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Case No COMP/M.2876 - NewsCorp/Telepiu

Only the English text is authentic.

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

Article 8 (2)

Date: 06/08/2010



EUROPEAN COMMISSION

Brussels, 20.7.2010
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PUBLIC VERSION

COMMISSION DECISION

of 20.7.2010

**modifying the application of the Commitments attached to a decision declaring
a concentration compatible with the common market
and the EEA Agreement**

(Case No COMP/M.2876)

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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

Having regard to Council Regulation (EEC) No 4064/1989 of 21 December 1989 on the control of concentrations between undertakings¹, and in particular Article 8(2) thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings² (the "EC Merger Regulation"), and in particular Article 8(2) thereof,

Having regard to the Commission's decision³ of 2 April 2003 declaring the operation whereby the News Corporation Limited acquired control of the whole of the undertakings Telepiù Spa and Stream Spa compatible with the common market and with the EEA Agreement, subject to full compliance by the News Corporation Limited with the Commitments set out in the Annex to that decision, with the exception of point 13 of Part II,

Having regard to Clause 14 of the Commitments attached to the Decision, and in particular paragraph 1(iii) thereof,

¹ OJ L 395, 30.12.1989, p. 1.

² OJ L 24, 29.1.2004, p. 1.

³ OJ L 110, 16.4.2004, p. 73.

WHEREAS:

1. INTRODUCTION

- (1) By decision of 2 April 2003 (“the Decision”), adopted in application of Article 8 (2) of Regulation (EEC) No 4064/89, the Commission declared the operation by which the Australian undertaking News Corporation Limited (“NewsCorp”) acquired control of Telepiù Spa and Stream Spa, which gave rise to a new digital satellite television company (“Sky Italia”), compatible with the common market and with the EEA Agreement, subject to full compliance with the commitments submitted by the notifying parties annexed to the Decision (“the Commitments”).
- (2) In the Decision, the Commission found that the concentration, as notified, would raise various competition concerns, and in particular would create a quasi monopoly in the market for Pay TV in Italy, raise the entry barriers to that market and create a quasi monopsony in the markets for the acquisition of contents such as, inter alia, “premium” movie and sports rights such as yearly football events. In the Decision the Pay TV market was defined as a separate market from the market for free-to-air (“FTA”) broadcasting. Moreover the Commission found that the merger would not raise any competition concerns on the FTA market. In order to address the competition concerns identified, the notifying party submitted Commitments which the Commission made binding in the Decision.
- (3) The Commitments were aimed at limiting the market power of the merged entity by easing new entry into the Italian Pay TV market. This was in particular done by facilitating third parties’ access to the infrastructures and the content necessary to effectively operate a Pay TV service in Italy. To achieve that purpose, the Commitments provided for a limitation on the ability of NewsCorp (and therefore Sky Italia) to (i) conclude contracts for the acquisition of movies and sports (namely football) rights in relation to both the duration of the rights and their scope, (ii) provide access to its proprietary infrastructure, (iii) operate Pay TV services on other platforms than the satellite platform (“Direct To Home” - “DTH”). The Commitments also provided for an obligation on Sky Italia to offer on a non-exclusive basis to third parties the right to distribute on platforms other than DTH any premium content if and for so long as the merged entity offers to its retail customers such premium content (wholesale offer). The Commitments will expire on 31 December 2011.
- (4) More particularly, as regards access to the relevant infrastructure, one of the commitments, namely Clause 9.1, stated that NewsCorp committed, in relation to digital terrestrial television broadcasting (“DTT”), not to operate in Italy as (i) a Network Operator; or (ii) a Retail Pay-TV Service Operator and not to apply for any necessary authorisation to do so. That Commitment was complemented by another, namely Clause 9.2, which required NewsCorp to divest its DTT activities (licences and authorizations for terrestrial broadcasting and rights to the related terrestrial frequencies). Such divestiture was completed on 30 October 2003, in accordance with the terms of the Commitments.

- (5) By letter of 28 September 2009⁴, NewsCorp informed the Commission that Sky Italia intended to seek a clarification of the Commitments and, if necessary, their modification. On 7 and 16 November 2009, Sky Italia submitted a document containing a formal request for the revision of the Commitments. Sky Italia, in particular, requested that the Commission waive or review Clause 9.1 of the Commitments so as to allow it to participate in the upcoming tender for the allocation of the new DTT frequencies in Italy.
- (6) On 6 July 2010, NewsCorp formally committed⁵ that Sky Italia would bid exclusively for one multiplex ("mux")⁶ in the upcoming tender and use the mux acquired, if acquired and in so far as it remains under the control of NewsCorp and Sky Italia, in the upcoming tender, to operate FTA channels for a period of five years following the adoption of this Decision (together, the "New Commitment"). The New Commitment is attached to this Decision.

2. FACTS

2.1 The situation of the Italian DTT platform

(a) Relevant legal and regulatory framework

- (7) The request by NewsCorp for a revision of the Commitments has to be considered against the background of the legal and regulatory situation of the DTT platform in Italy.
- (8) The transition from analogue to digital terrestrial television broadcasting (digital "switch-over") started in Italy on the basis of the legislation and administrative decisions in force since 2001⁷. On 1 December 2009, analogue terrestrial broadcasting was already "switched-off" in six regions/areas⁸. The switch-over is still ongoing and is progressing according to the calendar established by the Italian Authorities⁹. The final switch-off of the entire national territory is currently foreseen for 31 December 2012.
- (9) In the context of the Commission's infringement procedure n. 2005/5086¹⁰ against Italy, which is still open, the Italian Authority for Communications ("AGCOM") adopted new criteria to improve the distribution of the digital terrestrial frequencies (Delibera 181/09/CONS).

⁴ Letter co-signed by Mr. James Murdoch and Mr. Tom Mockridge, addressed to Commissioner Neelie Kroes (ref. CabKroes 001527, 7.10.2009).

⁵ Letter signed by Mr. Tom Mockridge, CEO News Corporation European Television.

⁶ A multiplex corresponds to a frequency for the transmission of a digital terrestrial signal. Each multiplex allows broadcasting between four to eight channels in standard digital (SD) technology and one/two channels in High Definition (HD) technology.

⁷ Notably, Law n. 66/2001, Law n. 112/2004 (the "Gasparri Law"), Legislative Decree n. 177/2004 (the "Single Text") and AGCOM Delibera 435/01/CONS.

⁸ Sardinia, Valle D'Aosta, Western Piedmont, Trentino Alto Adige, Latium, Campania.

⁹ Decree of the Ministry of Economic Development n. 33827, of 10 September 2008.

¹⁰ See

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1114&format=HTML&aged=0&language=EN&guiLanguage=fr>

- (10) The National Plan of frequency allocation for digital terrestrial television broadcasting, adopted by AGCOM on 15 June 2010¹¹, has identified 25 digital networks or muxes: 21 are for digital TV broadcasting (DVB-T¹²) and 4 are for mobile TV (DVB-H¹³). 16 DVB-T and 3 DVB-H muxes are already in use, or planned for use, while the remaining 6 muxes (5 DVB-T and 1 DVB-H), which have emerged in Italy from the "digital dividend" (that is to say, the transmission capacity "freed" from the analogue switch-off), will be put out to tender.
- (11) As a result of the application of the criteria set out in Delibera 181/09/CONS, out of the planned 21 DVB-T national muxes, 16 will be allocated as follows:

Digital frequency allocation in Italy (based upon Delibera 181/09/CONS)

NATIONAL BROADCASTERS	NETWORKS RESULTING FROM THE ANALOGUE LEGACY	EXISTING DVB-T NETWORKS IN USE	TOTAL DVB-T NETWORKS
RAI	2	2	4
RTI (Mediaset)	2	2	4
Telecom Italia	1	2	3
Other smaller broadcasters	3	2	5

- (12) The remaining 5 new DVB-T muxes, and the 1 DVB-H mux, will be allocated following tendering rules by AGCOM and a selection procedure (beauty contest) by the Italian Authorities¹⁴. For the time being, draft tendering rules are set out in Delibera n. 427/09/CONS, which was put to public consultation. At the time of the adoption of this Decision, those draft tendering rules had not been formally approved by the Board of AGCOM and a final text was awaited.
- (13) The new frequencies will be allocated following a tender based on objective, transparent and non-discriminatory criteria. In particular, the new muxes will be put out for tender in three lots: lot A (3 DVB-T muxes), lot B (2 DVB-T muxes) and lot C (1 DVB-H mux), as follows:
- (a) *Group A operators*: smaller existing broadcasters who had (i) one analogue national TV terrestrial network or (ii) no analogue or digital national TV terrestrial network (new entrants) before the digital conversion of the networks. They can bid for lot A (3 muxes), lot B (2 muxes) and lot C (1 mux);
- (b) *Group B operators*: major vertically-integrated broadcasters who had two (Telecom Italia) or more (RAI and Mediaset) analogue national TV terrestrial networks before the digital conversion of the networks. RAI and Mediaset can

¹¹ Delibera n. 300/10/CONS.

¹² Digital Video Broadcasting – Terrestrial.

¹³ Digital Video Broadcasting – Handheld.

¹⁴ Ministry of Economic Development – Communications.

bid for lot B (2 muxes) only, while Telecom Italia can also bid for lot C (1 mux)¹⁵;

(c) *Non-DVB-H operators*: terrestrial network operators who do not have a digital terrestrial TV network in DVB-H technology¹⁶. They can bid for lot C and also for the other lots, if they fulfil the necessary requirements.

(14) A trading ban regarding the frequencies that are associated with the muxes that are put out for tender is also defined by the relevant AGCOM rules, and in particular by the draft tendering rules set out in Delibera n. 427/09/CONS. The trading ban is applicable for 5 years after the switch-off. Exceptions to the ban, permitting trading, are: a) operations involving/between Group A operators and b) operations involving/between Group B operators which, as a result of the tender, have not reached the 5 mux cap and therefore are not under the obligation to offer 40% of digital transmission capacity on the fifth mux to third party independent content providers.

(15) At the time of the adoption of this Decision, the tender procedure has not been launched yet.

(b) The growth of the DTT platform

(16) Due to the "switch-offs" in 2009, 28% of the population is now receiving digital terrestrial transmissions. DTT is now the first platform for access to digital TV in Italy, followed by the satellite platform, IPTV¹⁷ and mobile TV, which is the fourth digital platform in Italy. As regards DTT, at the end of 2010 most regions/areas of Northern Italy will be switched-off¹⁸, involving around 23 million households (that is to say, 66% of the population). The advent of the new DTT technology has resulted in a quadruplication of the number of national TV terrestrial channels (see the overview of content (programmes/channels and services) currently offered by the Italian broadcasters at national level in both their analogue and digital (DVB-T) networks in Annex I). Notwithstanding this, there are currently very few new FTA channels ("Cielo" is one example – see recital 22 and following).

(c) New entrants on pay TV modality

(17) Since the entry into force of the Commitments in 2003, alternative pay-TV offers have emerged in Italy, even though Sky Italia has maintained its strong position on DTH. Those alternative pay-TV offers have been essentially driven by the DTT platform.

(18) There are currently two Pay TV offers in Italy on DTT: 1) "Mediaset Premium" and 2) "Dahlia TV" ("Dahlia"). Those two operators (and Telecom Italia before Dahlia) entered the Pay TV market by initially offering their "pay-per-view" ("PPV") services to consumers at competitive low prices.

¹⁵ Any of these broadcasters who reaches, as a result of the tender, the cap of 5 muxes is obliged to offer to independent third party content providers 40% of the transmission capacity on their 5th mux.

¹⁶ Currently, RAI, RTI and H3G have a national DVB-H mux.

¹⁷ In Italy, the IPTV platform has been created by Fastweb, Wind and Telecom Italia. It should be noted that the main Pay TV offers existing in Italy (namely Sky, Mediaset Premium) are available on IPTV.

¹⁸ According to the switch-off calendar, these regions/areas are: Eastern Piedmont and Lombardy, Veneto, Friuli Venezia Giulia and Liguria.

- (19) Mediaset Premium is the pay TV offer of RTI (Mediaset), which includes a number of channels offering premium content (films, sports, TV series) delivered through own and third parties' muxes¹⁹. Mediaset Premium was launched in 2005 and is the first PPV offer available in Italy, initially by means of anonymous "pre-paid" cards and more recently by means of subscription models.
- (20) Dahlia was set up after the acquisition in 2008 by the Scandinavian broadcasting company AirPlus TV of Telecom Italia's Pay TV activities on DTT ("LA7 Cartapiù")²⁰. Dahlia is currently renting transmission capacity from Telecom Italia Media Broadcasting ("TIMB") to broadcast its premium content (mainly sports and adult content) through anonymous "pre-paid" cards and more recently by means of subscription models, like Mediaset Premium.
- (21) Finally, some other minor operators with marginal positions are active in the pay TV market (for example, Conto TV on DTH, some local operators on DTT and the main mobile telecom operators on mobile TV²¹).

(d) Sky Italia's current FTA activities on DTT

- (22) In December 2009, Sky Italia launched a new generic 24-hour channel on DTT ("Cielo") by using the muxes and frequencies of the (smaller and non-integrated) operator "Rete A" (belonging to the group "Gruppo Editoriale L'Espresso").
- (23) In order to be able to broadcast Cielo, Sky Italia applied for an authorisation which it obtained after the Italian Authorities (Ministry of Economic Development – Communications) received confirmation from the Commission²² that Clause 9 of the Commitments does not imply that the prohibition on Sky Italia to operate on the DTT platform as a content provider should be interpreted so widely as to include also FTA services.
- (24) [...]*

3. NEWSCORP'S REQUEST

- (25) By letter of 28 September 2009²³, Newscorp informed the Commission that Sky Italia would seek a clarification of the Commitments and, if necessary, their modification. On 7 and 16 November 2009, Sky Italia submitted a document containing a formal request

¹⁹ RTI is currently using the transmission capacity of two own muxes (through its subsidiary Elettronica Industriale S.p.A. of the Mediaset group), of the "Dfree" multiplex (of Prima TV S.p.A.) and of the mux "TIMB1" of Telecom Italia Media Broadcasting) to broadcast its Mediaset Premium PPV service. RTI's offer is also present on other platforms (for example, IPTV).

²⁰ Telecom Italia Media has retained a 9% share in the new company.

²¹ The three mobile telecom operators (Telecom Italia, Vodafone and "3") offer mobile TV services, also by means of contracts with TV operators (mainly Sky Italia and Mediaset), in DVB-H standard; their market shares of Pay TV are however marginal.

²² Letter by Commissioner Neelie Kroes to Vice-Minister Paolo Romani of 3 December 2009.

* 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.

²³ Letter co-signed by Mr. James Murdoch and Mr. Tom Mockridge, addressed to Commissioner Neelie Kroes (ref. CabKroes 001527, 7.10.2009).

for the revision of the above mentioned Commitments. Sky Italia, in particular, requested that the Commission waives or reviews Clause 9.1 of the Commitments so as to allow it to participate in the upcoming tender for the allocation of the new DTT frequencies in Italy.

(26) On 4 December 2009, NewsCorp submitted a business plan detailing its analysis of the market opportunities generated by its entry into the DTT sector through participation in the forthcoming tender. In particular, according to the information provided in the submissions dated 7 and 16 November 2009, if it was allowed to participate in the tender, Sky Italia would bid for one mux with a view to operating FTA services through own [...]*

(27) .[...]*

4. ASSESSMENT OF NEWSCORP'S REQUEST

4.1 Reference legal framework

(28) Clause 14 of the Commitments ("the Review Clause") provides that the Commission may "waive or modify, in exceptional circumstances, one or more of the conditions and obligations contained in these Commitments". According to paragraph 74 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004²⁴, the Commission may grant a waiver, modification or substitution of the application of the commitments, particularly for non-divestiture commitments, in response to a request from the parties showing that market circumstances have changed significantly and on a permanent basis²⁵.

(29) In order to reconstruct the market circumstances and to assess whether a review or a modification of the Commitments as per NewsCorp's request would be appropriate, and whether "exceptional circumstances" are present, the Commission carried out a market investigation.

4.2 Market definition and position of the operators on the market

(30) In the Decision, the Commission defined the market for pay-TV as distinct from the market for FTA and did not distinguish between terrestrial, satellite, cable or other means of transmission. The recent market investigation confirmed the findings of the Decision as most respondents believe that the traditional distinction between FTA and pay-TV market is still valid. However, the digitisation process and the development of innovative modalities of production, distribution, transmission and fruition of TV content create synergies between the two markets and could have an influence upon such market definition.

²⁴ OJ C 267, 22.10.2008, p.1.

²⁵ Moreover, recital 225, point (m) of the Decision provides that "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".

- (31) According to 2008 data²⁶, the position of TV operators on the Italian Pay TV market (irrespective of the platforms through which their Pay TV offers are delivered) is the following: (i) Sky Italia has 88,8% market share of Pay TV offers; (ii) RTI (Mediaset) has 7,4%; (iii) Telecom Italia Media has 0,4%; (iv) telecommunication operators have 3,3%. More recently²⁷, Sky Italia's market share has eroded due to the growth of Mediaset in 2009 and is 85,8%; similarly, Mediaset's market shares increased during 2009 and are 10,7%. According to recent research forecast data²⁸, it is estimated that in 2011 Sky Italia's market share will be 80%, Mediaset's market share will be 15% and Telecom Italia's 3%²⁹.
- (32) In the Pay TV market, the main developments have taken place on the DTT platform. Particularly, Mediaset has developed its pay-TV offer on DTT by using not only its own, but also other operators' muxes. According to recent information provided by Mediaset, as of 1 July 2010 the active Mediaset Premium smart cards are 2.589.885³⁰, while Sky Italia has 4.7 million subscribers. However, the number of PPV cards cannot be compared to the number of DTH subscriptions: while the number of subscriptions is a benchmark for the number of actual subscribers per household, the number of PPV cards is not, as these are often prepaid, rechargeable cards and once their credit is consumed they can no longer be used and new cards need to be purchased. There is therefore usually more than one PPV card per household³¹. Moreover Mediaset's figures do not distinguish between pre-paid cards and the most recent subscription offers. In any event, DTT expansion and penetration is considered to be higher than DTH which, in contrast, has reached maturity. It is estimated³² that by 2011, DTH will reach a slightly higher number of households (from 6.4 to 6.6 million), while DTT is expected to almost double (from 8.4 million to 13.4 million), but the number of DTT and DTH households that have Pay TV will be the same (4.9 million each).
- (33) According to public statements by Mediaset, the two incumbents RAI and Mediaset have achieved market shares of 83,4% of the DTT infrastructure in the switched-off areas (for comparison, according to the figures reported by AGCOM in 2007³³, RAI and Mediaset jointly had around 83% of the total number of sites/frequencies available for the exercise of national terrestrial networks in analogue technology). It should be recalled that digital terrestrial broadcasting is gradually replacing analogue (FTA) transmissions, that RAI does not have a Pay-TV offer and that Mediaset also broadcasts FTA content (namely its three channels – Canale 5, Rete 4 and Italia 1) which, together with RAI's (and Telecom Italia's) channels, attract a large proportion of viewers (around 84% altogether).

²⁶ AGCOM Annual Report of 2009, p. 81 (available at: <http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=17>).

²⁷ AGCOM Annual Report of 2010, p. 79 (available at: <http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=19>).

²⁸ ITMedia – "Il Mercato Televisivo in Italia: 2009-2011", published on 19 November 2009.

²⁹ ITMedia – "Il Mercato Televisivo in Italia: 2009-2011", published on 19 November 2009.

³⁰ On 13 July 2010 RTI submitted to the Commission a letter stating that on 30 June 2010 a number of 1.804.782 smart cards have expired. However, RTI has not indicated whether these figures include the number of subscriptions that are offered in parallel to the PPV cards.

³¹ The "Easy Pay" card is however used to subscribe subscriptions, which usually last one year.

³² ITMedia – "Il Mercato Televisivo in Italia: 2009-2011".

³³ Delibera n. 544/07/CONS of 31 October 2007.

- (34) Furthermore, in September 2008, RAI, RTI and Telecom Italia set up a joint venture named TIVU, the stated objectives of which are, among other things, to promote and make the Italian viewers aware of the FTA offer available on the DTT platform during the ongoing switch-over period and to set up a satellite platform, called TIVU Sat, as an alternative to Sky Italia's platform. The stated aim of TIVU is to deliver the DTT programmes to the population living in those areas which are not reached by the terrestrial signal (this should correspond to approximately 500.000 families³⁴). Nonetheless, the entire FTA offer available on DTT can be viewed by any satellite viewer who is equipped with a decoder compatible with the encryption system adopted by TIVU, which is different from Sky Italia's encryption system³⁵. AGCOM has established that the TIVU's smart card cannot be used to receive pay-TV offers³⁶.
- (35) In conclusion, since the adoption of the Decision, and due to the effects of the Commitments, new players (Mediaset, Telecom Italia/Dahlia) have entered into the Italian Pay TV market through DTT, even though Sky Italia has maintained its strong position on DTH. The DTT platform has already become the first platform for digital TV consumption in Italy and the number of viewers that are concerned by the digital switch-over is increasing, due to the on-going regional switch-offs which, at the end of 2010, will involve around 66% of the Italian population. The relevance of the DTT platform will grow further in the next two years, as analogue transmissions will be completely replaced by digital terrestrial transmissions by 2012. Therefore, the importance of the DTT platform will be crucial especially for those Italian viewers (the majority) who are interested in FTA transmissions only and who are not willing to subscribe to pay TV.

4.3 Market investigation

- (36) The Commission's market investigation in relation to Newscorp's request involved national broadcasters (the incumbents and the smaller ones), local broadcasters, network operators and TV content providers (for example, channel editors), telecom operators, the Italian Competition Authority ("ICA"), AGCOM, and a number of Italian consumers' associations. The results of the market investigation are summarized in the following recitals.

(a) The view of ICA

- (37) ICA expresses serious competition concerns and believes that the current market situation does not make it possible to identify those "exceptional circumstances" that would be required to waive or review the Commitments³⁷. According to ICA, allowing

³⁴ See AGCOM Delibera N. 732/09/CONS.

³⁵ Before the creation of TIVU, the TV programmes of RAI and RTI were freely available on the satellite platform of Sky Italia; RAI and RTI used to encrypt those programmes for which they had rights limited to the Italian territory (mainly for copyright reasons), but in order for satellite viewers to decrypt the signal, RAI and RTI used Sky Italia's encryption protocol (Videoguard) by virtue of a technical agreement. From April 2009.[...]*. As a result, many RAI and Mediaset's programmes are currently not available on Sky Italia's platform.

³⁶ See AGCOM Delibera N. 519/09/CONS.

³⁷ For ICA, the presence of new pay-TV operators cannot be considered "exceptional", especially where their market position is compared to that of Sky. Those market developments must be seen as part of a pro-competitive process that the Commitments were intended to favour and that is still ongoing. According to ICA, the exit of Sky Italia from the DTT platform was intended to be maintained for some time after the

Sky Italia to participate in the upcoming tender, and to acquire the new DTT frequencies, would undermine the purpose of the Commitments which was to prevent it from foreclosing access to the Pay-TV market to its competitors by freeing up capacity on the DTT platform, which would allow new entries and challenge Sky Italia's monopolistic position on that market. Furthermore, ICA observes that Sky Italia could still acquire other frequencies on the market by means of commercial transactions³⁸.

- (38) ICA considers, however, that if Newscorp were to use the frequencies acquired not for Pay TV, but to ensure Sky Italia's entry in the FTA market under a significant, stable and long-term basis, there could be a potential beneficial effect upon the overall competitive situation of FTA TV in Italy, which is currently characterized by the presence of the two incumbents RAI and Mediaset. Nonetheless, in ICA's opinion the main risk of foreclosure in the Pay TV market, which would consist in DTT frequencies being available to Newscorp instead of its competitors, who could use them to enhance their offer and improve their competitive capacity, would remain. By letter of 21 May 2010, the President of ICA, Antonio Catricalà, transmitted a memorandum confirming the substance of the concerns regarding the risk of foreclosure in the pay TV market.

(b) The view of AGCOM

- (39) AGCOM expresses similar concerns as ICA. In AGCOM's view, significant barriers to competition still exist in the national Pay TV market concerning, mainly, access to and availability of premium content and access to Sky Italia's platform (that is to say, the characteristics of its decoder). However, the transition from analogue to digital TV should increase inter-platform competition, thus re-balancing the currently limited intra-platform competition on DTH.
- (40) From an FTA perspective, like ICA AGCOM is also of the opinion that the possible allocation to Sky Italia of DTT frequencies for FTA broadcasting only would considerably improve the overall competitive situation and the pluralistic structure of the FTA market whereby the two main operators, RAI and Mediaset, absorb the majority of advertising resources - provided that Sky Italia's entry to the FTA market is on a stable and lasting basis.

(c) The view of competitors

- (41) The incumbent vertically-integrated broadcasters have expressed grave concerns regarding the possibility that Sky Italia will enter the DTT platform. Similar concerns were expressed by the smaller national and local Italian broadcasters, by TV content providers (for example, European and US channel editors), by minor DTH operators and by some associations of national and local broadcasters. Most of those respondents consider that, although the market situation is evolving, it has not radically changed compared to 2003 when the Decision was adopted and that the exceptional circumstances that could justify a revision of the Commitments are therefore absent.

completion of the transition period, as it allegedly emerged from ICA's 2002 decision in the proposed transaction Groupe Canal +/Stream (decision AGCM C5109), which however was never completed.

³⁸ ICA hints at the possibility of Sky Italia acquiring existing operators such as Telecom Italia, Gruppo L'Espresso, Centro Europa 7 or Rete Capri.

- (42) Those respondents also expressed the fear that Sky Italia's significant market power on Pay TV, and particularly on the DTH platform, would be strengthened by its entrance on the DTT platform. In particular, they are concerned that Sky Italia might be able to acquire premium content in a bundle both for DTH and DTT, thus exploiting its market power on the DTH platform to extract better deals on the DTT platform. Some competitors, and particularly local/smaller broadcasters, expressed concerns as they could not outbid Sky Italia in the upcoming tender and fear that Sky Italia might "occupy" frequencies.
- (43) One incumbent broadcaster claimed that Sky Italia's entry to the DTT platform should be delayed further to take into account the postponement of the switch-off date from 2006 to 2012, as the duration of the Commitment was, according to this broadcaster, determined on the basis of the expectation that the switch-off would take place in 2006.
- (44) Some respondents (some channel editors, one IPTV operator and one network operator) were either neutral as to Sky Italia's possibility to enter the DTT platform or expressed a positive opinion, provided Sky Italia's business verticalization (that is to say, being at the same time network operator and content provider) is also tackled.

(d) The view of consumers

- (45) Italian consumers' associations have submitted a rather positive reply. They consider that Sky Italia's entry to the DTT platform would result in a broader offer of TV programmes to consumers and welcome the increase in competition both in Pay TV and FTA, if this is associated with lower costs for consumers.
- (46) Most Italian consumers' associations consider Sky Italia as a credible competitor vis-à-vis the strong duopolists RAI and Mediaset and consider that its possible presence on the DTT platform would introduce more dynamism in the Italian TV market, including in terms of pluralism of content. In this respect, they perceive the DTT platform as an alternative to the satellite platform, and note that entry to the DTT platform is still difficult because the existing major players in the analogue system have moved to the new digital system. In this regard, some consumer associations criticize AGCOM's criteria for the allocation of the new DTT frequencies and claim that those criteria would allow the existing major broadcasters to get a significant number of frequencies.
- (47) One consumer association observed that the DTT system will lead to an increase in the number of FTA channels and also allow the development of pay TV services, provided the new frequencies are not allocated to players who were already dominant in the previous analogue technology. Under this view, the possible entry of Sky Italia in the DTT platform would result in a wider choice for consumers and would avoid the creation of dominant positions in the individual markets. Another consumer association noted, however, that Sky Italia should allow consumers to easily switch to another pay TV and to watch any FTA channel through any decoder.

(e) Conclusion on market investigation

- (48) It follows from the above that the main competitive concerns raised during the market investigation focus on: (a) the risk of foreclosure with regard to access to premium content, (b) the risk of "occupation" of frequencies by Sky Italia and (c) the significant market power of Sky Italia on Pay TV.

- (49) Nonetheless, some respondents, and particularly the two national authorities, some competitors and most consumers' associations, have also pointed out that the entry of Sky Italia into the DTT platform for the broadcasting of FTA content only could have positive effects, if this is done on a stable and long-term basis.

4.4. Competitive assessment

(a) Analysis of the evolution of DTT broadcasting

- (50) Since the adoption of the Decision, the situation in relation to the DTT platform has significantly evolved. The DTT platform has already become the first digital TV platform in Italy and will grow further until 2012, when analogue transmissions will be switched-off. As a result of the conversion of the frequencies from analogue to digital technology, the transmission capacity of digital terrestrial networks has very much increased as compared to 2003, when digital broadcasting was in its infancy.
- (51) Such enhanced transmission capacity has allowed broadcasters to increase the number of channels on the DTT platform. For instance RAI, in addition to simulcasting its three channels Raiuno, Raidue and Raitre in analogue and digital technology, broadcasts some thematic channels that it produces on the digital platform (for example, RaiSportPiù, RaiNews24, Rai Gulp, SAT2000). Mediaset, in addition to simulcasting its three channels Canale 5, Rete 4, Italia 1 in analogue and digital technology, has used the digital platform to develop its pay-TV offer (Mediaset Premium) and to broadcast some thematic channels that it produces (for example, Boing - thematic channel for children and Iris - fiction TV). Telecom Italia broadcasts its two channels (La 7 and MTV Italia) in analogue and digital technology and delivers the pay TV offer of Dahlia through its own network infrastructure.
- (52) As regards the infrastructure, since 2005 Mediaset has developed its pay-TV offer on DTT by using not only its own, but also other operators' muxes. Telecom Italia (now Dahlia) has also recently developed a Pay TV offer on DTT. Those two operators own a very large network infrastructure (sites/frequencies/multiplexes) and digital transmission capacity which allows them to broadcast their own FTA and pay TV content (Dahlia does so by renting transmission capacity from Telecom Italia). RAI also has a very large network infrastructure (but does not have a Pay TV offer).
- (53) Moreover, the circumstances of the upcoming tender for the allocation of the "digital dividend" (five DVB-T muxes and one DVB-H mux), should be duly taken into account. The tender aims at allowing smaller existing broadcasters to expand and newcomers to enter the DTT, addressing also in this way the Commission's concerns expressed in the context of the infringement procedure N. 2005/5086 against Italy, which is based on the assumption that RAI and Mediaset (and, to a lesser extent, Telecom Italia) have a strong position³⁹ in the analogue infrastructure market (frequencies and transmission sites) and that there is a risk of transfer of such position into the digital infrastructure market.
- (54) It should not be forgotten, however, that Mediaset and Telecom Italia (in addition to the public broadcaster RAI) can participate in the tender, notwithstanding their strong position in the infrastructure market. For this reason, those incumbent operators (RAI,

³⁹ See also AGCOM decision n. 544/07/CONS.

Mediaset and Telecom Italia) would be allowed to bid for a maximum of two out the five new DVB-T muxes, subject to certain asymmetric measures⁴⁰.

(55) It should also be noted that, for the first time ever, some frequencies for TV terrestrial broadcasting will be allocated following a public tender. Despite several attempts at tendering some analogue frequencies⁴¹ and implementing different frequency plans⁴², the Italian authorities have previously not managed to rationalise the distribution of the spectrum, which is still largely allocated or planned for allocation to the incumbent broadcasters (see the Table in recital 11 setting out digital frequency allocation in Italy). The unique and exceptional character of this tender should also be considered in the light of the specific circumstances of the Italian broadcasting market, which has been characterized for decades by an inefficient distribution of frequencies and full occupation of available spectrum by the vertically integrated operators⁴³ – a situation that the Court of Justice of the European Union found to be incompatible with European Union law⁴⁴.

(56) Moreover, also for the first time ever, the digital terrestrial frequencies (both for DVB-T and DVB-H broadcasting) have been planned⁴⁵ and the frequency allocation that will result from this tender procedure will be the last opportunity to enter the DTT platform in a planned manner, on the basis of pre-defined rules, for many years to come. This should also ensure that certain situations from the past, whereby certain operators having a legitimate broadcasting licence could not broadcast for lack of available frequencies (this was the situation of Centro Europa 7 for about a decade), will no longer occur.

(57) Participating in this tender is therefore a unique, and probably the last, opportunity for any operator who has a negligible, or non existent presence, on DTT to effectively enter

⁴⁰ A "cap" of 5 muxes is imposed upon broadcasters as a result of the tender; if RAI, Mediaset and Telecom Italia reach this cap, they will be obliged to give access to 40% of the transmission capacity on the fifth mux to independent third party content providers. Moreover, access to the incumbents' terrestrial networks should be on cost oriented conditions for a period of five years (calculated from effective access); AGCOM can intervene with a binding decision in case of refusal from the incumbent.

⁴¹ In October 2007, the Ministry of Economic Development – Communications published a call for tender for the allocation of a small number of analogue TV sites/frequencies. The stated purpose of such tender procedure was to enable certain smaller national operators, active in Italy and provided with the licences for (analogue) broadcasting, to cover at least 80% of the territory and all the capitals of the provinces, as required by law. For various reasons, the tender procedure has never been brought to an end and the Ministry of Economic Development – Communications has recently stated that it has been abandoned without the need of adopting any formal administrative measure of closure.

⁴² The national analogue frequency plan was approved in 1998 (AGCOM Delibera n. 68/98 of 30 October 1998) but never implemented.

⁴³ The Italian analogue broadcasting market has been characterized almost completely by own-production as each network can carry one channel only which is broadcast by the same broadcaster owning the network infrastructure.

⁴⁴ See Case C-380/05 Centro Europa 7 [2008] ECR page I-00349. Following national judgments in application of that ruling, and negotiations between the Ministry of Economic Development – Communications and Centro Europa 7 which recently concluded with an agreement, that broadcasting company has ultimately obtained certain frequencies that should allow it to start its broadcasting activities (despite having had a valid broadcasting licence since 1999). Centro Europa 7 will be the assignee of one national multiplex in the context of the digital switch-over (see the Table in recital 11 setting out digital frequency allocation in Italy – included among "other smaller broadcasters").

⁴⁵ On 15 June 2010 AGCOM adopted the national digital frequency plan (see Delibera 300/10/CONS).

the DTT platform⁴⁶. By having digital terrestrial frequencies assigned to it, a new network operator, or a smaller existing one, can build, or reinforce, its own DTT network infrastructure. A newcomer could more effectively enter the DTT platform by acquiring and managing frequencies directly (that is to say, as a network operator) than by acquiring transmission capacity from the vertically integrated incumbent operators. Also, by obtaining and managing the DTT frequencies directly, smaller existing broadcasters would have a chance to expand their DTT network infrastructure, enhance their digital transmission capacity and enlarge their territorial reach, thereby increasing their chances of competing more effectively with the incumbents. To conclude, participation in the upcoming tender by newcomers and smaller operators should allow them to operate the frequencies effectively and to provide access to the infrastructure and transmission capacity to third party content providers, in competition with the existing vertically integrated incumbent operators.

- (58) The importance of the participation in the upcoming tender by newcomers and smaller operators is also apparent if the trading ban, which is currently defined by the draft tendering rules (see recital 14), is taken into consideration. In fact, as the draft tendering rules provide that any secondary trading of the frequencies put up for tender can occur only between the assignees of those frequencies (that is to say, Group A operators and, under certain circumstances, Group B operators), any operator who does not participate in the tender will not be able to acquire such frequencies through secondary trading, thus being *de facto* banned from effectively entering the DTT platform as a network operator until (most likely) 2018.
- (59) Consequently, if Sky Italia were to be excluded, under the Commitments, from the current tender, it would not be able, under the terms of the current draft tendering rules, to acquire the DTT frequencies which are subject to the tender until (at least) 2018. This would mean that the prohibition on Sky Italia from effectively operating on the DTT platform⁴⁷ would be *de facto* extended to 2018. This *de facto* extension by seven years of the Commitments would appear to constitute a disproportionate burden on that company which is not justified by the rationale of the Commitments or by the current situation on the Italian pay-TV market.
- (60) All the above market circumstances, and in particular the exceptional nature of the upcoming tender, which is the first and probably the last opportunity to enter the DTT platform in a planned manner, under pre-defined rules, must therefore be fully taken into account when assessing Newscorp's request and the concerns expressed during the market investigation, in particular the concern that, if it were to be assigned one mux as a result of the upcoming tender, Sky Italia would deprive competitors and smaller operators of frequencies which would otherwise be available to them (see recitals 41 and following).

⁴⁶ Some respondents to the market investigation have indicated the possibility for an operator to acquire frequencies on the market (secondary trading); this is indeed a possibility, but it remains to be seen what operators, and under which conditions, would be realistically willing to sell their frequencies.

⁴⁷ [...]*

(b) Analysis of Newscorp's request in the light of the concerns raised during the market investigation

(61) The market investigation has revealed the following main competitive concerns: (i) the risk of foreclosure with regard to access to premium content; (ii) the risk of "occupation" of frequencies by Sky Italia; (iii) the significant market power of Sky Italia on Pay TV. The Commission has carefully analysed these concerns.

(i) Access to premium content

(62) As regards the risk of foreclosure with regard to access to premium content, Newscorp's request for modification of the Commitments does not have an impact on the provisions of the Commitments relating to Sky Italia's purchases of premium content. The remaining Commitments (regarding access to content and to Sky Italia's platform/decoder) will remain in place until the end of 2011. In particular, Sky Italia will still be prevented from subscribing exclusive contracts for premium content to be broadcasted on means of transmission other than DTH transmission.

(63) It follows that Sky Italia will not have any exclusive rights in relation to premium content to be broadcast on DTT. As a consequence of the Decision and the Commitments which were made binding in 2003, competitors on DTT will not be foreclosed from having access to premium content and will therefore be able to develop their Pay TV offer.

(ii) Access to DTT frequencies

(64) The main impact of any modification of the Commitments following Newscorp's request may be considered in the field of infrastructure for terrestrial television broadcasting.

(65) Clause 9.1 of the Commitments states that Newscorp committed, in relation to DTT, not to operate in Italy as (i) a Network Operator; or (ii) a Retail Pay-TV Service Operator; and not to apply for any necessary authorisation to do so. That commitment is to expire on 31 December 2011, like the Commitments in general.

(66) The main commitment for freeing capacity and allowing new entry was the divestiture of Newscorp's terrestrial broadcasting activities to a company willing to include pay TV broadcasting in its business plan.⁴⁸ Clause 9.1 was a complement to the divestiture commitment⁴⁹ and its rationale was to (i) restrict the combined entity to broadcasting Pay TV only via the DTH platform and (ii) free up capacity on other platforms so as to permit new entry in the Italian market for Pay TV services. By not even allowing Newscorp to operate a DTT network for FTA broadcasting, the commitment was, as a secondary element, intended to eliminate the risk that, by acting as a network operator in relation to non-Pay TV channels, Sky Italia could block entry by taking up the capacity itself.

(67) As regards the argument that the duration of the Commitments was determined on the basis of the expectation that the switch off would take place in 2006, there are no grounds in the Decision to support that interpretation. This is confirmed by the fact that

⁴⁸ See recital 254 of the Decision.

⁴⁹ Recital 255 of the Decision.

there is no reference to the date of the switch off with regard to the prohibition on Sky Italia from operating on the DTT platform⁵⁰. Moreover, while at recital 35 the Decision refers to the Italian Government's plans for the introduction of DTT towards the end of 2006, it also acknowledges that "the latest market forecasts indicate that the switch-off of analogue TV in Italy will take place at an even later stage". Therefore, the Decision already considered that the final switch-off date would have been postponed, but this cannot be interpreted as implying that the prohibition on Sky Italia from operating on the DTT platform should apply indefinitely.

- (68) As regards the main concern expressed in relation to the risk of "occupation" of frequencies by Sky Italia, that is the fear that Sky Italia's significant market power on Pay TV, and particularly on DTH, is strengthened by its entrance on DTT, the Commission has carefully considered the arguments that have been put forward during the market investigation and, in order to assuage the concerns expressed, it has requested Newscorp to submit a new commitment whereby Sky Italia would bid only for one multiplex in the upcoming tender⁵¹ (see recitals 71 and following).

(iii) Use of the frequencies

- (69) Respondents to the market investigation also expressed concerns that Sky Italia will switch to pay-TV as soon as the Commitment expires and be able to leverage its market strength on pay-TV market on DTH to have access to premium contents for DTT as well. Therefore, according to such respondents, by acquiring DTT frequencies ahead of the expiry of the Commitments there would be a risk that Sky Italia would be able to prepare for the broadcasting of pay TV via DTT immediately after the expiry of the Commitments whereas, under the Commitments, it would generally only be able to start the acquisition of frequencies and the preparation of being a network operator after their expiry.
- (70) The Commission has, however, carefully considered those arguments and, in order to assuage the concerns expressed, it has requested Newscorp to submit a new commitment whereby Sky Italia would use the mux acquired, if acquired in the upcoming tender, to operate FTA channels for a period of five years (see recital 71 and following).

(c) The New Commitment

- (71) In order to address the concerns stemming from the market investigation, on 6 July 2010, in response to the Commission's request, Newscorp and Sky Italia formally committed to:

- (a) bid only for one mux in the upcoming tender; and

⁵⁰ The text of the Commitments only refers to the switch off when determining the characteristics of the suitable purchaser of the divested business in DTT. According to the Commitments, such purchaser should have included in its business plan pay-TV broadcasting of one or more channels after the switchover, which would have ensured that competitive constraints vis-à-vis the combined platform would have also emerged from the DTT. That condition does not, however, indicate that it was the Commission's intention to prevent Sky Italia from entering the DTT platform for five years after the switch off, as claimed by one of the respondents.

⁵¹ However, the same concerns could also apply to RAI and Mediaset who, despite their strong presence on the DTT platform, are still allowed to bid for one mux each, subject to certain asymmetric measures.

- (b) use the mux acquired, if acquired and in so far as it remains under the control of Newscorp and Sky Italia in the upcoming tender, to operate FTA channels for a period of five years following the adoption of this Decision (together, the "New Commitment").

(72) [...]*

(d) Assessment of the situation on the basis of the New Commitment

- (73) The Commission considers that the commitment whereby Sky Italia would operate FTA services exclusively for at least five years following the adoption of this Decision addresses the concern that, if Sky Italia were to be allowed to participate in the upcoming tender, Sky Italia would be able to prepare to start broadcasting pay-TV content before the expiry of the Commitments, as originally foreseen. Consequently, the Commission considers that the acquisition of one mux only in the upcoming tender, if Sky Italia were successful, for the transmission of FTA content for a relatively long period of time would not strengthen or have any impact on Sky Italia's position on the Italian pay-TV market.
- (74) Furthermore, even after the expiration of the New Commitment, Sky Italia will not be able to transmit Pay TV content only, as the relevant rules under Italian law applicable to the muxes that will be put out to tender provide that a certain amount of the available transmission capacity should be reserved to FTA broadcasting (that is to say, more precisely, that a "fair number" of national and local TV programmes should be FTA). Therefore, if Sky Italia obtained one mux in the tender, under relevant rules under Italian law applicable to the tendered muxes it will not be allowed to dedicate the entire transmission capacity of that one mux to broadcast Pay TV content only.
- (75) Moreover, as noted in recitals 38 and 40, ICA and AGCOM consider that the broadcasting of FTA content by Sky Italia on the DTT platform would have positive effects on competition in the FTA market. A similar positive opinion is largely shared by the Italian consumers' associations, who take the view that Sky Italia is a credible new player beyond the duopolists RAI and Mediaset and that its entry into DTT, if done on a stable basis and for a relatively long period of time, would generally benefit the overall Italian broadcasting market.
- (76) In addition, the Commission considers that Newscorp's commitment that Sky Italia would bid for only one mux addresses the concern that Sky Italia would substantially affect the frequencies market. Given the ongoing switch-over process whereby the allocation of the bulk of available DTT frequencies (16 out of 21 DVB-T muxes) has already been planned (see the Table in recital 11 setting out digital frequency allocation in Italy) and as the tendering rules are designed to be objective, transparent and non-discriminatory, all bidders that meet the criteria established by the Italian rules will be able to participate in the bidding contest. Since Sky Italia's competitors (big or small, existing or newcomers) are not precluded from bidding for at least some of the new DTT frequencies that have emerged in Italy, and taking into account the specific market circumstances, there are no reasonable grounds to believe that, if Sky Italia were to be allowed to bid for only one DTT mux and subsequently operated such a mux, if assigned to it as a result of the tender, through its own digital network infrastructure, it could foreclose access to DTT infrastructures/frequency market.

- (77) More generally, the muxes forming the subject of the tender procedure constitute additional frequencies, stemming from the "digital dividend" as described in recital 10. Therefore, by participating in the tender, Newscorp will not be able to occupy any existing frequencies and capacities of current or potential competitors. In any event, the same foreclosure argument would also apply to the two incumbents, RAI and Mediset who, despite having a very strong presence on the DTT infrastructure, are still allowed under the tendering rules to bid for one mux each, thus having the possibility to enhance and reinforce further their presence on the DTT platform⁵².
- (78) On the basis of the elements set forth in this Decision, it can be concluded that the modification of Clause 9.1 of the Commitments is justified in the exceptional circumstances of this case, considering the changed market circumstances deriving in particular from the significant development and growth of DTT in Italy as well the fact that participation in the upcoming tender represents a unique opportunity for any new entrant operator, or for any operator who has a negligible presence on DTT, to effectively enter the DTT platform, and the last opportunity for such operators to do so in a planned manner, on the basis of pre-defined rules, for many years to come. This consideration is reinforced by the fact that the DTT platform is already the first platform for digital TV consumption in Italy and will very likely remain the leading platform for many years to come, especially after the analogue switch off.
- (79) In the light, in particular, of the fact that there are a number of alternative players offering Pay-TV services in Italy, that those players use their own (and other parties') frequencies and network infrastructure to deliver their pay-TV services to the viewers on the DTT platform and that the situation in relation to the DTT infrastructure has significantly evolved since the Decision was adopted in 2003 and will further evolve following the switch-over and the tendering of the new frequencies, it is concluded that the possibility for Sky Italia to bid and operate only one DVB-T mux to provide FTA services exclusively for a relatively long period of time would not foreclose access to the Italian Pay TV market to new entrants and would not adversely affect the Pay TV market.
- (80) Furthermore, the New Commitment meets the concerns expressed regarding possible foreclosure of access to DTT frequencies, given that Sky Italia is limited to one mux only, as well as the concerns that Sky Italia could already begin preparing to use the frequencies, if acquired, for the broadcasting of pay-TV, given that the mux in question will be used for FTA broadcasting only and for a relatively long period of time. In any event, even if Sky Italia were assigned one mux as a result of the tender, the perceived risk of foreclosure would be minimal as 16 DTT frequencies have already been planned for assignment to existing operators (see the Table in recital 11 setting out digital frequency allocation in Italy) and, out of the remaining tendered frequencies which form part of the "digital dividend", 4 muxes (that is to say, 3 DVB-T and 1 DVB-H) will still be available to newcomers and smaller operators for assignment through the tender (and incumbents could also participate in the tender for some of such frequencies).
- (81) Finally, it is concluded that consumer welfare has been duly taken into account whereby the Commission considered that cultural diversity is not harmed.

⁵² See Delibera 181/09/CONS.

5. CONCLUSION

- (82) In the light of the considerations set forth in this Decision, in particular the changed market circumstances and the fact that the possibility for Sky Italia to operate one DTT mux would not affect the Pay TV market, which was the focus of the Commitments, it is concluded that the criteria of Clause 14 of the Commitments are met.
- (83) Moreover, the New Commitment is sufficient to remove the concerns raised during the market investigation, including the concerns expressed as regards consumer welfare.
- (84) Accordingly, subject to full compliance with the New Commitment presented by Newscorp and Sky Italia to the Commission on 6 July 2010 and described in recitals 71 and following of this Decision, it is appropriate to modify Clause 9.1 of the Commitments attached to the Decision insofar as it would prevent Sky Italia from participating in the upcoming tender, and if successful, from operating as a network operator in Italy on the DTT platform and from applying for any authorisation to do so. That modification is limited to the possibility for Sky Italia (i) to apply for an authorisation from the competent Italian authorities for the award of one DTT mux and (ii) to operate such infrastructure for the broadcasting of exclusively FTA content for a period of five years following the adoption of this Decision.
- (85) The text of the New Commitment is attached to this Decision and imposes obligations upon Newscorp.
- (86) It should be recalled that all the remaining conditions and obligations contained in the Commitments continue to apply until 31 December 2011, in accordance with the Decision,

HAS ADOPTED THIS DECISION:

Article 1

The part of Clause 9.1 of the Commitments attached to the Commission's decision of 2 April 2003, case no COMP/M.2876, which prevents Newscorp from operating as a network operator in Italy on the DTT platform and from applying for any authorisation to do so is modified in order to allow Sky Italia to apply for an authorisation with the competent Italian authorities for the award of one DTT mux in the upcoming tender procedure and to operate such infrastructure for the broadcasting of free-to-air content only for a period of five years following the adoption of the present decision, as detailed in the New Commitment presented by Newscorp to the Commission on 6 July 2010.

Article 2

Article 1 is subject to full compliance by Newscorp and Sky Italia with the obligations contained in the New Commitment attached to this Decision.

Article 3

This Decision is addressed to:

News Corporation European Television
Via Monte Penice 7
20138 - Milano
Italy

Done at Brussels, 20.7.2010

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission

ANNEX I

Overview of content (programmes/channels and services) currently offered by the Italian broadcasters at national level in both their analogue and digital (DVB-T) networks⁵³:

NATIONAL MULTIPLEXES	CHANNELS RECEIVABLE ALSO IN ANALOGUE TERRESTRIAL	NEW TERRESTRIAL CHANNELS RECEIVABLE IN DIGITAL TERRESTRIAL	PAY PER VIEW CHANNELS RECEIVABLE IN DIGITAL TERRESTRIAL
D-Free	Mediashopping		Disney Channel Joi, Mya, Steel Joi + 1, Mya + 1, Steel + 1
Mbone	LA7 Rete7 (Piemonte) Telequattro (Friuli) Primo Canale (Liguria)		Bouquet Dahlia TV Dahlia Xtreme* Dahlia Eros* Dahlia Calcio*
TIMB 1	La7 MTV Italia	Qoob Mediashopping Sportitalia* Sportitalia24* K2* Ted*	
Mediaset 1			Hiro Cartoon Network Playhouse Disney Disney Channel Studio Universal Offerta Mediaset Premium Calcio fra cui Premium Calcio (Premium Calcio 24/diretta calcio da 1 a 6 eventi speciali) Premium Calcio 1
Mediaset 2	Canale 5 Rete 4 Italia 1	Boing Iris Class News* Coming Soon* BBC World News*	
RAI – Mux A	RaiUno RaiDue RaiTre	Rai 4	
RAI – Mux B		RaiNews24 Rai Gulp RaiSportpiù RaiStoria SAT2000 Rai Sat YoYo Rai Sat Extra Rai Scuola Rai Sat Cinema TV 2000	
ReteA	DeejayTV	RepubblicaTV Poker Italia 24* Cielo* France24* Second TV*	

* Independent content providers broadcasted on digital terrestrial through the infrastructures of the network operators.
Source: AGCOM elaborations on the basis of business data

⁵³ Source: AGCOM Annual Report of 2010.

COMMITMENT TO THE EUROPEAN COMMISSION

A. DEFINITIONS

Capitalized terms shall have the same meaning as in the undertakings offered to the European Commission ("Commission") in case No. COMP/M.2786 - *Newscorp/Telepiù* (the "Undertakings").

B. BID FOR A SINGLE MUX IN THE TENDER

The Committed Group commits to bid exclusively for one Multiplex ("Mux") in the upcoming tender for the assignment of Digital Terrestrial Television frequencies in Italy (the "Tender").

C. USE OF DTT MUX ACQUIRED BEFORE DECEMBER 31, 2011

The Committed Group commits to using the Mux acquired, if acquired and in so far as it remains under the control of the Committed Group, in the Tender to operate free-to-air ("FTA") channels for a period of 5 years following the adoption of the Commission decision granting the right to participate in the Tender.

D. THE REVIEW CLAUSE

The Commission may, where appropriate, in response to a request from the Committed Group showing good cause:

- i. Reduce the time period foreseen in the Commitment, or
- ii. Waive, modify or substitute this Commitment.

Where the Committed Group seeks a reduction of a time period, it shall submit a request to the Commission no later than two weeks before the requested expiration of that period.

E. ENTRY INTO FORCE

The Commitment shall take effect upon the date of adoption of the Decision granting leave to participate in the Tender.

Milan, July 6, 2010,

Duly authorized for and on behalf of News Corp


Tom Mockridge

CEO News Corporation European Television