

EN

***Case No COMP/M.5532 -
CARPHONE
WAREHOUSE / TISCALI
UK***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 29/06/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29/06/2009
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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.5532 – Carphone Warehouse/ Tiscali UK
Notification of 20 May 2009 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 20 May 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") by which the undertaking The Carphone Warehouse Group PLC ("CPW", UK) acquires within the meaning of Article 3(1)(b) of the Council Regulation control over of the whole of the undertaking Tiscali UK Limited ("Tiscali UK", UK) by way of purchase of shares.

I. THE PARTIES

2. CPW is listed on the London Stock Exchange and is active in the UK and eight other Member States in the sale of mobile handsets, mobile connections as well as a range of connected devices, such as laptops. In the UK, it is active as broadband and narrowband Internet access provider, fixed-line telecommunication services operator and as a Mobile Virtual Network Operator ("MVNO") for residential and business customers.
3. Tiscali UK, a subsidiary of Tiscali SpA, an Italian company listed on the Milan stock exchange, is a telecommunications and Internet Service Provider ("ISP") supplying broadband and narrowband Internet access services, fixed-line telecommunication services and digital TV services to business and residential customers in the UK.

¹ OJ L 24, 29.1.2004, p. 1.

II. THE OPERATION

4. According to a Sale and Purchase Agreement signed on 8 May 2009, CPW, via its subsidiary TalkTalk Group Limited, proposes to acquire the whole of the issued share capital of Tiscali UK Limited and all its UK subsidiaries.

III. COMMUNITY DIMENSION

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million² (CPW: EUR 4 474 million in 2008, Tiscali UK: EUR 683 million in 2008). Each of them has a Community-wide turnover in excess of EUR 250 million (CPW: EUR 4 413 million in 2008, Tiscali UK: EUR 683 million in 2008). While Tiscali UK achieves its entire Community-wide turnover in the UK, CPW achieves 65% i.e. less than two thirds of its Community-wide turnover in that Member State. The proposed concentration has therefore a Community dimension.

IV. THE RELEVANT MARKETS

6. CPW and Tiscali UK are both active in the UK in (i) the provision of Internet access services to end customers; (ii) the wholesale provision of broadband Internet access to competing ISPs in local exchanges; and (iii) the provision of fixed-line telephony services to end customers. In addition, CPW through its network subsidiary Opal Telecom has limited activities in the wholesale provision of fixed-line telephony services (end-to-end calls) to resellers who in turn provide fixed-line telephony services to end users.

A. *The Relevant Product Markets*

The provision of Internet access services to end customers

7. Internet access services enable customers to access the Internet. Additional services include website hosting and the provision of e-mail facilities.
8. In previous decisions³, the Commission has distinguished between three common forms of Internet access: (a) narrowband (dial-up service); (b) broadband (higher bandwidth services); and (c) dedicated access (leased lines). Both parties are active in narrowband, broadband and, to a limited extent, in dedicated access. Broadband Internet access can be

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice of 10 July 2007.

³ See Case COMP/M.3914 - *Tele2/Versatel*, Commission decision of 7 September 2005. See also the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 344, 28.12.2007, p. 65 (the "Commission Recommendation").

provided through different technologies, at present mainly through: (i) XDSL⁴; (ii) cable⁵; or (iii) mobile⁶. Last, a distinction can be made between different types of customers.

Narrowband / broadband/ dedicated access

9. Broadband connections enable customers to use the Internet and PSTN⁷-based telephony simultaneously and take advantage of services such as Voice over Internet Protocol ("VoIP"), which is an ancillary service to the provision of Internet access. VoIP services enable voice calls and messaging services to be provided over a broadband connection rather than over traditional telephone networks.
10. Both the Commission⁸ and the UK regulatory authority, the Office of Communications (Ofcom), have indicated in previous decisions that broadband and narrowband Internet access constitute two separate markets. In its wholesale broadband sector review in 2004, Ofcom defined broadband Internet access as having three distinguishing features which are not available with narrowband access:
 - the service is always on (i.e. no dial-up is required);
 - it is possible to use both voice and data services simultaneously where they are provided together (for example, over the same access route) or separately, perhaps using more than one access route; and
 - broadband has a faster downstream speed than a dial-up connection.
11. The notifying party suggests treating narrowband and broadband Internet access as being part of the same market although the Commission in its past decisional practice has considered them as being separate. The notifying party submits that in the UK, as in other countries, there is a progressive migration of customers from narrowband to broadband, since broadband offers superior service and the price differential with narrowband is decreasing⁹. Particularly in the UK, broadband access is also increasingly being bundled with other communications services (mobile and fixed telephony) and/or television services (Internet Protocol Television¹⁰ – "IPTV") by several operators (so-called "multiple-play" or "triple-play").

⁴ XDSL enables fast data transmission over normal copper telephone lines. XDSL comprises ADSL (Asymmetric Digital Subscriber Line)/ADSL2/VDLS/SDSL, depending on the bandwidth and the symmetry between the upstream and downstream bandwidth.

⁵ Cable is a co-axial cable, which enable large bandwidth connections.

⁶ Such as 3G (e.g., UMTS or WiMax), 4G (e.g., LTE) and including here satellite based access.

⁷ Public Switched Telephone Network.

⁸ See for example, Cases COMP/M.4417 - *Telecom Italia/AOL*, Commission decision of 20 October 2006 and COMP/38.233 - *Wanadoo Interactive*, Commission decision of 16 July 2003.

⁹ This evolution is mainly due to the widespread use and evolution of ADSL / ADSL2.

¹⁰ IPTV is the delivery of the television signal over the Internet, whereby the video stream is encoded as a series of IP packets.

12. The notifying party explains that there has been a steady decline in the numbers of narrowband customers in recent years. Out of a total of 18.3 million Internet access users in 2007 in the UK, only 2.7 million were narrowband customers.
13. The market investigation indicated that the migration of customers is one-way only, namely towards broadband, and it is not considered unlikely that narrowband will disappear completely over time. Respondents to the market investigation were largely of the view that a separate assessment of the narrowband Internet access was not necessary.
14. For the purposes of the present decision, it can be left open whether broadband and narrowband constitute distinct product markets as the proposed concentration does not give rise to any competition concerns under any of the alternative product market definitions.
15. Dedicated access (leased lines) is a costly product used only by large corporate clients, which require much higher performance levels in terms of security and bandwidth. On the basis that the transaction leads only to a minor horizontal overlap¹¹ in this area, the analysis of this activity is not pursued any further.

Broadband technology: XDSL / cable / mobile broadband (3G)

16. The notifying party submits that the market for the provision of broadband Internet access comprises access via XDSL (ADSL, ADSL2 and VDSL) and cable.
17. In its decisions in the *Carphone Warehouse/AOL UK*¹², *LGI/Telenet*¹³ and *Wanadoo*¹⁴ cases, the Commission found that the product market included both offerings based on ADSL technology and offerings based on cable modem technology.
18. The market investigation was overwhelmingly in support of the demand-side substitutability of the main access technologies: cable and XDSL.
19. In its decision in the *Wanadoo* case, the Commission found that broadband provided through mobile technologies, such as 3G, were not yet substitutable to fixed broadband access. Ofcom has nevertheless noted¹⁵ that mobile broadband has shown similarities with low-end broadband in terms of service levels and customers targeted and found some evidence of mobile broadband being substituted for fixed.
20. The market investigation indicated that mobile broadband as an alternative access technology is still a nascent market with premium pricing and reduced speeds compared to fixed broadband, and therefore could belong to a separate product market.

¹¹ In 2008 Opal (the CPW subsidiary offering leased lines services) had only [...] leased lines and Tiscali UK had [...]. If this area was to be considered as a separate activity, the combined entity would enjoy a combined market share of at most [0-5]%, i.e. well below the level at which competition concerns may arise.

¹² See Case COMP/M.4442 - *Carphone Warehouse / AOL UK*, Commission decision of 7 December 2006.

¹³ See Case COMP/M.4521 - *LGI / TELENET*, Commission decision of 26 February 2007.

¹⁴ See Case COMP/38.233 - *Wanadoo Interactive*, Commission decision of 16 July 2003, at paragraph 171.

¹⁵ Ofcom - The Communications Market 2008, page 302.

21. For the purposes of the present decision the exact scope of the retail broadband market as to whether it comprises mobile broadband access in addition to cable and XDSL can be left open, as the proposed concentration does not raise any competition concerns under any of the alternative product market definitions.

Customer types: – residential and small business customers/ large business customers

22. In previous decisions in early cases dealing with Internet access services, the Commission further segmented the markets for narrowband and broadband between residential and business customers¹⁶.
23. The notifying party takes the view that small and medium enterprises should be included in the residential segment as their requirements for Internet access are largely equivalent.
24. In its more recent decisions¹⁷, the Commission has indeed taken the view that, because of the increased availability of broadband, it is no longer appropriate to differentiate between residential customers and small business customers as their requirements are substantially the same. As connection speeds and bandwidth constantly increase and new services for residential customers that require greater performance, such as IPTV are being launched, any remaining differences are being narrowed down further.
25. By contrast, narrowband or broadband supplied to residential and small business customers is not an option for large business customers. Large business customers require Internet access services based on broadband with higher performance in terms of security and bandwidth (both upstream and downstream), lower contention ratios¹⁸ and increased functionality. These customers may also require dedicated access (leased lines), symmetric lines (SDSL¹⁹) coupled with VPN (Virtual Private Network) technology²⁰ as well as value-added telecommunications services.
26. The market investigation confirmed that there is no need to distinguish between residential customers and small business customers as their needs in terms of Internet access are substantially similar, while the needs of large business customers are different.
27. Consequently, for the purposes of the present decision retail broadband internet access services for residential and small business customers will be regarded as being part of the same relevant product market. Furthermore, retail broadband internet access services for large business customers will be regarded as being a separate relevant product market.

¹⁶ See for example Case COMP/M.1838 - *BT/Esat*, Commission decision of 27 March 2000.

¹⁷ See Cases COMP/M.3914 - *Tele2/Versatel*, Commission decision of 7 September 2005; COMP /M.2803 - *Telia/Sonera*, Commission decision of 10 July 2002; and COMP/M. 4417- *Telecom Italia /AOL*, Commission decision of 20 October 2006.

¹⁸ A 'contention ratio' describes the degree to which a customer is required to share connection infrastructure with other customers.

¹⁹ Symmetric Digital Subscriber Line provides an upstream bandwidth that is of the same size as the downstream bandwidth. SDSL is a cost-advantageous alternative to leased lines.

²⁰ VPN is an encryption technology that enables secure shared access as if it were dedicated access.

Wholesale provision of broadband Internet access

28. Internet service providers which do not own local loop infrastructure, have essentially three options in the UK to reach their retail customers: (i) Local Loop Unbundling ("LLU"); (ii) procurement of wholesale input in the form of "bitstream"; and (iii) resale of the fixed incumbent's broadband offering.
29. CPW and, to a lesser extent Tiscali UK, have invested in unbundled (shared) access to metallic loops of the local access network (LLU) in a number of local telecommunications exchanges (in particular in urban areas), as this is the most cost-efficient way for alternative operators to provide differentiated retail broadband services.
30. LLU investments are however only economically viable in areas where demand is concentrated. In other areas, the parties are dependent of the wholesale market where they procure wholesale input in the form of "bitstream", where a wholesale capacity of bidirectional data transmission to and from the end-customer is provided.
31. An alternative ISP such as CPW or Tiscali can also resell the line of the owner of the telecommunication network. This third form of obtaining wholesale Internet access does not enable the alternative provider to differentiate its service from that of the wholesale provider, but allows it to offer a broadband product with no investment and at mostly variable costs.
32. The Commission Recommendation²¹, from a regulatory point of view, defines distinct markets for LLU and bitstream (respectively markets 4 and 5 of the Recommendation)²². Ofcom has reviewed the UK market on that basis and has concluded that the incumbent telecom operator BT which owns most of the telecommunications networks in the UK still has significant market power in the market for wholesale broadband access in those local exchanges where only a limited number of alternative broadband providers are present with LLU. Consequently BT is required to provide access in these local exchanges at regulated conditions.
33. The market investigation confirmed that there are significant differences in characteristics, price, performance and service between the different types of access products, namely LLU, bitstream access and resale. The market investigation further indicated that bitstream and resale were insufficient substitutes to LLU but that they mainly serve to complement the network of the alternative operator in places where it has no LLU in order to provide national coverage.
34. For the purposes of the present decision, the exact product market definition for the wholesale broadband Internet access can be left open as the proposed concentration does not give rise to any competition concerns under any of the alternative product market definitions.

²¹ Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 344, 28.12.2007, p. 65.

²² Cable and alternative access technologies, such as fixed wireless link or mobile technology, are not included in the UK market for wholesale unbundled broadband Internet access.

The provision of fixed-line telephony services to end customers

35. Previous merger decisions²³ have referred to the Commission Recommendation which defines this market as access to "*Publicly available telephone services provided at a fixed location for residential and non-residential customers.*" Apart from a differentiation according to customer groups, fixed-line telephony services can also be subdivided into local calls, national calls, international calls, calls to mobiles and assisted calls.
36. The notifying party however disputes the relevance of such further segmentation because call providers (including CPW and Tiscali UK) offer all call types while customers typically use each of these products.
37. Respondents to the market investigation confirmed that this distinction may not be relevant as providers indicated they are able to provide all types of calls without additional investment.
38. As regards the substitutability of fixed-line telephony services and broadband access (VoIP), most respondents were of the view that only managed VoIP services were substitutable to fixed-line telephony services. With managed VoIP services, the equipment and software are included, along with network operations centres and technical resources. Conversely, user-end software based VoIP solutions were not regarded as being part of the same product market due to their reduced functionality.
39. For the purposes of the present decision, the exact definition of the relevant product market for retail fixed-line telephony services can be left open as the proposed transaction does not raise any competition concerns under any of the alternative product market definitions.

B. The Relevant Geographic Markets

The provision of Internet access services to end customers

40. The notifying party considers these markets are national in scope, in line with previous Commission decisions.
41. In previous cases, the Commission²⁴ has defined the broadband Internet markets to be national in scope in particular taking into account the existing regulatory conditions in the telecommunications sector.
42. Most of the respondents to the market investigation, including Ofcom, confirmed that the markets for the provision of Internet access services to end customers have a national geographic scope.
43. A minority of respondents to the market investigation however suggested that the relevant geographic market might be limited to the local exchange level, and this on the basis of regional differences in retail prices and wholesale conditions (i.e., the degree to which alternative operators have invested in LLU).

²³ See for example Case COMP/M.3914 - *Tele2 / Versatel*, Commission decision of 7 September 2005.

²⁴ See Cases COMP/M.2803 - *Telia/Sonera* Commission decision of 10 July 2002 and COMP/M.3914 - *Tele2/Versatel* Commission decision of 7 September 2005.

44. However, it is not possible to define one local exchange or a group of local exchanges which can be distinguished from neighbouring geographic areas because the conditions of competition there would be appreciably different.
45. Where differences in the retail offers of alternative broadband suppliers do exist, this is mainly between urban areas (where alternative operators have invested in infrastructure through LLU) and rural areas where this is less so. However, these regional differences do not imply that DSL based broadband competition takes place in local or regional markets. Contrary to cable networks²⁵, DSL based broadband providers operate on a national scale and have a national presence. In addition, BT, the leading broadband provider in the market still applies national pricing at the retail level.
46. Furthermore, although retail prices or service levels may differ geographically (often in line with the price of wholesale input), retail prices are only marginally different from one neighbouring local exchange to the other. In addition, competition is generally more intense in areas that are also covered by cable networks and that do not necessarily geographically correspond to specific local exchanges, resulting in a chain of substitution along the local exchanges.
47. In line with previous Commission decisions, the relevant geographic market for the different retail markets for Internet access services is therefore national, namely the UK.

Wholesale provision of broadband Internet access

48. In assessing the UK market for wholesale broadband Internet access for the purpose of Article 7 Framework Directive notification²⁶, Ofcom has defined sub-national markets based on the territory covered per local exchange. In doing so, Ofcom took account of the fact that the wholesale input was provided at the local exchange level and that the number of wholesale suppliers could differ significantly from local exchange to local exchange depending on the degree of Local Loop Unbundling. On the basis of this analysis, Ofcom decided whether it was proportionate to regulate BT as a wholesale supplier with significant market power and required BT to provide wholesale access to competitors at regulated prices. In practical terms, Ofcom defined 3 categories of local exchanges according to the number of competitors present in each of them: Market 1 with only BT present, Market 2 with 2-3 competitors and Market 3 with more than 4 competitors. In the latter, which represents close to 70%²⁷ of local exchanges in the UK, BT's regulatory obligation to

²⁵ In relation to cable in the retail market, the Commission considered that the geographic market may be limited to the area of each cable network. In Case COMP/M.3355 - *Apollo/JPMorgan/Primacom*, Commission decision of 15 June 2004, paragraph 10, the Commission considered that if a separate market for the transmission via cable is distinguished, this market should be defined geographically in such a way that each cable network constitutes a separate geographic market, given that only those customers who are connected to a specific network can be reached through that network.

²⁶ Corresponding notifications of the UK in frames of Art. 7 of the Directive 2002/21/EC: UK/2004/0094 on Market 4 wholesale local access and UK/2007/0733 on Market 5 wholesale broadband access and remedies defined by Ofcom: <http://www.ofcom.org.uk/consult/condocs/wbamr07/statement/statement.pdf>

<http://circa.europa.eu/Public/irc/info/ecctf/library?l=/uk/registeredsnotifications&vm=detailed&sb=Title>

²⁷ http://www.ofcom.org.uk/media/news/2008/05/nr_20080521

provide cost-based access to other operators (imposed within the first market review) has been lifted.²⁸.

49. While for *ex ante* regulatory purposes the relevant geographic market has been considered the local exchange level where indeed the wholesale input is provided, there are several arguments that support a nation-wide geographic market definition from a merger control perspective.
50. According to the notifying party, wholesale broadband services are negotiated and uniformly priced on a national basis, and not on a local or regional basis. Even prices for small and locally established broadband providers are not negotiated locally. Distributors act as intermediaries as they resell wholesale broadband services from network operator suppliers to the smaller providers. Distributors negotiate on behalf of smaller customers with national wholesale broadband providers. However, it also appears that BT prices its wholesale broadband services at a discount level in some areas (see Commission letter in case 2007/0733), which are in general those where LLU operators are present, and that an alternative wholesale service to BT's is only offered by the alternative operators in those exchanges where they are present through LLU.
51. Furthermore, when customers (i.e. providers of retail services) seek a wholesale provider in addition to BT, they source their additional wholesale broadband requirements from a single LLU provider. Given that pricing is uniform across all local exchanges there is no advantage to a customer in selecting multiple wholesale broadband providers on an exchange-by-exchange basis.
52. As in the case of the provision of broadband Internet access services, it might therefore not be possible to define one local exchange or a group of local exchanges which can be distinguished from neighbouring geographic areas because the conditions of competition for wholesale broadband access would be appreciably different.
53. For the purposes of the present decisions, the exact geographic scope of the market for wholesale broadband internet access can be left open, as the proposed transaction does not raise any competition concerns under any of the alternative market definitions.

The provision of fixed-line telephony services to end customers

54. The notifying party considers that the market for the provision of fixed-line telephony services to end customers is national, since this reflects the continuing importance of national regulation in the telecommunications sector, the supply of upstream wholesale services on a national basis, as well as the fact that the pricing policies of telecommunications providers is predominantly national.

²⁸ Ofcom's review of the wholesale broadband access markets dated 21 May 2008 imposed on BT Wholesale to apply in Market 1 and 2 areas standard published prices for ADSL products which are available nationally and on a non-discriminatory basis. In Market 3 areas, BT has regulatory freedom to choose to supply those products at different prices. The market review is generally conducted every 3 years; however, in its review of the wholesale broadband access markets Ofcom commits itself to continue to monitor LLU investment and will conduct a further review of the market should an appreciable change in the level of LLU investment and competition occur.

55. This was confirmed by the market investigation and is in line with the Commission Recommendation and prior decision-making practice²⁹.
56. The Commission takes the view that, for the purposes of the present decision, the relevant geographic market for the provision of fixed-line telephony services to end customers can be defined as national, namely the United Kingdom.

V. COMPETITIVE ASSESSMENT

57. For the purposes of the present decision, the Commission has examined the following activities :
1. The provision of narrowband Internet access services to residential and small business customers;
 2. The provision of broadband Internet access to residential and small business customers (both through XDSL and cable);
 3. The provision of broadband Internet access services to large business customers (both through XDSL and cable);
 4. Wholesale provision of broadband Internet access possibly further segmented according to the access mode used (LLU, bitstream access, resale); and
 5. The provision of fixed-line telephony services, possibly further segmented based on the type of customers and based on the types of calls (local calls, national calls, international calls, calls to mobile networks, assisted calls).
58. As Tiscali UK is only active in the UK, the impact of the proposed concentration is limited to the UK.
59. The parties horizontally overlap in the provision of Internet access services to end customers in the UK (narrowband Internet access to residential and small business customers; broadband Internet access to residential and small business customers; broadband Internet access to large business customers; and dedicated access to large business customers). Only the markets for residential and small business customers are affected, with a post-merger market share of the parties of [20-30]%. By contrast, the parties' combined market shares on the markets for the provision of broadband Internet access and the provision of dedicated access to large business customers in the UK would remain below 15% post merger.
60. In addition, both parties have limited activities on the market for wholesale provision of broadband Internet access in the UK.
61. The parties both overlap in the market for the provision of fixed-line telephony services to end customers in the UK. The proposed concentration will however not give rise to any affected markets, as the parties' combined market share will remain below 15%

²⁹ See Cases COMP M.4442 - *Carphone Warehouse Group plc/AOL UK* Commission decision of 7 December 2006, COMP M.3914 - *Tele2/Versatel* Commission decision of 7 September 2005, COMP M.2803 - *Telia/Sonera* Commission decision of 10 July 2002.

(except on the basis of dialled minutes if considering a relevant market for international calls for residential customers where the parties would have a share of [30-40]%).

62. The proposed transaction could technically give rise to a vertically-affected market between the parties' activities in the wholesale provision of broadband Internet access and in broadband (or broadband/narrowband) Internet access for residential and small business customers in the UK where they have a combined market share slightly above 25%. However, the proposed concentration will not give rise to any risk of input foreclosure given the parties' limited activities at the wholesale level (see the assessment of the market for wholesale provision of broadband Internet access in paragraphs 81 et seq.).

Markets for the provision of Internet access services to end customers in the UK

63. The activities of CPW and Tiscali UK overlap horizontally in the provision of broadband and narrowband Internet access for residential customers as well as business customers.

Market dynamics

64. The notifying party submits that entry in this market has been greatly facilitated by the regulation granting cost-oriented wholesale broadband access for new entrants, such as BSKyB, and further competitive pressure is expected to arise through the deployment of next generation networks (such as fibre to the home, "FTTH") that have been announced by BT and Virgin Media. The notifying party also claims that competition from mobile technologies is equally intensifying due to higher and more regular bandwidth, with speeds becoming comparable to low-end fixed broadband, and emerging technologies such as VoIP. Although next generation networks have not been rolled out and mobile technologies are not yet a substitute for broadband, the market investigation has confirmed the dynamism of the UK retail Internet access market.
65. Furthermore, customers can switch internet service providers relatively easily and effectively do so when better offers become available. The main service providers report migration rates between 10 and 25%. Customer switching is fast – an average number of 10 days was frequently mentioned by the respondents to the market investigation – and not costly, as most providers do not charge any connection fee.³⁰ As a result, market shares are fluctuating and a new entrant with an attractive offer in terms of price, quality or bundle of services can quickly gain market share. For example, since its entry in 2006 BSKyB has gained market shares rapidly. O2 (belonging to the Telefónica group) also entered the market in 2006 and Vodafone in 2007. The parties themselves are rather recent entrants since CPW entered the market end of 2004 (while Tiscali UK operates since 2001).
66. Most respondents have noted³¹ that the market is saturating or at least growing at a very reduced pace compared to recent years and prices are stagnating and even going down. In this context, it is not excluded that market entry will slow down and further consolidation may occur. However, this would not be due to entry barriers, but to the maturity of a market where competition is likely to remain fierce as the established players will compete for market share in order to maintain or gain economies of scale.

³⁰ Responses to the questions 30-31-32 of the competitors' questionnaire.

³¹ 7 out of 9 responses to question 48 of the competitors' questionnaire.

Non-coordinated effects

67. As regards residential customers of broadband Internet access services, the parties will have combined market shares of 24.4% in 2008 (CPW: 16%, Tiscali UK: 8.4%)³². Post transaction, the new entity will become the second largest player behind BT (27.3%) and before Virgin Media (23.1%). Other established competitors are BSkyB (11.6%) and Orange (5.9%)³³.
68. The parties' position on residential narrowband Internet access services is more limited. Based on 2007 figures³⁴, the new entity would have a combined market share of 18.9% (CPW: 11.1%, Tiscali UK: 7.8%).
69. Considering a single product market for broadband and narrowband for residential customers, the parties' combined market share in 2007 amounted to 25.2% (CPW: 15.9%, Tiscali UK: 9.3%).
70. As regards business customers of broadband Internet access, the notifying party claims that there are no comprehensive and comparable third party market share statistics. Based on BT's published figures of its own 2008 business customers, the notifying party estimates that combined market shares would remain below 15%³⁵. The proposed concentration would therefore not lead to an affected market on this market. This was confirmed by the market investigation which revealed that the business segment is not a core business for either CPW or Tiscali UK.
71. Overall, responses from competitors and also from Ofcom submitted in frames of the market investigation have unanimously confirmed the intense competition on the UK broadband market, which was mostly seen as a result of LLU investments by alternative broadband providers, the presence of cable and the entry of large mobile operators such as O2 and Vodafone. Respondents have stated that the present merger will either not change the competitive dynamics or actually lead to more competition. In that regard, some competitors pointed to the potential efficiencies arising from the proposed transaction as well as to the challenges that Tiscali UK would face, in the absence of the proposed transaction.

³² External report (Enders Analysis), as of 2008. Ofcom figure for 2009 March shows a combined 25.3% market share.

³³ 2008 figures are estimates. Actual figures for 2007 based on data from Enders Analysis mirror the same competitive picture with slightly different market shares: CPW/Tiscali UK: 26.3%, BT: 27.2%, Virgin Media: 23.7%.

³⁴ 2008 data are not available yet due to the decreasing importance of narrowband.

³⁵ For the purpose of the calculation, the party assumed that only BT (828 724 business broadband subscribers at Q4 2008) and CPW ([...] subscribers) / Tiscali UK ([...] subscribers) were present on the market, since no other significant data were available. This led to a market share for the combined entity of [10-20]% (i.e. ([...] + [...]) / ([...] + [...]) + 828 724 = [10-20]%), mechanically overestimated since it does not take into account the other alternative operators such as Virgin, SKY or Cable and Wireless (which according to Enders Analysis may have 100,000 business customers). The notifying party therefore estimates that the actual market share is below 15%.

72. As regards this last point, several sources³⁶ hinted at Tiscali UK's critical financial situation (possibly linked to Tiscali UK's unfavourable cost structure as a result of its dependency on bitstream input, which is regarded as a non viable business strategy). The same sources mentioned the possibility that, but for the proposed concentration, Tiscali UK would have exited the market.
73. A third party raised the concern that post-merger Tiscali UK customers would see their retail prices increase due to the disappearance of a maverick from the market. Following the removal of a low price competitor, CPW could have the incentive and ability to raise prices for former Tiscali UK customers and at the same time remove a competitive price pressure also from CPW's competitors resulting in a market with less competitive intensity and possibly overall higher prices.
74. The market investigation³⁷ however showed that in the past both companies have pursued a relatively similar business strategy, focussing on price-oriented customers with aggressive pricing, but competing less on performance, service or brand value. Several respondents indicated³⁸ that pre-merger both could be regarded as maverick firms and that, therefore, the proposed concentration will result most likely in a stronger player that will have the incentive to remain focussed on aggressive pricing and thus maintain or increase the competitive pressure on its closest rivals.
75. Furthermore, given its market positioning and the ease with which customers can switch suppliers, it is unlikely that the combined entity would have the ability to raise prices because competitors of similar (if not larger) size such as BT and Virgin would immediately react and benefit from this situation. Therefore, the present case cannot be compared to a situation where a higher pricing competitor acquires a maverick firm removing thus a competitive force.
76. A competitor to the parties submitted that Tiscali UK was a generally innovative operator, both in terms of commercial practices (having first launched some entry-level broadband products) and in terms of technology (having introduced IPTV and Video on Demand first in the UK several years ago). The same respondent however acknowledged that Tiscali UK's innovative behaviour in the market for the retail Internet access has been fading away. The market investigation confirmed that Tiscali UK currently offers IPTV services as part of its triple-play bundle of broadband, fixed telephony and television services. As CPW does not currently have any triple-play offer, it cannot be excluded that CPW will continue offering IPTV services and that it could even expand this service to CPW's customers since it will be able to provide IPTV more efficiently over LLU than over Tiscali UK's bitstream infrastructure. At any rate, the number of Tiscali UK triple play customers ([...] as reported by the parties) is *de minimis* while many other competitors already offer triple-play packages. It should also be noted that the reference platforms for broadcasting services in the UK are not IPTV but cable (Virgin) and satellite (BSkyB).

³⁶ <http://www.reuters.com/article/mnaNewsTechMediaTelco/idUSL8103899920090508?pageNumber=2&virtualBrandChannel=10531>

³⁷ Respondents gave similar answers to questions 34 to 43 of the competitors' questionnaire.

³⁸ 2 competitors out of 9 and a consumer organisation have explicitly underlined this distinctive business strategy of the parties during the market investigation. However, responses to questions 35, 36 and 40 of the competitors' questionnaire have overall confirmed that Tiscali UK has been pursuing a very aggressive pricing strategy or at least has strongly competed on price and that CPW offers have been characterised by very competitive pricing as well.

Coordinated effects

77. In the residential segment of the retail broadband market, the transaction results in a market structure where the three largest companies, BT, Virgin Media and CPW/Tiscali UK hold near-symmetric shares (27.3%, 23.1% and 24.4% in 2008 respectively), while BSkyB and Orange follow (with 11.6% and 5.9% respectively).
78. However, the market investigation indicated that it is unlikely that coordinated effects could arise due to the dynamism of the UK broadband market, characterised by high customer switching rates, the complexity and diversity of the different players' cost structures, non-homogeneous product offers as well as competition of smaller fringe players, including BSkyB and Orange.
79. In light of the above considerations, the proposed concentration does not raise serious doubts as to its compatibility with the common market on the four relevant markets for the provision of Internet access services to end customers in the UK.

Wholesale broadband Internet access

80. All major alternative broadband service providers, including the parties, Virgin Media, BSkyB, Orange and O2 have engaged, to varying degrees, in Local Loop Unbundling in order to supply their downstream operations. To that effect, these operators have invested in backhaul capacity and have installed their equipment at a number of selected local exchanges. Apart from BT, no single broadband service provider has capacity across the whole of the UK, and most of their capacity is used captively. Based on Ofcom's analysis of the wholesale broadband market, BT is by far the leading supplier followed by Virgin Media, CPW, BSkyB, Tiscali UK, Orange, O2 and Cable and Wireless.³⁹
81. CPW and Tiscali UK have unbundled lines at the local exchange mainly to supply their retail operations without having to depend on wholesale input from BT or other providers. While most of the parties' capacity is therefore taken up captively, some idle capacity in the backbone or at the local exchange is further sold on to other broadband service providers or to resellers / distributors. According to the information provided by the notifying party, CPW's wholesale sales accounted for [0-5]% of all UK broadband connections and Tiscali UK around [0-5]%. Compared to their captive use, the parties used around 5% of their combined capacity as a wholesale input to competing broadband Internet service providers.
82. At an aggregate national level, the parties' combined market shares would thus be well below the level at which competition concerns could arise.
83. At the local exchange level, CPW and Tiscali UK are both present alongside BT and other providers in 937⁴⁰ local exchanges. In Market 3 as defined by Ofcom, where the obligation for BT to provide non-discriminatory, transparent and cost-based access has been lifted, there are [...] of the 937 local exchanges, in which, the parties' combined market share

³⁹ Corresponding market shares in Market 2/Market3 as defined by Ofcom: BT: 65.7%/32%, Virgin Media 12.9%/27%, CPW 14.7%/15%, BksyB 2.9%/14%, Tiscali UK 1.7%/6%, Orange 1.3%/3%, O2 0.7%/2% and Cable and Wireless 0.0%/1%.

⁴⁰ Out of a total number of local exchanges in the UK of approximately 5580, that is around 17% of all UK local exchanges.

including their captive use exceeds 25% in terms of lines. In none of these [...] local exchanges does the parties' theoretical market share (captive use included) exceed 31%.

84. However, in order to identify market power, it has to be examined what part is or could not be used captively. On the basis of information provided by the parties, it appears that in none of the [...] local exchanges where their combined market share exceeds 25% in terms of lines (including captive use), the parties have used their capacity for wholesale provision purposes to a material extent in the past. In fact, the proportion of capacity sold in the wholesale market is negligible for CPW ([0-5]% market share on average on these [...] exchanges, with a maximum of [0-5]%) and relatively small for Tiscali UK ([0-5]% on average, with a maximum of [5-10]%). On the basis of the same figures, the market share of the combined entity for the sale of wholesale capacity would be [0-5]% on average, with a maximum of [5-10]%, hence well below the level at which competition concerns may arise.
85. As confirmed by the market investigation, the proposed concentration is not likely to change CPW's strategy of serving its own retail customers first and to maintain its presence on the wholesale market as limited as possible. Most respondents to the market investigation have stated that CPW is likely to migrate Tiscali UK customers to its LLU capacity in order to maximise the use of its capacity and the resulting economies of scale and would therefore continue to use most of its wholesale LLU capacity captively.
86. A third party commented in the market investigation⁴¹ that post merger CPW/Tiscali UK could have the ability and incentive to change the conditions of supply to downstream customers if their combined capacity in that local exchange would become substantial as a result of the merger.
87. First of all, as described above, CPW uses the wholesale capacity as input to serve its own retail customers and will continue to do so post merger, therefore any scenario of CPW exercising of market power is merely hypothetical.
88. Furthermore, the market investigation indicated that this unlikely to arise, even at the level of individual local exchanges for the following reasons:
89. Firstly, as explained above, in none of the [...] local exchanges where the combined entity has a theoretical market share (captive use included) in excess of 25% does it hold a dominant position as it would continue to face competition of the incumbent operator BT⁴² and at least one other alternative operator (either O2, Virgin, Cable & Wireless, Orange or Sky). Therefore, the ability for the new entity to change the conditions of supply post merger, by increasing the wholesale price or the access conditions at the level of an individual local exchange is highly unlikely.

⁴¹ A response to question 49 of the competitors' questionnaire.

⁴² According to Ofcom's analysis, post merger, there will be [...] local exchanges in the UK where only BT and the combined entity will have a presence. In an additional [...] local exchanges, there will be BT, the combined entity and one additional competitor present. Whilst this information is important for Ofcom in order to decide in which exchanges regulation will continue to be imposed on BT (i.e. local exchanges where less than three alternative operators are present, in addition of the incumbent), it is not significant for the competitive assessment in the present case as it does not reflect the competitive position of the individual payers that are active in the local exchange.

90. Secondly, and as confirmed by the market investigation⁴³, post merger the new entity will continue to face BT as the reference wholesale provider in vast majority of the local exchanges and that BT is obliged to provide wholesale access in many of these exchanges at regulated prices.
91. In addition, the notifying party explained that the competitive conditions on the broadband wholesale market had a national dimension. Wholesale customers do not procure capacity at a local exchange level since the negotiation and pricing of that capacity takes place at a national level. In addition, the product characteristics of the wholesale input are homogeneous across a provider's LLU network and are sold at uniform prices. Therefore, they argue, the merged entity would not be able to translate a potential dominant position at the local exchange level, *quod non*, into a higher price for wholesale input provided at that specific local exchange.
92. In light of the above considerations, the proposed concentration does not raise serious doubts as to its compatibility with the common market on the market for wholesale broadband Internet access.

The market(s) for the provision of fixed-line telephony services to end customers in the UK

93. All segments combined, the merged entity's overall market share in 2008 is [10-20]% (expressed in revenues), which ranks it the third player behind BT (56.5%) and Virgin Media (18.5%).
94. Even considering distinct product markets for business and residential customers, and for local calls/national calls/international calls/calls to mobiles and other calls, the proposed concentration does not lead to an affected market under any of the sub-segments market shares expressed in revenues and in minutes. Moreover, the increment in market share is small due to Tiscali UK's limited presence.
95. It is true that in the residential segment, in terms of minutes called, the parties would have a combined market share of [30-40]% (CPW: [30-40]% and Tiscali UK: [5-10]%) of all dialled international minutes in the UK. According to the notifying party this is due to [...]. The revenue associated to these activities is however limited as shown by the [10-20]% market share in terms of revenue which seems to suggest that the relatively high market share in that segment is linked to aggressive pricing and not associated with market power in any form.
96. The market investigation⁴⁴ confirmed that entry barriers to this market are relatively low since third party wholesale access services (e.g., end-to-end call provision) are available from a number of suppliers, including on a regulated basis from BT itself.
97. In light of the above considerations, the proposed concentration does not raise serious doubts as to its compatibility with the common market on the market(s) for the provision of fixed-line telephony services to end customers in the UK.

⁴³ Unanimous responses to Questions 49-51 of the competitors' questionnaire.

⁴⁴ Question 44 of the competitors' questionnaire; while most respondents deemed entry relatively easy, with varying degrees of investment depending on the mode of entry, it was also mentioned that the market was saturating and entry has been becoming less attractive.

VI. CONCLUSION

98. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
(Signed by)
Günter VERHEUGEN
Vice-President of the Commission