

EN

*Case No COMP/M.2876 -
NEWSCORP/ TELEPIU'*

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**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 8 (2)
Date: 02/04/2003

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IV ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

A. THE RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

17. The concentration affects a number of markets within the territory of Italy.

1. PAY TV MARKET

Product market

18. *Newscorp* believes that the proposed transaction should be evaluated in the context of the overall market for TV broadcasting in Italy including both pay and free TV services. The parties have argued that the Commission has recognised the interaction between these two segments in earlier decisions⁷. *Newscorp* submits that, in relation to the Italian market, there may be reasons for the Commission to conclude that the relevant product market should include both pay and free TV services. *Newscorp* further argues that the strength of free-TV broadcasters in the specific case of Italy constitutes an effective constraint for the pay-TV operators.

19. The extensive market investigation carried out in this case has shown that in Italy there is a clear distinction, from the viewpoint of both customers and suppliers, between free-to-air TV and pay-TV. The scope of the investigation encompassed free-to-air TV broadcasters, channel suppliers, football clubs and associations of consumers. A summary of the main issues raised by the market test is presented in the paragraphs below.

Free-to-air broadcasters

20. The finding that free and pay-TVs are separate markets has been recognised both by larger (nation-wide broadcasters) and by the vast majority of smaller (regional or local broadcasters) free-to-air TV operators. Nearly all of the broadcasters consulted submitted that the type of content and the program schedules offered by pay-TV are not the same as those available on free-to-air TVs. This creates a clearly different appeal of the two services on end consumers. In addition, as regards supply-side substitutability, given that the business models of the two types of broadcasters are distinct, pay-TV operators would not be able to switch to free-to-air TV in the short term and vice-versa,

⁷ Commission decisions of 10 September 1991, case No. IV/M.110, *ABC/Generale des Eaux/Canal+/W.H. Smith TV*, para. 11; 20 September 1995, case No. M.553, *RTL/Veronica/Endemol*, para. 20. The mentioned decisions are published on the Commission's web-site: <http://europa.eu.int/comm/competition/mergers/cases/>

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without incurring significant additional costs or risks⁸. In particular, free-to-air TVs largely rely on revenues stemming from advertising or public funds (State contributions), whilst pay-TVs rely on revenues stemming from subscription fees (and to a much lesser extent – around 5% in Italy – from advertising).

21. Whilst “audience” (or viewer “share”) is the parameter for the assessment of the success of free-to-air TV (bearing in mind the potential reach for advertising), the number of subscribers is the key parameter for pay-TV. Respondents have also indicated that for some specific kinds of content, for example sports and, in particular, football, pay-TVs are able to offer a panoply of events, even simultaneously. This multi-channel offer is incommensurably superior to that available to free-to-air viewers who can, at the very most, view one event, for instance a football match, at a time. At this point in time, therefore, pay-TV and free-TV services are not fully interchangeable from the consumer perspective. Indeed, some free broadcasters have highlighted that viewers of pay-TVs are often interested in program schedules of a specific kind, for example sport and cinema, which is only available in the pay-TV modality.
22. Furthermore, some prominent free-to-air broadcasters have stated that, even if there may be a certain degree of interaction between pay-TV and free-to-air TV, content providers tend to multiply their revenue sources by clearly distinguishing the “selling windows” between pay-TV and free TV. This clearly contributes to identifying separate markets.

Channel suppliers

23. Similar views have been put forward by a substantial number of channel suppliers, which have stated that pay-TV and free-to-air TV belong to distinct markets.
24. Differences in typical revenue models between the two types of broadcasters contribute to placing them in different competitive arenas from the supply-side viewpoint. It has also been observed that, whilst there exists a direct economic relationship between the broadcaster and viewers as regards pay-TV (through the “subscription fee”), this is not the case for free-to-air TV, where the economic relationship is established between the broadcaster and advertisers. Furthermore, bearing in mind their respective program schedules, from the point of view of end consumers the relationship between the two types of TVs could be qualified as “complementary” rather than “alternative”.
25. Taking into account the supply-side perspective of thematic channel producers, respondents have stated that only pay-TVs are considered as possible purchasers of content, whilst free-to-air TV operators could hardly represent a suitable alternative.
26. Nevertheless, it has also been held by some respondents that all broadcasters do compete in a global retail market for viewers and in a global wholesale market for the acquisition of programming material. In this respect, it has been stated that “as regards the acquisition of the so-called “library” films (films broadcast by non-premium pay-TV channels), there is competition between pay-TV and free-TV.” However, when

⁸ See Commission’s notice on the definition of relevant market for the purpose of Community competition law, 97/C 372/03, paragraph 20. The short term is to be intended as “such a period that does not entail a significant adjustment of existing tangible and intangible assets.”

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identifying some specific elements of content, a third party acknowledged that “in general, there is no competition between pay-TV operators and free-TV operators in the acquisition/sale of channels and programs”. Another respondent stated that, in any event, even if pay and free TVs constitute separate markets, “they both rely on the same sources of programmes”, which in turn “means that prices and conditions negotiated in one segment have effects on the other” segment.

27. Third parties have emphasised that the two markets are substantially different essentially because of four elements: (a) business model that makes the two products different from the supply-side point of view, (b) dimension, (c) contents and (d) programme schedules. Leaving aside the first three elements, which have already been discussed, as regards programme schedules, it is important to underline that free TVs have a fixed “programming schedule” throughout the course of the day and of the week, whilst pay-TVs (especially thematic channels offered through pay-TV platforms) have a program schedule that allows various “replays” of the same content/program at various moments during the same day and week. Consequently, viewers of a pay-TV are able to watch the program of their choice (within a pay channel) on various occasions on the same day and also during the same week.
28. Respondents have, however, acknowledged that the presence of a high number of terrestrial free-to-air televisions in Italy influences the degree of penetration of pay-TV services and, to some extent, the ability of content providers to distribute their products through pay-TV platforms.

Football teams

29. Football clubs are particularly closely connected to the pay-TV business, since their revenue stream is highly dependent on the sale of their broadcasting rights to pay-TV operators. This is especially relevant in Italy. As a matter of fact, the vast majority of Italian football clubs (Serie A and Serie B teams) have stated that pay-TV and free-to-air TV markets are clearly distinguishable and that free-TVs do not directly compete in the same market as pay-TVs. The difference is based on four main elements: (a) technological differences, (b) the licensing/authorisation regime needed to operate in the sector, (c) the relationship with end consumers and (d) the different financing system on which the two types of TV are based. These basic differences are then to be coupled with the main difference in terms of “product offer” that characterises the two markets.
30. From a supply-side perspective, it has been said that, as regards live matches taking place throughout the year (for instance the Italian league, Serie A or Serie B) free TVs do not compete with pay-TVs for the acquisition of the relevant exclusive rights, whereas some degree of competition exists for friendly matches, highlights or other products. The majority of football teams tend to consider “football” as a unique product which is mainly geared to the exploitation in the pay modality. Exceptions in this respect might exist (for example, highlights or deferred matches), which show that there might also be some room for free-TVs to exploit football-related products, but these cases are of a sporadic nature and of marginal importance.
31. In this respect, some respondents have stated that since the right holders (the football teams), the product (the football match) and the target (the consumers) are ultimately the same, regardless of the transmission modality (encrypted or free-to-air), it could be

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argued that pay-TV and free TVs compete in the same market. However, in view of (a) the fact that pay TV platforms have the possibility to broadcast several matches at the same time, and (b) that football teams, especially medium and small ones, prefer to sell their rights to pay-TV's in order to preserve attendance at stadiums, as well as (c) the characteristics and the market conduct of most suppliers of rights in respect of football events, it can be concluded that there is a clear difference in the products for which it is possible and convenient to bid.

Associations of consumers

32. Questions were addressed to relevant Italian associations of consumers (Adusbef, Aduc, Altroconsumo, Codacons, Confconsumatori, Federconsumatori). Respondents stated that, even if competitive pressure may exist in Italy between free and pay-TV's due to the existence of a vast network of free-to-air TVs having an important set of programs, it is nevertheless unlikely that an increase of 5-10% in the subscription fee for a pay-TV platform would induce consumers to "switch" and terminate an existing subscription or refrain from subscribing⁹.
33. This is mainly because the pay-TV subscriber is typically different from the free-to-air TV viewer. Consumers willing to subscribe are driven by such strong interest for specific themes (such as sport, movies or music), that traditional generic free-TV's are not perceived as able to satisfy those interests. In this respect, it has been stated that the decision to subscribe is often an emotional one, driven by the attraction of the content offered by the pay-TV, for instance football matches of the favourite national team. This characteristic appears to blur the boundaries between the consumer of pay-TV services and the "supporter" or fan of a specific team or sport or content.

Additional elements

34. The market investigation has highlighted a number of other elements that militate in favour of a distinction between the pay-TV and the free-TV markets.
35. The first element relates to the difference in hardware required for the consumption of pay-TV as opposed to free-TV. A pay-TV consumer requires a decoder (so called "set-top box" or STB) in order to decrypt the broadcasting signal. The STB must be bought or leased, in addition to the customary TV set. The STB is a piece of hardware that a free-TV consumer does not require for terrestrial analogue broadcasting. The difference in hardware requirements is particularly relevant in Italy given that, at present, no digital terrestrial TV (DTT) is commercially available. It is not excluded that in the future this difference might become less relevant since, once DTT is introduced, "terrestrial" TV sets will also require a decoder in order to receive the digital signals. However, the Italian government's plans for the introduction of DTT point towards the end of 2006 (in

⁹ In this respect, the "churn rate" is the measure of disaffection of customers vis-à-vis pay-TV's. The replies have indicated that a rise of 15-20% is more likely to induce subscribers to "switch".

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contrast to other countries such as Spain or the United Kingdom¹⁰, where the digital terrestrial means of transmission is already operational). Moreover, the latest market forecasts indicate that the switch-off of analogue TV in Italy will take place at an even later stage.

36. Moreover the distinct functionalities offered by the digital technology, which to date are only available to consumers via pay-TV, are also relevant. Apart from the possibility to show different events at the same time through a multiplicity of channels, pay-TV in Italy offers a whole range of additional features which are only made possible by digital technology. Electronic Programme Guides (EPGs) and interactivity *inter alia* are clear examples. Viewers of sports events may format their viewing at their convenience, switching for example among the different cameras filming a Formula 1 Grand Prix (from the inside of one car to another, or to the pit-stop), replaying a goal during a football match or switching the camera to watch a penalty kick from the camera installed inside the goal.
37. All the described elements indicate that, at present, pay-TV and free-TV are still clearly distinct markets in Italy, in spite of an undeniable interaction between the two markets. It is clear that the more attractive the offer of a free-TV broadcaster, the smaller the incentive for a viewer to opt for a pay-TV subscription. This is particularly relevant in countries such as Italy where free-TV offers a wide choice of channels, some containing what could be considered as attractive contents. In this respect, free-TV undoubtedly represents a certain constraint to pay-TV.
38. Nevertheless, the crucial question is whether this constraint is sufficiently strong as to render free-TV a substitute for pay-TV. In this respect, the attractiveness of a free-TV broadcaster's offer depends by definition on the contents offered to viewers. At present, as shown by the market investigation, the types of contents which are considered in Italy to be "premium" (in particular, successful recent movies and sports, mainly football) are only available to and via pay-TV broadcasters. On the one hand, football clubs show a strong inclination to sell their broadcasting rights only to pay-TV operators. On the other hand, the most prominent film producers sell their broadcasting rights for a certain film under a "windowing" scheme that provides for a pay-TV "window" preceding the free-TV "window". Content providers have been unwilling, to date, to waive the pay-TV window scheme as it would mean foregoing an additional revenue source. For as long as this business model is in place, free-TV will not be able to compete with pay-TV in broadcasting successful recent movies immediately after the Home Video "windows". Therefore, at present there is a clear difference in Italy in terms of the "premium" contents that free-TVs and pay-TVs can offer and, most importantly, in terms of the timing at which such content is broadcast.
39. The current situation does not, however, exclude that the distinction between the two markets may not become increasingly blurred in the future, for reasons linked *inter alia* to the evolution of technology in general and the progress of digitisation in Italy. The future introduction of DTT in Italy will certainly bring about changes in the television landscape. Furthermore, the general convergence trend between different audio-visual

¹⁰ In this respect, it can be pointed out that, in Spain, Quiero TV has been transmitted as a pay-TV DTT broadcaster until mid 2002 and, in the United Kingdom, ITV transmits via DTT.

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media on the one hand and convergence between media and telecommunications on the other is likely to bring about an increasing proximity between the different ways in which entertainment and information are brought to consumers, and the ways in which these consumers enjoy them.

Previous Commission's decisions

40. The findings of the market investigation in this case are similar to the relevant market definitions established by the Commission in previous cases and by competition authorities of other Member States¹¹. The Commission has previously held that there is a separate market for pay-TV, without distinguishing between terrestrial, satellite, cable or other means of transmission. That market is financed through subscriptions and, to a lesser extent, advertising and is distinct from the market for free-to-air television, which is financed by advertising and / or through State contributions¹².
41. While in the case of free-to-air TV there is a commercial relationship only between the program supplier and the advertising industry, in the case of pay TV there is also a direct commercial relationship between the program supplier and the viewer as subscriber. Pay-TV is thus marketed through a network of distributors or using sales teams. A subscriber management system is essential and the pay-TV operator requires conditional access (CAS) technology in order to limit access to its services to paying subscribers.
42. The conditions of competition are accordingly different for the pay-TV and free-to air-TV. Whereas in the case of free-to-air TV the relationship between audience share and the advertising rates is the key parameter, in the case of pay-TV key factor is the relationship between the shaping of programmes and the number of subscriptions. The fact that subscribers are prepared to pay considerable sums for pay-TV, clearly indicates that pay-TV is a different product with a clear target.
43. As regards other services related to pay-TV, the Commission has previously identified two other possible markets: pay per view services¹³ and digital interactive TV services¹⁴,

¹¹ See for example, for the UK, the decision in the case NTL/CWC, <http://www.competition-commission.org.uk/fulltext/437c2.pdf>, for Italy the decision of the IAA, mentioned in footnote 6 above, in the Group Canal+/Stream merger dated 13 May 2002 and, for Spain, the decision of the Spanish Government in the Sogecable/Canalsatélite Digital/Vía Digital case of 29 November 2002.

¹² Case COMP JV 37 *BskyB/Kirch Pay TV*, case IV M. 993 *Bertelsmann/Kirch/Première*, case COMP M. 2211 *Universal Studio Networks/De Facto 829 (NTL) Studio Channel Ltd*, case COMP JV 57-TPS, Case COMP M. 2845 *Sogecable/Canalsatélite Digital/Vía Digital*. In some of these decisions it was indicated that another feature of pay-TV is the need for viewers to have a decryption module (decoder). In this context, it has to be pointed out that, presently, the use of set top boxes is also needed for Digital Terrestrial and Satellite free TV. All these decisions are published on the Commission's web-site: <http://europa.eu.int/comm/competition/mergers/cases/>.

¹³ Case COMP M. 2211 *Universal Studio Networks/De Facto 829 (NTL) Studio Channel Ltd*. Decision of the Commission dated 20.12.2000, published on the Commission's web-site: <http://europa.eu.int/comm/competition/mergers/cases/>.

¹⁴ Case COMP JV 37 *BskyB/Kirch Pay TV*, Decision of the Commission dated 2.03.2000, published on the Commission's web-site <http://europa.eu.int/comm/competition/mergers/cases/>.

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the latter having being considered as linked and complementary to pay-TV. As concerns in particular services such as “pay-per-view” (PPV), “near-video-on demand” (nVoD) and “video-on-demand” (VoD), the market investigation has revealed that, for the time being, they could be considered as segments within the pay TV market¹⁵.

TV channels, especially DTH pay channels

44. A certain degree of similarity exists between pay-TV special interest channels (marketed separately in some Member States¹⁶) and pay TV platforms. Individual channels cannot be assimilated to multi-channel pay-TVs such as *Stream* and *Telepiù*, where subscribers have the possibility to acquire a package of channels containing “basic” and “premium content” (bouquet). Nevertheless, in both cases (DTH channels and multi-channel pay TVs), according to information submitted during the market investigation, there is a direct commercial relationship between the program supplier and the viewer as subscriber. Both are marketed through a network of distributors or using sales teams. A subscriber management system is essential and both require conditional access (CAS) technology in order to limit access to its services to paying subscribers.
45. For the purpose of this case, the Commission has reached the conclusion that, in the future, independent DTH channels could constitute a competitive constraint in the Italian market vis-à-vis multi-channel pay-TV platforms such as *Stream* and *Telepiù* especially should they include premium content (recent movies, sports and football matches).
46. In any event, it is not necessary to establish whether pay-TV channels constitute a possible separate product market within the overall pay-TV services market, given that the concentration would lead to the strengthening of a dominant position under any possible product market definition.

Conclusion

47. In the light of the above, it can be concluded that the market investigation has shown that in Italy, although there exists a dynamic interplay between free-to-air-TV and pay-TV, which has an influence on the penetration and the success of pay-TV, these are two separate markets at this point in time, similarly to the findings of previous Commission’s investigations in the same sector.

¹⁵ Pay per view is another service where in addition to paying a TV subscription, the client has to pay on a product by product basis to see the content (for example, a film or a sport event). Video on demand and near video on demand are different modalities for customers of a pay-TV to have access to video contents on a personalised basis.

¹⁶ For instance, this appears to be the case in the UK as regards “Channel 4”.

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Geographic market

48. Despite the fact that in certain niche markets channels are broadcast throughout Europe, television broadcasting is still generally organised on a national basis. As the Commission has already stated in a number of decisions¹⁷, the markets for organisation of television are national in nature or relate to linguistically homogeneous areas. This is primarily due to differences in regulatory regimes, language barriers, cultural factors and other different conditions of competition prevailing in the individual Member States. That geographical market definition has been confirmed in this case, with specific reference to the pay-TV market. Therefore, the boundaries of the product market for the present transaction are limited to the territory of Italy.

2. UPSTREAM MARKETS (WITH REGARD TO PAY-TV)

Acquisition of Audio-visual TV contents (general considerations)

49. The transaction has an impact on the sector of audio-visual content. Within that market *Stream* and *Telepiù* operate mainly in Italy as purchasers of broadcasting rights¹⁸. Audio-visual content covers a number of heterogeneous entertainment products. These products include, without limitation, movies, TV programmes of all genres (for example, made-for-TV movies, drama, comedy, documentaries, quiz and game shows and news), sporting events and basic and thematic channels (“Audio-visual content”).

50. When TV broadcasters compile their programming schedules - and more generally their “offers” - they need to take into consideration various forms of audio-visual content. According to *Newscorp*, since a variety of TV content is essential to build a successful pay-TV platform, acquisition of TV content as a whole should be regarded as a separate market.

51. In this respect, the Commission’s findings show that, although it is true that TV broadcasters, especially pay-TV platforms, need to buy a variety of TV content, from the demand-side viewpoint, that is to say, from a TV operator's perspective, these contents are not substitutable (a feature film and a made-for TV program do not have the same value in terms of attractiveness to consumers).

52. From the supply-side, rights to TV content are traded under different pricing structures and do not have the same economic value. In addition, suppliers of specific content are not able to switch production between different types of contents. The Commission has held, in previous Decisions, that at least the following markets related to TV contents

¹⁷ Case COMP JV 37 *BskyB/Kirch Pay TV*, case IV M. 993 *Bertelsmann/Kirch/Première*, Commission Decision of 27 May 1998, Official Journal L 053 , 27/02/1999 p. 0001 – 0030. Case COMP M. 2845 *Sogecable/Canalsatélite Digital/Via Digital*, decision of the Commission dated 14.08.2002 published on the Commission’s web-site: <http://europa.eu.int/comm/competition/mergers/cases/>.

¹⁸ Fox (a company which is part of the Newscorp Group) is mainly active in the development, production and world-wide distribution of features films and television channels. It supplies some of those products in Italy, in particular filmed entertainment.

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exist¹⁹: (a) premium films, (b) football events that take place regularly (every year) and where national teams play, (c) football events that do not take place regularly and where national teams play, (d) other sports, (e) TV thematic and generic channels and (f) TV programs. The rights mentioned in (a), (b), (c) and (d) have been considered in the past both from the supply-side point of view (sales by rights owners) and the demand-side (acquisition of exclusive rights).

53. Moreover, although theoretically free-to-air TV and pay TV compete for the acquisition of the above mentioned TV content, there are some categories of contents which are acquired only by pay-TV in view, *inter alia*, of (i) their prices and the terms of the underlying contracts (for example, recent films are only sold to pay TVs in order to obtain additional revenues from subsequent sales to free to air TVs) (ii) in the specific case of football events, the capacity to broadcast several matches at the same time and the fact that most football clubs (especially the small and medium ones) are not interested in selling their rights to free TVs (readily accessible to all TV viewers) at the same price as to pay-TV, since such sales policy would reduce the number of stadium goers.
54. Consequently, this type of expensive contents cannot usually be viewed on free TV. In particular, rights to recent premium films and most regular football events where national teams participate (namely the Italian league) tend to be acquired on an exclusive basis by pay-TV operators and constitute the essential factor (the “drivers”) that leads consumers to subscribe to a particular pay-TV channel / platform. Although other types of contents are also important in order to complement the bouquet of a pay-TV, they are not necessarily “driver-type” contents.

Product markets

55. The markets affected by the present transaction on which the concentration creates or strengthens a dominant position with regard to the demand-side (the acquisition of the rights) are the following: (a) exclusive rights to Premium films; (b) exclusive rights to football events that take place every year where national teams participate (mainly national league, national cup, UEFA Cup and UEFA Champions League); (c) exclusive rights to other sport events; (d) acquisition of TV channels.

a) Rights to Premium Films

56. The Commission has previously segmented the purchasing activity for TV broadcasting rights into separate markets according to the nature of the content²⁰. In particular, it

¹⁹ See in particular COMP M. 553 *RTL/Veronica/Endemol*, COMP M. 2050 *Vivendi/CANAL+/Seagram*, case 37.576 *UEFA's Broadcasting Regulations*, COMP M. 2211 *Universal Studio Networks/De facto (NTL) Studio Channel Ltd*, COMP JV 57 *TPS*, COMP M. 2845 *Sogecable/Canalsatélite Digital/Via Digital*. See Commission's web-site: <http://europa.eu.int/comm/competition/mergers/cases/>.

²⁰ The general issue has been introduced without being settled by the above-mentioned Decision *TPS* of 03.03.1999 (paragraphs 34), then decided in the above-mentioned merger decision of 13.10.2000 in case COMP M.2050 *Vivendi/CANAL+/Seagram*. See also, as for the existence of a separate market for the acquisition of TV rights concerning football events played regularly throughout the year, the statement of objections in case COMP/C.2/37.398 *Joint selling of the TV rights to the UEFA Champions League on an*

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found in the *Vivendi/CANAL+/Seagram* merger case²¹ that the acquisition of broadcasting rights for feature films constitutes a separate market, distinct from made-for-TV programmes.

57. With particular regard to the pay-TV operators, the *Vivendi/CANAL+/Seagram* Decision indicates that "from a demand side point of view, these rights are not interchangeable from a pay-TV operators perspective. The reason is that feature films and made-for-TV programs do not have the same value in terms of consumer's attractiveness. From the supply side, these rights are traded under different pricing structures and do not have the same economic value." On this market, "Hollywood so-called Major Studios hold a very strong position both quantitatively and qualitatively, since they are the main source of successful movies".
58. More recently²², the Commission has indicated that the relevant market for films was mainly composed of "successful films", which in general correspond to films produced by the American major studios (so called Hollywood Majors). Films sold to pay-TV's comprise rights for the so-called "pay periods" ("pay per view", "near video on demand", "video on demand"), "first window" and "second window" exhibition²³.
59. The *first window* is the first period of premium films' availability on pay-TV after the pay periods. A pay-TV operator which does not have any first-window rights to films can only offer "older" premium films which have already been previously broadcast on pay TV, so-called *second window*. According to previous Commission investigations²⁴, consumers do not consider that second window films are interchangeable with first window movies in terms of novelty. Moreover, from a supply-side point of view, it is not possible to substitute a first window film by a second window film. As a matter of fact, in France, where these rights are marketed separately, second window fees are priced at between 5% and 25%²⁵ of the first window fees. The system of commercial exploitation by pay-TV operators tends to vary as well: while first window films are normally included in premium channels, second window films tend to be broadcast in specialised movie channels.

exclusive basis [press release IP/01/1043 dated 20.07.01], "*The Commission opens proceedings against UEFA's selling of TV rights to UEFA Champions League*" and background note [MEMO/01/271 dated 20/07/01] and case COMP M. 2845 *Sogecable/Canalsatélite Digital/Via Digital*.

²¹ See above-mentioned decision of 13.10.2000, case COMP M. 2050 *Vivendi/CANAL+/Seagram*.

²² Case COMP M. 2845 *Sogecable/Canalsatélite Digital/Via Digital*.

²³ Generally speaking, films for pay-TV are exhibited under different timing and windows. After a time period of theatrical exhibition (6-8 months) and of video rentals and/or sales (4-6 months) films reach pay-TV consumers through a pay per view period (usually a 3 months period). Films can be thereafter be released on first window (usually 6 months period) and the on second window (usually 6 months period). Finally they become part of the Major's library and available for the free TV market.

²⁴ Case COMP M. 2050 *Vivendi/Canal+/Seagram*, decision dated 13.10.2000, case COMP M. 2845 *Sogecable/Canalsatélite Digital/Via Digital*, decision dated 14.08.2002, published on the Commission's web-site: <http://europa.eu.int/comm/competition/mergers/cases/>.

²⁵ See case COM M. 2050 *Vivendi/Canal+/Seagram*, paragraph 19.

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60. In the specific case of Italy, the difference between first and second window has not, to date, been significant or relevant in the current commercial practice. According to *Newscorp*, none of the previously existing pay-TV platforms have shown a specific interest in acquiring rights for second pay-TV release. More particularly, within the framework of the output deals²⁶ entered into by the Italian pay-TV operators with the Majors and the main national film producers, no specific pay-TV second release rights have been acquired or sold. Nevertheless, *Telepiù* has pre-emption rights for second window for a number of films and in other cases second window rights cannot be sold to third parties before exhibition in free TVs due to hold back rights. Moreover, it is possible that second window rights may be marketed in the future in Italy.
61. The market investigation has largely confirmed that Premium motion pictures constitute a stand-alone “driver” content for pay-TV operators. In addition, the structure of supply, the characteristics of this type of contents and the pricing terms allow to consider the acquisition of exclusive broadcasting rights for premium motion pictures as a product market separate from other contents acquisition markets.

Geographic scope

62. In a number of Decisions the Commission has considered the geographic market to be national or, in certain cases, regional²⁷. Although most of the rights are sourced from the United States (from the so called Hollywood Majors) and nothing prevents operators from acquiring rights for more than one territory at a time, broadcasting rights are divided and sold on a mainly national basis or, at the most, by language area and the price is structured in such a way that the economic value of the contracts depends on the specific territory for which the rights are acquired. Accordingly, in view of the constraints imposed by the division of rights, the geographic scope of the market is national or limited to a linguistic area.
63. In Italy licences concerning broadcasting rights are limited to the Italian national territory. Thus, in the present case the geographic scope of the market is national.

b) Rights to Football events

64. The Commission has stated in previous cases²⁸ that there is a separate market for the acquisition of exclusive broadcasting rights for *football events played every year where*

²⁶ Pay-TV exhibition rights (especially those supplied by larger producers) are often acquired through so called output deals. Output deals agreements are typically agreements pursuant to which a film producer sells all or most of the production of its studio to a given operator. As regards output deals for pay-TV, pay TV operators buy the window for TV broadcasting subsequent to home video and, where available, pay-per-view and video-on-demand. In these cases, the same film may also be subject to other exhibition windows. The pricing of these contracts takes into account the box office results of the movies in theatrical distribution. Typically, free TV broadcasters purchase subsequent exhibition windows which are commonly referred to as free TV windows.

²⁷ Case COMP M. 2050 *Vivendi/Canal+/Seagram*, case COMP M. 2845 *Sogecable/Canalsatélite Digital/Via Digital*.

²⁸ Case 37.576- *UEFA's broadcasting regulations*, case COMP M. 2483 *Canal+/RTL/GJCD/JV*, case COMP M. 2845 *Sogecable/Canalsatélite Digital/Via Digital*.

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national teams participate (the national league, primarily first division and cups, the UEFA Champions league and the UEFA Cup). Free-to air TVs participate in the bidding process for rights to Champions league and UEFA cup.

65. This market can be distinguished from the acquisition of broadcasting rights for *football events that do not take place regularly where national teams participate*, such as the World Cup or the European Championship, which are sold by different organisations. To some extent, free-to-air TVs participate in the bidding process for these rights. These findings have been confirmed by the market investigation in the present case.
66. For the purpose of this case, the affected market is that of the acquisition of exclusive broadcasting rights for *football events played every year where national teams participate* (the national league, primarily first division and cups, the UEFA Champions League and the UEFA Cup). The market investigation has clearly confirmed that this type of football contents constitutes a stand-alone “driver” content for pay-TV operators. Moreover, in view of the characteristics of this type of contents and the pricing terms (which are clearly higher than for other regular sport events where national teams participate), the acquisition of exclusive broadcasting rights for these regular football events where national teams participate can be considered as a separate product market, clearly distinguishable from other contents acquisition markets.

Geographic scope

67. The UEFA broadcasting regulations reflect the fact that the market for broadcasting rights to football events is national since such broadcasting rights are generally sold on a national basis, even for pan-European events such as the UEFA cup and the UEFA Champions league. As regards broadcasting rights to national league and the national cup matches, the specificity of the product due to cultural factors linked to demand and national preferences implies that the geographic scope corresponds to the country where the matches are played. In Italy exclusive broadcasting rights relating to football events played every year where Italian teams participate have been acquired by Italian broadcasting operators. Furthermore, rights for the Italian league and the Italian cup are exploited in Italy.
68. Therefore, as in previous decisions, the geographic scope of the market in this case is national, that is to say, limited to Italy.

c) Rights on other Sport events

69. To date, the Commission has not taken a position on whether the market for the acquisition of exclusive rights to sports other than the two football markets mentioned in paragraph 64 and 65 above can be segmented into different markets.

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70. The market investigation has nevertheless indicated that, even if these contents do not constitute a key driver for the subscriptions to pay-TV, they are nevertheless very important for pay-TV operators in as much as they concern events with the potential to attract the interest of numerous end consumers (for example, important tennis tournaments, boxing matches, golf and motor bike races). Moreover, the characteristics of this type of contents and the pricing terms indicate that the acquisition of exclusive broadcasting rights for these sport events can be considered as a separate product market, distinguishable from other content acquisition markets.
71. Nevertheless, it is not necessary for the purpose of this case to decide whether the relevant markets should be divided into different markets according to single sports as regards the acquisition of broadcasting rights by TV operators, since the concentration will lead to the creation or strengthening of a dominant position regardless of the alternative product market definitions.

Geographic scope

72. As regards some sport events, the rights are acquired on an exclusive basis for the whole European territory and, regardless of the technical means of transmission, are thereafter re-sold on a per-country basis. These major sport events such as the Olympic Games, have a pan-European interest from the viewers' perspective. Another example of sports rights sold on a pan-European basis are those acquired by the Eurosport channel, broadcast all over Europe.
73. However, given that the vast majority of sports rights acquired by broadcasters are limited to a specific country or linguistic territory, it can be concluded that the market for acquisition of sports rights to be broadcast is still nation-wide or limited to linguistic areas.

d) TV channels

74. The market investigation in this case has confirmed that the operation of pay-TV channels marketed independently, particularly on DTH platforms, could constitute a competitive constraint vis-à-vis pay-TV platforms. TV channels can also be acquired by pay-TV platforms to be included in their "bouquet" and, as stated by the Commission in previous cases²⁹, are essential for putting together pay-TV services and constitute a separate product market³⁰. Premium channels are normally produced by pay-TVs with premium content (sports and movies) previously acquired from original rights owners. The market investigation has also indicated that even if only premium channels constitute a key driver for the subscriptions to pay-TV, other channels, are, nevertheless, very important for pay-TV operators in as much as these various types of channels

²⁹ case IV/36.237-TPS, OJ L 90, 02.04.1999 page 6.

³⁰ COMP M. 2845 *Sogecable/Canalsatélite Digital/Vía Digital*.

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(generic and thematic) contribute to rendering the pay-TV bouquet attractive for end consumers.

75. As regards TV channels, the supply-side is represented by providers that buy single events or contents (in general on a non exclusive basis) and assemble them in packages for resale to TV broadcasters. This characteristic of supply, the features of the type of contents offered and the pricing terms (lower price per hour compared to exclusive contents) means TV channels can be considered as a separate product market, distinguishable from other contents acquisition markets.
76. Nevertheless, it is not necessary for the purpose of this case to decide whether the relevant markets should be divided into different markets according to single type of channel (generic or thematic ones, for example, sports, children or news), since the concentration will create a monopsony situation regardless of the alternative product market definitions.

Geographic scope

77. In terms of geographic scope, the acquisition of these channels is mostly determined by the cultural and sociological background of the country in which the pay-TV platform operates and in any event appears to be strongly influenced and bound by each single national territory. Therefore, any possible alternative product market would necessarily have a national dimension. This national dimension is confirmed in the case of Italy: specific thematic channels in Italian and adapted to Italian preferences have been created by suppliers and distribution takes place at national level.

B. EFFECTS OF THE CONCENTRATION

78. The merger will lead to substantial horizontal overlaps in a number of markets which are vertically related.

1. THE ITALIAN PAY TV MARKET

1.1 General considerations

79. The Italian pay-TV market is characterised by the presence of two operators: *Telepiù* and *Stream*. Especially since the start of the DTH services in 1996, the size of the Italian market for pay-TV services has grown significantly both in terms of value and in terms of volume (number of subscribers). The tables below show an estimate of the market size provided by the parties for the horizontally affected market from 1999 to 2001 where this growth can be easily observed (in the three years of reference +80,8% in terms of value and +36,1% in terms of number of subscribers).

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4. OVERALL CONCLUSIONS ON THE HORIZONTAL AND VERTICAL EFFECTS OF THE CONCENTRATION IN THE AFFECTED MARKETS

179. On the basis of the foregoing, it can be concluded that:

4.1 Newscorp will have the monopoly as a pay-TV supplier in Italy

180. *Stream* and *Telepiù* are presently the only pay-TV suppliers in Italy and, although e.Biscom, DTT broadcasters and DTH channels or an alternative DTH platform could potentially act as competitive constraints in the future, there are not sufficient guarantees that potential competitors will have access to premium content (especially premium films from the Hollywood Majors and football matches of national teams). These specific contents are essential for the survival of any pay-TV operator and they will not be available in the market.

4.2 Newscorp will have access to the most attractive and most comprehensive content

181. Access to premium contents, mainly recent films and football events but also other sports events, is vital to the successful operation of a pay-TV. These contents incite potential consumers to subscribe. Access to second window films and non-live sport events is also important for potential competitors which would be interested in creating an alternative platform.

182. As indicated above, the Commission's investigation has shown that the combined platform will have access to programme resources unparalleled in Italy. In addition, part of the essential content, "pay-TV driver" content, namely films of the Majors will not be available in the market within a reasonable time (until the end of [...]*), if unilateral renewal rights are exercised by MGM and TC Fox.

4.3 No other undertaking will have the essential content to establish an alternative pay-TV

183. Access to rights is even more important for pay-TV than for free TV. In order to entice the consumer to subscribe, or to take particular productions on pay-per view basis, certain specific types of content are crucial. In order to be sufficiently attractive a pay-TV package must include a combination of premium rights for first window, or at least second window films and for popular sport events. This is especially true in Italy, where, as indicated by *Newscorp*, every household with television can receive a great number of free-access channels.

4.3.1 Foreclosure effects

184. Premium programme resources (recent films and football rights) are in short supply. Moreover, as a general rule broadcasting rights for premium content, (particularly

premium films of the Hollywood Majors) are granted on the basis of long term exclusive contracts. For the duration of the existing contracts, no other supplier will have access to the combined platform's programme resources. In addition football rights are extremely expensive and acquisition of such rights entails an important financial risk. Thus, potential competitors will not be in a position to create an alternative successful pay-TV platform. As regards other means of transmission, the only existing cable operator (e.Biscom) will have the capacity to reach a very limited number of households and potential DTT competitors will only be operational in the medium-long term.

185. It is also unlikely that the situation will change in any way once the current contracts for pay-TV rights have expired. Theoretically, pay-TV services could potentially be supplied in Italy by alternative DTH operators, cable operators such as e.Biscom and DTT operators. As indicated above, output deals concluded with the Hollywood Majors will begin to expire by the end of [...] (if MGM and TC Fox exercise their renewal right). Although contracts with sports rights suppliers expire at earlier stages, potential competitors would have to match the combined platform's offers for these rights. The chances for potential competitors to be able to offer attractive pay-TV appear at this stage to be very low.

186. In view of its market position, the combined platform will be well established by then. Competitors' prospects of securing any substantial volume of attractive pay-TV broadcasting rights will be small. To have any hope of acquiring broadcasting rights, it is vital to have access to viewers, in the form of an established subscriber base. The prices of pay-TV rights are usually determined by reference to the number of subscribers, subject to a stated minimum. This is certainly the case in output deals with the Hollywood Majors. As the combined platform's subscriber base can be expected to be the largest in the years to come, it follows that a sale of rights to *Newscorp* should secure a considerably higher price than a sale to a newcomer. A newcomer would also run a considerable financial risk by concluding output deals, at least for first window films. It would have to guarantee a minimum subscriber base equivalent to that guaranteed by *Newscorp*, without being in a position to achieve the guaranteed figure. *Newscorp* will have a competitive advantage compared to any potential competitor in the negotiation of contracts for premium content, even if these potential competitors possessed the resources to acquire rights from one or two Majors.

187. The Commission has therefore concluded that contracts affording the merged entity exclusive rights with Studios will foreclose potential market entry.

188. Moreover, as explained above, rights to premium movies for pay-TV purposes can be acquired in different formats (so-called windows) depending on the timing of the allowed exhibition. The closer this timing to the timing of theatrical release, the more valuable the window and thus the premium content. Second window rights are usually valued at a fraction of the first window pay-TV rights. It can reasonably be argued that, owing to their price differential and to their different time of broadcasting, first and second window rights to premium movies are *de facto* dissimilar products.

189. *Telepiù* holds a number of exclusive rights on first window movies pursuant to output deals with Studios. On the basis of the same output deals with most Majors, *Telepiù* also holds protection rights (for example, holdback rights) for second window rights, effectively impeding the product "second-window movies" from ever reaching the market by creating a sort of "black-out" period.

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190. This “protection” or black-out rights not only have the objective of (a) foreclosing potential entrants from having access to cheaper premium contents but also have the effect of (b) depriving consumers of their right to choose the time and price at which they prefer to view pay-TV products.
191. As regards market foreclosure, if second window rights were available for negotiations with the Studios (in particular with the Majors), a potential new pay-TV operator would have the possibility to enter the market with lower financial investments and lesser risks and would be able to offer cheaper premium contents at some time after the merged entity. Examples in other national markets in the Community indicate that competition can surface in the pay-TV market from (at least initially) smaller and less prestigious operators⁷¹. The foreclosing effect of the protection rights held by an incumbent (near-monopolist/monopsonist) pay-TV operator vis-à-vis potential entry is undeniable. Indeed, foreclosing the market constitutes the quintessential objective of such protection rights.
192. As regards the restriction of consumer choice, by exercising such protection rights, a pay-TV operator deprives consumers of their fundamental right to choose. Consumers’ preferences, price sensitivity and needs differ greatly, in all markets and with respect to all products. If second window movies were never to be accessible, consumers wishing to have access to pay-TV products would be forced to consume in a “one-format-fits-all” scenario, at the timing (first window) and at the price established by the pay-TV operator.
193. In contrast, in the absence of protection rights effectively withdrawing second window movies from the market, consumers would have the possibility to choose between “first tier” pay-TV operators, offering premium movies at a timing closer to theatrical release at a higher (subscription) fee and a “second tier” operator offering the same contents at cheaper prices although further down the time-line with respect to theatrical release. In this scenario, the right to opt for the preferred form of consumption of pay-TV services would rest entirely with the consumer.
194. Should the new entity decide to buy itself second window rights for broadcasting on the combined platform rather than simply blocking access to them for potential competitors, such rights would still not be available for a potential entrant. However, this would be the result of commercial transactions between the combined platform and one or more Studios and not the effect of blackout clauses. In any event, second window contents would eventually reach the market, albeit through the offer of the near-monopolist.
195. It is therefore concluded that any protection right or black-out rights have the objective and the effect of foreclosing potential market entry and have the effect of harming consumers, by preventing access to premium contents for both potential competitors and potential pay-TV consumers.

⁷¹ Second window rights are exploited in France by TPS, which has established itself as a significant competitor to Canal+ and, in Belgium, by Cinenova.

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196. Finally, in the case of regular football events where national teams participate, any potential competitor will also have to match the offers of the combined platform in order to acquire these rights. The importance of the price of these rights in overall costs is extremely high compared to other rights. The financial risk for a new entrant to subscribe contracts with football clubs would be much higher than for the combined platform.

197. Accordingly, without corrective measures, it is unlikely that e.Biscom or any other potential competitor (on DTH or on DTT) will be in a position to establish a fully-fledged alternative programme platform of equivalent reach for the following reasons:

(a) they do not hold exclusive rights for premium content;

(b) most rights (in particular rights to the Hollywood Majors' movies) will not be available on the market for a number of years ;

(c) many football rights and sports rights for important events will not be available for the coming years;

(d) the financial risk incurred by a new entrant when buying exclusive rights for football events constitutes an additional barrier to entry.

4.4 Newscorp will be the "gatekeeper" of a tool (Videoguard CAS) that may facilitate entry for any alternative pay DTH operator and of an infrastructure (the platform) that may ease the conditions for the broadcasting of pay and free TV satellite channels

198. In principle DTH pay-TV operators have a choice between building up their own infrastructure or offering their programmes through access to an existing platform. However, the setting up of a new infrastructure appears to be, at this juncture, a theoretical alternative at best, certainly not available to operators without sufficient programme resources to be able to make a premium offer. An outsider would usually be able to gain access to an existing platform more easily if it had the choice between several competing platforms. Such choice existed in Italy before the proposed transaction. In the absence of an alternative platform in Italy, however, potential DTH competitors on the Italian market or free channels wishing to offer their own channels to subscribers of the combined platform will in the future be dependent on access to *Newscorp's* platform.

199. This means that every DTH pay-TV operator which is not able to set up an alternative infrastructure and every free channel transmitted via digital satellite wishing to reach the combined platform's subscribers will be obliged to have its channels broadcast via *Newscorp's* platform. In the absence of corrective measures *Newscorp* would thus gain a large degree of control upon these competitors' activities and would be in a position to determine to some extent the conditions on which other pay DTH operators competed with it or the conditions under which its subscribers had access to free-to-air digital satellite channels.

200. *Newscorp* will be in a position to refuse access to its platform or to impose unfair or discriminatory conditions.

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201. Moreover, any alternative pay-TV platform wishing to enter the Italian market will need a CAS in order to be in a position to broadcast encrypted programs. As indicated above, *Newscorp* is the owner of NDS CAS (Videoguard). Although the existence of access rules contained in Directive 95/47/EC⁷² and Directive 2002/19/EC⁷³ might reduce and assuage the concerns in this respect, third parties believe that access to NDS' technology can be obstructed unless *Newscorp* undertakes to comply with those rules and appropriate and effective dispute settlement is put in place. Should this not be the case, long disputes on prices will arise which in the meantime will undermine the possibility to compete. On the other hand, the adoption by a newcomer of a different CAS can, in spite of the simulcrypt obligations imposed by Italian law transposing Directive 95/47/EC, constitute in all likelihood an additional barrier to entry given that effective application of these simulcrypt obligations has required in the past up to two years and can be extremely expensive.
202. The merged platform, in the absence of corrective measures, will thus be in a position to raise rivals' costs by controlling third parties' access to the DTH platform services and to CAS.
203. Consequently, the possibility for a newcomer DTH broadcaster, which is not able to set up an alternative infrastructure, to be in a position to become operational will depend on *Newscorp's* goodwill not to raise barriers when giving access to its platform services. In addition the possibility for a newcomer DTH broadcaster to be in a position to compete effectively with *Newscorp* will depend on *Newscorp* licensing its NDS CAS or fulfilling simulcrypt obligations in time and on transparent and non-discriminatory terms and conditions.

4.5 Duration of dominance

204. All the evidence shows that it is highly unlikely that any alternative competitor will be in a position to effectively compete with the parties in the foreseeable future, by any means of transmission. e.Biscom, the only possible competitor currently in the market in the cable segment will only have a capacity to reach 1 million households in the near future (5% of Italian households), whereas satellite has the capacity to reach virtually all Italian households. On the other hand DTT is expected, according to the governments' plans, to start being operative in Italy only by the beginning of 2007. However, the Commission's investigation has shown that this will probably not be the case and that a longer time frame is to be envisaged. Finally, no alternative DTH platform will be in a position to enter the market if access to content and to technical facilities is not guaranteed. Accordingly, there are reasonable and convincing grounds for the Commission to conclude that, as a result of the transaction, *Newscorp* will continue to be the only pay TV operator in Italy for a considerable time in the foreseeable future and that this will most likely impede significantly effective competition.

⁷² Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, OJ L281, 23.11.1995, p.51.

⁷³ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks OJ L 108, 24.4.2004 p.7.

V APPLICATION OF THE CONCEPT OF THE "RESCUE MERGER"

205. To date, the Commission has only twice based a merger decision on the concept of the "rescue merger" (commonly referred to as "failing company defence"), in case *Kali und Salz/MKD/Treuhand*⁷⁴ (hereinafter "*Kali und Salz*") and in the *BASF/ Eurodiol/ Pantochim* decision⁷⁵. In *Kali und Salz* the criteria set by the Commission for the application of the rescue merger defence were the following: (a) the acquired company would in the near future be forced out of the market, (b) there is no less anti-competitive purchaser, (c) the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market.

206. According to its judgement in *Kali und Salz*⁷⁶ (31 March 1998), the Court of Justice found that a merger can be regarded as a rescue merger if the deterioration in the competitive structure resulting from the concentration would occur in a similar fashion even if the concentration did not proceed. According to the Court of Justice⁷⁷ "*The introduction of this criterion (the acquiring undertaking would gain the market share of the acquired undertaking) if it were forced out of the market is intended to ensure that the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed. The criterion of absorption of market shares, although not considered by the Commission as sufficient in itself to preclude any adverse effect of the concentration on competition, therefore helps to ensure the neutral effects of the concentration as regards the deterioration of the competitive structure of the market. This is consistent with the concept of causal connection set out in Article 2(2) of the Regulation*".

207. In its Decision in *BASF/ Eurodiol/ Pantochim*, the Commission indicated that the approach taken by the Court of Justice is wider than the criteria set out in the Commission's Decision in *Kali und Salz*. According to the Court of Justice, the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded and so a merger can be regarded as a rescue merger only if the competitive structure resulting from the concentration is expected to deteriorate in similar fashion even if the concentration were not allowed to proceed, that is to say, even if the concentration were prohibited. In general terms, according to the *BASF/ Eurodiol/ Pantochim* Decision, the concept of the "rescue

⁷⁴ Commission Decision of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89, Case No IV/M.308 - Kali- Salz/MdK/Treuhand), Official Journal L 186, 21/07/1994 p. 0038 - 0056.

⁷⁵ Case COMP M. 2314, BASF/Eurodiol/Pantochim decision of 11.07.2001, OJ L132, 17.02.2002, page 45 and also published on the Commission's web-site: <http://europa.eu.int/comm/competition/mergers/cases/>.

⁷⁶ Joined cases C-68/94 and C-30/95, France vs Commission.

⁷⁷ Points 115 and following of the judgement Joined Cases C-68/94 and C-30/95.

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merger" requires that the undertakings to be acquired can be regarded as "failing firms" and that the merger is not the cause of the deterioration of the competitive structure. Thus, for the application of the rescue merger, two conditions must be satisfied:

(a) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking; and

(b) there is no less anti-competitive alternative purchase.

208. However, the application of these two criteria does not completely rule out the possibility of a take-over by third parties of the assets of the undertakings concerned in the event of their bankruptcy. If such assets were taken over by competitors in the course of bankruptcy proceedings, the economic effects would be similar to a take-over of the failing firms themselves by an alternative purchaser. Thus, the Commission in that particular case decided that, in addition to the first two criteria, it was necessary to establish that:

(c) the assets to be purchased would inevitably disappear or exit from the market in the absence of the merger.

209. In any event, the application of the concept of the "rescue merger" requires that the deterioration of the competitive structure resulting from the merger is at least no worse than that which would have occurred in the absence of the merger.

210. In its reply to the Statement of Objections, *Newscorp* argued that the conditions for a "failing company defence" were met in this case, namely that, in the absence of the merger, *Telepiù* would gain a position comparable to the combined platform's after the merger and that in any event the assets of *Stream* would inevitably exit the market.

211. Before examining this claim, it should be noted that *Newscorp* argues that *Stream*, currently jointly controlled by *Newscorp* and Telecom Italia, is the "failing firm" which would exit the market but for the merger. The present transaction is in fact a combination of a change from joint to sole control of *Stream* by one of its parent companies, *Newscorp*, and its merger with another company (*Telepiù*). As *Stream* is a separate "division" of one "company", *Newscorp*, this merger raises the question whether the "failing company defence" applies when the acquiring firm is financially healthy but one of its divisions, which is failing, is merging with another entity.

212. As indicated by the Commission in its Decision in *Rewe/Meinl*⁷⁸, in a case of a "failing-division defence" and not of a "failing-company defence", the burden of proving lack of causality between the merger and the creation or strengthening of a dominant position falls on the companies claiming it. Otherwise, every merger involving an allegedly unprofitable division could be justified under merger control law by the declaration that, without the merger, the division would cease to operate. The case *Rewe/Meinl* involved a division of the *Meinl* group that was acquired by *Rewe*. The importance of proving lack of causality is even greater in the case of a claimed "failing division", which is actually the acquiring company. Finally, it could reasonably be

⁷⁸ Commission Decision of 3 February 1999 relating to proceedings under Council Regulation (EEC) No 4064/89 (Case No IV/M.1221 - *Rewe/Meinl*) Official Journal L 274, 23/10/1999 p. 0001 – 0022.

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argued that it is possible that the buying group might have strategic reasons to keep its failing division alive even if the merger were to be prohibited.

a) The failing company would have been forced out of the market if not taken over by another undertaking

213. *Newscorp* argues that *Stream* is currently a "failing firm" which will exit the market in the absence of the merger because economic and business logic dictates that the shareholders' decision whether to take *Stream* into bankruptcy is based on a comparison of the (negative) net present value ("NPV") of the future cash flows (before debt service) from remaining in business with the (possibly negative) NPV from bankruptcy. If the NPV associated with bankruptcy is greater than the "remain in business" NPV, then the rational decision is to seek bankruptcy given that there are no realistic prospects of *Stream* becoming profitable as a stand alone entity. According to *Newscorp*, the exit costs that *Newscorp* and especially Telecom Italia face today are significantly lower than the "remain in business costs", and *Stream* has not yet exited the market only because of the prospects of closing the transaction under consideration. However, some third parties have argued that, with better management and higher efforts to effectively combat piracy, the number of subscribers and the corresponding revenues would substantially rise.

214. In the present transaction, the acquirer of sole control of the failing company is one of its parent companies, which is also acquiring sole control of another company (*Telepiù*). Although *Stream* is a separate legal person, there seems to be no question that a whole firm (i.e. *Newscorp*) would be forced out of the market. *Newscorp* acts as a holding company and *Stream* accounts for only part of the business activities and subsidiaries of the *Newscorp* group. *Stream's* withdrawal from the Italian pay-TV market would accordingly take the form of a management decision to abandon a business activity whose development has not lived up to the expectations of the firm's managing board.

215. It is important also to note that the parties have raised this argument at a very late stage. Indeed, no mention was made in the notification. This casts further doubts on the probative value of their claim as nothing has fundamentally changed since the notification.

b) There is no less anti-competitive purchaser

216. *Newscorp* argues that in the absence of substantial synergies, any potential buyer would face a similar situation to *Newscorp* and Telecom Italia. It is also likely that another buyer would face greater uncertainty over future profitability because *Newscorp* and Telecom Italia, as the existing shareholders, have superior information about the business. There is no realistic prospect of a less anti-competitive purchaser emerging because it is very difficult to imagine somebody having synergies large enough to

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substantially change the financial outlook for *Stream* from JPMorgan's projections⁷⁹ and there were no other potential buyers attempting to purchase *Telepiù* from the Vivendi group in May-June 2002 when the sale to *Newscorp* was finalised. In this respect JPMorgan notes that, to its understanding, no other potential buyers submitted a formal bid for either *Telepiù* or *Stream*. This was the case despite the fact that the transaction discussions were made public in 2001 and 2002 and the price was reportedly negotiated down by *Newscorp* over the course of extended negotiations and there were no other potential buyers attempting to purchase *Stream* from *Newscorp* when the sale to the Vivendi group was finalised.

217. It is clear from the Commission's reasoning in the *Kali und Salz* Decision that the burden of proving that there is no alternative potential buyer apart from the acquiring firm falls, in the Commission's opinion, on the party claiming it. *Newscorp's* argument does not discharge this burden of proof. Apart from some attempts to find mere financial investors for *Stream*, *Newscorp* has neither indicated the potential buyers (apart from the Vivendi group for *Stream* and *Newscorp* for *Telepiù*) with which *Newscorp* and the Vivendi group have entered into negotiations to sell their respective companies in Italy nor the reasons for which the negotiations failed. The only attempt to sell its controlling stake in *Stream* was made by Telecom Italia⁸⁰ but neither *Stream* nor the Vivendi group have actively tried to find a less anti-competitive solution than the merger of the two companies. According to the information available to the Commission, neither *Newscorp* nor Telecom Italia have ever put *Stream* on public offer.

c) the assets to be purchased would inevitably disappear from the market in the absence of the merger or the acquiring undertaking would gain the market share of the acquired undertaking

218. According to *Newscorp*, the assets to be acquired would inevitably exit the market. There are two main assets currently held by *Stream* whose future allocation is critical for the competitive conditions, namely its subscriber base and the rights on content that it currently holds. *Stream's* DTH subscribers would most likely flow to *Telepiù* because there is no other satellite platform, and cable is only available in limited areas. As regards *Stream's* premium rights, *Newscorp* argues that they would most likely be acquired by *Telepiù*. Following *Stream's* bankruptcy, the rights would be returned to the right holders that would be able to put them up for sale again.

⁷⁹ Document attached to *Newscorp's* Defence. Expert Report on Financial viability of *Stream* SpA. This documents, allegedly, shows that *Stream* is not financially viable as a stand-alone business in the foreseeable future and that, absent continued funding by its two shareholders, it would be forced into bankruptcy within the first half of 2003.

⁸⁰ According to Telecom Italia's submission in the Oral Hearing held on 5 and 6 March 2003, in 2001 Telecom Italia gave a mandate to a financial institution to sell its stake in *Stream*.

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219. According to *Newscorp*, *Telepiù* would be more likely to win these rights (for instance in comparison with e.Biscom or the competing free-to-air operators). Nevertheless it can reasonably be argued that at least some content (for example, Champions League rights or tennis rights) would not necessarily be acquired by *Telepiù*. As indicated above, free-to-air TVs and pay-TVs can at least to some extent compete for the acquisition of these rights and they would be in a better position to bid for these rights if *Telepiù*'s financial situation were to be weaker than that of the combined platform resulting from the merger. *Newscorp* has not given any indication as regards the possible acquisition by *Telepiù* or other companies of other assets of *Stream*, such as trademarks and distribution networks.

220. However since neither of the first two conditions is met in the present case, it is not necessary to take a final position on whether the third condition (inevitable disappearance or exit from the market of the assets to be acquired) is fulfilled in the present case.

d) Conclusion.

221. The Commission considers, therefore, that *Newscorp* has not been able to demonstrate that there is no causal link between the concentration and the effect on competition, because conditions of competition can be expected to deteriorate to a similar or identical extent even without the concentration in question. However, the risk of *Stream* exiting the market, if it were to materialise, would be a factor to take into account when assessing the present merger. The Commission further considers that an authorisation of the merger subject to appropriate conditions will be more beneficial to consumers than a disruption caused by a potential closure of *Stream*.

VI UNDERTAKINGS

222. On 13 March 2003, the *Newscorp* submitted a revised set of undertakings (hereinafter referred to as "undertakings" or "commitments") in accordance with Article 8(2) of the Merger Regulation, for the purpose of achieving clearance of the merger. The commitments are set out in the Annex to this Decision and form an integral part thereof.

223. The commitments proposed by *Newscorp* build upon the remedies submitted to the Commission on 31 October 2002 and on 14 January 2003. Following its investigation and on the basis of the market test on the two above-mentioned set of commitments, the Commission concluded that the undertakings submitted were not sufficient to solve the competition concerns raised by the operation. As a result, the Commission issued a communication pursuant to Article 18 of the Merger Regulation.

224. The Commission is of the view that that the commitments submitted on 13 March 2003 address and resolve in a satisfactory manner the competition concerns raised by the concentration.

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1 Summary of the commitments offered by Newscorp on 13 March 2003

225. The commitments offered by *Newscorp* on 13 march 2003 provide the following:

On-going exclusive contracts

- a) Right for Film Studios and Football clubs to unilaterally terminate contracts entered into with *Stream* and *Telepiù* with no applicable penalties.
- b) *Newscorp* shall waive exclusive rights with respect to TV platforms other than DTH (terrestrial, cable, UMTS, Internet etc.). Furthermore, the parties shall waive any protection rights as regards means of transmission other than DTH.
- c) *Newscorp* shall waive exclusive rights for pay-per view, video on demand and near video on demand on all platforms.

Future exclusive contracts

- d) *Newscorp* shall not subscribe contracts exceeding the duration of two years with football clubs and of three years with film Studios. The exclusivity attached to these contracts would only concern DTH transmission and would not apply to other means of transmission (for example, terrestrial, cable, UMTS and Internet). Furthermore, the parties shall waive any protection rights as regards means of transmission other than DTH. As regards football rights and world-wide sports events, the contractual counterparts shall be granted a unilateral right to terminate contracts on a yearly basis.
- e) *Newscorp* shall not acquire protection rights for DTH and will waive exclusive rights for pay-per view, video on demand and near video on demand on all platforms.
- f) *Newscorp* shall not acquire, through future contracts or re-negotiations of the terms of the existing contracts, any protection or black-out right with respect to DTH.

Relations with competitors / third parties: wholesale offer and access to the platform and technical services.

- g) *Newscorp* shall offer third parties, on a unbundled and non-exclusive basis, the right to distribute on platforms other than DTH any premium contents if and for as long as the combined platform offers such premium contents to its retail customers. Such offer will be made on the basis of the retail minus principle.
- h) *Newscorp* shall grant third parties and possible new DTH entrants access to its platform and access to the application program interface (API) according to a cost-oriented non-discriminatory formula based on: directly attributable costs of the services, a share of relevant technical costs (fixed and common costs) and a reasonable return over an appropriate period. In the provision of access services, the combined platform shall not apply dissimilar conditions to equivalent transactions.
- i) *Newscorp* shall procure that NDS shall grant to third parties on a fair and non-discriminatory prices basis licenses for its conditional access system (CAS).

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- j) *Newscorp* shall endeavour to enter into simulcrypt agreements in Italy as soon as reasonably possible and in any event within 9 months from the written request from an interested third party.

Divestiture of the DTT business and undertaking not to enter into DTT activities.

- k) Divestiture of *Telepiù*'s digital and analogue terrestrial broadcasting assets and commitment not to enter into any further DTT activities, neither as network nor as retail operator. The frequencies will have to be acquired by a company willing to include pay-TV broadcasting of or more channels in its business plan for the operation of the divested business after the switchover from analogue to digital terrestrial television broadcasting in Italy.

Arbitration

- l) *Newscorp* has proposed an arbitration procedure in order to guarantee the effectiveness of the commitments. This arbitration system includes *inter alia* the jurisdiction of AGCOM for the matters within its competence under Italian, including the wholesale offer.

Duration of the undertakings

- m) The commitments shall expire at the latest on 31 December 2011 unless, upon application of *Newscorp* or the combined platform, the Commission decides to shorten their duration on grounds that the conditions of competition would no longer justify the continuation of such Commitments.

2 Assessment of the commitments

226. In the light of the market investigation and of two market tests on the sets of commitments consecutively submitted by *Newscorp*, the Commission considers that the final undertakings are sufficient to resolve the competitive concerns raised by the notified operation.

2.1 General remarks

227. The new entity will hold a monopolist position in the Pay-TV market and a quasi-monopsonist position in the markets for the acquisition of TV channels, premium films, rights for national football clubs and for TV channels and a dominant position for the acquisition of other sports not included in the Italian legislation implementing the "Television without Frontiers" Directive, considered as "world-wide" sport events.

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228. The main thrust and the underlying ultimate objective of any remedy package should be to create the conditions for actual competition to subsist and/or potential competition to emerge. In a case like the one at stake, this aim must be achieved by lowering barriers to entry in the affected markets and through the creation of competitive constraints which effectively operate as a disciplining and restraining factor vis-à-vis the dominant player. The package of remedies proposed by *Newscorp* has been conceived and constructed with this ultimate objective in mind.

2.2 Access to contents (paragraph 1-7 of the commitments' text)

229. As regards access to contents, the scope and duration of exclusivity rights held by the combined platform will be extensively reduced to allow such rights to be contested on a frequent (in the case of DTH rights) or permanent (in the case of non-DTH rights) basis. Furthermore, premium contents to be broadcast via DTH by the combined platform will be made fully available to non-DTH platforms at wholesale prices via the wholesale offer. In addition *Newscorp* will not acquire, through future contracts or re-negotiations of the terms of the existing contracts, any protection or black-out right with respect to DTH.

2.2.1 On-going exclusive contracts:

230. As regards football rights, the undertaking submitted by *Newscorp* provides for the combined platform to grant to right holders a unilateral termination right starting from the season 2003/2004. This provision will enhance contestability of premium football contents as early as the coming season and will therefore improve the chances for a potential competitor to enter the pay-TV market.

231. *Newscorp* has also undertaken to waive exclusivity and other protection rights for non-DTH transmission for football and other sport events. This will allow operators competing on other means of transmission (for example, cable, Internet and UMTS.) to have direct and immediate access to premium sport contents.

232. As regards movie rights, *Newscorp* has undertaken to waive exclusivity and other protection rights for non-DTH transmission. This will allow operators competing on other means of transmission (for example, cable, Internet and UMTS) to have direct and immediate access to premium movie contents. Moreover, the counter-parties in the agreements with the combined platform will be given a unilateral right to terminate their contracts. Given the considerable duration of current output deals entered into with the Studios (both Hollywood Majors and Italian Film producers), the unilateral termination right will increase contestability of rights on premium movies to the benefit of potential new entrants in the pay-TV market even as regards DTH transmission. The obligation to provide a wholesale offer (see below) coupled with the unilateral termination right held by film producers (the Studios) will increase availability of premium contents to the maximum extent possible without completely undermining the ongoing contractual commitments between the merging parties and film producers. The commitment therefore appears to be both adequate and proportionate.

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2.2.2 Future exclusive contracts

233. As regards football rights, the limitation of the duration of future exclusive contracts for DTH transmission with football teams to two years and the unilateral termination right granted to football right owners are effective undertakings, in that they will make premium football contents contestable on the market at regular intervals.
234. As regards movie rights, a limitation on the duration of future exclusive contracts for DTH transmission will be applied to output deals concluded by the combined platform and the Studios (both Hollywood Majors and Italian Film producers). The duration of future output deals with Studios will not exceed three years.
235. A limitation of the maximum duration of contracts with football right owners of two years as compared to three years for contracts with Studios is appropriate in view of the results of the market tests. Whilst, within the Studios, all Hollywood Majors unanimously favoured no cap or, in any event the longest possible duration of their contracts with the combined platform, greatly diverging views were expressed by football teams: some advocated a maximum duration of one year, while some others advocated longer duration. In view of these diverging views and preferences, which appeared to highlight the peculiarity of the football teams' business model compared to that of the Studios', the Commission considers that a maximum duration of two years, in line with the condition imposed last year by the Italian Competition Authority in the mirror case, is appropriate. Moreover, unlike the Studios, football teams will also be granted a unilateral termination right also for future contracts. Such termination right constitutes an appropriate undertaking in that it will allow for the real value (which can be liable to drastic changes every football season in view of the results achieved) of each specific team's rights to be taken duly into account when negotiating with the combined platform.
236. As regards movie rights, *Newscorp* has undertaken not to acquire exclusivity and other rights for non-DTH means of transmission. This will allow operators competing on other platforms (for example, cable, Internet and UMTS) to have direct access to premium movie contents.
237. *Newscorp* has also committed not to acquire, with respect to future agreements with Studios, pay per view, video on demand and/or near video on demand exclusive rights and other protection rights.
238. In addition *Newscorp* has also undertaken not to seek DTH protection rights for pay-TV in the event of re-negotiation of present contracts.

2.2.2.1 Proportionality of the undertaking on the duration of future contracts with Studios

239. As stated above, as regards movie rights, the duration of future DTH exclusive agreements with the Studios will be limited to a maximum of three years. A reduced duration of output agreements with film producers will significantly reduce the foreclosure of the movie rights acquisition market to the benefit of potential new entrants in the pay-TV market. The acknowledged crucial importance of premium films as a "driver" for pay-TV subscriptions translates into a potential new entrant being

easily precluded from entering the market where premium movies are placed beyond his reach. Such foreclosure effect will inevitably stem from the cumulative effect of long-term agreements entered into by the dominant market player with all the major film producers and covering the bulk of these producers' output, no matter whether such initiative is undertaken by the incumbent, or by the film producers or by both. As long as an exclusive purchasing agreement is running, the mere possibility of a bid by another buyer is ruled out by the agreement itself. In this case, due to the cumulative effect of several agreements, this foreclosure effect is extended to an extremely high tied market share of a crucially important supply market. This is why the duration of the agreements is, under such circumstances, a very important parameter. If the combined platform were to be allowed to continue to enter into long-term agreements with such film producers in the future (for example, by being allowed to renew 10 year long terms for current contracts), the prospects for entry in the pay-TV market would be simply destroyed and potential competition would consequently be eliminated. In addition, this duration of three years is considered to be proportionate given that it is in line with normal industry standards for contracts subscribed in the past with Italian film producers.

240. In contrast, if the duration of the above-mentioned exclusive agreements is limited to a reasonable maximum, a potential buyer will have the possibility to submit an offer to each Studio on a more regular and frequent basis. This will improve competition on the buying side for the acquisition of premium movie rights. In the light of the characteristics of the relevant purchasing market, a maximum duration of three years will provide a sufficient level of flexibility for competition without undermining the possibility for content providers to secure the sale of their rights during a certain period of time. Although shorter than the current terms, a period of three years remains sufficiently long to remove any possible technical or commercial legitimate concern on the supply side.
241. As an alternative to the reduction in the duration of output deals, interested third parties argued that a unilateral termination right should be granted to the Studios in respect of future agreements. After careful consideration, the Commission concluded that such a solution would not enhance the contestability of premium movie rights as effectively as a reduction in the duration of output deals and that, furthermore, it could bring about some undesired effects resulting from a disproportionate shift of bargaining power in favour of the Studios, to the ultimate detriment of potential new entrants.
242. Any arguments made in respect of the monopsonist power to be exercised by the combined platform in the rights acquisition market must be carefully counter-balanced – as regards movies rights – with the fact that such monopsonistic power will only subsist if and for as long as the Studios (in particular the Hollywood Majors) maintain their current marketing model based on a segmentation of “windows”, pursuant to which free-to-air TVs are able to bid for the rights on a particular film only after the “pay-TV window” has been duly exploited by pay-TV operators. The moment right holders decide to allow free-to-air TVs to bid for film rights at the same time as pay-TV operators –that is to say, when they eliminate a distinction between a “free TV window” and a “pay-TV window” – the monopsonistic power of the combined platform will disappear *ipso facto*. This is particularly true in countries such as Italy where free-to-air TV, although still corresponding to a distinct relevant market, undeniably displays a certain inter-action with pay-TV (as previously acknowledged), and where major broadcasting groups are known to possess to significant financial means. The Studios

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therefore already hold a powerful instrument to be exercised at their full discretion in order to counter-balance any future monopsonistic power of the combined platform.

243. Secondly, relying only on a mere unilateral right of termination on the part of the Studios in order to remove the concern relating to a foreclosure effect would be unrealistic. A unilateral right of termination does not allow for a genuine full re-negotiation between the supplier and the potential buyers. On the contrary, it gives the supplier the possibility to prolong automatically all the initial contractual conditions with the current buyer. In the context of pay-TV film rights output agreements, this would be particularly worrisome, since there exist a number of factors that may lead the Studios to favour the *statu quo*. Pay-TV film rights output agreements provide for a large number of commercial conditions. For instance, the determination of fees may depend on several technical parameters. These parameters can be the classification of films according to their success, lump sums and/or variable prices such as the so-called "Cent Per Subscriber" (CPS), the number of subscribers (which may be subject to a precise method of calculation), minimum guarantees or price caps. Other key-terms are, for example, the duration, the films covered by the agreement, the volume and characteristics of products that the licensee must acquire each year and/or during all the license term, the number of exhibitions, dates of availability, security measures, payment terms, and warranties. Should the market conditions change, and they are likely to do so over time as shown by past experience, any of these numerous key terms will create a potential incentive for the studios to preserve a *statu quo* as long as possible. The stronger this inertia, the greater the foreclosure effect in spite of the theoretical existence of a unilateral termination right.

244. Thirdly, the complete uncertainty as to when a particular Studio will choose to unilaterally terminate its contract with the combined platform, as opposed to a fixed expiration date, would not allow a potential new entrant to properly plan its entry in the market, particularly from a financial point of view. Indeed, in order to enter the market, a potential entrant needs a critical mass of premium films. With respect to this constraint, the bargaining position of a new entrant would be particularly weak in case of a mere unilateral termination right. It would have to persuade and to negotiate with each Studio individually, facing a counterpart aware that all other studios have long-term ongoing contracts and that no rights are therefore instantly available. This is another reason why a set of fixed regular expiration dates, entailing that several Studios are regularly and more or less simultaneously seeking purchasers, is much more effective and satisfactory. In addition, the current contracts of half of the Hollywood Majors supplying the merging parties have expiration dates no more than 3 months apart. This means that the new contracts to be eventually entered into with the combined platform are likely to expire at least on dates close to each other, if not at the same time, should the combined platform negotiate simultaneous expiration dates.

245. Lastly, it is a fact that most monopolist/monopsonist pay-TV broadcasters, if not all of them, have in the past concluded very long-term output agreements. Such was the case, in particular, of *Telepiù* in 1996. This clearly shows that looking at duration as an issue of clear-cut vertical conflict, where the buyer necessarily aims at shortening the term of the contract against the supplier's interest, is over-simplistic and does not accurately reflect the reality of the market.

2.3 Premium wholesale offer (paragraph 10 of the commitments' text)

246. The wholesale offer is intended to allow competitors of the new entity on platforms other than DTH to subsist or to enter in the Italian pay-TV market. The underlying idea is that such wholesale offer will lower barriers to entry in the pay-TV market by allowing non-DTH pay-TV operators to access premium contents which would otherwise be too costly for them to purchase directly or which are locked away by means of long-duration exclusivity agreements entered into by the incumbent players with the content providers. Some types of content (mainly, but not exclusively, football and films) are considered to be "subscription-drivers" and are therefore crucial for the success of any pay-TV operation.
247. It was apparent from comments submitted by third parties during the market tests carried out by the Commission, that this particular undertaking as originally formulated, raised five issues: (a) the scope of the notion of "premium contents"; (b) the contractual availability of the necessary rights in order to provide a wholesale offer to platforms other than DTH; (c) the possible bundling of products; (d) the determination of the wholesale price of the offer pursuant to the "retail minus" principle; (e) the availability of the whole sale offer to all interested third parties.
248. As regards the scope of the notion of "premium contents", the commitment now provides for a wholesale offer covering all premium contents broadcast by the combined platform, even where such content is broadcast via a Basic Channel or Package. Furthermore, all pay-TV modalities will be included in the wholesale offer, meaning that third party operators will also be able to offer pay-per-view and/or video-on-demand in respect of premium content transmitted by the combined platform under such modalities.
249. As regards the contractual availability of the necessary rights in order to provide a wholesale offer, *Newscorp* has submitted an undertaking including a "best endeavours clause" concerning the acquisition of the necessary non-DTH rights for the wholesale offer to work. In the event that the combined platform, having used such reasonable endeavours, has been unable to acquire the rights to broadcast on non-DTH pay-TV certain content which it is entitled to broadcast on DTH, it shall take all reasonable steps to provide a full package of content under the premium wholesale offer, including the provision of suitable alternative content.
250. As regards the possible bundling of products, the commitment now explicitly provides for the wholesale offer to be provided on an unbundled basis, that is to say that a licensee will have the possibility of benefiting from a wholesale offer only as regards premium content without having to pay for, or somehow bear the costs of, basic content.
251. As regards the determination of the price for the wholesale offer according to the retail minus principle, the commitment satisfactorily lays down the fundamental principles without unduly restricting the discretion of the monitoring authority as regards the use of a particular test, be it to assess the possibility of margin squeeze or any other possible anti-competitive exercise of market power. Furthermore, an account separation between the wholesale and the retail operations of the combined platform will be provided, coupled with cost allocation to be carried out in accordance with the

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principle of causation. This will allow for *inter alia* the identification of avoidable costs in the calculation of the wholesale price.

252. As regards discount structure (so called "rate card") to be implemented in the future, the *Newscorp* undertakes not to discriminate between its own retail operation and third party retailers nor among third party retailers. In particular, the combined platform will be prevented from designing a discount structure such as to only allow its own retail operation to benefit from the highest discount rate made available by its wholesale operation, to the detriment of third party retailers.

253. In light of the above, it is concluded that the mechanism of the wholesale offer, as well as the "retail minus principle" enshrined therein, may be regarded as adequate instruments to resolve the competition concerns raised in respect of access by non-DTH operators to the pay-TV market as regards access to premium contents and in respect of illegitimate exercise of market power.

2.4 DTT and divestment of frequencies (paragraph 9 Part I and the entire Part III of the commitments' text)

254. The divestiture by *Newscorp* of its terrestrial broadcasting activities should prevent the extension of its stronghold on DTH to other technical platforms and, to the extent possible, allow a potential competitor pay-TV competitor to emerge. Such is the basis for the final undertaking submitted by *Newscorp*. The divestiture will liberate analogue as well as digital frequencies for other operators to exploit, digital frequencies assuming in this respect particular relevance due to the functionalities allowed for by digital technology.

255. As a logical complement to the divestiture commitment, *Newscorp* undertakes not to enter the DTT business either as a network operator or as a retail provider, thereby allowing alternative operators to emerge.

256. Against this background, the undertaking to divest terrestrial frequencies and not to enter the DTT business appear to be sufficient to establish favourable conditions for potential entry by other operators. Furthermore, the fact that the suitable purchaser of the terrestrial frequencies and of the divested business must be a company willing to include pay-TV broadcasting of one or more channels in its business plan after the switchover from analogue to digital terrestrial television broadcasting in Italy ensures that competitive constraints vis-à-vis the combined platform will also emerge from the DTT means of transmission.

2.5 Access to platform (paragraph 11 of the commitments' text)

257. Access to the platform and to technical services necessary to operate are instrumental in ensuring that intra-platform competition is actually possible. The undertakings submitted by *Newscorp* go a long way in providing accessibility to the combined platform with a view to allowing effective competition to be achieved.

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258. In the light of the above, new entry will be facilitated in the pay-TV market and it will be possible for free to air channels to be broadcast via DTH. Moreover, the competitive concerns arising from the impossibility for third parties to gain access to two alternative competing platforms available pre-merger (*Stream's* and *Telepiù's* platforms) will be offset by the undertakings offered by *Newscorp*.

2.6 Dispute resolution / Arbitration (paragraph 15 of commitments' text)

259. The submitted undertakings are to a large extent behavioural. An effective monitoring system is therefore crucial. The proposed undertakings provide for an effective system of monitoring. In particular, they provide a dispute settlement mechanism that involves on the one hand a private arbitration system and on the other hand the jurisdiction of the Italian Communication Authority on key matters such as access to platform and the wholesale offer.

2.7 The duration of the commitments would be at the latest until 31.12.2011

260. The Commission considers that the proposed duration of the undertakings provides sufficient guarantees to allow effective competition to be restored.

3 Conclusion on the commitments offered by *Newscorp*

261. In the light of the foregoing, the Commission considers that the commitments presented by *Newscorp* are sufficient to resolve the identified anti-competitive effects in the relevant markets, taking into account the specific features of this concentration.

VII TELECOM ITALIA'S LINK

I. PRELIMINARY CONSIDERATIONS

262. Pursuant to the "Shareholder Agreement" (see recital 12 above) with *Newscorp*, Telecom Italia holds a minority stake in the combined entity (19,9%), appoints one member of the board of Directors (for as long as it holds at least [0-10]*% of the issued voting capital of the merged entity) and holds a number of rights concerning the protection of its investment in the platform (modification of the by-laws, modification of corporate scope, increase/decrease of capital, issuance of securities, dividend policy, liquidation rights, and specific rights concerning the possibility of IPO (initial public offers) or sale of the merged entity by *Newscorp*).

263. Despite the minority shareholding position of Telecom Italia, it would appear unrealistic to consider the investment of the Italian telecom incumbent as "merely" financial. This is partly based on the fact that Telecom Italia is already directly present in the terrestrial broadcasting activities (through two free-to-air TVs: La 7 and MTV).