COMMISSION DECISION

of 2 April 2003

declaring a concentration to be compatible with the common market and the EEA Agreement

(Case COMP/M.2876 — Newscorp/Telepiù)

(notified under document number C(2003) 1082)

(Only the English text is authentic)

(Text with EEA relevance)

(2004/311/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 (2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) No 1310/97 [2], and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 29 December 2002 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations [3],

Having regard to the final report of the Hearing Officer [4] in this case,

WHEREAS:

(1) On 16 October 2002, the Commission received a notification pursuant to Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation) of a proposed concentration by which the undertaking The News Corporation Limited, Australia (hereinafter Newscorp) acquires control within the meaning of Article 3 of the Merger Regulation, via a special purpose vehicle company, of the whole of the Italian pay-TVs Telepiù Spa and Stream Spa (hereinafter, respectively Telepiù and Stream) by way of purchase of shares. Telepiù and Stream will merge their activities in a combined direct-to-home (DTH) satellite pay-TV platform. Telecom Italia SpA. (the Italian telecom incumbent, hereinafter Telecom Italia) will hold a minority stake (19,9 %) in the new combined pay-TV platform.

(2) After examination of the notification and the set of undertakings submitted by Newscorp on 31 October 2002, the Commission concluded, on 29 November 2002, that the notified operation fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the EEA Agreement. The Commission therefore decided to initiate proceedings in accordance with Article 6(1)(c) of the Merger Regulation.

(3) On 14 January 2003 a new set of undertakings was submitted by Newscorp.

(4) An Oral Hearing was held on 5 and 6 March 2003.

(5) On 13 March 2003 a final set of undertakings was submitted by Newscorp.

(6) The Advisory Committee discussed the draft of this Decision on 20 March 2003.

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[1] OJ L 395, 30.12.1989, p. 1 (corrected version in OJ L 257, 21.9.1990, p. 13).
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 92, 16.4.2004.
[4] OJ C 92, 16.4.2004.

I. THE PARTIES

(7) Newscorp is a media company active in USA, Canada, Europe, Australia, Latin America and the Pacific Basin. Newscorp's activities include the production and distribution of motion pictures and TV programming, TV satellite and cable broadcasting, the publication of newspapers, magazines and books, the production and distribution of promotional and advertising products and services, the development of digital broadcasting, the development of conditional access and subscriber management systems and the creation and distribution of on-line programming.

(8) Telepiù has been operating since 1991 as an analogue pay-TV platform. Since 1996, Telepiù has also operated as a pay-TV broadcaster via digital satellite (DTH) and, to a lesser extent, via cable. Telepiù also broadcasts on digital terrestrial television (DTT) on a technical testing basis in a very few areas of the Italian territory. Since 1997 Telepiù has been solely controlled by Vivendi Universal SA Telepiù operates mainly through its subsidiaries. In particular Europa TV SpA and Prima TV SpA are responsible for the editorial activities of the Telepiù channels and for the purchase of TV rights for sporting events and films. They hold, respectively, a concession for analogue terrestrial broadcasting and an authorisation for satellite digital broadcasting. Omega TV SpA is responsible for in-house programme productions and for the management of Telepiù's digital satellite pay-per-view offer. Atena Servizi SpA provides the technical-administrative services for the digital platform and purchases broadcasting rights for the channels produced by third parties to be offered on such platform. Finally TeleCare SpA, a company controlled by Atena Servizi, is responsible for the call centre.

(9) Stream was incorporated in 1993 and started operating as a pay-TV platform in Italy in 1998, transmitting in DTH. Between 1993 and 1997 Stream only operated as a service provider distributing pay-TV programmes for other operators. At present Stream operates only in digital technology, transmitting its signals via satellite and, to a lesser extent, via cable. Prior to mid 2000 the shareholding of Stream was as follows: Telecom Italia (35 %), Newscorp (35 %), Cecchi Gori Group Finmavi SpA (CGG) (18 %) and SDS — Società Diritti Sportivi Srl (SDS) (12 %). Since mid 2000, following the authorisation by the Commission ([5]) Stream has been jointly controlled by Newscorp and Telecom Italia on a fifty-fifty basis supported by a shareholders' agreement.

II. THE CONCENTRATION

(10) The proposed concentration involves the acquisition of sole control by Newscorp of Telepiù and Stream with the aim of pursuing the combination of their business. To this effect, on 1 October 2002, Newscorp and Telecom Italia entered into a 'share purchase Agreement' with Vivendi Universal SA, Group Canal+ SA and Canal+ Europe BV (collectively referred to as Vivendi group), providing for the acquisition of 100 % of the shares of Telepiù by Newscorp via a special purpose vehicle wholly owned by Stream.

(11) Simultaneously, Newscorp and Telecom Italia have entered into a 'Framework Agreement' whereby they intend to: (i) provide funding to Stream; (ii) redefine their interests and their respective roles in Stream and, through Stream, incorporate and capitalise a 100 % owned subsidiary of Stream as special purpose vehicle to carry out the acquisition of Telepiù; and (iii) govern their future relationships as shareholders of Stream and the related participation in the special purpose vehicle. These operations will be followed by the setting up of a combined DTH pay-TV platform merging the activities of Stream and Telepiù.

(12) Finally, the 'Shareholder Agreement' attached to the Framework Agreement governs the relationship between Newscorp and Telecom Italia as shareholders of Stream.

(13) Telecom Italia will have a participation of 19,9 % in the combined platform and Newscorp will have a participation of 80,1 %. It is possible that other investors may join the shareholding structure with a mere financial interest. The Share Purchase Agreement states that such possible other investors cannot assume, either individually or jointly with others, any power of control over the combined platform, that is to say that they cannot exert any influence on the definition of the business policy nor can they participate in the designation of its management.

(14) Although it is based on various contracts, the acquisition of sole control of Stream and Telepiù by Newscorp is to be considered as one single concentration carried out exclusively with a view to the acquisition of sole control of the combined platform by Newscorp. The proposed transaction is therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

(15) The proposed transaction constitutes a development of an operation scrutinised by the Italian Antitrust

([5]) Case COMP/M.1978 — Telecom Italia/News Television/Stream of 29/06/2000, published on the Commission's website: http://europa.eu.int/comm/competition/mergers/cases/.

Authority (the IAA) in 2002 ([6]). Under that operation, in contrast to the present transaction, the Vivendi group would have acquired sole control of the Italian DTH pay-TV platform resulting from the combination of Stream and Telepiù businesses. In that scenario, Telecom Italia together with Newscorp were the 'sellers', whereas in this case, Telecom Italia maintains a link with the combined platform. That transaction was cleared by the IAA by a decision dated 13 May 2002, imposing a set of conditions substantially similar to the undertakings presented by the parties during the first phase of the Commission's investigation. The deal was subsequently abandoned by the Vivendi group.

III. COMMUNITY DIMENSION

(16) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Newscorp EUR […]* (*) in June 2002, Stream EUR […]* in 2001, Telepiù EUR […]* in 2001). The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million (Newscorp EUR […]* in June 2002 and Telepiù EUR […]* in 2001, whilst Stream achieved EUR […]* in 2001). The parties do not achieve more than two-thirds of their turnover within one and the same Member State (Newscorp achieves two-thirds of its Community-wide turnover in the United Kingdom, Stream and Telepiù in Italy). The operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

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 decisions ([7]). 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 (nationwide 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 programme 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, without incurring significant additional costs or risks ([8]). In particular, free-to-air TVs largely rely on

([6]) Decision of the Italian Antitrust Authority (IAA) of 13 May 2002 (case C/5109).

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

([7]) Commission decisions of 10 September 1991, case No. IV/M.110, ABC/Generale des Eaux/Canal+/W.H. Smith TV, recital 11; 20 September 1995, case No. M.553, RTL/Veronica/Endemol, recital 20. The mentioned decisions are published on the Commission's website: http://europa.eu.int/comm/competition/mergers/cases/.

([8]) See Commission notice on the definition of the relevant market for the purpose of Community competition law (OJ C 372, 9.12.1997, p. 5) point 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.'

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 not fully interchangeable from the consumer perspective. Indeed, some free broadcasters have highlighted that viewers of pay-TVs are often interested in programme 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 programme 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 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 programmes'. 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 programme schedule that allows various 'replays' of the same content/programme at various moments during the same day and week. Consequently, viewers of a pay-TV are able to watch the programme 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 (A series and B series 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, A series or B series) 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 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-TVs 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-TVs due to the existence of a vast network of free-to-air TVs having an important set of programmes, it is nevertheless unlikely that an increase of 5 to 10 % in the subscription fee for a pay-TV platform would induce consumers to 'switch' and terminate an existing subscription or refrain from subscribing ([9]).

(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-TVs 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.

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

However, the Italian government's plans for the introduction of DTT point towards the end of 2006 (in contrast to other countries such as Spain or the United Kingdom ([10]), 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 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 States ([11]). 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

([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.

([11]) See for example, for the United Kingdom, 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, 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.

free-to-air television, which is financed by advertising and/or through State contributions ([12]).

(41) While in the case of free-to-air TV there is a commercial relationship only between the programme supplier and the advertising industry, in the case of pay TV there is also a direct commercial relationship between the programme 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 services ([13]) and digital interactive TV services ([14]), 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 market ([15]).

TV channels, especially DTH pay-channels

(44) A certain degree of similarity exists between pay-TV special interest channels (marketed separately in some Member States ([16])) 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 programme 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

([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 website: 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 December 2000, published on the Commission's website: http://europa.eu.int/comm/competition/mergers/cases/.

([14]) Case COMP/JV.37. — BskyB/Kirch Pay TV, Decision of the Commission dated 2 March 2000, published on the Commission's website http://europa.eu.int/comm/competition/mergers/cases/.

([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 United Kingdom as regards Channel 4.

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.

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 decisions ([17]), 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 rights ([18]). 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 programme 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 exist ([19]): (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 programmes. 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 abovementioned TV content, there are some categories of contents which are acquired only by pay-TVs 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-TVs, since such sales policy would reduce the number of stadium goers.

([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 53, 27.2.1999, p. 1. Case COMP/M. 2845 Sogecable/Canalsatélite Digital/Vía Digital, decision of the Commission dated 14 August 2002 published on the Commission's website: 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 worldwide distribution of feature films and television channels. It supplies some of those products in Italy, in particular filmed entertainment.

([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/Vía Digital. See Commission's website: http://europa.eu.int/comm/competition/mergers/cases.

(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 content ([20]). In particular, it found in the Vivendi/CANAL+/Seagram merger case ([21]) 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 recently ([22]), 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-TVs comprise rights for the so-called 'pay periods' ('pay per view', 'near-video-on-demand', 'video-on-demand'), 'first window' and 'second window' exhibition ([23]).

(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 investigations ([24]), 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

([20]) The general issue has been introduced without being settled by the abovementioned Decision TPS of 3 March 1999 recital 34), then decided in the abovementioned merger decision of 13 October 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 exclusive basis (press release IP/01/1043 dated 20 Juli 2001), '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/Vía Digital.

([21]) See abovementioned decision of 13 October 2000, case COMP/M.2050 Vivendi/CANAL+/Seagram.

([22]) Case COMP/M.2845 Sogecable/Canalsatélite Digital/Vía Digital.

([23]) Generally speaking, films for pay-TV are exhibited under different timing and windows. After a time period of theatrical exhibition (six to eight months) and of video rentals and/or sales (four to six months) films reach pay-TV consumers through a pay per view period (usually a three months period). Films can be thereafter be released on first window (usually six month period) and the on second window (usually six month 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 October 2000, case COMP/M.2845 Sogecable/Canalsatélite Digital/Vía Digital, decision dated 14 August 2002, published on the Commission's website: http://europa.eu.int/comm/competition/mergers/cases.

([25]) See case COMP/M.2050 Vivendi/Canal+/Seagram, recital 19.

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.

(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 deals ([26]) 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 holdback 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, regional ([27]). 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 cases ([28]) that there is a separate market for 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). 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.

([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/Vía Digital.

([28]) Case 37.576 - UEFA's broadcasting regulations, case COMP/M.2483 Canal+/RTL/GJCD/JV, case COMP/M.2845 Sogecable/Canalsatélite Digital/Vía Digital.

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 recitals 64 and 65 can be segmented into different markets.

(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 nationwide 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 cases ([29]), are essential for putting together pay-TV services and constitute a separate product market ([30]). 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 (generic and thematic) contribute to rendering the pay-TV bouquet attractive for end consumers.

([29]) Case IV/36.237 – TPS (OJ L 90, 2.4.1999, p. 6).
([30]) Case COMP/M.2845 – Sogecable/Canalsatélite Digital/Vía Digital.

(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).

TABLE 1

Market size

Value

(EUR 000)

	1999	2000	2001
Advertising	[…]*	[…]*	[…]*
Subscriptions	[…]*	[…]*	[…]*
Total	[…]*	[…]*	[…]*

Source: Form CO.

TABLE 2

Volume (number of subscribers)

1999	2000	2001
[…]*	[…]*	[…]*

Source: Form CO.

(80) It should be recalled that, prior to the merger, Telepiù (the target company) already held a dominant position in the Italian pay-TV market.

(81) In 2001 Telepiù had a [60 to 70]* % market share in terms of subscribers and [65 to 75]* % in terms of value; Stream had a [30 to 40]* % market share in terms of subscribers and a [25 to 35]* % market share in terms of value. Furthermore in November 2002 Telepiù had a [65 to 75]* % market share in terms of number of subscribers (Stream having [25 to 35]* %), and a market share of approximately [70 to 80]* % in terms of revenues. The tables below summarise Stream and Telepiù 's pre-merger positions over the three years of reference, according to value, number of subscribers (volume) and corresponding market shares:

TABLE 3

Market position of Telepiù and Stream pre-merger

Value

(EUR 000)

	1999	2000	2001
Telepiù	[…]*	[…]*	[…]*
Stream	[…]*	[…]*	[…]*
Total	[…]*	[…]*	[…]*

Source: Form CO.

TABLE 4

Volume (Number of subscribers)

	1999	2000	2001
Telepiù	[…]*	[…]*	[…]*
Stream	[…]*	[…]*	[…]*
Total	[…]*	[…]*	[…]*

Source: Form CO.

TABLE 5

Market share (value/volume)

(%)

	1999		2000		2001	
	Value	Volume	Wert	Volume	Value	Volume
Telepiù	[85-95]*	[70-80]*	[75-85]*	[65-75]*	[65-75]*	[60-70]*
Stream	[5-15]*	[20-30]*	[15-25]*	[25-35]*	[25-35]*	[30-40]*
Total	100	100	100	100	100	100

Source: Form CO.

1.2. ***Considerations on costs in the Italian pay-TV market***

(82) The pay-TV market is characterised, in Italy and across the EEA, by very high levels of costs incurred by platforms. The cost structure of a pay-TV operator is, to a considerable extent, determined by the burden of programming rights and by the level of subscriber acquisition costs (marketing and promotional expenses). The largest portion of the operating cost base is represented by programming costs, which have reached very high levels in absolute and relative terms in the accounts of the Italian pay-TV platforms especially over the last few years.

(83) These broadcasting or programming costs stem mainly from the need to acquire 'premium' contents (particularly football events and movies, but also, for example, other sports) that have the potential to attract viewers and render them stable subscribers of the pay-TV (or pay-per-view) service. According to documents submitted by the parties, these costs 'are predictable over the medium-term because of the maturity of the agreements with the content providers'. They could therefore be considered to some extent as fixed or unavoidable costs for the platforms. 'Such rights are usually negotiated with content providers on a per subscriber basis and often incorporate a minimum payment or subscriber guarantees. Once the minimum number of subscriber is reached, these costs become fully variable'.

(84) Although these costs may be regarded as either fixed or variable costs, depending on the company's analytical accountancy system, they appear to have consistently represented a rather heavy burden on the platforms, especially in Italy, where the level of penetration of pay-TV service is lower than in other EEA countries and therefore the customer-base and the revenues, on which it is possible to amortise those costs, are more limited.

(85) These costs are determined, *inter alia*, by long term exclusive contracts with premium content providers which may often encompass the acquisition of exclusive rights of broadcasting not only in the pay-TV and pay-per-view modality, but also in the modalities of near-video-on-demand and video-on-demand and include various protections (holdback rights, negative exclusive rights and similar) in respect of the possibility for third parties to acquire and broadcast the same contents by way of other existing and future means of transmission (cable, Internet, UMTS ([31]), etc.). Furthermore, in general, contracts with content providers are structured in such a way that a substantial portion of the fees to be paid by the pay-TV operator take the form of 'minimum guaranteed', directly or indirectly linked to an hypothetical minimum number of subscribers to the pay-TV platform. If the number of subscribers increased beyond that hypothetical number, then the fees to be paid by the pay-TV operator to the content provider would rise accordingly.

(86) Since the beginning of the pay-TV business in Italy in 1991 and after the inception of Stream in 1998, these broadcasting costs have skyrocketed. This factor has significantly affected the profitability of the competitive platforms, as shown by the data submitted by Newscorp.

(87) Indeed, the notifying party has reported (in the documents submitted in the course of the proceedings) that during the period 1991 to 2001 Telepiù and Stream incurred heavy losses. The table below shows in particular the financial losses incurred by the two platforms for the period 1998 to 2001:

([31]) Universal mobile telecommunications system.

TABLE 6

Net losses

(EUR million)

	Telepiù	Stream	Total
1998	[…]*	—	[…]*
1999	[…]*	[…]*	[…]*
2000	[…]*	[…]*	[…]*
2001	[…]*	[…]*	[…]*
Aggregate 1998 to 2001	[…]*	[…]*	[…]*

Source: Elaboration on form CO data.

(88) In its scrutiny of the previous merger (subsequently aborted) in which the Vivendi group would have acquired control of Stream, the IAA found that programming costs represented around [55 to 65]* % of the total costs of the DTH pay-TV operators ([32]).

1.3. *Cost of acquisition of movie rights*

(89) Both Stream and Telepiù have acquired quite a substantial number of 'premium' movie rights from the American majors and also to a lesser extent from Italian film producers. The total value of the acquisition (per platform) is shown in the table below for the last four years:

TABLE 7

Premium movies

Value

(EUR 000)

	1999	2000	2001	2002
Telepiù	[…]*	[…]*	[…]*	[…]*
Stream	[…]*	[…]*	[…]*	[…]*
Total	[…]*	[…]*	[…]*	[…]*

Source: Elaboration on data provided by the parties.

(90) From 1999 to 2002, the above costs have represented, on average, slightly less than [5 to 15]* % of total costs for Telepiù and around [0 to 10]* % for Stream.

1.4. *Cost of football rights*

(91) Both Stream and Telepiù have acquired a very significant number of sport rights from Italian football clubs, for the broadcasting of events regarding Italian teams and related to the Italian A series, B series, Coppa Italia, the Champions Leagues and the UEFA Cup. The total value of the

([32]) Decision of the Italian Antitrust Authority (IAA) of 13 May 2002, paragraph 33 (case C/5109).

acquisitions of those rights, in terms of cost for the platforms, is shown in the table below for the last four years:

TABLE 8

Football events

Value

(EUR 000)

	1999	2000	2001	2002
Telepiù	[…]*	[…]*	[…]*	[…]*
Stream	[…]*	[…]*	[…]*	[…]*
Total	[…]*	[…]*	[…]*	[…]*

Source: Elaboration on data provided by the parties.

(92) From 2000 to 2002, the above costs represented, on average, [40 to 50]* % of total costs for Stream and [20 to 30]* % for Telepiù.

1.5. *Cost of rights to other sports*

(93) Both Stream and Telepiù have acquired a very significant number of sport rights with regard to other sport events such as the Formula 1 races, important tennis tournaments (grand slam) or events where Italian teams or players participate. The total value of these acquisition of rights (in terms of cost for the platforms) is shown in the table below for the last three years:

TABLE 9

Other sport events

Value

(EUR 000)

	1999	2000	2001
Telepiù	[…]*	[…]*	[…]*
Stream	[…]*	[…]*	[…]*
Total	[…]*	[…]*	[…]*

Source: Elaboration on data provided by the parties.

(94) From 1999 to 2001 the above costs represented, on average, just over [0 to 10]* % of total costs for Telepiù and around [0 to 10]* % for Stream.

1.6. *Cost of acquisition of channels*

(95) Both Stream and Telepiù have acquired a very significant number of rights on channels to include in their bouquets or alternatively in their programming. The total value of these acquisitions of rights, in terms of cost for the platforms, is shown in the table below for the last four years. The cost of acquisition of these rights is also quite substantial as compared to the rest of the

programming rights even if these programs cannot be considered of a 'premium' nature. However, when taking into account the number of broadcasting hours acquired through channels compared to the number of broadcasting hours acquired through films and sports rights, the cost per-hour of channels is significantly lower than the cost of other programming rights. Nevertheless, the channels contribute to increasing the overall attractiveness of a pay-TV platform vis-à-vis the end consumers.

TABLE 10

Channels

Value

(EUR 000)

	1999	2000	2001	2002
Telepiù	[…]*	[…]*	[…]*	[…]*
Stream	[…]*	[…]*	[…]*	[…]*
Total	[…]*	[…]*	[…]*	[…]*

Source: Elaboration on data provided by the parties.

(96) The above costs represented, on average, [10 to 20]* % of total costs for Telepiù and [10 to 20]* % for Stream in 2001 to 2002.

1.7. *Cost of the overall programming rights*

(97) Overall, the acquisition of programming rights substantially erodes the revenue margins of each of the two platforms. However, recent data seem to point towards an improvement of the relevant ratios. The ratio 'total programming costs'/'total subscription revenues' has decreased for Telepiù from [85 to 95]* % (in 2001) to [75 to 85]* % (in 2002), and for Stream from [135 to 145]* % (in 2001) to [135 to 145]* % (in 2002).

(98) The above appears to indicate that the relationship between costs and revenues for the platforms is no longer out of control. Furthermore, the economic and financial difficulties experienced in the pay-TV market by both DTH platforms in Italy are being to a certain extent reduced thanks to the ongoing efforts to combat piracy. This has led to an increase of around 150 000 in the number of subscribers for Telepiù over the last months of 2002.

2. CREATION OR STRENGTHENING OF A DOMINANT POSITION IN THE ITALIAN PAY-TV MARKET

2.1. *Horizontal effects (supply of pay-TV services)*

(99) The pay-TV market is the overall market for pay-TV services that includes, for the time being, services such as pay-TV itself (in the strict sense of the term), pay-per-view, video on demand and near video on demand. It is possible to provide pay-TV services via various broadcasting means, namely, digital terrestrial (also known as DTT), cable or satellite (also known as DTH). Analogue terrestrial broadcasting is technologically much less adequate to support the simultaneous transmission of a wide number of channels, programmes and sport events which are typical of a pay-TV bouquet.

(100) The Italian pay-TV market is to date essentially limited to satellite transmission (DTH), where both Stream and Telepiù are active. Telepiù still maintains a residual number of subscribers for its initial analogue services (heritage of the beginning of the pay-TV era via analogue terrestrial means), whilst cable is only marginally developed (through the operator e.Biscom) and digital terrestrial television (DTT) is in its experimental phase.

2.1.(a) **Competitive scenario: cable and DTH**

(101) In this market Telepiù is the dominant player with a market share of [65 to 75]* % in terms of number of subscribers ([…]* as of November 2002) and most likely [70 to 80]* % in terms of revenues. Stream is the only competitor currently active in the market with […]* subscribers (as of November 2002). The parties argue that the competitive environment in Italy allows for further growth of cable operators, such as e.Biscom, which owns a network for the provision of TV services that is capable of reaching nearly one million households.

(102) As regards cable operators, at present e.Biscom only provides video-on-demand and interactive TV services to [10 000 to 20 000] subscribers. Furthermore, according to e.Biscom's business plan, the company is realising a proprietary optical fibre cable network reaching customers in a limited number of big cities in Italy. In addition, e.Biscom transmits Telepiù and Stream's pay-TV offers through its cable network, but client ownership, conditions of sale and customer care services remain within Stream and Telepiù.

(103) As the Commission pointed out in a statement of objections to Newscorp there will be virtually no competition left in the pay-TV market in Italy after the merger. The competitive constraint that the combined platform will have to face from cable operators in Italy can be considered as minimal. Even Newscorp has, in public conferences and presentations to the business community, stated that in Italy the merged entity will face 'no competition from cable' ([33]). In addition, it has been claimed by third parties that the cost of cable connection is higher, in relative terms, than in other markets.

(104) As regards DTH, Italian regulation requires access to conditional access systems (CAS) on fair, reasonable and non-discriminatory terms for third parties and contains simulcrypt obligations ([34]). However, for the reasons explained below (the need for any possible DTH competitor to acquire CAS from Newscorp or to enter into simulcrypt agreements with Newscorp and the ownership by Newscorp of the DTH platform), no effective competition from DTH can reasonably be expected after the merger unless additional guarantees are established.

2.1.(b) **Prospects for the development of DTT**

(105) As far as DTT is concerned, conditions for potential entry within a reasonable time-frame are unclear. The Italian government has fixed a deadline of 31 December 2006 for the switch-off from analogue to digital TV. However, according to the market investigation carried out by the Commission, the transition is more likely to take place at a later stage. In its white paper on digital terrestrial TV of 8 November 2000, the AGCOM (the italian regulatory Authority in the communications sector) has highlighted the difficulties regarding frequencies for broadcasters and set top boxes. It has recommended that the Italian State should subsidise each household with a digital decoder.

(106) According to a study published by the Commission ([35]), quoted by third parties, in order to achieve the expected benefits of DTT, the following obstacles would need to be overcome: (i) operators would need to invest in upgrading transmission networks; (ii) consumers would have to equip all current analogue receivers (main televisions, secondary televisions and video recorders) with converters/decoders and/or replace them gradually by integrated digital receivers, to receive DTT; (iii) regulators would have to modify national frequencies so that simulcasts can be organised.

(107) Third parties have also indicated that DTT operators face technical difficulties. They have pointed out that DTT technology is often not predictable enough and its relatively limited broadcasting power does not give

([33]) For example, see The News Corporation Goldman Sachs Media Conference October 1, 2000 http://www.newscorp.com/investor/presentations.html.

([34]) Decreti legislativi approvati dal Consiglio dei Ministri del 30 aprile 1999, per l'attuazione della direttiva comunitaria 95/47/CE concernente dei segnali televisi. Decreto legislativo 17 maggio 1999. Attuazione della direttiva 95/47/CE in materia di emissione di signali televisi ref: GURI nº 145, 23/06/1999. Legge 78 29.3.1999, Delibera AGCOM 216/00.

([35]) Digital Switchover in Broadcasting — Final Report 12 April 2002 by BIPE, Consulting Study for the European Commission. Published by DG Information Society.

absolute certainty that a decoder in a particular area would actually receive the signal ([36]). Third parties have stressed that there is no example of successful DTT pay-TV in Europe. Third parties claim that, apart from premium content, one of the main incentives for customers to pay for pay-TV remains the extensive choice of channels offered. If this is correct, a DTT pay-TV operator with limited bandwidth will not be able to compete with the number of channels that are currently offered by Telepiù and Stream.

(108) The sustainability of the DTT delivery mechanism with respect to other delivery mechanisms from a pay-TV operator's point of view depends on two factors: firstly, the existing reception infrastructure, that is to say, the number of households and receivers using terrestrial receptions; secondly, the cost of transmission via DTT, compared to cable and digital satellite TV. The fixed transmission cost of a nationwide DTT broadcast is much higher than for satellite. According to the above-mentioned study, the cost of a year of digital transmission through satellite amounts to approximately EUR 0,5 million whereas the cost of a nationwide DTT transmission amounts to EUR 5 million. It has also been indicated by third parties that the competitiveness, attractiveness and usefulness of the DTT delivery mechanism for commercial players has not been proved and that, as long as the variety of channels remains a determining factor for the promotion of pay-TV, DTH has an inherent advantage over DTT and will continue to hold the lion's share of the pay-TV market in Italy.

(109) However, in this respect it has to be borne in mind that the main driver for subscribing to pay-TVs is not so much the variety of channels offered (especially in the case of Italy with a substantial number of free-to-air channels) but rather the premium contents (premium films and sports, in particular national football). It has been indicated that a DTT bouquet can include 30 channels, as compared to 300 channels that can be viewed via a satellite platform. In this respect, according to the arguments of a third party, field tests in DTT have been conducted in Sicily and in the province of La Spezia. The recorded percentage of declared intention to subscribe at the end of the test period was extremely low and was deemed to be a deterrent for a candidate against launching its operation.

(110) In view of the above, it is not possible to assess with a sufficient degree of certitude if and when effective competitive pressure will arise from DTT platform(s) vis-à-vis the merged entity in the foreseeable future.

([36]) However, this seems only to be the case for earlier deployments of DTT technology which have been based on unrealistic coverage assumptions.

2.1.(c) **Claimed competitive constraints from free-to-air TV**

(111) Newscorp argues that the strength of free-TV broadcasters in Italy is an effective constraint for the pay-TV operators. Newscorp believes that the Italian free-to-air programming expresses a uniquely varied and attractive offer, both at national and local levels. This competitive pressure is, according to Newscorp, a critical constraint for pay-TV operators in Italy which goes beyond the mere 'interaction' or 'some relationship' recognised by the Commission in the past. In this respect, the notifying party states that, as regards free-to-air offer there are 12 national broadcasters, 50 channels via DTH and roughly 700 local broadcasters available in Italy.

(112) In any case, although a certain degree of competitive pressure from the free-to-air TV may exist (as is also the case in other countries, such as Germany), the evidence gathered by the Commission in this case confirms the finding that pay-TV is a distinguishable product with extra utility. This conclusion is supported by the fact that first window premium films and most football matches where national teams participate can only be viewed by pay-TV consumers and that subscribers are prepared to pay considerable sums for pay-TV services.

(113) As an example, the average revenue per subscriber was, in 2001, EUR […]* for Telepiù and […]* for Stream, whereas the annual fee (which is a compulsory tax) for public free-to-air TVs (RAI) for the year 2003 is EUR 97,10. Moreover, the three nationwide Mediaset TV channels can be viewed for free. As regards local free-to-air channels, as indicated in the oral hearing held on 5 and 6 March by a representative of an association of free-to-air TVs, the total turnover of the 608 regional and local Italian channels belonging to that association accounts for [40 to 50]* % only of Telepiù's turnover. These circumstances highlight, inter alia, that the competitive constraint stemming from free-TV operators vis-à-vis the pay-TV platform is rather limited at the moment.

2.1.(d) **Conclusion**

(114) Having regard to the above, the concentration will lead to the creation of a near-monopoly in the pay-TV market in Italy.

2.2. ***Vertical effects (technical services for pay-TV: CAS and technical platform)***

(115) The operation of pay-TV requires a special technical infrastructure to encrypt the television signals and to decrypt them for the authorised viewer. This infrastructure is constituted by a conditional access system (CAS), and by a decoder (also called set top box (STB)).

(116) The Commission has examined in previous decisions the possible existence of a product market for the wholesale provision of the technical services necessary for pay-TV ([37]). 'These services essentially comprise the making available of settop boxes, the provision of conditional access services, including smart cards, subscriber management services and possibly the services relating to accessing the electronic programme guide and the writing of applications compatible with the application programming interface included in the set top boxes. In addition, the provision of digital interactive television services also requires a system to allow financial transactions to be conducted in a secure environment ([38]).'

2.2.(a) **Conditional access system (CAS)**

(117) A CAS is a technology, which allows network operators and broadcasters to encrypt/scramble the digital transmission signal ([39]), which is then broadcast via satellite, cable or terrestrial systems to the STB. When the digital signal reaches the STB, a smart card ([40]), which is part of the CAS, generates the control word needed to decrypt and unscramble the broadcast signal, allowing subscribers with the required access rights to view the programmes.

(118) Newscorp is present in the supply-side of the conditional access system sector through a controlling stake of approximately 80 % in NDS, a conditional access system license supplier. More particularly, NDS provides conditional access and related products and services for the management, control and secure distribution of entertainment and information to television. The combined entity will therefore be vertically integrated with NDS, possessing in house a proprietary CAS technology (called Videoguard).

(119) In this respect, it should be borne in mind that the pay-TV sector has so far been characterised by strong vertical integration. Some of the technical services for pay-TV (and in particular the provision of CAS) have so far been provided in-house ([41]). In Italy in 2001, two operators (Canal+ Technologies and NDS) vertically integrated in the Vivendi group and in the Newscorp group respectively accounted for more than [80 to 90]* % of the total provision of CAS to pay-TV operators (the remaining being accounted for by the company Irdeto).

(120) The Commission pointed out in the statement of objections sent to Newscorp that it is very likely that the combined platform will, in the near future, adopt only one CAS, that is NDS' CAS Videoguard. Indeed, there are strong incentives for the combined platform to adopt this strategy: firstly, the majority stake held by Newscorp in NDS, which is the licensor of Videoguard; and secondly, the strategy, pursued by Newscorp as well as by other vertically integrated pay-TV operators, of using the CAS produced in-house. Indeed, both Stream and Telepiù started operating with the technology produced by Irdeto but switched subsequently to the CAS produced in-house (Videoguard produced by NDS and Mediaguard produced by Canal+Technologies respectively).

(121) In this context, regardless of whether separate product markets can be envisaged for CAS, STB and other technical services for pay-TV ([42]), the market investigation carried out by the Commission has highlighted specific concerns regarding technical services for pay-TV and in particular relating to conditional access systems. Such concerns were expressed both by some CAS providers and by some potential newcomers on the pay-TV markets (via satellite). They can be summarised as follows: firstly, the likelihood that the new entity may grant access to the

([37]) See cases IV/M.993 — Bertelsmann /Kirch/ Premiere, and IV/36.539 — British Interactive Broadcasting/Open (OJ L 312, 6.12.1999, p. 1) recital 30.

([38]) See case IV/36.539 — British Interactive Broadcasting/Open.

([39]) The encrypted data transmitted comprise television signals and other data like information on the programmes or packages of programmes subscribed to, as well as on the entitlement of the pay-TV subscribers to receive the programmes.

([40]) A smart card is a miniature computer with a microprocessor, memory and internal operating system, which is used to operate as a security barrier, granting or denying access to a given service.

([41]) The two biggest providers of CAS at a EEA level are NDS (belonging to the Newscorp group) and Canal+ Technologies (which belonged to the Vivendi group and which has been sold to the Thomson Multimedia Group in September 2002).

([42]) As mentioned, in previous cases the Commission has looked at CAS within the context of a wider market for technical services for pay-TV. In case IV/136.539 — British Interactive Broadcasting/Open (OJ L 312, 6.12.1999, p. 1), recital 32, the Commission has already held that narrower product markets may exist, given the different skills and technologies underlying each of the individual technical services for pay-TV.

NDS technology for CAS to potential new entrants under unfair terms and conditions; secondly, the likelihood that the new entity may obstruct the entry of alternative pay-TV platforms with a different CAS system from that of NDS, leading to a virtual monopoly, in view of the fact that NDS would become the only CAS used in Italy.

(122) As to the first concern, it has been argued that following the concentration Newscorp will be in a position to prevent possible new entrants in the pay-TV market in Italy from acquiring the Videoguard licence or in any case will be able to impose unfair conditions for its acquisition. Nevertheless the existence of access rules contained in Directive 95/47/EC ([43]) might reduce the concerns in this respect, since the said directive provides that access to CAS has to be granted in fair, reasonable and non-discriminatory terms. This provision has been rolled over to the new Access Directive 2002/19/EC ([44]) due to be transposed by 24 July 2003.

(123) With regard to the second concern, it has been claimed that new entrants could decide to use a CAS different from the one licensed by NDS and used by the combined entity. In this case, Newscorp would have to cooperate in order to set up a simulcrypt system able to make the CAS used by NDS compatible with the CAS used by the new entrant. Italian regulatory requirements ([45]) foresee simulcrypt obligations requiring implementation of interoperability between different CAS.

(124) However, the market investigation has suggested that, most likely, the Italian regulatory requirement is not sufficient to establish the conditions for unhindered new entry for pay-TV operators using a CAS different from NDS. Simulcrypt obligations are apparently difficult to implement within a short period of time ([46]) and a much more realistic option for any new entrant would be obtaining a licence for the NDS technology. A number of respondents in the market investigation have gone as far as considering NDS technology as a sort of 'essential facility' for the Italian pay-TV market.

(125) In the light of the results of the market investigation described above, given the vertical integration of NDS within the corporate structure of the new entity and the possession of a proprietary CAS technology, the Commission concludes that it is highly likely that, post-transaction, the operation will lead to the use of a single CAS by the combined entity. Since the entry of a new pay-TV DTH platform is not expected shortly after the merger, if the combined platform decides to use only NDS' technology (as it is rationally foreseeable), only one CAS will exist in Italy and the access to this CAS will depend on Newscorp. Furthermore, the deployment of any alternative CAS will entirely depend on Newscorp cooperation for the setting up of a simulcrypt.

(126) These are factors that will significantly raise the already high barriers to entry in the Italian pay-TV market further contributing to the strengthening of a dominant position of the combined entity in the market for pay-TV.

(127) In its reply to the statement of objections, Newscorp argued that the Commission had not concluded that the likely use of a single CAS by the combined platform is in itself anti-competitive, whilst 'the fact that the transaction "may" raise barriers to entry is not sufficient to justify a prohibition decision') ([47]).

(128) Moreover Newscorp argued that it would not have the ability to foreclose new entry. In this context, Newscorp quotes the Commission's decision in the case Telia/Sonera ([48]) where it was stated that 'in assessing whether (a vertical foreclosure issue) is significant, it is necessary to establish not only that the merged entity will have the incentive to foreclose, but also whether it

([43]) 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 L 281, 23.11.1995, p. 51).

([44]) 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 and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7).

([45]) AGCOM (Italian authority for communications) Decision N. 216/00/CONS.

([46]) The effective implementation of simulcrypt between Telepiù and Stream took two years and the two operators were twice fined by the Italian authority for communications (AGCOM) for not complying with their obligations.

([47]) Paragraph 5.1.3 of Newscorp's defence.

([48]) Paragraph 5.1.5 of Newscorp's defence.

will have the ability to do so, and whether it will have any significant effect on competition in the market in question' ([49]).

(129) According to the Commission's analysis, the effect of the transaction is not limited to raising barriers to entry, but is to create a monopoly as regards DTH pay-TV in Italy. In view of this monopolistic situation in the 'downstream' pay-TV market and of the possession of a proprietary conditional access system, likely to become the 'standard' CAS — Newscorp will not only have the incentive to pursue exclusionary strategies or to raise rivals' costs (in order to foreclose the market and maintain its monopolistic position within DTH), but it will indeed also have the ability to do so.

(130) Any potential competitor, wishing to enter the Italian pay-TV market in the satellite (DTH) modality will either have to obtain a licence from one of Newscorp's subsidiaries (that is NDS) in order to have access to the Videoguard CAS or to seek Newscorp's cooperation in order to be able to implement the simulcrypt agreement. In particular, based on past experience, this can give rise to 'heavy' litigation, and reaching such agreements has already proved to be a quite lengthy, time consuming and difficult exercise even between two established competitors, as Stream and Telepiù were in the past.

(131) In the absence of corrective measures, Newscorp will, in any case, be in a position to foreclose potential DTH entry or to raise rivals' costs as regards CAS. These factors are not considered in isolation by the Commission, but they must be seen in the perspective of the overall anti-competitive effects brought about by the transaction. In this context, the circumstance that, as a result of the operation, barriers to entry as regards DTH will be raised further, inter alia, through the very likely use of a single proprietary CAS by the combined entity, in a monopolistic situation (on DTH) is an aggravating element that further strengthens the dominant position of the combined platform in the Italian pay-TV market.

(132) Newscorp has furthermore argued that there is no causal link between the transaction and the alleged competitive harm. As Newscorp already owns 50 % of an Italian pay-TV operator any incentive to raise barriers to entry into the Italian pay-TV market is already in place and would not be caused by the transaction.

([49]) Case COMP/M.2803 — Telia/Sonera recital 91. Decision dated 10 July 2002, see Commission's website http://europa.eu.int/comm/competition/mergers/cases/.

(133) The Commission does not agree with this position. The possession of a proprietary CAS by a DTH monopolist is a factor that in itself does increase barriers to entry into the downstream pay-TV market. Newscorp's incentive to raise barriers to entry is a direct consequence of the transaction bringing about this monopolistic situation as regards DTH pay-TV. In addition, on the basis of the results of the market investigation, it is reasonable to expect that the situation described will not change for some time in the foreseeable future.

2.2.(b) **Technical platform**

(134) Stream and Telepiù will build up a common technical platform through which they will distribute their programmes via satellite. A technical platform can be defined as the system controlling conditional access and the provision of the technical services related thereto. The technical platform deciphers the signals broadcast by the programme supplier and transmits them to subscribers via the set top box.

(135) It has been claimed that, due to the important investment needed to set up a DTH platform, third parties' DTH pay and free satellite channels will need to be distributed via the combined platform of the new entity. Technical services that can be provided by Newscorp through the platform comprise conditional access management, transit through the decoders and inclusion in the pre-defined list of services (automatic tuning), digitalisation and cryptation, satellite up-link and particularly, access to the electronic programme guide (EPG).

(136) EPG is a TV listings guide. It constitutes an essential tool due to the increased programme choice available with digital televisions. Information for the EPG is sent by broadcasters, and displayed by the EPG software. The menu system allows the user to search for a particular programme type, such as films, comedy and children's programmes, or just view by programme number or time of day. Without an EPG, it would be extremely difficult for users to systematically and easily find the specific channel they seek.

(137) Access to the platform constitutes an essential element to facilitate new entry in the pay-TV market and to allow pay and free-to air channels to be broadcast via DTH. As a result of the merger DTH channels will no longer have the possibility to choose between two alternative platforms.

(138) By controlling the platform, Newscorp will have the incentive and the ability to refuse access or raise barriers to the consolidation of channels (for example by systematically changing their position in the EPG) or impose unfair or discriminatory conditions to digital satellite channels (free-to-air and pay-DTH). At this stage, there is not an adequate regulatory framework able to efficiently and speedily solve these problems. Accordingly, the possible behaviour described would contribute to consolidating the new entity's monopoly position in the pay-TV market.

(139) In its answer to the Commission's statement of objections ([50]) Newscorp submits that it would have no incentive to manipulate the EPG. In fact, it was argued, the merged group's incentive is to provide a high quality service to its subscribers. In particular, the merged group would be behaving ineptly towards its subscribers if it regularly swapped the order of channels in the electronic programme guide. In this respect the Commission is of the opinion that, as highlighted by Stream's past behaviour ([51]), the combined group's incentive to win viewer's loyalty to its own channels will override its incentive to provide a stable position in the EPG to third parties' channels.

2.3. ***Conclusion***

(140) On the basis of the foregoing, it is concluded that the concentration strengthens on a lasting basis, a dominant position in the Italian pay-TV market. The merged entity will have a monopoly as regards the DTH means of transmission and will have all the possibilities and economic incentives to foreclose actual and potential competitors wishing to enter the market via the same and/or other means of transmission, by raising rivals' costs and raising further barriers to entry. In this respect, although existing regulations mitigate, to some extent, the competitive concerns, the use of a standard (NDS) for conditional access services across the entire satellite platform, regardless of possible lengthy simulcrypt agreements to be entered into, is likely to make potential DTH newcomers completely dependent on the combined entity from the technological viewpoint. Furthermore, control of the technical platform will give Newscorp the possibility and the incentive to set the standard for the accepted level of 'intra-platform' competition. These elements are such that, in spite of applicable regulations, the monopoly of Newscorp as regards the DTH means of transmission will contribute substantially to the consolidation of the quasi monopolistic situation in the overall pay-TV market resulting from the operation for some time after the concentration.

(141) In the reply to the statement of objections ([52]), Newscorp indicated that the Commission had fallen short of its obligation to establish that it is more likely than not that Newscorp will adopt such conduct. Newscorp points out that in *Tetra Laval* BV v. *Commission* ([53]) the Court of First Instance held that the standard of proof was the balance of probabilities and rejected the Commission's approach (namely that a possibility of harm to competition was sufficient to justify a prohibition decision).

(142) In this respect the Commission submits that in the said judgment, the balance of probabilities against the Commission's approach was based on (i) the absence of any presumption of collective dominance ([54]) and (ii) the necessary reliance on a prospective analysis of future rational behaviour as the basis for a finding of dominance. Neither of those two conditions is met in this case. In relation to the first condition (absence of any presumption of collective dominance) it cannot be seriously disputed that the merger will, in fact, lead to the creation of a quasi-monopolistic situation in the pay-TV market. In relation to the second condition (necessary reliance on a prospective analysis of future rational behaviour) the analysis carried out for the present case is based on a situation which will occur immediately after the merger (creation of a quasi-monopoly).

(143) Therefore, on the basis of the evidence gathered throughout the procedure and having regard to the nature of horizontal overlaps brought about by the concentration, the Commission considers that there is sufficient evidence to conclude that the combined platform will, in the foreseeable future, have the necessary incentives and the actual ability to adopt the conduct indicated above, and, as a result, will, ultimately, significantly affect competition in the relevant market.

([50]) See paragraph 5.1.15 of Newscorp's defence.

([51]) For example Digitaly's position in Stream's EPG has changed four times over the last few years.

([52]) Paragraph 5.1.11 of Newscorp's defence.

([53]) Case T-5/02.

([54]) See paragraph 142 of Tetra Laval judgment.

3. CREATION OR STRENGTHENING OF A DOMINANT POSITION IN ACQUISITION MARKETS

3.1. ***Horizontal effects in upstream affected markets (acquisition of contents)***

3.1.(a) **Acquisition of exclusive broadcasting rights on premium films**

(144) Telepiù (the target company) already holds a dominant position in the market for the acquisition of exclusive rights for premium films (films acquired by Telepiù in 2001 represent around [85 to 95]* % of the total box office of the films that have been sold with exclusive rights to all TVs, [85 to 95]* % in terms of value ([55]) and [50 to 60]* ([56]) in terms of number of films). In 2001 the remaining rights have been acquired by Stream except for four Italian films whose first window rights have been acquired by La 7 (free-to-air TV controlled by Telecom Italia).

(145) Rights of Telepiù and Stream are shown in the tables below:

TABLE 11

Telepiù

American majors

Name	First window	Second window	PPV	VoD	NVoD	Expiration
Buena Vista (Walt Disney)						
Columbia						
Dreamworks						
Paramount						
MGM						
TC Fox						
Warner Bros						

Source: Form CO.

Confidential

TABLE 12

Italian film producers

Name	Pay-TV	PPV	VoD	NVoD	Expiration
Medusa					
Eagle Picture					
Fandango					
Lucky Red					
Mediatrade					

Source: Form CO.

Confidential

([55]) Of total amount of money paid in Italy for rights on premium films.

([56]) This reduction in the market share as regards the volume is due to the fact that Telepiù has most of the films produced by American majors which are the most expensive ones and the more viewed in the theatres.

(146) Telepiù has also subscribed contracts with Eyescreen, Nexo and other suppliers in 2002.

STREAM

American majors

(147) According to the information submitted by the parties in the Form CO, Stream holds exclusive rights with Universal for PPV and nVoD until 31 August 2002. Universal has exercised an option for an automatic renewal for five additional years.

TABLE 13

Italian film producers

Name	Pay-TV	PPV	VoD	nVoD	Expiration/ type of contract
Cecchi Gori					
Clemi					([57])
Istituto Luce					
Lady Film					
Mikado					
Raitrade					
Tangram					
Palomar					
Eyescreen					
Lantia					
CDE					
Veradia					
Cattleya					

Source: Form CO.

Confidential

(148) In addition, Stream has subscribed several contracts with Filmauro, Videofilm VCKappa and Key Films (distribution companies) for a number of Italian and non-Italian films. In 2002 it had also a number of rather 'small' contracts with other suppliers (Minerva, Pasodoble, Romagnosi, and Teodora).

(149) All contracts concluded by both Stream and Telepiù with their counterparts include exclusive rights for all means of transmission (terrestrial, satellite, cable etc.). Combined, they correspond to [75 to 85]* % of the box office total of theatrical exhibition in 2001 ([58]) and virtually [90 to 100]* % of exclusive rights acquired by pay-TVs. As indicated earlier, Telepiù has a [85 to 95]* % market share and Stream around [5 to 15]* % market share (based on box office) of films acquired/sold with exclusive rights. Free-to-air TV 'La 7' (belonging to Telecom Italia) acquired first window rights for four Italian films in 2001. However, La 7 has not subscribed exclusive contracts for first window with any Hollywood major.

([57]) […]*

([58]) In 2001, with the exception of four Italian films for which first window rights were acquired by La 7 almost 19 % of box office stemmed from films for which no exclusive rights were purchased or marketed.

(150) Following the acquisition of Telepiù by Stream and the addition of customers in Italy, the merger will lead to a quasi-monopolistic situation for the acquisition of exclusive rights for films (monopsony). La 7 has acquired an insignificant number of first window rights on Italian films. In this respect, it has to be borne in mind that right owners, in particular the Hollywood majors, are not likely to be willing to sell first and second window rights to free-to-air TVs in the future. As explained above, movie rights are sold at least five or six times (theatrical exhibition, video, pay-per-view and video-on-demand, first window, second window and catalogue films). Only the last category is acquired by free-to-air TVs. If right owners were to sell first window films to free-to-air TVs (accessible to 100 % of the viewers) six months after theatrical exhibition, this would seriously undermine the revenues of film producers.

(151) This monopsonistic situation, in the absence of corrective measures, forecloses access to content for third parties (also as regards means of transmissions other than DTH) and is likely to restrict availability of content to consumers, thus reducing their possibility of choice.

(152) In addition, the parties will be able to further reduce accessibility of contents by exercising holdback and pre-emption rights as regards second window movies, as envisaged by Telepiú's current contracts with most majors (see table 11). In the absence of remedial action, this will effectively prevent potential new entrants from attempting to enter the market as a 'fringe' or second-tier competitor. Moreover, these protection rights exercisable by the parties will effectively withdraw second window rights from the market, thus harming consumers' welfare and their freedom to choose at what price and at what time to 'consume' pay-TV products.

(153) Having regard to the above, and taking into account the duration of the existing contracts, the concentration will have the effect of preventing potential pay-TV competitors from having access to, and thus from being able to broadcast, this content on pay-TV for a number of years.

(154) In its reply to the statement of objections ([59]), Newscorp argued that the transaction would not modify the current situation, as 'the contracts entered into by Stream and Telepiú for the acquisition of rights are already in place and are not affected by the merger. Insofar as the network of contracts may affect the likelihood of entry, this issue is not caused by the merger'. This is all to say, according to the parties, that there is no causal link between the merger and the possible competitive harm. In this respect Newscorp refers to paragraph 10 of the draft notice on horizontal mergers ([60]), which indicates that 'the Commission compares the competitive conditions that would follow the merger with the conditions that would prevail absent the merger'.

(155) As a matter of fact, before the merger, two pay-TV operators were in a position to compete for the acquisition of contents. After the merger, 'the network of contracts' will be held by one single operator, which, in the absence of corrective measures, will be in a position to determine the terms and conditions of the markets vis-à-vis the right owners to a much greater extent than in the case of two competing purchasers. Most importantly, thanks to its obviously greater bargaining power, the quasi-monopsonist will in all likelihood be in a position to 'tailor' the contractual relations with content providers to its need and objective to prevent potential competition from new entrants. In the light of these considerations, the argument by the parties that, post merger, 'there will be a greater number rather than fewer rights available for other buyers' as the parties might reduce their demand, appears groundless.

(156) Newscorp also points out ([61]) that a new entrant could acquire rights analogous to those held by Stream if entered into contract with MGM with effect from 2004 and that the Commission is erroneous in assuming that the MGM contract will be extended. In this respect, the Commission considers that, firstly, following the merger it is not certain that a new competitor will enter the Italian market in 2004 and, secondly, taking into account all the evidence and other relevant factors, it is likely that MGM and TC Fox will exercise the unilateral renewal right. It is significant in this respect that Hollywood majors have, in the past, always exercised this right in spite of the existence of two alternative platforms. Columbia and Paramount exercised the right of renewal of their contract with Telepiù in 2002 and Universal has recently exercised this right with Stream. The economic context, therefore, in its historical perspective renders the claim of Newscorp unlikely.

([59]) Paragraph 6.1.3 of Newscorp's defence.

([60]) http://europa.eu.int/comm/competition/mergers/review/final_draft_en.pdf.

([61]) Paragraph 6.1.4 of Newscorp's defence.

3.1.(b) **Acquisition of sport content in general**

Legal framework

(157) Article 3a of the 'television without frontiers' Directive as amended ([62]), provides that Member States may take measures in order to ensure that events considered of major importance for society are not transmitted by television broadcasters under their jurisdiction on an exclusive basis and in encoded form. A provision to that effect appears in the Italian implementing measure dated March 1999 ([63]). These provisions are intended to make it possible for a substantial proportion (more than 90 %) of the Italian public to follow the listed events on free television without incurring additional costs for the acquisition of technical equipment.

(158) The listed events for Italy are: (a) the summer and winter Olympic games; (b) the football World Cup and all matches involving the Italian national team (to be given full live coverage); (c) the European football championship final and all matches involving the Italian national team (to be given full live coverage); (d) all matches involving the Italian national football team, at home and away, in official competitions; (e) the final and the semi-final of the Champions League and the UEFA Cup where an Italian team is involved; (f) the Tour of Italy (Giro d'Italia) cycling competition; and (g) the Formula One Italian Grand Prix. In addition, the Italian Communications Authority (AGCOM) reserves the right to amend the list in due course, in particular by including the following events: (a) finals of basketball, water polo and volleyball world championships involving the Italian national team; (b) the final and semi-finals of the Davis Cup where the Italian national team is involved; and (c) the road cycling world championship. Moreover, the Italian Communications Authority reserves the right to revise the list two years following the entry into force of its decision. The obligation of broadcasting the 'listed events' on a free-to-air basis tends to result in a decrease of the price of acquisition of the broadcasting rights to such events in the Italian market.

([62]) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23) as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

([63]) Regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, (OJ C 277, 30.9.1999, p. 3). http://europa.eu.int/eur-lex/de/consleg/pdf/1989/de_1989L0552_do_001.pdf.

3.1.(c) **Acquisition of exclusive broadcasting rights to football events that take place regularly (every year) where national teams participate**

(159) The parties' combined market shares represent [80 to 90]* % in terms of value (Stream [35 to 45]* %, Telepiù [35 to 45]* %) and [90 to 100]* % in terms of number of matches (Stream [35 to 45]* %, Telepiù [50 to 60]* %). According to Italian national law (law No 78/99), no DTH platform can own more than 60 % of total football rights. However, this rule would not apply in a single DTH platform scenario (that is to say post-merger), on condition that the duration of contracts providing for the acquisition of exclusive rights does not exceed three years.

(160) The A series and B series talian football clubs for which Stream has exclusive rights are the following: Bologna, Lecce, SDS srl ([64]) and Napoli (until […]*), Brescia, Chievo Verona, Empoli, Modena and Siena (until […]*). These rights represent [45 to 55]* % of A series matches. In addition it has exclusive rights for the UEFA Champions League for the 2002/2003.

(161) The A series and B series Italian football clubs for which Telepiù has exclusive rights are the following: Atalanta, Como, Messina, Perugia, Piacenza, Reggina and Torino (until […]*), Inter, Bari, Juventus, Milan, Cagliari, (until […]*). These rights represent [45 to 55]* % of A series matches.

(162) The merger will lead to a quasi-monopsonistic situation ([65]) of the new entity for the acquisition of exclusive rights for regular football events in which national teams participate. The exclusive rights comprise always live and non-live events for pay-TV and PPV, protection for live events in free to air TV and in some case also video on demand, UMTS and Internet. Most importantly, similarly to the case for movie rights and as a result of its greater bargaining power, the quasi-monopsonist will be in a position to 'tailor' the contractual relations with content providers to its need and objective to prevent new entry.

([64]) Roma, Lazio, Parma.

([65]) As explained above, football clubs especially the medium and small ones are reluctant to sell their rights to free-to-air TVs given that pay-TV platforms have the possibility to broadcast several matches at the same time and in order to preserve attendance to stadiums. Free-to-air TVs only compete for the acquisition of rights for the UEFA cup and the UEFA Champions League and Coppa Italia.

3.1.(d) **Acquisition of exclusive broadcasting rights to other sport events**

(163) Stream and Telepiù have exclusive rights for an important number of sports events, in addition to Formula 1 car races which are very popular in Italy. With respect to Formula 1, the rights held by pay-TV operators (which are the only operators transmitting these Formula 1 races on satellite) are not exclusive since RAI (free-to-air television) broadcasts Formula 1 in analogue terrestrial modality in the Italian territory.

(164) According to information provided by the parties on the Form CO submitted in October 2002, Telepiù has exclusive rights for the following sport events: golf (PGA Tour 2002, Ryder Cup, Open Italia ([66]) and Augusta national until […]*, British Open, US Golf Association and US PGA until […]*), tennis (Roland Garros ([67]) and US Open ([68]) until […]*, Australian Open, until […]*), basketball (NCAA, NBA and ULEB Euroleague until […]*, several FIBA until […]*) Motonautic (UIM F1 Powerboat until […]*), volleyball (Lega pallavolo serie A femminile for […]*), rugby (Lega Italiana for […]*, Trinitation 2002 […]*), boxing (Tyson vs Lewis until […]* ([69])), football (NFL seasons until […]*), car races (Le Mans 2002, 24 hours Spa until […]*) etc.

(165) Stream has exclusive rights for the following events: several sports according to a contract subscribed with Espn Inc. until […]*, golf (PGA Tour […]* PGA European Tour 2002/2003 until February 2004) and tennis (Tennis Masters Series, WTA Roma and Wimbledon until […]*).

(166) In any event, if sports in general, with the exception of national football, were to be considered as a separate market the transaction would lead to the creation of a dominant position in the acquisition of exclusive rights for sport events. If individual sports were to be considered as separate markets, the transaction would lead to the strengthening of a dominant position in golf and tennis. According to the notifying party, at present, Stream's market share for broadcasting rights to sport events different from national football is [35 to 45]* % and Telepiù's [30 to 40]* %. Other TV broadcasters that would be considered as competitors of Stream and Telepiù in the acquisition of those rights would have a market share of [20 to 30]* %.

([66]) Live rights only.

([67]) Exclusive rights for Roland Garros are not applicable in relation to Eurosport provided that Eurosport transmits matches from quarter finals onwards in languages other than Italian.

([68]) Exclusive rights for the US Open are not applicable in relation to Eurosport provided that Eurosport transmits matches from quarters final onwards in languages other than Italian.

([69]) Live rights only.

(167) In this respect, in 2001 the following major sport events were broadcast by free TV on an exclusive basis: cycling (Giro d'Italia and other international competitions), athletics (the most important international meetings), boxing (Italian and European titles matches), rugby (matches played by Italian national team and six nations tournament), motorcycling (the entire motorcycling world championship, sailing (Louis Vuitton cup, America's cup), Olympic games and winter games.

(168) The proposed transaction will increase the buying power of the new entity and strengthen its position as compared to the pre-merger situation. Potential TV competitors will not have the possibility to acquire exclusive rights for most of the important sport events that will take place in […]*. Most importantly, as a result of its greater bargaining power, the quasi-monopsonist will be in a position to 'tailor' the contractual relations with content providers to its need and objective to prevent new entry by, for example, imposing long term duration or acquiring exclusive rights or protection rights for other means of transmission than DTH.

3.1.(e) **TV channels**

(169) In contrast to premium films and football events, a large number of channels are not acquired on an exclusive basis. In other words, pay-TV competitors are able to acquire and broadcast the same channel.

(170) Stream has exclusive rights for the following channels: Duel TV, Comedy Life, National Geographic, MT Channel, Roma Channel, Fox Kids, CFN-CNBC and Music Choice. In addition it has eight own production channels for films, travel, news, language, reality show, music and sports.

(171) Telepiù has exclusive rights for Marco Polo, Disney Channel, Canal Jimmy, Raisat Ragazzi, Raisat show, Raisat fiction, Raisat Gambero Rosso, Raisat Art, Raisat Cinema, Happy Channel, Raisat Album, Planete, Cinecinema I and II, Cineclassics, INN, Bloomberg, ESPN Classic Sport, Eurosport News, TV5, Multimusica, Matchmusic, Rock TV, Classica, Milan Channel and Inter Channel and has also a number of own production channels for films (premium channels and PPV) and sports (PPV).

(172) Most channels acquired on an exclusive basis (excluding premium sports/movies channels normally produced by the parties) are characterised by programming based on non-exclusive content. Accordingly, with the exception of premium channels, it will be possible for potential competitors to acquire and produce channels.

(173) The competitive concern in the case of TV channels arises from the fact that, unless another competitor enters the market (and this will not be the case if access to premium content is not guaranteed), the merger will lead to a monopsonistic situation (100 %) for the acquisition of channels in Italy. Therefore, following the merger the bargaining position especially of the smaller independent suppliers of channels will be weakened due to the absence of alternative platforms to the combined entity. This could indirectly harm consumers' welfare, should the merged entity decide to stop purchasing rights to TV channels or exert its monopsonist power to such an extent that some TV channel providers exit the market, due to unsustainable economic conditions. If that were to be the case, consumers would enjoy a greatly reduced variety of products and freedom of choice. These adverse effects on consumers can only be offset by creating the conditions allowing these channels to be broadcast (free-to air or pay) via DTH even without being acquired by the merged platform.

3.2. *Conclusion on horizontal effects in upstream affected markets (acquisition of contents)*

(174) As regards in general the acquisition of rights to contents, Newscorp has argued in its reply to the Statement of Objections, that there is no monopsony: there is competition between pay-TV and free TV operators for the acquisition of rights and competition from other pay TV operators can be expected to increase. The market for contents is, according to Newscorp, a 'bidding market'.

(175) The Commission disagrees. Although the acquisition of programming contents in general can, to a certain extent, be regarded as a bidding market, because of the very nature and features of the various submarkets,the 'bidding' is de facto accessible to a limited number of operators with certain characteristics.

(176) As regards the acquisition of first (and at least theoretically second) windows for premium movie rights, 'bidding' is restricted to pay TV operators, due to the business model of the Studios ([70]) that is to say, the segmentation per windows. De facto free-to-air TV operators are prevented from acquiring such rights in competition with pay-TVs.

(177) Similar conditions of 'restricted bidding' occur de facto as regards the acquisition of most rights for football events that take place regularly (every year) where national teams participate, namely the A series and B series championships. As already indicated, it emerged clearly from the market tests that right owners (football teams) prefer to sell rights to pay-TV operators rather than free-to-air in order to avoid a negative impact on stadium attendance (the other main source of revenues). Once again, it seems that de facto free-to-air TV operators do not effectively compete with pay-TVs for the acquisition of such rights.

(178) Finally, as regards rights to the other sport events (for example, tennis and golf) although bidding conditions do appear to be more open, de facto the two existing pay-TV operators already (and the combined platform will) hold a dominant position as regards the acquisition of exclusive rights for these sport events. This further illustrates that most exclusive rights of all sorts tend to be purchased by pay-TVs even when right owners have no reasons, inherent to their business model, to prefer pay-TVs over free-to-air. It also undermines the probative value of the arguments put forward by the parties to the merger as regards future market conditions and the possible behaviour of the merged entity and its potential competitors.

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:

([70]) Throughout this document the word 'Studios' identifies both the Hollywood majors and the Italian film producers.

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 conumers 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) Telepiú 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, Telepiú 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.

(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 operators ([71]). 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

([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.

harming consumers, by preventing access to premium contents for both potential competitors and potential pay-TV consumers.

(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.

(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/EC ([72]) and Directive 2002/19/EC ([73]) 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.

([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 L 281, 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).

(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.

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 Kaliund Salz/MKD/Treuhand ([74]) (hereinafter Kali und Salz) and in the BASF/ Eurodiol/ Pantochim decision ([75]). 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 judgment 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 Justice ([77]) '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 merger' requires that the undertakings to be acquired can be regarded as 'failing firms' and that the

([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) (OJ L 186, 21.7.1994, p. 38).

([75]) Case COMP/M.2314, BASF/Eurodiol/Pantochim decision of 11 July 2001 (OJ L 132, 17.2.2002, p. 45) and also published on the Commission's website: http://europa.eu.int/comm/competition/mergers/cases/.

([76]) Joined cases C-68/94 and C-30/95, *France* v *Commission*.

([77]) Points 115 and following of the judgment in Joined Cases C-68/94 and C-30/95.

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 takeover 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 takeover 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 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

([78]) Commission Decision of 3 February 1999 relating to proceedings under Council Regulation (EEC) No 4064/89 (Case No IV/M.1221 — Rewe/Meinl) OJ L 274, 23.10.1999, p. 1).

(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 substantially change the financial outlook for Stream from JPMorgan's projections ([79]) 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.

([79]) Document attached to Newscorp's defence. Expert report on the financial viability of Stream SpA. This document, 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.

(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 Italia ([80]) 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.

(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

([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.

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, 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 abovementioned 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.

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:

Ongoing 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 worldwide 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 an 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).

(j) *Newscorp* shall endeavour to enter into simulcrypt agreements in Italy as soon as reasonably possible and in any event within nine 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 'worldwide' sport events.

(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 (POINTS 1 TO 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. ***Ongoing 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.

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 renegotiation 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 abovementioned 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 counterbalanced, 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 mjors) 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 interaction with pay-TV (as previously acknowledged), and where major broadcasting groups are known to possess to significant financial means. The studios therefore already hold a powerful instrument to be exercised at their full discretion in order to counterbalance 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 renegotiation 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 status 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 keyterms 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 warrantees. 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 status 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 three 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 Telepiú 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 (POINT 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 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 (POINT 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 (POINT 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.

(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 (POINT 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 DECEMBER 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**

1. *PRELIMINARY CONSIDERATIONS*

(262) Pursuant to the 'Shareholder Agreement' (see recital 12) 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 to 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).

(264) Moreover, pursuant to the 'Framework Agreement' (see recital 11) Telecom Italia participates, together with Newscorp, in the interim (pre-merger) funding of Stream (before closing of the concentration deal), through prorata shareholder loans for an amount not exceeding (for both parties) in aggregate EUR […]*. Telecom Italia may be asked to contribute in the same proportion to the losses that Stream incurs in the meantime, also through contribution of additional funding. Post-completion of the acquisition, Telecom Italia, together with Newscorp, will participate in the funding of the combined platform, by means of statutory capital contributions in proportion to its shareholding, for an amount not exceeding (for both parties) in aggregate EUR […]*. The importance and relevance of Telecom Italia's investment in the present deal and consequently in the combined platform is therefore clear ([81]).

(265) The participation and the financial support of Telecom Italia has been considered a key element for Newscorp in its decision to carry out the acquisition of control of the combined platform. Although contested by Telecom Italia in its written observations on the statement of objections ([82]), this element has been clearly confirmed by the statements made by the notifying party during the oral hearing.

(266) Furthermore, there is indeed prima facie a manifest industrial, commercial and strategic fit that can be implemented as a result of the deal between the merged satellite platform and Telecom Italia. In this regard, it is important to note that a rapid convergence is taking place between the telecom and the media markets, which were previously clearly distinct. This distinction is being increasingly blurred by technological evolution which is, in turn, spurring new business strategies and models aimed at exploiting commercially the new possibilities brought about by such convergence.

(267) The market investigation revealed that specific concerns exist in relation to the possible interest of the combined platform to elect Telecom Italia as its privileged partner

([81]) See Article II, paragraph 2.2 (Funding) and Article IV, paragraph 4.1 (Funding of the combined platform) of the Framework Agreement.

([82]) See point 4 of the written observations of Telecom Italia in reply to the non-confidential version of the European Commission's statement of objections, pursuant to Council Regulation (EC) No 447/98 on the notifications, time limits and hearings provided in the Merger Regulation.

for the telecom markets. Third parties have also argued that this would contribute to sterilising at the outset the actual/potential competition constraint stemming therefrom and thus potentially leading both parties to develop mutually reinforcing strategies/behaviours as regards the markets where the said convergence is taking place.

(268) Furthermore, concerns have been expressed as regards the fact that the link between Telecom Italia and the combined platform would eventually lead to a consolidation or strengthening of a dominant position held by Telecom Italia in the following markets: (a) Internet access, especially in broadband; and (b) fixed telephony. The overall assessment of the transaction should not ignore the likely effects that in the foreseeable future the link between Telecom Italia and the combined platform might have post-concentration in the above mentioned telecom markets.

2. *THE COMMISSION'S JURISDICTION TO ASSESS THE EFFECTS OF THE MINORITY PARTICIPATION OF TELECOM ITALIA IN RELEVANT MARKETS UNDER THE MERGER REGULATION*

(269) In its reply to the statement of objections, Newscorp did not contest that the Commission is entitled to carry out an assessment, within the framework of the Merger Regulation regarding the position of the minority shareholder Telecom Italia as a potential competitor of the combined platform in the pay-TV market. Nevertheless, it stated that the Merger Regulation does not confer power on the Commission to prohibit a transaction on the ground that it creates or strengthens a dominant position held by a third party, that is to say, an entity which is not itself an undertaking concerned in the transaction (Telecom Italia) ([83]). However, Newscorp also recalls a number of Commission's decisions in which the Commission carried out, under the Merger Regulation, the assessment of a dominant position held by third parties to the concentration at stake. Finally, it adduces that in theory 'the Commission is clearly correct that such a transaction may create or strengthen a dominant position held by a third party and, accordingly, may harm consumer welfare' ([84]).

(270) In particular, as Newscorp acknowledges, in Exxon/Mobil ([85]) the Commission concluded that a transaction may be prohibited under the Merger Regulation if it creates or strengthens a dominant position held by a third party or third parties (i.e. one which is not held by the undertakings concerned in the concentration) for the following reasons: 'It can be noted that Article 2(3) of the Merger Regulation states that a concentration which creates or strengthens a dominant position is to be declared incompatible with the common market. Article 2(3) is thus, in terms, not limited to the prohibition of an operation which will give rise to the creation or reinforcement of a dominant position on the part of one or more of the parties to the concentration, see also recitals 1, 5 and 7 in the preamble to the Regulation (…) The Commission considers that the creation or reinforcement of a dominant position by a third party is not excluded from the scope of application of Article 2(3) of the Merger Regulation.'

(271) In Exxon/Mobil, the Commission applied the principles above on the basis of, *inter alia*, the reasoning in two judgments, namely, that of the Court of Justice in Kali und Salz ([86]) and that of the Court of First Instance in *Gencor* v *Commission* ([87]).

(272) In Grupo Villar Mir/EnBW/Hidroélectrica del Cantábrico ([88]) the Commission found that the merger strengthened a position of collective dominance held by two electricity companies which were not undertakings

([83]) Paragraph 7.1.1 of Newscorp's defence.
([84]) Paragraph 7.3.5 of Newscorp's defence.
([85]) Case IV/M.1383, recitals 225 to 229.
([86]) Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375. At paragraph 171, the Court stated: 'A concentration which creates or strengthens a dominant position on the part of the parties concerned with an entity not involved in the concentration is liable to prove incompatible with the system of undistorted competition which the Treaty seeks to secure. Consequently, if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by the Regulations, its purpose (...) would be partially frustrated. The Regulation would thus be deprived of a not insignificant aspect of its effectiveness without being necessary from the perspective of the general structure of the Community system of control of concentrations.'
([87]) Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753.
([88]) Case COMP/M.2434.

concerned in the transaction. Similarly, in EnBW/EDP/Cajastur/Hidrocantábrico ([89]) the Commission found that the acquisition by EnBW, EDP and Cajastur of joint control over the Spanish utility company, Hidrocantábrico would strengthen the existing dominant position held collectively by Endesa and Iberdrola (neither of which was involved in the notified concentration). In that Decision, the Commission found that EDF, which jointly controlled EnBW, would, as a result of the transaction, no longer have the incentives which existed beforehand to expand the electricity interconnection capacity between France and Spain, which would eliminate the existing Spanish electricity generators' main potential independent competitor (EDF itself) and maintain the isolation of the Spanish electricity market from other European electrical systems outside the Iberian Peninsula ([90]).

(273) In its written observations, Telecom Italia has contended that since the Commission has recognised that Telecom Italia will not have a controlling interest in the combined platform and it is not an 'undertaking concerned' in the sense of the Merger Regulation, then the Commission would act *ultra vires* if it were to assess under the umbrella of the Merger Regulation the possible adverse effects arising from Telecom Italia's significant minority participation in the combined platform in the various markets at stake (both the Italian pay-TV market and the Italian telecom services markets), due to the transaction as it has been construed ([91]).

(274) In particular Telecom Italia contends that 'if the present operation were structured in two different phases and Telecom Italia's non-controlling interest in the combined platform were acquired at some later stage, that acquisition would not fall within the scope of the Merger Regulation and the Commission would be obliged to use Article 81 or Article 82 EC treaty to eventually assess any competition problems arising from it. Consequently, the approach adopted by the Commission in this case results in economically equivalent transactions being treated differently' ([92]).

(275) In its written submission Telecom Italia contends that 'the strengthening of Telecom Italia's dominant position, if it ever takes place, will then be the consequence of its minority shareholding in the combined platform and not of the concentration itself' ([93]). Therefore, Telecom Italia implicitly recognises the existence of a causal link at least between its minority participation and the possible adverse effects of it in the various markets brought about by this minority 'link'. Nevertheless, Telecom Italia appears still to consider its participation in the combined platform as an operation independent from the transaction which brings about the concentration.

(276) The Commission is of the opinion that the legal reasoning put forward by Telecom Italia is incorrect. In the agreements notified by Newscorp, Telecom Italia participates in the merger with a 19,9 % shareholding and this factual reality is what is legally relevant for the purposes of assessing the notified merger, not the purely hypothetical arguments advanced by Telecom Italia. Moreover, as was made plain during the oral hearing, the minority shareholding of Telecom Italia can be considered a 'structural part' of the notified transaction and is clearly not interchangeable with a possible acquisition of a minority shareholding by Telecom Italia in the combined platform occurring at a later stage, i.e. post-merger. In addition, without this minority shareholding, as stated by Newscorp during the oral hearing, the merger would not have been achieved in the form as notified to the Commission.

(277) It is very artificial to argue that it would be possible to 'carve out' an essential part of the transaction bringing about the concentration. The evidence available also suggests that it is speculative to present the acquisition of minority participation as a stand-alone operation which it would be possible for Telecom Italia to conclude post-merger.

(278) In accordance with the case-law of the Court of Justice in Kali und Salz, the Commission considers that any decision under the Merger Regulation must cover a transaction bringing about a concentration in its

([89]) Case COMP/M.2684, recitals 33 and 37.

([90]) See recital 33 of case COMP/M. 2684. The transaction was finally approved after EDF and the French grid operator, EDF/RTE, submitted undertakings to take all necessary steps to increase capacity on the interconnector connecting France and Spain to about 4 000 MW from an existing 1 100 MW.

([91]) See paragraph 5 and in particular paragraphs 9 to 13 of the mentioned written observations.

([92]) Paragraph 14 of the written observations.

([93]) Paragraph 16 of written observations.

entirety, including minority shareholdings. Telecom Italia fails to recognise that the transaction has been structured in such a way as to maintain Telecom Italia as a minority shareholder in the combined platform. Nevertheless, neither the notifying party, nor Telecom Italia have been able to show that without Telecom Italia's participation in the venture, the transaction would have been proposed and achieved. On the contrary, it has emerged clearly, also from the oral hearing, that the presence of Telecom Italia is essential for the transaction to proceed.

(279) The factual and legal situation arising from the notified transaction enables the Commission to examine and assess the effects of the transaction at stake (including the minority shareholdings) in all relevant markets where it could bring about adverse effects of the kind described under Article 2 of the Merger Regulation. Telecom Italia does not appear to contest that a 'causal link' exists as regards its minority participation and the possible strengthening of its dominant position in telecom markets. For the reasons set out above, the Commission considers the minority shareholding of Telecom Italia to be an integral part of the transaction bringing about the concentration.

(280) Furthermore, in this respect, in a recent case referred to the Spanish competition authority pursuant to Article 9 of the Merger Regulation, Sogecable/Canalsatélite Digital/Vía Digital ([94]), the Commission examined the merger between the two satellite platforms in Spain ([95]) (Sogecable, controlled by the companies Promotora de Informaciones SA (Prisa) and Group Canal+ SA (Group Canal+) and Vía Digital, controlled by Telefónica SA (Telefónica)), in a combined platform which would be jointly controlled by Prisa and Group Canal+. The Commission found that, as a result of the concentration, competition concerns would also exist in relation to the position of a company (Telefónica) not having a controlling interest in the venture, as regards some markets (telecom markets) which were not directly affected by the concentration ([96]).

([94]) M.COMP/2845 Sogecable/Canalsatélite Digital/Vía Digital, Decision of the Commission dated 14 August 2002. See Commission website: http://europa.eu.int/comm/competition/mergers/cases/.

([95]) COMP/M.2845. The case concerns the acquisition of by Promotora de Informaciones SA (Prisa) and Group Canal+ of joint control over the combined Spanish satellite platform (stemming from the integration of Sogecable with Vía Digital). In this venture, Telefónica would have had a position of significant minority shareholder, but would not have had any joint control over the merged entity.

([96]) See recitals 96, 100 and 102 of the mentioned merger decision Sogecable, regarding the Internet access market in Spain, and 106 to 109 regarding the fixed telephony market in Spain.

(281) Insofar as the adverse effects described in Article 2 of the Merger Regulation may arise from the transaction (in its entirety) bringing about a concentration, the Commission concludes that it has jurisdiction to carry out its competitive assessment and to respond to the claims and arguments made by interested third parties during the investigation and the oral hearing.

3. *ASSESSMENT IN CONFORMITY WITH ARTICLE 2 OF THE MERGER REGULATION*

A. *Horizontal effects as regards the Italian pay-TV market*

1. REMOVAL OF COMPETITION CONSTRAINT FOR THE COMBINED PLATFORM

1.1. ***General considerations***

(282) The transaction and the link between Telecom Italia and the monopolistic pay-TV platform has to be assessed from the perspective of the possible horizontal effects that it may generate as regards the pay-TV market itself (in particular, pay-per-view services and video-on-demand), which, in turn, would have an adverse effect for competition in some telecom markets.

(283) At the outset it is important to recall that, as regards pay-TV services, the market investigation carried out in this case has revealed that particular services such as 'pay-per-view' (PPV), 'near-video-on-demand' (nVoD) and 'video-on-demand' (VoD), could be considered as segments within the overall pay TV market ([97]).

(284) The pre-merger situation and the market investigation carried out in the present case have shown the interest of Telecom Italia in respect of pay-TV services and/or its interest with regard to the use of some premium content via its own means of transmission, even in the

([97]) Pay per view is a service where, in addition to paying a TV subscription, the client has to pay on a product-by-product basis to see the content (e.g. 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.

hypothesis that it were to focus on one or few segments of the pay-TV business (video-on-demand and pay-per-view).

(285) In this respect, it was postulated by third parties that Telecom Italia's shareholding (and its presence in the board of directors of the combined platform) would give Telecom Italia high incentives to help strengthening the platform rather than to compete with it in the pay-TV market, either via its 'halted' cable network, or via its own xDSL broadband infrastructure. This strategic choice would have appeared credible in the light of Telecom Italia's objective to recoup the losses accumulated in the past years in the Stream joint venture with Newscorp. At the same time, Newscorp would have had an interest in keeping Telecom Italia within the new entity in order to secure its significant financial support.

(286) Among the main arguments put forward in the course of the procedure, the fact that the 'link' would create a convergence of interests between the two companies was highlighted, as well as the fact that this would give both parties incentives to develop mutually reinforcing common strategies/behaviours, with respect both to the 'affected market' (pay-TV) and the markets where the media and telecom convergence takes place (Internet broadband access and fixed telephony).

1.2. ***Newscorp's arguments***

(287) In its reply to the statement of objections ([98]), Newscorp stated that the presence of Telecom Italia with a significant shareholding in the combined platform (in any event through a 'non-controlling involvement') does not reduce Telecom Italia's possible incentive to compete in the pay-TV market (by choosing not to re-enter and/or by cooperating with the combined platform) compared to the pre-merger situation, where Telecom Italia was owner on a fifty-fifty basis of Stream. Furthermore, Newscorp stated that considering Telecom Italia as a credible entrant in the pay-TV market in the near future is incorrect if due account is taken of the actual technical limitations of xDSL and of UMTS technologies as regards their ability to provide suitable alternatives to DTH, cable and DTT as a broadcaster of pay-TV services.

(288) Furthermore, Newscorp claims that, in general (and specifically in respect of any incentive that the combined platform would have to enter into co-operation strategy with Telecom Italia) the burden of proof to be applied should meet the requirements set out by the Court of First Instance in the Tetra Laval case ([99]). Therefore, it argues that the Commission should demonstrate that 'it is more likely than not that the merged group would adopt such a strategy' ([100]).

1.3. ***General assessment***

(289) Against this background, the Commission has thoroughly analysed all the available evidence and the possible impact of the transaction as regards the concerns raised during the market investigation with regard to the Italian pay-TV market. It has come to the conclusion that the evidence gathered in this respect does not make it possible to establish that possible adverse effects on competition would be brought about by the transaction creating the merger (i.e. including the minority shareholding of Telecom Italia) ([101]). The elements underpinning this conclusion are illustrated in detail below.

1.3. A. **Incentive for the combined platform to exploit the link, consolidating its dominance in Pay-TV through positive discrimination vis-à-vis Telecom Italia**

(290) It is true that in principle the link between the new entity and Telecom Italia would have the potential to strengthen further the dominant position of the new entity in the pay-TV market. Telecom Italia is the dominant player in xDSL broadband access and is also likely to be a very strong player in UMTS in the future.

([98]) Paragraphs 7.1.1 to 7.2.12 of Newscorp's defence.

([99]) Case T-5/02 *Tetra Laval SA* v. *Commission*, judgment of 25 October 2002, paragraphs 153 and 251.

([100]) Paragraph 7.2.12 of Newscorp's defence.

([101]) As regards the applicable burden and standard of proof, see Joined Cases C-68/94 and C-30/95, *France and Others* v *Commission* [1998] ECR I-1375, in particular paragraphs 110, 120, 128 and 246.

Pay-TV services and in particular video content can be provided to end consumers through various means of transmission: DTH, cable and to a certain extent already today via the xDSL broadband technology ([102]), while DTT will be operational in the foreseeable future. As explained above, the new DTH platform will be a near-monopolist in the pay TV market. Actual competition is expected to be very limited, due to the limited reach of the cable network of the only alternative pay-TV operator already active in the market.

1.3.A.1. Market investigation

(291) In this respect, it was stressed during the market investigation that Telecom Italia would, already at this juncture, have the potential to act as one of the main competitive constraints on the new entity through its cable or through its xDSL broadband network services. Third parties have observed that, because of the link, Telecom Italia might neither compete nor have any incentive to compete with the platform and/or to re-enter the pay TV market, even via its cable network ([103]) and via ADSL.

(292) In the light of this, third parties had expressed concerns, in the course of the market investigation and in responding to the market tests, as regards the new entity's incentive/interest in exploiting its link with Telecom Italia to somehow 'sterilise' the competitive threat coming from the dominant player in one of the existing alternative means of transmission of pay-TV services (broadband Internet access) and which is likely to be a strong player also in one of the future means of transmission (UMTS).

(293) This sterilisation objective could have been further achieved, it was suggested, by favouring Telecom Italia vis-à-vis its competitors in the Internet broadband market by, for instance, making its contents available to Telecom Italia under more favourable conditions (in terms of price, quality and timing). In return for this favourable treatment and on the basis of the link, Telecom Italia might have a lesser incentive to compete with the platform on a full scale basis via its existing operations.

1.3.A.2. Commission's appraisal

(294) In order to carry out its assessment, the Commission has analysed, *inter alia*, the state of play, in the specific case of Italy, of the xDSL technologies having the potential to offer pay-TV services in the foreseeable future, in competition with the satellite means of transmission. In addition, the Commission has also analysed the likely incentives that the combined platform might have to give privileged treatment to Telecom Italia compared to its competitors.

(295) In general all the third party submissions cannot overcome the factual evidence that, as regards pay-TV services, Telecom Italia is exiting full-scale operations and, at present, has no significant commercial incentive to reactivate its cable network in order to offer full scale pay-TV services in any event.

(296) As regards xDSL broadband access technologies (ADSL in particular), it is true that this technology could theoretically, be considered as a valid means of transmission for pay-TV services, as an alternative to DTH in the foreseeable future. However, the state of development of ADSL technology in Italy would still require huge investment and upgrade of the network ([104]) before being able to transport bundles of TV 'broadcast' channels (i.e. transmission allowing simultaneous vision by all end-users, such as live events, football matches or films).

(297) The Commission's investigation has revealed that Telecom Italia has, to date, not committed resources to this objective. This does not rule out the possibility that it may decide to make such investments in the future. In

([102]) In the context of Internet access, the term 'bandwidth' refers to the speed at which information can be transferred. The higher the bandwidth, the higher the speed of the line, and the more information a telecommunications system can transfer. Modern applications within the Internet, and in particular video on demand require the transmission of large amounts of information, and hence require high speed broadband interconnections if they are to be usable by the final subscriber. A kind of high speed band is represented by the 'xDSL' (digital subscriber line) technology. There are a number of variants of DSL technology such as ADSL (assymmetric digital subscriber line), HDSL (high data rate digital subscriber line) and VDSL (very high rate data digital subscriber line). They are collectively referred to as 'xDSL' technologies. Broadband services can be offered over the existing copper line if it is hooked up to so-called 'enabling' technologies such as one of the 'xDSL' (digital subscriber line) technologies. The xDSL technologies are capable of effectively converting a copper pair into a high speed digital line, and so overcome the technical limitations of the traditional copper local loop. In this respect also cable network infrastructure for broadband Internet access offers similar performances vis-à-vis the end-consumers and could be considered substitutable to xDSL technologies from the demand standpoint.

([103]) Virtually Telecom Italia could re-activate its cable network project, which was interrupted in 1998. This possibility concerns the completion of its existing cable network in Italy, (so-called project Socrates) initially aimed at connecting […] million households to a Hyber Fiber Coaxial (HFC) network.

([104]) For instance, in order to increase the width of the present network functionalities, both long-term and at local level.

any event, it has not been possible to gather sufficient evidence during the market investigation to draw the conclusion that Telecom Italia is already a potential re-entrant in the pay-TV market whose 'potential re-entry' is sterilised by the 'link' with the combined platform to a significant extent.

(298) As regards the direct and indirect incentives that the combined platform might have to elect Telecom Italia as preferred partner in its role of co-owner and because of its cofinancing (pro-quota) of the DTH platform (i.e. incentives stemming from the 'link'), the contractual provisions laid down between the the platform and Telecom Italia for the purpose of the present transaction do not allow to infer such conclusion, i.e. that a favourable treatment by the combined platform vis-à-vis the telecom incumbent would materialise as a direct consequence of the transaction bringing about the merger (i.e. including the minority participation).

(299) In view of the above, it cannot be concluded that, because of the presence of Telecom Italia as a minority shareholder, the combined platform would have reasonably strong incentives to elect the telecom incumbent as its privileged partner, thereby sterilising the potential competitive threat stemming from Telecom Italia and strengthening its dominant position in the pay-TV market in Italy.

1.3.B. **Incentive for the combined platform and Telecom Italia to develop parallel or joint conducts/strategies that further limit the remaining scope for competitive constraint between themselves**

(300) It is true that the transaction and the link between the monopolistic pay-TV platform and Telecom Italia may generate significant incentives between the two parties as regards the pay-TV market (in particular, pay-per-view services and video on demand), which, in turn, may also have an adverse effect for competition in the telecom markets. In particular, Telecom Italia and the combined entity may coordinate their activities with regard to (a) full scale pay-TV services and video on demand and (b) multimedia interactive services stemming from the media convergence.

1.3.B.1. Market investigation

(301) During the market investigation, it has been submitted by third parties to the Commission that it would not be unreasonable to expect that the combined platform would try to exploit the link with Telecom Italia in order to get access to its very wide customer base and, consequently, would try to enlarge its subscriber base, by extracting all possible advantages from the link with the telecom incumbent including through, if appropriate, common commercial initiatives. Therefore, it could be reasonably expected that both the telecom incumbent and the combined platform would adopt forms of tacit or explicit cooperation.

(302) Third parties affirmed that because of the link, and of the possible 'sterilisation' of the competitive threat, both parties might have the incentive to enter into agreements whereby the joint offer/purchase of products or services to customers is made possible in such a way as to enhance their respective market positions by cross-exploitation of their assets and infrastructures.

(303) Third parties have stressed the potential risks arising from the ability for both parties to enter into preferential agreements for the distribution of content of the combined platform, or for bundling multimedia and/or audiovisual content with telecom services. Moreover, it emerged from the market test that, because of their link (the minority shareholding and presence in the board of directors) the new entity and Telecom Italia might have an incentive and sufficient margin for manoeuvre to enter into more strategic alliances/agreements which could have detrimental effect on potential competitors to the new entity.

(304) According to nearly all third parties, this would further contribute to giving the combined platform and Telecom Italia, in the respective markets, an unrivalled competitive position vis-à-vis their competitors and would facilitate the adoption of parallel strategies/behaviours of 'market partitioning' within the segments of the pay-TV market of respective interest, thus further limiting the scope for competitive pressure that, in the absence of the link, Telecom Italia would still be able to exercise at the margin of the Italian pay-TV market.

1.3.B.2. Newscorp's arguments

(305) Newscorp has stated that the combined platform's incentives to cooperate post-merger with Telecom Italia

are not materially affected by the merger, since the new platform and Telecom Italia are committed by contract to its involvement in the project and 'therefore there is no question of the combined platform seeking to maintain Telecom Italia's goodwill. Further, Telecom Italia does not control the combined platform and, therefore, the combined platform's rational strategy is to enter cooperative arrangements only if they are the most profitable strategy for the combined platform itself' ([105]).

1.3.B.3. Commission's appraisal

(306) Against this background, the Commission has carefully analysed the above arguments and scenarios, bearing in mind the legal requirement that the described adverse effect on competition must arise from the transaction bringing about the concentration. In the light of this, the factual evidence gathered by the Commission during the entire procedure does not show that, in the absence of the possibility for Telecom Italia to exercise de facto a 'decisive influence' on the strategic commercial behaviour of the combined platform, both the platform and Telecom Italia would have incentives to develop parallel or joint conducts/strategies and, as a result of that, risks of substantially affecting competition would materialise due to the notified transaction.

(307) Therefore, it is concluded that the market investigation has not provided sufficient evidence to establish that the risks for competition highlighted by third parties in the course of the procedure, would materialise in the foreseeable future as a consequence of the transaction bringing about the merger (i.e. including the minority participation of Telecom Italia in the combined platform).

2. CONCLUSION

(308) Even if it is not unreasonable, in the light of the historical background and the context in which the notified merger takes place, to consider that the link between Telecom Italia and the combined platform (significant minority shareholding and member in the board of directors) may remove a possible source of potential competition, it has not been possible to conclusively establish that such link would further contribute to strengthening the dominant position of the combined platform in the Italian pay-TV market.

B. *Telecom services markets where the concentration may strengthen a dominant position of the incumbent Telecom Italia*

(309) Telecom Italia operates in Italy, *inter alia*, as provider of fixed telephony services, mobile and satellite telephony services and as an Internet service provider (ISP) both at wholesale and retail levels. Furthermore, Telecom Italia is active in providing website creation services, in selling on-line advertising spaces and in providing multimedia services. The business areas of Telecom Italia that are particularly relevant in the context of this concentration are Internet access and fixed telephony services, both of which are related to the possible provision of multimedia services.

(310) Telecom Italia holds a dominant position in Italy both in the broadband internet access market and in the fixed telephony market.

1. ANALYSIS OF POST-TRANSACTION POSSIBLE ADVERSE EFFECTS ON COMPETITION IN THE IDENTIFIED TELECOM MARKETS

1.1. ***General considerations***

(311) The combined platform would have the exclusive rights to exploit important sports content (such as, but not limited to, football) and movies. Whilst these rights have, to date, mainly been exploited via satellite in the Italian market, the existence of negative exclusivity rights and holdback provisions in the corresponding contracts make it possible for the combined entity to prevent the use of the same or part of those contents on different platforms of transmission (for instance Internet). To this extent, it is worth noting that in the proceedings before the IAA concerning the aborted 'mirror' agreement referred to in recital 15, the combined platform already proposed, inter alia, a commitment to waive those negative exclusivity rights and holdback rights on platforms other than DTH.

1.2. ***Market investigation***

(312) The market investigation has confirmed that multimedia rights such as the ones held by the combined platform

([105]) Paragraph 7.2.12 of Newscorp's defence.

(especially football and sport contents) are suitable for exploitation in relation to means of transmission other than DTH, regardless of the network infrastructure (Internet, cable, satellite or other). In particular, some of the content (for example football events) are also suitable for transmission in the 'streaming' modalities using xDSL technology, for instance the main actions of a football match. In this connection, in the course of the procedure third parties have contended that, due to its foothold in the combined platform, Telecom Italia would be in a clearly advantageous position to obtain privileged sublicensing of exclusive rights concerning some of the combined platform' contents, for exploitation on the means of transmission that it holds, notably broadband Internet access. For instance, the risk has been highlighted that, should Telecom Italia's portals get those contents under better conditions (for instance in near-real-time) than other portals, other ISPs would be put at a clearly unfair competitive disadvantage.

(313) In the above context, it is true that, if more favourable treatment were to materialise, the current market power of Telecom Italia, which results, *inter alia*, directly from its wide customer base, could be ultimately enhanced by its ability to further increase and lock in old and new customers by launching offers of bundled services including broadband Internet access, fixed telephony and multimedia content services (so-called 'triple play' offers). The enormous customer base of the incumbent is an attractive and relevant element both for advertisers and for content providers, as opposed to the much smaller customer base of the incumbent's competitors.

(314) In this scenario, the risk may exist that the incumbent's competitors would not be able to match any of the possible triple play offerings available to Telecom Italia. As a consequence, other telecom licensed operators (OLOs) would in all likelihood become increasingly less appealing for advertisers (and for content providers) ([106]).

1.3. ***Newscorp's arguments***

(315) Newscorp has strongly contested the fact that the transaction could strengthen Telecom Italia's dominant positions in broadband Internet access and in fixed telephony, thanks to preferential access to the combined platform's content, thereby allowing unmatched 'triple play' offers. On the contrary, Newscorp stated that 'it is not at all obvious why the other shareholders in the combined platform would wish to favour Telecom Italia […]*. The combined platform has no incentive to grant Telecom Italia preferred access to any content. The combined platform is not controlled by Telecom Italia and therefore determines its own commercial strategy. The combined platform has no need to seek to maintain Telecom Italia's goodwill because Telecom Italia is committed to its investment by contract. The Combined Platform's rational strategy is therefore to grant access to its content on an arm's length basis on normal commercial terms to any and all third parties including but not limited to Telecom Italia' ([107]).

1.4. ***Telecom Italia's arguments***

(316) Telecom Italia has stated that its participation in the combined platform is a merely financial investment. According to Telecom Italia 'there is no industrial, commercial or strategic fit that it wishes to gain through its minority stake. Since 2000, it had decided to exit the pay-TV market and, should the previous "mirror agreement" (the acquisition of sole control over the Combined Platform by the Vivendi group) been finalised, it would have sold its entire participation. The reasons why it remains as a minority shareholder of the Combined Platform […]* are linked to the possibility of recuperating some of the investments made: it is a simple financial decision' ([108]).

1.5. ***The Commission's appraisal***

(317) Against this background, the Commission has thoroughly analysed the impact of the transaction as regards the possible competitive concerns, namely the possible strengthening of a dominant position of Telecom Italia in the relevant Italian telecom markets (broadband Internet access and fixed telephony).

(318) As mentioned above, the Commission has not been able to establish that a more favourable treatment by the combined platform vis-à-vis Telecom Italia, as compared to other ISPs/OLOs, would materialise as a consequence of the transaction bringing about the concentration (i.e. including the minority participation of the telecom incumbent).

([106]) The competitors of Telecom Italia in respect of broadband Internet access services are: Fastweb (e.Biscom), Wind, Tiscali, Albacom, Gruppo I.net, MCI Worldcom (especially for business clients). Some of these companies are also competitors of the telecom incumbent as regards fixed telephony services (Wind-Infostrada, Albacom, Fastweb, Tiscali).

([107]) Paragraph 1.2.7 of Newscorp's defence.

([108]) Paragraph 24 of Telecom Italia's observations.

1.6. ***Conclusion***

(319) In view of the foregoing, it is concluded that the evidence gathered in the course of the procedure is not sufficient to establish that possible adverse effects on competition in the Italian telecom markets would result from the transaction bringing about the merger (i.e. including the minority shareholding of Telecom Italia).

2. CONCLUSION ON TELECOM ITALIA'S LINK

(320) The merger will not lead to the strengthening of Telecom Italia's dominant position on a durable basis, as regards those telecommunication markets (broadband Internet access and fixed telephony) which are brought into the assessment by the link of Telecom Italia with the combined entity.

4. *UNDERTAKINGS RELATING TO TELECOM ITALIA*

(321) As mentioned in recital 222, on 13 March 2003, Newscorp submitted a revised set of commitments (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 concerned merger. As already stated above, these commitments build upon remedies submitted to the Commission on 31 October 2002 and on 14 January 2003.

(322) The commitments proposed by Newscorp contain a part concerning the relations between the combined platform and Telecom Italia.

1. SUMMARY OF THE COMMITMENTS OFFERED BY NEWSCORP ON 13 MARCH 2003 RELATING TO TELECOM ITALIA (POINT 13 OF THE COMMITMENT TEXT)

(323) The commitments offered by Newscorp relating to its relationships with Telecom Italia provide the following:

(a) Newscorp will not make joint offers with Telecom Italia combining pay-TV services and Internet broadband access, will not discriminate in favour of Telecom Italia as regards the sublicensing of audio-visual contents,will not induce its clients to route their interactive services return path via Telecom Italia, and will not enter into strategic agreements with Telecom Italia without prior approval of the Commission.

(b) The undertakings regarding Telecom Italia will remain in force for as long as Telecom Italia holds a shareholding of no less than 5 % and has a member in the board of directors of the combined platform.

2. ASSESSMENT OF THE COMMITMENTS REGARDING TELECOM ITALIA

(324) In the light of the above findings and conclusions, the Commission takes note of the commitments offered by Newscorp in respect of its relations with Telecom Italia. These commitments, however, constitute neither conditions nor obligations of this decision.

VIII. **CONCLUSION**

(325) For the reasons set out above, it is concluded that, subject to compliance with the commitments entered into by Newscorp, the proposed concentration would not create or strengthen a dominant position on the market for the supply of pay-TV services, and on the markets for the acquisition of exclusive rights to premium movies, to football events played every year where national teams participate, to other sport events as well as in the market for TV channels, and as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. The concentration should, therefore, be declared compatible with the common market pursuant to Article 8(2) of the Merger Regulation and with the EEA Agreement pursuant to Article 57 thereof, subject to compliance with the commitments set out in the Annex,

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby The News Corporation Limited (Newscorp) acquires control of the whole of the undertakings Telepiù Spa and Stream Spa is declared compatible with the common market and with the EEA Agreement.

Article 2

Article 1 is subject to full compliance by Newscorp with the commitments set out in the Annex, with the exception of point 13 of part II.

Article 3

This decision is addressed to:

The News Corporation Limited
1211 Avenue des Americas
New York, NY 10036
United States of America.

Done at Brussels, 2 April 2003.

For the Commission
Mario MONTI
Member of the Commission

ANNEX

The full original text of the conditions and obligations referred to in Article 2 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html.