EN

Case No COMP/M.5121 -
NEWS CORP /
PREMIERE

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)b in conjunction with Article 6(2)
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COMMISSION OF THE EUROPEAN COMMUNITIES

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION IN CONJUNCTION WITH ARTICLE 6(2)

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.5121 - News Corp/ Premiere
Notification of 5 May 2008 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 5 May 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("EC Merger Regulation") by which News Corporation ("News Corp", USA), acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the undertaking Premiere AG ("Premiere", Germany) by way of purchase of shares.

I. THE PARTIES

2. News Corp is a media company mainly active in the United States, Europe, Australasia, Asia and the Pacific Basin. News Corp's activities include the production and distribution of TV programming, TV satellite and cable broadcasting, the development of digital broadcasting, the development of conditional access and subscriber management systems and the creation and distribution of on-line programming.

3. Premiere is active in the provision of pay-TV channels to viewers in Germany and Austria. In particular, Premiere typically offers its own, as well as third party channels[2]

[1] OJ L 24, 29.1.2004 p. 1.

directly to final customers (i.e., households, as well as bars, hotels, etc.) via its satellite platform and via cable and IP-TV (the latter only in Germany), as part of different channel packages.

II. THE OPERATION

4. At the time when the Commission received the notification, that is to say on 5 May 2008, the proposed transaction concerned the acquisition by News Corp of a shareholding of approximately 24.2%. In the notification, News Corp indicated that it expected to increase its share in Premiere to approximately 24.9% by mid-May 2008 at the latest and, at the time that this decision is taken, it has acquired in total [around 25%] of the shares in Premiere.

III. CONCENTRATION

5. Based on the attendance rates at Premiere's 2006 and 2007 annual shareholders meetings[3], at the time of the notification of the proposed transaction, News Corp's initial shareholding in Premiere of 24.2% would have been sufficient to acquire a *de facto* majority of the voting rights at such meetings and the acquisition of *de facto* control.[4] In 2006, the attendance rate was 44.92%, in 2007 it dropped to 29.61% because approximately 14.58% of the shares in Premiere were held under a trust agreement for Premiere's pay-TV competitor Unity Media NRW GmbH who could not be present in the meeting due to an arrangement with the German competition authority, the *Bundeskartellamt*. Assuming that, but for the trust agreement, those shares would have been present at the 2007 meeting, the attendance rate for this meeting would have been 46.28%, leading to an average attendance rate for 2006 and 2007 of 45.6%.

6. However, during Premiere's latest annual shareholders meeting, which took place on 12 June 2008 and therefore several weeks after the notification of the transaction to the Commission, an extraordinarily high attendance rate of 54.52% was reached. News Corp attended this shareholders meeting, but was not allowed to vote its [around 25%] stake in Premiere because of the ongoing merger control procedure before the European Commission. Had News Corp been allowed to exercise its voting rights during this shareholders meeting, News Corp would *not* have had a majority of the voting rights during this meeting.

7. Despite the fact that News Corp would not have a majority in this single meeting, for the following reasons, the Commission has come to the conclusion that the proposed transaction constitutes a concentration.

8. Firstly, compared to the attendance rates of 2006 and 2007, the attendance rate at Premiere's 2008 shareholders meeting appears to be exceptionally high. This high

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[2] Premiere offers in its packages, among others, Discovery Channel, Disney Channel, MTV and the RTL Crime channel.

[3] No earlier shareholders' meetings can be taken into account as Premiere was listed as a public company only on March 9, 2005.

[4] With the majority in the general meeting,, the members of Premiere's supervisory board can be appointed who, in turn, appoint the management and, thus, control the company.

attendance rate may have been caused by the fact that News Corp was present as a major industrial shareholder for the first time, without being allowed to exercise its voting rights. Therefore, an extraordinarily high number of shareholders attended the meeting to be able to influence the course of the company for one last time before News Corp would take control. Apart from that, several items on the agenda of this shareholders meeting related to capital measures. This situation gave an incentive to Premiere to urge their shareholders to attend. On the basis of these circumstances, it therefore appears that the 2008 attendance rate was extraordinarily high and that future attendance rates are likely to be comparable to the average attendance rate for 2006 and 2007 of 46.6%.

9. Secondly, on 19 June 2008 […].

10. In the light of these circumstances, the Commission has come to the conclusion that the proposed transaction constitutes a concentration within the meaning of Article 3(1)b of the EC Merger Regulation.[5]

IV. COMMUNITY DIMENSION

11. The proposed transaction has a Community dimension pursuant to Article 1(2) of the Merger Regulation. The undertakings concerned have a combined aggregate worldwide turnover in excess of € 5 000 million[6], and each of them have a Community-wide turnover in excess of € 250 million[7]. They do not achieve two thirds of their aggregate Community-wide turnover within one and the same Member State.

V. COMPETITIVE ASSESSMENT

A. Relevant Markets

12. The economic sectors involved in the transaction are (i) the provision of TV services to end users in Germany and Austria, respectively, (ii) the acquisition of TV broadcasting rights in the German speaking areas and (iii) the provision of technical services for pay-TV in the German speaking area.

(1) The provision of TV services to end users – pay-TV

(a) Relevant product market

13. The notifying party submits that the relevant product market includes the provision of both pay-TV and free-to-air (FTA) TV channels via all distribution means (i.e.

5 The notifying party also underlined that the Commission's Jurisdictional Notice explains that the relevant date for establishing Community jurisdiction over a concentration is *"the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier* (emphasis added)*"* (para. 156). At the time News Corp notified the transaction to the Commission, however, based on past attendance at the last two shareholders meetings, News Corp's 24.2% shareholding was clearly sufficient to confer de facto control over Premiere. Already for this reason, the parties take the view that the proposed transaction constitutes a concentration within the meaning of the EC Merger Regulation.

6 News Corp € 21 960 million for the fiscal year 2006/07 and Premiere € 984 million in 2007.

7 News Corp […] million for the fiscal year 2006/07 and Premiere […] million in 2007.

satellite, cable, IP-TV, and Digital Terrestrial TV), as well as the provision of non-linear services such as pay-per-view (PPV) and video-on-demand (VOD).

14. In support of this view, the notifying party puts forward that in Austria and in Germany pay-TV and FTA TV compete directly in terms of similar offerings, convergence through digitalization and convergence of business models in the sense that pay-TV operators are increasingly financed not only by subscription fees, but also by advertising revenues, whereas FTA broadcasters (traditionally financed primarily via advertising revenues) have started offering encrypted channels for which viewers have to pay a monthly subscription fee. Furthermore, the notifying party argues that both FTA and pay-TV broadcasters compete for the same content and audience.

15. This definition of the relevant product market proposed by the notifying party is not in line with the Commission's consistent practice to consider distribution of pay-TV and FTA TV as two separate product markets[8]. The established distinction between pay-TV and FTA TV is based upon several features that have characterized the national markets of several EU Member States which were subject to the Commission's investigation in previous cases. Firstly, there is a difference in the type of financing of pay-TV as opposed to FTA TV. Pay-TV establishes a commercial relationship between the TV distributor and the viewer, whereas FTA TV only establishes a relationship between the TV distributor and the advertisers. Secondly, while there is undeniably interaction between the two TV markets from the viewer's perspective, a distinction can be drawn based on whether the TV service offering is received for no specified cost or is the result of a subscription allowing access to certain programmes not otherwise available. Third, from a viewer's perspective, the programs and the "premium" contents exclusively distributed via pay-TV are often not substitutable with programs and contents available on FTA TV.

16. The market investigation has confirmed for both Germany and Austria that the relevant market for the assessment of the proposed transaction is the market for pay-TV. Contrary to the notifying party's submission, the majority of FTA TV and pay-TV operators have confirmed that they regard FTA TV and pay-TV as separate markets. In support of this view, the respondents to the Commission's market investigation put forward the following main arguments.

17. Firstly, the type of content and the program schedules offered by pay-TV are different from those available on FTA TV. In particular, premium content is, in many instances, first broadcasted via pay-TV before it becomes available on FTA TV. As a result, viewers do not consider pay-TV and FTA TV services as fully interchangeable.

18. Secondly, although TV operators in Germany and Austria which responded to the Commission's market investigation generally acknowledged that there is a certain degree of interaction between pay-TV and FTA TV, most of them considered pay-TV as complementary (rather than substitutable) to FTA TV. Obviously, the more attractive the offer of an FTA broadcaster, the smaller the incentive for a viewer to opt for a pay-TV subscription. However, this interaction does not render FTA TV a substitute for pay-TV as demand-side substitutability is limited by the fact that,

[8] Commission decisions in cases COMP/M.4504 – SFR/Télé2 France, COMP/M.4204 – Cinven/UPC France, COMP/M.3411 UGC/Noos, COMP/M.2876 Newscorp/Telepiù.

contrary to pay-TV, viewers of FTA TV generally do not have to pay a subscription fee to get access to a particular type of content or programme.

19. Finally, there are major differences with regard to the business models of the two types of broadcasters so that supply-side substitutability is limited. While FTA channels are chiefly financed by advertising revenues and, in the case of the public broadcasters in Germany and Austria, by public funds, pay-TV operators still largely rely on revenues stemming from subscription fees and, to an insignificant extent, from advertising[9]. Given these differences in financial models, pay-TV operators cannot readily switch to FTA TV in the short term and vice-versa, without incurring significant additional costs or risks.[10]

20. The results of the market investigation therefore indicate that, at present, pay-TV and FTA TV are still clearly distinct markets in both Germany and Austria.

21. As regards the pay-TV market, in previous decisions the Commission has also considered a further distinction between classical or "linear" channels and non-linear channels such as PPV, "near-video-on demand" (nVoD) and VoD.[11] However, for the purpose of the decision in the present case, it is not necessary to conclude on the exact definition of the relevant product market because the result of the competitive analysis would be the same, regardless of the exact market definition.

22. Furthermore, in principle, competition authorities do not tend to break down the pay-TV market any further on the basis of the technical means of delivery. In other words, they do not distinguish separate markets based on the different broadcasting platforms such as cable, satellite or, more recently, DSL. The reason for that is that producers of pay-TV programmes usually want their channels to be distributed as widely as possible in order to maximise revenues and, at the very least, to have a presence on all the broadcasting platforms through exclusive rights for more than one platform. In the case at hand it is not necessary to reach a definite conclusion concerning the relevance of a further breakdown of markets on the basis of broadcasting platforms since the conclusions of the competitive assessment of the proposed transaction would be the same, regardless of the exact definition of the relevant product market.

(b) *Relevant geographic markets*

23. In the notification, the notifying party submits that the market "for the provision of TV services to end-users" is national in scope. This approach is in line with previous Commission decisions according to which the markets for organisation of television, including the retail markets for pay-TV, are national in nature or relate to linguistically

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9 For instance, Premiere derives [0-10%] of its revenues from advertising. Other pay-TV broadcasters during the market investigation submitted that they have no advertising derived revenues.

10 See the Commission’s notice on the definition of relevant market for the purpose of Community competition law, 97/C 372/03, paragraph 20. The short term is to be intended as “such a period that does not entail a significant adjustment of existing tangible and intangible assets.”

11 See Commission decisions in cases COMP/M.2211 Universal Studio Networks/De Facto 829 (NTL) Studio Channel Ltd.; COMP JV 37 BskyB/Kirch Pay TV.

homogeneous areas[12], primarily due to differences in regulatory regimes, cultural factors and other differences in the conditions of competition prevailing in the individual Member States (e.g. the structure of the market for cable TV).

24. The market investigation also broadly confirmed for both Germany and Austria that the geographic scope of the relevant market is national. Although broadcasting rights are to some extent licensed for the entire German-speaking area, the results of the market investigation indicate that still a substantial part of such rights is licensed at national or even regional level. The latter is especially true for licenses to cable operators. In particular, premium sports rights are in most cases licensed on a national basis given that the German audience is more interested in the German "Bundesliga" or the "DFB-Pokal", whereas the Austrian audience prefers watching the Austrian "Bundesliga" and other national sports events.

25. In addition, there are regulatory differences between Germany and Austria with regard to parental guidance film ratings. The applicable rules, which potentially affect all pay-TV content, appear to be much stricter in Germany than in Austria.

26. Also the structural differences regarding the technical means for the delivery of pay-TV to households in Germany and Austria are significant. In Germany, FTA channels are currently not encrypted. Viewers in Germany therefore require a set-top box (STB) only to receive pay-TV, but not to receive FTA TV. Most STBs in German households are therefore STBs of the leading German pay-TV broadcaster Premiere. In Austria, on the other hand, even FTA channels of public broadcasters are encrypted for copyright reasons. As a result, households in Austria have a STB provided by ORS, a subsidiary of Austria's public broadcaster ORF. In Austria pay-TV operators, including Premiere, therefore essentially depend on access to the ORS STB population.

27. In the light of these circumstances, the Commission concludes that there are significant differences in the conditions of competition in the pay-TV markets in Germany and Austria to the extent that the pay-TV markets in these two countries are to be considered national in scope.

(2) Acquisition of broadcasting rights (audiovisual content)

(a) Relevant product market

28. Audiovisual content comprises all the "entertainment products" (e.g. films, sport, TV programs and channels) that can be broadcasted via TV. TV broadcasting rights belong to the creators of these products, who license them to broadcasters. In this market, Premiere operates as a purchaser of pay-TV broadcasting rights in Germany and Austria. News Corp is active as a licensor of film and TV program broadcasting rights and TV channels.

29. In the past, the Commission has distinguished between the licensing of broadcasting rights for pay-TV and the licensing of broadcasting rights for FTA TV[13]. The notifying

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12 Commission decisions in cases COMP/M.4504 – SFR/Télé2 France, COMP/M.4204 – Cinven/UPC France, COMP/M.3411 UGC/Noos, COMP/M.2876 Newscorp/Telepiù.

13 Cf. Case COMP/M.2876 – News Corp/Telepiù, Decision of 02.04.2003

party does not contest this distinction. The market investigation revealed that, in broad terms, this distinction is still applicable also to the German and Austrian markets. In particular, notwithstanding the fact that some respondents stressed that rights for pay-TV and FTA TV are negotiated at the same time, most replies that focused on a demand-side perspective clearly indicated that the type of content acquired by pay-TV operators is to a certain extent different from the content purchased by FTA operators. Furthermore, the business model in the context of which the acquired content is used by broadcasters (e.g. different programming, specific target groups, offer packaging) plays an important role in distinguishing between pay-TV and FTA TV.

30. The Commission has also found that, from both a demand-side and a supply-side perspective, certain types of content bought by pay-TV operators are not substitutable with each other[14]. Accordingly, in past decision the Commission considered (i) sports events, (ii) premium films[15] and (iii) other TV contents (such as documentaries, youth programs, etc.) as separate markets.[16]

31. News Corp proposes, for the purpose of the decision in the present case, to define markets for the acquisition/licensing of (i) feature films, (ii) other TV content and (iii) TV channels. News Corp submits that the market for sports rights is not relevant since News Corp is not active in the licensing of sports events. While News Corp refers to the Commission's precedents in relation to other TV content and TV channels, it disputes the past definition of the market for the licensing of "premium films". The market investigation revealed that the majority of the market players broadly agree with the subdivision proposed by the notifying party. Some respondents also highlight that feature films and TV programs can be considered as belonging to the same category. In general the distinction between film content and sports content is widely supported.

32. As regards premium films, in past decisions the Commission has distinguished separate markets for the different exhibition windows: (i) VOD, (ii) PPV, (iii) 1st window of pay-TV, (iv) 2nd window of pay-TV[17]. In addition, the Commission has also considered distinguishing between US-produced films and other films[18].

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14 For instance, a feature film and a made-for-TV film do not have the same value in terms of attractiveness to consumers; pricing structure and economic value are not similar, and suppliers of specific content are not able to switch production between different types of TV content.

15 Sports events and premium films, which are expensive contents, cannot usually be viewed on FTA TV. In particular, rights to recent premium films and most regular football events where national teams participate tend to be acquired on an exclusive basis by pay-TV operators and constitute the essential factor (the drivers) that leads consumers to subscribe to a particular pay-TV channel/platform, see *News Corp/Telepiù* decision *supra*.

16 Cf. Case n° COMP/M.2876 – News Corp/Telepiù, Decision of 02.04.2003.

17 Case COMP/M.2845 – Sogecable/CSD/Vía Digital, Decision of 14.08.2002, Case COMP/M.4504 – SFR/Télé2, Decision of 18.07.2007.

18 Case COMP/M.2845 – Sogecable/CSD/Vía Digital, Decision of 14.08.2002, Cf. Case n° COMP/M.2876 – News Corp/Telepiù, Decision of 02.04.2003. Additionally, in the past the Commission has also identified a market for the production and commercialisation of pay-TV channels (generic and thematic) The question whether this market should be further segmented by thematic content (such as premium,

33. News Corp contends that the sub-segmentation into VOD, PPV and pay-TV windows is not applicable in Germany and Austria because the same customers would acquire the same content[19]. As regards the different exhibition windows, the market investigation showed that this system is not applied consistently in Germany and in Austria. The replies broadly confirmed that the window system applies in both countries, even though with specific characteristics: for some respondents the "second window" is not present in Germany, while many respondents submitted that there are no separate negotiations for VOD and PPV.

34. News Corp also submits that US films compete with other productions, in particular, European local productions. As regards the relationship between US films and European films, the results of the market investigation show that most of the respondents take the view that there is very limited substitutability between the two categories, as US films are addressed to a vast audience while European movies are either appreciated by "niche" viewers or can compete with US films only on a "title by title" basis.

35. For the purpose of this decision, it can be concluded that the market for the acquisition of TV broadcasting rights is separated between pay-TV and FTA. On the other hand, it is not necessary to conclude as to whether it must be further sub-divided into markets for the acquisition/licensing of (i) feature films, (ii) other TV content and (iii) TV channels or whether, within the feature films category, it is necessary to further distinguish between the different exhibit windows or between US-produced and other films since, under any possible definition, the transaction does not raise any competition concerns.

sports, movies, news, youth channels, etc.) has been left open so far. Cf. for instance Case n° COMP/JV.57 – TPS, Decision of 30.04.2002.

19 On the basis of publicly available information about the offers of the different operators, ProSiebenSat.1 acquires rights for VOD/PPV and for the second TV window; RTL acquires rights for PPV/VOD on web-TV and for the TV second window; the Disney channel acquires rights for both the first and the second TV windows. On the other hand, it appears that in Austria the purchasers of rights for the different windows are clearly differentiated.

(b) Relevant geographic market

36. In previous decisions, the Commission considered that the markets for the acquisition of audiovisual TV content (films and other content) and for the production and acquisition of pay-TV channels are national in scope or relate to linguistically homogeneous areas[20]. However, in the *News Corp/Telepiù* decision the Commission noted in relation to the acquisition of rights to premium films (mostly US films) that "*nothing prevents operators from acquiring rights for more than one territory at the time*", although it found that broadcasting rights were divided and sold on a mainly national basis or, at most, by language area.

37. News Corp submits that the geographic scope of the markets is generally national, although in some cases it may extend to a linguistic area, for example the German speaking parts of the Community, i.e. Germany, Austria and Italy (Alto Adige).

38. The market investigation was not conclusive on this point: market players have submitted that the licenses - depending on the individual contracts - can be either national or may cover a homogeneous linguistic region (hence including, for the German language, Germany, Austria, (the German-speaking part of) Switzerland and the province of Alto Adige in Italy)[21].

39. In any case, for the purpose of the present decision, it is not necessary to conclude as to the geographical scope of the market for the acquisition of audiovisual TV content as, whether it is national or related to homogeneous linguistic areas, the transaction does not raise any competition concerns.

(3) Technical services: market for Conditional Access (CA) systems and for middleware

(a) Relevant product market

40. In *Bertelsmann/Kirch/Premiere*[22], the Commission identified a separate market for technical services for pay-TV, which would include a number of **different components such as conditional access (CA) systems, middleware and application programming interface**. **The notifying party agrees with this market definition. Given that the** *Bertelsmann/Kirch/Premiere* decision is already almost fifteen years old and that the pay-TV market is characterized by rapid technological change, **the market investigation has aimed at clarifying whether any of the different technical services components could constitute a separate market or segment.**

41. The market investigation has shown that the "technical services" label includes a number of very different elements, typically (i) CA system, (ii) middleware, (iii)

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[20] Cf. Case COMP/M.2876 – News Corp/Telepiu, Decision of 02.04.2003; in case COMP/M.2050-Vivendi/Canal+/Seagram, decision of 13.10.2000, the Commission considered that the market can be national or in certain cases (i.e. German-speaking area) regional; in case COMP/M.2845 – Sogecable/Canalsatelite Digital/Via Digital, decision of 14.08.2002, and in case COMP/M.4504 – SFR/Tèlè 2 France, decision of 18.07.2007, the Commission concluded that the market for the acquisition of content is national in scope.

[21] One respondent also submitted that licenses generally cover the geographic scope of the individual platform.

[22] Cf. Case COMP/M.993, Decision of 27 May 1998.

manufacturing of STBs and, (iv) STB technology. In practice, none of the main suppliers of pay-TV technical services offer all of these elements and therefore pay-TV operators always deploy "mixed" solutions incorporating elements from different suppliers.

42. In particular, a number of respondents have highlighted the importance of the CA system. CA systems are encryption technologies used by pay-TV broadcasters in order to manage and control content distribution while protecting the content from unauthorised access. CA systems enable pay-TV operators to charge their subscribers for access to content through a variety of pay-TV channels, pay-per-view events and digital television services ("DTS"), for example electronic program guides, VOD, personal video recorders, interactive shopping, interactive advertising or games. CA systems consist of two main components: (i) Software installed at the network operator's head-end; and (ii) software that is integrated into a viewer's STB, completed with a removable credit-card sized so-called "smartcard" inserted into each subscriber's STB, digital TV set or PC.

43. Providers of encryption systems usually do not operate a technical platform (including a CA head-end) themselves, but only license and provide the necessary encryption technology (CA head-end and smartcards) to technical TV platform operators who – on their own or through technical service providers – operate the CA head-end, issue the smartcards to their customers and encrypt the programmes. Usually, the pay-TV operator runs its own technical platform. In the case of Premiere, however, the technical platform is operated by APS, a subsidiary of SES Astra (a leading Luxembourg-based satellite group) because Premiere outsourced its platform to APS in 2004.

44. The market investigation shows that the choice and operation of a particular CA system is a strategic decision that goes to the core of the pay-TV offering. In fact, CA systems protect the only asset of a pay-TV platform, i.e. its programming and are closely intertwined with their main pieces of infrastructure: its head end and its set top boxes. Implementing a CA system is an expensive and cumbersome process and switching to a competing solution is a major decision. In fact, a vast majority of operators employ only one CA solution. On this basis, the Commission considers that the provision of CA solutions is a separate product market.

45. As regards middleware, in broad terms it is a technology embedded between hardware and application software which enables certain applications to run and interoperate between each other. In the context of an STB, its purpose is to provide an "operating system" which allows the STBs to run applications such as EPGs (electronic program guides) and interactive applications (shopping, weather forecast, news, TV games etc.). The market investigation confirmed that the supply of middleware could be considered as a separate segment within the market for technical services for pay-TV, as, from a supply side perspective, there appear to be several suppliers of middleware which do not sell also CA systems and STBs and, from a demand side perspective, pay-TV providers can buy the different elements of the technical services separately. This because usually producers of middleware supply the technical specifications necessary for the interoperability of the different elements to providers of technical services, manufacturers of STBs and pay-TV operators. On the other hand, it has also been submitted that the market for the provision of technical services to pay-TV operators seems to tend towards an integration whereby providers of CA systems also provide middleware.

46. In any case, it is not necessary to conclude as to the existence of a separate market for the provision of middleware for the purpose of this decision, since the competitive assessment of the concentration would not change.

(b) Relevant geographic market

47. According to *Bertelsmann/Kirch/Premiere*, the market for technical services for pay-TV, encompasses the entire German-speaking area. News Corp agrees in its notification with this geographic scope. On the other hand, the market investigation has revealed that providers of CA systems usually offer their encryption systems on a global basis. The most important providers of CA systems for broadcasting in Europe are Nagravision (Switzerland), NDS – a subsidiary of the News Corp group - (UK), Irdeto (the Netherlands), Conax (Norway) and Viaccess (France). At any rate, the question can be left open as the transaction will not have substantial effects in the market for CA systems.

48. When considering the middleware software segment in a different context and for different functionalities, the Commission has in a previous decision[23] defined the scope of a market for middleware software as global. This is because the middleware software products are broadly identical across different countries, customers consider offers from vendors from all parts of the world and there are no technological barriers that restrict vendors from supplying all over the world. Whereas the previous case does not deal with entirely similar products to the ones at hand, also in the present case the products at stake are middleware software solutions. The market investigation revealed no elements on the basis of which the geographic scope of the middleware market would not have to be defined as at least EEA-wide or even world-wide. In any case, the question can be left open as the transaction will not have substantial effects in the market for middleware software.

B. Horizontal Effects

49. According to the notifying party's view, which was confirmed by the market investigation, the proposed concentration has a very limited impact from a horizontal perspective. This applies to all relevant markets identified above, that is to say the pay-TV markets, the markets for the licensing of broadcasting rights and the markets for technical services for pay-TV in Germany and Austria.

(1) Pay-TV services to end-users in Germany and Austria

50. According to the notifying party, there are no horizontally affected markets because the parties' activities do not overlap in the market for the provision of pay-TV services to end-users in Germany and Austria.

51. Premiere is active as a leading pay-TV broadcaster in both countries. Premiere's market share in the pay-TV market is around [60-70%] in 2007 in Germany, both by number of subscribers and by revenues, and around [70-80%] by subscribers and around [65-75%] by revenues in 2007[24] in Austria.

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[23] See case COMP/M.5080 – Oracle/BEA, decision of 29.04.2008.

[24] Source: parties' estimates.

52. Although News Corp's TV channels are also broadcast in Germany and Austria, it is not active in the markets for pay-TV services to end-users in either of these two countries. News Corp currently operates the Fox Türk Channel, an FTA channel available via satellite and cable in Germany and via satellite in Austria[25], and the National Geographic channel, which is available as a pay-TV channel via cable and IPTV operators in Germany and Austria. Furthermore News Corp recently launched its Fox Channel in Germany[26].

53. Insofar as News Corp's channels qualify as FTA channels, the parties' activities would overlap horizontally only if pay-TV and FTA TV services were to be part of the same product market. As set out above, however, the market investigation has indicated for both Germany and Austria that pay-TV and FTA TV are part of distinct product markets. In any case, on a potential broader market including both pay-TV and FTA TV the parties' market shares would be negligible both in Germany and in Austria (Premiere would have a market share of less than [0-10%] in Germany and less than [0-10%] in Austria, News Corp's market share would even be lower than Premiere's in both countries).

54. Insofar as News Corp's channels qualify as pay-TV channels because they are included in a broader pay-TV channel package provided by platform operators in Germany and Austria, there is no significant horizontal effect of the transaction because News Corp does not deal directly with end-users, but rather licenses its channels to channel platform operators. News Corp therefore operates at a different level of the distribution chain than Premiere in both Germany and Austria.

55. Finally, the proposed transaction does not lead to significant anti-competitive effects with a view to the elimination of News Corp as a potential competitor of Premiere in the German or Austrian pay-TV markets. Some respondents to the Commission's market investigation indicated that News Corp would have the know-how and financial means to enter the German or Austrian pay-TV market. Nevertheless, the market investigation did not provide any evidence[27] that News Corp had actually had any concrete plans to enter the pay-TV market in Germany or Austria, apart from buying Premiere, or otherwise exerted a significant constraining influence on Premiere or other pay-TV operators as a potential entrant to the pay-TV markets in these two countries, let alone that News Corp could have grown into an effective competitive force in any of these two markets.

56. In the light of these considerations, the Commission has come to the conclusion that the combination of Premiere's pay-TV services with News Corp's activities is unlikely to cause any significant horizontal concerns.

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25 Offered as part of a specific Turkish-language package offered by several TV providers.

26 Through Unitymedia's cable network and satellite platform ArenaSAT in May 2008.

27 News Corp's internal presentation of the acquisition project does not refer to any possibility of News Corp to directly enter the market for Pay-TV services to end-users in Germany and Austria.

(2) Acquisition of broadcasting rights

57. News Corp is active as a licensor of films, TV channels and other TV content as a wholesale product in Germany and Austria. Premiere does not licence broadcasting rights. It is a mere buyer of such products. The transaction therefore does not raise horizontal anti-competitive issues in this market.

(3) Technical services for pay-TV

58. Similarly, the parties' activities do not overlap horizontally with regard to technical services for pay-TV as only News Corp is active in this market via its subsidiary NDS.

C. Non-horizontal Effects

(1) Acquisition of broadcasting rights

59. News Corp acknowledges that the transaction will bring about a vertical relationship with regard to the acquisition of broadcasting rights. Premiere operates as a purchaser of pay-TV broadcasting rights and News Corp is active as a licensor of TV content as a wholesale product (such as premium films through Twentieth Century Fox, TV channels via Fox Turk, National Geographic or the recently launched Fox Channel).

60. In a merger between companies which operate at different levels of the supply chain, anti-competitive effects may arise when the merged entity's behaviour could limit or eliminate competitors' access to supplies (input foreclosure) or markets (customer foreclosure)[28].

Input foreclosure

61. In order to establish the possibility of foreclosure to arise, a number of conditions must be established: the (i) ability of the merging firms to foreclose; (ii) the incentives to foreclose; and (iii) the overall impact on effective competition[29]. As recognised by the Non-Horizontal Merger Guidelines, in order to be *able* to foreclose competitors, the new entity must have a significant degree of market power (which does not necessarily amount to dominance) in one of the markets concerned. In particular, the Guidelines note that the merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality.[30]

62. According to the notifying party, News Corp's share in the markets for licensing of <u>feature films</u> would be around [10-20%] for 2007 in each of Germany and Austria[31],

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[28] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, adopted on 28 November 2007, http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf, at para 29-30.

[29] See Non-Horizontal Merger Guidelines, at paras 31 et seqq and 60 et seqq.

[30] See paragraph 36 of the Non-Horizontal Merger Guidelines.

[31] Source: Nielsen EDI.

with the strongest competitors Warner Bros, Disney and Universal having market shares between [10-20%] and [20-30%] in both countries. The proxy used for these calculations are the box office revenues: the market investigation confirmed that the rate of success of films at the box office can be used as an indication of the relative strength of right-holders in this category. As regards the market for the acquisition of TV programs, in the absence of a comparable proxy, the notifying party estimates that its position in this segment would be similar to its position in the feature film segment. The market investigation showed that there are no elements on the basis of which News Corp's position in this segment should be evaluated differently in either of Germany or Austria. Finally, when considering the TV channels licensing markets, News Corp is not considered by market players as having an edge over other suppliers in relation to the quality and attractiveness of its output.[32]

63. Therefore, as News Corp cannot be considered as having market power in the upstream market for acquisition of TV broadcasting rights either in Germany or in Austria (whether in the overall market or in any of its possible sub-segments), it can be concluded that the merger will not lead to any competition concerns in terms of input foreclosure.

Customer foreclosure

64. Looking at the pay-TV segment, Premiere's position in the purchase of audiovisual content is relatively stronger. Whereas the parties estimate that Premiere's market share of the overall market for the acquisition of broadcasting rights would be [10-20%] in the German-speaking area, this market share varies from [0-10%] for both films and TV programs to a significant [40-50%] for TV channels in the year 2007.[33] Nevertheless, it seems unlikely that Premiere would, after the merger, commit to exclusively purchase TV channel content from News Corp, thereby foreclosing News Corp's competitors. The attractiveness of a pay-TV operator's offer to consumers is based on the richness of the bundle of channels broadcast through its platform. It seems unlikely that Premiere would find it profitable to reduce the offer of channels to only three (Fox Turk, National Geographic and Fox Channel) currently produced by News Corp. The market investigation confirmed that the contents provided by News Corp, and in particular the National Geographic Channel or the new Fox Channel, do not have a particular edge that render them exceptionally attractive to viewers. Furthermore, none of the right holders expressed any concern that, as a result of the proposed concentration, they could be prevented from selling their content to Premiere.

65. It can therefore be concluded that, even if it was considered that post-merger Premiere had market power on the downstream market for the acquisition of TV channel content for pay-TV and even if it had the ability to foreclose News Corp's competitors in the upstream market for the supply of audiovisual content, it seems unlikely that it would have the incentive to do so.

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[32] News Corp's channels are Fox Turk, National Geographic and the newly launched (May 2008) Fox Channel.

[33] Source: parties' estimates.

66. In the light of these considerations, the Commission has come to the conclusion that the concentration is unlikely to cause any significant vertical concern in the market for the acquisition of TV content in Austria and Germany.

(2) Conditional Access systems for pay-TV

67. The transaction creates a vertical link in relation to CA systems because News Corp (through its subsidiary NDS) is a leading supplier of CA systems (and middleware) in the EU and Premiere is a key buyer of CA systems in Germany. NDS has supplied middleware to Premiere since March 2006 and […] it will start supplying CA systems with a view to becoming Premiere's sole supplier of encryption technology by 2012 at the latest. For the reasons explained below, the Commission considers that this [NDS Agreement] is related to the notified transaction and, therefore, it will be taken into account in order in appraising the competition effects of the proposed concentration.

68. Adapting the existing technical platform of a pay-TV operator to a new CA system is a major challenge, given the technical and commercial complexities involved and the strategic character of choosing a particular CA system. In this context, Premiere's switch to NDS's CA system may have the practical effect of rendering its STB base less open for third-party access from existing or potential pay-TV operators than before the notified transaction.

69. According to the market information provided by the parties, it can be concluded that Premiere as a dominant position in the German market for pay-TV. Premiere's dominant position would be then strengthened if third-party access to its STBs were to be eliminated or were to become more difficult because building a STB base is one of the most significant barriers to entry to the pay-TV market. Each of these issues is dealt with in more detail below.

Premiere already holds a dominant position

70. As explained above, the market investigation has confirmed that the relevant market for the assessment of the proposed transaction is the market for pay-TV in Germany. Furthermore, the market investigation indicated that Premiere holds a dominant position in the German market for pay-TV. As the Community courts have confirmed, the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative, but among those factors a highly important one is the existence of very high market shares.[34] In fact, according to the case law of the Community courts, a particularly high market share may in itself be evidence of the existence of a dominant position, in particular where other operators on the market hold only much smaller shares[35] More specifically, for market shares in excess of 50% the Court of Justice has established a presumption of dominance.[36]

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[34] Hoffman-La Roche v. Commission, Case 85/76, 1979 E.C.R. 461, paras. 38-40.

[35] Gencor v. Commission, Case T-102/96, 1999 E.C.R. II-753, paras. 201-202; and General Electric Co. v. Commission, Case T-210/01, 2005 E.C.R. II-5575, para. 115.

[36] Akzo v. Commission, Case C-62/86, 1991 E.C.R. I-3359, paras. 59-61; and General Electric Co. v. Commission, Case T-210/01, 2005 E.C.R. II-5575, para. 115 .

71. On the basis of this case law and the results of the market investigation, it must be concluded that Premiere is dominant in the provision of pay-TV services to end-customers in Germany. Historically, Premiere has been the sole pay-TV operator in Germany and its current market share of [60-70%] in terms of subscribers of pay-TV services and around [60-70%] in terms of revenues generated by pay-TV is well below the thresholds for which the described presumption of dominance applies.

72. This presumption is reinforced by the fact that Premiere is the only pay-TV operator using both satellite technology (where it runs its own technical platform and STB base) and cable (where Premiere runs as a pay-TV operator in all the main cable platforms). Satellite already accounts for 45% of TV distribution in Germany and this figure has been increasing over the last few years.

73. On the other hand, the market share of each of its two next largest competitors (Unitymedia and Kabel Deutschland) is much smaller, namely around [10-20%][37], that is to say not even one fourth of Premiere's market share. These two companies are regional cable operators which run their own technical platform and broadcast also Premiere's programmes on their platforms. So far, only one German pay-TV operator (Unitymedia) has tried to enter the satellite sector using Premiere's platform and STBs. This attempt failed despite the fact that Unitymedia held at the time (2006-2007) the broadcasting rights for the German football league (Bundesliga). Unlike in other European countries, IP-TV through ADSL networks is *de minimis* in Germany (0.4% of the market).

74. Finally, the results of the market investigation indicate that also the threat of potential entry into the Germany pay-TV market is unlikely to significantly constrain Premiere in its market conduct. In fact, the number of potential new entrants into the German pay-TV market appears very limited. It also seems that, in general, pay-TV markets are characterised by significant entry barriers to the extent that subscribers are adamant to switch set-top boxes or to buy a second decoder to receive a second pay-TV offering. In this context, it should be noted that Premiere runs the largest STB satellite base in Germany [1-2 million boxes] and that Premiere has a total STB population in Germany of [2-3 million boxes] (i.e. including cable STBs).

75. It follows that Premiere appears to have the ability to behave, to a considerable extent, independently of its competitors, customers, suppliers and, ultimately, the final consumer and must therefore be considered as a dominant player in the German pay-TV market.

The agreement with NDS is related to the notified transaction

76. The [NDS Agreement] was signed on 31 March 2008, i.e., after the notifying party had already formally communicated to the Commission that it intended to notify News Corp's acquisition of control over Premiere as soon as possible.

77. The notifying party argued that Premiere's switch of the CA system from Nagra to that of NDS/News Corp is not merger related, but was caused by the fact that its current system had been hacked and that its current supplier (Nagra) was not able to secure the

[37] Market shares calculated by subscriptions, i.e. taking into account the number of subscribers taking the cable operator’s pay-TV service and not the simple "access subscribers".

system again in a short time-frame. In this respect, the market investigation has shown that all systems may be hacked, but that the most suitable and inexpensive means to secure the system again (instead of exchanging the whole system and switching to another provider of CA technology) is a change of the smartcards.

78. [The Commission concludes that the switch to NDS was not the easiest and cheapest way to re-secure Premiere's system].

79. At any rate, the parties claim that the NDS Agreement is prior and unrelated to the proposed transaction because it was signed before the acquisition of control by News Corp over Premiere, which seems to have taken place shortly before the date of notification.

80. [The Commission concludes that News Corp had planned the acquisition of control over Premiere before the conclusion of the NDS Agreement].

81. [In particular, the Commission notes that during the pre-notification contacts with the Commission and prior to the conclusion of the NDS Agreement, News Corp argued that its then shareholding in Premiere would confer to it de facto sole control over Premiere and submitted evidence to the Commission of the Parties' good faith intention to bring about the operation].

82. […]

83. [Also, there is no evidence that negotiations between the parties started well before News Corp started to build its stake in Premiere. Further to comprehensive requests for information, the only NDS' documents submitted to the Commission (dated November 2006 and March 2007) and the only documents available from Premiere (dated April 2006) do not include any decisions or any detailed proposals].

84. [The Commission concludes that Premiere had not yet taken a decision regarding the choice of its CA system supplier until it became aware of the proposed acquisition of control by News Corp].

85. [The Commission concludes that the significant costs associated with the change of CA system are likely to be borne by NDS and that this appears rational only in the context of the proposed transaction] [38].

86. On the basis of the above, the Commission concludes that the NDS Agreement is related to the merger, and, therefore, that the competition issues raised by it are merger-specific.

The agreement with NDS raises competition issues

87. Against this background, the results of the market investigation suggest that the NDS Agreement whereby Premiere will switch to NDS' CA system will have the effect of strengthening Premiere's dominant position by foreclosing access of third-party pay-TV operators to Premiere's satellite STB base. This satellite STB base, which consists of [1-2] million STBs in Germany, is very significant.

[38] According to News Corp's internal presentation of the investment project, it appears that [part] of the STB can be updated by download. The other [part] will have to be replaced.

88. The issue relates to the "openness" of Premiere's satellite platform. Whereas it is current practice for pay-TV operators to run their own technical platform, in 2004, Premiere chose to outsource the technical services for its pay-TV platform to APS, a subsidiary of SES Astra.

89. In this framework, Premiere and APS concluded the so-called CA Agreement which allowed APS to give third-party pay-TV operators access to Premiere's satellite STB base. In 2007, APS' position for granting third party access was strengthened by a Memorandum of Agreement, which allowed APS to operate the Entavio technical platform, which had access to the Premiere satellite STB population and ensured the access for third party pay-TV operators. As Premiere, APS used the Nagra encryption system (albeit a more recent version).

90. Premiere's dominant position in the pay-TV market in Germany would be strengthened if such third-party access were to be eliminated or were to become more difficult given that building a STB base is one of the most significant barriers to entry to the pay-TV market (pay-TV broadcasting requires STBs to decode otherwise encrypted programming). The question is therefore whether Premiere's switch to the NDS encryption system and the vertical integration brought about by the merger would render Premiere's platform less open and therefore increase further the entry barriers for new pay-TV operators[39].

91. News Corp claims that the CA Agreement is technologically neutral and, therefore, that Premiere's switch to NDS would not prejudice third-party access under the CA Agreement. However, the results of the market investigation show that the switch to NDS will indeed render third-party access more difficult. The reasons for this are as follows.

Premiere/NDS will have to sub-license Videoguard to SES Astra

92. In order to provide third-party access, SES Astra needs, first and foremost, a sub-license to the CA solution used by Premiere. While SES Astra enjoys a comprehensive sub-license of Nagra (Premiere's current CA solution), it has not yet received a sub-license in respect of NDS' Videoguard. Hence, contrary to the current situation (in which SES Astra enjoys a comprehensive sub-licence of Nagra), post-merger NDS / Premiere would be in a position to refuse sub-licensing Videoguard to SES Astra (or, alternatively, grant an insufficiently comprehensive sub-licence) to the extent that, in the event of a switch of encryption services provider, the CA Agreement does not oblige Premiere to sub-licence to APS the new CA system.

93. Furthermore, it appears that, in order to ensure that, after the switch to NDS, Premiere's new and updated STBs are able to receive third party pay-TV operators' programs under the CA agreement, Premiere and NDS will also need to (i) provide SES/Astra with technical specifications and interfaces; and, in addition this, (ii) enable certain functionalities in the NDS system in order to guarantee multi-operator functionalities,

[39] One FTA broadcaster has claimed that Premiere's satellite STB base could also be regarded as a barrier to entry for FTA operators (to the extent that those broadcasters would encrypt their programming). However, as explained above, FTA and pay-TV are to be considered separate product markets and the effects of the transaction in this case concern directly only the pay-TV market.

that is to say the functionalities required to give several pay-TV operators access to Premiere's STB population via the same smartcard.

94. Therefore, as a result of the vertical integration brought about by the proposed concentration, it cannot be excluded that News Corp may use the need for the sub-licence and the related technical specifications and functionalities to prejudice third-party access to its STB base and thereby strengthen Premiere's dominant position in the pay-TV market in Germany.

One single party (NDS/Premiere) would control the distribution and management of smartcards

95. As most of Premiere's STBs do not support an ejectable / double smartcard system, third-party access under the CA Agreement focuses on the so-called multi-operator functionality which makes it possible to decrypt and encrypt the offers of different providers independently from each other on a single smartcard. The market investigation showed that the control of the distribution of smartcards has a strategic economic impact. In this context, it can be noted that […] A delay in the delivery of the smartcards by Premiere could hinder a third party pay-TV satellite operators' ability to commercialize their offer.

96. Under the new 2007 agreement, APS obtained the right to order smartcards for third-party pay-TV operators directly from the CA service provider. It is far from certain that this will remain the case once Premiere has switched its CA system from Nagra to NDS. In this respect, the main concern is that the proposed acquisition of Premiere by News Corp and the vertical integration of NDS and Premiere will change the incentives of the CA system provider in a way that makes third-party access to Premiere's STBs more difficult, if not impossible.

97. Pre-merger, the smartcard management of Premiere's STBs is done by Nagra, who has no links with any pay-TV operator or content provider as its only business activity is to provide CA services. Providers of CA systems usually charge a fee per smartcard, so an increase of the number of smartcards used on a platform increases their revenues. An independent provider of the CA system for the Premiere platform would therefore normally do its best to guarantee third-party access to the technical platform in order to attract more subscribers. In particular, it will sell to the technical service provider the smartcards required for the provision of access to the technical platform.

98. Post-merger, the incentives of the CA provider (e.g. NDS) change completely if the CA provider is vertically integrated with the operator of the technical platform and the broadcaster, as would be the case if News Corp were to acquire control over Premiere.

99. If the provider of the CA system, the operator of the technical platform and the broadcaster were part of the same economic entity, the provider of the CA system would have an incentive to protect the operator of the technical platform and the broadcaster against competition from third parties, because the additional financial gains of the CA provider which would result from an increase of the number of smartcards issued for that platform might not outweigh the financial losses caused by the additional competition to the provider of the programme platform.

100. Moreover, the issuance of smartcards also raises confidentiality issues to the extent that the issuer, i.e. NDS, has access to the specific entitlements (such as viewing permissions or subscriber options) of each card. The notifying party submits that this

information is of no competitive relevance because the customer relationship management of the subscriber base is done by the platform operator (in this case APS) and therefore, NDS is unable to match the entitlements of the smartcard with the actual subscriber data such as, in particular, the identity of the subscriber. Accordingly, NDS would only have access to the subscriber information on an aggregated basis. At any rate, these confidentiality aspects may act as a deterrent for third-party operators willing to obtain access to Premiere's STBs through APS.

(3) Middleware

101. NDS is one of the middleware suppliers active in the EEA. The concentration creates a vertical link between a supplier of middleware (and CA systems) in the EU and a key buyer of middleware and CA systems in Germany. The concentration would raise competition concerns if Premiere could leverage its position as a key customer of STBs into the middleware market by imposing on STB manufacturers the use of NDS middleware, thereby excluding other middleware producers from access to a large customer base. It should be first noted, however, that there are currently a number of competitors of NDS active in the EEA, such as Nagravision, IDway, Osmosys and Microsoft. Furthermore, as mentioned above, Premiere's influence on the STBs population is only present in Germany. As the middleware market has been defined as at least EEA-wide or even global, it appears unlikely that, post-merger, News Corp/Premiere would have the ability to effectively foreclose NDS' competitors given that its influence on the specifications of STBs is limited to Germany.

Conclusion

102. For the reasons set out above, the Commission has come to the conclusion that the proposed concentration raises serious doubts as to its compatibility with the common market to the extent that it may lead to a strengthening of the dominant position of Premiere in the German pay-TV market.

VI. COMMITMENTS

A. First set of commitments

<u>Description of the commitments</u>

103. In order to address the two competition concerns identified above, News Corp submitted the following commitments on 4 June 2008:

104. <u>Firstly</u>, News Corp committed to ensure that, post-transaction, APS would be in a position to grant third party access to Premiere’s satellite STBs under the same terms and conditions as it currently does. In order to achieve such a result, News Corp proposed that:

(a) A sublicensing agreement should be entered into with APS: (i) granting APS all necessary rights to use the NDS smartcards and the NDS Conditional Access (“<u>CA</u>”) software and for the operation of the NDS CA head-end system in such a way that APS can enable third parties to access the Premiere satellite STBs through the Premiere smartcards independently from Premiere and NDS; and (ii) providing that NDS directly supplies smartcards to APS and that the untimely delivery of smartcards be sanctioned by appropriate penalty provisions. The sublicense agreement will further ensure that NDS has no access to any data of third party competitors.

(b) News Corp further committed to cause NDS to deliver to APS (as service provider of Premiere) all hardware components necessary to implement the NDS' CA system at Premiere's satellite platform's head-end which is operated by APS. Such delivery should be combined with the necessary support for the implementation of the NDS CA system and should take place at market conditions no later than at the time of Premiere's deployment of the NDS CA system.

105. Secondly, News Corp committed to cause NDS not to place any restrictions on STB manufacturers to produce STBs with both an NDS embedded CA system and a CI slot and to provide the STB manufacturers with the necessary applicable technical cooperation required from NDS for this to be achieved.

Assessment of the first set of commitments

106. The first set of commitments has been market-tested with all those market participants which responded to the initial market investigation. As regards the substantive replies, a number of comments from market participants considered the proposed remedies as insufficient. However, these replies were not based on the idea of restoring pre-merger competition, but rather on a different starting point, namely the idea that Premiere's platform should be opened to third parties to a much greater extent than it is currently the case.

107. From the other substantive replies it can be concluded that the sub-license is in principle an appropriate remedy to remove the competition concerns identified by the Commission.

108. However, the market test also showed that the commitments lacked a proper implementation mechanism. This could have led to uncertainty as regards the ability of the commitments to clearly rule out serious doubts raised by the merger. For example, the sublicensing agreement did not extend to any further updates and product developments of the current NDS CA System.

109. The market test has also evidenced the irrelevance of some provisions of the commitments as proposed by the notifying party. This concerns, in particular, the second main element of the commitments submitted by News Corp, (relating to the production of STBs with a CI slot). Indeed, the market investigation revealed that this commitment only replicates the legal obligations of NDS under the applicable European and German telecommunication rules[40]. Therefore, the Commission concluded that this element of the proposed commitments will not be necessary to restore pre-merger situation.

40 Cf. Section 50(2) no. 1 of the German Telecommunications Act, which implements Article 6(1), Annex 1, Part 1 of the European Access Directive (Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities).

B. The sub-licensing agreement between News Corp (NDS) and APS (SES Astra)

110. On 17 June 2008, during the market test of the commitments, News Corp and SES Astra signed a Sub-licensing Agreement relating to the NDS CA system (the "Sub-licensing Agreement"). This agreement (i) grants APS a sub-licence in relation to various elements of the NDS CA System (smartcards, STB software, head-end system), (ii) grants to APS the technical information necessary to run a multi-operator environment of the Premiere STB base, that is to say the functionalities required to give several pay-TV operators access to Premiere's STB population via the same smartcard, (iii) seeks to ensure that NDS/Premiere will not obtain confidential information of the subscribers of other Pay-TV operators broadcasted through the Premiere STB base, (iv) regulates the distribution of smartcards, and (v) provides some brief rules in the event of non-compliance (penalties and arbitration).

Premiere/NDS will have to sub-license Videoguard to SES Astra

111. According to the market test relating to the first set of commitments, in order to ensure that, after the switch to NDS, Premiere's new and updated STBs are able to receive the programme of third party pay-TV operators under the CA agreement, Premiere and NDS will need to provide SES/Astra's subsidiary APS with (i) a sub-licence for the CA system, (ii) technical specifications and interfaces; and (iii) Premiere and NDS will need to enable certain functionalities in the NDS system in order to guarantee multi-operator functionalities.

112. According to Article 2 and 3 the Sub-licensing Agreement all the necessary licenses (smartcard software/hardware, STB software, and head-end software) for the use and operation of the NDS CA System at APS' premises are provided to APS under the same terms and conditions as currently provided for by the CA Agreement, as amended, with respect to Nagravision. Moreover, APS will operate the NDS CA System on Premiere's behalf as APS does today with Nagravision's CA System under the current SLA between Premiere and APS.

113. According to Article 4 of the Agreement, all provisions in the CA Agreement, as amended, dealing with "access critical" issues such as access, fees (for access and CA), smartcard ordering and delivery, as well as CA System exchange, are also applicable to the NDS smartcards, STBs, and head-end.

114. Further, Article 5 ensures the technical interfaces within the systems, so that APS can actually entitle access by third party pay-TV providers' subscribers on existing NDS smartcards of Premiere subscribers or on newly ordered smartcards.

115. Therefore, the Sub-licensing Agreement replicates APS' current position in relation to the Nagra CA system, granting third-party pay-TV operators access on an ongoing basis also after the introduction of the NDS CA system by Premiere.

Distribution and management of smartcards

116. As confirmed by the Commission's initial market investigation and the market test of the first set of commitments, the control of the smartcard management by NDS could lead to two detrimental effects: (i) NDS could delay the provision of smartcards to third-party pay-TV operators wishing to access the Premiere platform, and (ii) NDS/Premiere would have access to confidential information on subscribers of the other operators which are broadcasted via Premiere's platform.

117. According to the Sub-licensing Agreement:

- The rules as regards "*smartcard ordering and delivery*" applicable to the Nagra smartcards will be equally applicable to the NDS smartcards and both types of cards "*shall in no case be treated differently*" (Section 4).

- "*CAS or Premiere will not seek or agree to obtain any personal subscriber data, such as names and addresses of customers of TPCPs (i.e. third-party content providers) or data on entitlement on, and usage of, a particular smartcard by a TPCP. Premiere guarantees that NDS will ensure that any information or entitlement on, and usage of, a particular smartcard by a TPCP will not be used for purposes other than the administration of security and that in particular NDS will not make available any of these data to Premiere."* (Section 6.1).

<u>Assessment of the sub- license agreement</u>

118. It must be noted that the Sub-licensing Agreement has the same objective and includes similar provisions as the ones proposed in the first set of commitments in order to allow APS to have access to Premiere's satellite STBs. As noted before, this principle was assessed through the market test of the first set of commitment with the result that it can generally be considered as a satisfactory means to help solving the competition issues raised by the transaction.

119. However, the Sub-licensing Agreement raised several uncertainties as regards its ability to efficiently constrain the parties to apply its provisions in such a way as to guarantee that the access for third-party pay-TV operators via APS is effective in practice.

120. For instance, it is not entirely clear for which duration the NDS Sublicensing Agreement had been concluded and how the duration of this new agreement relates to the duration of the 2004 CA Agreement and the 2007 Memorandum of Agreement.

121. Also, effective penalty provisions are necessary to ensure that NDS and Premiere comply with the respective obligations under the Sub-licensing Agreement. In this regard, Section 7 of the Sub-licensing Agreement mandated the conclusion of a separate agreement that would include effective penalties to ensure the parties' compliance with their respective obligations, but this agreement had not been concluded and therefore it was uncertain whether the agreed penalties would actually be sufficient to deter NDS and Premiere from breaching their obligations under the Sub-licensing Agreement..

122. Finally, it was not clear from the Sub-licensing Agreement which type of smartcard information (number of subscribers, viewing patterns) would be accessible by NDS and how Section 6.1 of the Sub-licensing Agreement will be implemented as well as how the smartcard ordering and distribution process would take place in practice.

C. Latest set of commitments

123. Taking into consideration the elements described above, the notifying party submitted on 19 June 2008 modified commitments bringing clarifications and improving the effectiveness of the remedies.

124. The new version of the commitments clarifies the duration, for which the commitments apply. In this respect they contain a commitment on the part of News Corp to ensure third-party access to Premiere's satellite platform via APS at least until 31 October 2013 (in line with the initial term of the original CA Agreement) or as long as the CA Agreement (including its amendments) will stay in force thereafter .

125. Furthermore, in view of the conclusion of the Sub-licensing Agreement on 17 June 2008, the obligation to conclude this agreement in the previous version of the commitments was replaced by a simple reference to the Sub-licensing Agreement as a means to achieve the general commitment of News Corp to ensure third-party access via APS.

126. In addition, as in the previous version of the commitments, the latest set of commitments provides that NDS should directly supply smartcards to APS and that the untimely delivery of smartcards be sanctioned by appropriate penalty provisions. To this end, Premiere, NDS and APS have signed a memorandum of understanding on 20 June 2008 which is a binding agreement in relation to the scope of penalties as may be applied in relation to the failure of NDS to deliver smart card to APS. This memorandum of understanding sets the delivery and penalty provisions. […]

127. The latest set commitments also clarifies that the Sublicense Agreement further ensures that NDS has no access to any confidential data of third party competitors. To the extent that third party competitors order new smartcards from NDS via APS, NDS will also not have access to any confidential information concerning third party’s activities because the order for the relevant smartcards can be placed by APS anonymously. Additionally, the Sublicensing Agreement provides that NDS will not have access to any information concerning the identity of third-party subscribers and/or their individual entitlements.

128. The latest set of commitments also specifies that the NDS CA system concerned by the commitments is to be defined as the NDS supplied system components "*as used by Premiere at any time"* that together provide individual pay-TV operators with a means to control access to their broadcast content.

129. Finally, the second main element of the first set of commitments (relating to the production of STBs with a CI slot) has been removed from the latest set of commitments as the market test has shown that this commitment is not necessary to restore effective pre-merger situation.

<u>Conclusion on the last set of commitments</u>

130. The implementation of the last set of commitments relating to sub-license agreement between News Corp and SES Astra, as described above, would therefore solve the competition concerns identified by the Commission and would replicate the pre-merger level of access to Premiere's STB base for third-party pay-TV operators, hence restoring the pre-merger consumer choice and cultural diversity ranges.

C. Conditions and obligations

131. Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations

intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

132. The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

133. In accordance with the basic distinction described above, all requirements set out in the commitments under Sections C and B submitted by the notifying party on 19 June 2008 are considered to constitute obligations.

VII. CONCLUSION

134. The Commission has concluded that the remedies submitted by the notifying party are sufficient to remove the serious doubts raised by the concentration. Accordingly, subject to the full compliance with the commitments submitted by the notifying party, 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) and Article 6(2) of Council Regulation (EC) No 139/2004.

135. The detailed text of the commitments is annexed to this decision. The full text of the annexed commitments forms an integral part to this decision.

For the Commission
(Signed by)

Neelie KROES
Member of the Commission

June 19, 2008

By hand and by fax: 00 32 2 296 4301

European Commission

DG Competition

Rue Joseph II 70

B-1000 Brussels

Case M. 5121 – NEWS CORP/ PREMIERE

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 (the "Merger Regulation"), News Corporation ("News Corp") hereby provides the following Commitments (the "Commitments") in order to enable the European Commission (the "Commission") to declare the acquisition by News Corp of Premiere AG ("Premiere" and, together with News Corp, the "Parties") compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the "Decision").

These Commitments are given by News Corp without prejudice to their position that the notified concentration does not significantly impede effective competition within the common market or a substantial part of it, and is therefore compatible with the common market and the functioning of the EEA.

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

A. DEFINITIONS

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings:	undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice.
APS	the company APS Astra Platform Services GmbH
CA Agreement	the 2004 CA agreement entered into by Premiere, SCAS, and DPC, as amended by Section 14 and 15 of the 2004 Amendment Agreement and the 2007 Memorandum of Agreement entered into by SDDS, Premiere, APS, and SCAS.
DPC	the company DPC Digital Playout Center GmbH
Effective Date:	the date of adoption of the Decision
Monitoring Trustee:	one or more natural or legal person(s), independent from the Parties and their Affiliated Undertakings who is approved by the Commission and appointed by the Parties, and who has the duty to monitor News Corp's compliance with the conditions and obligations attached to the Decision.
NDS' CA System	the NDS' supplied system components as used by Premiere at any time that together provide individual Pay TV operators with a means to control access to their broadcast content. The system comprises elements for authorising/de-authorising individual subscribers for services, via a proprietary smartcard in the subscriber's STB, including: smartcards, resident conditional access software module for STBs, headend NDS' specific conditional access application software, headend application servers, and third party software running on the servers required to support the NDS specific applications
Premiere Satellite Platform	The end-to-end system components and related specifications required to broadcast, receive, and view direct-to-home digital satellite TV services provided by Premiere and transmitted by the satellite systems and uplink facilities provided and operated by SES Astra
SCAS	the company SCAS Satellite CA Services GmbH
SES Astra	the company SES Astra SA

SDDS	the company SES Digital Distribution Services Sarl
STB	the receiver unit, with an internal decoder, which receives and demultiplexes incoming digital TV signals. In Pay TV systems, the STB contains conditional access system software and a descrambler that allows TV signal decryption when provided with keys by an authorised smart card

B. ACCESS TO PREMIERE'S SATELLITE PLATFORM

1. News Corp commits to ensure that APS will be in a position to grant third party access to Premiere's Satellite Platform under the same terms and conditions as it did before News Corp's acquisition of Premiere at least until October 31, 2013 or for as long as the CA Agreement will remain in place thereafter. In order to achieve such a result:

   (a) Premiere, SDDS, APS, and SCAS entered into a sublicensing agreement of NDS' Videoguard solution to APS on June 17, 2008 (hereinafter referred to as the "Sublicensing Agreement", a copy is attached as Annex 1). By the Sublicensing Agreement, in particular (i) APS is granted all necessary rights to use the NDS smartcards and the NDS Conditional Access ("CA") software and for the operation of the NDS CA head-end system in such a way that APS can enable third parties to access the Premiere satellite STBs through the Premiere smartcards independently from Premiere and NDS; (ii) it is provided that NDS directly supplies smartcards to APS and that the untimely delivery of smartcards be sanctioned by appropriate penalty provisions, which will be set forth under a separate penalty agreement pursuant to Section 7 of the Sublicensing Agreement. […]. The Sublicense Agreement further ensures that NDS has no access to any confidential data of third party competitors. To the extent that third party competitors order new smartcards from NDS via APS, NDS will also not have access to any confidential information concerning third party's activities because the order for the relevant smartcards can be placed by APS anonymously. Finally, the Sublicensing Agreement provides that NDS will not have access to any information concerning the identity of third party subscribers and/or their individual entitlements.

   (b) News Corp commits to cause NDS to deliver to APS all hardware components necessary to implement the NDS' CA System at the Premiere Satellite Platform's head-end. Such hardware components shall enable APS to provide access to third party operators. Such delivery shall be combined with the necessary support for the implementation of the NDS CA System and shall take place at market conditions not later than at the time of Premiere's switch to NDS' CA System.

C. MONITORING TRUSTEE

I. Appointment Procedure

2. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee.

3. The Monitoring Trustee shall be independent of the Parties (and of their Affiliated Undertakings), possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Monitoring Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfillment of its mandate.

Proposal by the Parties

4. No later than one week after the Effective Date, the Parties shall submit a list of one or more persons whom the Parties propose to appoint as the Monitoring Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustee fulfils the requirements set out in paragraph 3 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfill its duties under these Commitments; and

(b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.

135.1.1. Approval or rejection by the Commission

5. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfill its obligations. If only one name is approved, the Parties shall appoint or cause to be appointed, the individual or institution concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Parties shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission’s approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

6. If all the proposed Monitoring Trustees are rejected or removed in accordance with paragraph 13 below, the Parties shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 4 and 5.

Monitoring Trustee nominated by the Commission

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

II. Functions of the Monitoring Trustee

8. The Monitoring Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at

the request of the Monitoring Trustee or the Parties, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

9. The Monitoring Trustee shall:

(i). monitor compliance with the obligations and conditions attached to the Decision.

(ii). assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

(iii). in particular, the Monitoring Trustee should report to the Commission within three months from the Effective Date on the full implementation of commitment *sub* 1), (i) for a period of three months on a monthly basis, and (ii) thereafter, every six months. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that News Corp is failing to comply with these Commitments;

(iv). propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure News Corp's compliance with the conditions and obligations attached to the Decision.

III. Duties and obligations of the Parties

10. The Parties shall provide and shall cause its advisors to provide the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of the Parties' books, records, documents, management or other personnel, facilities, sites and technical information to the extent necessary for fulfilling its duties under the Commitments and the Parties shall provide and cause to provide the Monitoring Trustee upon request with copies of any such documents, records, and/or books. The Parties shall make available to the Monitoring Trustee one or more offices on its premises and shall be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.

11. The Parties shall indemnify the Monitoring Trustee and its employees and agents (each an "Indemnified Party") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the willful default, recklessness, gross negligence, or bad faith of the Monitoring Trustee, its employees, agents or advisors.

12. At the expense of the Parties, the Monitoring Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Parties' approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees

and other expenses incurred by the Monitoring Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Paragraph 9 shall apply *mutatis mutandis*.

IV. Replacement, discharge and reappointment of the Monitoring Trustee

13. If the Monitoring Trustee ceases to perform its functions under the 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 the Parties to replace the Monitoring Trustee; or

(b) The Parties, with the prior approval of the Commission, may replace the Monitoring Trustee.

14. If the Monitoring Trustee is removed according to paragraph 13, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the 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 paragraphs 4-7.

15. Beside the removal according to paragraph 13, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented or waived by the Commission. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

136. THE REVIEW CLAUSE

16. The Commission may, where appropriate, in response to a request from News Corp showing good cause and accompanied by a report from the Monitoring Trustee:

i. Grant an extension of the time periods foreseen in the Commitments, or

ii. Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where News Corp seeks an extension of a time period, it shall submit a request to the Commission no later than two weeks before the expiry of that period, showing good cause.

New York, June 19, 2008,

Duly authorised for and on behalf of News Corporation

Lawrence A. Jacobs

Senior Executive Vice President and Group General Counsel

Agreement about

Sublicensing of the Premiere specific NDS Videoguard CAS

(this "Agreement")

[…]