EUROPEAN COMMISSION
DG Competition

Case M.8861 - COMCAST / SKY

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 15/06/2018

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EUROPEAN COMMISSION

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.8861 - Comcast/Sky**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 7 May 2018, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Comcast Corporation ("Comcast" or the "Notifying Party", United States) proposes to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of Sky plc ("Sky", United Kingdom and the "Proposed Transaction"). Comcast and Sky are collectively referred to as the "Parties".[3]

1. THE OPERATION

(2) Comcast is a US listed global media, technology and entertainment company, with two primary businesses: Comcast Cable and NBCUniversal ("NBCU"). Comcast is present in Europe almost entirely through NBCU, which is active in Europe in: (i) production, sales and distribution of film and television content; (ii) wholesale supply of TV channels and on-demand services; (iii) CNBC, a business news service, as well as NBC News; (iv) the provision of television content to end users through NBCU's video on demand service; (v) the licensing of its

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 Publication in the Official Journal of the European Union No C 170, 17.05.2018, p. 9.

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intellectual property to manufacturers and distributors of consumer products; (vi) minor golf-related digital businesses; and (vii) minor direct to consumer DVD, Blu-ray and music disk sales.[4]

(3) Sky is a UK public company whose shares are listed on the London Stock Exchange. Sky is the holding company of a number of subsidiaries carrying on business in a variety of sectors predominantly in the UK, Ireland, Germany, Austria and Italy, including: (i) licensing/acquisition of audiovisual programming; (ii) TV channel wholesale supply in the UK and Ireland; (iii) retailing of audiovisual programming to subscribers; (iv) provision of technical platform services to broadcasters on Sky's 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; (vii) in the UK, the provision of mobile communications services; and (viii) in the UK, provision of access to public Wi-Fi hotspots. Sky also recently launched its over-the-top ("OTT") subscription service ("Now TV") in Spain.

2. THE CONCENTRATION

(4) On 25 April 2018, Comcast published its announcement for a pre-conditional cash offer for the entire issued and to be issued share capital of Sky, under Rule 2.7 of the UK City Code on Takeovers and Mergers. This constitutes the announcement of the intention to launch a public bid in terms of Article 4(1) of the EUMR.

(5) Comcast intends to implement its offer to acquire the entire issued and to be issued share capital of Sky by way of a takeover offer pursuant to the relevant provisions of Part 28 of the UK Companies Act 2006. Whilst Comcast's objective is to achieve 100% ownership in Sky, under these circumstances, the offer will be conditional upon the receipt of valid acceptances in respect of Sky shares which, together with Sky shares that Comcast has acquired or may agree to acquire (pursuant to the offer or otherwise), carry in aggregate more than 50% of the voting rights normally exercisable at a general meeting of Sky. The offer will thus be conditional on a minimum acceptance condition of 50 per cent, plus one share. The Proposed Transaction therefore constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

(6) The Commission notes that, by decision of 7 April 2017 in case M.8354 – *Fox/Sky*, it unconditionally approved the proposed acquisition by Twenty-First Century Fox, Inc. of the remaining shares that it does not currently own in Sky.

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4 In the US, Comcast is also active as a broadband and cable TV provider. In the course of the market investigation, the Commission received third party submissions alleging that the as a result of the Proposed Transaction, Comcast would engage in anticompetitive foreclosure of third party content over Sky's broadband network. First, the Commission notes that there is no overlap between the Parties for the provision of broadband anywhere in the EEA and as a result, the Parties' market power will not change as a result of the Transaction. Second, Sky's market share for the provision of broadband services in the UK and Ireland is significantly below 30% and a number of other providers will continue to be active post-transaction. As a result, the Commission has not considered these submissions further.

That transaction has not been completed yet. The current transaction in case M.8861 - *Comcast/ Sky* constitutes a competing bid for Sky.

3. EU DIMENSION

(7) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[5] (Comcast: EUR 74 437 million; Sky: EUR 15 186 million). Each of them has an EU-wide turnover in excess of EUR 250 million (Comcast: EUR [*turnover*]; Sky: EUR [*turnover*]), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

(8) The Proposed Transaction relates to all the levels of the TV value chain. Section 4.1 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.

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

(9) Audiovisual ("AV") content for television (TV content) comprises all products (films, sports, series, shows, live events, documentaries, etc.) that are broadcast via TV.[6] 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.[7] As a part of its analysis of the Parties' activities, the Commission also considers the Parties' activities in the area of advertising (section 4.1.4).

(10) Sections 4.1.1 to 4.1.3 further describe these levels of the TV value chain as well as provide an overview of the Parties' activities at each level in the UK, Ireland, Germany, Austria, Italy and Spain.

4.1.1. Production, supply and acquisition of TV content

(11) 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).

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5 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).

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

7 Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 28; Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, recital 29.

(12) 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.

(13) 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).

(14) As regards commissioned TV content, in most cases, TV production companies produce TV content tailored to the needs of their customers on the basis of original TV formats[8] 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).

(15) 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 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.

(16) As regards pre-produced TV content, this upstream level of the value chain concerns the licensing of broadcasting rights relating to pre-existing TV content –

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

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.

(17) 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.

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

a. Sky licenses small amounts of both commissioned and pre-produced TV content through its distribution arm, Sky Vision. It has also minimal activities through its Vision Distribution joint venture[9] and Sky Cinema Original Films initiative[10].

b. Comcast licenses both commissioned and pre-produced TV content via several NBCU companies (e.g. Universal Studios, Carnival Films and others).

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

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

b. Comcast has a minor presence in acquisition of TV content in the EEA to include in its own channels.

4.1.2. Wholesale supply and acquisition of TV channels

(20) 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.

(21) 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 subject to advertising limitations), while pay-TV channels generate revenues through subscription fees.

(22) The Commission notes that TV broadcasters are increasingly complementing their traditional linear TV channel offering with non-linear services such as VOD services.[11]

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9 Vision Distribution is a joint venture with five Italian independent producers (Cattleya, Wildside, Lucisano, Palomar, and Indian Production), focused on Italian films.

10 The initiative was launched in 2018.

11 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

(23) Some TV broadcasters are vertically integrated as they are also active as retail TV operators (TV distributors) in the market for the retail provision of TV services 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.

(24) 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 Austria, and only to very limited extent in Germany;

b. NBCU supplies a range of basic pay-TV channels on a wholesale basis, including 13th Street, Universal Channel, SyFy, E!, CNBC and Movies24.

(25) 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. Comcast does not acquire TV channels.

4.1.3. Retail provision of TV services to end users

(26) 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.[12] OTT players deliver channels and content in both a linear and non-linear fashion through the use of the internet.

(27) 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

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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).

12 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.

regard to online content platforms and other non-linear methods of supplying content, or may form only part of a TV distributor's customer interface.

(28) In the retail provision of TV services to end users:

(a) Sky offers retail services in the UK, Ireland, Germany, Austria and Italy, retailing its own and third party linear pay-TV channels and VOD programming via DTH satellite, OTT and mobile technologies to end customers. Sky also broadcasts a limited number of FTA channels: Sky News International (available across much of Europe); in the UK and Ireland, Sky News, Sky News Arabia, Challenge, Pick and the Sky Intro channel; and in Italy, Cielo and TV8. Sky’s TV services on an OTT basis include NowTV in the UK, Ireland[13] and Italy, “Sky Ticket” in Germany and Austria, Sky Go (which is an OTT service available to DTH subscribers) and services operated under the Sky brand in Spain, which enable the end user to access Sky TV content in a linear and/or non-linear manner on big screen and small screen mobile devices without requiring a cable or satellite connection with Sky.

(b) NBCU supplies on demand service *hayu* in the UK and Ireland. It also offers limited direct sales to clients from licensing the CNBC linear channel in the UK, Ireland, Germany, Austria and Italy.

4.1.4. Advertising

(29) Advertising space can be provided through various media, including newspapers, TV airtime, radio or online advertising.

(30) When it comes to online advertising, the online advertising value chain has, on the supply side, ad publishers (including broadcasters and website owners); and on the demand side, advertisers, media buyers and advertising agencies. The ad publishers have advertising inventory available (i.e. “spaces” on their websites, videos or other digital assets) that they seek to monetise. The demand-side players seek these spaces on which to display their advertisements. Intermediaries, ad networks and ad exchanges sometimes operate in between those two markets.

(31) Once advertising space has been sold by a publisher to an advertiser, either directly or through an intermediary, both parties need to ensure that the correct ad actually appears (i.e. is served) onto the publisher website space at the right place at the right time. This step is undertaken by the ad serving tools.

(32) Both Parties are active in the supply of TV advertising airtime. Sky is also active in selling online advertising space, including targeted advertising (through Sky AdSmart) and multiplatform advertising (through Sky Advance). Apart from that, Comcast provides online display ad serving technology (through FreeWheel).

[13] A difference between standard Sky retail TV services and NowTV is the method of distribution. NowTV customers also have more limited access to content compared to regular Sky TV customers. NowTV customers gain access to content via subscriptions to “passes” which allows them to view pre-defined blocks of linear TV channels and on-demand content.

4.2. Production, supply and acquisition of TV content

4.2.1. Product market definition

4.2.1.1. Commission precedents

(33) 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.[14]

(34) 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.[15]

(35) The Commission has also considered further sub-dividing the market for the licensing 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.[16]

4.2.1.2. Notifying Party's view

(36) The Notifying party submits that, notwithstanding potential sub-divisions of TV content, if a company is only active in the production of one type of content (in particular, film content) it would be able to start producing sports content and/or other TV content within a short timeframe and without incurring significant additional costs. Moreover, there is no material difference from a demand-side perspective between US films and non-US films since both types compete to attract the same viewing audience in the EEA. Accordingly, it is the Notifying Party's view that the distinction in the Commission's decisional practice by

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14 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.

15 Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, recital 67; 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).

16 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 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.

content type may not necessarily reflect conditions of competition from a supply or demand side perspective.

(37) Moreover, the Notifying Party does not believe that it is necessary formally to distinguish the licensing of broadcasting rights by exhibition window (SVOD, TVOD, PPV, first pay-TV window, second pay-TV window or FTA) for the purpose of market definition since suppliers of TV content do not produce different types of TV content designed for different exhibition windows, and the content licensed in each window is broadly substitutable from a demand side perspective.

4.2.1.3. The Commission's assessment

(38) The results of the market investigation indicate that, although content providers did not provide definitive views, most broadcasters and retail providers of audiovisual services consider the segmentations adopted in prior Commission decisions (by content type and exhibition window as indicated above) still relevant.[17]

(39) In any event, for the purpose of this decision, the exact product market definition for the production and supply of 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 segmented on the basis of content type or exhibition window.

4.2.2. Geographic market definition

4.2.2.1. Commission precedents

(40) 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.[18]

4.2.2.2. Notifying Party's view

(41) Comcast submits that the relevant geographic market for the production and supply of TV content, including any narrower segmentation thereof, is national in scope. This delineation reflects the nature of the typical licensing relationship between the supplier of the TV content and the licensee. In particular, Comcast considers that the majority of licensing relationships are concluded at the national level, with some exceptions in which the licensee obtains broadcasting rights to multiple countries/regions with a common language. Moreover, in many cases, supranational considerations are not relevant given many broadcasters (particularly FTA broadcasters) are only active in one Member State.

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17 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, part B; Replies to Questionnaire Q3 to TV distributors of 7 May 2018, part B.

18 Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, recital 74; 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.

Accordingly, it is more appropriate to delineate the geographic scope of the market based on national, rather than linguistic, boundaries.

4.2.2.3. The Commission's assessment

(42) The results of the market investigation show that most of the respondents among TV broadcasters and distributors purchase content nationally or for certain linguistic regions. Broadcasters sometimes also purchase content on an EEA or worldwide basis.[19]

(43) In any event, for the purpose of this decision, the exact geographic market definition for the production and supply of 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 and acquisition of TV channels

(44) 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 precedents

(45) 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.[20] The Commission has further concluded that within the pay-TV channel market, there are separate markets for: (i) premium pay-TV channels; and (ii) basic pay-TV channels. For the purposes of its assessment, the Commission has considered FTA channels to be in the market for basic pay-TV channels.[21]

(46) In previous decisions, the Commission also examined a number of other potential segmentations, including: (i) genre or thematic content (such as films, sports, general entertainment, news, youth, and others);[22] (ii) linear channels vs non-

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19 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question B4.

20 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.

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

22 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,*

linear services (VOD, PPV);[23] and (iii) the different means of infrastructure used for the delivery to the viewer (cable, satellite, terrestrial TV and IPTV).[24] It has ultimately left the market definition open in all these regards.

4.3.1.2. Notifying Party's view

(47) The Notifying Party considers that basic pay-TV channels and FTA TV channels are broadly substitutable, since any differences in terms of content, pricing and licensing rights are insufficient to create a meaningful distinction. In this respect, Comcast notes that a programme produced for pay-TV could just as easily play on a FTA platform, and is not inherently of a different type. Within basic pay-TV channels, as mentioned above, Comcast considers that it is not necessary to distinguish between channels on the basis of genres for the purposes of product market definition, since each of the above mentioned genres are broadly substitutable with one another from the consumer's perspective.

(48) In particular, the Notifying Party considers that a distinction between FTA and pay-TV does not make sense with respect to news channels. Several channels providing news content, for example the BBC and Sky News in the UK and Ireland, are available on both a FTA basis and through the EPG for retail pay-TV services in the five Member States where Sky is primarily active. Further, within these Member States, the majority of news viewing tends to be undertaken on channels available on a FTA basis, even on pay-TV platforms. Consequently, FTA news channels (such as the BBC and Sky News in the UK) are in direct competition with the (generally much smaller) news channels which are only available on a pay-TV basis (e.g. Euronews in the UK). The lack of any practical distinction between FTA and pay-TV news channels is also demonstrated by the fact that many news channels – including CNBC in the UK, Ireland and Italy – are available both FTA and via pay-TV platforms. The lack of relevance of a distinction between FTA and pay-TV in the news genre is further illustrated through the choice of several media regulatory agencies to analyse news consumption at the level of "all TV" when reporting on news consumption and competitive dynamics within their Member State.

4.3.1.3. The Commission's assessment

(49) According to broadcasters, the distinctions drawn between FTA and pay-TV channels as well as between basic and premium pay-TV are still relevant in the UK, Ireland, Germany, Austria and Italy. However, the market investigation did not provide definitive views on whether thematic channels are only substitutable with other channels that broadcast the same specific content.[25]

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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.

23 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.

24 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.

25 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, part B.

(50) In any event, for the purpose of this decision, the exact product market definition in relation of the 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 segmented on the basis of channel type or exhibition window.

4.3.2. Geographic market definition

4.3.2.1. Commission precedents

(51) In previous decisions, the Commission found the market for the wholesale supply of TV channels to be either national in scope,[26] sub-national,[27] or by linguistic region encompassing more than one Member State.[28]

4.3.2.2. Notifying Party's view

(52) Comcast considers that the appropriate geographic market is national in scope, given that the majority of wholesale supply relationships are concluded at the national level, with some exceptions in which the retailer obtains broadcasting rights to multiple countries/regions with a common language.

4.3.2.3. The Commission's assessment

(53) The results of the market investigation show that the majority of agreements between TV broadcasters and retail TV distributors for the wholesale supply of TV channels are negotiated on either a national basis, although they are also sometimes negotiated on a linguistic basis. Exceptionally, agreements are also made on a sub-national or worldwide basis.[29]

(54) 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.

4.4. Retail provision of TV services

4.4.1. Product market definition

4.4.1.1. Commission precedents

(55) In previous cases the Commission has split the retail supply of television services in two separate markets: (i) FTA and pay-TV.[30] The Commission also considered

26 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.

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

28 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*.

29 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question B4.

30 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

whether pay-TV can be segmented further according to: (ii) linear vs non-linear pay-TV services;[31] (iii) according to distribution technologies (e.g. cable, satellite, or terrestrial);[32] and (iv) premium vs basic pay-TV services.[33] In recent cases, the Commission has left open the market definition with regard to each of these potential sub-segments.[34]

4.4.1.2. Notifying Party's view

(56) Sky considers that there is a single, albeit differentiated, market for the provision of all audiovisual services (comprising pay and FTA, basic and premium) to end users.

4.4.1.3. The Commission's assessment

(57) A number of respondents to the market investigation doubted the relevance of the distinction between basic and premium pay-TV. In addition, respondents were divided as to whether the provision of retail services could be segmented by genre.[35]

(58) The results of the market investigation indicated that most distributors provide both linear and non-linear services. However, they did not provide definitive views as to whether the broadcasting rights for linear and non-linear services are always acquired separately or together. A majority of distributors did not consider VOD services offered by OTT providers substitutable to pay-TV services.[36]

(59) In any event, for the purpose of this decision, the exact product market definition in relation of the retail supply of TV services 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 further segmented or not.

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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 Medi*a, 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).

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

32 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.

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

34 Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*.

35 Replies to Questionnaire Q3 to TV distributors of 7 May 2018, part B.

36 Replies to Questionnaire Q3 to TV distributors of 7 May 2018, part B.

4.4.2. Geographic market definition

4.4.2.1. Commission precedents

(60) 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.[37]

4.4.2.2. Notifying Party's view

(61) Comcast considers that the geographic scope of the market for the retail provision of TV services is national, but submits that the analysis would not be materially different if the markets were combined into linguistic regions (or considered on a sub-national basis).

4.4.2.3. The Commission's assessment

(62) Nothing in the market investigation contradicts the Commission's previous findings that the market is either national, or limited to the geographic coverage of a supplier's cable network.

(63) In any event, the Commission considers 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 on any geographic basis.

4.5. Advertising

4.5.1. Product market definition

4.5.1.1. Commission precedents

(64) The Commission has previously defined separate product markets for the sale of advertising space in national newspapers and TV broadcasting.[38] The Commission has also drawn a distinction between online and offline advertising, due to each channel's specificity and different pricing mechanisms.[39]

(65) With respect to TV advertising, the Commission has not previously distinguished between advertising space on FTA channels and pay-TV channels.[40]

(66) With respect to online advertising, the Commission has previously distinguished between the market from the provision of advertising space and the market for the provision of online display ad technology.[41] Within the market for the provision of advertising space, the Commission has considered that: (i) there may be

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

[38] Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 267.

[39] Commission decision of 9 September 2014 in case M.7288 *Viacom/Channel 5 Broadcasting*, recital 35.

[40] *News Corp/BskyB*, recital 267, *Viacom/Channel 5 Broadcasting*, recital 38.

[41] Commission decision of 11 March 2008 in case M.4731 *Google/DoubleClick*, recital 56.

different markets for search and non-search advertising but left the market open;[42] and (ii) intermediation is likely part of the market.[43]

4.5.1.2. Notifying Party's view

(67) The Notifying Party notes that advertisers typically use TV advertising airtime to reach a mass audience, while also seeking to reach particular audience demographics that might be delivered by advertising on particular channels or programmes. Moreover, in view of the increasing consumption of TV services (particularly non-linear services) online, online advertising exercises an increasing competitive constraint on TV advertising. Comcast considers that the precise definition of the relevant market can be left open, as the Proposed Transaction does not raise any competition concerns under any plausible product market definition.

(68) The Notifying Party considers that the relevant market comprises the supply of online display ad serving technology, in line with previous Commission precedent.

4.5.1.3. The Commission's assessment

(69) Nothing in the market investigation contradicts the Commission's previous findings regarding the advertising markets.

(70) In any event, the Commission considers that the precise definition of the relevant market can be left open, as the Proposed Transaction does not raise any competition concerns under any plausible product market definition.

4.5.2. Geographic market definition

4.5.2.1. Commission precedents

(71) Previous Commission decisions have taken the view that the markets for TV advertising are national in scope.[44]

(72) As regards the geographic market definition for online display ad serving technology services, the Commission has previously considered the geographic market for these services to be at least EEA-wide in scope.[45]

4.5.2.2. Notifying Party's view

(73) The Notifying Party considers that there is no need to precisely delineate the scope of these markets as the Proposed Transaction does not raise concerns under any approach to geographic market definition. It does not offer a position on the geographic scope of online display ad serving technology services market.

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42 Commission decision of 11 March 2008 in case M.4731 *Google/DoubleClick*, recital 73.

43 Commission decision of 11 March 2008 in case M.4731 *Google/DoubleClick*, recital 81.

44 Commission decision of 7 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*.

45 *Google/DoubleClick*, recital 91.

4.5.2.3. The Commission's assessment

(74) Nothing in the market investigation contradicts the Commission's previous findings that the markets for TV advertising are national in scope and that the market for online display ad serving technology services is at least EEA in scope.

(75) Accordingly, in line with previous decisions, the Commission takes the view that the markets for advertising TV space and newspaper advertising are national in scope. The Commission also considers the geographic market for online display ad serving technology services to be at least EEA-wide but leaves the precise geographic market definition open.

5. COMPETITIVE ASSESSMENT – HORIZONTALLY AFFECTED MARKETS

(76) The Proposed Transaction results in a number of horizontal overlaps at different levels of the distribution chain.

(77) Upstream, the Parties' activities overlap with regard to the supply of TV content. Comcast is active with regard to the production and supply of commissioned TV content, as well as licensing pre-produced film and other TV content.[46] While Sky has some marginal activities with regard to licensing pre-produced and commissioned TV content and sports content, its presence upstream is negligible, leading to no horizontally affected markets in relation to the production or supply of TV content.

(78) The Parties' activities 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) Comcast 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, Germany, Austria and Italy, which are discussed further below in Sections 5.1, 5.2 and 5.3.

(79) 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. Comcast has a more limited number of TV channels, including 13th Street, Universal Channel, Syfy, E!, CNBC and Movies24. Horizontally affected markets arise in the UK and Ireland which are discussed further below in Sections 5.4 and 5.5 respectively.

(80) In Germany, Austria and Italy, Sky's has a "self-retail" business model: in addition to retailing TV channels on its own platform, Sky's service is available on the platform of cable network and IPTV providers who transmit the programs' signal to end customers and perform certain marketing and distribution services for Sky. 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. Sky

46 NBCU also has limited licencing activities for sports content.

is therefore not active with regard to the wholesale distribution of TV channels in Germany, Austria and Italy and no affected markets arise.

(81) Sky is active as a retail supplier of TV services in the UK, Ireland, Germany, Austria and Italy. Comcast is also active in those Member States with the overlap resulting in an affected market in United Kingdom, Ireland, and Italy which is discussed further below in Section 5.6.

(82) For the sake of completeness, the Commission notes that Sky also expanded its OTT offering by launching a retail TV service in Spain on 11 September 2017 under the Sky brand via NOW TV.[47] Sky's retail offering in Spain does not currently include any of Sky's own TV channels, but rather broadcasts third party TV channels supplied by wholesale TV channel suppliers such as Twenty First Century Fox ("21CF"), Turner, NBCU and Viacom. However, no horizontally affected markets arise.

(83) Finally, the Parties' activities also overlap with regard to the supply of TV advertising airtime on their TV channels. However no horizontally affected markets arise on any plausible market definition.

(84) In the course of the market investigation the Commission received a third party submission alleging possible adverse effects on competition arising from the Proposed Transaction in the market for premium video advertising technology services. Comcast is active in the provision of online display ad serving technology services (FreeWheel), while Sky provides targeted and multi-platform advertising services (Sky AdSmart and Sky AdVance).

(85) While reserving an opinion on the precise delineation of the product market, the Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in relation to video advertising technology services. Sky's services are not an online ad serving technology,[48] and Sky requires ad serving technology from third-party providers for its on demand adverts. The Transaction therefore does not lead to any overlap in this respect. In addition, Comcast's position in the relevant market is limited (even on the narrowest market definition, Comcast's market share will amount to [*5-10*] – [*10-20*]%) and there are other competitors present, for example Google DoubleClick, Ooyala, AppNexus or SpotX.

5.1. Acquisition of TV content - UK & Ireland

(86) In the UK and Ireland, both NBCU and Sky acquire distribution rights for TV content for inclusion in their TV channels and in their non-linear service

47 The Service comprises 16 non-exclusive, non-premium linear channels and over 3,000 hours of video-on-demand programming priced at EUR 10 a month with no contract. The linear channels available on Sky's OTT service include (inter alia): FOX, FOX Life, TNT, Historia, Syfy, Disney Junior, Nickelodeon, TCM, Comedy Central, Calle 13, Disney XD and National Geographic. On demand content accessible via the OTT service includes boxset TV series and movies such as How I Met Your Mother, Grey's Anatomy, and Guardians of the Galaxy. Catch-up content from the available linear channels is also made available to subscribers on-demand.

48 The online ad serving technology market has been considered in *Google/Doubleclick*; Ad serving tools ensure that the correct ad actually appears (i.e. is served) onto the publisher website space at the right place at the right time.

offerings. Table 1 below shows the segments where the Parties' overlapping activities result in horizontally affected markets, namely: (i) acquisition of all TV content, and (ii) acquisition of all film content. There are no affected markets when considering a segment of all other TV content, or when considering only pre-produced content.

Table 1 - Market shares for the acquisition of TV content – UK & Ireland -2017

	All TV content (%)	All film content (%)
NBCU	[*0-5*]	[*0-5*]
Sky	[*40-50*]	[*50-60*]
Combined	[*40-50*]	[*50-60*]

Source: Form CO, table 7.

(87) Table 1 shows that when considering the market for the acquisition for all TV content, the Parties combined market share is [*40-50*]%. However, the increment brought about by the Proposed Transaction is limited as while Sky has a market share of [*40-50*]%, Comcast's share is less than [*0-5*]%. When considering the segment for the acquisition of film content, the position is similar. The Parties have a combined market share of [*50-60*]% with an increment of just [*0-5*]%. The market shares do not materially change when considering the UK and Ireland separately although for the acquisition of film content in Ireland, there would not be an overlap as Comcast [*business secret regarding business strategy of Notifying Party*] film content in Ireland.

(88) Whilst Sky has a material share for the acquisition of all TV content and film content in the UK and Ireland, the Proposed Transaction does not materially change the competitive landscape in those segments and is unlikely to significantly increase Sky's market power because of the limited increment.

(89) Moreover, in each of the UK and Ireland there are also a number of other players present in the segment for the acquisition of film content, including the BBC, ITV and Channel 4, as well as OTT players such as Netflix and Amazon.

(90) Consequently, the Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market with regard to the acquisition of TV content in the UK and Ireland, whether the Member States are considered together or separately.

5.2. Acquisition of TV content – Germany & Austria

(91) In Germany and Austria both NBCU and Sky acquire distribution rights for TV content for inclusion in their TV channels. Table 2 shows the Parties' market share for the segment for all film content. No affected market arises when considering the market for the acquisition of all film content.

Table 2 - Market shares for the acquisition of TV content – Germany and Austria - 2017

	All film content (%)
NBCU	[*0-5*]
Sky	[*20-30*]
Combined	[*20-30*]

Source: Form CO, table 7.

(92) Table 2 shows that the Parties combined share is [*20-30*]% (Sky: [*20-30*]%; Comcast: [*0-5*]%). The market shares do not materially change when considering Germany and Austria separately.

(93) Given the minimal NBCU's acquisition activities in Germany and Austria, the increment share arising from the Proposed Transaction would be negligible. With limited increment, the Proposed Transaction could not be expected to materially increase Sky's market power in this regard.

(94) Moreover, in each of Germany and Austria there are also a number of other players present in the segment for the acquisition of film content, including ARD, ZDF, PS71 and RTL as well as OTT players such as Netflix and Amazon.

(95) Consequently, the Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market with regard to the acquisition of TV content in Germany and Austria, whether the Member States are considered separately or together.

5.3. Acquisition of TV content – Italy

(96) In Italy both NBCU and Sky acquire distribution rights for TV content for inclusion in their TV channels. Table 3 below shows the segments where the Parties' overlapping activities result in horizontally affected markets, namely: (i) acquisition of all TV content, and (ii) acquisition of all film content.

Table 3 - Market shares for the acquisition of TV content – Italy - 2017

	All TV content (%)	All film content (%)
NBCU	[0-5]	[0-5]
Sky	[20-30]	[30-40]
Combined	[20-30]	[30-40]

Source: Form CO, table 7.

(97) Table 3 shows that when considering the market for the acquisition for all TV content, the Parties combined market share is [*20-30*]% however, the increment brought about by the Proposed Transaction is limited as while Sky has a market share of [*20-30*]%, Comcast's share is less than [*0-5*]%. When considering the

segment for the acquisition of film content, the position is similar. The Parties have a combined market share of [*30-40*]% with an increment of [*0-5*]%.

(98) As in the case of other markets on which the Parties' are both active, the increment brought about by the Proposed Transaction is minimal. The Proposed Transaction could not be expected to materially increase Sky's market power in this regard.

(99) Moreover, there are also a number of other players in the Italian market that are active with regard to the acquisition of TV content, including film content. With regard to the acquisition of film rights RAI and Mediaset occupy a similar position as the biggest competitors of the merged entity with [*20-30*]% and [*20-30*]% market share respectively and OTT players such as Netflix and Amazon are also active.

(100) Consequently, the Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market with regard to the acquisition of TV content in Italy.

5.4. Wholesale supply of TV channels – UK

(101) Both Sky and Comcast are active in the wholesale supply of TV channels in the UK. Comcast wholesales five channels to distributors: Universal Channel, SyFy, E! Entertainment Television, CNBC and Movies24. Sky licenses a wide range of channels including sports, movie and "other" TV channels.[49] The Parties' activities give rise to affected markets in the overall market for the wholesale supply of TV channels and its possible segmentations of news channels, pay-TV channels, basic pay-TV channels and the basic general entertainment channels segment. No overlap arises in respect of premium pay-TV channels category, since Comcast is not active in that area.

(102) The Parties' market shares on the basis of revenue and audience shares in the affected markets (or market segments) can be seen below in Table 4. The Parties' combined market share in the pay-TV basic channel market is the same by revenue and by audience and amounts to [*20-30*]%.

Table 4 - Market shares for the wholesale supply of basic pay-TV channels – UK 2017

	By revenue (%)	By audience (%)
NBCU	[*5-10*]	[*5-10*]
Sky (including AETN)	[*20-30*]	[*20-30*]
Combined	[*30-40*]	[*30-40*]

Source: Form CO, Table 9 and 10, response to RFI 5.

49 Sky's channels include: Challenge, Pick, Sky 1, Sky 2, Sky Living, Sky Atlantic, Sky Arts, Sky Intro, Sky Cinema channels, Sky News, Sky Sports channels (1-5, Box Office, F1, Mix, Sports News HQ).

(103) The Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in this market in for the following reasons: (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 generally the Parties are not close competitors.

(104) First, the overall increment brought about by the Proposed Transaction is limited or does not lead to significant market shares. When looking at the segment of news channels, Comcast's presence on that market is minimal, so the increment brought about by the transaction is negligible. On the basic pay-TV channels market, Sky has a wide range of pay-TV channels but Comcast only wholesales five channels in the UK and does not license any sports channels. While Sky may already have a material market position, given the limited extent of NBCU'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 to the wholesale supply of TV channels.

(105) Second, a large number of TV channel suppliers will continue to compete with the merged entity post-Transaction, in particular UKTV ([*10-20*]% by revenue and [*10-20*]% by audience), Discovery ([*5-10*]% by revenue, [5-*10*]% by audience), Fox ([*5-10*]% by revenue and [*5-10*]% by audience), Viacom ([*10-20*]% by revenue, [*10-20*]% by audience), Disney ([*5-10*]% by revenue, [*5-10*]% by audience) and Time Warner ([*0-5*]% by revenue, [*0-5*]% by audience). These broadcasters each supply a range of basic pay-TV channels to third parties and will continue to place a competitive constraint on the merged entity.

(106) Third, the results of the market investigation indicate that Sky and Comcast's channels do not closely compete. The majority of respondents to the market investigation noted the wide range of channels offered by the Parties and the limited overlapping content of the channels, considering each of the Parties' portfolios to be complementary given Sky's focus on sports and premium channels and Comcast's more limited portfolio focussed on general entertainment non-premium movie content.

(107) There were however a number of respondents to the market investigation that indicated that certain channels offered by the Parties' do compete closely in the general entertainment segment, in particular Sky 1, Sky Atlantic and Sky Living were identified by some respondents as close competitors to Comcast's Universal and SyFy channels.

(108) When considering the narrower general entertainment segment of basic pay-TV channels, the Parties have a combined market share of [*50-60*]% by revenue and [*30-40*]% by audience share (Sky, including AETN: [*40-50*]% by revenue, and [*20-30*]% by audience; Comcast: [*5-10*]% by revenue, and [*10-20*]% by audience). By channel, Comcast's Universal channel has a [*5-10*]% share by revenue and [*5-10*]% by audience and SyFy has a share of [*0-5*]% by revenue and by audience.

(109) The Commission notes that Sky Atlantic is exclusive to Sky and not currently wholesaled to third parties. It therefore does not contribute to Sky's position on the wholesale market. With regard to the reported closeness between Sky One and

Sky Living on the one hand and Universal and SyFy on the other, the Commission considers that there are a sufficient number of other closely competing channels, some of which are larger than the Comcast channels, that will remain post-Transaction and continue to place a constraint on the merged entity. In particular, UKTV's GOLD ([*5-10*]% by revenue and [*5-10*]% by audience) and Alibi ([*0-5*]% by revenue and [*5-10*]% audience) channels and Fox's FOX channel ([*5-10*]% by revenue and [*5-10*]% by audience) were all also identified as being close competitors to the Comcast channels. Furthermore, several distributors have indicated that the entry of new channels could not be excluded.

(110) The Commission therefore considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the wholesale provision of TV channels in the UK.

5.5. Wholesale supply of TV channels – Ireland

(111) Both Sky and Comcast are active in the wholesale supply of TV channels in Ireland. Comcast wholesales five channels to downstream customers: Universal Channel, SyFy, E! Entertainment Television, CNBC and Movies24. Sky licenses a wide range of channels including sports, movie and "other" TV channels.[50] The Parties' activities give rise to affected markets in the overall market for the wholesale supply of TV channels and its possible segmentations of news channels, pay-TV channels, and within that basic pay-TV channels and basic pay-TV general entertainment channels. No overlap arises in respect of the premium pay-TV channels category, since Comcast is not active in that area.

(112) The Parties' market shares on the basis of revenue and audience shares in the affected market are shown below in Table 5. By revenues, the Parties have a combined market share of [*10-20*]% (Sky: [*10-20*]%; Comcast: [*0-5*]%); the audience based market shares are higher: [*20-30*]% (Sky: [*10-20*]%; Comcast: [*5-10*]%). An affected market only arises when considering the market on the basis of audience shares.

Table 5 - Market shares for the wholesale supply of basic pay-TV channels – Ireland 2017

	By revenue	**By audience**
NBCU	[*0-5*]%	[*5-10*]%
Sky (including AETN)	[*10-20*]%	[*10-20*]%
Combined	[*10-20*]%	[*20-30*]%

Source: Form CO, Table 11, response to RFI 5.

50 Challenge, Pick, Sky 1, Sky 2, Sky Living, Real Lives, Sky Arts, Sky Cinema channels, Sky News, Sky Sports channels (Main Event, Premier League, Football, Cricket, Golf, Action, Arena F1, Mix, Sports News).

(113) The Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market in this market for the following reasons: (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 generally the Parties are not close competitors.

(114) First, the overall increment brought about by the Proposed Transaction is limited. When looking at the segment of news channels, Comcast's presence on that market is minimal, so the increment brought about by the transaction is negligible. On the basic pay-TV channels market, the Parties' combined market share ([*20-30*]%) does not give rise to competition concerns.

(115) Second, a large number of TV channel suppliers will continue to compete with the merged entity post-Transaction, in particular Viacom ([*10-20*]% by revenue, [*20-30*]% by audience), Discovery ([*5-10*]% by revenue, [*10-20*]% by audience), UKTV ([*10-20*]% by revenue, [*5-10*]% by audience), Disney ([*5-10*]% by revenue and by audience), and Fox ([*5-10*]% by revenue, [*5-10*]% by audience). These broadcasters each supply a range of basic pay-TV channels to third parties and will continue to place a competitive constraint on the merged entity.

(116) Third, as described above in paragraph (106) in relation to the UK, the results of the market investigation indicate that Sky and Comcast's channels do not closely compete in the UK and Ireland. The majority of respondents to the market investigation noted the wide range of channels offered by the Parties and the limited overlapping content of the channels, considering each of the Parties' portfolios to be complementary given Sky's focus on sports and premium channels and Comcast's more limited portfolio focussed on general entertainment non-premium movie content.

(117) There were however a number of respondents to the market investigation that indicated that certain channels offered by the Parties' do compete closely in the general entertainment segment, in particular Sky 1, Sky Atlantic and Sky Living were identified by some respondents as close competitors to Comcast's Universal and SyFy channels.

(118) When considering the narrower general entertainment segment of basic pay-TV channels in Ireland, the Parties have a combined market share of [*20-30*]% by revenue and [*40-50*]% by audience share (Sky, including AETN: [*20-30*]% by revenue, and [*30-40*]% by audience; Comcast: [*0-5*]% by revenue, and [*10-20*]% by audience). By channel, Comcast's Universal channel has a [*0-5*]% share by revenue and [*5-10*]% by audience and SyFy has a share of [*0-5*]% by revenue and [0-5]% by audience.

(119) The Commission notes that Sky Atlantic is exclusive to Sky and not currently wholesaled to third parties. With regard to the reported closeness between Sky One and Sky Living on the one hand and Universal and SyFy on the other, the Commission considers that there are a sufficient number of other closely competing channels, some of which are larger than the Comcast channels, that will remain post-Transaction and continue to place a constraint on the merged entity. In particular, UKTV's GOLD ([*5-10*]% by revenue and [*5-10*]% by audience) and Alibi ([*5-10*]% by revenue and [*0-5*]% audience) channels and Fox's FOX channel ([*5-10*]% by revenue and [*5-10*]% by audience) were all also

identified as being close competitors to the Comcast channels. Furthermore, several distributors have indicated that the entry of new channels could not be excluded.

(120) The Commission therefore considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the wholesale provision of TV channels in Ireland.

5.6. Retail provision of TV services

(121) In the UK and Ireland, Comcast offers one non-linear service, *hayu*, direct to end-users, and licenses the CNBC linear channel to hotels and financial services firms. In Italy, Comcast's retail activities are limited to licensing the CNBC linear channel to hotels and financial services firms. In these countries, the overlap with Sky's own retail TV services leads to technically affected markets given Sky's retail market shares.[51]

(122) However, Comcast's retail activities are *de minimis*. As of 5 April 2018, *hayu* has [*redacted*] direct subscribers in the UK and [*redacted*] direct subscribers in Ireland and Comcast's share does not exceed [*0-5*]% of the potential sub-segment for the retail provision of non-linear pay TV services. Similarly, Comcast's position resulting from direct sales of CNBC account for a negligible share of the retail market for pay TV services or potential linear pay TV sub-segment.

(123) Accordingly, the Proposed Transaction will not lead to a material increment in the merged entity's market share in the retail provision of pay TV services.

(124) The Commission therefore considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the retail provision of TV services in the UK, Ireland and Italy given the negligible overlap and Comcast’s minimal presence on these markets.

6. COMPETITIVE ASSESSMENT – VERTICALLY AFFECTED MARKETS.

(125) 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 in the UK and Ireland; and (iii) Sky is active as a TV distributor for retail TV services in the UK, Ireland, Germany, Austria and Italy and Comcast is active in the UK, Ireland and Italy. The Proposed Transaction therefore results in a number of vertical relationships.

(126) These activities at various levels of the value chain give rise to the following vertically affected markets in various Member States:

(a) Comcast’s and Sky’s upstream activities as suppliers of TV content and their respective downstream activities in the wholesale supply of TV channels; and,

[51] Sky's share of retail pay TV services by revenue amounts to [*60-70*]% in the UK, [*60-70*]% in Ireland and [*70-80*]% in Italy. These market shares will not be materially increased as a result of the Proposed Transaction.

(b) Comcast's and Sky's upstream activities as wholesale suppliers of TV channels and Sky's downstream activities as a TV retailer.

(127) 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).

(128) 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.

(129) For the sake of completeness, the Commission notes that it found no vertically affected markets in relation to advertising markets.

6.1. Input foreclosure – TV markets

6.1.1. Introduction

(130) 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 (to assemble TV channels to be provided to TV retailers or to use in a self-retail model) and TV channels (which it integrates in its TV retail offers) while Comcast 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 13th Street or SyFy).

(131) 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 competitor's access to supplies – input foreclosure.

(132) 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.[52]

(133) In the course of the market investigation the Commission received a third party submission with regards to a possible input foreclosure strategy in relation to video ad technology services.[53] The Commission does not consider that the Proposed Transaction gives rise to serious doubts with regard to its compatibility with the internal market as a result of input foreclosure effects in relation to online display/video ad technology services for lack of ability to foreclose access to input. Even on the narrowest market definition, Comcast's limited market shares ([5-10] – [10-20]%) do not give rise to a significant degree of market power. The merged entity's share in the acquisition of online display ad serving technology services is estimated well below 30%, such that there are not

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52 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.

53 See also paragraph (84) in relation to horizontal concerns.

vertically affected markets in relation to these services. Regardless, on both the advertiser-side and publisher-side there exist other significant competitors, including Google, Ooyala, AppNexus, and SpotX. In addition, video ad serving technology services are not a necessary input into the supply of digital advertising, either for publishers or advertising sales houses.

(134) 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. Notifying Party's view

(135) The Notifying Party submits that it would not have the ability to engage in input foreclosure post-merger as: (i) it does not have market power in any product or geographic segment of the upstream market for licensing of TV content; (ii) multi-year contractual relationships with downstream customers would hamper the merged entity's ability to restrict the supply of TV content or otherwise degrade the terms on which it supplies content to third parties; (iii) Sky already licenses content from NBCU on an exclusive basis.

(136) The Notifying Party submits that it would equally have no incentive to engage in input foreclosure given: (i) its strategy to license its content [*Business Secrets redacted regarding sales strategy*], (ii) that using NBCU content exclusively or otherwise to degrade the conditions on which it provides access to NBCU content would result in significant lost licensing revenues that the merged entity would have no prospect of recovering downstream.

(137) Finally, it submits that in any event, such strategy would not have any impact on competition as there would be no change in the current position with regard to access to NBCU content for third parties ([*Confidential information redacted regarding Comcast's current licensing arrangements*]), and the existence of several other providers of film content which would continue to be accessible by competing channel suppliers.

6.1.2.2. Commission's assessment

(a) Ability to engage in input foreclosure

(138) In the UK and Ireland, the merged entity's share in the upstream market is between [*10-20*]% and [*20-30*]% in all market segments, except for the narrower segment of licensing of US film content in the first pay-TV window in which NBCU has a [*20-30*]% market share in 2017. Post-transaction the other major Hollywood studios will also have significant market shares licensing of US film content in the first pay-TV window: Disney ([*20-30*]%), Fox ([*10-20*]%), Warner ([*10-20*]%), Sony ([*10-20*]%), Paramount ([*0-5*]%) and will continue to place a competitive constraint on the merged entity.

(139) In Germany and Austria, the merged entity's market shares are below 20% in all vertically affected segments.[54]

(140) In Italy, merged entity's market shares in the upstream market are below [*10-20*]% in the TVOD/PPV and first pay-TV window segments and [20-30]% in the overall all film content category. In the US film first pay-TV window Comcast held a [*20-30*]% market share in 2016, but its share fell to [*10-20*]% in 2017. Post-transaction the other major Hollywood studios will have superior to similar market shares: Warner ([*30-40*]%), Disney ([*20-30*]%), Fox ([*10-20*]%) and will continue to place a competitive constraint on the merged entity.

(141) Given the merged entity's limited market position with regard to the licensing of content, the Commission considers that it would not have the ability to foreclose its downstream rivals.

(b) Incentive to engage in input foreclosure

(142) Several respondents to the market investigation consider that the merged entity may have the incentive to exclusively supply some of its TV content to Sky and not to other TV channel suppliers/TV services retailers, or to otherwise degrade the terms and conditions on which it provides access.[55]

(143) On the other hand, the Commission notes that [*redacted*] of Comcast's licensing revenue is accounted for acquirers other than Sky. Existing contractual arrangements for the provision of content could also disincentive the merged entity from foreclosing its inputs. Furthermore, given the significant position of alternative content suppliers, foreclosing access to Comcast's content would not significantly impact the merged entity's downstream revenues.

(144) In any event, given the lack of ability to foreclose, it is not necessary to conclude as to whether the merged entity will have the incentive to foreclose competing TV channel suppliers and/or TV services retailers from its content in the relevant Member States.

(c) Impact on effective competition

(145) 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 strategy would have an impact on competition.

(146) 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 and so 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 Comcast today.

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54 Data for 2017, response to RFI4 Table 10.1. In 2016, NBCU's market shares in the licensing of US film first pay-TV window was [*20-30*]%.

55 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question C5; Replies to Questionnaire Q3 to TV distributors of 7 May 2018, question D7.

(d) Conclusion

(147) 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.

6.1.3. Wholesale supply of TV channels

6.1.3.1. Introduction

(148) The Proposed Transaction increases Sky's pre-existing vertical integration by adding Comcast's channels to Sky's existing portfolio. The Commission has therefore assessed the risk of input foreclosure with regard to TV channels as a result of the transaction. The Commission notes, in this regard, that Comcast broadcasts general entertainment channels and CNBC, a business news channel. CNBC is available on an FTA basis in the UK, Ireland and Italy. In Germany and Austria, CNBC's audience share is negligible[56], such that input foreclosure can be excluded at the outset. The below analysis will therefore focus on input foreclosure in relation to general entertainment channels.

6.1.3.2. The Notifying Party's view

(149) The Notifying Party submits that the merged entity would lack the ability to engage in input foreclosure. It argues that the Parties' combined share is limited in all Member States where Sky is active and considers that none of Comcast's channels can be considered to constitute important inputs to downstream competitors. The Notifying Party also indicates that there will remain a sufficient number of wholesale competitors for downstream rivals to have access to alternative inputs, especially in the general entertainment segment where major broadcasters like Fox, Time Warner, UKTV, Viacom ad Discovery will continue to compete after the Transaction.

(150) In addition, the Notifying Party indicates that the merged entity would lack the incentive to cease making Comcast's channels available to downstream competitors. It argues that the limited increment brought about by the Transaction would not suffice to modify the merged entity's incentives. The Notifying Party indicates that Comcast's current incentive to [*Business secret redacted regarding Comcast's sales policy*] will remain unchanged by the Transaction. Moreover, it notes that, despite already being vertically integrated, Sky has not foreclosed its downstream rivals' access to its wholesale TV channels in the UK and Ireland, and its incentive in that regard will not change as a result of the Proposed Transaction.

(151) Finally, the Notifying Party considers that Comcast's channels do not just compete with other general entertainment channels, but also with channels broadcasting different thematic content. Because the merged entity's position in

56 The Notifying Party has only provided market share estimates for all pay-TV channels and were unable to provide market share estimates limited to pay TV-only news channels, due to the limited size of this market in Germany and Austria. However, no respondent to the market investigation identified any input foreclosure risk in relation to CNBC.

other genres would remain unaffected by the Transaction, the Notifying Party argues that any hypothetical customer diversion as a result of input foreclosure can be expected to be very limited. As a result, according to the Notifying Party, the merged entity's incentives would not be changed by the Transaction and any putative impact on competition would be immaterial.

6.1.3.3. The Commission's assessment - UK and Ireland

(a) Ability to engage in input foreclosure

(152) As set out above in Tables 4 and 5, with regard to the wholesale supply of basic pay TV channels:

(a) in the UK, the Parties have a combined market share of [*30-40*]% by revenue (Sky: [*20-30*]%; Comcast: [*5-10*]%) and [*30-40*]% by audience share (Sky: [*20-30*]%; Comcast: [*5-10*]%);

(b) in Ireland, the Parties have a combined market share of [*10-20*]% by revenue (Sky: [*10-20*]%; Comcast: [*0-5*]%) and [*20-30*]% by audience share (Sky: [*10-20*]%; Comcast: [*5-10*]%).

(153) As Comcast does not wholesale any premium pay-TV channels there is no overlap in this regard.

(154) In respect of the merged entity's ability to engage in input foreclosure, respondents to the market investigation consider that Sky holds a leading market position and "*must have*" channels. As concerns the Notifying Party, although a number of respondents consider that Comcast does have bargaining power, there is no indication that there would remain insufficient substitutes to its channels in the market after the Transaction.

(155) When considering a potential sub-segment for general entertainment pay-TV channels, the Parties market shares are higher, as indicated in Tables 4 and 5 above. However, close competitors with audience shares higher or similar to Comcast's channels would remain active in the market in both the UK and Ireland (UKTV, with [*20-30*]% in the UK and [*10-20*]% in Ireland, Fox with [*10-20*]% in the UK and [*5-10*]% in Ireland).

(156) The availability of alternatives is further supported by the market investigation which showed that several TV channels, which will remain available post-transaction, are close competitors to Comcast's main channels, Universal Channel and SyFy. Close competitors to Universal Channel and SyFy include Fox (21CF), W and Alibi (both UKTV). This result confirms the Parties' own assessment of closeness of competition and singles out channels whose audience is either higher or on par with Comcast's.

(157) Based on the above, the Commission considers that the merged entity is unlikely to have the ability to foreclose competing TV distributors in the UK and Ireland post-transaction.

(b) Incentive to engage in input foreclosure

(158) Several 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 providers of TV retail services, or to degrade the terms and conditions to which it provides access.[57]

(159) However, 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 Transaction is therefore limited to Comcast's channels. As noted above, Comcast's market share in the wholesale supply of TV channels is limited and the merged entity's incentives will therefore not be significantly changed as a result of the Transaction.

(160) Moreover, despite being vertically integrated, Sky currently licenses basic general entertainment channels to competing distributors. There is no evidence on file to suggest that the change brought about by the Transaction would modify its overall incentive in this respect.

(161) In any event, given the lack of ability to foreclose, it is not necessary to conclude as to whether the merged entity will have the incentive to foreclose competing TV distributors in the UK and Ireland post-transaction.

(c) Impact on effective competition

(162) 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.

(163) As detailed above in paragraph (156) there are several providers of basic pay-TV channels that closely compete with Comcast's channels and 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 sufficient alternative inputs.

(d) Conclusion

(164) 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. Germany and Austria

(a) Ability to engage in input foreclosure

(165) As noted above in paragraph (80), Sky does not supply channels on a wholesale basis to retail TV distributors in Germany and Austria as it has adopted a self-retail model. Therefore, Sky's channels do not generate wholesale carriage

57 Replies to Questionnaire Q3 to TV distributors of 7 May 2018, questions C8 and C9.

revenues and revenue-based market share estimates are unavailable. The present assessment will thus rely on audience shares. However, due to Sky's lack of wholesale activity, the audience of Sky's channels has been excluded from wholesale market share calculations. Finally, the Notifying Party has been unable to provide market share estimates for Austria alone, but considers that its position in that country is not materially different than its position in Germany, such that market share data provided for Germany provide an adequate proxy for its market share in Austria. On this basis, Comcast holds a [*10-20*]% audience share in basic pay-TV channels, and [*20-30*]% of the general entertainment segment in Germany and Austria.

(166) Several respondents to the market investigation indicate that Comcast's channels are important inputs to compete. This is particularly true with respect to 13th Street, the channel generating the most audience out of Comcast's portfolio, with an [*10-20*]% audience share among all basic pay-TV channels. Several respondents thus claim that Comcast's channels constitute important inputs and indicate that their thematic content (general entertainment) is among the most popular in basic pay TV.

(167) According to respondents to the market investigation, 13th Street and SyFy, which make up the bulk of Comcast's market share, compete most closely with Fox (21CF), RTL Crime (RTL), TNT Serie and TNT Film (both Time Warner). This assessment is consistent with the Notifying Party's views. According to the Notifying Party's analysis in terms of content and on the basis of customer surveys, in both Germany and Austria [*channel names*] are 13th Street closest competing channels and [*channel names*] are SyFy's closest competitors.

(168) On the wholesale basic pay TV market, Fox Serie's audience share amounts to [*5-10*]%, TNT Serie [*0-5*]% and RTL Crime [*5-10*]%. Taken individually, these channels have lower audience shares than 13th Street ([*10-20*]%) but have higher to equivalent audience shares as SyFy ([*5-10*]%). However, the combined audience share of Fox Serie, TNT Serie and RTL Crime ([*10-20*]%) is slightly higher than the combined audience share of 13th Street and SyFy ([*10-20*]%). Other TV channels providing access to general entertainment content and TV series include: TNT Film, Romance TV and RTL Crime.

(169) In order to assess whether 13th Street and SyFy should be considered as particularly important for TV distributors, more than their audience share could suggest, the Commission requested the Parties to provide viewer shares based on different parameters.[58] Table 8 summarizes such information in relation to the total viewing, continuous viewing and prime time viewing of Comcast's channels and their closest competitors in Germany and Austria.

[58] In line with M.7194 - *Liberty Global/Corelio/W&W/De Vijver Media*, the Commission requested viewership data based on (i) total viewing time per month, (ii) continuous viewing time per month and (iii) prime time viewing time per month. For each (i), (ii) and (iii), the Parties submitted data for (a) 6 minutes, (b) 30 minutes, (c) 60 minutes, (d) 180 minutes. Table 8 presents a summary of the data provided.

Table 8 - Viewership data of basic pay-TV general entertainment channels in Germany

Channel	total time 30 min	N.	total time 180 min	N.	continuous time 30 min	N.	Viewers continuous time 180 min	N.	prime time 30 min	N.	prime time 180 min	N.
TLC	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
13th Street	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Fox Serie	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
RTL Crime	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
SyFy	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
TNT Serie	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

Source: Notifying Party using third parties reports

(170) Although Table 8 above only lists Comcast's channels and the closest competing channels, the ranking provided is out of all basic general entertainment channels, including Sky-branded channels that are solely self-distributed on Sky's platform. As indicated, within its competitor group, 13th Street systematically ranks [*redacted*], when considering several viewership data: (i) total time viewed within a month, (ii) continuous time viewed within a month, and (iii) prime time viewed within a month. For each of these three measures, the Notifying Party provided data that rank the channels in terms of viewers who watched the channel for 6 min or longer, 30 min or longer, 60 min or longer and 180 or longer within a month. SyFy has a significantly lower ranking.

(171) Among general entertainment channels, the [*redacted*] TLC, a channel broadcasted by Discovery. TLC's content, which mainly consists of reality shows, differs from Comcast's channels. TLC is therefore not a close competitor to Comcast, as confirmed by both the Notifying Party and the results of the market investigation.

(172) Among 13th Street's close competitors within general entertainment, Fox Serie is systematically the [*redacted*] viewed channel, all categories of viewership included. The performance and ranking of RTL Crime and TNT Serie varies depending of the viewership category. However, these channels' ranking in relation to both 13th Street and SyFy's confirms that there currently exists a close competing relationship between these channels.

(173) In addition, the Notifying Party has provided data indicating that the [*redacted*] content on its channels (representing [*redacted*] of 13th Street and SyFy's total viewing) are not exclusive to Comcast and are also available to viewers on other TV channels. Therefore, Comcast's channels do not constitute crucial inputs to competing distributors.

(174) The Notifying Party has provided data according to which the top [*redacted*] TV series broadcasted on 13th Street and SyFy, which represent [*redacted*] of these channels' viewing, is not exclusive against FTA channels. Furthermore, Comcast's channels [*Confidential information redacted relating to content licensing rights*].

(175) Based on the above, despite their strong position in basic pay TV, the audience and viewership of Comcast's channels is at least matched by the combined audience and viewership of the three closest competitors. Given that these competitors will remain available post-Transaction, the Commission considers that the merged entity would not have the ability to foreclose its downstream rivals.

(b) Incentive to engage in input foreclosure

(176) The Notifying Party argues that it would lack the incentive to foreclose access to its channels in Germany and Austria as this would adversely impact the revenues generated from Comcast's carriage agreements. In this regard, the Notifying Party notes that Sky accounts for only [*redacted*]% of its carriage revenues in Germany and Austria and argues that input foreclosure would not result in material diversion from rivals to Sky at the downstream level. The Notifying Party concludes that additional retail revenues would not outweigh wholesale losses and that input foreclosure would therefore be unprofitable.

(177) The Notifying Party provides no relevant data to support its arguments. In the absence of diversion and margin evidence and given the disproportionate importance of Sky's downstream revenues in relation to Comcast's carriage revenues, it cannot be assumed that reserving Comcast's channels to Sky's platform would be unprofitable for the merged entity.

(178) In addition, although, as indicated above in paragraphs (165) to (175) the merged entity will lack the ability to foreclose downstream rivals given that significant competitors will remain active at the wholesale level, Comcast's market shares both in relation to all basic pay TV and in general entertainment are material. It therefore cannot be excluded that the Transaction will have an impact on the merged entity's incentives.

(179) The Notifying Party also emphasizes that, as the Commission observed in its decision in case M.8354 – *Fox/Sky*, Sky Deutschland was previously controlled by 21CF which did not refuse to supply its TV channels to third parties despite being vertically integrated. The Notifying Party thus considers that, under the Commission's Non-Horizontal Merger Guidelines, 21CF's prior strategy constitute evidence that the merged entity's incentives would be no different.

(180) However, as explained in recital 45 (footnote 7) of the Commission's Non-Horizontal Merger Guidelines, past strategies adopted by competitors in relation to input foreclosure may be taken into account for the purpose of the competitive assessment in situations where these competitors held "*a similar market position*". This is not the case in the present instance as the Notifying Party's market share is twice as important as 21CF's market share.

(181) In any event, given the lack of ability to foreclose, it is not necessary to conclude as to whether the merged entity will have the incentive to foreclose competing TV distributors in the Germany and Austria.

(c) Impact on effective competition

(182) 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.

(183) As detailed above in paragraphs (165) to (175), the number of competing channels that will continue to be available to downstream competitors post-Transaction is sufficient to enable them to compete. The combined audience and viewership of channels that compete most directly with Comcast's main channels, 13th Street and SyFy, equate or exceed Comcast's audience and viewership.

(184) Given the continued availability of channels that compete closely with Comcast's and represent significant viewership within the narrow segment of basic general entertainment pay TV channels, even in the event of input foreclosure, it is unlikely that downstream rivals would be significantly impacted and unable to compete effectively post-merger.

(d) Conclusion

(185) 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. Italy

(186) In respect of the merged entity's ability to engage in input foreclosure, as explained above in paragraph (80), Sky does not supply channels on a wholesale basis to retail TV distributors in Italy whereas Comcast supplies Studio Universal and CNBC. With respect to Studio Universal, the Notifying Party estimates that it has a negligible market share in Italy, both out of all basic pay TV channels and within the general entertainment segment.

(187) As a result of Comcast's negligible market share, the Transaction will bring no material change to the merged entity's incentives. In any event, for the same reason, were the merged entity to distribute Studio Universal exclusively on Sky's platform, this would have no appreciable impact on competition.

(188) In light of the above, the Commission considers that the 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

(189) The Proposed Transaction combines Comcast’s and Sky’s content with their respective downstream activities as acquirers of content for their TV channels and Sky’s downstream activities as a pay-TV retailer.

(190) 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.[59]

(191) 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.

6.2.2. Supply of TV content

6.2.2.1. Introduction

(192) 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 be 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

(193) The Notifying Party argues that post-Transaction, it would not have the ability to foreclose its upstream rivals for the following reasons: (i) there are multiple other downstream outlets to which upstream rivals could licence their content, including TV channels and OTT platforms such as Netflix and Amazon; (ii) Sky's multi-year output and other licencing agreements with suppliers would prevent the merged entity from ceasing to acquire content from its upstream rivals. Specifically as regards the downstream markets for the acquisition of sports content, the Notifying Party argues that there can be no prospect of customer foreclosure: although Sky is a significant acquirer of sports content in each of the vertically affected markets, it would not be possible for Sky to pursue a strategy of exclusively sourcing its sports content from NBCU, given NBCU’s activity as a licensor in the EEA is negligible and only includes [*Business secret redacted relating to scope of Comcast’s sports content licensing activities*].

(194) The Notifying Party further submits that the merged entity would not have the incentive to stop acquiring content from other suppliers of TV content as its commercial success is based on the richness of the bundle of content and channels broadcast through its platform. In addition, while Sky could be considered as an important acquirer of film content, Comcast acquires very limited amounts of content.

(195) It submits that such a customer foreclosure strategy would have a limited impact on competition given: (i) the existence of multi-year output agreements; (ii) the existence of a sufficient number of credible alternative content acquirers which will remain post-merger; and (iii) the fact that the impact of the hypothetical loss

59 Non-Horizontal Merger Guidelines, paragraph 58.

of revenues from Sky and NBCU's European operations would not be sufficiently severe so as to render rival suppliers of content ineffective as competitors.

6.2.2.3. The Commission's assessment - UK and Ireland

(196) As noted above in paragraph (43), 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.

(197) Regardless of this question, the Commission considers that the 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

(198) 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.

(199) 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 9 below.

Table 9 - Market shares for acquisition of TV content in share - by total spend - UK and Ireland - 2017

	All TV content (%)	**All sports (%)**[60]	**All film (%)**	**Other TV content (%)**[61]
NBCU	[*0-5*]	[*0-5*]	[*0-5*]	[*0-5*]
Sky	[*40-50*]	[*50-60*]	[*50-60*]	[*10-20*]
Combined	[*40-50*]	[*50-60*]	[*50-60*]	[*10-20*]

Source: Annex 7.4, Form CO.

(200) 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: [*70-80*]%. In addition, Sky has a [*70-80*]% market share for US films and [*90-100*]% for US films in the first pay-TV window. The other purchasers of film rights in the UK and Ireland overall are 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: [*5-10*]%; Amazon: [*10-20*]%).

(201) Despite the importance of Sky as a purchaser of TV content, the Commission considers that it would have a limited ability to foreclose rivals by ceasing to

60 In the sub-segment of acquisition of all other sports content in the UK and Ireland, Sky has a market share of [*30-40*]%.

61 This concerns all licenced other TV content. The Parties' market shares for the segment of licenced pre-produced other TV content are not materially different.

purchase from them and exclusively relying on the content of NBCU post-transaction, for the following reasons.

(202) First, NBCU has an extremely limited market position in the UK and Ireland with regard to the supply of sports rights (less than [*0-5*]% share by revenue in 2017 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 NBCU in the UK and Ireland.

(203) Second, the results of the market investigation indicate that a 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 terms on which it acquires their TV content.[62] Therefore, the merged entity would have no ability to restrict the access of rival upstream licensors to downstream purchasers of those rights given the multiple other outlets available to TV content licensors. A broad range of other TV broadcasters and content platform operators compete to acquire TV content, each of which will continue to be credible purchasers of TV content post-Transaction, thus allowing rival upstream licensors to continue to operate efficiently.

(204) Third, Sky has multi-year output agreements and other licensing agreements in place with a wide range of rights holders. 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.

(b) Incentive to engage in customer foreclosure

(205) 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.

(206) 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.[63] On this basis, the merged entity would not have the incentive to cease purchasing content from upstream competitors. Sky does not limit its offering to NBCU film content, including its entire output of new films but it purchases similar premium film content also from NBCU's competitors.

(207) A majority of the 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 NBCU or stated that they considered it unlikely that the merged

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62 Replies to Questionnaire Q1 to TV rights holders of 7 May 2018, question C.9. As to the comment made during the market investigation that there may not be actual demand from such alternatives in the first pay-TV window for movies, as claimed by a respondent to the market investigation, the Commission notes that when considering the ability to foreclose upstream rivals, the Commission may also take into account potential demand (see Non-Horizontal Merger Guidelines, paragraph 61).

63 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.

entity would cease licensing content from third parties all together.[64] Among the latter category of respondents, a major content supplier noted that "*consumers generally prefer a broad selection of content, so [we consider] that a broadcaster is likely to maintain such a broad selection (including content of third parties)*".

(208) In this regard, the Commission notes that over the past three years, Sky has had output agreements with [*business secret re. sources of supply redacted*] major US film studios for the UK and Ireland. Therefore, any strategy by the merged entity that reduced the number of licensor relationships would likely be detrimental to Sky's downstream TV channel and TV retail business.

(209) 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.

(210) 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 merged entity would not have the incentive to partially foreclose its upstream rivals.

(c) Impact on competition

(211) 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: a broad range of other TV broadcasters and content platform operators compete to acquire TV content, each of which will continue to be credible purchasers of TV content post-Transaction thus allowing rival upstream licensors to continue to operate efficiently. 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 the UK or Ireland.

(d) Conclusion

(212) 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. The Commission's assessment - Germany and Austria

(213) As noted above in paragraph (43), 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 on linguistic region.

64 Replies to Questionnaire Q1 to TV rights holders of 7 May 2018, question C.6.4.

(214) 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

(215) In the first instance, the market shares indicate that Sky is an important purchaser of sports and film TV content in Germany and Austria, as shown in Table 10 below where Sky has a pre-transaction market share of [*30-40*]% for sports rights and a share of [*20-30*]% for films.

Table 10 - Market shares for acquisition of TV content – by total spend – Germany and Austria - 2017

	All sports (%)	**All film (%)**
NBCU	[*0-5*]	[*0-5*]
Sky	[*30-40*]	[*20-30*]
Combined	[*30-40*]	[*20-30*]

Source: Annex 7.4, Form CO.

(216) 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*]% by revenue. Sky's market share is slightly lower than that in the sub-segment of US films in the first pay-TV window ([*60-70*]%).

(217) Despite the importance of Sky as a purchaser of TV content for sports and 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 NBCU for the following reasons.

(218) The arguments articulated in relation to the UK and Ireland are also applicable in this market.

(219) First, with regard to sports rights, NBCU has an extremely limited market position in Germany and Austria ([*0-5*]%) and the Parties have a combined share for the licencing of sports of [*0-5*]%. It is therefore not possible for Sky to exclusively rely on the sports rights licenced by NBCU in Germany and Austria.

(220) Second, as noted above in with regard to the UK and Ireland, a broad range of other TV broadcasters and content platform operators compete to acquire TV content, each of which will continue to be credible purchasers of TV content post-Transaction, thus allowing rival upstream licensors to continue to operate efficiently.

(221) 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.

(b) Incentive to engage in customer foreclosure

(222) As noted with regard to the UK and Ireland in paragraphs (205) to (210) 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.[65]

(c) Impact on competition

(223) 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: a broad range of other TV broadcasters and content platform operators compete to acquire TV content, each of which will continue to be credible purchasers of TV content post-Transaction thus allowing rival upstream licensors to continue to operate efficiently. Moreover, due to its existing output agreements, 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 the Germany or Austria.

(d) Conclusion

(224) 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. The Commission's assessment - Italy

(a) Ability to engage in customer foreclosure

(225) In the first instance, the market shares indicate that Sky is an important purchaser of TV content in Italy as shown in Table 11 below.[66]

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65 With respect to the agreements with major US films studios for Germany and Austria, the Commission notes that Sky has had output agreements with [*business secret re. sources of supply redacted*] major US film studios over the past three years.

66 Vertically affected markets arise in Italy as regards the licensing/acquisition of all sports content and the licensing/acquisition of other sports content, due to NBCU's presence as a licensor of other sports content in Italy ([*Business secret redacted relating to scope of Comcast's sports content licensing activities in Italy*]). However, given the [*Business secret redacted relating to scope of Comcast's sports content licensing activities in Italy*], customer foreclosure is not likely in these segments. Therefore these market segments are not further discussed in the present Section.

Table 11 - Market shares for acquisition of TV content – by total spend – Italy - 2017

	All TV content (%)	All film (%)
NBCU	[*0-5*]	[*0-5*]
Sky	[*20-30*]	[*30-40*]
Combined	[*20-30*]	[*30-40*]

Source: Annex 7.4, Form CO

(226) 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 [*40-50*]%.

(227) With regard to TVOD/PPV rights, Sky is an important player ([*40-50*]%) with a number of other players purchasing a more limited amount of movies rights for this distribution platform (iTunes: [*10-20*]%; TimVision: [*5-10*]%).

(228) Despite the importance of Sky as a purchaser of film content, the Commission concludes that it would have a limited the ability to foreclose rivals by ceasing to purchase from them and exclusively relying on the content of NBCU.

(229) 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 NBCU'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.

(b) Incentive to engage in customer foreclosure

(230) As noted above with regard to the UK and Ireland in paragraphs (205) to (210), 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.[67]

(231) In particular, as noted above in with regard to the UK, Ireland, Germany and Austria, a broad range of other TV broadcasters and content platform operators compete to acquire TV content in Italy, each of which will continue to be credible purchasers of TV content post-Transaction, thus allowing rival upstream licensors to continue to operate efficiently.

67 With respect to the agreements with major US films studios Italy, the Commission notes that Sky has had output agreements with [*business secret re. sources of supply redacted*] major US film studios over the past three years.

(c) Impact on competition

(232) 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: a broad range of other TV broadcasters and content platform operators compete to acquire TV content, each of which will continue to be credible purchasers of TV content post-Transaction thus allowing rival upstream licensors to continue to operate efficiently.

(233) 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

(234) 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

(235) 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 Comcast's TV channels.

(236) 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.

(237) Pay TV providers have to offer a diverse portfolio of channels in order to maximise their attractiveness for a large number of viewers. The risk of broad foreclosure strategy not targeting closely competing channels with Comcast's channels, but foreclosing also channels that are not close competitors to Comcast's channels can therefore be excluded at the outset. In the following Section 6.2.3.2, the Commission identifies those closely competing channels which could potentially be the target of customer foreclosure.

6.2.3.2. Potential targets of customer foreclosure

(238) Comcast broadcasts general entertainment channels and CNBC, a business news channel. CNBC is available free-to-air ("FTA") in the UK, Ireland and Italy. In Germany and Austria, its audience share is negligible such that customer

foreclosure can be excluded. The below analysis will thus focus on customer foreclosure in relation to general entertainment channels.

(239) In the general entertainment genre, Comcast broadcasts Universal Channel, Syfy, E! in the UK, Ireland, Germany and Austria; as well as Movies 24 in the UK and Ireland; 13th Street in Germany and Austria; and Studio Universal in Italy.

(240) 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 Comcast's channels.

(241) As noted in paragraphs (156) and (167) above in relation to the UK, Ireland, Germany and Austria, Comcast's channels can be considered to closely compete with the following:

(a) In the UK and Ireland: close competitors to Universal Channel and Syfy include Fox (21CF), W and Alibi (both UKTV);

(b) In Germany and Austria: 13th Street and Syfy can be considered to closely compete with Fox (21CF), RTL Crime (RTL), TNT Serie and TNT Film (both Time Warner).

(242) In addition, the Notifying Party submits that Universal Channel closely competes with TNT Serie (in Germany); E! closely competes with MTV (Viacom) and TLC (Discovery) (both in the UK and Ireland) and Sixx (ProSieben Sat)(Germany and Austria); and Movies24 closely competes with TCM (Time Warner) (UK and Ireland).

(243) Finally, in Italy, the Notifying Party states that Studio Universal, the sole general entertainment channel wholesaled by Comcast, has a negligible audience: while there are no close competitors to Studio Universal, channels with similar content include: FOX, Viacom A+E Crime and Investigation, Gambero Rosso.

6.2.3.3. The Notifying Party's views

(244) The Notifying Party submits that the merged entity would have no ability to totally or partially foreclose rivals as there are other TV retailers competing to purchase broadcasting rights in each of the relevant Member States. In addition, because Sky has entered in multi-year carriage agreements, wholesale suppliers would be protected against any attempt by the merged entity to impede access to its retail platform. Furthermore, the merged entity would lack the ability to partially foreclose competing channels due to regulatory and contractual protections in favour of wholesale suppliers.

(245) Furthermore, the Notifying Party argues that Sky's product offering relies on content diversity, such that any degradation in its retail line-up, especially in general entertainment, would only benefit its competitors. The Notifying Party notes that any benefits from total or partial customer foreclosure in the form of increased viewership of NBCU and Sky channels on Sky's platform would be speculative and minimal in comparison to Sky's much greater downstream subscription revenues. Accordingly, the Notifying Party submits that it would be commercially irrational for the merged entity to fully or partially foreclose competing TV channels.

(246) The Commission's assessment of customer foreclosure risks in each of the relevant territories is set out below.

6.2.3.4. The Commission's assessment - UK and Ireland

(247) From the outset, the Commission recalls that 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 limited to the addition of Comcast's TV channels.

(a) Ability to engage in customer foreclosure

(i) Sky's importance as a distribution platform

(248) At the outset, 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.

(249) Downstream, Sky has a market share of [*30-40*]% in the UK and [*40-50*]% in Ireland for the acquisition of TV channels.[68] 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 [*60-70*]% in the UK and [*60-70*]% in Ireland.[69] Sky's platform allows broadcasters to access [*30-40*]% of pay-TV subscribers in the UK and [*40-50*]% in Ireland. [70]

(250) Several TV channel suppliers consider that distribution on Sky is very important to them given Sky's position as a pay-TV platform with a large customer base resulting in higher audiences and accompanying revenues.[71] Several TV broadcasters also indicated that the majority of their revenues are derived from distribution on Sky's platform.[72]

(ii) Ability to engage in total foreclosure

(251) As to the extent of Sky's bargaining power, the results of the market investigation were mixed. While the majority of wholesale suppliers of TV channels in the UK and Ireland consider that Sky currently does not have significant bargaining power, a small but significant minority of them considered that Sky has such bargaining power.[73] Furthermore, market participants do not expect new entry at the retail level in the UK or Ireland offering a distribution scale comparable to Sky.[74]

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68 Form CO, Table 25.
69 Form CO, Annex 7.4, Tables 38.1 and 38.2.
70 Form CO, Annex 7.4, Tables 38.6 and 38.7.
71 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.4.1.
72 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.3.
73 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.4.
74 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.10 and D.11.

(252) The market investigation did not provide reasons to consider that switching to FTA distribution and self-retailing on Sky's platform would constitute viable alternative supply options for broadcasters.[75]

(253) In any event, the Commission considers that the following factors militate against a finding of ability on the part of Sky to engage in full foreclosure of Comcast's closely competing channels Fox, W, Alibi, MTV, TLC or TCM.

(254) First, Sky's carriage agreement with [*company name*] will not expire until [*term time*] and termination by Sky is only possible in very specific and limited circumstances; [*company name*] carriage agreements will not expire until [*term time*] and termination by Sky is only possible in very specific and limited circumstances. Therefore, an ability on the part of Sky to foreclose [*company names*] cannot be held to arise in light of the applicable contractual provisions.

(255) Second, despite limited retail market shares, alternative purchasers in the UK and Ireland represent a material share of acquisition of licensing rights: namely Liberty Global, BT and Talk Talk in the UK (respectively [*50-60*]%, [*5-10*]% and [*5-10*]% of shares in the acquisition of TV channels) and Liberty Global, Eir and Setanta in Ireland (respectively [*40-50*]%, [*10-20*]% and [*5-10*]%). Therefore, a strategy of ceasing to purchase from competing wholesale TV channel suppliers would still leave broadcasters with the possibility to access a material portion of the market.

(256) In light of the above, the Commission considers that overall the merged entity would lack the ability to engage in the total customer foreclosure strategies considered above.

(iii) Ability to engage in partial foreclosure

(257) The market investigation indicated that a small majority of respondents in the UK and Ireland consider that the merged entity will be able to degrade distribution terms in particular by diminishing carriage fees.[76] UK-based broadcasters are also concerned with EPG slot degradation and Sky pushing for its own content over the Sky Q interface although respondents also emphasize that Sky's UK EPG listing is subject to regulation and adheres to its published methodology.[77]

(258) As indicated above, however, the only merger specific element pertinent to the present assessment of partial foreclosure is the addition of Comcast's channels. Comcast's general entertainment channels comprised just [*redacted*]% of all

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75 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 *Fox / Sky* (paragraph 308), the Commission noted that 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.

76 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.6.

77 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.7.

viewing on Sky's platform in 2015 to 2017, which is lower than the channels of UKTV, Viacom and Discovery.[78]

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

(260) As regards potential partial foreclosure via a reduction of carriage fees, the Commission notes that [*details of Sky carriage agreements including term*]. This therefore affords protection in relation to [*supplier names*] carriage fees revenue until at least the expiry of those contracts.

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

(262) 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.[79]

(263) 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, 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.[80] 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.

(264) The Commission considers that in light of these regulations in the UK, the merged entity would not be able to foreclose Comcast's closely competing channels via EPG degradation in the UK without infringing regulation which would expose it to significant penalties, as described below in paragraph (280).

(265) 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.

(266) The Commission has also considered partial foreclosure via the Sky Q set top boxes, which Sky has introduced in the UK and Ireland. The Sky Q set-top box provides users with new services available on its interface, including "Home" (previously "My Q") an application listing content available to subscribers based on the type of content that they have been watching, using algorithms determined

78 Reply to RFI 4, page 57.

79 See Form CO, paragraph 364.

80 See Form CO, paragraph 365.

by Sky to suggest viewing recommendations. The criteria used to select content and channels through these algorithms are not subject to regulation.

(267) 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 in the UK, and [*number of Sky Q box subscribers*] in Ireland have Sky Q box. This amounts to c. [*redacted*]% and [*redacted*]% of Sky subscribers in respectively the UK and Ireland.[81] Moreover, the Sky Q box does not present channels only via the Home application. On the contrary, the Sky EPG is positioned at the top of the list of options in the Sky Q box menu, above the My Q application. Data submitted by the Parties regarding the Sky Q box also indicates that [*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 Home (previously My Q) function of Sky Q, nor a material likely impact on effective competition if the ability of Sky to partially foreclose via the Home (previously My Q) function of Sky Q were to be assumed.

(268) Furthermore, the Commission notes that, based on the Notifying Party's submission, [*confidential information about the functioning of the "Home" section*]. On this basis, the Commission considers that a partial foreclosure via the Sky Q set top boxes can be excluded.

(269) Finally, contractual commitments also restrict the way in which Sky makes available non-Sky VOD content on its on-demand platform in the UK and Ireland.[82]

(270) 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

(271) The Commission has assessed the likelihood of full foreclosure in the UK and in Ireland.

(272) First, the majority of the UK and Irish broadcasters are not concerned that the transaction would result in full customer foreclosure: they consider that the merged company would probably carry on licensing third party TV channels as the separate companies do today and would not stop sourcing TV channels from third parties, and exclusively rely on its own TV channels.[83] In this regard, a broadcaster noted that the merged entity was more likely to maintain a broad selection of channels (including of third parties) given that consumers generally prefer a wide selection of channels.

81 Form CO, Table 28.

82 According to the Notifying Party, Sky has provided guarantees in its carriage agreements with each of [*company names*] with regard to [*details of guarantees included in Sky's carriage agreements*].

83 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.5.

(273) Second, a number of Sky's internal documents indicate that [*description of Sky's internal documents*].[84] The Notifying Party states that offering a wide variety of channels is particularly important for a premium pay-TV operator such as Sky, which needs to justify its tariff structure to subscribers in order to ensure they do not switch away to more cost-effective alternatives. Notably, in this respect, while UKTV (W and Alibi) 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.

(274) Third, given NBCU's limited presence as a wholesale supplier of TV channels, representing less than [*redacted*]% of viewing share on Sky's retail platform[85], the Proposed Transaction is unlikely to bring about changes in the merged entity's incentives in its purchasing of TV channels from other wholesaler suppliers.

(275) Fourth, the closest competitors of NBCU in the general entertainment genre are major TV broadcasters that typically supply a popular suite of channels to Sky's retail platform, including in respect of channels outside of the general entertainment segment and in respect of content used by Sky on its own TV channels. The importance of Sky's commercial relationships with broadcasters renders a hypothetical wholesale foreclosure strategy in the basic pay-TV general entertainment segment risky as the affected broadcasters could retaliate on the basis of commercial relationships in other markets.

(a) For example, UKTV, which is a close competitor to Universal Channel and Syfy in the UK and Ireland, has an audience share in general entertainment of [*20-30*]% in the UK and [*10-20*]% in Ireland. Therefore, the Commission considers it unlikely that Sky would be incentivised to foreclose UKTV's channels to benefit the Universal and Syfy channels, which represent a less significant proportion of the genre in the UK and Ireland. Moreover, the Notifying Party submitted an internal document of Sky, indicating that "[*quote from Sky's internal document*]".[86]

(b) Another example is Viacom, the owner of MTV, which is a close competitor to E! in the UK and Ireland. At group level, Viacom supplies a broad range of channels to Sky's retail platform, including other key general entertainment channels like Comedy Central. Its share of audience is greater than that of all NBCU channels in aggregate in the UK and in Ireland, thereby demonstrating its importance to Sky.

(c) Discovery, the owner of TLC which is a close competitor of E!, is an important wholesale supplier of Sky in the UK and Ireland, particularly in the factual genre. In the UK, Discovery accounts for an audience share of [*5-10*]% in the segment for all basic pay-TV and of [*10-20*]% by audience in Ireland. Its importance to Sky in the factual genre has been acknowledged in the *Fox/Sky* decision.

(d) Time Warner, the owner of TCM, which competes closely with NBCU's Movies 24 in the UK and Ireland, is an important input across the

84 Response to RFI 4, page 56.
85 Form CO, Table 26.
86 Response to RFI 4 of 4 June 2018, question 17, Annex 17.2.

spectrum of Sky’s retail offering and particularly in film content licensing. The Notifying Party submits that [*details about Sky’s negotiating power*].

(276) Fifth, given Sky's subscription revenues largely outweigh Comcast's wholesale revenues, the adoption of a customer foreclosure strategy which would risk deteriorating Sky's offering in the hope of improving Comcast's upstream revenues does not appear to be profitable. Although the Notifying Party did not provide an assessment of the amount of customer diversion that would result from foreclosing competing channels nor quantifies the resulting gains for Comcast, the difference between NBCU's 2017 revenue from its wholesale operations (UK: EUR [*redacted*]; Ireland: EUR [*redacted*]) and total subscription revenues for Sky (UK: EUR [*redacted*]; Ireland: EUR [*redacted*]) appears significant.

(277) Furthermore, if a foreclosure strategy were to focus on certain but not all of Comcast's competitors, any resulting diversion of audience would also benefit Comcast's competitors that would remain on Sky's platform, reducing the prospective benefit of such a strategy.

(278) In light of the above, the Commission considers that overall the merged entity would lack the incentive to engage in the total customer foreclosure strategies considered above.

(ii) Incentive to engage in partial foreclosure

(279) 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.[87] 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 increase the merged entity's own channel portfolio, it will also increase this incentive.[88]

(280) In the UK, as explained above, there are strict restrictions on Sky’s (and therefore the merged entity’s) ability to degrade the way in which wholesalers’ TV channels appear on its platforms. The regulatory regime preventing Sky from degrading other wholesalers’ TV channels acts as a deterrent to its incentives, not least given the potential remedies that the relevant communications authorities can impose are stringent, including, the revocation of Sky’s licence. Such sanctions are significant potential costs that reduce the merged entity’s incentive to degrade the way in which it partners with third party wholesalers. The information submitted by the Notifying Party indicates that Sky has never been found in breach of this regulation.[89]

(281) As regards degradation via My Q on Sky's "Sky Q," as indicated above in paragraph (267), viewing data for Sky Q subscribers from March 2018 show that [*Sky confidential internal analysis*]. Therefore, the role that alternative program recommendation tools play remains [*redacted*] to date, thus providing little incentive for Sky to use this tool to divert viewing to Comcast's channels.

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87 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.6.

88 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.6.2.

89 See Form CO, paragraph 363.

(282) 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.

(283) In light of the above, the Commission considers that overall the merged entity would lack the incentive to engage in the partial customer foreclosure strategies considered above.

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

(284) In *Fox / Sky*, the Commission noted that given Sky's importance as a distributor of pay-TV services, Sky appears to be an important source of advertising and carriage revenues.[90] The market investigation did not provide indications that this would no longer be the case. UK broadcasters have stated that being foreclosed from Sky's platform would have a significant adverse impact on their revenues.[91]

(285) However, as indicated above, the agreements in place between Sky and wholesale TV channel suppliers 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 wholesale TV channel suppliers which may result from partial foreclosure via EPG degradation for wholesale TV channel suppliers' 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 wholesale TV channel suppliers, which may result from such a foreclosure strategy, is, in light of information on file and referred to above in paragraph (267), unlikely to be significant.

(286) In addition, Sky’s retail platform is not the only purchaser of general entertainment TV channels in the UK and Ireland, where Sky’s downstream share of TV channel acquisitions is in the range of [*30-40*]% ([*30-40*]% in the UK and [*40-50*]% in Ireland). In the event that Sky sought to cease carrying third party channels on its platform, a large proportion of the retail market would remain for third party wholesalers to access.

(287) 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

(288) 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.

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90 *Fox / Sky*, paragraph 338.

91 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.9.

6.2.3.5. The Commission's assessment - Germany and Austria

(289) From the outset, the Commission recalls that 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 only the addition of Comcast's TV channels.

(a) Ability to engage in customer foreclosure

(i) Sky's importance as a distribution platform

(290) Downstream, Sky has a market share of [*30-40*]% in Germany and [*40-50*]% in Austria for the acquisition of TV channels.[92] The Notifying Party estimates that Sky's share of all retail pay-TV services amounts to [*20-30*]% by revenue in each of Germany and Austria[93] (which makes Sky the leading pay-TV retailer in Germany by revenue and the second largest in Austria) and [*10-20*]% by subscribers in Germany and [*10-20*]% in Austria.

(291) However, as the Commission noted in its decision in case M.8354, *Fox/Sky*, other sources credit Sky with higher market shares by revenue, in the range of 50 to 60%.[94] While the Notifying Party disputes these estimates, it admits that Sky's position in the retail market in Germany and Austria has not changed significantly in the last two years.

(292) The results of the market investigation confirm that Sky's retail platform is significant to channel broadcasters, respondents to the market investigation having indicated that Sky is the biggest pay-TV platform in the German speaking territories.[95]

(ii) Ability to engage in total foreclosure

(293) 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.[96] Furthermore, a respondent noted that the revenues it derives from Sky exceeds the revenues of all other pay-TV platforms combined.

(294) As indicated above, the only merger specific element pertinent to the present assessment of full customer foreclosure is the addition of 13th Street and Syfy, Universal Channel and E!.

(295) 13th Street and Syfy can be considered to closely compete with Fox (21CF), RTL Crime (RTL), TNT Serie and TNT Film (both Time Warner); Universal Channel also with TNT Serie; and, E! with Sixx (ProSieben Sat). Comcast's general entertainment channels comprised just [*redacted*]% of all viewing on Sky's

92 Form CO, Table 25.

93 Form CO, Annex 7.4, Tables 38.3 and 38.4.

94 Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, recital 342.

95 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.4.1.

96 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.4.

platform in 2015 to 2017, which is lower than the channels TLC, TNT Serie and RTL Crime.[97]

(296) Sky's offering relies on a wide range of high quality content in order to satisfy customers' expectations. Accordingly, no respondent to the market investigation expressed a concern that Sky would cease licensing all third party channels. Therefore, customer foreclosure, if any, could not concern more than a few of Sky's current suppliers.

(297) In this context, Sky's carriage agreements with third party channel providers are typically [*duration of Sky's carriage agreements*]. In this respect, Sky currently has carriage agreements with providers [*names of suppliers and term of carriage agreements*], such that the merged entity's ability to foreclose these suppliers can be excluded.

(298) However, Sky' carriage agreement with [*supplier names*], which broadcast channels that closely compete with Comcast's channels, will terminate [*term of Sky's carriage agreements*].

(299) On this basis, while several elements will constrain the merged entity's ability to engage in total foreclosure, the Commission cannot rule out that the merged entity will have the ability to cease carrying a number of channels that compete closely with Comcast's in Germany and Austria.

(iii) Ability to engage in partial foreclosure

(300) A small majority of respondents fear that the merged entity will be able to degrade distribution terms, in particular by diminishing carriage fees or the granting of unfavourable EPG slots.[98]

(301) As indicated above, the only merger specific element pertinent to the present assessment of partial customer foreclosure is the addition of Comcast's channels to Sky's portfolio.

(302) 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.

(303) As regards partial foreclosure via lowering carriage fees, the Commission notes that Sky's ability to foreclose channels competing with Comcast's channels is strictly constrained by applicable contractual provisions. In this regard, the merged entity's ability to reduce carriage fees can be excluded in relation to broadcasters currently protected by multi-year agreements, as noted above in relation to total foreclosure.

(304) 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. Any changes to Sky's

[97] Reply to RFI 4, page 57.
[98] Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, questions D.6 and D.6.1.

EPG methodology in Germany are subject to mandatory prior notification to the State Media Authority. [99]

(305) In Austria, Sky employs an EPG listing methodology similar to the one implemented in Germany in order to comply with the Austrian EPG Regulation. The Austrian EPG Regulation removes any ability for the merged entity to deteriorate the EPG listings of third party wholesale channels. The regime is founded on the principle of non-discrimination. The Austrian Communications Authority (KommAustria) has significant powers to sanction Sky were any discriminatory behaviour substantiated (including the revocation of its licence to operate its Sky Sport Austria channel in the country).[100]

(306) A violation of those regulatory obligations would be easily detected by the interested party, which would likely complain with the competent regulatory authorities.

(307) 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 in the form of EPG degradation without infringing regulation which would expose it to significant consequences, as described below in paragraph (318).

(b) Incentive to engage in customer foreclosure

(i) Incentive to engage in full foreclosure

(308) The Commission has assessed the likelihood of full foreclosure in Germany and in Austria.

(309) While a number of German broadcasters are concerned that the merged entity might reduce its reliance on third party channels, albeit not for the totality of its line-up,[101] other broadcasters consider that the merged entity's incentives in relation to third party channels will not change as a result of the Proposed Transaction.[102] Therefore, no clear view on the merged ability's incentives to foreclose competing channels can be deducted from the market investigation.

(310) Given Comcast's limited presence as a wholesale supplier of TV channels, representing [*redacted*]% of viewing share on Sky's retail platform,[103] the Proposed Transaction is unlikely to bring about changes in the merged entity's incentives in its purchasing of TV channels from other wholesaler suppliers. Moreover, channels which compete closely with Comcast's channels (including TNT Serie and RTL Crime) have significant individual audience shares (of [*5-10*]% and [*5-10*]% respectively), demonstrating their importance as inputs to Sky's retail platform.

99 Form CO, paragraph 366.

100 See Form CO, paragraph 367.

101 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.5.

102 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.5.1.

103 Form CO, Table 26.

(311) Sky's internal customer surveys further demonstrate the importance of channels that closely compete with Comcast's for subscriber retention. Sky's 2017 survey results show that [*results of Sky's customer survey*].

(312) 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. Therefore, full foreclosure of competing channels TLC, TNT Serie and RTL Crime would be at odds with this.

(313) In addition, as noted by the Notifying Party, the closest competitors of NBCU in the general entertainment genre are major TV broadcasters that typically supply a popular suite of channels to Sky's retail platform, including in respect of channels outside of the general entertainment segment and in respect of content used by Sky on its own TV channels. The importance of Sky's commercial relationships with broadcasters renders a hypothetical wholesale foreclosure strategy in the basic pay-TV general entertainment segment risky as the affected broadcasters could retaliate on the basis of commercial relationships in other markets. In particular:

(a) [*Details of Sky's carriage agreement and on-going negotiation*].

(b) [*Details of Sky's carriage agreement*]. The Notifying Party submitted an internal document[104] showing [*details of a Sky internal document concerning viewership data*].

(314) Given that Sky's subscription revenues largely outweigh Comcast's wholesale revenues, the adoption of a customer foreclosure strategy which would risk deteriorating Sky's offering in the hope of improving Comcast's upstream revenues does not appear to be profitable. Although the Notifying Party did not provide an assessment of the amount of customer diversion that would result from foreclosing competing channels nor quantifies the resulting gains for Comcast, the difference between NBCU's 2017 revenue from its wholesale operations (Germany: EUR [*redacted*]; Austria: EUR [*redacted*]) and total subscription revenues for Sky (Germany: EUR [*redacted*]; Austria: EUR [*redacted*]) appears significant.

(315) If a foreclosure strategy was to focus on certain but not all of Comcast's competitors, any resulting diversion of audience would also benefit Comcast's competitors that would remain on Sky's platform, reducing the prospective benefit of such a strategy.

(316) In light of all the above, the Commission considers that overall the merged entity would not have the incentive to engage in total foreclosure of Comcast's competing channels in Germany and Austria as a result of the Proposed Transaction.

104 Response to RFI 4 of 4 June 2018, question 17, Annex 17.3.

(ii) Incentive to engage in partial foreclosure

(317) The results of the market investigation show that a number of German broadcasters are concerned about potential degradation of the terms and conditions for the acquisition of their channels and the granting of unfavourable EPG slots.[105]

(318) However, as noted above, EPG regulations in Germany and Austria require that broadcasters be treated fairly and in a non-discriminatory fashion. Under the applicable German regulation, in the event of an infringement of those obligations, the State Media Authority would 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. Similarly, 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.

(319) Furthermore, as noted in relation to total customer foreclosure, in Germany and Austria, FTA television remains more developed than pay-TV.[106] 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 Comcast's competing channels.

(320) In light of all the above, the Commission considers that overall the merged entity would not have the incentive to engage in partial foreclosure of Comcast's competing channels in Germany and Austria as a result of the Proposed Transaction.

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

(321) As indicated above, certain broadcasters' current distribution agreements with Sky in relation to Germany and Austria will protect them against total foreclosure until their term, thus safeguarding their position for the foreseeable future.

(322) As regards [*supplier names and term of carriage agreements*], these broadcasters generate significant licensing revenues from alternative sources. The evidence on file shows that these broadcasters do not generate the majority of their licensing revenues from Sky in Germany and Austria. Therefore, even in the event of total or partial foreclosure from Sky's retail platform, these broadcasters would continue to operate efficiently.

(323) 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.

105 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, questions D.6 and D.6.1.

106 The FTA audience in Germany in 2017 was [*10-20*] million, compared with [*0-5*] million for pay-TV (see Reply to RFI 4, para. 18.9))

(d) Conclusion

(324) 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 - Italy

(a) Ability to engage in customer foreclosure

(i) Sky's importance as a distribution platform

(325) Downstream, Sky represents [*90-100*]% of the total spend on the acquisition of TV channels.[107] In Italy, Sky's share of all retail pay-TV services amounts to [*70-80*]% by revenue and [*50-60*]% by subscribers. [108]

(326) A majority of respondents to the market investigation indicate that Sky currently has normal bargaining power, with negotiations being on an ordinary and equal footing. [109] However, a broadcaster expressed concern about Sky's large market position.

(ii) Ability to engage in total or partial foreclosure

(327) During the market investigation, Italian broadcasters raised concerns that the merged entity would engage in complete customer foreclosure of certain third party channels. [110]

(328) The only merger specific change which is to be considered in relation an assessment of customer foreclosure is the addition of Comcast's channel Studio Universal to Sky's channel portfolio.

(329) While some channels, i.e. FOX, Viacom, A+E's Crime and Investigation and Gambero Rosso do broadcast content that to some degree overlaps with that of Studio Universal, there are no third party channels closely competing with Studio Universal in Italy within the general entertainment segment.[111] Studio Universal typically broadcasts library film content and is therefore not a close substitute for subscribers seeking alternatives to other general entertainment channels such as FOX, Fox Crime, Comedy Central or Crime + Investigation (which focus on crime dramas and comedy series). The latter channels have higher audience shares than Studio Universal (which does not register as generating an audience share in the data available to the Parties[112]): Fox ([*50-60*]% audience share), Viacom ([*5-10*]% audience share) and Gambero Rosso ([*0-5*]% audience share), Discovery ([*0-5*]% audience share).[113]

107 Form CO, Table 25.
108 Form CO, Annex 7.4, Tables 38.5 and 38.10.
109 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.4.
110 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.5.
111 Reply to RFI 4, para. 17.18.
112 See Reply to RFI 4, para. 17.17, referring to Table 14 in Annex 7.4 to the Form CO.
113 Reply to RFI 4, para. 19.5.

(330) As in other countries, Sky's offering in Italy relies on a wide range of high quality content in order to satisfy customers' expectations. Accordingly, no respondent to the market investigation expressed a concern that Sky would cease licensing all third party channels. Therefore, customer foreclosure, if any, could not concern more than a few of Sky's current suppliers.

(331) In this context, Sky's carriage agreements with third party channel providers are typically [*duration of Sky's carriage agreements*]. In this respect, Sky's carriage agreements with the majority of its channel providers [*names of suppliers and term of carriage agreements*], such that the merged entity's ability to foreclose these suppliers can be excluded.

(332) However, Sky' carriage agreement with [*company name*], which broadcast channels that fall under the same thematic content as Comcast's channels, will terminate [*term of the carriage agreement and details of the commercial relation between the parties*]. Nevertheless, [*company name*] alone represents the majority of the audience of basic general entertainment channels in Italy, such that Sky would not be in a position to cease to distribute its channels without significantly deteriorating its offering.

(333) Furthermore, 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. In *Fox / Sky*, the Commission noted that in 2015 the pay-TV services represented only 36% of all retail television revenues in Italy, with FTA channels generating 64% of all revenues. Pay-TV retailers like Sky therefore have an overall incentive to improve pay-TV's penetration. The market investigation did not provide any indication that such an incentive would no longer exist. 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 channels with similar content as Studio Universal would be at odds with this.

(334) Therefore, in light of Studio Universal's marginal position and the importance of other channels within its thematic category, the merged entity does not appear to be in a position to cease carrying third party channels.

(335) As to partial foreclosure, the responses to the market investigation were mixed. Some broadcasters however, consider that the merged entity would degrade the terms and conditions of the acquisition of TV channels from third parties, in particular through worse contract terms.

(336) In relation to potential EPG degradation, the Commission notes that no formal EPG regulation exist in Italy. However, the Italian Communication Authority (AGCOM) may impose on operators the obligation to guarantee access to resources, including EPGs, on equitable, reasonable and non-discriminatory conditions, to the extent necessary to guarantee access to digital radio and TV services by end users. AGCOM has the power to intervene by imposing rules relating to access to EPGs in the event it identifies any distortions in the behaviour of TV operators that affect end users' ability to access TV services. A breach of these rules can result in a financial sanction of up to EUR 2.5 million, or up to 5% of the total turnover of a company with significant market power in the relevant market to which the breach refers.

(337) However, given the lack of formal EPG regulation, the Commission does not consider that these elements constitute factors liable to eliminate the potential risk of partial foreclosure.[114]

(338) In light of all the above, the Commission considers that overall the merged entity would not have the ability to engage in total foreclosure of Comcast's competing channels in Italy as a result of the Proposed Transaction. However, whilst there are elements which suggest a constraint on Sky's ability to engage in partial foreclosure, the Commission cannot rule out that the merged entity will have the ability to partially foreclose Comcast's closely competing channels in Italy as a result of the Proposed Transaction.

(b) Incentive to engage in customer foreclosure

(i) Incentive to engage in full foreclosure

(339) The Commission has assessed the likelihood of full foreclosure in Italy.

(340) During the market investigation, Italian broadcasters raised concerns that the merged entity would have an incentive to engage in customer foreclosure of certain third party channels.[115] Broadcasters have pointed out that Sky has decreased the number of third party licensed channels in Italy in the past 3 years while increasing promotional efforts for Sky-owned channels, thus forcing a number of channels to switch to an FTA model. Adding Comcast’s general entertainment channel to its portfolio would accelerate this trend.

(341) The only merger specific change which is to be considered in relation an assessment of customer foreclosure is the addition of Comcast's channel Studio Universal to Sky's channel portfolio.

(342) In Italy, Comcast’s sole channel (Studio Universal) has a negligible market share by audience: indeed, the channel does not register as generating an audience share in the data available to the Parties.[116] The combination of this channel with Sky’s retail platform in Italy is therefore unlikely to give rise to potential customer foreclosure. Sky relies on 21CF ([*50-60*]% audience share), Viacom ([*5-10*]% audience share) and Gambero Rosso ([*0-5*]% audience share) and other broadcasters for the vast majority of its audience. Even modest players like Discovery ([*0-5*]% audience share) are of greater value to Sky's retail service than Studio Universal.

(343) In addition, as noted in paragraph (333), pay-TV retailers like Sky have an overall incentive to improve pay-TV's penetration. 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 channels that carry content that overlaps with the content on Studio Universal.

114 See in this regard, the Commission's Non-Horizontal Merger Guidelines, para. 46.

115 Replies to Questionnaire Q2 to TV broadcasters of 7 May 2018, question D.5.

116 See Reply to RFI 4, para. 17.17, referring to Table 14 in Annex 7.4 to the Form CO.

(344) In light of the above, the Commission considers that overall the merged entity would lack the incentive to engage in the total customer foreclosure strategies considered above.

(ii) Incentive to engage in partial foreclosure

(345) As to partial foreclosure, the responses to the market investigation were mixed, with some respondents considering that the merged entity would degrade the terms and conditions of the acquisition of TV channels from third parties. Other respondents were less concerned.

(346) By contrast with other Member States, Sky's EPG ranking of pay-TV channels does not appear significantly constrained by regulations. As a consequence, Sky's incentives may not be materially reduced by sector specific rules.

(347) However, in light of the structure of the Italian television sector (see paragraph (333)) , it is unlikely that Sky would have an incentive to make its basic offering less attractive to consumers by degrading access to channels that carry content that overlaps with the content on Studio Universal. As noted above in relation to total foreclosure, Sky's retail service relies on third party channels for the vast majority of the audience within Comcast's channels thematic group. Therefore, in light of Comcast's negligible contribution to the merged entity's upstream position, a change of Sky's incentives in relation to the distribution of third party channels appears implausible.

(348) On this basis, the Commission considers, on balance, that the merged entity would lack incentives to engage in partial foreclosure of Comcast's competing channels in Italy post-Transaction.

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

(349) As indicated above, the majority of broadcasters' current distribution agreements with Sky in relation to Italy will protect them against total foreclosure until their term, thus safeguarding their position for the foreseeable future.

(350) In respect of 21CF, in the implausible event that the merged entity ceased distributing its channels, the Commission notes that this broadcaster generates significant licensing revenues from alternative sources. Therefore, even in the event of total or partial foreclosure from Sky's retail platform, 21CF would continue to operate efficiently.

(351) 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

(352) 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.

7. CONCLUSION

(353) 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
Phil HOGAN
Member of the Commission