the other.[277] Some TV broadcasters confirmed that they are able to put pressure on either the Notifying Party or Ziggo by communicating the outcome of the negotiations for the distribution of their TV channels with the other. The Parties' internal documents confirmed the existence of this constraint. For instance, [...].[278] As explained in paragraph (540), [...] was able to obtain more favourable draft clauses once it could avoid dealing with Liberty Global and Ziggo together. This would however be precisely the situation in which it would be following the merger.

(548) The Commission found in the Conditional Clearance Decision that it was unlikely that TV broadcasters would be able to resist contractual clauses that hamper their ability to launch or sustain OTT services by adapting a coordinated market response to the merged entity to relinquish such clauses. Indeed, when faced with requests by the merged entity to agree to restrictive OTT agreements, each TV broadcaster was likely to weigh its short term gain derived from not losing income from the merged entity – in the form of higher licence fees - if it agreed to such clauses against the longer-term gain that could be derived from cross-platform competition between cable TV and OTT TV, that is to say by facilitating entry at the downstream level. However, for OTT TV to become a viable and credible substitute to cable TV, the Commission considered that it would likely require OTT content from a large proportion of major TV broadcasters. Each TV broadcaster therefore faces the

[277] Document ID1985, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014, p 2; Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014, p. 3; Document ID1700, non-confidential minutes of conference call between Commission's services and VIMN of 20 June 2014, p. 2; Document ID2209, non-confidential version of the European Broadcasters' Union's submission of 30 June 2014, p. 4; Document ID2270, non-confidential minutes of conference call between Commission's services and Fox International Channels of 25 June 2014, p. 4.

[278] Document ID331-12405, Liberty Global email 'Status update NPO/RTL/SBS' of 23 April 2012.

risk that a sufficiently high proportion of TV broadcasters agree to restrictive contract terms on OTT, jeopardising the long-term benefit of additional competition from OTT services overall. Under those circumstances, the longer term benefits of cross-platform competition to TV broadcasters may be sufficiently uncertain to be outweighed by the short term benefit of agreeing to such restrictions. The risk of such coordination failure is likely increased by the dispersed nature of TV broadcasters.[279] The fact that some broadcasters had so far resisted these clauses did not alter that assessment. After the Transaction, they would face a combined Liberty Global/Ziggo. The short-term gain derived from the licensing income of such a large market player would only make it more difficult for those broadcasters to secure the long-term gain of bringing additional competition to the market in the form of OTT services.

(549) Therefore, the Commission considered that, post-merger, the Notifying Party would likely have a greater ability contractually to prevent, delay or hamper OTT innovation. This increased ability to prevent, delay or hamper OTT innovation by contractual means, needed to be assessed in conjunction with the ability that each of the Parties already had pre-merger to technically degrade the distribution of OTT content via their Internet networks, which was another market where they were active.

Ability to prevent, delay or hamper OTT innovation compounded by the ability to technically restrict OTT services

(550) The Commission further considered in the Conditional Clearance Decision that both Liberty Global and Ziggo were also active as a provider of Internet access services to consumers in the Netherlands. In that role, they operated the Internet networks that providers of OTT services needed to access Liberty Global's and Ziggo's broadband customers in the Netherlands. Post-merger, the Notifying Party would provide access to around 43% of Dutch broadband customers. Under those circumstances, the Commission had to assess whether the merged entity's increased ability to prevent, delay or hamper OTT innovation by contractual means would be compounded by its ability to technically degrade the distribution of OTT content via its Internet network.

(551) In terms of access to the Parties' broadband customers in the Netherlands, providers of OTT audio visual services could reach the Parties' broadband customers in three distinct ways:

(i) Private direct peering: the OTT provider can directly connect to the Parties' Internet networks via a private physical interconnection link.[280] *The Notifying*

[279] This reasoning is in line with established models of exclusive dealing. See C. Fumagalli and M. Motta, 'Buyers' miscoordination, entry, and downstream competition' in Working Paper no. 152 *Centre for Studies in Economics and Finance* of January 2006, page 15, and Commission decision of 18 October 1996 in case IV/M.580, *ABB/Daimler Benz*.

[280] This is often a dedicated fibre connection between the two parties' routers to be used exclusively for the exchange of traffic flowing between their respective Internet networks.

Party refers to this as direct physical network interconnect (PNI). OTT providers can achieve this PNI at a paid or settlement-free basis;

(ii) Public direct peering: the OTT provider can directly connect to the Parties' Internet networks via a physical interconnection link at a public Internet exchange. The Parties' overall interconnection capacity at an Internet exchange is shared between all of the companies they connect with there (between 50 and 500 Gbit/s for the Notifying Party);

(iii) Transit: the OTT provider can contract a third-party Internet connectivity transit provider, whose Internet network is connected to that of the Parties, through private direct peering[281]*, to hand over its Internet traffic to the Parties' networks in exchange for a transit fee.*[282]

(552) The Commission's investigation confirmed that there were close links between the Parties' technical role in delivering OTT services to their broadband customers and their ability to insist upon contractual clauses that restrict, directly or indirectly, the ability of TV broadcasters to offer their content via OTT services. The existence of such links became apparent from the Notifying Party's approach to, for example, the OTT TV (GO) services of [...] and of [...]. As regards both of those OTT services, the Notifying Party was only willing to guarantee a free high quality (in this case meaning a direct, private and uncongested interconnection) access to its Internet network if those services would be exclusively available to its own [...] customers. In that way, the Notifying Party sought to achieve a contractual restriction of […]' possibility to offer OTT services to consumers in the Netherlands by partly relying on its position as an Internet network provider and route to deliver OTT traffic to its broadband customers.

(553) The Commission has assessed in detail in the Conditional Clearance Decision the technical means that the Parties have at their disposal to influence the manner in which OTT services can reach their broadband customers. The Commission's investigation confirmed that, ultimately, each of the routes that OTT providers can use to interconnect with the Parties' Internet networks, thereby obtaining access to the Parties' broadband customers, are under the control of the Parties.

(554) ***Private and public direct peering.*** As regards direct peering, that is to say the first way, so-called 'private direct peering', and the second way, so-called 'public direct peering', of interconnecting with the Parties' Internet networks, the Notifying Party shortly before the 2014 Transaction publicly enforced a policy by which providers of OTT audio visual services would not be allowed to engage in settlement-free direct peering with it, whether public or private.[283] Moreover, under its peering policy, the Notifying Party had

[281] According to the Notifying Party, interconnections at an Internet exchange are usually not allowed to be used to provide transit services. See: Document ID2384, Liberty Global presentation 'M.7000: technical presentation', of 1 July 2014.

[282] Document ID2384, Liberty Global presentation 'M.7000: technical presentation', of 1 July 2014.

[283] Indeed, OTT audio visual services will never comply with the maximum ratio of 3:1 between traffic incoming to the Notifying Party's Internet network and traffic outgoing from the Notifying Party's

reserved the right not to engage in private direct peering with any party at all, regardless of whether the requirements for settlement-free private direct peering were met. The Notifying Party's policy was summed up in its internal documents as: [...][284] Given that any OTT audio visual service would thus only qualify for *paid* direct private peering, if at all, the Notifying Party could refuse or severely restrict those services from having access to its Internet network, either by charging excessive fees for paid direct private peering or by altogether refusing to engage in private direct peering.

(555) As already mentioned in paragraph (552), the Commission stated in the Conditional Clearance Decision that it had found evidence that suggested that the Notifying Party already refused to offer direct high quality access to its Internet network to OTT service providers. […]:

(i) [Reference to the Parties' internal business documents][285];

(ii) [Reference to the Parties' internal business documents][286];

(iii)[Reference to the Parties' internal business documents][287];

(iv)[Reference to the Parties' internal business documents][288]

(v) [Reference to the Parties' internal business documents][289]

(vi)[Reference to the Parties' internal business documents][290]

(556) [...]. As regards [a third party TV content provider], the Notifying Party offered to conclude a [...] direct interconnection in relation to the imposition of a contractual clause that would prohibit [a third party TV content provider] from providing its streaming service directly to end users.[291]

Internet network, required by the Notifying Party for settlement-free *private* direct peering. Such OTT services generate largely one-way traffic, sometimes achieving inbound-outbound ratios in excess of 100:1. Liberty Global's peering policy is available at: http://www.libertyglobal.com/PDF/LGI-Settlement-Free-IP-Peering-Policy-2012-final.pdf [Accessed at 16 July 2014].

284 [Reference to the Parties' internal business documents].

285 Document ID331-41175, Liberty Global Engineering PNI/ODIA Scope Document of 19 June 2013, section 1.2.

286 Document ID331-7320, Liberty Global email 'RE: Fox sports GO | direct peering / Kosten direct peering' of 11 June 2013.

287 Document ID331-10359, Liberty Global email 'RE: HBO NL – Big Questions' of 7 November 2012.

288 [Reference to the Parties' internal business documents].

289 [Reference to the Parties' internal business documents].

290 [Reference to the Parties' internal business documents].

291 [Reference to the Parties' internal business documents].

(557) [...]. That indicated that the Notifying Party was unlikely to be deterred from engaging in such strategy due to any perceived risk that it infringes Dutch net neutrality law.

(558) In addition to that inability to interconnect directly via a private link with the Notifying Party's Internet network, those OTT audio visual services could not engage in *public* direct peering with the Notifying Party, that is to say direct peering at an Internet exchange, as those would not be allowed, pursuant to its peering policy, to generate traffic in excess of 3 Gbit/s at any one Internet exchange. This effectively made it impossible for any successful OTT service to use that route to reach the Notifying Party's broadband customers. In that regard, Ziggo indicated that even a limited number of around [...] concurrent OTT video streams at peak time then already generated traffic far exceeding the threshold of 3 Gbit/s (namely around [...]).[292] In addition to that, the Notifying Party had confirmed that it would be unlikely to establish new direct peering relationships at the Amsterdam Internet Exchange with peers that did not already connect to its Internet network in some other way, that is to say it would be unlikely to establish direct peering relationships *only* at the Amsterdam Internet Exchange.[293] Furthermore, the Commission found that the Notifying Party maintained highly limited interconnection capacity and only for certain legacy interconnections that it still had at, for example, the NL-IX Internet exchange. This limited capacity for non-exclusive OTT competitors had, […], already caused problems as a result of port congestion.[294]

(559) For all of those reasons, the Commission considered in the Conditional Clearance Decision that OTT audio visual service providers already had limited prospects of using private or public direct interconnection effectively in order to reach the Notifying Party's broadband customers.

(560) ***Transit.*** In the Conditional Clearance Decision, the Commission noted that direct interconnection capacity with third-party Internet interconnectivity/transit providers, that is to say the third way of reaching the Parties' customers ('transit') was the only access route for Internet content providers that did not obtain access through private or public direct peering.[295] Owners of Internet access networks such as the Parties were also capable of severely hampering access via any such transit links, for example by refraining from upgrading direct interconnection capacity in line with increased Internet traffic flows.

---

[292] Document ID1548, Liberty Global and Ziggo response to Commission's request for information of 11 June 2014, p. 10.

[293] Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014, p. 3.

[294] Document ID331-20108, Liberty Global email 'Eredivisie Live Go' of 25 March 2013.

[295] Draft Report on the BEREC public consultations on net neutrality, Berec Conclusion on Question 7. Available at: www.berec.europa.eu [as at 8 August 2014].

(561) Importantly in that respect, the Notifying Party was not contractually bound, under its direct peering agreements with transit providers, to increase interconnection capacity in line with capacity utilization on the relevant interconnection point(s).[296] The Notifying Party acknowledged that it could even decrease the capacity of an entire transit connection, thereby increasing the risk of congestion.[297]

(562) The Commission considered in the Conditional Clearance Decision that refusal by the Notifying Party to upgrade transit capacity or to even degrade it, would have had serious consequences for the viability of OTT services in the Netherlands. The Commission's investigation namely confirmed that only a small proportion of Dutch Pay TV subscribers would have to switch to linear OTT TV in order to significantly increase Internet traffic flows, such that the Parties' existing interconnection capacity with transit providers would be exhausted, resulting in port congestion.

(563) For example, the Commission had compared Netflix' publicly available speed index for Ziggo (3.74 Mbit/s)[298] with Ziggo's current total paid transit capacity ([...]).[299] Based on that comparison, only [...] concurrent video streams at peak time would exhaust that total transit capacity. In other words, interconnection congestion would occur if only [0-5]% of Ziggo's then DTV subscriber base of 2.253 million customers[300] were to switch to watching, for instance, the daily news, which then attracted large viewing shares, via the Internet.

(564) In terms of the Notifying Party's then overall paid transit capacity, which could be used by all Internet networks but was exclusively located in the United States, for its entire pan-European network, this would already be congested in the event that 30 500 concurrent video streams were to occur at peak time ([…][301]). In fact, the Notifying Party's main Internet network AS6830 that covered 9 different European countries could potentially no longer be effectively reached via transit providers at all, including all settlement-free peers in Europe, in the event that around [...] concurrent video streams were to occur at peak time.[302] When taking account of the existing

---

296 Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014, p. 5.

297 Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, para. 167.

298 http://ispspeedindex.netflix.com/netherlands [accessed at 23 July 2014].

299 Document ID1548, Liberty Global and Ziggo response to Commission's request for information of 11 June 2014, p. 10.

300 Document ID1627, Liberty Global response to Commission's request for information of 20 June, annex XXI.

301 Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014.

302 This is based on AS6830's current overall direct interconnection capacity with transit providers of 3395 Gbit/s, as estimated in Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014. The Commission has compared this with the average speed of 3.6 Mbit/s

maximum peak-time capacity utilization on the same direct interconnections points, it become apparent that AS6830's direct settlement-free interconnection links with transit providers could in fact not – in the worst case scenario[303] – handle more than [...] additional concurrent peak-time video streams.[304] NPO in that regard indicated that the Dutch Internet infrastructure was not well equipped to handle more than 300 000 – 400 000 concurrent Internet video streams.[305] Finally, the Notifying Party itself noted in internal business documents that [...].[306]

(565) In any event, the Commission noted in the Conditional Clearance Decision, that the Notifying Party at the time maintained a total paid transit capacity of only [...] for its entire pan-European AS6830 Internet network, whilst those transit connections were located exclusively in the United States. That rendered the connections less efficient for Internet traffic originating from and destined to Europe.[307]

(566) Finally, the availability of transit as a viable route to the merged entity's broadband customers could not be assessed separately from the Notifying Party's peering policy in general. The Notifying Party did not *pay* for maintaining interconnection capacity with providers of transit services in Europe. […][308] […][309], [internal business policy of one of the Notifying Parties].[310] This business policy affected the traffic that transit providers were

---

that the Notifying Party currently attains for Netflix streams in the Netherlands. http://ispspeedindex.netflix.com/netherlands [accessed at 23 July 2014].

303 The Commission notes that the Notifying Party has indicated that peak times do not necessarily coincide for all providers of Internet content; Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014, p. 3.

304 This is based on AS6830's current maximum peak-time capacity utilization of 2108 Gbit/s as estimated in Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014, and an average speed of 3.6 Mbit/s that the Notifying Party currently attains for Netflix streams in the Netherlands (http://ispspeedindex netflix.com/netherlands) [Accessed at 23 July 2014].

305 Document ID1983, non-confidential version of NPO email of 3 July 2014.

306 [Reference to the Parties' internal business documents].

307 Transit providers historically received two-sided payment; from the Internet content provider whose content was delivered to a terminating network, as well as from the terminating network itself, whose customers where thus able to access that content. When a terminating network ceases to pay transit providers for delivering traffic, the transit provider will in turn only hand over traffic for which it gets paid by its Internet content customers and not from its settlement-free peers. By limiting/eliminating paid transit capacity, the Notifying Party thereby already limits the interconnectivity of its Internet network because the entire network of Tier 1 transit providers will no longer hand over each other's traffic to the network of the Notifying Party, because that would mean doing it for free.

308 A Tier 1 network is an Internet Protocol (IP) network that participates in the Internet solely via settlement-free interconnection (also known as settlement-free peering), rather than paid interconnection – See http://en.wikipedia.org/wiki/Tier_1_network [accessed on 11 August 2014].

309 [Reference to the Parties' internal business documents].

310 [Reference to the Parties' internal business documents].

likely, or capable, to hand over to the Notifying Party for final delivery to the broadband customers. During the Commission's investigation, a number of transit providers explained that if they interconnected with the Notifying Party on a settlement-free basis, they were only likely to hand over traffic of their own paying customers to the Notifying Party's Internet network. The providers of transit services that it interconnected with on a settlement-free basis would accordingly only hand over traffic of their own *paying* customers to the Notifying Party's Internet network. If the latter were to hand over traffic of their own settlement-free peers, for example other Tier 1 transit providers, to the Notifying Party, itself being a settlement-free peer as well, those transit providers would not receive any payment for providing their services.[311] They would have no economic incentive to hand over that traffic.[312]

(567) Furthermore, the contractual arrangements covering the settlement-free direct interconnections between the Notifying Party and providers of transit services did not even allow transit providers to hand over traffic of their peers, that is to say other transit providers.[313] The Notifying Party was thereby able to congest specific interconnection links with providers of transit services in a targeted manner, knowing that congestion on that particular link would only affect the direct, paying customers of that particular provider of transit services, rather than the Internet at large. The Notifying Party acknowledged this in its internal business documents: [Reference to the Parties' internal business documents].[314] In that regard, it was also important to note that the Notifying Party had indicated that several public tools existed, such as *http://bgp.he.net/* and *https:stat.ripe.net/widget/bgplay*, that gave insight about who has a relation with what AS[315] and may or may not be a transit provider for it, although it claimed this would never be exact.[316] The Commission noted in the Conditional Clearance Decision that those tools indeed listed the

---

311 See for an explanation on this issue, for example: Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: www.berec.europa.eu [as at 8 August 2014]; non-confidential minutes of conference call between the Commission's services and Level 3 of 31 July 2014, p. 2.

312 Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: www.berec.europa.eu [as at 8 August 2014]; Michael Kende, *The Digital Handshake: Connecting Internet backbones* Office of Plans and Policy Federal Communications Commission Working Paper No. 32 of September 2000. Available at: http://www fcc.gov/working-papers/digital-handshake-connecting-internet-backbones [as at 8 August 2014]; Comments of AT&T on the BEREC Consultation Paper, *An assessment of IP Interconnection in the context of net neutrality* of 31 July 2012. Available at: www.berec.europa.eu [as at 8 August 2014].

313 [Reference to the Parties' internal business documents].

314 [Reference to the Parties' internal business documents].

315 Within the Internet, an autonomous system (AS) is a collection of connected Internet Protocol (IP) routing prefixes under the control of one or more network operators that presents a common, clearly defined routing policy to the Internet – see http://en.wikipedia.org/wiki/Autonomous_System_(Internet) [accessed on 11 August 2014].

316 Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014, p. 5.

AS number of specific Internet content providers such as Netflix, RTL Nederland, NPO, SBS and others. They also seemed to list the peers of such Internet content providers, as well as the extent to which those peers were exchanging traffic with them. The public tool *www.robtex.com* furthermore provided a detailed up-to-date insight into which transit providers were used for handing over Internet traffic by any given Internet content provider, the extent to which those were used, and the type of routing announcements employed (allowing one to determine whether a connection with a given provider of transit services is a *paid* transit connection), all in an efficient graphic representation. Using that tool would, for example, allowed one to first find out which Internet network hosts NPO's catch-up service *Uitzending Gemist* – being NPO's AS25182 – and to subsequently determine which of the transit providers that were paid by NPO, for example, KPN International Eurorings that advertised all routes into NPO's AS, would be capable of handing over Internet traffic to the Notifying Party's Internet network AS6830.

(568) Regarding Ziggo, its internal documents showed that despite the fact that it had a more ad-hoc policy in terms of establishing peering and interconnection relationships shortly before the 2014 Transaction, it had been moving towards a policy that was in line with that of the Notifying Party. [...][317] The merger would cement that strategic shift of Ziggo as the Notifying Party's existing policy would apply to the merged entity.

(569) The Commission considered in the Conditional Clearance Decision that the Notifying Party's arguments as to why it would not be able to shut down or hamper the access of OTT service providers to its Internet network in such a manner, were not convincing.[318] Rather, explicit evidence to the contrary was found during the Commission's investigation:

(i) [Reference to the Parties' internal business documents][319]

---

317 Document ID366-8846, Ziggo presentation of February 2014, 'Internet interconnectie / peering' by Arie van der Giessen, slide 1. The Parties explained, in their reply to the Commission's decision initiating proceedings, that the document in question merely concerned an internal exploration on the different peering policies that would be available. The Commission however notes that Ziggo's CEO has similarly been reported to want data-intensive Internet services to pay for direct interconnection: http://www.nrc nl/nieuws/2014/03/08/nieuwe-topman-ziggo-netflix-mogelijk-vragen-om-extra-betaling [accessed at 25 July 2014].

318 In that regard, the Commission understands that by creating so-called Border Gateway Protocol communities, it even seems to be technically possible to exclude certain specific, individual Internet networks from having access to the Notifying Party's own Internet network (or only via less effective, congested interconnections or more costly ones), without having to physically congest any interconnections. BGP is also employed by the Notifying Party's Internet network to communicate with other Internet networks: Document ID2384, Liberty Global presentation 'M.7000: technical presentation', of 1 July 2014. See for an explanation on this issue: Alexander Reicher, *Redefining Net Neutrality after Comcast v. FCC*, Berkeley Technology Law Journal, Vol. 26:733, pp. 757 and 758; Christopher S. Yoo, *Innovations in the Internet's Architecture that Challenge the Status Quo*, J. on Telecomm. & High Tech. L. 79 (2010); Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: www.berec.europa.eu [as at 8 August 2014].

319 [Reference to the Parties' internal business documents].

(ii) [Reference to the Parties' internal business documents][320]

(iii) [Reference to the Parties' internal business documents][321]

(570) All of this evidence confirmed that the Parties had the *technical* ability to preclude or significantly hamper OTT competitors from having effective access to their respective Internet networks.

(571) Indeed, if the Notifying Party were to refrain from upgrading direct interconnection capacity with providers of transit services in line with increased Internet traffic levels, congestion could have occurred. Due to such congestion, providers of OTT audio visual services could then have been altogether foreclosed from effective access to the merged entity's broadband customers in the Netherlands, as it would eventually result in lost IP packets, that is to say parts of the requested Internet content would be lost.[322] Importantly, any such congestion would have likely be limited to peak time usage of OTT audio visual services and would not, in any case, affect the quality of the merged entity's broadband offer across the board. Indeed, the Commission considered in the Conditional Clearance Decision that first, given that the Notifying Party peered directly with Internet content providers such as [...][323], a foreclosure of providers of OTT audio visual services would leave these major Internet services [...] wholly unaffected. Second, the Commission considered that it seemed that the congestion on the merged entity's settlement-free direct interconnections with transit providers would only affect the direct paying customers of the transit providers in question, whose identity could be established through the public tools referred to in paragraph (567). Furthermore, the Notifying Party had confirmed that its own OTT service Horizon Online would be unaffected by such congestion.[324]

(572) The Commission considered in the Conditional Clearance Decision that the implications of a general strategy to restrict overall interconnection capacity that is available for OTT services and to force providers of such OTT services to rely on paid peering models under Dutch net neutrality rules had never been investigated in full by the competent Dutch authorities. In any event, evidence referred to in paragraphs (554) to (556) showed that [...].

(573) A number of respondents to the Commission's market investigation confirmed that finding. They indicated that insufficient interconnection capacity can affect, and in some cases had already affected the viability of OTT TV as a

---

320 [Reference to the Parties' internal business documents].

321 [Reference to the Parties' internal business documents].

322 See for an explanation on this issue, for example: Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 6 and 7. Available at: www.berec.europa.eu [as at 8 August 2014].

323 Document ID1623, Liberty Global submission 'Annex XVIII – List of direct peers', of 24 June 2014.

324 Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014, p. 9.

result of congestion, both in the Netherlands and abroad.[325] The majority of Pay TV retailers and a number of TV broadcasters confirmed that post-merger, the merged entity would be able to restrict OTT SVOD services in having effective access to its Internet network by technically degrading their quality.[326] The Commission considered that this technical ability compounded the merged entity's increased ability to hamper, delay or prevent OTT innovation by contractual means.

(574) Moreover, in internal business documents, the Notifying Party itself noted that […].[327]

(575) The Notifying Party has highlighted the fact that OTT providers can always reach consumers in the Netherlands via KPN's Internet access network. However, the Commission explained in the Conditional Clearance Decision that it had found indications that suggested that KPN's Internet network was then less suited to handle data-intensive OTT services than that of the merged entity. NPO had indicated that congestion occured on the last-mile of the DSL network, hampering the viability of large-scale OTT audio visual services.[328] CanalDigitaal pointed out that given the ongoing market trends towards bundled triple play services the DSL network had a competitive disadvantage since for it to carry a TV signal with an acceptable quality, comparable to the quality on cable, less bandwidth would be available on DSL for Internet access.[329]

(576) Under those circumstances, the Commission found that the risk of losing distribution on the merged entity's enlarged cable network combined with the possibility that an OTT TV service could not even effectively reach the single largest group of Dutch broadband customers was likely to severely limit content providers' prospects of successfully launching or contributing to OTT services.

(577) Therefore, the Commission found that the increased ability of the merged entity to restrict by contractual means the availability of OTT services in the Netherlands would be compounded by its technical ability to preclude or

---

325 Document ID1982, NPO's non-confidential email of 3 July 2014; Document ID2269, non-confidential minutes of conference call between Commission services and Fox International Channels, p. 3; Document ID1987, Netflix' non-confidential submission of 11 July 2014; Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: www.berec.europa.eu [as at 8 August 2014].

326 Replies to Phase I Questionnaire Q2 to TV channels wholesale suppliers of 17 March 2014, questions 69 and 70; replies to Phase I Questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 107 and 108.

327 [Reference to the Parties' internal business documents].

328 Document ID1982, NPO's non-confidential email of 3 July 2014.

329 Document ID845, M7 Group's reply to questionnaire Q3 to retailers of TV, telephony and Internet access services' of 17 March 2014, questions 30.1 and 37.1.

hamper OTT service providers from reaching their broadband customers over its Internet network.

Conclusion

(578) Therefore, the Commission concluded that the Transaction would confer upon the merged entity an increased degree of buyer power vis-à-vis TV broadcasters in the Netherlands. This would increase its ability to impose contractual terms on TV broadcasters that prevent, hamper or delay, by direct and indirect means, the OTT services that include those broadcasters' content. The increased ability to do so would be compounded by the fact that the Parties already have the technical means at their disposal to shut down or to degrade the access to their Internet networks, which these OTT services would need to reach the merged entity's broadband customers.

The incentive to prevent, hamper or delay OTT innovation

(579) The Commission considered in the Conditional Clearance Decision that preventing, hampering or delaying OTT innovation would reduce or eliminate the risk that such innovation would lead to cross-platform competition which might ultimately threaten cable companies' business model – a competitive threat which was well recognised in internal documents of the Parties, as outlined in paragraph (488).

(580) Based on the Parties' approach to OTT services described in section 6.4.3.2 of this decision, the Commission considered in the Conditional Clearance Decision that the Notifying Party then already had the incentive to try and prevent TV broadcasters from providing their linear and non-linear content OTT, either on a standalone basis or in cooperation with others, but that, pre-merger, it might be limited in its ability to do so. The different contractual clauses that Liberty Global had sought to negotiate in its contracts with TV broadcasters in order to restrict their ability to develop their OTT offers showed that the Notifying Party had a clear incentive to engage in such practices.

(581) Furthermore, the Commission considered in the Conditional Clearance Decision that the existing incentive would increase as a result of the Transaction. Since the successful foreclosure of competition from OTT services at the retail level would benefit all existing Pay TV services providers, Pay TV services providers have an incentive to free-ride on the foreclosure efforts of their competitors at the retail level (i.e. Ziggo did not need to engage in the same foreclosure efforts in order to benefit from any such effort that could be made by its competitors). As shown in the previous paragraph (568), Ziggo had been less assertive than Liberty Global in preventing or hampering OTT innovation which is consistent with such an effect. Indeed, prior to the Transaction, Ziggo would have benefited as an external third party competitor from any success that Liberty Global would have had in restricting OTT services overall. However, the proposed combination of Liberty Global and Ziggo would allow the merged entity to internalise the benefit to both parties of successful foreclosure of OTT services. That increases the incentive for the merged entity to engage in such foreclosure.

(582) The Commission therefore concluded in the Conditional Clearance Decision that the existing incentive for the Notifying Party to prevent or hamper OTT services was likely to increase as a result of the Transaction. In combination with the increased ability to prevent, hamper, or delay OTT innovation, and in light of the pre-merger approach by the Notifying Party towards OTT services, the Commission considered that the merged entity was likely to engage in strategies to prevent, hamper, or delay OTT innovation post-merger.

Likely negative effects on competition

(583) As set out in the Horizontal Merger Guidelines, the exercise of buyer power in an upstream market can adversely affect competition in a downstream market. That is particularly the case if the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals.

(584) The Commission considered in the Conditional Clearance Decision that the merged entity would indeed be likely to use its increased buyer power in the upstream market for the acquisition of Pay TV channels to foreclose its potential and existing competitors in the downstream market for the retail provision of Pay TV services, in particular, potential innovative OTT audio visual service providers.

(585) In this regard, the Commission considered first, that the increased ability of the merged entity to restrict TV broadcasters' possibilities to offer their content over the Internet was likely to result in a foreclosure of rival third party OTT audio visual service providers that could distribute that content to retail consumers. Those third parties included Smart TV providers such as Sony and Samsung, but also potential new aggregators of Internet content such as Netflix, Weepee NV[330] and others. These third parties would be precluded from having access to consumers on the retail market for Pay TV, restricting consumer choice on that market. Second, the Commission considered that TV broadcasters themselves could offer their content directly to consumers via the Internet. That concerned the OTT offerings that were available in the Netherlands, such as NLZiet and the individual OTT offers of TV broadcasters.

(586) Restrictions to that alternative distribution method for their TV content would ultimately cement the significant market power that the merged entity would hold vis-à-vis the TV broadcasters as the main distributor of their TV content in the Netherlands. That was likely to have negative effects on the upstream market for the acquisition of Pay TV channels.

(587) Importantly, OTT offers would introduce further competition and innovation into the retail market for Pay TV services. The merger was likely to prevent that from happening. That would have led to higher prices to Dutch consumers and deprive Dutch consumers of the benefits of innovation in the way they watch TV.

---

330 http://www.broadbandtvnews.com/2013/05/13/weepee-tv-looking-at-dutch-ott-market/ [accessed at 8 September 2014].

(588) The Commission considered in the Conditional Clearance Decision that the likely raising of barriers to entry to OTT competitors on the downstream market for the retail provision of Pay TV services was particularly relevant to the Netherlands, where significant developments in the provision of OTT TV services had already taken place. Indeed, the Commission noted that NPO had started streaming its linear TV channels, although in lower quality, that RTL had recently introduced a standalone OTT SVOD service and that Netflix had recently also entered the Netherlands, while RTL, SBS and NPO had jointly launched an OTT catch-up TV service.[331] That development was acknowledged by the Notifying Party, which noted the following: "*The use of OTT services has expanded rapidly and expectations are that this expansion will continue, to the detriment of 'traditional' video and television services offered by network operators such as UPC, Ziggo and KPN*".[332]

(589) If the merged entity were to succeed in preventing, hampering or delaying the OTT TV services of the seven TV broadcasters that the Commission analysed in the Conditional Clearance Decision (see paragraph (507) above), that would have already eliminated the potential OTT distribution of around 80% of all TV watched in the Netherlands.[333] If the merged entity were to succeed only in relation to RTL, SBS and NPO, that would have eliminated the potential OTT distribution of around 70% of all TV watched in the Netherlands.[334] As the Notifying Party itself noted in its internal business documents, OTT TV cannot constitute a viable alternative to traditional cable TV without those TV broadcasters' content and the Transaction was accordingly likely to prevent, hamper or delay OTT competition.

(590) The negative effects on competition would be felt beyond the merged entity's Internet subscribers alone. The Commission recalled in the Conditional Clearance Decision that the successful inclusion of an OTT ban in a carriage agreement between the merged entity and any TV broadcaster in the Netherlands would prevent that particular TV broadcaster from offering its content via the Internet network of every broadband retailer in the Netherlands and not just that of the merged entity, thereby affecting all broadband customers in the Netherlands, and would prevent TV broadcasters from offering their content directly to end consumers, thereby eliminating likely efficiencies that derived from such vertical integration. Such an OTT ban would accordingly eliminate any potential cross-platform competition on retail TV services between traditional 'cable' TV and OTT TV.

---

331 https://www nlziet.nl/ [accessed at 31 July 2014]; http://www npo.nl/live [accessed at 31 July 2014]; https://www.videoland.com/ [accessed at 31 July 2014]; https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10477&contentGroup=Company+Timeline [accessed at 31 July 2014].

332 Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraph 37.

333 Stichting KijkOnderzoek Jaarrapport 2013, available at: https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf.

334 Stichting KijkOnderzoek Jaarrapport 2013, available at: https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf.

(591) In the Conditional Clearance Decision the Commission considered that the effects of a successful imposition of a contractual ban on TV broadcasters' OTT activities could not, therefore, inherently, be off-set by the presence of the merged entity's competitors on the downstream market for the retail provision of fixed Internet access, such as KPN and the alternative operators on its network benefiting from wholesale access. The consequences of a contractual ban imposed by the largest provider of retail fixed Internet access services post-merger automatically extended to all competing providers of retail Pay TV services and retail fixed Internet access that would, post-merger, remain active in the market. Those remaining competitors would not, therefore, constitute a constraint on the negative effects on competition that would result from a foreclosure of existing and potential OTT TV competitors.

(592) Without the threat of potential increased cross-platform competition from OTT TV, the existing providers of retail Pay TV services would be less constrained in their price-setting. Given the degree of concentration that would exist on this relevant downstream market for the retail supply of TV services, or the hypothetical retail market for the retail supply of multiple play services, the elimination of potential or emerging competition from OTT services was all the more likely to lead to consumer harm.

6.4.3.3. Commission's assessment and conclusion in 2014

(593) Therefore, the Commission found that the Transaction was unlikely to be compatible with the internal market in that it was likely to significantly impede effective competition on the market for the acquisition of Pay TV channels, on the market for the retail provision of Pay TV services or on the hypothetical market for the retail provision of multiple play services.

6.4.3.4. The OTT Commitment in 2014

(594) In order to remove the significant impediment to effective competition in relation to OTT services, the Notifying Party had committed not to enter into or renew agreements with TV broadcasters that contained terms which would directly or indirectly restrict the TV broadcasters' ability to offer their channels and associated content via OTT services. This applied to any agreements with TV broadcasters for the distribution of those broadcasters' linear channels and catch-up TV services on the Liberty Global and Ziggo Pay TV Platform in the Netherlands. The Commitments made clear that the Notifying Party was not allowed to, directly or indirectly, restrict the ability of the broadcasters to offer, on a standalone basis or in partnership with a third party, OTT services in the Netherlands, or the ability of those broadcasters to offer their linear channels and any content owned or controlled by the TV broadcaster via such OTT services in the Netherlands. In addition, the Notifying Party offered commitments to ensure the effectiveness of the distribution of OTT content via NewZiggo's internet network. To that end, the Notifying Party sought to make it impossible to engage in a foreclosure capacity by committing to maintaining sufficient interconnection capacity towards NewZiggo's customers in the Netherlands by ensuring there are always at least three uncongested internet routes into the merged entity's IP network in the Netherlands. The commitment not to prohibit OTT distribution

of content would, in its entirety, be in force for a period of eight years following the date of adoption of the 2014 decision.

(595) In the 2014 decision, the Commission assessed whether the OTT Commitments were suitable and sufficient to eliminate the competition concerns; and capable of being implemented effectively within a short period of time.

(596) The Commission noted that the significant impediment to effective competition that would arise in relation to OTT services was a specific one. The Commission had found that the Dutch market for the acquisition of Pay TV channels was characterised by the existence of agreements that restricted or aimed to restrict TV broadcasters in their ability to offer their TV channels and associated content via the internet. The Commission had found that the Transaction would increase Liberty Global's ability and incentive to continue such restrictive agreements, or to have made them even more onerous. That would have deprived consumers in the Netherlands from innovations regarding the ways in which they can watch TV content over the internet. With the OTT Commitments, the Notifying Party effectively committed to terminate any agreement between it and TV broadcasters that related to the carriage of the TV broadcasters' linear and catch-up services on NewZiggo's Pay TV platform and which restricted their ability to offer their channels and content via an OTT service in the Netherlands. It also committed that NewZiggo would not enter into such agreements in the future. Against that background and in the context of the 2014 notification, the Commission considered that the effective termination of those agreements was a suitable and sufficient remedy to remove the significant impediment to effective competition. Taking into account the additional safeguards that ensure the viability and effectiveness of the OTT commitment, including maintaining sufficient interconnectivity capacity towards its Dutch internet customers, the Commission considered that the OTT Commitment was capable of being implemented effectively and immediately.

(597) Therefore, the Commission considered that the OTT Commitment was suitable and sufficient to eliminate the competition concerns expressed, according to which the Transaction would have resulted in a significant impediment to effective competition in relation to OTT Services.

6.4.3.5. The Notifying Parties' views in their Supplementary Notification

(598) The Notifying Parties submit that none of the current contracts with broadcasters contain restrictions on broadcasters' OTT offerings (or even clauses relating to broadcasters' OTT offerings), in line with the OTT commitments. Old contracts which previously contained such OTT restrictions have been amended via an addendum to ensure compliance with the OTT commitments.

(599) The Notifying Parties note in their Supplementary Notification that they have implemented the OTT commitment with all third parties based on their evolving understanding of it and are not aware that any conflicts have arisen in relation to the OTT commitment.

(600) The Notifying Parties state that during the course of 2015, the Parties worked internally and with the Monitoring Trustee to develop a practical understanding of the OTT Commitments and a process for securing necessary transparency. They largely reached agreement on key elements in June 2015. The Notifying Parties consider that since then, the Parties have continued to engage constructively with the Monitoring Trustee.

(601) The Notifying Parties further submit that the Parties cannot assess the impact of the OTT Commitment as there is no counterfactual to compare it with.

(602) Regarding the requirements on IP interconnect which flank the main commitment, the Notifying Party notes that the peering edge of the IP network serving Dutch customers is and always has been uncongested and that the aim of the IP interconnect requirement was to remove any ability for the Parties to congest this peering edge and so remove the incentive to try to do so.

(603) The Notifying Parties further submit that the Parties do not and would in any event never have any incentive to allow such congestion to happen as this would negatively impact its retail customers. This position would further have been strengthened by the entry into force of Regulation (EU) 2015/2120 concerning open internet access which considerably restricts any ability to manage internet traffic and ensures an open internet. According to the Notifying Party, the IP interconnect requirement has no impact on the Parties' actions or incentives.

6.4.3.6. Commission's assessment

(604) The Commission notes that, based on current market conditions, the Parties would appear to have a market share of approximately [50-60]% on the market for the acquisition of Pay TV channels in the Netherlands. The Transaction results in a very significant market share increment as absent the Transaction each of UPC and Ziggo would distribute Pay TV channels only within their respective footprint and, as a consequence, would also have individually much smaller market shares in the market for the acquisition of Pay TV channels.

(605) Given that the OTT commitments have been in force since the adoption of the 2014 decision, the Commission has assessed whether the OTT commitment was still necessary and, if so, for which period.[335]

[335] The Commission notes that in Section 7.5 of the Conditional Clearance Decision (*The market for the provision of retail fixed Internet access services- network access foreclosure*), the Commission assessed the concerns expressed during the market investigation that the proposed Transaction raised two distinct competition concerns that would stem exclusively from the increased size and importance of the merged entity's Internet network in the Netherlands: the first concern was that the merged entity would have the ability and the incentive to engage in Internet network access foreclosure vis-à-vis competing (OTT) providers of retail TV content, and the second was that the merged entity could leverage its position in the market for the retail provision of fixed Internet access vis-à-vis certain providers of data-intensive Internet content such as OTT audio visual services in order to force them to start paying for having access to its broadband customers. Having assessed these concerns, the Commission concluded that it did not need to conclude whether the proposed Transaction raised competition concerns as a result of the merged entity's increased share of the market for the retail

(606) A majority of respondents to the market investigation, wholesale suppliers of TV channels as well as retail providers of TV services, consider that, as a result of the merger, in the absence of the OTT remedy, the merged entity would have the ability to degrade the quality of OTT SVOD services in order to benefit the merged entity's own retail offerings.[336] In addition, a majority of them also considers that the merged entity would have the commercial incentive to degrade the quality of OTT SVOD services of Dutch broadcasters, in the absence of the OTT remedy[337].

(607) A majority of wholesale suppliers of TV channels also report that the OTT remedy has been helpful in their negotiations with the merged entity.[338]

(a) Fox Networks Group stated: "*UPC also required FNG to agree to discontinue its OTT-product, FOX Sports GO, in order to favour UPC's own Horizon service. After the OTT-service remedies were made binding, New Ziggo ceased this behaviour.*"

(b) RTL: "*This subject not to offer OTT was a topic in previous talks before the remedy was in place. As a result of the remedy this subject wasn't discussed again.*"

(c) Talpa TV: "*During the negotiation of the previous contract (January 2015- December 2017), VodafoneZiggo had sought to impose a clause that would have prohibited Talpa TV from distributing her linear TV channels on other OTT platforms. Because of the commitments on VodafoneZiggo in case M.7000, the clause was removed from the draft contract.*"

(608) In light of the above, the Commission concludes that the Transaction raises serious doubts as to its compatibility with the internal market as regards the market for the acquisition of Pay TV channels, the market for the retail provision of Pay TV services or the hypothetical market for the retail provision of multiple play services.

---

provision of fixed Internet access, given that the commitments entered into by the Notifying Party would eliminate any potential adverse effects on competition that could stem therefrom. Given that, in the present case, the Notifying Parties have submitted an OTT remedy again, the Commission considers that also in the present case it is not necessary to conclude whether the proposed Transaction raises competition concerns as a result of the merged entity's increased share of the market for the retail provision of fixed Internet access.

[336] Replies to Q2 to TV channel wholesale suppliers of 5 April 2018, question C.D.1; replies to Q3 to retailers of TV, telephony and Internet access services of 5 April 2018, question C.H.1..

[337] Replies from Q2 to TV channel wholesale suppliers of 5 April 2018, question C.D.2; replies to from Q3 to retailers of TV, telephony and Internet access services of 5 April 2018, question C.H.2.

[338] Replies from Q2 to TV channel wholesale suppliers of 5 April 2018, question C.D.4.

6.4.4. Ability and incentive of the Notifying Party to use its increased buyer power to foreclose TV broadcasters' competing content from having access to its Pay TV distribution platform

6.4.4.1. The Notifying Party's views in 2014

(609) In relation to the access of competing TV channel broadcasters to the merged entity's Pay TV platform, the Notifying Party claimed that it would be in the interest of the merged entity to distribute as much attractive content as possible and to be able to offer to consumers a wide ranging of channels. Hence there was no reason to assume that post-Transaction the incentive of the merged entity to foreclose TV channels from access to its TV platform would change.[339] The Notifying Party also noted that there was no correlation between the size and number of subscribers of a retail TV services provider and the number of channels offered by that provider.[340] The Notifying Party did not express a view on its ability or incentive to foreclose thematic TV channels in particular.

6.4.4.2. Commission's assessment in 2014

(610) In the Article 6(1)(c) decision, the Commission considered that the proposed Transaction raised serious doubts as to its compatibility with the internal market also to the extent that it may confer upon the merged entity an ability to engage in customer foreclosure in respect of TV broadcasters' new initiatives.[341]

(611) As established in recitals (258) to (275) of the Conditional Clearance Decision, the Commission considered it likely that the Notifying Party would, as a result of the proposed Transaction, enjoy significantly increased bargaining power vis-à-vis TV broadcasters. That conclusion was based on several of the Notifying Party's internal business documents and had been overwhelmingly confirmed by the respondents to the Commission's market investigation.

(612) According to the Notifying Party's own internal business documents, this increased buyer power [...].[342]

(613) During the Commission's in-depth market investigation, several respondents expressed their concern that the merged entity would be able to engage in customer foreclosure specifically in relation to TV broadcasters' (then) new

339 Form CO, paragraph 560.

340 Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraph 75.

341 Commission decision pursuant to Article 6(1)(c) of 8 May 2014 in case M.7000 – Liberty Global/Ziggo, paragraph 165.

342 [Reference to the Parties' internal business documents].

and existing thematic TV channels.[343] Thematic TV channels are linear TV channels that feature content revolving around one central theme such as, for example, nature, history, documentaries and cooking, or those that target a specific consumer group, such as women, men or children. Examples of thematic TV channels that then existed in the Netherlands were 24Kitchen, NPO Cultura, NPO Doc, RTL Crime, RTL Telekids and Comedy Central Family. Given that those thematic TV channels would depend largely on income derived from retail TV distributors, the largest portion of which would be accounted for by the merged entity, the latter would have the ability to determine their very existence. NPO for example indicated that it was obliged, under the Dutch Media Act, to spend all income received from 3rd parties on programming and that, accordingly, any decrease in the licence fee secured by NPO from TV distributors would directly influence the content it offered on its thematic TV channels, given that its costs would remain the same.[344] Fox similarly indicated that its thematic TV channels would not be able to survive in the long term without receiving income both from advertising as well as from licence fees.[345] RTL, in turn, explained that 93% of the income generated by its thematic TV channels RTL Lounge, RTL Crime and RTL Telekids was derived from licensing fees paid by TV distributors.[346] Given that the merged entity would account for at least [50-60]% of the overall expenditure on TV channels and [60-70]% of all TV subscribers in the Netherlands, TV broadcasters' thematic TV channels were unlikely to be able to survive in the long term without being carried by, and receiving a licence fee from, the former.

(614) Moreover, some of the respondents to the Commission's market investigation that had raised this particular concern also indicated that providing their new thematic TV channels OTT was not, at that time, a fully adequate alternative to being carried by Pay TV distributors. This would be due to the fact that the OTT market (*i.e.* the percentage of the overall TV audience that received its TV services OTT) was not yet sufficiently large to allow the advertising-based business model, while the price of OTT subscriptions would remain low.[347] The Commission however reiterated that the OTT market in the Netherlands had (then) recently (even as recent as June 2014, when NLZiet was launched) seen a number of major developments that suggested that this

---

343 Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014; Document ID1400, non-confidential response of SBS to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, questions 20.3.1 and 20.6; Document ID1989, non-confidential minutes of conference call between the Commission's services and NPO of 19 June 2014, paragraph 6; Non-confidential response of RTL to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 20.3;

344 Document ID1989, non-confidential minutes of conference call between the Commission's services and NPO of 19 June 2014, paragraph 6.

345 Non-confidential minutes of conference call between the Commission's services and Fox of 25 June 2014.

346 Document ID1741, non-confidential submission of RTL of 26 June 2014.

347 See, for example, Non-confidential submission of RTL of 23 June 2014.

market could become ever more interesting for advertisers and customers alike.

(615) The Commission further noted, as already stated in the section on the Notifying Party's increased ability to hamper OTT innovation of the Conditional Clearance Decision, that there was evidence suggesting that the Notifying Party already considered its ability to cease carrying TV broadcasters' thematic TV channels to constitute a serious threat.[348] [...].

(616) Those internal documents suggested that the Notifying Party already constituted an important partner to TV broadcasters' thematic TV channels but that those same channels, if popular with TV viewers, could constitute a competitive threat at the retail Pay TV level if one were not to carry them.

(617) Therefore, the Commission considered that the Notifying Party could well have the ability post-merger to determine which of the TV broadcasters' thematic TV channels would survive in the long run.

(618) Whether the merged entity was likely to have an incentive not to carry thematic TV channels depended on the attractiveness of the content offered and whether the content was in competition with the merged entity's own content. A successful thematic TV channel that did not compete with the Notifying Party's own content would constitute an enrichment of its Pay TV offering, possibly allowing it to attract additional subscribers or to move more of its subscribers to its premium subscriptions. Indeed, the Notifying Party noted in an internal business document [...].[349] However, the merged entity might have an incentive not to carry new thematic channels – thereby undermining TV broadcasters' business case for their launch or continuation – if such new channels competed with the merged entity's own content. Moreover, any post-merger ability to hamper thematic TV channels' viability could also help attain the Notifying Party's goal to prevent retail Pay TV competitors from obtaining exclusive carriage rights to such TV channels, as it mentioned in relation to [...].[350]

(619) Although the Parties' combined share of content ownership in the Netherlands then remained limited, the Notifying Party seemed to have a strategy whereby it aimed to integrate the wholesale supply of content and of TV channels with the retail distribution thereof.[351] As part of the proposed Transaction, the

---

348 [Reference to the Parties' internal business documents].

349 [Reference to the Parties' internal business documents].

350 [Reference to the Parties' internal business documents].

351 The Commission notes in this respect that the Notifying Party has recently acquired a 6.4% stake in ITV (Liberty Global press release of 17 July 2014, 'Liberty Global acquires a 6.4% stake in ITV, the leading commercial broadcaster in the United Kingdom), and is in the process of acquiring control over several important content production houses, including in the Netherlands (Cases No M.7282 - Liberty Global/Discovery/All3Media; No M.7194 - Liberty Global/Corelio/W&W/De Vijver Media).

Notifying Party would add Ziggo's thematic TV channel Xite[352] and Premium Pay TV channel HBO to its content portfolio and its incentive to foreclose competing TV channels from having access to its network was thus expected to increase in the future. While the Commission considered that further integration by the Notifying Party in the wholesale supply of content might provide it with an incentive to foreclose TV broadcasters' thematic TV channels from having access to its cable network in the future, the then limited content ownership implied that the merged entity's incentive to foreclose thematic TV channels was also likely to be limited immediately following the proposed Transaction.

(620) Moreover, significant developments had then recently taken place in the Netherlands that could contribute to the establishing of a successful alternative OTT route to customers for (thematic) TV channels. Amongst those were the launch of NLZiet, a major catch-up TV platform combining the content of the three largest TV broadcasters in the Netherlands, the launch of Netflix' OTT SVOD service and the launch of NPO's paid OTT service NPO Plus.

(621) Although those OTT developments then mainly revolved around VOD TV services, if such new services were successful they would provide different routes to customers and different models for distributing content. Over time, this was likely to undermine the merged entity's ability to prevent the emergence of new thematic TV channels.

(622) The Notifying Party had – as part of the proposed Transaction – entered into commitments vis-à-vis the Commission which aimed at removing any ability on the part of the Notifying Party to use its buyer power in the market for the acquisition of Pay TV channels in order to hamper OTT innovation. Those commitments would therefore leave TV broadcasters at liberty to further develop the OTT TV market. Importantly, the Commission understood that new thematic TV channels generally required time to develop and were not, therefore, expected to be profitable from the start. Fox for example indicated that when it launched its thematic TV channel 24Kitchen, it had to offer it for free to the large TV distributors in the Netherlands in order for it to get onto their networks.[353] Regardless of whether a fully-fledged linear OTT TV market eventually develops, the commitments entered into by the Notifying Party allowed TV broadcasters in the Netherlands to try and do so, without having to risk losing their existing business with the Notifying Party. The Commission considered that the mere possibility that TV broadcasters might for example start offering their existing and new thematic or non-thematic TV channels OTT directly after having concluded a carriage agreement for those TV channels with the Notifying Party, should confer a degree of leverage on those TV broadcasters. The Commission considered that the risk that certain (potentially) successful thematic TV channels became exclusively available

[352] Form CO, paragraph 187; Document ID1989, non-confidential minutes of conference call between the Commission's services and NPO of 19 June 2014.

[353] Non-confidential minutes of conference call between the Commission's services and Fox of 25 June 2014.

on TV broadcasters' OTT platforms should remove the Notifying Party's post-merger ability, and thereby its incentive, to foreclose them from having access to TV customers in the Netherlands.

6.4.4.3. Commission's assessment and conclusion in 2014

(623) The Commission considered that it did not need to conclude on whether the proposed Transaction gave rise to competition concerns as a result of any increased ability and (future) incentive on the part of the merged entity to engage in customer foreclosure vis-à-vis TV broadcasters competing thematic TV channels, given that the commitments entered into by the Notifying Party were likely to eliminate potential adverse effects on competition that could stem therefrom.[354]

6.4.4.4. The Notifying Parties' views in their Supplementary Notification

(624) In their Supplementary Notification, the Notifying Parties' set out the Commission's assessment and conclusion of the Conditional Clearance Decision.

6.4.4.5. Commission's assessment

(625) The Commission considers that it does not need to conclude on whether the Transaction gives rise to competition concerns as a result of any increased ability and (future) incentive on the part of the merged entity to engage in customer foreclosure[355] vis-à-vis TV broadcasters competing thematic TV channels, given that the commitments entered into by the Notifying Parties are likely to eliminate potential adverse effects on competition that could stem therefrom.

6.4.5. Ability and incentive of the Notifying Party post-merger to use its increased buyer power to foreclose its rivals in the retail market for the provision of Pay TV services

(626) in their responses to the first phase market investigation, responding providers of retail TV services considered that the merged entity would enjoy increased bargaining power vis-à-vis TV broadcasters that could, in turn, negatively affect the availability or cost of TV channels for them.[356] Based on those

[354] Conditional Clearance Decision, recital 424.

[355] In particular, this also applies to Fox Sports which is the only directly competing Premium Pay TV sports channel. First, the Commission notes that the merged entity has always been offering Fox Sports to its customers since the Transaction. Second, as explained in section 6.3, Fox Sports is carrying one of the most popular sports content in the Netherlands, the Dutch football league Eredivisie, at least until 2025, and possibly beyond given that Fox Sports entered into a joint venture with the Dutch football clubs in 2012. Therefore, it would not be in the interest of the merged entity to withhold Fox Sports' very attractive package of channels from its customers. Third, the commitments entered into by the Notifying Parties are likely to eliminate potential adverse effects on competition.

[356] Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 5 April 2018, question 65.

results, and in line with its Horizontal Merger Guidelines, the Commission considered in the Article 6(1)(c) decision that the proposed Transaction raised serious doubts as to its compatibility with the internal market as a result of the impact that an increase in the merged entity's bargaining power might have on the availability or cost of TV channels to rival providers of retail TV services in the Netherlands and whether this could significantly impact competition in the market for the retail provision of Pay TV services.[357]

6.4.5.1. The Notifying Party's views in 2014

(627) The Notifying Party argued that even if the proposed Transaction resulted in increased buyer power of the merged entity, there was no reason to believe that this would have an impact on the costs of competing providers of Pay TV services, which is often called a waterbed effect. That would require TV channel suppliers to seek to recoup any potential loss in revenue resulting from lower fees that the merged entity would be able to negotiate given its increased bargaining power vis-à-vis TV channel suppliers, by charging higher fees to competing TV services providers.

(628) First, the Notifying Party considered that there was no reason to believe that a reduction in the price that one TV services provider could negotiate would lead to an increase in the price to another TV services provider operating in the same territory. TV channel suppliers would in any event seek to maximise to the extent possible the income derived from each individual agreement with a given TV services provider and the incentive for TV channel providers to do so would not be affected by the proposed Transaction.[358] The bargaining power that TV channel suppliers enjoyed vis-à-vis other retailers of TV services would not increase as a result of the proposed Transaction thus preventing TV channel suppliers from charging increased fees in order to compensate any possible reduction in their revenue derived from the merged entity.[359] On the contrary, the Notifying Party argued that it cannot be excluded that a reduction in price might serve as a benchmark leading to a reduced price being offered to other TV service providers as well.[360] Second, the Notifying party considered that the conditions required for the waterbed effects to appear in economic theory models were very limited and unlikely to be satisfied in this case.

(629) As regards the possibility that the merged entity would foreclose downstream rivals from access to channels through exclusivity agreements with broadcasters, the Notifying Party submitted that neither Liberty Global nor Ziggo in general aimed at concluding exclusive distribution contracts with TV channel suppliers thus preventing competing TV services retailers from

---

357 The Article 6(1)(c) decision, paragraphs 168-173.

358 Form CO, paragraph 489.

359 Liberty Global response to the Article 6(1)(c) decision, paragraphs 16 and 79.

360 Form CO, paragraph 488; [Liberty Global economic submission prepared by Oxera, 21 May 2014, Section 6.2.3].

distributing certain channels. The Notifying Party claimed that the proposed Transaction would not increase the incentive of the merged entity to seek exclusivity over channels and that in any event pursuing such exclusivity would be feasible only if the merged entity could compensate the TV channel supplier for the revenues foregone from competing TV services retailers and at the same time gain sufficient advantage at retail level in the form of attracting extra customers in order to offset the extra cost related to obtaining exclusivity over the channels at hand.[361]

(630) The Notifying Party also claimed that seeking exclusivity over a channel that is relatively less important would make no sense as customers were unlikely to switch to the merged entity only to be able to follow a relatively less important channel that was available exclusively on the Liberty Global/Ziggo TV platform. Even if the merged entity could obtain exclusivity over one of the most popular or attractive channels it was not likely that a sufficient number of consumers would switch to Liberty Global/Ziggo to offset the extra costs of obtaining the channel exclusively. In addition the Notifying Party submitted that advertising revenues represented a very important part of the revenues generated by TV channel suppliers and they would expect a distributor seeking exclusivity over certain channels to pay substantially higher fees for exclusivity in order to compensate for the foregone advertising revenues thus making the cost for exclusivity unrealistically high.[362]

6.4.5.2. Commission's assessment in 2014

(631) During its in-depth investigation, the Commission first of all investigated whether the proposed Transaction was likely to increase the degree of buyer power that the Notifying Party would enjoy in the market for the acquisition of Pay TV channels in the Netherlands. As indicated in section 7.3.2 of the Conditional Clearance Decision, such an increase in bargaining power was likely to indeed ensue from the proposed Transaction, as evidenced by, amongst others, the Parties' internal business documents and the responses to the Commission's market investigation.

(632) The Commission therefore continued to investigate whether an increased buyer power on the part of the merged entity could (i) allow it to limit the availability of TV channels in the Netherlands by forcing TV broadcasters to conclude exclusivity agreements in return for increased license fees; or (ii) lead to TV broadcasters in the Netherlands charging higher fees to the merged entity's downstream competitors to an extent that a significant impediment to effective competition would arise in the downstream market via a waterbed effect.

(633) As regards point (i) of paragraph (632), the Commission noted that the TV broadcasters that responded to its in-depth market investigation unanimously indicated that they would not be able to operate profitably if their TV

361 Form CO, paragraphs 482, 483 and 484.

362 Liberty Global submission "Financial data on broadcasters", 24 June 2014.

channels were exclusively broadcast on the merged entity's cable network.[363] Any lost income ensuing from exclusivity would not be able to be off-set by an increased fee paid by the merged entity. Relying mainly on advertising income, SBS required its TV channels to have a national reach.[364] RTL also stated in that regard that, in order to remain economically viable, it would have to be able to reach 100% of Dutch households.[365] SBS further explained: "*In order to make a channel financially viable (based on an advertising model) a minimum coverage is required of at least 90% of the Dutch households. Thus advertisers would not choose a channel for their advertisements, if they were only to have access to only the merged entity's cable network (or generally anything lower than 90%). Thus, losing access to for example 20% of the viewer market would not amount to a linear decrease of advertising revenue, but probably with more than 40%*".[366] Commercial broadcasters such as SBS and RTL were accordingly unlikely to be able to concede to providing their content exclusively to the merged entity. Also, NPO's TV channels were subject to a 'must-carry' obligation for TV distributors in the Netherlands pursuant to the Dutch Media Act and could not, therefore, be the subject of an exclusivity arrangement.[367] Given that NPO, RTL and SBS together already accounted for around 70% of all TV viewed in the Netherlands[368], and given that the TV broadcasters that responded to the Commission's market investigation unanimously ruled out the possibility of licensing their TV channels exclusively to the merged entity, the Commission concluded that the merged entity was unlikely to have the ability to foreclose its downstream rivals by demanding exclusivity over TV broadcasters' channels.

(634) As regards point (ii) of paragraph (632), the Commission noted that a competitive concern based on a waterbed effect requires that the exercise of increased buyer power by the merged entity would lead to higher licence fees paid by downstream rivals, and that the negative effects on competition of higher costs for downstream rivals would outweigh the positive effect of lower licence fees paid by the merged entity.[369]

---

363 Responses to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.

364 Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014;

365 Non-confidential response of RTL to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 11.

366 Document ID1400, non-confidential response of SBS to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.1.

367 Document ID1424, non-confidential response of NPO to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.1.

368 Stichting KijkOnderzoek Jaarrapport 2013, available at: https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf.

369 A waterbed effect further requires that upstream cost reductions will affect downstream prices, that is it requires a degree of pass-through.

(635) The Commission noted, first, that the retailers which voiced concerns that they would be harmed as a result of increased bargaining power by the merged entity had not identified a clear mechanism of how this would arise. An argument that better terms for the merged entity would put retail rivals at a relative competitive disadvantage did not imply that rivals have to pay higher licence fees to broadcasters. Rather it could simply be the result of a pro-competitive effect of lower licence fees by the merged entity that does not affect the level of fees paid by rivals.

(636) Moreover, the Commission acknowledged that the argument that because broadcasters may receive lower licence fees from the merged entity, they would recoup those losses by extracting higher licence fees from the merged entity's downstream competitors was not convincing unless there was evidence for the mechanism through which this would arise. In particular, as pointed out by the Notifying Party, this argument did not answer the question why broadcasters, if they were in a position to negotiate higher licence fees from the merged entity's rivals post-merger, they could not use that ability to increase their revenues from those firms already pre-merger.

(637) The Commission noted that it was in theory conceivable that a merged entity that benefits from increased bargaining power would pay less for its inputs which allowed it to be more competitive on the downstream market and gain market share from rivals. That in turn could worsen the bargaining position of rivals and lead to an increase in their input prices if the lower market share implied that not concluding an agreement with suppliers becomes relatively more costly for rivals. Such an effect on rivals' cost could negatively affect competition in the downstream market.[370]

(638) However, in this case, the evidence collected during the market investigation did not allow the Commission to identify a specific mechanism by which the merged entity's increased buyer power would lead to higher licence fees for downstream rivals.[371] The market investigation did not produce convincing evidence that the merged entity's downstream competitors' bargaining position vis-à-vis TV broadcasters would materially deteriorate as a result of the Transaction so that TV broadcasters would be able to recoup some of their lost licence revenues from the merged entity's rivals. In fact, some evidence from the market investigation indicated that TV broadcasters that exclusively relied on licence fees would become more rather than less dependent on the merged entity's downstream rivals were the merged entity to lower its licence fee payments and that broadcasters would not be able to recoup reduced

370 Such an effect has been discussed in an economic paper (Inderst, R and TM Valetti (2011), Buyer Power and the 'Waterbed Effect', Journal of Industrial Economics, Volume LIX(1), pp1-20). In that paper, it is shown that the worsening of the bargaining position of rivals occurs, because not agreeing triggers a fixed cost to self-supply the input. As the rival's market share is reduced, the cost per unit of self-supply (including the fixed cost element) increases.

371 For example, there is also no evidence that the merger would affect the credibility of rivals' contingency plans in the absence of an agreement with broadcasters.

licence revenues from the merged entity by increasing licence fees to downstream rivals.[372]

(639) The Commission further noted that Fox' premium sport channel, which carried the live football rights to the Dutch premier league, the Eredivisie, was subject to a non-discrimination obligation imposed by the Dutch regulator, which required Fox to apply the same terms and conditions to all retail TV distributors in the Netherlands.[373] Any lost income derived from the merged entity could not, therefore, be recouped by Fox by charging higher, discriminatory prices to other TV retailers.

6.4.5.3. Commission's conclusion in 2014

(640) Following its in-depth investigation, the Commission considered that the Transaction would not significantly impede effective competition in so far as it is unlikely to confer upon the Notifying Party the ability and the incentive to engage in input foreclosure vis-à-vis its downstream rivals.

6.4.5.4. The Notifying Parties' views in their Supplementary Notification

(641) In their Supplementary Notification, the Notifying Parties' set out the Commission's assessment and conclusion of the Conditional Clearance Decision.

6.4.5.5. Commission's assessment

(642) The Commission notes that based on the results of the market investigation, the Transaction is likely to have increased the degree of buyer power that the Parties have enjoyed in the market for the acquisition of Pay TV channels in the Netherlands.[374]

(643) The Commission therefore assessed whether an increased buyer power on the part of the merged entity could (i) allow it to limit the availability of TV channels in the Netherlands by forcing TV broadcasters to conclude exclusivity agreements in return for increased license fees; or (ii) lead to TV broadcasters in the Netherlands charging higher fees to the merged entity's downstream competitors to an extent that the Transaction would raise serious doubts as to its compatibility with the internal market as a result of the impact in the downstream market via a waterbed effect.

---

[372] See, for example, Document ID1380, non-confidential response of BBC to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.1, question 11; Non-confidential minutes of conference call between the Commission's services and the BBC of 25 June 2014.

[373] Non-confidential minutes of conference call between the Commission's services and Fox of 25 June 2014.

[374] See Section 6.4.2 above.

(644) As regards point (i), the Commission considers that the merged entity is unlikely to have the ability to foreclose its downstream rivals by demanding exclusivity over TV broadcasters' channels, for the following reasons. First, broadcasters which responded to the market investigation indicated that it is important to have maximum reach to operate profitably. [375] For example Talpa TV noted: "*In general a wholesale supplier like Talpa TV needs to be featured on every possible network. Thus, the question whether or not a wholesale supplier must have access to a specific platform is somewhat arbitrary. Talpa TV wants a 100 percent coverage if possible, but would not be able to exploit its business model with less than approximately 90 to 95 percent coverage.*" RTL also emphasized that it was important "*to have a maximum reach*". Discovery noted: "*as basic pay channels we need to have a maximum reach and possibility to monetise our IP*." It remains therefore unlikely that commercial broadcasters would be able to concede to providing their content exclusively to the merged entity. Second, NPO's TV channels are still subject to a 'must-carry' obligation for TV distributors in the Netherlands pursuant to the Dutch Media Act and could not, therefore, be the subject of an exclusivity arrangement.[376] Together NPO, RTL and Talpa TV still today, as in 2014, together account for more than 70% of all TV channels viewed in the Netherlands.[377]

(645) As to the competitive concern based on a waterbed effect mentioned in point (ii), the market investigation has not brought to light any new fact that would lead the Commission to adopt a different conclusion in the present assessment. With regard to Fox Sports, the market investigation confirmed that Fox Sports Eredivisie channels are distributed on a non-discriminatory basis and therefore any lost income derived from the merged entity could not, therefore, be recouped by Fox by charging higher, discriminatory prices to other TV retailers.[378]

6.4.5.6. Overall conclusion

(646) Therefore, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of any possible ability and incentive on the part of the merged entity to, post-Transaction, engage in input foreclosure vis-à-vis its downstream rivals.

---

[375] Replies to questionnaire Q2 to TV channel wholesale suppliers of 5 April 2018, questions C.B.13 and C.B.14.

[376] Replies to questionnaire Q2 to TV channel wholesale suppliers of 5 April 2018, questions B.B.3.1 and C.B.14.

[377] Reply to RFI 5, question 3, providing the market shares for the top 20 most viewed TV channels in the Netherlands based on information from Stichting Kijk Onderzoek.

6.4.6. Ability and incentive of the Notifying Party post-merger to block TV broadcasters' Hybrid Broadcast Broadband TV signals

6.4.6.1. The Notifying Party's views in 2014

(647) The Notifying Party pointed out that the transmission of Hybrid Broadcast Broadband TV ("HbbTV") signals ('triggers') had been the subject of political discussions in the Netherlands and the Dutch government refrained from imposing a compulsory transmission of that technology.[379] The Notifying Party was also of the view that as a result of imposing an HbbTV standard, other more recent standards would be obstructed or jeopardised, leading to disproportionate costs.

(648) The Notifying Party also claimed that Ziggo did not apply a more liberal policy towards allowing HbbTV signals in its footprint than the Notifying Party. Accordingly, the Transaction would not affect the ability or the incentive of the merged entity to engage in the blocking of TV broadcasters' HbbTV signals on its network.[380]

6.4.6.2. Commission's assessment in 2014

(649) The Commission explained that certain specific internal business documents of the Parties had warranted an investigation into the possible effects of the Transaction on the merged entity's ability and incentive to block HbbTV signals on its network.

(650) The Commission's concern was mainly premised on the possible existence of a significant difference in the respective policies of the Notifying Party and of Ziggo on the carriage of HbbTV triggers.

(651) During the Commission's 2014 in-depth market investigation, however, evidence had been found that, neither the Notifying Party nor Ziggo, allowed HbbTV triggers in their respective cable network footprints in the Netherlands, while the Notifying Party seemed to have very recently altered its strict policy on allowing HbbTV triggers on its cable network, as it had in fact reached an agreement with NPO for the carriage of its HbbTV triggers relating to the TV channels Nederland 1, Nederland 2 and Nederland 3.[381]

6.4.6.3. Commission's conclusion in 2014

(652) The Commission concluded that, insofar as the merged entity may have the ability and the incentive to engage in the filtering out and blocking of TV

---

[379] Letter of the Dutch Ministry of Education, Culture and Science to parliament, entitled 'Rode Knop (Amendement/motie Van Dam-Huizing)' of 7 April 2014.

[380] Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraphs 149-151.

[381] http://www.upc.nl/klantenservice/uitleg/hbbtv/; http://www.broadbandtvnews.com/2014/08/08/upc-starts-hbbtv-distribution-for-npo-channels/; http://tweakers.net/nieuws/97714/upc-voorlopig-enige-grote-tv-aanbieder-met-hbbtv-ondersteuning.html.

broadcasters' HbbTV triggers, any such ability and incentive is not specific to the Transaction. This was particularly true given that the Notifying Party and Ziggo had both already engaged in such filtering out and blocking of HbbTV triggers in the past, while the former was the only of the large TV distributors in the Netherlands (encompassing KPN, Ziggo and UPC) to partly support this technology.

(653) Therefore, the Commission concluded that the Transaction would not significantly impede effective competition as a result of any possible ability and incentive on the part of the merged entity to, post-merger, refuse to carry HbbTV triggers on its network.

6.4.6.4. The Notifying Parties' views in their Supplementary Notification

(654) In their Supplementary Notification, the Notifying Parties' set out the Commission's assessment and conclusion without providing any particular view.

6.4.6.5. Commission's assessment

(655) The Commission considers that the Commission's assessment and conclusions still hold and that there have been no market developments capable of changing the Commission's assessment in 2014. The market investigation did not raise any elements that would cast doubt on this conclusion.

6.4.6.6. Overall conclusion

(656) Therefore, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of any possible ability and incentive on the part of the merged entity to, post-Transaction, refuse to carry HbbTV triggers on its network.

6.5. The markets for the retail provision of pay TV services, fixed Internet access services, fixed telephony services and multiple play services

6.5.1. Horizontal concerns – non-coordinated effects

6.5.1.1. The Notifying Party's views in 2014

(657) The Notifying Party submitted that no direct competition was taking place between the Notifying Party and Ziggo at retail level in the Netherlands, as the geographic footprint of their respective cable networks did not overlap. In light of this, no standard unilateral upward price effect could result from the Transaction as it did not allow the merged entity to capture customers that would, pre-merger, have switched between the two independent parties in the event of a unilateral price rise.

(658) The Notifying Party also submitted that there was no evidence for a theory of harm based on sequential pricing. Indeed, the merger could have led to a hypothetical price increase only if KPN was not the price leader who was systematically setting prices first and there was no evidence of such patterns.

In conclusion, according to the Notifying Party, there was no evidence of indirect competition between the Notifying Party and Ziggo.

(659) Finally, the Notifying Party noted that if any direct benchmarking between the Notifying Party and Ziggo that did not exceed simple commercial benchmarking aimed at monitoring, and possibly imitating, industry's best practices were to discontinue after the Transaction, this would have been unlikely to constitute a significant lessening of competition.

6.5.1.2. Commission's assessment in 2014

(660) The Commission first took into account the market shares of the merged entity and of its main competitors.

(661) The Commission noted that in Q3 2013 UPC and Ziggo had a combined market share of 56% by number of subscribers or [60-70]% by value in the retail supply of Pay TV services in the Netherlands. In the same market, KPN was the second largest retail TV operator with a market share of 25%, followed by CanalDigitaal with 10% and others with 10% including Tele2.

(662) In the market for the retail provision of fixed telephony services, UPC and Ziggo had a combined market share of 34% in Q4 2012 and 41% in Q3 2013. In the same market, KPN had a market share of 60% in Q4 2012 and 43% in Q3 2013. Tele2 had a market share of 5% and other smaller competitors a combined market share of 12% in Q3 2013.

(663) In referring to the market for the retail provision of fixed Internet access services, the Parties' combined market share was 42% in Q4 2012 and 43% in Q3 2013. In the same market, KPN had a market share of 43% in Q4 2012 and 41% in Q3 2013. Tele2 had a market share of 5% and other smaller competitors a combined market share of 11% in Q3 2013.

(664) In the hypothetical retail market for multiple play services, the combined market share of UPC and Ziggo amounted to between 65%-75% in Q2 of 2013 and to between 55%-65% in Q4 of 2013. On the same market, the second most important participant would be KPN with a market share of 30% and Tele2 with a market share of 3%.

(665) The Commission analysed the results of its investigation on retail markets jointly, given that Ziggo and the Notifying Party were active on all of the investigated retail markets and they often provided those retail services as part of multiple play packages. The Commission noted at the outset that the retail services were exclusively provided within the respective geographic footprints of UPC and Ziggo in the Netherlands, which did not overlap and that, accordingly, no direct customer switching could have taken place between them. UPC and Ziggo were, therefore, not exerting a direct competitive constraint on each other's prices.

(666) However, the Commission also assessed whether UPC and Ziggo, despite their different geographic footprints, still took account of each other's actions when making their commercial decisions. According to the Commission, this could have been done either directly, by benchmarking their pricing against each other, or via a mechanism that involves KPN as the nation-wide

competitor of both UPC and Ziggo. The Commission noted that UPC and Ziggo could have exercised on each other an indirect competitive constraint but that, in order to give rise to a significant impediment to effective competition, any existing indirect competitive pressure that would be removed as a result of the Transaction would have to be particularly strong.

(667) With reference to indirect competition between UPC and Ziggo, while the evidence indicated that the competitors on the Dutch retail market tended to closely monitor each other and responded to each other's promotional offers, the Commission concluded that insufficient evidence existed to suggest that this limited direct benchmarking between the Parties exceeded simple commercial benchmarking aimed at monitoring and possibly imitating best practices in the industry. Moreover, an analysis of retail prices did not indicate that price element changes in the Dutch retail telecommunications markets were consistently initiated by UPC or Ziggo, sufficiently close in time to each other and in the same sequence, as would have been required for the two undertakings to indirectly constrain each other via a sequential pricing mechanism that transmits price changes of one undertaking to the territory of the other via national price responses of KPN.

6.5.1.3. Commission's conclusion in 2014

(668) The Commission considered that the Transaction would not have significantly impeded effective competition as a result of any possible non-coordinated effects occurring in the retail markets for the provision of Pay TV, fixed Internet access, fixed telephony and multiple play services in the Netherlands.

6.5.1.4. The Notifying Parties' views in their Supplementary Notification

(669) The Notifying Parties submit that the current market circumstances demonstrate that the Transaction has not led and will not lead to a substantial impediment to effective competition in the retail markets for the provision of Pay TV, fixed Internet access, fixed telephony and multiple play services in the Netherlands.

(670) In relation to linear Basic Pay TV services (national and regional), according to the data provided by the Notifying Parties, in 2017 VodafoneZiggo had a footprint, based on homes connected, equal to [50-60]% and has lost market shares to KPN from the time of the Transaction (VodafoneZiggo went from 55% market share based on subscribers in 2014 to 53% in 2017 Q3 and KPN went from 27% in 2014 to 32% in 2017 Q3). Moreover, the Notifying Parties submitted that competition has increased since the Transaction.

(671) As for non-linear services (national), the Notifying Parties submit that the market has grown from 2013 to 2017 and that the market share of VodafoneZiggo based on revenues decreased from [40-50]% in 2013[382] to [20-30]% in 2017.

[382] This figure is based on PWC's retrospective update, on the basis of market input, of the estimates for previous years contained in the PWC's Media and Entertainment Outlook, on which Liberty Global relied in the 2014 Notification. At the time of the 2014 Notification, PWC estimated the total market to

(672) With reference to the market for fixed telephony services, the Notifying Parties submit that, under the current market circumstances, there remains a clear threat of entry and/or expansion by a number of smaller competitors. The Parties provide the example of the recent expansion of M7, KPN and EQT Infrastructure and they refer to the entry into the Dutch market for retail fixed telephony services of NLE in October 2016. Moreover, the absence of non-coordinated effects of the Transaction is underlined by the evolution of the market shares of the merged entity in the market for retail fixed telephony services. Indeed, the market shares have fundamentally remained stable.

(673) In referring to the market for retail Internet access, the Notifying Parties submit that the market share of the merged entity has essentially remained stable. Moreover, according to them, today significant competitive pressure is exerted by a clear threat of entry of and/or expansion by a number of smaller competitors (M7, KPN and EQT Infrastructure). The Notifying Parties also submit that the Transaction has not raised competition concerns as a result of NewZiggo's increased share of the market for the retail provision of fixed internet access. In any event, the commitments entered into following the 2014 Decision have eliminated any potential adverse effects on competition that could hypothetically have stemmed therefrom.

(674) With regard to the hypothetical market for the retail provision of multiple play services, the Notifying Parties submit that the current market circumstances demonstrate that the Transaction has not led and will not lead to a substantial impediment to effective competition in any hypothetical retail market for multiple play to end customers. According to them, the Transaction has not removed any competitive constraint from the potential market for multiple play and triple play services and, therefore, it has not led to any non-coordinated effects. The Notifying Parties also claim that the merged entity has not increased its market share as a result of the Transaction. Indeed, KPN continues to grow (from 23.6% in 2012 to 35.6% in 2017), while VodafoneZiggo's subscriptions for triple play have continued to decrease (from 65.3% in 2012 to 52.4%). Last, according to the Notifying Parties, the fact that VodafoneZiggo's market share has decreased notwithstanding the significant increase in multi-play bundles in the Netherlands demonstrates that there is competition on the market and that the Transaction has not led to any non-coordinated effects.

(675) The Notifying Parties concluded that they could not exercise a direct constraint on each other given that their respective geographic footprints in the Netherlands did not overlap and that the finding on indirect competition that the Commission made in the 2014 Decision should be re-stated.

(676) According to the Notifying Parties, the Commission's assessment on the absence of unilateral effects is demonstrated by the fact that VodafoneZiggo's market shares have generally remained the same or even decreased compared to 2014. If anything, according to the Notifying Parties, the market has become even more dynamic as a result of T-Mobile aggressively selling

---

be considerably larger (i.e. 97 million). With this figure, the market share of VodafoneZiggo in 2013 would be [20-30]%.

multiple play packages, Tele2 and T-Mobile pursuing unlimited mobile data propositions and CAIW and Delta joining forces.

6.5.1.5. Commission's assessment

(677) The Commission notes that, in the market for the retail supply of Pay TV services, in 2016, the Parties had a combined market share of 54% by number of subscribers and that VodafoneZiggo had a market share of 53% in Q3 2017, always by number of subscribers. KPN, the second biggest player in the market, had a market share of 31 % in 2016 by number of subscribers and a market share of 32% in Q3 2017, always by number of subscribers. KPN and LibertyZiggo are followed by CanalDigitaal that in the same time frames had a market share of 5% and 4% and other smaller player with a market share of 10% in 2016 and 11% in Q3 2017.

(678) Table 6 shows the evolution over time of the market shares of the Parties, VodafoneZiggo and the main competitors in the market for the retail supply of Pay TV services in terms of subscribers. According to the figures reported in Table 6, the merged entity has been losing market shares to KPN post-Transaction.

Table 6 - Market shares for retail TV distribution (subscribers)

	2011	2012	2013 Q3	2014	2015	2016	2017 Q3
VodafoneZiggo	-	-	-	-	-	-	53%
NewZiggo	-	-	-	55%	55%	54%	-
Ziggo	38%	36%	34%	34%	-	-	-
Liberty Global (UPC)	24%	22%	21%	20%	-	-	-
KPN	18%	23%	25%	27%	30%	31%	32%
Canal Digitaal	10%	10%	10%	10%	5%	5%	4%
Other	10%	9%	10%	8%	10%	10%	11%

Source: Form CO, p. 135

(679) In the market for the retail provision of fixed telephony services, in 2016, the Parties had a combined market share of 40% by number of subscribers and VodafoneZiggo had a market share of 41% in Q3 2017, always by number of subscribers. KPN had a market share of 42 % in 2016 by number of subscribers and the same market share in Q3 2017, always by number of subscribers. KPN and VodafoneZiggo are followed by Tele2 that in the same time frames had a market share of 5% and other smaller players with a market share of 13% in 2016 and 12% in Q3 2017.

(680) Table 7 shows the evolution over time of the market shares of the Parties, VodafoneZiggo and the main competitors in the market for the retail provision of fixed telephony services in terms of subscribers. According to the

figures reported in Table 7, the market share of the merged entity has remained stable post-Transaction.

Table 7 - Market shares for fixed telephony services (subscribers)

	2011	2012	2013	2014	2015	2016	2017 Q3
VodafoneZiggo	-	-	-	-	-	-	41%
NewZiggo	-	-	-	41%	40%	40%	-
Ziggo	23%	24%	25%	25%	-	-	-
UPC	15%	15%	16%	16%	-	-	-
KPN	48%	45%	43%	42%	43%	42%	42%
Tele2	6%	5%	5%	5%	5%	5%	5%
Other	8%	11%	12%	12%	13%	13%	12%

Source: Form CO, p. 135

(681) In the market for the retail provision of fixed Internet access services, in 2016, the Parties had a combined market share of 43% by number of subscribers and VodafoneZiggo had a market share of 44% in Q3 2017, always by number of subscribers. KPN had a market share of 40 % in 2016 by number of subscribers and a market share of 41% in Q3 2017, always by number of subscribers. KPN and VodafoneZiggo are followed by Tele2 that in the same time frames had a market share of 4% and other smaller players with a market share of 13% in 2016 and 11% in Q3 2017.

(682) Table 8 shows the evolution over time of the market shares of the Parties, VodafoneZiggo and the main competitors in the market for the retail provision of fixed Internet access services in terms of subscribers. According to the figures reported in Table 8, the market share of the merged entity has remained stable post-Transaction.

Table 8 - Market shares for fixed Internet access services (subscribers)

	2011	2012	2013	2014	2015	2016	2017 Q3
VodafoneZiggo	-	-	-	-	-	-	44%
NewZiggo	-	-	-	44%	43%	43%	-
Ziggo	24%	27%	27%	28%	-	-	-
UPC	12%	15%	16%	16%	-	-	-
KPN	45%	43%	41%	40%	41%	40%	41%
Tele2	7%	6%	5%	5%	4%	4%	4%
Other	11%	8%	11%	11%	12%	13%	11%

Source: Form CO, p. 136

(683) In 2016, the Parties had a combined market share of 52.4% by number of fixed triple play subscriptions and VodafoneZiggo had the same market share in Q3 2017, always by number of fixed triple play subscriptions. KPN had a market share of 35.9% in 2016 and a market share of 35.6% in Q3 2017. KPN and VodafoneZiggo are followed by Tele2 that in the same time frames had a market share of 2.6% and other smaller players with a market share of 9.3% in 2016 and 9.4% in Q3 2017.

(684) Table 9 shows the evolution over time of the market shares of the Parties, VodafoneZiggo and the main competitors in the market for the retail provision of fixed triple play subscriptions in terms of subscribers. According to the figures reported in Table 9, the market share of the merged entity has decreased post-Transaction, while there has been an increase of KPN's market share in the same market.

Table 9 - Market shares for fixed triple play (subscribers)

	2012 Q3	2013 Q3	2014	2015	2016 Q4	2017 Q3
VodafoneZiggo	-	-	-	-	-	52.4%
NewZiggo	-	-	57.4%	53.6%	52.4%	-
UPC	25.3%	24.2%	22.4%	-	-	-
Ziggo	40.0%	37.4%	35.0%	-	-	-
UPC/Ziggo	65.3%	61.6%	-	-	-	-
KPN	23.6%	29.5%	31.8%	35%	35.9%	35.6%
Tele2	3.4%	3.0%	2.4%	2.3%	2.6%	2.6%
Other	7.7%	5.9%	8.4%	9.1%	9.3%	9.4%

Source: Form CO, p. 136

(685) The Commission also notes that the merged entity has been losing market shares to KPN in the period from 2014 to 2017 in the market for Pay TV services. Moreover, their market share remained stable in the market for fixed telephony services and for retail internet access and, in the hypothetical market for the retail provision of multiple play services, VodafoneZiggo lost market shares notwithstanding the significant increase in multi-play bundles in the Netherlands.

(686) The market investigation has highlighted that one market participant considered that the Notifying Parties were not competitors pre-Transaction due to their different footprints.[383] One market participant underlined that VodafoneZiggo is currently the largest provider of retail services and submitted that the position of the cable operator improved significantly due to its increased scale.[384] The market investigation confirmed that KPN and VodafoneZiggo are the two biggest players in all the retail markets.

(687) The market investigation has also indicated that one market player is concerned that the Transaction paved the way for the merger between Liberty Global and Vodafone and so strengthened the dominance of the market for multi-play offerings by just two players – KPN and VodafoneZiggo. Moreover, the same market player is also concerned that the Transaction will reinforce the market structure in which two large players dominate the provision of fixed line services, with implications for related markets such as the supply of retail mobile services in the Netherlands. According to the respondents to the market investigation, neither VodafoneZiggo nor KPN will have an incentive to challenge each other post-Transaction; they will both benefit from increasing prices and will have no incentive to invest materially in infrastructure. Without robust measures being taken, third parties will not be able to exert any meaningful competitive pressure on these providers.[385]

(688) According to the Horizontal Merger Guidelines[386], a merger can have a negative impact due to a reduction in key competitive pressure on one or more providers who would acquire, or benefit from increased market power. If, for instance, one of the companies to be merged increased its prices prior to the merger, it would have lost turnover to a certain extent to the other undertaking to be merged. The merger removes that competitive pressure, which could serve as an incentive for the new undertaking to increase prices. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that thus results from the merger since the merging firms' price increase may switch some demand to the rival firms which, in turn, may find it profitable to increase their own prices.[387] If that is the case, the merger

[383] Reply to Q3 to retailers.of 5 April 2018, question C.D.9.

[384] Reply to Q3 to retail providers of TV services, question C.F.4.

[385] Reply to Q3 to retail providers of TV services of 5 April 2018, question C.E.5. and D.1.

[386] Horizontal Merger Guidelines, paragraph 24.

[387] Ibid.

results in so-called non-coordinated effects. Although a merger giving rise to non-coordinated effects typically creates or strengthens a dominant position in the relevant markets, that is not the only situation in which such effects can arise. Mergers in oligopolistic markets involving the elimination of important constraints that the Parties previously exerted on each other, together with a reduction of competitive pressure on the remaining competitors, may also result in a significant impediment to effective competition.[388]

(689) The Commission notes that the retail services are exclusively provided within the Parties' respective geographic footprints in the Netherlands, which do not overlap. Accordingly, no direct customer switching can take place between the Parties. As a consequence, the Parties are not in direct competition with one another and the Transaction does not lead to the elimination of a direct competitive constraint between the Parties.

(690) The Commission has also assessed whether the Parties, despite their different geographic footprints, still take account of each other's actions when making their commercial decisions. This could either be done directly, by benchmarking their pricing against each other, or via a mechanism that involves KPN as the nation-wide competitor of both Parties. If such indirect constraints are significant, constituting 'key' competitive pressure, the Transaction, which would remove such an indirect pricing constraint between the Parties and on the remaining competitors, could result in negative competitive effects even if direct customer switching between Liberty Global and Ziggo is not possible. However, the Commission recognizes that in order to give rise to a significant impediment to effective competition, any existing indirect competitive pressure that would be removed as a result of the Transaction would have to be particularly strong.

(691) For the Transaction to potentially lead to non-coordinated price increases due to the elimination of an indirect competitive constraint between the Parties, a systematic mechanism through for this constraint should be identified. In particular, firms need to act sequentially, and one of the cable operators must act as a price leader. The leader's price is subsequently transmitted via KPN to the other cable operator thereby exerting an indirect constraint on the other cable operator. That indirect constraint would be eliminated by the merger.

(692) It should hence be established that firms in the retail TV, Internet and telephony markets revisit the same price elements in a recurring, consistent sequence. Price changes should also occur sufficiently close in time, as it would otherwise be impossible to discern whether any firm consistently moves first thereby initiating a recurring sequence of price changes and they should take place consistently between the Notifying Parties and KPN.

(693) In the absence of clear evidence of such sequential pricing, firms' static pricing incentives are typically analysed on the assumption that they set their prices simultaneously, that is to say based on what they expect others to do rather than on their rivals' actual choices. In a simultaneous price-setting model the lack of direct competition occurring between two regional players

[388] Horizontal Merger Guidelines, paragraph 25.

whose respective footprints do not overlap necessarily implies that a merger between such regional players does not generate non-coordinated effects. In other words, non-coordinated effects in case of lack of direct competition could occur only in cases where the markets are characterized by sequential pricing. In all other circumstances, firms are expected to set prices independently and unilateral effects cannot arise.

(694) As noted in paragraph (667) the Commission found in 2014 that, while the evidence indicated that the competitors on the Dutch retail market tended to closely monitor each other and responded to each other's promotional offers, insufficient evidence existed to suggest that this limited direct benchmarking between the Parties exceeded simple commercial benchmarking aimed at monitoring and possibly imitating best practices in the industry. Moreover, an analysis of retail prices did not indicate that price element changes in the Dutch retail telecommunications markets were consistently initiated by UPC or Ziggo, sufficiently close in time to each other and in the same sequence, as would have been required for the two firms to indirectly constrain each other via a sequential pricing mechanism that transmits price changes of one firm to the territory of the other via national price responses of KPN.

(695) The Commission considers that the reasoning above still holds and that there have been no market developments capable of changing the Commission's assessment in 2014. [389]

6.5.1.6. Overall conclusion

(696) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards non-coordinated effects in the market for the retail provision of pay TV services, retail provision of fixed telephony services, retail provision of fixed internet access and multi-play and triple play services in the Netherlands.

6.5.2. Horizontal concerns – coordinated effects

6.5.2.1. The Notifying Party's views in 2014

(697) The Notifying Party submitted that the Transaction could not give rise to coordinated effects on the markets for the retail provision of TV, fixed and mobile telephony and Internet access, and on the possible market for multiple play products.

(698) First, the Notifying Party argued that the Transaction would not increase the ability to coordinate as the number of competitors on the market would not be reduced as a result of the merger.

(699) Second, the Notifying Party submitted that the Airtours criteria were not met in any of the markets being considered.

[389] Moreover, as UPC and Ziggo were operating as one entity since 2014, the Commission's 2014 analysis of the sequence of retail prices cannot be updated.

(700) According to the Notifying Party, there was a high degree of differentiation between the offers provided by KPN and by the Notifying Party; the market for the retail provision of TV services had not been stable; and the respective infrastructure and associated cost-base employed by the two main competitors were different in a number of respects.

(701) The Notifying Party also pointed to current and future smaller, innovative competitors, which would maintain an external competitive pressure on the main competitors.

(702) The Notifying Party contested the credibility of there being a deterrent mechanism.

6.5.2.2. Commission's assessment in 2014

(703) The Commission underlined at the outset that the Transaction involved a combination of two firms whose physical cable networks did not overlap geographically. Indeed, even if the market was defined as national, in practice the ability of KPN and NewZiggo to coordinate was limited within their networks.

(704) In relation to the ability to reach terms of coordination, the Commission first noted that the Dutch retail markets seem to be moving towards multiple play, and considered that given that KPN, Ziggo and UPC all already offered roughly the same types of bundled services, the Transaction was not likely to alter the degree to which those bundles' price points could constitute effective focal points for coordination.

(705) The Commission also noted that, in terms of market shares, the increased symmetry in the broadband and fixed telephony markets did not significantly increase the firms' ability to reach terms of coordination across retail markets, also in light of the lack of evidence of non-coordinated effects arising in all those markets as a result of the Transaction.

(706) The Commission concluded that the Transaction was not likely to significantly alter or improve any existing ability of firms to reach terms of coordination in the retail markets in the Netherlands by virtue of the: (i) non overlapping network footprints; (ii) lack of evidence of either party operating very aggressively on any of the Dutch retail markets; (iii) lack of evidence of significant differences in their cost structures; (iv) existing cooperation through several industry bodies and; (v) cross-shareholding of 28.5% (Liberty Global being the largest minority shareholder in Ziggo at the time).

(707) In relation to deterrent mechanisms, the Commission considered that the Transaction could not be considered to be likely to enhance the availability and/or efficiency of deterrent mechanisms. The Commission also noted that UPC and Ziggo did not seem to be asymmetrical in such a way that the Transaction could provide the merged entity with additional or enhanced retaliatory measures. The Commission's key arguments were that; (i) UPC and Ziggo’s activities were already exactly the same and, therefore, the Transaction did not increase the number of markets in which Liberty Global could, post-merger, retaliate against diverging behaviour; and (ii) UPC and Ziggo used the same technology and were both in the process of upgrading

their network technology, meaning that the Notifying Party was not likely to have an enhanced ability to retaliate by implementation of technology upgrades of its network.

(708) In relation to the transparency of the markets and ability to monitor deviations, the Commission noted that some characteristics of the retail market for TV services, fixed telephony, Internet access and multi play services seemed to make it conducive to coordination. The Commission concluded that the Dutch retail Pay TV, broadband, fixed telephony and multiple play markets were characterised by a degree of transparency that could have allowed firms to monitor deviations from coordinated behaviour. However, since there was no evidence to suggest that the Transaction would have materially changed the existing degree of transparency of those markets, the Commission considered that any possible impact of the Transaction on transparency would have not significantly altered firms' existing ability to monitor deviations.

(709) In relation to the reaction of outsiders, the Commission noted that several alternative operators to KPN, UPC and Ziggo were active on a more or less national basis in the Dutch markets for the provision of retail services. Given that those alternative operators did not rely on either the Notifying Party or Ziggo for having access to those markets, the Commission considered that neither their technical ability nor their incentive to distort coordinated behaviour would have changed as a result of the Transaction.

(710) In 2014 the Commission concluded that, although there were many elements suggesting that the Dutch retail Pay TV, broadband, fixed telephony and multiple play could be conducive to coordination, it was not necessary for the Commission to conclude on the precise degree to which that was the case since there was not sufficient evidence to conclude that the Transaction could create the conditions for coordination or make coordination easier, more stable or more effective.

6.5.2.3. *The assessment of coordinated effects in case M.7978*

(711) In 2016, the Commission assessed the possibility that the joint venture between Vodafone and Ziggo could make coordination with KPN more likely, more effective and more sustainable in the retail markets affected by the transaction.

(712) In relation to the ability to reach terms of coordination and focal point of coordination, the Commission noted that there were a number of factors that made the possible markets for fixed triple play and fixed-mobile quadruple play more conducive for coordination.

(713) The Commission first highlighted the fact that the market shares of KPN and Ziggo in all retail markets for standalone fixed services were already broadly similar pre-transaction (TV services being less symmetric) and that, therefore, the transaction had not led to any significant increase of the symmetry on these markets. The Commission, however, also noted that the positions of KPN and Ziggo were far less symmetrical on the fixed triple play market and that, through the transaction, the symmetry would increase. Moreover, the

symmetry between KPN and Ziggo would have increased, post-merger, also in relation to fixed-mobile quadruple play market.

(714) With reference to the focal point for coordinated behaviour, the Commission noted that, notwithstanding the existence of a certain level of product (and pricing) differentiation, market shares and related customer churn figures could constitute an effective focal point for possible coordination. The Commission also noted that the market for fixed-mobile bundles was still growing and unstable and, therefore, it was doubtful whether the merged entity would have had an incentive to establish coordination with KPN. Moreover, there was no evidence of past coordination or proof of plans of such coordination.

(715) In relation to transparency and ability to monitor deviations, the Commission considered that the market was characterized by a certain degree of transparency but that there was no evidence suggesting that the transaction would have significantly altered the degree of transparency of the market existing at the time.

(716) As to the existence of a deterrent mechanism, the Commission held that no evidence was gathered to support the conclusion that the transaction could enhance the availability and/or efficiency of deterrent mechanisms and the scope of retaliation.

(717) In referring to the reactions of outsiders, the Commission noted that there were outsiders (Tele2 and M7) active in the markets for the retail provision of internet access, fixed telephony, TV services and multiple play services and that those operators did not rely on either Vodafone or Ziggo for having access to the markets. Indeed, those operators were able to compete on the markets for the retail provision of fixed telephony, fixed Internet access and TV services through access to KPN's network, which is guaranteed through ex ante regulation. In light of the above, the joint venture between Vodafone and Ziggo would neither have changed the ability nor the incentive of outsiders to disrupt coordinated behaviour.

6.5.2.4. The Notifying Parties' views in their Supplementary Notification

(718) The Notifying Parties submit that current market circumstances confirm the conclusions of the Commission that the Transaction has not led to any coordinated effects on any of the retail markets and that no such effects currently occur, regardless of the question whether these markets are conducive to coordination.

(719) In relation to the ability to reach terms of coordination, the Notifying Parties first note that, in the VodafoneZiggo 2016 decision, the Commission confirmed that the combination of Vodafone’s Dutch business and NewZiggo would not result in coordinated effects. According to the Notifying Parties, since then, the market dynamics have not altered significantly so as to increase any risk of coordinated effects.

(720) In terms of the likelihood of elimination of destabilising factors, the Notifying Parties submit that the fact that the Transaction has not enabled KPN and VodafoneZiggo to eliminate destabilising factors in the market is proven by

the fact that competition on the retail markets has only become more dynamic. According to the Notifying Parties, (i) the number of market players that enter the market on the basis of a commercial agreement for wholesale broadband access (WBA) with KPN continues to grow; (ii) increased competition is also exerted by mobile players, which can offer a (near) substitute; (iii) T-Mobile and Tele2 are also positioning themselves on the market with competitive multi-play offerings; (iv) Delta and CAIW have joined forces as of January 2018.

(721) In terms of the degree of symmetry between market shares, the Notifying Parties submit that current market conditions confirm the Commission's conclusion in the 2014 Decision that the increased asymmetry in terms of market shares in the Pay TV and hypothetical multi-play markets rendered it unlikely that any potential increased symmetry in the broadband and fixed telephony markets would significantly increase the firms' ability to reach terms of coordination across those retail markets. According to the Parties, relevant in this respect is the lack of evidence of non-coordinated effects arising in all those markets as a result of the concentration. The Notifying Parties, moreover, refer to the Commission's assessment in the 2014 Decision according to which the Transaction would not lead to higher stability on the market due to the elimination of aggressive competitive force.

(722) In relation to transparency of the markets and ability to monitor deviations, the Notifying Parties submit that they are not aware of any evidence to suggest that the Transaction would have increased the degree of transparency on the retail markets since 2014 and therefore the Transaction has not significantly improved the ability pre-Transaction to monitor deviations of coordination in the market.

(723) According to the Notifying Parties, the degree of transparency on the retail markets has actually decreased and this has also been confirmed by the ACM. Moreover, the Notifying Parties are of the view that under the current market conditions it would be impossible to reach an agreement with KPN or monitor a tacit agreement due to the increased complexity of the product offerings (in terms of products that are being offered and prices).

(724) In relation to deterrent mechanisms, the Notifying Parties argue that the conclusion reached by the Commission in the 2014 Decision, according to which Liberty Global and Ziggo were not sufficiently asymmetrical for the Transaction to enhance the availability and/or efficiency of deterrent mechanisms, still holds.

(725) In relation to reactions from outsiders, the Notifying Parties submit that the alternative operators identified by the Commission in the 2014 Decision do not rely on the combined business brought about by the Transaction for having access to any of the retail markets. Therefore, neither the technical ability nor the incentive to resort to coordinated behaviour has changed as a result of Transaction.

(726) The Notifying Parties also submit that to the extent that some players are dependent on access to KPN's network, the unbundled local loop access obligation continues to be imposed on KPN and access to KPN's fibre (FttH) network is also guaranteed. Moreover, KPN continues to provide commercial

wholesale arrangements on a significant scale. Finally, the Notifying Parties submit that the competitive pressure exerted by OTT players on retail TV services have since 2014 only increased further.

6.5.2.5. Results of the market investigation

(727) During the market investigation, the Commission received some negative replies about the possible anti-competitive coordinated effects arising from the Transaction and a more articulated complaint from one market player.

(728) According to this market player, which presented more articulated submissions, first, the Transaction transformed the Dutch telecommunications market from an asymmetric competitive landscape into a highly symmetrical duopoly. Pre-Transaction, there was one player with nation-wide coverage and two non-overlapping regional networks. Post-Transaction, there would be only two fixed network operators, both with nation-wide networks.[390]

(729) According to the complainant, the situation described above would have given rise, post-2014, to significant price increases and, by contributing to the creation of a symmetric duopoly of fixed and mobile network operators at the national level and by reducing the number of players required for coordination from three to two, the Transaction triggered coordinated effects on the Dutch market.[391] In contrast, looking at product level data before 2014 would not indicate any price parallelism.

(730) Finally, according to this complainant, the Transaction would have caused a decrease in the investment in network development on the part of the merged entity.[392]

6.5.2.6. Commission's assessment

(731) As set out in the case law[393] and the Horizontal Merger Guidelines,[394] to find coordinated effects evidence is needed that the horizontal merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also

[390] Submission of T-Mobile Netherlands dated 16 April 2018.

[391] Ibid.

[392] Submission of T-Mobile Netherlands dated 27 April 2018.

[393] Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECRI-4951, and in particular paragraphs 122-123 regarding the conditions for tacit coordination;; Case T-342/99, *Airtours v Commission* [2002] ECR II-2585, and in particular paragraphs 58 and 82 regarding the fact that "[i]*f there is no significant change in the level of competition obtaining previously, the merger should be approved because it does not restrict competition*".

[394] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 05.02.2004, p.5), (the "Horizontal Merger Guidelines"), paragraphs 22, 39 et seq.

make coordinationeasier, more stable or more effective for firms which were coordinating prior to the merger.[395] The Commission will therefore asses the changes brought about by the merger. The analysis will include an assessment of: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations from the terms of coordination; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reaction of outsiders such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.

(732) However, before turning to these standard elements relevant for the assessment of coordinated effects under current market conditions, it is first useful to discuss the situation that would exist absent the Transaction in light of developments since 2014, in particular the creation of the VodafoneZiggo joint venture in 2016.

(733) As a second preliminary step, the Commission will then examine the consequences for the assessment of coordinated effects of the specific feature that the present Transaction combines two firms that are not in direct competition for retail customers with each other as they are active in distinct non-overlapping areas within the national market corresponding to the footprint of their respective fixed network areas.

The situation absent the Transaction

(734) The reassessment of the Transaction under current market conditions has to take account of the fact that, in 2016, the Notifying Parties set up a joint venture, which combined the respective businesses of UPC/Ziggo and the (primarily mobile) operator Vodafone in the Netherlands, which was cleared by the Commission subject to the divestment of Vodafone's fixed business. That transaction therefore led to the creation of an operator (VodafoneZiggo) which, similarly to KPN, owns both fixed and mobile networks. This might have potentially led to an increased coordination between the two operators owing nation-wide fixed and mobile networks.

(735) As mentioned at paragraphs (711) to (717) above, the Commission thoroughly assessed the potential coordinated effects stemming from the creation of the joint venture and dismissed such concerns because the transaction did not significantly alter any of the factors generally considered conducive to coordination.[396]

(736) These conclusions concerning the addition of Vodafone's mobile network to the Parties' fixed network apply *a fortiori* to the present case, which concerns the combination of two regional non-overlapping fixed networks into a single near nation-wide one. Indeed, the existence of an already unified fixed network was taken into account in the Commission's assessment of the

[395] Ibid., paragraph 22(b).

[396] See Commission decision of 03.08.2016, in case M.7978, *Vodafone/Liberty Global/Dutch JV*, paragraph 629 et seq.

VodafoneZiggo joint venture in 2016, which – as mentioned – excluded the presence of any significant evidence of past coordination (including following the combination of UPC and Ziggo) or increased risk of future coordination.

(737) When assessing the Transaction under current market conditions, the Commission will account for the formation of the VodafoneZiggo joint venture by considering that, in the absence of the Transaction, each of UPC and Ziggo is present in the market as a mobile operator owning its own mobile network but is offering fixed services (or fixed-mobile bundles) only within the respective (non-overlapping) footprint of its fixed infrastructure.

Combination of non-overlapping network areas through the Transaction

(738) The non-overlapping nature of the UPC and Ziggo's respective fixed infrastructures remains a key relevant fact for the assessment. It implies that the UPC and Ziggo are not directly competing in the provision of fixed products or fixed-mobile products to retail customers and distinguishes the assessment of the Transaction from that of standard horizontal mergers which eliminate direct competition between the merging firms.

(739) Due to this central feature, the Transaction does not reduce the number of firms that would need to take part in a hypothetical coordination scheme in each of the Parties' network area, nor does it affect the number or identity of outsiders that could disrupt such coordination. Absent the Transaction, each of the merging parties would need to coordinate with its main competitor, KPN, in its respective fixed network area, subject to the competitive constraint exerted by outsiders (which, in each case, do not include the other merging party). In other words, a hypothetical coordination scheme would, in each of UPC's and Ziggo's respective fixed network area, involve two firms. Post-Transaction, a hypothetical coordination would also involve two firms, i.e. the merged entity and KPN, subject to the competitive constraint exerted by the same outsiders. The main difference is that post-Transaction, there is the potential of having a single two-firm coordination scheme that covers the combined network areas of UPC and Ziggo, as opposed to two separate two-firm coordination schemes, on in each of the two network areas, in the absence the Transaction. In each of the areas, the Transaction does therefore not affect the number of firms that would need to coordinate.

(740) Accordingly, the Commission has investigated (taking into account possible competitive pressure exercised by third parties using regulated wholesale access) whether the Transaction affects the likelihood for coordination between KPN and the merged entity in the combined (fixed) network area of the Parties relative to the likelihood for coordination between KPN and UPC, respectively KPN and Ziggo, in the Parties respective network areas.

(741) A merger that brings together firms that are active in separate geographic areas could potentially facilitate coordination through the establishment of "multi-market" contact. Meeting the same competitor in several different markets may lead to a greater alignment of firms' ability and incentive to coordinate than when each market is analysed in isolation, if it results in

greater symmetry in the "combined market" relative to "individual markets".[397]

(742) In the present case, the question is, therefore, whether the Transaction may lead to an alignment in the incentives to coordinate (and to adhere to coordination) or increased deterrence potential between the merged entity and KPN relative to the incentives for coordination of each of the Parties and KPN in the Parties' respective network areas.

(743) The Commission considers this unlikely to be the case because the situation between KPN and the cable operator in each of the respective footprints of UPC and Ziggo is comparable to that between KPN and the merged entity at a national level post-Transaction. The Transaction does therefore not lead to increased symmetry relative to the situation in each Party's network area and is hence unlikely to lead to a greater alignment of the ability and incentives to coordinate with KPN.

(744) First, as can be seen in Table 10 below, in 2014 KPN's market shares in UPC's footprint were broadlysimilar to KPN's corresponding market shares in Ziggo's footprint; and UPC's market shares in its footprint were broadly similar to the corresponding market shares of Ziggo in the latter's footprint. The position of KPN and that of the cable operator, UPC and Ziggo, is therefore largely similar in both of the latter's network footprints and will not change significantly in the combined footprint post-merger. Second, in each of their respective network footprints, Ziggo and UPC were active in the same retail TV, Internet, telephony and multiple play markets, using the exact same network technology (DOCSIS) and with broadly comparable product offerings. Third, KPN and the merged entity would, post-merger, continue to face the same (number of) competitors that could potentially be able to distort coordination.

397 For example, consider two markets of equal size. Assume firm A has a 20% market share in market 1 and an 80% market share in market 2. Firm A faces firm B (with 80% market share) in market 1 and firm C (with 20% market share) in market 2. Each of the markets is hence characterised by a rather asymmetric structure with one very large player (with 80% market share) and a smaller player (with 20%) market share. A hypothetical merger between firm B and C in this example might lead to coordinated effects in such a setting, because the multi-market contact between the merged entity (B+C) and firm A would make these firms more symmetric with each having an "average" market share across the two individual markets of 50% which might significantly align their incentives to coordinate.

Table 10: Retail supply of Pay TV, broadband and fixed telephony services – market shares (2013)

	UPC footprint				Ziggo footprint			
	UPC	KPN	Tele2	Other	Ziggo	KPN	Tele2	Other
Retail supply of Pay TV services	87%	6%	2%	5%	78%	10%	4%	8%
Retail supply of broadband services	33%	50%	7%	10%	47%	40%	5%	8%
Retail supply of fixed telephony services	40%	43%	5%	12%	48%	37%	4%	10%

(745) The assessment in Table 10 necessarily relates to the situation in 2014. An assessment of the Transaction under current market conditions (which notably would reflect that the merged entity has formed a joint venture with Vodafone in 2016) is unlikely to affect the conclusion that the combination of the Parties non-overlapping networks will facilitate coordination. In particular, in the counterfactual situation relevant for the current Transaction, each of UPC and Ziggo would have become a fixed-mobile player (by entering into a joint venture with Vodafone in their respective footprint). To the extent that the emergence of fixed-mobile players facilitates coordination (quod non as assessed in the 2016 case), it would also facilitate coordination absent the Transaction in each of UPC's and Ziggo's respective network areas. Specifically, absent the Transaction, KPN would need to coordinate with each Party (and only that Party) in that Party's respective network area (including, potentially, on fixed-mobile services). Post-Transaction KPN would need to coordinate with the merged entity in the combined network area, without the Transaction (for the reasons explained above) leading to a greater symmetry or alignment between the merged entity and KPN at a national level relative to the situation between each Party and KPN in their respective footprint. The fact, that the UPC and Ziggo, as a result of the 2016 transaction, have become fixed-mobile players does therefore not affect the conclusion that the combination of UPC's and Ziggo's non-overlapping (fixed) networks is unlikely to affect the likelihood of coordination.

(746) Moreover, as explained in paragraphs (748) to (771) below, the Commission concludes that, on the basis of the current market conditions, the Transaction does not significantly alter any of the factors generally considered conducive to coordinated behaviour. The absence of non-coordinated effects combined with the inherent non-overlapping nature of the Parties' cable networks limits any impact the Transaction may have on the post-merger ability of firms to reach terms of coordination, their ability and incentives to enforce coordination through a deterrent mechanism or the constraint from outsiders.

(747) The Commission's investigation has, furthermore, not yielded any substantial evidence of past coordination that could support a coordinated-effects theory of harm in fixed and fixed-mobile bundles markets. This finding exists irrespective of the degree to which the latter markets may currently be conducive to coordinated behaviour. In that respect, the Commission's

investigation showed that those markets may, to an extent, already be conducive to coordination.

Ability to reach terms of coordination and focal point of coordination

(748) The Commission notes that, given that it has found that the Transaction does not eliminate direct competition (see paragraph (689)), any pre-existing stability of the retail markets is not material to establishing possible coordinated effects arising as a result of the Transaction.

(749) Similarly, since the Dutch market is moving towards multiple play bundles (in particular fixed-mobile ones), the Commission does not consider that the Transaction is likely to alter the degree to which those bundles' price points can constitute effective focal points for coordination. In particular, the provision of fixed-mobile bundles as a result of the VodafoneZiggo transaction has likely added more complexity to the offering, with a number of additional price and non-price features, which does not seem to increase the likelihood of coordination with KPN around a focal point. Moreover, as already noted by the Commission when assessing the VodafoneZiggo joint venture, the fixed-mobile bundles market segment is expanding (growing to almost 2 million subscribers in 2017[398]), with VodafoneZiggo rapidly eroding KPN's established leading position. It is therefore doubtful that the merged entity would have the incentive to establish coordination with KPN in respect to fixed-mobile bundles.

(750) In 2016, the Commission noted that KPN's market shares were broadly similar to Ziggo's on all retail markets for standalone fixed services (with the exception of retail TV) and that the proposed joint venture would not lead to any significant increase in symmetry on any of those markets. It also noted that Ziggo's position on the fixed triple play market was considerably stronger than KPN's and that the elimination of Vodafone as a fixed player would have strengthened Ziggo's position in the fixed markets (including triple play bundles) and, in turn, the positions of both KPN and Ziggo post-merger. In this context, the Commission found that post-transaction the joint venture would have been better positioned to compete more aggressively in the expanding market for fixed-mobile bundles. It was therefore doubtful that the merged entity would have had an incentive to coordinate with KPN in respect of fixed-mobile bundles. The 2016 Decision was also conditional on remedies which the Commission considered sufficient to offset the elimination of the competitive constraint from VF's fixed activities on the Parties.

(751) As noted in paragraphs (734) to (737), the fact that the Parties both have fixed and mobile networks, while relevant for the assessment of the Transaction under current market conditions, cannot be considered to be a result of the current Transaction.

(752) Over the course of the following years (2016 and 2017), while VodafoneZiggo's shares have slightly increased for fixed telephony and internet access, they still show symmetry with KPN's, as it existed already in

[398] Form CO, table 50. See also ACM's Telecom Monitor for Q1-2 2017 (Form CO, paragraph 503).

2014. On the other hand, VodafoneZiggo and KPN still have asymmetric market shares in retail TV and triple-play bundles (although VodafoneZiggo's share has slightly decreased in retail TV and remained stable for fixed telephony triple-play bundles). At the same time, VodafoneZiggo has significantly increased its presence in the expanding fixed-mobile bundles market segment.

	VodafoneZiggo	KPN
Retail supply of Pay TV services	53%	32%
Retail supply of fixed telephony services	41%	42%
Retail supply of internet services	44%	41%
Retail supply of triple-play services	52%	36%

Source: Telecompaper Television 2017 Q3, Broadband 2017 Q3, Fixed Telephony 2017 Q3

(753) The abovementioned evolution of the markets, on the one hand, does not provide evidence that the retail markets have been or are more likely to be prone to coordination as a result of the Transaction and, on the other, confirm the finding of the Commission in its 2016 decision of the increasing importance of fixed-mobile bundles. In this respect, the Commission notes that, by bringing together two operators with non-overlapping fixed networks (which should be considered as each having its own mobile network, in light of the setting up of the joint venture with Vodafone in 2016), the Transaction does not affect coordination for fixed-mobile bundles is it does not lead to a reduction in the number of players nor to an increased symmetry relative to the situation where each of UPC and Ziggo are active in the non-overlapping regional footprint areas (paragraphs (738) to (745)).

(754) With regard to evidence on the evolution of prices, T-Mobile Netherlands ("TMNL") submits that 2011-2014 pricing data from Telecompaper supports its claims that prior to the 2014 Transaction there was no coordinated tacit price coordination between Liberty/Ziggo and KPN. TMNL[399] further submits, referring to an ACM presentation,[400] that post-merger coordination arose between these market players, and that Vodafone/Ziggo and KPN enacted very significant price increases in a parallel manner, which were far beyond those of the other Dutch market players.

(755) The Commission notes that Telecompaper data on monthly fees of triple-play ("3P") packages for the period 2013-2017 does not seem to reveal a substantially different pricing behaviour or increased price parallelism after the 2014 merger. While in mid-2014 KPN introduced several higher priced packages it also kept its products with middle or low price positioning. As for the overall evolution of 3P monthly fees, there does not seem to be a trend to exclusively increase over the period. While there were several price increases by several operators, there were also price decreases. In particular, though

399 TMNL's submission of 16 April 2018.

400 Presentatie industry group voor marktanalyse ontbundelde toegang, dated 4 July 2017, p. 22.

KPN raised all of its monthly fees effective of July 2016 and some of them effective from July 2017, it also decreased all the fees equally or even more at the end of 2016. Vodafone/Ziggo also increased some of its monthly fees effective of July 2017 (mostly in the high and middle price range), but in many cases this followed a prior decrease. Moreover, unlike KPN, Vodafone/Ziggo tended not to decrease its fees at the end of 2016, and, in the case of the high range fees, it even increased prices. Some, but not all Vodafone/Ziggo fees were increased effective from July 2017.

(756) Overall, these patterns do not provide evidence of changes in behaviour or in the degree of pricing parallelism between Vodafone/Ziggo and KPN in the post-2014 period relative to the period before 2014.

(757) Moreover, the monthly fees referred to by TMNL do not include promotional discounts, which could significantly alter the effective price available for consumers.[401] The absence of an analysis of promotions raises doubts as to the existence of effective price parallelism in the prices ultimately applied to final customers.

(758) Furthermore, the Notifying Parties explained that VodafoneZiggo generally introduces a price change across the whole of its customer base once a year, through a lengthy process taking several months since it involves thousands of different products and does not translate into the same increase for all those products. This decision-making process, together with the statutory waiting period after communication to the customers, means that July is the earliest moment in the financial year to implement a price change. Since VodafoneZiggo's financial year corresponds to the solar year, the earlier VodafoneZiggo introduces the change, the greater are the effects on its annual accounts. Therefore, VodafoneZiggo has an interest to implement the change as early as possible in the year. Moreover, VodafoneZiggo only announces the price change for all its products once the decision-making process has been finalized, thereby voluntarily extending to fixed products regulatory commitments applicable only to mobile products[402].

(759) Finally, in 2014 UPC and Ziggo were both working towards the same network technology upgrades. Therefore, in terms of their (non-overlapping) fixed networks, the Transaction did not lead to the elimination of a more aggressive innovator that could have distorted the firm's pre-merger ability to coordinate.

Deterrent mechanisms

(760) In relation to the possible existence of effective deterrent mechanisms, the Commission considers that the Transaction cannot be considered to be likely

[401] See, for example, paragraph 764 below.

[402] In 2014, Vodafone Libertel B.V., together with KPN and TMNL, committed – in the field of mobile services – that the senior management would not make any oral or written announcements about future prices and other commercial conditions, before the internal decision-making process had been finalized and laid down in writing (see ACM Case 13.0612.53 Toezeggingsbesluit mobiele operators). Although those commitments lapsed as of 7 January 2017, VodafoneZiggo has continued to abide by them.

to enhance the availability and/or efficiency of deterrent mechanisms relative to the possible deterrent mechanisms in each of the two (fixed) network areas of UPC and Ziggo absent the Transaction.

(761) First, the Transaction does not lead to significantly increased symmetry between KPN and the merged entity relative to the degree of symmetry between KPN and UPC, respectively KPN and Ziggo, in their respective (fixed) network areas. It hence does not lead to a greater alignment of incentives or enhanced possibilities via increased symmetry resulting from the combination of the non-overlapping network areas or via contact in multiple markets (see paragraphs ((741) to (745))

(762) Moreover, while UPC and Ziggo, as cable operators, both use the same fixed network technology, that technology remains different from KPN's DSL infrastructure. And while the roll-out of fibre networks may have resulted in a somewhat greater similarity in terms of network technologies between KPN and the Parties in certain areas, this development could not be a consequence of the Transaction. Therefore, the Parties are not likely to have an enhanced ability to retaliate by implementation of technology upgrades of their network relative to the retaliation possibilities of each Party absent the Transaction.

(763) Furthermore, the Commission notes that UPC and Ziggo were active in the exact same markets in 2014 and, also under current market conditions, in a scenario where each is considered as having entered into a joint venture with Vodafone and therefore each is also considered as owning and operating a mobile network. Therefore, the Transaction does not increase the number of markets in which the Parties could, post-merger, retaliate against diverging behaviour.

(764) The Commission also does not consider that the Transaction would facilitate retaliation by creating a national competitor to KPN. While KPN may be bound to some extent by national pricing policies, KPN was, already before the Transaction, likely to take retaliatory actions against deviations by one (or both) of UPC and Ziggo through targeted offers or discounting (e.g. by offering below the line discounts to customers in a specific region). Indeed, KPN does not appear to have been (and does not appear to be) prevented from running promotions only in specific parts of the Netherlands and in 2013 has, for example, launched a promotion for a fixed telephony, internet and television subscription limited to residents in the area with a specific postal code.[403] It is hence unlikely that national pricing would be a constraint on KPN's possibilities to retaliate or deviate that would be softened through the creation of a national competitor through the Transaction.

[403] See Notifying Parties' reply to request for information dated 25 May 2018. The offer of 13 May 2013 was presented as a "*Postcode Waardencheque*" with a value of more than EUR 130 and consisted of a subscription to fixed telephony, internet and television for the reduced price of EUR 35 per month during the first six months (instead of EUR 58 per month). The offer was only valid for residents of postal code 8061 DC (one of the postal codes in Zwolle), as evidenced by the following extracts: "*Speciaal voor bewoners met postcode 8016 DC*"; "*Tijdelijk meer dan €130;- voordeel voor bewoners met postcode 8016 DC*".

Transparency of the market and ability to monitor deviations

(765) The Commission considers that some characteristics of the post-merger retail markets for TV services, fixed telephony, Internet access and multi play services in the Netherlands seem to have made those markets conducive to coordination already before the Transaction. Coordination on retail prices for instance might be possible because prices seem to be transparent and publically available.

(766) Notwithstanding the fact that the products offered in those retail markets are mostly bundled products that can be offered in different configurations and that have an array of features that could allow operators to differentiate, the Commission takes the position that it would not have been impossible to reach an agreement with KPN or monitor a tacit agreement due to the complexity of the product offerings, neither before nor after the Transaction. Indeed, the degree of transparency might allow easy detection of deviations from coordination and may, therefore, have been and also in the future be conducive to coordination.

(767) The Commission concludes that the Dutch retail Pay TV, broadband, fixed telephony and multiple play markets were and are characterised by a degree of transparency that could allow firms to monitor deviations from coordinated behaviour. However, since there is no evidence to suggest that the Transaction would materially change the existing degree of transparency of those markets, the Commission considers that any possible impact of the Transaction on transparency will not significantly alter firms' existing ability to monitor deviations.

Reaction of outsiders

(768) The Commission notes that several alternative operators to KPN and VodafoneZiggo are currently active on a more or less national basis in the Dutch markets for the retail provision of internet access, fixed telephony, TV services and multiple play services, either exclusively or partly by means of regulated and commercial wholesale access to KPN's copper (vDSL) and fibre (FttH) networks. Those alternative, "outsider" operators are Tele2, Canal Digitaal and T-Mobile. Given that those alternative operators do not rely on either of the Parties for having access to those markets, the Commission considers that neither their technical ability nor their incentive to distort coordinated behaviour will change as a result of the Transaction.

(769) Any competitive pressure that those alternative players are able to impose on KPN and VodafoneZiggo, stems from access obligations on both KPN's copper and fibre networks. Based on unbundled local loop access as well as wholesale broadband access, those operators are able to compete on the Dutch markets for the retail provision of fixed telephony, fixed Internet access and TV services.

(770) Access to KPN's fibre network is guaranteed through *ex ante* regulation which, as it will be explained below (see Section 6.6), is expected to continue in the foreseeable future. Moreover, KPN continues to provide commercial wholesale arrangements on a significant scale. An example of a market player that offers retail services as a result of a commercial WBA deal with KPN is

NLE. In October 2016, NLE launched a multi-play offer, specifically targeted at VodafoneZiggo's customers.

(771) As regards the threat that potential competition from OTT would pose to the successful outcome of coordination in the retail Pay TV market, the Commission considers that the Final Commitments offered by the Notifying Parties in the context of the Transaction ensure that it will remain unchanged. Moreover, the Commission notes that the competitive pressure exerted by OTT players on retail TV services has since 2014 only increased further.

6.5.2.7. Conclusion

(772) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards coordinated effects in the market for the retail provision of pay TV services, the retail market for fixed telephony, the retail market for the provision of fixed Internet access services and for multi-play and triple play services in the Netherlands.

6.6. The possible market for fixed internet access at wholesale level

(773) As mentioned above in Section 5.2.4, the ACM found in its draft decision of 27 February 2018 that there is a single wholesale market for access to copper, fiber-optic and cable networks in which KPN and VodafoneZiggo are active market players. In light of the abovementioned concerns raised by a market player with regard to coordinated effects stemming from the Transaction (see Section 6.5.2 above), the Commission will in the following assess also whether the Transaction gives rise to coordinated effects on the possible market for fixed internet access at wholesale level.

(774) As indicated in the Commission's *Guidelines on market analysis and the assessment of significant market power*, the national regulatory authorities shall carry out their assessment by taking into account "*existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation*"[404], which is known as "Modified Greenfield Approach".

(775) The Commission, on the other hand, evaluates mergers in the market context within which they arise, which includes the regulatory environment. Anticipated changes to the regulatory environment within the timeframe of the prospective merger analysis can be taken into account if future changes can be reasonably predicted.[405]

---

[404] Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications and services, C(2018)2374; OJ C 159, 7.5.2018, p. 1–15, paragraphs 17 and following.

[405] According to paragraph 9 of the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/ C 31/03), generally, the conditions existing at the time of the merger constitute the relevant comparison for evaluation the effects of a merger. Only in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.

(776) As to the present market context, KPN owns and operates a fiber to the home ("FttH") network and a hybrid fibre-copper network. Both KPN's fixed telecommunications networks are subject to *ex ante* regulation in the form of local unbundling and virtual unbundled local access (VULA) under the terms of the ACM's decision of 17 December 2015 resulting from the market review carried out in the period October 2013 to October 2015. VodafoneZiggo operates a hybrid-coax network, which is not currently subject to ex ante regulation, and does not grant access to it to third parties on a voluntary basis.

(777) In light of the existing regulation, the Commission considers that the Transaction in itself does not make coordination between KPN and VodafoneZiggo on the hypothetical single wholesale market for access to copper, fiber-optic and cable networks more likely, considering that KPN is currently obliged to grant access to its network at specific terms included in a reference offer. If one of the two potential parties to the coordination is subject to these obligations, the other party (VodafoneZiggo) would not have increased incentives to coordinate post-Transaction, also in light of the fact that so far it has not granted access to any third party.

(778) As to the future changes to the regulation that can be reasonably predicted, the ACM's draft decision found that KPN and VodafoneZiggo have joint significant market power ("SMP") and proposed to impose access obligations on both KPN and VodafoneZiggo. While changes to the draft decision cannot be excluded at this stage (also in light of the fact that this decision does not prejudge the Commission's own review under Article 7 of the Framework Directive[406] of any proposed regulation), there are no indications at this stage that ACM has identified market developments justifying any such change concerning the finding of joint SMP. Assuming therefore the most likely scenario that ACM will maintain its proposed approach concerning the finding of joint SMP and will impose access obligations on both KPN and VodafoneZiggo as foreseen in its draft decision, there would be no ability for them to coordinate on refusing access (or granting it only at unfavourable terms) as both would be under an obligation to provide access at terms which would be put forward in a reference offer.[407]

(779) In light of the above, and without prejudice to any future finding of the ACM in the context of the ongoing market review, the Commission therefore considers that the Transaction does not give rise to serious doubts as to its compatibility with the internal market regarding a merger-specific increased likelihood of coordinated effects on the possible market for fixed internet access at wholesale level to copper, fiber-optic and cable networks.

(780) In any event, the Commission notes that, similarly to the assessment on possible coordinated effects on the retail markets in Section 6.5.2 , the non-

[406] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

[407] On the other hand, if ACM confirmed its finding of joint SMP but imposed access remedies only on KPN, the situation would be similar to that under the existing regulation described above in paragraph 777.

overlapping nature of the UPC and Ziggo's respective fixed infrastructures implies that they are not directly competing in the provision of fixed products or fixed-mobile products to final customers. As a consequence, in each of their respective areas, the Transaction does not reduce the number of firms that would need to take part in a hypothetical coordination scheme at wholesale level, nor does it affect the number or identity of outsiders that could disrupt such coordination. Therefore, the Transaction does not appear to lead to (or at least not to increase the risk of) coordination at wholesale level.

(781) Moreover, the potential coordination scheme at wholesale level would have a clearer focal point than at the retail one (i.e., the refusal to grant access to their network). In light of the relative easiness to reach terms of coordination, the Transaction does not appear to be materially increase the chances of reaching coordination among two operators with nation-wide networks, compared to a pre-merger situation where three competitors could already as easily coordinate on a refusal to grant access at wholesale level in their respective areas.

(782) Finally, with regard to T-Mobile's argument that, according to the ACM, VodafoneZiggo and KPN might have delayed investments in their respective fixed networks in a coordinated way, the Commission notes that ACM only refers to the fact that VodafoneZiggo and KPN are aware of a situation of strategic interdependence. However, considering that the Transaction combines non-overlapping fixed networks, it does not seem to increase the chances of a similar situation to occur, compared to a scenario where KPN faces two operators each in a separate geographic area.

(783) Also for those (independent) reasons, the Commission considers that the Transaction does not give rise to serious doubts as to its compatibility with the internal market regarding a merger-specific increased likelihood of coordinated effects on the possible market for fixed internet access at wholesale level to copper, fiber-optic and cable networks.

7. PROPOSED REMEDIES

(784) In order to render the concentration compatible with the internal market, the Notifying Parties submitted commitments under Article 6(2) of the Merger Regulation on 3 May 2018 (the "Proposed Commitments" or "Initial Commitments"). These commitments were market tested by the Commission. Following certain modifications, a final set of commitments was submitted on 29 May 2018 (the "Final Commitments"). These Final Commitments are annexed to this decision and form an integral part thereof.

7.1. Analytical framework

(785) Where the Commission considers that a concentration will raise competition concerns the parties may seek to modify the concentration in order to resolve such competition concerns and thereby gain clearance of their merger.[408]

(786) In Phase I, commitments offered by the parties can only be accepted where the competition problem is readily identifiable and can easily be remedied. The competition problem therefore needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out "serious doubts" within the meaning of Article 6(1)(c) of the Merger Regulation. Where the assessment confirms that the proposed commitments remove the grounds for serious doubts on this basis, the Commission clears the merger in Phase I.[409]

(787) In assessing whether the proposed commitments will likely eliminate the competition concerns identified, the Commission considers all relevant factors including inter alia the type, scale and scope of the proposed commitments, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other participants on the market.[410]

(788) In order for the commitments to comply with these principles, commitments must be capable of being implemented effectively within a short period of time.[411] Where, however, the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted.[412]

(789) As concerns the form of acceptable commitments, the Merger Regulation leaves discretion to the Commission as long as the commitments meet the requisite standard.[413]

(790) Commitments which are structural in nature, such as the commitment to sell a business unit, are generally preferable. Such commitments prevent durably the competition concerns which would be raised by the merger as notified and do not require medium or long-term monitoring. Nonetheless, it cannot be ruled

---

408 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice"), OJ C 267, 22.10.2008, p. 1, paragraph 5.

409 Remedies Notice, paragraph 81.

410 Remedies Notice, paragraph 12.

411 Remedies Notice, paragraph 9.

412 Remedies Notice, paragraphs 13, 14 and 61 *et seq*.

413 Case T-177/04 *easyJet v Commission* [2006] ECR II-1913, paragraph 197.

out that other types of commitments may also be capable of preventing the significant impediment to effective competition.

(791) It is against this background that the Commission analysed the proposed commitments in this case.

7.2. The First Commitments

7.2.1. Description of the First Commitments

(792) The First Commitments submitted on 3 May 2018 comprised a commitment not to enter into or renew agreements with TV broadcasters that contain terms which would directly or indirectly restrict the TV broadcasters' ability to offer their channels and associated content via OTT services. That Commitment applied to any agreements with TV broadcasters for the distribution of those broadcasters' linear channels and catch-up TV services on the Parties' Pay TV Platform in the Netherlands. The Commitments made clear that the Parties shall not, directly or indirectly, restrict the ability of the broadcasters to offer, on a standalone basis or in partnership with a third party, OTT services in the Netherlands, or the ability of those broadcasters to offer their linear channels and any content owned or controlled by the TV broadcaster via such OTT services in the Netherlands.

(793) If any such restrictive terms were included in existing agreements that the Parties and TV broadcasters had concluded for the distribution of those broadcasters' linear TV channels and catch-up TV services on the Parties' Pay TV platform in the Netherlands, the Parties would not enforce those restrictive terms.

(794) In addition, the Notifying Parties offered commitments to ensure the effectiveness of the distribution of OTT content via VodafoneZiggo's Internet network. To that end, the Notifying Parties committed to maintain sufficient interconnection capacity for parties seeking to distribute data to VodafoneZiggo's broadband customers by ensuring such parties have at least three uncongested routes into VodafoneZiggo's IP network in the Netherlands.

(795) In more detail, the Notifying Parties offered to ensure that the daily peak utilization, defined as the daily 95^{th} percentile over 5-minute average bits transferred sample intervals, across their interconnection points with each of a group of at least three reputable interconnectivity providers (ICPs) who are willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to its broadband customers, will not exceed 80%, that is to say that there will be at least 20% capacity available above the daily peak as calculated in arriving at daily peak utilization. The Notifying Parties further offered to ensure that the capacity available above the daily peak across that group of three ICPs shall be at least 20 Gbit/s. That figure would be reviewed annually by the Monitoring Trustee.

(796) The three ICPs that were subject to those additional commitments would be selected by the Notifying Parties from a predetermined list of ICPs which would also contain the ten largest ICPs that were willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to VodafoneZiggo's broadband customers. The

list, holding the identity of the ten largest ICPs, could be changed from time to time with the approval of the Monitoring Trustee. One of the three selected ICPs had to be one from those ten largest ICPs. The group of at least three reputable ICPs could vary from time to time. However, it could not vary more than once per year for the ICP that was one of the ten largest ICPs and no more than once per quarter for the other two selected ICPs. Any alteration in a situation where there was an urgent need for the Notifying Party to upgrade capacity and it being impossible to achieve that upgrade in a timely manner with the three ICPs – had to be approved by the Monitoring Trustee, and ultimately by the Commission. In that case the Notifying Party would use reasonable commercial endeavours to agree and implement an upgrade with the ICP at hand and, if it could do so, to immediately return that ICP to the group of three, in place of the ICP which replaced it, at least until it would otherwise have been possible to change that ICP pursuant to those additional commitments.

(797) The Notifying Parties committed to request each ICP with whom the Parties directly interconnected in the Netherlands for permission to publish in arrears on a monthly basis the highest Daily Peak Utilization in the preceding month, as a percentage of available aggregated direct capacity between that ICP and the Parties. As long as at least half of such ICPs agreed to such publication, the Notifying Parties would publish, on a publicly available website, on a monthly basis, that information with respect to any such ICP who was and remained willing for it to be published. Where fewer than half such ICPs agreed to such publication the Notifying Parties would publish, on a publicly available website, on a monthly basis, only an aggregated figure based on the highest Daily Peak Utilization in the preceding month of aggregated direct interconnect capacity in the Netherlands.

(798) A fast track dispute resolution procedure would be applicable in the event that a third party would claim that the Notifying Parties were failing to comply with the Commitments. Any third party that wished to avail itself of the fast track dispute resolution procedure ("Requesting Party") had to send a written request to the Notifying Parties and the Monitoring Trustee setting out in detail the reasons leading the Requesting Party to believe that the Notifying Parties were failing to comply with the Commitments. The Notifying Parties and the Requesting Party then had a maximum of fifteen working days after receipt of the request to resolve the issue through cooperation and consultation. Within eight working days after receipt of the request, the Monitoring Trustee had to present its proposal to resolve the dispute and to specify in writing any action that the Notifying Parties had to take to ensure compliance with the Commitments. If the Requesting Party and the Notifying Parties could not resolve their differences of opinion, the dispute had to be resolved by arbitration under the Rules of the Arbitration Court of the International Chamber of Commerce. The arbitration had to be conducted in Amsterdam and in the English language. It was also fast-track, in that the Arbitral Tribunal would shorten all applicable procedural limits as far as admissible and appropriate. The Arbitral Tribunal could give a preliminary ruling within one month, and would as a rule not give its final decision any later than six months after its confirmation.

(799) The Commission would be closely associated to any arbitration proceedings. In case of disagreement between the arbitrating parties on the interpretation of the Commitments, the Arbitral Tribunal could seek the Commission's interpretation and that interpretation would be binding. The fast-track dispute resolution procedure did not affect the power of the Commission to take decisions in relation to the Commitments and in accordance with the Merger Regulation.

(800) The commitment not to prohibit OTT distribution of content would, in its entirety, be in force for a period of eight years following the date of adoption of this Decision.

7.2.2. Results of the market test

(801) Some respondents considered that the First Commitments would not be sufficient to remedy the competition concerns raised by the Transaction, in particular insofar as they failed to address coordinated effects[414] and input foreclosure concerns[415] resulting from the Transaction.

(802) As regards the commitment not to contractually restrict broadcasters in distributing their content via an OTT service, a majority of those respondents who expressed an opinion to the market test considered that the First Commitments were not sufficient to ensure that broadcasters can effectively distribute their content via an OTT service, in addition to distributing it via the merged entity's platform, should they wish to do so.[416] Some respondents to the market test also emphasised, in particular,[417] the need to modify certain provisions of the Commitments in order to ensure their effectiveness, namely (i) to add the obligation for the Parties to inform the relevant broadcasters that the Parties waive their rights to enforce any clauses in existing agreements that restrict the Broadcasters' OTT Services and to remove such terms; (ii) to reflect that OTT Services include such services delivered over all delivery models including WiFi, hotspots and mobile internet; (iii) to ensure that the legal entities subject to the proposed commitment include affiliated undertakings of the Parties; (iv) to clarify that the Parties' TV platform include mobile propositions; (v) to make sure that the agreements covered include also any contractual terms agreed through e.g. e-mails, side letters or other; and (vi) to prolong the duration of the Commitment.

(803) As regards the commitment to maintain sufficient direct interconnection capacity between VodafoneZiggo's Internet network covering the Netherlands and third-party providers of transit services, respondents to the market test

414 Observations by TMNL, on the Remedy Proposal of 7 May 2018 in addition to the response to the Remedy RFI, 15 May 2018.

415 Replies to Q4 - Market test of the proposed remedies of 7 May 2018, question C.2.1, Observations by TMNL, on the Remedy Proposal of 7 May 2018 in addition to the response to the Remedy RFI, 15 May 2018.

416 Replies to Q4 - Market test of the proposed remedies of 7 May 2018, question A.1.

417 Replies to Q4 - Market test of the proposed remedies of 7 May 2018, questions A.1, A.2, A.4, A.5.

highlighted a number of technical improvements required for such a commitment to be effective[418], relating mainly to the lowering of the 80% congestion threshold, the suitability of the ICPs listed in the Schedule, the need to guarantee that the chosen ICP's have good capacity / connectivity within the Netherlands, the need to be given prior notice in case of switching between different ICP's and the duration of the commitment. Finally, some respondents to the market investigation claimed that the remedies should not only include direct interconnect capacity via ICPs but also alternative capacity via direct peering.[419]

7.2.3. Assessment of the First Commitments

(804) In line with concerns expressed by the respondents to the market test, the Commission considered that the First Commitments were insufficient to eliminate the competition concerns raised by the Transaction.

(805) As regards the commitment not to contractually restrict broadcasters in their OTT activities, the Commission considered that this could only be effective if it applied also to the Parties' affiliated undertakings (as defined in the Commitments) and if it covered also agreements for the distribution of broadcasters' channels via the Parties' mobile network. In addition, in order to improve the ability to enforce that commitment, the Parties would have to inform the relevant broadcasters that they waive their rights to enforce any clauses in existing agreements and remove such terms. The Commission also considered that it would have to be clarified that OTT Services included such services delivered over all delivery models (including WiFi, hotspots and mobile internet). Furthermore, it would have to be specified that the agreements covered with broadcasters would not be limited to formal written agreements but also included any contractual terms agreed through, for example, e-mails and side letters.

(806) However, the Commission considered that the duration of eight years following the date of adoption of this Decision is in line with the investment cycle that OTT service providers take into account when deciding to launch and sustain OTT services. The Commission therefore considers that this duration is suitable and sufficient.

(807) In relation to the commitment to maintain sufficient direct interconnection capacity, the Commission was of the opinion that the commitment did not require modifications. The commitment has applied in its current form since its acceptance in the 2014 Decision and has been monitored by the Monitoring Trustee. In particular, the reporting of the Monitoring Trustee has confirmed that Liberty Global's implementation of it has "*had [no] impact on Dutch broadcasters' ability to distribute content OTT or on the user experience of viewers of Dutch broadcaster OTT content in the Netherlands*".[420] The

[418] Replies to Q4 - Market test of the proposed remedies of 7 May 2018, questions B.3, B.4, B.6, B.7, B.8, B.9.

[419] Replies to Q4 - Market test of the proposed remedies of 7 May 2018, questions B.3.1, B.4.1, B.9.1.

[420] Para. 11 of the 11th Trustee report on Case M.7000 – Liberty Global / Ziggo of 21 November 2017.

commitments foresee that the available capacity will follow demand[421] and that capacity above the daily peak shall be at least 20 Gbit/s, a figure that can be reviewed annually to ensure a reasonable level of spare capacity. The commitment also provides that the Monitoring Trustee shall review Schedule 1 every three months to ensure that it contains a sufficient number of reputable ICPs. Furthermore, the 3 ICPs chosen must be willing to sell transit in the Netherlands. Further, the Commission considers that based on the implementation of the commitment since the 2014 Conditional Clearance Decision, the commitment in its current drafting ensures that the aim to ensure that VodafoneZiggo's broadband customers can be accessed across relevant interconnection points without congestions, is achieved even if the commitment does not include direct peering and no prior notice in case of switching between different ICP's.

(808) As to the duration of the commitment, the Commission considers that eight years is sufficient, given the considerations in paragraph (806) and the fact that the commitment to maintain sufficient direct interconnection capacity also ensures the effectiveness of the commitment not to contractually restrict broadcasters in their OTT activities.

7.3. The Final Commitments

(809) Following the communication to the Notifying Parties of the results of the market test and the Commission's own assessment of the First Commitments, the Notifying Party submitted an improved and final set of commitments ("Final Commitments") on 29 May 2018.

7.3.1. Description of the Final Commitments

(810) The Final Commitments contain a commitment not to enter into or renew agreements with TV broadcasters that contain terms which would directly or indirectly restrict the TV broadcasters' ability to offer their channels and associated content via OTT services and containing modifications by the Notifying Parties to address the shortcomings described in paragraph (805).

(811) In addition, in the Final Commitments the Notifying Parties commit to ensure sufficient direct interconnection capacity between VodafoneZiggo's network and third-party providers of transit services.

(812) Finally, the Final Commitments contain a commitment not to acquire, whether directly or indirectly, the possibility of exercising influence over the whole or part of Film1's activities in the Netherlands, being the provision of movies, series and documentaries to customers through a package of Premium Pay TV channels and related VOD services.

[421] See in this regard also the Notifying Parties' reply to the Commission's request for information of 18 May 2018 (RFI 8), 21 May 2018, paragraph 8.2.

7.3.2. Assessment of the Final Commitments

(813) In accordance with the principles of the Merger Regulation on the acceptability of commitments, the Commission has assessed whether the Final Commitments:

(d) are suitable and sufficient to eliminate the competition concerns; and

(e) capable of being implemented effectively within a short period of time.

(814) As explained in paragraph (790), divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.[422] Other commitments may be suitable and sufficient only if those remedies are equivalent to a divestiture in their effects.[423] The question whether a remedy, or more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis.[424]

(815) In this case, the serious doubts as to the compatibility of the Transaction with the internal market that would arise in relation to OTT services are a specific concern. The Commission had found in 2014 that the Dutch market for the acquisition of Pay TV channels was characterised by the existence of agreements that restrict or aim to restrict TV broadcasters in their ability to offer their TV channels and associated content via the Internet. The Commission had found in 2014 that the merger would increase the Notifying Party's ability and incentive to continue such restrictive agreements, or to make them even more onerous. That would deprive consumers in the Netherlands from innovations in the way they can watch TV content over the Internet.

(816) The market investigation has confirmed that these concerns are still relevant post-Transaction.

(817) As set out in the Remedies Notice[425], remedies that fall short of complete divestitures, but are equivalent to them in terms of effects, may be considered in situations where markets are characterised by agreements between the Parties and their competitors that restrict competition. In certain circumstances, the Commission may accept commitments to terminate such agreements.[426]

---

[422] Remedies Notice, paragraph 17.

[423] Remedies Notice, paragraph 61.

[424] Remedies Notice, paragraph 16.

[425] Remedies Notice, paragraph 17.

[426] Remedies Notice, paragraph 60.

(818) As also set out in the Remedies Notice[427], the change in market structure resulting from a proposed transaction may cause existing contractual arrangements to be inimical to effective competition.[428] That is true for exclusive long-term supply agreements if such agreements foreclose upstream the input for competitors that are active downstream. In such circumstances, the termination or change of existing exclusive agreements may be considered appropriate to eliminate the competition concerns.[429] The available evidence must allow the Commission to determine that no de facto exclusivity will be maintained. Such change of long-term agreements will normally only be considered sufficient as part of a remedies package to remove the competition concerns identified.

(819) The serious doubts as to the compatibility of the Transaction with the internal market in relation to OTT services in the present case is similar to the two categories of agreements mentioned above in paragraphs (817) and (818).

(820) As far as TV broadcasters are providers of OTT services themselves, the restrictive agreements that Liberty Global had in place are agreements between providers that at the very least potentially compete with each other. The effect of the OTT clauses is that this potential competition is limited, or in the extreme situation, eliminated altogether.

(821) As far as TV broadcasters provide their linear channels or the content that they own or control to third party providers of OTT services, the restrictive agreements that Liberty Global had in place are agreements that restrict Liberty Global's potential competitors access to those inputs that they need to offer their OTT services.

(822) Against that background and in the context of this case, the Commission considers that the effective termination of those agreements has been – and is still – a suitable and sufficient remedy to remove serious doubts as to the compatibility of the Transaction with the internal market.

(823) With the OTT Commitments, the Notifying Parties effectively commit to terminate any agreement between the Parties and TV broadcasters that relates to the carriage of the TV broadcasters linear and catch-up services on the merged entity's Pay TV platform and which restricts their ability to offer their channels and content via an OTT service in the Netherlands. The fact that the Parties shall promptly inform the relevant broadcaster that they waive their rights to enforce such terms and commit to remove such terms from their existing agreements, addresses a concern expressed by third parties to the market test that the commitment would not be effective without such provision. The Notifying Parties also commit that the Parties will not enter into such agreements in the future. The OTT Commitments cover all the

[427] Remedies Notice, paragraphs 67 and 68.

[428] Remedies Notice, paragraph 67.

[429] Remedies Notice, paragraph 68.

restrictive agreements that the Commission has identified in this case. In particular, the Commitments cover the following:

(a) clauses that restrict TV broadcasters in offering their linear TV channels and content in their own OTT services that can compete with VodafoneZiggo's Pay TV packages;

(b) clauses that restrict TV broadcasters in offering linear TV channels and associated content to third party OTT services that can compete with VodafoneZiggo's Pay TV packages;

(c) clauses according to which the distribution agreements for Pay TV channels and associated content would be terminated, in whole or in part, in the event that TV broadcasters were to offer their channels and associated content via such OTT services;

(d) clauses that limit TV broadcasters in their ability to offer their channels and associated content to competing retail providers of Pay TV services that are willing to offer those channels and content via their Internet networks. Banning such restrictions preserves the freedom of KPN, other cable operators and remaining providers of Pay TV services to allow for such OTT innovation;

(e) clauses that limit the ability of TV broadcasters to offer their channels and associated content via OTT services in the Netherlands to content that can be viewed by subscribers of the Parties only. This covers requirements to make unencrypted or free OTT services available only to authorised subscribers of the Parties. It also covers other clauses that tie the OTT services technically and exclusively into the Pay TV offering of the Parties;

(f) exclusivity deals for the use of TV content that a TV broadcaster owns or for which it has the right to distribute it in the Netherlands, insofar as exclusivity is agreed as part of, or in parallel to, agreements between the merged entity and TV broadcasters for the distribution of linear Pay TV channels over the merged entity's Pay TV platform.

(824) With those clarifications, the commitment not to include such direct or indirect restrictions in the agreements with the TV broadcasters is capable of being monitored effectively by market participants, the Trustee and ultimately the Commission.

(825) The Commitments apply in relation to contracts that TV Broadcasters conclude with the Parties for the distribution of TV channels and associated catch-up content via the Parties' Pay TV platform. That is appropriate, given that VodafoneZiggo would enjoy market power at the level of the market where those agreements are concluded.

(826) The commitment not to contractually restrict broadcasters in their OTT activities, applies also to the Parties' affiliated undertakings. The commitment covers also agreements for the distribution of broadcasters channels via the Parties' mobile network and OTT services delivered over the internet, including such services delivered over all delivery models (including WiFi,

hotspots and mobile internet). These provisions address concerns of respondents during the market test.

(827) The Commitments cover new and existing agreements between the Parties and TV broadcasters. The fact that they also cover terms agreed orally and in writing, whether formal or informal (including in side letters, via e-mails or other) addresses a concern expressed during the market test by third parties that the commitment could only be effective if it also covered these other types of agreements.

(828) The Commitments also cover exclusivity agreements for TV content that TV broadcasters own or for which they have the right to distribute it in the Netherlands. Those agreements are covered insofar they are concluded as part of, or in parallel with, the agreement for the carriage of those TV broadcasters' linear Pay TV channels over the merged entity's Pay TV platform.

(829) The OTT Commitments contain additional safeguards that ensure their viability and effectiveness.

(830) In order to prevent *de facto* restrictions on the TV broadcasters' ability to offer their channels and content via OTT services to remain, the Notifying Parties commit in particular not to make the conclusion or renewal of a separate agreement to distribute TV channels and associated content via the Parties' Pay TV platforms conditional on the acceptance of such restrictive agreements. That safeguard is important to ensure that the OTT Commitments are not circumvented during commercial negotiations between the merged entity and TV broadcasters. It preserves a balance in the bargaining power between the merged entity and the TV broadcasters, allowing the TV broadcasters genuinely to resist the type of restrictive agreements that the Commission has identified as giving rise to a serious doubts.

(831) Moreover, as set out in recitals (550) to (578), since the merged entity's role as an Internet network provider would compound its ability to restrict the TV broadcasters' ability to distribute their channels and content via OTT services, it is necessary to restrain its technical ability to hamper OTT services in order to preserve the viability and effectiveness of the OTT Commitments. Otherwise, the merged entity’s ability to hamper the technical access that OTT service providers have to its Internet network could be used to circumvent the commitment not to restrict the TV broadcasters' ability to use OTT services by contractual means.

(832) In order to ensure the effectiveness of the distribution of OTT content, Liberty Global therefore commits to maintain sufficient interconnection capacity for parties seeking to distribute data to its broadband customers. In particular, it will ensure that it has at least three uncongested routes into the merged entity's IP network in the Netherlands.

(833) The Commitments are capable of being implemented effectively and immediately. They apply from the date of the adoption of this decision. They apply to contracts that are concluded after that date, as well as contracts that are in place before it. Therefore, from the date of adoption of this Decision, TV broadcasters can insist upon, and monitor, the Notifying Parties' compliance with the OTT Commitments.

(834) Any third party can use fast-track dispute resolution to resolve any issues that may arise in relation to the compliance with the OTT Commitments. Given that the arbitration tribunal may make a preliminary ruling within one month and the final ruling shall be rendered within six months, the procedure should allow OTT providers to enforce any breach of the OTT Commitments quickly.

(835) Moreover, the Final Commitments provide for the appointment of a Monitoring Trustee to be approved by the Commission and to carry out obligations consistent with the Commission's precedents[430] in this area. The function, mandate and related provisions provided for in the Final Commitments are in line with the Commission standard requirements for commitments, according to which the Monitoring Trustee must be in a position to ensure full compliance of the Notifying Parties with the commitments.

(836) Once appointed, the Monitoring Trustee has an extensive role in ensuring that the Commitments are complied with in full. In particular, the Monitoring Trustee will act as a contact point for any complaints that the Final Commitments are not complied with. The Monitoring Trustee can give, in agreement with the Commission, any instructions to the Notifying Parties to ensure full compliance. The Monitoring Trustee will also be closely involved in any fast-track dispute resolution that beneficiaries of the Commitments may launch.

(837) The Commission retains the ultimate authority to verify the compliance with the OTT Commitments.

(838) Therefore, the Commission considers that the Commitments are suitable and sufficient to eliminate the serious doubts as to the compatibility of the Transaction with the internal market in relation to OTT Services. The Commission also considers that the Commitments can be implemented effectively and immediately.

(839) Finally, with regard to the Notifying Parties' commitment in the Final Commitments not to acquire, whether directly or indirectly, the possibility of exercising influence over the whole or part of Film1's activities in the Netherlands, the Commission recalls that, as noted in paragraph (279), pursuant to the Conditional Clearance Decision, the Notifying Parties committed to divest Film1 in order to maintain effective competition in relation to Premium Pay TV film channels in the Netherlands. In order to maintain the structural effect of that commitment, the Notifying Parties had committed, for a period of 10 years after the date of adoption of the decision, not to acquire, whether directly or indirectly, the possibility of exercising influence, as defined in paragraph 43 of the Remedies Notice, over the whole or part of the Film1 Divestment Business, unless, following the submission of a reasoned request from the Notifying Parties showing good cause and accompanied by a report from the Monitoring Trustee, the Commission finds

[430] See for example Commission's decision of 26 January 2011 in Case No COMP/M.5984 - Intel/McAfee.

that the structure of the market has changed to such an extent that the absence of influence over the Film1 Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market (see paragraph (282)). Film1 was divested to Sony in March 2015. The Commission has concluded in this Decision that following the divestment of Film1 and the winding up of the HBO NL joint venture, any overlap in relation to Premium Pay TV film channels has been removed and therefore, no horizontal non-coordinated effects can arise. However, if the Notifying Parties were to be able to re-acquire Film1, the structural effect of the divestiture that took place in 2015 could be undone. The Commission's analysis, which is premised on the Notifying Parties having no control over Film1, would then be erroneous. The Notifying Parties' Film1 non-acquisition commitment in the Final Commitments ensures that, the divestiture of Film1 remains in effect at least until 11 October 2024.

7.4. Conclusion

(840) For the reasons outlined above, the commitments entered into by the undertakings concerned are sufficient to eliminate the serious doubts as to the compatibility of the Transaction with the internal market.

8. CONDITIONS AND OBLIGATIONS

(841) Pursuant to the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.

(842) The fulfilment of the measures that give rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission’s decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 6(3) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

(843) In accordance with the described distinction as regards conditions and obligations, this Decision should be made conditional on the full compliance by the Notifying Party with Section D of the commitments set out in the Annex, while all other Sections of those commitments constitute obligations.

(844) The full text of the commitments is an integral part of and is attached as Annex 1 to this Decision.

9. CONCLUSION

(845) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section D of the commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission

Case COMP/M.7000 — Liberty Global / Ziggo

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 10(5) of the European Union Merger Regulation 139/2004 (***EUMR***), the 2014 Notification was supplemented on 4 April 2018 to reflect changes in market conditions and information provided since the annulled approval by the Commission on 10 October 2014 subject to certain conditions (***Initial Clearance Decision***).

Pursuant to Article 6(2) in conjunction with Article 6(1)(b) of the EUMR, Liberty Global plc (***Liberty Global***) and Vodafone Group plc (*Vodafone* and jointly with ***Liberty Global Notifying Parties***) hereby enter into the following commitment (the ***Commitments***) vis-à-vis the European Commission (the ***Commission***) with a view to rendering the acquisition of control by Liberty Global of Ziggo N.V. (***Ziggo***) (the ***Concentration***) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 6(2) in conjunction with Article 6(1)(b) of the EUMR to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the ***Decision***), in the general framework of European Union law, in particular in light of the EUMR, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the ***Remedies Notice***).

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

2014 Notification: The initial notification to the Commission of the Concentration (Case COMP/M.7000).

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the ***Consolidated Jurisdictional Notice***).

Broadband Customers: consumers located in the Netherlands, that have a subscription to VodafoneZiggo' broadband internet services either on a stand-alone basis or as part of a bundle.

Broadcaster: a provider of one or more linear TV channels.

Confidential Information: any business secret, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.

Daily Peak Utilization: the daily 95th percentile over 5-minute average bits transferred sample intervals (technically Liberty Global takes 288 measurements of interface bit input counters per day, the highest 14 values are discarded and 15th highest is used for this purpose) of the sum of measured inbound capacity.

Effective Date: the date of adoption of the Decision.

Film1 business: Film1's activities in the Netherlands, being the provision of movies, series and documentaries to customers through a package of Premium Pay TV channels and related VOD services.

Internet: the world-wide matrix of interconnecting computers known as the internet which transfers data using Internet Protocol, covering all delivery models including, but not limited to Wi-Fi, hotspots and mobile internet.

Liberty Global: Liberty Global Plc.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Notifying Parties, and who has the duty to monitor the Notifying Parties' compliance with the conditions and obligations attached to the Decision.

OTT Service: any service that allows consumers access to audio-visual content, whether linear or non-linear, over the internet (howsoever delivered) via one or more devices.

Parties: Liberty Global, Vodafone Group, and VodafoneZiggo and their respective affiliated undertakings.

Parties' TV Platform: television content distributed pursuant to a contract for such distribution on the Parties' hybrid fibre co-ax network via the analogue PAL standard, the digital DVB-C standard, the PTV standard or any future standard used for the distribution of such television content on the Parties' hybrid fibre co-ax network as well as on their mobile network in the Netherlands.

Trustee: the Monitoring Trustee.

Vodafone: Vodafone Group Plc.

VodafoneZiggo: VodafoneZiggo Group Holding B.V. and its subsidiaries, including its cable network and related business.

Ziggo: Ziggo N.V. and its subsidiaries, including its cable network and related business.

Section B. Commitment not to restrict OTT distribution of content

1. By the below commitment, the Notifying Parties seek to remove any link that could exist between, on the one hand, commercial negotiations of the Parties and Broadcasters and conditions agreed with Broadcasters in such negotiations regarding the distribution of Broadcasters' linear channels and catch-up TV services relating to content on such linear channels via the Parties' TV Platform in the Netherlands and, on the other hand, such Broadcasters' OTT activities, including the content that such Broadcasters could offer for inclusion in such OTT activities (***OTT Commitment***).

2. As of the Effective Date, the Parties shall not enter into or renew any agreement (whether in writing or oral and whether formal or informal, including but not limited to e-mails, side letters or other) with a Broadcaster that includes the distribution of such Broadcaster's linear channels and catch-up TV services relating to content in such linear channels via the Parties' TV Platform in the Netherlands and that contains terms that would directly or indirectly restrict such Broadcaster's ability to offer to third parties and/or end-users, on a stand-alone basis or in partnership with another entity or third party:

   (i) an OTT Service in the Netherlands;

   (ii) its linear channels via an OTT Service in the Netherlands; or

(iii) any content owned and controlled by such Broadcaster (that is to say any content in respect of which that Broadcaster holds the relevant intellectual property rights for OTT distribution in the Netherlands, for so long as it is so owned and controlled), including content from such linear channels, for inclusion in an OTT Service in the Netherlands.

3. To the extent any such terms are included in agreements with Broadcasters regarding the distribution of linear channels and catch-up TV services relating to content on such linear channels of such Broadcasters on the Parties' TV Platform in the Netherlands made before the Effective Date, the Parties shall not enforce such terms and shall promptly after the Effective Date inform the relevant Broadcaster that they waive their rights to enforce such terms and commit to remove such terms from their existing agreements. Furthermore, the Parties shall not make the entry into or renewal of agreements with Broadcasters regarding the distribution of linear channels and catch-up TV services relating to content on such linear channels of such Broadcasters on the Parties' TV Platform in the Netherlands in any way conditional upon the conclusion of a separate agreement with such Broadcasters relating to OTT Services and/or the linear and non-linear content contained therein.

Section C. Interconnection capacity commitment

Purpose

4. By the interconnection capacity commitment, the Notifying Parties seek to ensure that they maintain at least three uncongested routes into VodafoneZiggo's IP network in the Netherlands. By doing this the Notifying Parties seek to ensure they have an incentive to provide sufficient interconnection capacity so as to allow VodafoneZiggo's Broadband Customers to access OTT Services in the Netherlands either via the interconnection points described in paragraph 5 or otherwise.

Practicality

5. To this end, the Notifying Parties will ensure that the Daily Peak Utilization across their interconnection points with each of a group of at least three (3) reputable interconnectivity providers (***ICPs***) who are willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to Broadband Customers, will not exceed eighty (80) percent. That is to say that there will be at least **[20-30]** per cent capacity available above the daily peak as calculated in arriving at Daily Peak Utilization.

6. The Notifying Parties will further ensure that the capacity available above the daily peak, as calculated in arriving at Daily Peak Utilization across that group of at least three (3) reputable ICPs, shall be at least twenty **[20-30]** Gbit/s. This figure shall be reviewed annually in accordance with the procedure described in paragraph 22.

7. Subject to paragraph 8 below, this group of at least three (3) reputable ICPs may vary from time to time but no more than once per quarter generally and once per year in respect of the one (1) ICP declared as being one of the ten (10) largest ICPs in accordance with paragraph 9.

8. By way of exception to paragraph 7, where there is an urgent need to upgrade capacity with a particular ICP and it does not prove possible to agree or implement such upgrade in a timely manner the Notifying Parties will seek the approval of the Commission via

the Monitoring Trustee in accordance with paragraph 22 to replace that ICP with another ICP irrespective of when it was last changed. In that case the Notifying Parties will use their reasonable commercial endeavours to agree and implement an upgrade with that ICP and, if it can do so, to immediately return that ICP to the group of three (3), in place of the ICP which replaced it, at least until it would otherwise have been possible to change that ICP in accordance with paragraph 7.

9. Schedule 1 contains a long list of ICPs which will include the three (3) reputable ICPs referred to above in paragraph 5. This list may be changed from time to time in coordination with the Commission and the Monitoring Trustee, in particular by the addition of other reputable ICPs. This long list shall include the ten (10) largest ICPs who are willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to Broadband Customers. The group of three (3) reputable ICPs referred to above in paragraph 5 shall include at least one of these ten (10) largest ICPs.

10. The Notifying Parties shall request each ICP with whom the Parties directly interconnect in the Netherlands and over which interconnection points traffic may flow to VodafoneZiggo's Broadband Customers for permission to publish in arrears on a monthly basis the highest Daily Peak Utilization in the preceding month, as a percentage of available aggregated direct capacity between that ICP and the Parties. As long as at least half of such ICPs agrees to such publication the Notifying Parties shall publish, on a publicly available website, on a monthly basis, this information with respect to any such ICP who is and remains willing for this to be published. Where fewer than half such ICPs agrees to such publication the Notifying Parties shall publish, on a publicly available website, on a monthly basis, only an aggregated figure based on the highest Daily Peak Utilization in the preceding month of aggregated direct interconnect capacity in the Netherlands.

Section D. Film1 non-acquisition commitment

11. The Notifying Parties commit not to acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice) over the whole or part of the Filml Business (***Film1 Commitment***).

Section E. Trustee

I. Appointment Procedure

12. The Notifying Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee.

13. The Trustee shall:

(i) at the time of appointment, be independent of the Parties and their Affiliated Undertakings;

(ii) possess the necessary qualifications to carry out its mandate, for example have sufficient experience as an investment bank or consultant or auditor; and

(iii) neither have nor become exposed to a Conflict of Interest.

14. The Trustee shall be remunerated by the Notifying Parties in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by the Notifying Parties

15. No later than two (2) weeks after the Effective Date, the Notifying Parties shall submit a name or names of one or more natural or legal persons whom the Notifying Parties propose to appoint as the Monitoring Trustee to the Commission for approval.

16. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 13 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments; and

(b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

17. The Commission shall have the discretion to approve or reject the proposed Trustee and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, the Notifying Parties shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Notifying Parties shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Notifying Parties

18. If all the proposed Trustees are rejected, the Notifying Parties shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraph 15.

Trustee nominated by the Commission

19. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom the Notifying Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

20. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or the Notifying Parties, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee with regard to agreements with Broadcasters

21. The Monitoring Trustee shall make use of the methodology in Schedule 2 for reviewing existing and new agreements with Broadcasters in order to monitor compliance with the OTT Commitment.

Duties and obligations of the Monitoring Trustee with regard to the interconnection capacity commitment

22. The Monitoring Trustee shall monitor compliance with the interconnection capacity commitment set out in Section C. To that end the Monitoring Trustee shall:

(a) verify, on the basis of information provided to it by the Notifying Parties that, in accordance with paragraph 5, the Daily Peak Utilization across the relevant interconnection points does not exceed 80%;

(b) review Schedule 1 every three (3) months with the aim of ensuring that Schedule 1 will always contain a sufficient number of reputable ICPs;

(c) identify which of the ICPs referred to in Schedule 1 are amongst the ten (10) largest ICPs for the purposes of paragraph 9. It shall determine the appropriate metric for defining the 10 largest ICPs in consultation with the Notifying Parties, having regard to paragraph 4;

(d) review every year the minimum capacity level described in paragraph 6 to determine whether such commitment is still required to prevent that the Concentration gives rise to a significant impediment to competition and if so, to agree with the Notifying Parties a number which allows for a reasonable level of spare capacity;

(e) in the event that the Notifying Parties contend that they need to vary the group of three (3) ICPs in the situation referred to in paragraph 8, where there is an urgent need to upgrade capacity and it does not prove possible to agree or implement such upgrade in a timely manner, to review this matter with the Notifying Parties and if deemed appropriate, to allow the Notifying Parties to make this change;

(f) provide to the Commission, sending the Notifying Parties a copy at the same time, a written report within fifteen (15) days after the end of each quarter that shall cover, for that period: (i) the three (3) ICPs referred to in paragraph 5 and (ii) the Daily Peak Utilisation; and

(g) promptly report in writing to the Commission, sending the Notifying Parties a copy at the same time, if it concludes on reasonable grounds that the Notifying Parties are failing to comply with any of the Commitments.

III. Duties and obligations of the Notifying Parties

23. The Notifying Parties shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Parties shall provide the Trustee upon request with copies of any document (see in relation to the OTT Commitment further Schedules 2 and 3). The Notifying Parties shall make available to the Trustee one or more offices on their premises and shall be available

for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

24. The Notifying Parties shall indemnify the Trustee and its employees and agents (each an ***Indemnified Party***) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Notifying Parties for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

25. At the expense of the Notifying Parties, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Notifying Parties' approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should the Notifying Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Notifying Parties. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 27 shall apply *mutatis mutandis*.

26. The Notifying Parties agree that the Commission may share Confidential Information proprietary to the Notifying Parties with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17(1) and (2) of the EUMR apply *mutatis mutandis.*

27. The Notifying Parties agree that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and the shall inform interested third parties of the identity and the tasks of the Monitoring Trustee.

28. For a period of ten (10) years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of the Commitments.

IV. Replacement, discharge and reappointment of the Trustee

29. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:

(a) the Commission may, after hearing the Trustee, require the Notifying Parties to replace the Trustee; or

(b) the Notifying Parties, with the prior approval of the Commission, may replace the Trustee.

30. If the Trustee is removed according to paragraph 29, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 12 to 19.

31. Besides the removal according to paragraph 29, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after the Commitments with which the Trustee has been entrusted have been implemented and/or have expired in accordance with Section F above. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. Arbitration

Fast Track Dispute Resolution

32. In the event that a third party claims that the Notifying Parties or an Affiliated Undertaking is failing to comply with the requirements of the Commitments vis-à-vis that third party, the fast track dispute resolution procedure as described herein shall apply.

33. Any third party who wishes to avail itself of the fast track dispute resolution procedure (a ***Requesting Party***) shall send a written request to the Notifying Parties (with a copy to the Trustee) setting out in detail the reasons leading that party to believe that the Notifying Parties are failing to comply with the requirements of the Commitments. The Requesting Party and the Notifying Parties will use their commercially reasonable efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding fifteen (15) working days after receipt of the request.

34. The Trustee shall present its own proposal (the ***Trustee Proposal*****)** for resolving the dispute within eight (8) working days, specifying in writing the action, if any, to be taken by the Notifying Parties or an Affiliated Undertaking in order to ensure compliance with the Commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.

35. Should the Requesting Party and the Notifying Parties (together the ***Parties to the Arbitration***) fail to resolve their differences of opinion in the consultation phase, the Requesting Party shall serve a notice (the ***Notice***), in the sense of a request for arbitration, to the International Chamber of Commerce (hereinafter the ***Arbitral Institution***), with a copy of such Notice and request for arbitration to the Notifying Parties.

36. The Notice shall set out in detail the dispute, difference or claim (the ***Dispute***) and shall contain, *inter alia,* all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by the Notifying Parties (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.

37. The Notifying Parties shall, within ten (10) working days from receipt of the Notice, submit its answer (the ***Answer***), which shall provide detailed reasons for its conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which the Notifying Parties propose to undertake vis-a-vis the Requesting

Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

Appointment of the Arbitrators

38. The Arbitral Tribunal shall consist of three (3) persons. The Requesting Party shall nominate its arbitrator in the Notice; The Notifying Parties shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by the Notifying Parties shall, within five (5) working days of the nomination of the latter, nominate the chairman, making such nomination known to the parties and the Arbitral Institution which shall forthwith confirm the appointment of all three (3) arbitrators.

39. Should the Requesting Party wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the Requesting Party and the Notifying Parties shall agree on the nomination of a sole arbitrator within five (5) working days from the communication of the Answer, communicating this to the Arbitral Institution which shall forthwith confirm the appointment of the arbitrator.

40. Should the Notifying Parties fail to nominate an arbitrator, or if the two (2) arbitrators fail to agree on the chairman, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution.

41. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the ***Arbitral Tribunal***.

Arbitration Procedure

42. The Dispute shall be finally resolved by arbitration under the Rules of the Arbitration Court of the International Chamber of Commerce, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the ***Rules***). The arbitration shall be conducted in Amsterdam in the English language.

43. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.

44. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.

45. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Trustee in all stages of the procedure if the Parties to the Arbitration agree.

46. The Arbitral Tribunal shall not disclose confidential information and apply the standards attributable to confidential information under the EUMR. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Trustee, and outside counsel and experts of the opposing party.

47. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Requesting Party unless the Notifying Parties can produce evidence to the contrary.

Involvement of the Commission

48. The Commission shall be allowed and enabled to participate in all stages of the procedure by:

(i) receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;

(ii) receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural timetable);

(iii) having the opportunity to file *amicus curiae* briefs; and

(iv) being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.

49. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.

50. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

Decisions of the Arbitral Tribunal

51. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the EUMR, EU law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.

52. Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.

53. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by the Notifying Parties or an Affiliated Undertaking in order to comply with the Commitments vis-à-vis the Requesting Party (e.g. specify a contract including all relevant terms and conditions). The final award shall

be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

54. The final award shall, as a rule, be rendered within six (6) months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitments if asked by the Arbitral Tribunal.

55. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.

56. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation.

Section G. Duration

57. The OTT Commitment will expire eight (8) years from the Effective Date, unless in response to a request by the Notifying Parties in accordance with the Review Clause, the Commission decides to waive, modify or substitute this commitment on grounds that the conditions of competition would no longer justify the undiminished continuation of this commitment.

58. The Film1 Commitment will expire on 11 October 2024, unless in response to a request by the Notifying Parties in accordance with the Review Clause, the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Film1 Business is no longer necessary to render the Concentration compatible with the internal market.

Section H. The Review Clause

59. The Commission may extend the time periods foreseen in the Commitments in response to a request from the Notifying Parties or, in appropriate cases, on its own initiative. For the avoidance of doubt, the Commission cannot extend the duration of the OTT Commitment in Section B and Section C beyond the eight (8) years specified in paragraph 57 and the Film1 Commitment in Section D beyond the date specified in paragraph 58. Where the Notifying Parties request a change to a time period, they shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Parties. Only in exceptional circumstances shall the Notifying Parties be entitled to request an extension within the last month of any period.

60. The Commission may further, in response to a reasoned request from the Notifying Parties, showing good cause waive, modify or substitute one or more of the undertakings

in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall at the same time send a non-confidential copy of the report to the Notifying Parties. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with. Such a request may be submitted by the Notifying Parties pursuant to paragraph 57 or 58, or in exceptional circumstances, in any other instance.

Section I. Entry into Force

61. The Commitments shall take effect upon the date of adoption of the Decision.

SCHEDULE 1 — LONG LIST INTERNET CONNECTIVITY PROVIDERS

1. […]
2. […]
3. […]
4. […]
5. […]
6. […]
7. […]
8. […]
9. […]
10. […]
11. […]
12. […]
13. […]
14. […]
15. […]
16. […]
17. […]
18. […]
19. […]
20. […]
21. […]
22. […]
23. […]
24. […]
25. […]
26. […]
27. […]

SCHEDULE 2 — REVIEW OF AGREEMENTS

Pursuant to Section E, the following methodology shall be applied for reviewing agreements with Broadcasters by the Trustee in order to monitor compliance with the OTT Commitment, set out in Section B:

(a) Any (part of an) agreement with a Broadcaster, existing on, amended or signed after the Effective Date, in so far as it directly or indirectly relates to OTT services, and regardless its form (***Relevant Agreement***), shall be provided to the Trustee for review in a database to which the Trustee and Commission have access.

(b) The Parties will maintain a rolling list of potential Relevant Agreements to be reviewed by the Trustee with an indication of the expected commencement, duration and finalisation of negotiations. This rolling list is to be updated every three months.

(c) The Parties have the discretion whether to submit an agreement for review either before or after its signature. If after signature, the Parties will not delay submission of the agreement for review.

(d) In the event that the Parties and the Broadcaster are enforcing terms, without signing a formal agreement, the Parties will provide the Trustee with the then current draft of such agreement (or any summary of such terms including by e-mail) to the extent it directly or indirectly relates to OTT services.

(e) The Trustee will have 48 hours to review agreements which have not yet been signed and one week to review if the agreement has been signed.

(f) Communication with the Commission:

  (i) The Trustee will keep the Commission informed of any potential concern identified by the Trustee relating to terms addressing OTT services, identified by the Trustee, regardless of whether it is ultimately (quickly) resolved in cooperation with the Parties.

  (ii) The Parties will have the opportunity to discuss queries with the Trustee before the Trustee escalating any issue identified to the Commission.

SCHEDULE 3 —INFORMATION PROVISION

Pursuant to Section E, the Notifying Parties shall secure that the Trustee shall be provided with all information reasonably required in order to undertake its functions. To this end, the Parties shall provide the Trustee, on a regular basis, but and at least automatically every quarter, and in addition in timely manner on request, with the following (which may vary from time to time by agreement with the Trustee):

(g) A chart showing for the last month for each of the three ICPs, daily peak capacity (as a percentage of total), daily capacity (as a percentage of total) and daily available bandwidth in Tera bits per second (Tbps).

(h) Three documents in a format mutually agreed with the Trustee, containing the following:

(i) Capacity planning notes;

(ii) Hourly data (one line every hour for each interface of the three ICPs) with data on Device, Interface, Timestamp, Average usage, Minimum Usage and Maximum Usage;

(iii) Interface speeds (total physical capacity for each interface of the three ICPs) snapshot of one day per month with data on Device, Interface and Speed; and

(iv) Daily interface 95th percentile capacity (one line for each interface of the three ICPs, one column per day, done monthly).