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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.5932 – News Corp/ BSkyB
Notification of 3 November 2010 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 3 November 2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which News Corporation (**'News Corp'**, United States of America, hereinafter the ***'notifying party'***), acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the undertaking British Sky Broadcasting Group (**'BSkyB'**, United Kingdom) by way of public bid.

2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the internal market and the EEA agreement[2]. After having been informed that it could not be excluded at that stage of the procedure that the notified operation might raise serious doubts as to its compatibility with the

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[1] OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). 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.

[2] This is without prejudice to the ongoing UK media plurality review (see Section V below).

internal market given the absence at that stage of certain data with respect to advertising, on 1 December 2010, the notifying party submitted commitments pursuant to Article 6, paragraph 2 of the Merger Regulation. Specifically, News Corp offered commitments involving [access remedy] to advertising space in [newspaper] in the UK for a period of […] from the completion of the proposed transaction. On the basis of the additional elements provided by the notifying party and third parties, the Commission considers that no serious doubts arise from a possible input foreclosure of BSkyB's pay-TV competitors as regards advertising space in News Corp's newspapers (as explained below), so that the commitments submitted by the notifying party are not necessary.

I. THE PARTIES

3. News Corp is a diversified global media company which is active in the following fields: production and distribution of filmed entertainment, TV programming, TV satellite and cable broadcasting, the development of conditional access and subscriber management systems and the creation and distribution of online programming. News Corp is active in the following sectors in the United Kingdom and Ireland: (i) licensing of feature films and TV programmes; (ii) wholesale supply of TV channels; (iii) publishing of print and online newspapers; (iv) book publishing; (v) advertising on TV channels, websites and printed press; and (vi) provision of pay-TV technical services. News Corp is also a leading pay-TV operator in Italy (through Sky Italia), and Germany and Austria (through Sky Deutschland).

4. BSkyB is the holding company of a number of subsidiaries which are active in a variety of sectors in the UK and Ireland, namely: (i) creation and wholesale supply of TV channels; (ii) retail distribution of pay-TV channels; (iii) provision of pay TV technical services; (iv) advertising on BSkyB and third party TV channels, and on BSkyB's online media properties; (v) provision of retail telephony and broadband services; (vi) enhanced and interactive services; and (vii) gaming and betting.

II. THE OPERATION

5. On 15 June 2010, News Corp announced pursuant to Rule 2.4 of the UK Takeover Code, that it had approached the board of directors of BSkyB and, proposed to make an offer to acquire the entire issued and to be issued share capital of BSkyB not already owned by News Corp. News Corp and BSkyB have so far been unable to reach a mutually agreeable price. However, both parties entered into a Cooperation Agreement on 15 June 2010 agreeing to proceed with the regulatory process to facilitate the transaction.

6. The announcement made by News Corp on 15 June 2010 along with the Cooperation Agreement concluded between News Corp and BSkyB on 15 June 2010 are sufficient to meet the relevant legal standard to constitute a notifiable concentration within the meaning of Article 4(1) of the Merger Regulation.

7. News Corp is already a shareholder in BSkyB via News Nominees Limited ("News"). The current shareholder structure of BSkyB is the following: News: 39.14%; Capital Research and Management Company: 5.02%; Brandes Investment Partners L.P.: 3.12%; The Capital Group Companies, Inc.: 3.1%; Other (free float): 49.62%.

8. In order to establish whether the proposed acquisition by News Corp of the remaining 60.86% of the shares in BSkyB that it does not already own constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation, the Commission must assess whether the proposed transaction would bring about a change of control over BSkyB (from a situation of no control to a situation of sole control by News Corp).

9. The legal test to be applied in this context is whether News Corp (through News) already has the possibility to exercise a decisive influence on BSkyB (Article 3(2) of the Merger Regulation). It must be assessed whether, on the basis of the shareholding structure and the corporate governance rules of BSkyB, News Corp could be deemed to be already exercising a decisive influence on the strategic business decisions of BSkyB.

10. Notwithstanding its shareholding of 39.14% in BSkyB, News Corp's voting rights are restricted to 37.19% as a result of a voting agreement (the "Voting Agreement") of 21 September 2005, which became effective on 4 November 2005[3].

11. The fact that News Corp indirectly holds 37.19% of the voting rights in BSkyB does not confer it sole control over the company, as it would not have the majority of the votes at the shareholders' meetings and it does not hold any special rights attached to its shareholding[4].

12. A limited number of decisions require a supermajority of 75% of the total voting rights which could grant News Corp a veto right. The actions for which a majority of 75% of the total voting rights of the members who voted on the resolution are established by the Companies Acts 2006, by the Insolvency Act 1986 and by the Articles of Association of the company. These decisions, however, have no bearing on the strategic decisions of BSkyB[5], but rather refer to the protection of minority shareholders or to administrative matters related to the "off-market purchases of own shares" or to possible winding up of the company. None of these decisions would have an impact on the strategic commercial conduct of BSkyB.

13. On the basis of an analysis of the attendance rates of the annual general meetings of BSkyB for the past 4 years (since 2006), News Corp did not hold more than 50% of the total of the present shares that voted. This is true both in relation to News Corp´s restricted voting rights (37.19%) and also in relation to its shareholding without restriction (39.14%).

14. In general, directors are nominated by the board and then appointed by a vote at the shareholders' meeting, which decides by simple majority[6].

15. The composition of BSkyB's board of directors is as follows: 8 "independent" directors and 6 "non-independent" directors[7]. Of the 6 non-independent directors, 4

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3 […].

4 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.04.2008, p. 1, paragraph 57

5 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.04.2008, p. 1, paragraph 58.

6 Articles of Associations of BSkyB, article 69, and UK Companies Act 2006.

are affiliated with News Corp and do not have executive positions within BSkyB, while the 2 directors who are not affiliated with News Corp are, respectively, CEO and CFO of BSkyB. Therefore, only 4 out of 14 directors have a connection with News Corp.

16. The board of directors takes its decisions by simple majority[8].

17. The minutes of the board meetings provided by BSkyB also confirmed that in matters involving relationships with any of the companies belonging to the News Corp's group, the 4 directors affiliated with News Corp are excused from the discussion and the voting.

18. There also are no other elements on the basis of which News Corp could be deemed to de facto control BSkyB.

19. For the year ending 30June, 2009, BSkyB supplied programming, telephony, airtime sales, transmission and EPG services, marketing, brand and other IPR licensing, network hosting services, and consultancy services to News Corp, in addition to receiving revenues from certain joint ventures (National Geographic International and National Geographic Latin America, and Tour Racing limited, which supports the "Team Sky" professional road cycling team) with News Corp companies, for a value of around GBP 40 million.

20. During the same period, BSkyB purchased programming (including content and channels), digital equipment, smartcards and encryption services, set top box technologies, advertising and IT services from News Corp companies for a value of GBP 212 million.

21. Revenues achieved by BSkyB from dealings with News Corp's entities account for less than [0-5]% of BSkyB's total revenues. News Corp does not therefore seem to be a key customer of BSkyB.

22. Similarly, BSkyB is not in any way dependent upon News Corp as a supplier. TV content and TV channels provided by News Corp only represents a very limited percentage of the total content acquired by BSkyB in the UK and Ireland. For the year ending 30 June 2009, BSkyB's spend on the News Corp TV channels represented approximately […] of BSkyB's total spend on third party TV channels. With respect to BSkyB's spend on content for its wholly-owned channels, its spend on TV content from News Corp made up approximately […] of BSkyB's total spend on content during the same time period. Similarly, while BSkyB currently sources pay-TV technical services from NDS, which is jointly controlled by News Corp and Permira, BSkyB could source similar services from NDS' competitors. In any event, the relevant agreement was, according to the notifying party, negotiated at arm's length between BSkyB and NDS, also in view of the presence of Permira as a co-controlling shareholder of NDS.

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7 A non-independent director in this context is one who has either a connection to BSkyB operations (namely the CFO and CEO in this case) or who has a connection to News Corp.

8 Art. 116(3) of the Articles of Association of BSkyB group plc.

23. In any event, BSkyB submitted that it conducts all business transactions with companies that are part of the News Corp group on an arm's length basis. This is ensured by the "related party transactions" provisions of BSkyB's corporate governance policies, which specifically provide that arrangements with News Corp require either the approval of BSkyB's Audit Committee (which comprises Independent Directors only), or both Audit Committee and the board approval, depending on materiality.

24. In view of the above, it can be concluded that News Corp does not currently exercise sole control, whether de jure or de facto, over BSkyB.

25. Through the proposed transaction, News Corp will therefore acquire sole control of BSkyB. The proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. EU DIMENSION

26. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[9] (News Corp: EUR 23 499.9; BSkyB: EUR 6 635.4). Each of them has an EU-wide turnover in excess of EUR 250 million (News Corp: EUR […]; BSkyB: EUR […]). BSkyB achieved more than two-thirds of its EU-wide turnover in one Member State (the United Kingdom), but News Corp did not.

27. The notified operation therefore has an EU dimension.

IV. COMPETITIVE ASSESSMENT

28. News Corp and BSkyB are active in various sectors in the UK and Ireland, namely the audiovisual sector; advertising; and newspaper publishing. The assessment of the competitive impact of the proposed transaction is carried out in relation to the markets where the parties are active at the same level of the value chain (horizontal overlaps) or to the markets where the parties have activities that are upstream or downstream of each other (vertical relationships).

1. The Audiovisual Sector

1.1. Introduction: the audiovisual value chain and the parties' activities in the audiovisual sector in the UK and Ireland

29. The pay-TV supply chain in the UK and Ireland consists of the following layers: (1) licensing and acquisition of audiovisual content; (2) wholesale supply of TV channels; (3) provision of pay-TV technical services (conditional access technology, set-top box); (4) provision of platform services (such as terrestrial, cable, satellite, ADSL); and (5) retail pay-TV services (linear and non-linear). BSkyB is active at each of these levels (except for the provision of pay-TV technical services).

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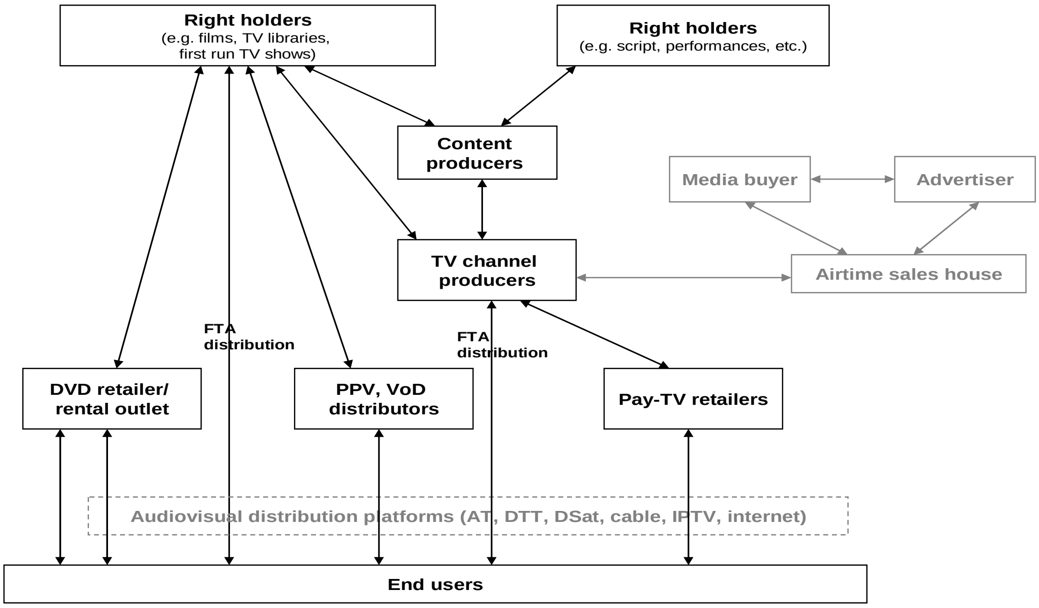
9 Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

Table 1 – Audiovisual supply chain



1.1.1. Content – production, licensing and acquisition

30. Upstream in the audiovisual chain are the holders of broadcasting rights for audiovisual content such as (i) premium films, (ii) sport events and (iii) other content (such as TV series and documentaries).

31. As regards premium films in the UK and Ireland, the six Hollywood majors[10] usually license different categories of broadcasting rights, corresponding to an exhibition window. Following the exhibition windows for cinematic release, for DVD retail/rental and for 'download to own' (*'DTO'*), films are made available for TV broadcast in the following sequential order: (i) Pay-Per-View (PPV)/Video On Demand (VOD); (ii) first and second pay-TV windows; and (iii) free-to-air (FTA) window. A motion picture licensor typically agrees to license all of its non-library[11] motion picture "output" over a fixed number of months for a fixed number of runs (through so-called "output deals") and generally on an exclusive basis[12]. Film broadcasting rights may be licensed for the entire territory of the UK and Ireland, or separately between the two countries, and may include a variety of rights.

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[10] 20th Century Fox (controlled by News Corp), Warner Bros, Paramount, Sony, Universal and Walt Disney.

[11] After films have run this course of exhibition, they become known as 'library films'.

[12] A licensor typically grants exclusive broadcasting rights when it believes that the revenue that it can achieve from one single licensee would likely exceed the revenue that it would achieve by licensing its content more broadly to various different licensees. A licensee's interest in obtain exclusive rights lies in the fact that competition between TV broadcasters is driven by product differentiation. The principal means of product differentiation is to acquire or produce programming for their channels that is, as far as possible, unique to the channel.

32. Broadcasting rights are licensed to: (i) broadcasters which then incorporate them into linear TV channels; or (ii) content platform operators which retail the content to end users on a VOD/PPV basis.

33. News Corp licenses rights to the following content in the UK and Ireland:

(i) *US films.* News Corp's subsidiary, 20th Century Fox, is one of the Hollywood majors.

(ii) *Sport events.* News Corp's licensing activities in relation to sport events in the UK and Ireland are very limited and relate mainly to rugby union and league matches from South Africa, New Zealand and Australia.

(iii) *Other TV content.* New Corp's licensing activities in relation to other content are limited in the UK and Ireland with shares of approximately [0-5]% and [0-5]% in terms of hours of programming.

34. BSkyB produces (or commissions) its own audiovisual content[13]. It also acquires rights to third party content:

(i) *Premium films.* In the UK and Ireland, BSkyB holds exclusive first pay-TV window rights and exclusive subscription VOD rights ('SVOD') in the first pay-TV subscription window[14] to films from the Hollywood majors via output deals (as well as from a number of independent film distributors). BSkyB also holds non-exclusive licenses to approximately [50-60]% of transactional VOD ('TVOD')/PPV rights. BSkyB accounts for approximately [50-60]% of total spend on acquisition of broadcasting rights for all films in the UK and Ireland[15].

(ii) *Sport events.* BSkyB is the acquirer of most of the live matches of the UK Premier League football matches (considered as key content in the UK in order to attract viewers). BSkyB accounts for approximately [50-60]% of total spend on acquisition of broadcasting rights for sport events in the UK and Ireland.

(iii) *Other TV content.* BSkyB's acquisition of broadcasting rights for other TV content represents, according to the notifying party, approximately [5-10]% of total spend in the UK and Ireland.

1.1.2. Linear TV channels – wholesale supply and acquisition

35. TV channel suppliers (such as BSkyB, BBC, ITV and ESPN) license their channels to providers of retail TV services for incorporation into broader TV channel bouquets that are in turn sold to viewers.

36. Some TV channel suppliers (such as BSkyB) are vertically-integrated as they own a technical platform and/or are active as a retail pay-TV operator. They broadcast their own

[13] With the exception of some news content and a limited amount of sports content, BSkyB does not generally license its own audiovisual content to third parties.

[14] Both types of exclusive rights are sold together by the Hollywood majors to BSkyB.

[15] Total spend includes PPV, VOD, second pay-TV window, FTA and library rights.

channels together with third party channels via their own platform. Other TV channel suppliers (such as Discovery channels) are not vertically-integrated and depend on platform operators or retail pay-TV operators to broadcast their channels.

37. FTA channels[16] are mainly financed by advertising and sometimes, public funds. Pay-TV channels[17] are primarily financed by subscription fees paid by viewers; other sources of finance are carriage fees paid by retail operators and advertising.

38. News Corp licenses its pay-TV channels (National Geographic, Fox, Baby TV and Star TV) to a number of retail pay-TV operators (including BSkyB).

39. BSkyB acquires third party pay-TV channels in the UK and Ireland for inclusion in its retail pay-TV offering. BSkyB accounts for approximately [80-90]% of total spend on acquisition of TV channels in the UK and [70-80]% in Ireland.

40. BSkyB also licenses some of its basic and premium TV channels to cable operators (such as Virgin Media in the UK and UPC in Ireland) for retail to their subscribers, as well as to IPTV operators (Talk Talk TV in the UK), or DTT operators (BT Vision and Top Up TV in the UK).

41. The notifying party submits that BSkyB has a clear preference for self-retail, as in such case BSkyB has a direct customer relationship and is able to better market its premium channels and other services to end customers. The notifying party submits that BSkyB has nevertheless a strong incentive to also distribute its channels to other retail operators in order to reach subscribers that it would not be able to reach via its digital direct to home satellite ("DTH") platform (subscribers may have a preference for the platform of another operator due to its characteristics such as superfast optic fibre cable broadband or due to planning restrictions which may prevent installation of a satellite dish).

42. On 31 March 2010, Ofcom issued a decision requiring BSkyB to offer its premium channels Sky Sports 1 and Sky Sports 2 to qualifying retailers (currently Virgin Media, BT Vision and TopUp TV) on platforms other than BSkyB’s at reduced prices determined by Ofcom. BSkyB has appealed the decision. In addition, on 4 June 2010, as part of the sale by Virgin Media of some of its TV channels[18] (Virgin Media TV Channels – "VMtv") to BSkyB, BSkyB reached an agreement with Virgin Media by which Virgin Media will have the option of carrying any of Sky's basic High Definition ("HD") channels, Sky Sport HD 1 and Sky Sport HD 2, and all Sky Movies HD channels. Virgin Media will also make available through its on-demand TV

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16 In the UK: the BBC, ITV, Five, some Channel 4, three BSkyB channels; and in Ireland:, TG4, TV3, the RTE channels and the BBC.

17 Such as BSkyB’s basic channels (for example Sky News and Sky Sports News) and premium channels (for example Sky Movies Premiere and Sky Sports channels), UKTV's channels, ESPN's channels and Disney's channels in the UK.

18 The channels acquired are LIVING, LIVINGit, Challenge, Challenge Jackpot, Bravo2 and Virgin1. The operation did not include the acquisition of Virgin Media's participation in UKTV, a joint venture with BBC.

service a range of content from Sky's basic and premium channels, including the newly acquired VMtv channels[19].

1.1.3. Retail TV services

43. Retail pay-TV services essentially comprise the provision to end-users of (i) packages of linear TV channels; and (ii) non-linear PPV/VOD services[20].

44. The following pay-TV retailers are present in the UK: BSkyB (DTH), Virgin Media (cable), Top Up TV (DTT), Talk Talk TV (IPTV), and BT Vision (DTT and IPTV).

45. The main pay-TV retailers present in Ireland are BSkyB (DTH) and UPC (cable). Others include Casey Cablevision (cable), Crossan Cable (cable – analogue only), Magnet Networks, 3Play Plus and Smart Telecom (all limited IPTV players).

46. There are six main technical means of delivering audiovisual content to end users: (i) via analogue and digital terrestrial televisions; (ii) satellite; (iii) cable; (iv) IPTV[21]; (v) the internet more generally; (vi) 3G mobile technologies.

47. All technologies are used in the UK and Internet TV is evolving rapidly there, due, inter alia, to increasing amounts of content becoming available online[22], improvements in compression technologies and increasing penetration of fast broadband services and internet-enabled devices. A recent development in the UK is the BBC-backed joint venture[23] to develop an internet-connected television platform (previously known as Project Canvas, now marketed as 'YouView') to provide both linear and on-demand content on a hybrid DTT/IPTV platform (via a set-top box connected to viewers' TV sets) on a free and pay basis. YouView is currently intended to launch in April 2011.

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19 http://corporate/sky/com/page.aspx?pointerid=6123cbfe61d648e38fb10a1e7a2024e5 .

20 Programming supplied on VOD can be offered on a subscription basis (periodic fee for access to a pool of programming - SVOD); a transactional/PPV basis (TVOD); or at no additional charge to an existing pay-TV subscriptions (such as *'Sky Anytime'* for BSkyB). There are several types of VOD services, including: (i) *Push VOD* – programmes selected by the service provider broadcast and automatically saved on the customer's personal video recorder (like *'Sky Anytime'* - available to BSkyB subscribers with an appropriate set-top-boxes in the UK and Ireland; or Top Up TV's UK VOD service); (ii) *Pull VOD* – libraries of programming stored externally to the home available for viewing upon request (BSkyB will be launching a pull VOD service, *'Sky Anytime +'* later this year to BSkyB subscribers having a Sky+HD box and a BSkyB broadband service). DTH and DTT technologies, which are "uni-directional" technologies, cannot support pull services. However, cable and IPTV networks, being "bi-directional" technologies, are ideally suited for such services.

21 IPTV involves the distribution of audiovisual content over the Internet (via a telecommunications or DSL network). Such service requires that the end-user be in possession of a DSL modem and a (proprietary) set-top-box.

22 'Catch up TV' (for example, the ITV Player), archive TV content (for example, the TV series available on Apple's iTunes), streamed simulcasts of TV channels (for example live sports events streamed by BBC) and movies are becoming increasingly available for viewing online. Such content is available via (i) TV broadcasters' websites (for example ITV.com, 4OD) and player applications (for example BSkyB's *'Sky Player'*); and (ii) aggregator services (for example, You Tube showing TV programmes provided by Channel 4 and Five and clips from programmes provided by the BBC and Blinkbox (an online VOD service)).

23 Other joint venture partners are ITV, Channel 4, Five, BT, TalkTalk TV and Arqiva.

48. DTT is not yet commercially available in Ireland. The IPTV sector in Ireland has yet to develop significantly (three operators are currently present to a limited extent: Magnet Networks, 3Play Plus, and Smart Telecom).

49. In the UK and Ireland, BSkyB retails packages of its own and third party pay-TV channels and audiovisual programming (i) to its DTH subscribers; (ii) via IPTV/cable; (iii) via the Internet; and (iv) via mobile technologies:

(i) *DTH*. BSkyB's DTH packages include different combinations of the 26 basic and premium BSkyB channels and third party channels, totalling 160 channels. BSkyB also offers HD subscription (to access HD variants of BSkyB and third party channels), 'Sky Box Office' service (a PPV service) and a 3D channel. BSkyB subscribers with compatible set-top boxes can access the 'Sky Anytime' service.

(ii) *IPTV/cable ('Sky By Wire')*. BSkyB retails certain premium channels to customers on Talk Talk TV's IPTV platform. BSkyB has similar arrangements in place with a number of small cable and IPTV platform operators in the UK and Ireland.

(iii) *Internet TV ('Sky Player')*. BSkyB also offers an Internet TV service available to both Sky subscribers and non-DTH customers[24] and allowing customers to watch movies, sports and other entertainment via their PC or other Internet-connected devices on an SVOD and TVOD basis.

(iv) *Mobile TV ('Sky Mobile TV')*. BSkyB retails BSkyB and third party 'made-for-mobile' channels in the UK on certain mobile telephony operators' networks/on certain devices.

1.1.4. Pay-TV technical services

50. The operation of pay-TV platforms requires a special technical infrastructure in order to ensure that only authorized viewers access the content. The components of this infrastructure include systems for conditional access ("CA"), middleware technology and set-top-boxes.

51. CA systems include encryption and decryption software aimed at preventing unauthorized access of television signals. Also, some CA systems use smart cards[25]. Middleware is software running on the operating systems of the set-top-boxes which facilitates the interoperability and proper functioning of hardware technologies, such as set-top-boxes and smart card components of CA systems. In addition, middleware enables certain functionalities of the set-top-boxes, such as electronic program guides and other interactive applications. Set-top-boxes are hardware devices responsible for decoding the television signal transmission into a format that is viewable on screen.

52. News Corp, through its jointly controlled subsidiary NDS[26], is active in the provision of pay-TV technical services and, in particular, CA systems and middleware. BSkyB, through its wholly owned subsidiary Amstrad, currently produces set-top-boxes […].

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24 BSkyB’s stand-alone *'Sky Player'* subscriber base currently amounts to […] customers.

25 Smart cards are credit card sized hardware devices that are inserted into the set-top-box.

26 The investment fund Permira is the other controlling shareholder.

53. BSkyB currently sources from NDS a number of pay-TV technical services, among which CA systems (smart cards included) and part of its middleware needs.

1.2. Market definition

54. The activities to be considered in the audiovisual sector are (i) the licensing and acquisition of broadcasting rights; (ii) the wholesale supply of TV channels; (iii) the retail supply of audiovisual content to end users; and (iv) the provision of pay-TV technical services.

1.2.1. Licensing/acquisition of broadcasting rights to audiovisual content

a. Product market definition

55. Audiovisual content comprises all the 'entertainment products' (for example films, sports, TV programmes) that can be broadcast via TV[27]. TV broadcasting rights belong to the creators of these products, who license them to broadcasters (which then incorporate them into a linear stream of content – TV channel) or content platform operators which retail directly to end users on a VOD/PPV basis.

56. The notifying party submits that there is a single product market for the acquisition of all TV content rights, which encompasses all types of content, as well as both FTA and pay-TV rights. However, for the purposes of assessing the proposed transaction, the notifying party agreed to distinguish between the licensing of (i) films; (ii) sport content; and (iii) TV programmes.

57. The notifying party submits that further sub-segmentation of the market for the licensing of broadcasting rights for films is not appropriate in the present case. Firstly, the distinction between the windows mentioned above (paragraph 31) is not relevant, because, according to the notifying party, customers generally acquire rights for all the windows mentioned above. Secondly, the notifying party submits that US films compete with other productions, in particular local European productions. In addition, the boundaries between US and non-US productions are becoming increasingly blurred. Thirdly, the notifying party submits that US-produced content forms only a relatively small proportion of the content shown on pay-TV.

58. The Commission has previously distinguished between the licensing of broadcasting rights for pay-TV and the licensing of broadcasting rights for FTA TV[28].

59. In particular, the Commission has 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. Accordingly, in past decisions the Commission has also considered a further segmentation into separate markets of the licensing of

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[27] See Case COMP/M.5121 – *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 28.

[28] See in particular Case COMP/M.5121 - *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 35.

broadcasting rights for: (i) sports events, (ii) premium films and (iii) other TV content (such as documentaries)[29].

60. In past decisions, the Commission has considered distinguishing between US-produced films and other films,[30] indicating that the relevant market for films was mainly composed of commercially ‘successful films’, which in general tends to correspond to films produced by the Hollywood majors[31]. As regards the licensing of broadcasting rights for premium films for pay-TV, in past decisions, the Commission has identified separate markets for the following different exhibition windows: (i) PPV/VOD; (ii) the first pay-TV window; and (iii) the second pay-TV window[32].

61. As regards sports, the Commission has previously found that the market for football broadcasting rights should be distinguished from the market for other sports broadcasting rights due to football’s pre-eminence as the singularly most popular sport across most Member States and beyond[33]. The Commission has considered (but ultimately left open) that the market for football broadcasting rights may be subdivided in a number of ways (for example on the basis of the type of event concerned, that is whether (i) it is a regular event (such as the domestic leagues, the UEFA Champions League and the UEFA Cup) or (ii) an event that is played more intermittently (such as the FIFA World Cup and the EURO Cup)[34].

62. A majority of right holders[35] responding to the market investigation did not confirm a segmentation of broadcasting rights for audiovisual content into films, sport content and other TV programmes. Similarly, a majority[36] of right holders did not confirm a possible distinction between premium and non-premium audiovisual content. Content distributors by contrast tended to consider that a segmentation of broadcasting rights for audiovisual content into films, sport content and other TV programmes is appropriate[37]. Moreover, a majority of content distributors also consider that a

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29 See in particular Case COMP/M.5121 - *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 30.

30 See Case COMP/M.2876 – *News Corp/ Telepiù*, Commission decision of 2 April 2003, paragraphs 58 and 61.

31 See Case COMP/M.2845 - *Sogecable/CanalSatélite Digital/Vía Digital*, Commission decision of 14 August 2002, paragraph 25.

32 See Case COMP/M.2050 - *Vivendi/Canal+/Seagram*, Commission decision of 13 October 2000, paragraphs 18 et seq.; Case COMP/M.2845 - *Sogecable/CanalSatélite Digital/Vía Digital*, Commission decision of 14 August 2002, paragraph 25.

33 See Case COMP/M.4519 – *Lagardère/Sportfive*, Commission decision of 18 January 2007, paragraph 9.

34 See Case COMP/M.4519 – *Lagardère/Sportfive*, Commission decision of 18 January 2007, paragraph 10.

35 Questionnaire to right holders of 5 November 2010 - question 3 - 3 out of 4 respondents.

36 Questionnaire to right holders of 5 November 2010 - question 4 - 3 out of 4 respondents.

37 Questionnaire to content distributors I of 5 November 2010 - question 8 - 6 out of 10 respondents.

distinction should be drawn between premium and non-premium audiovisual content[38].

63. As regards films, all the Hollywood majors responding to the market investigation claim that all films (whether US or European) are interchangeable from a viewer's perspective[39]. Content distributors by contrast consider that films produced by the major Hollywood studios are not substitutable with British, Irish or other European films[40].

64. The Hollywood majors generally confirm the release window structure outlined in paragraph 31 above[41] and confirm that PPV/TVOD rights are licensed on a non-exclusive basis and separately from SVOD rights which are licensed together with first window pay-TV rights and on an exclusive basis[42].

65. The market investigation was therefore not conclusive as regards the possible segmentation of the market for licensing of audiovisual content in relation to the UK and Ireland. In general, it seems that right holders do not agree with a segmentation of the rights, while content distributors, which are present at a lower level of the value chain, attribute more importance to the various segments (premium and non-premium, all movies and US majors movies, sports and other content) as each segment has a different appeal on viewers or subscribers.

66. For the purposes of the present decision, it is not necessary to conclude on the exact product market definition as the proposed transaction does not raise any competition concerns under any alternative market definition for the licensing and acquisition of broadcasting rights to audiovisual content.

b. Geographic market definition

67. The notifying party submits that the geographic scope of the market is generally national, and in certain cases, regional (with a region potentially comprising more than one national territory, where there is a larger single language group), in this case the UK and Ireland together.

68. In past decisions, the Commission has considered that the market for the licensing/ acquisition of audiovisual content (film and other content) is national in scope or relates to linguistically homogeneous areas[43].

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38 Questionnaire to content distributors I of 5 November 2010 - question 9 - 6 out of 10 respondents.

39 Questionnaire to right holders of 5 November 2010 - question 5.

40 Questionnaire to content distributors I of 5 November 2010 - question 10 - 8 out of 10 respondents. A few respondents explicitly refer to Ofcom's pay-TV statement in this regard.

41 Questionnaire to right holders of 5 November 2010 - question 7.

42 Questionnaire to right holders of 5 November 2010 - questions 15 and 16.

43 See for example Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 62.

69. As regards the acquisition of rights to premium films, in its *News Corp/Telepiù* decision, the Commission noted that *"nothing prevents operators from acquiring rights for more than one territory at the time"*. However, in that case, the Commission ultimately found that broadcasting rights were divided and sold on a mainly national basis or, at most, by language area.

70. As regards rights for football events that are played regularly throughout the year, in past decisions, the Commission has found that such rights are sold on a national basis. Also from past Commission decisions, it appears that only the potential sub-market for football broadcasting rights to events that are played more intermittently (that is, FIFA World Cup and European Championship of Nations) might be wider than national. In its *News Corp/Telepiù* decision, the Commission noted that the UEFA broadcasting regulations reflect the fact that the market for broadcasting rights to football events is national since such broadcasting rights are generally sold on a national basis, even for pan-European events such as the UEFA cup and the UEFA Champions league[44]. In that decision, the Commission found that, as regards broadcasting rights to national league and national cup matches, the specificity of the product due to cultural factors linked to demand and national references implies that the geographic scope corresponds to the country where the matches are played[45].

71. As regards other (non-football) sport events, in the past, the Commission has found that the rights are acquired on an exclusive basis for the whole European territory and are thereafter re-sold on a per-country basis. The Commission has also found that major sport events, such as the Olympic Games, have a pan-European interest from the viewers' perspective[46]. Another example of sports rights sold on a pan-European basis cited by the Commission in its *News Corp/Telepiù* decision are those acquired by the Eurosport channel, broadcast all over Europe[47]. In that decision, the Commission concluded that, given that the vast majority of sports rights acquired by broadcasters are limited to a specific country or linguistic territory, the market for acquisition of sports rights to be broadcast is national or delineated along linguistic areas.

72. The market investigation largely confirmed the past Commission decisional practice of defining the geographic scope of markets for the licensing/acquisition of audiovisual TV content (film and other content) as national or relating to linguistically homogeneous areas.

73. Particularly as regards broadcasting rights to premium films, the market investigation confirmed that these rights are only rarely negotiated simultaneously for different territories. According to the respondents, broadcasting rights are generally negotiated and concluded on a country-by-country basis, with the only exceptions appearing to be licensing in relation to a linguistic area (for example rights for Germany, Austria

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44 See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 67.

45 See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 67.

46 See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraph 72.

47 See Case COMP/M.2876 – *News Corp/Telepiù*, Commission Decision of 2 April 2003, paragraphs 72 and 73.

and the German speaking parts of Switzerland and Luxembourg) or in relation to areas with a particular common socio-cultural background (for example Scandinavia)[48]. Two respondents cited a number of factors which prevent cross-border negotiation/licensing, including: availability of materials in each language; differences in the availability dates for content in different territories; and the fact that each country and region reflects local preferences in programming[49].

74. As regards pan-European/international sport rights, the market investigation generally revealed that such rights are acquired by content distributors on a national basis[50]. One respondent to the market investigation noted that broadcasting rights for sport events are increasingly marketed by sport rights agencies, which tend to offer broadcasting rights (such as Olympic Games and UEFA Champions League) on a national basis first to maximize their profits[51]. The market investigation revealed only limited examples of acquisitions of rights to sport events with a geographic scope wider than national or linguistic borders in the EEA (notably by the EBU)[52].

75. In light of the above and for the purposes of the present decision, it may be concluded that the geographic scope of markets for the licensing/acquisition of broadcasting rights to audiovisual content (film and other content) is national or, at most, relates to linguistically homogeneous areas.

1.2.2. Wholesale supply of TV channels

a. Product market definition

76. According to the notifying party, the wholesale supply of TV channels is the market in which broadcasters and distributors negotiate the terms and conditions for the distribution of pay-TV channels to end-users. pay-TV channels can be of a general nature (general interest channels) or concentrate on a specific genre (thematic channels).

77. As regards product market definition, the notifying party departs from the Commission's findings in past cases and submits that the relevant product market is at least as broad as the wholesale supply of TV channels (including both FTA and pay-TV channels), and possibly larger.

78. First, the notifying party considers that wholesalers of pay-TV channels face intense competition from major, well-established FTA broadcasters such as the BBC. Second, it notes that the appropriate relevant market may in fact be wider and also include, for example, the supply of *individual* programmes and films at the wholesale level (which

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48 Questionnaire to right holders of 5 November 2010 - question 8, 19 and 22.

49 Questionnaire to right holders of 5 November 2010 - question 17.

50 Questionnaire to content distributors II of 5 November 2010 - question 3(c) and 4 - 6 out of 7 respondents.

51 Questionnaire to right holders of 5 November 2010 - question 9 - Only a limited number of replies covered licensing/acquisition of rights to pan-European/International sport events.

52 Questionnaire to right holders of 5 November 2010 - question 7.

are then distributed to end users – for example via PPV/VOD services or directly via DVD sale and rental).

79. In any event, the notifying party submits that the definition of the relevant product market as regards the wholesale supply of TV channels can ultimately be left open since, regardless of the market definition ultimately retained, the proposed transaction will not give rise to any competition concerns.

80. In past decisions, the Commission has identified pay-TV and FTA TV as belonging to separate markets. In its *SFR/Télé 2* decision, the Commission considered that in the intermediate market for the distribution of TV channels, a distinction must be made between FTA and pay-TV channels[53].

81. In the past, the Commission has also generally left open whether the market should be further segmented by thematic content (such as premium films, sports, news, youth channels, etc.)[54]. It should be mentioned that in the context of its investigation into UK pay-TV, Ofcom has identified a distinct market for *"the wholesale of pay-TV packages including core premium movies channels"*[55].

82. As regards the submission of the notifying party that the relevant product market may be larger than the wholesale supply of TV channels, in the *SFR/Télé 2* and *News Corp/Premiere* cases, the Commission left open whether a distinction could be envisaged between the classical or 'linear' TV channels and the non-linear services (VOD, PPV), as well as within the non-linear services[56].

83. The market investigation conducted for the purpose of this case generally confirmed that pay-TV and FTA channels still belong to two separate product markets as regards the wholesale supply of TV channels[57].

84. In addition, a majority of respondents to the market investigation indicated that premium content TV channels (such as Sky Sports and Sky Movies) are not substitutable with other TV channels as they broadcast exclusive content unavailable

53 See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 40.

54 See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 76; Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraphs 41-42; Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 35.

55 See Ofcom Decision of 4 August 2010, *Premium Pay TV movies*, paragraph 4.3.

56 See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 43; Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 21.

57 Questionnaire to TV channels of 5 November 2010 - question 9.3 - 4 out of 6 respondents confirmed that pay-TV subscribers are attracted by the premium content and additional services and are unlikely to switch to FTA channel offers in case of a 5-10% price increase of their pay-TV subscription; another respondent indicated that FTA channels content was similar to much of the other content available in pay-TV homes, but that the recent price increases by BSkyB and Virgin Media which did not result in a significant churn rate show that the majority of pay-TV customers are immune to price increases; and the last respondent did not know.

elsewhere[58], thereby giving a strong indication that there is a differentiation within the market for the wholesale supply of pay-TV channels between basic pay-TV channels and premium pay-TV channels (namely sports and movies channels). Some replies also refer to Ofcom's recent investigation on the pay-TV market, which concluded that a differentiation between premium and non-premium movie channels exists.

85. In light of the above and for the purposes of the present decision, the Commission considers that FTA and pay-TV channels (both basic pay-TV and premium pay-TV) constitute two separate product markets, in line with the precedents of the Commission. The market investigation also provided strong indications that the premium pay-TV channels belong to a separate product market from basic pay-TV channels. However, for the purpose of the present decision, the possible distinction between premium and basic channels is left open, given that the transaction would not raise serious doubts as to its compatibility with the internal market under any alternative market definition.

b. Geographic market definition

86. The notifying party submits that in line with the Commission's past decisions, the relevant geographic market for the wholesale supply of TV channels is national or, potentially, regional, delineated along the language area encompassing the UK and Ireland.

87. In past decisions, the Commission has consistently found that the markets for the wholesale supply of TV channels were national or delineated along the linguistic areas[59]. The market investigation conducted for the purpose of this case did not contradict these findings.

88. In light of the above and for the purposes of the present decision, it may therefore be concluded that the geographic scope of markets for the wholesale supply of TV channels is national or, at most, relates to linguistically homogeneous areas.

1.2.3. Retail supply of audiovisual content to end users

a. Product market definition

89. According to the notifying party, the relevant product market for the retail provision of audiovisual content to end-users encompasses at least the provision of FTA and pay-TV channels via all distribution channels (satellite, DTT, cable, IPTV and others), as well as the provision of non-linear services and pre-recorded media (such as PPV, VOD or DVD).

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[58] Questionnaire to TV channels of 5 November 2010 - question 4 - 2 respondents replied that premium sport and movie channels are in a separate market from all other TV channels, 1 respondent replied that the level of substitutability was inversely proportional to the volume of exclusive content (citing as example Sky Sports which cannot be substituted with another channel), 1 respondent replied that there is a clear difference between general interest TV channels, thematic TV channels, and premium content TV channels, 1 respondent replied that no TV channel can be substituted by another, and 1 respondent replied that TV channels are generally substitutable, except for some which have different content (e.g. a sport channel cannot substitute a science channel).

[59] See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 62; decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 48; Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 27.

90. The notifying party considers that consumers in the UK and Ireland have a wide range of choices in accessing audiovisual content at home and could generally: (i) buy a DVD of a film; (ii) rent a DVD of a film from a store or by post; (iii) use a PPV/VOD service to watch a film at a convenient time (including free VOD services such as the BBC iPlayer); (iv) download a film via an Internet download service; (v) watch a film that is broadcast on any of a number of FTA channels; or (vi) pay for a subscription to a linear pay-TV service through which the consumer could watch a film at one of the times that it is shown or record the film and then watch it at a later time convenient to the consumer.

91. Furthermore, it submits that DVDs constitute an important constraint on the supply of pay-TV content and, in particular, on movie channels, because (i) the uptake of DVD hardware in the UK has been extensive, (ii) accessing content via DVD holds a number of advantages, particularly in terms of timing (a motion picture may be available on DVD for almost a year before pay-TV), (iii) online DVD rental (including subscription-based) allows easy access to content and (iv) the pricing of DVDs is particularly competitive.

Pay-TV and FTA

92. The notifying party submits that at retail level, the provision of FTA and pay-TV services belongs to the same relevant product market.

93. First, the notifying party argues that in cases where the Commission defined separate relevant product markets for pay-TV and FTA services in the past[60], it made such a distinction on the basis of the specific market conditions prevailing in the individual Member States concerned.

94. Moreover, it submits that the rate of technological change in the TV sector mandates the re-examination of the approach to market definition in light of the technological and market conditions that exist now, at the time of the proposed transaction. In particular, according to the notifying party, the peculiarities of the UK and Irish TV sector, taken together with the recent developments in TV technology and the fact that both FTA and pay-TV broadcasters compete for the same content and audience all point towards the existence of an overall market for all TV offerings to end users in the UK and Ireland.

95. Furthermore, the notifying party considers that if the Commission in some of its earlier decisions[61] identified differences in content type and programme schedules as a distinguishing feature between pay-TV and FTA TV channels, these differences increasingly diminish as pay-TV and FTA content is often similar and FTA platforms/channels also show attractive content in the UK and Ireland.

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[60] See Commission decision of 27 May 1998 in Case IV/M.993 - *Bertelsmann/Kirch/Premiere;* Commission decision of 13 October 2000 in Case COMP/M.2050 - *Vivendi/Canal+/Seagram;* Commission decision of 5 November 2002 in Case COMP/M.2996 - *RTL/CNN/ Time Warner/ N-TV.*

[61] See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù,* paragraph 112.

96. Finally, it submits that the advancement of digitisation in the TV sector has promoted further convergence between pay-TV and FTA TV, with digital TV achieving a high penetration rate in the UK and being currently developed in Ireland.

97. The market investigation of the Commission in the *NewsCorp/Telepiù* decision revealed that FTA TV exercises a certain constraint to pay-TV and that there is an interaction between both markets, in particular in countries such as Italy "where free-TV offers a wide choice of channels, some containing what would be considered as attractive contents"[62]. However, the Commission concluded, also based on the results of the market investigation, that in Italy, FTA and pay-TV are two separate markets[63]. In its *SFR/Télé 2* decision, the Commission also concluded that because of the different type of financing between FTA and pay-TV and the fact that, from the standpoint of the viewers, these offerings are not substitutable (in one case the service is provided at no specified cost, in the other it requires a subscription), both belong to separate product markets[64]. Finally, in its *NewsCorp/Premiere* decision, the Commission also concluded that pay-TV and FTA TV are still clearly distinct markets in both Germany and Austria because of the different type of content and programme schedules offered by pay-TV and FTA TV, because of limited demand-side substitutability due to the absence of subscription fee in FTA TV and of limited supply-side substitutability due to the different business model of the two types of broadcasters[65].

98. The majority of the pay-TV retailers[66] and TV channels[67] who responded to the market investigation conducted for the purpose of this case considered that pay-TV and FTA continue to be in separate markets.

99. In conclusion, for the purpose of the present decision, the Commission considers that the retail supply of pay-TV and FTA TV belong to separate markets.

Distribution channels

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62 See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 37.

63 See Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 47.

64 See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 45.

65 See Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraphs 17 to 20.

66 Questionnaire to content distributors of 5 November 2010 - question 13.3 - 8 respondents considered that in case of a 5-10% price increase for pay-TV subscriptions, the proportion of viewers switching to FTA would not be significant, while only one expressed a different view.

67 Questionnaire to TV channels of 5 November 2010 - question 9.3 - 4 out of 6 respondents confirmed that pay-TV subscribers are attracted by the premium content and additional services and are unlikely to switch to FTA channel offers in case of a 5-10% price increase of their pay-TV subscription; another respondent indicated that FTA channels content was similar to much of the other content available in pay-TV homes, but that the recent price increases by BSkyB and Virgin Media which did not result in a significant churn rate show that the majority of pay-TV customers are immune to price increases; and the last respondent did not know.

100. The notifying party submits that the market for the provision of TV services to end-users in the UK and Ireland encompasses all technical means of TV distribution, as TV channel providers and TV retailers (including FTA providers) compete to distribute their channels to reach the largest possible number of TV viewers. It submits that in previous decisions[68], the Commission correctly noted that customer preferences essentially depend on the TV content provided, regardless of the distribution mode.

101. The notifying party further considers that the different TV means of distribution compete with each other in terms of geographical reach. In the UK, satellite and DTT are the most important distribution channels, with satellite having a technical reach of 98% and DTT a reach of 73%[69]. The UK cable network has a technical reach of 49% and IPTV has a technical reach of 39%. In Ireland, the notifying party submits that cable and satellite are the most important distribution channels, with around 78% of TV households using satellite or cable/MMDS (multi-channel multi-point distribution service[70]) services.

102. With regard to switching costs, the notifying party considers that that the investment costs associated with the choice of a given distribution channel have decreased over recent years, both in the UK and in Ireland, and that there are thus no material disincentives for viewers to switch to another form of TV reception. It also submits that decoders and satellite dishes are becoming increasingly cheap, that cable providers supply decoders on a rental basis, thereby reducing substantially any switching costs, and that even in Ireland where IPTV requires the viewer to purchase a dedicated set-top box, no additional fee is charged for that set-top box when an IPTV subscription is purchased.

103. In past decisions, the Commission has only identified pay-TV and FTA TV as belonging to separate markets, without distinguishing between terrestrial, satellite cable or other means of transmission[71].

104. The market investigation conducted for the purpose of this case showed that content distributors consider the different means of delivery as substitutable from the viewers' point of view[72]. The TV channel suppliers who responded to the market investigation were less conclusive[73].

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68 See Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, Commission decision of 4 March 2005 in Case COMP/M.3609 - *CINVEN/France Telecom Cable - NC Numericable*; Commission decision of 17 May 2004 in Case COMP/M.3411 - *UGC/Noos* and Commission decision of 2 June 2006 in Case COMP/M.4217 - *Providence/Carlyle UPC Sweden*.

69 This will grow to cover the entire UK territory by the time the full switchover will be completed in 2012.

70 MMDS is a wireless telecommunications technology, used usually in sparsely populated rural areas, where laying cables is not economically viable.

71 See Commission decision of 27 May 1998 in Case IV/M.993 – *Bertelsmann/Kirch/Premiere*, paragraph 21; Commission decision of 2 April 2003 in Case COMP/M.2876 - *Newscorp/Telepiù*, paragraph 40, 47; Commission decision of 18 July 2007 in Case COMP/M.4505 - *SFR/Télé 2*, paragraph 40; and Commission decision of 25 June 2008 in Case COMP/M.5121 - *Newscorp/Premiere*, paragraph 20.

72 Questionnaire to content distributors of 5 November 2010 - question 19 - 7 respondents considered that from the perspective of end users, the audiovisual content offered through the different technical

105. For the purposes of the present decision, and in line with past Commission decisions, it is considered that different distribution modes are part of the same product market for the retail distribution of content to consumers.

106. Finally, the market investigation confirmed that non-linear services comprising (i) DVDs[74] and (ii) PPV/VOD[75] are not substitutable with the retail supply of pay-TV linear channels at this point in time in the UK.

107. Based on the above and for the purpose of the present decision, the Commission considers that, within the pay-TV market, the retail supply of non-linear services and linear channels belong to two separate markets.

b. Geographic market definition

108. The notifying party submits that the market for the retail provision of TV services to end users is national in scope.

109. In a previous decision[76], the Commission considered that TV broadcasting is generally organised on a national basis. The market investigation conducted for the purpose of this case did not contradict these findings.

110. In light of the above and for the purposes of the present decision, it may therefore be concluded that the geographic scope of markets for the retail distribution of content to consumers is national or, at most, relates to linguistically homogeneous areas.

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platforms is substitutable, with 2 respondents noting an exception as regards Internet as mode of delivery, while 3 respondent replied that the extent of substitutability is limited by the degree of availability of content.

73 Questionnaire to TV channels of 5 November 2010 - question 8 - 3 respondents did not view the different distribution modes as readily substitutable by viewers, 2 replied that different distribution services may be regarded as substitutable by viewers, 2 linked substitutability to access to content and 2 distinguished between FTA and pay-TV.

74 Questionnaire to TV channels of 5 November 2010 - question 9.1 - 4 out of 6 respondents confirmed that DVDs cannot substitute watching (pay-)TV, as the content offered is much narrower (e.g. does not offer live events such as Premier League football, or even other content), and pay-TV subscriptions also offer a wider range of services such as triple-play offers with telephony and internet; one respondent indicated that it was possible that DVDs could substitute for (pay-)TV, and one respondent did not know.

75 Questionnaire to TV channels of 5 November 2010 - question 9.2 - 4 out of 6 respondents indicated that PPV/VOD services cannot substitute for watching (pay-)TV, as the content offered is much narrower and the business model is different (pay-per-view versus free at the time of consumption, even with a pay-TV subscription); one respondent indicated that they could be substitutable, but not for e.g. live TV, and one respondent did not know.

76 See Commission decision of 27 May 1998 in Case IV/M.993 - *Bertelsmann/Kirch/Premiere*, paragraph 24.

1.2.4. Supply of pay-TV technical Services

111. The notifying party submits that the provision of pay-TV technical services constitutes a single relevant product market including CA systems, middleware and set-top-boxes. The Commission defined in previous decisions a single product market for the provision of pay-TV technical services[77]. In the *News Corp/Premiere* decision, the Commission however considered that the provision of CA solutions is a separate product market[78].

112. The majority of respondents to the market investigation considered that, from a supply-side perspective, it is not necessary for providers of pay-TV technical services to offer all three components (namely CA systems, middleware and set-top-boxes) together in order to be able to compete. The Commission cannot therefore exclude that these constitute three different markets.

113. With regard to the geographic scope of the market, the notifying party argues that this is at least EEA-wide, if not global. Concerning CA systems, the Commission noted in the *News Corp/Premiere* decision[79] that the market investigation revealed that providers of CA systems usually offer their encryption systems on a global basis, but ultimately left the question open. Also in the *News Corp/Premiere* case[80], the Commission noted that the market investigation revealed no elements[81] 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 worldwide, but ultimately left the question open.

114. For the purposes of this decision, the exact scope of the product and geographic market definition may be left open, as the proposed transaction does not raise competition concerns under any alternative product market definitions.

1.3. Competitive assessment

115. The Commission investigated possible anti-competitive effects of the proposed transaction both from a horizontal and from a non-horizontal perspective. As News Corp and BSkyB are generally active at different levels of the audiovisual chain in the UK and Ireland, the analysis focuses on vertical relationships.

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77 See Commission decision of 27 May 1998 in Case IV/M.993 - *Bertelsmann/Kirch/Premiere*, paragraph 25 and Commission decision of 27 May 1998 in Case IV/M.1027 *Deutsche Telekom/BetaResearch*, paragraph 18.

78 In the *News Corp/Premiere* decision, the Commission noted that the market investigation confirmed that the supply of middleware could also be considered as a separate segment within the market for technical services for pay-TV, but ultimately the question was left open. See Commission decision of 25 June 2008 in Case COMP/M.5121- *News Corp/Premiere*, paragraphs 44-46.

79 See Commission decision in the *News Corp / Premiere* Case, paragraph 47

80 See Commission decision in the *News Corp/Premiere* Case, paragraph 48.

81 The Commission made reference to a previous decision adopted in Case COMP/M.5080 - *Oracle/BEA*, where the scope of the geographic market for middleware software had been defined as worldwide, albeit in a different context.

1.3.1. Horizontal assessment

116. The proposed transaction results in a limited horizontal overlap in the wholesale provision of TV channels.

117. In the overall market for the supply of TV channels (FTA and pay-TV), the merged entity's combined market share[82] in terms of viewing shares would be [10-20]% in the UK and [5-10]% in Ireland. In terms of revenues, the market share of BSkyB is significantly higher ([20-30]%) - given that it already controls the premium movies channels and sports channels - but the increment of News Corp's TV channels would be minimal ([0-5]%).

118. The Commission considers that, given the outcome of the market investigation, the most appropriate market to take into account in order to assess the relative competitive strength of the parties to the transaction is the market for the supply of "basic pay-TV channels". This is in line with the product market definition considered by OFT in the *BSkyB/Virgin Media* decision and with Ofcom's findings in its 3 year investigation in the Pay-TV market in the UK.

119. In 2009, BSkyB's market share based on the revenues from the wholesale supply of its basic pay-TV channels in the UK was [30-40]% (comprising the Sky branded channels and proportionate share of revenue from Sky's joint venture channels) and […] for the channels of Virgin Media TV (VMtv) that BSkyB has acquired (and therefore excluding Virgin Media's 50% share in UKTV). […] BSkyB estimated that Fox's market share in terms of revenues was [0-5]% (for FX and Fox News, along with an allocation of National Geographic channel wholesale revenues in proportion to News Corp's shareholding). As regards Ireland, the estimated market share of BSkyB in 2009 was [30-40]% […]. Fox channels' share would be [0-5]%.

120. Even when considering the market for the overall supply of pay-TV channels[83], BSkyB´s market share by revenue in 2009 in the UK was approximately [40-50]% (including the newly-acquired Virgin Media channels). In the same year, its market share by revenue in Ireland was around [30-40]%. This strong position resulted from its control of the premium movie and sports channels, for which it charges premium prices. In this market, however, News Corp´s position is limited: its market share is around [0-5]% in the UK and [0-5]% in Ireland. In addition, there are a number of other players on the market such as UKTV, Viacom, MTV, Disney, NBC Universal/Sparrowhawk and Turner.

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[82] The calculation also takes into account the Virgin Media channels that BSkyB has recently acquired. These channels are LIVING, LIVINGit, Challenge, Challenge Jackpot, Bravo2 and Virgin1. The transaction whereby BSkyB acquired these channels was approved by the OFT by a decision of 14 September 2010 (ME/4568/10) published on the OFT's website on 5 October 2010, http://www.oft.gov.uk/shared_oft/mergers_ea02/2010/sky-virgin.pdf

[83] The Commission requested the notifying party to supply market share data "excluding notional carriage fees", that is excluding the internal sales between the wholesale business and the retail business of the vertically integrated broadcasters (as BSkyB and Virgin Media). The calculation of the market shares of 2009 take into account the acquisition of VMtv channels by BSkyB, whereas the overall value of the market has changed (BSkyB has internalized the acquisition of VMtv channels while Virgin Media has externalized the purchase of those channels).

121. Given that the addition of market shares derived from News Corp´s channels is very limited under any alternative market definition, it is unlikely that the proposed transaction will bring anticompetitive effects of a horizontal nature in the market for the wholesale supply of TV channels in the UK and in Ireland.

1.3.2. Non-horizontal assessment

122. The main vertical relationships arising from (or reinforced by) the proposed transaction relate to News Corp's activities upstream as a licensor of broadcasting rights to premium movie content (via its subsidiary, 20th Century Fox), pay-TV channels and other TV content <u>and</u> BSkyB's activities as a TV channel producer and retailer of pay-TV services (linear pay-TV or on-demand services).

123. The Commission examined four separate issues in this regard.

124. First, it examined whether the proposed transaction could give rise to a possible risk of input foreclosure for News Corp´s content to the detriment of BSkyB´s downstream competitors.

125. Second, it assessed any possible risk of customer foreclosure for News Corp´s competitors in the licensing of broadcasting rights to audiovisual content and in the wholesale supply of pay-TV channels due to BSkyB´s strong presence on the market for the acquisition of broadcasting rights and as platform operator and retail supplier of audiovisual content to end users in the UK and in Ireland.

126. Third, given that News Corp is also active in three other EU countries on the market for acquisition of broadcasting rights to film and sport content as it has pay-TV businesses in Germany, Austria and Italy, the Commission also verified whether the addition of the UK and Ireland pay-TV businesses could negatively affect the position of News Corp´s competitors in the different countries as a result of a possible increase of News Corp´s negotiating power in a potential scenario of pan-European licensing for broadcasting rights.

127. Fourth, the Commission considered whether the proposed transaction would give rise to a risk of input foreclosure by the merged entity as regards the pay-TV technical services provided by NDS.

a. Input foreclosure - access by competing TV channel producers and retail content distributors to News Corp content (movies, other TV content and TV channels)

128. The proposed transaction will bring about a vertical relationship with regard to the licensing of broadcasting rights. BSkyB operates as a purchaser of pay-TV broadcasting rights and News Corp is active at the wholesale level as a licensor of TV content (such as films through 20th Century Fox and TV channels as FX channels, National Geographic, Baby TV and STAR).

129. 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).

130. In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines (i) whether the merged entity would have post-merger the

ability to substantially foreclose access to input; (ii) whether the merged entity would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental impact on effective competition downstream[84].

131. As recognised by the Non-Horizontal Merger Guidelines, in order to be *able* to foreclose competitors, the vertically integrated firm resulting from the merger must have a significant degree of market power (which does not necessarily amount to dominance) in the upstream market[85]. In particular, the Non-Horizontal Merger 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[86].

132. The following sections examine any possible input foreclosure with respect to movie content and TV channels. As regards "other TV content", News Corp's market share is below [5-10]% both in the UK and Ireland. Given this very strong indication of an absence of market power in this segment, and the lack of alternative elements pointing to the contrary during the market investigation, the possibility of input foreclosure in relation to "other TV content" is not further discussed.

i. Movie content

133. In relation to movie content, the notifying party submitted market share data according to different possible categorizations and according to various calculation methods (box office revenues, consumer spend, programming hours) for the years 2007 to 2009.

134. News Corp's share in the markets for the licensing of broadcasting rights for all feature films in terms of box office revenues[87] in 2009 was approximately [10-20]% for 2009 in each of the UK and Ireland, with the other Hollywood studios (Warner Bros, Disney, Sony, Paramount and Universal) having market shares between [10-20]% and [10-20]% in both countries. The market share held by News Corp in 2009 is particularly high by comparison with the previous two years. In 2008, the box office market shares for UK and Ireland were as follows: News Corp [5-10]%, Disney [10-20]%, Sony [10-20]%, Warner Bros [10-20]%, Paramount [10-20]% and Universal [10-20]%. In 2007, they were as follows: News Corp [10-20]%, Disney [10-20]%, Sony [5-10]%, Warner Bros [10-20]%, Paramount [10-20]% and Universal [10-20]%.

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84 See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p. 11, paragraph 32.

85 See Non-Horizontal Merger Guidelines, paragraph 35.

86 See Non-Horizontal Merger Guidelines, paragraph 36.

87 Source: Nielsen data. The market investigation confirmed that the rate of success of films at the box office can be used as a reliable indication of the relative strength of right holders in this category.

It seems evident that the shares of each of the Hollywood studios fluctuate year over year depending on the relative success of the various movies they issue. For instance, News Corp had the largest share in 2009 due to the success of the 3D title "Avatar", which in the UK earned largely more than the second best selling title, "Harry Potter and the half-blood prince" (Warner Bros).

135. The notifying party also submitted market shares according to narrower definitions, namely based on licensing only by Hollywood studios. In this segment, in 2009, News Corp had the largest market share ([20-30]%), with Warner Bros and Paramount both having a market share of [10-20]%, Universal [10-20]%, Disney [10-20]% and Sony [10-20]%.Other minor US studios have together a market share of around [10-20]%,. Also in this case, when contrasted with the market shares from the previous years, it appears evident that 2009 was a particularly successful year for News Corp. Its market share in 2008 was [10-20]%,, behind Universal ([20-30]%), Paramount ([20-30]%), Sony ([10-20]%), Warner Bros ([10-20]%) and Disney ([10-20]%). In 2007, News Corp's market share of [10-20]% placed it behind Warner Bros ([20-30]%) Paramount ([20-30]%) and Universal ([10-20]%).

136. On the basis of the market share data, it seems unlikely that News Corp could have market power in relation to the market for licensing of movie content, whether in general or strictly in relation to US studio productions. Apart from News Corp's limited market share, there are a number of other players on this market which are of equivalent size to News Corp. It is therefore unlikely that the merged entity could be seen as having a "significant degree of market power" within the meaning of the Non-Horizontal Merger Guidelines.

137. Nevertheless, with respect to the merged entity's ability to substantially foreclose access to an input, the market investigation also aimed at verifying whether News Corp content might have specific qualities that would render it an "important input", within the meaning of the Non-Horizontal Merger Guidelines, for downstream competitors, both pay-TV producers and distributors of content on a PPV/TVOD basis[88].

138. The movie rights that right-holders license are purchased by pay-TV retailers for inclusion in their TV channels and by PPV/TVOD content distributors for supply on a title-by-title basis. Therefore the investigation aimed at verifying whether News Corp content could be considered "important input" in either of the two different distribution channels.

139. In this respect, the Hollywood majors which responded to the market investigation all take the view that no specific content (movies, Hollywood movies, 20th Century Fox movies or other content) is important for success at downstream level.

140. The pay-TV retailers which responded to the market investigation stated that Hollywood majors' premium movie content in general (therefore, referring to all the Hollywood majors, and not specifically to 20th Century Fox) is relevant and important, and even essential according to BSkyB's largest competitors. However, no element in the market investigation revealed reasons why 20th Century Fox' content could be singled out for being individually important. One competitor also submitted

[88] See Non-Horizontal Merger Guidelines, paragraph 34.

that at least three major Hollywood studios' content would be sufficient to build a viable offer competing with that of BSkyB's Sky Movies channels.

141. In addition, the respondents which consider 20th Century Fox content "essential" mostly refer to the license for "first pay-TV" window in the UK, which also includes rights for subscription VOD (SVOD). However, BSkyB already has exclusive deals in this regard for premium movies with all the Hollywood majors. The proposed transaction does not change the structure of this long-established network of contracts. It should be noted that Ofcom has already found that this pre-existing network of contracts creates a limit to the development of competing SVOD services in the UK. Therefore the concerns raised by BSkyB's largest competitors do not relate to substantiated merger-specific issues.

142. As regards content distributors of PPV/TVOD content, some players take the view that 20th Century Fox movie content is very important. However, there is nothing in the replies which explains whether the importance of content is related to 20th Century Fox itself or to the content of Hollywood majors as a whole. Half of the replies indicate that Hollywood majors' content is important for a PPV/VOD offer, but the market investigation did not yield any concrete element on the basis of which it should be concluded that any offer should include each and every major's content in order to be competitive[89]. Significantly, FilmFlex, a PPV/TVOD service offered by Virgin Media, does <u>not</u> consider 20th Century Fox content to be important for a PPV/TVOD offer and, in general, submitted that no content (whether movie content or TV channel) is a "must have". Overall, the market investigation did not show that 20th Century Fox content alone would be an important input for downstream competitors of BSkyB in the PPV/TVOD market.

143. In addition, with respect to the licensing for PPV/TVOD, the licensing systems currently in place tend to indicate that the merged entity would not have an incentive to engage in input foreclosure. Specifically, the market investigation confirmed that the licensing for PPV/TVOD takes place on a non-exclusive basis and that there is a well-established structure of licensing windows which has been developed in order to maximize the right holders' revenues from licensing to TVOD/PPV distributors. The right holders tend not to strike "output" deals with PPV/TVOD players, but rather seem to license movies on a "title-by-title" basis. It follows that right holders have an interest in licensing to as many purchasers as possible. News Corp is also currently licensing its 20th Century Fox movie content on a non-exclusive basis for PPV/TVOD, and it seems unlikely that News Corp would have an incentive to forego these revenues by supplying exclusively BSkyB's TVOD service.

ii. TV channels

144. The notifying party submitted market shares based on viewing shares and revenue shares on the market for the overall supply of TV channels (FTA and pay-TV) in the UK and Ireland (see paragraph 117 above). It also supplied market share data for the wholesale supply of all pay-TV channels and basic pay-TV channels (see paragraphs

[89] For instance, it has been submitted that a PPV offer could not be attractive if it does not include "Avatar" or "The A-team" titles from 20th Century Fox: however this argument implies that the viability of a PPV business might depend on one or two premium titles per season.

119 and 120 above). In all cases, the addition of Fox channels would have a very limited impact on BSkyB's market position at the upstream level.

145. When considering the wholesale supply of pay-TV channels, News Corp is only active as supplier of basic pay-TV channels, and not in premium movie or sports channels. Given the minimal increment brought about News Corp's TV channels in a potential narrower market for the wholesale supply of basic pay-TV channels, it is unlikely that the proposed transaction would change the merged entity's (News Corp's and BSkyB's) current behaviour in relation to the supply of basic-pay TV channels to downstream competitors of BSkyB.

146. In any case, the market investigation did not reveal any element on the basis of which Fox channels would be considered an important input for a pay-TV basic package, as most respondents considered them substitutable with other channels. Although Fox channels have a recognizable brand name (in particular, National Geographic), the majority of the respondents[90] indicated that the "must have" channels are Sky1, Living and other Sky channels[91].

iii. Conclusion

147. It can therefore be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to a possible input foreclosure for BSkyB competitors for News Corp's movie and TV channel content.

b. Customer foreclosure

148. The proposed transaction will result in the vertical integration of News Corp's upstream activities as a licensor of broadcasting rights to audiovisual content and wholesale supplier of basic pay-TV channels <u>and</u> BSkyB's downstream activities as a purchaser of pay-TV broadcasting rights, platform operator and retail supplier of pay-TV channels.

149. The Commission has examined whether the proposed transaction would lead to a risk of customer foreclosure for the competitors of News Corp.

150. In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines (i) whether the merged entity would have post-merger the ability to foreclose access to downstream markets by reducing its purchases from its

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90 Only two pay-TV retailers consider that Fox channel's content is "key". However, one of these retailers acknowledges that the addition of News Corp's channels to the current wholesale offer by BSkyB would be limited to 5%.

91 One competitor submitted that "Although the News Corp owned TV channels are attractive to viewers – particularly FX which is popular with audiences and which increasingly shows first runs of major US series such as Dexter, True Blood and Family Guy – and would contribute to a platforms success at the retail level it is unlikely that the availability (or not) of these specific channels would make or break a platform-switching decision as they are potentially substitutable by other similar channels".

upstream rivals; (ii) whether the merged entity would have the incentive to reduce its purchases from its upstream rivals; and (iii) whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market[92].

151. In the present case, the Commission in particular assessed whether the merged entity would have the ability and incentive to foreclose its actual or potential competitors on (i) the market for the licensing of pay-TV broadcasting rights (namely, the risk that News Corp's competitors in the licensing market would not be able to license their movie, sports, other TV content to BSkyB) and (ii) the market for the wholesale supply of basic pay-TV channels by refusing or restricting its downstream competitors' access to a sufficient customer base in the market for retail pay-TV services.

Customer foreclosure in relation to the licensing of broadcasting rights

152. In the UK and Ireland, News Corp is active as a licensor of broadcasting rights to audiovisual content, namely movies (20th Century Fox), sports and other TV content[93].

153. When looking at total spend in 2009 for the acquisition of broadcasting rights for films (UK and Ireland), BSkyB has a [50-60]% market share. In 2009, BSkyB held a [50-60]% market share in the market for the acquisition of PPV/VOD[94] rights for films (UK and Ireland), whereas it accounted for nearly [90-100]% of the market for the acquisition of first pay-TV window rights for films (UK and Ireland). With regard to sports content, BSkyB accounted in 2009 for [50-60]% of the acquisition market in the UK and Ireland. On the market for the acquisition of other TV content, BSkyB held a [5-10]% share in 2009 for the UK and Ireland.

154. Therefore, BSkyB's position in the acquisition market for films and sports is significant. Nevertheless, as regards audiovisual content (movies and other TV content), it is unlikely that BSkyB would, after the merger, commit to exclusively purchase 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 content and channels broadcast through its platform. Given its current wide offer of content, it is not imaginable that BSkyB, after the merger, would want to narrow its offering by limiting it to only 20th Century Fox's movies or content.

155. As regards sports content, as mentioned above News Corp's licensing activities in relation to sport events in the UK and Ireland are very limited and relate mainly to rugby union and league matches from South Africa, New Zealand and Australia. Therefore it seems unlikely that BSkyB would commit to only purchase such sports rights and would stop acquiring rights for Premier League matches or other major sports events' rights.

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92 See Non-Horizontal Merger Guidelines, paragraph 59.

93 New Corp’s licensing activities in relation to other content are limited in the UK and Ireland with shares of approximately [0-5]% and [0-5]% in terms of hours of programming.

94 The notifying party submitted that normally SVOD rights are licensed/acquired together with the first pay-TV window rights, hence the PPV/VOD denomination refers only to TVOD rights.

156. Furthermore, none of the right holders or basic pay-TV channel producers (except one) expressed any concern that as a result of the transaction they would be prevented from selling their content to BSkyB.

Customer foreclosure in relation to the licensing of wholesale basic pay-TV channels

157. News Corp is a supplier of wholesale TV channels, in total 13 of them[95].

158. BSkyB is already pre-merger a vertically integrated company that is active as a wholesale supplier of TV channel broadcasting rights in the upstream market, and as a purchaser of TV channels broadcasting rights/pay-TV retailer and pay-TV platform operator in the UK and Ireland in the downstream market.

159. Upstream, BSkyB supplies over 30 different channels and is present in all the different segments: FTA channels, basic pay-TV channels and premium pay-TV channels. 15 of the channels are considered premium pay-TV channels[96]; the other channels are divided between FTA and basic pay-TV channels[97].

160. At the downstream level, BSkyB creates, markets and retails packages of channels to end-users. BSkyB's retail packages include different combinations of its channels (basic and premium), as well as third party channels, totalling 160 channels (including multiplex versions)[98]. A third party channel included in a "Sky" package receives a share of BSkyB's revenues generated from sales of that package.

161. At the downstream level, BSkyB is also active as an operator of a DTH (technical) satellite platform with about 10 million subscribers in the UK. It is the leading pay-TV platform with a market share of [60-70]% in terms of subscribers in 2009, without distinction in relation to delivery technology. BSkyB has about 570 000 subscribers in Ireland, which represents around [50-60]% of all pay-TV households or [30-40]% of all households in 2009. Channels that are not purchased at the wholesale level by BSkyB and not retailed by BSkyB as part of a package can still be viewed by end-users on BSkyB's DTH platform. In this case, the channel retails and markets its service to subscribers independently from BSkyB.

162. The notifying party argues that the merged entity will not have an incentive to foreclose competing TV channel suppliers since offering as many channels as possible renders BSkyB’s retail packages more attractive to subscribers. Any channel that

95 Four Fox channels (FX, FX+, FX HD, Fox News), five National Geographic channels (NGC +1, NGC HD, NGC Wild and NGC Wild HD), Star TV channels (Star Plus, Star One and Star Gold) and Baby TV.

96 Sky Movies Premiere, Sky Movies Comedy, Sky Movies Action and Adventure, Sky Movies Crime and Thriller, Sky Movies Family, Sky Movies Drama and Romance, Sky Movies SciFi and Horror, Sky Movies Classics, Sky Movies Modern Greats, Sky Movies Indie, Sky Movies Showcase, Sky Sports 1, Sky Sports 2, Sky Sports 3 and Sky Sports 4.

97 Sky News, Sky Sports News, Sky One, Sky Two, Sky Three, Sky Arts 1, Sky Arts 2, Sky Vegas and Sky Poker.com.

98 For instance, the Discovery channel and MTV channels are included in certain packages retailed by BSkyB, as well as BSkyB's own Sky Arts 1, Sky 1 etc..

makes a positive contribution to attracting or retaining pay-TV subscribers brings a positive contribution to the platform operator.

163. The notifying party argues that the merged entity will not have the ability to totally foreclose competing TV channel suppliers from accessing a viewer base due to BSkyB's obligation to grant third party channels access to its DTH platform on fair, reasonable and non-discriminatory terms (FRAND)[99]. However, this obligation only exists in the UK and not in Ireland.

164. The Commission considers that the merged entity would not have the incentive to engage in customer foreclosure in this respect.

165. The market investigation confirmed that the most important parameter for competition in the retail market is content and that platform operators seek to carry the largest and most interesting bundle of channels. This is also in line with the conclusions reached in the Commission's decision in *News Corp/Premiere*[100].

166. In addition, and importantly, BSkyB is already pre-merger a vertically integrated firm which retails third party channels as inputs to its channel packages. This shows the ongoing incentive to carry a rich bouquet of channels, rather than limiting the offering to company-owned channels.

167. It is unlikely that the proposed transaction will lead to a material change in incentives for the merged entity leading to restrict access to BSkyB's platform to competing pay-TV channel suppliers. This is because News Corp's presence on the market for wholesale supply of basic pay-TV channels is limited. As regards the market for the wholesale supply of pay-TV channels, News Corp held in 2009 a [0-5]% market share in the UK and of [0-5]% in Ireland, both in terms of revenue. When considering the narrower market for the wholesale supply of basic pay-TV channels, News Corp accounted for [0-5]% of the market in 2009 in the UK in terms of revenue.

168. For the above reasons alone, the Commission can conclude that it is unlikely that there would be input foreclosure in the market for the wholesale supply of basic pay-TV channels.

169. For completeness, with respect to the ability to foreclose, the market investigation confirmed the notifying party's argument that the merged entity would not have the ability to completely foreclose competing basic pay-TV channels from BSkyB's DTH platform due to BSkyB's obligation to carry third party channels on FRAND terms. However, it has been highlighted that access to the technical platform is not a perfect substitute for access to viewers through BSkyB's packages: the competing TV channels have to pay carriage fees to BSkyB and would have to incur all the retailing and marketing costs which they do not have to pay when the channel is marketed (in the various packages) by BSkyB. Furthermore, if a channel is retailed on its own

99 Ofcom, Provision of Technical Platform Services, Guidelines and Explanatory Statement, 21 September 2006, available at http://stakeholders.ofcom.org.uk/binaries/consultations/tpsguidelines/statement/statement.pdf .

100 See Case COMP/M.5121 - *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 64.

rather than as part of a package, it is plausible that it will have fewer viewers and thus lose advertising revenues.

170. As regards Ireland, the lack of "must carry" regulatory obligations is counter balanced by the fact that UPC, the largest cable Pay-TV operator in Ireland, had around 500 000 subscribers in 2009[101]. This accounts for [40-50]% of Pay-TV households in Ireland[102].

171. It can be concluded in light of all of the above that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to a possible customer foreclosure of News Corp' competitors in the market for the licensing of pay-TV broadcasting rights and the market for the wholesale supply of basic pay-TV channels in relation to BSkyB's platform and position as an acquirer of broadcasting rights to pay-TV channels.

c. Joint negotiation of rights to audiovisual content for several countries/areas

172. News Corp controls leading pay-TV operators in Italy (Sky Italia) and in Germany and Austria (Sky Deutschland).

173. The notifying party submitted that Sky Italia holds a market share of approximately [50-60]% in terms of subscribers and [80-90]%[103] in terms of revenues in relation to the retail pay-TV market in Italy, whilst Sky Deutschland holds market shares of approximately [40-50]% in terms of subscribers in relation to the retail pay-TV markets in Germany, and approximately [60-70]% in terms of subscribers in relation to the retail pay-TV markets in Austria. […].

174. Through the proposed transaction, News Corp will also gain control over a third leading pay-TV operator, BSkyB, in the UK and Ireland. Therefore, the proposed transaction will increase the merged entity's presence within the EEA in relation to the acquisition of rights to premium content.

175. In light of these facts, the market investigation examined whether the proposed transaction could increase News Corp's negotiating power in relation to licensors of premium films and pan-European/international sport events[104], making it a possibly

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101 See Liberty Global Annual report 2009, http://www.lgi.com/PDF/LGI_2009_AnnualReport.pdf , page 24.

102 Calculation based on ComReg, Quarterly Key Data Report Q2 2009, p. 69.

103 Source: Sky Italia and AGCom 2009 Annual Report. See also the Commission's decision C(2010) 4976 final of 20 July 2010 (the "Decision") modifying the application of the Commitments attached to a decision of 2 April 2003 declaring a concentration compatible with the common market and the EEA Agreement (Case No COMP/M.2876), paragraph 31 and 32. Given the fact that Mediaset's DTT pay-TV offer includes both a "pre-paid card" and a "subscription" option, the number of Mediaset subscribers cannot be compared to the number of Sky subscriptions. This is because Mediaset cards are often prepaid, rechargeable cards and once their credit is consumed they can no longer be used and new cards need to be purchased. There is therefore usually more than one PPV card per household. Therefore the most reliable market share data related to the Italian territory are those based on revenues.

104 The notifying party estimates that BSkyB’s market share in the acquisition of ‘other TV content’ in the UK/Ireland is approximately [5-10]%. It is therefore unlikely that there would be increased post-merger negotiating power on the part of the merged entity in relation to acquisition of such ‘other TV content’.

unavoidable counterpart for the distribution of content on the pay-TV platform because of its presence in UK, Ireland, Italy, Germany and Austria. In particular, the market investigation examined whether any such increase in negotiating power would result in other content distributors being *de facto* cut off from the negotiation process for key content, which would in turn strengthen News Corp's position in each national retail pay-TV market. In relation to premium films, the market investigation examined whether the merged entity would, post-merger, have the ability to require exclusivity in relation to PPV/TVOD rights[105].

i. Premium films

176. The notifying party submits that, although post-merger News Corp would be active in the acquisition of film content in three separate geographic markets in the EEA (UK/Ireland, Germany/Austria and Italy), this would not enhance the merged entity's ability to access third party film rights in these territories.

177. Notably, notwithstanding the possibility of broadcasters in different territories acquiring rights in a number of territories at once, the number of cross-border licensing deals for film rights would not be significant today. According to the notifying party, due to language and cultural differences, licensing of broadcasting rights for films has traditionally taken place on a national basis and, where licensing has occurred on a wider basis, it has typically been for specific language areas (such as the UK and Ireland). Also, differences in national broadcasting markets (for example licensed content and number of permitted runs) and the staggered expiry dates of the existing license agreements further explain why licensing generally takes place on a national/language area basis and why cross-territory bids would be unlikely.

178. The notifying party also submits that right holders have strong bargaining power and would prefer to license rights as narrowly as possible in order to maximise licensing revenues.[…]. Moreover, post merger the merged entity would still face strong international competitive pressure from a number of large international groups which operate in several Member States.

179. The Commission's examination, based on the results of the market investigation, showed no concerns as regards the possible increase of News Corp's negotiating power in relation to licensors of premium films following the transaction.

As regards sport rights, the market investigation focused mainly on pan-European/international sport events (such as the Olympic Games, the World Cup and the UEFA Champions League). Such events have a pan-European interest from the viewers' perspective (see Case COMP/M.2876 – *News Corp/Telepiù*, Commission decision of 2 April 2003, paragraph 72). National sport events (notably football events) on the other hand appear to have limited appeal outside the State which they relate to (see Case COMP/M. 5121 – *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 24) and therefore an increased post-merger negotiating power on the part of the merged entity in relation to national sport events would be unlikely.

105 […]. Sky Italia's exclusive SVOD rights are limited to the DTH platform in Italy pursuant to commitments attached to the Commission's decision in Case COMP/M. 2876 – *News Corp/Telepiù*, Commission decision of 2 April 2003.

180. First, as noted by the Commission in past decisions,[106] as the main source of successful movies, Hollywood majors hold a strong position both quantitatively and qualitatively in relation to pay-TV operators. This factor would affect the merged entity's strength in relation to the negotiation and acquisition of rights to premium films.

181. In that context, the Commission notes that the market investigation did not raise substantiated concerns regarding any possible increase in the merged entity's bargaining power in the negotiation of rights to premium films.

182. Second, the market investigation also revealed that the manner in which licenses are negotiated at present militates against an increased bargaining power of the merged entity across different countries. The Commission found that (i) broadcasting rights are only rarely negotiated simultaneously for different territories and that (ii) broadcasting rights for premium films are generally negotiated and concluded on a country-by-country basis or in relation to a linguistic area or in relation to areas with a particular common socio-cultural background.

183. A number of other factors also appear to exist which would prevent cross border negotiation/licensing: (i) the availability of materials in each language; (ii) differences in the availability dates for content in different territories and (iii) local preferences in programming.

184. Third, it would appear that News Corp is not engaged in joint right negotiations for Germany/Austria and Italy. Some respondents confirmed that News Corp currently engages in multi-territorial negotiations for acquisition of content <u>only</u> in relation to particular linguistic areas[107] […].

185. Fourth, like the Hollywood Majors (see paragraph 181 above), most of News Corp and BSkyB's competitors at the retail pay-TV level did not express concerns as regards the possible increase of News Corp's negotiating power in relation to licensors of premium films following the transaction[108].

186. Finally, the market investigation also revealed that the merged entity would face other multinational groups on a hypothetical right purchasing market encompassing several countries, such as the Liberty Global Group and Deutsche Telekom.

187. As regards PPV/TVOD rights, the market investigation confirmed that, unlike linear pay-TV and SVOD services, content in the PPV/TVOD windows generates license fee revenue only for the particular title selected by the viewer. Hollywood majors, therefore, generally license PPV/TVOD rights on a non-exclusive basis as it is important for the content to be widely available through as many delivery points as

[106] See in particular Case COMP/M. 2876 – *News Corp/ Telepiù*, Commission decision of 2 April 2003, paragraph 61 and paragraph 57 referring to case COMP/M.2050 *Vivendi/CANAL+/Seagram*, Commission decision of 13 October 2000.

[107] Questionnaire to right holders of 5 November 2010 - Question 20.

[108] Questionnaire to content distributors I of 5 November 2010 – 1 out of 11 respondents expressed concerns; and questionnaire to content distributors II of 5 November 2010 – A minority of competitors in the UK, Germany and Italy (6 out of 16 respondents) did raise concerns in relation to access to premium films.

possible to reach the widest number of customers possible and maximize returns from each title[109]. It is unlikely that, post-merger, the merged entity would be so strong as to undermine the well-established non-exclusive licensing structure for PPV/TVOD in its favour by insisting on exclusive PPV/TVOD rights

ii. Premium sport content

188. While recognizing that the submission of bids covering rights in more than one territory would be theoretically possible in relation to pan-European/international sport events (such as FIFA organized football, UEFA Champions League and the Olympic Games, which, according to the notifying party are licensed by one single rights holder at the European level to various broadcasters at national or regional level), the notifying party submits that there are several reasons why such multi-territory bids would not be likely in practice.

189. First, tender rules of the major pan-European sport event rights owners require the submission of separate bids for every single country, and on different dates. Furthermore, in terms of the UK Broadcasting Act, 1996, key sport events such as the Olympic Games, FIFA World Cup Finals Tournament and certain matches within the European Football Championship Finals Tournament would need to be offered for live broadcast on the main (FTA) terrestrial channels.

190. […].

191. The market investigation has confirmed the notifying party's submission that rights to pan-European/international sport events are licensed on a national basis[110].

192. Furthermore, only one respondent to the market investigation expressed concerns that, by joining its subscriber base in various Member States for the acquisition of international sport rights, News Corp could reduce its average content costs. However, the same respondent also stated that it expects the trend of sports rights acquisitions being made more and more on a purely national basis going forward.

193. Furthermore, certain sports rights would be currently covered by 'listed events' regimes derived from the Audiovisual Media Services Directive in EU Member States. These regimes provide that certain events (such as all or certain matches of the FIFA World Cup finals tournament and all or certain matches of the European Football Championship) must not be broadcast on an exclusive basis. Relative legislation in the UK ensures that key events and matches are available for national broadcast on a FTA basis. Therefore, it is unlikely that the proposed transaction would increase the negotiation power of the merged entity in this regard.

iii. Conclusion

194. In light of the above, the Commission has come to the conclusion that the combination of BSkyB’s presence as a leading pay-TV operator in the UK and Ireland with News Corp’s presence as a leading pay-TV operator in Italy, Germany and Austria does not

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109 Questionnaire to right holders of 5 November 2010 - Question 15 and 16.

110 Questionnaire to content distributors II of 5 November 2010 - Question 4.

raise serious doubts as to its compatibility with the internal market in relation to a possible increased bargaining power as regards the negotiation and acquisition of rights to TV content.

d. Pay-TV technical services

195. The proposed transaction will result in the vertical integration of News Corp’s upstream activities as provider of pay-TV technical services (through a jointly controlled subsidiary, NDS) and BSkyB's downstream activities on the market for the retail supply of audiovisual content to end users. Considering that BSkyB's share of the downstream market exceeds 25%, the market for the provision of pay-TV technical services in the EEA is vertically affected by the merger.

196. The Commission examined the likelihood that News Corp would foreclose BSkyB's rivals in the market for the retail supply of pay-TV by restricting access to the pay-TV technical services offered by NDS.

197. […]. None of the respondents to the market investigation purchases pay-TV technical services from NDS or plans to do so in the future. However, another pay-TV operator indicated that it is in the process of negotiating an agreement with NDS for the provision of middleware.

198. The Commission considers that the merged entity would not have the ability to foreclose BSkyB's rivals in the market for the retail supply of pay-TV by restricting access to the technical services offered by NDS. In particular, NDS does not have market power in the market for the provision of pay-TV technical services. In 2009, NDS held a market share of [20-30]% for the supply of CA systems in the EEA and accounted for [10-20]% of the supply of middleware.

199. Furthermore, there are strong alternative suppliers of CA systems and middleware in the EEA. Thus, Nagra (Kudelski) accounted in 2009 for [30-40]% of the supply of CA systems, and Conax for [10-20]%. As regards the supply of middleware, Open TV held a [30-40]% share in 2009, whereas the share of Seachange was of [5-10]%, Netgem [0-5]%, Microsoft [0-5]%, proprietary developments [5-10]%, and others [20-30]%.

200. In addition, the fact that control over NDS is exercised jointly by News Corp together with an independent investment fund would appear to limit News Corp's ability to foreclose.

201. Although two respondents to the market investigation[111] expressed concerns that the merged entity would foreclose access to the technical services offered by NDS, such concerns were not substantiated, notably with regard to the condition that NDS must hold market power in the market for the provision of pay-TV technical services. In addition, both respondents acknowledge that there are various alternative suppliers of (unbundled) pay-TV technical services components.

202. In light of the above, it can be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the possible

[111] Questionnaire to Content Distributors I of 5 November 2010 - question 20.

input foreclosure of BSkyB's pay-TV competitors in relation to the pay-TV technical services provided by NDS.

2. The Newspaper Publishing Sector

2.1. Description

203. Newspaper markets are classically two-sided markets. On the publishing side, publishers compete to supply newspapers and other news services to consumers, and/or to attract consumers to online content with many (but not all) publishers generating revenues by charging a cover price for print copies (whether over the counter or by subscription) or an online subscription fee. On the other side of the market, both free and paid-for newspapers, in print and online versions, compete for advertising revenues. In the UK, print newspapers that charge a cover price still derive, on average, around […] of their overall revenue from advertising. Advertisers purchase advertising space in newspapers and online to promote the sales of goods or services.

204. As concerns means of delivery, while some customers purchase their newspapers under subscription via home delivery, overall, only a small percentage of all newspaper readers in the UK have a subscription to a newspaper, and a number of newspapers (including *The Sun*) do not offer any subscription service. Moreover, newspaper subscription services are not available everywhere in the UK and in Ireland. In addition, in geographic areas where newspaper subscription services are available, newspaper readers are able to obtain the same newspapers at a wide variety of retailers (including newsagents, petrol stations, and general purpose stores such as supermarkets), with a number of retailers providing their own home delivery service.

205. The following two tables show the total newspaper circulation in the UK and in Ireland in 2009, grouping daily and weekly newspapers together[112].

Table 2: Newspaper Circulation – UK (2009)

[112] Source: Audit Bureau of Circulations, News Corp. The weekly newspapers only have these sales on Sunday.

Publisher	Titl	Average Sales/Day (M)	Share per title (%)	Publisher share (%)
News Corp	Su	[…]	[10-20]	[30-40]
	News Of The World	[…]	[10-20]	
	Times	[…]	[0-5]	
	Sunday Times	[…]	[0-5]	
Daily Mail	Daily Mail	[…]	[5-10]	[20-30]
	Mail On Sunday	[…]	[5-10]	
	Metro (Group)	[…]	[5-10]	
Trinity Mirror	Daily Mirror	[…]	[5-10]	[10-20]
	Sunday Mirror	[…]	[5-10]	
	Daily Record	[…]	[0-5]	
	Sunday Mail	[…]	[0-5]	
	Peopl	[…]	[0-5]	
Telegraph Media Group	Daily Telegraph	[…]	[0-5]	[5-10]
	Sunday Telegraph	[…]	[0-5]	
Northern & Shell	Daily Express	[…]	[0-5]	[10-20]
	Daily Star	[…]	[0-5]	
	Sunday Express	[…]	[0-5]	
	Daily Star Sunday	[…]	[0-5]	
Guardian Media Group	Guardian	[…]	[0-5]	[0-5]
	Observe	[…]	[0-5]	
D.C. Thomson	Sunday Post	[…]	[0-5]	[0-5]
Independent News	Independent	[…]	[0-5]	[0-5]
	Independent on Sunday	[…]	[0-5]	
Pearson PLC	Financial Times	[…]	[0-5]	[0-5]
Johnston Press	Scotsma	[…]	[0-5]	[0-5]
	Scotland on Sunday	[…]	[0-5]	
Newsquest	Herald (Scotland)	[…]	[0-5]	[0-5]
	Sunday Herald	[…]	[0-5]	
FL Partners	Racing Post	[…]	[0-5]	[0-5]
	Tota l	**[…]**	**100**	**100**

Table 3: Newspaper Circulation – Ireland (2009)

Publisher	Titl	Average Sales/Day ('000)	Share per title (%)	Publisher share (%)
News Corp	News Of The World	[…]	[5-10]	[10-20]
	Sunday Times	[…]	[5-10]	
	Su	[…]	[5-10]	
	Times	[…]	[0-5]	
Tribune Newspaper Plc	Sunday Tribune	[…]	[0-5]	[0-5]
Irish Times Trust	Irish Times	[…]	[5-10]	[5-10]
Independent News and Media	Irish Independent	[…]	[5-10]	[30-40]
	Sunday Independent	[…]	[10-20]	
	Sunday World	[…]	[10-20]	
Thomas Crosbie	Sunday Business Post	[…]	[0-5]	[5-10]
	Irish Examiner	[…]	[0-5]	
Daily Mail	Daily Mail	[…]	[0-5]	[10-20]
	Mail On Sunday	[…]	[5-10]	
Trinity Mirror	Daily Mirror	[…]	[0-5]	[5-10]
	Sunday Mirror	[…]	[0-5]	
	Daily Record	[…]	[0-5]	
	Sunday Mail	[…]	[0-5]	
	Peopl	[…]	[0-5]	
Telegraph Media Group	Daily Telegraph	[…]	[0-5]	[0-5]
	Sunday Telegraph	[…]	[0-5]	
Northern & Shell	Daily Express	[…]	[0-5]	[5-10]
	Daily Star	[…]	[5-10]	
	Sunday Express	[…]	[0-5]	
	Daily Star Sunday	[…]	[0-5]	
Guardian Media Group	Guardian	[…]	[0-5]	[0-5]
	Observe	[…]	[0-5]	
D.C. Thomson	Sunday Post	[…]	[0-5]	[0-5]
Independent News	Independent	[…]	[0-5]	[0-5]
	Independent on Sunday	[…]	[0-5]	
Pearson PLC	Financial Times	[…]	[0-5]	[0-5]
FL Partners	Racing Post	[…]	[0-5]	[0-5]
	Tota l	**[…]**	**100**	**100**

206. The following two tables show the total share for the provision of online news in the UK and in Ireland in 2009[113]. Data for Google News and Yahoo News are not available and have not been included in the market share tables.

Table 4: Online News and Information Services - UK (2009)

Website	Monthly average number of total unique users (000)	Share per title (%)
News Corp	[…]	[5-10]
The Sun Online	[…	*[0-5]*
Times Onlline	[…]	*[0-5]*
Wal Street Journal Online	[…]	*[0-5]*
The Scottish Sun Online	[…]	*[0-5]*
News.Com.au Sites	[…	*[0-5]*
Foxnews.com	[…]	*[0-5]*
NYPost.com	[…]	*[0-5]*
BSkyB	[…]	[0-5]
BBC	[…]	[10-20]
Mail Online	[…]	[0-5]
NY Times Digital	[…]	[5-10]
Gannett Sites	[…]	[0-5]
The Guardian	[…]	[0-5]
Telegraph Media Group	[…]	[0-5]
MSN News	[…]	[0-5]
Independent.co.uk	[…]	[0-5]
Mirror Online	[…]	[0-5]
AOL News	[…]	[0-5]
Johnston Press Plc	[…]	[0-5]
MSNBC	[…]	[0-5]
Metro.co.uk	[…]	[0-5]
Others	[…]	[30-40]
Total	**[…]**	**100**

Table 5: Online News and Information Services – Ireland (2009)

Website	Total Unique Visitors (000s)	Share per title (%)
News Corp	[…]	[0-5]
BSkyB	[…]	[0-5]
BBC	[…]	[10-20]
RTE News	[…]	[5-10]
NY Times Digital	[…]	[5-10]
Mail Online	[…]	[5-10]
Independent.ie	[…]	[0-5]
Irishtimes.com	[…]	[0-5]
MSNBC	[…]	[0-5]
AOL News	[…]	[0-5]
Mirror Online	[…]	[0-5]
Independent.co.uk	[…]	[0-5]
Others	[…]	[40-50]
Total	**[…]**	**100**

2.2. Market definition

2.2.1. Product market definition

207. The notifying party considers that that the relevant product market for the purpose of this transaction comprises the supply of print newspapers and online news services.

[113] Source: comSource.

208. The notifying party submits that the markets for the supply of newspapers have changed significantly during the past several years, with an increasing proportion of consumers reading news and other editorial-style content online rather than buying (or reading) a daily print newspaper, and with the re-positioning and entry of newer newspapers.

209. According to the notifying party, all of the main newspaper titles have dedicated branded websites that contain all, or at least a large proportion, of the news and editorial content from their print editions, and, with few exceptions, are available free of charge. In many cases the online versions of daily newspapers offer a volume of information and level of detail that surpasses that found in print daily newspapers. Other freely available online sources, in particular the BBC, also offer a similar range and depth of dedicated news coverage, as well as easy access to various specialist and international news sources. Internet portals – such as Google and Yahoo! – also offer their own dedicated news reports, often supplied by news agencies such as Thomson-Reuters and consumers can also use search engines to search for additional coverage of specific stories. Finally, the type of editorial comment provided by professional journalists in newspapers and (often) in branded websites is increasingly challenged by less formal sources of opinion and comment, such as blogs.

210. The notifying party further submits that there is evidence of a direct competitive relationship between print newspapers and online news sources, and that the expansion of online news sources is one of the main drivers of the decline of print newspaper circulation over the last few years.

211. The Commission has in the past considered that written press should be differentiated from other media products[114]. The market investigation conducted for the purpose of this case was inconclusive as to the substitutability of print newspapers and online news services[115]. The market investigation was also inconclusive as to the substitutability of print newspapers and paid-for online news services[116].

212. The Commission also investigated whether news delivery through new digital devices such as tablets (e.g. Apple's iPad or Samsung's Galaxy) or e-readers (such as Amazon's Kindle) (will) belong to a separate market or are (will be) part of same

114 See Case IV/M.423 - *Newspaper Publishing*, Commission decision of 14 March 1994, paragraph 11; Case IV/M.1401, *Recoletos/Unedisa*, Commission decision of 1 February 1999, paragraphs 17.

115 Questionnaire to Newspapers of 5 November 2010 - question 9 - Out of 6 respondents, 2 considered them to still belong to separate markets, 2 considered that increasingly they were becoming part of the same market, 1 indicated that potentially they could be part of the same market, and 1 indicated that for some users, they were part of the same market and for some others, not.

116 Questionnaire to Newspapers of 5 November 2010 - question 10 - Out of 6 respondents, 2 considered them to still belong to separate markets, 1 considered that increasingly they were becoming part of the same market, 1 indicated that they were part of the same market, 1 replied besides the question, and 1 replied that it was too early to say but that there were indications that in the future, whereas tablets may to some extent substitute print newspapers, free online websites will still complement them.

market as print, or online, newspapers. The market investigation was inconclusive, given the very nascent nature of these new devices[117].

213. The notifying party and several respondents highlighted that there are very few tablets currently available on the market and that they have only been released for a few months[118]. The notifying party and two respondents replied that in the future, some level of substitutability may exist between newspaper applications ('apps') on tablets (such as Apple's iPad or Samsung's Galaxy) or e-readers (such as Amazon's Kindle), and print newspapers. This is because, according to them, tablets are the digitally-based products that are the closest to the print version of a newspaper and so the most likely to produce substitution. On the other hand, one respondent indicated that according to their research, their online news website audience is significantly different to their print audience (and by implication this may also be true for tablets), that evidence of actual switching away from newspapers is very limited and that it is not clear how this will evolve in the future[119].

214. In the past, the Commission also concluded that there are three segments within the national print newspaper market: (i) popular tabloids; (ii) mid-market titles; and (iii) the quality segment[120]. This was confirmed by the market investigation[121].

215. In previous decisions, the Commission has also considered whether there can be distinctions between: (i) daily newspapers and non-daily (i.e., weekly, monthly)[122] and (ii) national daily newspapers and regional or local newspapers[123]. A majority of respondents to the market investigation confirmed that national daily newspapers

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117 Questionnaire to Newspapers of 29 November 2010 - question 3 - 5 out of 6 respondents indicated that it was too early to conclude at this stage whether print newspapers, online news and news delivered through new digital devices such as tablets would be more complementary than substitutes to each other.

118 Apple launched its iPad in April 2010; a recent article by Enders Analysis estimates that some 500,000 iPads have been sold so far in the UK (Newspapers: Good news, bad news, 3 December 2010).

119 Questionnaire to Newspapers of 29 November 2010 - question 1 and 3 - Out of 6 respondents, 1 indicated some possible substitutability, 1 indicated that based on their research, there is some substitutability, 3 indicated that there was no information to confirm a certain level of substitutability, and 1 replied that based on their research, there was little substitutability because the audiences were different.

120 See Case IV/M.423 - *Newspaper Publishing*, Commission decision of 14 March 1994, paragraph 14.

121 Questionnaire to Newspapers of 5 November 2010 - question 14 - 5 out of 6 respondents.

122 See Case IV/M.1401, *Recoletos/Unedisa*, Commission decision of 1 February 1999, paragraphs 19-20 (the Commission considered such a distinction, but ultimately did not reach a conclusion on product market definition).

123 See Case COMP/M.3817, *Wegner/PCM/JV*, Commission decision of 7 July 2005, paragraph 19 (the Commission considered such a distinction, but ultimately did not reach a conclusion on product market definition).

constitute a market separate from regional[124] newspapers and magazines, as well as free newspapers[125].

216. For the purposes of this decision, the Commission considers that the exact product market definition for the supply of newspapers (either in print format, through online news websites or through new digital devices such as tablets) can be left open as the proposed transaction does not raise any competition concerns under any of the alternative product market definitions considered.

2.2.2. Geographic market definition

217. In past decisions[126], the Commission concluded that the relevant geographic market for national newspapers is national. This was not put in question by the market investigation.

218. For the purposes of this decision, the Commission considers that the relevant geographic market for national newspapers is national, in line with Commission precedents.

2.3. Competitive assessment

219. Respondents to the market investigation[127] raised the concern that in the UK, the merged entity would have, post-transaction, the ability and incentive to (i) use BSkyB's dominant position in the market for the retail supply of pay-TV to foreclose rivals in the newspaper market by offering mixed bundling of subscriptions for print or online News Corp newspapers and BSkyB's pay-TV subscriptions at a price cheaper than the sum of the stand-alone subscription prices; and/or (ii) further decrease prices of its newspapers by subsidising resulting losses from BSkyB’s revenue stream.

220. Conglomerate mergers are mergers between firms that are in a relationship that is neither purely horizontal nor vertical. In practice, the focus is on mergers between companies that are active in closely related markets, that is to say mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use[128].

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124 Regional newspapers concentrate on local as opposed to national issues.

125 Questionnaire to Newspapers of 5 November 2010 - question 18 - Out of 6 respondents, 4 considered them to still belong to separate markets, 1 considered that a new segmentation should be taken into account (national paid-for newspapers, national free newspapers, regional paid-for newspapers, regional free newspapers), and 1 considered that this segmentation had become irrelevant with the advent of free newspapers.

126 See Case IV/M.423 - *Newspaper Publishing*, Commission decision of 14 March 1994, paragraph 17; Case IV/M.1401, *Recoletos/Unedisa*, Commission decision of 1 February 1999, paragraph 29.

127 Questionnaire to Newspapers of 5 November 2010 - question 46 - 6 out of 6 respondents have raised either one or two of these concerns.

128 Non-horizontal Mergers Guidelines, paragraph 91.

221. To establish possible conglomerate leveraging, the Commission must show each of the following elements, in accordance with the Non-Horizontal Merger Guidelines, (i) that the merged firm would have the ability to foreclose its rivals, whether (ii) that it would have the economic incentive to do so and, (iii) that a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers[129].

222. The notifying party submits that with respect to News Corp's paid-for online news content, any possible offer of packaged deals including BSkyB's pay-TV services and News Corp's paid-for online news content would not have any foreclosure effect. The notifying party also submits that, with respect to News Corp's print newspapers, News Corp has no current plans to offer packaged deals including BSkyB's pay-TV services and News Corp's newspapers. Moreover, the notifying party considers that any such packaged deal would be highly unlikely to have any foreclosure effect *vis-à-vis* competing newspapers in the UK and in Ireland.

223. The Commission will not assess in more detail the submission that post-merger, the merged entity may further decrease the cover price of its newspapers and subsidise any resulting losses from BSkyB's revenue stream as it considers that this possible strategy is not merger-specific. Indeed, before the proposed transaction, News Corp already has the financial means to engage in a strategy of price reduction for its newspapers in the UK if it so wished and does not need the additional anticipated financial gains resulting from the acquisition of the remaining shares of BSkyB to do so.

224. The concern that the merged entity may use BSkyB's dominant position in pay-TV to foreclose rivals in the newspaper market by offering mixed bundling of subscriptions for print, online, or tablet applications of News Corp newspapers and BSkyB's pay-TV subscriptions at a price cheaper than the sum of the stand-alone subscription prices is further analysed below.

225. Following the Non-horizontal Merger Guidelines[130], the ability to engage in bundling practices requires the merged entity to hold a significant degree of market power in one of the markets concerned. In addition, there must be a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary. Finally, bundling practices are less likely if there are effective and timely counter-strategies that the rival single-product firms may deploy, such as combining their offers in order to make them more attractive or pricing more aggressively to maintain market shares.

226. The notifying party submits that BSkyB does not hold any significant degree of market power in the provision of audiovisual content to end-users in the UK and/or Ireland, and that absent dominance, bundling cannot have any anticompetitive effect. The Commission does not share this view and considers that BSkyB has a strong

129 Non-horizontal Mergers Guidelines, paragraph 94.

130 Non-horizontal Mergers Guidelines, paragraph 95 to 104.

position in the market for the retail supply of pay-TV in the UK, with a market share raising a presumption of dominance[131]. The combined market share of all of News Corp's newspapers is also significant is the UK and Ireland[132].

227. The Commission first investigated whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to print newspapers.

228. The notifying party submits that pay-TV and newspapers are not viewed by consumers as being complementary in the same way as, for instance, pay-TV and broadband internet and telephony where triple-play offers are marketed to customers.

229. The result of the market investigation was inconclusive as to whether, and to what extent, TV and newspapers are complementary goods or not. A number of newspapers submitted in response to the market investigation that TV programmes and newspapers are complementary goods, especially in terms of the provision of news and of information about programmes[133]. By contrast, most TV content providers replied that they are not complementary[134]. On that basis, the Commission cannot conclude that these goods are complementary and that a bundle of them may be attractive to customers.

230. Furthermore, the market investigation confirmed that the UK has historically had low newspaper subscription rates (around 6% of overall circulation), even lower on the tabloid market, and around 25-33% in the quality market[135]. The Commission therefore considers that creating a bundle of BSkyB's pay-TV with News Corp’s newspapers subscriptions may not be sufficiently appealing to customers as

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131 According to figures provided by the notifying party, BSkyB held [60-70]% of pay-TV subscriptions in the UK and between [70-80]% to [80-90]% of revenues in 2009.

132 According to figures provided by the notifying party, News Corp's newspapers combined [30-40]% of all newspapers circulation in the UK in 2009 ([30-40]% of daily and [40-50]% of weekly newspapers circulation; or [50-60]% of national daily tabloids and [20-30]% of national daily quality newspapers circulation, and [50-60]% of national weekly tabloids and [40-50]% of national weekly quality newspapers circulation); they combined [30-40]% of all newspapers revenue in the UK in 2009 ([20-30]% of daily and [30-40]% of weekly newspapers revenue; or [50-60]% of national daily tabloids and [20-30]% of daily quality newspapers revenues, and [80-90]% of national weekly tabloids and [40-50]% of national weekly quality newspapers revenues).

In Ireland, News Corp's newspapers combined [10-20]% of all newspapers circulation in 2009 ([10-20]% of daily and [20-30]% of weekly newspapers circulation; or [30-40]% of national daily tabloids and [0-5]% of national daily quality newspapers circulation, and [20-30]% of national weekly tabloids and [20-30]% of national weekly quality newspapers circulation); they combined [10-20]% of all newspapers revenue in 2009 ([10-20]% of daily and [10-20]% of weekly newspapers circulation; or [30-40]% of national daily tabloids and [0-5]% of daily quality newspapers revenues, and [10-20]% of national weekly tabloids and [20-30]% of national weekly quality newspapers revenues).

133 Questionnaire to Newspapers of 5 November 2010 - question 4 - 6 respondents. In that context, it is important to note that *The Sun* does not offer subscription services.

134 Questionnaire to Content Distributors of 5 November 2010 - question 43 - 5 respondents in total - 3 responded that TV and newspapers were not complementary goods, 1 responded that with the advent of 24h news channels, they were increasingly complementary, and one had no opinion.

135 Questionnaire to Newspapers of 5 November 2010 - question 20 - 6 out of 6 respondents.

subscriptions are currently not the distribution channel through which the vast majority of them buy their newspapers, even though customers are generally given a substantial discount (between 25-35%) in case of subscriptions.

231. The market investigation also confirmed that out of the factors motivating readers to purchase a particular newspaper, price is not the first factor, and only one out of several important factors influencing purchasing decisions and determining customer loyalty. The perceived political stance of a newspaper, family heritage, social-economic factors and the type of content are more important factors[136]. The Commission therefore also considers that creating a bundled subscription of BSkyB's pay-TV with News Corp's newspapers at an attractive price may not guarantee either that customers will switch in a significant manner away from their usual newspapers in order to start reading News Corp's newspapers, just because they are cheaper.

232. In conclusion, it appears that post transaction, the merged entity would not have the ability to engage in a bundling strategy between its pay-TV and print newspapers that may foreclose its newspaper competitors.

233. The Commission also investigated whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to online news website subscriptions.

234. The notifying party submits that internet-users interested in news typically read multiple online news websites for free, and that competition is very intense. It submits that there is no reason to believe that increased readership of News Corp online newspapers resulting from packaged offers would result in a disproportionate reduction in the readership of any particular rival source of online news.

235. The Commission first notes that News Corp is currently one of the two companies in the UK (the other being the Financial Times) that has started to charge for its online news websites, whereas the majority of its competitors have business models based on free digital news financed by advertising.

236. The market investigation also revealed that while some newspapers may have plans to potentially charge for (parts of) their news or for tablet applications, it is unlikely that in the future, News Corp's newspaper competitors will no longer provide online versions of their titles free-of-charge[137]. In addition, news aggregators such as Google News, Yahoo! News or The Huffington Post will continue to represent another free alternative to News Corp's online news websites. Therefore, the Commission considers that even if the merged entity was to bundle its pay-TV subscriptions with subscriptions to News Corp's online news services, there would still remain a large number of free online news websites for readers to access and it is unlikely that they would stop consulting them.

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[136] Questionnaire to Newspapers of 5 November 2010 - question 14 - 5 out of 6 respondents listed family heritage, perceived political stance, routine, social stance and content as main factors, only one respondent replied that price was the number one factor determining the choice of a newspaper.

[137] Questionnaire to Newspapers of 5 November 2010 - questions 5 and 6 – 6 respondents, 2 had no plans to charge for online news services, 1 replied that they had such plans for the future, and 3 replied that they had plans to charge for specific applications or specific subscriptions.

237. As a conclusion, it appears that post-transaction, the merged entity would not have the ability to engage in a bundling strategy between its pay-TV and online news websites that may foreclose its newspaper competitors.

238. The Commission also investigated whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to newspaper applications on <u>new electronic devices such as tablets or e-readers.</u>

239. iPad owners can download for free *The Times* app and use it for 30 days. Afterwards, they either can continue to use it for free if they are already subscribers to the online or print edition of *The Times*, or can purchase the app on a stand-alone basis for the price of GBP 9.99 for a 30-day period through the iTunes store[138]. The iPad apps for News Corp's weekly newspapers (*The News of the World* and *The Sunday Times*) will be charged, when launched, on a per-edition basis.

240. The market investigation revealed that in general, newspaper competitors of News Corp already have or consider the possibility to launch free or paid-for apps on iPads and similar e-readers[139]. The market investigation also showed that tablet makers have the incentive to accept as many newspaper apps as possible, including from News Corp's competitors, as they retain a portion of these apps' revenues[140]. It is therefore likely that in the future, most if not all newspapers competing with News Corp will market an app for their newspaper.

241. The Commission assessed whether newspaper apps on digital tablets may have to be consumed through some sort of subscription model. On one hand, when iPad owners purchase an app for *The Times* on a stand alone basis for the price of GBP 9.99 for a 30 day period, this represents a type of subscription model, even though the iTunes store does not currently allow for on-going subscriptions and customers have to renew their subscription on a periodic basis (currently 30 days). […]. Furthermore, some competing newspapers such as *The Independent* offer the app free of charge. It is therefore not clear, at this early stage of the development of these digital devices, to what extent newspaper apps will be based on some sort of subscription model.

242. The market investigation also highlighted that newspapers are currently somewhat restricted by tablet makers in the way (i) they price their application and (ii) charge for subscriptions[141]. For instance, it appears that the price of the newspaper apps on the Kindle e-reader is decided by Amazon, and not the newspapers. This seems to be confirmed by the fact that News Corp offers *The Times* iPad app for free to subscribers to thetimes.co.uk, but does not offer a similar reduction of fee for its app on Kindle (which can be bought for GBP 0.99 per copy or GBP 9.99 per month). It therefore seems that News Corp could face a number of technical or other commercial

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[138] News Corp submits that out of a total of […] customers accessing *The Times* publications via the iPad, approximately [>50]% are subscribers to one or more of News Corp's newspapers (printed or online), and approximately [<50]% are stand-alone subscribers via iTunes. Out of a total of […] customers accessing *The Sun* publication via the iPad, [>50]% are stand-alone subscribers via iTunes.

[139] Questionnaire to Newspapers of 24 November 2010 - questions 1 and 2 – 6 out of 6 respondents.

[140] Questionnaire to Newspapers of 24 November 2010 - question 2.

[141] Questionnaire to Newspapers of 24 November 2010 - questions 2.

restrictions imposed by tablet makers even if it wanted to engage in a bundling strategy for its pay-TV and newspaper apps subscriptions by offering a packaged subscription at a discount.

243. In addition, as in the case of print newspapers (see paragraph 231 above), price is only one, but not the main factor influencing purchasing decisions and determining customer loyalty, such that any possible bundling strategy may not switch readers away from their usual newspaper.

244. Also, it may take some time before the emerging digital news applications on tablets and other devices represent a significant part of the market (currently digital newspaper subscriptions to *The Times* are estimated as about [0-5]% of total daily print circulation in the UK, and to *The Sun* at about [0-5]%). In addition, although this number may increase quite significantly, the current number of iPads sold so far in the UK is still low compared to more than 11 million daily print newspapers sold per day and their price starts at GBP 429.

245. As a conclusion, new digital devices such as tablets are at a very early stage of development such that it is very difficult to assess any possible competition concerns with respect to subscriptions. On the basis of the business models developed so far, it appears that the merged entity would not have a greater ability to engage in a bundling strategy with BSkyB's pay-TV subscriptions foreclosing its newspaper competitors than is the case for its print edition or online news.

246. Based on the above, it appears unlikely that overall, the merged entity would have the ability to engage in a bundling strategy between pay-TV and (print, online or tablet-based) newspapers subscriptions that may foreclose News Corp's competitors in the newspaper market in the near future.

247. Even though any competition concern that the merged entity would foreclose its competitors in the newspaper market by bundling its pay-TV with newspaper subscriptions could be dispelled on the basis that the merged entity would not have the ability to foreclose its competitors through such strategy, the Commission also investigated whether News Corp would have an incentive to engage in such a strategy post-transaction.

248. As regards incentives, the Commission considers, in accordance with the Non-horizontal Merger Guidelines[142], that the incentive of the merged entity to foreclose its competitors depends on the degree to which a foreclosure strategy would be profitable. Thus, the possible gains from expanding market share must be compared to the possible losses that result from customers not purchasing the product bundle. It is unlikely that a company would risk losing sales on one large and highly profitable market in order to gain market share in a smaller, less profitable one. The Commission also takes into account the types of strategies adopted in the market in the past and the content of internal strategic documents.

249. The notifying party submits that it has no financial incentive to engage in such bundling strategy […]. News Corp will not therefore want to run the risk of losing pay-TV customers by engaging in such practices.

142 Non-Horizontal Merger Guidelines, paragraphs 105 to 110.

250. The notifying party further submits that there are a number of commercial considerations which would make such a bundling strategy not attractive to BSkyB.

251. First, offering discounts via package offers to BSkyB subscribers would have a disadvantage relative to offering direct discounts to newspapers readers in that it would, in general terms, be more expensive to achieve similar subscription results through such an "indirect" offer. It considers that a special offer on newspaper subscriptions via a package offer to BSkyB subscribers would likely to entail higher costs than offering these discounts directly to potential newspaper subscribers, as BSkyB subscribers who already subscribe to News Corp newspapers would be almost certain to take up the offer in order to save some money. From News Corp's perspective, this would be like lowering price to customers who are already willing to buy its papers at current prices.

252. Second, such a strategy would not be attractive to customers, and as a result to BSkyB, for the following reasons:

   a. BSkyB already has a large number of products to sell to customers and has to make decisions over which products to advertise to customers using available communications assets and resources. It is likely that BSkyB would prioritise other, more profitable products (both on a profit margin per unit basis and as to the percentage of potential subscribers likely to find the product appealing), over any bundle including newspapers;

   b. Navigating new subscribers through the complex combinations of packages available to them from BSkyB is already challenging (even with just the core combinations of TV packages, high definition, multi-room, broadband and telephony, there are currently over 80 000 different combinations for a new customer to choose from). BSkyB seeks to simplify those choices, not add further options that may not be as profitable.

253. As regards past examples of similar bundling strategies, the notifying party submits that News Corp has not implemented any bundling or tying strategy between pay-TV and newspapers (and/or online news services) elsewhere in the world, including in the US (for the period during which it controlled pay-TV operator Direct TV) and in Australia, where News Corp controls a number of newspapers (e.g., The Australian and Weekend Australian, The Daily (and Sunday) Telegraph, and the Herald Sun and Sunday Herald Sun) and the pay-TV operator Foxtel. The notifying party further submits that News Corp has no current plans to jointly offer, post-transaction, BSkyB pay-TV subscriptions with News Corp print or online news content.

254. As regards financial incentives, the Commission considers that News Corp's argument is only valid if the merged entity was to engage in a tying strategy where customers wishing to purchase a subscription to BSkyB's pay-TV platform would be obliged to take a subscription to one or several of News Corp's newspapers. The Commission considers that this would be a rather risky commercial strategy which is therefore unlikely to be put in place. In contrast, if the merged entity was to offer customers the possibility, but not the obligation to bundle their pay-TV subscription with a (print or online) newspaper subscription, there seems to be little risk of losing pay-TV customers by engaging in such practice.

255. However, the Commission takes notes that the arguments advanced by News Corp against such a possible bundling strategy appear to be commercially rational. In that

context, the Commission further notes that the market investigation confirmed that to the knowledge of the respondents, such bundling strategy between pay-TV subscription and newspapers (online or paper) had never been attempted before[143]. The market investigation has also confirmed that competing newspapers have not envisaged such strategy either.

256. Based on the above, it seems unlikely that the merged entity would have the incentive to engage in a bundling strategy that may foreclose News Corp's competitors in the newspaper market in the near future.

2.4. Conclusion

257. In light of the above, it can be concluded the proposed transaction does not raise any serious doubts as to its compatibility with the internal market with respect to possible bundling of News Corp's newspaper subscriptions with BSkyB's pay-TV subscriptions.

3. The Advertising Sector

258. In the UK and Ireland, News Corp sells advertising space in its print media (*The Sun, The Times, The Sunday Times, News of the World*, and *The Wall Street Journal*) as well as on its TV channels (in particular, on the *Fox*, *National Geographic* and *Star* channels) and various web properties such as its newspapers' websites as well as *MySpace* and *Fox.com*.

259. BSkyB sells advertising space and sponsorship[144] through its advertising sales house Sky Media on its own TV channels and some third party TV channels (from which BSkyB buys the advertising inventory and then resells it), its VOD programming services (*Sky* Anytime and *Sky Player*) as well as on its online media properties and certain third party websites in the UK and Ireland.

260. As of today, Sky Media buys and re-sells advertising space for some, but not all, of News Corp’s TV channels including the Fox and National Geographic channels. However, Sky Media does not sell advertising space in News Corp's print newspapers and websites, including online news services.

261. BSkyB is engaged in a […] number of integrated advertising deals where their clients can advertise across BSkyB's various media properties (TV channels, VOD, online) with one contract, […].

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143 Questionnaire to Content Distributors of 5 November 2010 - question 44 - 6 out of 6 respondents.

144 “Sponsorship” means the sale of sponsor credits, generally scheduled directly before and after the advertising break.

3.1. Market definition

3.1.1. Relevant product markets

262. The Commission has previously defined a separate product market for the sale of advertisement space in national daily newspapers[145] and in television broadcasting[146]. The Commission has also determined that a distinction can be drawn between online and offline advertising[147]. As regards online advertisement, the Commission further considered whether this market might be further segmented into search and display advertising but ultimately did not reach a conclusion[148].

263. The notifying party submits that it is not necessary to define the precise scope of the relevant product market for advertising, as the proposed transaction will not give rise to any competition concerns, regardless of the possible alternative market definitions. Alternatively, the notifying party submits that the sale of advertising comprises at the very least newspapers and online news services.

264. With respect to advertisement in print newspapers and online news services, a majority of respondents to the market investigation consider them as complementary and a minority as increasingly substitutable, at least to some degree[149]. The latter view is substantiated by the fact that UK newspapers have lost a significant share of advertising revenues in recent years, with by far the largest increase in revenues being seen in relation to online advertising.

265. Concerning advertising in newspapers, the market investigation indicated important differences between advertising in newspapers with *national* reach versus *regional or local* reach[150]. National newspapers currently offer a significantly lower cost per thousand readers to advertisers than regional and local newspapers. Moreover, nation-wide campaigns are currently far more difficult to book through regional newspapers although new market developments may lead to more ease of booking (and possibly

145 See Case COMP/M.3817 - *Wegener/PCM/JV*, decision of 07 July 2005, paragraph 27. Case N° IV/M.1401 *Recoletos/Unedisa*, Commission decision of 01 February 1999, paragraphs. 26-28.

146 See Case No IV/M.566 *CLT/Disney/SuperRTL*, decision of 17 May 1995, paragraph 14; case IV/M.525 *VOX (II)*, Decision of 21 December 1994, paragraph 16.

147 See Case COMP/M.4731 *Google/Double Click*, decision of 11 March 2008, paragraphs 45, 46.

148 See Case COMP/M.5727 *Microsoft/ Yahoo! Search Business*, decision of 18 February 2010, paragraph.75; Case COMP/M.4731 *Google/Double Click*, decision of 11 March 2008, paragraph 56.

149 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 5 out of 7 content distributors, 3 out of 5 newspapers, and 4 out of 5 media agencies who expressed an opinion did not consider advertising in national newspapers and in online news services to be substitutable. However, out of those saying that both media channels are not substitutable, 3 content distributors and 2 newspapers, media agencies recognize that online advertising is a partial substitute for advertisers and/or does exercise a strong constraint on advertising in print newspapers.

150 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 8 out of 10 content distributors, 5 out of 6 newspapers, and 3 out of 5 media agencies did not consider advertising in national newspapers and in regional/ local newspapers to be substitutable.

lower prices) for campaigns in regional/local newspapers going forward[151]. Finally, certain advertisers consider that the perceived editorial quality, as well as the measurement of reach ("audit"), differ between national and (some) regional/local titles.

266. Furthermore, most content distributors and media buying agencies suggested a segmentation of the national newspaper advertising market into daily and weekly sub-segments but the market investigation was inconclusive given that most newspapers did consider them to be substitutable[152]. Some respondents point out that there is a large or an increasing degree of substitutability. Others base a distinction mainly on the fact that *daily* newspapers enable advertisers such as retailers or content distributors to execute specifically timed media campaigns that are important for their direct response advertising campaigns.[153] A high share of advertising in newspapers by large pay-TV providers appears to be spent on direct response marketing[154]. Advertising in *weekly* (Sunday) newspapers is less important for time-critical advertising campaigns. Therefore, the sub-segment of advertising in daily national newspapers is of specific relevance to the competition concern examined here.

267. In line with findings in previous Commission decisions[155], the majority of respondents see advertisements in print newspapers and TV as separate markets[156]. While being able to reinforce each other, such advertisements expose sufficiently different characteristics (e.g. price, reach, consumption patters) to not be directly substitutable. The market investigation was inconclusive as to whether advertising on pay-TV and free-to-air TV are part of the same market[157]. However, in light of previous

151 Two respondents pointed out that a new advertising product called "OneLocal" provides a one-stop shop for agencies and advertisers to purchase advertising in all 84 regional / local daily titles in the UK at similar cost per thousand impressions..

152 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 9 out of 10 content distributors, 1 out of 6 newspapers, and 4 out of 5 media agencies did not consider advertising in daily national newspapers and in weekly (Sunday) newspapers to be substitutable. 5 out of 6 newspapers responded that they are substitutable.

153 Direct response advertising is a form of marketing designed to solicit a direct and specific response from potential customers who would contact the advertiser directly (e.g. by calling a call centre number). It is different from brand advertising (aiming to build awareness) and other forms of marketing such as direct marketing (the advertiser contacts the customer directly e.g. by mailings).

154 For instance, in its last five advertising campaigns, BSkyB spent the following percentage of each campaign's press/inserts advertising budget on direct response advertising: […]

155 See Case No IV/M.566 *CLT/Disney/SuperRTL*, decision of 17.05.1995, para. 14; case IV/M.525 *VOX (II)*, Decision of 21.12.1994, para. 16.

156 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 9 out of 10 content distributors, 3 out of 6 newspapers, and 4 out of 5 media agencies did not consider advertising on TV and in newspapers to be substitutable.

157 Questionnaires to content distributors, newspapers and media agencies of 5 November 2010 - 4 out of 7 content distributors, 2 out of 6 newspapers, and 1 out of 5 media agencies considered TV and pay TV advertising to be equivalent, whereas 9 out of all 18 respondents (all categories) considered them not to be in the same market (2 respondents did not express a view).

Commission decisions[158] as well as decisions by the OFT[159] concluding that there was a relevant market for all television advertising, it is likely that advertising on pay-TV is not a distinct advertising market in the UK.

268. For the purposes of the present decision, the Commission considers that the exact product market definition for the supply of advertising space can be left open as the proposed transaction does not raise any competition concerns under any of the alternative product market definitions considered.

3.1.2. Relevant geographic markets

269. In line with Commission precedents[160], the notifying party submits that the relevant product market for advertising (and/or any possible segment thereof) would be at least national in scope in the present case.

270. The market investigation indicated that the relevant geographic market for advertising is national and does *not* comprise both the UK and Ireland. Where a significant part of buyers of advertising space are active in both countries, most sellers of advertising space in various media channels differ. Intermediary media agencies tend to plan and execute campaigns through their local offices. Prices (at least) for certain media channels (TV, national press, outdoor) are significantly lower in the UK.

3.2. Competitive assessment

3.2.1. Horizontal overlaps

271. The notifying party submits that the merged entity's combined share in an overall advertising market encompassing all media channels in the UK and Ireland is well below 15%. It submits that the parties' activities do not overlap in the provision of advertising in the written press in the UK and in Ireland. It further considers that while their activities do overlap in the provision of TV as well as online advertising in the UK and Ireland, their combined market share does not exceed 15% within those markets/ segments (see table 6 below).

272. The Commission notes that the parties only have a relatively small combined market share in the markets for online and TV advertising in the UK and Ireland of [0-5]% and [10-20]% respectively. Therefore, the transaction does not give rise to horizontal competition concerns in these markets.

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[158] See Case COMP/M. IV/M.566, *CLT/Disney/SuperRTL*, Commission decision of 17 May 1995, paragraph 14; case COMP/M.1574, *Kirch/Mediaset*, Commission decision of 3 August 1999, paragraphs 11-12; case COMP IV/M.525, *VOX (II)*, Commission decision of 21 December 1994, paragraph 16.

[159] See ME/4569/10, BSkyB/Virgin Media Television, 14 September 2010, paragraph 26. ME/2811/06, BSkyB/ITV, Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc, Report to the Secretary of State for Trade and Industry, April 27 2007, paragraphs 197-198.

[160] See COMP/ M.1455 - *Gruner + Jahr/Financial Times/JV*, Decision of 20.04.1999, paragraph 21.

Table 6: Advertising Sales (UK – 2009[161])

Media	Total Market (M EUR)	BSkyB		News Corp		Combined Share (%)
		Revenue (M EUR)	Share of total sales (%)	Revenue (M EUR)	Share of total sales (%)	
All advertising	**[…]**	**[…]**	**[0-5]**	**[…]**	**[0-5]**	**[5-10]**
TV	[…]	**[…]**	[10-20]	**[…]**	[0-5]	[10-20]
Internet	[…]	[…]	[0-5]	**[…]**	[0-5]	[0-5]
Search	*[…]*	*[…]*	*[0-5]*	**[…]**	*[0-5]*	*[0-5]*
Non-search	*[…]*	*[…]*	*[0-5]*	**[…]**	*[0-5]*	*[5-10]*
Magazines	[…]	[…]	[0-5]	[…]	[0-5]	[0-5]
Newspapers	[…]	[…]	[0-5]	[…]	[10-20]	[10-20]
Other	[…]	[…]	[0-5]	[…]	[0-5]	[0-5]

Source: Parties and Zenith Optimedia Advertising Expenditure Forecast March 2010

3.2.2. Non-horizontal assessment

273. The parties' activities are vertically related to the extent that: (i) BSkyB is a supplier of News Corp, which purchases advertising space to promote its products and services on BSkyB's TV channels and/or websites; and (ii) BSkyB is a customer of News Corp, as it purchases advertising space to promote its products and services on News Corp's newspapers (and to a lesser extent, News Corp's websites and TV channels).

274. The notifying party submits that the market for the provision of advertising space in the UK and in Ireland is not affected since: (i) News Corp's share in the provision of advertising space on print newspapers in the UK and Ireland is below 25%, and (ii) BSkyB's share in the provision of advertising space on TV channels in the UK and Ireland is below 25%.

275. As pointed out above, the market investigation suggested that the relevant advertising product markets may comprise the supply of advertising space in *national* print newspapers (i.e. without regional or local newspapers) or even *daily* national print newspapers. News Corp has a market share of [30-40]% and [30-40]% respectively in these narrower markets/ sub-segments in the UK. Its share in the sub-segment of *weekly* national newspaper advertising amounts to [40-50]%. Therefore, these sub-segments/ markets are technically affected. In Ireland, News Corp's market shares are significantly lower, with [10-20]% of advertising in national print newspapers, [10-20]% in daily national print newspapers and [20-30]% in weekly national print newspapers in 2009. Only the latter sub-segment/market is therefore technically affected.

161 The parties submit that they do not distinguish internally between sales made for the UK and Ireland, but they understand that their shares within each segment would not be significantly different in Ireland.

a. Input foreclosure of BSkyB's competitors related to advertising in News Corp's newspapers

276. The first assessment concerns the possible risk of input foreclosure of BSkyB's competitors in relation to advertising in News Corp's newspapers. In the market investigation, a number of content distributors in the UK expressed the concern that, in the same way that they are currently denied access to advertising on BSkyB's wholly-owned channels, post-transaction, the merged entity would refuse them access to advertising space in News Corp's newspaper titles, or charge a competitive premium for advertising by BSkyB's rivals, thereby impeding their ability to attract subscribers and/or viewers for their channels. No such concerns were raised in Ireland. In addition, News Corp's market shares in national newspapers are significantly lower in Ireland. For these reasons, the analysis focuses on the market in the UK.

277. Following the Non-Horizontal Merger Guidelines, competition concerns could only arise if News Corp had (i) the ability to foreclose BSkyB's competitors from advertising in daily national newspapers, (ii) the incentive to do so and (iii) if this were to have an impact on the (pay) TV market[162].

i. Ability to foreclose

278. The notifying party submits that the merged entity will not have a significant degree of market power in the market(s) for advertising and that advertising on News Corp's titles does not constitute an important input in the provision of pay or FTA TV services.

279. According to the notifying party, News Corp's ability to restrict access to its own advertising space could only have detrimental effects on BSkyB's competitors if the latter could not advertise their services elsewhere. It also claims that News Corp and The Sun lack market power in the relevant advertising markets and that there are a number of strong newspaper publishers (e.g. Daily Mail General Trust, Trinity Mirror) that offer advertising space to a similar number of readers to that of News Corp’s newspapers.

280. A small number of respondents to the market investigation submitted that *The Sun* would be indispensable for advertising their products, or their clients' products, in UK newspapers[163].

281. The Commission considers that market shares in the narrower segments of national newspapers ([30-40]%) or daily national newspapers ([30-40]%) indicate that there are alternative opportunities to advertise. The market investigation confirmed that this is also true for the specific category of content distributors. Content distributors did not spend significantly more on News Corp's newspapers than the average newspaper advertiser. During 2007-2010, content distributors in the UK spent between [20-30]% and [40-50]% of their expenditure on national newspapers on titles owned by News

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162 See above, paragraph 222.

163 3 out of 21 respondents, Questionnaires to content distributors, newspapers and media agencies of 5 November 2010.

Corp. Moreover, most newspapers with national circulation responding to the market investigation indicated that there were little constraints on the capacity to supply advertising space. BSkyB's competitors would thus not be prevented by capacity constraints from switching their advertising budgets that were previously allocated to News Corp to alternative national newspapers.[164] For these reasons, it can be concluded that there exist sufficient alternatives for advertising in national newspapers and daily national newspapers. This is further confirmed by the data provided by third parties on the reach and effectiveness of direct response campaigns when substituting to alternative newspapers.

282. With respect to the alleged importance of News Corp's newspaper *The Sun*, the Commission notes that with […] average sales per day, *The Sun* has a share of [20-30]% of UK sales of daily newspapers, [30-40]% of sales of national daily popular press[165] and [50-60]% of sales of daily tabloid titles.[166] However, the Commission considers that there are a number of rival newspaper publishers that also have a large circulation, most notably *The Daily Mail* with […] sales per day ([10-20]% of UK sales of daily newspapers, [20-30]% of sales of national daily popular press). Moreover, the vast majority of respondents to the market investigation did not quote *The Sun* in particular as a publication necessary for advertising. Given *The Sun's* market shares and the results of the market investigation, the Commission does not consider *The Sun* to constitute an important input for advertising, within the meaning of the Non-Horizontal Merger Guidelines[167].

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[164] Questionnaires to newspapers of 19 November 2010 - question 3 - Four newspapers groups out of 6 respondents indicated that capacity constraints were not an issue. Two respondents said that there may be constraints at key times (e.g. Easter and pre-Christmas, as well as on Fridays and Saturdays). One respondent limited this statement to a situation where there was a sudden demand for several large sized advertisements during peak times.

[165] National popular press includes tabloid titles (such as *The Sun*, *Daily Mirror*, *Daily Star*) as well as mid-market titles (such as *The Daily Mail* and *Daily Express*).

[166] 2009 data from Audit Bureau of Circulations. Average sales per day of *The Sun* and *The Times* amount to 30% of all daily newspaper sales and *The News of the World* and *The Sunday Times* represent 40.4% of all weekly newspaper sales.

[167] 18 out of 21 respondents. Questionnaires to content distributors, newspapers and media agencies of 5 November 2010. Amongst others, some respondents also considered certain TV programmes, both FTA and pay TV, to be important for their advertising campaigns. However, to the extent that this involves BSkyB's content, such concern would not be merger-specific given that the transaction does not affect the current situation. Furthermore, one respondent to the market investigation submitted that certain socio-demographic sub-segments may be particularly valuable to advertisers and that News Corp's titles, including The Sun, have high reach for instance in the sub-segment of the 15-44 group. However, the relevant product market for the purposes of competition analysis is not defined, in this case, in terms of audience shares with specific socio-demographic target categories. Furthermore, it has not been substantiated that the audience segment of 15-44 year olds would be particularly attractive to advertisers in general or to content distributors in particular. Indeed, other sub-segments such as the "middle class" sub-segment may be considered equally or even more attractive to advertisers due to this audience's higher purchasing power. Moreover, the target audience will differ from one advertising campaign to another depending on who the advertisers identifies as the target group most likely to be responsive to the particular advertising message.

283. For the above reasons, it is not likely that the merged entity will have the ability to foreclose BSkyB's competitors by preventing them from advertising their services effectively.

ii. Incentive to foreclose

284. The notifying party submits that News Corp would not have the incentive to foreclose BSkyB’s competitors. Firstly, these companies account for a significant fraction of News Corp’s revenue stream. Given that some of them also purchase advertising space from News Corp for non-TV related activities they could retaliate and stop advertising for their other products. Secondly, it would be unlikely that such refusal would allow News Corp to achieve greater revenues through an increase in subscriptions to BSkyB’s pay TV services. Finally, the notifying party stresses that even though News Corp owns 39% of BSkyB, it has never refused to sell advertising space to BSkyB's competitors and that it is unlikely that the proposed transaction will bring about a change in its business strategy geared toward maximising revenues deriving from advertising.

285. The Commission notes that News Corp’s revenues derived from BSkyB's competitors advertising their products amounted to between […] and […][168], or [0-5]% and [0-5]% of News Corp’s overall revenues in newspaper and online advertising that year. Even taking into account the advertising spend of rivals with News Corp on non-TV related products such as broadband subscriptions, all advertising spending by these companies amounts to a total of less than [0-5]% of News Corp's overall revenues in newspaper and online advertising. The Commission therefore does not agree with the argument submitted by the notifying party that News Corp's advertising revenues from BSkyB's competitors represent a significant part of News Corp's overall advertising revenues. As a consequence, it appears that the cost for News Corp, in terms of foregone revenues, in undertaking the foreclosure strategy would not be prohibitive and therefore not constitute in itself a reason to refrain from it.

286. The Commission cannot therefore exclude that, due to its existing shareholding in BSkyB, News Corp already has an incentive to foreclose competitors of BSkyB provided that such strategy is effective and profitable. Such an incentive would only increase with the acquisition of 100% of BSkyB. The fact that News Corp has so far never refused to sell advertising space to BSkyB's competitors can therefore indicate that a strategy of foreclosing BSkyB’s competitors from advertising on News Corp newspapers may not be effective (e.g. in view of alternative advertising channels possibly available to the foreclosed advertisers) and/or profitable.

287. Therefore, assuming that News Corp *did* have an ability to foreclose, then it would likely have a greater incentive to implement such a strategy when it moves from 39% to 100% ownership of BSkyB.

iii. Overall likely impact on effective competition

[168] The exact amount depends upon the extent to which certain companies are considered close competitors and hence are included in, or excluded from, the calculation.

288. Assuming that News Corp not only has the incentive but also the ability to discriminate against BSkyB's competitors, the notifying party submits that this course of action would not result in anti-competitive effects by providing the following economic arguments.

289. The notifying party submits that the fact that News Corp does not currently foreclose BSkyB's competitors willing to advertise on News Corp's titles could be assumed as evidence that such a strategy is not profitable in view of the balance between foregone advertising revenues and additional revenues from new BSkyB subscribers. In 2009, BSkyB's closest competitors spent approximately […] on advertising in News Corp's print and online properties. Assuming that the foreclosing strategy were effective, this would mean that a "break even" would occur when current News Corp's advertising revenues from BSkyB's competitors correspond to an equivalent (or larger) increase in subscription revenues.

290. Estimations provided by BSkyB on the average net present value of new subscribers[169] with a horizon of […] years are […] and […] per subscriber, respectively. Based on those estimates, […][170] and […] new subscribers would be needed to balance the loss of […] in advertising after foreclosure. Since with [30-40]% ownership of BSkyB, News Corp did not have the incentive to foreclose, and full ownership would reduce the number of subscribers that would be necessary for the strategy to break even, it can be assumed, for the purposes of the economic analysis, that the worst-case scenario is that News Corp would manage to divert a maximum […] new subscribers from BSkyB's competitors. This number corresponds to approximately [0-5]% market share[171] that BSkyB would divert from its competitors. Assuming that this diversion would take place proportionally to the current share of each competitor, the strategy would only marginally modify the market shares (e.g. BSkyB up from [60-70]% to [60-70]%; Virgin Media down from [20-30]% to [20-30]%). The conclusion is therefore that assuming ability as well as the "maximum effect" for winning new subscribers, the impact on competition in the provision of pay TV services would be minimal.

291. The Commission observes that this analysis makes a number of working assumptions, which the Commission considers reasonable and relatively conservative. Firstly, the subscription revenues are likely to be underestimated, in view of the fact that the average lifetime of a subscription (and therefore the related revenue streams) is likely to be higher. In fact, on the basis of a churn rate of […][172], the average lifetime can be estimated to be […]). Secondly, even considering a higher amount of foregone advertising revenues (as noted above, when including less close competitors such revenues could be estimated to be […]), the point of break even and the overall impact in terms of market shares would be only slightly higher in absolute terms[173]. Thirdly,

169 […].

170 […].

171 Calculated on the basis of the number of total subscribers to pay TV services of 14 038 794.

172 News Corp's response of 23 November to questionnaire of 19 November (question 15).

173 The break-even under the worst case scenario ([…] years) would be […] = [...] / ([...]). This would amount to a market share of [<1]%, which would not materially change the conclusion.

this analysis is developed under the assumption that News Corp has acted rationally until to date by not refusing BSkyB's competitors the supply of advertising space in its newspapers. The Commission has no reason to question News Corp's rational behaviour with respect to this issue.

292. In addition, the Commission's own market investigation with third parties ascertaining the potential impact of possible foreclosure on BSkyB's competitors suggests that the likely impact would not be sufficiently significant. In particular, the market investigation revealed that foreclosing BSkyB's competitors from advertising on News Corp's titles would not be likely to have a significant impact on the response rates (e.g. calls into call centres) to direct response advertising campaigns. Simulations by content distributors show that the estimated responses by potential customers would fall in between [5-10]% and [20-30]%[174] assuming that the advertising budget formerly dedicated to News Corp titles are re-invested into the next best print titles. Taking into account the average rates for converting responses (e.g. received calls) into sales as provided by one of the respondents and by BSkyB, the lost sales on a yearly basis can be estimated between [0-5]% and [5-10]% of the respective annual growth in subscriber numbers. It should be noted that the real impact would likely be lower given that the simulation assumes that BSkyB's competitors do not substitute their spending with non-national print titles or alternative media channels such as direct mail or online advertising.[175] For these reasons, it would not appear that the potential impact on subscription numbers of rival TV providers would be sufficiently significant.

293. It is more difficult to measure the impact of potential foreclosure on the awareness of an advertiser's brand, products and services and promotions generated by advertising. "Impacts"[176] of an advertisement during a weekly campaign can be taken as a proxy to measure awareness on a comparative basis. Figures from weekly advertising plans submitted by content distributors show that the maximum loss in impacts in *national print* newspapers could amount to [10-20]%-[10-20]% if all of content distributors' spending on News Corp titles are substituted through next best performing print titles. It should be noted that the real impact would likely be lower given that the simulation assumes that BSkyB's competitors do not substitute their spending with non-national print titles or alternative media channels.

294. For the above reasons it appears that, even if the merged entity had the ability to foreclose BSkyB's competitors from advertising in its newspaper titles, the impact on

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174 The methods for calculating the impact on campaign response rates differ, which may explain the large variation. One content distributor estimates responses by (broadly) multiplying (i) the average weekly volume of gross circulation of the relevant titles during 2010 by (ii) the average weekly response rate attributable to those titles during 2010. Another content distributor used its media agency's calculations based on a proprietary tool and did not disclose the exact formula used.

175 Under the extreme hypothetical assumption that BSkyB's competitors could not re-invest their advertising budget formerly dedicated to News Corp titles into other print titles (or other media channels), the lost sales on a yearly basis would still be estimated between 11% and 14% of the respective annual growth in subscriber numbers.

176 "Impacts" means the reached adults in absolute numbers (i.e. coverage rate multiplied by 49 757 000 UK adults) multiplied by the frequency of an advertisement.

the market for the provision of pay TV services would not be significant enough to raise serious doubts.

iv. Conclusion

295. For the above reasons, it can be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to a possible input foreclosure of BSkyB's competitors as a result of a refusal to advertise in News Corp's newspapers, given that the merged entity will lack the ability to foreclose, and in any case, such a strategy would not have a significant impact on the market of providing pay TV services.

b. Advertising – Tying/Conditional selling of the Purchase of Advertisements in Newspapers to Purchase of TV Advertisements

296. A small number of respondents to the market investigation[177] pointed out that the merged entity could be able to conditionally sell advertising space and extend its position in national print newspaper advertising into other media channels including TV advertising. According to them, the merged entity could condition or incentivise purchases of advertising space from one of its media properties, such as print, on the purchase of advertising space in another, one such as TV or online.

297. The notifying party submitted that News Corp already has the ability to offer bundled solutions for advertising, but it is currently not engaging in any type of conditional selling between its newspaper advertising space and its TV channels. This is because TV-advertising and print advertising have different sales structures and different customers, and different media agencies would be used by advertisers to advertise on TV and on newspapers. It further submitted that it offers special prices ('targeted discounts') for incremental slots in its newspapers or TV channels, respectively, rather than conditional discounts as it would find the conditional selling not profitable. Furthermore, offering conditional discounting would result in a loss of infra-marginal revenue that it would not suffer via targeted discounts to sell incremental advertising space.

298. Furthermore, News Corp submitted that it does not already condition the sale of advertising in *The Sun* and *The News of the World* to advertising sales in any other publication. It is also mentioned that no advertiser has ever complained on conditional selling before the relevant representative bodies from advertisers in the UK. It appears that, when a customer purchases advertising space across a number of titles together, News Corp generally grants volume-based price incentives or advantageous rates.

299. For a conglomerate theory to be sustainable, the merged entity should be found to hold significant market power in one of the two tied markets[178]. The respondents who made submissions about this potential competition concern appear to rely on the allegation of significant market power of News Corp in newspaper advertising.

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177 Two media agencies and three TV competitors of BSkyB.

178 See the paragraph 221 for a description of the test.

300. The Commission considers that the significant market power of News Corp in newspaper advertising is not confirmed by the market share data available to the Commission. As mentioned above, News Corp's overall market share in print newspaper advertising in the UK is [10-20]%, with market shares in national print newspaper advertising and daily national print newspaper advertising reaching [30-40]% and [30-40]% respectively. The merged entity's market share in TV advertising would be [10-20]% in the UK (with News Corp's increment being [0-5]%) and its market share in online advertising would be [0-5]% ([0-5]% News Corp and [0-5]% BSkyB). In relation to these market shares, it is unlikely that the merged entity could be considered to have significant market power in national print newspaper advertising or in TV advertising.

301. Furthermore, as mentioned above (paragraph 282), the Commission found that there are alternative opportunities to advertise in national daily newspapers. As regards daily national newspapers, there are alternative players which have market shares around 10-15% each (The Daily Mail, Financial Times and the Daily Telegraph) and a high number of other national daily publications. Moreover, most newspapers with national circulation responding to the market investigation confirmed that they would not face capacity constraints for supplying advertising space.

302. All these elements taken together indicate that it is very unlikely that News Corp would have the ability to leverage its position in the market for advertising in national newspapers to the detriment of BSkyB's competitors in the TV advertising sector. In addition, the Commission takes notes that the arguments advanced by News Corp against such a possible bundling strategy appear to be commercially rational.

303. It can therefore be concluded that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to possible conditioning of the purchase of advertisements in News Corp newspapers to the purchase of TV advertisements from BSkyB

V. THE UK MEDIA PLURALITY REVIEW

304. Article 21(4) of the Merger Regulation recognizes that Member States may take appropriate measures to protect legitimate interests, such as plurality of the media. In the UK, the Secretary of State for Business, Innovation and Skills (the "Secretary of State") can intervene in mergers involving newspapers and/or broadcasting companies on public interest grounds by issuing a “European intervention notice”, making a proposed concentration subject to an additional review of media plurality issues by the UK authorities. Such review is distinct from the competition review carried out by the Commission and is carried out on separate legal grounds[179].

305. On 4 November, the Secretary of State issued a European intervention notice. This notice requires the relevant UK authorities to investigate and report by 31 December

179 When acting under Article 21(4) of the Merger Regulation, the Member State may take appropriate measures to protect its legitimate interests, provided that such measures are compatible with general principles and other provisions of EU law (recital 19). The European Intervention notice can be found on the following link: http://www.bis.gov.uk/assets/biscore/business-law/docs/b/bskyb-intervention-notice-nov-2010.pdf

2010 on whether the proposed transaction is or may be expected to operate against the public interest in sufficiency of plurality of persons with control of media enterprises[180].

306. The Merger Regulation grants the Commission the exclusive competence to scrutinise mergers of EU dimension on competition grounds. Pursuant to Article 2, paragraph 3, of the Merger Regulation, the Commission must assess whether the concentration would significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

307. The purpose and legal frameworks for competition assessments and media plurality assessments are very different. The focus in merger control is whether there is a "significant impediment to effective competition", including the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger. By contrast, a media plurality review reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient.

308. The media plurality review has also a different scope and focuses on issues going beyond a competition assessment. The media plurality assessment undertaken with reference to "broadcasting and cross media public interest considerations" includes[181]:

(a) the need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience in relation to every different audience in the UK or a particular area/locality of the UK;

(b) the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests;

(c) the need for persons carrying on media enterprises and for those with control of such enterprises to have a genuine commitment in relation to broadcasting to the attainment of the standard objectives set out in Section 319 of the Communications Act 2003 (for example: due impartiality of news, taste and decency).

309. The present decision is based solely on competition-related grounds under the Merger Regulation and is without prejudice to the media plurality review of the relevant UK authorities. Given that the purpose, legal frameworks, and focus of a competition review by the Commission on one hand, and a media plurality review by the relevant UK authorities on the other hand are different, the findings in the present decision are without prejudice to the UK media plurality review of the proposed transaction.

VI. CONCLUSION

310. For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the

180 Section 58 of the UK Enterprise Act 2002.

181 Ofcom guidance for the public interest for media mergers, paragraph 17.

EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation. This Decision is without prejudice to the Media Plurality Review conducted by the relevant UK Authorities.

For the Commission,
(signed by Neelie Kroes, p.p.)
Joaquín ALMUNIA
Vice-President