EUROPEAN COMMISSION
DG Competition

Case M.8665 – Discovery / Scripps

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 9(3)
Date: 06.02.2018

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

EUROPEAN
COMMISSION

Brussels, 06.02.2018
C(2018) 816 final

PUBLIC VERSION

COMMISSION DECISION

of 06.02.2018

relating to Article 9 of Regulation (EC) No 139/2004
referring to case M.8665 – Discovery / Scripps

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the "TFEU")[1],

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings[2] (the "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by Discovery Communications, Inc. on 8 December 2017, pursuant to article 4 of the said Regulation,

Having regard to the request of the *Urząd Ochrony Konkurencji i Konsumentów* (the Polish Competition Authority, the 'PCA') of 4 January 2018,

Whereas:

1. INTRODUCTION

(1) On 8 December 2017 the Commission received notification of a proposed concentration by which Discovery Communications Inc. ('Discovery' or the 'Notifying Party', United States) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of Scripps Networks Interactive, Inc. ('Scripps', United States), by way of purchase of shares (the 'Transaction').[3] Discovery and Scripps are collectively referred to as the 'Parties'.

(2) The PCA received a copy of the notification on […]* December 2017.

(3) In order to remove the serious doubts arising from the Transaction in relation to the market for the wholesale supply of basic Pay-TV channels in Poland, the Notifying Party submitted commitments pursuant to Article 6(2) of the Merger Regulation on 16 January 2018 (the "Initial Commitments"). The Commission launched a market test of the Initial Commitments on 16 January 2018. Following the feedback received

1 OJ C115, 9.8.2008, P.47.

2 OJ L 24, 29.1.2004, p.1. With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

3 Publication in the Official Journal of the European Union No C 431, 15.12.2017, p. 9.

* Should read "8".

from the Commission, the Notifying Party submitted a final set of commitments on 30 January 2018 (the "Final Commitments").

(4) By letter dated 4 January 2018, Poland via the PCA requested the referral to its competition authority of the proposed concentration with a view to assessing it under national competition law, pursuant to article 9(2)(a) of the Merger Regulation ('the Referral Request').

(5) On 23 January 2018, the Commission sent a pre-rejection letter to the PCA, stating its reasons as to why it intended to reject the Referral Request and inviting the PCA to submit its observations. On 24 January 2018, the Commission received the PCA's observations, which reiterated the Referral Request and referred to the arguments already set out therein.

2. THE PARTIES AND THE CONCENTRATION

(6) Discovery is a global media company that provides content across multiple distribution platforms, including linear platforms such as pay television, free-to-air ("FTA"), and various digital distribution platforms around the world. Discovery's portfolio in the EEA include: (i) non-fiction TV channels through its global brands (such as Discovery, Animal, Animal Planet); (ii) sports entertainment channels through Eurosport International ("Eurosport"); and (iii) across the Nordic region (Sweden, Norway, Denmark and Finland), a portfolio of TV channels that feature non-fiction content, as well as locally produced entertainment programmes, sports and scripted series and movies from major studios through SBS Discovery Media AS ("SBS Nordic").

(7) Scripps is a global media company providing primarily home, food, travel and other related programming. Scripps operates as two business units: (i) U.S. Networks which accounts for 84% of Scripps' total turnover; and (ii) International Networks which covers Scripps' activities outside the United States. In Europe, the International Networks operations include TVN, a Polish multi-platform media company acquired in 2015, and UKTV, a joint venture with BBC Worldwide in the UK. In Poland, Scripps's activities include TVN Media, an advertising sales house. TVN also holds a legacy minority interest in ITI Neovision S.A. ("NC+"), which is active in the retail Pay-TV market in Poland.

(8) On 30 July 2017, Discovery and Scripps entered into an Agreement and Plan of Merger pursuant to which Scripps will be merged with a direct wholly-owned subsidiary of Discovery and, therefore, become a wholly-owned subsidiary of Discovery. The Transaction therefore constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

(9) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[4] (Discovery: EUR 5 869 million; Scripps: EUR 3 073). Each of them has an EU-wide turnover in excess of EUR 250 million (Discovery: EUR [...] million; Scripps: EUR [...] million), but they do not achieve more than

4 Turnover calculated in accordance with Article 5 of the Merger Regulation.

two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. ASSESSMENT UNDER ARTICLE 9(3) OF THE MERGER REGULATION

4.1. Introduction

(10) Pursuant to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of a case to the competent authorities of the Member State concerned with a view to the application of that Member State's competition law, if the criteria laid down in Article 9(2)(a) of the Merger Regulation are met, that is to say, if a concentration threatens to affect significantly competition in a market within the relevant Member State which presents all the characteristics of a distinct market.

(11) Moreover, Article 9(3) of the Merger Regulation provides that the Commission has to analyse, in the context of a request pursuant to Article 9(2)(a) of the Merger Regulation, whether it is appropriate to refer a given case to a national competition authority. The Commission therefore retains a margin of discretion in deciding whether to refer a case or not.[5] In exercising such discretion, the Commission will take into account the need to ensure effective protection of competition in all markets affected by the transaction at hand.[6] The Commission exercises that discretion taking into account the criteria set out in the case law and the Commission Notice on Case Referral in respect of concentrations (the 'Referral Notice').[7]

(12) In the following sections, the Commission considers whether the criteria of Article 9(2)(a) of the Merger Regulation are fulfilled (section 4.2) and then it assesses whether it is appropriate to refer the present case to Poland (section 4.3).

(13) In its assessment of the Referral Request, the Commission has taken into account all the arguments it received from the PCA and the Notifying Party.

4.2. Criteria of Article 9(2)(a) of the Merger Regulation

(14) Pursuant to Article 9(2)(a) of the Merger Regulation, a referral request by a Member State must fulfil one procedural and two substantive criteria.

(15) As to the procedural criterion, the referral request must be made within 15 working days from the date on which the notification of a concentration before the Commission is received by that Member State. In this regard, the Commission notes that Poland, via the PCA, received a copy of the notification of the Transaction on 8 December 2017 and that the Referral Request was submitted to the Commission on 4 January 2018. Therefore, the Referral Request was made within 15 working days following the receipt by Poland of the notification of the Transaction and, consequently, within the deadline provided for in Article 9(2) of the Merger Regulation.

(16) As to the substantive criterion, first, in assessing a referral request made pursuant to Article 9(2)(a) of the Merger Regulation, the Commission is required to determine

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5 Joined cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraphs 173-175. See also Commission Notice on Case Referral in respect of concentrations (hereafter, the "Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 7.

6 Referral Notice, paragraph 8.

7 Referral Notice, paragraphs 5, 7-9.

whether there is a market within the Member State concerned which is affected by the notified concentration and presents all the characteristics of a distinct market. According to Article 9(3) of the Merger Regulation and the case law of the General Court,[8] the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. Second, the Commission is required to verify whether the notified concentration threatens to significantly affect competition in that market. Each of these criteria is assessed in turn in the following assessment.

4.2.1. Markets within Poland which present all the characteristics of a distinct market

(17) According to paragraph 36 of the Referral Notice, to meet the criteria for referral under Article 9(2)(a) of the Merger Regulation, the Member State should demonstrate that the geographic markets in which the notified concentration threatens to affect competition are national or narrower than national in scope.

4.2.1.1. PCA's submission

(18) On the basis of the Parties' submissions in the notification, in its Referral Request, the PCA submits that the Transaction gives rise to horizontal overlaps in the following markets in Poland: (i) the market for the wholesale supply of FTA channels; (ii) the market for the wholesale supply of Pay-TV channels; and (iii) the market for the wholesale supply of basic Pay-TV channels. The PCA further indicates that the Transaction give rises to vertical relationships between the Parties' activities in Poland also on the (iv) market for the sale of advertising on TV channels; and (v) the market for the retail provision of Pay-TV services.

(19) The PCA therefore considers that the criterion of the test pursuant to Article 9(2)(a) of the Merger Regulation which requires that the market in question must be *"within the requesting Member State, and present all characteristics of a distinct market*" is met, since the Transaction affects geographic markets that are national in scope.

4.2.1.2. Notifying Party's view

(20) In its submission to the Commission, the Notifying Party does not contest the existence of distinct markets for the wholesale supply of FTA, Pay-TV and (basic) Pay-TV channels, as well as TV advertising and retail provision of Pay-TV services, or that the relevant geographic markets are either national in scope, sub-national, or by linguistic region encompassing more than one Member State, but notes that the Polish markets must be assessed in the wider context of the European media landscape.

4.2.1.3. Commission's assessment

(21) The Commission, on the basis of the information gathered during its market investigation and in light of its previous decision-making practice, reached the conclusion in the decision adopted pursuant to Article 6(1)(b) and 6(2) of the Merger Regulation, that the relevant product markets for the assessment of the effects of the Transaction and those identified by the PCA, are indeed national in scope or confined to a linguistic region.[9]

8 Joined Cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraph 105.

9 See Article 6(1)(b) Decision, Section 4.

(22) In this respect, the Commission considers that the distinction between national scope and linguistic region is not relevant in this case since in both scenarios, the effects of the Transaction would be circumscribed by the territory of Poland.

(23) In the light of the above, the Commission considers that Poland has shown that the markets identified in its Referral Request present the characteristics of distinct markets in Poland as required under Article 9(2)(a) of the Merger Regulation.

4.2.2. Markets within Poland in which the Transaction threatens to significantly affect competition

(24) According to paragraph 35 of the Referral Notice, to meet the criteria for referral under Article 9(2)(a) of the Merger Regulation, the Member State should demonstrate that, based on a preliminary analysis, there is a real risk that the notified concentration may have a significant adverse impact on competition. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

4.2.2.1. PCA's submission

(25) Without prejudice to a full investigation into the competitive effects of the Transaction, the PCA considers that there is a real risk that the Transaction may have a significant adverse impact on competition in the markets discussed at recital (18) due to the following alleged competition concerns, namely: (i) an increase in bargaining power of the merged entity arising from the combination of the Parties' channel portfolios; (ii) an increase in dominance in specific basic Pay-TV genres, namely factual and lifestyle; (iii) a strengthening of TVN's (TVN Media) position in the market for the sale of advertising on TV channels in Poland, (iv) possible vertical issues stemming from the fact that Mr. John Malone[10] allegedly controls both Discovery (which, post-Transaction, would include TVN) and Liberty Global (which operates as a Pay-TV distributor in Poland and is in the process of acquiring Multimedia Polska ('MMP'), another TV distributor), and (v) horizontal issues in the market for the provision of retail Pay-TV services arising from the fact that Mr. Malone post-Transaction would control both Liberty Global and NC+, a satellite TV distributor in Poland, where each of TVN and Liberty Global have a minority stake. These concerns are presented in turn.

(1) The PCA submits that the Parties have a strong position in the market for the wholesale supply of Pay-TV channels, the combined share being approximately [30-40]% (Discovery [5-10]%; Scripps [20-30]%), with a similar position in the market for basic Pay-TV channels ([30-40]%, Discovery [10-20]%; Scripps [20-30]%). According to the PCA, there would be a risk that as a result of the Transaction, the merged entity would have a dominant position in the markets for the supply of Pay-TV and basic Pay-TV channels.

(2) The PCA states that the merged entity would have a dominant position in each of the markets for Factual and Lifestyle basic Pay-TV channels, where it would have a combined market share of [50-60]% (increment of [10-20]%) and [40-50]% (increment of [10-20]%), respectively. According to the PCA, a separate

10 Mr Malone is one of the main shareholders of Discovery. In particular, it owns [0-5]% of Series A common stock and [90-100]% Series B common stock of Discovery.

assessment of these two markets would be justified, given that channels of both genres are not close substitutes.

(3) The PCA submits that there is a reasonable probability that, post-Transaction, Discovery would be selling the advertising time of all its channels through its own subsidiary TVN Media (including Discovery's [0-5]% of the market). The Transaction would therefore lead to the strengthening of the already strong position of TVN Media ([40-50]%) in the market for the sale of TV advertising and would have a negative impact on competitors.

(4) The PCA submits that it is extremely important to carefully investigate the links between John Malone, Liberty Global and Discovery. Due to the very strong position of Discovery and Scripps in the wholesale supply of Pay-TV channels and of UPC and MMP[11] in many local retail Pay-TV and fixed broadband markets (on the demand side), there is a high probability that the Transaction would result in a significant restriction of competition. In particular, the merged entity may apply preferential treatment of UPC/MMP in relation to their competitors. Therefore, the notified concentration may have a negative impact on UPC/MMP's competitors in local markets in Poland.

(5) The PCA submits that the Transaction may create or strengthen an already existing dominant position on local retail Pay-TV markets in Poland, given that Mr. Malone would also indirectly control NC+ (via the minority stakes of 32% in TVN and 17% in Liberty Global). If that were the case and taking into account UPC's and MMP's strong and often dominant position in many local markets of Pay-TV channels supply and the NC + share, the Transaction may lead to strengthening an already existing dominant position in some local markets or to the creation of such a position in others.

4.2.2.2. Notifying Party's view

(26) The Notifying Party submits that the criterion provided by Article 9(2)(a) which requires that "a concentration threatens to affect significantly competition [...]" is not met, as the Transaction does not threaten to affect significantly competition in any markets in Poland. Accordingly, the criteria for making a referral under Article 9(2)(a) do not apply in the present case.

(1) With regard to the horizontal concern in the supply of Pay-TV channels in Poland, the Notifying Party submits that the Parties' shares do not establish a dominant position (as revenue shares are below [20-30]%, in fact less than [10-20]%) and a combined market share of around [30-40]% (based on audience) cannot be considered as giving rise to a dominant position.

(2) Regarding the increase in dominance in specific basic Pay-TV genres, the Notifying Party argues that (i) the market definition does not conform with the Commission's precedents, as in previous merger investigations, the Commission has declined to define distinct wholesale markets by genre, and (ii) distributors do not emphasise factual and lifestyle programming in their retail marketing demonstrating that consumers, and therefore distributors, do not have separate demand for these types of channels.

11 UPC belongs to Liberty Global while the PCA is currently reviewing Liberty Global's acquisition of MMP.

(3) In relation to the strengthening of TVN's (TVN Media) position in the market for the sale of advertising on TV channels in Poland, the Notifying Party submits that the Transaction does not give rise to any merger-specific change in TV advertising, as Discovery is not active in the sale of advertising spots in Poland and a hypothetical move of Eurosport 1 and 2 and Metro advertising sales to TVN Media would not strengthen TVN Media or foreclose Polsat Media. Nor would Discovery have the incentive to terminate its agreement with Polsat Media post-Transaction.

(4) With regard to possible vertical issues stemming from the fact that Mr. John Malone allegedly controls both Discovery and Liberty Global, the Notifying Party submits that (i) the theory is not merger specific, (ii) Mr. Malone does not control Discovery, and (iii) Discovery would have no ability or incentive to foreclose distributors.

(5) In relation to the claim that the Transaction may create or strengthen an already existing dominant position on local retail Pay-TV markets in Poland, given that Mr. Malone would also indirectly control NC+, the Notifying Party submits that (i) the theory rests on seven cumulative elements, some of which are implausible, including Mr. Malone's alleged control over Liberty Global and Discovery, and (ii) NC+ will remain solely controlled by Vivendi, as established by the Commission's decision in case M.6741 - *Vivendi Group / N-C Entity*, as the Transaction does not change NC+'s governance structure.

4.2.2.3. Commission's assessment

(27) The Commission considers that Poland has demonstrated that the Transaction threatens to affect significantly competition in the market for the wholesale supply of basic Pay-TV channels in Poland, but it has failed to demonstrate that the Transaction threatens to affect significantly competition in the: (i) market for the wholesale supply of factual basic Pay-TV channels; (ii) market for the wholesale supply of lifestyle basic Pay-TV channels; (iii) market for the retail supply of Pay-TV services; and (iv) the sale of advertising on TV channels.

(28) The Commission, in the following recitals, will assess the alleged competition concerns raised by the PCA, namely: (i) horizontal effects on the market for the wholesale supply of basic Pay-TV channels, including narrower market segments, namely factual and lifestyle (Section 4.2.2.3.1); (ii) horizontal effects on the market for the retail supply of Pay-TV services, stemming from the alleged control of TVN (Section 4.2.2.3.2); (iii) vertical effects on the retail supply of Pay-TV services stemming from the fact that Mr. John Malone allegedly controls both Discovery (which, post-Transaction, would include TVN) and Liberty Global (which operates as a Pay-TV distributor in Poland and is in the process of acquiring MMP (Section 4.2.2.3.3); and (iv) vertical effects on the TV advertising market due to strengthening of TVN's (TVN Media) position in the market for the sale of advertising on TV channels in Poland (Section 4.2.2.3.4).

4.2.2.3.1 *Horizontal assessment - Wholesale supply of basic pay TV channels*

(29) With regard to the market for the wholesale supply of basic Pay-TV channels in Poland, the Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market, as a result of horizontal unilateral effects only in the market for the wholesale supply of basic Pay-TV channels, due to an increase in the merged entity's bargaining power vis-à-vis TV distributors. The Transaction,

however, would not raise serious doubts on the possible narrower product markets for the provision of factual and lifestyle basic Pay-TV channels.

(30) In more detail, the Commission considers that the merged entity will control a portfolio of channels which are important to Pay-TV distributors. Discovery's current portfolio includes the Discovery Channel and Eurosport, which are considered important, while TVN24, TVN's flagship news channel, which Discovery will acquire via the Transaction, is also considered particularly important by TV distributors and is among the most-watched pay-TV channels in Poland. The addition of TVN24 to Discovery's existing portfolio will increase the merged entity's bargaining power. This concern is predicated on the fact that the Parties' customers, namely TV distributors, have a preference for channel variety. As a result of the Transaction, Discovery would control a greater variety of channels than pre-merger. Post Transaction, Discovery would have a greater ability and incentive than pre-merger to raise the price for its increased channel repertoire when negotiating wholesale license fees with TV distributors by leveraging the importance that TVN24 has for retail customers.

(31) This is the case for the following reasons.

(32) First, although the merged entity's combined market share in the wholesale supply of basic Pay-TV channels is moderate ([30-40]%), respondents to the market investigation indicated that certain TV channels in the Parties' portfolio are particularly important to TV distributors in Poland. These channels include Eurosport and the Discovery Channel from Discovery, and TVN24 from Scripps.

(33) Second, TVN24, Scripps' main news channel in Poland, is widely perceived as one of the few channels offering high-quality news and also as particularly important for Pay-TV distributors.[12] As a matter of fact most TV distributors that replied to the market investigation consider TVN24 as important for their retail TV offering in Poland, in the sense that it plays an important role for them to remain competitive, thus placing them at a weaker negotiating position should the merged entity increase licensing fees as a consequence of the addition of the channel to its portfolio.. TVN24 is not subject to any must-offer obligation or any other obligation to this effect and TVN currently charges Pay-TV distributors for carrying this channel. Another aspect that shows TVN24's importance to Pay-TV distributors is that, according to the data provided by the Notifying Party, it represents [a significant share]of the carriage fees paid by TV distributors for all of Scripps' channels.[13]

(34) As it emerges from data provided by the Notifying Party, TVN24 systematically ranks as the number 1 or number 2 basic Pay-TV channel, when considering several viewership data: (i) total time viewed within a month, (ii) continuous time viewed within a month, and (iii) prime time viewed within a month. For each of these three measures, the Notifying Party provided data that rank the channels in terms of viewers who watched the channel for 6 min or longer, 30 min or longer, 60 min or

12 Responses to Questionnaire Q3 to TV distributors of 11 December 2017, question 18 and non-confidential minutes of Commission's calls with TV distributors on 23 November and 7 December 2017.

13 Notifying Party's submission of 3 January 2018, "*Bargaining power in wholesale channel supply*", E.III and Notifying Party's response to the Commission's RFI 7 of 26 January 2018, question 1.

longer and 180 min or longer within a month. In particular, TVN24 consistently ranked 1st when 180 min or longer where considered.

(35) Third, the merged entity would likely have the ability and the incentive to jointly offer the licensing of its TV channel portfolio and, by so doing, increase the fees charged to TV distributors by exploiting the additional bargaining power gained through the addition to its portfolio of TVN24, a particularly important channel in the Polish Pay-TV market. It could also threaten TV distributors to withdraw its full channel portfolio which, given its variety, would force TV distributors to accept the merged entity's new conditions. Most respondents to the market investigation confirmed this.[14]

(36) The Transaction, however, would not raise serious doubts on the possible narrower product markets for the provision of factual and lifestyle basic Pay-TV channels.

(37) As regards the wholesale supply of basic Pay-TV channels within the Factual genre, where the Parties' activities overlap, the Commission considers that (i) there are a number of other competing channels, such as Fox, A&E, Polsat and BBC; (ii) Scripps/T\TN’s factual channel (T\TN Turbo) has not been identified by any of the respondents to the market investigation as one of the top four factual channels in Poland,[15] and (iii) the Parties are not close competitors, including based on a study from GfK submitted by one of the respondents, according to which National Geographic would be the Discovery Channel's closest substitute in terms of customers' spontaneous awareness and as first choice for factual content.[16]

(38) As regards the wholesale supply of basic Pay-TV channels within the Lifestyle genre, where the Parties' activities overlap, the Commission considers that: (i) there are a number of competing channels in each of those genres such as Polsat, A&E and the BBC and (ii) the Parties are not close competitors (internal documents submitted by Scripps/TVN indicate that TLC, Polsat Cafe and BBC Lifestyle are TVN's closest competitors in this segment).[17]

(39) For the above reasons, the Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market only with respect to the wholesale supply of basic Pay-TV channels in Poland. The Transaction, however, does not raise serious doubts with regard the possible narrower markets for the wholesale supply of factual basic Pay-TV channels and lifestyle basic Pay-TV channels.

4.2.2.3.2 *Horizontal assessment - retail supply of basic pay TV services*

(40) In relation to the market for the retail supply of Pay-TV services, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market for the following reasons.

(41) First, even assuming (*quod non*) that Mr. Malone currently controls both Discovery and Liberty Global, the overlap between the Parties would be minimal, since Scripps

14 Responses to Questionnaire Q3 to TV distributors of 11 December 2017, question 20 and non-confidential minutes of Commission's calls with TV distributors on 23 November and 7 December 2017.

15 Responses to Questionnaire Q4 to TV distributors of 11 December 2017, question 17.

16 See Annex 8 in response to RFI 4 of 11 January 2018.

17 See Annex 7 in response to RFI 4 of 11 January 2018.

is active in this market only as a provider of OTT retail Pay-TV services with a market share of only [0-5]% by subscribers.

(42) Second, the Commission does not consider that Scripps, through its subsidiary TVN, controls NC+ which is controlled by Canal+ and will continue to be solely controlled by Canal +.[18] The Commission notes that Canal+ has the right to appoint the majority of the supervisory board which, in turn, would have the power to approve NC+'s strategic commercial decisions (annual budget, business plan, and investments decisions are taken at simple majority). TVN does not have any *veto rights* on such strategic commercial decisions. Liberty Global does not have any veto rights either.

4.2.2.3.3 <u>*Vertical assessment – Wholesale supply of basic Pay-TV channels and retail supply of Pay-TV services*</u>

(43) With regard to the alleged vertical effects stemming from the Parties' upstream activities in the wholesale supply of basic Pay-TV channels and the downstream activities of Liberty Global in the market for the retail supply of pay TV services (resulting from Mr Malone's alleged control of both Discovery and Liberty Global), the Commission considers that Transaction does not raise serious doubts as to its compatibility with the internal market for the following reasons.

(44) First, the PCA has not indicated why is very likely that Mr Malone controls Discovery and Liberty Global. Second, even assuming (*quod non*) that Mr. Malone currently controls both Discovery and Liberty Global, the Commission considers that the Final Commitments would also address any merger-specific material increase in Discovery's market power in the wholesale supply of basic Pay-TV channels in Poland. The Commission therefore concludes that the Transaction would not increase Discovery's ability and/or incentive to engage in input foreclosure.

4.2.2.3.3 <u>*Vertical assessment – Sale / purchase of TV advertising in Poland*</u>

(45) With regard to the market for the sale of advertising on TV channels, the market shares of Scripps, through TVN Media, and its competitors on the basis of revenues and audience shares are shown below in Table 1.

Table 1: Market shares for the sale of TV advertisement (revenue-based)

	2014	**2015**	**2016**
TVN Media (Scripps) – Total	[40-50]%	[40-50]%	[40-50]%
Polsat	[20-30]%	[30-40]%	[30-40]%
BR TVP	[20-30]%	[20-30]%	[20-30]%
Others	[0-5]%	[0-5]%	[0-5]%

Source: Notifying Party

18 Commission decision of 30 November 2012 in case M.6741 - *Vivendi Group / N-C + Entity*. Vivendi, through Canal+, controls 51% of the shares and votes in NC+. The remaining shares and votes are held by TVN, which holds a 32% stake, and Liberty Global, which holds a 17% stake.

(46) The Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market for the following reasons.

(47) First, no input foreclosure effects would arise from the Transaction since, even in a scenario where Discovery would sell exclusively TV advertising space through TVN Media, such strategy would have a limited impact on effective competition on the market and would not hamper the ability to compete of TVN Media's competitors. For example, Polsat would continue to sell advertising space for over 40 TV channels and to hold a market share above 30%. Furthermore, the increment brought about by the Transaction is not significant. In 2016, Discovery generated only EUR [...] million from the sale of TV advertising, a small share of the supply in market, corresponding to [0-5]% of the TV advertising market. Moreover, [a significant amount] of Discovery's advertising revenue is generated already today via Scripps. Discovery today sells advertising space through Polsat, which competes with TVN Media, only on three TV channels (Eurosport 1, Eurosport 2 and Metro) and the revenues from advertising on these channels is limited (EUR [...] million in 2016, corresponding to [0-5]% of Discovery's advertising revenue and [0-5]% of the overall TV advertising market).

(48) Second, no customer foreclosure effects would arise from the Transaction since the merged entity would not have the ability to foreclose the upstream suppliers of TV advertising space. Should the merged entity favour its own channels, other TV channels have the possibility to switch to TVN Media's competitors, which would be well placed to accommodate any TV channel supplier for the sale of the advertising time on its TV channels. In particular, strong downstream competitors would continue to remain available in the market including Polsat and BR TVP with market share of respectively [30-40]% and [20-30]%. In particular, Polsat sells advertising airtime for 18 of Polsat’s own TV channels as well as 46 channels from third party wholesale TV channel suppliers while BR TVP sells advertising airtime for 12 own TV channels and 13 third party wholesale TV channel suppliers.

4.2.2.3.4 <u>*Conclusion*</u>

(49) On the basis of the foregoing, the Commission considers that the criterion of the test pursuant to Article 9(2)(a) of the Merger Regulation which requires that *"the concentration must threaten to affect significantly competition in a market*" is met, as it has itself concluded in the decision pursuant to Article 6(1)(b) of the Merger Regulation that the Transaction raises serious doubts as to its compatibility with the internal market in relation to the market for the wholesale supply of basic Pay-TV channels, identified by the PCA in the Referral Request.

4.2.3. Conclusion on the criteria of Article 9(2)(a) of the Merger Regulation

(50) In light of the above, the Commission considers that the criteria for a referral provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to the Transaction in relation to the market for the wholesale supply of basic Pay-TV channels.

4.3. The Commission's discretion whether to refer

(51) Pursuant to Article 9(3) of the Merger Regulation, in the event that the criteria provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to a proposed transaction, the Commission has discretion whether to refer a given case to a national competition authority.

(52) If the legal requirements are met, the Commission has discretion under Article 9(3) of the Merger Regulation to decide whether the referral of the case is appropriate. The Commission's assessment will involve an examination of the application of the guiding principles referred to in the Referral Notice as well as of the question whether the competition authority of the requesting Member State is the most appropriate authority for dealing with the Transaction.

(53) In the following, the Commission assesses the appropriateness of a referral in the present case in light of the principles set out in the Referral Notice.

4.3.1. PCA's submission

(54) According to the PCA, the Referral Request satisfies both the requirements in Article 9(2)(a) of the Merger Regulation and the criteria set out in the Referral Notice. The PCA notes that the Transaction has potentially significant effects on the competition landscape in various markets within Poland. Moreover, the PCA considers that it would in this case be the more appropriate authority to assess the Transaction.

(55) The PCA highlights in this respect that, due to the fact that the Parties' main customers and competitors (or entities from their groups) are located in Poland, it will be relatively easy for the PCA to conduct a market investigation and gather evidence allowing for a thorough assessment of the case. The PCA also points out that it has in recent years conducted a number of proceedings related to the broadly understood television market and therefore has the necessary knowledge and experience to evaluate the case.

4.3.2. Notifying Party's view

(56) The Notifying Party submits that no exceptional circumstances justify a referral of jurisdiction.

(57) First, the Commission is the "more appropriate authority" because (i) market developments that affect Poland affect the entire Union, (ii) the Commission is highly qualified to review the Transaction, as it has extensive sectoral experience and recently reviewed several concentrations in the sector, and (iii) the factors that allegedly constitute risks to competition in Poland are not unique to that Member State.

(58) Second, the one-stop-shop principle must be observed, as a referral of jurisdiction would increase the administrative burden on the Parties, the authorities and third parties.

(59) Third, a rejection of the Referral Request ensures legal certainty, as granting it would be a derogation from the general rules and a subsequent Polish review would entail risk for the Parties in relation to its duration and timing.

4.3.3. Commission's assessment

(60) As explained in recital (51) above, the Commission retains a margin of discretion in deciding whether to refer a case or not.

(61) The Commission recalls that in light of the Referral Notice and the case law of the European Courts, and mainly for reasons of legal certainty, referral decisions should only be taken in exceptional cases as, by their very nature, such decisions result in a derogation to the jurisdictional rules for the allocation of cases between the Commission and Member States provided for in Article 1 of the Merger Regulation. In exercising its discretion, the Commission will take into account the need to ensure

effective protection of competition in all markets affected by a proposed transaction, the principle of subsidiarity, the protection of the competition interests of the Member States, the need to protect legal certainty, the "one-stop shop" principle, as well as effort and cost for undertakings.

(62) As a general point, paragraph 5 of the Referral Notice states that *"[...] referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds*". Moreover, according to paragraph 8 of the Referral Notice, *"[d]ecisions taken with regard to the referral of cases should accordingly take due account of all aspects of the application of the principle of subsidiarity in this context, in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction*".

(63) According to paragraph 9 of the Referral Notice *"[...] jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is more appropriate for dealing with the merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority*". In this regard, the Referral Notice clarifies that, in addition to the likely geographic localisation of the impact on competition of the merger, *"[r]egard may also be had to the implications, in terms of administrative effort, of any contemplated referral*".

(64) Moreover, paragraph 13 of the Referral Notice clearly states that "*referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question, particularly at the post-notification stage*".

(65) Finally, the General Court has underlined that the "*referral conditions laid down in Article 9(2)(a) and (b) of Regulation 4064/89 should be interpreted restrictively so that referrals to national authorities of concentrations with a Community dimension are limited to exceptional cases*".[19]

(66) In light of the above and in exercising its margin of discretion, the Commission considers that, in this case, there are no compelling reasons that justify a referral of the Transaction to Poland.

(67) First, the Commission has a particular interest in ensuring that competition is preserved in sectors such as the media sectors that are of crucial importance for the economic development of the Union. The Commission also has a strong interest in ensuring consistency in the way the different mergers falling into its competence in this sector are assessed throughout the Union. In that regard, the Commission notes that the Pay-TV markets in the Union are characterised by common trends such as the development of Over-The-Top ('OTT') platforms for the distribution of audio-visual content and channels, a development requiring the Commission to use its ability to conduct pan-European, holistic assessments of mergers occurring in these sectors.

(68) Second, the Commission is better placed to deal with the Transaction. The Commission has indeed developed significant expertise in TV audiovisual markets over the last years, as it has assessed numerous merger cases affecting several EU

[19] Case T-119/02 *Royal Philips Electronics NV*, paragraph 354.

Member States.[20] These cases have enabled the Commission to acquire an extensive, thorough and recent knowledge of the sector and a sound understanding of the legal and economic issues raised by this type of cases. Moreover, while it is the case that every TV audiovisual national market in the EEA has different characteristics, the majority of the competition issues that are raised by these cases present similarities across Member States. Therefore the Commission has sector-specific thorough and recent knowledge of the TV audiovisual markets in the Member States which enable it to assess the effects of the Transaction by conducting a pan-European, holistic assessment of the developments occurring in this sector.

(69) Moreover, the Commission has actively investigated the Transaction and conducted an extensive market investigation. In this context, prior to the Referral Request, the Commission had extensive pre-notification contacts (two months) with the Parties and with third parties. Furthermore, following the notification of the Transaction, the Commission has conducted an extensive market investigation involving competitors and customers of the Parties. Several requests for information have also been sent to the Parties in order to thoroughly investigate the key competition issues raised by the Transaction. Finally, the Commission has launched a market test on the commitments that Discovery formally submitted on 16 January (the 'Initial Commitments').

(70) Finally, the Commission also notes that a referral would entail an additional administrative effort for the Parties, since the need to comply with the requirements of the new procedure before the PCA, after having already complied with the procedure under the Merger Regulation and having submitted a large amount of information, internal documents and data to the Commission. This additional burden would be all the more unjustified in the case at hand given that the Notifying Parties have offered remedies addressing the serious doubts raised by the Transaction. The remedies offered by the Notifying Party allow for the Commission to declare the concentration compatible with the internal market in the framework of a phase I investigation, which is in the best interest of the Parties and of administrative efficiency.

(71) In light of the above, the Commission considers that it is the better placed authority to assess the Transaction.

5. CONCLUSION

(72) In light of the above, while the criteria to request a referral under Article 9(2)(a) Merger Regulation are met, the Commission considers that it is the better placed authority to carry out an investigation of the Transaction, and therefore decides not to refer the case to the competition authority of Poland.

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20 By way of recent examples, in the media sector (Cases M.5932 - *News Corp / BSKYB*, M.6566 - *Time Warner / CME*, M.7194-*Liberty Global/Corelio/ W&W/ De Vijver Media*, M.7282 - *Liberty Global / Discovery / All3media*, M.7360 - *21st Century Fox / Apollo / JV*, M.8354 - *Fox / Sky*).

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration is not referred to the competition authority of Poland, pursuant to Article 9(3)(a) of Council Regulation (EC) No 139/2004.

Article 2

This Decision is addressed to Poland.

Done at Brussels, 6.2.2018

For the Commission

(Signed)

Margrethe VESTAGER
Member of the Commission