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***Case No COMP/M.7332 - BSKYB/ SKY DEUTSCHLAND/  
SKY ITALIA***

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: 11/09/2014

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## EUROPEAN COMMISSION

Brussels, 11.09.2014  
C(2014) 6516 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

### To the notifying party

Dear Sir/Madam,

**Subject: Case M.7332 – BSKYB / SKY DEUTSCHLAND / SKY ITALIA  
Commission decision pursuant to Article 6(1)(b) of Council Regulation  
No 139/2004<sup>1</sup>**

- (1) On 6 August 2014, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (1) by which the undertaking Sky Broadcasting Group plc ("BSkyB", United Kingdom) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertakings Sky Deutschland AG ("Sky Deutschland", Germany) and Sky Italia S.r.l. ("Sky Italia", Italy) by way of purchase of shares.<sup>2</sup> BSKyB, Sky Italia and Sky Deutschland together are designated hereinafter as the "Parties".

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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.

<sup>2</sup> Publication in the Official Journal of the European Union No C 267, 14.08.2014, p. 27.

## 1. THE PARTIES

- (2) **BSkyB** is a United Kingdom public company<sup>3</sup> active through a number of subsidiaries in a variety of audio-visual sectors in the United Kingdom and Ireland, namely the licensing / acquisition of audio-visual programming, the TV channel wholesale supply, the retailing of audio-visual programming to subscribers, the provision of technical platform services to broadcasters on BSkyB's DTH platform, the sale of TV advertising airtime and sponsorship, the retail provision of fixed telephony and broadband services, the provision of access to public Wi-Fi hotspots, marketing services, and fixed-odds betting services. BSkyB has also minimal activities outside the United Kingdom and Ireland, including the licensing and distribution of BSkyB and third party audio-visual programming, the provision of BSkyB's Sky News International, the provision of public internet access via Wi-Fi hotspots in various countries and the supply of set-top boxes to Sky Italia.
- (3) **Sky Deutschland** is a German media company active primarily in the pay TV sector. Its activities are predominantly limited to Germany and Austria, including retailing of subscription based pay TV services and the provision of on-demand content. To a lesser extent, Sky Deutschland also derives revenues from commercial subscriptions in bars and hotels, non-linear services (including pay-per-view ("PPV")), the activation and installation of Sky Deutschland receivers and the sale of advertising time.
- (4) **Sky Italia** is an Italian media company active primarily in the TV sector in Italy. Its activities include the operation and retail distribution of linear and non-linear pay TV channels and content and a free-to-air (FTA) TV channel across a range of transmission technologies. Sky Italia is also active in the sale of advertising and sponsorship on Sky Italia and third parties' linear TV channels.

## 2. THE OPERATION

- (5) The proposed transaction consists in the acquisition by BSkyB of sole control over Sky Deutschland and Sky Italia. The transaction comprises a single concentration under the Merger Regulation as BSkyB's acquisition of Sky Italia is conditional upon completion of the Sky Deutschland acquisition.

### *Sky Deutschland*

- (6) Sky Deutschland is currently solely controlled by Twenty-First Century Fox, Inc. ("21<sup>st</sup> Century Fox"). 21<sup>st</sup> Century Fox owns a 57.4% economic and voting interest in Sky Deutschland. The remaining 42.6% of Sky Deutschland's shares are owned by a large number of smaller shareholders.
- (7) According to the share purchase agreement for Sky Deutschland signed on 25 July 2014, the transaction consists in the acquisition by BSkyB of the 57.4% of Sky Deutschland's shares owned by 21<sup>st</sup> Century Fox. In addition, BSkyB will make a voluntary cash takeover offer for the 42.6% Sky Deutschland's shares not owned by 21<sup>st</sup> Century Fox.

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<sup>3</sup> Twenty-First Century Fox owns a minority share of 39.14% of BSkyB's shares (with voting rights capped at 37.19%). It does not have *de jure* or *de facto* control over BSkyB. See also Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BSkyB*, paragraphs 7-24.

- (8) After the transaction, BSKyB will acquire sole control of Sky Deutschland whether or not BSKyB is successful in its public bid for the outstanding 42.6% share capital.

#### *Sky Italia*

- (9) Sky Italia is currently solely controlled by 21<sup>st</sup> Century Fox which owns 100% of its shares.
- (10) According to the share purchase agreement for Sky Italia signed on 25 July 2014, the transaction consists in the acquisition by BSKyB of Sky Italia's entire issued corporate capital owned by 21<sup>st</sup> Century Fox.
- (11) Through the transaction, BSKyB will therefore acquire sole control of Sky Deutschland and Sky Italia. The proposed concentration constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

### **3. EU DIMENSION**

- (12) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>4</sup> (BSkyB: EUR 9 147 million; Sky Deutschland: EUR 1 546 million; Sky Italia: EUR 2 922 million). Each of them has an EU-wide turnover in excess of EUR 250 million (BSkyB: EUR [...]; Sky Deutschland: EUR [...]; Sky Italia: EUR [...]), and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.<sup>5</sup>
- (13) The notified operation therefore has an EU dimension.

### **4. COMPETITIVE ASSESSMENT**

#### **4.1. Market definitions**

- (14) The activities to be considered in the audio-visual sector are (i) the licensing and acquisition of broadcasting rights; (ii) the wholesale supply of TV channels; (iii) the retail supply of audio-visual programming; (iv) the supply of set-top boxes; and (v) the sale of TV advertising airtime.

##### *4.1.1. Licensing / Acquisition of audio-visual programming*

###### *4.1.1.1. Product market definition*

- (15) In previous decisions, the Commission distinguished between the licensing / acquisition of broadcasting rights for pay TV and the licensing / acquisition of broadcasting rights for FTA.<sup>6</sup> The Commission has also identified separate markets

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<sup>4</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

<sup>5</sup> BSKyB derived more than two-thirds of its EU-wide turnover in the United Kingdom in the financial year ending 30 June 2014. Sky Deutschland [...] in the financial year ending 31 December 2013. Sky Italia derived more than two-thirds of its EU-wide turnover in Italy in the financial year ending 30 June 2013.

<sup>6</sup> Commission decision of 02.04.2003 in Case COMP/M.2876 - *Twentieth Century Fox/Telepiu*; Commission decision of 13.07.2010 in Case COMP/M.5779 - *Comcast/NBC Universal*; Commission decision of 21.12.2010 in Case COMP/M.5932 - *News Corp/BSkyB*.

for the licensing / acquisition of distribution rights for (i) films; (ii) sporting events and (iii) other TV content.<sup>7</sup>

- (16) The Notifying Party refers to the Commission's approach in previous decisions. The Notifying Party refers to the overall sector of all TV and to separate pay TV and FTA markets. Moreover, the Notifying Party refers to separate markets for the licensing / acquisition of films, sports and other TV content (both by pay TV and FTA as well as together for all TV).
- (17) The Notifying Party notes that rights for films are typically licenced in separate (distinct or overlapping) "windows". Each window corresponds to a time period for which studios have licenced the rights to distribute a film in a certain way. The number, type and duration of the release windows are independently and unilaterally set by each rights holder.
- (18) Rights for major sports content are typically sold via a tender procedure to content distributors (channel providers and subscription video on demand (SVOD) service providers) for live or ex post broadcasting, in full or in highlights form. Rights to national football league matches, such as the Premier League in the United Kingdom, Bundesliga in Germany and Serie A in Italy, are generally licensed for three to four seasons.
- (19) Rights for other TV content are distributed via less complex licensing arrangements. For example, made-for-TV programming may be commissioned by a particular channel provider or SVOD service provider for initial exhibition on its own channels / services, or may be produced by an independent producer and offered for licensing to all interested channel providers (whether FTA or pay TV) and SVOD service providers, with a view to being licensed exclusively for a given period to the successful bidder. Made-for-TV programmes that are licensed for broadcast are often also made available to viewers on a VOD basis at the same time as initial broadcast, soon after in a "catch-up" service, or after a full series has aired by way of a "box-set" of the entire series. Once the initial licensee's rights and protections have expired, the licensor may license another channel provider to show repeats.
- (20) The Notifying Party submits that given the clear lack of competition concerns arising from the transaction on any plausible product market definition, the precise boundaries of the relevant markets can be left open.
- (21) The majority of respondents to the market investigation agree that the Commission's finding in previous cases that the product markets for the licensing of broadcasting rights can be categorised as broadcasting rights for (i) films, (ii) sports content and (iii) other TV programmes is still correct.<sup>8</sup>

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<sup>7</sup> Commission decision of 13.07.2010 in Case COMP/M.5779 – *Comcast/NBC Universal*.

<sup>8</sup> Questionnaire to right-holders, question 3. A minority of respondents consider that all the different genres of audio-visual content are capable of being regarded as substitutes for each other. Content acquirers can switch part of their budget from one type of content to another. Therefore, these respondents submit that the licensing of broadcasting rights can be categorised as broadcasting rights for all forms of audio-visual content.

- (22) For the purposes of the present decision, the Commission considers that 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 audio-visual programming.

#### 4.1.1.2. Geographic market definition

- (23) In previous decisions, the Commission considered the markets for the licensing / acquisition of broadcasting rights to be generally national in scope or to comprise linguistically homogenous areas.<sup>9</sup>

##### *The Notifying Party's views*

- (24) The Notifying Party considers that its position is in line with the Commission's approach in previous decisions and submits that rights to audio-visual programming are generally licensed and acquired on a national or linguistic region basis, reflecting differences in language, culture and preferences and in economic conditions between territories.
- (25) The Notifying Party submits that given the clear lack of competition concerns arising from the transaction on any plausible geographic market definition, the precise boundaries of the relevant markets can be left open.

##### *Results of the market investigation and the Notifying Party's response*

- (26) The majority of respondents to the market investigation agree that the past Commission decisional practice of defining the geographic scope of markets for the licensing / acquisition of broadcasting rights as national in scope or comprising linguistically homogeneous areas continues to be valid. Several respondents to the market investigation refer to "the different regulatory regimes, existing language barriers, cultural factors and other different conditions of competition prevailing in the various markets".<sup>10</sup> Other respondents note that licenses have been granted on a territory by territory basis and that they expect licenses to continue to be granted on this basis. Normally a distributor licenses contents that reflect audiences' preferences in the area of reference also aiming to reach the widest audience related to the language. As far as sports rights are concerned, the market respondents submit that these rights are sold on a country by country basis. Indeed, the national scope of rights is also enhanced by the "listed events" as applicable in each EU Member State, which further differentiates the major events (sports and non-sports events) in accordance to their relevance to the national public.
- (27) Two respondents refer to the judgment of the Court of Justice in the joined cases C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* (the "Murphy judgment") in relation to the development of multi-territorial negotiations and licensing of rights. In the Murphy judgment, the Court remarked that the Football

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<sup>9</sup> Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BSkyB*.

<sup>10</sup> Questionnaire to right-holders, question 4; response referring to Commission decision of 07.10.1996 in Case IV/M.779, *Bertelsmann/CLT*.

Association Premier League (FAPL) grants licences in respect of those broadcasting rights for live transmission, on a territorial basis and for three year terms. Those rights are awarded to broadcasters under an open competitive tender procedure which begins with the invitation to tenderers to submit bids on a global, regional or territorial basis. Demand then determines the territorial basis on which the FAPL sells its international rights. However, as a rule, that basis is national since there is only a limited demand for bidders for global or pan-European rights, given that broadcasters usually operate on a territorial basis and serve the domestic market either in their own country or in a small cluster of neighbouring countries with a common language.<sup>11</sup>

- (28) These two respondents submit that the proposed transaction is apt to change this scenario. The proposed transaction will lead to the creation of a European player, able to bid for pan-European broadcasting rights. According to these respondents to the market investigation, for the first time, on the demand side, a multi-country group, with enormous negotiating power, will face the licensing parties and will be interested in offering on a much wider territorial basis. By doing so, the merged entity could secure pan-European rights. The merged entity could directly exploit such rights in the countries where it operates as a pay TV company (such as the United Kingdom, Ireland, Germany, Austria and Italy) and sub-licence the same rights in the other countries where it is not interested in direct exploitation.
- (29) The Notifying Party does not consider that the Murphy judgment is expected to have material actual or potential implications, as it does not establish any new principles in relation to multi-territorial licensing. The Notifying Party argues that the Court of Justice in the Murphy judgment applied the principles set out previously in *Case 262/81 Coditel SA, Compagnie générale pour la diffusion de la télévision and others v Ciné-Vog Films SA and others (Coditel II)* to a specific obligation on broadcasters not to supply decoding devices enabling access to satellite broadcasts of Premier League matches in commercial premises. The Notifying Party submits that the Murphy judgment concerned only the satellite broadcasting of Premier League matches to the public by broadcasting organisations. The Notifying Party submits that there is no sound basis to infer, from the conclusions reached in the Murphy judgment, broader principles of law, capable of application to different sets of facts.
- (30) In addition, the same two respondents to the market investigation submit that the current market situation could change as a consequence of the evolution of EU regimes and policies, such as the "Licence for Europe" progress, which could contribute to the developing of pan-European licensing patterns.
- (31) The Licence for Europe process is a stakeholder dialogue, brokered by the European Commission, in an attempt to overcome problems in relation to cross-border access and portability of services, user-generated content and micro-licensing, audio-visual heritage and text and data mining. In relation to cross-border portability of audio-visual services, the process has led to a joint statement of the audio-visual industry to continue working to make it easier for consumers to

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<sup>11</sup> This is confirmed by the respondents to the market investigation. Questionnaire to right-holders, questions 4-8.

legally access films and TV programmes from their home Member State when travelling abroad on holidays or business trips.

- (32) The Notifying Party does not consider that the Licence for Europe process has any implications in relation to any potential development of multi-territorial negotiations and licensing of rights. The Licence for Europe process is focusing on "portability" (i.e. the consumers' ability to access content to which they have subscribed in their home EU Member State when travelling to other Member States), rather than multi-territorial negotiation and licensing of rights to provide a single service on a cross-border basis.
- (33) The Notifying Party submits that, since the Murphy judgment, the relevant rights holders have each continued to sell rights on a territory-by-territory basis, both within the EEA and throughout the rest of the world, through separate tender processes held at different times, even in relation to major pan-European / global events. Examples include the licensing by UEFA in respect of the Champions League, Europa League and the Centralised Qualifiers for Euro 2016 and the FIFA World Cup 2018, the Football Association Premier League for the 2013/2014 – 2015/16 seasons, FIFA in respect of the FIFA World Cups 2014, 2018 and 2022, Formula One Management in respect of Formula 1 for the years 2012 – 2018 and Wimbledon until at least 2017. According to the Notifying Party, the list of sports rights holders which continue to license their rights on a national basis is clear evidence that sports rights are still licensed predominantly on a national basis post-Murphy judgment.
- (34) The Notifying Party is aware of only a small number of instances where global providers of audio-visual content services have simultaneously acquired rights for a number of territories. These instances are not the norm and relate predominantly to over the top ("OTT") windows and/or the licensing of international rights either with low residual value or those intended for further distribution to third parties outside the home territory. The Notifying Party argues that these are not rights that, on their own, would induce many customers to subscribe to a broadcaster's offering and do not, therefore, have a meaningful impact on competition between broadcasters and/or OTT content providers.
- (35) On this basis, the Notifying Party submits that the market for the licensing of audio-visual programming is national or among linguistically homogeneous areas and that neither the Murphy judgment nor the Licence for Europe initiative have any impact on the geographic market definition.

#### *The Commission's assessment*

- (36) The Commission notes that in recent previous decisions, such as Case M.6866 *Time Warner / CME*<sup>12</sup>, Case M.6880 *Liberty Global / Virgin Media*<sup>13</sup> and Case M.6396 *HBO / Ziggo / HBO Nederland*,<sup>14</sup> which were decided post-Murphy judgment, the Commission found that the market for the licensing of audio-visual content is national in scope.

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12 Commission decision of 14.06.2013 in Case COMP/M.6866 - *Time Warner/CME*.

13 Commission decision of 15.04.2013 in Case COMP/M.6880 – *Liberty Global / Virgin Media*.

14 Commission decision of 21.12.2011 in Case COMP/M.6369 – *HBO / Ziggo / HBO Nederland*.



- (37) In the *Liberty Global / Virgin Media* decision, the market investigation revealed that the geographic scope of the markets for the 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). 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 which in that decision covered the United Kingdom and Ireland).<sup>15</sup>
- (38) In the *Time Warner / CME* decision, the market investigation indicated that in the countries of Central and Eastern Europe (i.e. Bulgaria, the Czech Republic, Romania, Slovakia, Slovenia and to a lesser extent Hungary, which were the EEA Member States around which the market investigation focused), broadcasting rights for audio-visual content were generally licensed on a national basis. While there were some exceptions, the majority of film studios and production companies indicated that they license their audio-visual content to TV channel broadcasters on a country by country basis. Different primary languages spoken in each country, as well as differing consumer tastes were mentioned in that investigation as factors which may prevent or hamper cross-border negotiations and / or cross-border licensing of rights to audio visual content.<sup>16</sup>
- (39) The Commission assessed the responses to the market investigation in the present case, which largely confirm the current practice of the rights holders and broadcasters to negotiate and license audio-visual programming rights on a territory-by-territory basis or along linguistically homogeneous borders on the basis of the audience's preferences in the area of reference. The majority of respondents consider that the market should be defined as national or across linguistically homogeneous areas.
- (40) The same rationale applies to the licensing of sports rights. Sports rights are often consumer-led and certain consumers in particular Member States, regions or language groups wish to receive geographically or linguistically distinct services which are tailored to their collective preferences. Different sports vary widely in popularity across the EEA. In the case of football all countries in the EEA have domestic football leagues which are typically more popular in their home nation than abroad. Therefore, the desire of consumers to watch a specific football league outside of their domestic league varies enormously from Member State to Member State. This is especially true in the countries in continental Europe with the strongest domestic leagues, such as Germany and Italy.
- (41) The Commission notes that even the respondents who submit that the Murphy judgment and the License for Europe may alter the geographic scope for rights negotiations and licensing consider that currently the geographic market is still national or across linguistically homogeneous areas. These respondents mainly take the view that the situation could potentially evolve in the future.

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15 Paragraphs 21 to 24.

16 Paragraphs 28 to 31.

- (42) The Commission has investigated whether currently multi-territorial negotiations and licensing are practiced across territories in the EEA. Currently, the licensing of rights remains predominantly national / linguistically homogeneous. The Commission has found that licensing on a multi-territorial basis is not common.<sup>17</sup>
- (43) The Commission also notes that [...] This indicates to the Commission that the current market for the acquisition of audio-visual rights remains at this stage national or at most across linguistically homogeneous areas.
- (44) In light of the above and for the purposes of the present decision, the Commission concludes that the geographic scope of the markets for the licensing / acquisition of broadcasting rights is national or, at most, relates to linguistically homogeneous areas covering Germany, Austria, Italy, the United Kingdom and Ireland.

#### 4.1.2. Wholesale supply of TV channels

##### 4.1.2.1. Product market definition

- (45) In previous decisions, the Commission identified wholesale markets for the supply of TV channels, in which channel broadcasters and retail TV distributors negotiate the terms and conditions for the distribution of TV channels.<sup>18</sup> The Commission considered that there are two separate markets for (i) the wholesale supply of FTA channels and (ii) the wholesale supply of pay TV channels.<sup>19</sup>
- (46) In previous decisions, the Commission left open whether the market should be segmented by genre or thematic content (such as channels for films, supports, documentaries, youth, news, etc.).<sup>20</sup>
- (47) The Notifying Party considers that the aggregation of content into TV channels and supply of TV channels of all types to third parties comprise part of a wider relevant market between the upstream licensing of content and downstream retail distribution of audio-visual services. According to the Notifying Party, there is competition in the market from a range of other audio-visual products and services that all serve a common consumer demand for audio-visual entertainment and information in a broad range of programming genres.
- (48) The Notifying Party notes the Commission's market definition in past decisions and considers that it follows this approach in the Form CO. The Notifying Party submits that the market for the wholesale supply should not be segmented by genre.
- (49) The Notifying Party further submits that given the clear lack of competition concerns arising from the transaction on any plausible product market definition, the precise boundaries of the relevant markets can be left open.

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<sup>17</sup> Any multi-territory deals with OTT operators apply to an extremely minor part of the catalogues of such players.

<sup>18</sup> Commission decision of 14.06.2013 in Case COMP/M.6866 - *Time Warner/CME*.

<sup>19</sup> Commission decision of 15.04.2013 in Case COMP/M.6880 – *Liberty Global/Virgin Media*; Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BSkyB*.

<sup>20</sup> Commission decision of 14.06.2013 in Case COMP/M.6866 - *Time Warner/CME*.

- (50) The Commission notes that the Parties have very limited overlaps in their activities, even on the narrower markets of wholesale pay TV and FTA channels.
- (51) For the purposes of the present decision, the Commission considers that 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 wholesale supply of TV channels.

#### 4.1.2.2. Geographic market definition

- (52) In previous decisions, the Commission has considered the market for the wholesale supply of TV channels to be generally national in scope or to comprise linguistically homogeneous areas.<sup>21</sup>
- (53) The Notifying Party considers that the geographic scope of the market is national and states that the analysis would not be materially different if these markets were combined into linguistically homogeneous regions. The Notifying Party submits that each of the Parties acquires on a wholesale basis TV channels for retail distribution in distinct territories and in separate geographic markets.
- (54) The Notifying Party considers that competition for the wholesale supply of TV channels to pay TV operators occurs primarily on a national basis, and that competitive conditions among suppliers of channels are broadly homogeneous throughout a national territory. In some limited cases, TV channels are supplied outside a national market, for example, news channels to serve expats / immigrants or in a language well understood in the supplied territory. However, such viewing is *de minimis*.
- (55) The Commission notes that in recent previous decisions, such as Case M.6866 *Time Warner / CME*,<sup>22</sup> Case M.6880 *Liberty Global / Virgin Media*<sup>23</sup> (covering the United Kingdom and Ireland) and Case M.6396 *HBO / Ziggo / HBO Nederland*<sup>24</sup> (covering the Netherlands), the Commission found that the market for the wholesale supply of TV channels is national in scope.
- (56) In the *Liberty Global / Virgin Media* decision, the market investigation showed that the agreements for the wholesale supply of TV channels were, as a general rule, negotiated on a national basis (in that case covering the United Kingdom and Ireland). This was partly explained by the fact that TV retailers mostly have a national footprint. More rarely, these agreements were 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.<sup>25</sup>

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21 Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corps/BSkyB*; Commission decision of 15.04.2013 in Case COMP/M.6880 – *Liberty Global/Virgin Media*.

22 Commission decision of 14.06.2013 in Case COMP/M.6866 – *Time Warner / CME*.

23 Commission decision of 15.04.2013 in Case COMP/M.6880 – *Liberty Global / Virgin Media*.

24 Commission decision of 21.12.2011 in Case COMP/M.6369 – *HBO / Ziggo / HBO Nederland*.

25 Paragraphs 38 to 41.

- (57) In the *Time Warner / CME* decision, the market investigation indicated that pay TV operators do not tend to operate on a multi-territory basis, and as such, negotiations between the suppliers of TV channels and TV retailers were rarely multi-territorial (in that case covering Bulgaria, the Czech Republic, Romania, Slovakia, Slovenia and Hungary). This view was supported by a number of factors in addition to the linguistic differences across the relevant countries: (i) the rights to broadcast TV channels are obtained for the whole of a national territory; (ii) the appeal of audio-visual content depends on national tastes, culture and preferences; (iii) advertising on channels is not sold on a multi-territory basis; (iv) marketing, promotion and advertising of channels tends to take account of national differences and consumer preferences and tends to be executed nationally; and (v) channels negotiate carriage fees separately for each country.<sup>26</sup>
- (58) The market investigation in the present case confirms the prevalence of these factors today. National preferences are still very important, in relation to movies, sports and other content which make up TV channels, which in turn affects the value of TV channels and the marketing and promotion strategy. In addition, TV advertising still operates on a national basis in the relevant EEA Member States, such as Germany, Austria, Italy, the United Kingdom and Ireland.
- (59) The Commission has investigated the cross-border licensing of TV channels and found that it was not common. There is currently no pan-European dimension to the wholesale supply of TV channels and as a rule, agreements are negotiated and concluded on a national basis or for a linguistically homogeneous area.
- (60) One of the reasons why negotiations for the wholesale supply of TV channels are typically carried out nationally is that channels are mainly local with limited appeal to other EU Member States, due to language and cultural differences.
- (61) In light of the above and for the purposes of the present decision, the Commission considers that the geographic scope of the market for the wholesale supply of TV channels is national or, at most, relates to linguistically homogeneous areas.

#### 4.1.3. *Retail distribution of audio-visual programming to consumers*

##### 4.1.3.1. Product market definition

- (62) In previous decisions, the Commission has taken the view that all technical means of television distribution compete with each other and has not identified separate relevant product markets for television distributed via digital terrestrial (DTT), satellite, cable, internet TV (IPTV), over-the-top (OTT) and mobile technologies.<sup>27</sup>
- (63) In previous decisions, the Commission also considered that the retail supply of pay TV to end users constitutes a separate product market.<sup>28</sup>

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26 Paragraphs 52 and 53.

27 Commission decision of 15.04.2013 in Case COMP/M6880 – *Liberty Global/Virgin Media*.

28 Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BskyB*; Commission decision of 15.04.2013 in Case COMP/M6880 – *Liberty Global/Virgin Media*.

- (64) The Notifying Party considers that the relevant retail market is for the provision of all audio-visual programming to end users on both a pay TV and FTA basis, regardless of distribution technology and mode of delivery.
- (65) 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 retailing of audio-visual programming to consumers.

#### 4.1.3.2. Geographic market definition

- (66) In previous decisions, the Commission considered that the geographic scope of the retail market for audio-visual programming to consumers is national in scope or comprises linguistically homogeneous areas.<sup>29</sup>
- (67) The Notifying Party considers that the geographic scope of the market is national and states that the analysis would not be materially different if these markets were combined into linguistic regions.
- (68) In light of the above and for the purposes of the present decision, the Commission considers that the market for the retail distribution of audio-visual programming to consumers is national or, at most, relates to linguistically homogeneous areas covering Germany, Austria, Italy, the United Kingdom and Ireland.

#### 4.1.4. *Supply of set-top boxes*

##### 4.1.4.1. Product market definition

- (69) In previous decisions, the Commission concluded that the supply of set-top boxes constitutes a distinct product market from other pay TV technical services.<sup>30</sup>
- (70) The Notifying Party considers that its position is in line with the Commission's approach in previous cases but considers that the precise market definition can in any event be left open in this case.
- (71) 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 supply of set-top boxes.

##### 4.1.4.2. Geographic market definition

- (72) In previous decisions, the Commission considered that the geographic scope for the supply of set-top boxes is at least EEA-wide, if not global, but left the precise geographic market definition open.<sup>31</sup>

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<sup>29</sup> Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BskyB*; Commission decision of 15.04.2013 in Case COMP/M.6880 – *Liberty Global/Virgin Media*.

<sup>30</sup> Commission decision of 23.07.2012 in Case COMP/M.6568 – *Cisco Systems/NDS Group*.

<sup>31</sup> Commission decision of 23.07.2012 in Case COMP/M.6568 – *Cisco Systems/NDS Group*.

- (73) The Notifying Party considers that the relevant market is at least EEA-wide, if not global. Set-top boxes are distributed globally by a number of large international distributors, including Technicolor, Humax, Pace, Arris-Motorola, Cisco, EchoStar and Samsung. In any event, the Notifying Party submits that the exact scope of the relevant geographic market can be left open in this case.
- (74) For the purposes of the present decision, it is not necessary to conclude on the exact geographic market definition as the proposed transaction does not raise any competition concerns under any alternative market definition for the supply of set-top boxes.

#### 4.1.5. *Sale of TV advertising airtime*

##### 4.1.5.1. Product market definition

- (75) In previous decisions, the Commission defined a relevant product market for the sale of TV advertising airtime.<sup>32</sup>
- (76) The Notifying Party submits that the relevant market may be broader in scope due to the increasing constraint of internet advertising.
- (77) 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 sale of TV advertising airtime.

##### 4.1.5.2. Geographic market definition

- (78) In previous decisions, the Commission considered that the geographic scope for the supply of TV advertising airtime is national.<sup>33</sup> The Commission considered that the relevant geographic market is not wider than national and is not along linguistically homogeneous areas. For example, the Commission found in Case M.5932 – *News Corp/BSkyB* that the relevant geographic market did not comprise both the United Kingdom and Ireland.
- (79) The Notifying Party considers that its position is in line with the Commission's approach in previous decisions.
- (80) For the purposes of the present decision, it is not necessary to conclude on the exact geographic market definition as the proposed transaction does not raise any competition concerns under any alternative market definition for sale of TV advertising airtime.

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32 Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BSkyB*.

33 Commission decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BSkyB*.

## **4.2. Competitive assessment**

### *4.2.1. Horizontal assessment*

#### 4.2.1.1. Licensing / Acquisition of audio-visual programming

- (81) The Parties are predominantly active in distinct geographic markets in relation to the licensing / acquisition of audio-visual programming for pay TV and FTA. BSkyB is mainly active in the United Kingdom and Ireland with minor activities in other countries (including Germany, Austria and Italy), Sky Deutschland is mainly active in Germany and Austria and Sky Italia is mainly active in Italy. The only overlaps arise in the markets for the licensing / acquisition of audio-visual programming in Germany, Austria and Italy, but not in the United Kingdom and Ireland, as Sky Deutschland and Sky Italia are not active in the United Kingdom and Ireland.
- (82) Within the markets for the licensing / acquisition of audio-visual programming for pay TV and FTA in Germany, Austria and Italy which are national or among linguistically homogeneous areas, the merger would not lead to any horizontally affected markets on any relevant markets. Sky Deutschland's market share is less than 20% in Germany and Austria. Sky Italia's market share is less than 20% in Italy and BSkyB's market share in all three countries is [0-5]%.
- (83) The Commission therefore concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the markets for the licensing/acquisition of broadcasting rights in Germany, Austria and Italy.

#### 4.2.1.2. Wholesale supply of TV channels

- (84) The Parties are predominantly active in distinct geographic markets in relation to the wholesale supply of TV channels for pay TV and FTA. BSkyB is mainly active in the United Kingdom and Ireland, Sky Deutschland is mainly active in Germany and Austria. Sky Italia has some very minor activities in the wholesale supply of pay TV and FTA channels in Italy. The only overlaps arise in the markets for the wholesale supply of pay TV and FTA channels in Germany, Austria and Italy, but not in the United Kingdom and Ireland, as Sky Deutschland and Sky Italia are not active in the wholesale supply of pay TV and FTA channels the United Kingdom and Ireland.
- (85) BSkyB's channel, Sky News International is available on a FTA basis on the Astra satellite, and can therefore be received by consumers with the appropriate reception equipment in a number of countries throughout Europe, including Germany, Austria and Italy. [...].
- (86) Within the markets for the wholesale supply of pay TV and FTA channels in Germany, Austria and Italy, which are national or among linguistically homogeneous areas, the merger would not lead to any horizontally affected markets on any relevant markets. Sky Deutschland and Sky Italia have limited activities on these markets. BSkyB's Sky News International generates [...] and has an audience share of less than [0-5]% on these markets.
- (87) The Commission therefore concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the markets for the wholesale supply of TV channels in Germany, Austria and Italy.

#### 4.2.1.3. Retailing of audio-visual programming to consumers

- (88) The Parties are predominantly active in distinct geographic markets in relation to the retailing of audio-visual programming to consumers. BSkyB is mainly active in the United Kingdom and Ireland, Sky Deutschland is mainly active in Germany and Austria and Sky Italia is mainly active in Italy. The only overlaps arise in the markets for the retailing of audio-visual programming to consumers in Germany, Austria and Italy, but not in the United Kingdom and Ireland, as Sky Deutschland and Sky Italia are not active in the United Kingdom and Ireland.
- (89) Concerning the markets for the retailing of audio-visual programming in Germany and Austria the merger does not lead to any horizontally affected markets as Sky Deutschland's market share is less than 20% by subscribers and by revenue in Germany and Austria and BSkyB's market share through the provision of Sky News International is [0-5]% in audience. Moreover, [...] Sky News International which is available FTA in Germany and Austria.
- (90) In Italy, Sky Italia has [10-20]% subscriber share but [30-40]% revenue share in the retailing of audio-visual programming. However, the market share of BSkyB in Italy through the provision of Sky News International has an audience share around [0-5]% and [...]. Thus, considering the market share by audience, the combined market share is less than 20%. In terms of revenue, Sky Italia has [30-40]% but there is no increment, as [...] Sky News International which is broadcast FTA.
- (91) The Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the markets for the retailing of audio-visual programming to consumers in Germany, Austria and Italy.

#### 4.2.1.4. Supply of set-top boxes

- (92) BSkyB is active in the supply of set top boxes in the EEA and worldwide. BSkyB has a market share of [0-5]% in the EEA and [0-5]% worldwide. However, the proposed transaction will not lead to any horizontally affected markets as Sky Deutschland and Sky Italia are not active in the supply of set top boxes.
- (93) The Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the market for the supply of set-top boxes in the EEA or worldwide.

#### 4.2.1.5. Sale of TV advertising airtime

- (94) The Parties are active in the markets for the sale of TV advertising airtime which are national. There is no geographic overlap in the Parties' sales of TV advertising. BSkyB primarily sells TV advertising in the United Kingdom and Ireland. Sky Deutschland sells TV advertising on its channels in Germany and Austria. Sky Italia sells TV advertising on its channels in Italy. Therefore, the proposed transaction will not lead to any horizontally affected markets.
- (95) The Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the market for the sale of advertising airtime in the United Kingdom, Ireland, Germany, Austria, and Italy.



## 4.2.2. *Non-horizontal assessment*

### 4.2.2.1. Vertical effects

#### *Licensing / acquisition of audio-visual content*

- (96) The proposed transaction would combine the activities of BSkyB as an upstream licensor of audio-visual content with the activities of Sky Deutschland as a downstream retailer of audio-visual programming in Germany and Austria and with the activities of Sky Italia as a downstream retailer of audio-visual programming in Italy.

#### Germany

- (97) In the retail sector for all TV in Germany, Sky Deutschland has [5-10]% by audience (measured by the number of households) and [10-20]% by revenue. In the pay TV market in Germany, Sky Deutschland has [10-20]% by subscribers and [30-40]% by revenue.
- (98) However, given that BSkyB's market share in the licensing of audio-visual content is [0-5]% in Germany, BSkyB's upstream share in the licensing of audio-visual content is negligible. Therefore, the proposed transaction does not give rise to any vertically affected markets.

#### Austria

- (99) In the retail sector for all TV in Austria, Sky Deutschland has [5-10]% by audience (measured by the number of households) and [10-20]% by revenue. BSkyB only licenses content to FTA broadcasters in Austria, so there is no vertical overlap on any pay TV market.
- (100) In any event, given that BSkyB's market share in the licensing of audio-visual content is [0-5]% in Austria, BSkyB's upstream share in the licensing of audio-visual content is negligible. Therefore, the proposed transaction does not give rise to any vertically affected markets.

#### Italy

- (101) In the retail sector for all TV in Italy, Sky Italia has [10-20]% by audience (measured by the number of households) and [30-40]% by revenue. In the pay TV market in Italy, Sky Italia has [60-70]% by subscribers and [70-80]% by revenue.
- (102) BSkyB has very small licensing revenue of other TV content, predominantly to FTA broadcasters, and to sports-related content only to pay TV broadcasters. The revenue is *de minimis*, approximately EUR [...] which leads to an estimated market share of [0-5]%.
- (103) Therefore, the merger creates a vertically effected market on the basis of Sky Italia's shares for the acquisition of content for broadcast on pay TV, the acquisition of sports content and / or pay TV retail supply. However, given that BSkyB's market share in the licensing of audio-visual content is [0-5]% in Italy, BSkyB's upstream share in the licensing of audio-visual content is *de minimis*. Therefore, the proposed transaction does not give rise to competition concerns.

- (104) The Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market arising from the vertical relationship between BSKyB's activities for the licensing of audio-visual content and the downstream activities of Sky Deutschland and Sky Italia as retailers of audio-visual programming in Germany and Austria and Italy, respectively.

*Supply of set-top boxes*

- (105) The proposed transaction would combine the activities of BSKyB as an upstream supplier of set-top boxes with the activities of Sky Deutschland as a downstream retailer of audio-visual programming in Germany and Austria and with the activities of Sky Italia as a downstream retailer of audio-visual programming in Italy.
- (106) However, given that BSKyB's market share of set-top boxes supply upstream are [0-5]% on an EEA-basis and [0-5]% worldwide BSKyB's upstream share of the supply of set-top boxes is negligible. Therefore, the proposed transaction does not give rise to any vertically affected markets.
- (107) The Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market arising from the vertical relationship between BSKyB's activities for the supply of set-top boxes and the downstream activities of Sky Deutschland and Sky Italia as retailers of audio-visual programming in Germany and Austria, and Italy, respectively.

4.2.2.2. Conglomerate effects

- (108) BSKyB is the leading pay TV operator in the United Kingdom and Ireland. Through the proposed transaction, it acquires control of two leading pay TV providers in Italy (Sky Italia) and in Germany and Austria (Sky Deutschland). Therefore, the proposed transaction extends the presence of the BSKyB group to three additional EEA Member States, i.e. Germany, Austria and Italy. The Commission examined whether any conglomerate effects result from the merger in relation to the acquisition of rights to audio-visual content, in particular premium content as well as with respect to the acquisition of TV channels for its pay TV programmes, for different territories of the EEA by the merged entity.
- (109) The Notifying Party submits that in 2013, BSKyB has approximately 9.7 million subscribers and holds a market share in retail pay TV of [50-60]% in terms of subscribers and [70-80]% in terms of revenues in the United Kingdom. Pay TV competitors include Virgin/ Liberty Global ([10-20]% by revenues, [10-20]% by subscribers) and BT ([0-5]% by revenues, [10-20]% by subscribers). In Ireland, BSKyB has [...] subscribers and holds a market share in retail pay TV of [50-60]% in terms of subscribers and [50-60]% in terms of revenues. Pay TV competitors include UPC/ Liberty Global ([30-40]% by revenues, [30-40]% by subscribers), and Setanta ([0-5]% by revenues and [0-5]% by subscribers).
- (110) According to the Notifying Party, on the basis of 2013 data, Sky Italia has 4.6 million subscribers and holds a market share of approximately [60-70]% in terms of subscribers and 77.8% in terms of revenues in the retail pay TV market in Italy.

Its main pay TV competitor is Mediaset (19.1% by revenues, [20-30]% by subscribers).<sup>34</sup>

- (111) On the basis of 2013 data, Sky Deutschland has approximately [...] subscribers in Germany and holds market shares of approximately [10-20]% in terms of subscribers and [30-40]% in terms of revenues in the retail pay TV markets in Germany. Its main pay TV competitors are Kabel Deutschland/ Vodafone ([20-30]% by revenues, [30-40]% by subscribers), Unity Media/ Liberty Global ([20-30]% by revenues, [20-30]% by subscribers), and Deutsche Telekom ([20-30]% by revenues, [5-10]% by subscribers). In Austria, Sky Deutschland has [...] subscribers and holds a market share of approximately [20-30]% in terms of subscribers and [20-30]% in terms of revenues in the retail pay TV market. Its main pay TV competitors include UPC / Liberty Global ([40-50]% by revenues, [30-40]% by subscribers), Liwest Kabelmedien GmbH Pay ([5-10]% by revenues and [5-10]% by subscribers), A1TV/ Telekom Austria Pay ([5-10]% by revenues, [10-20]% by subscribers) and KabelPlus ([5-10]% by revenues and [5-10]% by subscribers).
- (112) The Commission has examined whether the proposed transaction could increase BSkyB's negotiating power in relation to licensors of audio-visual content including premium films and pan-European / international sport events,<sup>35</sup> as well as TV channel suppliers, by combining negotiations and contracts in different territories across the EEA. The Commission has also 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 could in turn strengthen the merged entity's position in each national retail pay TV market.

*The Notifying Party's view*

Audio-visual programming

- (113) First, the Notifying Party submits that, although the merged entity would be active in the acquisition of audio-visual content in three separate geographic markets in the EEA (United Kingdom / Ireland, Germany / Austria and Italy), this would not enhance its ability to access third party rights in these territories. There have not been any material changes in licensing practices since the Commission's decision in *News Corp/BSkyB*. The licensing / acquisition of rights to audio-visual content continues to be largely confined to national territories or linguistically homogeneous areas.

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34 In addition, Mediaset has 1.7 million pre-paid cardholder customers that have not been included in the total market size of 6.8 million subscribers.

35 As regards sports, the market investigation focused mainly on pan-European/international sport events (such as the football 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 on the other hand appear to have more limited appeal outside the country which they relate to (see Case COMP/M. 5121 – *News Corp/Premiere*, Commission decision of 25 June 2008, paragraph 24) and therefore it is less relevant to the conglomerate analysis undertaken here. This is also applicable to other TV content, which tends to be of more local interest (see Case COMP/M.6880 – *Liberty Global/Virgin Media*).

- (114) For premium films, this is partially explained by language and cultural differences, as well as by differences between territories: (i) in valuation of the rights by different broadcasters and OTT operators, in turn reflected in a number of differences including in box office success from country-to-country; (ii) in the specific rights granted, for example differences in the content licensed, volume commitments, licence fees, licence periods, and in the number of permitted runs, and (iii) in staggered expiry dates of the existing licensing agreements. Factors (ii) and (iii) would make it impractical for the merged entity to submit consolidated multi-territory bids absent a willingness of rights holders to synchronise tenders.
- (115) As regards premium sports content, the existence of cross-border deals for sports content continues to be limited in practice, primarily because the content supplier varies from country to country, and is generally interested principally in selling rights for exhibition of its content in its own home territory (where consumer interest in the content is greatest). Rights to other territories are sold separately, either bundled together and sold to multi-national broadcasters or often through rights agencies that negotiate the onward license of rights. Licenses for sports events of interest beyond their home territory (for example the Olympic Games and football events held intermittently such as the World Cup Finals, or the UEFA Euro Finals) are each sold on a national basis.
- (116) Second, the merged entity would not have the incentive to implement a multi-territory licensing strategy that results in bidding more for rights across multiple territories than the sum of what it would have bid for the rights in each of those territories. Even if a rights holder were inclined to invite bids for multi-territory rights, the merged entity would only have an incentive to bid the amount that the rights are worth by reference to its actual or potential subscriber base in each of the territories in which it operates (primarily, Austria, Germany, Ireland, Italy and the United Kingdom). Since the actual / potential subscriber base across those countries does not change as a result of the transactions, the value of the rights would not increase. Furthermore, BSkyB has not identified any synergies on the basis of combined rights acquisition but has identified a number of synergies in terms of streamlining of operating and other costs. Any efficiencies obtained including through managing a single contract would be immaterial.
- (117) Third, the Notifying Party submits that the merged entity will continue to face sophisticated rights holders that have countervailing bargaining power – including the Hollywood studios and holders of rights to premium sports events. Even if purchasers wanted to acquire rights on a cross-territorial basis, they would only be able to do so if the relevant rights holders considered this to be the best way to maximise their revenues.
- (118) Fourth, even if the rights owners' licensing model were to change and they were to license rights on a pan-European basis in the future, the merged entity would face strong competition for rights from a number of operators, including national pay TV and FTA broadcasters – who could form bidding consortia for multi-territory bids – as well as international competitors some of which have a broader geographic coverage than that of the merged entity (such as Liberty Global that is active in 12 European countries, or RTL that is active 8 European countries).

### Wholesale supply of TV channels

- (119) In relation to any conglomerate effects arising from the wholesale supply of TV channels across different territories in the EEA, the Notifying Party submits that the arguments in paragraphs (113) to (118) above also apply in this case.
- (120) The Notifying Party submits that cross-border licensing of TV channels is not common. As a general rule, agreements for the wholesale supply of TV channels are negotiated nationally. The reason for this is that channels are mainly local, with no or limited appeal in other EU Member States. Channels differ across the territories. Often the channel providers produce the content for their channels in the country for which it is destined and / or at least buy local productions. In addition, the content is tailored to the specific European language. Even if a channel is available in multiple territories, the programming and its scheduling / assembly on the channels would be different in the different national versions.
- (121) The Notifying Party claims that the vast majority of the TV channels retailed by each of the Parties are local channels broadcast in the relevant territory's language which are not suitable for, and as a result are not in fact retailed in, other territories. As such, there is no scope for multi-territorial distribution (and hence acquisition) of such local channels and the potential concern would hypothetically only arise in relation to channels which are distributed in the United Kingdom as well as the territories of Sky Italia and Sky Deutschland.
- (122) The Notifying Party submits that even those channels licensed by large international groups operating in multiple territories, such as Disney, Viacom and Discovery are negotiated on a national basis, reflecting differences in popularity of a channel and different conditions of competition in national downstream retail markets. Moreover, the expiry dates of the Parties' current channel distribution agreements with each of the wholesale channel suppliers differ significantly. The staggered expiry of the existing licence agreements is a further reason why licensing of the rights to distribute channels generally takes place on a territorial basis and why multi-territory offers / negotiations would be unlikely.
- (123) Finally, the Notifying Party submits that the merged entity will not have the ability to foreclose competing TV channel suppliers from accessing BSKyB's subscriber base in the United Kingdom due to BSKyB's regulatory obligations to grant third party channels access to its DTH platform on fair, reasonable and non-discriminatory terms (FRAND)<sup>36</sup>. Therefore, a pay TV channel has the option of

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<sup>36</sup> For conditions on BSKyB's electronic programming guide (EPG) see paragraph 9 of Schedule 18 to the Communications Act 2003, 23 July 2003, which carried over the previous regulatory regime by means of a continuation notice. For conditions on conditional access (CA services, see "Regulation of conditional access: Setting regulatory conditions, explanatory statement and formal notification pursuant Section 48(1) of the Communications Act 2003" published by Oftel on 24 July 2003. Ofcom's 2006 Technical Platform Services (TPS) Guidelines set out its approach to considering, in the event of a dispute or complaint, whether BSKyB has complied, amongst others, with its obligations to provide access to EPG and CA services. See 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>. The system is reviewable by Ofcom in the event of any complaint but TPS charges are set by BSKyB and not by Ofcom. According to Ofcom's TPS Guidelines, 'the costs that Sky should be entitled to recover from TPS customers should be restricted to costs which it reasonably, necessarily and

self-retailing by entering into electronic programming guide (EPG) and conditional access (CA) agreements with BSkyB, or enter into a distribution arrangement with a third party pay TV retailer who could obtain EPG and CA services on their behalf.

#### *Results of the market investigation*

- (124) The majority of respondents to the market investigation submit that the current geographic licensing practice is national or at most across linguistically homogeneous areas and that it was likely to remain such in the future.<sup>37</sup>
- (125) However, some respondents to the market investigation raise concerns with respect to the merged entity's possible role in particular with respect to the acquisition of rights to audio-visual content on a multi-territorial basis.

#### Audio-visual programming

- (126) Two respondents raise concerns that post-transaction, BSkyB will be able to successfully bid *higher* amounts for pan-European broadcasting rights than its competitors in particular for attractive sports and premium film content. By bidding higher amounts for exploiting rights in EEA Member States where broadcasting competition is stronger and lower amounts in other countries, the merged entity could exclude its more local competitors from the national pay TV market(s).
- (127) On the other hand, some respondents submit that to the extent that the transaction would result in a shift to multi-territorial acquisition of rights, the merged entity's bargaining power toward rights holders may grow. The respondents submit that the merged entity may become an "unavoidable trading partner" on the basis of its strong position on national pay TV markets, such as the United Kingdom. On a multi-territorial basis, the merged entity might be able to extract *lower* license fees and/ or more favourable conditions for instance with respect to the scope or duration of the rights.
- (128) Finally, in relation to premium films, a respondent raised the concern that the merged entity could, post-merger, have the ability to require exclusivity in relation to pay per view ("PPV") / transactional video on demand ("TVOD") rights.

#### Wholesale supply of TV channels

- (129) A respondent to the market investigation raised the concern that the merged entity could introduce exclusivity into the contracts for its acquisition of Basic Pay TV content at the wholesale level, especially towards important pan-European channel operators.

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efficiently incurs in the provision of TPS to those customers or in order to develop and operate the DSat platform.'

<sup>37</sup> Questionnaire to right-holders, question 4.

Audio-visual programming

- (130) While it has always been possible for rights holders to grant multi-territorial licenses, the market investigation has established that rights are predominantly granted on the basis of national borders or across linguistically homogeneous areas (see section 4.1.1.2 above). Therefore, the relevant question is whether the merged entity would be able to change rights holders' predominant geographic licensing practice and establish either multi-territorial licenses or link negotiations in various territories with the effect of foreclosing competing broadcasters.
- (131) First, from a practical point of view, there appears to be limited possibility of bidding across a number of territories simultaneously, or linking bids for several territories. The Commission reviewed the timeline for the negotiations of major pan-European/ global sports events,<sup>38</sup> and it appears that many sports rights owners require the submission of separate bids for each territory, on different dates, and possibly using different processes such as auctions/ tenders and private negotiations.
- (132) Moreover, certain sports content rights, including a number of pan-European / global sports events of great public interest, are currently covered by "Listed Events" regimes transposed from the EU Audio-visual Media Services Directive.<sup>39</sup> This regime provides that Member States can define certain events that cannot be broadcast on an exclusive basis, in order to ensure that a substantial proportion of the public in that country has the opportunity to view the event live on FTA television.<sup>40</sup> Therefore, these sports events cannot be shown exclusively on pay TV.
- (133) A review of the existing contracts of the Parties with the six major Hollywood film studios supports the Notifying Party's claim that expiry dates are staggered – in some cases by two years or so – between the same studio and each of BSKyB, Sky Deutschland, and Sky Italia (to the extent that the entity has a licensing contract in place with the respective studio). Moreover, licensing agreements concluded between the Parties and the same studio differ with respect to the length of licensing periods, the categories of content and their definitions (which is often in reference to the theatrical, home video or electronic sell through success in the particular territory in which the rights are granted), and the number of permitted runs by category of content. These existing divergences established by rights holders make pan-territory bids impractical or linkages between negotiations highly unlikely.

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38 Events included the recent UEFA champions' leagues, FIFA World Cup, Winter Olympic games, the tennis tournaments Wimbledon and French Open, Formula 1 and Tour de France.

39 Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the Audio-visual Media Services Directive), L 95/1, 15.04.2010.

40 For instance, United Kingdom, Irish, German, Austrian and Italian legislation all list the Olympic games (except winter Olympic games in Ireland), and all or part of the football games of the FIFA World Cup Finals Tournament and the European Football Championship Finals Tournament, as well as at least the final game of the Champions league (except in the United Kingdom).

- (134) Second, it is unlikely that rights holders would deviate from their current preferred model of licensing largely territory-by-territory or by linguistic area and/or synchronise their bidding contests and contracts across multiple territories unless it is in their interest in terms of maximizing revenues. Rights holders – in particular those holding rights for premium sports and premium film content – are sophisticated operators with attractive and often unique content.<sup>41</sup>
- (135) One respondent to the market investigation argues that the merged entity could bid for rights such as major sports events of pan-European interest on a pan-European basis and then sub-licence rights in the countries where it is not present. The Commission notes that rights holders are likely to pursue such a strategy only if the transaction costs to directly licence their rights in all European territories would be higher than the revenues from licence fees that they could obtain. Transaction costs are unlikely to be higher than licensing revenues in cases where the content is capable of having an important effect on competition in the retail pay TV market. For such content, rights holders are unlikely to have an intermediary – such as the merged entity – deriving a margin from sub-licencing their content if they could directly licence the content more profitably. Therefore, it is unlikely that groups with a multi-territorial footprint would bring about a shift in existing licencing practices for premium content towards pan-European licensing that include a sub-licence for territories where a broadcaster is not present.
- (136) Furthermore, the Commission observes that pre-merger, there are already a number of broadcasters, such as Liberty Global or Sky Deutschland and Sky Italia, which operate in groups across various territories in the EEA. Nevertheless, rights holders do not appear to have established, or accepted, the practice of multi-territorial licensing to any meaningful extent, or to have aligned their bidding processes or contract terms. In its *News Corp/BSkyB* decision,<sup>42</sup> the Commission found that Sky Italia and Sky Deutschland had not appeared to engage in joint bidding for rights in the countries where they are mainly active (Italy, Germany, and Austria) despite being in the same group. In the present proceedings, [...]<sup>43</sup>
- (137) Third, even assuming that rights owners were to license rights on a pan-European basis, the merged entity would in any event face competition for multi-territory rights from a number of other pay TV operators, including other multinational groups whose geographic scope partly overlap (such as Liberty Global that – out of the five countries in the merged entity's footprint – is a pay TV operator in the UK, Ireland, Germany and Austria and is present in eight more European countries). Moreover, national or regional pay TV broadcasters could form consortia to bid for pan-European rights.
- (138) Even if the merged entity had the ability to engage in multi-territory strategies due to its presence in multiple territories, it would need to be shown that it has the incentive to do so and that such a strategy would lead to foreclosure of its competitors in the various national pay TV markets.

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41 See also Commission decisions of 21.12.2010 in Case COMP/M.5932 – *News Corp/BskyB*, paragraph 180 and of January 25, 2010 in case COMP/M.5734 – *Liberty Global Europe/UnityMedia*, paragraph 59 (citing respondents to the market investigation).

42 Commission Decision of 21.12.2010 in Case COMP/M.5932 – *News Corp/BskyB*, paragraph 184.

43 [...].



- (139) As regards in particular the first concern expressed in the market investigation, that is that the merged entity would bid, in aggregate, *higher* amounts for premium rights for several territories compared to separate bids for the same territories, the Commission notes in addition that it is questionable that this strategy would be economically plausible and, in any event, would constitute a relevant competition concern.
- (140) First, the value of the bid is based mainly on how rights can be recouped in terms of sales at the retail level in each country / linguistically homogeneous area separately, based on the subscriber base. However, the number of subscribers in each country does not change as a result of the transaction to recoup this investment. In other words, already pre-merger, the Sky entities could bid more money for content in their respective home territories. Second, to the extent that the merged entity can submit higher bids for premium content, this is not anti-competitive. Third, it is rational for rights holders to evaluate potential longer term consequences of the allocation of exclusive rights. For instance, they could forego – and the market investigation revealed an example for such action – a relatively small amount of revenue in the short term by allocating license packages to two or more broadcasters even if a single broadcaster had bid more for the combined package, in order to avoid a potential situation of monopsony which could reduce right holders' revenues in the longer term.<sup>44</sup>
- (141) As regards in particular the second concern expressed in the market investigation, that is that the merged entity would force the rights holders to bundle the rights in multi-territorial licenses and award them to the merged entity by exercising its strong bargaining power and bidding a *lower* combined amount for the package than it would have for separate rights, the Commission notes a number of additional observations.
- (142) First, the Commission notes that a number of respondents to the market investigation who expressed this concern pointed out at the same time that such concern was speculative.
- (143) Second, the Commission reviewed BSkyB's relevant internal documents assessing synergies of the transaction. While BSkyB anticipates synergies of GBP [...], none of those are related to negotiations with rights holders. [...] <sup>45</sup>[...] <sup>46</sup>In any event, these efficiencies are very small compared to the identified efficiencies in procurement, as well as to the overall efficiencies ensuing from the transaction.
- (144) Third, none of the respondents to the market investigation have articulated the reason why rights holders would be willing to negotiate and contract on a multi-territorial basis for a value that is lower than the sum of the price for each territorial licence that they could achieve. Rights holders have the incentive and expertise to maximise revenues in return for licensing their content, in particular if the content is attractive to end users.

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44 Both in the United Kingdom and in Italy, two operators in each country have secured rights to exclusively broadcast certain football games in the respective leagues (Premier League and Seria A) during the same licensing period.

45 [...] See Annex 5.3.6 to the Form CO, slide 7.

46 See Annex 5.3.14 to the Form CO, slides 3 and 6, and Annex 5.3.23, slide 11.

- (145) As regards in particular the concern expressed with respect to PPV/TVOD rights, the Commission notes in addition 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 studios, therefore, generally have an incentive to, and do, 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 possible to reach the widest number of customers possible and maximize returns from each title. Given the rights holders countervailing power, it is unlikely that, post-merger, the merged entity would be so strong as to undermine the non-exclusive licensing structure for PPV/TVOD in its favour by insisting on exclusive PPV/TVOD rights.
- (146) Moreover, the respondents' concern relates in particular to the leveraging of BSkyB's alleged market power to the Italian and/or German and Austrian market. PPV/TVOD rights granted to BSkyB are currently non-exclusive in the United Kingdom.<sup>47</sup> It is implausible that, while BSkyB has not sought to impose, or succeeded in imposing, exclusivity in the United Kingdom, it could succeed in doing so, post-merger, in other countries of the merged entity's footprint. For completeness, the Commission notes that [...].

#### Wholesale supply of TV channels

- (147) As regards the concern that the combination between the Parties would strengthen the merged entity's buyer power in multi-territorial negotiations with (Pay) TV channel providers across different Member States, 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.
- (148) First, the Commission did not find any evidence in BSkyB's internal documents that the Notifying Party anticipated cost savings from the proposed transaction stemming from future negotiations with TV channel broadcasters (see paragraph (143) above for more details on the efficiencies anticipated by BSkyB).
- (149) Second, as discussed in more detail in section 4.1.2.2 above, multi-territorial negotiations between content providers / TV channel suppliers and pay TV retailers are the exception rather than the rule. Rather, the geographic scope of the market for the wholesale supply of TV channels is national or, at most, relates to linguistically homogeneous areas. Many TV channels broadcast local content that is of limited interest to the public in other countries / linguistic areas. According to the Notifying Party, the vast majority of the TV channels retailed by each of the Parties are local channels broadcast in the relevant territory's language. These would not seem suitable for distribution in other territories. For instance, according to the Parties, all channels broadcasted on Sky Deutschland, with the exception of Eurosport, are national/ local and have been created for the German market.

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<sup>47</sup> [...].

- (150) Third, to the extent that multi-territorial negotiations with TV channel broadcasters occasionally happen or could happen, these negotiations would likely be mainly with a limited number of international groups, such as Disney, Viacom or Time Warner. These international groups are likely to enjoy countervailing bargaining power, in particular if they also own rights to other attractive content such as premium films.
- (151) Fourth, the Commission notes the Parties' representation that [...] Moreover, for channels licensed by large international groups operating in multiple territories such as Disney, Viacom and Discovery, the terms of agreements by Sky Italia and Sky Deutschland, although part of the same group, vary. For example, while Sky Italia [...], Sky Deutschland [...]. The expiry dates of the Parties' current channel distribution agreements with each of the wholesale channel suppliers differ significantly (up to two years).
- (152) Fifth, the Commission notes that the respondent to the market investigation raising the concern presently discussed is particularly concerned about the merged entity leveraging its alleged market power in the United Kingdom into other territories of the merged entity's footprint. However, in the United Kingdom, BSkyB does not have exclusive distribution rights to any of the channels the merged entity would distribute in more than one territory. It would be implausible that BSkyB could use its alleged market power in the United Kingdom— where it has not sought or succeeded in imposing exclusivity – for the purpose of requesting exclusivity in another territory (such as Germany, Austria or Italy).

#### *Conclusion*

- (153) In light of the above, the Commission concludes that the combination of BSkyB's presence as a leading pay TV operator in the United Kingdom and Ireland with Sky Deutschland and Sky Italia's presence as leading pay TV operators in Germany, Austria and Italy does not 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 audio-visual programming content or TV channels in the United Kingdom and Ireland, Germany and Austria, as well as Italy.

## **5. CONCLUSION**

- (154) 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 EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission*  
*(signed)*  
*Joaquín ALMUNIA*  
*Vice-President*