

EN

***Case No COMP/M.6880 - LIBERTY GLOBAL/ VIRGIN  
MEDIA***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION

Date: 15/04/2013

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Brussels, 15.04.2013  
C(2013) 2168 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

**To the notifying party:**

Dear Sir/Madam,

**Subject: Case No COMP/M.6880 – LIBERTY GLOBAL/ VIRGIN MEDIA  
Commission decision pursuant to Article 6(1)(b) of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 6 March 2013, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Liberty Global Corporation Limited ("Liberty Global Corporation", the United Kingdom), a wholly owned subsidiary of Liberty Global, Inc. ("LGI", the United States), acquires within the meaning of Article 3(1)(b) of the Merger Regulation control over Virgin Media, Inc. ("Virgin Media", the United States).
2. Liberty Global Corporation is designated hereinafter as the "Notifying Party". LGI and Virgin Media together are designated hereinafter as the "Parties".

**I. THE PARTIES**

3. **LGI** is an international cable operator. It owns and operates cable networks offering TV, broadband internet and voice telephony services in 11 European countries: Austria, Belgium, the Czech Republic, Germany, Hungary, Ireland, the Netherlands, Poland, Romania, Slovakia and Switzerland; and also in Chile and Puerto Rico. Through its Chellomedia division, LGI also distributes TV channels across Europe and beyond and

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<sup>1</sup> 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.

provides technical and other support services to TV broadcasters across Europe. In the United Kingdom, LGI offers a small number of channels: the Extreme Sports Channel and, via CBS Chellozone UK Channels Partnership, a joint venture with CBS, the CBS Action, CBS Drama, CBS Reality and Horror channels.

4. The largest minority shareholder of LGI is John Malone, a United States citizen,<sup>2</sup> who also holds significant minority shareholdings in Liberty Interactive Corporation ("LIC"), Liberty Media Corporation ("LMC") and Discovery Communications, Inc. ("Discovery"). John Malone holds also the positions of Chairman of the Board of LGI, LIC and LMC and is a Director of Discovery. LIC, LMC and Discovery are active in the wholesale supply of TV channels, including in the United Kingdom. John Malone will also be the largest minority shareholder of the merged entity following the proposed transaction, with an expected percentage of voting rights of approximately [...]%.
5. For the purpose of the present decision, the issue of whether John Malone controls each of LGI, LIC, LMC or Discovery (or will control the merged entity following the proposed transaction) can be left open, because the proposed transaction is unlikely to raise any competition concerns even under the assumption that Mr Malone controls one or more of these companies.
6. **Virgin Media** is an entertainment and communications company, which owns and operates a cable network in the United Kingdom. Virgin Media provides: (1) broadband, (2) Pay TV, (3) mobile telephony, and (4) fixed line telephony services. Virgin Media generated its 2012 turnover almost exclusively in the United Kingdom.

## II. THE CONCENTRATION

7. The proposed transaction involves the acquisition of sole control over Virgin Media by Liberty Global Corporation, which is currently a wholly owned subsidiary of LGI. Pursuant to an agreement between LGI, certain LGI companies newly formed for the purpose of the proposed transaction and Virgin Media, dated 5 February 2013, Liberty Global Corporation will acquire sole control of Virgin Media by way of acquisition of shares.
8. Post transaction, and following a simultaneous corporate reorganisation, Virgin Media and LGI will become wholly owned subsidiaries of Liberty Global Corporation. Ultimately, LGI's current shareholders will hold approximately [...]% of the voting rights of Liberty Global Corporation and Virgin Media's current shareholders will hold approximately [...]% of the voting rights of Liberty Global Corporation.
9. The proposed transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

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<sup>2</sup> LGI is listed on NASDAQ stock exchange. The largest shareholder of LGI, John Malone, ultimately holds approximately 37% of voting powers in LGI. To LGI's knowledge, no other stockholder has a significant equity interest in LGI.

### III. EU DIMENSION

10. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million<sup>3</sup> in 2012 (LGI: EUR 8 025 million; Virgin Media: EUR 5 057 million). They both had a combined aggregate EU-wide turnover of more than EUR 250 million in 2012 (LGI: EUR 6 203 million; Virgin Media: EUR 5 057 million) but did not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
11. The proposed transaction therefore has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

### IV. RELEVANT MARKETS

12. The proposed transaction gives rise to certain horizontal overlaps and vertical relationships between the Parties' activities in a number of relevant markets along the value chain for the licensing and distribution of audio visual TV content in the United Kingdom (and in Ireland), as well as in the provision of telecommunication services in Ireland.

#### **A. Licensing and distribution of audio visual TV content**

##### **i. Licensing of broadcasting rights for individual audio visual TV content**

13. Audio visual TV content comprises "entertainment products" (films, sports, TV programmes, etc.) that can be broadcast via TV.<sup>4</sup> The broadcasting rights belong to the creators of the content. These rights holders (which constitute the supply side of this market) license them to: (1) broadcasters which then incorporate them into linear TV channels (where programmes are broadcast at scheduled times); or (2) content platform operators which retail the content to end users on a non-linear, that is Pay-Per-View ("PPV") or Video-On-Demand ("VOD"), basis (which, together, comprise the demand side of this market).
14. LGI acquires broadcasting rights for individual audio visual TV content for inclusion in its Pay TV channels, which are distributed across Europe, including the United Kingdom and Ireland. Virgin Media acquires individual audio visual TV content for its retail VOD services in the United Kingdom. On the supply side, neither LGI, nor Virgin Media produces and licenses broadcasting rights for individual audio visual TV content that is distributed in the United Kingdom or Ireland either directly or following incorporation into TV channels.

##### *Product market*

15. The Notifying Party considers the licensing of broadcasting rights for stand-alone VOD content to be part of the overall market for the licensing of broadcasting rights for individual TV content. The Notifying Party does not, however, take a firm view on the exact product market definition, in particular on the issue whether the licensing of

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<sup>3</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.04.2008, p. 1).

<sup>4</sup> Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 28.

broadcasting rights for linear TV content (that is to say content for TV channels) and non-linear TV content (for example VOD or PPV) form part of the same or different product markets. In any event, the Notifying Party submits that the exact product market definition in the licensing/acquisition of broadcasting rights for individual audio visual TV content may be left open for the purposes of the review of the proposed transaction as, on any market definition, no competition concerns arise.

16. In previous cases, the Commission has first of all distinguished between the licensing of broadcasting rights for Pay TV and Free-To-Air ("FTA") individual audio visual TV content.<sup>5</sup>
17. The Commission has also previously sub-divided the market for the licensing of broadcasting rights for individual audio visual TV content into TV content for linear and non-linear broadcast.<sup>6</sup> In other cases, the Commission considered a more detailed breakdown based on the different exhibition windows, namely: (1) VOD; (2) PPV; (3) first Pay TV window; (4) second Pay TV window (where applicable); and (5) FTA TV.<sup>7</sup>
18. As regards content type, the Commission has previously defined different product markets for: (1) exclusive rights to premium films, (2) exclusive rights to football events that take place every year where national teams participate (for example national league, national cup, UEFA Cup and UEFA Champions League), and (3) exclusive rights to other sport events.<sup>8</sup> In *HBO/Ziggo/HBO Nederland*, the Commission discussed the possible existence of separate product markets for the licensing of broadcasting rights for: (1) films, (2) sport events and (3) other TV content.<sup>9</sup>
19. The market investigation conducted for the purpose of the review of the present proposed transaction did not reveal any new element that would change the previous findings of the Commission on the definitions of the product markets for the licensing and distribution of audio visual TV content. The market investigation generally confirmed the distinction between licensing of broadcasting rights for individual audio visual TV content for each of (1) films, (2) sport events and (3) other TV content<sup>10</sup>, even though some suppliers of audio visual content noted that there can be competition between these different types of content.
20. 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 product market definition for the licensing of broadcasting rights for individual audio visual TV content.

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<sup>5</sup> Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 35.

<sup>6</sup> Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 24-36.

<sup>7</sup> Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 18.

<sup>8</sup> Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 55.

<sup>9</sup> Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraphs 18-20.

<sup>10</sup> Questionnaire to suppliers (Q1) of 6 March 2013 - question 5.

### *Geographic market*

21. The Notifying Party submits that the question on the exact scope of the geographic market for the licensing of broadcasting rights for individual audio visual TV content can be left open in the present case.
22. The Commission has previously considered that the market for the licensing of broadcasting rights for individual audio visual TV content is either national in scope or potentially comprises a broader linguistically homogeneous area.<sup>11</sup>
23. In the present case, the market investigation revealed that the geographic scope of the contracts for licensing of broadcasting rights for individual audio visual TV content (films, sports, other TV content) is mainly national or may sometimes cover linguistically homogeneous areas (for example the United Kingdom and Ireland).<sup>12</sup> Generally, the respondents to the market investigation indicated that cultural, linguistic and other demand differences are the factors due to which the contracts are normally negotiated and concluded on a national basis (or for linguistically homogeneous areas).<sup>13</sup>
24. In light of the above and for the purposes of the present decision, the Commission concludes that the geographic scope of markets for the licensing of broadcasting rights for individual audio visual TV content (films, sports and other TV content) is national or, at most, covers linguistically homogeneous areas.

#### **ii. Wholesale supply of TV channels**

25. TV channel broadcasters acquire or produce individual audio visual content and package it into TV channels. These TV channels are then broadcast to end users via different distribution infrastructures (for example cable, satellite, internet, mobile etc.) either on a FTA basis or on a Pay TV basis (individually or as part of so-called "channel bouquets"). Hence, the supply side of this market comprises TV channel broadcasters and its demand side comprises TV retailers, which either limit themselves to "carrying" the TV channels and make them available to end users, or also act as channel aggregators (FTA or Pay TV platforms), which also "package" TV channels and provide them to end users.
26. Through its Chellomedia division, LGI produces and supplies a number of Pay TV channels to TV retailers across the EEA, including the United Kingdom and Ireland.
27. Virgin Media does not itself produce TV channels. Virgin Media acquires Pay TV channels from a number of providers, including LGI, and then offers these channels as part of Pay TV packages to end users over its cable network in the United Kingdom.

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<sup>11</sup> Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 62; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 73-75.

<sup>12</sup> Questionnaire to suppliers (Q1) of 6 March 2013 - question 8.

<sup>13</sup> Questionnaire to suppliers (Q1) of 6 March 2013 - question 11.

### *Product market*

28. The Notifying Party refers to several precedents where the Commission and the UK authorities discuss the markets for the wholesale supply of TV channels. It supports the distinction between the basic Pay TV segment and the premium Pay TV segment (primarily movies and sports channels). The Notifying Party does not, however, take a firm view on the exact product market definition. It submits that the exact product market definition in the wholesale supply of TV channels may be left open for the purposes of the review of the proposed transaction as, on any market definition, no competition concerns arise.
29. In previous decisions, the Commission identified a wholesale market for the supply of TV channels, in which channel broadcasters and retail TV suppliers negotiate the terms and conditions for the distribution of TV channels to end users.<sup>14</sup>
30. Within this market, the Commission further identified two separate product markets for FTA channels and for Pay TV channels. This distinction was mainly justified based on the differences between the financial models of these channels: the FTA channels are chiefly financed by advertising revenues (public channels may also be financed by public funds) whereas Pay TV channels are mainly financed by the fees paid by Pay TV distributors and end users.<sup>15</sup> In the United Kingdom, regulators have tended to distinguish between FTA TV channels and Pay TV channels according to the availability of the channel to consumers who do not pay for a TV subscription rather than on the basis of the business model of the channel provider. In its 2012 Communications Market Report, Ofcom distinguished FTA TV from Pay TV channels by identifying those channels available via the Freeview DTT platform as of May 2012 as FTA TV channels.<sup>16</sup>
31. Within the market for the wholesale supply of Pay TV channels, the Commission has also previously indicated that there is a differentiation between "basic" and "premium" Pay TV channels (for example premium sports and movies channels). However, it was left open whether these two categories of Pay TV channels constitute separate product markets.<sup>17</sup>

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<sup>14</sup> Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 76 and 85; Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 22.

<sup>15</sup> Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 37-40; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 80, 83 and 85; Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 24.

<sup>16</sup> Ofcom's Communications Market Report 2012, published 18 July 2012, available at [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR\\_UK\\_2012.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf).

<sup>17</sup> Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 76; Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 41-42; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 85; Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraphs 24 and 27.

32. In the past, the Commission also examined, but ultimately left open, whether the market should be further segmented by genre or thematic content (such as films, sports, news, youth channels, etc.).<sup>18</sup>
33. In the present case, the market investigation confirmed that FTA and Pay TV channels belong to separate product markets. The vast majority of the responding TV retailers and TV channel broadcasters did not view them as substitutable, in particular due to the different business models of FTA channels and Pay TV channels. Some market respondents noted that, while FTA channels are financed by advertising revenue or State funds, Pay TV channels generate revenue from fees of end users who are willing to pay for special premium and thematic content.<sup>19</sup>
34. The market investigation also generally indicated that there is a distinction between basic Pay TV channels and premium Pay TV channels, due to their different content and costs.<sup>20</sup> This finding is in line with the product market definition considered by the OFT in the *BSkyB/Virgin Media* decision and with Ofcom's findings in its three-year investigation in the Pay TV market in the United Kingdom.
35. As concerns content, the results of the market investigation pointed to a possible distinction between general interest Pay TV channels and thematic Pay TV channels.<sup>21</sup> While general interest Pay TV channels are more generic in nature and address different subjects and audiences, thematic Pay TV channels are focussed on more specific interests of end users (for example history, cooking, science, etc.). However, a number of respondents also stated that there may be a certain degree of substitutability between general interest and thematic Pay TV channels depending on the channel and the viewers.
36. Among thematic channels, the market investigation suggested that it may be appropriate to distinguish the channels according to their genre, for example sport, science, history, documentaries, news, etc. The majority of the responding TV retailers and TV channel broadcasters stated that a thematic Pay TV channel is only substitutable with a thematic Pay TV channel of the same genre.<sup>22</sup> Substitutability within genre may be more limited for sports channels, where there is a greater degree of exclusive content and interest of viewers in a particular sports type or event.
37. In light of the above and for the purposes of the present decision, the Commission concludes that the wholesale supply of FTA and Pay TV channels constitute separate

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<sup>18</sup> Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 76; Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 41-42; Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 35; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 81.

<sup>19</sup> Questionnaire to customers (Q3) of 6 March 2013 - questions 5 and 5.1; questionnaire to competitors (Q2) of 6 March 2013 - questions 6 and 6.1.

<sup>20</sup> Questionnaire to customers (Q3) of 6 March 2013 - questions 6 and 6.1; questionnaire to competitors (Q2) of 6 March 2013 - questions 7 and 7.1.

<sup>21</sup> Questionnaire to customers (Q3) of 6 March 2013 - questions 7 and 7.1; questionnaire to competitors (Q2) of 6 March 2013 - questions 8 and 8.1.

<sup>22</sup> Questionnaire to customers (Q3) of 6 March 2013 - questions 8 and 8.1; questionnaire to competitors (Q2) of 6 March 2013 - questions 9 and 9.1.



product markets. The question whether, within the market for the wholesale supply of Pay TV channels there are even narrower product markets may be left open since, as explained later in the relevant section of the competitive assessment, the proposed transaction does not raise competition concerns under any alternative product market definition for the wholesale supply of Pay TV channels.

#### *Geographic market*

38. The Notifying Party submits that the geographic market in the present case is likely to comprise the United Kingdom given the way the rights are sold and purchased.
39. In previous cases, the Commission found the market for the wholesale supply of TV channels to be either national in scope<sup>23</sup> or potentially to comprise a broader linguistically homogeneous area.<sup>24</sup>
40. In the present case, the market investigation has shown that the agreements for the wholesale supply of TV channels are, as a general rule, negotiated on a national basis.<sup>25</sup> This is partly explained by the fact that TV retailers mostly have a national footprint. More rarely, these agreements are negotiated for several Member States which usually share the same language (for example the United Kingdom and Ireland). Negotiations on a wider basis appear to be rather exceptional.
41. In light of the above, the Commission considers that the market for the wholesale supply of TV channels (whether FTA or Pay TV channels) is currently national or, at most, comprises a broader linguistically homogeneous area.

#### **iii. Retail supply of audio visual content to end users**

42. LGI is active in the retail supply of audio visual content to end users in Ireland, as well as in a number of EU Member States, but not in the United Kingdom. Virgin Media is active in the retail supply of audio visual content to end users only in the United Kingdom.

#### *Product market*

43. The Notifying Party recalls the Commission's precedents regarding the product market definition for the retail supply of audio visual content to end users, without expressing any particular view on the appropriate definition in the present case.
44. As identified in the *News Corp/BSkyB* decision, there are six main technical means of delivering audio visual content to end users, namely via: (1) analogue terrestrial television and digital terrestrial television ("DTT");<sup>26</sup> (2) satellite (also referred to as

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<sup>23</sup> Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 39.

<sup>24</sup> Commission Decision of 26 August 2008 in Case M.5121 Newscorp/Premiere, paragraph 27; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 86-88.

<sup>25</sup> Questionnaire to customers (Q3) of 6 March 2013 – question 9; questionnaire to competitors (Q2) of 6 March 2013 – question 10.

<sup>26</sup> DTT is transmitted on radio frequencies in a similar way to standard analogue television, with the difference that it uses multiplex transmitters to allow reception of multiple channels on a single frequency range. In order to view TV services broadcast via DTT, consumers require a DTT tuner, typically

Direct to Home ("DTH");<sup>27</sup> (3) cable;<sup>28</sup> (4) Internet Protocol Television ("IPTV");<sup>29</sup> (5) the internet more generally; and (6) mobile technologies. According to the Notifying Party, in the United Kingdom consumers have a choice of TV offers across all of these technologies. In previous cases, the Commission took the view that the different distribution technologies do not constitute separate product markets.<sup>30</sup>

45. In several past cases, the Commission also considered that the retail supply of Pay TV to end users constitutes a separate product market.<sup>31</sup>
46. Finally, the Commission also distinguished between the retail supply of linear (that is to say channels) and non-linear Pay TV content (for example VOD and PPV).<sup>32</sup>
47. In the present case, the market investigation confirmed that, generally speaking, TV services distributed through different technologies are substitutable to each other.<sup>33</sup> Price and content quality appear to be more important attributes for end users' decisions than the distribution technology. The market investigation, however, also indicated that substitutability may depend on the end user's actual ability to switch to a given TV distribution technology (for instance in light of the availability of this technology in a specific geographic area and/or due the possible existence of other restrictions and/or obstacles to switching).
48. The majority of the responding Pay TV retailers and TV channels broadcasters also confirmed that retail supply of Pay TV services constitute a separate product market from FTA channels.<sup>34</sup>

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contained either in a Set-Top Box ("STB") or integrated into the TV set, which decodes the digital signal. DTT has hitherto been predominantly used to broadcast FTA TV services.

- 27 Satellite technology or DTH involves distribution of digital content via satellite. Digital satellite requires a satellite dish and a STB or an integrated digital TV set to receive digital TV services. BSkyB was the first, in 1998, to launch a digital DTH satellite platform in the United Kingdom. Ten years later in 2008 a second digital satellite platform, branded as Freesat, was launched by the BBC and ITV.
- 28 Digital content may also be distributed via cable networks. Receiving digital cable TV services often requires consumers to have a digital STB.
- 29 IPTV involves delivery of streamed linear and on-demand TV content to subscribers or viewers using internet protocol, the technology that is also used to access the internet.
- 30 Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraph 46; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 103-105.
- 31 Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 47; Commission Decision of 13 July 2006 in Case M.4204 Cinven/UPC France, paragraph 18; Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraph 45; Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 20; and Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 99.
- 32 Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 106-107.
- 33 Questionnaire to customers (Q3) of 6 March 2013 – questions 11 and 11.1; questionnaire to competitors (Q2) of 6 March 2013 – questions 12 and 12.1.
- 34 Questionnaire to customers (Q3) of 6 March 2013 - questions 5, 5.1 and 10.1.3; questionnaire to competitors (Q2) of 6 March 2013 - questions 6, 6.1 and 11.1.3.

49. Finally, the market investigation also provided indications that the retail supply of linear and non-linear TV audio visual content to end users may still constitute separate product markets.<sup>35</sup>
50. In light of the above and for the purposes of the present decision, the Commission concludes that the retail supply of Pay TV services to end users constitutes a separate product market. The question whether other market segmentations would be appropriate can be left open, since, as explained later in the relevant section of the competitive assessment, the proposed transaction does not raise competition concerns under any alternative product market definition for the retail supply of audio visual content to end users.

#### *Geographic market*

51. The Notifying Party submits that the market for the retail supply of audio visual content to end users is national, as offers tend to differ significantly from country to country.
52. In its previous decisions, the Commission considered that the markets for the organisation of television, including the retail markets for the supply of audio visual content to end users are national in nature or, at most, may relate to linguistically homogeneous areas.<sup>36</sup>
53. In the present case, the market investigation revealed that a number of TV retailers are active only in either the United Kingdom or Ireland.<sup>37</sup> For example, due to the geographic footprint of their networks, Virgin Media is only active in the United Kingdom and LGI, via UPC Ireland, only in Ireland. At the same time, BSkyB provides its services at the retail level via satellite in both the United Kingdom and Ireland.
54. For the purposes of the present case, the Commission considers the geographic market for the retail supply of audio visual content to end users to be national in scope or, at most, to comprise the United Kingdom and Ireland.

### **B. Provision of telecommunication services**

#### *Product market*

55. In addition to TV-related services, the Parties also provide telecommunication services in the territories where they are active.
56. The Notifying Party submits that, consistent with prior Commission decisional practice, the telecommunication activities of the Parties fall within the following product markets: (1) retail market for fixed telephony services; (2) wholesale market for call termination on fixed networks; (3) retail market for mobile telephony services; (4) wholesale market for call termination on mobile networks; (5) retail market for internet access; (6) retail

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<sup>35</sup> Questionnaire to customers (Q3) of 6 March 2013 – questions 10.1.1 and 10.1.2; questionnaire to competitors (Q2) of 6 March 2013 – questions 11.1.1 and 11.1.2.

<sup>36</sup> Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 110.

<sup>37</sup> Questionnaire to customers (Q3) of 6 March 2013 – question 12; questionnaire to competitors (Q2) of 6 March 2013 – question 14.

market for multi play and triple play services; (7) wholesale market for carrier services; and (8) retail market for business communication services.

57. 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 product market definition for the provision of telecommunication services.

#### *Geographic market*

58. According to previous Commission decisions, the geographic scope of the telecommunication markets mentioned in paragraph 56 above is either national or corresponds to the footprint of the relevant provider's network (except for the wholesale market for carrier services which is likely to be global in scope).

## **V. COMPETITIVE ASSESSMENT**

### **A. Licensing and distribution of audio visual TV content**

#### **1. Horizontal analysis**

##### **i. Licensing of broadcasting rights for individual audio visual TV content**

59. There is a horizontal overlap between the activities of LGI and Virgin Media on the acquisition side of the market for the licensing of broadcasting rights for individual audio visual TV content in the United Kingdom (or in the United Kingdom and Ireland if the geographic scope of the market is deemed to cover both territories). In the United Kingdom, both companies purchase such content (LGI acquires audio visual TV content for inclusion in its Pay TV channels, and Virgin Media for inclusion in its VOD services). In a market comprising the United Kingdom and Ireland, LGI would also acquire audio visual TV content for use in its Irish VOD services.

#### View of the Notifying Party

60. The Notifying Party submits that, from a supply-side perspective, neither LGI nor Virgin Media (nor any of the TV channels where John Malone has a minority stake) produces individual audio visual TV content that is distributed in the United Kingdom or Ireland either directly or following incorporation into TV channels. Moreover, according to LGI, the Parties have only limited activities on the demand side of this market.
61. LGI's Chellomedia division (directly and through the CBS UK Partnership) acquires individual TV content for inclusion in its Pay TV channels which are distributed across Europe, including in the United Kingdom. In 2012, LGI's total expenditure (including Chellomedia) on individual audio visual TV content in the United Kingdom was around EUR [...]. The CBS UK Partnership spent just over GBP [...] (EUR [...]) on individual content in the United Kingdom and the Extreme Sports Channel spent approximately USD [...] (EUR [...]) in the United Kingdom and Ireland.
62. The Notifying Party cannot rule out that the TV channels in which John Malone has a minority stake acquire individual TV content for those channels, which are distributed in the United Kingdom and Ireland. The Notifying Party is not aware of any publicly available data on the amount of expenditure on audio visual content by these TV channels.

63. Virgin Media provides a range of on-demand content to its customers, including TV catch-up and back catalogue programmes as well as PPV services. Virgin Media acquires non-linear content in the form of SVOD and VOD content. Virgin Media acquires [...] content from a range of providers including Channel 4, ITV and Five and acquires film [...] content primarily from FilmFlex, which it brands as Virgin Movies on its service. Virgin Media spent approximately GBP [...] (EUR [...]) on non-linear content in 2012.
64. Based on LGI's own estimates, the Parties' combined share in the acquisition of all audio visual TV content in the United Kingdom is [0-10]%. This share would also remain below 10% even if the content acquired by the channels in which John Malone has a minority stake, were to be taken into account.
65. If this market were to be further segmented between the acquisition of each of films, sports and other TV content for all TV or even Pay TV only, the Parties' combined share in the United Kingdom would be below 15% in each of these segments (including possible sub-segments for premium films and/or premium sports and other TV content). This share would also remain below 15% even if the content acquired by the channels in which John Malone has a minority stake were to be taken into account.
66. Moreover, while Virgin Media is active in the acquisition of content for its non-linear services, LGI acquires content for inclusion in its linear TV channels (the same is true for the channels in which John Malone has a minority stake). As a result, there would be no overlap between the Parties' activities if the relevant market were to be segmented based on the type of broadcasting window and/or of service (linear versus non-linear) offered.
67. Finally, should the geographic market encompass the United Kingdom and Ireland, the total value of purchases of content rights would clearly be higher than looking at the United Kingdom alone. Virgin Media does not purchase any broadcasting rights for Ireland. LGI purchases some individual audio visual TV content for use in its Irish VOD services (2012 spend of EUR [...]). In any event, the Notifying Party estimates that the Parties' combined market share across the United Kingdom and Ireland would be [0-5]% under any of the above discussed market definitions (and below 10% if the channels in which John Malone holds a minority stake were to be taken into account).

#### Commission's assessment

68. Based on the figures provided by the Notifying Party, the Parties have a low combined market share on the acquisition side of the market for the licensing of broadcasting rights for individual audio visual TV content in the United Kingdom and/or Ireland. These figures appear to be reliable and were not contradicted by the respondents to the market investigation. Hence, the proposed transaction will result only in a limited increase in the Parties' market presence, which will remain small post transaction. Consequently, the Commission takes the view that the market for the licensing of broadcasting rights for individual audio visual TV content in the United Kingdom and/or Ireland is not horizontally affected by the proposed transaction.
69. Furthermore, none of the content providers, which participated in the Commission's market investigation, raised concerns as regards the fact that the conditions under which

they license content to each of LGI and/or Virgin Media may be negatively impacted by the proposed transaction.<sup>38</sup>

70. Therefore, the Commission considers that the proposed transaction does not give rise to serious doubts as regards its compatibility with the internal market as a result of the horizontal overlap between the Parties' activities in this market.

**ii. Wholesale supply of TV channels**

71. There is no horizontal overlap between the Parties' activities on the supply or demand side of the market for the wholesale supply of TV channels in the United Kingdom, as only LGI (via its Chellomedia division) supplies Pay TV channels in the United Kingdom.
72. There is, however, a horizontal overlap between the activities of LGI and Virgin Media on the demand side of the market for the wholesale supply of (Pay) TV channels if the market is deemed to cover the linguistically homogenous area comprising the United Kingdom and Ireland. Indeed, Virgin Media is active in the acquisition of Pay TV channels in the United Kingdom and LGI (via its subsidiary UPC) is active in the acquisition of Pay TV channels in Ireland. The proposed transaction may therefore lead to an increase in LGI's buyer power in this market.
73. Moreover, as pointed out by some respondents to the market investigation, since LGI is active in the acquisition of (Pay) TV channels in several Member States (in addition to Ireland), the question also arises as to whether the combination between the Parties would strengthen LGI's buyer power in negotiations with (Pay) TV channel providers across different Member States.
74. In particular, a limited number of respondents to the market investigation indicated that, post transaction, the merged entity's increased presence as a TV retailer in a number of Member States may lead to an increase of its buyer power vis-à-vis TV channel broadcasters. According to these respondents, by engaging in multi-territory negotiations with Pay TV channel broadcasters, the merged entity would be able to obtain better terms and conditions from (or even exclusive access to) these TV channels. Moreover, and again according to these respondents, since, in the case they were to grant better terms and conditions to the merged entity, these Pay TV channels broadcasters would have to compensate for the worsened conditions they will receive from the merged entity, they will likely increase the price for their channels to the merged entity's competitors at the retail level, which would therefore have to pay more for these channels and risk being foreclosed.<sup>39</sup>

View of the Notifying Party

75. The Notifying Party explains that retail Pay TV markets in the EU are still highly fragmented with viewing shares vastly dominated by local broadcasters in local languages. As a result, channel negotiations are essentially driven by the needs and commercial imperatives of local cable operations. The geographic scope of these negotiations will also be dependent on other factors, including whether the Pay TV

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<sup>38</sup> Questionnaire to Suppliers (Q1) of 6 March 2013, questions 17 and 18.

<sup>39</sup> Questionnaire to Customers (Q3) of 6 March 2013, replies by some respondents to question 23.

channels are relevant for a given market, and which LGI operating countries are interested in adding the relevant channels, as well as whether any pre-existing agreements terminate at a similar time, and the extent to which the TV channel suppliers are open to a centralised approach.

76. The Notifying Party does not, however, exclude that, post transaction it may have the ability to negotiate with TV channel broadcasters across multiple territories, including, in particular, linguistically homogeneous territories, such as the United Kingdom and Ireland.
77. Nevertheless, the Notifying Party submits that today it does not enjoy buyer power vis-à-vis TV channels suppliers and, in any event, the proposed transaction will not confer upon it any buyer power (and/or increase any buyer power, which may exist today) for a number of reasons.
78. First, despite the lack of available data on the channel spend by Pay TV retailers in the United Kingdom or Ireland, the Notifying Party estimates that the merged entity's market share in the acquisition of Pay TV channels across the United Kingdom and Ireland is below [30-40]%. The Notifying Party also submits, by way of comparison, that BSkyB's market share in the same relevant market would be much larger, around [60-70]%, with other market participants accounting for [the remainder].
79. Second, many TV channels suppliers to LGI are large sophisticated players with significant bargaining power (for instance Comcast/NBC Universal, Time Warner, Viacom, Disney). Sales to LGI (and to the merged entity following the proposed transaction) only represent a very small proportion of these players' global revenues. Alternatively, these TV channel suppliers may be very strong national broadcasters, which either enjoy "must carry" status or are commercially "must have" channels for any Pay TV retailer in the relevant Member State.
80. Third, the proposed transaction will not lead to any increase in the merged entity's buyer power vis-à-vis those TV channel suppliers, which currently only supply to one of LGI or Virgin Media and are not likely to start supplying to both companies in the near future. This will be the case, for example, for many of LGI's TV channel suppliers, which specialise in the supply, for example, of German language TV channels (and which are therefore unlikely to start operating in the United Kingdom in the near future).
81. Fourth, to the extent that LGI and Virgin Media have common TV channel suppliers today, these suppliers mainly consist of large and sophisticated players, which enjoy significant countervailing negotiating power.
82. As a result, the Notifying Party considers that, post transaction, it will not be able to obtain better terms and conditions (and/or exclusivity) from TV channel suppliers as a result of its increased buyer power whether in the United Kingdom and Ireland or elsewhere in the EEA.
83. In any event, the Notifying Party also submits that, even if the proposed transaction were to lead to an increase in the merged entity's buyer power, it is unlikely that TV channel providers would seek to directly recoup a loss in any one territory from the combined entity's retail Pay TV platform competitors in that territory. Suppliers of content to both LGI and Virgin Media are large, international, media groups with multiple sources of income. There is no reason to assume that negotiations with all retail Pay TV customers in a given territory form a single sum game so that a reduction in

price in negotiation with one customer in a Member State must necessarily lead to an increase in price in negotiation with another customer in the same Member State. Furthermore, even in the event that it was possible to identify significant likely cost savings as a result of the combination of LGI and Virgin Media, and it was considered likely that the combined entity would use these cost savings to lower retail prices, this is primarily a pro-competitive effect.

#### Commission's assessment

84. The Commission does not consider that the proposed transaction would likely lead to the merged entity being able to obtain significantly better terms and conditions from TV channel suppliers due to its increased geographic footprint and/or that, as a result, the merged entity's competitors in the retail supply of audio visual content to end users would be foreclosed from the market, for a number of reasons.
85. First, the Commission did not find any evidence in the internal documents of LGI that the Notifying Party anticipated significant cost savings from the proposed transaction stemming from future negotiations [...].
86. Second, a majority of audio visual content providers, which replied to the market investigation, confirmed that by and large, until now, most negotiations between them and Pay TV retailers take place on a national basis. One respondent explained that, occasionally, they have "*concurrent negotiations happening in different territories with different parts of LGI (e.g. with UPC in different countries)*" but that, in their experience, LGI does not engage in multi territorial negotiations as a rule<sup>40</sup>. A majority of TV channel broadcasters also confirmed that negotiations with Pay TV retailers are still conducted in most cases on a national basis or for linguistically homogeneous areas.<sup>41</sup> In other words, the market investigation confirmed that today multi-territorial negotiations between content providers / TV channel suppliers and pay TV retailers continue to be the exception rather than the rule in the EEA.
87. Third, based on information provided by the Notifying Party, it appears that one of the reasons why multi-territorial negotiations with TV channel broadcasters do not regularly take place is that a large proportion, if not the majority, of the TV channels, which are broadcast on LGI's Pay TV channel platforms across Europe, are local TV channels that are not being broadcast in other Member States.
88. As a result, it appears that, in practice, multi territorial negotiations with TV channel broadcasters happen only occasionally and mainly with a limited number of large international groups, such as BSkyB (limited to the United Kingdom and Ireland), Disney, Viacom and Time Warner.
89. The TV channels belonging to the above identified groups are also the ones which account for the vast majority of Virgin Media's current spend on TV channels, as well as the main common TV channels across LGI's and Virgin Media's retail Pay TV platforms. They are therefore the TV channels which could potentially most be damaged by a possible increase in buyer power on the part of the merged entity as a result of the proposed transaction. Indeed, these are the TV channels for which the proposed

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<sup>40</sup> Questionnaire to Suppliers (Q1) of 6 March 2013, question 13.

<sup>41</sup> Questionnaire to Competitors (Q2) of 6 March 2013, question 10.



transaction may actually change something compared to the current situation, as they would potentially have to deal with one stronger player (the merged entity) instead of with each of LGI and Virgin Media separately.

90. However, during the market investigation, none of these TV channels raised concerns in relation to a possible increased buyer power on the part of the merged entity as a result of the proposed transaction. As a matter of fact, the vast majority of the current Virgin Media TV channel suppliers did not raise any such concerns in response to the Commission's market investigation.
91. In light of the above, the Commission considers that it is unlikely that, post transaction, the merged entity will enjoy such a degree of buyer power to be able to obtain better terms and conditions than each of LGI and Virgin Media currently obtain from TV channel suppliers (and/or to even impose on these suppliers the granting of exclusivity for the broadcasting of their TV channels) in the UK and Ireland, as well as in other Member States.
92. In any event, even if, post transaction, the merged entity were to be able to secure better terms and conditions (and/or even exclusive access) to some of the TV channels, which are present across multiple territories, and which do not enjoy a sufficient degree of countervailing negotiating power to resist any such requests from the merged entity, it is unlikely that, as a result, the merged entity's competitors in the retail of audio visual content to end users would be foreclosed. This reflects the fact that the TV channels, which may be less likely to enjoy a sufficient degree of countervailing negotiating power to resist any such requests, are in all likelihood those TV channels which are less important for a Pay TV retailer to carry and to include in its channel bouquets. Indeed, the more important the TV channel is for a Pay TV retailer, the greater is this channel's negotiating power vis-à-vis the Pay TV retailer, and therefore the less likely it is that such TV channel would give in to the merged entity's request (and vice versa). As a result, the merged entity's Pay TV retail competitors would likely be able to continue to compete with the merged entity post transaction (and therefore they would be unlikely to be foreclosed) even if they were obliged no longer to carry some of these TV channels (either because they would not be able to pay for the increased fees requested by these channels or because of these channels entering into an exclusivity agreement with the merged entity).
93. As a result, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as a result of the combination of the Parties' activities on the demand side of the market for the wholesale of Pay TV channels in the UK and Ireland (as well as in other Member States).

### **iii. Retail supply of audio visual content to end users**

94. Finally, on the market for the retail supply of audio visual content to end users, there is no horizontal overlap between the activities of Virgin Media in the United Kingdom and of LGI in Ireland. This reflects the fact that, due to the geographic footprint of their cable network, each of Virgin Media and UPC (the LGI subsidiary, which is active in the provision of retail TV services in Ireland) can only provide their retail services in, respectively, the United Kingdom and Ireland. As a result, despite the fact that the market for the retail of TV services could potentially cover a linguistically homogeneous area comprising the United Kingdom and Ireland, the proposed transaction does not give rise to any horizontal overlap between the Parties' activities in this market.

95. Therefore, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as a result of the combination of the Parties' activities in the retail supply of audio visual content to end users. Therefore, this market is no longer addressed in the horizontal analysis section of the present decision.

## 2. Vertical analysis

96. There is a vertical relationship between the activities of the Parties in the United Kingdom since LGI (via Chellomedia) is active in the wholesale supply of Pay TV channels and Virgin Media acquires Pay TV channels for inclusion in the channel bouquets which it offers to its Pay TV subscribers in the United Kingdom.

97. The Notifying Party estimates that Virgin Media's share in the retail supply of Pay TV channels in the United Kingdom is around [20-30]% (and considers this share to be a good proxy for Virgin Media's market position in the acquisition of Pay TV channels). Accordingly, the vertical link between LGI's activities in the wholesale supply of Pay TV channels, and Virgin Media's activities in the acquisition of and retail of Pay TV channels gives rise to vertically affected markets in the United Kingdom.

98. During the market investigation, some TV retailers expressed concerns regarding the possibility that, post transaction, the merged entity may deny third party Pay TV retailers access to its Pay TV channels (or otherwise unfairly discriminate against these retailers and in favour of Virgin Media as regards access to these channels) in the United Kingdom.<sup>42</sup> Also, certain TV channel broadcasters expressed concerns that, post transaction, the merged entity may restrict access to its Pay TV platform or otherwise unfairly discriminate in favour of the LGI Pay TV channels (and/or the channels in which John Malone has a minority stake) and against competing Pay TV channels (for example, by moving these competing channels to less favourable positions in its electronic programme guide or EPG).<sup>43</sup>

99. The Commission therefore analysed whether the proposed transaction would give rise to a risk of: (1) input foreclosure for retail Pay TV providers in the United Kingdom; and (2) customer foreclosure for TV channel broadcasters in the United Kingdom.

100. For completeness, it is noted that the claim made by some respondents to the market investigation, according to which the proposed transaction may lead to input and/or customer foreclosure in Member States *other than the United Kingdom*, is unfounded as it is not merger-specific. Indeed, LGI is already present in the wholesale of TV channels and in the provision of audio visual TV content to end users in a number of other Member States and the proposed transaction will not change anything in this respect, as Virgin Media is only active at the retail level in the United Kingdom. As a result, the United Kingdom is the only Member State, where the proposed transaction will give rise to a vertical integration between LGI's activities in the wholesale of TV channels and Virgin Media's activities in the retail of audio visual TV content to end users.

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<sup>42</sup> Questionnaire to Customers (Q3) of 6 March 2013, question 23.

<sup>43</sup> Questionnaire to Competitors (Q2) of 6 March 2013, questions 26 and 29.

**i. Potential input foreclosure for retail Pay TV providers**

View of the Notifying Party

101. The Notifying Party argues that its position in the market for wholesale supply of TV channels in the United Kingdom is insignificant. As mentioned in paragraph 3 above, LGI offers a small number of channels in the United Kingdom : the Extreme Sports Channel and, via CBS Chellozone UK Channels Partnership, a joint venture with CBS, the CBS Action, CBS Drama, CBS Reality and Horror channels. The Notifying Party submits that LGI's channels represent a very small proportion of the hundreds of channels available to United Kingdom consumers. In addition, the companies in which John Malone holds a minority interest only supply 20 channels in the United Kingdom.
102. In terms of viewers' share, the Notifying Party submits that, in 2012 in the United Kingdom, its TV channels had a total share of approximately [0-5]% of all TV channels. If the TV channels in which John Malone has a minority stake are also taken into account, this share increases to around [0-5]%.
103. When considering Pay TV channels only, the Notifying Party submits that the viewers' share of LGI in the United Kingdom is also minimal ([0-5]% for LGI alone, or [5-10]% if the channels in which John Malone has a minority stake are also taken into account). When considering the narrower market segment of basic Pay TV channels only, the Notifying Party submits that the viewers' share of LGI in the United Kingdom is similarly small ([0-5]% for LGI alone, or [5-10]% if the channels in which John Malone has a minority stake are also taken into account).
104. In terms of revenue share, the Notifying Party estimates LGI's share of all Pay TV channels in the United Kingdom to be less than 10%, even if the channels in which John Malone has a minority interest are taken into account. Considering basic Pay TV channels only (none of the LGI channels and/or of the channels in which John Malone has a minority stake is considered to be a premium channel), the above share (even including the channels in which John Malone has a minority stake) would be again below 10%.
105. As regards a possible segmentation of the market for the wholesale supply of (Pay) TV channels by genre, the Notifying Party submits that there is no established way to calculate market shares by genre because there is no established way in which genres have been defined or TV channels allocated to each genre. The Notifying Party nevertheless provided the following estimates of the viewing shares held in 2012 in the United Kingdom by the LGI channels and by the other channels in which John Malone has a minority stake by genre: Entertainment [0-5]%, Sport less than [0-5]%, Factual [20-30]%, and Lifestyle [20-30]%.
106. The Notifying Party submits that there are many strong competitors in both the Factual and Lifestyle genres in the United Kingdom. Notable competitors in the Factual genre include UKTV, (Yesterday and Eden channels) Fox (National Geographic channels), AETN (History Channel, Military History Channel, Bio Channel), and [...] BSkyB. According to the Notifying Party, these channels compete directly with the Discovery Factual channels (the channels in which John Malone has a minority stake, which are mainly active in the Factual genre) for a similar audience and all tend to feature documentaries with factual content involving subjects such as nature, science, culture and history.

107. Furthermore, notable competitors in the Lifestyle genre include UKTV (Good Food channels, Home, Really), BSkyB (Sky Art channels), Scripps Networks (Travel Channel(s), Food Network channels), and NBC Universal. The Notifying Party submits that all Lifestyle channels compete directly with the Discovery Lifestyle channels for a similar audience and tend to feature programs relating to subjects such as food, property, fashion and travel.
108. Consequently, the Notifying Party submits that it has a very small share of the wholesale supply of Pay TV channels in the United Kingdom and that, in any event, it controls no "must have" TV channels. Accordingly, the Notifying Party states that it has no ability to foreclose access to content for downstream competitors.
109. Furthermore, the Notifying Party states that, post transaction, it would have no incentive to withhold its channels from other Pay TV retailers since its interest is to maximise its investment by securing the widest possible distribution of its channels. Virgin Media's platform would allow the merged entity to reach only approximately [20-30]% of viewers in the United Kingdom. According to the Notifying Party, there is no reason to believe that, if LGI were to withhold its TV channels (and/or the other channels in which John Malone has a minority stake) from competing Pay TV retailers, the demand for Virgin Media's services would rise sufficiently to offset the loss of income from distribution over competitors' platforms (which represent around [70-80]% of the retail Pay TV market in the United Kingdom). Accordingly, LGI would have no incentive to cease to supply its content to competitors (and the same would apply to the other channels in which John Malone has a minority stake).
110. Finally, according to the Notifying Party, in any event there would be no negative impact on competition from potential input foreclosure. This is because Virgin Media's key competitors - BSkyB and BT - are each vertically integrated and would be more than capable of making a credible counter threat, which would be potentially far more damaging to Virgin Media.<sup>44</sup>

#### Commission's assessment

111. In terms of ability to foreclose, the Commission first investigated whether there exist "must have" channels for Pay TV retailers in the United Kingdom, and whether the TV channels supplied by LGI and/or the TV channels in which John Malone holds a minority stake can be considered as "must have" input for Pay TV retailers.
112. A majority of TV channel broadcasters, which replied to the market investigation, indicated that there are a number of TV channels that can be considered as "must have" in order for retail suppliers of TV content to be able to offer a competitive offering to viewers. A number of them indicated that, in the United Kingdom, the public service channels (BBC, ITV, Channel 4 and Channel 5) make up a significant proportion of viewing and are "must have" channels for retail suppliers. For Pay TV operators, in

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<sup>44</sup> BSkyB offers key premium sports and movie channels in the UK which are very important to Pay TV customers. BT has also acquired a number of packages of Premier League Sports' rights and will be launching its own premium sports channel.

addition to these public service channels, premium sport and movie channels drive take up and retention of Pay TV subscribers.<sup>45</sup>

113. The overwhelming majority of TV channel broadcasters which replied to the market investigation further explained that none of the TV channels supplied by LGI or the TV channels where John Malone holds a minority stake can be considered as "must have" input for Pay TV retailers to be competitive with an attractive offer to viewers.<sup>46</sup>
114. The results of the market investigation in the case at hand are in line with the Commission's findings in another recent case involving the TV sector in the United Kingdom, *News Corp / BSkyB*. In that case, the majority of respondents to the market investigation indicated that the "must have" channels in the United Kingdom were Sky1, Living, and other Sky channels.<sup>47</sup>
115. Therefore, given the relatively low market shares of LGI in the supply of Pay TV channels in the United Kingdom (including if this market were to be segmented between basic and premium Pay TV channels or by genre and if the channels in which John Malone holds a minority stake are taken into account) and the findings that neither its channels, nor the channels in which John Malone holds a minority stake can be considered as "must have" input for Pay TV retailers, the Commission considers that the merged entity will likely not have the ability post transaction to engage in an input foreclosure strategy.
116. In terms of incentives to foreclose, the Commission then assessed whether LGI would have an incentive not to sell its TV channels (as well as, for the sake of argument, the channels in which John Malone holds a minority stake) to competitors of Virgin Media in the retail supply of TV content to end customers.
117. In this respect, the market investigation confirmed that TV channel broadcasters seek to maximise the reach of their channels.<sup>48</sup> Hence, they typically have an incentive to be present on as many retail platforms as possible. As explained by one TV channel broadcaster, this is due to the fact that the costs for producing the channels are largely fixed, while the advertising and carriage fee revenues increase with the number of viewers and subscribers.<sup>49</sup> In the present case, if the merged entity were to stop supplying the other TV retailers and instead were to offer LGI's channels (and/or channels in which John Malone has a minority stake) only on Virgin Media's platform, it would lose access to approximately [70-80]% of the UK market represented by viewers using alternative TV platforms. The Commission considers such a strategy to be unlikely.
118. Finally, as regards the likely impact of any such input foreclosure strategy, the Commission considers that it is unlikely to result in any meaningful foreclosure effects. This conclusion is premised, among other things, on the fact that there are a number

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<sup>45</sup> Questionnaire to Competitors (Q2) of 6 March 2013, question 20.

<sup>46</sup> Questionnaire to Competitors (Q2) of 6 March 2013, question 20.1.

<sup>47</sup> Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 146.

<sup>48</sup> Questionnaire to Competitors (Q2) of 6 March 2013, question 24.

<sup>49</sup> Questionnaire to Competitors (Q2) of 6 March 2013, question 24.

of alternative Pay TV channels to those offered by LGI and to the channels in which John Malone has a minority stake in the United Kingdom, which are regarded by market participants as substitutable to those channels. In other words, the LGI channels and the channels in which John Malone has a minority stake are not "must-have" channels for a TV retailer to operate in the United Kingdom.

119. Therefore, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as a result of input foreclosure concerns in the wholesale of Pay TV channels and the retail of audio visual content to end users in the United Kingdom.

**ii. Potential platform foreclosure for TV channel broadcasters**

View of the Notifying Party

120. The Notifying Party submits that it will have no ability to deny third party TV channel providers the access to Virgin Media's Pay TV platform given that Virgin Media has only approximately [20-30]% of Pay TV subscribers, with the main competitor being BSkyB with around 10 million subscribers and around 66% of Pay TV subscribers in the United Kingdom.
121. Therefore, even if Virgin Media ceased to carry a third party TV channel, that third party channel would still have access to the [70-80]% of Pay TV households in the United Kingdom represented by Virgin Media's rivals as well as having the possibility to distribute content to the even larger Freeview customer base. Accordingly, the Notifying Party submits that it is clear from Virgin Media's modest share of Pay TV households in the United Kingdom that it has no ability to foreclose access to the downstream market.
122. Furthermore, the Notifying Party states that it would have no incentive not to carry a third party channel given that content is the most important parameter for competition in the retail market and that platform operators seek to carry the largest and most interesting bundle of channels.
123. In response to the concern expressed during the market investigation regarding the potentially less favourable EPG listing of the competitors' TV channels post transaction (see paragraph 98 above), the Notifying Party notes that Virgin Media's current EPG policy complies with Ofcom's Code of Practice on Electronic Programming Guides and, in line with this, access to the EPG is provided on a fair, reasonable and non-discriminatory basis. According to the Notifying Party, this would remain the case also post transaction given the vital importance of content/channels to the attractiveness of Virgin Media's services for end-customers. In any event, as mentioned in paragraph 121 above, the Notifying Party considers that there would be no effect from the potential channel discrimination strategy, since Virgin Media is only one of the retail Pay TV platforms in the United Kingdom and TV channel broadcasters would still have access to approximately three quarters of the Pay TV audience in the United Kingdom through other platforms.

Commission's assessment

124. It was confirmed in the Commission's market investigation in the *News Corp/BSkyB* case 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.<sup>50</sup> This is also in line with the conclusions reached in the Commission's decision in *News Corp/Premiere*.<sup>51</sup> The market investigation in the present case also confirmed that content, including its range and diversity, is a key parameter of competition for TV retailers.<sup>52</sup>

125. The Commission therefore considers that it is unlikely that, post transaction, Virgin Media would stop acquiring third party TV channels (or at least those channels which more closely compete with the LGI channels and/or the channels in which John Malone has a minority stake). To the contrary post transaction, Virgin Media will likely continue to have an incentive to acquire and offer to its retail customers as broad a channel choice as possible to better compete with the other strong players, which operate in the retail TV sectors in the United Kingdom.
126. As regards EPG positioning, the Commission considers that, due to the intense competition that it faces at the retail level in the United Kingdom, post transaction Virgin Media will likely continue to decide on the EPG positioning of the various channels in its bouquets on the basis of what it considers the most attractive option for its retail customers and in line with Ofcom's Code of Practice on Electronic Programming Guides.
127. In any event, the Commission considers that, even if Virgin Media were to engage in any such platform foreclosure strategy in the United Kingdom, any such strategy is unlikely to give rise to any anti-competitive foreclosure effects.
128. Indeed, the market investigation provided mixed results on the question as to whether Virgin Media is one of the TV platforms in the United Kingdom, to which a TV channel supplier would need to have access in order to reach a sufficiently large market penetration. A number of TV channel broadcasters explained that access to Virgin Media and its 3.6 million subscribers was necessary in order to reach a large enough audience, and that if Virgin Media chose not to license their channels post transaction, this would have a material negative effect on their operations. However, a number of respondents also explained that, if Virgin Media was to engage in such strategy, alternatives would exist, including the largest Pay TV operator BSkyB with its 10 million viewers, or BT Vision, Talk Talk or other potential new entrants.<sup>53</sup>
129. Therefore, in light of the above and of the fact that Virgin Media represents only [20-30]% of the retail Pay TV market, the Commission takes the view that it is unlikely that any customer foreclosure strategy that Virgin Media may put in place would result in the foreclosure of TV channels' access to end users in the United Kingdom.
130. The Commission therefore considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as a result of customer foreclosure

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<sup>50</sup> Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 165.

<sup>51</sup> Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 64.

<sup>52</sup> Questionnaire to Competitors (Q2) of 6 March 2013, questions 19 and 20.

<sup>53</sup> Questionnaire to Competitors (Q2) of 6 March 2013, question 22.

concerns in the wholesale of Pay TV channels and the retail of audio visual content to end users in the United Kingdom.

## **B. Provision of telecommunication services**

131. The only telecommunication markets where there is a horizontal overlap between the Parties' activities are the wholesale market for carrier services and the retail market for business communication services in Ireland. The Notifying Party, however, submits that the overlap between the Parties' activities in these markets in Ireland is very limited and the Parties' combined share is well below [0-5]%.
132. The Commission therefore considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as a result of the horizontal overlap between the Parties' activities in these markets.
133. As regards the possible vertical relationships between the Parties' activities in these markets (including, in particular, between the wholesale markets for call termination on each of fixed and mobile networks and the retail markets for, respectively, fixed and mobile telephony services, and the wholesale market for carrier services and the retail market for business communication services), consistent with its prior decisional practice, the Commission considers that the proposed transaction is unlikely to give rise to competition concerns. This in particular reflects the fact that the markets for the provision of wholesale mobile and fixed call termination services are subject to regulatory analysis by national regulators, in order to ensure that access is granted on reasonable conditions (price caps and non-discrimination obligations) preserving effective competition.<sup>54</sup> As concerns the wholesale market for carrier services (upstream) and the retail market for business communication services (downstream), no competition concerns are likely to arise due to the Parties' negligible activities in each of these markets (see paragraph 131 above).
134. The Commission therefore considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as a result of the vertical relationship between the Parties' activities in these markets.

## **VI. CONCLUSION**

135. For the above reasons, the Commission considers that the notified operation does not raise serious doubts as to its compatibility with the internal market.
136. It has therefore decided not to oppose the proposed operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission*

*(signed)*

*Androulla VASSILIOU*

*Member of the Commission*

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<sup>54</sup> Commission Decision of 1 March 2010 in Case M.5650 T-Mobile/Orange, paragraphs 176; Commission Decision of 3 July 2012 in Case M.6584 Vodafone Group/Cable & Wireless Worldwide, paragraph 69.