

## Case AT.40023 – Cross-border access to pay-TV

## Disney | Commitments

**Preamble**

In accordance with Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (“**Regulation 1/2003**”), The Walt Disney Company and The Walt Disney Company Limited (together “**Disney**”, which also includes their successors and any and all of their current and future subsidiaries over which they exercise positive sole control within the meaning of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings) make the following commitments (“**Commitments**”) to the European Commission (the “**Commission**”) in response to the Commission’s investigation in Case AT.40023 – Cross-border access to pay-TV (“**Pay-TV Investigation**”).

In a Statement of Objections received by Disney on 27 July 2015 (“**SO**”), the Commission has come to the preliminary view that: (a) a contractual obligation in Disney’s agreement with Sky UK Limited (formerly British Sky Broadcasting Limited) and Sky Plc. (formerly British Sky Broadcasting Group Plc.) (together “**Sky**”) prevents or limits Sky from responding to unsolicited requests from consumers residing and located in the European Economic Area but outside Sky’s licensed territory; and (b) that obligation has as its object the restriction of competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union (“**TFEU**”) and Article 53(1) of the Agreement on the European Economic Area (“**EEA Agreement**”) and cannot benefit from an exemption under Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement.

The Commitments are offered in order to meet the Commission’s concerns relating to obligations of this kind and on the understanding that the Commission will adopt a decision pursuant to Article 9 of Regulation 1/2003 (“**Commitment Decision**”): (i) making binding the Commitments; and (ii) concluding that there are no longer grounds for further action against Disney in relation to the Pay-TV Investigation and that the proceedings against Disney should be closed.

Consistent with Article 9 of Regulation 1/2003, the Commitments are given on the understanding that they are made without admission of infringement by Disney or acceptance of the concerns expressed by the Commission in the SO.

This text shall be interpreted in the light of the Commitment Decision, the general framework of European Union law, and Regulation 1/2003.

**Clause 1 - Definitions**

“**Broadcaster**” means an organisation, including Sky, which produces and distributes Pay-TV service(s) in the EEA.

“**Broadcaster Obligation**” means the Relevant Clauses or equivalent clauses to the extent they prevent or limit a Broadcaster from responding to unsolicited requests from consumers residing and located in the European Economic Area but outside of such Broadcaster’s licensed territory.

**“Effective Date”** means the date upon which Disney receives formal notification of the Commitment Decision, or, with respect to future subsidiaries, one month following the closing of the acquisition of full control of that future subsidiary.

**“European Economic Area”** or **“EEA”** means those countries participating in the European Economic Area as of the Effective Date and continuing to participate thereafter.

**“Studio Obligation”** means the Relevant Clauses or equivalent clauses to the extent they require a film studio to prohibit or limit Broadcasters located within the European Economic Area but outside a Broadcaster’s licensed territory from responding to unsolicited requests from consumers residing and located inside such Broadcaster’s licensed territory.

**“Pay-TV”** means the linear, regularly-scheduled encrypted transmission from a distance of audiovisual content in its entirety and without any interruptions to a viewing device for personal, residential viewing only by subscribers, as part of a premium tier subscription service which is not primarily advertiser-supported, that can only be intelligibly received by such subscribers upon payment of a periodic (not less than biweekly) subscription fee for such service.

**“Pay-TV Output License Agreement”** means an agreement that licenses to a Broadcaster (as the licensee) a licensor’s entire future output of defined films on an exclusive basis (and may include other audiovisual content) for a limited period of time during which the Broadcaster may exhibit the films on a Pay-TV basis and, to the extent included in the licence (or separate licence(s)) with such Broadcaster, on an SVOD basis (for a companion on demand service, if any, included within the customer’s subscription to the relevant Pay-TV service operated by such Broadcaster).

**“Portability Regulation”** means Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

**“Relevant Clauses”** means clauses in Pay-TV Output License Agreements (even if not included in the agreement at issue in the SO) that (i) with regard to satellite transmission, stipulate that (a) overspill in territories other than the licensed territory will not be deemed a breach of contract by the Broadcaster provided that the Broadcaster does not knowingly authorise reception outside of the licensed territory, and/or (b) overspill in the licensed territory will not be deemed to be a breach of contract by the studio provided that the studio has not authorised the availability of a third party’s descrambling device necessary for reception of content in the licensed territory; and (ii) with regard to Internet transmission, (a) impose an obligation on a Broadcaster to prevent the unauthorized downloading and/or streaming of films (and, if included, other audiovisual content) outside the licensed territory by means of geo-filtering and/or equivalent technology, and/or (b) stipulate that Internet “overspill” in a Broadcaster’s licensed territory is not a breach of contract by the studio provided that the studio has required other Broadcaster(s) to use geo-filtering and/or equivalent technology.

**“SVOD”** means the encrypted transmission of audiovisual content, without any interruptions, to a viewing device for personal, residential viewing only by subscribers by means of a point-to-point telecommunications system originating from a distance and delivered from a digital storage device: (a) at a time selected by a subscriber in such subscriber’s sole discretion; (b) for a specified limited viewing period; and (c) for which such subscriber pays a periodic (not

less than biweekly) subscription fee and is not charged a per-transaction, per-title, per-exhibition or per-transmission fee.

**Clause 2 - Commitments in relation to satellite broadcast, internet transmission and/or transmission by means of mobile wireless technologies**

- 2.1 From the Effective Date, Disney shall not enter into, renew or extend a Pay-TV Output License Agreement that, with respect to any territory in the EEA, (re)introduces any Broadcaster Obligation or Studio Obligation.
- 2.2 From the Effective Date,
  - (a) Disney shall not seek to enforce or initiate proceedings before a court or tribunal for the violation of a Broadcaster Obligation, and/or Studio Obligation, as applicable, in an existing Pay-TV Output License Agreement; and
  - (b) Disney shall not honour any Broadcaster Obligation and/or Studio Obligation, to which it is subject pursuant to any existing Pay-TV Output License Agreement.
- 2.3 Disney shall notify Sky of the commitments in Clause 2.2 within ten (10) working days, and any other Broadcaster in the EEA with a relevant Pay-TV Output License Agreement with Disney within one (1) month after the Effective Date. Such notice shall specify that Disney irrevocably waives any Broadcaster Obligation and/or Studio Obligation, as applicable, as long as such contractual obligations continue to be covered by these Commitments.
- 2.4 Without prejudice to Clauses 2.1 to 2.3, nothing in the Commitments shall be interpreted as a limitation on or a waiver by Disney of rights that Disney would otherwise have to enter into Pay-TV Output License Agreements that:
  - (a) require a Broadcaster to employ geo-filtering technology and/or equivalent measures for the verification purposes permitted under the Portability Regulation and in compliance with EU law;
  - (b) require a Broadcaster to employ geo-filtering technology that prevents or limits such Broadcaster from making its retail Pay-TV and/or SVOD service(s) available to consumers residing and/or located outside of the EEA;
  - (c) require a Broadcaster to prevent or limit the cross-border provision of decoding cards or any similar devices outside of the EEA;
  - (d) require a Broadcaster to focus efforts on the exclusive territory licensed to that Broadcaster and not to market, solicit or otherwise actively sell outside of that exclusive territory; and
  - (e) without prejudice to Clause 5, provide for the allocation of liability between Disney and a Broadcaster relating to the implementation of the Commitments.
- 2.5 Nothing in the Commitments shall be interpreted as limiting or waiving Disney's rights under copyright law and to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law.

- 2.6 Nothing in the Commitments shall be interpreted as limiting or waiving Disney's rights to decide unilaterally to employ geo-filtering technology and/or equivalent measures to limit access to its retail Pay-TV and/or SVOD service(s) by consumers residing and/or located within or outside of the EEA.

**Clause 3 - Term of the Commitments**

The Commitments shall be in force for a term of five (5) years from the Effective Date.

**Clause 4 - Review Clause**

Without prejudice to the general provision of Article 9(2) of Regulation 1/2003, Disney may request that the Commission reopen proceedings with a view to modifying these Commitments where there has been a material change in any of the facts or circumstances on which the Commitment Decision is based.

**Clause 5 - Non-circumvention**

Disney shall not in any way circumvent, or attempt to circumvent, these Commitments either by action or omission.

**Clause 6 - Commitments in relation to appointing a Monitoring Trustee**

Disney shall appoint a monitoring trustee to monitor Disney's compliance with these Commitments until the end of the term (the "**Monitoring Trustee**"). The Monitoring Trustee shall be independent of Disney (and any other undertaking affiliated with Disney) and a Broadcaster (and any other legal entity directly or indirectly controlled or affiliated with a Broadcaster). The Monitoring Trustee will be remunerated by Disney in a way that does not influence or impede the independent and effective fulfilment of its mandate. The Monitoring Trustee should possess the qualifications, experience and competence necessary to carry out its mandate. The Monitoring Trustee shall neither have nor become exposed to a conflict of interest. In particular, the Monitoring Trustee shall not provide services to, or become an employee of, Disney or any Broadcaster, neither during the Monitoring Trustee's mandate nor for a period of one (1) year following termination of the Monitoring Trustee's mandate.

**Clause 7 - Proposal by Disney**

On the Effective Date, Disney shall submit to the Commission for approval a list of at least two (2) persons whom Disney proposes to appoint as the Monitoring Trustee. The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustees fulfil the requirements set out in Clause 6 and shall include:

- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties set forth in Clause 12; and
- (b) the outline of a plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.

## **Clause 8 - Approval or rejection by the Commission**

The Commission shall have the discretion to approve or reject the proposed Monitoring Trustees and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. The Commission shall give reasons in case of rejection of a proposed Monitoring Trustee and reasons supporting the need for any modifications. If only one person is approved, Disney shall appoint, or cause to be appointed, the individual concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Disney shall be free to choose the Monitoring Trustee to be appointed from among the persons approved. The Monitoring Trustee shall be appointed within one (1) week of the Commission's approval, in accordance with the mandate approved by the Commission.

## **Clause 9 - New proposal(s) by Disney**

If all the proposed Monitoring Trustees are rejected, Disney shall submit the names of at least two (2) more persons within two (2) weeks of being informed of the rejection(s), in accordance with the requirements and the procedure set out in Clauses 7 and 8.

## **Clause 10 - Monitoring Trustee nominated by the Commission**

If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom Disney shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

## **Clause 11 - Replacement, discharge and reappointment of the Monitoring Trustee**

- 11.1 If the Monitoring Trustee ceases to perform its functions under these Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a conflict of interest:
- (a) the Commission may, after hearing the Monitoring Trustee, require Disney to replace the Monitoring Trustee; or
  - (b) Disney, with the prior approval of the Commission, may replace the Monitoring Trustee.
- 11.2 If the Monitoring Trustee is removed, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the former Monitoring Trustee has effected a full hand-over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in Clauses 7 to 10.
- 11.3 The Monitoring Trustee shall cease to act as the Monitoring Trustee only upon the expiration of the Commitments or after the Commission has discharged it from its duties.

## **Clause 12 - Duties and obligations of the Monitoring Trustee**

- 12.1 The Monitoring Trustee shall:
- (a) upon reception of the notices given pursuant to Clause 13.1(a), report in writing to the Commission within one (1) month;

- (b) provide to the Commission, sending Disney a non-confidential copy at the same time, a written report on Disney's compliance with these Commitments on the first Friday of November of each year after the Effective Date so that the Commission can assess whether Disney is in compliance with these Commitments; and
- (c) report in writing to the Commission, sending Disney a non-confidential copy at the same time, if it concludes on reasonable grounds that Disney is failing to comply with the Commitments.

12.2 The Monitoring Trustee shall not:

- (a) have access to Disney's books, records, documents, management or other personnel, facilities, sites or technical information except the documents provided by Disney in accordance with Clause 13;
- (b) have any decision-making powers or powers of investigation of the kind vested in the Commission pursuant to Regulation 1/2003;
- (c) undertake any significant work not covered by its mandate unless it has received written express instructions from the Commission. Where the Monitoring Trustee is required to exercise its own initiative, it shall discuss the work involved with the Commission and obtain its prior approval before undertaking any significant work; and
- (d) disclose any confidential information to anyone other than the Commission. Any confidential information obtained by the Monitoring Trustee in performance of the duties and obligations specified in the Commitments shall be kept in the strictest confidence and shall be used solely for the purpose of performing the duties and obligations specified in the Commitments. The Monitoring Trustee shall ensure that adequate safeguards are established and adhered to in taking delivery of, tracking the dissemination of, monitoring the use of, protecting against the disclosure of, and determining the safe disposal of confidential information. These safeguards must be effective to protect the confidential information, but shall not be such as to prevent the Monitoring Trustee from effectively fulfilling its duties and obligations specified in the Commitments. The Monitoring Trustee shall not make any public statements relating to the performance of its functions in relation with the Commitments. The Monitoring Trustee shall sign confidentiality undertakings warranting its knowledge of and compliance with its duties and obligations specified in the Commitments. The Monitoring Trustee shall abide by the obligations of non-disclosure imposed in Article 28(2) of Regulation 1/2003 with regard to any information acquired in its performance or from the Commission, even after the term of its mandate.

**Clause 13 - Duties and obligations of Disney**

13.1 Disney shall provide the Monitoring Trustee or directly the Commission, with one (1) complete copy of:

- (a) the notices given pursuant to Clause 2.3, within five (5) working days of the date of each such notice; and

(b) any Pay-TV Output License Agreement that Disney enters into, renews and extends after the Effective Date and during the term of these Commitments for any territories within the EEA, within two (2) weeks after the date such agreement is executed.

13.2 Disney will confirm annually to the Monitoring Trustee that:

(a) any modifications to the Pay-TV Output License Agreement(s) referenced in Clause 13.1(b) comply with the Commitments; and

(b) it has complied with Sections 2.2 and 2.3.

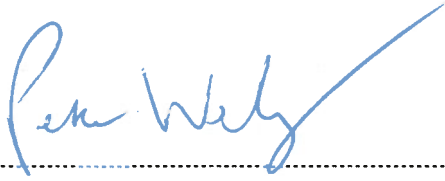
13.3 On request by the Commission or the Monitoring Trustee, Disney will supply details of compliance with the above obligations referenced in Clauses 13.1 and 13.2 within ten (10) working days.

Date: 25 October 2018

The Walt Disney Company Ltd

Signed

/s/



**Name:** PETER WILEY

duly authorized to sign on behalf of The Walt Disney Company Limited.

The Walt Disney Company

Signed

/s/

**Name:**

duly authorized to sign on behalf of The Walt Disney Company



The Walt Disney Company Ltd

Signed


/s/.....

**Name:**

duly authorized to sign on behalf of The Walt Disney Company Limited.

The Walt Disney Company

Signed

/s/ 

**Name:** *Kenneth E. Newman*

duly authorized to sign on behalf of The Walt Disney Company