



EUROPEAN COMMISSION
DG Competition

Case M.8354 - FOX / SKY

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION

Date: 07/04/2017



EUROPEAN COMMISSION

Brussels, 7.04.2017
C(2017)2451 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying party:

Subject: Case M.8354 - FOX / SKY
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004¹ and Article 57 of the Agreement on the European Economic Area²

Dear Sir or Madam,

- (1) On 3 March 2017, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004³ by which Twenty-First Century Fox, Inc ("21CF" or the "Notifying Party", US) proposes to acquire the remaining shares that it does not currently own in Sky Plc ("Sky", UK, and the "Proposed Transaction"). 21CF and Sky are collectively referred to as the "Parties".

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

² OJ L 1, 3.1.1994, p. 3 (the "EEA Agreement").

³ OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

1. THE PARTIES

- (2) 21CF⁴ is a diversified global media company with operations in three main industry segments: cable network programming, television and filmed entertainment. The activities of 21CF are conducted principally in the United States, the United Kingdom, Continental Europe, Asia and Latin America.
- (3) The legal predecessor of 21CF was News Corporation (US). On 21 December 2010, the Commission adopted a decision whereby it [...] * unconditionally the proposed acquisition by News Corporation of British Sky Broadcasting ("BskyB") (BSkyB is now known as "Sky" and is the target in the present Proposed Transaction).⁵ The *NewsCorp/BskyB* proposed transaction was ultimately abandoned. At the time of that proposed transaction, BskyB was active in the United Kingdom and Ireland.
- (4) On 28 June 2013, the activities of News Corporation (that is, the acquirer in the *NewsCorp/BskyB* transaction), were separated into two distinct legal entities: (i) 21CF (the acquirer in the present case), which retained News Corporation's cable network programming, TV and filmed entertainment businesses; and (ii) News Corp, which retained the News Corporation's publication business.
- (5) On 11 September 2014, the Commission adopted a decision whereby it cleared unconditionally the proposed acquisition by BskyB of Sky Deutschland and Sky Italia from 21CF.⁶
- (6) Sky⁷ is the holding company of subsidiaries carrying on business in a variety of sectors predominantly in the UK, Ireland, Germany, Austria and Italy,⁸ including: (i) licensing/acquisition of audio-visual ("AV") programming; (ii) TV channel wholesale supply in the UK and Ireland; (iii) retailing of AV programming to subscribers; (iv) provision of technical platform services to broadcasters on Sky's direct-to-home ("DTH") platforms in the UK, Ireland, Germany and Austria; (v) sale of TV advertising; (vi) in the UK and Ireland, the provision of fixed-line retail telephony and broadband services.

* Should read: "cleared"

⁴ 21CF is a Delaware corporation whose shares are listed and traded on the NASDAQ Global Select Market.

⁵ Commission decision of 21 December 2010 in case M.5932 – *NewsCorp/BskyB*.

⁶ Commission decision dated 11 September 2014 in case M.7332 - *BskyB/ Sky Deutschland/ Sky Italia*.

⁷ Sky's shares are listed on the London Stock Exchange.

⁸ BSkyB (with activities in the UK and Ireland) had acquired Sky Deutschland and Sky Italia in 2014. That transaction was cleared unconditionally by the Commission in case M.7332 - *BskyB/ Sky Deutschland/ Sky Italia*.

2. THE OPERATION

- (7) The Proposed Transaction relates to the proposed acquisition of control by 21CF over Sky by way of purchase of shares not already owned by it.
- (8) On 15 December 2016, 21CF publicly announced pursuant to Rule 2.7 of the UK Takeover Code its firm intention to make an offer to acquire the fully diluted share capital of Sky not already owned by 21CF and its affiliates. This constitutes the announcement of the intention to launch a public bid in terms of Article 4(1) of the EUMR.
- (9) As a result of the Proposed Transaction, 21CF will own 100% of the Sky shares and will acquire control of Sky pursuant to Article 3(1)(b) of the Merger Regulation.
- (10) The information submitted by the Notifying Party indicates that 21CF's absence of control over Sky remains unchanged compared to the situation assessed by the Commission in case M.5932 – *NewsCorp/BskyB*.
- (11) Like its legal predecessor, News Corporation, 21CF is currently a shareholder in Sky, with a shareholding of 39.14%. The remainder of the shares in Sky are publicly traded and widely held. Indeed, as at 18 January 2017, the only other shareholders with an interest of more than 2% were: (i) Blackrock, Inc – 5.22%; (ii) Franklin Resources – 4.09%; and Invesco – 3.56%.
- (12) However, in line with the position adopted in its decision in *NewsCorp/BskyB*, the Commission considers, for the purposes of the case at hand, that 21CF does not currently control Sky within the meaning of the Merger Regulation, whether on a *de jure* or on a *de facto* basis, for the following reasons.
- (13) First, 21CF holds a minority shareholding of 39.14% in relation to which, the voting rights that 21CF can exercise at general meetings, are capped at 37.19% pursuant to a voting agreement.⁹ Therefore, 21CF does not hold the majority of voting rights in Sky.
- (14) Second, there are no special rights attached to the shares held by 21CF, which grant it the possibility of exercising control over Sky within the meaning of the Merger Regulation.
- (15) Third, as regards voting at shareholder level, 21CF did not hold more than 50% of the total of the present shares that voted at annual general meetings of Sky over the period 2012-2016. The shareholder attendance rate at Sky's annual general meetings during that period was between a minimum level of

⁹ Voting Agreement between 21CF, Sky and affiliated entities dated 21 September 2005.

82.9% (2014) and a maximum level of 85.55% (2016).¹⁰ 21CF accounted for 43.99% of all votes instructed at Sky's most recent annual general meeting (13 October 2016), and an average of 44.35% over the period 2012 - 2016.

- (16) Strategic decisions (notably those related to the budget and the business plan) in Sky are taken at the level of the Board of Directors on the basis of a majority of votes. 21CF does not have the right to appoint any director to Sky's board of directors. Therefore 21CF cannot impose or block decision making at this level. For completeness, the Board of Directors of Sky is composed of eleven Directors. Three of the eleven directors on Sky's Board of Directors are affiliated to 21CF. One of these directors currently chairs Sky's board. However, the Chairman does not carry a casting vote, and in any event, a majority of members (eight out of eleven) of Sky's Board have no connection with 21CF.
- (17) The information submitted by the Notifying Party indicates therefore that 21CF has no rights in relation to the passing or the blocking of strategic decisions in Sky.
- (18) Also for completeness, Sky's directors (and Group CEO¹¹) are appointed by the Board of Directors. Board members are then eligible for re-appointment at Sky's Annual General Assembly with at least 50% of the votes expressed by the participating shareholders. Given its shareholding and voting rights level and the lack of special rights (regarding strategic decisions) attached to its shares, Sky cannot on its own impose, nor can it block decisions, including decisions related to the re-appointment of directors, at the level of the shareholders' meeting. Moreover, as explained above, 21CF held on average 44.35% of the total of the present shares that voted at annual general meetings of Sky over the period 2012-2016. Thus, the information submitted by the Notifying Party indicates that 21CF would not, on its own have the de facto ability to re-appoint board members at the level of the shareholder meeting.
- (19) Fourth, the information submitted by the Notifying Party indicates that there are no economic links sufficient to give 21CF control over Sky on the basis of economic dependence.
- (20) The Commission's above findings in paragraphs (12) - (19) above are in line with the position of the Commission adopted in its decision in *NewsCorp/BskyB* in which the Commission assessed the proposed acquisition by 21CF's legal predecessor, News Corporation, over BskyB. On the basis of similar elements to those considered above, in that case the Commission reached the conclusion that News Corporation's 39.14% shareholding did not confer control over Sky (then known BskyB) within the meaning of the

¹⁰ 84.7% in 2012, 83.48% in 2013, 82.90% in 2014, 85.55% in 2015 and 84.72% in 2016.

¹¹ The Group CEO appoints other senior management.

Merger Regulation.¹² That position was later confirmed by the Commission in its decision in case M.7332 - *BskyB/ Sky Deutschland/ Sky Italia*.¹³

- (21) The Proposed Transaction therefore constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.
- (22) As indicated above, on 28 June 2013, the activities of News Corporation (that is, the acquirer in *NewsCorp/BskyB*) were separated into two distinct legal entities: (i) 21CF, which retained News Corporation's cable network programming, TV and filmed entertainment businesses; and (ii) News Corp, which retained the News Corporation's publication business.
- (23) The Commission notes that The Murdoch Family Trust (the "MFT") is the largest shareholder in both 21CF (the acquirer in the present case) and in the media company, News Corp.¹⁴ Together with minor interests associated with the businessman K. Rupert Murdoch, the MFT holds approximately 38.9% of 21CF's voting shares and approximately 39.4% of News Corp's voting shares respectively.
- (24) For the purposes of the competition assessment in the present case, the question of whether K. Rupert Murdoch, the MFT or any member of the Murdoch family controls either 21CF or News Corp can be left open given that the outcome of the competitive assessment will not change whether or not K. Rupert Murdoch, the MFT or any member of the Murdoch family controls either 21CF or News Corp. For the purposes of the case at hand, the Commission has therefore undertaken the competitive assessment of the Proposed Transaction as if 21CF and News Corp were under common control.

3. EU DIMENSION

- (25) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million¹⁵ (21CF: EUR 26 658 million; Sky: EUR 16 006 million; Combined: EUR 42 664 million). Each of them has an EU-wide turnover in excess of EUR 250 million (21CF: EUR [...] million; Sky: EUR [...] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

12 Commission decision of 21 December 2010 in case M.5932 – *NewsCorp/BskyB*, paragraphs 7-24.

13 Commission decision of 11 September 2014 in case M.7332 *BskyB/ Sky Deutschland/ Sky Italia*, paragraph 2, footnote 3.

14 In the EEA, News Corp's main activities comprise the publication of newspapers, principally in the UK (the Times, Sunday Times, Sun and Sun on Sunday), the publication of books through Harper Collins and radio broadcasting in the UK and Ireland through Wireless Group (which News Corp acquired in September 2016).

15 Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

- (26) The Proposed Transaction therefore has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

- (27) The Proposed Transaction relates to all the levels of the TV value chain. Section [...] * first provides an overview of the TV value chain and the Parties activities at each level of the chain. Section 4.2 onward then discusses the product and geographic market definition for each level of the TV value chain.
- (28) Moreover, as described at paragraph (24), the Commission has undertaken the competitive assessment of the Proposed Transaction as if 21CF and News Corp were under common control. Therefore, the Commission discusses the product and geographic market definition of the advertising market, where 21CF News Corp and Sky are active, in Section 4.5 and the newspaper publishing market, where News Corp is active, at Section 4.6.

4.1. Introduction – the TV value chain and the Parties' activities

- (29) AV content for television (TV content) comprises all products (films, sports, series, shows, live events, documentaries, etc.) that are broadcast via TV.¹⁶ In previous decisions, the Commission has identified different activities in the TV value chain, namely: (i) the production and supply of TV content (including the supply of pre-produced TV content and Commissioned TV content); (ii) the wholesale supply of TV channels; and (iii) the retail provision of TV services to end customers.¹⁷ As a part of its analysis of the Parties' activities, the Commission also considers: (iv) the sale of advertising on TV channels.
- (30) Sections 4.1.1 to 4.1.3 [...] ** these levels of the TV value chain as well as providing an overview of the Parties' activities at each level in the UK, Ireland, Germany, Austria and Italy.

4.1.1. Production and supply of TV content

- (31) This upstream level of the value chain concerns the production of new TV content. TV production companies produce TV content for either: (i) internal use on their own TV channels or retail TV services if they are vertically integrated in the wholesale supply of TV channels and/or in the retail provision of TV services (that is to say, captive TV production); or (ii) supply to third-party customers (that is to say, non-captive TV production).

* Should read: "4.1"

** Should read: "further describe"

¹⁶ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 28.

¹⁷ See, for example, Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*; Commission decision of 22 September 2006 in case M.4353 *Permira/All3Media Group*, and Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*.

- (32) Third-party customers are typically: (i) TV channel suppliers (TV broadcasters), which then incorporate the TV content into linear TV channels, or (ii) content platform operators, which then retail the TV content to end users on a non-linear basis (that is to say, Pay-Per-View ("PPV") or video on demand ("VOD")), including non-traditional platforms, that is to say internet or so-called Over-The-Top ("OTT") platforms.
- (33) TV broadcasters and TV distributors who source TV content for their TV channels or retail TV services generally have a choice between a number of sourcing models, which can be broadly categorised as follows:
- (a) Obtaining TV content produced on an 'ad hoc' basis (that is to say tailor-made), by:
 - i. Commissioning TV content from a TV production company (which owns the relevant TV format);
 - ii. Hiring a TV production company to provide the technical means and deliver the finished TV content based on a format owned by the broadcaster; or
 - iii. Producing the content themselves by relying on their in-house facilities (captive TV production); or
 - (b) Acquiring broadcasting rights from TV production companies for pre-produced TV content (pre-produced TV content, sometimes referred to as off-the-shelf or tape sales).
- (34) These are discussed further below.

4.1.1.1. Production and supply of commissioned TV production content

- (35) In most cases, TV production companies produce TV content tailored to the needs of their customers on the basis of original TV formats¹⁸ that they develop themselves or that they acquire from right holders (commissioned production). However, in some instances, TV production companies are hired by TV broadcasters or content platform operators to simply provide the technical production means and deliver the finished programme based on a TV format owned or acquired by the hiring company (production-for-hire or supply of TV production services).
- (36) The production costs are usually borne entirely or almost entirely by the TV broadcasters or content platform operators. As regards ownership of the various rights relating to the TV content (for example, primary TV broadcast rights, 'catch-up', VOD, etc.), the extent to which those rights are retained by the production company – as opposed to the acquirer of TV content – may vary

¹⁸ TV format refers to the overall concept and branding of a copyrighted TV programme.

based on a number of factors, such as national regulation in the country concerned, the type of broadcasting, the outcome of the commercial negotiations between the parties, etc. Producers or the acquirers of TV content may then achieve secondary revenues by further licensing/distributing the TV content or the TV format to third parties.

(37) It follows that the supply-side of this market comprises TV production companies, while the demand-side comprises third parties that commission the production of TV content or hire TV production services, typically TV broadcasters or content platform operators.

(38) As regards the supply-side of the market:

(a) Sky has some minor activities in the supply of Commissioned TV content through its distribution arm, Sky Vision.

(b) 21CF is active in the supply of commissioned TV content through its JV with Apollo, Endemol Shine Group ("Endemol Shine").¹⁹

(39) As regards the demand-side of the market:

(a) Sky acquires some commissioned TV content from third party content owners and distributors to include in its own channels and content platforms.

(b) 21CF does not acquire any commissioned TV content.

4.1.1.2. Licencing of broadcasting rights to pre-produced TV content

(40) This upstream level of the value chain concerns the licensing of broadcasting rights relating to pre-existing TV content – that is to say TV content that has been previously produced and is subsequently made available ‘off-the-shelf’ by the rights holder (so-called pre-produced TV content) – and broadcasting rights relating to sports events.

(41) The broadcasting rights relating to TV content can belong to one or more of the following: (i) the holder of the rights to the TV format; (ii) the production company that produced the TV content; and (iii) the company that commissioned the production of the TV content. In addition, the broadcasting rights can belong to a third-party distributor, to which they were licensed by the original owner, with a right to sub-license.

(42) All of these categories of rights owners, which constitute the supply-side of the market, license broadcasting rights to content aggregators, which constitute the demand-side of the market, namely: (i) TV broadcasters; or (ii) content platform operators.

¹⁹ Commission decision of 10 July 2014 in case M.7279 – *Apollo / Endemol*.

- (43) As regards the supply-side of the market:
- (a) Sky licenses small amounts of pre-produced TV content through its distribution arm, Sky Vision.
 - (b) 21CF licenses pre-produced TV content through 20th Century Fox ("20CF"), Endemol Shine, and Fox Networks Group ("FNG").
- (44) As regards the demand-side of the market:
- (a) Sky acquires some pre-produced TV content from third party content owners and distributors to include in its own channels and for its content platforms;
 - (b) 21CF, through FNG, acquires a small amount of Pre-Produced TV content from third party content owners and distributors to include in its own channels.

4.1.2. *Wholesale supply of TV channels*

- (45) TV broadcasters use the TV content that they have acquired or produced in-house in order to package it into linear TV channels. (Linear) TV channels are broadcast to end users either on a free-to-air ("FTA") basis or on a pay-TV basis.
- (46) At a very general level, FTA channels are TV channels that are available to viewers free of charge. Pay-TV channels are channels for which the viewer must pay a subscription fee in order to watch. Traditionally, FTA channels finance their operations via advertising revenues (with the exception of the publicly-owned TV channels in a number of Member States which are not allowed to sell advertising space), while pay-TV channels generate revenues through subscription fees.
- (47) The Commission notes that TV broadcasters are increasingly complementing their traditional linear TV channel offering with non-linear services such as VOD services.²⁰
- (48) Some TV broadcasters are vertically integrated as they are also active [...] retail TV operators (TV distributors) in the market for the retail provision of TV services

* Should read: "as"

²⁰ VOD services can be further differentiated into three types. First, Subscription VOD ("SVOD") designates a service whereby the end user obtains the right to watch multiple titles during a designated time period, for instance one month, through a single payment. Second, Transactional VOD ("TVOD") designates a service whereby the end user obtains the right to watch a single selected title within a designated time frame, for instance within 24 hours, through a single payment. Third, pay per view ("PPV") designates a service whereby the end user makes a payment to watch a single title that is being broadcast at a specific time, which is the same for all viewers. In the case of TVOD and SVOD, viewers can select, purchase and view the titles at times of their own preference, whereas in the case of a title available for PPV, viewers purchase the right to watch that title at the given time it is broadcast, which is the same for everyone (for instance, the right to watch the live broadcast of a football match can be purchased for PPV).

to end users. Other TV broadcasters are not vertically integrated and rely on third party TV distributors to distribute their TV channels at the retail level.

- (49) As regards the supply-side of the market:
- (a) Sky supplies channels to TV distributors and also holds a 50% stake in channel provider A&E Networks UK, a joint venture with A&E Networks. Sky does not supply channels on a wholesale basis in Italy, and does so only to a limited extent in Germany.²¹
 - (b) 21CF supplies a range of channels such as FOX, National Geographic, and BabyTV, to TV distributors. 21CF supplies the Fox Sports Channel in the Netherlands and Italy. 21CF also owns Star TV, which distributes a number of special-interest channels targeted at the South Asian community.
- (50) As regards the demand-side of the market:
- (a) Sky enters into agreements with TV broadcasters for the distribution of TV channels in the UK, Ireland, Germany, Austria and Italy.
 - (b) 21CF does not acquire TV channels.

4.1.3. *Retail provision of TV services to end users*

- (51) TV distributors either limit themselves to carrying TV channels and making them available to end users, or also act as channel aggregators, which ‘package’ TV channels. The TV services supplied by TV distributors to end users consist of: (i) packages of linear TV channels (which they have either acquired or produced themselves); and (ii) content aggregated in non-linear services, such as VOD, SVOD, TVOD and PPV. TV content can be delivered to end users through a number of technical means including cable, satellite and IPTV.²² OTT players deliver channels and content in both a linear and non-linear fashion through the use of the internet.
- (52) The content offered by the TV distributor is presented in an electronic programme guide ("EPG"), which is an application used on television sets to list current and scheduled programmes that are or will be available on each channel and a short summary or commentary for each programme. Each channel broadcast on the TV platform receives an EPG position, which is usually agreed between the TV broadcaster and the TV distributor. Traditional EPGs are not always used with regard to online content platforms and other non-linear

²¹ In Germany, Sky Deutschland [Details of Sky Deutschland’s wholesale supply agreements].

²² IPTV is the abbreviation for Internet Protocol TV; it is a system through which television services are delivered using the Internet protocol over a packet-switched network such as the internet, instead of being delivered through traditional terrestrial, satellite signal and cable television formats.

methods of supplying content, or may form only part of a TV distributor's customer interface.

- (53) In the retail provision of TV services to end users:
- (a) Sky offers retail services in the UK, Ireland, Germany, Austria and Italy.
 - (b) 21CF supplies one FTA channel in the UK.

4.2. Production and supply of TV content

4.2.1. Product market definition

4.2.1.1. Commission precedent

- (54) With regard to the market for the supply of TV content, in previous decisions the Commission has concluded that there are separate markets for the: (i) production and supply of commissioned TV content; and (ii) licencing of broadcasting rights for pre-produced TV content.²³
- (55) With regard to the market for licencing of broadcasting rights for TV content, the Commission has considered that it could be subdivided by content type, in particular: (i) films; (ii) sports; and (iii) other TV content (i.e. all non-sport, non-film content); and potential sub-segments within these content types. Ultimately, the Commission left the exact scope of the product market open.²⁴
- (56) The Commission has also considered further sub-dividing the market for the licencing of broadcasting rights for TV content by exhibition window: (i) subscription video on demand ("SVOD"); (ii) transactional video on demand ("TVOD"); (iii) pay-per-view ("PPV"); (iv) first pay-TV window; (v) second pay-TV window; and (vi) FTA; but left the market definition open.²⁵

²³ Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 69. See also Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*, recital 41 and Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recital 40.

²⁴ Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland* and Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 69; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recitals 18–20; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 19. Moreover, as regards sports, the Commission has also previously considered a distinction between football and other sports and further distinctions within football, for example between regular football events and football events that are played more intermittently (Commission decision of 18 January 2007 in case M.4519 *Lagardère/Sportfive*, recital 10). As regards films, the Commission has considered distinguishing between US-produced films and other films (Commission decision of 2 April 2003 in case M.2876 *News Corp/Telepiù*, recitals 58 and 61).

²⁵ Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 69; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 18; Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*, recitals 46–48; Commission decision of 9 October 2014 in

4.2.1.2. Notifying Party's view

- (57) The Notifying Party submits that it is not necessary for the Commission to make a determination on the product market definition for the supply of TV content given the competitive assessment would not change.
- (58) The Notifying Party argues that the production and supply of TV content is a heterogeneous activity which makes it difficult to reliably define separate markets. In particular, the Notifying Party does not consider a segmentation of TV content in premium and non-premium content as appropriate.²⁶
- (59) The Notifying Party further submits that if the Commission were to consider a separate market for sports, it should be a market for the supply of all sports content, which would include the live broadcast of sporting events, as well as sports highlights.²⁷ Similarly, if the Commission were to consider a market for the supply of film content, the Notifying Party submits that it should encompass all film content, irrespective of origin and across all exhibition windows. Furthermore, in relation to a potential market for other TV content, it submits that it would not be appropriate to further segment this market between pre-produced TV content and commissioned TV production or by type of content (e.g. factual, general entertainment, youth).
- (60) Finally, the Notifying Party submits that it would not be appropriate to segment by exhibition window or by type of broadcaster.

4.2.1.3. The Commission's assessment

- (61) The results of the market investigation indicate that: (i) commissioned TV content; and (ii) pre-produced TV content; [...] * substitutable from either the demand or the supply side.²⁸ From the demand side, most TV broadcasters note that commissioned TV content is produced especially to meet the taste of the local viewers and that there are significant differences in cost compared to pre-produced TV content.²⁹ From the supply side, respondents note that significant investment in additional expertise, infrastructure and creative potential would be needed for a company only active in the licensing of pre-produced TV content to start the production of commissioned TV content.³⁰

case M.7360 *21st Century Fox/Apollo/JV*, recitals 45–47, Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 38–44.

* Should read: "are not"

²⁶ Form CO, paragraphs 6.57-6.58.

²⁷ Form CO, paragraph 6.59.

²⁸ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 8.

²⁹ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 8.

³⁰ Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 6.

- (62) Therefore, it appears that the production of commissioned TV content and the licensing of broadcasting rights for pre-produced TV content are two separate product markets.
- (63) With regard to the type of TV content, the market investigation confirms that from the demand side: (i) films; (ii) sport; and (iii) other TV content; are not substitutable and that there are significant differences from a supply side.³¹ Most of the right holders responding to the market investigation consider that a company which is only active in the production of films or sports content would not be able to start producing TV programmes other than films and sports within a short timeframe and without incurring significant additional costs.³²
- (64) There is also evidence to suggest that these types of TV content should be further sub-divided. With regard to films, most TV broadcasters (from the demand side) and rights holders (from the supply side) indicate that the US films (i.e. films produced by the six 'major' Hollywood studios - Warner, Universal, Disney, 21CF, Paramount and Sony) and other non-US films are not substitutable. Respondents note that major Hollywood studios have a higher budget, are able to attract the mass market and have good international and national reputation.³³
- (65) With regard to other TV content, most TV broadcasters (from the demand side) and rights holders (from the supply side) consider that scripted and unscripted TV content are in general not substitutable with each other due to their differences in the audience, types and genre of content, as well as production process and budget.³⁴
- (66) The information gathered during market investigation also indicates that premium and non-premium other TV content are not substitutable. These different types of TV content have different costs, target audience and have different competitive and revenue potentials. One respondent noted that the production of premium TV content, especially high end TV series, can be compared with cinema productions in terms of production value. Another respondent highlights that premium and non-premium TV content are in general complementary.³⁵

31 Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 13. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 10.

32 Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 14.

33 Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 18. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 12.

34 Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 19. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 13.

35 Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 22. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 14.

- (67) The results of the market investigation suggest that the market for the licensing of pre-produced TV content could be further segmented according to the exhibition window and type of content, in line with the Commission's previous decisions.³⁶ With regard to the exhibition window, the market investigation indicates that the majority of the content owners continue to licence their content separately and with different terms with the following windows: (i) SVOD; (ii) TVOD; (iii) PPV; (iv) first pay-TV; (v) second pay-TV; and (vi) FTA.³⁷
- (68) In any event, for the purpose of this decision, the exact product market definition for production of commissioned TV content and the supply of pre-produced content can be left open, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market regardless of whether the market is sub-divided this way or whether these segments are further segmented as described above.

4.2.2. *Geographic market definition*

4.2.2.1. Commission precedent

- (69) In past decisions, the Commission has defined the market for the production and supply of TV content, including production of TV content and the licensing of broadcasting rights for TV content to be either national or regional, based on linguistically homogeneous areas.³⁸

4.2.2.2. Notifying Party's view

- (70) The Notifying Party agrees with this market definition and submits that the relevant geographic market for the production and supply of TV content, or any more narrowly defined markets, is either national or regional, based on linguistically-homogeneous areas.
- (71) Whether content is licensed on a linguistic region basis primarily depends on the business model of the licensee and the territories where it is active. By contrast, a FTA broadcaster that is only located in one Member State would naturally require a licence for that Member State only.
- (72) Ultimately, the Notifying Party submits that the precise geographic scope of the market can be left open in this case.

³⁶ Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 15. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 11.

³⁷ Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 15.

³⁸ Commission decision of 21 December 2010 in case M.5932 *News Corp/BSkyB*, recitals. 73–75; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 24. Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recitals 73-76.

4.2.2.3. The Commission's assessment

- (73) The results of the market investigation suggest that most of the respondents among rights holders and TV broadcasters supply and purchase content nationally or for certain linguistic regions; by way of example, some broadcasters indicate that they buy content for the whole German speaking region since viewing tastes are largely identical.³⁹
- (74) In any event, for the purpose of this decision, the exact geographic market definition for supply of commissioned TV content and the supply of pre-produced TV content can be left open, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market regardless of whether the market is considered to be national or by linguistic region.

4.3. Wholesale supply of TV channels

- (75) TV broadcasters package the TV content that they have acquired or produced in-house into linear TV channels. Linear TV channels are broadcast to end users either on a FTA basis or on a pay-TV basis. This wholesale level is an intermediate activity between upstream production and licensing of content, and the downstream retail provision of TV services to customers.

4.3.1. Product market definition

4.3.1.1. Commission precedent

- (76) In previous decisions, the Commission has identified a wholesale market for the supply of TV channels. Within that market, the Commission has further identified two separate product markets for: (i) FTA TV channels; and (ii) pay-TV channels.⁴⁰ The Commission has further concluded that within the pay-TV channel market, there are separate markets for: (i) premium pay-TV

³⁹ Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 32. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, questions 27 to 28. Also, the Austrian competition authority notes that whilst the supply of TV content may be based on linguistically homogeneous regions, from a demand side, the market for the purchase of TV content is Austria on the grounds that: (i) Austrian TV broadcasters such as ORF buy on a national basis; (ii) content providers tend to licence Germany, Austria and Switzerland separately in order to maximise revenues; and (iii) certain content, in particular sports, has a far higher value in Austria than Germany. Bundeswettbewerbshörde - submission of 9 March 2017.

⁴⁰ Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 91. Commission decision of 18 July 2007 in case M.4504 SFR/Télé 2 France, recitals 37–40; Commission decision of 18 July 2007 in case M.4504 SFR/Télé 2 France, recital 40; Commission decision of 21 December 2010 in case M.5932 News Corp/BskyB, recitals 80, 83 and 85; Commission decision of 21 December 2011 in case M.6369 HBO/Ziggo/HBO Nederland, recital 24; Commission decision of 15 April 2013 in case M.6880 Liberty Global/Virgin Media, recital 37.

channels; and (ii) basic pay-TV channels, conducting the assessment for FTA channels within the market for basic pay-TV channels.⁴¹

- (77) In previous decisions, the Commission also examined a number of other potential segmentations, including: (i) genre or thematic content (such as films, sports, news, youth, and others)⁴²; (ii) linear channels vs non-linear services (VOD, PPV)⁴³; and (iii) the different means of infrastructure used for the delivery to the viewer (cable, satellite, terrestrial TV and IPTV).⁴⁴ It has ultimately left the market definition open in all these regards.

4.3.1.2. Notifying Party's view

- (78) The Notifying Party notes that in its previous decisions the Commission has identified a separate wholesale market for the supply of TV channels and considered a number of other potential segmentations.
- (79) The Notifying Party considers that the question of whether the wholesale market for the supply of TV channels must be further segmented according to the type of TV channels or according to the type of platform can be left open.

4.3.1.3. The Commission's assessment

- (80) The market investigation indicates that the segmentation between FTA and pay-TV channels continues to be appropriate. Respondents highlight the differences in terms of content, pricing, audience and how broadcast rights are licenced, with price being the key differentiating factor. Most respondents do not consider basic pay-TV specifically and FTA channels to be substitutable,⁴⁵ citing the significant differences in business models between FTA (mainly financed by advertisements and sometimes by public funds) and pay-TV channels (mainly financed by the fees paid by pay-TV retailers).⁴⁶

41 Commission decision of 24 February 2015 in case M.7194 Liberty Global / Corelio / W&W / De Vijver Media, recital 101.

42 Commission decision of 24 February 2015 in case M.7194 Liberty Global / Corelio / W&W / De Vijver Media, recital 92. Commission decision of 2 April 2003 in case M.2876 *Newscorp/Telepiù*, 2 April 2003, recital 76; Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recitals 41–42; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 35; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 81; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 89.

43 Commission decision of 24 February 2015 in case M.7194 Liberty Global / Corelio / W&W / De Vijver Media, recital 94. Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 43; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 21.

44 Commission decision of 24 February 2015 in case M.7194 Liberty Global / Corelio / W&W / De Vijver Media, recital 98. Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 44; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 22.

45 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 19 and 20. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 8 and 9.

46 Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 10. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 21.

- (81) The results of the market investigation also suggest that a distinction should be made between basic pay-TV and premium pay-TV channels with most respondents considering them not to be substitutable. Several respondents note that premium pay-TV channels typically offer very specific content, e.g. sports, movies or exclusive content which has a particular value to the customer and is not available on basic pay-TV channels.⁴⁷
- (82) The results of the market investigation were mixed as to whether the market should be further sub-divided according to genre. Most respondents indicate that channels of a specific genre are only substitutable with channels in the same genre. Several respondents explain that thematic channels are created for specific target audiences. One respondent notes that factual channels are a distinct feature of any pay-TV package and cannot be substituted by channels in another genre.⁴⁸
- (83) On the other hand, some respondents indicate that certain genres are substitutable to a certain degree, such as factual channels and general entertainment channels. One respondent notes while TV distributors should offer a complementary ranges of genres, they have flexibility regarding the composition.⁴⁹
- (84) With regard to a possible segmentation of TV channels depending on the type of infrastructure used for their transmission, the results of the market investigation did not indicate that there are any differences on either the demand- or supply- side of the market according to the type of infrastructure the TV distributor operates.⁵⁰
- (85) In any event, for the purpose of the present decision, the question whether the market for the wholesale supply of TV channels should be further segmented based on the type of infrastructure, among FTA, basic pay-TV and premium pay-TV or by genre could be left open, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market under any of these product market definitions.

⁴⁷ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, questions 22 and 23. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 15.

⁴⁸ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 24. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 16.

⁴⁹ Discovery non-confidential reply to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 24.

⁵⁰ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 26.

4.3.2. Geographic market definition

4.3.2.1. Commission precedent

- (86) In previous decisions, the Commission found the market for the wholesale supply of TV channels to be either national in scope,⁵¹ sub-national,⁵² or by linguistic region encompassing more than one Member State.⁵³

4.3.2.2. Notifying Party's view

- (87) The Notifying Party considers [...] national or confined to linguistic region but, in any case, submits that the precise geographic scope of the market can be left open in this case.

4.3.2.3. The Commission's assessment

- (88) According to the respondents to market investigation, the majority of agreements between TV broadcasters and retail TV distributors for the wholesale supply of TV channels are negotiated on either a national, sub-national or linguistic basis.⁵⁴
- (89) In any event, for the purpose of this decision, the exact geographic market definition for wholesale supply of TV channels can be left open, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market regardless of whether the market is considered as national, sub-national or by linguistic region.

* Should read: "the geographic scope of the market to be"

51 Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 39; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 41; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 98.

52 Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*.

53 Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 86–88; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*.

54 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, questions 27 to 29. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, questions 20 to 22. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, questions 27 to 29.

4.4. Retail provision of TV services

4.4.1. Product market definition

4.4.1.1. Commission precedent

- (90) In previous cases the Commission has split the retail supply of television services in two separate markets: (i) FTA and pay-TV⁵⁵. The Commission also considered whether pay-TV can be segmented further according to: (ii) linear vs non-linear pay-TV services⁵⁶; (iii) according to distribution technologies (e.g. cable, satellite, or terrestrial)⁵⁷; and (iv) premium vs basic pay-TV services⁵⁸. In recent cases, the Commission has left open the market definition with regard to each of these potential sub-segments.
- (91) Notifying Party's view
- (92) The Notifying Party submits that the relevant market is the provision of all TV services to end users.
- (93) First, the Notifying Party submits that the retail supply of FTA TV and pay-TV should be considered as one market as they are in direct competition for content rights, audiences and advertising revenues.
- (94) The Notifying Party argues that retail operators typically offer both linear and non-linear services to their customers, and in the case of pay-TV services these are commonly packaged within a single subscription. There is also a huge range of FTA and paid for content that is available on an OTT basis.

⁵⁵ See for instance the Commission decisions of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 40, and of 25 June 2008 in case M.5121 *News Corp / Premiere*, recital 20. In other cases this question has instead been left open (see for instance the Commission decisions of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 119-120, of 25 June 2008 in case M.5121 *News Corp/Premiere*, recitals 15 and 21, and of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 108).

* Should read "provision"

⁵⁶ Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 124. Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 21. Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 109–110.

⁵⁷ Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 127. Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 22; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 105. Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 113.

⁵⁸ Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, recital 119.

- (95) The Notifying Party also argues that it is not appropriate to distinguish between different means of television distribution.
- (96) Finally, the Notifying Party does not consider it appropriate to distinguish basic pay-TV from premium pay-TV at the retail level.

4.4.1.2. The Commission's assessment

- (97) With regard to a potential segmentation of the market for the [...] of TV retail services between FTA and pay-TV, most of the respondents consider that within the market for retail distribution of TV content to viewers, a distinction should be made between the two. Respondents note that there is a clear distinction from consumers' point of view between FTA and pay-TV with the first having a generalist content approach and the latter a more specific one, offering access to premium content such as live sports.⁵⁹
- (98) Respondents to the market investigation have mixed views on whether linear TV channels and non-linear services (such as VOD) are substitutable. On the one hand, some respondents indicate that they are substitute since they both compete for viewing time and provide access to identical programming. On the other hand, other retail TV providers consider these services as complements since they have different modes of consumption, different target groups and are not substitutable with each other.⁶⁰
- (99) With regard to a possible segmentation of TV channels depending on the type of infrastructure used for their transmission, the results of the market investigation provide mixed results with some respondents arguing that most of the content is available on each technology and it does not matter how it reaches the household while others saying certain services, such as interactivity, are available only for certain infrastructure.⁶¹
- (100) The majority of respondents to market investigation consider that a distinction should be made between basic pay-TV and premium pay-TV services.⁶² As explained in paragraph (81), the market investigation indicates that basic pay-TV channels and premium pay-TV channels constitute separate product markets; in turn this results in a distinction between [...] includes premium pay-TV channels and a basic pay-TV offering which does not.
- (101) In any event, for the purpose of the present decision, the question whether the market for the provision of TV retail services should be further segmented based on the type of infrastructure, among FTA, basic and premium pay-TV

⁵⁹ Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 27.

* Should read: "a premium pay-TV offering which"

⁶⁰ Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 23.

⁶¹ Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 32.

⁶² Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 28.

could be left open, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market under any of these alternative product market definitions.

4.4.2. *Geographic market definition*

4.4.2.1. Commission precedent

- (102) The Commission has previously considered that the market for the retail provision of TV services is either national, or limited to the geographic coverage of a supplier's cable network.⁶³

4.4.2.2. Notifying Party's view

- (103) The Notifying Party treats the geographic scope of the market as being national but submits that the analysis would not be materially different if the markets were combined into linguistic regions.
- (104) Ultimately, the Notifying Party submits that the precise geographic scope of the market can be left open in this case.

4.4.2.3. The Commission's assessment

- (105) The results of the market investigation suggest that a large majority of distributors make their retail offering available to end customers on a national basis. Some of them also operate on a sub-national level.⁶⁴
- (106) In any event, for the purpose of this decision, the exact geographic market definition for the retail provision of TV services can be left open, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market whether considered nationally or by linguistic region.

4.5. Advertising

4.5.1. *Product market definition*

4.5.1.1. Commission precedent

- (107) The Commission has previously defined separate product markets for the sale of advertising space in national newspapers and TV broadcasting.⁶⁵ The Commission has also drawn a distinction between online and offline advertising, due to each channel's specificity and different pricing mechanisms.⁶⁶

⁶³ Commission decision of 24 February 2015 in case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*.

⁶⁴ Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 33.

⁶⁵ *News Corp/BskyB*, recital 267.

⁶⁶ *Commission decision of 9 September 2014, Viacom/Channel 5 Broadcasting*, recital 35.

- (108) Within newspaper advertising, the Commission has considered distinguishing national from local newspapers⁶⁷ and daily national newspapers from non-daily national newspapers.⁶⁸
- (109) With respect to TV advertising, the Commission has not previously distinguished between advertising space on FTA channels and pay-TV channels.⁶⁹

4.5.1.2. Notifying Party's view

- (110) The Notifying Party points out that advertisers typically utilise TV advertising to reach a mass audience, while at the same time seeking to reach particular audience demographics that might be delivered by advertising on particular channels or programs. It also argues that online advertising exercises an increasing competitive constraint on TV advertising, but considers that the precise definition of the relevant market can be left open.

4.5.1.3. The Commission's assessment

- (111) The results of the market investigation confirm that advertising on TV channels and advertising in print newspapers are separate product markets as these media perform different functions: advertisers can communicate emotionally engaging messages to a broad audience through TV advertising, whereas print ads are rather used to advertise a product in details to a targeted audience.
- (112) Concerning advertising in print newspapers,⁷⁰ the market investigation confirmed that daily and non-daily newspapers form separate relevant markets. Daily newspapers allow for planning around specific dates and events, whereas this possibility is limited with non-daily newspapers. On the other hand, non-daily newspapers allow for messaging that require more contemplation because readers spend more time on these publications. The market investigation also confirmed that national and local newspapers cannot be substituted as national newspapers offer broader coverage than local newspapers. Advertising in national newspapers thus cannot be readily replaced by advertising in several local newspapers because these have different audiences.
- (113) Concerning advertising on TV channels, market participants noted differences between FTA and pay-TV channels in terms of reach, target and costs, with pay-

⁶⁷ *News Corp/BskyB*, recital 265.

⁶⁸ *News Corp/BskyB*, recital 266.

⁶⁹ *News Corp/BskyB*, recital 267; Commission decision of 9 September 2014, *Viacom/Channel 5 Broadcasting*, recital 38.

* Should read: "decisions"

⁷⁰ The market investigation was inconclusive as to whether advertising in print newspapers and in online news services are substitutable.

TV channels more adequate to targeted campaigns whereas advertising on FTA TV channels offers a broadest reach.

- (114) In line with previous Commission [...] and in the light of the results of the market investigation, the Commission takes the view that TV advertising and newspapers advertising constitute separate markets. As regards the possible segmentations within these markets, for the purposes of the present decision, the exact product market definition can be left open as the Proposed Transaction does not raise any competition concerns under any of the above possible market definitions.

4.5.2. *Geographic market definition*

4.5.2.1. Commission precedent

- (115) In terms of geographic scope, previous Commission decisions have taken the view that the markets for TV and newspaper advertising are national.⁷¹

4.5.2.2. Notifying Party's view

- (116) The Notifying Party considers that the precise definition of the relevant market can be left open in this case.

4.5.2.3. The Commission's assessment

- (117) The results of the market investigation suggest that the relevant geographic market for advertising remains national and does not comprise both UK and Ireland. Whereas the main buyers and sellers of advertising space as well as the intermediary agencies are similar in the UK and Ireland, prices remain different between the two countries.
- (118) In line with previous decisions, the Commission takes the view that the markets for TV and newspapers advertising are national in scope.

4.6. **Newspaper publishing**

4.6.1. *Product market definition*

4.6.1.1. Commission precedent

- (119) Newspapers are two-sided markets, competing for readership on one side of the market and advertising revenues on the other. Newspaper publishing refers to the market on which newspapers compete for the sale of newspapers and subscriptions to consumers.

⁷¹ Commission decision of 07 March 2008 in the case M.5051 - APW/GMG/EMAP; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*; and Commission decision date 9 September 2014 in case M.7288 *Viacom/Channel 5 Broadcasting*.

- (120) In previous decisions, the Commission concluded that written press was separate from other media products (such as TV and radio products).⁷²
- (121) Furthermore, in *News Corp/BskyB* the Commission examined whether print newspapers and online news services, whether free or at a fee, constituted separate product markets, but ultimately left that question open.⁷³
- (122) In *News Corp/BskyB* the Commission investigated whether news delivery through digital devices such as tablets (e.g. Apple's iPad or Samsung's Galaxy) or e-readers (such as Amazon's Kindle) belong to a separate market or are part of the same market as print, or online, newspapers, but ultimately left the product market definition on this point open.⁷⁴
- (123) The Commission has in the past also concluded that the national print newspaper market contains three segments: (i) popular tabloids; (ii) mid-market titles; and (iii) the quality segment.⁷⁵
- (124) In the past, the Commission also considered distinguishing between (i) daily and non-daily (i.e. weekly, monthly) newspapers⁷⁶ and (ii) national and regional or local newspapers,⁷⁷ but ultimately did not reach a conclusion on product market definition.

4.6.1.2. Notifying Party and NewsCorp's view

- (125) The Notifying Party does not express an opinion on the product market definition for newspaper publishing.
- (126) Without expressing an opinion on the exact product market definition, News Corp has submitted that newspaper publishing in the UK and Ireland has been affected by convergence of different forms of media in recent years.⁷⁸
- (127) With regard to the segments of “popular tabloid”, “mid-market” and “quality” newspapers News Corp notes that any historic difference between these

⁷² Commission decision of 14 March 1994 in case M.423 *Newspaper Publishing*, paragraph 11; Commission decision of 1 February 1999 in case M.1401 *Recoletos/Unedisa*, paragraph 17.

⁷³ Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 211 and 216.

⁷⁴ Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 212 and 216.

⁷⁵ Commission decision of 14 March 1994 in case M.423 *Newspaper Publishing*, paragraph 14; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 214.

⁷⁶ Commission decision of 1 February 1999 in case M.1401 *Recoletos/Unedisa*, paragraphs 19-20; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 215.

⁷⁷ Commission decision of 7 July 2005 in case M.3817, *Wegner/PCM/JV*, paragraph 19; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 215.

⁷⁸ News Corp's Response to RFI 2 of 16 February 2017.

categories from the reader's perspective has become increasingly blurred in recent years.

- (128) News Corp further submits that online consumers would also have the option of other news sources, such as the branded websites of the BBC and other television broadcasters, in addition to international and specialist news providers. Moreover, dedicated providers of online news would compete with a range of sources not focused solely – or even principally – on the provision of news.

4.6.1.3. The Commission's assessment

- (129) With regard to the question whether printed newspapers belong to the same relevant product market as free and paid-for online news services, a majority of newspapers which provided a meaningful response to the market investigation stated that printed newspapers have lost readership or audience to free⁷⁹ and paid-for online editions.⁸⁰
- (130) In addition, all respondents to the market investigation have stated that readers consider Internet news portals featuring editorial content on their website and/or online news aggregators and/or informal online sources (such as blogs) to be alternatives to online editions of newspapers.⁸¹
- (131) With regard to the segmentation within the national print newspaper market between popular tabloids, mid-market titles, and quality titles, a majority of newspapers which responded to the market investigation, stated that this segmentation is still pertinent today within the UK and Ireland.⁸²
- (132) However, the market investigation was inconclusive as to whether the segmentation between national, regional and free print newspapers would still be pertinent within the UK and Ireland.⁸³ In addition, the market investigation was not conclusive on the relevance of the segmentation between daily and non-daily national print newspapers within the UK and Ireland.⁸⁴
- (133) In any event, for the purpose of this decision, the exact product market definition for newspaper publishing can be left open, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market under any of the alternative market definitions.

79 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 10.

80 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 11.

81 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 12.

82 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 13.1.

83 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 14.

84 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 15.

4.6.2. Geographic market definition

- (134) As regards geographic market definition, in past decisions the Commission concluded that the relevant market for national newspapers is national.⁸⁵ This was not put in question by the market investigation in this case.
- (135) For the purposes of this decision, the Commission considers that the relevant geographic market for national newspapers is national, in line with Commission precedents.

5. COMPETITIVE ASSESSMENT – HORIZONTALLY AFFECTED MARKETS

- (136) The Proposed Transaction results in a number of horizontal overlaps at different levels of the distribution chain.
- (137) Upstream, the Parties overlap with regard to the supply of TV content. Sky is active with regard to licensing pre-produced and commissioned TV content and sports content. 21CF is active through its wholly owned subsidiary 20CF (movies and other TV content), its Endemol Shine joint venture (other TV content) and, FNG Content Distribution (other TV content, some limited sub-licensing of 20CF films and a small amount of sports content). 21CF also licenses some sports rights through Star TV (principally Indian cricket events). No horizontally affected markets arise in relation to the production or supply of TV content.
- (138) The Parties also overlap with regard to the acquisition of TV content which: (i) Sky includes in its TV channels (which are incorporated into its retail TV offering and/or wholesales to third parties) as well as for supply via its PPV/TVOD services; and (ii) 21CF includes in its TV channels which are wholesaled to third parties. This overlap results in a number of horizontally affected markets in the UK, Ireland and Italy which are discussed further below.
- (139) Both Parties supply TV channels on a wholesale basis to third parties in a number of Member States. Sky supplies a range of channels including sports, movie and other channels to third parties, in particular those under the Sky brand. 21CF has a more limited number of TV channels, including those under the National Geographic and FOX brands. Horizontally affected markets arise in the UK, Ireland, Germany, and Italy which are discussed further below.
- (140) Sky is active as a supplier of TV services in the UK, Ireland, Germany, Austria and Italy. 21CF is active in the UK and Ireland with the overlap

⁸⁵ Commission decision of 14 March 1994 in case M.423 *Newspaper Publishing*, paragraph 17; Commission decision of 1 February 1999 in case M.1401 *Recoletos/Unedisa*, paragraph 29; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 218.

resulting in an affected market in these Member States which is discussed further below.

- (141) Finally, the Parties also overlap with regard to the supply of TV advertising airtime on their TV channels however no horizontally affected markets arise.
- (142) For completeness, the Commission notes that some respondents to the market investigation indicate that the Proposed Transaction increases the merged entity's ability and incentive to foreclose access to premium sports content and channels by increasing Sky's bargaining power.⁸⁶ For example,⁸⁷ it has been mentioned that the merged entity will have greater financial resources to acquire expensive sports rights, and that post-transaction, it will bundle the purchase of certain sports rights in several territories together thereby increasing Sky's bargaining position to the detriment of its competitors.
- (143) As regards the acquisition of sports content,⁸⁸ the Commission notes that, while Sky purchases sports rights in each of the UK, Ireland, Austria, Germany and Italy (following the acquisition by BskyB of Sky Italia and Sky Deutschland), the only Member State in which 21CF is also present as an acquirer of sport rights is Italy, where the increment in market share brought about by 21CF's acquisition of sport content is between [0-5]% (see paragraphs (150) and (151) below).⁸⁹ It is therefore unlikely that the Proposed Transaction changes the bargaining position of Sky as a purchaser of sports rights significantly. Moreover, even if the bargaining power of Sky would be strengthened as a result of the Proposed Transaction, it is unlikely that this would have a significant impact on competition given the very small increment. In particular, in each of the relevant Member States, when bidding for football rights, Sky faces competition from other operators. For example, in the UK, as a result of the bidding by Sky and BT, the cost of the rights to broadcast the premier league football matches in the UK appears to have risen by 70% in each of the last two auctions.⁹⁰

86 Confidential reply to Questionnaire Q3 to TV distributors of 7 March 2017, question 50.

87 Non-confidential Minutes of the Meeting with Discovery, 14 March 2017. Other market participants also raised similar issues in confidential submissions.

88 Similar to the acquisition of sports rights, concerns were raised regarding the acquisition of audio-visual content more generally. In particular, one market participant was worried that multinational channel providers that buy exclusive content for geographic areas wider than national or linguistic borders are in a superior position to bid for content and have a higher bargaining power in comparison with channel providers that are only active in German speaking Europe, for instance. Similar to the argument in relation to sports rights, Sky is already currently purchasing audio-visual content on a multi-jurisdictional basis and it is therefore questionable whether the Proposed Transaction significantly changes Sky's bargaining power. This matter is therefore not discussed further in the present decision.

89 21CF and Sky overlap in the acquisition of football content in Italy is discussed at section 5.2 below.

90 Confidential reply to Questionnaire Q3 to TV distributors of 7 March 2017, question 50.

- (144) As regards licensing of sport rights, the Commission notes that: (i) 21CF does not license football content (i.e. premium sports content); (ii) 21CF has a market share below [0-5]% in the potential market segment for the licensing of other sports content; and (iii) the Parties' combined market share is below [0-5]% in the potential market segment for the licensing of other sports content. Therefore, the Commission does not consider that the merged entity would have the ability to foreclose rivals' access to sport content. Moreover, with regard to sports channels, the Commission notes that 21CF licenses premium pay TV sports channels only in Italy, where the channels are already exclusively distributed on Sky pre-transaction.
- (145) These issues (described in paragraph (142) above) are therefore not discussed further in the present decision.

5.1. Acquisition of TV content – UK & Ireland

- (146) In the UK and Ireland, both Sky and 21CF acquire content for inclusion into their TV channels and PPV/TVOD services in the case of Sky. Table 1 below shows the segments where the Parties' overlapping activities result in horizontally affected markets, namely: (i) the acquisition of all TV content; (ii) the acquisition of films; (iii) the acquisition of all licenced content; and the sub-segment of that: (iv) licenced pre-produced content.
- (147) There are no affected markets when the market for the acquisition of films is further segmented according to distribution window (e.g. TVOD/PPV or first pay-TV window). There is also no affected market when considering a market for the acquisition of other TV content (Sky: [10-20]%; 21CF: [0-5]%), only when this market is segmented according to licenced content and the sub-segment of licenced pre-produced content.

Table 1 – Market shares for the acquisition of TV content - by revenue - UK and Ireland - 2015

	All TV content (%)	All films (%)	All other TV content	
			All licenced content (%)	Licenced pre-produced content (%)
21CF	[0-5]	[0-5]	[0-5]	[0-5]
Sky	[20-30]	[60-70]	[20-30]	[20-30]
Combined	[20-30]	[60-70]	[20-30]	[20-30]

Source: Form CO, table 6.22⁹¹

- (148) The Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in this market given the limited increment brought about by the Proposed Transaction. 21CF does not have a market share of more than [0-5]% in any relevant market. Accordingly, while Sky may have a high market share for the acquisition of content overall as well as in certain segments, such as films, the Proposed Transaction will not materially change the competitive landscape in the UK and Ireland, or increase Sky's market power in this regard.
- (149) The Commission considers this to be the case whether the UK and Ireland are considered together, or separately.

5.2. Acquisition of TV content – Italy

- (150) In Italy, both Sky and 21CF acquire content for inclusion into their TV channels and PPV/TVOD services in the case of Sky. Table 2 below shows the segments where the Parties' overlapping activities result in horizontally affected markets, namely: (i) the acquisition of all TV content; (ii) the acquisition of sports content; and the following sub-segments thereof: (iii) the acquisition of football content; and (iv) the acquisition of other sports. There are no other affected markets for the acquisition of all TV content.

⁹¹ 21CF and Sky estimates produced with elaboration from Oliver and Ohlbaum.

Table 2 – Market shares for the acquisition of TV content - by revenue - Italy - 2015

	All TV content (%)	Acquisition of sports rights		
		All sports (%)	Football content (%) ⁹²	Other sports content (%)
21CF	[0-5]	[0-5]	[0-5]	[0-5]
Sky	[20-30]	[40-50]	[50-60]	[30-40]
Combined	[20-30]	[50-60]	[50-60]	[30-40]

Source: Form CO, table 6.44⁹³

- (151) The Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market for the following reasons.
- (152) First, there is a very limited increment brought about by the Proposed Transaction. 21CF does not have a market share of more than [0-5]% in any relevant market therefore while Sky may have a high market share for the acquisition of certain types of content, in particular sports content, the Proposed Transaction will not materially change the competitive landscape in Italy or significantly increase Sky's market power in this regard.
- (153) Second, there are a number of other players in the Italian market that are active with regard to the acquisition of content, including sports content. When considering the market for the acquisition of football rights, Mediaset has a market share of [30-40]% and when considering the market for the acquisition of other sports rights, RAI has a larger market share than the merged entity of [40-50]%. Moreover, with regard to the acquisition of premium sports rights, related to football content, other operators would remain active in the market including RAI, Italy's national public broadcaster, and Telecom Italia, the Italian market leader in the provision of fixed broadband services.

5.3. Wholesale supply of TV channels – UK

- (154) In the UK, 21CF licences the following TV channels to third parties: FOX, National Geographic, Nat Geo Wild, Fox News, Baby TV, YourTV and the Star branded channels. Sky licences a wide range of channels including sports, movie and other channels. The Parties therefore overlap with regard to the wholesale supply of basic pay-TV channels. There is no overlap with

⁹² An affected market also arises when this market is considered as acquisition of football rights for regular events with the Parties having the same market shares.

⁹³ 21CF and Sky estimates produced with elaboration from Oliver and Ohlbaum.

regard to premium pay-TV channels as 21CF does not offer any premium pay-TV channels.

- (155) The Parties' market shares on the basis of revenues and audience shares for all basic pay-TV channels can be seen below in Table 3. By revenues, the Parties have a combined market share of [30-40]% (Sky: [20-30]%; 21CF: [5-10]%; the audience based market shares are overall slightly lower: [20-30]% (Sky: [20-30]%; 21CF: [5-10]%).

Table 3 - Market shares for wholesale supply of basic pay-TV channels – by revenue and audience - UK - 2015

	Revenue share ⁹⁴ (%)	Audience share (%)
21CF	[5-10]	[5-10]
Sky (inc. AETN)	[20-30]	[20-30]
Combined	[30-40]	[20-30]

Source: RFI response Table 7.30(b) for revenues; Table 7.30 for audience shares⁹⁵

- (156) The Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in this market in light of: (i) the limited increment brought about by the Proposed Transaction; (ii) the presence of multiple competing TV channel providers that will continue to constrain the merged entity post-transaction; and (iii) the fact that the Parties are generally not close competitors.
- (157) First, the increment brought about by the Proposed Transaction is limited. While Sky has a wide range of pay-TV channels, 21CF only wholesales a very limited number of channels in the UK and does not licence any sports or movie channels. While Sky may already have a material market position, given the limited extent of 21CF's offering, the Commission does not consider that the Proposed Transaction will have a significant effect on the competitive landscape in the UK or materially increase Sky's existing market power with regard the wholesale supply of TV channels.
- (158) Second, there are a large number of TV channel suppliers that will continue to compete with the merged entity post-transaction, in particular: Discovery ([10-20]% by revenue, [10-20]% by audience), Disney ([5-10]% by revenue, [5-10]% by audience), ITV ([10-20]% by revenue, [0-5]% by audience) and

⁹⁴ Revenues are based on carriage revenues (excluding public funding, advertising and sponsorship revenues).

⁹⁵ Audience shares: Sky, using BARB data; revenue shares: Notifying Party's estimates.

UKTV ([10-20]% by revenue, [10-20]% by audience) when considering the market for all basic pay-TV channels. These TV broadcasters each provide a range of pay-TV channels to third parties and will continue to place a competitive constraint on the merged entity.

- (159) Third, the results of the market investigation indicate that in the UK, the TV channels that 21CF and Sky wholesale to third parties are not generally close competitors.⁹⁶ With regard to 21CF's National Geographic channel and Nat Geo Wild, the results of the market investigation suggest that none of the channels in the Sky portfolio would be considered as close competitors. Equally, the market investigation did not identify any Sky TV channels as being close competitors to Baby TV or the Star branded channels.
- (160) On the other hand, some respondents to the market investigation indicate that Sky Atlantic is likely to be the closest competitor to the FOX general entertainment channel. When considering a potential sub-segment for the wholesale supply of general entertainment channels, the Parties have a combined market share of [40-50]% by revenue and [40-50]% by audience share (Sky, including AETN: [30-40]% by revenue, and [20-30]% by audience; 21CF [5-10]% by revenue, and [10-20]% by audience). However, the Commission notes that Sky Atlantic is not currently licenced to third parties.⁹⁷
- (161) Moreover, as noted above in recital (158), even if one were to consider a narrow sub-segment for the wholesale supply of general entertainment TV channels, there are a number of competing channel providers that will continue to place a constraint on the merged entity post-transaction, including Universal, Comedy Central and UKTV.
- (162) The market investigation indicates that these competing channel providers have a number of general entertainment channels which are also considered to be close competitors to the FOX channel and each have an equivalent market position to FOX today on the potential market for general entertainment channels ([5-10]% by audience share), in particular: Universal ([5-10]% by audience share), Comedy Central ([5-10]% by audience share) and UKTV's W ([5-10]% by audience share) as well as multiple other general entertainment channels. Given the large number of competing channels (both general entertainment channels and basic pay-TV channels in other genres) which exert a competitive pressure on Sky at least equivalent of that exerted by the FOX channel, the Commission does not consider the FOX channel to

⁹⁶ Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 35. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 32.

⁹⁷ As it is not licenced to third parties, it has no influence on the revenue based market shares of the Parties but is reflected in the audience based market share of Sky.

constitute an important competitive force that has more of an influence on the market than its market share suggests.⁹⁸

- (163) With regard to Fox News, the Commission notes that while it potentially competes with the Sky News channels,⁹⁹ Fox News is currently only licenced to Sky in the UK therefore the Proposed Transaction will not materially change the competitive landscape for the wholesale supply of TV channels to third parties in this regard.

5.4. Wholesale supply of TV channels – Ireland

- (164) In Ireland, 21CF licences the following channels to third parties: FOX, National Geographic, Nat Geo Wild and Baby TV. Sky licences a wide range of channels including sports, movie and other channels. The Parties therefore overlap with regard to the wholesale supply of basic pay-TV channels. There is no overlap with regard to premium pay-TV channels as 21CF does not offer any premium pay-TV channels.
- (165) The Parties' market shares on the basis of revenues and audience shares for all basic pay-TV channels can be seen below in Table 4. By revenues, the Parties have a combined market share of [10-20]% (Sky: [10-20]%; 21CF: [0-5]%; the audience based market shares are marginally higher: [20-30]% (Sky: [20-30]%; 21CF: [5-10]%). An affected market only arises when considering the market on the basis of audience shares.

⁹⁸ As per paragraphs 37 and 38 of the Horizontal Merger Guidelines.

⁹⁹ When considering a potential market for the wholesale supply of news pay-TV channels Sky has a market share of [30-40]% and 21CF [0-5]% by audience share.

Table 4 - Market shares for wholesale supply of basic pay-TV channels - by revenue and audience - Ireland - 2015

	Revenue share¹⁰⁰ (%)	Audience share (%)
21CF	[0-5]	[5-10]
Sky (inc. AETN)	[10-20]	[20-30]
Combined	[10-20]	[20-30]

Source: Parties' estimates¹⁰¹

- (166) The Commission concludes that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in this market for the following reasons.
- (167) First, the increment brought about by the Proposed Transaction is not significant. Whilst Sky has a broad range of channels, 21CF licences just three channels to third parties in Ireland. While Sky may already have a material market position, given the limited extent of 21CF's offering, the Commission does not consider that the Proposed Transaction will have a significant effect on the competitive landscape in Ireland or materially increase Sky's existing market power with regard the wholesale supply of TV channels.
- (168) Second, there are a large number of TV channel suppliers that will continue to compete with the merged entity post-transaction, in particular: UKTV ([30-40]% by revenue, [10-20]% by audience), Discovery ([10-20]% by revenue, [10-20]% by audience), and NBCU ([5-10]% by revenue, [5-10]% by audience) when considering the market for all basic pay-TV channels. These TV broadcasters each provide a range of pay-TV channels to third parties and will continue to place a competitive constraint on the merged entity.
- (169) Third, as set out in paragraph (159), the market investigation indicates that Sky does not have any channels that compete closely with National Geographic, Nat Geo Wild or BabyTV.
- (170) On the other hand, the market investigation did suggest that Sky 1 could be considered as a close competitor of the FOX channel in Ireland. When considering a potential sub-segment for the wholesale supply of general entertainment channels, the Parties have a combined market share of [20-30]% by revenue and [40-50]% by audience share. The increment to Sky's

¹⁰⁰ Revenues are based on carriage revenues (excluding public funding, advertising and sponsorship revenues).

¹⁰¹ Audience data: Annex 13 to the Form CO, table 7.43, Sky, using Nielsen data; revenue data: Notifying Party's response to the Commission's RFI of 24 March 2017 Table 7.43(b).

market share (including AETN) ([20-30]% by revenue, [30-40]% by audience) is limited [...] * narrower segmentation given 21CF's limited presence (21CF: [0-5]% by revenue, [5-10]% by audience).

- (171) As detailed above in paragraph (168) in relation to the UK, even considering this narrow segment for general entertainment TV channels, there are a number of competing channel providers that will continue to place a constraint on the merged entity post-transaction; many of these channels are also active in Ireland. The market investigation indicated that these competing channel providers have a number of channels which are also considered to be close competitors to FOX in Ireland and each have an equivalent or larger market position than FOX today ([5-10]% by audience share) in particular: Universal ([5-10]% by audience share), Comedy Central ([10-20]%) and W ([0-5]% by audience share) when considering the sub-segment of general entertainment channels. Given the large number of competing channels (both general entertainment channels as well as basic pay-TV channels in other genres) which exert a competitive pressure on Sky at least equivalent to that exerted by the FOX channel, the Commission does not consider the FOX channel to constitute an important competitive force that has more of an influence on the market than its market share suggests.

5.5. Wholesale supply of TV channels - Germany

- (172) In Germany, 21CF licences the following channels to third parties: FOX, National Geographic Channel, Nat Geo People and Nat Geo Wild. Sky's business model in Germany is a "self-retail" model rather than a wholesale model. In addition to retailing TV channels on its own platform, under its self-retail model cable network and IPTV providers transmit the Sky programme signals to end customers and perform certain marketing and distribution services. Sky however enters into direct contractual relationships with subscribers, controls subscriber data, deploys its own subscriber management system and retains the rights to determine the service packaging and pricing. It therefore submits that it is not active with regard to the wholesale distribution of TV channels and that any revenues it has from such activities in Germany should be considered as retail revenues.¹⁰²

* Should read: "in"

102 See reply to Questionnaire Q2 to TV Broadcasters, question 46. One respondent notes that the merged entity would have, after the Transaction, the incentive to terminate its agreements with IPTV providers to distribute Sky's channels. In any case, the Commission notes that there would be no material changes brought by the Proposed Transaction in the distribution of channels through IPTV providers since the Proposed Transaction does not affect Sky's incentives to resell its packages via other distribution platforms. Moreover, any potential change brought by the Proposed Transaction in the wholesale supply of 21CF channels in Germany and Austria, is discussed in Section 6.1.3.4 below.

- (173) The Notifying Party estimates that by revenue, it has a market share of [10-20]%. The Parties' audience based market shares with regard to Germany can be seen in Table 5 below for all basic pay-TV channels.

Table 5 – Market shares for wholesale supply of basic pay-TV channels – by audience - Germany - 2015

	All basic pay-TV channels
21CF	[10-20]
Sky	[5-10]
Combined	[10-20]

Source: Parties' estimates¹⁰³

- (174) The Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in this market given that: (i) no affected market arises on the basis of the audience based market shares; and (ii) the Proposed Transaction will not result in a material change to the competitive landscape as Sky does not today provide its TV channels on a wholesale basis to third parties in Germany or Austria.

5.6. Wholesale supply of TV channels – Austria

- (175) In Austria, 21CF offers its FOX and National Geographic channels and estimates that it has a market share by revenues of [10-20]%. Sky does not supply channels on a wholesale basis to retail TV distributors in Austria as it adopts the same distribution model as it does in Germany. The Notifying Party states that it cannot provide audience based market shares for Austria however it confirms that the market shares in Austria do not materially differ to those in Germany.

- (176) Given that Sky does not today provide its TV channels on a wholesale basis to third parties in Austria, the Commission does not consider that the Proposed Transaction will raise serious doubts as to its compatibility with the internal market in this market.

5.7. Wholesale supply of TV channels - Italy

- (177) In Italy, 21CF offers FOX, National Geographic, Nat Geo Wild, Baby TV, as well as a sports channel, news channels and a number of other channels. It estimates that it has a market share by revenues of [20-30]%. Sky does not supply channels on a wholesale basis to retail TV distributors in Italy. An affected market arises when considering the audience based market shares for

¹⁰³ All basic pay-TV channels – table 7.89, using GFK data.

the wholesale supply of basic pay-TV channels: [50-60]% (Sky: [20-30]%; 21CF: [20-30]%).¹⁰⁴

- (178) Given that Sky does not today provide its TV channels on a wholesale basis to third parties in Italy, and moreover, the 21CF channels are exclusively licenced to Sky and therefore only available today to end customers on the Sky platform in Italy, the Commission does not consider that the Proposed Transaction will raise serious doubts as to its compatibility with the internal market in this market.

5.8. Retail supply of TV services – UK & Ireland

- (179) In the UK and Ireland, Sky retails its own and third party linear pay-TV channels and VOD programming and also broadcasts a limited number of FTA channels (including Challenge, Pick and Sky News). 21CF broadcasts one FTA channel, YourTV which was launched in September 2015.
- (180) The Parties' market shares by revenue are provided below in Table 6.

Table 6 - Market shares for provision of TV content to end users – by revenue - UK & Ireland - 2015

	Revenue based shares - UK (%)	Revenue based shares - Ireland (%)¹⁰⁵
21CF	[0-5]	[0-5]
Sky	[30-40]	[40-50]
Combined	[30-40]	[40-50]

Source: Parties' estimates¹⁰⁶

- (181) The Notifying Party submits that no competition concerns could arise from the Proposed Transaction in this market given the negligible overlap.
- (182) The Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in this market given the negligible market position that YourTV has in both the UK and Ireland, indeed, its revenues in 2016 for the UK and Ireland combined were limited to EUR [...]. Moreover, the results of the market investigation suggest that whilst Sky Living may be a close competitor of YourTV in

¹⁰⁴ The audience shares data provided by the Notifying Party overestimate 21CF and Sky positions since the Notifying Party did not provide audience shares for Mediaset's channels, Sky's main pay-TV competitor in Italy.

¹⁰⁵ The Notifying Party submits that it is not able to provide its UK and Irish revenues separately therefore the revenues 21CF achieved in Ireland are included in the UK revenues.

¹⁰⁶ Table 2 of response to RFI date 30 March 2017, Form CO table 6.7 and table 6.9.

Ireland, there are a number of other channels that also compete closely with it, in particular Discovery's TLC channel, ITVBe, truTV in the UK and Discovery ID and True Crime in Ireland.¹⁰⁷

6. COMPETITIVE ASSESSMENT – VERTICALLY AFFECTED MARKETS

- (183) As noted above: (i) both Parties are active with regard to the supply of TV content; (ii) both Parties supply TV channels on a wholesale basis to third parties; and (iii) Sky is active as a TV distributor for retail TV services in the UK,¹⁰⁸ Ireland, Germany, Austria and Italy and 21CF is active in the UK and Ireland. The Proposed Transaction therefore results in a number of vertical relationships.¹⁰⁹
- (184) These activities at various levels of the value chain give rise to the following vertically affected markets in various Member States:
- (a) 21CF's and Sky's upstream activities as suppliers of TV content and their respective downstream activities in the acquisition of TV content;
 - (b) 21CF's and Sky's upstream activities as wholesale suppliers of TV channels and Sky's downstream activities as an acquirer of channels; and
 - (c) 21CF's and Sky's upstream activities in the supply of TV advertising opportunities on their channels, and Sky Media's downstream activities as an ad sales house.
- (185) Where there are vertically affected markets, two possible forms of foreclosure arise. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure).
- (186) Section 6.1 discusses the possible input foreclosure concerns arising from the Proposed Transaction with regard to TV markets; Section 6.2 discusses the possible customer foreclosure concerns arising from the Proposed Transaction with regard to TV markets; and Section 6.3 discusses both the

¹⁰⁷ Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 35. Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 32.

¹⁰⁸ In the UK and Ireland, Sky is also active in the downstream market for the provision of fixed internet broadband services. In the UK, Sky provides those services through its own infrastructure.

¹⁰⁹ In relation to the potential vertical link between 21CF upstream activities as content provider and Sky downstream activity as provider of fixed internet broadband services, the Parties submit that there are no vertical links since 21CF does not provide OTT services in the UK and Ireland. However, the Commission notes that, even considering the market for the provision of audio-visual content as upstream market, the Proposed Transaction would not give rise to a vertical affected market since the Parties' market shares are below [30-40]% in both the upstream and downstream markets.

possible input and customer foreclosure concerns relating to advertising markets.

6.1. Input foreclosure – TV markets

6.1.1. Introduction

- (187) The Proposed Transaction will bring about a vertical relationship with regard to the licensing of broadcasting rights. Sky operates as a purchaser of broadcasting rights and TV channels while 21CF is active at the wholesale level as a licensor of TV content (such as films and TV series) and provider of TV channels (such as FOX and National Geographic).
- (188) In a merger between companies which operate at different levels of the supply chain, anti-competitive effects may arise when the merged entity's behaviour could limit or eliminate competitors' access to supplies - input foreclosure.
- (189) In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines: (i) whether the merged entity would have post-merger the ability to substantially foreclose access to input; (ii) whether the merged entity would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental impact on effective competition downstream.¹¹⁰
- (190) The following sections examine any possible input foreclosure with respect to the supply of TV content and TV channels in the UK, Ireland, Germany, Austria and Italy.

6.1.2. Supply of TV content

6.1.2.1. Views of the Notifying Party

- (191) The Notifying Party submits that it would not have the ability to foreclose or partially foreclose downstream broadcasters or distributors because: (i) it does not have upstream market power; (ii) 21CF already licences a large amount of content ([licensing practices of 21CF]) to Sky on an exclusive basis in all five jurisdictions; (iii) with regard to 21CF's other content from Endemol Shine, 21CF would not have the ability to cause the JV to sacrifice supply revenues as Apollo has joint control and has no incentive to allow such a strategy.
- (192) The Notifying Party submits that it would not have the incentive to restrict access to either Sky or 21CF content post-transaction given: (i) the high fixed costs and negligible marginal costs in the supply of TV content; (ii) its

¹¹⁰ See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p. 11, paragraph 32.

business model to distribute content as widely as possible which is underpinned by contractual obligations with co-producers and finance companies to maximise the value of its works; and (iii) the fact that revenues lost by 21CF are unlikely to be recuperated by Sky on the downstream wholesale or retail markets as its competitors would still be able to put together attractive packages using content from other providers.

- (193) Finally, it submits that even if it were to restrict access to the merged entity's content, it would have no effect as downstream rivals have other potential sources of supply.

6.1.2.2. The Commission's assessment

(a) Ability to engage in input foreclosure

- (194) In the UK and Ireland, the merged entity's market share in the upstream market is below [20-30]% in all market segments except for the overall market for the licensing of broadcasting rights for films, where 21CF has a market share of [20-30]% by revenue. Post-transaction the other Hollywood studios have similar market shares: NBC Universal ([20-30]%), Disney ([20-30]%), Sony ([10-20]%) and Warner Bros ([5-10]%) and will continue to place a competitive constraint on the merged entity post-transaction.

- (195) In Germany and Austria, 21CF's market share in the upstream market is below [20-30]% by revenue for all markets except for when the market for the licencing of film rights is segmented according to exhibition window: (i) first pay-TV window: [20-30]%; and (ii) TVOD/PPV: [20-30]%. The other Hollywood studios have similar market shares in these windows and a number have larger market share for the licencing of films overall compared to 21CF ([10-20]%) : Disney ([10-20]%), NBC Universal ([20-30]%), and Warner Bros ([10-20]%).

- (196) In Italy, 21CF's market share for the licensing of TV content on all segments is below [10-20]% by revenue.

- (197) Given the merged entity's limited market position with regard to the licencing of content, the Commission considers that it would not have the ability to foreclose its downstream rivals. In addition, 21CF [licensing practices of 21CF] which would hamper its ability to restrict supply or otherwise degrade the terms on which it supplies content to third parties.

(b) Incentive to engage in input foreclosure

- (198) Respondents to the market investigation consider that the merged entity may have the incentive to exclusively supply TV content to Sky and not to other

TV channel suppliers/TV services retailers, or to otherwise degrade the terms and conditions to which it provides access.¹¹¹

(199) On the other hand, the Commission notes that when 21CF controlled Sky Deutschland (Sky's retail businesses in Germany and Austria) and Sky Italia, (Sky's retail businesses in Italy),¹¹² 21CF continued to supply its TV content to third parties in those jurisdictions.

(200) Even if the Commission were to assume that, post-Transaction, the merged entity may have the incentive to foreclose TV broadcasters and providers of TV retail services, despite the fact that 21CF's past behaviour does not support such an assumption, the outcome of the assessment would not change given the lack of ability to foreclose and impact on effective competition.

(c) Impact on effective competition

(201) Regardless of whether the merged entity has either the ability or the incentive to foreclose competing downstream rivals with regard to the supply of TV content, the Commission does not consider that such a strategy would have an impact on competition.

(202) First, 21CF already licences its entire output of new films (as well as various library films and TV series) to Sky on an exclusive basis on subscription pay-TV in the UK, Ireland, Germany, Austria and Italy. Therefore, there is no change brought by the Proposed Transaction, in particular for films where 21CF has a market share of more than [20-30]% in some segments.

(203) Second, the market shares presented above indicate that several providers of TV content would remain active in the market in each of the UK, Ireland, Germany, Austria and Italy. This is confirmed by the market investigation which indicates that competing TV channel suppliers and providers of TV retail services would continue to have access to TV content that competes with the content supplied by 21CF today.¹¹³

(d) Conclusion

(204) In light of the above, the Commission considers that the Proposed Transaction does not give rise to serious doubts with regard to its compatibility with the internal market as a result of input foreclosure effects to the detriment of either competing TV broadcasters or providers of TV retail services in the UK, Ireland, Germany, Austria or Italy.

111 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, questions 37 and 38. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, questions 38 and 39.

112 Commission decision of 11 September 2014 in case M.7332 *BskyB/ Sky Deutschland/ Sky Italia*.

113 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 40. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 40.

6.1.3. Wholesale supply of TV channels

6.1.3.1. Introduction

- (205) At the wholesale level, the Proposed Transaction increases Sky's pre-existing vertical integration by adding 21CF's channels to Sky's existing channel portfolio. The Commission has therefore assessed the risk of input foreclosure with regard to TV channels as a result of the Proposed Transaction.

6.1.3.2. Views of the Notifying Party

- (206) The Notifying Party submits that the Proposed Transaction does not change the merged entity's ability or incentive to restrict competitors' access to its TV channels in each of the relevant Member States. With regard to the UK and Ireland, the Notifying Party submits that 21CF's [21CF share of viewers] and cannot be considered as an important input. With regard to Germany and Austria, it submits that Sky is not materially active with regard to the wholesale supply of TV channels to third parties and 21CF [21CF market position]. In Italy, it submits that Sky is not active with regard to the wholesale supply of TV channels and 21CF already exclusively supplies its channels to Sky.
- (207) Finally, the Notifying Party claims that given the limited audience shares, even if the merged entity were to adopt such a foreclosure strategy, there would be no effect on competition.

6.1.3.3. The Commission's assessment - UK and Ireland

(a) Ability to engage in input foreclosure

- (208) As set out above in Table 3, with regard to the wholesale supply of basic pay-TV channels in the UK, the Parties have a combined market share of [30-40]% by revenue (Sky: [20-30]%; 21CF: [5-10]%) and [20-30]% by audience share (Sky: [20-30]%; 21CF: [5-10]%). As 21CF does not wholesale any premium pay-TV channels there is no overlap in this regard.
- (209) As set out above in Table 4, in Ireland, the Parties have a combined market share of [10-20]% by revenue (Sky: [10-20]%; 21CF: [0-5]%) and [20-30]% by audience share (Sky: [20-30]%; 21CF: [5-10]%) with regard to the wholesale supply of basic pay-TV channels. As 21CF does not wholesale any premium pay-TV channels there is no overlap in this regard.
- (210) Respondents to the market investigation consider that a number of the Sky channels are "must have" such as Sky Sports and Sky Cinema however there is no strong indication that any of the 21CF channels are "must have". There are multiple close substitutes to 21CF's channels provided by competing TV channel suppliers that will remain in the market post-transaction which have a

similar share to 21CF and will continue to place a competitive constraint on the merged entity: Discovery ([10-20]%), Disney ([5-10]%) and ITV ([10-20]%) (all by revenue).

- (211) When considering a potential sub-segment for factual pay-TV channels 21CF's National Geographic has a limited market share of [10-20]% in the UK and [10-20]% in Ireland and Discovery will remain the far larger player in both the UK ([40-50]%) and Ireland ([50-60]%) (by audience)).
- (212) With regard to the potential sub-segment for general entertainment pay-TV channels, the Parties' market and audience shares have been presented in paragraph (160) above. In this market segment, alternative competitors with similar audience shares to 21CF's general entertainment channel, FOX, would remain active in the market (UKTV with [10-20]% and [10-20]% in respectively the UK and Ireland).
- (213) This availability of alternatives is supported by the market investigation which showed that several TV channels are FOX's closest competitor (e.g. Universal, Sky, Alibi).¹¹⁴ One respondent, for example, notes that the merged entity will face upstream competition from the other main providers of basic pay-TV channels and Channel4 highlights that for some channels there are similar genre services from other major networks (Discovery and UKTV).
- (214) Finally, the Parties submit that 21CF's ability to deny or degrade access to National Geographic's TV channels is limited since [internal processes of National Geographic],¹¹⁵ [internal processes of National Geographic].
- (215) Based on the above, the Commission considers that post-transaction the merged entity is unlikely to have the ability to foreclose competing TV distributors in the UK and Ireland.

(b) Incentive to engage in input foreclosure

- (216) Many respondents to the market investigation consider that post-transaction the merged entity would have the incentive to exclusively supply its channels to Sky and not to other provider of TV retail services, or to degrade the terms and conditions to which it provides access.¹¹⁶
- (217) Sky is already vertically integrated with regard to the upstream supply of TV channels and the downstream supply of retail TV services; the increment brought about by the Proposed Transaction is therefore limited to the 21CF channels. As noted above, 21CF has a limited market share in the wholesale

¹¹⁴ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 32.2. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 35.1.

¹¹⁵ [Internal processes of National Geographic].

¹¹⁶ Replies to Questionnaire Q3 to TV distributors of 7 March 2017, questions 44 and 45.

supply of TV channels, the Commission therefore considers that incentives of the merged entity will not significantly change as a result of the Proposed Transaction.

- (218) Moreover, as noted above in paragraph (199), until 2014, 21CF controlled Sky Deutschland and Sky Italia. There is no evidence on the file that 21CF refused to supply its TV channels to third parties in those jurisdictions despite this vertical integration.
- (219) Based on the above, the Commission considers that post-transaction the merged entity is unlikely to have the incentive to foreclose competing TV distributors in the UK and Ireland.

(c) Impact on effective competition

- (220) Regardless of whether the merged entity has either the ability or the incentive to foreclose competing downstream rivals with regard to the wholesale supply of basic pay-TV channels, the Commission does not consider that such a strategy would have an impact on competition.
- (221) As detailed above in paragraphs (208) - (212) [...] a number of competing providers of basic pay-TV channels will remain active post-transaction. Therefore even if the merged entity were to adopt a foreclosure strategy, downstream rivals would continue to have access to alternative inputs that compete with the 21CF channels.

(d) Conclusion

- (222) In light of the above, the Commission considers that the Proposed Transaction does not give rise to serious doubts with regard to its compatibility with the internal market as a result of input foreclosure effects of TV channels to the detriment of competing retail providers of TV retail services in the UK or Ireland.

6.1.3.4. The Commission's assessment - Germany and Austria

(a) Ability to engage in input foreclosure

- (223) As noted above in paragraph (172), Sky is not active with regard to the wholesale supply of non-sports TV channels in Germany as it has adopted a self-retail model. 21CF has a limited portfolio of channels consisting of FOX and the National Geographic channels. As set out in Table 5, when considering the audience shares, the Parties' combined market share is well below [20-30]% (combined: [10-20]%; Sky: [5-10]%; 21CF: [10-20]%).
- (224) With regard to Austria, as set out in paragraph (175), Sky has adopted the same self-retail model as it has in Germany and 21CF offers the FOX and National Geographic channels. The Notifying Party states that it cannot

provide audience based market shares for Austria however it confirms that the market shares in Austria do not materially differ to those in Germany i.e. below [10-20]%.

- (225) Despite its limited TV channel offering, some respondents to the market investigation indicate that 21CF's channels are important input to compete, in particular the National Geographic channels. With regards to other TV channels, some respondents including large downstream operators such as Deutsche Telekom and Telekom Austria consider the FOX branded channels as "must have" because of content and customer awareness.¹¹⁷
- (226) On the other hand, respondents also note that close substitutes to 21CF's channels would remain in the market both for factual and general entertainment TV channels. With regard to the National Geographic channels, other providers include Discovery (whose 'Discovery' and 'Animal Planet' channels had an audience share in 2015 of [10-20]% and [0-5]% respectively), AETN/Universal (whose 'History' and 'A&E' channels had an audience share in 2015 of [10-20]% and [5-10]% respectively) and Spiegel TV/Autentic (with an audience share in 2015 of [10-20]%).¹¹⁸ Other TV channels providing access to general entertainment content and TV series include: 13th Street, TNT Serie, ProSiebenSat, RTL Crime which compete with the FOX channel.
- (227) Given the merged entity's limited market position with regard to the licencing of TV channels and the existence of multiple strong competitors, the Commission considers that it would not have the ability to foreclose its downstream rivals. Moreover, as described above at paragraph (210), 21CF's ability would be limited given that [internal processes of National Geographic].
- (b) Incentive to engage in input foreclosure
- (228) Given 21CF's limited market share in the wholesale supply of TV channels, the Commission therefore considers that incentives of the merged entity will not significantly change as a result of the Proposed Transaction.
- (229) Moreover, as noted above in paragraph (199), until 2014, 21CF controlled Sky Deutschland and Sky Italia. There is no evidence on the file that 21CF refused to supply its TV channels to third parties in those jurisdictions despite this vertical integration.

¹¹⁷ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 33. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 42.

¹¹⁸ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 32.2. Replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 35.2.

(230) Based on the above, the Commission considers that post-transaction the merged entity is unlikely to have the incentive to foreclose competing providers of TV retail services in the Germany and Austria.

(c) Impact on effective competition

(231) Regardless of whether the merged entity has either the ability or the incentive to foreclose competing downstream rivals with regard to the supply of TV channels, the Commission does not consider that such a strategy would have an impact on competition.

(232) First, the Proposed Transaction does not materially change the competitive landscape given that Sky currently does not wholesale its TV channels to third parties and the increment brought about by the Proposed Transaction with regard to the 21CF channels is limited.

(233) Second, as detailed above at paragraphs (223) - (226), there are a large number of competing inputs that will continue to be available to downstream rivals post-transaction.

(d) Conclusion

(234) In light of the above, the Commission considers that the Proposed Transaction does not give rise to serious doubts with regard to its compatibility with the internal market as a result of input foreclosure effects of TV channels to the detriment of competing retail providers of TV retail services in Germany or Austria.

6.1.3.5. The Commission's assessment - Italy

(a) Ability to engage in input foreclosure

(235) As detailed above in paragraph (177), Sky does not supply channels on a wholesale basis to retail TV distributors in Italy whereas 21CF supplies FOX, the National Geographic channels, Baby TV, the FOX sports channel, news channels and a number of other channels. It estimates that it has a market share by revenues of [20-30]%. Regardless of the respective market positions of the Parties, 21CF already exclusively licences its TV channels to Sky in Italy, it is therefore not relevant to assess whether the merged entity would have the ability to withhold its TV channels from competing downstream retail TV distributors.

(b) Incentive to engage in input foreclosure

(236) With regards to the incentive to foreclose downstream competitors and potential impact on effective competition, the Commission notes that, 21CF's channels are already exclusively distributed on Sky's platform and there has been no indication from the Parties' internal documents that this strategy

would have changed absent the Proposed Transaction. Therefore, there would be no merger specific change brought by the Proposed Transaction.

(c) Impact on effective competition

- (237) Regardless of whether the merged entity has either the ability or the incentive to foreclose competing downstream rivals with regard to the supply of TV channels, the Commission does not consider that such a strategy would have an impact on competition given that 21CF's channels are already exclusively distributed on Sky's platform in Italy.

(d) Conclusion

- (238) In light of the above, the Commission considers that the Proposed Transaction does not give rise to serious doubts with regard to its compatibility with the internal market as a result of input foreclosure effects of TV channels to the detriment of competing retail providers of TV retail services in Italy.

6.2. Customer foreclosure – TV markets

6.2.1. Introduction

- (239) The Proposed Transaction combines 21CF's upstream content (in particular films from its subsidiary, 20CF, and content from Endemol Shine) with Sky's significant downstream position as an acquirer of content for its TV channels and as a pay-TV retailer.
- (240) According to the Non-Horizontal Merger Guidelines a downstream firm being part of a vertical merger may refuse to buy inputs from its rivals input suppliers as a result of the Proposed Transaction. This incentive to foreclose access to customers downstream may result from the vertical integration of an upstream supplier with an important customer downstream. Due to their downstream presence, the merged entity may foreclose its upstream rivals' access to an important customer base. In turn this can inhibit upstream rivals to effectively compete.¹¹⁹
- (241) In television markets, different forms of customer foreclosure may occur. First: (i) intermediate TV channel wholesalers; or (ii) downstream TV distributors; cease purchasing TV content from upstream rivals. Second, downstream TV distributors cease buying TV channels from their rivals at the intermediate level for the wholesale supply of TV channels.

¹¹⁹ Non-Horizontal Merger Guidelines, paragraph 58.

6.2.2. *Supply of TV content*

6.2.2.1. Introduction

- (242) The following section assesses whether post-transaction, the merged entity would have the ability and incentive to cease acquiring TV content from its upstream rivals either: (i) for incorporation into TV channels to be wholesaled to third parties; or (ii) to sold by the merged entity directly to end users. It then assesses what the overall likely effect on competition would be.

6.2.2.2. Notifying Party's views

- (243) The Notifying Party submits that it would not have the ability to foreclose or partially foreclose competing upstream providers because: (i) it has multi-year output agreements in place with a wide range of suppliers; and (ii) content providers have multiple other outlets for their supply.
- (244) The Notifying Party submits that it would have no incentive to cease acquiring the content of competing providers as this would seriously undermine the attractiveness of Sky's retail offering which would result in lost customers.
- (245) It argues that such a customer foreclosure strategy would not have an effect on competition as content providers could easily continue to supply to other players, both to FTA channels and pay-TV channels.

6.2.2.3. Commission's Assessment - UK and Ireland

- (246) As noted above in paragraph (74), the Commission has left open whether the relevant market for the supply and acquisition of TV content should be considered as national or on the basis of linguistic region. The Notifying Party submits that the Parties typically supply and acquire content rights for the UK and Ireland together and that the analysis should therefore consider the UK and Ireland as one market.
- (247) Regardless, the Commission considers that conclusion of the competitive analysis does not differ depending on whether the UK and Ireland are considered separately or together.
- (a) Ability to engage in customer foreclosure
- (248) When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Commission examines whether there are sufficient economic alternatives in the downstream market for upstream rivals to sell their output.

- (249) In the first instance, the market shares indicate that Sky is an important purchaser of TV content, in particular for sports and films, as shown in Table 7 below.

Table 7 – Market shares for acquisition of TV content in share - by total spend - UK and Ireland - 2015

	All TV content (%)	All sports (%)	All film (%)	Other TV content (%)
21CF	[0-5]	[0-5]	[0-5]	[0-5]
Sky	[20-30]	[50-60]	[60-70]	[10-20]
Combined	[20-30]	[50-60]	[60-70]	[10-20]

Source: Annex 13, Form CO.¹²⁰

- (250) Sky's market share for the acquisition of films further increases when segmented according to release window: (i) first pay-TV window: [70-80]%; and (ii) TVOD/PPV rights: [60-70]%. The other purchasers of films rights in the UK overall are the PSB channels (BBC: [5-10]%; ITV: [10-20]%; Channel 4: [10-20]%). With regard to the first pay-TV window, the OTT players are the other purchasers (Netflix: [10-20]%; Amazon: [10-20]%).
- (251) When sub-segmenting the market for the supply of other TV content, Sky has a material market position with regard to the acquisition of licenced pre-produced TV content (Sky: [20-30]%; 21CF: [0-5]%) but not commissioned TV content (Sky: [5-10]%; 21CF: [0-5]%).
- (252) Despite the importance of Sky as a purchaser of TV content the Commission concludes that it would have a limited ability to foreclose rivals by ceasing to purchase from them and exclusively relying on the content of 21CF post-transaction.
- (253) First, [...] 21CF has an extremely limited market position in the UK and Ireland with regard to the supply of sports rights ([0-5]% share by revenue in 2015 and the Parties together do not have more than [0-5]% under any other sub-segment considered). It is therefore not possible for Sky to exclusively rely on the sports rights licenced by 21CF in the United Kingdom and Ireland.
- (254) Second, the results of the market investigation indicate that the majority of rights holders consider that there are other players to which they could licence their content as an alternative to the merged entity in the event that the merged entity ceased acquiring their TV content or otherwise degraded the

¹²⁰ 21CF and Sky estimates produced with elaboration from Oliver and Ohlbaum.

terms on which it acquires their TV content. No respondents consider that there are no alternative licensors for their content.¹²¹

- (255) In the segment where Sky has a significant market position, the licencing of film rights, 21CF's main competitors are the other major Hollywood studios which licence their content far beyond the UK and Ireland. This means that the potential customer foreclosure would not impair 21CF's competitors' ability to compete, as it would not affect their ability to realise economies of scale or to invest and, as a consequence, would not affect their cost structure of the quality of their productions.¹²²
- (256) Third, Sky has multi-year output agreements and other licensing agreements in place with a wide range of rights holders, for both series and films. Accordingly, Sky cannot unilaterally cease to licence such content from these third parties or otherwise degrade the terms of supply until their expiry without being in breach of these agreements.
- (257) One respondent whose licencing agreement for film rights expires in the near future and is currently in negotiations with Sky regarding renewal of their output deal notes that both Netflix and Amazon are potential purchasers of its content, in particular for the first pay-TV window where Sky has a strong market position. This respondent raised concerns however that its negotiations with Sky for the distribution of its content could be impacted by Sky's market power as a wholesale purchaser of TV channels.
- (258) The Commission notes however that: (i) this respondent does not have concerns regarding customer foreclosure for content as it considers there to be sufficient alternatives; and (ii) its concern regarding the impact of its TV channel negotiations on its TV content negotiations is not merger specific as Sky was already active with regard to both the acquisition of content and channels prior to the Proposed Transaction. As discussed above in Sections 5.1 and 5.2, the Proposed Transaction does not materially increase Sky's market power for the acquisition of content given the minimal increment.
- (259) Other film rights holders with contracts which expire in the near future have not raised concerns regarding the merged entity ceasing to acquire content from them or otherwise degrading the terms on which it does so. Moreover, the merged entity has a variety of agreements with the other major US studios (including content licensing, commissioning, advertising sales representation and transaction VOD business) thus rendering a content foreclosure strategy risky as the studios could retaliate on the basis of commercial relationships in other markets.

121 Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 41.

122 See paragraphs 62 - 65 of the Non-Horizontal Mergers Guidelines.

(b) Incentive to engage in customer foreclosure

- (260) The Commission does not consider that the merged entity would have the incentive to foreclose access to downstream markets by reducing purchases from upstream competing rivals for the following reasons.
- (261) The attractiveness of a pay-TV operator's offer to consumers is based on the richness of the bundle of content and channels broadcast through its platform.¹²³ On this basis, the merged entity would simply not have the incentive to cease purchasing content from upstream competitors. Sky does not limit its offering to 21CF film content, including its entire output of new films but it also purchases similar premium film content also from 21CF's competitors. Moreover, Sky did not limit its film content to 21CF offering in the past in Germany, Austria and Italy even if, at the time, it was controlled by 21CF. This indicates that Sky does not have an incentive to reduce the variety of content it purchases from different upstream operators, as this might affect the attractiveness of its pay-TV offer.
- (262) The majority of respondents to the market investigation stated either that they considered that the merged entity would not have the incentive to stop sourcing TV content from other producers/licensors and exclusively rely on content provided by 21CF or stated that they did not know.¹²⁴ Those that responded "I don't know", noted that they considered it unlikely that the merged entity would cease content from third parties all together.
- (263) A number of respondents to the market investigation noted that post-transaction, the merged entity may have an incentive to favour its own content above others but have not provided substantiated submissions explaining how the merged entity would implement such a potential partial foreclosure strategy. As noted above, the Commission considers that the merged entity will continue to have a strong incentive to carry a broad range of the most attractive content on its platform therefore, as with the incentive to fully foreclose, the Commission does not consider that the merged entity would have the incentive to partially foreclose its upstream rivals.

(c) Impact on competition

- (264) Given that there are multiple alternatives to the merged entity to which rights holders can supply their content, a large number of rights holders are protected from a foreclosure strategy. Moreover, due to the existing output agreements with Sky, Sky cannot unilaterally cease to licence content from these third parties or otherwise degrade the terms of supply. In light of this,

¹²³ See for example: Commission decision of 21 December 2010 in case M.5932 – *NewsCorp/BskyB*, paragraph 154; Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media* paragraph 68.

¹²⁴ Replies to Questionnaire Q1 to TV rights holders of 7 March 2017, question 38.

the Commission does not consider that a potential customer foreclosure strategy for content would have a material effect on competition in the UK or Ireland.

(d) Conclusion

- (265) In light of the above, the Commission concludes that the Proposed Transaction does not give rise to serious doubts with regard to its compatibility with the internal market as a result of customer foreclosure for the supply of TV content in the United Kingdom or Ireland (or in relation to a linguistic region encompassing both the United Kingdom and Ireland).

6.2.2.4. Commission's Assessment - Germany and Austria

- (266) As noted above in paragraph (89), the Commission has left open whether the relevant market for the supply and acquisition of TV content should be considered as national or on the basis of linguistic region. The Notifying Party submits that the Parties typically supply and acquire content rights for [...] together and the analysis should therefore consider both Member States together as one market.
- (267) Regardless, the Commission considers that conclusion of the competitive analysis does not differ depending on whether Germany and Austria are considered separately or together.

(a) Ability to engage in customer foreclosure

- (268) In the first instance, the market shares indicate that Sky is an important purchaser of TV content in Germany and Austria, in particular for sports rights, as shown in Table 8 below where Sky has a pre-transaction market share of [50-60]%.

Table 8 – Market shares for acquisition of TV content – by total spend – Germany and Austria - 2015

	All TV content (%)	All sports (%)	All film (%)	Other TV content (%)
21CF	[0-5]	[0-5]	[0-5]	[0-5]
Sky	[10-20]	[50-60]	[20-30]	[0-5]
Combined	[10-20]	[50-60]	[20-30]	[0-5]

Source: Annex 13, Form CO.¹²⁵

- (269) Sky's market share for the acquisition of films materially increases when segmented according to release window, in particular the first pay-TV window where Sky has a market share of [80-90]% by revenue. With regard to TVOD/PPV rights however Sky has a far lower market share ([5-10]%) with a number of other purchasers remaining more important post-transaction (Amazon: [20-30]%; iTunes: [20-30]%; Maxdome: [20-30]%).
- (270) Sky's market share for the acquisition of sports also further increases when sub-segmented, in particular Sky is an important buyer of regular event football content ([60-70]% by revenue).
- (271) Despite the importance of Sky as a purchaser of TV content, in particular for films, the Commission concludes that it would have a limited ability to foreclose rivals by ceasing to purchase from them and exclusively relying on the content of 21CF for the following reasons.
- (272) First, with regard to sports rights, 21CF has an extremely limited market position in Germany and Austria and does not licence any football rights (regular or non-regular events) and the Parties have a combined share for the licencing of other sports of [0-5]%. It is therefore not possible for Sky to exclusively rely on the sports rights licenced by 21CF in Germany and Austria.
- (273) The arguments articulated in relation to the UK and Ireland are also applicable in this market. Second, as noted [...] with regard to the UK and Ireland, there are many other potential purchasers of content that competes with 21CF's content. Third, Sky currently has multi-year output agreements with a wide range of rights holders which prevent Sky from ceasing to purchase their content and the multitude of agreements with the other US studios renders content foreclosure strategy risky.

* Should read: "above"

¹²⁵ 21CF and Sky estimates produced with elaboration from Oliver and Ohlbaum.

(b) Incentive to engage in customer foreclosure

- (274) As noted above with regard to the UK and Ireland in paragraphs (260) - (263) above, the Commission does not consider that the merged entity would have the incentive to either fully or partially cease licencing content from third parties in relation to the markets in Germany and Austria as it would reduce the quality of the Sky offering thereby risking the loss of customers.

(c) Impact on competition

- (275) Given that there are multiple alternatives to the merged entity to which rights holders can supply their content, a large number of rights holders are protected from a foreclosure strategy. Moreover, due to the existing output agreements with Sky, Sky cannot unilaterally cease to licence content from these third parties or otherwise degrade the terms of supply. In light of this, the Commission does not consider that a potential customer foreclosure strategy for content would have a material effect on competition in Germany or Austria.

(d) Conclusion

- (276) In light of the above, the Commission concludes that the Proposed Transaction does not give rise to serious doubts with regard to its compatibility with the internal market as a result of customer foreclosure for the supply of TV content in Germany or Austria (or on in linguistic region encompassing both Germany and Austria).

6.2.2.5. Commission's Assessment - Italy

(a) Ability to engage in customer foreclosure

- (277) In the first instance, the market shares indicate that Sky is an important purchaser of TV content in Italy, in particular for sports rights, as shown in Table 9 below. In addition, as 21CF supplies its Fox Sport channel in Italy, there is a limited increment ([0-5]%) deriving from Fox's activities as an acquirer of sports rights.

Table 9 – Market shares for acquisition of TV content – by total spend – Italy - 2015

	All TV content (%)	All sports (%)	All film (%)	Other TV content (%)
21CF	[0-5]	[0-5]	[0-5]	[0-5]
Sky	[20-30]	[40-50]	[30-40]	[0-5]
Combined	[20-30]	[50-60]	[30-40]	[5-10]

Source: Annex 13, Form CO.¹²⁶

- (278) Sky's market share for the acquisition of films materially increases when segmented according to release window, in particular the first pay-TV window where Sky has a market share of [60-70]%. Mediaset is the other purchaser of first pay-TV rights in Italy with a share of [30-40]%.
- (279) With regard to TVOD/PPV rights, Sky is an important player ([50-60]%) with a number of other players purchasing a more limited amount of movies rights for this distribution platform (iTunes: [20-30]%; TimVision: [10-20]%).
- (280) Sky's market share for the acquisition of sports is similar when sub-segmented; for football rights the merged entity will have a market share of [50-60]% (Sky: [50-60]%; 21CF: [0-5]%, both all football rights and regular event football rights) and [90-100]% for non-regular football events.
- (281) Despite the importance of Sky as a purchaser of TV content, in particular for films, the Commission concludes that [...] ability to foreclose rivals by ceasing to purchase from them and exclusively relying on the content of 21CF.
- (282) First, with regard to sports rights, 21CF has an extremely limited market position in Italy licencing less than [0-5]% of all sports content, regardless of segmentation. It is therefore not possible for [...] merged entity to exclusively rely on the sports rights licenced by 21CF in Italy.
- (283) The arguments articulated in relation to the UK and Ireland are also applicable in this market. There are many other potential purchasers of content that compete with 21CF's content. Moreover, Sky currently has multi-year output agreements with a wide range of rights holders which prevent Sky from ceasing to purchase their content and the multitude of agreements with the other US studios renders content foreclosure strategy risky.

* Should read "the"

¹²⁶ 21CF and Sky estimates produced with elaboration from Oliver and Ohlbaum.

(b) Incentive to engage in customer foreclosure

- (284) As noted above with regard to the UK and Ireland in paragraphs (260) - (263), the Commission does not consider that the merged entity would have the incentive to either fully or partially cease licencing content from third parties as it would reduce the quality of the Sky offering thereby risking the loss of customers.

(c) Impact on competition

- (285) Given that there are multiple alternatives to the merged entity to which rights holders can supply their content, a large number of rights holders are protected from a foreclosure strategy. Moreover, due to the existing output agreements with Sky, Sky cannot unilaterally cease to licence content from these third parties or otherwise degrade the terms of supply. In light of this, the Commission does not consider that a potential customer foreclosure strategy for content would have a material effect on competition in Italy.

(d) Conclusion

- (286) In light of the above, the Commission concludes that the Proposed Transaction does not give rise to serious doubts with regard to its compatibility with the internal market as a result of customer foreclosure for the supply of TV content in Italy.

6.2.3. *Wholesale supply of TV channels*

6.2.3.1. Introduction

- (287) At the wholesale level, Sky is already vertically integrated in that it already owns a portfolio of channels in addition to being present downstream as a distribution platform. The merger specific aspect in this regard is the addition of 21CF's TV channels.
- (288) The Commission has therefore assessed the risk of the following types of customer foreclosure strategies in the United Kingdom, Ireland, Austria, Germany and Italy: (i) complete foreclosure of rival TV broadcasters through the denial of access to Sky's downstream distribution platform; and (ii) partial customer foreclosure of rival TV broadcasters through for instance a degradation of the quality of the viewer experience for competing channels on Sky's platform or through a reduction in carriage fees.

6.2.3.2. Potential targets of customer foreclosure

- (289) 21CF broadcasts scripted entertainment ("FOX" branded channels) and 'factual' (National Geographic branded channels) basic pay-TV channels in the relevant Member States, as well as a premium sports channel (Fox Sports) in Italy

- (290) For the purposes of its assessment, the Commission has considered, in particular, as the more likely potential targets of a customer foreclosure strategy, the channels that compete closely with 21CF's channels.
- (291) 21CF's channel, FOX, belongs to a wide category of channels broadcasting scripted entertainment content (general entertainment pay-TV channels). In all relevant Member States, based on audience shares and similarity of content, FOX appears to compete closely with Sky as well as other major US studios branded channels and local (national or regional) broadcasters with similar content.
- (292) The Parties' audience shares in the different Member States for the potential sub-segment of general entertainment channels is set out in Table 10 below.

Table 10 – Market shares for licencing of general entertainment basic pay-TV channels - by audience - 2015

	UK (%)	Ireland (%)	Germany and Austria (%)	Italy (%)
FOX	[5-10]	[5-10]	[5-10]	[5-10]
21CF total	[10-20]	[5-10]	[5-10]	[20-30]
Sky	[30-40]	[30-40]	[10-20]	[10-20]
Combined	[40-50]	[40-50]	[10-20]	[40-50]

Source: Parties' response to RFI of 24 March 2017 ¹²⁷

- (293) As regards other major US studios branded channels, the merged entity has a variety of agreements with the different studios (including [21CF licensing practices]) thus rendering a wholesale foreclosure strategy risky as the studios could retaliate on the basis of commercial relationships in other markets. As regards national and regional broadcasters, these are deemed to compete less closely with Fox's channels¹²⁸ and therefore, the merged entity appears to have a more limited incentive to engage in customer foreclosure. This is due to the fact that given that these compete less closely with Fox's channels, only a limited number of viewers could be expected to switch to Fox's channels as a result of the foreclosure of national or regional channels, which would limit the profitability of such a strategy. These channels are therefore not considered further for the purposes of the assessment below.
- (294) As regards 21CF's factual content channels (the National Geographic channels) these appear to compete more closely with Discovery's factual

¹²⁷ Annex 11.2 - Tables 7.39(d), 7.52(b), 7.98(d), 7.143(d).

¹²⁸ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 32.

channels (the Discovery channel and Animal Planet).¹²⁹ 21CF's and Discovery's audience share in the different Member States in its genre category is set out in Table 11 below.

Table 11 – Market shares for licencing of factual basic pay-TV channels – by audience - 2015

	UK (%)	Ireland (%)	Germany and Austria (%)	Italy (%)
National Geographic	[5-10]	[5-10]	[20-30]	[10-20]
21CF total	[10-20]	[10-20]	[30-40]	[20-30]
Discovery	[40-50]	[50-60]	[20-30]	[30-40]

Source: Parties response to RFI of 22 March 2017¹³⁰

(295) Other competitors include channels with significantly lower audience shares. In addition, National Geographic and Discovery adopt a comparable positioning, each with well recognized international brand names, where competitors have national or regional brands. [Description of Sky's internal documents]. There is therefore a significant asymmetry in the competitive relationship between National Geographic and Discovery on one hand and other channels on the other. As a result, it is unlikely that the merged entity would target channels other than Discovery's for foreclosure as this would not result in significant viewer diversion towards National Geographic. Consequently, given the similarity of content between National Geographic and Discovery's factual channels, the proximity between these players in terms of strategic positioning, and the fact that the market investigation has indicated that both channels closely compete with each other, the Commission has focused in particular on Discovery's channels as a potential targets of a customer foreclosure strategy.

(296) 21CF's Fox Sports channel in Italy is a premium sports content channel. The market investigation confirmed that Fox Sports' closest competitor is Sky Sports. Other competing channels include Mediaset's Premium Sport. Fox Sports is exclusively distributed via Sky before the merger and Mediaset's Premium Sport is exclusively distributed by Mediaset and therefore does not seek distribution on Sky's platform. Eurosport, Discovery's sports channel, does not broadcast premium sport content and thus does not compete closely with Fox Sports. As such, Eurosport's foreclosure would not induce a material amount of viewers switching to Fox Sports. Therefore, no merger-specific

¹²⁹ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 32.

¹³⁰ Annex 4(1), 4(2), 4(3) and 4(4) – Tables 7.95(c), 7.36(c), 7.49(a) and 7.140(c).

customer foreclosure issues appear to arise with respect to the addition of Fox Sports to Sky's channel portfolio in Italy.

- (297) In light of the above, the Commission has focused its assessment regarding customer foreclosure particularly on the foreclosure of Discovery's channels in each of the relevant Member States.

6.2.3.3. The Notifying Party's view

- (298) The Notifying Party submits that the merged entity would have no ability to foreclose or partially foreclose rivals as there are other TV retailers competing to purchase content in each of the relevant Member States. The Notifying Party also argues that, should they fail to sell distribution rights, broadcasters have alternative routes to supply their channels to viewers. It asserts that channels can freely switch to FTA distribution and thus gain viewership and increased advertising revenues sufficient to offset the loss of a carriage fee. In addition, the Notifying Party explains that Sky is required to provide non-discriminatory access to its platform in the UK, Germany and Austria which gives broadcasters the ability to self-retail directly on Sky's platform.
- (299) Moreover, Sky submits that it would not have the ability to engage in partial foreclosure consisting in degrading the rank of competing channels on its EPG listing due to regulatory and contractual protections.¹³¹ Each channel broadcast on a TV platform receives an EPG position, which is usually agreed between the TV broadcaster and the TV distributor. The Notifying Party invokes EPG regulations in the UK, Germany and Austria requiring Sky to provide listings in its EPG on non-discriminatory terms. Despite the absence of comparable regulations in Ireland, the Notifying Party explains that its Irish EPG is the same as the UK EPG so that regulatory constraints in the UK are also reflected in the EPG services provided in Ireland. In Italy, it asserts that "*[Parties' view of regulation in Italy]*."¹³² Accordingly, the Notifying Party submits that the merged entity would be prevented from engaging in partial foreclosure by way of EPG degradation in the UK, Ireland, Germany, Austria and Italy.
- (300) Finally, the Notifying Party submits that no merger-specific mechanism increases its bargaining power and, henceforth, its ability to decrease carriage fees paid to third-party broadcasters. Furthermore, as Sky's ability to engage in quality degradation would not be impacted by the merger due to rules applicable to Sky's EPG listings, it argues that Sky could not credibly threaten broadcasters of foreclosure to obtain favourable financial terms.

¹³¹ As noted above in paragraph (52), the EPG is an application used on television sets to list current and scheduled programmes that are or will be available on each channel and a short summary or commentary for each programme.

¹³² Form CO, paragraph 3.15.

- (301) Concerning the incentives to foreclose, the Notifying Party submits the following. As regards full foreclosure, the [...] * that in case channels would be fully blacked out, this channel would switch from a Pay TV to a FTA business model and would therefore not fully be deprived of advertising revenues. Moreover, the Notifying Party [Notifying Party's view of diversion of advertising revenues]. Third, the incremental increase in advertising revenues would be very limited given that Sky Media [Details of commercial arrangements between Sky and 21CF].
- (302) Regarding the incentives to engage in partial foreclosure, the Notifying Party is of the view that any attempt to partially foreclose would entail significant retail losses for Sky; in particular, any degradation of the viewer experience would lead to consumer switching of those consumers that are close to the margin. Moreover, consumers who see their viewer experience degraded may also negotiate discounts to their subscription or switch to cheaper bundles. The Notifying Party also posits that it is not clear that the net benefit of partial foreclosure would be larger than that of full foreclosure. Overall, they are of the view that given the uncertain size of potential gains and the risk of adverse consumer reaction, it would be implausible that the merged entity would engage in such behaviour.

6.2.3.4. The Commission's assessment in the UK and Ireland

(a) Ability to engage in customer foreclosure

(i) Sky's importance as a distribution platform

- (303) For customer foreclosure to be a concern, the transaction must involve a company with a significant degree of market power as a customer in the downstream market.
- (304) Sky is the leading pay-TV retailer in the UK and Ireland. Sky's share of all pay-TV services on the basis of revenues is [70-80]% in the UK and [70-80]% in Ireland. Sky's platform allows broadcasters to access [50-60]% of pay-TV subscribers in the UK and [50-60]% in Ireland.¹³³
- (305) TV channel suppliers overall consider that there is no alternative to Sky as a distributor given its large customer base resulting in higher audiences and accompanying revenues.
- (306) These market shares estimates are consistent with the results of the market investigation. Several TV broadcasters indicated that the majority of their revenues are derived from distribution on Sky's platform or consider that

* Should read: "Notifying Party believes".

¹³³ These subscribers shares do not include Netflix and Amazon which are non-linear services do not carry linear channels and therefore do not offer alternative distribution platforms to the Parties' upstream competitors.

distribution on Sky's platform is essential for pay-TV channels to achieve a sufficient scale.

(ii) Ability to engage in total foreclosure

- (307) A majority of wholesale suppliers of TV channels in the UK and Ireland consider that Sky currently has significant bargaining power.¹³⁴ Furthermore, market participants do not expect new entry at the retail level in the UK or Ireland offering a distribution scale comparable to Sky.
- (308) Switching to FTA distribution and self-retailing on Sky's platform do not constitute viable alternative supply options for broadcasters. FTA distribution involves a different business model which essentially relies on advertising revenues where pay-TV channels generate revenues from carriage fees and advertising. Switching from a pay-TV to an FTA model would entail considerable uncertainty and may induce losses in revenues. Furthermore, in the course of the market investigation, several market participants explained that self-retailing does not constitute a commercially viable alternative absent premium content capable of attracting clients to channels marketed outside of a Sky package.¹³⁵
- (309) However, the Commission considers that several factors militate against a finding of ability on the part of Sky to engage in full foreclosure of Discovery's channels.
- (310) A number of market participants confirmed that customers expect Sky to carry a large portfolio of channels post-merger. Indeed, as submitted by the Notifying Party, Sky is branded as a superior pay-TV distributor offering a wide range of high quality content. Sky's strategy to offer a broad range of third party channels therefore also impacts on Sky's ability to foreclose upstream competitors. Notably, in this respect, while Discovery is concerned about the merged entity's potential to engage in partial customer foreclosure, it believes that is unlikely that it would be fully foreclosed.¹³⁶
- (311) [Description of Sky's internal documents].¹³⁷
- (312) [Details of the recent agreement entered into between Sky and Discovery].¹³⁸
[Details of the recent agreement entered into between Sky and Discovery].

¹³⁴ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 43.

¹³⁵ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 45.2 and replies to Questionnaire Q3 to TV distributors of 7 March 2017, question 50.1, noting that self-retailing on Sky's platform involves significant commercial disadvantages compared to distribution as part of a Sky retail package, as it requires that subscribers pay a fee in addition to their Sky subscription and bear a separate billing arrangement.

¹³⁶ See non-confidential version of the minutes of the Meeting between the Commission and Discovery on March 14, 2017.

¹³⁷ See submission of the Notifying Party from March 28, 2017, Annexes 1.1-1.4.

(313) Therefore, an ability on the part of Sky to foreclose Discovery cannot be held to arise in light of the applicable contractual provisions. Discovery's current distribution contract for the UK and Ireland runs until [term of the recent agreement entered into between Sky and Discovery].¹³⁹

(iii) Ability to engage in partial foreclosure

(314) The market investigation indicated that the majority of wholesale suppliers of TV channels in the UK and Ireland consider that Sky is able to impose unfavourable contract terms due to its superior bargaining power.¹⁴⁰

(315) As indicated above, however, the only merger specific element pertinent to the present assessment of partial foreclosure is the addition of 21CF's National Geographic channel, which in comparison to Discovery enjoys a limited audience share in the UK and Ireland.

(316) The Commission considers that a number of other elements exist which militate against a finding of the ability of the merged entity to engage in partial customer foreclosure in the present case.

(317) As regards potential partial foreclosure via a reduction of carriage fees, the Commission notes that [details of the recent agreement entered into between Sky and Discovery]. This therefore affords protection in relation to Discovery's carriage fee revenue until [details of the recent agreement entered into between Sky and Discovery].

(318) As regards a degradation of EPG ranking, the Commission notes that EPG regulations are applicable to Sky in the UK.

(319) The UK regulator, Ofcom, has a code of practice on EPGs (the EPG Code) which ensures that any agreement with broadcasters for the provision of an EPG service is made on FRAND terms. Moreover, Sky is required to refrain from giving undue prominence in any listing or display to a channel connected to Sky. Sky also needs to carry out periodic reviews of its listing policy and of channel listings made in accordance with that policy, in consultation with channel providers.¹⁴¹

(320) In addition, Sky is subject to Sky-specific regulation (EPG Conditions) that requires Sky (i) to provide EPG services upon request and on a fair,

138 [Description of provisions in the agreement entered into between Sky and Discovery].

139 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 42.1.

140 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 43.

141 See Form CO, paragraph 6.234. Moreover, this general regulation ensures among other things that Sky is required to publish and comply with an objectively justifiable method of allocating listings (objectively justifiable methods could include 'first come, first served', alphabetical listings, and those based on audience shares).

reasonable and non-discriminatory basis, (ii) not to discriminate or show undue preference to any particular persons or class of persons, (iii) a requirement to publish a notice specifying, or specifying the method that is to be adopted for determining, the charges and other terms and conditions.¹⁴² Consequently, Sky set out its EPG listing methodology in a public document ("Method of Allocating Listings in Sky's EPG"). A violation of those regulatory obligations would be easily detected by the interested party, which would likely complain with the competent regulatory authorities.

- (321) The Commission considers that in light of these regulations in the UK, the merged entity would not be able to foreclose Discovery via EPG degradation in the UK without infringing regulation which would expose it to significant penalties, as described below in paragraph (334).
- (322) The Commission notes that whereas no comparable regulation exists in Ireland, the information submitted by the Notifying Party indicates that Sky broadcasts the same EPG in the UK and Ireland and therefore the Irish EPG also reflects the UK regulatory constraints. Under its current carriage agreement on Sky's platform in both the UK and Ireland, [...] must adhere to Sky's Method of Allocating Listings in Sky's EPG which therefore also applies to Discovery's EPG rank in Ireland despite the absence of regulation.
- (323) The Commission has also considered partial foreclosure via a new set-top boxes ("Sky Q"), which Sky is rolling out in the UK and Ireland. The Sky Q set-top box provides users with new services available on its interface, including "My Q," an application listing content available to subscribers based on the type of content that they have been watching, using algorithms determined by Sky to suggest viewing recommendations. The criteria used to select content and channels through these algorithms are not subject to regulation. [Details of carriage agreements between Sky and third parties].
- (324) However, in this regard the Commission notes that Sky Q is currently only available to new subscribers or to customers who seek to upgrade to that set-top box. Accordingly, only [Number of Sky Q box subscribers] subscribers have Sky Q box. This amounts to less than [share of Sky Q box subscribers]% of Sky subscribers.¹⁴³ Moreover, the Sky Q box does not present channels only via My Q. On the contrary, the Sky EPG is positioned at the top of the list of options in the Sky Q box menu, ahead of My Q (one position up). [Sky's confidential internal analysis]. These elements do not indicate neither an ability on the part of Sky to engage in a partial foreclosure strategy via the My Q function of Sky Q, nor a material likely impact on effective competition if the ability of Sky to partially foreclose via the My Q function of Sky Q were to be assumed.

142 See Form CO, paragraph 6.235.

143 Parties' response to question 1 of the Commission's RFI dated 20 March 2017.

- (325) In light of all the above, the Commission considers that overall the merged entity would lack the ability to engage in the partial customer foreclosure strategies considered above.
- (b) Incentive to engage in customer foreclosure
- (i) Incentive to engage in full foreclosure
- (326) The Commission has assessed the likelihood of full foreclosure in the UK and in Ireland.
- (327) First, market participants confirm that Sky's product offering requires content diversity as customers expect to be provided access a large bouquet of channels. Accordingly, many broadcasters have not expressed concerns that the merged entity would totally foreclose access to its platforms after the merger. In particular, the majority of the UK and Irish broadcasters are not concerned that the transaction would result in full customer foreclosure given Sky's incentive to retain the most popular content.¹⁴⁴
- (328) Second, as discussed above, Discovery itself believes that full customer foreclosure would be an unlikely scenario. This is corroborated by Discovery's [40-50]% audience share in factual basic pay-TV channels in the UK and its [50-60]% audience share in Ireland.
- (329) [Description of Sky's internal documents].
- (330) [Description of Sky's internal documents].
- (331) [Description of Sky's internal documents]¹⁴⁵ [Description of Sky's internal documents].
- (332) The Commission is therefore of the view that Sky's incentives to engage in total customer foreclosure of Discovery's channels from Sky's platform in the UK and Ireland cannot be excluded.
- (ii) Incentive to engage in partial foreclosure
- (333) The majority of broadcasters responding to the market investigation were concerned about possible incentives of the merged entity to degrade the terms and conditions of acquisition of rival TV channels.¹⁴⁶ One respondent mentioned that as Sky already has an incentive to favour its own channels and content over those of third parties and, as the Proposed Transaction will

¹⁴⁴ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 46.

¹⁴⁵ See submission of Notifying Party of 28th of March, 2017. Annex 1.2.

¹⁴⁶ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 47.

increase the merged entity's own channel portfolio, it will also increase this incentive.¹⁴⁷

- (334) In the UK, as explained above, the EPG number of Discovery's channels falls under applicable EPG regulations and Sky's Method of Allocating Listings in Sky's EPG. As such, the circumstances in which Sky can change channel numbers appear very narrow and mainly relate to moving a channel to a more appropriate genre within the EPG, which is unlikely as far as Discovery's channels are concerned. Furthermore, as explained above, part of the applicable regulation is Sky-specific, which puts Sky under direct scrutiny by the relevant regulators. Moreover, the regulation gives Ofcom the possibility to impose fines on Sky should it be found in breach. A breach of the EPG Code would amount to a breach of Sky's Television Licensable Control Service Licence. As such, Ofcom could thus impose a financial penalty of 5% of Sky's EPG-related revenues (or £250,000 if greater). It could also order Sky to broadcast a public statement relating to Ofcom's findings and revoke Sky's broadcast licence should Sky fail to comply with Ofcom's order to remedy the breach. A breach of the EPG Conditions would also subject Sky to a remedy order and, possibly, a penalty of 10% of the relevant turnover in case of failure to comply. The information submitted by the Notifying Party indicates that the Parties have never been found in breach of this regulation.¹⁴⁸
- (335) As regards degradation via My Q on Sky's "Sky Q,"[Sky's confidential internal analysis].
- (336) As regards EPG degradation in Ireland, whilst the British EPG regulations are not mandatory, the information submitted by the Notifying Party indicates that Sky broadcasts the same EPG in the UK and Ireland and therefore the Irish EPG also reflects the UK regulatory constraints. This may be considered to constrain Sky's incentives to engage in partial foreclosure by way of EPG degradation.
- (337) Whilst there are elements which appear therefore to suggest a constraint on Sky's incentives to engage in partial foreclosure, the Commission cannot rule out that the merged entity will have the incentive to partially foreclose Discovery in the UK and in Ireland as a result of the Proposed Transaction.

147 Reply by ITV to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 47.1.

148 See Form CO, paragraph 6.237.

(c) Impact on effective competition of full/partial foreclosure

- (338) Given Sky's importance as a distributor of pay-TV services, Sky appears to be an important source of advertising and carriage revenues.¹⁴⁹ Sky's role as an important source of revenues is confirmed by Discovery.¹⁵⁰
- (339) Also, as indicated above, the agreement in place between Sky and Discovery in relation to the United Kingdom and Ireland afford protection in relation to carriage fees. The regulation in place in the United Kingdom in relation to EPG also affords protection against impact on Discovery which may result from partial foreclosure via EPG degradation for Discovery's channels. Similarly, the information on file from the notifying party indicates that Sky broadcasts the same EPG in the UK and Ireland and therefore the Irish EPG also reflects the UK regulatory constraints. As regards degradation via My Q on Sky Q, the Commission considers that the effect on Discovery, which may result from such a foreclosure strategy, is, in light of information on file and referred to above in paragraph (324), unlikely to be significant.
- (340) As a consequence, it is unlikely that the customer foreclosure strategies considered above would have a significant negative impact on consumers. Consequently, the adoption of a foreclosure strategy would not appear to have a material effect on competition in the UK and Ireland.

(d) Conclusion

- (341) On the basis of the foregoing, the Commission therefore concludes that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market resulting from partial or total customer foreclosure in the United Kingdom and Ireland.

6.2.3.5. The Commission's assessment in Germany and Austria

(a) Ability to engage in customer foreclosure

(i) Sky's importance as a distribution platform

- (342) Sky is the leading pay-TV retailer in the Germany and Austria. In Germany, the Notifying Party estimates that Sky's share of all retail pay-TV services amounts to [20-30]% by revenue and [10-20]% by subscribers. However, according to a 2016 Goldman Sachs report submitted by the Parties, Sky represents [50-60]% of pay-TV revenues in Germany.¹⁵¹ Similarly, in a 2016

¹⁴⁹ In the UK, pay-TV generates [share of pay-TV revenues] of all television revenues (including advertising and carriage revenues). It represents [share of pay-TV revenues] of all television revenues in Ireland.

¹⁵⁰ See Discovery submissions of 17 February 2017, Annex 3 and 24 March 2017.

¹⁵¹ Parties' response to RFI 2, Annex 2, Goldman Sachs Global Investment Research Report of February 26, 2016, Exhibit 23, p. 10. According to Goldman Sachs estimates, Sky makes up [50-

decision on the sale of the Bundesliga rights, the Bundeskartellamt estimated Sky Deutschland's market share to be above 60% in Germany on the basis of revenues.¹⁵²

(ii) Ability to engage in total foreclosure

- (343) The market investigation revealed that the majority of wholesale suppliers of TV channels consider that Sky currently has significant bargaining power and is able to impose unfavourable contract terms.¹⁵³ Furthermore, several players noted that the revenues they derive from Sky exceed the revenues of all other pay-TV platforms combined.
- (344) As indicated above, the only merger specific element pertinent to the present assessment of full customer foreclosure is the addition of 21CF's National Geographic channel.
- (345) As noted above in paragraph (327), Sky's offering relies on a wide range of high quality content in order to satisfy customers' expectations. Furthermore, while Discovery is concerned about the merged entity's potential to engage in partial customer foreclosure, it believes that is unlikely that it would be fully foreclosed.¹⁵⁴
- (346) [Description of Sky's internal documents],¹⁵⁵ Sky extended Discovery's distribution agreement in the German-speaking territories including Germany and Austria [Term of the recent agreement entered into between Sky and Discovery],¹⁵⁶ [details of the recent agreement entered into between Sky and Discovery].¹⁵⁷ [Details of the recent agreement entered into between Sky and Discovery].¹⁵⁸ [Details of the recent agreement entered into between Sky and Discovery].
- (347) Therefore, Sky's ability to foreclose Discovery is strictly constrained by applicable contractual provisions.
- (348) As Discovery's current distribution contract for the German-speaking territories runs until [Term of the recent agreement entered into between Sky and Discovery], it cannot be subject to total foreclosure and its revenues

60] of pay-TV revenues in Germany, with IPTV (Deutsch Telekom) cable TV services suppliers holding lower shares (respectively [20-30]% and [20-30]%).

152 Bundeskartellamt B6-32/15 decision of 11 April 2016 (<http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2016/B6-32-15.html>).

153 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 43.

154 See non-confidential version of the minutes of the Meeting between the Commission and Discovery on March 14, 2017.

155 See submission of the Notifying Parties from March 28, 2017, Annexes 1.1-1.4.

156 See https://info.sky.de/inhalt/de/medienzentrum_news_pr_31012017_4.jsp.

157 Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 42.1.

158 [Details of the agreement entered into between Sky and Discovery].

generated from carriage fees cannot be lowered in Germany and Austria until that date.

(iii) Ability to engage in partial foreclosure

- (349) As indicated above, the only merger specific element pertinent to the present assessment of partial customer foreclosure is the addition of 21CF's National Geographic channel to Sky's portfolio.
- (350) The Commission considers that a number of other elements exist which militate against a finding of the ability of the merged entity to engage in partial customer foreclosure in the present case.
- (351) As regards partial foreclosure via a lowering carriage fees, the Commission notes that Discovery is afforded protection in relation to revenues generated from carriage fees through the distribution contract for the German-speaking territories in place between Sky and Discovery and which runs until [Term of the recent agreement entered into between Sky and Discovery].
- (352) As regards EPG ranking, in Germany, Sky is subject to regulation requiring it to (i) allocate listings based on an objective metric (audience viewing figures) and (ii) refrain from unduly discriminating between channels (whether FTA or pay-TV) with regard to presentation.
- (353) Any changes to Sky's EPG methodology in Germany are subject to mandatory prior notification to the State Media Authority. The principal consideration for the purposes of obtaining approval by the State Media Authority is compliance with the requirement to provide listing on FRAND terms.¹⁵⁹
- (354) In Austria, the regulator requires EPG providers to grant access to the EPG on fair, balanced and non-discriminatory terms. In the event that providers fail to comply with their obligations under the Act, the regulator is able to impose obligations on EPG providers or issue a statutory ordinance in order to prevent any form of discrimination on the EPG.¹⁶⁰
- (355) A violation of those regulatory obligations would be easily detected by the interested party, which would likely complain with the competent regulatory authorities.
- (356) Whilst in the course of the market investigation, German broadcasters explained that EPG rank allocations were determined by Sky unilaterally, no respondent complained of having been unfairly treated by Sky in that regard. The extent to which the Proposed Transaction will change the merged entity's incentive in that regard is examined below.

159 See Form CO, paragraph 6.241.

160 See Form CO, paragraph 6.244.

- (357) [Details of the agreement entered into between Sky and Discovery].
- (358) In light of all the above, the Commission considers that overall the merged entity would not be able to engage in the partial customer foreclosure strategies considered above without infringing regulation which would expose it to significant consequences, as described below in paragraph (371).
- (359) In Germany and Austria FTA television remains more developed than pay-TV. Pay-TV retailers like Sky therefore have an overall incentive to improve pay-TV's penetration. As a consequence, Sky's ability to engage in partial foreclosure appears impacted by its incentive to make its basic pay-TV offering attractive to consumers. Partial foreclosure of Discovery channels by degrading access to Discovery's channel would be at odds with this.

(b) Incentive to engage in customer foreclosure

(i) Incentive to engage in total customer foreclosure

- (360) German broadcasters explain that Sky may already have an incentive to reduce the number of channels in its line-up and note that Sky has recently terminated carriage agreements with several channels in Germany.¹⁶¹ They express concern that this practice would continue after the Proposed Transaction.
- (361) [Description of Sky's internal documents],¹⁶² [description of Sky's internal documents].
- (362) In Germany and Austria, FTA television remains more developed than pay-TV. Pay-TV retailers like Sky therefore have an overall incentive to improve pay-TV's penetration by making its basic pay-TV offering attractive to consumers. Full foreclosure of Discovery channels would be at odds with this.
- (363) Moreover, and similar to the situation in the UK and Ireland, Discovery's channels are popular in Germany and Austria which is reflected in high audience shares in the pay-TV factual segment. In Germany and Austria,¹⁶³ Discovery's channels have an audience share of [20-30]% when looking at its overall bouquet of all factual channels in 2015. As discussed above, Discovery itself considers a full customer foreclosure of its channels an unlikely scenario.

¹⁶¹ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 46.

¹⁶² See submission of Notifying Party of 28th of March, 2017. Annex 1.4.

¹⁶³ The Notifying Party confirmed that Discovery's audience share in Austria is materially the same as in Germany.

- (364) Indeed, as indicated above, the carriage contract between Sky and Discovery was extended and now runs until [Term of the recent agreement entered into between Sky and Discovery].
- (365) These elements may be considered as impacting on incentives of the merged entity to engage in full foreclosure.
- (366) Furthermore, until the acquisition of Sky Deutschland by BSkyB, 21CF fully owned Sky Deutschland and was therefore vertically-integrated, with incentives similar to those of the merged entity. 21CF did not engage in full customer foreclosure targeting Discovery at the time.
- (367) Whilst there are significant elements which appear therefore to suggest a constraint on Sky's incentives to engage in total foreclosure, the Commission cannot rule out that the merged entity will have the incentive to totally foreclose Discovery in Germany and Austria as a result of the Proposed Transaction.
- (ii) Incentive to engage in partial customer foreclosure
- (368) As regards partial foreclosure via a lowering of carriage fees, the agreement in place between Discovery and Sky affords contractual protection in relation to carriage fees until [details of the recent agreement entered into between Sky and Discovery] and could be considered as impacting on the merged entity's incentives to engage in partial foreclosure.
- (369) Benefits of partial customer foreclosure to the merged entity could be seen as stemming from higher advertising revenues due to a shift in viewership towards National Geographic channels in case of a lowering of the EPG position of Discovery's channel. In case of discrimination of Discovery's content via Sky's homepage, the benefits of customer foreclosure to the merging Parties could take the form of an increase in advertising sales or higher sales of non-linear services to TV subscribers.
- (370) The results of the market investigation show that a number of German broadcasters are concerned about potential quality degradation of their channels resulting from the Proposed Transaction. One respondent to the market investigation considered that National Geographic's channels could receive further support by a preferential position on the EPG and that maximised ratings be could be monetized by Sky's advertising sales subsidiary.¹⁶⁴
- (371) However, as noted above EPG regulations in Germany and Austria require [...] * broadcasters be treated fairly and in a non-discriminatory fashion. Under the applicable German regulation, in the event that a third party

* Should read: "that"

¹⁶⁴ Replies by Spiegel TV Geschichte & Wissen GmbH to Questionnaire Q2 to TV broadcasters of 7 March 2017, Question 47.2.

complained to the State Media Authority regarding Sky's compliance with national EPG regulation (and its approved listing methodology), the State Media Authority would investigate and be able to impose an administrative fine of up to EUR 500,000. The State Media Authority also has the power to revoke an infringing operator's EPG licence. As explained above, the Austrian Communications Authority can also act to prevent discriminatory treatment in EPG allocations. In case of an infringement of Austrian EPG regulations, the Austrian Communications Authority can order remedies and, should Sky fail to comply, revoke Sky's licence. Sky's incentives in relation to degradation of EPG rankings could therefore also be considered to be constrained in light of these significant consequences.

(372) In Germany and Austria, FTA television remains more developed than pay-TV. Pay-TV retailers like Sky therefore have an overall incentive to improve pay-TV's penetration by making its basic pay-TV offering attractive to consumers. As a consequence, it is unlikely that Sky would have an incentive to make its basic offering less attractive to consumers by degrading access to Discovery's channel.

(373) On the basis of the above, the Commission considers, on balance, that there are various elements which impact on the incentive to engage in partial customer foreclosure in the manners described above and that the merged entity would not have the incentive to partially foreclose Discovery in Germany and Austria as a result of the Proposed Transaction.

(c) Impact on effective competition of full/partial foreclosure

(374) As indicated above, Discovery's distribution agreement with Sky in relation to Germany and Austria protects Discovery against total foreclosure until its term. [Details of the recent agreement entered into between Sky and Discovery].

(375) As regards partial foreclosure, the agreement in place between Sky and Discovery affords protection in relation to carriage fees. The applicable regulations as well as contractual provisions relating to EPG in both countries also afford protections against an impact on Discovery resulting from partial foreclosure via EPG degradation for Discovery's channels.

(376) Furthermore, under its current distribution arrangement, Discovery's factual channels are distributed on several pay-TV platforms. As a consequence, Discovery's pay-TV business would not be significantly affected in the event of partial foreclosure on Sky's platform and would likely continue to operate efficiently.¹⁶⁵

¹⁶⁵ The Commission also notes that Discovery's revenues in Germany and Austria are mainly generated from distribution on FTA channels besides distribution on several pay-TV platforms.

(377) Consequently, in light of these elements, the Commission considers that full or partial foreclosure strategies are not likely to have an overall likely significant impact on effective competition in the market in question in Germany and Austria.

(d) Conclusion

(378) On the basis of the foregoing, the Commission therefore concludes that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in relation to full or partial customer foreclosure in Germany and Austria.

6.2.3.6. The Commission's assessment in Italy

(a) Ability to engage in customer foreclosure

(379) In Italy, Sky's share of all retail pay-TV services amounts to [80-90]% by revenue and [60-70]% by subscribers. Sky currently appears to have significant bargaining power and is able to impose unfavourable contract terms.¹⁶⁶

(380) The only merger specific change which is to be considered in relation to an assessment of customer foreclosure is the addition of 21CF's National Geographic channels to Sky's channel portfolio.

(381) In the course of the market investigation, Italian broadcasters did not raise concerns that the merged entity would engage in complete customer foreclosure. One market participant stated that it is important to carry a large set of channels. In line with this, Discovery's channels are popular and hold [30-40]% audience shares in 2015 in basic pay-TV factual channels in Italy.

(382) In addition, before 2014, 21CF fully owned Sky Italia and was therefore vertically-integrated and 21CF did not engage in full customer foreclosure targeting Discovery at the time.

(383) The Notifying Party argues that in case of an attempt to foreclose access to Sky's platform, channels would be able to switch to an FTA distribution model. As evidence of that possibility, the Notifying Party notes that Discovery currently uses a mixed distribution strategy in Italy, where approximately half of Discovery's channels are FTA. However, as explained above in paragraph (308), switching to FTA does not constitute a viable alternative supply options for broadcasters.

¹⁶⁶ Replies to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 43.

- (384) The agreement in place between Sky and Discovery terminates in [Term of the agreement entered into between Sky and Discovery]. There is no regulation in Italy regulating the carriage of channels by Sky.
- (385) It cannot be ruled out, on balance, in light of the above that the merged entity would have the ability to engage in full foreclosure [...] * close rival, Discovery, in Italy.
- (386) The structure of the Italian television sector is similar to that in Germany and Austria, in the sense that FTA television remains more developed than pay-TV. Thus, in 2015 the pay-TV services represented only [share of pay-TV/FTA revenues]% of all retail television revenues in Italy, with FTA channels generating [share of pay-TV/FTA revenues]% of all revenues. Pay-TV retailers like Sky therefore have an overall incentive to improve pay-TV's penetration. As a consequence, Sky's ability to engage in full foreclosure appears impacted by its incentive to make its basic pay-TV offering attractive to consumers. Full foreclosure of Discovery channels would be at odds with this. In this regard, it should be noted that the Discovery channel alone has the leading audience share of its category ([10-20]%), Discovery overall holding a [30-40]% audience share as explained above, making it the most popular broadcaster of factual channels.
- (387) As regards partial foreclosure, in contrast with the situation in the UK, Germany and Austria, such a strategy would not be constrained by regulatory obligations.
- (388) [Details of the agreement entered into between Sky and Discovery].
- (389) [Details of the agreement entered into between Sky and Discovery].
- (390) [Details of the agreement entered into between Sky and Discovery].
- (b) Incentive to engage in customer foreclosure
- (i) Incentive to engage in full customer foreclosure
- (391) The Commission has assessed the likelihood of full foreclosure in Italy.
- (392) In the course of the market investigation, Italian broadcasters did not raise concerns that the merged entity would engage in complete customer foreclosure. One market participant stated that it is important to carry a large set of channels.¹⁶⁷ In line with this, Discovery's channels are popular and hold [30-40]% audience shares in 2015 in basic pay-TV factual channels in Italy.

* Should read: "of a"

¹⁶⁷ Reply by Chili to Questionnaire Q2 to TV broadcasters of 7 March 2017, question 46.1.

- (393) The structure of the Italian television sector is similar to that in Germany and Austria, in the sense that FTA television remains more developed than pay-TV. Thus, in 2015 the pay-TV services represented only [share of pay-TV/FTA revenues]% of all retail television revenues in Italy, with FTA channels generating [share of pay-TV/FTA revenues]% of all revenues.¹⁶⁸ Pay-TV retailers like Sky therefore have an overall incentive to improve pay-TV's penetration by making their basic pay-TV offering attractive to consumers. Full foreclosure of Discovery channels would be at odds with this. In this regard, it should be noted that the Discovery channel alone has the leading audience share of its category ([10-20]%), Discovery overall holding a [30-40]% audience share as explained above, making it the most popular broadcaster of factual channels.
- (394) In addition, before 2014, 21CF fully owned Sky Italia and was therefore vertically-integrated, with incentives similar to those of the merged entity. 21CF did not engage in full customer foreclosure targeting Discovery at the time.
- (395) In light of the above, the merged entity's incentive to engage in full customer foreclosure in Italy appears low.
- (ii) Incentive to engage in partial customer foreclosure
- (396) As regards partial foreclosure, it can be noted that before 2014, 21CF fully owned Sky Italia and was therefore vertically-integrated, with incentives similar to those of the merged entity. 21CF does not appear to have engaged in foreclosure targeting Discovery at the time.
- (397) Responses from Italian market participants on the scope of partial customer foreclosure were mixed. While some participants raised concerns that the merged entity may have an incentive to foreclose post-transaction, others were less concerned.
- (398) By contrast with other Member States, Sky's EPG ranking of pay-TV channels is not constrained by regulations. As a consequence, Sky's incentives are not reduced by sector specific rules.
- (399) However, the structure of the Italian television sector is similar to that in Germany and Austria, in the sense that FTA television remains more developed than pay-TV. Thus, in 2015 the pay-TV services represented only [share of pay-TV/FTA revenues]% of all retail television revenues in Italy, with FTA channels generating [share of pay-TV/FTA revenues]% of all revenues.¹⁶⁹ Pay-TV retailers like Sky therefore have an overall incentive to improve pay-TV's penetration. As a consequence, it is unlikely that Sky

¹⁶⁸ Form CO, Annex. tables 7.145 et seq.

¹⁶⁹ Form CO, Annex. tables 7.145 et seq.

would have an incentive to make its basic offering less attractive to consumers by degrading access to Discovery's channel. In that regard, it should be noted that the Discovery channel alone has the leading audience share of its category ([10-20]%), Discovery overall holding a [30-40]%, audience share as explained above, making it the most popular broadcaster of factual channels.

(400) On this basis, the Commission considers, on balance, that the merged entity would lack incentives to partially foreclose Discovery in Italy post-transaction.

(c) Impact on effective competition of full/partial customer foreclosure

(401) Under its current distribution arrangement, Discovery has allocated exclusive distribution rights for its factual channels to the main two pay-TV platforms, with most channels distribution rights exclusively granted to Sky, and with Mediaset holding exclusive distribution rights for one channel (Investigation Discovery) out of Discovery's portfolio.¹⁷⁰ As a consequence, in the event of partial foreclosure, not only will Discovery remain carried on Sky's platform, but Discovery's pay-TV business would continue to have [...] * revenue stream generated through Mediaset's platform.¹⁷¹

(402) Moreover, the information on file indicates that Discovery has an extensive library of content and owns most rights to our content and footage. This enables Discovery to exploit its library and to launch brands and services into new markets quickly.¹⁷² It appears that Discovery's content can be re-edited and updated in a cost-effective manner to provide topical versions of subject matter that can be utilized around the world.

(403) In light of these elements, even if partial foreclosure were to take place, it appears that Discovery may still continue to operate efficiently as it may find other uses/markets for its input without incurring significantly higher costs¹⁷³

(404) In the event of total foreclosure from Sky's platform, Discovery would be able to sell exclusive distribution rights to Mediaset. That possibility is all the more plausible given Discovery's significant audience share in Italy. It

* Should read: "an alternative"

170 The Commission notes that in Italy, Discovery's revenues are generated through both pay-TV and FTA channel distribution. In Italy Discovery relies more significantly on its FTA business to generate profits than in countries where pay-TV has greater penetration rates.

171 The Commission also notes that for the operation of its business in Italy, Discovery's revenues are generated mainly by its FTA channels besides distribution on the two pay-TV platforms.

172 <https://www.sec.gov/Archives/edgar/data/1437107/000143710716000059/disca-2015123110k.htm>

173 See in this regard paragraph 66 of the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07).

therefore would likely be able to substitute its losses on Sky's platform by revenues from its main competitor, Mediaset.

- (405) In light of these elements, the Commission considers that full or partial foreclosure strategies in Italy, are unlikely to have an overall likely significant impact on effective competition in the market in question.

(d) Conclusion

- (406) In light of the above, the Commission therefore concludes that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in relation to full or partial customer foreclosure in Italy.

6.3. Input and customer foreclosure – Advertising

6.3.1. Introduction

- (407) TV advertising airtime is an input for TV distributors which use advertising space on TV channels to promote their products to end users in the market for retail TV services. As suppliers of TV channels, both Sky and 21CF supply TV advertising airtime. News Corp¹⁷⁴ is active with regard to the supply of newspaper advertising. Accordingly, the Proposed Transaction results in a vertical relationship between 21CF's upstream activities as a supplier of TV advertising airtime and Sky's downstream activities as a retail [...] * of pay-TV services.
- (408) In addition, the Parties' and News Corp's respective TV and newspaper advertising activities are vertically linked in each other's quality as both suppliers of advertising space and advertisers for their respective retail products. Thus, Sky and 21CF are both suppliers of News Corp, which purchases advertising space on their channels, and customers of News Corp, as they purchase advertising space on its newspapers.
- (409) This vertical relationship results in [...] ** as discussed below.

6.3.2. The Parties' upstream activities in the supply of TV advertising airtime and Sky's downstream activities in the provision retail TV services

- (410) As noted above, Sky has a significant market position with a market share above [30-40]% as a supplier of retail pay-TV services in the UK, Ireland, Germany, Austria and Italy. Given that 21CF is active upstream as a supplier of TV advertising airtime, vertically affected markets arise in each of these Member States.

* Should read: "distributor"

** Should read: "a number of affected markets"

¹⁷⁴ As described at paragraph (23), the MFT is the largest shareholder in both 21CF and News Corp. For the purposes of the case at hand, the Commission has undertaken the competitive assessment of the Proposed Transaction as if 21CF and News Corp were under common control.

- (411) The Commission does not consider that the Proposed Transaction gives rise to serious doubts as to its compatibility with the internal market regarding either input or customer foreclosure with regard to the upstream supply of advertising airtime and downstream provision of retail pay-TV services in these Member States for the following reasons.
- (412) First, the merged entity does not have a material position in the upstream market for the supply of advertising airtime. Based on 2016 sales, the merged entity will represent: (i) [10-20]% of TV advertising sales in the UK; (ii) [5-10]% in Ireland; (iii) [0-5]% in Germany; (iv) [0-5]% in Austria; and (v) [10-20]% in Italy. Advertising space on the Parties' channels therefore does not constitute an important input for retailer distributors of TV services.
- (413) Second, the merged entity is already vertically integrated in this regard and there is a very limited merger specific increment in the upstream market: 21CF's 2016 market share of TV advertising sales is negligible: (i) [0-5]% in the UK and Ireland; (ii) less than [0-5]% in Germany and Austria; and (iii) [0-5]% in Italy.
- (414) Third, before the merger [Details of the relationship between Sky Media and 21CF].
- (415) The Proposed Transaction will therefore not induce material changes to the merged entity's incentives in TV advertising.

6.3.3. News Corp's upstream activities in the supply of newspaper advertising space and 21CF's and Sky's downstream activities as pay-TV channels and retail service providers

- (416) News Corp is active as a supplier of advertising space in its newspapers, with a [10-20]% share of newspaper advertising sales in the UK and [10-20]% in Ireland. News Corp was unable to provide its market shares on narrower market definitions but acknowledged that its share of newspaper circulation in each segment constitutes a reasonable proxy for its corresponding share of advertising sales.¹⁷⁵ Based on that assumption, in the UK, News Corp would hold [50-60]% of advertising sales in popular tabloids (including a [50-60]% share of sales in daily publications and [50-60]% in weekly publications) and [30-40]% in "quality" newspapers (including a [30-40]% share of sales in daily publications and [50-60]% in weekly publications).¹⁷⁶ In Ireland, News Corp's share of advertising sales would reach [30-40]% in popular tabloids (including [40-50]% in daily tabloids).¹⁷⁷ Given that Sky and 21CF are active downstream as advertisers, vertically affected markets arise in each of these Member States.
- (417) The Commission does not consider that the Proposed Transaction gives rise to serious doubts as to its compatibility with the internal market regarding

¹⁷⁵ News Corp's Response to RFI 2 of 16 February 2017.

¹⁷⁶ Based on Jan-Sept 2016 circulation figures.

¹⁷⁷ Based on Jul-Dec 2016 circulation figures.

either input or customer foreclosure with regard to the upstream supply of newspaper advertising space and downstream provision of pay-TV channels and retail pay-TV service in these Member States for the following reasons.

- (418) First, News Corp publications are not unavoidable for advertising¹⁷⁸. The vast majority of [...] * consider that News Corp publications, in particular The Sun, face significant competitive pressure from rival publications.¹⁷⁹ Moreover, the majority of respondents consider that the transaction would not have an impact on newspapers advertising.¹⁸⁰
- (419) Second, News Corp submits that newspapers have low bargaining power vis-à-vis advertisers. First, News Corp explains that the growth of online publications has disrupted the balance between revenues from readers and advertisers, because the availability of much of the editorial content of newspapers online leads advertisers to demand that newspapers counter-balance reduced demand for paid-for title, even though their total readership may not be decreasing to the same extent.
- (420) Second, News Corp submits that [News Corp view of advertising market]. This sector-wide trend has been confirmed by the market investigation, respondents having confirmed that investments in newspapers advertising space have decreased in the past 5 to 10 years in the UK and Ireland. Consistent with the sector-wide trend, News Corp's publishing subsidiary, News UK, [News Corp revenues].
- (421) It follows that, regardless of News Corp's market share or relationship to 21CF, News Corp's [News Corp revenues] make the adoption of a strategy whereby it would further forego advertising revenues highly unlikely.

6.3.4. The Parties' upstream activities in the supply of TV advertising airtime and News Corp's downstream activities as a newspaper publisher

- (422) As noted above, Sky and 21CF are active as suppliers of TV advertising airtime. News Corp is active downstream as an advertiser with [News Corp shares] in newspaper publishing. News Corp's titles represent [30-40]% of all quality newspapers in the UK (including [30-40]% of daily newspapers and [50-60]% in weekly newspapers) and [50-60]% in popular tabloids (including [50-60]% of daily tabloids and [50-60]% in weekly tabloids).¹⁸¹ In Ireland, News Corp's titles represent [30-40]% of all tabloids (including [40-50]% of

* Should read: "respondents"

178 Replies to Questionnaire Q5 to TV channels of 7 March 2017, question 17. Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 36.

179 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 24.

180 Replies to Questionnaire Q5 to TV channels of 7 March 2017, question 24. Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 43.

181 Based on Jan-Sept 2016 circulation figures.

daily tabloids).¹⁸² Vertically affected markets therefore arise in each of these Member States.

- (423) The Commission does not consider that the Proposed Transaction gives rise to serious doubts as to its compatibility with the internal market regarding either input or customer foreclosure with regard to the upstream supply of TV advertising and the downstream newspaper publication markets in these Member States for the following reasons.
- (424) First, as explained above, the Parties' combined TV advertising market shares do not exceed [10-20]% and the Transaction gives rise to negligible horizontal overlaps, 21CF's channels holding no more than [0-5]% market shares in all the relevant countries.¹⁸³
- (425) Second, the adoption of a strategy whereby 21CF and Sky would cease selling advertising airtime to News Corp's competitors is unlikely, regardless of News Corp's downstream market shares. Revenues from newspaper and news services advertisers make up less than [0-5]% of Sky's overall advertising revenues in the UK and Ireland which limits the cost of foreclosure for the merged entity. Nevertheless, given the merged entity's limited market share in TV advertising in the UK and Ireland, there will remain ample opportunities for competing newspapers to advertise outside of Sky and 21CF.
- (426) The Parties' limited role in TV advertising has been confirmed by the market investigation. Market participants both upstream and downstream have confirmed that the Parties' channels are not unavoidable for advertising¹⁸⁴ and that the Proposed Transaction will not have an impact on newspapers publishing.¹⁸⁵
- (427) Therefore, even in the event of foreclosure, lack of access to Sky's and 21CF's channel's advertising airtime is unlikely to appreciably divert demand away from competing newspapers and news services.

6.4. Conglomerate relationships

- (428) The Proposed Transaction gives rise to two conglomerate relationships, resulting from the Parties' and News Corp's activities on neighbouring markets in the UK and Ireland: (1) the supply of TV advertising and advertising space in newspapers; and (2) the supply of pay-TV and

182 Based on Jul-Dec 2016 circulation figures.

183 The Parties are also active as suppliers of online advertising on their respective websites. They submit that these sales are *de minimis* and would amount, in any event, to market shares significantly [0-5]% (Parties' Response to RFI 3 of 16 February 2017).

184 Replies to Questionnaire Q5 to TV channels of 7 March 2017, question 16. Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 35.

185 Replies to Questionnaire Q5 to TV channels of 7 March 2014, question 24. Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 43.

newspaper subscriptions. These relationships are further discussed in Sections 6.4.1 and 6.4.2 below.

- (429) Conglomerate mergers are mergers between firms that are in a relationship that is neither purely horizontal nor vertical. In practice, the focus is on mergers between companies that are active in closely related markets, namely mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use.¹⁸⁶
- (430) To establish possible conglomerate leveraging, the Commission must show each of the following elements, in accordance with the Non-Horizontal Merger Guidelines: (i) that the merged firm would have the ability to foreclose its rivals, whether (ii) that it would have the economic incentive to do so and, (iii) that a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.¹⁸⁷
- (431) Following the Non-Horizontal Merger Guidelines¹⁸⁸, the ability to engage in bundling practices requires the merged entity to hold a significant degree of market power in one of the markets concerned. In addition, there must be a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary. Finally, bundling practices are less likely if there are effective and timely counter-strategies that the rival single-product firms may deploy, such as combining their offers in order to make them more attractive or pricing more aggressively to maintain market shares.
- (432) As regards incentives, the Commission considers, in accordance with the Non-Horizontal Merger Guidelines¹⁸⁹, that the incentive of the merged entity to foreclose its competitors depends on the degree to which a foreclosure strategy would be profitable. Thus, the possible gains from expanding market share must be compared to the possible losses that result from customers not purchasing the product bundle. It is unlikely that a company would risk losing sales on one large and highly profitable market in order to gain market share in a smaller, less profitable one. The Commission also takes into account the types of strategies adopted in the market in the past and the content of internal strategic documents.

186 Non-horizontal Merger Guidelines, paragraph 91.

187 Non-horizontal Merger Guidelines, paragraph 94.

188 Non-horizontal Merger Guidelines, paragraphs 95 to 104.

189 Non-horizontal Merger Guidelines, paragraphs 105 to 110.

(433) As to the overall likely impact on prices and choice in accordance with the Non-Horizontal Merger Guidelines¹⁹⁰, the Commission considers that bundling or tying may result in a significant reduction of sales prospects faced by single-component rivals in the market which, in particular industries, may lead to a reduction in rivals' ability or incentive to compete. In particular, foreclosure practices may deter entry by potential competitors. It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the merger that the merger may significantly impede effective competition. The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power or the likelihood that entry would maintain effective competition in the upstream or downstream markets. Further, the effect on competition needs to be assessed in light of the efficiencies substantiated by the merging parties.

6.4.1. Supply of TV and newspaper advertising space

(434) The Parties and News Corp are active on neighbouring advertising markets in the UK and Ireland. As explained above, Sky's and 21CF's share of the TV advertising market is limited ([10-20]% in the UK; [5-10]% in Ireland). For its part, News Corp estimates its shares to be approximately [10-20]% of advertising sales in newspapers in the UK and [10-20]% in Ireland. In the UK, News Corp estimates its share of advertising sales in popular tabloids to amount to [50-60]% and its share of advertising in "quality" newspapers would amount to [30-40]%. In Ireland, News Corp estimates its share of advertising in popular tabloids to amount to [30-40]%. With regards to the above market shares, it is unlikely that the merged entity could be considered to have significant market power in national print or in TV advertising in the UK and Ireland except on the possible market segment for advertising in popular tabloids.

(435) The Commission investigated the risk that the merged entity would tie newspaper and TV advertising spaces by leveraging its position in newspaper advertising to favour the Parties' position in TV advertising. During the market investigation, the vast majority of respondents dismissed that risk.¹⁹¹

(436) First, as mentioned above, newspapers, including News Corp's publications, have low bargaining power vis-à-vis advertisers as showed by the wide decreasing advertising revenues. Moreover, despite their market shares, it results from the market investigation that News Corp's publications, including popular tabloids, are not deemed indispensable for advertising¹⁹² and face competitive pressure from other newspapers¹⁹³. Therefore, it is unlikely that

¹⁹⁰ Non-horizontal Merger Guidelines, paragraphs 111 to 118.

¹⁹¹ Replies to Questionnaires Q5 to TV channels of 7 March 2017, question 14. Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 43.

¹⁹² Replies to Questionnaires Q5 to TV channels of 7 March 2017, question 17. Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 36.

¹⁹³ Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 24.

News Corp could have significant market power in the market for newspapers advertising.

- (437) Second, other media companies might be able to propose a bundle. It results from the market investigation that there have been initiatives by other TV operators and newspapers publishers to combine their advertising offers.¹⁹⁴ Moreover, according to some respondents, Bauer Media and Global Radio are currently offering cross-platform bundles. Bauer Media Group sells cross-platform bundles across their radio stations, websites and magazines. Global Radio sells across their radio stations and music TV channels. Besides, the majority of newspapers who participated to the market investigation have considered joining forces with TV operators. Therefore attempts by the Parties to launch cross-media bundles could be replicated by its competitors.
- (438) Therefore, the Commission considers that post-Transaction the merged entity would not have the ability to foreclose competitors by bundling TV and newspapers advertising in the UK and Ireland.
- (439) For the above reasons, it can be concluded that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in relation to possible conditioning of advertisements in News Corp newspapers to the purchase of TV advertisements from the Parties.

6.4.2. Supply of pay-TV and newspaper subscriptions

- (440) The Commission investigated the risk that Sky would use its position in the supply of pay-TV services to foreclose rival newspapers by offering mixed subscription bundles of print newspapers or online news content of News Corp's newspapers and Sky's pay-TV subscriptions in the UK and Ireland.

6.4.2.1. Ability to engage in foreclosure

- (441) The Parties are active as pay-TV retailers in the UK and Ireland, where they hold market shares of [70-80]% in the United Kingdom and [70-80]% in Ireland. On the basis of these market shares the Commission considers that the Parties have a strong position in the market for the retail supply of pay-TV services in the UK and Ireland.
- (442) Moreover, News Corp's market shares are above [30-40]% for certain potential market segments of the newspapers market in the UK and Ireland.
- (443) News Corp's operations in the United Kingdom and Ireland are principally conducted through the group of companies that has as its UK parent company News Corp UK & Ireland Limited, and trades as "News UK".

¹⁹⁴ Replies to Questionnaires Q5 to TV channels of 7 March 2017, question 20. Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 39.

(444) News Corp’s share of national newspaper circulation and its segments¹⁹⁵ in the United Kingdom, based on monthly average daily circulation data, is shown in the following tables:

Table 12 – Market shares for all newspaper titles – by circulation – UK - Jan-Sep 2016

	All	Daily	Sunday
News Corp	[20-30]%	[20-30]%	[30-40]%
Mail	[30-40]%	[30-40]%	[20-30]%
Northern & Shell	[10-20]%	[10-20]%	[10-20]%
Trinity Mirror	[10-20]%	[10-20]%	[10-20]%
Telegraph	[5-10]%	[5-10]%	[5-10]%
i	[0-5]%	[0-5]%	[0-5]%
Guardian Media Group (Scott Trust)	[0-5]%	[0-5]%	[0-5]%
Financial Times	[0-5]%	[0-5]%	[0-5]%
Independent *	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

Source: News Corp Response to RFI-2 of 16 February 2017.¹⁹⁶

¹⁹⁵ The market shares exclude regional and local titles and magazines.

¹⁹⁶ News UK analysis of ABC circulation data. Newspapers are categorised based on ABC classifications. * The Independent closed its daily and Sunday print editions as of March 2016.

Table 13 – Market shares for quality newspaper titles – by circulation – UK - Jan-Sep 2016

	All	Daily	Sunday
News Corp	[30-40]%	[30-40]%	[50-60]%
Telegraph	[30-40]%	[30-40]%	[20-30]%
i	[10-20]%	[10-20]%	[0-5]%
Guardian Media Group (Scott Trust)	[10-20]%	[10-20]%	[10-20]%
Financial Times	[0-5]%	[0-5]%	[0-5]%
Independent *	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

Source: News Corp Response to RFI-2 of 16 February 2017.¹⁹⁷

Table 14 – Market shares for popular tabloid newspaper titles – by circulation – UK - Jan-Sep 2016

	All	Daily	Sunday
News Corp	[50-60]%	[50-60]%	[50-60]%
Trinity Mirror	[20-30]%	[20-30]%	[30-40]%
Northern & Shell	[10-20]%	[10-20]%	[10-20]%
Total	100%	100%	100%

Source: News Corp Response to RFI-2 of 16 February 2017.¹⁹⁸

- (445) News Corp's newspapers combined [20-30]% of all newspapers circulated in the UK in the period January to September 2016 ([20-30]% of daily and [30-40]% of Sunday newspapers circulation), [30-40]% of quality newspapers ([30-40]% of daily and [50-60]% of Sunday newspapers circulation) and [50-60]% of popular tabloids ([50-60]% of daily and [50-60]% of Sunday newspapers circulation).

¹⁹⁷ News UK analysis of ABC circulation data. Newspapers are categorised based on ABC classifications. * The Independent closed its daily and Sunday print editions as of March 2016.

¹⁹⁸ News UK analysis of ABC circulation data. Newspapers are categorised based on ABC classifications.

(446) Based on News Corp's submission, News Corp's newspapers hold [30-40]% of UK circulation market shares by revenue for all titles and [30-40]% of daily titles (Jan-Sep 2016).¹⁹⁹

(447) The following tables show News Corp's share of national newspaper circulation and its segments²⁰⁰ in Ireland, based on monthly average daily circulation data:

Table 15 – Market shares for all newspaper titles – by circulation – Ireland – Jul - Dec 2016

	All	Daily	Sunday
News Corp	[10-20]%	[10-20]%	[20-30]%
Independent News and Media	[30-40]%	[20-30]%	[40-50]%
Irish times Trust	[10-20]%	[10-20]%	[0-5]%
Independent Star Limited	[10-20]%	[10-20]%	[0-5]%
Associated Newspapers	[10-20]%	[5-10]%	[10-20]%
Trinity Mirror	[5-10]%	[5-10]%	[5-10]%
Landmark Media Investments	[5-10]%	[5-10]%	[0-5]%
Northern & Shell	[0-5]%	[0-5]%	[0-5]%
Key Capital	[0-5]%	[0-5]%	[0-5]%
Guardian Media Group (Scott Trust)	[0-5]%	[0-5]%	[0-5]%
Telegraph Media Group	[0-5]%	[0-5]%	[0-5]%
Financial Times	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

¹⁹⁹ News Corp Response to RFI-2 of 16 February 2017.

²⁰⁰ The market shares exclude regional and local titles and magazines.

Source: News Corp Response to RFI-2 of 16 February 2017.²⁰¹

Table 16 – Market shares for quality newspaper titles – by circulation – Ireland – Jul - Dec 2016

	All	Daily	Sunday
News Corp	[5-10]%	[0-5]%	[20-30]%
Independent News and Media	[40-50]%	[40-50]%	[60-70]%
Irish times Trust	[20-30]%	[30-40]%	[0-5]%
Landmark Media Investments	[10-20]%	[10-20]%	[0-5]%
Key Capital	[0-5]%	[0-5]%	[10-20]%
Guardian Media Group (Scott Trust)	[0-5]%	[0-5]%	[0-5]%
Telegraph Media Group	[0-5]%	[0-5]%	[0-5]%
Financial Times	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

Source: News Corp Response to RFI-2 of 16 February 2017.²⁰²

201 News UK analysis of ABC circulation data. Newspapers are categorised based on ABC classifications. Independent Star Limited is a joint venture between Northern & Shell and Independent News & Media.

202 News UK analysis of ABC circulation data. Newspapers are categorised based on ABC classifications.

Table 17 – Market shares for popular tabloid titles – by circulation – Ireland – Jul - Dec 2016

	All	Daily	Sunday
News Corp	[30-40]%	[40-50]%	[20-30]%
Independent Star Limited	[20-30]%	[30-40]%	[0-5]%
Trinity Mirror	[20-30]%	[20-30]%	[10-20]%
Independent News and Media	[5-10]%	[0-5]%	[40-50]%
Northern & Shell	[0-5]%	[0-5]%	[5-10]%
Total	100%	100%	100%

Source: News Corp Response to RFI-2 of 16 February 2017.²⁰³

- (448) Based on the circulation market shares in Ireland in the period July to December 2016, News Corp's newspapers held [10-20]% of all newspapers ([10-20]% of daily and [20-30]% of Sunday newspapers circulation), [5-10]% of quality newspapers ([5-10]% of daily and [20-30]% of Sunday newspapers circulation) and [30-40]% of popular tabloids ([40-50]% of daily and [20-30]% of Sunday newspapers circulation).²⁰⁴
- (449) The Commission assessed first whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to print newspapers.
- (450) The market investigation did not allow the Commission to conclude that pay-TV and newspapers can be deemed complementary goods and that a bundle combining these goods could be attractive to consumers. Moreover, the Commission notes that a majority of newspapers contacted during the market investigation has stated that it has not considered joining forces with TV operators to combine newspapers subscriptions with pay-TV subscriptions at a package price with a bundled rebate.²⁰⁵

²⁰³ News UK analysis of ABC circulation data. Newspapers are categorised based on ABC classifications. Independent Star Limited is a joint venture between Northern & Shell and Independent News & Media.

²⁰⁴ Based on News Corp's submission, since the circulation shares for Irish national newspapers do not include free titles, these market shares could be used as proxy for market shares by revenue.

²⁰⁵ Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 28.

- (451) Furthermore, the market investigation indicates that subscription rates in the UK and Ireland are generally low. Several respondents have indicated that total subscription rates are around [10-20]%.²⁰⁶
- (452) Based on News Corp's submission, subscription rates for The Sun are extremely low ([0-5]%),²⁰⁷ while the proportion of UK and Ireland circulation of The Times accounted for by subscriptions was [30-40]% and the proportion of UK and Ireland circulation of The Sunday Times accounted for by subscriptions was [20-30]%.²⁰⁸
- (453) Furthermore, the market investigation²⁰⁹ indicated that The Independent (Ireland) has low subscription rates ([0-5]%), whereas the Financial Times ("FT") has subscription rates for FT newspaper of [40-50]%.²¹⁰
- (454) Therefore, on the basis of the market investigation, the Commission considers that since the vast majority of customers do not buy their newspapers through subscriptions, creating a bundle of Sky's pay-TV with News Corp's newspapers subscriptions may not be sufficiently attractive for customers.
- (455) In addition, a majority of respondents to the market investigation have indicated that the reasons driving readers to take a subscription to a newspaper are not primarily price, but several factors (price being one of them) including, convenience, support for the values and products of the newspaper, access to unique, specialised or exclusive content.²¹¹
- (456) Several respondents to the market investigation have also indicated that in response to a hypothetical bundle, they would have counter-strategies, including one newspaper mentioning the conclusion of a partnership with other TV providers to provide a similar bundle, among other strategies.²¹²
- (457) Therefore, the Commission considers that post-Transaction the merged entity would not have the ability to foreclose competitors by bundling mixed subscription bundles of print newspapers of News Corp newspapers and Sky's pay-TV subscriptions in the UK and Ireland.
- (458) The Commission also assessed whether the merged entity would have the ability to bundle its pay-TV subscriptions with subscriptions to online news website subscriptions.

206 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 26. Two respondents in the UK have indicated approximately 10% and one respondent has indicated a total subscription rate for the UK and Ireland of 13.1%.

207 News Corp Response to RFI-2 of 16 February 2017.

208 News Corp Response to RFI-3 of 1 March 2017.

209 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 4.3.

210 85% for the Investors Chronicle.

211 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 27.

212 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 33.

- (459) The Commission notes that some of News Corp's online news services are offered for free while others are not. Consumers have free access to digital and online content of The Sun, The Sun on Sunday, the Irish Sun and the Irish Sun on Sunday. However, The Times and the Sunday Times are not available for free.
- (460) The market investigation indicated that most newspapers which are active online have indicated that they charge or have plans to start charging a fee for all or some or all of their online editions or online content.²¹³ However, there remain several newspapers which offer most of their website content for free or have no intention to charging a fee.²¹⁴
- (461) Therefore, the Commission considers that post-Transaction the merged entity would not have the ability to foreclose competitors by bundling mixed subscription bundles of pay-TV subscriptions and online news websites in the UK and Ireland.

6.4.2.2. Incentive to engage in foreclosure

- (462) Even though the merged entity would not have the ability to engage in a foreclosure strategy by bundling its pay-TV and newspaper subscriptions, the Commission also assessed whether the merged entity would have the incentive to engage in such a strategy.
- (463) In this regard, the Commission notes that based on News Corp's submission, there have been no material offers in respect of its newspapers, news services and/or news application whereby it may have bundled or otherwise packaged in the past 6 years print newspaper subscriptions together with Sky's pay-TV subscriptions; subscriptions to online news services together with Sky's pay-TV subscriptions; or subscriptions to digital news applications together with Sky's pay-TV subscriptions.²¹⁵ This is also confirmed by the Parties.²¹⁶
- (464) In addition, both Sky and News Corp have indicated that they have no plans to market subscriptions together in the future.

213 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 5.

214 Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 5.1.

215 News Corp Response to RFI-2 of 16 February 2017.

216 The Commission notes that based on the Parties' submission, Sky and News Corp did engage in bundling, to a very limited extent, in 2015 (see Parties' Response to RFI-3 of 16 February 2017). The bundled offer then enabled Sky sports subscribers to access football highlights on certain areas of The Sun's website. However, the offer was only promoted for a very short period of time (less than two weeks).

- (465) Furthermore, most newspapers which responded to the market investigation have stated that they have not considered joining forces with TV operators to combining newspapers subscriptions with pay-TV subscriptions.²¹⁷
- (466) Therefore, the Commission considers that post-Transaction the merged entity would not likely have the incentive to foreclose rivals by engaging in a bundling strategy by offering mixed subscription bundles of pay-TV subscriptions and News Corp's newspapers and online news services in the UK and Ireland.

6.4.2.3. Impact of possible bundling on effective competition

- (467) As regards the impact of a foreclosure strategy by News Corp and the Parties on the newspapers market in the UK and Ireland, the Commission considers that the Transaction is unlikely to have a negative impact on prices and choice in the market. First, subscription rates of News Corp's closest competitors in the UK and Ireland are generally low, therefore any attempt to bundle newspapers and pay-TV services would not significantly reduce their sales. Second, the low subscription rates further indicates that a small fraction of the market output would be affected by the bundling. Moreover, alternative operators would remain active in both the market for the provision of newspapers and pay-TV services that could be able to replicate the Parties' strategy.

6.4.2.4. Conclusion

- (468) Based on the above, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market with respect to possible bundling of News Corp's newspaper subscriptions with Sky's pay-TV subscriptions.

7. MEDIA PLURALITY REVIEWS

- (469) Article 21(4) of the Merger Regulation recognizes that Member States may take appropriate measures to protect legitimate interests, such as plurality of the media.
- (470) Media plurality related notifications have been made by the Parties in Austria,²¹⁸ Germany²¹⁹ and Italy²²⁰ and a mandatory filing will also need to be

²¹⁷ Replies to Questionnaire Q6 to newspapers of 6 March 2017, question 28.

²¹⁸ On 3 March 2017 the Parties submitted a media plurality filing to the Bundeswettbewerbsbehörde.

²¹⁹ On 31 January 2017 the Parties notified a change in the ownership of Sky Deutschland to the Kommission zur Ermittlung der Konzentration im Medienbereich, the Media Authority of Hamburg and Schleswig-Holstein and the Bavarian State Central Authority for New Media.

²²⁰ On 31 January 2017 the Parties submitted a media plurality filing to the Autorità per le Garanzie nelle Comunicazioni.

made in Ireland²²¹ following adoption of this decision by the Commission. In addition, on 16 March 2017, the Secretary of State for Culture, Media and Sport of the United Kingdom (the "Secretary of State") issued a European intervention notice²²² which requires the relevant UK authorities to investigate and report to the Secretary of State by 16 May 2017 on whether the Proposed Transaction is, or may be, expected to operate against the public interest.

- (471) The Merger Regulation grants the Commission the exclusive competence to scrutinise mergers of EU dimension on competition grounds. Pursuant to Article 2, paragraph 3, of the Merger Regulation, the Commission must assess whether the concentration would significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. On the other hand, the purpose and legal framework for a media plurality assessment is very different. A media plurality review reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient.
- (472) Such reviews on the grounds of media plurality are distinct from the competition review carried out by the Commission and is carried out on separate legal grounds.
- (473) The present decision is based solely on competition-related grounds under the Merger Regulation and is without prejudice to the media plurality review of the relevant authorities in Austria, Germany, Ireland, Italy and the United Kingdom. Given that the purpose, legal frameworks, and focus of a competition review by the Commission on one hand, and a media plurality review by the relevant national authorities on the other hand are different, the findings in the present decision are without prejudice to the national media plurality reviews of the Proposed Transaction in the aforementioned Member States.

221 The notification will be made to the Minister for Communications, Climate Action and Environment.

222 The European Intervention notice can be found on the following link: <https://www.gov.uk/government/collections/proposed-merger-between-twenty-first-century-fox-inc-and-sky-plc>

8. CONCLUSION

(474) 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 and Article 57 of the EEA Agreement.

For the Commission

(Signed)

*Margrethe VESTAGER
Member of the Commission*