



# Annex press release referral request Liberty Global / Ziggo

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## Introduction

1. On 14 March 2014, the European Commission (“Commission”) received a notification of the proposed transaction that comprises the acquisition of sole control by Liberty Global plc (“Liberty Global”) of Ziggo N.V. (“Ziggo”)<sup>1</sup>. On 17 March 2014, the Netherlands Authority for Consumers and Markets (“ACM”) received a copy of this notification.
2. Liberty Global announced on 27 January 2014 its intention to launch a public bid for the remaining shares in Ziggo it does not already own. Liberty Global is active in the Netherlands primarily through UPC Nederland B.V. (“UPC”), which owns and operates a cable network in The Netherlands. Via its Chellomedia division (“Chellomedia”), Liberty Global distributes a number of TV channels in the Netherlands<sup>2</sup>. Ziggo owns and operates a broadband cable network in the Netherlands. Also, Ziggo owns a 50% equity interest in HBO Nederland Coöperatief U.A. (“HBO Nederland”). HBO Nederland operates pay-TV channels and VOD services in the Netherlands. The proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the EC Merger Regulation (“ECMR”)<sup>3</sup> or Article 27(1)(b) of the Dutch Competition Act<sup>4</sup>.
3. Having carried out a preliminary assessment, ACM has come to the conclusion that the proposed transaction *prima facie* affects markets that are regional or national in scope, which therefore present all the characteristics of distinct markets within the meaning of Article 9(2)(a) of the ECMR, and threatens to affect competition significantly in at least several Dutch TV-related markets and telecommunication markets. In particular, this is due to the creation or strengthening of a dominant position and/or coordinated effects on one or more (possible) regional/national markets for TV and/or telecommunication.
4. ACM argues that it is the more appropriate authority for assessing the concentration at hand. In summary, this conclusion is based on the fact that the potential effects of the proposed transaction are national in scope, the fact that ACM has developed significant expertise in the TV-related and telecommunication markets over the previous years, the timing and potential impact and overlap of ongoing ACM investigations on the affected national markets and the need to ensure a coherent and consistent approach when assessing regulation and concentrations in the telecommunication sectors in the Netherlands falling under ACM’s competence. In the past investigations on Dutch TV-related markets and telecommunication markets have been carried out by the Netherlands Competition Authority (NMa) and the Dutch telecom regulator the Netherlands Independent Post and Telecommunications Authority (OPTA). As of 1 April 2013 the Netherlands Consumer Authority, the NMa en the OPTA merged into the ACM. Furthermore, this conclusion is based on the fact that the Commission has referred comparable proposed transactions to Member States in recent history and the absence of overlap with current investigations of the Commission.
5. ACM therefore requests the Commission a full referral under Article 9(2)(a) ECMR of the proposed transaction in view of enforcing Dutch merger control (chapter 5, Dutch Competition

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<sup>1</sup> COMP.M/7000 - Liberty Global/Ziggo.

<sup>2</sup> On 3 February 2014, Liberty Global announced that it has completed the sale of virtually all of the assets of Chellomedia to AMC Networks Inc. Liberty Global will retain its Dutch Premium channel business, which consists of its Film1 and Sport1 channels.

<sup>3</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

<sup>4</sup> If applicable.



Act), in accordance with the three guiding principles – more appropriate authority, one-stop-shop and legal certainty –, as specified in its Notice on Case Referral in respect of concentrations<sup>5</sup>.

### Guiding principles for case referral

6. The system of merger control established by the Merger Regulation, including the mechanism for re-attributing cases between the Commission and Member States, is consistent with the principle of subsidiarity enshrined in the Treaty on the functioning of the European Union. These rules governing the referral of concentrations protect the competition interests of the Member States in an adequate way<sup>6</sup>. Decisions with regard to the referral of cases take due account of the following inter-linking aspects of this principle: which authority is more appropriate for carrying out the investigation, the benefits inherent in a 'one-stop-shop' system and the importance of legal certainty with regard to jurisdiction. In the following ACM concludes that a decision of the Commission to refer the concentration at hand to the Netherlands is consistent with the guiding principles of case referral.

#### 1. More appropriate authority

7. The proposed acquisition of Ziggo by Liberty Global has potentially significant effects on the competition landscape in various Dutch markets, whereas the cross-border/European effects of this concentration are preliminary assessed as limited. The combined businesses of Liberty Global/UPC and Ziggo will reach over 90% of Dutch homes, i.e. approximately 7 million homes. This combination will make a leading provider on both Dutch TV-related and telecommunications markets<sup>7</sup>.
8. ACM houses up-to-date, extensive and in-depth knowledge and experience of the affected markets allowing it to assess the merger on its merits. In the past years, ACM dealt with several concentration and antitrust cases with regard to telecommunication markets<sup>8</sup> and TV-related markets<sup>9</sup>.
9. In addition, ACM is the Dutch telecom regulator. In that capacity, ACM is currently investigating several telecommunication markets in preparation of draft market analysis decisions by mid-2014. The aim of these analyses is to review the markets from a forward-looking perspective in the absence of regulation and to determine whether ex-ante wholesale obligations are to be imposed for the next three years. As part of the analyses, the product markets and geographical

<sup>5</sup> Commission Notice on case referral in respect of concentrations, OJ C 56, 5 March 2005, p.2.

<sup>6</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, recital 11.

<sup>7</sup> Press release Liberty Global and Ziggo, *Liberty Global to acquire Ziggo*, dated 27 January 2014.

<sup>8</sup> NMa decision of 6 November 2002 in case 3052/Liberty Media – Casema, NMa decision of 8 December 2006 in case 5796/Cinven – Warburg Pincus – Essent Kabelcom, NMa decision of 19 December 2008 in case 6397/KPN – Reggefiber, NMa decision of 5 August 2011 in case 7204/KPN – CAIW, NMa decision of 13 April 2012 in case 7325/KPN – Lijbrandt – Glashart – Reggefiber Wholesale, NMa decision of 16 October 2012 in case 7326/KPN – Concepts ICT – Edutel – XMS – KickXL, NMa decision of 16 April 2013 in case 7604/Ziggo B.V. – Esprit Telecom B.V., NMa decision of 30 December 2002 in case 2658/Mobile Operators and CBb decision of 31 December 2007 in case AWB 06/657/660-662 – Mobile operators, ACM decision of 7 January 2014 in case 13.0612.53, Toezeggingsbesluit mobiele operators, Court of Rotterdam decision of 10 May 2012 in case AWB 09/345 – Ziggo vs. NMa (appeal KPN-Reggefiber).

<sup>9</sup> NMa decision of 13 August 2007 in case 6126/RTL NL – Radio 538, NMa decision of 22 July 2011 in case 7185/Sanoma – SBS, NMa decision of 29 November 2012 in case 7500/Fox Entertainment – Eredivisie.



markets of the retail telecommunication markets will be defined. Once the retail markets have been defined, it has to be assessed whether there is a risk of single or joint significant market power ("SMP") from a forward-looking perspective and in the absence of regulation. If a risk of SMP is identified at the retail level, the highest wholesale level is identified and analyzed as well. If SMP is identified at the wholesale level, obligations are imposed at the highest wholesale level such that significant impact on competition on both the wholesale market and the retail market is resolved. The markets currently analyzed are referred to as affected markets by Liberty Global as ACM analyzes the retail markets for internet access, fixed-telephony and business connectivity services and the wholesale markets for local loop unbundling and fixed telephony. ACM has collected a wide range of information<sup>10</sup>. Among the investigated theories of harm is the existence of a collective joint dominance by KPN and the merged entity.

10. Moreover, on 7 February 2014, ACM started its merger investigation on the proposed transaction of KPN acquiring full control over Reggefiber. Currently KPN has joined control over Reggefiber. Reggefiber is responsible for investments in the roll-out of a Next Generation Network of Fiber-to-the-Home ("FttH") in the Netherlands. Reggefiber connects around 20% of Dutch households through FttH. FttH is for KPN an important infrastructure to compete with cable companies such as UPC and Ziggo. To correctly assess the effects of this concentration all possible effects on competition, and especially the competitive pressure from cable companies on all of the affected markets must be analyzed by ACM. Again, the markets analyzed in that investigation overlap with various affected markets of the concentration at hand.
11. ACM is aware of current investigations of the Commission into TV-related and mobile telecommunications sector. ACM argues that the proposed transaction at hand does not coincide with any of these investigations.
12. With regard to mobile telephony, ACM would like to point out that, although John Malone (owner of Liberty Global) has announced Liberty Global to become active on the mobile-telephony market, the position of both UPC and Ziggo on the mobile-telephony markets in the Netherlands is very limited, since both are active as MVNOs on the network of Vodafone NL since 2013. Furthermore, UPC and Ziggo are expected to exploit their WiFi-hotspots network in the Netherlands to achieve a position on the mobile-telephony market, but to date the WiFi-hotspots network have not been considered as a substitute for a mobile network. As such neither the concentration at hand is comparable with mergers of MNOs such as recently in Austria<sup>11</sup>, Germany<sup>12</sup> and Ireland<sup>13</sup>, neither are the potential effects on the mobile-telephony market.
13. Concerning the cable industry, ACM would like to point out that a recent German case in 2011 of Liberty Global merging with Kabel Baden-Württemberg<sup>14</sup> was referred to the BundesKartellamt. With this merger, the number two and three of the regional German cable TV operators are

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<sup>10</sup> The external research consists of market research under consumers of fixed telephony and internet. The research focuses on the profile of users, usage patterns, potential substitutes, switching behavior and barriers to switch. Market research under business customers fixed telephony, internet and business connectivity services. The research focuses on the profile of users, usage patterns, potential substitutes, switching behavior, barriers to switch and the sourcing process of business services. Prospective analysis until 2018 of the retail markets for internet access, fixed telephony and business connectivity services. This analysis describes the developments in the markets and the effects of these developments on the various players in the markets. It results in a model with markets shares in the period 2013-2018.

<sup>11</sup> Commission decision of 12 December 2012 in case COMP M.6497 Hutchison 3G Austria/Orange Austria.

<sup>12</sup> COMP M.7018 Telefonica Deutschland/E-Plus.

<sup>13</sup> COMP M.6992 Hutchison 3G UK/Telefonica Ireland.

<sup>14</sup> Commission decision of 16 June 2011 in case COMP M.5900 LGI/KBW.



combined<sup>15</sup>. Like in the Netherlands, these regional cable TV operators are only active on their own footprint area, but it cannot be excluded that this is the result of coordination among the operators and that the concentration could strengthen such coordinated effects.

14. In its referral decision, the EC revealed that the proposed transaction might significantly affect competition in some of its domestic German TV-related markets. Furthermore, the Commission indicated that almost all markets potentially affected are national or regional, and that the national competition authority has significant experience in the sector. As the proposed transaction Liberty Global/Ziggo will also significantly affect competition in several distinct Dutch telecommunications and TV-related markets, and the ACM has significant experience in the competitive and regulatory landscape on the telecommunications markets in the Netherlands, a referral of Liberty Global/Ziggo would be in line with the Commission's practice.
15. Moreover, contrary to most other Member States in the Netherlands two fixed networks with a national coverage compete in various markets with each other. Cable operators (like UPC and Ziggo) at one hand and KPN, the incumbent with a national network<sup>16</sup> on the other hand are active in the Netherlands. This puts ACM in a unique position as the sole authority familiar with the current situation of the competitive and regulatory landscape on the telecommunications markets in the Netherlands.
16. With regard to possible TV-related markets, ACM would like to point out that the Commission announced on 13 January 2014 that it has opened formal antitrust proceedings to examine certain provisions in licensing agreements between several major US film studios and the largest European Pay TV broadcasters. The investigation focuses on restrictions in agreements between film studios and Pay TV broadcasters that grant "absolute territorial exclusivity" to these broadcasters. Such provisions ensure that the films licensed by the US studios are shown exclusively in the Member State where each broadcaster operates via satellite and the internet. They prevent access by subscribers who are located outside the licensed territory. The investigation will focus on restrictions that prevent the selling of the content in response to unsolicited requests from viewers located in other Member States - the so-called "passive sales" - or to existing subscribers who move or travel abroad.
17. However, overlap of the Commission's current TV-related investigations with the proposed concentration is very limited:
  - As far as broadcasters are concerned, the proceedings only involve the largest Pay TV operators active in countries which represent the most important European Pay TV markets<sup>17</sup>. No Dutch Pay TV operators are subject of the investigation.
  - The investigation concerns only a part of the activities of Liberty Global and Ziggo that are to be examined in the concentration involved. UPC and Ziggo are already geographically

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<sup>15</sup> Kabel Deutschland is the leading player in Germany.

<sup>16</sup> Next to the Netherlands, only Belgium and Malta have a similar situation of two competing fixed networks. In Belgium, no joint dominance has been identified, but both parties are currently regulated. In Malta, in 2006 an attempt was made to identify joint dominance, but this was withdrawn in the Commission's second-phase investigation. According to the Commission, the MCA however did not convincingly establish that the market was sufficiently mature and characterized by reduced scope for price coordination to make it conducive to tacit coordination.

<sup>17</sup> BSkyB in the UK, Sky Italia in Italy, Canal+ in France, Sky Deutschland in Germany and DTS (operating under the Canal Plus brand) in Spain. The film studios involved are the so-called "major" US studios: Twentieth Century Fox, Warner Bros, Sony, NBC Universal and Paramount.



limited in their offerings towards customers as a result of the infrastructure used. ACM can obviously share the gathered information about Film1 and HBO with the Commission.

- Acquisition of Eyeworks by Warner Bros is notified in the Netherlands (as in Germany, Austria, Sweden, Argentina, and Ukraine). ACM started its investigation on 26 February 2014.

18. ACM concludes that it should be considered to be the more appropriate authority for assessing the concentration at hand, given the significant expertise in the content and telecommunication markets and since the potential effects of the proposed transaction are national in scope. The timing, the potential impact of the concentration at hand and the overlap with current and current ACM investigations on the affected markets, underline the need for a coherent and consistent approach. Furthermore, the Commission has referred comparable proposed transactions to Member States in recent history, and the absence of overlap with current investigations of the Commission would favor a referral given the overlap with investigations conducted by ACM.

### 2. One-stop-shop principle

19. The Commission's policy with regard to the referral of concentration cases is aimed at having cases be dealt with by the authority that is in the best position to do so.
20. In general, it is not desirable that parties need to file notifications with multiple national competition authorities. Notifying parties could potentially have the objection that a referral of the transaction to the Netherlands would lead to a delay because of the obligation to re-notify. This possible objection can be overcome since ACM has already formed a broad picture of potential competition problems with filing this referral request. The market investigation of ACM can be launched at the moment that a referral decision has been taken by the Commission and the notification with ACM has been filed by the parties. The investigation's duration can thus be kept to a minimum, and further delays can be avoided as much as possible.

### 3. Legal certainty

21. Even though a full referral would mean a deviation from the original power with regard to the concentration case at hand, no harm would be done from the perspective of all concerned if the concentration at hand would be referred by the Commission to the Netherlands. A referral should be made when there is a compelling reason for departing from the original jurisdiction. In the above, ACM has extensively shown that there are compelling reasons to depart from the original jurisdiction. Both the parties and the Commission are aware of ACM's desire to assess this concentration given the potential effects of the proposed concentration in the Netherlands and have contacted each other on several occasions in the period prior to and after the final submission of the notification with the Commission.

## **Conclusion**

22. In conclusion, the Netherlands Authority for Consumers and Markets is of the opinion that the proposed concentration of Liberty Global and Ziggo is ready for a full referral to the Netherlands by the European Commission, as the referral criteria of article 9(2)(a) of the EC Merger Regulation have been met, based on the aforementioned criteria.