EN

Case No COMP/M.6866 - TIME WARNER/ CME

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.6866 – TIME WARNER/ CME
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1]

1. On 8 May 2013, the European Commission received a notification of a proposed transaction pursuant to Article 4 of the Merger Regulation by which Time Warner Inc. ("Time Warner", the United States), acquires within the meaning of Article 3(1)(b) of the Merger Regulation control over Central European Media Enterprises Ltd. ("CME", a company incorporated in Bermuda and active mainly in Central Europe).

2. Time Warner is designated hereinafter as the "Notifying Party". Time Warner and CME together are designated hereinafter as the "Parties".

I. THE PARTIES

3. **Time Warner** is a United States-based global media and entertainment company with operations in film, television and magazine publishing. Through a network of subsidiary companies, Time Warner is active in Central and Eastern Europe, including in Bulgaria, the Czech Republic, Hungary, Romania, the Slovak Republic and Slovenia, in: the following sectors: (i) film and television entertainment (production and distribution of films, television programming and video games; distribution of home entertainment products and licensing rights to films, television programming and characters); (ii) TV channels, sold on a wholesale basis and offering programming to cable, satellite, telecommunications and other distributors. Certain TV channels sell advertising (basic channels), while others are

1 OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

advertising-free and supported by consumer subscription revenue (premium channels); and (iii) magazine publishing (production and distribution of magazines to subscribers).

4. **CME** is active in television broadcasting and other media sectors, primarily in Bulgaria, Czech Republic, Croatia, Romania, Slovak Republic, Slovenia and to a lesser extent Hungary and Moldova. For the purpose of the present decision, Bulgaria, Czech Republic, Hungary, Romania, Slovak Republic and Slovenia are referred to as "the CME countries", whereas Croatia and Moldova will be referred to as "the non EU CME countries". CME's activities include, *inter alia*: (i) the operation of "linear" TV channels broadcast on a free-to-air ("FTA") or Pay TV basis[2] that offer a series of programs at scheduled times; (ii) the production of audio-visual content, mostly for broadcast on CME's own TV channels; (iii) the retail distribution of audio-visual programming, created by CME or third parties, for viewing at the time of the viewer's choosing (video on demand ("VOD")); (iv) the sale of advertising on CME's channels and websites; (v) the distribution of films for theatrical release; and (vi) the distribution of home entertainment products such as DVDs and Blu-ray Discs.

II. THE OPERATION

5. The proposed transaction consists of the acquisition by Time Warner of *de facto* sole control over CME.

6. […][3], Time Warner will control 49.9% of the votes at CME shareholder meetings. Based on the attendance rate of shareholders who are not associated with Mr Lauder or Time Warner at past CME shareholder meetings (always below […]% of all shares in CME over the last 3 years) and on CME's current shareholding structure, Time Warner is likely to achieve a stable majority at CME's shareholder meetings[4] and therefore, based on CME's corporate governance, to appoint the members of the CME Board of Directors, as well as the management of CME.

7. The proposed transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. EU DIMENSION

8. The undertakings concerned had a combined aggregate worldwide turnover of more than EUR 5 000 million[5] in 2012 (Time Warner: EUR 22 400 million; CME: EUR 601 million). They both had a combined aggregate EU-wide turnover of more than EUR 250 million in 2012 (Time Warner: EUR […] million; CME: EUR […] million) and did not achieve more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

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2 As explained in more detail in paragraphs 40 and 48 below, Pay TV channels can be further divided into basic and premium Pay TV channels depending on their business model and the content they broadcast.

3 […].

4 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95 of 16.4.2008, page 1, paragraph 59.

5 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.04.2008, p. 1).

9. The notified concentration therefore has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

IV. COMPETITIVE ASSESSMENT

10. The notified concentration gives rise to certain horizontal overlaps and vertical relationships between the (1) TV-related activities; (2) cinema related activities; and (3) home entertainment related activities of the Parties in the CME countries.

11. In assessing the impact of the notified concentration on competition in the above-mentioned sectors, the Commission also pays attention to aspects of cultural diversity, given that a reduction of choice may raise concerns with respect to cultural diversity in these sectors.[6]

1. TV-related activities

12. In light of the Commission's decisional practice,[7] it is possible to distinguish between three levels in the value chain of the TV sector namely the: (1) licensing of audio-visual TV content; (2) wholesale supply of TV channels; and (3) retail supply of TV services to end users. As part of its analysis of the Parties' TV-related activities, the Commission will also analyse in this section the impact of the notified concentration on the sale of advertising on TV channels.

A. Market definition

A.1. Licensing of audio-visual TV content

13. Audio-visual TV content comprises entertainment products (films, sports, TV programmes, etc.) that can be broadcast via TV.[8] The broadcasting rights belong to the creators of the content. These rights holders (which constitute the supply side of this market) license them either to: (1) broadcasters which then incorporate them into linear TV channels (where programmes are broadcast at scheduled times); or (2) content platform operators, which retail the content to end users on a non-linear, that is pay-per-view ("PPV") or video on demand ("VOD") basis (which, together, comprise the demand side of this market).

14. Time Warner is active (as a licensor) in the licensing of broadcasting rights to TV channel broadcasters and to content platform operators in the CME countries. It does so principally through its Warner Bros. division. In each of the CME countries, Warner Bros. International Television Distribution Inc. ("WBITD") licenses television broadcast rights to channel broadcasters for films, television series and other television

[6] Article 167 (4) of the TFEU requires the Union to take cultural diversity aspects into account in its actions under the other provisions of the Treaties, including Union competition rules. Moreover, the UNESCO Convention on the protection and the promotion of the diversity of cultural expressions to which the Union is a Party sets out a comprehensive set of guiding principles relating to the diversity of cultural expressions.

[7] Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB; Commission Decision of 15 April 2013 in Case M.6880 Liberty Global/Virgin Media.

[8] Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 28.

programmes that Warner Bros. produces, co-produces, or for which it has distribution rights. WBITD also licenses certain VOD rights to such programmes to content platform operators for their various VOD platforms. Time Warner’s television divisions, HBO and Turner, also license TV content in the CME countries.

15. CME creates and licences content primarily "in-house" to CME's downstream broadcasting operations in the CME countries. CME licenses content to third party broadcasters in the CME countries in limited circumstances, such as where CME acquires rights to a film or programme, but does not ultimately find a place for it in the schedules of any CME channel.

16. CME is active (as a licensee) in the acquisition of broadcasting rights in all of the CME countries, apart from Hungary (where CME does not have any broadcasting activities). Time Warner also acquires content for its HBO and Turner channels.

A.1.1. Product market

View of the Notifying Party

17. According to the Notifying Party, audio-visual content comprises all entertainment products that can be broadcast via TV. It considers that, generally, many different forms of audio-visual content and distribution methods compete for consumers' attention and spending.

18. Moreover, in the view of the Notifying Party, the licensing of broadcasting rights for Pay TV and the licensing of broadcasting rights for FTA TV do not constitute separate product markets in the CME countries as it considers for the reasons outlined in paragraphs 36 to 39 below that FTA TV and Pay TV do not constitute separate product markets either.

19. The Notifying Party, however, submits that the Commission could ultimately leave the market definition open in this case, because the notified concentration does not pose any competitive concerns, regardless of the precise market definition adopted.

Commission's assessment

20. In previous cases, the Commission first of all distinguished between the licensing of broadcasting rights for Pay TV and FTA audio-visual TV content.[9]

21. The Commission also previously sub-divided the market for the licensing of broadcasting rights for individual audio-visual TV content into TV content for linear (that is to say TV channels) and non-linear (for instance VOD) broadcast.[10] In other previous cases, the Commission considered a more detailed breakdown based on the different exhibition windows, namely: (1) VOD; (2) PPV; (3) first Pay TV window; (4) second Pay TV window (where applicable); and (5) FTA TV.[11] However, this was ultimately left open.

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9 Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 35.

10 Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 24-36.

11 Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 18.

22. As regards content type, the Commission previously defined different product markets for: (1) exclusive rights to premium films, (2) exclusive rights to football events that take place every year where national teams participate (for example national league, national cup, UEFA Cup and UEFA Champions League), and (3) exclusive rights to other sport events.[12] In *HBO/Ziggo/HBO Nederland*, the Commission considered the possible existence of separate product markets for the licensing of broadcasting rights for: (1) films, (2) sport events and (3) other TV content.[13]

23. In the present case, a slight majority of the responding film studios which expressed an opinion on the question whether a distinction should be drawn between the licensing of broadcasting rights for Pay and for FTA audio-visual TV content, supported the Commission's past finding that a distinction should indeed be drawn, mainly in light of the fact that FTA and Pay TV rights are sold separately under different terms and conditions.[14] Furthermore, some of these respondents explained that the business model of FTA and Pay TV operators is different, which may have an impact on their acquisition strategy.

24. A large majority of respondents to the market investigation also supported the Commission's past finding that the market for the licensing of broadcasting rights for audio-visual TV content should be sub-divided into TV content for linear and non-linear broadcast.[15]

25. Moreover, a slight majority of the respondents to the market investigation supported drawing a distinction between licensing of broadcasting rights for individual audio-visual TV content for each of (1) films, (2) sport events and (3) other TV content, even though several suppliers of audio-visual content noted that there can be competition between these different types of content.[16]

26. Finally, the results of the market investigation were mixed as to the question whether a distinction should be drawn between premium and non-premium audio-visual content. While a number of respondents indicated that a distinction should be drawn because premium sport, movies and TV series content is distributed in certain CME countries at a significantly higher price than non-premium content, others explained that such a distinction is not always clear-cut, given the subjectivity of what broadcasters and viewers may consider as premium content.[17]

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12 Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 55.

13 Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraphs 18-20. The same distinction was made in Commission Decision of 15 April 2013 in CaseM.6880 Liberty Global/Virgin Media, paragraph 19.

14 See replies to Commission questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 13.

15 See replies to Commission questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 14.

16 See replies to Commission questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 15.

17 See replies to Commission questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 16.

27. In any event, for the purposes of the present decision, it is not necessary to conclude on the exact product market definition, as the notified concentration does not raise any competition concerns under any alternative product market definition for the licensing of broadcasting rights for audio-visual TV content.

A.1. 2. Geographic market

View of the Notifying Party

28. The Notifying Party submits that in the CME countries broadcasting rights are generally negotiated and licensed on a national basis, as the customers are mostly different in each Member State, and language differences require differences in content. It therefore proposes to follow the Commission's practice of treating each national territory as a distinct geographic market.

Commission's assessment

29. The Commission previously considered that the market for the licensing of broadcasting rights for individual audio-visual TV content is either national in scope or potentially comprises a broader linguistically homogeneous area.[18]

30. In the present case, the market investigation indicated that in the CME countries broadcasting rights for audio-visual content are generally licensed on a national basis. While there are some exceptions, the majority of film studios and production companies indicated that they license their audio-visual content to TV channel broadcasters on a country-by-country basis.[19] Different primary languages spoken each country, as well as differing TV consumer tastes, were mentioned as factors which may prevent or hamper cross-border negotiations and /or cross-border licensing of rights to audio-visual content in the CME countries.[20]

31. In light of the above and for the purposes of the present decision, the Commission concludes that the geographic scope of markets for the licensing of broadcasting rights for audio-visual TV content is national.

A.2. Wholesale supply of TV channels

32. TV channel broadcasters acquire or produce individual audio-visual content and package it into TV channels. These TV channels are then broadcast to end users via different distribution infrastructures (for example cable, satellite, internet, mobile etc.) either on a FTA basis or on a Pay TV basis (individually or as part of so-called "channel bouquets"). Hence, the supply side of this market comprises TV channel broadcasters and its demand side comprises TV retailers, which either limit themselves to "carrying" the TV channels and make them available to end users, or also act as channel

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[18] Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 62; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 73-75; Commission Decision of 15 April 2013 in Case M.6880 Liberty Global/Virgin Media, paragraph 23.

[19] See replies to Commission questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, questions 18 and 19.

[20] See replies to Commission questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 21.

aggregators (FTA or Pay TV platforms), which also "package" TV channels and provide them to end users.

33. Both Parties are active in the wholesale supply of TV channels to TV retailers in the CME countries. Time Warner's HBO and Turner divisions incorporate their own and third party content into TV channels. Turner's channels are advertising-supported basic Pay TV channels, which are offered to viewers as part of a basic level of pay TV services, whereas HBO's channels are advertising free "premium" channels, which are available only on special subscription. HBO and Turner license their channels on a wholesale basis to cable, satellite, IPTV and other distributors.

34. CME incorporates its own produced audio-visual content and content licensed from third parties into its TV channels. In addition to FTA broadcasting direct to end users, CME generally supplies TV channels, including those available on FTA, on a wholesale basis to cable, satellite, IPTV and other platform distributors. CME's channels are mainly supported by advertising revenues rather than subscription fees.

A.2.1. Product market

View of the Notifying Party

35. The Notifying Party considers that the distinction between FTA and Pay TV channels is generally not an appropriate distinction in relation to the CME countries. The Notifying Party justifies this view with the following arguments.

36. First, Pay TV channels are already involved in the advertising side of the television market in the CME countries, with their advertising revenue share increasing consistently over recent years at the expense of the FTA channels. CME’s original Pay TV channels were historically dependent on advertising revenues before CME generated any carriage fees from the distribution of such channels and all of CME’s current Pay TV channels still remain advertising supported. In the CME countries, FTA and Pay TV business models are therefore similarly financed to a significant degree which represents a departure from the classic FTA and Pay TV business models.

37. Second, there is significant overlap in terms of type of content, and therefore competition for the same content, among FTA and Pay TV channels. The similarity in content over both distribution platforms reflects the negotiating processes and strategies between content providers and media providers.

38. Third, due to the dynamics and economics of the CME markets, there is little penetration of premium content (or special "pay-per-view" events in the program schedule of channels), which is a significant "driver" of subscription Pay TV revenues in other markets.

39. Fourth, as the technical reach of the cable and Direct to Home ("DTH", also known as satellite distribution) operators continues to expand in the CME countries and investment costs associated with the choice of a given distribution channel have decreased over recent years, viewers have increased choice among distribution channels and there are no material disincentives to switching from one to the other.

40. The Notifying Party explains that Pay TV channels may generally be described as being either "premium" or "basic" depending on the business model on which they are based. Basic channels are supported by advertising and offered as part of a basic level of Pay TV services. Premium channels are not supported by advertising, but receive their

revenues through subscriptions, and are offered to viewers for a separate charge on top of their basic Pay TV subscription (that is, an extra fee is levied specifically for that channel). Using this definition, all of CME's and Turner’s channels can be considered basic, while all of HBO’s channels are premium channels. In any event, CME is not active in the premium channel segment and therefore there will not be any overlap between the Parties' activities in that segment.

41. Moreover, the Notifying Party considers that it would not be appropriate in the current case to segment the market by themes (such as TV channels for films, sports, documentaries, youth, news etc.), because TV channels in the CME countries would generally show a variety of content related to different or overlapping themes and compete for viewers' attention across all genres and themes.

42. Against this background, the Notifying Party submits that, in any case, the product market definition can be left open in the present case, as the notified concentration would not lead to competitive concerns under any possible market delineation.

Commission's assessment

43. In previous decisions, the Commission defined a wholesale market for the supply of TV channels, in which channel broadcasters and retail TV distributors negotiate the terms and conditions for the distribution of TV channels to end users.[21]

44. Within this market, the Commission further defined separate product markets for FTA channels and for Pay TV channels. This distinction was justified mainly based on differences between the financial models of these channels: the FTA channels are chiefly financed by advertising revenues (public channels may also be financed by public funds) whereas Pay TV channels are mainly financed by the fees paid by Pay TV distributors and end users.[22]

45. Within the market for the wholesale supply of Pay TV channels, the Commission also previously indicated that there could be a differentiation between "basic" and "premium" Pay TV channels (for example premium sports and movies channels). However, it was left open whether these two categories of Pay TV channels constitute separate product markets.[23]

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[21] Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 76 and 85; Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 22.

[22] Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 37-40; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 80, 83 and 85; Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 24; Commission Decision of 15 April 2013 in CaseM.6880 Liberty Global/Virgin Media, paragraphs 33 and 37.

[23] Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 76; Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 41-42; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 85; Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraphs 24 and 27; Commission Decision of 15 April 2013 in CaseM.6880 Liberty Global/Virgin Media, paragraphs 34 and 37.

46. In the past, the Commission also further examined, but ultimately left open, whether the market should be further segmented by genre or thematic content (such as films, sports, news, youth channels, etc.).[24]

47. In the present case, a majority of the TV channel broadcasters and retail distributors, which replied to the market investigation, indicated that FTA and Pay TV channels are not substitutable, in particular due to the different business models of FTA channels and Pay TV channels (FTA channels are financed by advertising revenue or State funds, Pay TV channels generate revenue from fees of end users, who are willing to pay for special premium and thematic content), and their different level of reach towards viewers. A number of respondents, however, pointed to an increasingly blurred delineation between FTA and Pay TV channels' funding models.[25]

48. A majority of the licensors of TV content and TV channel broadcasters that replied to the market investigation also pointed towards a distinction between basic Pay TV channels and premium Pay TV channels, due to their different content and costs.[26]

49. Furthermore, a majority of the TV channel broadcasters and retail distributors that replied to the market investigation indicated a possible distinction between general interest Pay TV channels and thematic Pay TV channels. While the former are more generic in nature and address different subjects and audiences, the latter are focussed on more specific interests of viewers (for example history, cooking, science, etc.). However, a minority of respondents also stated that there may be a certain degree of substitutability between general interest and thematic Pay TV channels depending on the channel and the viewers.[27]

50. Among thematic channels, the majority of the TV retailers and TV channel broadcasters that responded to the market investigation suggested that it may be appropriate to distinguish thematic Pay TV channels according to their genre, for example film, sport, science, history, documentaries, news, etc. According to them, a thematic Pay TV channel is only substitutable with a thematic Pay TV channel of the same genre.[28]

51. In light of the above and for the purposes of the present decision, the Commission leaves open the question whether the wholesale supply of FTA and Pay TV channels constitute separate product markets, as the notified concentration does not raise competition concerns under any possible market delineation. The question whether, within the market for the wholesale supply of Pay TV channels, there are even narrower product

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[24] Commission Decision of 2 April 2003 in Case M.2876 Newscorp/Telepiù, paragraph 76; Commission Decision of 18 July 2007 in Case M.4504 SFR/Télé 2 France, paragraphs 41-42; Commission Decision of 26 August 2008 in Case M.5121 News Corp/Premiere, paragraph 35; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 81; Commission Decision of 15 April 2013 in Case M.6880 Liberty Global/Virgin Media, paragraphs 35-37.

[25] See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, question 4 and Q3 – Retail distributors of audio visual content to viewers of 8 May 2013, question 3.

[26] See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, question 5 and Q3 – Retail distributors of audio visual content to viewers of 8 May 2013, question 4.

[27] See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, question 6 and Q3 – Retail distributors of audio visual content to viewers of 8 May 2013, question 5.

[28] See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, question 7 and Q3 – Retail distributors of audio visual content to viewers of 8 May 2013, question 6.

markets can also be left open since the notified concentration does not raise competition concerns under any alternative product market definition for the wholesale supply of Pay TV channels.

A.2.2. Geographic market

View of the Notifying Party

52. The Notifying Party submits that competition for the supply of TV channels occurs primarily on a national basis and that competitive conditions among suppliers of channels are broadly homogenous throughout a national territory. It points out that each of the relevant CME countries has its own national language.

53. The Notifying Party also explains that Pay TV operators do not tend to operate on a multi-territory basis, and as such, negotiations between the suppliers of channels and TV retailers are rarely multi-territorial. This view would be supported by a number of factors in addition to the linguistic differences across CME countries, including: (i) rights to broadcast TV channels would traditionally be obtained for the whole of a national territory; (ii) the appeal of audio-visual content would depend on national tastes, culture and preferences; (iii) advertising on channels would not be sold on a multi-territory basis; (iv) marketing, promotion and advertising of channels would tend to take account of national differences and consumer preferences and tend to be executed nationally; and (v) channels would negotiate carriage fees separately for each country.

Commission's assessment

54. In previous cases, the Commission found the market for the wholesale supply of TV channels to be either national in scope[29] or potentially to comprise a broader linguistically homogeneous area.[30]

55. In the present case, the market investigation has indicated that the agreements for the wholesale supply of TV channels are, as a general rule, negotiated on a national basis.[31] This is mainly explained by the fact that TV retailers mostly have a national footprint, and that negotiations take place, and prices are, set on a national basis. More rarely, these agreements are negotiated on a regional basis, for instance Central or Eastern Europe. Negotiations on a wider basis, for instance covering the entire European Union, appear to be rather exceptional.

56. In light of the above, the Commission considers that the market for the wholesale supply of TV channels (whether FTA or Pay TV channels) in the CME countries is currently national.

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29 Commission Decision of 21 December 2011 in Case M.6369 HBO/Ziggo/HBO Nederland, paragraph 39.

30 Commission Decision of 26 August 2008 in Case M.5121 Newscorp/Premiere, paragraph 27; Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 86-88; Commission Decision of 15 April 2013 in Case M.6880 Liberty Global/Virgin Media, paragraph 41.

31 See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, question 8 and Q3 – Retail distributors of audio visual content to viewers of 8 May 2013, question 7.

A.3. Retail supply of TV services to end users

57. While CME recently[32] launched an internet-based VOD platform called "Voyo" in the CME countries, its activities at this level of the value chain are still limited. Moreover, Time Warner is not active as a retailer of TV services to end users in any of the CME countries. As a result, there is no horizontal overlap between the activities of the Parties and this level of the TV value chain is not affected by the notified concentration. It is therefore not discussed further in this decision.

A.4. TV advertising

58. CME sells TV advertising space for its TV channels in Bulgaria, the Czech Republic, the Slovak Republic, Romania and Slovenia. Time Warner sells TV advertising space for its Turner TV channels in Bulgaria and Romania. There is no advertising on Time Warner's HBO channels.

A.4.1. Product market

View of the Notifying Party

59. The Notifying Party considers the relevant market to comprise all TV advertising, in line with a past decision where the Commission ultimately left open the issue whether the market for all TV advertising should be further segmented.[33]

Commission's assessment

60. The Commission has previously defined a separate product market for the sale of advertising space in national daily newspapers and in TV broadcasting.[34] The Commission also drew a distinction between online and offline advertising.[35]

61. These distinctions were supported by the vast majority of the customers, which responded to the market investigation (media agencies, companies buying advertising space for their products directly) and sellers (TV wholesalers) of advertising space, considering that the sale of advertising on TV is not substitutable with the sale of advertising in other forms of media.[36]

62. For the purposes of the present case, the Commission considers that the product market is the sale of advertising space on TV.

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32 Voyo was launched in December 2010 in the Czech Republic, in December 2011 in Romania and Slovenia, and in December 2012 in the Slovak Republic and Bulgaria. It offers the possibility to watch some of the CME channels for a subscription fee, and has a limited transactional VOD offer. Its 2012 turnover was EUR […].

33 Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraphs 267-268.

34 Commission Decision of 1 February 1999 in Case M.1401 Recoletos/Unedisa, paragraphs 26-28; Commission Decision of 7 July 2005 in Case M.3817 Wegener/PCM/JV, paragraphs 27-30;Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 267.

35 Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 262.

36 See replies to Commission questionnaires Q4 – Advertisers and media agencies of 8 May 2013, question 3 and Q2 – TV channel suppliers of 8 May 2013, question 9.

A.4.2. Geographic market

View of the Notifying Party

63. The Notifying Party, in line with a past Commission decision[37], considers that the relevant geographic market is national in scope.

Commission's assessment

64. The Commission concluded in the past that advertising markets were national in scope.[38]

65. Responses to the market investigation indicated that a majority of responding buyers of advertising space do not run campaigns beyond the boundaries of one CME country, partly because they are only active in one country.[39] A majority of the responding sellers of advertising space support this view.[40] Some of them, however, add that while negotiations are usually done on a national level, some larger buyers of advertising space may negotiate only one deal covering several countries.[41] In the same vein, some buyers submit that even if they ran campaigns across several countries, they are tailored (in terms of language, timing etc.) to one country.[42]

66. Also, according to a majority of respondents, the buyers and sellers of advertising space are different in each of the affected CME countries.[43] Some respondents state that the buyers are broadly the same while the sellers vary per country.[44]

67. Finally, a vast majority of respondents submits that the price of advertising space varies per country.[45]

68. For the purposes of the present case, the Commission considers the geographic market for the sale of advertising space on TV markets to be national in scope.

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37 Commission Decision of 21 December 2010 in Case M.5932 News Corp/BSkyB, paragraph 270.

38 Ibid.

39 See replies to Commission questionnaire Q4 – Advertisers and media agencies of 8 May 2013, question 7.

40 See replies to Commission questionnaire Q2 – TV channel suppliers of 8 May 2013, question 11.

41 See replies to Commission questionnaire Q2 – TV channel suppliers of 8 May 2013, question 11.

42 See replies to Commission questionnaire Q4 – Advertisers and media agencies of 8 May 2013, question 7.

43 See replies to Commission questionnaires Q4 – Advertisers and media agencies of 8 May 2013, question 8 and Q2 – TV channel suppliers of 8 May 2013, question 12.

44 See replies to Commission questionnaires Q4 – Advertisers and media agencies of 8 May 2013, question 8 and Q2 – TV channel suppliers of 8 May 2013, question 12.

45 See replies to Commission questionnaires Q4 – Advertisers and media agencies of 8 May 2013, question 9 and Q2 – TV channel suppliers of 8 May 2013, question 13.

B. Horizontal analysis

B.1. Licensing of TV content

View of the Notifying Party

69. According to the Notifying Party, the notified concentration would lead to horizontally affected markets in the licensing of TV content only in the hypothetical relevant market for the licensing of film content for FTA TV broadcast in the Czech Republic, where the Parties' combined market share would reach [10-20]% (Time Warner: [10-20]% and CME [0-5]%). However, the Notifying Party submits that, in this market, competition concerns can be excluded on the basis of the limited combined market share and the limited increment arising from the notified concentration.

70. The Notifying Party also submits that the notified concentration will not result in an increased buyer power of the merged entity vis-à-vis content owners in any of the CME countries for a number of reasons, including, in particular, the fact that Time Warner's activities on the acquisition side of the market are rather limited and essentially focused on the acquisition of broadcasting rights for the Pay TV windows, while CME's activities encompass all types of content, but essentially for the FTA window. The Notifying Party further refers to the strength of the other competitors active on the acquisition side of the relevant market, as well as to the strong bargaining power of content owners.

Commission's assessment

71. The Commission considers that, post transaction, the merged entity will hold a limited market share in the only relevant market potentially affected by the notified concentration. Moreover, the market share increment resulting from the notified concentration on such relevant market would be limited. In addition, none of the respondents to the market investigation raised concerns in relation to the notified concentration as regards the horizontal overlap between the Parties' licensing activities.[46]

72. The Commission also takes the view that, on the acquisition side of the market for the licensing of TV content (and/or its possible sub-segment), the notified concentration will not result in an increased buyer power of the merged entity vis-à-vis content owners.

73. Indeed, not only does Time Warner acquire a relatively modest amount of TV content in the CME countries, but also, and more importantly, Time Warner acquires broadcasting rights almost exclusively for films and only for the first and second Pay TV windows, while CME acquires rights for different content types, including films, but only for the FTA window.[47] Since broadcasting rights for films for the Pay TV and the FTA TV

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[46] Several TV channels raised concerns alleging that the notified concentration may lead to input foreclosure given the vertical relationship between the Parties in the licensing of audio visual content and the wholesale supply of TV channels. However, these concerns will be addressed as part of the vertical assessment in Part C of the present decision below.

[47] Broadcasting (and other) rights for films tend to be sold in separate "windows", each window being a limited period of time for which studios license the rights to distribute a film in a certain way. In the first (theatrical) window, the film is shown in cinemas. The next window is usually the home entertainment window, which typically begins four to six months after the theatrical window. The next window (the first Pay TV window) generally runs for around twelve months, beginning approximately nine months after a

windows are typically licensed separately by content owners in order to maximise revenues, the notified concentration will not result in the increase of the merged entity's buyer power with respect to these types of broadcasting rights.

74. Moreover, none of the respondents to the market investigation raised concerns of a horizontal nature relating to the possible increase of the merged entity's buyer power towards content owners resulting from the addition of Time Warner's TV channels to CME's existing portfolio of TV channels. Market participants also indicated that the fact of being, post transaction, in a position vis-à-vis content owners to bid for both Pay TV and FTA TV rights would not confer upon the merged entity any increased bargaining power vis-à-vis content owners.[48]

75. In light of the above, the Commission concludes that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the licensing of TV content (and/or other possible market segments within this market) in any of the CME countries based on horizontal effects.

B.2. Wholesale supply of TV channels

View of the Notifying Party

76. The Notifying Party submits that the notified concentration will not raise competition concerns when assessing the wholesale supply of FTA channels and Pay TV channels as separate product markets. Since Time Warner is not active in the wholesale supply of FTA TV channels, the Parties activities do not overlap on this market. As regards the wholesale supply of Pay TV channels, the Parties' combined shares on the affected markets are modest and would amount to only [10-20]% in Bulgaria, [20-30]% in Romania, and [10-20]% in Slovenia on the basis of revenues.

77. The Notifying Party further submits that the notified concentration will not raise competition concerns when assessing the overall market for the wholesale supply of all TV channels to Pay TV distributors. When measured on the basis of revenues, the Parties' combined market shares would remain below 25% in all CME countries. When measured by audience share (for Pay TV and FTA channels combined), the Parties' combined shares range between [20-30]% (in Romania) and [40-50]% (in Bulgaria) in the CME countries. The Notifying Party submits, however, that the increment is low in each of the CME countries ranging between [0-5]% in Bulgaria and [0-5]% in Romania. The Time Warner channels, when combined with the channels that CME supplies on a wholesale basis, therefore lead to only a small degree of aggregation in the market for the wholesale supply of television channels in the CME countries.

78. The Notifying Party explains that the Parties will continue to face strong competition from various rival wholesale suppliers of TV channels in each CME Territory, including

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film becomes available on home entertainment. A second (or "basic") Pay TV window may follow the first Pay TV window. This window runs slightly ahead of, and then concurrently with the FTA window. The FTA window generally starts two to four years after theatrical exhibition and may run for two to three years. At the end of the FTA window, the film is made available in the library window.

48 See replies to Commission questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 37.

(among others) in Bulgaria: Discovery Networks (estimated 2012 share [10-20]%), MTG Nova ([10-20]%) and Fox International Channels ([5-10]%); in Romania: Discovery ([10-20]%), Eurosport ([5-10]%), NBC Universal ([5-10]%), Fox International Channels ([5-10]%); in Slovenia: Fox International ([10-20]%), Discovery ([5-10]%) and IKO Media ([5-10]%).

79. Finally, the Notifying Party submits that the notified concentration does not raise competition concerns when assessing the wholesale supply of thematic Pay TV channels by genre, given the limited thematic overlap of the Parties' channels. The greatest overlap between the Parties' channels when segmented by genre is in relation to films, where the Parties face numerous competitors in each of the CME countries. The only other thematic overlaps are between the Parties' comedy channels in the Slovak Republic, and the Parties' kids/cartoon channels in Slovenia. However, their combined overall audience share is estimated to be less than [0-5]% in both instances. The Notifying Party therefore does do not consider that the notified concentration will have any effect on competition as a result of this overlap.

Commission's assessment

80. In assessing the competitive effects of the notified concentration on the wholesale supply of TV channels, the Commission has, consistent with its decisional practice firstly assessed the Parties’ position on separate product market for the wholesale supply of (i) FTA TV channels and (ii) Pay TV channels.

81. As regards <u>FTA TV channels</u>, the Commission notes that, while CME's' audience share of FTA TV channels in the CME countries is significant ([60-70]% in Bulgaria, [30-40]% in Czech Republic, [30-40]% in Romania, [40-50]% in Slovak Republic, and [50-60]% in Slovenia), Time Warner does not broadcast any FTA channel in these territories. Therefore the notified concentration does not give rise to any horizontal overlap.

82. As regards <u>Pay TV channels</u>, when considering the wholesale supply of Pay TV channels in the CME countries, looking at the Parties’ market shares in terms of revenues, the notified concentration would only give rise to affected markets in Bulgaria (combined share [10-20]%; Time Warner [5-10]% and CME [5-10]%), Romania ([20-30]%; Time Warner [10-20]% and CME [0-5]%) and Slovenia ([10-20]%; Time Warner [10-20]% and CME [5-10]%). On the basis of audience, the notified concentration would only give rise to an affected market in Bulgaria (combined share [10-20]%; Time Warner [5-10]% and CME [5-10]%).

83. Second, as regards the possible market segments for the wholesale supply of <u>basic and premium Pay TV channels</u>, the Commission considers that the notified concentration will not give rise to a horizontal overlap in relation to premium Pay TV channels, as CME does not currently broadcast any such channels. However, the notified concentration will give rise to a horizontal overlap in relation to the wholesale supply of basic Pay TV channels.as Time Warner's Turner channels and several CME channels form part of this segment. However, the Parties' combined market shares based on revenues will only lead to an affected market in Romania, where the merged entity's market share will amount to [10-20]%. In Romania, the merged entity's basic Pay TV channels will continue to face competition by over 140 other basic Pay TV channels.

84. Third, the Commission also assessed the impact of the notified concentration on a hypothetical market for the wholesale of all TV channels (whether FTA or Pay TV) to TV retailers in the CME countries.

85. The Parties' 2012 combined market share measured by audience on this hypothetical relevant market in the CME countries is [40-50]% in Bulgaria, [30-40]% in the Czech Republic, [20-30]% in Romania, [30-40]% in the Slovak Republic and [30-40]% in Slovenia. However, the increment provided by Time Warner's TV channels post transaction is limited ([0-5]% only in Romania, where the combined audience share of the Parties is the lowest ([20-30]%) and less than [0-5]% in the other affected markets). In terms of revenues, the notified concentration would only give rise to affected markets in Bulgaria (combined share [10-20]%; Time Warner [5-10]% and CME [5-10]%), Romania ([20-30]%; Time Warner [10-20]% and CME [0-5]%) and Slovenia ([10-20]%; Time Warner [10-20]% and CME [0-5]%).

86. Despite the Parties' relatively limited combined market share in the CME countries, particularly in terms of revenues, some respondents to the market investigation raised the concern that the notified concentration will combine the largest FTA TV channel broadcaster in the CME countries (CME) with an important supplier of Pay TV channels in these countries (Time Warner). These respondents expressed the concern that the notified concentration may lead to an increase of the merged entity's market power vis-à-vis TV retailers as a result of its increased channel portfolio. This, in turn, would allow the merged entity to be in a position to extract better terms from TV retailers (including increased license fees) and/or "bundle" new/less popular channels with popular/"must-have" channels, thereby increasing the effective price of the latter.[49] The Commission also learned through the market investigation that the Bulgarian Competition Authority is currently investigating certain bundling allegations on the part of CME.

87. The Commission considers the complaints raised by market participants concerning the impact of the notified concentration on the market for the wholesale supply of TV channels in the CME countries to be unfounded for a number of reasons.

88. First, as noted, the merged entity's post transaction market share in terms of revenues (which appears to be the most relevant proxy for the merged entity's post transaction market power in terms of ability to extract revenues from TV retailers) would remain rather limited.

89. For completeness, following submissions by certain market participants particularly in relation to Bulgaria, according to which CME would have significantly increased the license fees to TV retailers for its channels at the beginning of 2013, which, in turn, would have resulted in an increase in CME's market share in terms of revenues for the year 2013, the Commission asked the Parties, as well as certain third parties, to provide (forecast) market shares also for the year 2013. Based on the Parties' data (which is not contradicted by information provided by third parties), while it is true that CME's share in 2013 will likely be higher than in 2012, this share still remains below 25%.

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[49] See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, question 18 and 24, and Q3 – Retail distributors of audio visual content to viewers of 8 May 2013, questions 15 and 16.

90. Second, even if audience shares are taken as a relevant proxy for market power, the increment in audience share (and therefore in the merged entity’s alleged market power) arising from the notified concentration would be limited.

91. Third, the Commission considers that the Time Warner channels, and, in particular, the HBO channels are not "must have" channels for TV retailers. In other words, these channels do not appear to have a greater commercial importance for TV retailers than the one emerging from their revenue and/or audience share. While a number of respondents to the market investigation claim that Time Warner's HBO channels are the only significant (or, in any event, the strongest) premium Pay TV film channels in the CME countries[50] these channels’ penetration rates in the CME countries are low. In fact, HBO TV channels are not carried by all Pay TV distributors in the CME countries and only a limited share of pay TV subscribers that are offered the possibility to subscribe to HBO channels, actually exercise that option ([10-20]% in the Czech Republic and the Slovak Republic, [10-20]% in Romania, [10-20]% in Bulgaria, and [5-10]% in Slovenia).

92. Fourth, the type of channels and the business models of CME and Time Warner are different. CME's channels with the highest audience shares are available FTA and are general entertainment channels (for example bTV in Bulgaria, TV Nova in the Czech Republic, Pro TV in Romania, Markiza in the Slovak Republic, and Pop TV in Slovenia). By contrast, Time Warner's Turner channels are basic Pay TV and themed (news/children/movies) channels, while its HBO channels are subscription-only movie channels (also showing TV series).

93. As a result, CME's channels generate revenues primarily through advertising. For example, while in 2012, the carriage fees obtained by CME from TV retailers ranged between EUR […] and EUR […] in the different CME countries, in the same year, CME's income generated through the sale of TV advertising ranged between EUR […] and EUR […] in these countries. This business model requires that the CME channels attract large audiences, since the rates that CME obtains from advertisers depend on the audience shares achieved by its channels. For this reason, it is also important for the CME channels to be available on as many retail platforms as possible, which explains why CME offers its FTA and basic Pay TV channels to TV retailers at lower terms compared to premium Pay TV channels.[51] In contrast, the business model of Time Warner's HBO channels is based only on subscription and is a premium channel offered *à la carte*. While Time Warner's income from HBO and Turner subscriptions ranged between EUR […] and EUR […] in the respective CME countries in 2012, Time Warner only generated limited income from the sale of advertising on Turner channels in Bulgaria (EUR […]) and Romania (EUR […]).

94. Taking into account these differences, CME and Time Warner cannot be considered as close competitors and there is little rivalry between them today, which would be eliminated by the notified concentration. For this reason, it is unlikely that the notified concentration will significantly increase CME's current market power.

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50 See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, questions 17.1.

51 This also explains the fact that CME's revenue share in the wholesale market for the supply of Pay TV channels to retailers is far less than its audience share.

95. For the same reason, the Commission also considers it to be unlikely that the merged entity will bundle the Time Warner channels with the CME channels, since it is unlikely that it would achieve higher revenues by bundling these channels than by offering them separately. In fact, information provided by the Notifying Party shows that […]. This can be seen as an indication that the bundling of HBO's channels with CME's channels post transaction is unlikely.

96. As a result, the Commission concludes that it is unlikely that the addition of Time Warner's TV channels to CME's TV channels' portfolio will significantly increase its pre-existing bargaining power versus Pay TV operators post transaction.

97. The Commission further assessed the impact of the notified concentration on hypothetical separate markets for the wholesale of all <u>Pay TV channels segmented by genre.</u>

98. The Parties' Pay TV channels thematically overlap mainly in relation to films. In Bulgaria, Czech Republic, Romania, and Slovenia, CME offers one Pay TV film Channel and Time Warner offers respectively its TCM, HBO and Cinemax film channels. The Commission, however, considers that, post transaction, the merged entity will continue to face competition by a number of film channels. Moreover, none of the respondents to the market investigation raised any concern in this respect. Therefore, the Commission considers that the notified concentration will not give rise to competitive concerns as regards the wholesale supply of Pay TV film channels in the above mentioned CME countries.

99. Moreover, the Parties' channels thematically overlap as regards comedy channels in the Slovak Republic, where Time Warner offers the HBO Comedy channel as part of its premium HBO package and CME offers its comedy channel FOOOR as a basic Pay TV channel to Pay TV operators. Taking into account that these two channels belong to different segments of the Pay TV market (premium and basic Pay TV), as well as the fact that the merged entity will continue to face competition by a further dedicated comedy channel (MTV's Comedy Central Extra) and by general entertainment channels which show comedies as part of their programming mix, as well as the fact that none of the respondents to the market investigation raised any concern in this respect, the Commission considers that the notified concentration will not give rise to competition concerns as regards the wholesale supply of comedy channels in the Slovak Republic.

100. Finally, the Parties' channels thematically overlap as regards children/cartoon channels in Slovenia, where Time Warner offers its basic Pay TV children/cartoon channels, the Cartoon Network and Boomerang, and CME offers its basic Pay TV children/cartoon channel POP OTO. These channels face competition by ten dedicated children/cartoon channels which are all basic Pay TV channels. Moreover, none of the respondents to the market investigation raised any concern in this respect. Hence, the Commission considers that the notified concentration will not give rise to competition concerns as regards the wholesale of children/cartoon channels in Slovenia.

Conclusion

101. In light of the above, the Commission concludes that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the market for the wholesale supply of TV channels (and its possible segments) in any of the CME countries.

B.3. TV advertising

View of the Notifying Party

102. The Notifying Party submits that, while the market share of CME on the TV advertising market is fairly high, the increment deriving from the addition of the Time Warner channels is minimal.

103. The Notifying Party also submits that, given that Time Warner's channels are Pay TV channels and that their collective audience share is low, these channels are not as attractive to buyers of advertising space as CME's FTA channels with high audience shares. Therefore, their loss as an independent alternative to CME would not affect CME's market position vis-à-vis advertising customers.

104. The Notifying Party further submits that advertising agencies have strong buyer power deriving from their ability to control the flows of large amounts of advertising revenue and that this buyer power will remain unaltered by the notified concentration.

Commission's assessment

105. A horizontal overlap between the Parties' activities on the market for the sale of TV advertising space would be limited to Bulgaria and Romania.

106. In both countries, however, the increment deriving from the addition of Time Warner's sales to CME's existing market position would be low. In particular, in Bulgaria, where CME's current market share on the TV advertising market amounts to [60-70]%, the increment deriving from Time Warner's activities is [0-5]%. In Romania CME's market share on the TV advertising market is [50-60]% and the increment deriving from Time Warner's activities is [0-5]%.

107. Despite this low increase in both countries, a limited number of respondents to the market investigation expressed the concern that the notified concentration would strengthen CME's market position (by making it more attractive to advertisers) and weaken its competitors' market position, since, post transaction, CME would enjoy privileged access to Time Warner's content.[52]

108. The Commission has investigated this concern and considers that the notified concentration is unlikely to materially strengthen CME's existing market power in the sale of TV advertising space in any of the CME countries.

109. The addition of Time Warner's limited advertising revenues to CME's current position is unlikely to have any material impact on CME's existing market position in any of the CME countries. This is all the more the case, in the Commission's view, since (i) a significant percentage of Time Warner's advertising revenues are generated by Turner's CNN International ("CNNI") channel, which is broadcast as a single feed in English to the entire EMEA (Europe, Middle East and Africa) region, and which therefore tends not to feature locally-targeted advertising, but rather advertising that is mostly […], which is why typical advertisers are, inter alia, […]; and (ii) CME and Time Warner do not appear to be close competitors as regards the sale of TV advertising given the

[52] See replies to the Commission's questionnaire Q4 – Advertisers and media agencies of 8 May 2013, questions 12, 14.

different nature of the TV channels on which they sell advertising (mainly generalist channels for CME and small, genre-specific channels for Time Warner).

110. Moreover, the Commission considers it unlikely that CME's sales of TV advertising will be materially strengthened (and the position of its competitors weakened) as a result of CME's channels allegedly having improved access to Time Warner's content post transaction because CME already now has access to Time Warner's content.

111. In light of the above, the Commission concludes that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the markets for the sale of advertising on TV channels (and their possible market segments) in Bulgaria and Romania.

C. Vertical analysis

112. The Commission notes that there are vertical relationships between: (i) Time Warner's upstream activities as a licensor of broadcasting rights to audio-visual content and the activities of Time Warner and CME as wholesale suppliers of TV channels to Pay TV retailers; and (ii) the wholesale supply of TV channels by Time Warner and CME and CME's activities as supplier of retail TV services (through its platform Voyo).

113. For completeness, the Commission also notes that there is a vertical relationship between Time Warner's upstream activities as a licensor of broadcasting rights to audio-visual content and CME's activities as a provider of VOD services through Voyo. This latter vertical relationship is analysed in paragraphs 250 to 255 below in the section dealing with digital home entertainment.

View of the Notifying Party

114. The Notifying Party submits that the vertical relationships referred to in paragraph 112 above will not have any adverse impact on competition. Post transaction, Time Warner will continue to be only one of CME's numerous suppliers of audio-visual content and CME will continue to be one of Time Warner's numerous customers for the acquisition of such content. The Parties will continue to contract with each other on arm's length terms and on a commercially reasonable basis in order to maximize the revenues generated by their respective businesses. Furthermore, according to the Notifying Party, the notified concentration will not lead to any risk of market foreclosure either at the upstream level (licensing) or the downstream level (wholesale supply of channels to TV retailers).

Commission's assessment

115. Certain respondents to the market investigation expressed the concern that the notified concentration will have a negative impact on their ability to access content and/or TV channels from the Parties whether for incorporation into linear TV channels or TV retail distribution platforms.[53]

116. The Commission has first assessed these concerns as regards the vertical relationship between Time Warner's upstream activities as a licensor of broadcasting rights to audio-

53 See replies to Commission questionnaires Q2 – TV channel suppliers of 8 May 2013, question 19 and Q3 – Retail distributors of audio visual content to viewers of 8 May 2013, questions 13 and 14.

visual content and the activities of Time Warner and CME as wholesale suppliers of TV channels to Pay TV retailers. The Commission has then assessed the concerns related to the vertical relationship between the wholesale supply of TV channels by Time Warner and CME and CME's activities as supplier of retail TV services (through its platform Voyo).

– Vertical relationship between Time Warner's upstream activities as a licensor of broadcasting rights to audio-visual content and the activities of Time Warner and CME as wholesale suppliers of TV channels to Pay TV retailers - input foreclosure

117. In a merger between companies which operate at different levels of the supply chain, anti-competitive effects may arise when the merged entity's behaviour can limit or eliminate competitors' access to supplies (input foreclosure).[54]

118. In relation to the notified concentration, the Commission has assessed whether, in the downstream markets for the wholesale supply of TV channels, the Parties' competitors may be foreclosed, post transaction, from having sufficient access to the key inputs, such as, in particular, films and other TV content.

119. In investigating the likelihood of input foreclosure, the Commission has assessed: (i) whether, post transaction, the merged entity will have the ability to substantially foreclose access to input; (ii) the merged entity will have the incentive to do so; and (iii) whether a foreclosure strategy could have a significant detrimental impact on effective competition downstream.

120. The Commission first notes that based on the information provided by the Notifying Party, pre-transaction, CME does not license audio-visual content to any significant extent to third parties in the CME countries. Only Time Warner licenses its audio-visual content to third parties to a meaningful extent in these countries.

121. Second, the Commission notes that, based on the data provided by the Notifying Party, Time Warner's market share in the licensing of audio-visual content is always below 25% in all the CME countries, irrespective of the segmentation of the market considered. These market share levels are below the level at which a supplier would be considered to have market power.[55]

122. Third, the Commission notes that Time Warner is in competition with other content suppliers for the licensing of audio-visual TV content to TV channel broadcasters and retailers of TV services. Time Warner faces competition from numerous other film studios, including the other five major Hollywood studios (Columbia Pictures, Walt Disney Pictures, Universal Pictures, 20th Century Fox, Paramount Pictures), as well as independent internationally-active studios (including Studiocanal), and producers of local-language films in each CME country (such as In Film Praha).

123. Post transaction, Time Warner will therefore not have the necessary degree of market power, and hence the ability, to engage in any input foreclosure strategy.

54 Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p.7, paragraph 30.

55 Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p.7, paragraphs 25 and 35.

124. Moreover, the Commission notes that it is unlikely that the merged entity will have an incentive to reserve its audio-visual content exclusively to CME in the CME countries following the notified concentration. Instead, Time Warner will continue to be driven by its desire to achieve the widest possible exposure for its audio-visual content in order to maximize its licensing revenues.

125. In this regard, the Commission notes that Time Warner already holds a significant stake in CME, which will not increase as a result of the notified concentration. Therefore, the notified concentration is unlikely to have an impact on Time Warner's economic incentives to change its existing licensing practices vis-à-vis CME and its competitors. Indeed, the percentage of CME's downstream revenues to which Warner will have access following the notified concentration will not change as a result of the notified concentration.

126. Finally, even if Time Warner were to have the ability and incentive to foreclose third party access to its audio-visual content, the Parties' competitors in the wholesale of TV channels and retail of TV services will continue to have access to a wide range of audio-visual content from other content owners, including the other five major Hollywood studios, other internationally active independent film studios, such as Studiocanal and producers of local language films in CME countries, such as In Film Praha.

127. In light of the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards a possible input foreclosure strategy of the Parties in the licensing of audio-visual content in the CME countries.

– Vertical relationship between Time Warner's upstream activities as a licensor of broadcasting rights to audio-visual content and the activities of Time Warner and CME as wholesale suppliers of TV channels to Pay TV retailers - customer foreclosure

128. In assessing the likelihood of anti-competitive customer foreclosure, the Commission has assessed (i) whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals; (ii) whether the merged entity would have the incentive to do so; and (iii) whether such a foreclosure strategy would have a significant detrimental effect on customers in the downstream market.[56]

129. As regards the merged entity's ability to foreclose competing content suppliers, the Commission firstly assessed CME's shares in the acquisition of broadcasting rights to audio-visual content.[57]

130. CME's market presence in the acquisition of TV content in each of the CME countries is significant. Its share of the total expenditure for such content is above [40-50]% in

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56 Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p.7, paragraph 59.

57 Time Warner is already vertically-integrated into the licensing of audio visual content and, given CME's limited presence in the licensing of audio visual content, the notified concentration will not change the existing situation in terms of Time Warner's ability and incentive to source content for its TV channels from third parties in the CME countries

Bulgaria (in the acquisition of broadcasting rights for all TV content, as well as in the segments of broadcasting rights for films, sport, and other TV content) and between [20-30]% and [40-50]% in all other CME countries and market segments.

131. Against this background, the Commission notes that, as regards a possible foreclosure of customers in the licensing of broadcasting rights for sport events, neither Time Warner nor CME are actually active as licensors in this possible market segment. Hence, the merged entity will not be in a position to license broadcasting rights for sport events internally within the merged entity (that is to say without acquiring these rights from third party licensors). Any risk of customer foreclosure can thus be excluded on this basis.

132. As regards the licensing of broadcasting rights for films and other TV content, in previous cases the Commission found that the attractiveness of TV channels' and Pay TV operators' offer to consumers is based on the richness of the bundle of content.[58] In particular, in *News Corp/BSkyB*, the Commission considered it unlikely that, post transaction, BSkyB would start to exclusively purchase content (whether films or other TV content) from News Corp (20th Century Fox) thereby foreclosing News Corp's competitors in the licensing of such content.

133. The Commission considers that the same reasoning is valid in the present case. If the merged entity starts to exclusively source broadcasting rights for films and other TV content in house (namely from Time Warner), the richness and variety of content available on its TV channels (and/or retail platform), and, as a result, these channels' attractiveness to advertisers, will significantly decrease. Figures provided by the Parties indicate that the majority of CME's 2012 expenditure on TV content in each CME country is accounted for by the acquisition of TV content from third parties other than Time Warner ([70-80]% in Bulgaria, [50-60]% in the Czech Republic, [60-70]% in Romania, [50-60]% in the Slovak Republic, and [70-80]% in Slovenia).

134. In this regard, the Commission also notes that, today, CME already has access to Time Warner's content in each of the CME countries. As a result, the notified concentration will not have the effect of granting CME access to an input (Time Warner content), which pre-transaction it does not have.

135. The Commission therefore considers that the merged entity will not have the incentive post transaction, to stop purchasing audio-visual content from third parties.

136. This finding is supported by results of the market investigation. While a small number of content licensors expressed the concern that, since Time Warner owns a significant amount of audio-visual content, the merged entity may not have the incentive to license the same volume of content from third parties, or license it under similar commercial terms,[59] a majority of licensors of content do not expect any significant change stemming from the notified concentration and consider that the merged entity will not have the ability and the economic incentive to stop purchasing broadcasting rights or purchasing them at significantly worse commercial terms. A majority of licensors of

58 Commission Decision of 21 December 2012 in Case M.5932 News Corp/BSkyB, paragraph 154.

59 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 26.

content also believe that there will be no significant change to the merged entity's negotiation position vis-à-vis them post transaction.[60]

137. In any event, the Commission also notes that, post transaction, there will continue to remain significant TV channels and TV services (other than CME, and including Time Warner), to which content owners can license their content following the notified concentration. These include numerous FTA and Pay TV channel broadcasters. Post transaction, these broadcasters will remain important customers for content owners and will continue to acquire content from a wide range of studios and production companies.

138. Based on the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards a possible customer foreclosure by the Parties in the acquisition of audio-visual content in the CME countries.

– Vertical relationship between the wholesale supply of TV channels by Time Warner and CME and CME's activities as supplier of retail TV services through its platform Voyo - input foreclosure

139. The Commission considers first that, for the reasons already outlined in paragraphs 80 to 101 above, the addition of the Time Warner channels to CME’s channel portfolio will not materially increase the merged entity's market position in the wholesale supply of TV channels. As a result, the notified operation will not materially increase the merged entity's ability to engage in any input foreclosure strategy.

140. Second the Commission considers that today, CME does not have the incentive to distribute its channels exclusively on Voyo platform. CME's TV channels are currently available on Voyo and on other distribution platforms. The notified concentration will not alter this situation. Moreover, the Commission considers that, post transaction, the merged entity is unlikely to have the incentive to distribute the Time Warner channels exclusively via its Voyo Internet platform. Voyo was launched only recently (in December 2010 in the Czech Republic, in December 2011 in Romania and Slovenia, and in December 2012 in the Slovak Republic and Bulgaria) and so far its activities are limited (in 2012, its turnover was EUR […]). Given the nascent nature of Voyo's activities and its limited reach in terms of subscribers, it would not make economic sense for the merged entity to stop distributing the Time Warner channels on competing platforms, with a greater customer reach, such as cable, satellite and/or IP TV.

141. Third, given that the Time Warner channels do not constitute a “must have” input as outlined in paragraph 91 above, even if, post transaction, the merged entity were to exclusively distribute these channels via the Voyo platform, the ability of Voyo´s competitors to provide a commercially attractive TV offer to viewers would not be materially affected.

142. Based on the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards a possible input foreclosure by the Parties as regards the wholesale supply of TV channels in the CME countries.

60 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 37.

– Vertical relationship between the wholesale supply of TV channels by Time Warner and CME and CME's activities as supplier of retail TV services through its platform Voyo - customer foreclosure

143. Given the fact that Voyo currently offers only some of CME's own channels and does not offer any channels from third parties, the notified concentration will not remove an existing customer of any wholesale supplier of TV channels from the market.

144. Moreover, given Voyo´s limited presence in the retail of TV services, even if third party TV channels were not to be able to access Voyo, they would continue to have access to several alternative retail distributors for their channels.

145. Based on the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards a possible customer foreclosure by the Parties as regards the wholesale supply of TV channels in the CME countries.

2. Cinema sector

146. Time Warner, through its subsidiary Warner Bros., is one of the major international producers of films. Time Warner licenses third parties to distribute its film output to cinemas for theatrical release in most of the CME countries. The only exception is in the Czech Republic, where a Time Warner subsidiary distributes Time Warner-produced films for theatrical release. This Time Warner Czech subsidiary does not distribute the films of any third party studios.

147. CME has limited activities in the production of films for theatrical release. CME is, however, active in the distribution of (mainly third party) films in four CME countries: the Czech Republic, Hungary, Romania and the Slovak Republic. CME is also active in the theatrical exhibition of films in Romania, where it operates two cinema complexes, comprising a total of 11 screens. Time Warner is not active in theatrical exhibition in any of the CME countries.

A. Market definition

A.1. Product market

View of the Notifying Party

148. The Notifying Party explains that film studios and production companies produce films for theatrical release, while distributors acquire the rights to films and then negotiate film booking agreements with exhibitors (that is to say cinemas). Film distributors also carry out marketing functions and collect film revenues from exhibitors.

149. In the view of the Notifying Party, it can, however, be left open whether film production and film distribution constitute separate product markets, given the notified concentration's lack of competitive impact. Nevertheless, the Notifying Party considered separately the activities of film production and theatrical distribution for the purpose of the merger notification.

Commission's assessment

150. In its decisions in Cases No. IV/M.1219 *Seagram/Poligram* and No. COMP/M.2050 *Vivendi/Canal+/Seagram*, the Commission considered that the distribution of films to

theatres constituted as a distinct product market. In more recent decisions in Cases No. COMP/M.3595 *Sony/MGM* and Case COMP/M.5779 *Comcast/NBC Universal*, the Commission left open the question of whether the activities of production, acquisition and distribution of films for theatrical release comprise a single product market or two or more separate markets.

151. The large majority of film studios that replied to the Commission's market investigation indicated that they do not engage directly in the distribution of films, but use third party distributors to distribute their films for theatrical release in the CME countries.[61] In other words, these respondents to the market investigation indicated that the production/licensing of films for theatrical exhibition and the distribution of these films for theatrical release constitute two different activities, in which different market players are involved, at least in the CME countries.

152. In light of the above, the Commission considers that, for the purposes of the present Decision, the production/licensing of films for theatrical distribution and the distribution of these films for theatrical release constitute separate product markets.

A. 2. Geographic market

View of the Notifying Party

153. While the Notifying Party suggests to ultimately leave open the geographic market definition, it puts forward several arguments supporting the conclusion that the market for the distribution of films for theatrical distribution is national in scope: (1) film distribution rights are traditionally obtained for the whole of a national territory; (2) film releases are largely simultaneous throughout the national territory; (3) the appeal of audio-visual content depends on national tastes, culture and preferences; (4) marketing, promotion and advertising of films tends to take account of national differences and consumer preferences and to be executed nationally; (5) producers and distributors spend time and money in creating subtitled or dubbed local language versions of films; and (6) the rental terms that distributors offer to exhibitors tend to be broadly similar though the whole national territory.

Commission's assessment

154. The Commission has previously considered the geographic market for the distribution of films for theatrical release to be national in scope.[62]

155. In the present case, the vast majority of film studios and distributors that responded to the market investigation supported the view that the market for the distribution of films for theatrical release is national in scope.[63]

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61 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 3.

62 Commission Decision of 13 October 2000 in Case M.2050 Vivendi/Canal+/Seagram.

63 See replies to the Commission's questionnaires Q1 – Licensors of broadcasting rights of 8 May 2013, question 5, and Q7 – Film distributors of 8 May 2013, question 8.

156. In light of the above, the Commission considers that, for the purposes of the present Decision, the market for the distribution of films for theatrical release to be national in scope.

B. Horizontal analysis

157. The notified concentration gives rise to one horizontally affected market that is the distribution of films for theatrical release in the Czech Republic. In addition, the Commission has assessed the impact of the notified concentration in Hungary, Romania and the Slovak Republic, where the Notifying Party currently uses third party distributors for its films, but could start using CME as its local film distributor post transaction.

B.1. Distribution of films for theatrical release in the Czech Republic

View of the Notifying Party

158. The Notifying Party submits that, based on 2012 data, the merged entity's market share in the distribution of films for theatrical release in Czech Republic would amount to [50-60]% (CME: [40-50]%; Time Warner: [10-20]%).

159. The Notifying Party, however, also points out that two of CME's largest suppliers in the Czech Republic, namely United International Pictures ("UIP") and Twentieth Century Fox ("Fox"), decided to switch their business to a different distributor (CinemArt A.S.) as of March 2013. Hence, CME's distributions shares would fall […] in 2013 to around […]% and the merged entity's post transaction share will likely be around […]%.

160. In addition, the Notifying Party puts forward a number of reasons why a larger market share in theatrical distribution of films does not confer market power, particularly vis-à-vis exhibitors (cinemas).

161. First, the price which exhibitors are willing to pay for a film is based primarily on the strength of a particular film. Therefore the size of a distributor does not necessarily translate into greater pricing power vis-à-vis an exhibitor or into a distributor attracting more studios.

162. Second, studios choose distributors for a variety of reasons, not just the price they can negotiate, including their administrative capacity and ability to focus attention on promoting a studio's films. In this regard, size might actually serve as a disadvantage for a distributor, as it may not have the same kind of focussed attention on a particular studio's films.

163. Third, barriers to entry and expansion are low, as illustrated by CinemArt's recent expansion in the theatrical distribution business in the Czech Republic.

164. Fourth, studios always have the option of switching to an alternative distributor, if their current distributor fails to offer competitive terms when selling the films to exhibitor customers and thereby fails to maximise exposure of the studio's films to cinema audiences.

165. Fifth, for studios, the pricing that they can achieve for a film in later windows (home entertainment and television) is generally based on the film's gross box office ("GBO") revenues. This creates an incentive for the studios to achieve the greatest possible cinema audiences and GBO success for their films. It also means that that there is

pressure on theatrical distributors to offer competitive terms to their exhibitor customers in order to ensure the widest possible distribution.

166. For completeness, the Notifying Party also points out that the notified concentration will not lead to a reduction in choice for film studios, since Time Warner does not engage in third party film distribution in the Czech Republic.

Commission's assessment

167. Respondents to the market investigation confirmed that UIP and Fox recently switched from CME to a competing third party film distributor in the Czech Republic.[64]

168. Moreover, respondents to the market investigation indicated that the merged entity will continue to face competition from at least nine competing film distributors, including well established companies such as Falcon with an estimated market share of [30-40]% in 2011 and [20-30]% in 2012 and new entrants, such as Forum Film (which entered the Czech theatrical distribution market in 2011 and in 2012 had established an estimated market share of [5-10]%) and Eastern European Acquisition Pool (which entered the Czech market in 2011 and achieved an estimated market share of [0-5]% in 2012). In addition, the above mentioned recent entries in the Czech market for film distribution for theatrical release suggest that barriers to entry in this market are low.

169. Finally, respondents to the market investigation did not raise significant concerns in relation to the impact of the notified concentration on film distribution for theatrical release in the Czech Republic. Only one of the responding film studios remarked that should Time Warner distribute its films through CME, this will lead to a reduction in the number of credible competitors at the distribution level in the Czech Republic.[65] However, the same respondent considered that even if this were to occur, there will remain sufficient credible alternatives to CME. None of the responding film distributors, including several film distributors that are active in the Czech Republic, replied that the notified concentration will have a negative impact on their business.[66] Also replies from Czech cinema operators were neutral as regards the impact of the notified concentration on their business.[67]

170. In light of the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the distribution of films for theatrical release in the Czech Republic on the basis of horizontal effects.

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64 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, questions 3 and 6.1.

65 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, questions 8.1 and 9.1.

66 See replies to the Commission's questionnaire Q7 – Film distributors of 8 May 2013, question 14.

67 See replies to the Commission's questionnaire Q8 – Cinema operators of 8 May 2013, questions 7 to 11.

B.2. Distribution of films for theatrical release in Hungary, Romania, and the Slovak Republic

View of the Notifying Party

171. The Notifying Party considers that there is no horizontal overlap between Time Warner and CME's activities in Hungary, Romania and the Slovak Republic since Time Warner is not active at this level of trade in these territories, but relies on third parties to distribute its films. Hence, the Notifying Party submits that the notified concentration will not give rise to horizontally affected markets in these countries.

172. The Notifying Party also submits that it is uncertain whether, following the notified concentration and the expiry of its current agreements with theatrical distributors, Time Warner will entrust CME with its distribution business in these territories. This will only happen, if at that time, CME offers the best terms and conditions available.

173. At the Commission's request, the Notifying Party provided the following hypothetical market shares if CME were to start distributing Time Warner films post transaction. In Hungary, the hypothetical market share of the merged entity would amount to [10-20]% (CME: [5-10]%; Time Warner: [10-20]%). In Romania, the merged entity's market share would amount to [20-30]% without any increment, given that CME currently distributes Time Warner films. In the Slovak Republic, the hypothetical market share of the merged entity would amount to [50-60]% (CME: [30-40]%; Time Warner: [10-20]%).

174. As regards the hypothetical market share of the merged entity in the Slovak Republic, the Notifying Party points out that that two of CME's largest suppliers for this territory, namely UIP and Fox, decided to switch their business to a different distributor as of March 2013. Hence, CME's distributions shares will fall […] in 2013 to around […]% and the merged entity's post transaction hypothetical share will be around […]%.

Commission's assessment

175. In <u>Hungary</u>, CME's post transaction market share will remain rather limited (below 20%), even if post transaction, it starts to distribute Time Warner films in this territory. Moreover, none of the respondents to the market investigation raised any concerns as regards the likely impact of the notified concentration on the market for the distribution of films for theatrical release in Hungary.

176. In <u>Romania</u>, since, as noted, CME already distributes Time Warner's films, the notified concentration will not have any material impact on CME's position in the relevant market. Based on the above, the Commission considers the few negative replies by cinema operators alleging that CME's negotiating position vis-à-vis them will be strengthened through the combination with Time Warner, are unfounded.[68]

177. In the <u>Slovak Republic</u>, respondents to the market investigation confirmed that UIP and Fox recently switched from CME to a competing third party film distributor.[69].

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68 See replies to the Commission's questionnaire Q8 – Cinema operators of 8 May 2013, question 10.

69 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, questions 3 and 6.1.

178. Moreover, respondents to the market investigation indicated that the merged entity will continue to face competition from at least nine competing film distributors in the Slovak Republic.[70]

179. In addition, respondents to the market investigation did not raise significant concerns in relation to film distribution for theatrical release in the Slovak Republic. Only one of the responding film studios remarked that should Time Warner distribute its films through CME, this will lead to a reduction in the number of credible competitors at the distribution level in the Slovak Republic.[71] However, the same respondent considered that, post transaction, there will remain sufficient credible alternatives to CME. None of the responding film distributors, including several film distributors that are active in the Slovak Republic, replied that the notified concentration will have a negative impact on their own business.[72] Also the Commission did not receive any complaints from Slovak cinema operators.

180. In light of the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the distribution of films for theatrical release in the Hungary, Romania and the Slovak Republic on the basis of horizontal effects.

C. Vertical analysis

181. Considering that the production/licensing of films for theatrical release and their distribution to exhibitors are vertically linked activities, the present case gives rise to vertically affected markets in the Czech Republic, Romania and the Slovak Republic, where CME's shares in the theatrical distribution of films were above 25% in 2012 (while Time Warner’s shares in the production/licensing of films were below 25%).

View of the Notifying Party

182. The Notifying Party submits that the notified concentration will not create a risk of input foreclosure for rival film distributors because Time Warner does not have the requisite market power to be able to foreclose access to the input of films. Time Warner's market share based on GBO revenues in 2012 ranged between [10-20]% and [10-20]% in the affected markets. Also, Time Warner competes with numerous film studios, including Disney, Fox, Paramount, Sony, Universal, DreamWorks, MGM, Lionsgate, Entertainment One/Momentum Pictures, Studiocanal, Summit and Revolutionary, many of which are similar in size and strength to Time Warner.

183. The Notifying Party also explains that the notified concentration will not create any risk of customer foreclosure for rival film producers, given that in all of the affected markets, there will be sufficient alternative film distributors apart from CME.

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[70] See replies to the Commission's questionnaire Q7 – Film distributors of 8 May 2013, questions 9.3 and 10.3.

[71] See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, questions 8.1 and 9.1.

[72] See replies to the Commission's questionnaire Q7 – Film distributors of 8 May 2013, question 14.

Commission's assessment

184. As regards the risk of input foreclosure in the present case, the Commission considers that the merged entity's market share on the upstream market for the production/licensing of films for theatrical release ranges between [10-20]% and [10-20]% based on 2012 data, is insufficient to confer market power upon the merged entity.[73] Hence, the merged entity will not have the ability to foreclose its competitors at the distribution level from accessing film content for distribution for theatrical release.

185. This finding is supported by the market investigation, as none of the responding film distributors replied that the notified concentration will have a negative impact on their business.[74]

186. As regards the risk of customer foreclosure, the Commission considers that the merged entity's market share in the distribution of films for theatrical release will be limited in the three affected CME countries and hence not suffice to confer market power upon the merged entity.[75] In Romania, it will amount to [20-30]%. Given that CME lost UIP and Fox as customers of its film distribution business in the Czech and the Slovak Republics in early 2013, the merged entity's market share is likely to amount to around […]% and […]% in these two countries respectively.

187. Furthermore, all film studios and production companies, which took part in the market investigation, replied that post transaction, there will be sufficient credible alternative film distributors in the CME countries, where the merged entity will be active in film distribution. The film studios' ability to switch distributor pre and post transaction was also supported by the replies of film distributors.[76]

188. In light of the above, the Commission concludes that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the distribution of films for theatrical release in the Czech Republic, Romania and the Slovak Republic on the basis of vertical effects.

3. Home entertainment sector

189. Time Warner supplies/licences its home entertainment content (films and television programmes produced or co-produced by Time Warner) to third party wholesale distributors in physical format (DVD and Blu-ray Discs) and to third party retailers in digital formats (transactional VOD (TVOD), electronic sell-through (EST) and download to own (DTO)) in the CME countries.

190. CME supplies/licenses a small amount of home entertainment content on a digital basis. CME also distributes at the wholesale level third party audio-visual content in the form of DVDs and Blu-ray Discs to clients active at the retail level in the Czech Republic,

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73 Commission guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008 page 7, paragraphs 25 and 35.

74 See replies to the Commission's questionnaire Q7 – Film distributors of 8 May 2013, question 14.

75 Commission guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008 page 7, paragraphs 25 and 61.

76 See replies to the Commission's questionnaire Q7 – Film distributors of 8 May 2013, questions 11 and 13.

Hungary, the Slovak Republic and Romania (including Time Warner's home entertainment content in Hungary and Romania). CME further operates a retail website for the direct sale of physical home entertainment products in the Czech Republic. Finally, CME operates a VOD platform called "Voyo" in the CME countries with limited TVOD offerings.

A. Market definition

A.1. Product market

View of the Notifying Party

191. The Notifying Party submits that there are at least two levels in the home entertainment market value chain, the licensing/supply of home entertainment content by studios and production companies to wholesalers and the wholesale distribution of home entertainment content to retailers.

192. The Notifying Party does not consider any segmentation of the home entertainment market necessary and suggests that the relevant product market comprises all types of content, formats and media for the non-linear private viewing of audio-visual content including films and other TV content, TVOD and DTO, as well as the sale or rental of DVDs and Blu-ray Discs.

Commission's assessment

193. The Commission has to date not explicitly distinguished between different levels in the home entertainment value chain.[77] However, in relation to video games, the Commission has considered a distinction between publishing of video game software and wholesale video game distribution, although this question was ultimately left open.[78]

194. The Commission also previously considered various possible segmentations of the home entertainment market based on the type of content, formats and media, but ultimately left the exact product market definition open.[79]

195. In this case, the Commission notes that, in relation to physical home entertainment products, all of the responding licensors/suppliers of home entertainment content rely on third parties for the distribution of their content.[80] None of the responding distributors of physical home entertainment content is active at the licensing/supply level.[81] Thus, it can be considered that the licensing/supply of home entertainment content by studios and production companies to wholesalers and the wholesale distribution of home

[77] Cases in which home entertainment related activities were considered are Commission Decisions of 30 March 2005 in Case M.3595 Sony/MGM and of 13 July 2010 in Case M.5779 Comcast/NBC Universal.

[78] Commission Decision of 16 April 2008 in Case M.5008 Vivendi/Activision.

[79] Commission Decision of 30 March 2005 in Case M.3595 Sony/MGM, paragraph 13; Commission Decision of 13 July 2010 in Case M. 5779 Comcast/NBC Universal, paragraphs 61-62.

[80] See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 27.

[81] See replies to the Commission's questionnaires Q5 – Retailers of home entertainment content of 8 May 2013, questions 1, 5 and Q6 – Wholesale distributors of home entertainment content of 8 May 2013, questions 1 and 5.

entertainment content to retailers constitute two separate levels of the value chain and therefore two separate product markets.

196. As for digital home entertainment products, the Commission notes that the structure of the value chain is different as licensors/suppliers of home entertainment content license their content directly to retailers, and wholesalers are therefore not present.

197. This difference in the structure of the value chain, as well as the fact that the market players, which are active in the retail of digital home entertainment content are typically (with the notable exception of CME) different from the market players, which are active in the wholesale and/or retail of physical home entertainment content, supports the conclusion that the licensing of physical and digital home entertainment content constitute separate product markets.

198. Respondents to the market investigation further indicated that, within the wholesale market for physical home entertainment content, at least today in the CME countries, DVDs and Blu-Ray Discs (that is to say the different media on which physical home entertainment content is made available to retailers and end users) are substitutable.[82] The Commission agrees and considers that at least in the CME countries, DVDs and Blu-Ray Discs are substitutable.

199. As regards digital home entertainment products, a number of respondents consider that VOD, DTO and PPV services form part of digital home entertainment.[83] The Commission agrees and considers that at least in the CME countries, digital home entertainment comprises at least the above non-linear services.

200. Given that none of the Parties has significant activities as regards the retail distribution of physical home entertainment content[84] and that no competition concerns arise regarding CME's retail distribution of digital home entertainment content, the Commission leaves open the question of whether, at the retail level, physical and digital home entertainment products are part of the same product market.

201. Finally, the market investigation was inconclusive as to whether the licensing/supply (of both physical and digital home entertainment), the wholesale market for physical home entertainment and the retail market (for both physical and digital home entertainment) should be further segmented based on the type of content (such as films, TV series, documentaries, etc.).

202. In particular, as regards the different possible content categories, the majority of respondents consider that content categories such as (i) films; (ii) TV series; and (iii) other home entertainment content (comprising e.g. documentaries and concerts) are not

[82] See replies to the Commission's questionnaires Q5 – Retailers of home entertainment content of 8 May 2013, question 9 and Q6 – Wholesale distributors of home entertainment content of 8 May 2013, question 10.

[83] See replies to the Commission's questionnaires Q5 – Retailers of home entertainment content of 8 May 2013, question 12 and Q6 – Wholesale distributors of home entertainment content of 8 May 2013, question 13.

[84] Time Warner does not have any retail distribution activities and CME's retail website for the direct sale of physical home entertainment products in the Czech Republic generated […] revenues in 2012.

substitutable.[85] Given that no competition concerns arise even if the above content categories are considered to be separate market segments, the Commission leaves this question open.

203. In light of the above, and for the purposes of the present decision, the Commission therefore identifies the following relevant product markets: (i) the licensing/supply of home entertainment content for physical exploitation; (ii) the licensing/supply of home entertainment content for digital exploitation; (iii) the wholesale distribution of physical home entertainment content; and (iv) the retail distribution of home entertainment content.

204. The Commission, however, leaves open the question whether the retail distribution of home entertainment content should be further segmented between physical and digital. The Commission also leaves open the question whether any of the above product markets should be further segmented according to the type of content. This is because the notified concentration does not raise any competition concerns under any alternative product market definition at the licensing/supply level and at the distribution levels of home entertainment content.

A.2. Geographic market

View of the Notifying Party

205. The Notifying Party considers the relevant geographic market for the licensing/supply, as well as the wholesale distribution of home entertainment content to be national for the following reasons: (i) distribution rights are typically obtained for the whole of a national territory; (ii) release dates are largely simultaneous throughout a national territory; (iii) pricing is typically set on a national level; (iv) time and money is spent in creating local language version DVDs and Blu-Ray Discs; (v) the appeal of audio-visual content depends on national tastes, culture and preferences; and (vi) marketing, promotion and advertising of audio-visual content tends to take account of national differences and consumer preferences and tends to be executed nationally.

Commission's assessment

206. In previous decisions, the Commission indicated that home entertainment markets are national in scope, while ultimately leaving this question open.[86]

207. The majority of wholesalers that responded to the market investigation considered that competitors active in each country,[87] consumer preferences, wholesale price and

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[85] See replies to the Commission's questionnaires Q5 – Retailers of home entertainment content of 8 May 2013, question 15 and Q6 – Wholesale distributors of home entertainment content, question 16.

[86] Commission Decision of 30 March 2005 in Case M.3595 Sony/MGM, paragraph 24 and Commission Decision of 13 July 2010 in Case M.5779 Comcast/NBC Universal, paragraphs 61-62.

[87] According to the respondents (wholesalers and retailers), wholesalers of physical home entertainment content competing with CME are, among others (i) in the Czech Republic: Magic Box (CZ), Ceska Musica, Filmexport, Hollywood Classic Entertainment (CZ); (ii) in Hungary: ADS Service, Fantasy Film, Gamma Home Entertainment, InterCom, Neosz, RHE Sales House, Select 86; (iii) in Romania: Atlas Corp., Best Distribution, Empire Film, Royal Computers; and (iv) in the Slovak Republic: Magic Box (SK), Ceska muzika, Filmexport, Hollywood Classic Entertainment (SK), Intersonic and Slovak Film Institute.

language of home entertainment content vary across countries.[88] Moreover, a large majority of the licensors/suppliers of home entertainment content that responded to the market investigation considered the geographic market to be national.[89] In addition, the majority of the retailers, which responded to the market investigation, are only active in one Member State.[90]

208. In light of the above and for the purposes of the present decision, the Commission concludes that the geographic scope of the relevant markets is national.

B. Horizontal analysis

209. The notified concentration gives rise to horizontally affected markets in the overall market for the licensing/supply of all home entertainment content, as well as in the possible market segments in the Czech Republic, Hungary and Romania for the licensing/supply of: (i) digital home entertainment products; (ii) TV series (digital); and (iii) films (digital).

B.1. Licensing/supply of home entertainment content

View of the Notifying Party

210. The Notifying Party submits that the Parties' combined market shares are modest on the overall home entertainment market and on all possible sub-segments, except for TV series, where market shares are higher.

211. However, given that the increment from CME in this market and all of its possible segments is small in share and even smaller in revenue and that the Parties will continue to face strong competition from other studios and production companies, the Notifying Party considers that no competition concerns will arise as a result of the notified concentration.

Commission's assessment

212. Based on 2012 data, the Parties combined market share on the overall market for the licensing/supply of home entertainment products was low, amounting to [10-20]% in the Czech Republic (Time Warner: [10-20]%; CME: [0-5]%), [10-20]% in Hungary (Time Warner: [10-20]%; CME: [0-5]%), and [10-20]% in Romania (Time Warner: [10-20]%; CME: [0-5]%). The increment in market share attributable to CME was also limited.

213. Moreover, post transaction, Time Warner will continue to face strong competition from numerous studios and production companies such as Disney, Fox, Paramount, Sony, Universal DreamWorks, MGM, Lionsgate, Entertainment One/Momentum Pictures, Studiocanal, Summit and Revolutionary as well as producers of local language content

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88 See replies to the Commission's questionnaire Q6 – Wholesale distributors of home entertainment content of 8 May 2013, questions 17 and 18.

89 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 28.

90 See replies to the Commission's questionnaire Q5 – Retailers of home entertainment content of 8 May 2013, question 17.

in each CME country that produce films, TV programs and other content for exploitation in home entertainment formats.

214. Based on 2012 data, the Parties' combined market share in the licensing/supply of digital home entertainment products was low, amounting to [10-20]% in the Czech Republic (Time Warner: [10-20]%; CME: [0-5]%), [10-20]% in Hungary (Time Warner: [10-20]%; CME: [0-5]%), and [10-20]% in Romania (Time Warner: [10-20]%; CME: [0-5]%). The increment in market share attributable to CME was also limited.

215. Moreover, post transaction, Time Warner will continue to face strong competition from the numerous studios and production companies listed in paragraph 213 above that produce film, TV programs and other content also for exploitation in digital home entertainment format. In this respect, the respondents to the market investigation supported the Notifying Party's submission that licensors who license content for physical distribution typically also license content on a digital basis.[91]

216. In addition, data provided by the Notifying Party shows that the licensing/supply of digital home entertainment content is in its early stages of development in the relevant countries and, as a result, revenues are still small.

217. Based on 2012 data, the Parties' combined market share in the licensing/supply of digital TV series amounted to [30-40]% in the Czech Republic (Time Warner: [20-30]%; CME: [0-5]%), [30-40]% in Hungary (Time Warner: [30-40]%; CME: [0-5]%), and [30-40]% in Romania (Time Warner: [30-40]%; CME: [0-5]%). The increment in market share attributable to CME was, however, limited.

218. Moreover, post transaction, Time Warner will continue to face competition on this nascent market from a large number of other studios, including the major international studios, smaller international studios, as well as local production companies mentioned in paragraph 213 above.

219. Based on 2012 data, the Parties' combined market share in the licensing/supply of digital films was low, amounting to [10-20]% in the Czech Republic (Time Warner: [10-20]%; CME: [0-5]%), [10-20]% in Hungary (Time Warner: [10-20]%; CME: [0-5]%), and [10-20]% in Romania (Time Warner: [10-20]%; CME: [0-5]%). The increment in market share attributable to CME was also limited.

220. Moreover, post transaction, Time Warner will continue to face competition on this nascent market from a large number of other studios, including major international studios, smaller international studios, as well as local production companies including those listed in paragraph 213 above.

221. Respondents to the market investigation did not raise any concerns as regards the horizontal overlaps between Time Warner and CME on the overall market for the licensing/supply of home entertainment content and/or on any of the possible market segments thereof, in the Czech Republic and Hungary and Romania.[92]

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91 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 27.

92 See replies to the Commission's questionnaires Q5 – Retailers of home entertainment content of 8 May 2013, questions 18, 20, 21; Q6 – Wholesale distributors of home entertainment content of 8 May 2013,

222. In light of the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the licensing/supply of all types of home entertainment content (and/or any possible market segment thereof, including, in particular, those for all digital home entertainment content and for TV series) in the Czech Republic, Hungary and Romania on the basis of horizontal effects.

B.2. Wholesale distribution of physical home entertainment content

View of the Notifying Party

223. The Notifying Party considers that there are no horizontal overlaps at the wholesale distribution level since Time Warner is not active at this level of trade in these countries.

224. The Notifying Party also submits that post transaction CME will not enjoy increased market power vis-à-vis retailers of home entertainment on the overall market for the wholesale distribution of physical home entertainment content and/or any possible segments thereof.

225. According to the Notifying Party, CME is already Time Warner's exclusive wholesale distributor in Hungary and Romania. As for the Czech and the Slovak Republics, it is uncertain whether, following the concentration and the expiry of its current agreements with wholesale distributors, Time Warner will entrust CME with its distribution business in these territories. This will only happen, if at that time, CME offers the best terms and conditions available.

226. The Notifying Party provided the following hypothetical market shares if CME were to start distributing Time Warner content post transaction. In the Czech Republic, the hypothetical market share of the merged entity as regards physical home entertainment content overall would amount to [50-60]% (instead of [40-50]%) and in the Slovak Republic to [40-50]% (instead of [30-40%).

227. However, the hypothetically increased market shares would not confer increased market power on the merged entity. First, it will continue to face strong competitors at the wholesale distribution level. Second, barriers to market entry and expansion are low because distribution contracts can usually be contested on an annual basis. Finally, according to the Notifying Party, countervailing buyer power is increasing due to consolidation trends in the retail market

Commission's assessment

228. In Hungary and Romania, since CME already distributes Time Warner's physical home entertainment products, the notified concentration will not have any material impact on CME's position in the relevant market.

229. Based on the above, the Commission considers unfounded the negative replies received from: (i) a retailer of physical home entertainment products alleging that the notified

questions 20, 21, 25-27 and 28; and Q1 – Licensors of broadcasting rights of 8 May 2013, questions 32, 33.

concentration will have an impact on its access to home entertainment products;[93] (ii) a wholesaler of physical home entertainment products alleging that, post transaction, the merged entity will become a stronger distributor of home entertainment content;[94] and (iii) a small minority of the responding licensors/suppliers seeing potential problems of access to the market due to the lack of alternative wholesale distributors.[95]

230. As regards the Czech Republic and the Slovak Republic, the market investigation indicated that the merged entity will continue to face competition by several competing wholesale distributors.[96] As regards both countries, these distributors include Time Warner's current wholesale distributor for its Warner Brothers' division, Magic Box which, based on 2012 data, had a market share of 35% in the Czech Republic and 40% in the Slovak Republic. Even if it were to lose Time Warner as a customer post transaction, the merged entity's hypothetical market share would still be substantial.

231. Also, the market investigation confirmed that distribution contracts between licensors/suppliers and wholesale distributors can typically be terminated on an annual basis.[97]

232. In addition, respondents to the market investigation did not raise significant concerns in relation to wholesale distribution physical home entertainment content in the Czech Republic and the Slovak Republic. Only one of the responding wholesalers of physical home entertainment content remarked, without however substantiating its submissions, that the notified concentration would have an impact, should Time Warner start distributing its content though CME.[98] Two of the responding retailers shared similar concerns, without, however linking their concerns to the possibility that CME might become the distributor of Time Warner's physical home entertainment products post transaction.[99] One licensor/supplier considered that, while in the Czech Republic there are sufficient other credible distribution options, this might not be the case in the Slovak Republic.[100] However, as explained in footnote 87 above, respondents to the market investigation indicated that, apart from CME, there are at least six alternative wholesale

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93 See reply to the Commission's questionnaire Q5 – Retailers of home entertainment content of 8 May 2013, question 19.

94 See reply to the Commission's questionnaire Q6 – Wholesale distributors of home entertainment content of 8 May 2013, question 23.

95 See reply to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 31.

96 See footnote 87 and replies to the Commission's questionnaires Q5 – Retailers of home entertainment content of 8 May 2013, question 6 and Q6 – Wholesale distributors of home entertainment content of 8 May 2013, questions 6, 21.

97 See replies to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 27.

98 See reply to the Commission's questionnaire Q6 – Wholesale distributors of home entertainment content of 8 May 2013, questions 25-27.

99 See replies to the Commission's questionnaire Q5 – Retailers of home entertainment content of 8 May 2013, questions 19, 20.

100 See reply to the Commission's questionnaire Q1 – Licensors of broadcasting rights of 8 May 2013, question 31.

distributors active in the Slovak Republic, one of which is Magic Box with a market share of 40% in 2012. Thus, the Commission considers this concern to be unfounded.

233. In light of the above, the Commission considers that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the wholesale distribution of home entertainment content (and/or any possible market segment thereof) in the Czech Republic, Hungary, Romania and the Slovak Republic on the basis of horizontal effects.

C. Vertical analysis

234. The notified concentration gives rise to vertical relationships in the Czech Republic, Hungary, Romania and the Slovak Republic between, on the one hand, Time Warner's activities on the markets for the licensing/supply of <u>physical</u> home entertainment content and, on the other hand, CME's activities on the markets for the wholesale distribution of physical home entertainment content.

235. There is also a vertical relationship between the Parties as regards, on the one hand Time Warner's activities on the markets for the licensing/supply of <u>digital</u> home entertainment content and, on the other hand, CME's retail distribution activities of digital home entertainment content due to CME's VOD offerings on its retail platform Voyo in the same countries.

C.1. Physical home entertainment content

View of the Notifying Party

236. The Notifying Party submits that, notwithstanding CME's market shares on the various wholesale distribution markets for physical home entertainment products in the Czech Republic, Hungary, Romania and the Slovak Republic, the notified concentration will not create a risk of input and customer foreclosure.

237. As regards input foreclosure, the Notifying Party argues that Time Warner, given its market share on the market for the licensing/supply of physical home entertainment content and/or any possible segments thereof, and the fact that it competes with numerous other studios of similar size and strength, who will continue to provide their content to CME's competitors, does not have the requisite market power to be able to foreclose access to the input of content.

238. The Notifying Party also argues, based on the Commission's decision in case *News Corp/BskyB*, where the Commission found that the content of one major studio alone was not a "must-have" input for downstream broadcasters, that films and TV series produced by Time Warner do not constitute a "must-have" input for third party distributors of physical home entertainment content.

239. As regards customer foreclosure, the Notifying Party argues that this will not occur because CME will continue to face strong competition from other distributors, barriers to entry and expansion are low in the wholesale distribution of physical home entertainment, and rival studios will retain the option of entrusting the home entertainment distribution intra-group to an affiliated company.

Commission's assessment

240. As regards the risk of input foreclosure, the merged entity's market shares on the upstream market for the licensing/supply of physical home entertainment content (including the possible market segments for films and TV series) ranged, based on 2012 data, between [10-20]% and [30-40]% in the Czech Republic, [10-20]% and [30-40]% in Hungary, [10-20]% and [30-40]% in Romania and [10-20]% and [20-30]% in the Slovak Republic.

241. Based on these market shares, the Commission considers that the merged entity's market shares are generally at a level, which does not give rise to a possible risk of input foreclosure.[101] Moreover, the relevant markets will continue to be characterised by the presence of a number of strong competitors.[102]

242. The market investigation supported this conclusion. Indeed, none of the responding wholesalers of home entertainment content and of the responding licensors/suppliers of home entertainment content raised any concerns stemming from the notified concentration as regards access to home entertainment content.[103]

243. As regards the risk of customer foreclosure, the Commission considers that CME's shares on the market for the wholesale distribution of physical home entertainment content and/or any possible segment thereof are generally below [30-40]% with the exception of the wholesale distribution of films (and as a result on the overall physical segment and on overall market for the wholesale distribution of home entertainment content) in the Czech Republic and the Slovak Republic, where CME's market shares range between [40-50]% and [40-50]% (Czech Republic) and between [30-40]% and [30-40]% (Slovak Republic).

244. Despite these market shares, the Commission considers that CME will not have the incentive not to carry content of third parties, given that the majority of the retailers responding to the market investigation indicated that they source content produced by a large variety of studios and that at least the content produced by major international studios is indispensable for their businesses.[104]

245. Respondents to the market investigation also did not raise concerns regarding a risk of customer foreclosure other than with the exception of a minority of responding licensors/suppliers of home entertainment content mentioning a lack of alternative distributors, in particular in Romania (and to a lesser extent also in the Slovak Republic

[101] Commission guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008 page 7, paragraphs 25 and 35.

[102] For competitors on the markets for the licensing/supply of physical home entertainment content see paragraph 213 above. As regards competitors on the wholesale distribution markets, see footnote 87 above.

[103] See replies to the Commission's questionnaires Q6 – Wholesale distributors of home entertainment content of 8 May 2013, questions 22, 24; and Q1 – Licensors of broadcasting rights of 8 May 2013, question 34.

[104] See replies to the Commission's questionnaires Q5 – retailers of home entertainment content of 8 May 2013, questions 3, 4.

and Hungary).[105] However, the Commission does not consider these concerns to be founded. As regards the Slovak Republic, as set out in paragraph 232 above, there are at least six alternative wholesale distributors, one of which with an estimated market share of 40% on the overall physical distribution market. In Hungary, there are at least seven alternative distributors. InterCom, the largest competitor has an estimated market share of 23% and the second largest competitor, Select 86, has an estimated market share of 12%. In Romania, there at least four competitors active at the wholesale distribution level, the largest of which (Odeon), had an estimated market share of 20% in 2012.

246. In light of the above, the Commission concludes that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the wholesale distribution of physical home entertainment products in the Czech Republic, Hungary, Romania and the Slovak Republic on the basis of vertical effects.

C.2 Digital home entertainment content

View of the Notifying Party

247. The Notifying Party submits that, for the same reasons as in relation to the distribution of physical home entertainment products, the notified concentration does not give rise to any risk of input foreclosure for rival retailers of digital home entertainment products and any risk of customer foreclosure for rival producers of digital home entertainment content.

248. The Notifying Party argues that as the merged entity's market shares upstream are limited and that there are numerous other content providers competing on the licensing/supply markets for digital home entertainment content, Time Warner will not have sufficient market power upstream to foreclose input to content.

249. At the retail level, the Notifying Party submits that it does not have any basis to reliably estimate the market size and thus market shares because this market is nascent and developing fast. However, there are numerous other retail platforms in each of the affected countries, including iTunes (except for Romania). Digital home entertainment contracts are also generally non-exclusive, thus making content accessible to all platforms

Commission's assessment

250. The merged entity's market share on the upstream market for the licensing/supply of digital home entertainment content (including the possible market segments for films and TV series) ranges, based on 2012 data, between [10-20]% and [30-40]% in the Czech Republic, between [10-20] % and [30-40]% in Hungary, between [10-20]% and [30-40]% in Romania and between [10-20]% and [20-30]% in the Slovak Republic.

251. Based on the above, the Commission considers that the merged entity’s market shares are generally at a level, which does not give rise to a possible risk of input

[105] See replies to the Commission's questionnaires Q5 – retailers of home entertainment content of 8 May 2013, questions 19, 20; Q6 – Wholesale distributors of home entertainment content of 8 May 2013, questions 23, 25-27; and Q1 – Licensors of broadcasting rights of 8 May 2013, question 31.

foreclosure.[106] Moreover, the relevant markets will continue to be characterised by the presence of a number of strong competitors.[107]

252. The market investigation supports this conclusion. Indeed, none of the responding retailers of home entertainment content and none of the responding licensors/suppliers of home entertainment content raised any concern stemming from the notified concentration as regards access to home entertainment content.[108]

253. The Commission considers furthermore that there is no risk of customer foreclosure, in particular due to the limited size of the TVOD offering on CME's retail platform Voyo which, based on figures provided by the Notifying Party for the first quarter of 2013, will generate […] revenues in 2013 of approximately EUR […].

254. This conclusion is supported by the market investigation. Indeed, no concerns were raised in relation to customer foreclosure as regards digital home entertainment products.[109]

255. In light of this and given the merged entity's lack of market power on the upstream licensing/supply market the Commission concludes that the notified concentration does not raise serious doubts as to its compatibility with the internal market as regards the distribution of digital home entertainment products in the Czech Republic, Hungary, Romania, and the Slovak Republic on the basis of vertical effects.

V. CONCLUSION

256. For the above reasons, the Commission considers that the notified operation does not raise serious doubts as to its compatibility with the internal market.

257. It has therefore decided not to oppose the proposed operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

For the Commission
(signed)
Joaquín ALMUNIA
Vice-President

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[106] Commission guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008 page 7, paragraphs 25 and 35.

[107] As regards competitors on the markets for the licensing/supply of digital home entertainment content see paragraphs 213 and 215 above. Competitors of CME, offering digital home entertainment products at the retail level include the following: (i) Czech Republic: iTunes, Topfun, O2 TV/Videoteka; (ii) Hungary: iTunes, UPS, T-Home; (iii) Romania: See Now, Dolce TV; (iv) Slovak Republic: iTUnes, KlikTV, Topfun.

[108] See replies to the Commission's questionnaires Q5 – retailers of home entertainment content of 8 May 2013, question 19; and Q1 – Licensors of broadcasting rights of 8 May 2013, question 34.

[109] See replies to the Commission's questionnaires Q5 – retailers of home entertainment content of 8 May 2013, questions 19, 20; and Q1 – Licensors of broadcasting rights of 8 May 2013, question 31.