Authority for Consumers & Markets

Non-confidential version

Grounds for the referral request in accordance with Article 9(2)(a) of the EC Merger Regulation in case COMP.M/7978 – Ziggo / Vodafone Netherlands / JV

Our reference: ACM/DM/2016/203953

1 Introduction

1. On 15 June 2016, the European Commission ("Commission") received a notification of the proposed transaction that comprises the creation of a 50/50 joint venture by Liberty Global Europe Holding B.V. ("Liberty Global") and Vodafone Group plc ("Vodafone") in the Netherlands. On 15 June 2016, the Netherlands Authority for Consumers and Markets ("ACM") received a copy of this notification.

2. Liberty Global owns and operates a cable network in The Netherlands under the name Ziggo. Ziggo's focus is on fixed-line and TV-services. In addition, Ziggo owns a […][*]% equity interest in HBO Nederland Coöperatief U.A. ("HBO Nederland"). HBO Nederland operates pay-TV channels and related video-on-demand ("VOD") services in the Netherlands. Vodafone is primarily involved in the operation of mobile telecommunications networks and the provision of mobile telecommunications services. In addition Vodafone is a relatively new player in the provision of fixed voice, broadband internet access and TV services. The proposed transaction constitutes a concentration within the meaning of Article 3(4) of the EC Merger Regulation ("ECMR") [1] or Article 27(2) of the Dutch Competition Act[2].

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 telecommunications and media markets. In particular, this is due to the creation or strengthening of a dominant position and/or coordinated effects on one or more (possible) national markets for telecommunications.

4. ACM concludes 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 telecommunications 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

[*] In this public version, parts of the text are replaced or omitted for reasons of confidentiality. Replaced or deleted parts are enclosed in square brackets. In the case of numbers or percentages substitution may have occurred in the form of bandwidths.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[2] If applicable.

a coherent and consistent approach when assessing regulation and concentrations in the telecommunications sectors in the Netherlands both falling under ACM's competence. In the past investigations on Dutch TV-related markets and telecommunications markets have been carried out by ACM (and its predecessors).

5. ACM therefore requests the Commission to make a full referral under Article 9(2)(a) ECMR of the proposed transaction in view of enforcing Dutch merger control (chapter 5, Dutch Competition 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[3].

6. […]

1.1 Analysis of the market positions of Liberty Global and Ziggo on the affected markets

7. ACM expects *prima facie* that the proposed transaction will have a significant impact on competition in the Netherlands. In this section ACM will show that on several of the affected Dutch TV-related and telecommunications markets competition concerns exist. In particular due to a significant impediment of effective competition. Competition concerns exist on at least the following markets:

   a) retail market for mobile telecommunications
   b) retail market for fixed-telephony services
   c) retail market for internet access
   d) retail market for TV services to end consumers
   e) retail market for multi-play services
   f) retail market for business communications
   g) Wholesale market for supply and acquisition of pay TV channels

Ad a) Retail market for mobile telecommunications

8. The joint venture will have a significant impact on the mobile market in the Netherlands. […] As a result of fixed-mobile convergence there is a further risk that there will be competition concerns on this market due to the possible creation of a duopoly of KPN and Vodafone/Ziggo. The competitive pressure from mobile-only players, such as T-Mobile, will be reduced. ACM considers the threat of a significant weakening of competition through the reduction of the number of players with a fixed-mobile bundle to be serious. Mobile-only players will have to put severe effort into remaining in competition with the fixed-mobile bundles.

[3] Commission Notice on case referral in respect of concentrations, OJ C 56, 5 March 2005, p.2.

9. Moreover, the proposed joint venture has an advantage over its competitors on the future 5G network. Although the additional market share of the joint venture is limited due to the position of Ziggo, it is important to note that Ziggo acquired significant spectrum in the mobile spectrum auction in 2010. Ziggo has 2 x 20 MHz on the 2.6 GHz band. Combined with Vodafone's 2 x 10 MHz on this band, the joint venture is capable of a more timely introduction of 5G mobile internet leading to increased competitive pressure on KPN and T-Mobile.

Ad b, c, d) Retail markets for fixed-telephony services, internet access and TV services

10. KPN and Ziggo both own a fixed network with (almost) national coverage. KPN has a copper and fibre network and Ziggo exploits a cable network. KPN and Ziggo both have high market shares on the various fixed retail markets. KPN has market shares on these markets between [20 – 30][confidential: ..]% - [60 – 70][confidential:..]% and Ziggo's market shares are between [30 – 40][confidential:..]% - [70 – 80][confidential: ..]%..

11. During ACM's most recent market review (resulting in the WLA-decision of December 2015), Vodafone positioned itself as a real and substantial challenger to KPN and Ziggo. Vodafone's ambition is to grow and challenge the established companies in the market and achieve a top-3 position in the fixed retail markets (telephony, internet and TV services). Based on wholesale access to KPN's copper infrastructure, as well as through unbundled access to the FttH-network, Vodafone is well placed to challenge KPN and Ziggo by offering differentiated services on the fixed markets and for fixed-mobile bundles. Vodafone expressed in 2014 the ambition to gain a market share on fixed [of 10%]. Vodafone argued that in the future it could become the only alternative operator that is able to invest significantly and therefore would be the most important competitor to KPN and Ziggo. Vodafone stressed the importance of access regulation by ACM for it to realise its ambitions. Since the beginning of 2015, Vodafone's footprint on fibre has grown to cover […] households in the Netherlands and Vodafone argued that its fibre coverage would further increase rapidly. Although its market share is still small, Vodafone is currently [a] challenger, as illustrated in the table below.

Table 1: Quarterly growth on broadband market (including bundled offers) [Confidential]

	2014	2015				2016
	Q4	Q1	Q2	Q3	Q4	Q1
Vodafone	[…]	[…]	[…]	[…]	[…]	[…]
Online	[…]	[…]	[…]	[…]	[…]	[…]
Tele2	[…]	[…]	[…]	[…]	[…]	[…]
KPN	[…]	[…]	[…]	[…]	[…]	[…]
Ziggo	[…]	[…]	[…]	[…]	[…]	[…]

Source: ACM Telecommonitor

12. […]. ACM therefore concludes that Tele2 is a weaker competitor than Vodafone. T-Mobile is currently not active on the fixed markets. It sold its entire fixed network (operating under the

Online brand) to M7 in 2013. The significant costs of re-entry lead ACM to believe that it is unlikely that the current owner of T-Mobile will commit to such investment either in the short-term or in the long-term.

13. Because Vodafone is currently [a] challenger and has already committed itself to remain in the fixed markets through significant investments in fibre, the concentration will result in the removal of Vodafone as maverick on the fixed markets. The decrease of this competitive pressure is larger than the market shares currently express. Therefore, ACM is of the opinion that the concentration will likely have significant unilateral effects on competition.

14. Besides the unilateral effects of this concentration, there are strong indications that the concentration could possibly create a collective dominant position of KPN and Vodafone/Ziggo in the fixed markets as well as in the multiplay market (see paragraph 17 and further). Therefore, ACM considers an assessment necessary of possible coordinated effects on the fixed retail markets and possibly also the retail markets for multi-play services.

15. After the concentration the market for internet access will be highly concentrated. The combined market share of KPN and Vodafone/Ziggo will be approximately 80 – 90 [confidential: …]% on a national market. KPN and Vodafone/Ziggo will have symmetric market positions of 40 – 50% [Confidential:…%] each and will compete with each other in 90% of the households in the Netherlands (Vodafone/Ziggo's footprint). The nature of the services is highly homogeneous. Marginal costs seem to be very low both for KPN and Vodafone/Ziggo and it is not plausible that differences in marginal costs will make the creation of a collective dominant position impossible. An equal market share distribution between KPN and Vodafone/Ziggo could be a possible focal point for coordination. In addition, there are indications that the market will be transparent enough to successfully monitor the coordination. While there are a few other smaller competitors active on the market, it is not evident that they will exercise enough competitive pressure to jeopardize the outcome expected from coordination.

16. Given the above, ACM concludes therefore that a further assessment of the retail markets for TV services to end consumers, fixed-telephony services, internet access as well as on the retail market for multi-play services is essential in order to be able to exclude the likelihood of a significant impediment to effective competition.

Ad e) retail market for multi-play services

17. […], the current market share on quadplay-bundles does not reflect the real competitive pressure of the proposed joint venture. In particular large players (owning a fixed and mobile network) are capable of putting a competitive quad play offer on the market.

18. KPN is best placed to offer (fixed-mobile) multi-play services, owning a fixed as well as a mobile network with national coverage. Ziggo lacks a mobile network, but is able to offer multi-play services as an MVNO on the network of Vodafone. Vodafone can currently offer multi-play services relying on the access regulation of KPN's fixed network. Independently, Ziggo is the

largest challenger of KPN on multi-play services. Vodafone and Tele2 are significantly smaller players on this market, having a much smaller customer base than KPN and Ziggo.

19. In the Netherlands Tele2 […] only just recently started – end of 2015 - with its own mobile network. In comparison to KPN and Vodafone, Tele2 has a weaker mobile proposition; having only 4G it is dependent on third party access for 3G. 3G is still very important in the Netherlands – 62% of the Dutch consumers still use 3G.

20. With the creation of the joint venture the parties are capable to create a very strong second player on the multi-play market, making it very difficult to challenge for the only remaining player Tele2. It will be relatively easy for the joint venture to combine Ziggo customers with Vodafone mobile subscribers through a fixed-mobile bundle, thereby reducing the numbers of viable competitors in various telecommunications markets in the Netherlands. ACM is of the opinion that Tele2 will probably not be able to take the current market position of Vodafone in the fixed and multi-play market.

21. T-Mobile is currently not active on the fixed markets and can therefore not offer multi-play services to its customers. In 2013, T-Mobile even sold its fixed network to focus only on mobile. It would require substantial investments to re-enter the fixed market and become active on multi-play services as well. Although further investigation would be necessary in order to draw definitive conclusions, ACM considers a timely and sufficient entry by T-Mobile most unlikely.

Ad f) Retail market for business communications

22. Currently both Vodafone and Ziggo have relatively limited positions on the retail market for business communications (or business connectivity services as defined by ACM). The combined powers of the joint venture will make it a stronger competitor to KPN. However, if the joint venture decides to offer these services mainly via its coax network it could weaken the position of Eurofiber, which is active on both wholesale and retail level with its own FttO-network. The roll-out of Eurofiber's fibre-network may slow down if one of the main access seekers, Vodafone, no longer demands fibre-access. The business case for rolling out the fibre-network and connecting new business customers could diminish. Further assessment of this potential harm is necessary.

Ad g) Wholesale market for supply and acquisition of pay TV channels

23. Ziggo has already a large position on the wholesale market of the acquisition of pay TV channels. Ziggo is capable to reach better results in negotiation with content providers than smaller parties like T-Mobile (for its OTT service Knippr) and Tele2 (for its retail bundle offer). Due to the removal of another small player on the market, content providers have less incentive to offer smaller parties a reasonable price.

1.2 Coherence between the various competition concerns and connection with existing regulation

24. In the above ACM has given an outline of its competition concerns on the individual relevant markets. The competition concerns are strongly interconnected [with each other and with] (current) access regulation of KPN's network.

25. In all relevant telecommunications markets, the position of the joint venture will more or less equal KPN's position, resulting in oligopolistic markets with only two large conglomerate players (instead of different competitive structures on the different relevant markets) and strong indications that the concentration could possibly create a collective dominant position of KPN and Vodafone/Ziggo in the fixed markets and the multi-play market. In these circumstances it is more difficult for smaller players who do not own a fixed network to compete. Access regulation will become more important to guarantee competitive pressure on these oligopolistic players in the future.

26. In the meantime the proposed joint venture raises the question how to deal with the current ex-ante access regulation when assessing this proposed joint venture. Also the more fundamental question on how merger control and ex ante regulation (together) should deal with (the risk of) joint dominance requires in-depth investigation.

27. Currently access regulation is based on the analysis that KPN has single significant market power on wholesale local access. ACM believes that there are strong indications that after the concentration there will be collective joint dominance of KPN and Ziggo. […]

28. ACM […] that the market circumstances on retail level will change after the creation of the joint venture. Whether the assessment of a collective joint dominance in a new market review by ACM will lead to the same kind of access regulation is currently unclear. This makes the continuation of current wholesale local access regulation uncertain. At the same time, regulation is of utmost importance for the remaining competitive pressure of smaller telecoms players on the markets, which are highly dependent of access regulation for its fixed telephony and multi-play offer in the future. In a new wholesale local access market analysis ACM will have to investigate these new market circumstances thoroughly. In light of the aforementioned, ACM is of the opinion that when assessing this concentration the strong coherence between the assessment of the present concentration and regulation should be fully taken into account. Moreover, ACM is of the opinion that the uncertainty of the regulation as a direct result of the joint venture, has as a consequence that the current access regulation cannot be taken into consideration as a sufficiently certain future market condition in the assessment of the concentration.

2 Guiding principles Case Referral

29. 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[4]. 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.

2.1 More appropriate authority

30. The proposed creation of a joint venture between Liberty Global and Vodafone has potentially significant effects on the competition landscape in various Dutch retail and wholesale telecommunications markets, whereas the cross-border/European effects of this concentration are preliminary assessed as nonexistent. The combined businesses of Liberty Global and Vodafone reach over 90% of Dutch homes, i.e. approximately 7 million homes. This combination will create a leading provider on both Dutch TV-related and telecommunications markets[5]. Moreover the proposed creation of the joint venture will have direct effect on the current access regulation of KPN's network.

31. 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 has dealt with several concentration and antitrust cases with regard to telecommunications markets[6] and TV-related markets[7]. Important cases in this respect were the KPN-Reggefiber cases in 2008 and

[4] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, recital 11.

[5] Press release Liberty Global and Ziggo, *Liberty Global to acquire Ziggo*, dated 27 January 2014.

[6] 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 Augustus 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.,* ACM decision of 31 October 2014 in case 14.0672.24/*KPN – Reggefiber*, NMa decision of 30 December 2002 in case 2658 *Mobiele 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).

[7] 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*.

2014.[8] In these cases there was also strong coherence between the assessment of the concentration case and the possible future regulation.

32. Especially because of the strong coherence between the competitive assessment and the regulatory uncertainty as a result of this concentration, the knowledge of the regulatory framework in the Netherlands is of utmost importance. ACM is the Dutch telecommunications regulator. In that capacity, ACM has investigated several telecommunications markets in preparation of market analysis decisions in 2015. The markets analyzed are referred to as affected markets by the parties: ACM analyzed 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[9]. Among the investigated theories of harm was the existence of a collective joint dominance by KPN and Ziggo.

33. Furthermore, in February 2016 ACM started a market study into the effects of bundling and the relationship with content markets. ACM analyses the effects of bundled telecom offers on competition and looks into the effects of exclusive TV content on competition. […] ACM intends to present the results of this study in a report later this year.

34. 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 telecommunications 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 strong coherence between this concentration case and current and future regulation as well as current ACM investigations on the affected markets, underline the need for a coherent and consistent approach.

2.2 One-stop-shop principle

35. The Commission's policy with regard to the referral of concentration cases is aimed at having cases dealt with by the authority that is in the best position to do so.

36. In general, it is not desirable that parties need to file notifications with multiple national competition authorities. In this case, there are no cross-border effects to this concentration. Therefore referring the case to the Netherlands would not lead to multiple notifications.

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[8] NMa decision of 19 December 2008 in case 6397/*KPN – Reggefiber*, ACM decision of 31 October 2014 in case 14.0672.24/*KPN – Reggefiber and* Court of Rotterdam decision of 10 May 2012 in case AWB 09/345 – Ziggo vs. NMa (appeal KPN-Reggefiber).

[9] 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.

37. 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 duration of the investigation and any further delays can thus be kept to a minimum.

2.3 Legal certainty

38. 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 this concentration 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 shown extensively that there are compelling reasons to depart from the original jurisdiction. Moreover, a full referral to the Netherlands would give more legal certainty to other market players in the Dutch telecommunications markets, because the concentration could be assessed in full coherence with current and future access regulation.

39. 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.

3 Conclusion

40. In conclusion, the Netherlands Authority for Consumers and Markets is of the opinion that a full referral to the Netherlands by the European Commission of the proposed concentration of Liberty Global and Vodafone is appropriate, as the referral criteria of article 9(2)(a) of the EC Merger Regulation have been entirely met.