



EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.9299 – DISCOVERY / POLSAT / JV

Only the English text is available and authentic.

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

Article 9
Date: 26/08/2020

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 Where possible the information omitted has been replaced by ranges of figures or a general description.



EUROPEAN
COMMISSION

Brussels, 26.8.2020
C(2020) 5935 final

COMMISSION DECISION

of 26.8.2020

**relating to Article 9 of Regulation (EC) No 139/2004
referring to case M.9299 – Discovery / Polsat / JV**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the "TFEU")¹,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings² (the "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by Discovery Communications Europe Limited and Cyfrowy Polsat S.A. on 7 July 2020, pursuant to article 4 of the said Regulation,

Having regard to the request of the President of the Office of Competition and Consumer Protection of Poland (Urzędu Ochrony Konkurencji i Konsumentów ("the UOKiK")) of 27 July 2020 and received by the Commission on 27 July 2020 (the "Referral Request"),

Whereas:

- (1) On 7 July 2020 the Commission received notification of a proposed concentration by which Discovery Communications Europe Limited ("Discovery", UK) belonging to Discovery, Inc. ("Discovery Group", US), and Cyfrowy Polsat S.A. ("Polsat", Poland), controlled by Zygmunt Solorz, acquire, within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation, joint control of a newly created company constituting a joint venture (the "JV", Poland) (the "Transaction").
- (2) Discovery and Polsat are collectively referred to as the "Notifying Parties" or the "Parents". Discovery, Polsat and the JV are jointly referred to as the "Parties".
- (3) The UOKiK received a copy of the notification on 8 July 2020.
- (4) By its Referral Request, Poland via the UOKiK requested the referral to its competition authority of the proposed concentration with a view to assessing it under national competition law, pursuant to Article 9(2)(a) of the Merger Regulation.

¹ OJ C115, 9.8.2008, P.47.

² OJ L 24, 29.1.2004, p.1. 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.

1. THE PARTIES

- (5) **Discovery** is a media company belonging to the Discovery Group, which produces free-to-air (“FTA”) and pay-TV channels and provides TV content across multiple distribution platforms. Discovery's portfolio in the EEA includes: (i) non-fiction TV channels through its global brands (such as Discovery and Animal Planet); (ii) sports entertainment channels through Eurosport; and (iii) Scripps Networks Interactive Inc., which includes a controlling interest in TVN, a Polish media company which broadcasts a range of TV channels. Discovery’s activities in Poland include the retail Over-the-Top (“OTT”) audio-visual (“AV”) services “Player”, “Eurosport Player” and “TVN24Go” and TVN Media, an advertising sales house.
- (6) **Polsat** is a Polish media company ultimately controlled by Mr. Zygmunt Solorz. Polsat produces and broadcasts FTA and pay TV channels. It provides retail AV services through satellite, IPTV³ (via Netia S.A., “Netia”) and OTT (“Ipla” and “Eleven Sports”). Polsat offers fixed telecommunication and mobile telecommunication services under its Netia and Plus (via Polkomtel sp z. o. o., “Polkomtel”) brands. Polsat is active in the advertising market as well as advertising intermediation.
- (7) The **JV** will operate an OTT video-on-demand (“VOD”) service in Poland.⁴ The new service will include local productions supplied by Discovery and Polsat, acquired TV content and new Polish series commissioned specifically by the new entity. The JV platform may also distribute the TV channels of the Parents and other third parties.
- (8) [Confidential information relating to the implementation of the JV].
- (9) Discovery and Polsat will [Confidential information relating to the JV’s activities]^{5 6}.

2. THE OPERATION AND THE CONCENTRATION

- (10) On 25 October 2019, Discovery and Polsat entered into a Joint Venture Agreement (“JVA”) to form, develop and operate a fully functioning and independent joint venture over a number of years by making available, licencing or transferring to the JV certain funding, content, rights, technology and other assets.

2.1. Joint control

- (11) Discovery and Polsat will each hold 50% of the shares in the JV. They will each appoint [an equal number of the] members of the management board and the same number of supervisory board members.⁷ All decisions of the management board are determined by a simple majority except in relation to certain matters for which decisions must be taken unanimously by all management board members in office.⁸

³ 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.

⁴ [Confidential information relating to the JV’s activities].

⁵ TVN24Go is an OTT news platform, with primarily Polish content, available on TVN’s website, via a mobile application and smart TV app.

⁶ Under the Joint Venture Agreement, [Confidential information regarding the operation of Player and Ipla].

⁷ JVA, article 5.4.

⁸ JVA, article 5.4.12 (b).

In general, all decisions of the supervisory board on all matters to be determined by the board must be decided unanimously.⁹

- (12) Accordingly, all matters¹⁰ addressed by each of the governing bodies of the JV (i.e. the shareholders' meeting, the management board and the supervisory board) will require the consent of both Discovery and Polsat (or members of those bodies appointed by the respective Parents).
- (13) Therefore, as a result of the Transaction, Discovery and Polsat will jointly control the JV within the meaning of Article 3(1)(b) of the Merger Regulation.

2.2. Full-functionality

- (14) The JV will be fully functional.
- (15) First, the JV will employ its own management dedicated to its day-to-day operations.¹¹ The JV will also have access to sufficient resources, including finance, staff and tangible and intangible assets that will enable it to operate independently on the market for the retail supply of AV services, performing the functions normally carried out by undertakings operating on the same market.¹²
- (16) Second, the JV is intended to operate as an autonomous entity and will have its own, independent access to and presence on the market for the supply of AV (OTT) services.¹³ Its activities will not be limited to the distribution or sale of its Parents' products, as the JV will supply its own OTT offering to end customers, as a fully independent company with its own personnel. In addition, the JV has negotiated and/or will negotiate agreements with its Parents (e.g. wholesale agreements for the supply of content and channels) on an arm's length basis, reflecting the normal market conditions it practices with third parties.¹⁴
- (17) Third, the JV will not only purchase from and/or supply to its Parents. It will have direct contractual relationships with third party licensors and will not be reliant on its parents for licensing relationships. It will also commission original productions from TV production studios and source additional and new SVOD licenses to content mainly from third party content providers.¹⁵
- (18) Finally, the JV is intended to operate on a lasting basis. The JV will operate for [Confidential information relating to the JV's activities].¹⁶
- (19) Therefore, the Transaction will lead to the creation of a full-function joint venture within the meaning of Article 3(4) of the Merger Regulation.

⁹ Form CO, paragraph 53 and JVA, articles 5.2.10 and 5.2.11.

¹⁰ The initial business plan of the JV has been approved by the Notifying Parties and is attached to the JVA. Any amendments to the initial business plan, annual budget and subsequent business plans will be prepared by the management board and then approved by the supervisory board (which, in accordance with the explanation provided above, requires a unanimous decision of the supervisory board members appointed by both Notifying Parties). See JVA, article 5.5.1.

¹¹ Form CO, paragraphs 70-72.

¹² Form CO, paragraphs 73-79.

¹³ Form CO, paragraphs 80-93.

¹⁴ Form CO, paragraphs 94-106.

¹⁵ Form CO, paragraphs 94-106.

¹⁶ Form CO, paragraph 107.

3. EU DIMENSION

- (20) The Parties concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (Discovery: EUR 10 379 million; Polsat: EUR [...]). Each of them has a Union-wide turnover in excess of 250 million (Discovery: [...]; Polsat: [...]). While Polsat generates more than 2/3 of its total EU turnover in Poland, Discovery Group does not.
- (21) Therefore, the Transaction has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

4. ASSESSMENT UNDER ARTICLE 9(3) OF THE MERGER REGULATION

4.1. Introduction

- (22) By its Referral Request of 27 July 2020, the UOKiK, on behalf of Poland, requests a referral of the Transaction with a view to assessing the effects of the Transaction in Poland under national competition law, pursuant to Article 9(2)(a) of the Merger Regulation.
- (23) According to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of the case to the competent authorities of the Member State concerned with a view to applying the Member State's national competition law if, following a request for referral by that Member State pursuant to Article 9(2) of the Merger Regulation, the Commission considers that the Transaction threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market.
- (24) When the criteria laid down in Article 9(2)(a) are met, the Commission will assess whether it is appropriate to refer a given case to a national competition authority. The Commission retains a margin of discretion in deciding whether to refer a case or not¹⁷. In exercising such discretion, the Commission will take into account the need to ensure effective protection of competition in all markets affected by the Transaction¹⁸. The Commission exercises that discretion taking into account the criteria set out in the case law and the Referral Notice.¹⁹
- (25) In the following sections, it will be examined whether the criteria of Article 9(2)(a) of the Merger Regulation are fulfilled (Sections 4.2 - 4.5), the remedies submitted by the Notifying Parties will be described (Section 4.6) and then, it will be examined whether it would be appropriate to refer the present case to Poland (Section 4.7).
- (26) In its assessment of the Referral Request, the Commission takes into account the arguments it received from the Polish authorities and the Notifying Parties.

4.2. The criteria of Article 9(2)(a) of the Merger Regulation

- (27) In order for a referral request to be issued by a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 9(2)(a) of the Merger Regulation.

¹⁷ See also Commission Notice on Case Referral in respect of concentrations (hereafter, the "Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 7.

¹⁸ Referral Notice, paragraph 8.

¹⁹ Referral Notice, paragraph 7.

- (28) As to the procedural condition, the referral request must be made within 15 working days from the date on which the notification of a concentration before the Commission is received by that Member State. In this regard, the Commission notes that Poland, via the UOKiK, received a copy of the notification of the Transaction on 8 July 2020. The Referral Request was made by letter received by the Commission on 27 July 2020. Therefore, the Referral Request was made within 15 working days following the receipt by Poland of the notification of the Transaction and, consequently, within the deadline provided for in Article 9(2) of the Merger Regulation.
- (29) As to the substantive conditions, first, in assessing a referral request made pursuant to Article 9(2)(a) of the Merger Regulation, the Commission is required to determine whether there is a market within the Member State concerned which is affected by the notified concentration and presents all the characteristics of a distinct market. According to Article 9(3) of the Merger Regulation and the case law of the General Court²⁰, the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. Second, the Commission is required to verify whether the Transaction threatens to significantly affect competition in that market. Finally, Article 9(7) of the Merger Regulation gives further indications as to which area the geographically relevant market shall consist of, and which elements the Commission must take particular account of when assessing that issue. These conditions are assessed in turn in the following sections.

4.3. Markets within Poland which present all the characteristics of distinct markets

4.3.1. The UOKiK's submission

- (30) In its Referral Request, the UOKiK considers that the Transaction threatens to significantly affect competition in the following markets within Poland presenting all the characteristics of distinct market:
- The production and licensing of AV content (supply and demand side),
 - The wholesale supply of TV channels (supply and demand side),
 - The retail supply of AV services, and
 - The sale of offline and online advertising space (supply and demand side).

- (31) With regard to these markets, the UOKiK considers that the geographic scope can be defined at national level, or narrower, in line with the Commission's practice.²¹

4.3.2. The Notifying Parties' view

- (32) First, in the Form CO, for the production and licensing of AV content, the Notifying Parties consider that the exact definition of the geographic markets can be left open, their scope potentially being broader than national.²²
- (33) Further, the Notifying Parties have provided market information in line with the UOKiK's assessment of the relevant geographic markets for the wholesale supply of TV channels, the retail supply of AV services, where they find that markets are

²⁰ Joined Cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraph 105.

²¹ Referral Request, page 3.

²² Form CO, paragraphs 231-233, 258-259.

national at most, considering, however, that the exact definition of the geographic markets can be left open.²³

- (34) Finally, the Notifying Parties agree with previous Commission decisions and share the UOKiK's assessment of the relevant geographic market for the sale of advertising space, which were found to be national, although the Notifying Parties consider that the exact definition of the geographic markets can be left open.²⁴
- (35) Second, in its Response to the UOKiK's Referral Request, the Notifying Parties confirm that they generally agree with the definition of the product markets as put forward by the UOKiK (except in respect of the sub-segments of the market for the wholesale supply of TV-channels)²⁵ but note (as above) that some of the geographic markets have previously been defined by the Commission as broader than national in scope.²⁶
- (36) Further, the Notifying Parties note that the JV is intended to be active not just in Poland, but that in the future, its operations are intended to expand outside Poland. As a result, the effect of the JV on the TV retail market would not be limited to a distinct geographic market of only Poland.²⁷

4.3.3. *Commission's assessment*

- (37) The Transaction concerns all three levels of the AV value chain, namely:
- The production and licensing of AV content, where Discovery and Polsat, independently, and the JV will be active mainly on the demand side of the market;
 - The wholesale supply of TV channels where Discovery and Polsat will remain independently active, while the JV will only be active on the demand side of the market; and
 - The retail supply of AV services where the JV will be active and Discovery and Polsat will remain independently active through their other distribution platforms.
- (38) In addition, the Transaction concerns:
- The market for the sale of advertising space where both Discovery and Polsat are independently active (offline and online) and where the JV will be active in the sale of online advertising space; and
 - The markets for fixed telecommunication services (fixed telephony, fixed internet access) and mobile telecommunication services where only Polsat is active and which could be bundled with the JV's AV services (potentially in a separate market for multiple play services).

4.3.3.1. The AV value chain

- (39) In previous cases, the Commission set out the different levels of the AV value chain as follows: (i) the (upstream) markets for the production and the licensing of AV

²³ Form CO, paragraphs 287-288, and 327-328.

²⁴ Form CO, paragraphs 390-391.

²⁵ Response to the UOKiK Referral Request, paragraph 13.

²⁶ Response to the UOKiK Referral Request, paragraph 19.

²⁷ Response to the UOKiK Referral Request, paragraph 19.

content, (ii) the (intermediate) market for the wholesale supply of TV channels, and (iii) the (downstream) market for the retail supply of AV services.²⁸

- (40) The market investigation confirmed that this three-layer classification with regard to the chain of supply of AV content is still applicable today.²⁹

4.3.3.2. Production and licensing of AV content

Product market definition

Previous Commission decisions

- (41) This part of the value chain concerns on the one hand, the production of new AV content. The supply side of the market comprises TV production companies while the demand side comprises companies (TV broadcasters or content platform operators) that commission the production of AV content or hire TV production services.
- (42) On the other hand, this part of the value chain concerns the licensing of (i) broadcasting rights relating to pre-existing AV content, which is made available ‘off-the-shelf’ by the rights holder, and (ii) broadcasting rights for sports events. The broadcasting rights can belong to either (or a combination of) the rights holder to the TV format, the production company that produced the content, the company that commissioned the production of the content, or a third party distributor to which the rights were licensed by the original owner. Rights holders license rights to TV broadcasters, or content platform operators, which retail the content to end-users on a non-linear basis (e.g., SVOD service providers).
- (43) The Commission has consistently considered that the production of AV content should be distinguished from the licensing of broadcasting rights for AV content.³⁰ The Commission has also found the product market for the production of TV content to be limited to non-captive TV production, thereby excluding content produced by TV broadcasters for use on their own channels.³¹
- (44) In addition, in its 2015 case *Liberty Global/Corelio/W&W/De Vijver Media*, the Commission considered that the market for the production of TV content and the market for licensing of broadcasting rights to TV content could be further segmented depending on the type of TV content (that is films, sports or other) or exhibition window (namely SVOD, transaction-based VOD (“TVOD”), Pay Per View (“PPV”), First pay TV window, Second pay TV window, FTA), but ultimately left those possible segmentations open.³² In subsequent cases, the Commission either did not

²⁸ Commission decisions of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 113; of 6 February 2018 in case M.8665 - Discovery/Scripps, recital 12.

²⁹ Replies to questionnaires Q1 to content providers, Question 5; Replies to questionnaires Q2 to AV market participants, Question 5; and Replies to questionnaires Q3 to purchasers of advertising space, Question 5.

³⁰ Commission decisions of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 121; of 6 November 2018 in case M.8785 – Disney/Fox, recital 70; of 7 April 2017 in case M.8354 – Fox/Sky, recital 62; of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recital 60.

³¹ Commission decisions of 20 June 2016 in case M.7865 – Lov Group/De Agostini/JV, recital 18; ; of 9 October 2014 in case M.7360 - 21st Century Fox/Apollo/JV, recital 36; of 22 September 2006 in case M.4353 - Permira/All3Media Group, recitals 11–12.

³² 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 23 November 2018 in case M.8944 - Liberty Global / De Vijver Media and Liberty Global (SBS) / Mediahuis / JV, recital 53.

consider further segmentations or left open the question whether the market for the production of AV content should be further segmented. In particular, the question was left open whether the market for production of general entertainment TV content should be further segmented: (i) by genre; (ii) between scripted and non-scripted content; and (iii) between commissioned TV production or TV production for-hire.³³ Similarly, the question whether the market for licensing AV content could be further sub-divided by distinguishing premium and non-premium content, or scripted and non-scripted content was left open.³⁴

The Notifying Parties' views

- (45) The Notifying Parties submit that the Transaction should be assessed on the two separate markets for (i) production and supply of commissioned TV content; and (ii) licensing of broadcasting rights for pre-produced TV content (available 'off-the-shelf') and that any further segmentation would not be appropriate.³⁵

Commission's assessment

- (46) A majority of respondents to the market investigation consider that (i) the production and supply/acquisition of commissioned TV content, whereby the producer delivers tailor-made content to its customers; and (ii) the licensing of broadcasting rights whereby pre-produced AV content is made available off-the-shelf by the rights-holder to downstream operators are two distinct product markets.³⁶
- (47) In addition, in relation to the product market for the production of AV content, the results of the market investigation provided no reason to depart from the Commission's approach according to which the market is limited to non-captive AV production. Further, a majority of respondents to the market investigation consider that the market for the production of AV content needs to be subdivided by content type or into scripted and non-scripted AV content.³⁷ The replies were inconclusive as to whether a segmentation by exhibition window would be appropriate.³⁸ Lastly, the results of the market investigation provided no reason to depart from the Commission's approach of considering a further segmentation between commissioned TV production or TV production for-hire.
- (48) Further, in relation to the product market for the licensing of AV content, most of the providers of AV content consider that the market for the licencing of broadcasting rights for pre-produced AV content could be subdivided by content type, in particular: (i) films; (ii) sports; and (iii) other AV content (i.e. all non-sport, non-film content). Furthermore, potential sub-segments within these content types should be considered including, in particular, the sub-division of "film content" into (a) US and (b) non-US films and the subdivision of "other AV content" into (a) scripted AV content and (b) unscripted AV content.³⁹ Most providers of retail AV services further

³³ Commission decision of 20 January 2016 in case M.7865 - Lov Group Invest/De Agostini/JV, recital 31.

³⁴ Commission decisions of 6 November 2018 in case M.8785 The Walt Disney Company/Twenty-First Century Fox, recital 68; of 7 April 2017 in case M.8354 - Fox/Sky, recitals 65-66.
³⁵ Form CO, paragraphs 216-217.

³⁶ Replies to questionnaires Q1 to content providers, question 6; and replies to questionnaires Q2 to AV market participants, question 6.

³⁷ Replies to questionnaires Q1 to content providers, question 7.

³⁸ Replies to questionnaires Q1 to content providers, question 8; and replies to questionnaires Q2 to AV market participants, question 8.

³⁹ Replies to questionnaires Q1 to content providers, question 7.

consider that these segmentations may be appropriate, however few respondents indicate that a segmentation of sports content should be subdivided by sport discipline.⁴⁰

- (49) Most of the respondents consider that the market for the licensing of broadcasting rights for pre-produced AV content could be segmented by exhibition windows: (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) free-to-air ("FTA").⁴¹
- (50) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the UOKiK, a relevant market for the non-captive production of AV content and a market for the licensing of broadcasting rights for pre-produced AV content has to be considered, while it can be left open whether this relevant product market needs to be further sub-segmented, as it would not change the outcome of the Commission's evaluation of the Referral Request.

Geographic market definition

Previous Commission decisions

- (51) In previous cases, the Commission considered that the question whether the geographic scope of the market for the production of TV content and the market for the licensing of broadcasting rights for TV content was national or regional could be left open.⁴²

The Notifying Parties' views

- (52) The Notifying Parties submit that it may be possible to define the relevant geographic markets more broadly than national or regional. In relation to the market for licensing of AV content, the Notifying Parties consider that this market should encompass all licensing irrespective of its origin and that, therefore, from the production side, no distinctions on the basis of country of origin should be made. Regardless, the Notifying Parties submit that it is not necessary for the Commission to reach a conclusion, as the Transaction will not raise any competition concern under any possible market segmentation.⁴³

Commission's assessment

- (53) According to a majority of respondents to the market investigation, the geographic scope of agreements for the licensing of broadcasting rights for AV content is national.⁴⁴
- (54) In light of the above, for the purpose of this Decision and without prejudice to further investigation by the UOKiK, the Commission concludes that the relevant geographic market for the non-captive production of AV content and the market for licensing of

⁴⁰ Replies to questionnaires Q2 to AV market participants, question 7.

⁴¹ Replies to questionnaires Q1 to content providers, question 8; and replies to questionnaires Q2 to AV market participants, question 8.

⁴² Commission decision of 23 November 2018 in case M.8944 - Liberty Global/De Vijver Media and Liberty Global (SBS)/Mediahuis/JV, recital 75; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 76.

⁴³ Form CO, paragraphs 231-233 and 258-259.

⁴⁴ Replies to questionnaires Q1 to content providers, question 23; and replies to questionnaires Q2 to AV market participants, question 40.

broadcasting rights for pre-produced AV content, and all its possible sub-segments, is national in scope.

4.3.3.3. Wholesale supply of TV channels

Product market definition

- (55) TV broadcasters package the AV content and broadcasting rights for AV content that they have produced in-house or acquired into linear TV channels, which are supplied to retail suppliers of AV services, and then broadcast to end users either on a FTA basis or on a pay TV basis. Ancillary services, such as catch-up TV, have gradually been associated to TV channels in order to complement the TV offering and enhance the viewer experience of traditional linear TV channels.

Previous Commission decisions

- (56) In its past decisional practice, the Commission identified a wholesale market for the supply of TV channels. Within that market, in certain decisions, the Commission further identified two separate product markets for (i) FTA TV channels, and (ii) pay TV channels.⁴⁵ The Commission further stated that within the pay TV channels market, there could be different segments for (i) basic pay TV channels; and (ii) premium pay TV channels,⁴⁶ for which end customers pay a premium in addition to their basic subscription fee.
- (57) In other decisions, the Commission concluded that at the level of the wholesale supply of TV channels there were two separate product markets, one consisting of the wholesale supply of premium pay TV channels and one consisting of the wholesale supply of FTA and basic pay TV channels.⁴⁷ In its decision of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, the Commission has considered that, given that (i) FTA channels were mostly supplied together with basic pay TV channels, and (ii) the competitive assessment would remain the same even if FTA channels were regarded as belonging to a separate product market from that of basic pay TV, it was not necessary to make a distinction between FTA and basic pay TV channels on the market for wholesale supply of TV channels in that case.
- (58) In addition, in previous decisions including its recent decision of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding* (hereafter *Telia/Bonnier*), the Commission considered that there was no need to draw a distinction between linear TV channels and their ancillary services, which are

⁴⁵ Commission decisions of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, recital 41 (identifying separate markets); of 30 May 2018 in case M.7000 *Liberty Global/Ziggo*, recital 111 (leaving open the question as to whether FTA and Pay TV belong to separate markets, because of peculiarities of the Dutch TV market); of 7 April 2017 in case M.8354 – *Fox / Sky*, recital 85 (leaving open the question whether the market for the wholesale supply of TV channels should be further segmented among FTA, basic pay TV and premium pay TV).

⁴⁶ Commission decisions of 6 November 2018 in case M.8785 – *Disney/Fox*, recital 77; of 15 June 2018 in case M.8861 – *Comcast/Sky*, recital 50; of 6 February 2018 in case M.8665 – *Discovery/Scripps*, recitals 19- 20; of 7 April 2017 in case M.8354 – *Fox/Sky*, recitals 80- 81.

⁴⁷ Commission decisions of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, recital 157; of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recitals 90 and 91.

licensed by TV broadcasters to TV distributors along with, or in addition to those linear TV channels.⁴⁸

- (59) Further, in previous decisions, the Commission examined a number of other potential additional segmentations, including genre or thematic content (such as sports, films, general entertainment, news, youth, and others), and ultimately left the market definition open in these regards.⁴⁹
- (60) Last, in *Telia/Bonnier*, the Commission considered that the market for wholesale supply of TV channels, and any other possible segmentation, should not be further segmented according to the type of infrastructure used for the delivery to the viewer (cable, satellite, terrestrial TV and IPTV).⁵⁰

The Notifying Parties' views

- (61) The Notifying Parties submit that the relevant markets for the wholesale supply of TV channels may be separated between FTA and pay-TV channels, and with the further distinction between basic pay-TV and premium pay-TV channels, but no further distinction based on genre, between linear channels and non-linear services, or between the different means of transmission. Regardless, the Notifying Parties submit that it is not necessary for the Commission to reach a conclusion, as the Transaction will not raise any competition concern under any possible market segmentation.⁵¹

Commission's assessment

- (62) Most of the providers of AV content consider that FTA TV and pay TV channels form separate relevant product markets. This result of the market investigation is in line with the Commission's past decisional practice.⁵²
- (63) Within pay TV channels, the Commission has previously further distinguished between the markets for basic pay TV channels (that are part of the basic cable or IPTV subscription) and premium pay TV channels (for which end customers have to pay a premium in addition to their basic subscription fee).⁵³ However, during the market investigation, providers of retail AV services provided a mixed reply. In particular, several respondents consider that a segmentation in FTA and pay channels

⁴⁸ Commission decisions of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 163; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 94.

⁴⁹ Commission decisions of 7 April 2017 in case M.8354 – Fox/Sky, recital 82-83; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 92; of 2 April 2003 in case M.2876 - Newscorp/Telepiù, 2 April 2003, recital 76; of 18 July 2007 in case M.4504 - SFR/Télé 2 France, recitals 41–42; of 26 August 2008 in case M.5121 - News Corp/Premiere, recital 35; of 21 December 2010 in case M.5932 - News Corp/BskyB, recital 81; of 10 October 2014 in case M.7000 - Liberty Global/Ziggo, recital 89.

⁵⁰ Commission decision of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 162.

⁵¹ Form CO, paragraphs 283-285.

⁵² Commission decisions of 20 September 2013 in case M.6990 – Vodafone/Kabel Deutschland, recital 41 (identifying separate markets); of 30 May 2018 in case M.7000 Liberty Global/Ziggo, recital 111 (leaving open the question as to whether FTA and Pay TV belong to separate markets, because of peculiarities of the Dutch TV market); of 7 April 2017 in case M.8354 – Fox / Sky, recital 85 (leaving open the question whether the market for the wholesale supply of TV channels should be further segmented among FTA, basic pay TV and premium pay TV).

⁵³ Replies to questionnaires Q1 to content providers, questions 11-13.

is not appropriate since broadcasters bundle FTA and pay channels into the same package when negotiating with retail providers of AV services.⁵⁴

- (64) With reference to a segmentation by genre, most of the respondents consider that thematic pay-TV channels of a given genre (such as TVN Turbo) constitute a complement to thematic pay-TV channels of a different genre (such as Polsat News).⁵⁵ In particular, respondents indicate that sports channels should be regarded as complementary in respect to other TV channels.⁵⁶
- (65) Most respondents consider that ancillary services (e.g., TVE, catch-up, PVR, etc.) have gradually been associated to TV channels in order to complement the TV offering and enhance the viewer experience of traditional linear channels.⁵⁷ In particular, in the Polish market most of the providers of retail AV services provide both linear and non-linear services with the latter offered either as ancillary rights to linear distribution or as standalone OTT services.⁵⁸
- (66) Most of the respondents consider that the market for the wholesale supply of TV channels should not be further segmented according to the distribution forms (e.g. cable, IPTV, satellite, terrestrial, or OTT).⁵⁹
- (67) In light of the above, the Commission considers that, for the purpose of this Decision and without prejudice to further investigation by the UOKiK, the relevant product market is the market for the wholesale supply of TV channels, including their ancillary services and covering all types of infrastructure. The question whether this product market can be further segmented (i) by genre, (ii) by distribution technology, or between (iii) FTA and pay TV channels, and in turn whether pay TV channels can be further segmented between basic pay and premium pay TV channels, or (iv) FTA and basic pay TV channels on the one hand, and premium pay TV channels on the other hand could be left open as it would not change the outcome of the Commission's evaluation of the Referral Request.

Geographic market definition

Previous Commission decisions

- (68) In its decisional practice, the Commission has considered that the market for wholesale supply of TV channels could be national,⁶⁰ sub-national⁶¹ or could

⁵⁴ Replies to questionnaires Q2 to AV market participants, question 11- 13

⁵⁵ Replies to questionnaires Q1 to content providers, question 14; and replies to questionnaires Q2 to AV market participants, question 14.

⁵⁶ Replies to questionnaires Q1 to content providers, questions 15-16; and replies to questionnaires Q2 to AV market participants, question 15 and 16.

⁵⁷ Replies to questionnaires Q1 to content providers, question 19; and replies to questionnaires Q2 to AV market participants, question 19.

⁵⁸ Q2, questions 17 - 18.

⁵⁹ Replies to questionnaires Q2 to AV market participants, question 22.

⁶⁰ Commission decisions of 6 November 2018 in case M.8785 – Disney/Fox, recital 86; of 7 April 2017 in case M.8354 – Fox/Sky, recital 89; of 21 December 2011 in case M.6369 - HBO/Ziggo/HBO Nederland, recital 39; of 15 April 2013 in case M.6880 - Liberty Global/Virgin Media, recital 41; of 10 October 2014 in case M.7000 - Liberty Global/Ziggo, recital 98.

⁶¹ Commission decisions of 7 April 2017 in case M.8354 – Fox/Sky, recital 89; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 108.

correspond to a linguistically homogeneous area broader than national.⁶² In *Telia/Bonnier*, the Commission concluded that the market was national in scope.⁶³

The Notifying Parties' views

- (69) The Notifying Parties submit that, in the present case, the relevant geographic market for the wholesale supply of TV channels is national in scope and corresponds to Poland. The Notifying Parties however submit that it is not necessary for the Commission to reach a conclusion, as the Transaction will not raise any competition concern under any possible market segmentation.⁶⁴

Commission's assessment

- (70) According to a majority of the respondents to the market investigation, the geographic scope for the wholesale supply of TV channels is national in scope.⁶⁵
- (71) In light of the above, for the purpose of this Decision and without prejudice to further investigation by the UOKiK, the Commission concludes that the relevant geographic market for the wholesale supply of TV channels, including all its possible sub-segments, is national in scope.

4.3.3.4. Retail supply of AV services

Product market definition

- (72) Retail providers of AV services offer packages of linear AV services and/or non-linear AV services to end customers. Such linear and non-linear AV services can be augmented with ancillary services, such as catch-up TV or TV everywhere. Retail AV services can be delivered to end-users through a number of technical means including cable, satellite, IPTV and OTT.

Previous Commission decisions

- (73) In its past decisional practice, the Commission considered the retail supply of FTA TV and pay TV as separate markets, but ultimately left open the product market definition.⁶⁶ The Commission also considered whether pay TV could be segmented further according to: (i) linear vs non-linear pay TV services;⁶⁷ (ii) premium vs basic

⁶² Commission decisions of 7 April 2017 in case M.8354 – Fox/Sky, recital 89; of 21 December 2010 in case M.5932 - News Corp/BskyB, recitals 86–88; of 15 April 2013 in case M.6880 - Liberty Global/Virgin Media, recital 41.

⁶³ Commission decisions of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 169.

⁶⁴ Form CO, paragraphs 287-288.

⁶⁵ Replies to questionnaire Q2 to AV market participants, question 41.

⁶⁶ Commission decisions; of 6 November 2018 in case M.8785 - Disney/Fox, recital 98; of 8 October 2018 in case M.8842 – Tele2/ComHem, recital 37; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, recital 137; of 6 February 2018 in case M.8665 - Discovery/Scripps, recital 33; of 7 April 2017 in case M.8354 – Fox/Sky, recital 101; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 56; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 152.

⁶⁷ Commission decisions of 18 July 2019 in case M.8864 - Vodafone/certain Liberty Global assets, recitals 79 and 83; of 6 November 2018 in case M.8785 - Disney/Fox, recital 98; of 8 October 2018 in case M.8842 – Tele2/ComHem, recital 37; of 15 June 2018 in case M. 8861 - Comcast/Sky, recital 59; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, recital 137; of 6 February 2018 in case M.8665 - Discovery/Scripps, recital 32; of 7 April 2017 in case M.8354 – Fox/Sky, recitals 98 and 101; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 58; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 124.

pay TV services.⁶⁸ However, the Commission left open the market definition with regard to each of these potential sub-segments.

- (74) In addition, the Commission considered a possible segmentation of the market for the retail supply of AV services according to distribution technology (for example, cable, OTT, satellite, IPTV or terrestrial). In its decisions of 12 November 2019 in *Telia/Bonnier*, and of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, the Commission considered that all the different distribution technologies were part of the same product market,⁶⁹ while leaving the exact product market definition open in a number of other decisions.⁷⁰

The Notifying Parties' views

- (75) The Notifying Parties submit that the Transaction should be assessed on the basis of an overall market for the retail supply of AV services including both linear and non-linear services.
- (76) The only material distinction that they consider justified is between (i) advertising funded services (market comprising both FTA linear and AVOD non-linear services); and (ii) subscription funded services (market comprising linear pay-TV and Paid VOD services). The Notifying Parties however submit that it is not necessary for the Commission to reach a conclusion as to the precise product market definition, as the Transaction will not raise any competition concern under any possible market segmentation.⁷¹

Commission's assessment

- (77) The information gathered during the market investigation indicated that the distinction between the retail supply of FTA AV services on the one hand, and the retail supply of pay AV services on the other hand, remains valid today.⁷²
- (78) As regards a further segmentation of the market for retail supply of AV services between the retail supply of (i) basic and (ii) premium AV services⁷³ or a segmentation between the retail supply of (i) premium film and series AV services and (ii) other premium sport AV services⁷⁴ several respondents considered such a segmentation not appropriate.

⁶⁸ Commission decisions of 18 July 2019 in case M.8864 - Vodafone/certain Liberty Global assets, recitals 79 and 83; of 6 November 2018 in case M.8785 - Disney/Fox, recitals 94 and 98; of 15 June 2018 in case M. 8861 - Comcast/Sky, recital 59. of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, recitals 135 and 137; of 6 February 2018 in case M.8665 - Discovery/Scripps, recital 33; of 7 April 2017 in case M.8354 - Fox/Sky, recitals 100-101; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 119.

⁶⁹ Commission decisions of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 200; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, recital 137. See also Commission decision of 21 December 2010 in case M.5932 - News Corp/BskyB, recital 105.

⁷⁰ Commission decisions of 18 July 2019 in case M.8864 - Vodafone/certain Liberty Global assets, recitals 80, 81 and 83; of 6 November 2018 in case M.8785 - Disney/Fox, recital 98; of 8 October 2018 in case M.8842 – Tele2/ComHem, recital 37; of 6 February 2018 in case M.8665 - Discovery/Scripps, recital 33; of 7 April 2017 in case M.8354 – Fox/Sky, recitals 99 and 101; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 62.

⁷¹ Form CO, paragraphs 314-325.

⁷² Replies to Questionnaire Q2 to AV market participants, question 23.

⁷³ Replies to Questionnaire Q2 to AV market participants, question 24.

⁷⁴ Replies to Questionnaire Q2 to AV market participants, question 25.

- (79) The results of the market investigation are inconclusive as to whether these markets should be further segmented on the basis of linear vs non-linear pay TV services.⁷⁵ Furthermore, respondents provided a mixed view on whether they consider a segmentation between non-linear services based on international content, such as Netflix or Amazon, and TV channels appropriate.⁷⁶
- (80) The market investigation was also inconclusive as to whether non-linear services such as those offered by Ipla and Player should be considered as a different segment to linear channels as they serve different audiences and satisfy different consumption habits.⁷⁷
- (81) As regards distribution technologies, a majority of respondents to the market investigation considered that end customers perceive the distribution forms (e.g. cable, IPTV, satellite, terrestrial or OTT) through which they access AV content in Poland as different segments to each other.⁷⁸
- (82) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the UOKiK, the relevant product market at retail level is to be considered the market for the retail supply of AV services encompassing all distribution technologies. Moreover, the Commission considers that, in any case, the question can be left open whether the retail supply of AV services should be further segmented between (i) FTA and pay AV services, as well as the question whether in turn the retail supply of pay AV services should be segmented according to (ii) linear and non-linear pay AV services, and (iii) premium and basic pay AV services, as this would not change the outcome of the Commission's evaluation of the Referral Request.

Geographic market definition

Previous Commission decisions

- (83) In previous decisions, the Commission considered that the market for the retail provision of AV services is either national, or limited to the geographic coverage of a supplier's cable network.⁷⁹ In *Telia/Bonnier*, the Commission concluded that the market was national in scope.⁸⁰

The Notifying Parties' views

- (84) The Notifying Parties submit that the market for the retail supply of AV services is national in scope. The Notifying Parties however submit that it is not necessary for the Commission to reach a conclusion, as the Transaction will not raise any competition concern under any possible market segmentation.⁸¹

⁷⁵ Replies to Questionnaire Q2 to AV market participants, questions 26-28

⁷⁶ Replies to questionnaires Q1 to content providers, question 20; and replies to questionnaires Q2 to AV market participants, question 20.

⁷⁷ Replies to questionnaires Q1 to content providers, question 21; and replies to questionnaires Q2 to AV market participants, question 21.

⁷⁸ Replies to Questionnaire Q2 to AV market participants, question 29.

⁷⁹ Commission decisions of 6 November 2019 in case M.8785 - Disney/Fox, recital 100; of 6 February 2018 in case M.8665 - Discovery/Scripps, recital 21; of 15 June 2018 in case M. 8861 - Comcast/Sky, recital 63; of 7 April 2017 in case M.8354 - Fox/Sky, recital 106; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 139.

⁸⁰ Commission decisions of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 207.

⁸¹ Form CO paragraphs 327-328.

Commission's assessment

- (85) The results of the market investigation indicated that it is still relevant to consider that the relevant geographic market for the retail supply of AV services is national.⁸²
- (86) In light of the above, for the purpose of this Decision and without prejudice to further investigation by the UOKiK, the Commission concludes that the relevant geographic market for retail supply of AV services, and all its possible sub-segments, is national in scope.

4.3.3.5. Sale of advertising space

Product market definition

Previous Commission decisions

- (87) The Commission has previously drawn a distinction between online and offline advertising, due to each channel's specificity and different pricing mechanisms.⁸³ Within offline advertising, the Commission has previously considered that the sale of advertising space in national TV broadcasting constitutes a separate market from other means such as newspapers.⁸⁴ Within online advertising, the Commission has previously segmented between search and non-search advertising and considered a possible further sub-segmentation (i) including and excluding social media⁸⁵ and (ii) between video advertising and other forms of online advertising.⁸⁶

The Notifying Parties' views

- (88) The Notifying Parties generally agree with the Commission's view that online and offline advertising constitute separate markets even though they note that, given the uptake of OTT services, it may no longer be appropriate to consider TV advertising exclusively as a segment of offline advertising.⁸⁷
- (89) The Notifying Parties agree with the Commission that within the online advertising market search and non-search advertising are likely to constitute separate markets. The Notifying Parties however submit that it is not necessary for the Commission to reach a conclusion, as the Transaction will not raise any competition concern under any possible market segmentation.⁸⁸

Commission's assessment

- (90) The market investigation in the present case did not provide any indication that the Commission should depart from its findings in previous cases. The majority of respondents responding to this question indicated that these findings (distinction of

⁸² Replies to questionnaire Q2 to AV market participants, question 42.

⁸³ Commission decisions of 9 September 2014 in case M.7288 – Viacom / Channel 5 Broadcasting, paragraph 35.

⁸⁴ Commission decisions of 9 September 2014 in case M.7288 – Viacom / Channel 5 Broadcasting, recital 40; of 21 December 2010 in case M.5932 - News Corp/BskyB, recital 267; of 24 February 2015 in case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, recital 144; of 6 February 2018 in case M.8665 – Discovery/Scripps, recital 40.

⁸⁵ Commission decisions of 18 February 2010 in Case M.5727 – Microsoft / Yahoo! Search Business, paragraphs 71-75; of 11 March 2008 in case M. 4731 – Google / DoubleClick, paragraphs 49-56.

⁸⁶ Case M.4731 – Google / DoubleClick, Decision, paragraph 13.

⁸⁷ Form CO paragraphs 360-365.

⁸⁸ Form CO paragraphs 366-388.

online vs. offline advertising and segmentation of advertising market by media channel, such as newspapers, radio, TV, internet) are still accurate in Poland today.⁸⁹

- (91) In light of the above, the Commission concludes that, for the purpose of this Decision and without prejudice to further investigation by the UOKiK, the market for offline TV advertising and the market for online advertising constitute separate markets. The Commission also concludes that the question whether the market for online advertising can be divided between search and non-search advertising, including a possible further sub-segmentation (i) including and excluding social media and (ii) between video advertising and other forms of online advertising can be left open, since this would not change the outcome of the Commission's evaluation of the Referral Request.

Geographic market definition

Previous Commission decisions

- (92) The Commission previously considered that the geographic markets for (i) offline TV advertising, and (ii) online advertising is either national or regional.⁹⁰

The Notifying Parties' views

- (93) The Notifying Parties submit that the geographical scope of the markets at stake is national and thus constitutes Poland. The Notifying Parties however submit that it is not necessary for the Commission to reach a conclusion, as the Transaction will not raise any competition concern under any possible market segmentation.⁹¹

Commission's assessment

- (94) A majority of respondents indicated that the geographic market for advertising space is national.⁹²
- (95) In light of the above, for the purpose of this Decision and without prejudice to further investigation by the UOKiK, the Commission concludes that the relevant geographic market for offline TV advertising and the market for online advertising, and all its possible sub-segments, are national in scope.

4.3.3.6. Telecommunication services

- (96) In relation to the markets for the retail supply of telecommunication services, the Notifying Parties have not provided any views as to the relevant product or geographic market definition. Therefore, the below section will only set out previous Commission decisions and the Commission's assessment.

⁸⁹ Replies to questionnaire Q2 to AV market participants, questions 32-33.

⁹⁰ Commission decisions of 14 June 2013 in case M.6866 Time Warner/CME, paragraph 63; of 24 February 2015 in case M.7194 Liberty Global/Corelio/W&W/De Vijver Media, paragraph 147; of 21 December 2016 in case M.8180 Verizon/Yahoo, paragraph 27; of 6 February 2018 in case M.8665 Discovery/Scripps, paragraph 43.

⁹¹ Form CO, paragraphs 390-391.

⁹² Replies to questionnaire Q2 to AV market participants, question 43; and Replies to questionnaire Q3 to purchasers of advertising space, question 13.

Retail supply of fixed telephony services

Product market definition

- (97) Fixed telephony services to end customers comprise the provision of subscriptions enabling access to public telephone networks at a fixed location for the purpose of making and/or receiving calls and related services.⁹³
- (98) In previous decisions, the Commission considered whether a distinction between local/national and international calls as well as between residential and non-residential customers should be drawn, based on the distinctions in the Commission Recommendation 2003/311/EC,⁹⁴ but ultimately left the exact product market definition open.⁹⁵
- (99) More recently, the Commission also considered that managed Voice over Internet Protocol (“VoIP”) services⁹⁶ and traditional telephony are interchangeable and therefore belong to the same market. In recent decisions, the Commission considered that an overall retail market for fixed telephony services exists, which includes VoIP services.⁹⁷
- (100) The Commission considers that, for the purposes of this decision and without prejudice to further investigation by the UOKiK, the exact product market definition with regard to the market for the retail supply of fixed telephony services can be left open, since this would not change the outcome of the Commission’s evaluation of the Referral Request.

Geographic market definition

- (101) In previous decisions, the Commission concluded that the retail market for the provision of fixed telephony services was national in scope.⁹⁸ This is due to the continuing importance of national regulation in the telecommunications sector, the supply of upstream wholesale services that work on a national basis, and the fact that

⁹³ Commission decisions of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 33; of 15 July 2019 in case M.9370 – Telenor/DNA, paragraph 47; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraph 21; of 4 February 2016 in case M.7637 – Liberty Global/BASE Belgium, recital 69; of 20 September 2013 in case M.6990 – Vodafone/Kabel Deutschland, paragraph 131.

⁹⁴ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (Text with EEA relevance) (notified under document number C(2003) 497), OJ L 114, 8.5.2003, p. 45–49.

⁹⁵ Commission decisions of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 40; of 15 July 2019 in case M.9370 – Telenor/DNA, paragraph 52; of 29 January 2010 in case M.5730 – Telefónica/Hansenet Telekommunikation, paragraphs 16-17; of 29 June 2009 in case M.5532 – Carphone Warehouse/Tiscali UK, paragraphs 35 and 39; of 7 September 2005 in case M.3914 – Tele2/Versatel, paragraph 10.

⁹⁶ VoIP is a technology that allows users to make voice calls using a broadband internet connection instead of a regular (or analogue) phone line.

⁹⁷ Commission decisions of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 40; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraph 26; of 4 February 2016 in case M.7637 – Liberty Global/BASE Belgium, recital 69; of 20 September 2013 in case M.6990 – Vodafone/Kabel Deutschland, paragraph 131.

⁹⁸ Commission decisions of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 46; of 15 July 2019 in case M.9370 – Telenor/DNA, paragraph 56; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, paragraph 150; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/ Dutch JV, paragraph 29; of 19 May 2015 in case M.7421 – Orange/Jazztel, recital 37.

the pricing policies of telecommunications providers are predominantly national.⁹⁹ In *Liberty Global/BASE Belgium* and *MEIF 6 Fiber/KCOM Group*, the Commission assessed the possibility for the scope of the market for the retail provision of fixed telephony services to be narrower than national.¹⁰⁰ More recently in *Vodafone/Certain Liberty Global Assets*, the Commission considered that the scope of the market for the retail provision of fixed telephony services was national.¹⁰¹

- (102) In light of the foregoing, the Commission considers that, for the purposes of this decision and without prejudice to further investigation by the UOKiK, the relevant market for the retail supply of fixed telephony services is national in scope.

Retail supply of fixed internet access services

Product market definition

- (103) In recent cases, the Commission considered but ultimately left open possible segmentations according to (i) product type (distinguishing narrowband, broadband, and dedicated access), and (ii) distribution technology (distinguishing xDSL, fibre, cable). Moreover, the Commission acknowledged that the retail market for fixed internet access services should not be divided according to download speed.¹⁰²
- (104) The Commission also considered, but ultimately left open, possible segmentations as to customer type, distinguishing between residential and small business customers, on the one hand, and larger business and public authorities, on the other hand.¹⁰³
- (105) With regard to a possible segmentation of the market for the retail provision of fixed internet access services according to product and customer type or according to distribution technology (that is to say, xDSL, cable or fibre), the results of the market investigation provide no reason to depart from the Commission's approach in previous cases.
- (106) In light of the foregoing, the Commission does not depart from its previous assessment, and concludes, for the purposes of this Decision and without prejudice to further investigation by the UOKiK, that the exact scope of the product market definition in relation to the provision of retail fixed internet access services can be left open, since this would not change the outcome of the Commission's evaluation of the Referral Request.

⁹⁹ Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 44-45; of 29 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraph 47; of 7 December 2006 in case M.4442 – *Carphone Warehouse Group plc/AOL UK*, paragraph 19; of 7 September 2005 in case M.3914 – *Tele2/Versatel*, paragraph 18.

¹⁰⁰ Commission decisions of 18 October 2019 in case M.9433 – *MEIF 6 Fiber/KCOM Group*, paragraphs 24-25; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 73; .

¹⁰¹ Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 46.

¹⁰² Commission decisions of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, recital 218; of 8 October 2018 in case M.8842 – *Tele2/Com Hem*, paragraph 26; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 38; of 20 September 2013 in case M.6990 - *Vodafone/Kabel Deutschland*, recital 194.

¹⁰³ Commission decisions of 8 October 2018 in case M.8842 - *Tele2/Com Hem*, paragraph 26; of 7 October 2016 in case M.8131 - *Tele2 Sverige/TDC Sverige*, recital 32; of 19 May 2015 in case M.7421 - *Orange/Jazztel*, recital 42; of 10 October 2014 in case M.7000 - *Liberty Global/Ziggo*, recital 132.

Geographic market definition

- (107) In its previous decisions, the Commission concluded that the retail market for the provision of fixed internet services was national in scope.¹⁰⁴
- (108) The market investigation did not provide any indication that the Commission should depart from its findings in previous cases, according to which the geographic market should be national.
- (109) In light of the foregoing, the Commission concludes that, for the purpose of this decision and without prejudice to further investigation by the UOKiK, the relevant market for the provision of fixed internet services is national in scope.

Retail supply of mobile telecommunication services

Product market definition

- (110) The Commission has previously considered that there is an overall retail market for mobile telecommunications services constituting a separate market from retail fixed telecommunication services.¹⁰⁵ The Commission did not further segment the overall retail mobile market based on the type of service (voice calls, SMS, MMS, mobile internet data services), or the type of network technology (for example, 2G/3G/4G). The Commission considered distinctions within the overall retail market for mobile telecommunication services between pre-paid or post-paid services and private customers or business customers, concluding that these did not constitute separate product markets but represent rather market segments within an overall retail market.¹⁰⁶
- (111) In light of the foregoing, the Commission does not depart from its previous assessment, and concludes, for the purposes of this Decision and without prejudice to further investigation by the UOKiK, that the exact scope of the product market definition in relation to the provision of retail mobile telecommunications services can be left open, since this would not change the outcome of the Commission's evaluation of the Referral Request.

Geographic market definition

- (112) In its previous decisions, the Commission concluded that the retail market for the provision of mobile telecommunications services was national in scope.¹⁰⁷

¹⁰⁴ Commission decisions of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 239; of 8 October 2018 in case M.8842 – Tele2/Com Hem; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 40; of 20 September 2013 in case M.6990 – Vodafone/Kabel Deutschland, recital 197.

¹⁰⁵ Commission decisions of 8 October 2018 in case M.8842 – Tele2/Com Hem, paragraph 10; of 11 May 2016 in case M.7612 – Hutchison 3G UK/Telefónica UK, recital 252; of 10 October 2014 in case M.7000 – Liberty Global/Ziggo, recital 141; of 2 July 2014 in case M.7018 – Telefónica Deutschland/E-Plus, recital 64.

¹⁰⁶ Commission decisions of 8 October 2018 in case M.8842 – Tele2/Com Hem, recital 47; of 1 September 2016 in case M.7758 – Hutchison 3G Italy/Wind/JV, recitals 149 and 161; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 74; of 11 May 2016 in case M.7612 – Hutchison 3G UK/Telefónica UK, recitals 255, 261, 270, 279, 287; of 2 July 2014 in case M.7018 – Telefónica Deutschland/E-Plus, recitals 31 to 55; of 10 October 2014 in case M.7000 – Liberty Global/Ziggo, recital 141; of 28 May 2014 in case M.6992 – Hutchison 3G UK/Telefónica Ireland, recital 141; of 12 December 2012 in case M.6497 – Hutchison 3G Austria/Orange Austria, recital 58.

¹⁰⁷ Commission decisions of 8 October 2018 in case M.8842 – Tele2/Com Hem, recital 49; of 1 September 2016 in case M.7758 – Hutchison 3G Italy/Wind/JV, recital 166; of 3 August 2016 in

- (113) In light of the foregoing, the Commission concludes that, for the purpose of this decision and without prejudice to further investigation by the UOKiK, the relevant market for the retail provision of mobile telecommunications services is national in scope.

Retail supply of multiple play services

Product market definition

- (114) In previous decisions, the Commission has considered but ultimately left open the question as to whether there exist one or more multiple play markets, which are distinct from each of the underlying individual telecommunication services.¹⁰⁸ Moreover, in previous decisions, the Commission has noted that, due to different services, delivered over different infrastructures (fixed for dual play and triple play or fixed and mobile for quadruple play), that are included in the different multiple play bundles, instead of one possible market for multiple play, there could be several possible multiple play markets: a market for fixed bundles (dual play, and triple play) and another separate market for fixed-mobile convergence bundles. The Commission has also noted that the possibility for several mobile subscriptions to be included in a quadruple play bundle further complicates the picture.¹⁰⁹
- (115) In light of the foregoing, the Commission concludes that, for the purpose of this decision and without prejudice to further investigation by the UOKiK, the question as to whether there exist one or more multiple play markets which are distinct from each of the underlying individual telecommunications services can be left open, since this would not change the outcome of the Commission's evaluation of the Referral Request.

Geographic market definition

- (116) In previous decisions, the Commission considered that the geographic scope of any possible retail market for multiple play services would be national since the components of the multiple play offers are offered individually at a national level, and the bundling of the services would not change the geographic scope of the components.¹¹⁰
- (117) In light of the foregoing, the Commission concludes that, for the purpose of this decision and without prejudice to further investigation by the UOKiK, any possible market for the retail supply of multiple play services would be national in scope.

case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 76; of 11 May 2016 in case M.7612 – Hutchison 3G UK/Telefónica UK, recital 293; of 10 October 2014 in case M.7000 – Liberty Global/Ziggo, recital 143; of 2 July 2014 in case M.7018 – Telefónica Deutschland/E-Plus, recital 74; in case M.6497 – Hutchison 3G Austria/Orange Austria, recital 73; in case M.5650 – T Mobile/Orange UK, recitals 25-26; of 28 May 2014 in case M.6992 – Hutchison 3G UK/Telefónica Ireland, recital 164.

¹⁰⁸ Commission decisions of 8 October 2018 in case M.8842 – Tele2/Com Hem, recital 60; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 108; of 4 February 2016 in case M.7637 – Liberty Global/BASE Belgium, recital 96; of 19 May 2015 in case M.7421 – Orange/Jazztel, recitals 86 and 91.

¹⁰⁹ Commission decisions of 8 October 2018 in case M.8842 – Tele2/Com Hem, recital; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, recital 107.

¹¹⁰ Commission decisions of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraphs 112; of 19 May 2015 in case M.7421 - Orange/Jazztel, recitals 89-90; of 10 October 2014 in case M.7000 - Liberty Global/Ziggo, recitals 152-153; of 20 September 2013 in case M.6990 - Vodafone/Kabel Deutschland, paragraphs 263-265; of 16 June 2011 in case M.5900 - LGI/KBW, paragraphs 183-186.

4.3.4. *Conclusion on the first substantive condition*

(118) In addition to the Commission's findings set out above (Section 4.3.3), the Commission notes that at this stage, the JV's services will only be offered in Poland. In the Form CO, the Parties have not indicated any relevant or affected markets outside Poland. The JV's activities will, at least in the foreseeable future, be restricted to the Polish territory.¹¹¹

(119) In light of the above, the Commission considers that the markets identified in the Referral Request (Section 4.3.1) present the characteristics of distinct markets in Poland, as required under Article 9(2)(a) of the Merger Regulation, also in light of Article 9(7) thereof.

4.4. Markets within Poland in which the Transaction threatens to significantly affect competition

4.4.1. *The UOKiK's submission*

(120) In its Referral Request, the UOKiK submits that the Transaction threatens to significantly affect competition in Poland as a result of the following:

- Horizontal: the UOKiK claims that the Transaction will have an adverse effect on the markets for the production and licensing of AV content, the wholesale supply of TV channels and the retail supply of AV services. In this respect, the UOKiK stressed the high market shares of the Parties in these markets;
- Vertical: the UOKiK considers that anticompetitive vertical concerns arise in respect of the Notifying Parties' activities in the wholesale supply of TV channels on the one hand and the JV's acquisition of TV channels for its retail AV services on the other hand, and the Notifying Parties' sale of offline advertising space on the one hand and the JV's acquisition of such advertising services to promote its retail AV services on the other hand;
- Coordination: the UOKiK further notes the risk of coordination between the Notifying Parties and the JV in the market for the sale of advertising space, given the level of the Notifying Parties' market shares in this market. In this respect, the UOKiK stresses the market power of the Notifying Parties, which may lead to coordinated effects as a result of the Notifying Parties cooperating on markets outside of the JV to promote and disseminate their services to the detriment of competitors.

(121) In light of the above, the UOKiK *prima facie* considers that the Transaction is likely to have significant effects in the Polish market.

4.4.2. *The Notifying Parties' view*

(122) The Notifying Parties disputes the UOKiK's findings in its Referral Request.

(123) First, in relation to the UOKiK's horizontal concerns¹¹², the Notifying Parties submit that these must be rejected for the following reasons:

- The Transaction is limited to the consolidation of the Notifying Parties' OTT businesses only, which does not result in a horizontally affected market for the

¹¹¹ See JVA, clause 3.4.2: [Confidential information relating to the JV's activities].

¹¹² Response to the UOKiK Referral Request, paragraphs 7-11.

retail supply of AV services. The Notifying Parties stress the low market shares of the JV and each of the Notifying Parties in this respect;

- The JV’s intended licensing of content from third parties is yet to be determined, with a prospective yearly budget of just [...]. Therefore, the extent of any overlap between the Notifying Parties and the JV in this market is uncertain. Consequently, the Notifying Parties submit that such prospective behaviour combined with the Notifying Parties’ market share cannot result in a potential competition concern;
- Finally, the Notifying Parties submit that there is no further horizontally affected market in the remaining markets the UOKiK identified given that the Notifying Parties’ activities on these markets are not being consolidated as part of the Transaction. This relates to all upstream activities in respect of content production and acquisition, wholesale or retail supply of TV channels, acquisition of TV channels and offline TV advertising.

(124) Second, in relation to the UOKiK’s vertical concerns¹¹³, the Notifying Parties submit that:

- The Notifying Parties’ activities as wholesale suppliers of TV channels will continue to be operated as independent businesses post-Transaction. Further, the Notifying Parties stress that their individual market shares on this market are below 30%, and their combined market share is irrelevant in the absence of consolidation. [Confidential information relating to the JV’s activities];
- The Notifying Parties also reject the UOKiK’s sub-segmentation by genre of the market for the wholesale supply of TV channels, whereby the Parties market shares do exceed 30%. They submit that this is not in line with the Commission’s previous market definition practice, namely to leave open whether the market for wholesale supply of TV channels should be segmented further;
- Finally, the Notifying Parties’ activities in the offline advertising market will also continue to be operated as independent businesses post-Transaction. They also note that they do not have sufficient market power in the upstream market for the supply of offline TV advertising in order for any vertical competition concerns to arise.

(125) Third, in relation to the UOKiK’s coordination concerns,¹¹⁴ the Notifying Parties submit that:

- In relation to offline advertising, the Notifying Parties and the JV could not coordinate. Any potential agreements for the JV to purchase offline advertising airtime would be entered into on an arms-length basis. Further, the JV could still purchase such airtime from a third party. In any case, the JV will represent less than [0-5]% of the purchasing market for offline advertising in Poland;
- Finally, more generally, the Notifying Parties emphasize that the Transaction will not lead to any coordination between them, due to the nature of the relevant markets and the Parties disparate activities therein – the complete lack of homogeneity between products and the difference in the Parties’ geographic

¹¹³ Response to the UOKiK Referral Request, paragraphs 12-14.

¹¹⁴ Response to the UOKiK Referral Request, paragraphs 15-17.

focus (global versus local player), lack of transparency over input costs and multiple complex revenue streams.

4.4.3. *Commission's assessment*

- (126) As explained in paragraphs (7) to (9), the JV will be active in the retail supply of AV services with its OTT platform in Poland.
- (127) In order to provide content for its OTT platform, the JV will acquire AV content from the Notifying Parties as well as from third parties. The JV will also commission the production of original content and license broadcasting rights for pre-produced AV content. Furthermore, the JV will acquire linear TV channels (and the associated ancillary services) from the Notifying Parties and third parties.¹¹⁵
- (128) In the following sections, the Commission discusses all horizontal and non-horizontal relationships between the Parties, which give rise to affected markets, and carries out a preliminary assessment as to whether the Transaction threatens to significantly affect competition in these affected markets.

4.4.3.1. Horizontal assessment

Horizontal non-coordinated effects in the production of AV content and licensing of broadcasting rights for pre-produced AV content (demand side)

- (129) The Notifying Parties' activities and those of the JV overlap on the demand side of the markets for the production and licensing of AV content, i.e. on the markets for the acquisition of commissioned AV content and broadcasting rights for pre-produced AV content.

Market shares

- (130) On an overall market for the acquisition of commissioned AV content, the Parties' combined market share, by revenues in 2019, amounted to [50-60]% (Discovery: [20-30]%, Polsat: [20-30]%, JV estimate¹¹⁶: [0-5]%). The market shares remain broadly consistent on potential narrower segments of the market such as scripted, premium or Polish content.
- (131) On an overall market for the acquisition of broadcasting rights for pre-produced AV content (excluding sports rights), the Parties' combined market share, by revenues in 2019, amounted to [30-40]% (Discovery: [10-20]%, Polsat: [10-20]%, JV: [0-5]%). In the segment for the acquisition of sport rights, the Parties had a combined market share of [40-50]% (Discovery: [5-10]%, Polsat: [30-40]%, JV: [0-5]%), however, [Confidential information relating to the JV's activities].

The Notifying Parties' views

- (132) The Notifying Parties submit that the Transaction does not raise horizontal competition concerns in the markets for the acquisition of commissioned AV content

¹¹⁵ In addition, [Confidential information relating to the JV's activities].

¹¹⁶ The JV was not present on the markets for the acquisition of commissioned AV content and broadcasting rights for pre-produced AV content in 2019, however, the Notifying Parties have provided market share estimates based on the JV's budget and the 2019 market size. The Notifying Parties indicated that they are not able to provide more forward-looking market shares for the JV as both the total market size as well as the precise scope of the JV's activities are uncertain.

and broadcasting rights for pre-produced AV content on the basis of any plausible market definition.¹¹⁷

- (133) First, the Notifying Parties explain that they will remain independent TV wholesalers and would therefore keep the same incentive to compete aggressively against one another in order to secure the best content. Second, they also submit that the JV would be marginally active in these markets with a spending of [...] for commissioned content and [...] for pre-produced content. Third, the Notifying Parties consider that the Parties' market shares would likely further decrease due to increasing demand from international OTT players. Fourth, several other large customers would continue to be active in the market.

Commission's assessment

- (134) The Commission preliminarily considers that horizontal effects in the markets for the acquisition of commissioned AV content and broadcasting rights for pre-produced AV content are unlikely.
- (135) First, as put forward by the Notifying Parties, both Discovery and Polsat will continue to be active as independent purchasers of AV content production services and as independent licensees of individual AV content post-Transaction.
- (136) Second, the JV will be a new additional purchaser of AV content production and a new licensee of individual AV content. Based on the 2019 market size, it will only represent [0-5]% of the demand (by value) in the market for the production of Polish-language AV content and [0-5]% of the demand (by value) in the market for the licensing of Polish-language AV content in Poland. Therefore, the merger specific change brought about by the Transaction will be limited.
- (137) Third, the majority of content providers responding to the market investigation did not indicate that the Transaction would significantly increase the bargaining power of the Parties vis-à-vis providers of commissioned content¹¹⁸ or providers of pre-produced content.¹¹⁹
- (138) Fourth, the Commission notes that significant alternative purchasers and licensors will remain active on the demand side of the market, including TVP, Canal+, TV Puls as well as global OTT platforms such as Amazon Prime, HBO Go and Netflix.

Conclusion

- (139) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that the Transaction would not threaten to significantly affect competition with respect to the markets for the acquisition of commissioned AV content and broadcasting rights for pre-produced AV content (and any segments thereof).

Horizontal non-coordinated effects in the wholesale supply of TV channels (demand side)

- (140) The Notifying Parties' activities and those of the JV will overlap on the demand side of the market for the supply of TV channels, i.e., on the market for the acquisition of TV channels.

¹¹⁷ Form CO, paragraphs 449-655.

¹¹⁸ Replies to questionnaire Q1 to content providers, question 25.

¹¹⁹ Replies to questionnaire Q1 to content providers, question 26.

Market shares

- (141) On the overall market for the acquisition of TV channels, Polsat had a [10-20]% market share by subscribers in 2019 while Discovery had a market share of below [0-5]%. Discovery does not currently acquire TV channels for incorporation into its retail TV offering other than the acquisition of one single third-party general entertainment/lifestyle pay-TV channel. In some narrower segments, Polsat's market share was above 20%, notably it was [20-30]% in the acquisition of pay-TV channels and [20-30]% in the acquisition of basic pay-TV channels.
- (142) The Notifying Parties submit that the JV may acquire the Parents' and certain third parties' TV channels to be streamed on its OTT platform, however, these activities would be limited.

The Notifying Parties' views

- (143) The Notifying Parties submit that the Transaction does not raise horizontal competition concerns in the market for the acquisition of TV channels on the basis of any plausible market definition.¹²⁰
- (144) First, the Parents would continue to operate their activities in the acquisition of TV channels independently. Second, Discovery would have marginal activities in the acquisition of TV channels. Third, the JV would only have marginal activities in the acquisition of TV channels.

Commission's assessment

- (145) The Commission preliminarily considers that horizontal effects in the markets for the acquisition of TV channels are unlikely.
- (146) First, both Discovery and Polsat will continue to be active as independent purchasers of TV channels post-Transaction.
- (147) Second, given the JV's limited foreseen activities in the acquisition of TV channels, the merger-specific change brought about by the Transaction will be limited.
- (148) Third, there are many other purchasers of TV channels, including Canal+ (second largest DTH operator as well as OTT operator), Orange as well as cable operators such as Vectra and UPC.
- (149) Finally, no concerns with regard to the market for the acquisition of TV channels were raised in the market investigation.¹²¹

Conclusion

- (150) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that the Transaction would not threaten to significantly affect competition with respect to the market for the acquisition of TV channels (and any segments thereof).

Horizontal non-coordinated effects in the retail supply of AV services

- (151) The Notifying Parties and the JV's activities overlap in the market for the retail supply of AV services.

¹²⁰ Form CO, paragraphs 656-672.

¹²¹ Replies to questionnaire Q2 to AV market participants.

- (152) Discovery's Player and Polsat's Ipla platforms will be replaced with the JV's OTT platform. [Details regarding business plan].

Market shares

- (153) The Notifying Parties were not able to provide market shares fully in line with the Commission's market definition. For instance, the Notifying Parties did not provide market shares in the overall retail supply of AV services nor for all plausible segments. Nevertheless, the Commission considers that the submitted market shares provide a good overview on the Parties' activities in retail supply of AV services.
- (154) The Notifying Parties submit that the market for the retail supply of AV services should be segmented according to whether AV services are (i) funded by advertising, including linear (FTA channels) and non-linear services (AVOD), or (ii) funded by subscriptions, including linear (pay-TV channels) and non-linear services (VOD).
- (155) In the advertising-funded market segment, the Parties' combined market share, based on average monthly real users in 2019, amounted to [40-50]% (Discovery[20-30]%¹²², Polsat: [20-30]%, JV estimate¹²³: [0-5]% (Player: [0-5]%, Ipla: [0-5]%))). In the narrower segment for the retail supply of AVOD services (i.e., advertising funded non-linear OTT services), the JV had a combined share of [30-40]% (Player: [20-30]%, Ipla: [10-20]%).¹²⁴ The Notifying Parties have not provided market shares for the retail supply of linear advertising funded OTT services.
- (156) In the subscription-based segment, the Parties' combined market share, by subscribers in 2019, amounted to [30-40]% (Discovery: [0-5]%, Polsat: [20-30]%, JV estimate: [0-5]%¹²⁵). In the narrower market segment for the retail provision of SVOD services (i.e. subscription-based non-linear OTT services), the Parties hold a combined market share of [10-20]% (Discovery SVOD: [5-10]%, Polsat SVOD: [0-5]%, no separate share available for the JV). The Parties' SVOD share mainly represents Player and Ipla, but also includes their sports players, which will not be contributed to the JV, but will be offered as an add-on to the JV, as well as Discovery's TVN24Go. The Parties' market shares in value terms do not differ significantly. The Notifying Parties have not provided market shares for the retail supply of linear subscription-based OTT services.

The Notifying Parties' views

- (157) The Notifying Parties submit that the Transaction does not raise horizontal competition concerns in the market for the retail supply of AV services on the basis of any plausible definition of the relevant product and geographic markets for the reasons set out below.¹²⁶

¹²² Discovery does not have any retail TV activities other than its OTT platforms (i.e. Player, Eurosport Player and TVN24Go). However, the provided market shares for the FTA segment attribute shares to the broadcaster rather than the retailer.

¹²³ The JV was not present on the market for the retail supply of AV services in 2019, however, the Notifying Parties have provided market share estimates based on Ipla's and Player's activities in 2019. The Notifying Parties indicated that they are not able to provide more forward-looking market shares for the JV as both the total market size as well as the precise scope of the JV's activities are uncertain.

¹²⁴ This excludes players such as Facebook, YouTube, which also offer AVOD services, however, unrelated to traditional AV content, and unverified content.

¹²⁵ [...].

¹²⁶ Form CO, paragraphs 731-798.

- (158) First, the assessment would be the same for all potential segments of the market for the retail supply of AV services as the JV will in any case have a limited market share. Second, international OTT platforms, such as Netflix and HBO, which are the most frequently viewed OTT platforms in Poland, have a very strong market position. Third, Canal+ has recently announced the launch of its own OTT service in the Polish market providing access to general entertainment, kids, sport and film channels in Poland. Fourth, there would be other strong local competitors active on the Polish market. Wirtualna Polska and Onet run AVOD businesses in Poland and Wirtualna Polska would have achieved a significant position on the Polish VOD market.

Commission's assessment

- (159) Within the overall market for the retail supply of AV services, the Commission considers that Player and Ipla are close competitors in light of (i) the same distribution technology (OTT) and (ii) the similar type of content (focus on local productions). This was also confirmed by the results of the market investigation. The vast majority of AV distributors identified Player as Ipla's closest competitor and Ipla as Player's closest competitor.¹²⁷
- (160) The Commission expects that the Transaction will likely allow the Parties to significantly increase the JV's subscriber base once the JV's platform aggregates both Parents' content and channels. The Notifying Parties have not been able to provide up-to-date projections¹²⁸ as regards the expected viewer and subscriber evolution of the JV but the Notifying Parties' submissions confirm that they have similar expectations, as they consider that:
- “The JV will generate significant added value in comparison to the products currently offered by each of the Parents”¹²⁹,
 - “The JV will create the unique destination for wide aggregation of free and pay content, offering consumers convenience resulting from easy access to a wide variety of content (previously offered on a few platforms) on one platform.”¹³⁰,
 - [Details regarding commercial strategy]¹³¹, and
 - [Details regarding commercial strategy]¹³².
- (161) Market participants that responded to the market investigation confirmed the Parties' assessment, for instance stating that “the cooperation of Polsat and Discovery regarding JV will lead to a situation in which there will be established the platform combining today's potential of the Player and Ipla” and that “after the transaction it will be difficult to find a player on the Polish market who will be able to match them both in terms of content and market share”.¹³³

¹²⁷ Replies to questionnaire Q2 to AV market participants, questions 80 and 81.

¹²⁸ The Notifying Parties indicated that the JV's projections are almost two years old (Form CO, footnote 29).

¹²⁹ Form CO paragraph 88.

¹³⁰ Form CO, paragraph 89.

¹³¹ Form CO, paragraph 743.

¹³² RBB report, Assessment of the EC's theory of harm on the foreclosure of wholesale TV channel supply, page 14.

¹³³ Replies to questionnaire Q2 to AV market participants, question 83.

- (162) Nevertheless, with regard to the retail supply of AV services, the Commission's preliminary analysis, based on the available market share information at this stage, is that horizontal effects are unlikely.¹³⁴
- (163) With regard to the advertisement-funded market segment (FTA and AVOD), the Commission notes that the JV's market share will be very limited ([0-5]%). Even in the narrower segment for the supply of AVOD services, the JV's market share will only be slightly above 30% ([30-40]%), down from [30-40]% in 2017.
- (164) Several AVOD alternatives to the JV's platform will exercise a competitive constraint on the JV:
- Onet ([20-30]): a press publisher owning vod.pl, a VOD service providing a wide range of content ([Details regarding commercial strategy]),
 - TVP ([10-20]): the Polish national broadcaster which offers a range of linear TV channels as well as non-linear VOD services on its OTT platform,
 - CDA ([10-20]): a video website,
 - WP Pilot ([10-20]): an OTT linear AV services provider,
 - TV Puls: a Polish broadcaster with a VOD offering, and
 - Canal+: which launched a new OTT service in May 2020. Canal+'s service, MyCanal, will offer a variety of content including Canal+ channels, third party channels and paid content, including Polish content.
- (165) Similarly, with regard to the subscription-based segment (pay-TV and SVOD), the Commission notes the JV's market share in the overall subscription-based segment will be limited ([0-5]%). In the narrower segment for the supply of SVOD services, the JV's market share will amount to c. [10-20]%. Several alternative SVOD platforms will exercise a competitive constraint on the JV:
- Netflix ([30-40]): the most frequently viewed OTT platform in Poland, which entered the market with minimal Polish content, but has gained a significant position and has started commissioning Polish content,
 - HBO Go ([10-20]): the second most frequently viewed OTT platform in Poland. HBO also commissions its own Polish content,
 - CDA ([10-20]): a video website, and
 - WP Pilot, TVP, TV Puls and Canal+ (mentioned above), which also offer SVOD services. In particular, Canal+'s paid content will include several packages, including Kids, Fun and Info, Film and Sports packages.
- (166) The Commission notes, however, that the constraint exerted by international OTT platforms such as Netflix and HBO Go may be limited as these platforms are mainly focussed on international rather than Polish content. Therefore, international OTT platforms may represent a complement rather than a substitute to the JV's services.
- (167) Given the JV's current limited market position and the number of alternative platforms, the Commission considers that horizontal effects are unlikely even if the JV increases its downstream footprint in the future.

¹³⁴ The Commission preliminarily considers that the JV's increased downstream footprint will increase the Notifying Parties' incentives to withhold or degrade access to OTT licenses for its TV channels (see Section 4.4.3.2.B).

Conclusion

- (168) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that the Transaction would not threaten to significantly affect competition with respect to the market for the retail supply of AV services (and any segments thereof).

4.4.3.2. Vertical and conglomerate assessment

Foreclosure of competing suppliers of retail AV services from the Notifying Parties' AV content (input foreclosure)¹³⁵

- (169) Both Notifying Parties are active in the market for the licensing out of broadcasting rights for pre-produced AV content. This market is upstream of the market for the retail supply of AV services, in particular VOD services, where the JV will be active as well as the Notifying Parties.¹³⁶
- (170) The merger-specific change brought about by the Transaction is the increase in the JV's downstream activities as a provider of OTT services compared to the Notifying Parties' stand-alone activities as OTT providers (see paragraphs (160) to (161)).

Market shares

- (171) On the upstream market for the licensing out of broadcasting rights for pre-produced AV content, the Notifying Parties' combined market share, by revenues in 2019, amounted to of [0-5]% (Discovery: [0-5]%, Polsat: [0-5]%). The Notifying Parties' market shares were slightly higher in some narrower segments of the market, however, they remain well below 30%: other content (TV series) [0-5]% (Discovery [0-5]%, Polsat [0-5]%), scripted content [0-5]% (Discovery [0-5]%, Polsat [0-5]%) and Polish content [10-20]% (Discovery [0-5]%, Polsat [0-5]%). In addition, the Notifying Parties license in sports rights from leagues and other rights holders and sometimes sub-license out certain of these rights to other broadcasters. In this segment, their combined market share was [10-20]% (Discovery [0-5]%, Polsat 10.6%).
- (172) On the downstream market for the retail supply of AV services, the JV will be a relatively small player. Its presence is more significant in the VOD segments: (i) in AVOD services, the JV (Player and Ipla taken together) had a combined share of [30-40]% in 2019; (ii) in the SVOD segment, the Parties had a combined market share of [10-20]%, which also covers the Parties' remaining VOD services.

The Notifying Parties' views

- (173) The Notifying Parties submit that the Transaction will not give rise to any vertical competition concerns, including input foreclosure concerns, on the basis of any plausible market definition, for several reasons: (i) there will be no change to supply on the upstream market; (ii) the Notifying Parties do not have market power on the

¹³⁵ The vertical relationship between the licensing out of broadcasting rights for pre-produced AV content and the retail supply of AV services was not mentioned in the Referral Request, however, the Commission notes that this overlap gives rise to a vertically affected market. The Commission only addresses potential input foreclosure concerns. No customer foreclosure concerns were raised in the market investigation (Replies to questionnaire Q1 to content providers) and the JV's activities as acquirer of pre-produced AV content will be limited (see section 4.4.3.1).

¹³⁶ The market for the non-captive production of AV content is also vertically related to the retail supply of AV services. However, Polsat does not supply its commissioned content to third parties while Discovery has a minimal market position of [0-5]%.

upstream market; (iii) access to the Parents' AV content does not constitute an essential input in order to provide retail AV services; and (iv) other VOD players are investing heavily in content, including Polish content.¹³⁷

- (174) The Notifying Parties also argue that the JV could be a potential new entrant into the market for the licensing out of broadcasting rights for pre-produced content as the JV will develop its own productions (i.e., OTT dedicated TV series) which may be further licensed to third parties should the JV management choose to engage in this activity.

Commission's assessment

- (175) The vast majority of AV distributors responding to the market investigation indicated that the Notifying Parties would have the ability and incentive to worsen the terms and conditions at which they license pre-produced AV content and that competitors would not have effective counterstrategies.¹³⁸
- (176) The Commission notes that the JVA includes a clause [Confidential – details regarding commercial strategy].¹³⁹
- (177) Nevertheless, the Commission preliminarily considers that vertical effects as a result of input foreclosure strategies by the Parties with regard to access to the Notifying Parties' AV content are unlikely as the Notifying Parties do not have ability to foreclose competing OTT distributors by withholding their AV content.
- (178) First, the Notifying Parties' market shares do not reflect a position of market power on any plausible market for the supply of broadcasting rights for pre-produced content, including with regard to the Polish content (combined market share of [10-20]%).
- (179) Second, neither Discovery (via TVN) nor Polsat have licensed their own Polish TV content to competing standalone OTT VOD platforms. The results of the market investigation confirmed that most market participants currently do not license the Notifying Parties' AV content for their OTT VOD platforms. The few respondents that do license AV content from the Notifying Parties indicated doing so only to a very limited extent.¹⁴⁰
- (180) Third, there is no indication in the Commission's file that Discovery and Polsat would have licensed out their Polish AV content to competing standalone OTT VOD platforms absent the Transaction.
- (181) Fourth, OTT VOD platforms that currently do not access the Notifying Parties' AV content successfully compete on the market without relying on the Notifying Parties' AV content (see paragraphs (164) and (165)).

Conclusion

- (182) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that the Transaction would not threaten to significantly affect competition in the retail supply of AV

¹³⁷ Form CO, paragraphs 799-843.

¹³⁸ Replies to questionnaire Q2 to AV market participants, questions 51 and 52.

¹³⁹ This provision applies to the following VOD platforms: Amazon Prime, Netflix, HBO Go, CDA, TVP VOD, WP Pilot, Onet, Disney+ and HULU (JVA, definition of "Restricted Party" and clause 19.2.6).

¹⁴⁰ Replies to questionnaire Q2 to AV market participants, question 47.

services a result of input foreclosure strategies with regard to the licensing out of broadcasting rights for pre-produced AV content (and any segments thereof).

Foreclosure of competing suppliers of retail AV services from the Notifying Parties' TV channels (input foreclosure)

- (183) Both Notifying Parties are active in the market for the wholesale supply of TV channels. This market is upstream of the overall market for the retail supply of AV services, in particular linear services, where the JV will be active as well as the Notifying Parties.
- (184) The merger-specific change brought about by the Transaction is the increase in the JV's downstream activities as a provider of OTT services compared to the Notifying Parties' stand-alone activities as OTT providers (see paragraphs (160) to (161)).

Market shares

- (185) On the upstream market for the wholesale supply of TV channels, the Notifying Parties' combined market share, by subscribers in 2019, amounted to of [40-50]% (Discovery [20-30]%, Polsat [20-30]%). Table 1 presents the Notifying Parties' shares in the various segments of the market, i.e. distinguishing (i) between FTA and (basic) pay-TV and (ii) by genre.

Table 1: Market shares in the wholesale supply of TV channels (subscribers, 2019)

Segment	Discovery (in %)	Polsat (in %)	Combined (in %)
Overall	[20-30]	[20-30]	[40-50]
FTA vs. (basic) pay TV			
FTA	[20-30]	[20-30]	[40-50]
Pay-TV	[30-40]	[20-30]	[50-60]
Basic Pay-TV	[30-40]	[20-30]	[50-60]
Genre (for all genres for which market share data is available)			
News	[40-50]	[10-20]	[50-60]
Sports	[10-20]	[30-40]	[50-60]
Movies	[0-5]	[5-10]	[10-20]
General entertainment	[20-30]	[30-40]	[50-60]
Lifestyle	[70-80]	[10-20]	[90-100]
Factual	[20-30]	[0-5]	[20-30]
Travel	[90-100]	-	-
Home	[80-90]	-	-
Food	[60-70]	-	-
Youth	-	[20-30]	-

Source: Form CO, Annex 7.1A.

- (186) On the downstream market for the retail supply of AV services, the JV will be a relatively small player. Its presence is more significant in the VOD segments: (i) in AVOD services, the JV (Player and Ipla taken together) had a combined share of [30-40]% in 2019; (ii) in the SVOD segment, the Parties had a combined market share of [10-20]%, which also covers the Parties' remaining VOD services. The Notifying Parties have not provided market shares for the retail supply of linear OTT services.

The Notifying Parties' views

- (187) The Notifying Parties submit that the Transaction will not give rise to any vertical competition concerns on the basis of any plausible market definition.¹⁴¹
- (188) The Notifying Parties argue that Discovery and Polsat will not have the ability to engage in a foreclosure strategy and the Transaction will not increase their ability to do so. First, the Notifying Parties' market power would be limited since they will each remain independently active in the wholesale supply of TV channels in Poland and neither of them has a market share above 30%. Second, according to the Notifying Parties, linear TV channels would not be an important input for the distribution of AV content via OTT as shown by the success of VOD-only platforms such as Netflix. Third, Discovery and Polsat's most popular FTA channels would be subject to must-offer obligations.
- (189) The Notifying Parties submit that Discovery and Polsat will not have the incentive to engage in a foreclosure strategy and the Transaction will not increase this incentive. Each of Discovery and Polsat are already vertically integrated and the JV is only expected to result in a limited increase of their presence on the downstream market for the retail supply of AV services.
- (190) Finally, the Notifying Parties argue that a potential foreclosure strategy would have no effect on competition since, already before the Transaction, Polsat does not licence out OTT rights to its channels and Discovery only licences these rights to a limited extent.

Commission's assessment

- (191) The Commission preliminarily considers that the Notifying Parties could hinder the JV's OTT competitors' access to Discovery's and Polsat's TV channels. These TV channels constitute important inputs which, absent the Transaction, would likely have been licensed out, at least to some additional players, for OTT distribution. If such foreclosure were to materialise, the JV would become the sole channel aggregator distributing over the internet, eliminating potential competition between different OTT channel aggregators.

As regards ability

- (192) The Commission preliminarily considers that the Notifying Parties will have the ability to foreclose competing OTT platforms by withholding or degrading access to the Notifying Parties' TV channels, for several reasons.
- (193) First, the Notifying Parties have very high market shares in the market for the wholesale supply of TV channels. As indicated in paragraph (185), the Notifying Parties' combined market share amounted to [40-50]% in 2019. In several market segments and specific genres, the Parties' combined market share exceeds 50%: pay-TV channels ([50-60]%), basic pay-TV channels ([50-60]%), news channels ([50-60]%), sports channels ([50-60]%), general entertainment channels ([50-60]%) and lifestyle channels ([90-100]%).
- (194) Even taken separately, both of the Notifying Parties' market shares exceed 30% in several market segments and specific genres. Discovery's market share is above 30% in the supply of pay-TV channels ([30-40]%), basic pay-TV channels ([30-40]%),

¹⁴¹ Form CO, paragraphs 674-730.

news channels ([40-50]%), lifestyle channels ([70-80]%), travel channels ([90-100]%), home channels ([5-10]%) and food channels ([60-70]%). Polsat's market share is above 30% in the supply of sports channels ([30-40]%) and general entertainment channels ([30-40]%).

- (195) Second, the results of the market investigation confirmed both Discovery's and Polsat's important position in the wholesale supply of TV channels in Poland.
- (196) In the first place, all providers of linear retail AV services license channels from both Discovery and Polsat.¹⁴² In the second place, respondents to the market investigation consider both Discovery's and Polsat's channels to be particularly important, i.e. these channels contribute significantly to the competitiveness of a retail AV service. Respondents describe Discovery's and Polsat's channels, for instance, as representing a "*high viewership share and [without] alternative available to consumers*", as being "*irreplaceable*" or "*must-have*" because "*end-users find a significant part of these programs absolutely necessary*". Distributors consider that the Parties' channels are "*most attractive on the market*".¹⁴³ With regard to the importance of Discovery's channels, while some respondents indicated that all channels are particularly important, certain respondents indicated that the most important channels are TVN24, TVN Style, TVN Turbo, HGTV, Eurosport and Discovery Channel. According to respondents, Discovery's channels are particularly relevant for their reach, and offering by genre focused on news, general entertainment and sport content.¹⁴⁴ With regard to the importance of Polsat's channels, while some respondents indicated that all channels are particularly important, certain respondents indicated that the most important channels are Polsat, Polsat News, Polsat Sport, Eleven Sports and Polsat Premium Sport.¹⁴⁵ Respondents particularly highlighted the relevance of Polsat's sport channels.
- (197) Third, the results of the market investigation confirmed that respondents consider linear channels to be relevant inputs for OTT platforms.¹⁴⁶
- (198) Fourth, Discovery and Polsat are two of the three key wholesalers in Poland, the third one being the public broadcaster, whose channels are not a valid alternative to the Notifying Parties' channels.
- (199) In the first place, TVP is a public broadcaster and does not operate according to commercial incentives that drives competition between commercial broadcasters in the wholesale supply of TV channels. Accordingly, TVP cannot be presumed to respond to market opportunities (e.g., should the Notifying Parties' channels no longer be available to OTT distributors) in a way that other commercial broadcasters would. In the second place, TVP's channels are in any case widely distributed. Therefore, TVP's channels are not a suitable replacement for the Notifying Parties' channels. In the circumstance that the Notifying Parties' channels are available to one TV distributor other TV distributors would not be able to differentiate their offering by distributing only TVP's channels instead (which by definition are available to all TV distributors). The results of the market investigation confirmed

¹⁴² Replies to questionnaire Q2 to AV market participants, question 53.

¹⁴³ Replies to questionnaire Q2 to AV market participants, questions 68-69.

¹⁴⁴ Replies to questionnaire Q2 to AV market participants, question 56.

¹⁴⁵ Replies to questionnaire Q2 to AV market participants, question 57.

¹⁴⁶ Replies to questionnaire Q2 to AV market participants, question 61 and 67-68.

that assessment, as the majority of respondents indicated that TVP does not exercise a significant competitive constraint on Discovery and Polsat.¹⁴⁷

- (200) Finally, as regards the Notifying Parties' technical ability to withhold access to OTT rights for their FTA channels, the Commission notes that must-offer obligations befalling the Notifying Parties only concern a limited number of FTA channels: for Discovery, the must-offer obligation applies to TVN but not to TVN7, TTV and Metro; for Polsat, it applies to Polsat and TV4 but not Super Polsat, Eska TV, Polo TV and TV6. In addition, must-offer obligations do not apply to ancillary rights which the market investigation confirmed are increasingly relevant to a competitive retail offering.¹⁴⁸ Furthermore, [Details regarding licensee].¹⁴⁹ The results of the market investigation also confirm that it is unclear whether Discovery and Polsat will be obliged to offer certain of their linear channels to third party OTT platforms and emphasised that such obligations would only apply to a limited number of channels.¹⁵⁰

As regards incentive

- (201) The Commission preliminarily considers that the Notifying Parties will have the incentive to foreclose competing OTT platforms by withholding or degrading access to the Notifying Parties' TV channels for OTT distribution for the following reasons.
- (202) So far, the Notifying Parties have licensed out OTT rights to the following extent:
- Discovery granted OTT rights to [Details regarding licensee];
 - Polsat has contracts with [Details regarding licensee].
- (203) Following the Transaction and the creation of an OTT channel aggregator including both Parents' TV channels, there is the risk that the Notifying Parties will aim to protect the JV's unique position on the market. Discovery may be incentivized to limit its licensing out of OTT rights to its linear channels (i.e., to terminate existing agreements at the contract end and/or not enter into new agreements), and Polsat will have diminished incentives to license out OTT rights and/or limit the licensing out of Eleven Sports channels. Alternatively, the Notifying Parties could achieve a similar outcome by degrading the terms and conditions at which Discovery and Polsat would offer OTT rights. The Notifying Parties could thus reserve to the JV's OTT platform access to their TV channels and certain ancillary rights and/or make available such services for the JV OTT platform on preferential conditions, to the detriment of competing OTT providers.¹⁵¹
- (204) The majority of AV distributors responding to the market investigation consider that Discovery and Polsat would stop licensing their TV channels to third parties for OTT distribution and only offer them on the JV's OTT platform.¹⁵² One respondent explained that "*incentives for limiting licensing for OTT distribution will be*

¹⁴⁷ Replies to questionnaire Q2 to AV market participants, question 60.

¹⁴⁸ Notifying Parties' response of 6 August 2020 to RFI 20, question 1.

¹⁴⁹ See e.g. Form CO, paragraph 263 concerning negotiations on OTT licenses between Discovery and [Details regarding licensee].

¹⁵⁰ Replies to questionnaire Q2 to AV market participants, question 63.

¹⁵¹ This section focusses on the licensing of OTT rights as most direct access to the Notifying Parties' TV channels for competing OTT providers. In principle, the Notifying Parties could also implement an input foreclosure strategy, with similar outcome, by limiting the relevant ancillary rights of its licensing contracts, in particular TV Everywhere rights.

¹⁵² Replies to questionnaire Q2 to AV market participants, question 66.

primarily the fact that [the] JV platform will be leading to create the most competitive offer, in particular with the exclusive content and exclusive linear channels.” Another respondent stated that, “[a]fter the transaction, Polsat and Discovery as a strong media group will want to gain a competitive advantage over other entities. Thus, they would seek to limit the distribution of its content among external platforms, especially OTT”. If Discovery and Polsat were to continue licensing OTT rights to their TV channels, the majority of respondents expect that Discovery and Polsat would degrade the terms and conditions for the acquisition of their TV channels.¹⁵³

- (205) In addition, evidence shows that the Transaction may reduce the number of OTT platforms with access to the Notifying Parties’ TV channels:
- [Details regarding licensee]. Under the JVA, both Polsat and Discovery [Details regarding licensee].¹⁵⁴ Therefore, [Details regarding licensee]. While the Notifying Parties indicate that the JV will be free to [Details regarding licensee].¹⁵⁵ Therefore, [Details regarding licensee];
 - [Details regarding licensee].¹⁵⁶
- (206) Finally, the Commission notes that the Transaction increases each Notifying Parties’ unilateral incentive to engage in input foreclosure strategies in order to protect the JV’s market position. Moreover, as soon as one of the Notifying Parties engages in a foreclosure strategy, the JV’s competitive advantage as sole OTT channel aggregator would be preserved. In addition, as explained in Section 4.4.3.3, in light of the Notifying Parties’ high market shares in the wholesale supply of TV channels, a risk of cooperative effects in this market cannot be excluded.

As regards effects on competition

- (207) The Commission preliminarily considers that an input foreclosure strategy with regard to the Notifying Parties’ TV channels would likely have significant effects on competition in the market for the retail supply of AV services.
- (208) Post-Transaction, the JV will become the only OTT channel aggregator on the Polish market. The Notifying Parties will aim to protect the JV’s competitive advantage by refusing to provide OTT rights to their TV channels to other OTT platforms. By doing so, the Notifying Parties will deprive end customers of competition between different OTT channel aggregators.

Conclusion

- (209) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that the Transaction would threaten to significantly affect competition in the retail supply of AV services as a result of input foreclosure strategies with regard to the wholesale supply of TV channels, and thus requires further investigation.

¹⁵³ Replies to questionnaire Q2 to AV market participants, question 67.

¹⁵⁴ JVA, clause 19.2.11.

¹⁵⁵ JVA, clause 19.2.6.

¹⁵⁶ Notifying Parties’ response of 14 July 2020 to RFI 16, question 8.

Foreclosure of competing suppliers of VOD services from the Notifying Parties' offline TV advertising space (input foreclosure)

- (210) The Notifying Parties are both active on the upstream market for offline TV advertising space, while the Notifying Parties and the JV will be active in the downstream market for the retail supply of AV services.
- (211) The merger-specific change brought about by the Transaction is the increase in the JV's downstream activities as a provider of OTT services compared to the Notifying Parties' stand-alone activities as OTT providers (see paragraphs (160) to (161)).

Market shares

- (212) On the upstream market for the supply of offline TV advertising space, the Notifying Parties' combined market share, by revenues in 2019, amounted to [60-70]% (Discovery: [30-40]% and Polsat: [20-30]%).
- (213) On the downstream market for the retail supply of AV services, the JV will be a relatively small player. Its presence is more significant in the VOD segments: (i) in AVOD services, the JV (Player and Ipla taken together) had a combined share of [30-40]% in 2019; (ii) in the SVOD segment, the Parties had a combined market share of [10-20]%, which also covers the Parties' remaining VOD services. The Notifying Parties have not provided market shares for the retail supply of linear OTT services.

The Notifying Parties' views

- (214) The Notifying Parties submit that the Transaction will not give rise to any vertical competition concerns, including input foreclosure concerns, on the basis of any plausible market definition, for several reasons: (i) the Notifying Parties do not have market power on the upstream market; (ii) there are many alternative forms of advertising which constrain offline TV advertising; and (iii) competitors could purchase offline TV advertising space via media houses.¹⁵⁷
- (215) Finally, the Notifying Parties emphasise that the JV will not be a significant purchaser and that the Transaction will therefore not materially affect the market for the supply of offline TV advertising.

Commission's assessment

- (216) The Commission preliminarily considers that it cannot be excluded that the Notifying Parties will have the ability to foreclose competing OTT platforms by withholding or degrading access to the Notifying Parties' offline TV advertising space.
- (217) First, based on the market shares presented in in paragraph (212), the Notifying Parties seem to have a significant degree of market power in the upstream market for offline TV advertising. In addition, one respondent to the market investigation indicated that the Notifying Parties' combined market share would be in the range of [80-90]% in this market (as opposed to [60-70]% indicated by the Notifying Parties).¹⁵⁸
- (218) Second, the vast majority of AV distributors responding to the market investigation consider that (i) if, post-Transaction, Polsat and Discovery were to engage in cross-promotion of the JV's OTT platform on their TV channels, this would constitute a

¹⁵⁷ Form CO, paragraphs 855-880.

¹⁵⁸ Replies to questionnaire Q2 to AV market participants, question 92.

very significant competitive advantage for the JV, and that (ii) this would have a very negative impact on the ability of third party TV distributors to compete with the JV,¹⁵⁹ due to insufficient alternatives to the Notifying Parties' TV advertising space.¹⁶⁰

- (219) Third, whilst TV advertising space may be considered an “*important input*” within the meaning of the Non-Horizontal Merger Guidelines for certain downstream activities, this must be based on the concrete context of the case (e.g. the extent to which rival suppliers of OTT services have relied upon offline TV advertising). The market investigation was inconclusive in this regard.
- (220) Therefore, at this stage, the Commission considers that further investigation is required in order to determine the Notifying Parties' ability and incentive to foreclose rival suppliers of OTT services by engaging in an input foreclosure strategy with regard to the Notifying Parties' offline TV advertising space and whether such input foreclosure would have an impact on effective competition in the retail supply of AV services (and any segments thereof).

Conclusion

- (221) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that it cannot be excluded that the Transaction would threaten to significantly affect competition in the retail supply of AV services a result of input foreclosure strategies with regard to the sale of offline TV advertising space, and thus requires further investigation.

Conglomerate effects relating to the JV's activities in the retail supply of AV services and Polsat's activities as telecommunications provider

- (222) The JV's OTT offering is complementary to the fixed telephony, fixed internet access and mobile telecommunication services supplied by Polsat, because end customers can procure fixed telephony, fixed internet access, mobile telecommunication and TV services from one and the same provider.¹⁶¹
- (223) The merger-specific change brought about by the Transaction is the increase in the JV's downstream activities as a provider of OTT services compared to the Notifying Parties' stand-alone activities as OTT providers (see paragraphs (160) to (161)).
- (224) In the present section, the Commission preliminarily examines whether the Transaction could lead to foreclosure of telecommunication operators. Given that Polsat's market shares in the various telecommunication markets are below 30%, the Transaction does not give rise to a vertically affected market in this regard and the Commission does not analyse whether the Transaction could lead to foreclosure of TV distributors.

¹⁵⁹ Replies to questionnaire Q2 to AV market participants, question 92.

¹⁶⁰ Replies to questionnaire Q2 to AV market participants, question 91.

¹⁶¹ The Commission does not carry out a separate analysis of potential vertical effects arising from the Transaction, i.e. treating retail TV services as an input in the provision of multiple play services. While it is not possible to conclude on the existence of a single multiple play services market in Poland (see Section 4.3.3.6), in any case, similar considerations would apply in the context of an assessment of vertical effects as those set out in the analysis of conglomerate effects.

Market shares

- (225) Polsat held the following shares on relevant telecommunications markets, by subscribers, in 2018:
- market for the retail supply of fixed telephony services: [5-10]%;
 - market for the retail supply of fixed internet access services: [5-10]%;
 - market for the retail supply of mobile telecommunication services: [20-30]%;
 - market for the retail supply of multiple play services: [20-30]%.
- (226) On the market for the retail supply of AV services, the JV will be a relatively small player. Its presence is more significant in the VOD segments: (i) in AVOD services, the JV (Player and Ipla taken together) had a combined share of [30-40]% in 2019; (ii) in the SVOD segment, the Parties had a combined market share of [10-20]%, which also covers the Parties' remaining VOD services. The Notifying Parties have not provided market shares for the retail supply of linear OTT services.

The Notifying Parties' views

- (227) The Notifying Parties submit that the Transaction will not give rise to any conglomerate competition concerns on the basis of any plausible market definition.¹⁶²
- (228) First, the Notifying Parties argue that neither Polsat nor the JV will hold market power on any of the relevant markets corresponding to the different elements composing multiple play offerings that include AV services. In particular, Polsat's market share is below 30% on all the relevant market segments for telecommunication services. Second, the Notifying Parties consider that Discovery will have no incentive to confer an advantage to Polsat's multiple play offerings and that it will therefore oppose any strategy restricting the distribution of the JV in order to increase the value of Polsat's offers by bundling the JV's services with telecommunication services.

Commission's assessment

As regards ability

- (229) The vast majority of respondents to the market investigation consider that the JV's OTT services will likely not be made available for inclusion in bundled offers other than the one offered by Polsat or only at less favourable terms.¹⁶³ Respondents consider that adding the JV's services to Polsat's bundled offers will constitute a significant competitive advantage. They also consider that Polsat's competitors will not be able to replicate equivalent bundled offers. However, none of the respondents explained why the JV would not have the incentive to license its services to telecommunication operators other than Polsat.
- (230) The Commission preliminarily considers that the Parties will not have the ability to engage in any hypothetical foreclosure strategy of competing providers of fixed and mobile telecommunication services by bundling the JV's OTT offering (exclusively) with Polsat's fixed and mobile telecommunication services, for the following reasons.

¹⁶² Form CO, paragraphs 908-927.

¹⁶³ Replies to questionnaire Q2 to AV market participants, question 85.

- (231) First, a possible bundling strategy would be more plausible for the SVOD rather than the AVOD service, as AVOD services (i) are offered free of charge, (ii) are advertising-funded and require the widest possible distribution and (iii) have not been used in the past to create bundled products in the Polish market. In the SVOD segment, the JV's market share will not be higher than c. [10-20]%.
- (232) Second, the ownership structure of the JV would diminish the likelihood of adoption of such foreclosure strategy. The JV will be jointly controlled by Polsat and Discovery, with the latter not being active on the markets for fixed and mobile telecommunication services. Indeed, [Business plan details].
- (233) Third, it is unclear that obtaining the JV's offering integrated with Polsat's platform would confer Polsat a significant competitive advantage. That is because the JV's OTT offering will be available on a direct to customer basis to all consumers with an internet connection, regardless of the identity of the provider of such connection.
- (234) Fourth, alternative OTT offers remain available with whom competing providers of telecommunication services could partner. For instance, several cable operators (UPC, Vectra, Inea) make HBO Go available as part of their offering. Mobile network operators T-Mobile and P4 (Play) offer Netflix and Amazon Prime. Finally, Orange has a cooperation with Canal+, whereby Orange offers Canal+ packages while Canal+ offers Orange's telecommunication services.
- (235) Therefore, Polsat's competitors could develop effective and timely counter strategies and contract with one or several competing OTT providers.

As regards incentive

- (236) The Commission preliminarily considers that the Parties will not have the incentive to foreclose competing providers of fixed and mobile telecommunication services by bundling the JV's OTT offering (exclusively) with Polsat's fixed and mobile telecommunication services.
- (237) The Commission preliminarily considers that Discovery would not benefit from such a foreclosure strategy. It has no presence on the fixed and mobile telecommunication services. On the contrary, Discovery will have the incentive to make the JV's OTT service as widely available as possible. As a result, a foreclosure strategy is unlikely to be pursued by the JV.

As regards effects on competition

- (238) The Commission considers that, in light of the absence of ability and incentive, there is no need to assess whether a hypothetical foreclosure strategy due to the conglomerate relationships created by the Transaction would have any negative impact on effective competition.

Conclusion

- (239) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that the Transaction would not threaten to significantly affect competition with regard to the relationship between Polsat's activities in the retail supply of fixed telephony, fixed internet access, mobile telecommunication as well as multiple play services and the JV's activities in the retail supply of AV services.

4.4.3.3. Cooperative effects

- (240) The Notifying Parties will remain independently active in a number of the same markets as the JV, notably in the markets for the (i) production of AV content

(demand side), (ii) licensing of broadcasting rights for pre-produced AV content (demand side), (iii) wholesale supply of TV channels (demand side), (iv) retail supply of AV services, and (iv) sale of online advertising space

- (241) The Notifying Parties will also remain independently active in a number of markets which are upstream or downstream from or closely related to the activities of the JV, notably in the markets for the (i) production of AV content, (ii) licensing of broadcasting rights for pre-produced content, (iii) wholesale supply of TV channels, and (iv) sale of offline advertising space.

The Notifying Parties' views

- (242) The Notifying Parties argue that the creation of the JV does not have the object or effect of and will not lead to coordination between the Notifying Parties and the JV, or amongst themselves, on any of the concerned markets, because (i) the market conditions are not conducive to tacit coordination, (ii) the Notifying Parties will continue to have different commercial interests and (iii) the JV will form a small part of the Notifying Parties' overall businesses.

Commission's assessment

- (243) The Commission, based on its preliminary analysis, considers that cooperative effects cannot be excluded in light of the Notifying Parties' high and symmetric market shares in the following markets:

- Production of AV content (demand side), i.e., acquisition of commissioned AV content: where the Parties held a combined market share of [50-60]% (Discovery: [20-30]%, Polsat: [20-30]%, JV: [0-5]%) by revenues in 2019;
- Wholesale supply of TV channels: where the Notifying Parties held a combined market share of [40-50]% (Discovery [20-30]%, Polsat [20-30]%) by subscribers in 2019, with higher market shares in several segments;
- Supply of offline TV advertising space: where the Notifying Parties held a combined market share of [60-70]% (Discovery: [30-40]% and Polsat: [20-30]%) by revenues in 2019.

- (244) Therefore, at this stage, the Commission considers that further investigation is required in order to determine whether the abovementioned markets in Poland are conducive to coordination.

Conclusion

- (245) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the UOKiK, the Commission considers that it cannot be excluded that the Transaction would threaten to significantly affect competition as a result of cooperative effects with respect to the markets for (i) the production of AV content (demand side), (ii) the wholesale supply of TV channels, and (iii) the sale of offline advertising space, and thus requires further investigation.

4.4.4. Conclusion on the second substantive condition

- (246) In light of the above considerations, following the Commission's preliminary assessment,¹⁶⁴ the Commission concludes that the Transaction threatens to significantly affect competition at least in the market for the retail supply of AV

¹⁶⁴ Commission Notice on Case Referral in respect of concentrations, recital 35.

services in Poland as a result of input foreclosure strategies with regard to the wholesale supply of TV channels, as required under Article 9(2)(a) of the Merger Regulation.

- (247) Moreover, as regards the *prima facie* competition concerns presented by the UOKiK in relation to the possible foreclosure of competing suppliers of retail AV services from accessing the Notifying Parties' offline TV advertising space as well as in relation to the risk of coordination resulting from cooperative effects in the markets for (i) the production of AV content (demand side), (ii) the wholesale supply of TV channels, and (iii) the sale of offline advertising space, following the Commission's preliminary assessment, the Commission cannot exclude that the Transaction threatens to significantly affect competition in this regard.

4.5. Conclusion on the criteria of Article 9(2)(a) and (3) of the Merger Regulation

- (248) In light of the above, the Commission considers that the legal requirements for a referral laid down in Article 9(2)(a) and (3) of the Merger Regulation are fulfilled with regard to the Transaction.

4.6. Remedies

- (249) On 5 August 2020, the Notifying Parties submitted commitments pursuant to Article 6(2) of the Merger Regulation, [Commitments offered].
- (250) By the [Commitments offered], the Notifying Parties would have committed, following the Commission's approval of the Transaction, [Commitments offered].¹⁶⁵ Within one month of the Commission's approval of the Transaction, the Notifying Parties would have appointed a Monitoring Trustee.
- (251) The [Commitments offered] (ii) the Commission's approval following consultation with the Monitoring Trustee.
- (252) According to the [Commitments offered]:
- [Commitments offered]
 - [Commitments offered]
 - [Commitments offered]
 - [Commitments offered]
 - [Commitments offered]
- (253) The Notifying Parties submit that this mechanism would not have constituted an agreement to prevent restrict or distort competition within the meaning of Article 101 TFEU.

4.7. The Commission's discretion whether to refer

- (254) Pursuant to Article 9(3) of the Merger Regulation, in the event that the criteria provided for in Article 9(2)(a) are fulfilled with regard to a proposed transaction, the Commission has discretion whether to refer a given case to a national competition authority.
- (255) The UOKiK submits that it would be the best placed authority to review the effects of the Transaction in Poland given that (i) the potential significant impact of the

¹⁶⁵ [Commitments offered].

proposed concentration on competition relates to one or more markets that are national in scope, (ii) the UOKiK closely cooperates with the national regulator of the media market (the National Broadcasting Council), (iii) the UOKiK has recent and substantial case experience following a number of proceedings relating to the wider television market in recent years¹⁶⁶, and (iv) the UOKiK is already conducting an investigation into a potential infringement of the Competition and Consumer Protection Act of 16 February 2007 concerning the marketing of audio-visual content by means of television, in particular the creation, compilation, transmission, distribution and distribution of television programmes.¹⁶⁷

(256) The Notifying Parties consider that the Commission is better placed to review the Transaction, for the following reasons:

- The Commission has a central role in deciding cases in TV-related markets in view of the pan-European nature of these markets. This is particularly visible in respect of OTT services, which by definition can be technically available across the EU. There is a need to ensure consistency in deciding these cases. Further, the Commission has recent sector specific knowledge applicable to the current Transaction, including the Commission’s recent decision in *Telia/Bonnier*,¹⁶⁸
- A re-notification and market investigation by the UOKiK would add to the Parties’ administrative burden, as the Commission has already conducted its market investigation. In addition, conducting a second investigation would unnecessarily add to the administrative burden of the market players and the reviewing authorities. This would run counter the one-stop-shop principle;¹⁶⁹
- There is no compelling reason in this case, nor is this case exceptional, because of which a referral would be justified.

(257) In the following recitals, the Commission assesses the appropriateness of a referral in the present case in light of the principles set out in the Referral Notice.

(258) According to paragraph 9 of the Referral Notice, “[i]n principle, jurisdiction should only be reattributed to another competition authority in circumstances where the latter is more appropriate for dealing with the merger, having regard to the specific

¹⁶⁶ Decision No DKK 83/2015 of 16 June 2015 (ref. DKK2-421/18/15/AI) on the acquisition by SOUTHBANK Media Ltd, established in London, United Kingdom, control of N-Vision B.V., located in Amsterdam, the Netherlands (Scrappis — TVN); Decision No DKK 93/2012 of 14 September 2012 (ref. DKK2-421/21/12/AI) concerning the takeover by Groupe Canal + SA of Issy-les-Moulineaux and TVN S.A. with its registered office in Warsaw of the merged entity Canal + Cyfrowy Sp. z o.o. and ITI Neovision Sp. z o.o. (Canal ± TVN); Decision No DKK 94/2012 of 14 September 2012 (ref. DKK2-421/19/12/AI) on the takeover by Groupe Canal + SA of Issy-les-Moulineaux control of N-Vision B.V., based in Amsterdam, the Netherlands, which will be held jointly with International Trading and Investments Holdings S.A., established in Luxembourg; Decision No 32/2012 of 13 April 2012 (ref. DKK2-421/53/11/AI) concerning the takeover by Multimedia Poland S.A. of the control of Stream Communications Sp. z o.o. located in Krakow; Decision No DKK 101/11 of 5 September 2011 (ref. DKK2-421/52/10/AI) on the takeover by UPC Polska Sp. z o.o. of the control of Aster Sp. z o.o., with its registered office in Warsaw; and Decision No 24/10 of 9 March 2010 (ref. no DKK2-422/7/09/AI) concerning the setting by Telewizja Polsat S.A. with its registered office in Warsaw and Jimajm CEE Limited, based in London, United Kingdom, of a joint venture named Polsat Jimam Ltd, based in the United Kingdom.

¹⁶⁷ Polish Journal of Laws of 2019, item EUR 1076.

¹⁶⁸ Response to the UOKiK Referral Request, paragraph 27.

¹⁶⁹ Response to the UOKiK Referral Request, paragraphs 27.

characteristics of the case as well as the tools and expertise available to the authority”. The Referral Notice also states that “particular regard should be had to the likely locus of any impact on competition resulting from the merger” and that “[r]egard may also be had to the implications, in terms of administrative effort, of any contemplated referral”.

- (259) Moreover, paragraph 13 of the Referral Notice states that “referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question, particularly at the post-notification stage”.
- (260) Contrary to the Notifying Parties’ view,¹⁷⁰ the Commission considers that there are compelling reasons for departing from the original jurisdiction over the present case, by referring the Transaction to Poland.
- (261) First, considering that the geographic scope of the relevant markets is likely to be national (see Section 4.3 above), and that the Transaction is likely to significantly threaten competition in those markets, the UOKiK is better placed to evaluate any submissions of the Parties in relation to these markets. In particular, the JV would be active in Poland, and several respondents to the market investigation have indicated that, in their view, the Transaction would have a negative impact on these markets in Poland.¹⁷¹
- (262) Further, as to the point raised by the Notifying Parties in relation to the Commission’s experience in the relevant markets impacted by the case, it should be noted that the UOKiK has also gained relevant knowledge in relation to the Polish media markets, through TV-related concentrations,¹⁷² including concentrations involving Polsat.¹⁷³ The Commission also notes, in this regard, that the UOKiK is running an antitrust investigation in the relevant markets.¹⁷⁴ Moreover, the UOKiK indicated that it will closely cooperate with the national regulator of the media market (the National Broadcasting Council) to conduct its review.

¹⁷⁰ Notifying Parties’ submission dated 3 August 2020.

¹⁷¹ See Replies to questionnaires Q2 to AV market participants, Question 99.

¹⁷² Decision No DKK 25/2020 of 17 January 2020 (ref. DKK2-421/55/AI) on the acquisition by Vectra S.A., located in Gdynia, control of Multimedia Polska S.A., located in Gdynia; Decision No DKK 83/2015 of 16 June 2015 (ref. DKK2-421/18/15/AI) on the acquisition by SOUTHBANK Media Ltd, established in London, United Kingdom, control of N-Vision B.V., located in Amsterdam, the Netherlands (Scrappis — TVN); Decision No DKK 93/2012 of 14 September 2012 (ref. DKK2-421/21/12/AI) concerning the takeover by Groupe Canal + SA of Issy-les-Moulineaux and TVN S.A. with its registered office in Warsaw of the merged entity Canal + Cyfrowy Sp. z o.o. and ITI Neovision Sp. z o.o. (Canal ± TVN); Decision No DKK 94/2012 of 14 September 2012 (ref. DKK2-421/19/12/AI) on the takeover by Groupe Canal + SA of Issy-les-Moulineaux control of N-Vision B.V., based in Amsterdam, the Netherlands, which will be held jointly with International Trading and Investments Holdings S.A., established in Luxembourg; Decision No 32/2012 of 13 April 2012 (ref. DKK2-421/53/11/AI) concerning the takeover by Multimedia Poland S.A. of the control of Stream Communications Sp. z o.o. located in Krakow; Decision No DKK 101/11 of 5 September 2011 (ref. DKK2-421/52/10/AI) on the takeover by UPC Polska Sp. z o.o. of the control of Aster Sp. z o.o., with its registered office in Warsaw; and Decision No 24/10 of 9 March 2010 (ref. no DKK2-422/7/09/AI) concerning the setting by Telewizja Polsat S.A. with its registered office in Warsaw and Jimajm CEE Limited, based in London, United Kingdom, of a joint venture named Polsat Jimam Ltd, based in the United Kingdom.

¹⁷³ Decision No DKK 126/2020 of 1 July 2020 (ref. DKK2-421/23/AI) on the acquisition by Telewizja Polsat sp.z.o.o., located in Warsaw, control of Grupa Interia.pl sp.z.o.o. and Grupa Interia.pl Media, based in Warsaw; and Decision No DKK 75/2018 of 11 May 2018 (ref. DKK2-421/75/AI) on the acquisition by Cyfrowy Polsat S.A., based in Warsaw, control over Netia S.A., based in Warsaw.

¹⁷⁴ Polish Journal of Laws of 2019, item EUR 1076.

- (263) In addition, the Commission has previously already referred a similar case, which concerned the creation of a linear OTT aggregation JV, to the relevant national competition authority in case M.9040 – *France Télévisions/Métropole Télévision/TF1/JV*.
- (264) Furthermore, the requested referral will preserve the one-stop-shop principle, as it will be referred to a single competition authority, which contributes to administrative efficiency.
- (265) Moreover, it appears likely that any additional administrative effort for the Parties due to a referral will not be disproportionate. The UOKiK has already formed a broad picture of the main characteristics of the case and potential competition concerns prior to the filing of its Referral Request. The UOKiK indicated that the authority will conduct a thorough assessment of the case.
- (266) Finally, the remedies offered by the Notifying Parties appear also not so obviously suited to address the competition concerns identified in Section 4.4.3.2 as to allow for the Commission to declare the concentration compatible with the internal market in the framework of a phase I investigation. In particular, and without prejudice to the investigation by the UOKiK, [...] identified by the Commission are the following:
- the scope of the commitment proposal does not appear to be sufficient to ensure the effectiveness of the [...], namely to allow at least [] provider to act as a competitive constraint, offering [...]. The scope of the commitment includes [...].
 - the duration of [...] years, renewable once (for [...] years) appears insufficient, in particular having regard to [...], and (iii) the total duration, which falls short of the duration accepted in the Commission’s previous practice, most recently in the *Telia/Bonnier*¹⁷⁵ case, where a similar commitment was accepted with a duration of 10 years.
- (267) In light of the above, the Commission considers that the UOKiK is in the best position to investigate the effects of the Transaction in Poland.

5. CONCLUSION

- (268) From the above it follows that the conditions for a referral under Article 9(2)(a) Merger Regulation are met. The Commission also considers that, given the national scope of the markets affected by the transaction and the UOKiK’s extensive experience with transactions in the Polish media sector, the competent authorities of Poland are better placed to carry out a thorough investigation of the whole case, and that it is therefore appropriate for the Commission to exercise its discretion under Article 9(3)(b) Merger Regulation to refer the case in whole to the competition authority of Poland.

¹⁷⁵ Commission decisions of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, recital 1513.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration is referred in its entirety to the competition authority of Poland, pursuant to Article 9(3)(b) of Council Regulation (EC) No 139/2004.

Article 2

This Decision is addressed to Poland.

Done at Brussels, 26.8.2020

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President