EUROPEAN COMMISSION
DG Competition

Case M.10456 - SKY / VIACOMCBS / JV

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 01/12/2021

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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

ViacomCBS Inc.
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Subject: **Case M.10456 – SKY/ViacomCBS/JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 25 October 2021, the European Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004[3] by which Sky Limited ("**Sky**"), part of Comcast Corporation ("**Comcast**") (together, "**Comcast/Sky**"), and Paramount Pictures International Limited ("**Paramount**"),

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.

2 OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

3 OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation').

part of the group headed by ViacomCBS Inc. (together, "**ViacomCBS**") will acquire joint control of a newly created JV (the "**JV**") within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation (the "**Transaction**"). Sky and ViacomCBS are together referred to as the "**Notifying Parties**" (together with the JV, the "**Parties**").

1. THE PARTIES

(2) **Sky** is the (indirect) holding company (UK) of a number of subsidiaries carrying on business across the audio-visual ("**AV**") value chain, predominantly in the UK, Ireland, Germany, Austria and Italy. Sky is ultimately owned by **Comcast**, a global media, technology and entertainment company (US). Comcast is present in Europe almost entirely through Sky and NBCUniversal ("**NBCU**"). NBCU is a media and entertainment company active in the AV sector as well as in the home entertainment sector through the direct to consumer ("**DTC**") distribution of DVDs, Blu-rays and music discs.

(3) **ViacomCBS** is a global media and entertainment company (US) that creates AV content and experiences for audiences worldwide. ViacomCBS's portfolio currently consists of three segments: TV Entertainment, Cable Networks, and Filmed Entertainment. ViacomCBS is controlled by National Amusements Inc (US).

(4) The **JV** will establish and operate a subscription video on demand ("**SVOD**") streaming service that comprises AV content and is distributed DTC on an over the top ("**OTT**")[4] basis as well as via third party platforms and connected devices. The JV will also wholesale some of ViacomCBS' and NBCU's linear pay TV channels via third party multichannel video programming distributors in 22 European countries, including the following 15 countries within the EEA (the "**JV EEA Territories**"): Bulgaria, Croatia, Czech Republic, Denmark, Finland, Hungary, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

2. THE CONCENTRATION

(5) The Transaction will be implemented by means of an agreement, entered into by Sky and Paramount on 16 August 2021 (the "**Investment Agreement**"). Subject to satisfaction of all the conditions precedent in the Investment Agreement, including receipt of regulatory approvals, Sky and Paramount will each purchase 50% of the shares in the newly created JV.[5]

2.1. Joint control

(6) Sky and ViacomCBS will each own 50% of the shares of the JV and have the ability to exercise decisive influence over the JV. In particular, the Notifying Parties will each appoint an equal number of directors in the JV's board of directors, and will

4 *I.e.* the content is delivered *via* the internet.

5 Form CO, paragraphs 91 – 93 and 96.

also jointly appoint the JV's Chief Executive Officer, Chief Financial Officer and Chief Operating Officer.[6]

(7) The executive officers will have executive and day-to-day responsibility for the operation of the JV, except for the matters that must be referred to the JV's board of directors and to the JV's shareholders pursuant to the joint venture agreement that will be entered into upon completion of the Transaction.[7] [Reference to the JV's corporate governance]. The approval of these matters requires a favourable vote by at least two appointed directors of each of the Notifying Parties or written consent of both shareholders.[8]

(8) Therefore, as a result of the Transaction, Sky and ViacomCBS will jointly control the JV within the meaning of Article 3(1)(b) of the Merger Regulation.

2.2. Full-functionality

(9) The JV will be fully functional. First, the JV will employ its own management dedicated to its day-to-day operations, and have access to sufficient resources, including finance, staff and assets that will enable it to operate independently on the market for the retail supply of AV services.[9] [10] [Reference to strategic decisions regarding the JV]. This will allow the JV to become (both financially and operationally) independent and self-financing.

(10) Second, the JV is intended to operate as an autonomous entity with independent access to the market. Its activities will not be limited to the distribution or sale of its parent companies' products, as the JV will supply its own SVOD offering as a fully independent company with its own personnel and dedicated management. Therefore, the JV will not rely on sales to its parents.[11] In addition, the JV has negotiated agreements with its parents on an arm's length basis, reflecting normal market conditions.[12]

(11) Third, the JV will not only purchase from its own parents. It will also source SVOD licenses to content from third party content providers and may also commission new content.[13]

(12) Finally, the JV is intended to operate on a lasting basis. [Reference to the JV's corporate strategy].[14]

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6 Form CO, paragraphs 97 – 98.

7 The Notifying Parties have already agreed on the terms of such joint venture agreements (the "**Agreed Form Joint Venture Agreement**"). Other agreements that the Notifying Parties will enter into upon completion of the Transaction include the Initial Annual Business Plan and the Initial Annual Budget. See Form CO, paragraph 94.

8 Form CO, paragraphs 99 – 103.

9 Form CO, paragraph 111.

10 Form CO, paragraphs 114, 118 and 120 – 125.

11 Form CO, paragraph 126 – 127.

12 Form CO, paragraphs 117, 119, 121, 123 and 125.

13 Form CO, paras. 73 and 178. The Notifying Parties estimate that spend on third party content will represent up to [proportion] of all spend on content whereas content acquired from the parents would account for between approximately [proportion] and [proportion] of the overall spend value. These percentages will be reviewed periodically as part of the budget review and may vary year on year based on the specific content output of each of the parents.

(13) Therefore, the Transaction will lead to the creation of a full-function joint venture within the meaning of Article 3(4) of the Merger Regulation.

3. UNION DIMENSION

(14) In the last financial year, Comcast/Sky and ViacomCBS achieved a combined aggregate worldwide turnover of more than EUR 5 000 million.[15] Each of the undertakings concerned achieved an EU-wide turnover in excess of EUR 250 million, but they did not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The Transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

(15) This Transaction concerns all three levels of the AV value chain (from upstream to downstream):

a) The production and supply of AV content (including the supply of pre-produced AV content and commissioned AV content), where Comcast/Sky and ViacomCBS are active on the demand- and supply-side of the market, and the JV will be active on the demand-side of the market only;

b) The wholesale supply of TV channels, where Comcast/Sky, ViacomCBS and the JV[16] will be active mainly on the supply-side of the market; and

c) The retail supply of AV services to end customers, where the JV will be active both (i) DTC, and (ii) via third-party multichannel video programming distribution ("MVPD") platforms, and Sky and ViacomCBS will also remain independently active (mostly) outside the territories where the JV will operate.

(16) In addition, the Transaction concerns the sale of advertising on TV channels, where both Comcast/Sky and ViacomCBS will remain independently active from the JV, while the JV will not be active in the supply of advertising space.

4.1. Production and supply of AV content

4.1.1. Relevant product market

4.1.1.1. The Commission's previous practice

(17) In previous decisions, the Commission has concluded that there are separate markets for: (i) the production and supply of commissioned AV content (also referred to as

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14 Form CO, paragraphs 136 – 137.

15 Turnover calculated in accordance with Article 5 of the Merger Regulation.

16 Form CO, paras. 213-215. The JV will distribute ViacomCBS's and NBCU's linear pay TV channels to third party multichannel video programming distribution platforms. In the Nordics, the JV will complement its on-demand offer with two linear TV channels on its own retail service to promote movies and series with the potential for further TV channels to be added to the service and made available in other JV Territories in future. The JV will also wholesale its SVOD offering to other retailers.

ad hoc or new content); and (ii) the licensing of broadcasting rights for pre-produced AV content (available off-the-shelf).[17]

(18) With regard to the market for the **production of commissioned AV content**, the Commission has found the product market to be limited to non-captive AV production, thereby excluding captive AV production (*i.e.*, AV content produced by broadcasters for use on their own TV channels), as this AV content is not offered on the market.[18]

(19) With regard to the market for the **licensing of pre-produced AV content**, the Commission has considered that it may be subdivided by content type, in particular: (i) films, (ii) sports, and (iii) other AV content (*i.e.*, all non-sport, non-film content), but ultimately left the market definition open.[19] In addition, the Commission had assessed whether AV content could be further sub-divided by distinguishing between: (i) US and non-US films; (ii) premium and non-premium content; or (iii) scripted and non-scripted content. This sub-segmentation has been left open in previous decisions.[20]

(20) The Commission has also considered further sub-dividing the market for the licensing of pre-produced AV content by exhibition window:[21] (i) SVOD; (ii) transactional video on demand ("**TVOD**");[22] (iii) pay-per-view ("**PPV**");[23] (iv) first pay TV window; (v) second pay TV window; and (vi) free-to-air ("**FTA**"), but has ultimately left this question open.[24]

4.1.1.2. The Notifying Parties' view

(21) The Notifying Parties agree with the Commission's previous practice that the market for the production and supply of AV content should be segmented between (i) the production and supply of commissioned AV content, and (ii) the licensing of exploitation rights for pre-produced AV content.[25]

(22) However, the Notifying Parties do not consider it appropriate to further segment these relevant markets, in particular by: (i) content type, (ii) scripted vs non-scripted

[17] Commission decision of 7 April 2017 in Case M.8354 – *Fox / Sky*, para. 54; Commission decision of 24 February 2015 in Case M.7194 – *Liberty Global/Corelio / W&W / De Vijver Media*, para. 69; Commission decision of 6 November 2018 in Case M.8785 - *The Walt Disney Company / Twenty-First Century Fox*, para. 67; Commission decision of 26 August 2020 in Case M.9299 – *Discovery / Polsat / JV*, para. 50.

[18] Commission decision of 22 September 2006 in Case M.4353 – *Permira / All3Media Group*, paras. 11-12; Commission decision of 9 October 2014 in Case M.7360 - *21st Century Fox/Apollo / JV*, para. 36; Commission decision of 20 June 2016 in Case M.7865 – *Lov Group / De Agostini / JV*, para. 18; M.9299 – *Discovery / Polsat / JV*, para. 50.

[19] Commission decision of 21 December 2011 in Case M.6369 *HBO / Ziggo / HBO Nederland*.

[20] M.8354 – *Fox / Sky*, para. 55; M.6369 – *HBO / Ziggo / HBO Nederland*, para. 18; M.7194 – *Liberty Global / Corelio / W&W / De Vijver Media*, para. 52; M.8785 - *The Walt Disney Company / Twenty-First Century Fox*, para. 68.

[21] The use of the term exhibition windows is not applicable to non-film AV content. Non-film AV content may be broadcast through different exploitation fields (*e.g.* pay TV, FTA) but the rights do not pass through each method in the same way a newly released film does.

[22] TVOD designates a product where a consumer obtains the right to watch a single title within a designated time frame (for example 48 hours) through a single payment.

[23] PPV designates a product where a consumer obtains the right to watch a single title during a specific time frame (for example Sunday between 2.00 pm and 3.45 pm) through a single payment.

[24] M.8354 – *Fox / Sky*, para. 56; M.8785 - *The Walt Disney Company / Twenty-First Century Fox*, para. 68.

[25] Form CO, paragraph 194.

content, (iii) premium vs non-premium content, or (iv) exhibition window. In this regard, the Notifying Parties submit that the above distinctions do not reflect the economic reality of competition in the AV sector.[26]

(23) More specifically, with reference to content type, the Notifying Parties argue that production companies are active in the production of content across different types and genres. Furthermore, a producer that supplies only one type of content could start supplying content of a different type swiftly and at no significant costs. The Notifying Parties also argue that, from a demand-side perspective, there is no material difference between content of different types and genres, as they all compete to attract the same audience.[27]

(24) With reference to scripted and non-scripted content, the Notifying Parties submit that, from a supply-side perspective, production companies produce both scripted and non-scripted content based on demand and, if they are specialised in the supply of either of the two, they could in any case start producing the other type of content timely and at no significant costs. Moreover, from a demand side, content acquirers do not target scripted or non-scripted content in particular, but source content based on its attractiveness to their audience, regardless of the type.[28]

(25) Moreover, the Notifying Parties argue that a segmentation between premium and non-premium content would be artificial, as it is not clear what constitutes premium and non-premium content, and the success and commercial value of any specific content is not dependent on the production budget, nor can it be predicted.[29]

(26) Finally, with reference to the different exhibition windows, the Notifying Parties note that suppliers of AV content do not produce different types of AV content designed for different exhibition windows. Moreover, the Notifying Parties argue that the distinction between exhibition windows has become increasingly blurred due to the uptake of OTT VOD platforms and non-linear services.[30]

(27) In any event, the Notifying Parties consider that, for the purpose of this decision, it is not necessary to reach a conclusion as to the exact product market definition of the market for the production and supply of AV content, as the Transaction does not raise competition concerns regardless of how such market is defined.[31]

4.1.1.3. The Commission's assessment

(28) The Commission focused its investigation in relation to this market on Spain, given that only the Spanish production and supply of AV content market is affected (see below Section 5.2). Respondents to the market investigation agree that there is a relevant product market for the production and supply of AV content.[32]

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[26] Form CO, paragraph 195.
[27] Form CO, paragraph 196.
[28] Form CO, paragraph 197.
[29] Form CO, paragraphs 199 – 200.
[30] Form CO, paragraph 201.
[31] Form CO, paragraph 202.
[32] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 6.

(29) However, the results of the market investigation are inconclusive as to the identification of two separate relevant product markets for (i) the **production and supply of commissioned AV content** and (ii) the **licensing of broadcasting rights for pre-produced AV content**, with only a slight majority of respondents considering that such separation is accurate.[33] In this regard, some respondents pointed out that these activities are not always clearly distinguishable, as production costs are similar and they represent alternative options for customers to source content.

(30) With reference to a distinction of pre-produced AV content by **content type**, in particular (i) films; (ii) sports; and (iii) other AV content, the majority of respondents to the market investigation consider such differentiation not accurate, as different content types compete with each other for viewers' attention. A few respondents also suggested alternative separations, taking into account, for example, TV series or general entertainment.[34]

(31) As regards pre-produced film content, the results of the market investigation are overall inconclusive as to whether separate relevant product markets exist for (i) **US** and (ii) **non-US film content**. A small majority of respondents consider that this distinction is not accurate because different types of AV content, including US and non-US films, compete for viewership, and because the geographic origin of a production does not determine per se the quality or the success of a film. However, other respondents stress that US films have an important value for attracting viewers, and should be distinguished from other films on grounds of volume and general quality.[35]

(32) With reference to other AV content (i.e. excluding films and sports), the market investigation is inconclusive as to whether a separation between (i) **scripted** and (ii) **unscripted AV content** is appropriate. According to a number of respondents, the argument that different types of AV content all compete for viewership applies to scripted and unscripted content as well. However, on the other hand, a similar number of respondents believes that scripted and unscripted content should form separate relevant product markets and note that AV content producers usually specialize in either type of content.[36]

(33) Similarly, the market investigation yield no clear results as to whether other AV content should be separated between (i) **premium** and (ii) **non-premium content**. However, a small majority of respondents consider that the production of premium and non-premium content do not form separate relevant product markets as they both compete for viewership and are substitutable from a consumers' perspective.[37]

(34) With reference to a distinction of the possible relevant markets for the production and licensing of pre-produced AV content according to **exhibition windows**, the results of the market investigation are overall inconclusive.[38] A small majority of

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[33] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 7.
[34] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 8.1.
[35] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 8.2.
[36] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 8.3.
[37] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 8.4.
[38] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 9.1.

respondents is of the opinion that such separation would not be relevant for the market for the production and supply of commissioned AV content in Spain.[39] Market participants provided different views as regards possible distinctions they consider appropriate. For instance, a few market participants submit that there is a single market for AV services in Spain and that customers may use pay TV channels, FTA TV channels and SVOD services as a complementary source.[40]

(35) Market participants that provide both linear and non-linear services at retail level usually acquire the broadcasting rights for such services together when it comes to tailor-made content, but replies by market participants are mixed in relation to pre-produced content.[41] Furthermore, a small majority of respondents considers that there are differences in terms of content, pricing or contract terms when content is licensed to pure OTT providers compared to other licensees, although most respondents answered that they do not know. However, explanations provided do not allow to clearly identify such differences.[42]

(36) In light of the above, the Commission concludes, for the purpose of this decision, that the production and supply of AV content forms a relevant product market. The Commission also considers that, for the purpose of this decision, the question whether within this product market further distinctions could be made (i) between commissioned and pre-produced AV content; (ii) between different content types; and (iii) based on the exhibition window, can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any such plausible product market definitions.

4.1.2. Relevant geographic market

4.1.2.1. The Commission's previous practice

(37) In past decisions, the Commission has defined the market for the production and supply of AV content (and its relevant segments) to be either national or regional, based on linguistically homogeneous areas.[43]

4.1.2.2. The Notifying Parties' view

(38) The Notifying Parties consider that the appropriate geographic market is national or regional in scope, given that the majority of content is licensed on that geographic basis. While it is not uncommon to conclude deals that span multiple territories, there would usually be different terms for different territories (*e.g.*, with respect to titles, licence period, price, etc.).[44]

(39) In any event, the Notifying Parties submit that it is not necessary for the Commission to reach a conclusion as to the precise geographic market definition for the

[39] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 9.2.
[40] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 9.3.
[41] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 10.
[42] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 10.
[43] M.8354 – *Fox / Sky*, para. 69; M.9299 – *Discovery / Polsat / JV*, para. 54.
[44] Form CO, paragraphs 204 – 205.

production and supply of AV content, as the Transaction would not raise any competition concern under any plausible market segmentation.[45]

4.1.2.3. The Commission's assessment

(40) Almost all suppliers of AV content in Spain licence their content on a national basis. Some respondents pointed out that, in some cases, they also license content on a regional basis. One respondent replied that it is active in the licencing at all geographic levels, from national to worldwide.[46]

(41) In light of the above, for the purpose of this decision, the Commission concludes that in Spain the relevant geographic market for the production and supply of AV content, including all its possible sub-segments, is national in scope.

4.2. Wholesale supply of TV channels

4.2.1. Relevant product market

4.2.1.1. The Commission's previous practice

(42) In previous decisions, the Commission has identified a wholesale market for the supply of TV channels. Within that market, in certain decisions, the Commission has further identified two separate product markets for: (i) FTA TV channels, and (ii) pay TV channels.[47] The Commission further stated that, within the pay TV channels market, a further distinction could be made between: (i) basic pay TV channels, which are included in the basic subscription fee, and (ii) premium pay TV channels,[48] for which end customers pay a premium in addition to their basic subscription fee.

(43) In *Liberty Global / Corelio / W&W / De Vijver Media*, the Commission concluded that, at the level of the wholesale supply of TV channels, there were two separate product markets, one consisting of the wholesale supply of premium pay TV channels and one consisting of the wholesale supply of basic pay TV/FTA channels. The Commission also considered that there was no need to draw a distinction between linear TV channels and their non-linear ancillary services.[49]

(44) Further, in previous decisions, the Commission examined a number of other potential additional differentiations, including genre or thematic content (such as sports, films, general entertainment, news, youth, and others), and ultimately left the market definition open in these regards.[50]

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[45] Form CO, paragraph 209.

[46] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 18.

[47] M.7194 - *Liberty Global / Corelio / W&W / De Vijver Media*, paras. 90-91.

[48] M.8785 – *The Walt Disney Company / Twenty-First Century Fox*, para. 77; Commission decision of 15 June 2018 in Case M.8861 – *Comcast / Sky*, para. 50; Commission decision of 6 February 2018 in Case M.8665 – *Discovery / Scripps,* paras. 19- 20; M.8354 – *Fox / Sky,* paras. 80- 81.

[49] M.7194 - *Liberty Global / Corelio / W&W / De Vijver Media*, paras. 93-94.

[50] M.7194 - *Liberty Global / Corelio / W&W / De Vijver Media*, para. 98; Commission decision of 18 July 2007 in Case M.4504 – *SFR / Télé 2 France*, para. 44; Commission decision of 26 August 2008 in Case M.5121 - *News Corp / Premiere*, para. 22.

(45) Last, in the recent *Telia Company / Bonnier Broadcasting Holding* decision, the Commission considered that the market for the wholesale supply of TV channels should not be further segmented according to the type of infrastructure used for the delivery to the consumer (such as cable, satellite, DTH, digital terrestrial TV and IPTV) since the competitive condition in the market for the wholesale supply of TV channels, and any possible segmentation, would be similar irrespective of the distribution technology and type of infrastructure used for the distribution of the TV channels.[51]

4.2.1.2. The Notifying Parties' view

(46) The Notifying Parties do not consider it appropriate to make any further distinctions within the market for the wholesale supply of TV channels, be it between FTA and pay TV, between linear TV channels and non-linear ancillary services, by genre, or by means of transmission.[52] Regardless, the Notifying Parties submit that it is not necessary for the Commission to reach a conclusion on this, as the Transaction would not raise any competition concern under any plausible market definition.[53]

4.2.1.3. The Commission's assessment

(47) The Commission focused its investigation in relation to this market on Denmark, given that only the Danish wholesale supply of TV channels market is affected (see below Section 5.2). With reference to whether **FTA TV** and **pay TV** channels form separate relevant product markets, respondents to the market investigation provided a mixed reply.[54] In particular, some respondents noted that there is no real FTA TV market in Denmark, with only the public service broadcaster still offering FTA TV channels.

(48) Similarly, within pay TV channels, the results of the market investigation are inconclusive regarding whether it remains appropriate to segment the wholesale supply of TV channels between **FTA and basic pay** TV channels on the one hand, and **premium pay** TV channels on the other hand in Denmark.[55] In particular, one respondent remarks that "premium" pay TV channels only have a minor presence in Denmark, with a decreasing value in a TV market affected by streaming services such as Netflix and HBO.

(49) With reference to a segmentation by **genre**, including the specific genre of **kids' TV channels**,[56] the results were similarly inconclusive. While a number of respondents considered that thematic pay TV channels of a given genre could be alternatives (rather than complements) to thematic pay TV channels of a different genre, respondents also indicated that they did not consider a market segmentation by genre

[51] Commission decision of 12 November 2019 in Case M.9064 - *Telia Company / Bonnier Broadcasting Holding,* para. 162.

[52] Form CO, para. 222.

[53] Form CO, para. 228.

[54] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 7.

[55] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 8.

[56] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 10.

appropriate. Respondents noted that TV distributors tend to demand a variety of genres to ensure an attractive global offering.[57]

(50) With regard to a possible distinction between linear TV channels and their **ancillary services**, the results of the market investigation did not provide reasons to depart from the Commission's previous approach, as the results of the market investigation indicated that ancillary services (*e.g.*, TVE, catch-up, PVR, etc.) are associated to TV channels in Denmark in order to complement the TV offering and enhance the viewer experience of traditional linear channels.[58]

(51) Most of the respondents consider that the market for the wholesale supply of TV channels should not be further segmented according to the **distribution forms** (*e.g.*, cable, IPTV, satellite, terrestrial, or OTT).[59]

(52) In light of the above, the Commission considers that, for the purpose of this decision and in line with its decisional practice, the relevant product market is the market for the wholesale supply of TV channels, including their ancillary services and covering all types of infrastructure. The question whether this product market can be further distinguished (i) by genre, (ii) by distribution technology, or between (iii) FTA and pay TV channels, and in turn whether pay TV channels can be further split into basic pay and premium pay TV channels, or (iv) FTA and basic pay TV channels on the one hand, and premium pay TV channels on the other hand can be left open since the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any such plausible product market definitions.

4.2.2. Relevant geographic market

4.2.2.1. The Commission's previous practice

(53) In previous decisions, the Commission found the market for the wholesale supply of TV channels to be either national in scope,[60] sub-national,[61] or delineated by linguistically homogeneous areas encompassing more than one EU Member State.[62]

4.2.2.2. The Notifying Parties' view

(54) The Notifying Parties consider that the appropriate geographic market is national in scope, given that the majority of wholesale supply relationships are concluded at the national level, with some exceptions in which the retail AV service provider obtains broadcasting rights to multiple countries/regions with a common language.[63] Regardless, the Notifying Parties submit that it is not necessary for the Commission

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57 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 9.

58 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to questions 13-14-15.

59 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 16.

60 M.6369 – *HBO / Ziggo / HBO Nederland*, para. 39; Commission decision of 15 April 2013 in Case M.6880 – *Liberty Global / Virgin Media*, para. 41; Commission decision of 10 October 2014 in Case M.7000 – *Liberty Global / Ziggo*, para. 98; M.9299 – *Discovery / Polsat / JV*, para. 70.

61 M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, para. 106 onwards.

62 M.8354 – *Fox / Sky*, para. 90 onwards.

63 Form CO, para. 230.

to reach a conclusion, as the Transaction will not raise any competition concern under any plausible geographic market definition.[64]

4.2.2.3. The Commission's assessment

(55) All respondents to the market investigation distribute their wholesale TV channels to retail RV/AV service providers in Denmark on a **national** basis. One respondent clarifies that this reflects the retailers' scope of operations and the homogenous linguistic region.[65]

(56) In light of the above, for the purpose of this decision, the Commission concludes that in Denmark the relevant geographic market for the wholesale supply of TV channels, including all its possible sub-segments, is national in scope.

4.3. Retail supply of AV services to end customers

4.3.1. Relevant product market

4.3.1.1. The Commission's previous practice

(57) The Commission has in previous cases identified two relevant product markets within the retail supply of AV services, namely (i) FTA TV services and (ii) pay TV services,[66] but in other more recent cases has ultimately left open the product market definition.[67] The Commission has also considered whether the market for retail pay TV services should be distinguished further according to: (i) premium pay TV vs. basic pay TV services;[68] (ii) distribution technologies (*e.g.* cable, satellite, or terrestrial);[69] and (iii) linear vs non-linear AV services;[70] but ultimately left the market definition open.[71]

(58) With reference to distribution technologies, in *Liberty Global / Corelio / W&W / De Vijver Media* the Commission recognised that at least retail AV services offered over cable and IPTV form part of the same relevant product market.[72] In the recent case of *Telia Company / Bonnier Broadcasting Holding*,[73] the Commission concluded that all the different distribution technologies are part of the same product market.

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64 Form CO, para. 233.

65 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 16.

66 M.4504 – *SFR/Télé 2 France*, para. 45.

67 M.8785 - *The Walt Disney Company / Twenty-First Century Fox*, para. 98; Commission decision of 8 October 2018 in Case M.8842 – *Tele2 / ComHem*, para. 37; M.7000 – *Liberty Global / Ziggo*, para. 137; M.8665 – *Discovery / Scripps*, para. 33; M.8354 – *Fox / Sky*, para. 101; Commission decision of 3 August 2016 in Case M.7978 – *Vodafone / Liberty Global / Dutch JV*, para. 56; M.7194 - *Liberty Global / Corelio / W&W / De Vijver Media*, para. 152.

68 M.7194 - *Liberty Global / Corelio / W&W / De Vijver Media*, para. 119.

69 M.7194 - *Liberty Global / Corelio / W&W / De Vijver Media*, para. 127; M.5121 - *News Corp / Premiere*, para. 22; Commission decision of 21 December 2010 in Case M.5932 - *News Corp / BskyB*, para. 105; M.7000 - *Liberty Global / Ziggo*, para. 113.

70 M.7194 - *Liberty Global / Corelio / W&W / De Vijver Media*, para. 124; M.5121 - *News Corp / Premiere*, para. 21; M.7000 - *Liberty Global / Ziggo*, paras. 109–110.

71 M.8785 - *The Walt Disney Company / Twenty-First Century Fox*, para. 93 and case law cited; M.9299 – *Discovery / Polsat / JV*, para. 82.

72 M.7194 – *Liberty Global / Corelio / W&W / De Vijver Media*, para. 126.

73 M.9064 - *Telia Company / Bonnier Broadcasting Holding*, para. 195.

(59) With reference to linear and non-linear services, in the past the Commission noted that non-linear services have gradually been integrated to complement TV broadcasters' and retail AV service providers' offerings and enhance the consumer's experience of linear TV channels. Most recently, in *NENT / Telenor*, the Commission indicated that linear and non-linear AV services are increasingly regarded as substitutable.[74]

(60) Furthermore, the question whether premium and basic pay TV services constitute separate product markets has ultimately been left open in recent cases.[75]

4.3.1.2. The Notifying Parties' view

(61) The Notifying Parties consider that the Transaction should be assessed on the basis of a single market for the retail supply of AV services, which encompasses all AV services (including linear and non-linear, FTA and pay TV, basic and premium), delivered through all distribution technologies, including OTT.[76]

(62) More specifically, as regards linear and non-linear services, the Notifying Parties submit that customers view these services as substitutable and that data demonstrates that viewing time is shifting from linear to non-linear services, especially in countries with the highest levels of penetration of OTT platforms. Furthermore, linear and non-linear services are being made available to consumers under a single subscription, and much of the content available on linear TV channels is also available on VOD services.[77]

(63) As regards the distribution technology, the Notifying Parties submit that content distributed via different retail infrastructures is broadly substitutable from a consumer perspective. The Notifying Parties point out that distribution technologies are increasingly converging given the rapid development of internet that enables consumers to receive video signal of comparable quality to satellite or cable service via OTT platforms.[78]

(64) Furthermore, with reference to premium and basic pay TV services, the Notifying Parties consider that there is no relevant difference between basic and premium content, regardless of the type of retail AV service of the commissioning/acquiring service provider.[79]

(65) In any case, the Notifying Parties submit that, for the purpose of this case, it is not necessary for the Commission to reach a conclusion on the precise product market definition for the retail supply of AV services, as the Transaction will not raise any competition concerns under any plausible market segmentation.[80]

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74 Commission decision of 30 April 2020 in Case M.9604 – *NENT / Telenor / JV*, para. 184.

75 See *e.g.* M.9799 – *Discovery / Polsat / JV*, para. 82.

76 Form CO, paragraph 254.

77 Form CO, paragraphs 257 – 259.

78 Form CO, paragraph 255.

79 Form CO, paragraph 260.

80 Form CO, paragraph 261.

4.3.1.3. The Commission's assessment

(66) The Commission focused its investigation in relation to this market on Denmark and Spain given that both the Danish and Spanish retail supply of AV services markets are relevant (see below Section 5.2). Respondents to the market investigation agree that there is a relevant product market for the retail supply of AV content.[81]

(67) With reference to the segmentation between **FTA TV** channels and **pay TV channels**, the majority of respondents to the market investigation consider that the retail supply of FTA TV channels and the retail supply of pay TV channels do not form separate product markets. Respondents pointed out that FTA channels, pay TV channels and internet platforms compete with each other in the eyes of consumers and one respondent specified that differences in revenue models between FTA channels, pay TV channels but also internet subscription platforms are blurring. One respondent submitted that the distinction between FTA and pay TV channels is relevant in the case of sports content.[82]

(68) The majority of respondents consider that the possible market for the retail supply of pay TV channels should not be separated between **basic pay TV** and **premium pay TV channels**. More specifically, all respondents in Denmark replied that basic and premium pay TV channels are seen as an alternative, although a number of respondents answered that they do not know.[83] Replies by market participants in Spain are less clear-cut, as the majority replied that these channels are actually complements. However, most of the explanations provided suggest that basic and premium pay TV channels do not form separate product markets, and that the difference between the two has been blurring. One respondent argued that whether a difference exists depends on how retail suppliers package their channels, as premium channels need to be offered in addition to a basic pay TV channel subscription.[84] All respondents submit that it would not be accurate to distinguish between the retail supply of (i) FTA channels and basic TV channels on the one hand and (ii) premium pay TV channels on the other.[85]

(69) With reference to a distinction within pay TV channels between **linear** and **non-linear pay TV channels**, the majority of respondents to the market investigation consider that this segmentation is not accurate. More specifically, the majority of respondents in Denmark replied that linear and non-linear pay TV channels do not form separate product markets.[86] In Spain, however, only a small majority of respondents believe that linear and non-linear TV channels compete with each other for consumers' viewership. In this regard, one respondent pointed out that pay TV providers increasingly integrate non-linear elements alongside linear services, and

81 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 6; Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 6.

82 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 12; Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 31.

83 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 18.

84 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to questions 13.

85 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 13.2; Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 18.2.

86 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 19.

that pay TV services commonly acquire linear and non-linear content rights together and incorporate them into the same subscription service.[87]

(70) All respondents to the market investigation consider that non-linear pay AV services offered by **local OTT SVOD platforms** and by **international OTT SVOD platforms** are alternatives and therefore do not form separate product markets.[88] Overall, respondents pointed to the fact that there is intense competition between local and international VOD platforms, as they both contend for the same local audiences to which they tailor their content.

(71) Similarly, all respondents to the market investigation submit that, with reference to advertising founded AV services, **FTA linear channels** and **VOD non-linear services** do not form separate product markets. In general, respondents submit that consumers do not differentiate on this basis and that the content on FTA channels and VOD platforms is equivalent.[89]

(72) With reference to the different **distribution technologies**, the majority of respondents to the market investigation consider different distribution technologies for AV content as alternative to each other, although many respondents answered that they do not know.[90] In this regard, the majority of respondents are generally aligned in considering that, from a demand-side perspective, consumers view different transmission technologies as substitutable. Furthermore, one respondent specified that, from a supply-side perspective, certain retailers use multiple distribution technologies to provide services to consumers.

(73) In light of the above, the Commission considers that, for the purpose of this decision, there exists a relevant product market for the retail supply of AV services, separate from the production and supply of AV content and the wholesale supply of TV channels. However, the Commission considers that the question whether within this product market a further distinction can be made (i) between FTA TV channels and pay TV channels; (ii) between basic and premium pay TV channels; (iii) between linear and non-linear TV channels (and further sub-segmentations thereof); or (iv) between different distribution technologies, can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any such plausible product market definitions.

4.3.2. Relevant geographic market

4.3.2.1. The Commission's previous practice

(74) The Commission has in the past considered that the geographic scope of the market for the retail provision of AV services could be either (i) national, since providers of

[87] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to questions 14.

[88] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 15; Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 20.

[89] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 16; Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 21.

[90] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 17; Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 22.

retail AV services compete on a nation-wide basis; or (ii) limited to the coverage area of each respective cable operator.[91]

4.3.2.2. The Notifying Parties' view

(75) The Notifying Parties consider that the geographic scope of the market for the retail provision of AV services is national. According to the Notifying Parties, the Commission's previous findings regarding the geographic market for retail AV services on the basis of the "coverage area of each cable operator" have been based on the premise that the distributor was acting *via* its regional infrastructure, *e.g.*, a cable network. For content delivered directly to consumers over the open internet, these restrictions of coverage area are not applicable. In this regard, the Notifying Parties note that there is an increasing number of SVOD players such as Disney+, Netflix and Amazon Prime Video, which are providing their retail services on a national basis.[92]

(76) In any case, the Notifying Parties consider that, for the purpose of this case, it is not necessary for the Commission to reach a conclusion as to the precise geographic scope of the market for the provision of retail AV services, as the Transaction would not result in a significant impediment of effective competition under any possible geographic market definition.[93]

4.3.2.3. The Commission's assessment

(77) Almost all respondents to the market investigation consider that the relevant geographic market for the retail supply of AV services is **national** in scope.[94] One respondent submitted that, although some OTT broadcasters are present on a worldwide basis, content licensed for a specific country can't be broadcasted outside of such country.

(78) In light of the above, for the purpose of this decision, the Commission concludes that in Spain and Denmark the relevant geographic market for the retail supply of AV services, including all its possible sub-segments, is national in scope.

4.4. Sale of advertising space

4.4.1. Relevant product market

4.4.1.1. The Commission's previous practice

(79) The Commission has in previous cases established a distinction between (i) online and (ii) offline advertising, on the basis of specificity (i.e. the ability to reach a more targeted audience) and pricing model.[95] Within offline advertising, the Commission

[91] M.8785 - *The Walt Disney Company / Twenty-First Century Fox,* para. 100; M.9799 – *Discovery / Polsat / JV*, para. 86.

[92] Form CO, paragraphs 263 – 265.

[93] Form CO, paragraph 266.

[94] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 19; Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 32.

[95] Commission decision of 9 September 2014 in Case M.7288 – *Viacom / Channel 5Broadcasting,* para. 35.

has distinguished separate markets for (i) the sale of advertising on TV channels and (ii) for the sale of advertising in newspapers.[96]

(80) However, in the market investigation in *Viacom / Channel 5* respondents pointed out that the line between online advertising and TV advertising is becoming increasingly blurred.[97] The Commission has never assessed whether advertising placed on OTT and VOD services belongs to the market for online or offline advertising.

4.4.1.2. The Notifying Parties' view

(81) The Notifying Parties consider that there is only one market for all TV advertising. In this regard, the Parties submit that online advertising exercises an increasing competitive constrain on advertising through OTT VOD platforms and linear TV channels.[98]

(82) Further, the Notifying Parties consider that advertising on OTT VOD platforms forms part of the same market as advertising via linear TV channels, and that there is no need to distinguish between advertising on FTA and pay TV channels.[99]

(83) In any case, the Notifying Parties submit that, for the purpose of this case, the exact product market definition for the sale of advertising space can be left open as the Transaction would not result in a significant impediment to effective competition under any possible product market definition.[100]

4.4.1.3. The Commission's assessment

(84) The Commission focused its investigation in relation to this market on Denmark given that only the Danish advertising market is relevant (see below Section 5.2). The majority of respondents to the market investigation submit that **online** and **offline** advertising do not form separate relevant product markets.[101] In this regard, some respondents consider that the advertising market is converging and such distinction is no longer relevant as it no longer reflects the mechanisms of the market. Another respondent submits that offline and online advertising are very similar from a customer perspective. Along the same lines, a respondent specified that the rise of non-linear VOD viewing is making the boundaries between online and offline advertising more blurred and that constraint from online advertising is increasing across all forms of advertising media. However, on the other hand, one respondent considers that TV and digital advertising have different pricing mechanisms and different levels of reach.[102]

(85) As regards the possible market for online advertising, a limited number of respondents consider that advertising **placed on OTT VOD platforms** would

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96 Commission decision of 7 July 2005 in Case M.3817 – *Wegener / PCM / JV*, para. 27; Commission decision of 1 February 1999 in Case M.1401 – *Recoletos / Unedisa*, paras. 26-28; M.5932 - *News Corp / BSkyB*, paras. 265 and 266; M.8665 - *Discovery / Scripps*, para. 40.

97 M.7288 – *Viacom / Channel 5 Broadcasting*, paras. 38 and 40.

98 Form CO, paragraph 283.

99 Form CO, paragraph 284.

100 Form CO, paragraph 287.

101 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 24.

102 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 24.1.

belong to the market for online advertising, assuming that such a market exists as a distinct product market, although many respondents answered that they do not know.[103]

(86) With reference to a separation of advertising according to the **media channel**, all respondents consider that it is not appropriate to distinguish the market for the supply of advertising spaces according to the media channel used (*e.g.*, newspapers, radio, TV, Internet). Respondents consider that historic segmentations on the market are no longer accurate as today consumers allocate their attention across different digital media platforms on the basis of the type of content made available to them.[104]

(87) With reference to both offline TV advertising and online advertising, all respondents consider that advertising space sold **directly by the publisher** (*e.g.*, the OTT platform or the TV channel) and advertising space sold **through an intermediary** do not form separate product markets, although many respondents answered that they do not know.[105]

(88) Finally, the results of the market investigation are inconclusive as to whether, within online advertising, **search** and **non-search** advertising form separate relevant product markets,[106] although all respondents consider that, should non-search advertising form a separate relevant product market, it would not be appropriate to further distinguish between non-search video advertising and other types of non-search advertising.[107]

(89) The Commission considers that, for the purpose of this decision, the question whether within the relevant product market for the sale of advertising space should be a further distinction should be made between: (i) online and offline advertising; (ii) the different media channels; (iii) advertising sold directly by the publisher or through an intermediary; and (iv) online search and non-search advertising, can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any such plausible product market definitions.

4.4.2. *Relevant geographic market*

4.4.2.1. The Commission's previous practice

(90) In previous decisions, the Commission has considered that the market for the supply of TV advertising, including the possible separate markets outlined above, is national in scope.[108]

4.4.2.2. The Notifying Parties' view

(91) The Notifying Parties agree with previous Commission's decisions and consider that the market for the supply of TV advertising is national in scope.[109] In any case, the

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103 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 25.
104 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 24.
105 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to questions 26 and 27.
106 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 28.
107 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 29.
108 Among other cases, M.7288 – *Viacom / Channel 5Broadcasting*, para. 45.

Notifying Parties consider that, for the purpose of this case, it is not necessary for the Commission to reach a conclusion as to the precise geographic scope of the market for the sale of advertising space, as the Transaction would not result in a significant impediment of effective competition under any possible geographic market definitions.

4.4.2.3. The Commission's assessment

(92) The majority of respondents to the market investigation submit that they buy/sell TV advertising space on a national basis. In general, respondents submit that they operate advertising specifically targeted at the audience of the relevant country.[110]

(93) In light of the above, for the purpose of this decision, the Commission considers that the relevant geographic market for the sale of advertising space, including all its possible sub-segments, is national in scope.

5. COMPETITIVE ASSESSMENT

5.1. Analytical framework

(94) Article 2 of the Merger Regulation requires the Commission to examine whether notified concentrations are compatible with the internal market, by assessing whether they would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position.[111]

(95) In this respect, a merger may entail horizontal and/or non-horizontal (*i.e.*, vertical or conglomerate) effects. Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. Non-horizontal effects are those deriving from a concentration where the undertakings concerned are active in different relevant markets. In a case where a merger entails horizontal or non-horizontal effects, the Commission will appraise these effects in accordance with the guidance set out in the relevant notices.[112]

(96) Horizontal mergers involve companies which are actual or potential competitors of each other in one or more of the relevant markets concerned. The Horizontal Merger Guidelines list a number of factors which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger, such as the large market shares of the merging firms, the fact that the merging firms are close

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109 Form CO, paragraphs 289 – 290.

110 Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 33.

111 With regard to the application of the Merger Regulation in the EEA, see Annex XIV to the EEA Agreement.

112 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C 31, 5.2.2004.

competitors, the limited possibilities for customers to switch suppliers, or the fact that the merger would eliminate an important competitive force.[113]

(97) Vertical mergers involve companies operating at different levels of the supply chain. There are two main ways in which vertical mergers may significantly impede effective competition: input foreclosure and customer foreclosure.

(98) Input foreclosure may raise competition problems only if it concerns an important input for the downstream market, and if the combined entity has a significant degree of market power upstream.[114] In assessing the likelihood of an anticompetitive input foreclosure strategy, the Commission examines: (i) whether the combined entity would have the ability to substantially foreclose access to inputs; (ii) whether it would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental effect on competition downstream.[115]

(99) For a transaction to raise customer foreclosure competition concerns, the combined entity must be an important customer with a significant degree of market power in the downstream market.[116] In assessing the likelihood of an anticompetitive customer foreclosure strategy, the Commission examines: (i) whether the combined entity would have the ability to foreclose access to downstream markets by reducing its purchases from upstream rivals; (ii) whether it would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market.[117]

(100) In relation to potential cooperative effects, under Article 2(5) of the Merger Regulation, the Commission takes into account in particular: (i) whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and (ii) whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

5.2. Identification of affected markets

(101) Comcast/Sky and ViacomCBS are active: (i) in the production and supply of commissioned AV content and in the licensing of pre-produced AV content; (ii) in the wholesale supply of TV channels; and (iii) in the retail supply of AV services to end customers. Moreover, Comcast/Sky and ViacomCBS are also active in the sale of TV advertising space.[118]

(102) The JV will be active: (i) in the market for the wholesale supply of TV channels, where it will wholesale supply Comcast/Sky and ViacomCBS' TV channels to MVPD platforms; and (ii) in the market for the retail supply of AV services, where it

[113] Horizontal Merger Guidelines, paragraphs 27 and following.
[114] Non-Horizontal Merger Guidelines, paragraphs 34-35.
[115] Non-Horizontal Merger Guidelines, paragraph 32.
[116] Non-Horizontal Merger Guidelines, paragraph 58.
[117] Non-Horizontal Merger Guidelines, paragraph 59.
[118] Form CO, Table 3.

will develop and operate a SVOD streaming service comprising AV services distributed both directly to consumers and via third-party MVPD platforms.

(103) The Transaction gives rise to the following vertically affected markets.

a) First, the production and supply of pre-produced US film content in Spain[119], where Comcast/Sky and ViacomCBS are active, which is upstream from the retail supply of AV services to end-customers in Spain, where the JV is active.

b) Second, the wholesale supply of pay TV channels in the kids segment in Denmark, where ViacomCBS is active, which is upstream from the retail supply of AV services to end-customers in Denmark, where the JV is active.

5.3. Horizontal relationships

(104) The Transaction involves no significant horizontal overlaps between the Parties and the JV. At the **retail level** (*i.e.*, the main focus of the JV), there is no horizontal overlap as Sky has no or minimal activities in the JV EEA Territories, ViacomCBS has only minor activities in the Nordics through Paramount+, and the JV will have a modest share of the retail market. At the **wholesale level**, the JV will be supplying both Parents' TV channels to third parties in the JV Territories. While the Parties' activities do overlap in the supply of TV channels, their combined shares are modest, and in any event below 20%. Therefore, there are no horizontally affected markets.

5.4. Vertical relationships

(105) The Transaction gives rise to two vertically affected relationships, in which the affected markets are:

c) Sky and ViacomCBS' supply of pre-produced US film content in Spain (upstream) (Sky: [20-30]%, ViacomCBS: [5-10]%)[120] for the JV's retail supply of AV services in Spain (downstream) (JV: […]% in 2024[121], Sky: [0-5]%, ViacomCBS: [0-5]%[122]); and

d) ViacomCBS's wholesale supply of pay TV channels in the kids segment in Denmark (upstream) (ViacomCBS: [60-70]%)[123] for the JV's retail supply of AV

[119] The Commission considers that, for the purpose of this decision, the production and supply of US film content constitutes the narrowest possible segment in which the activities of the Notifying Parties overlap giving rise to affected markets. First, in relation to the distinction between premium and non-premium US film content, the Notifying Parties explained that whether specific content is "premium" or not, can't be predicted when it is produced. It essentially depends on the success with which a piece will have sold, and its commercial value will change over time. [Reference to the Parties' commercial strategy] Second, in relation to the distinction between US film content based on the exhibition windows, the Notifying Parties explained that the film content that they license is the same regardless of which specific exhibition window it is licensed in (Form CO, paragraph 201).

[120] Form CO, Annex B.1.2.2., Table 14.5 (Spain, 2020 revenue shares for pre-produced US film content).

[121] Notifying Parties' response to the Commission's RFI No 5 of 29 October 2021. The JV will be a new entrant, but is expected to hold […]% in Spain and […]% across all JV territories in the total SVOD segment (the JV will be a SVOD only service) in 2024. The Notifying Parties have estimated the projected total market and JV SVOD subscribers for Spain using data regarding the population for Spain.

[122] Form CO, Annex B.1.2.5, Table 14.1 (Spain, 2020 revenue shares for total pay TV segment).

[123] Form CO, Annex B.1.2.3., Table 4.7 (Denmark, 2020 revenue shares for pay TV kids channels).

services to end-customers in Denmark (downstream) (JV: […]% in 2024[124], Sky: [0-5]%, ViacomCBS: [0-5]%[125]).

(106) The Notifying Parties' combined market shares in the upstream market for the supply of pre-produced US film content in Spain are above 30% ([30-40]%). Likewise, the Notifying Parties' combined market shares in the upstream market for the supply of pay TV channels in the kids segment in Denmark are above 30% ([60-70]%).

(107) Therefore, the Commission has assessed the risk of (i) foreclosure of competing suppliers of retail AV services (downstream) from accessing Comcast/Sky and ViacomCBS' supply of pre-produced US film content in Spain (input foreclosure); and (ii) foreclosure of competing suppliers of retail AV services (downstream) from accessing ViacomCBS's wholesale pay TV channels in the kids segment in Denmark (input foreclosure).

5.4.1. Possible foreclosure of competing suppliers of retail AV services in Spain (downstream) from accessing Comcast/Sky and ViacomCBS' pre-produced US film content in Spain (upstream)

5.4.1.1. The Notifying Parties' views

(108) The Notifying Parties submit that, post-Transaction, the JV will not have the ability or incentive to foreclose competing retail suppliers of AV services from accessing Comcast/Sky and ViacomCBS' pre-produced US film content in Spain.

(A) Ability to engage in input foreclosure

(109) The Notifying Parties submit that the JV will not have the ability to engage in a successful input foreclosure strategy because Comcast/Sky and ViacomCBS do not have a significant degree of market power in the market for the supply of pre-produced US film content in Spain.

(110) First, the Notifying Parties note that Comcast/Sky and ViacomCBS' combined market share is only slightly above 30% in 2020, and that there are significant alternative suppliers of US film content in Spain, including studios of a similar size such as Warner Bros, Walt Disney Studios/Twentieth Century Fox and Sony. Moreover, the Notifying Parties point out that their combined market share in 2019 and the first half of 2021 is substantially lower ([10-20]% and [10-20]% respectively).[126] According to the Notifying Parties, this is due to the endemic volatility of revenue shares from year to year in the market at hand, which is inconsistent with a position of market power.[127] Therefore, retailers of AV content

[124] Notifying Parties' response to the Commission's RFI No 5 of 29 October 2021. See also footnote 38 above. In Denmark, the JV is expected to hold […]% in the total SVOD segment in 2024. The Notifying Parties have estimated the projected total market and JV SVOD subscribers for Denmark using data regarding the number of broadband households for Denmark.

[125] Form CO, Annex B.1.2.5, Table 4.1 (Denmark, 2020 revenue shares for total pay TV segment).

[126] Form CO, paragraph 360.

[127] Form CO, paragraph 360 and footnote 275. The Notifying Parties submit that this volatility is due to different studios having successful film releases at different points in time.

would continue to have a wide variety of alternative choice for US film content in Spain.

(111) Second, the Notifying Parties submit that US film content would be an overly narrow segment to consider for estimating whether the Parties enjoy a significant degree of market power. US film content constitutes only one of the many content types that attract viewers, such that it plays a limited role in shaping end consumers' choice. In this regard, the Notifying Parties consider that they could not exploit their market position on US film content, because it is not an important input for retailers of AV services in Spain and it is not determinant of end-consumers' choice of retailer.[128]

(112) Therefore, the Notifying Parties consider that the JV would not have the ability to foreclose Comcast/Sky and ViacomCBS' pre-produced US film content in Spain.

(B) Incentive to engage in input foreclosure

(113) As regards the incentive to engage in input foreclosure, the Notifying Parties note that, as part of the Transaction, Comcast/Sky and ViacomCBS [details of licensing arrangements].[129]

(114) Therefore, according to the Notifying Parties, there is no need to assess whether Comcast/Sky and ViacomCBS would have the incentive to foreclose their pre-produced US film content by rendering it unavailable to the JV's competitors.[130]

(C) Impact on effective competition

(115) The Notifying Parties further submit that a foreclosure of their pre-produced US film content in Spain would not cause any anticompetitive effects *vis-à-vis* retail suppliers of AV content.

(116) First, the Notifying Parties submit that attractiveness of film content for retail suppliers of AV services can be measured by box office success, which solely depends on the particular films released in cinemas in the relevant year and not on the identity of the producing studio. The Notifying Parties note that there is nothing unique about their US film content, or about Hollywood studios' content more generally, as any given year non-Hollywood studios produce films which are as popular or more popular than the content produced by Comcast/Sky or ViacomCBS.[131]

(117) Second, the Parties will face strong competition in the downstream market for the retail supply of AV content from vertically integrated players such as Disney+, Amazon Prime Video and Netflix, who produce their own content and have committed significant resources to this end. Therefore, these players do not depend on the supply of pre-produced US film content by Comcast/Sky and ViacomCBS. Moreover, even downstream players that acquire US film content from the Notifying

[128] Form CO, paragraph 360.
[129] Form CO, paragraph 365.
[130] Form CO, paragraph 366.
[131] Form CO, paragraph 367.

Parties do not depend on their input, as Comcast/Sky and ViacomCBS' US film content [scale of the Parties' sales to their customers].[132]

(118) Third, the Notifying Parties point out that exclusive licensing of US film content is common practice by producing studios. [Details of licensing arrangements].

(119) Fourth, the Notifying Parties note that the increasing trend of multi-homing by consumers means that they would not cancel their subscription with a particular provider and divert their subscription to the JV's offering simply because a certain proportion of US films are no longer available on the previous provider's platform. On the contrary, consumers may continue their current subscription in addition to the subscription to the JV's offering.[133]

(120) Therefore, the Notifying Parties consider that, even if they were to engage in input foreclosure with regard to Comcast/Sky and ViacomCBS' US film content, such practices would not have any impact on competition in the downstream market for the retail supply of AV services.

5.4.1.2. Commission's assessment

(121) For the reasons set out below, the Commission considers that the Transaction does not lead to credible input foreclosure concerns in the downstream market for the retail supply of AV services in Spain, regardless of the precise product and geographic market definitions retained (see Sections **4.1** and **4.3** above).

(A) Ability to engage in input foreclosure

(122) The Commission considers that, although Sky and ViacomCBS would be able to license their pre-produced US film content to the JV on an exclusive basis, post-Transaction the Notifying Parties will not have the ability to engage in a successful input foreclosure strategy in Spain, because they will not have a significant degree of market power upstream and their US film content does not represent a sufficiently important input.

(123) First, the Commission notes that Comcast/Sky and ViacomCBS' 2020 combined market shares in the possible relevant market for the production and supply of pre-produced US film content in Spain are just above 30% ([30-40]%), with a modest increment of [5-10]%. Moreover, a number of alternative production studios offer pre-produced US film content in competition with the Notifying Parties, including major Hollywood studios. In this regard, the majority of respondents to the market investigation indicate that the level of competition in the market for the production and licensing of AV content in Spain is very high or high.[134] Therefore, the Commission considers that, post-Transaction, competing retail suppliers of AV services in Spain would continue to have access to a variety of alternative choices for pre-produced US film content.

(124) Second, the Commission considers that pre-produced US film content offered by the Notifying Parties is not particularly strategic for retail suppliers of AV services as

[132] Form CO, paragraph 367.

[133] Form CO, paragraph 367

[134] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 22.

compared to the US film content offered by other studios. Although the majority of respondents to the market investigation consider that US film content in general is relevant for the attractiveness of an AV offering to consumers[135], the market investigation also indicates that the US films library licensed by Comcast/Sky and ViacomCBS is not particularly important for the competitiveness of retail AV services.[136]

(125) In this regard, a small majority of respondents submit that, should the Notifying Parties stop licensing their US film content, they would be able to license other US film content from alternative suppliers, but such alternative content would not entirely replicate the present arrangements.[137] However, the Commission notes that, as explained by the Notifying Parties[138], a number of retail suppliers of AV services are independent from Comcast/Sky and ViacomCBS' offering of US films. Moreover, retailers that purchase this content from the Notifying Parties are not reliant on them to an extent greater than their market share in the possible market for the production and supply of US film content[139] (as indicated in paragraphs (105)-(106)), and would therefore be able to complement their retail offering with US films produced by other studios. Furthermore, the Commission notes that the success of even major studios varies and that market shares fluctuate as they depend on the consumers' reception of the particular films released in the reference year.[140]

(126) Third, the Commission considers that the supply of pre-produced US film content amounts to a very narrow market representing only one of the different types of content that retail suppliers of AV services offer in order to attract viewers to their platforms. In this regard, a number of respondents to the market investigation explained that US films usually contribute to build a successful portfolio of content, but retail providers of AV services seek to secure a variety of different types of AV content in order to maximize the attractiveness of their platform *vis-à-vis* consumers and reach a wider audience.[141]

(127) [Confidential information from the Parties' internal documents].[142]

(128) Last, the Commission notes that exclusive licensing of US film content is common across suppliers of AV content in Spain, as indicated by all respondents to the market investigation.[143] A number of attractive platforms including Netflix, Amazon Prime Video, HBO and Disney+ compete for consumers' attention in the

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135 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 28.

136 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 27.

137 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 29.

138 Form CO, paragraph 367.

139 Form CO, paragraph 367.

140 Form CO, paragraph 360 and footnote 275. The Notifying Parties explained that there is significant volatility in production studios' revenue shares, as these studios release successful films at different points in time. For example, Warner Bros' share in the US films sub-segment jumped from approximately [20-30]% in 2020 to approximately [40-50]% in the first half of 2021 due to successful releases such as *Godzilla vs Kong*, *The Conjuring: The Devil Made Me Do it*, *Wonder Woman 1984* and *Mortal Kombat*.

141 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 28.1.

142 Notifying Parties' internal documents, [confidential reference to internal document].

143 Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 21.

downstream market for the retail supply of AV services.[144] Such platforms also rely on exclusive content to boost their competitiveness[145], and no respondents to the market investigation indicated that this practice has led to the exit of competitors from the downstream market so far. Therefore, [Parties' business strategy], the Notifying Parties are unlikely to have the ability to successfully foreclose competing retail suppliers of AV services.

(129) Therefore, for the reasons set out above, the Commission considers that the Parties would not have the ability to engage in a successful input foreclosure strategy with regard to Comcast/Sky and ViacomCBS' pre-produced US film content in Spain.

(B) Incentive to engage in input foreclosure

(130) The Commission notes that the conditions for a successful input foreclosure strategy to occur are cumulative. Since the Commission concluded that the Parties would not have the ability to engage in a successful input foreclosure, the Commission considers that the Parties' incentive to foreclose competing suppliers of retail AV services from accessing Comcast/Sky and ViacomCBS' pre-produced US film content in Spain is not decisive. Therefore, the Commission does not have to take a position on the Parties' incentive to engage in input foreclosure.

(131) For the sake of completeness, the Commission notes that the JV will acquire broadcasting rights for pre-produced AV content from each of Comcast/Sky and ViacomCBS, [details of licensing arrangements].[146] [details of licensing arrangements].[147]

(C) Impact on effective competition

(132) The Commission considers that the Parties will not have the ability to engage in a successful input foreclosure strategy. In any event, a hypothetical input foreclosure strategy from the Parties, even if it could impact some retail suppliers of AV services, would not have an overall detrimental impact on effective competition in the market for the retail supply of AV services in Spain. Therefore, even if the Parties were to foreclose some competing retail suppliers of AV content from accessing Comcast/Sky and ViacomCBS' pre-produced US film content, this would not have a detrimental impact on effective competition in the downstream market for the retail supply of AV services in Spain.

(133) First, the Commission considers that there are sufficient alternatives for the supply of US film content in Spain. In particular, as indicated in paragraph (123) above, a number of other US production studios offer US film content comparable to that of the Notifying Parties, including major Hollywood studios such as Warner Bros, Walt Disney Studios/Twentieth Century Fox and Sony.

[144] Form CO, paragraph 367; see also Q1 – Questionnaire to market participants in the AV sector (Spain), one competitor's reply to question 32.

[145] Form CO, paragraph 367: for example, Netflix has recently entered into a five-year streaming deal with Sony whereby it will acquire exclusive rights to Sony's films once they leave theatres and premium VOD services.

[146] Form CO, paragraph 176.

[147] Form CO, paragraphs 358 and 367.

(134) Second, the Commission notes that a number of competing retail providers of AV services such as Netflix, Amazon Prime Video, Disney+ and HBO do not depend on US film content supplied by the Notifying Parties, as they are vertically integrated players that produce their own US films.[148]

(135) Third, in any case, while acknowledging that US films in general are important for the purpose of building an attractive AV offering *vis-à-vis* consumers, the Commission considers that US films do not constitute *per se* a sufficiently important input for the competitiveness of platforms offering AV services at retail level. In this regard, as noted by the Notifying Parties[149], non-Hollywood studios regularly produce film content that is very successful at the box office and that drives success throughout the entire AV chain, as also specifically pointed out by one respondent to the market investigation.[150]

(136) Therefore, the Commission notes that the Notifying Parties' [details of licensing arrangements] licenses of their US film content to the JV is unlikely to have a significant effect on the ability of rival platforms (both vertically integrated and non-vertically integrated) to compete.

(137) This conclusion is supported by the results of the market investigation. A majority of respondents submit that the Transaction would have a neutral impact on their company.[151] Only one respondent expressed concerns about the general trend of major producers of AV content creating their own OTT platforms and rendering access to their AV content, including US films, more difficult and expensive.[152]

(138) As regards the impact on the overall market for the retail supply of AV services in Spain, the results of the market investigation are inconclusive. Most respondents stated that they do not know what the overall impact will be. A few respondents consider the impact to be neutral. An equal number of respondents consider that the Transaction will have a negative impact on the overall market for the retail supply of AV content.[153]

(139) However, it was specified that, although a different alternative would not completely replicate the current arrangements, there would be alternative suppliers of US film content in Spain.[154] In any case, as an additional element, some respondents to the market investigation pointed out that they source content across different genres and categories to stay attractive[155] and that therefore the success of an AV platform would not depend solely on US films.

(140) For the reasons set out above, the Commission considers that, even if the Parties had the ability to engage in a successful input foreclosure strategy by ceasing to supply their US film content to third-party retail suppliers of AV content, such strategy

[148] Form CO, paragraph 367.
[149] Form CO, paragraph 367.
[150] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 8.2.
[151] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 38.
[152] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 38.
[153] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 39.
[154] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 35.1.
[155] Q1 – Questionnaire to market participants in the AV sector (Spain), replies to question 27.

would not have a detrimental impact on competition in the market for the retail supply of AV services.

(D) Conclusion

(141) The potential market for the supply of pre-produced US films is the narrowest possible product market with the largest overlap between the Notifying Parties. Under any other potential market definition, their combined market shares would be considerably lower.

(142) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to the compatibility with the internal market with respect to possible input foreclosure practices of retail AV services in Spain (downstream) from accessing Comcast/Sky and ViacomCBS' AV content in Spain (upstream) under any of the alternative product markets for the supply of AV content in Spain.

5.4.2. Possible foreclosure of competing suppliers of retail AV services in Denmark (downstream) from accessing ViacomCBS' wholesale pay TV channels in the kids' segment in Denmark (upstream) (input foreclosure)

(143) Upstream, Comcast/Sky and ViacomCBS will both supply their current pay TV channels to the JV for wholesale supply in each of the JV EEA Territories. Downstream, the JV will become responsible for distributing these channels, and will also be active in the retail supply of AV services.

(144) [Parties' strategic decisions with regard to the JV]. Comcast/Sky does not have any kids' channels in Denmark.

5.4.2.1. The Notifying Parties' views

(145) The Notifying Parties submit that post-Transaction, the Parties will not have the ability or incentive to foreclose some or all of ViacomCBS' pay TV kids' channels in Denmark. Accordingly, the Notifying Parties also consider there would not be any plausible negative effect on competition in the downstream retail supply of AV services in Denmark.[156]

(A) Ability to engage in input foreclosure

(146) The Notifying Parties submit that, post-Transaction, the Parties will not have the ability to engage in a successful input foreclosure strategy.

(147) First, the Notifying Parties submit that ViacomCBS' market share results from an unduly narrow market segmentation, which consists only of kids' pay TV channels in Denmark and is not a real indicator of market power.

(148) Second, the Notifying Parties consider that kids' pay TV channels are not an important input for a retail AV offering in Denmark. Kids' pay TV channels would only account for 1% of the overall pay TV audience and would be considered one of the least important genres from the perspective of end-customers.

[156] Form CO, paragraph 317.

(149) Third, pay TV retailers possess credible alternatives, including Disney (*e.g.*, Disney Channel, Disney Junior and Disney XD), WarnerMedia (*e.g.*, Cartoon Network and Boomerang) as well as FTA channels incorporating similar content.

(150) Therefore, the Notifying Parties argue that the Parties would not have the ability to foreclose competing retail suppliers of AV services from accessing ViacomCBS' wholesale kids' pay TV channels in Denmark.

(B) Incentive to engage in input foreclosure

(151) As regards incentives, the Notifying Parties submit that, post-Transaction, there is no prospect that an input foreclosure strategy would be successful.

(152) First, even if pay TV retailers were no longer able to carry ViacomCBS' kids' pay TV channels, this is unlikely to result in significant amounts of end-customers switching away from these retailers because: (i) kids' pay TV channels do not play a significant role in shaping the end-customers' choice at the retail level; (ii) retailers have credible alternative options (*e.g.*, Disney and Warner Media); and (iii) retailers can improve other aspects of their offerings (*e.g.*, content/channels carried, home broadband and telephone services).

(153) Second, other retailers (not the JV) would most likely capture any switching away from foreclosed pay TV retailers. JV's SVOD services will not be the closest competitors to those linear pay TV retailers that ViacomCBS currently supplies with kids' channels.

(154) Third, there are a number of alternative significant suppliers in the SVOD segment in Denmark including Viasat's Viaplay, Netflix, WarnerMedia's HBO Max, TV2's TV2 Play, Discovery+, and Disney+.

(155) Fourth, the incentive for ViacomCBS to engage in foreclosure will be significantly dampened by its only partial stake in the JV (*i.e.*, 50%). [ViacomCBS' sales strategy and financial information].

(156) Finally, this vertical relationship already exists before the Transaction as ViacomCBS' has an existing retail business in Denmark, Paramount+, [Parties' strategic decisions with regard to the JV].

(157) Therefore, the Notifying Parties conclude that they will not have the incentive to foreclose competing retail suppliers of AV services from accessing ViacomCBS' wholesale kids' pay TV channels in Denmark.

(C) Impact on effective competition

(158) The Notifying Parties submit that, even if they had the ability and incentive to engage in a successful input foreclosure strategy with regard to ViacomCBS' pay TV kids' channels in Denmark, this would not have anticompetitive effects *vis-à-vis* retail suppliers of AV content.

(159) In this regard, as set out above, the Notifying Parties consider that downstream retailers would have recourse to other upstream providers of kids' pay TV content if they wished to include this in their service. Further, the inclusion of kids-specific TV channels would not be essential to the success of a downstream retail AV service.

(160) Therefore, the Notifying Parties note that a potential input foreclosure strategy would not have any plausible negative effect on competition in the market for the retail supply of AV services in Denmark.

5.4.2.2. Commission's assessment

(161) For the reasons set out below, the Commission considers that the Transaction does not lead to credible input foreclosure concerns in the downstream markets for retail AV services with regard to the wholesale supply of TV channels, regardless of the precise product and geographic market definitions retained (see Sections **4.2** and **4.3** above).

(A) Ability to engage in input foreclosure

(162) While ViacomCBS would have the technical ability to implement an exclusivity strategy with regards to kids' pay TV channels *vis-à-vis* rival retail AV suppliers, the Commission considers that the JV will not have the ability to engage in a successful input foreclosure strategy.

(163) First, all respondents to the market investigation considered that competition in the upstream wholesale market for the supply of kids' channels in Denmark, is indeed high or very high.[157] ViacomCBS's kids' channels in Denmark face strong competition from at least two significant and credible competitors, *i.e.,* Disney and WarnerMedia. Disney's kids' channels (*i.e.,* Disney Channel, Disney Junior and Disney XD) account for a combined audience share of [50-60]% and Warner Media's kids' channels, (*i.e.,* Cartoon Network and Boomerang) account for a combined audience share of [10-20]%.[158] Together, Disney and WarnerMedia also account for a combined revenue share of [40-50]%.[159] The market investigation also showed further credible alternatives to ViacomCBS' kids' channels in Denmark exists, including FTA TV channels, such as by the Danish public service broadcaster, Ramasjang.[160] Ramasjang, in a hypothetical kids TV channel segment (comprising not only pay TV but also FTA channels), would have an audience share of approx. [70-80]%.[161] Even if the relevant market would be defined as kids' pay TV channels, Ramasjang as FTA channel would therefore constitute an important out-of-market constraint.

(164) Second, a majority of respondents to the market investigation explained that ViacomCBS' kids' channels (and kids' channels more generally) are unlikely to be a sufficiently important input for pay TV retailers for there to exist an ability to successfully foreclose.[162] One respondent clarified that kids' pay TV channels are not particularly important for the competitiveness of retail services in Denmark, since retailers seek to build diverse bundles of attractive channels, regardless of their specific "genre".[163] In terms of audience share, kids' pay TV channels only account

[157] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 35.

[158] Form CO, Table 5 and Annex D.7.

[159] Form CO, Table 4.

[160] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 45.1.

[161] Form CO, Annex D.7.

[162] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 44.

[163] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to questions 35.1, 44 and 50.1.

for approximately 1% of pay TV audience. Furthermore, viewership of kids' pay TV channels in Denmark has been declining significantly in recent years. Between 2015 and 2020, there has been a 74% decline in viewership of kids' pay TV channels in Denmark.[164] Ampere data also shows that kids' channels are of limited importance to Danish end-customers, with only 1% of Danish consumers identifying "children and family" as their favourite genre, with this genre ranking last place amongst the 18 genres listed.[165]

(165) Third, in the scenario that a separate market for the supply of kids' pay TV channels would indeed exist, this market forms a very small part of overall pay TV channels. This is reflected in the difference in the Notifying Parties' market shares: while the Notifying Parties' combined market for kids' pay TV channels amounts to [60-70]% by revenue, and [30-40]% by audience in 2020 in Denmark, the Notifying Parties' combined market share by revenue for the wholesale supply of all pay TV channels in Denmark amounts to just [0-5]%, with a combined audience share of [0-5]%.[166]

(166) Therefore, for the reasons set out above, the Commission concludes that the JV would not have the ability to foreclose rival retail AV suppliers by engaging in a total or partial input foreclosure strategy.

(B) Incentive to engage in input foreclosure

(167) The Parties' incentive to foreclose rival retail AV suppliers depends on the balance between: (i) the losses from ceasing to supply (or increasing the carriage fees of) ViacomCBS' kids' channels in Denmark; and (ii) the higher profits obtained by the JV downstream from any switching by end-customers to the JV's SVOD service. In light of this trade-off, the Commission concludes that the Parties would not have the incentive to engage in an input foreclosure strategy by refusing to supply ViacomCBS' kids' channels on other channels or degrading the terms under which these channels are made available.

(168) The Commission notes that an input foreclosure strategy would only be economically viable if ViacomCBS' kids' channels were able to attract a sufficiently high number of new end-customers to the JV's SVOD service, and if ViacomCBS could profit enough from their viewership. However, such an outcome is unlikely.

(169) First, it should be taken into account that the vertical link between activities in the supply of kids' pay TV channels in Denmark and SVOD services in Denmark exist already before the Transaction as ViacomCBS currently operates the SVOD platform Paramount+.[167] Consequently, only one respondent to the market investigation believes it is credible that ViacomCBS' incentives to license rights to its kids' pay TV channels in Denmark would change as a result of the Transaction.[168] This respondent does not substantiate its concerns.[169]

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[164] Form CO, Annex D.7.
[165] Form CO, Annex C.15.1, Ampere analysis.
[166] Form CO, Tables 4-5 and Annex D.7.
[167] Form CO, Annex D.7.
[168] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 46.
[169] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 46.1.

(170) In contrast, another respondent notes that it has no reason to expect that the Transaction would negatively affect ViacomCBS' incentive to license rights to its kids' pay TV channels to broadcasters and streaming services in Denmark due to the pre-existing vertical relationship. According to this respondent, the introduction of Paramount+ on the Danish market did not affect its incentive to licence its kids' pay TV channels. On the contrary, in this respondent's experience, ViacomCBS [customer strategy].[170]

(171) Finally, the Commission recalls that the JV is co-owned by Comcast/Sky (50%). This makes foreclosure less attractive for ViacomCBS compared to the situation before the Transaction, given that it would need to forego its own upstream profit to benefit the JV at the downstream retail level, but after the Transaction it will not recapture the entire potential benefit, but only 50% of it.[171]

(172) Therefore, for the reasons set out above, the Commission concludes that the Parties would not have the incentive to foreclose rival AV suppliers by engaging in a total or partial input foreclosure strategy.

(C) Impact on effective competition

(173) Even if the Parties were to engage in a (total or partial) input foreclosure strategy, the Commission considers that such a strategy would not have a material impact on competition in the EEA. Rival AV retailers would not be deprived of a sufficiently important input, and could still rely on a large array of valuable kids' channels content to attract viewers. Furthermore, as one respondent to the market investigation pointed out, the attractiveness of a retail offering is not based on kids' channels alone (see paragraphs (163)-(164) above).

(174) This conclusion is consistent with the results of the market investigation. All respondents to the market investigation considered that, if ViacomCBS were to cease licensing its kids' pay TV channels or degrade the terms on which it licenses these channels, this would not have a negative impact on their company.[172] One respondent explained specifically that the kids' content provided by Paramount+ is not of particular competitive importance to its SVOD service and it would have sufficient alternatives to Paramount+' kids' content.[173] The majority of respondents also indicated, more generally, that the Transaction would have a neutral or positive impact on the retail supply market.[174]

(175) In light of the above, the Commission finds that a potential (partial or total) input foreclosure strategy would not have a material negative impact on effective competition in Denmark.

(D) Conclusion

(176) The potential market for the supply of kids' pay TV channels in Denmark is the narrowest possible product market with the highest market shares of the Parties.

[170] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 48.1.
[171] [ViacomCBS' sales strategy and financial information].
[172] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 49.
[173] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 49.1
[174] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to question 53.

Under any other potential market definition, their combined market shares would be considerably lower.

(177) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to the compatibility with the internal market with respect to possible input foreclosure practices concerning ViacomCBS' kids' channels in Denmark (upstream) under any of the alternative product markets for wholesale supply of TV channels.

5.5. Cooperative effects

(178) Sky and ViacomCBS will remain independently active in the **same product markets as the JV**, *i.e.,* the retail supply of AV services to end-customers, both within the JV EEA Territories and outside the JV EEA Territories ("Rest of the EEA"). ViacomCBS will remain active *via* the AVOD service Pluto TV. Comcast/Sky will remain active *via* the OTT service hayu, the AVOD service Xumo and very limited direct sales of the CNBC linear channel.

(179) Sky and ViacomCBS will also remain independently active in a number of **markets closely related to the activities of the JV**, notably: (a) within the JV EEA Territories: (i) the production and supply of AV content (upstream); (ii) the wholesale supply of TV channels (upstream); and (iii) the sale of advertising space (neighbouring)[175]; and (b) outside the JV EEA Territories (**"Rest of EEA"**) in the wholesale supply of TV channels (upstream).

5.5.1. The Notifying Parties' views

(180) The Notifying Parties submit that the creation of the JV will not lead to any coordination between them and the JV, or amongst themselves, because market conditions are not conducive to tacit coordination, confidentiality obligations will be in place to limit the use by the Notifying Parties of confidential information obtained from the JV and the JV will form only a small part of the Notifying Parties' overall businesses.[176]

5.5.2. The Commission's assessment

(181) The Commission considers that the Transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of cooperative effects in the markets for (i) the production and supply of AV content; (ii) the wholesale supply of TV channels; (iii) the retail supply of AV services to end-customers; and (iv) the sale of advertising space, both within and outside the JV EEA Territories, for the reasons set out below.[177]

(182) First, the Commission observes that the relevant markets are not conducive to coordination between the Parties. The market shares of the Parties are low (see **Tables 1-3** below), the Transaction does not eliminate a market player, and several

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[175] Form CO, paragraphs 449 and 456. While the JV will distribute the Parents' linear channels, [Parties' strategic decisions with regard to the JV].

[176] Form CO, Section 10.

[177] Note that the analysis applies in respect of all JV EEA Territories and the Rest of the EEA and does not vary by individual country.

competitors would remain post-Transaction, which would likely disrupt any attempts of the Notifying Parties to coordinate their activities on the relevant markets. Moreover, the JV will not become a vertically integrated player with its own active wholesale and retail services on the market.

(183) In relation to the market for the production and supply of AV content, ViacomCBS's market shares for the licensing of all AV content is [5-10]% or less in each of the **JV EEA Territories**. Similarly, Comcast/Sky's market shares for the licensing of all AV content is less than [5-10]% in each of the JV EEA Territories (see **Table 1** below).[178] The JV will not be active in this market. Post-Transaction, the Notifying Parties will continue to face competitive constraints from a number of market participants, including large US movie studies (*e.g.*, Disney/Fox, Warner, and Sony), smaller players (*e.g.*, Lionsgate and MGM), certain suppliers or retail AV services (*e.g.*, Netflix and Amazon Prime Video) and independent content producers.[179]

Table 1: Production and supply of AV content (revenue, 2020)

Country	**ViacomCBS market share for the licensing of all AV content**	**Comcast/Sky market share for the licensing of all AV content**
Bulgaria	[0-5]%	[0-5]%
Croatia	[0-5]%	[0-5]%
Czech Republic	[0-5]%	[0-5]%
Denmark	[0-5]%	[0-5]%
Finland	[0-5]%	[0-5]%
Hungary	[5-10]%	[0-5]%
Netherlands	[0-5]%	[0-5]%
Norway	[0-5]%	[0-5]%
Poland	[0-5]%	[0-5]%
Portugal	[0-5]%	[0-5]%
Romania	[0-5]%	[0-5]%
Slovakia	[0-5]%	[5-10]%
Slovenia	[0-5]%	[0-5]%
Spain	[0-5]%	[0-5]%
Sweden	[0-5]%	[5-10]%

Source: […]

[178] Form CO, paragraph 483. There are a few narrowly defined sub-segments (see paragraph (36)) in which ViacomCBS' share exceeds [5-10]% in certain JV EEA Territories, however, these shares never exceed [10-20]%. Similarly, there are a narrowly defined few sub-segments in which Comcast/Sky's share exceeds [5-10]% in certain JV EEA Territories, however, these shares never exceed [20-30]%. The highest combined market share in these sub-segments is reached in the production and supply of US film content in Spain ([30-40]%). *See* Form CO, paragraph 477 and Annex B.1.2.2.

[179] Form CO, paragraph 495 and Figure 4.

(184) In relation to the market for the wholesale supply of TV channels, the JV will be active in the market for the wholesale supply of TV channels **in the JV EEA Territories**. The JV will distribute all of the Notifying Parties' channels in the JV EEA Territories, with the exception of [Parties' strategic decisions with regard to the JV],[180] there is no overlap in the Parties' activities in the wholesale supply of TV channels in the JV EEA Territories and therefore, no risk of cooperation between the Parties in respect of their retained activities in distinct JV EEA Territories.

(185) **Outside the JV EEA Territories**, in relation to the Rest of the EEA, the JV will not be active in the wholesale supply of TV channels.[181] The Notifying Parties' market share in the Rest of the EEA where both Notifying Parties will remain active, remains limited.[182] Overall, the Notifying Parties' market share in the wholesale supply of TV channels, irrespective of the product market definition, are below [0-10]% for both Comcast/Sky and ViacomCBS.[183]

(186) In relation to the market for the retail supply of AV services to end customers, the JV will operate **in the JV EEA Territories** as an SVOD streaming service comprising AV content distributed both: (i) DTC on a variety of consumer devices as well as via app stores, and (ii) via third party MVPD platforms. Each of the Notifying Parties will retain certain very limited activities in the market for the provision of retail AV services. The Notifying Parties will continue to provide these limited retail AV services independently, and in competition with each other. While both ViacomCBS and Comcast/Sky will continue to be active in this market, based on their 2020 revenues, their market shares are minimal. ViacomCBS' market share in the total pay TV segment is less than [0-5]% of subscription revenues in each of the JV EEA Territories in which it provides retail AV services. The same applies in relation to the OTT sub-segment specifically.[184] Similarly, Comcast/Sky's market share in the total pay TV segment is less than [0-5]% in each of the JV EEA Territories in which it provides retail AV services. The same applies in relation to the OTT sub-segment specifically (see also Table 2 below).[185] The JV is expected to have […] market share across these Territories. [details of JV's projected market shares].[186]

180 Form CO, paragraphs 499-501.

181 Form CO, paragraphs 533-534.

182 ViacomCBS is active in the wholesale supply of TV channels in every country within the Rest of the EEA. Comcast/Sky is active in the wholesale supply of TV channels in almost every country within the Rest of the EEA, except in Latvia.

183 Form CO, paragraph 536 and Notifying Parties' Response to RFI 6, question 2. Please note that there are limited exceptions, where the Notifying Parties' market share remains below 30% (*e.g.*, Ireland (pay TV, other genres, basic pay TV and premium pay TV) - Comcast/Sky); and each EEA country which is not a JV EEA Territory (Rest of EEA) (kids' channels, ViacomCBS)).

184 Form CO, paragraph 508 (a) and Tables 15-16.

185 Form CO, paragraph 508 (b) and Tables 17-18. The same conclusions regarding ViacomCBS and Comcast/Sky's market shares apply when considering the various sub-segments as set out in paragraph (78). *See* Form CO, Annex B.1.2.5.

186 Notifying Parties' Response to RFI 6, question 1. This statement does not apply in relation to the Netherlands and Portugal, where the JV's estimated projected 2024 and 2026 market shares would be slightly higher (*i.e.*, [details of the JV's projected market shares]). *See* also Form CO, footnote 79, Notifying Parties Response to RFI 2 (question 1), RFI 3 (question 10), and RFI 5. [Methodology to estimate the JV's projected market shares].

Table 2: Retail supply of AV services to end-customers (total pay TV and OTT segment) (revenue, 2020)

Country	ViacomCBS market shares for the provision of retail AV services (total pay TV segment)	ViacomCBS market shares for the provision of retail AV services (OTT segment)	Comcast/Sky market shares for the provision of retail AV services (total pay TV segment)	Comcast/Sky market shares for the provision of retail AV services (OTT segment)
Bulgaria	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[*Comcast/Sky not active*]
Croatia	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[*Comcast/Sky not active*]
Czech Republic	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[*Comcast/Sky not active*]
Denmark	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Finland	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Hungary	[0-5]%	[0-5]%	[0-5]%	[*Comcast/Sky not active*]
Netherlands	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[0-5]%
Norway	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Poland	[0-5]%	[0-5]%	[0-5]%	[*Comcast/Sky not active*]
Portugal	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[*Comcast/Sky not active*]
Romania	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[*Comcast/Sky not active*]
Slovakia	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[*Comcast/Sky not active*]
Slovenia	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[*Comcast/Sky not active*]
Spain	[*ViacomCBS not active*]	[*ViacomCBS not active*]	[0-5]%	[0-5]%
Sweden	[0-5]%	[0-5]%	[0-5]%	[0-5]%

Source: […].

(187) **Outside the JV EEA Territories**, in relation to the Rest of the EEA,[187] the JV will not be active in the retail supply of AV services. Comcast/Sky's market share remains below 30%.[188] ViacomCBS' market share remains between 0 and 5%, as it is accounted for only by the provision of its AVOD Pluto TV service which in 2020 was available only in Austria and Germany.[189] In any event, post-Transaction, the Notifying Parties will continue to face competitive constraints from a number of market participants, including global competitors (*e.g.*, Netflix) and various recent entrants (*e.g.*, Disney+, Amazon Prime Video, Apple TV, Facebook, *etc.*).

(188) In relation to the market for the sale of advertising space, ViacomCBS' market share is less than [5-10]% in each of the **JV EEA Territories** in which it sells advertising airtime on its TV channels (**Table 3** below). ViacomCBS's market share for the supply of online advertising is less than [0-5]% in each of the JV EEA Territories in which it sells online advertising space.[190] Comcast/Sky's market share for the supply of TV advertising is less than [0-5]% in each of the JV EEA Territories in which it sells advertising airtime on its TV channels. Comcast/Sky's market share for the supply of online advertising is less than [0-5]% in each of the JV EEA Territories in which it sells online advertising space (see also **Table 3** below).[191,192] The JV will not be active in this market. Post-Transaction, the Notifying Parties will continue to face competitive constraints from a number of market participants, including large global players (*e.g.*, Google and Facebook)[193] and multiple other local competitors (*e.g.*, TV2, NENT, SBS in Norway and Denmark, and SBS, NPO and RTL in the Netherlands).

Table 3: Sale of TV advertising space (revenue, 2020)

Country	ViacomCBS market shares for the sale of TV advertising space	Comcast/Sky market shares for the sale of TV advertising space
Bulgaria	[0-5]%	[0-5]%
Croatia	[...]	[...]
Czech Republic	[0-5]%	[...]
Denmark	[0-5]%	[...]

187 ViacomCBS and Comcast/Sky will, in relation to the retail supply of AV services in the Rest of the EEA, only both be active in Austria and Germany. Therefore, this paragraph relates to Austria and Germany only. Furthermore, these market shares apply irrespective of the exact product market definition.

188 Notifying Parties' Response to RFI 6, question 3. In relation to an FTA-services only segment, Comcast/Sky's market share remains below [0-5]% (both in Germany and Austria). Further, Comcast/Sky notes that the [20-30]% figure is estimated conservatively, as it corresponds to the retail supply of pay TV services and not of all AV services (both FTA or pay-TV).

189 Form CO, paragraph 538 and Notifying Parties' Response to RFI 6, question 3.

190 Form CO, paragraph 461 and Table 11.

191 Form CO, paragraph 461 and Table 12.

192 The same conclusion applies when considering the various sub-segments as set out in paragraph (89). *See* Form CO, Annex B.1.2.7.

193 Form CO, paragraph 477. For instance, according to Salesforce Research, Google Search, YouTube, Facebook and Instagram were responsible for 66% of global digital advertising in 2018. *See Source: Salesforce research*, *https://www.salesforce.com/content/dam/web/en_us/www/assets/pdf/datasheets/digital-advertising-2020.pdf*.

Country	ViacomCBS market shares for the sale of TV advertising space	Comcast/Sky market shares for the sale of TV advertising space
Finland	[0-5]%	[...]
Hungary	[5-10]%	[...]
Netherlands	[5-10]%	[0-5]%
Norway	[0-5]%	[0-5]%
Poland	[0-5]%	[0-5]%
Portugal	[0-5]%	[0-5]%
Romania	[0-5]%	[0-5]%
Slovakia	[...]	[...]
Slovenia	[...]	[...]
Spain	[0-5]%	[0-5]%
Sweden	[0-5]%	[0-5]%

Source: [...].

(189) Second, the small size of the JV relative to ViacomCBS' and Sky/Comcast's activities makes it unlikely that the Notifying Parties would have any incentive to coordinate their competitive behaviour. [Comparison between the Parties' and the JV's revenues] (see also **Table 4** below).[194] Based on the Commission's decisional practice[195], this suggests that the conduct of the Notifying Parties on the markets is unlikely to be influenced by their cooperation in the JV.

Table 4: Ratio of expected turnover over Notifying Parties' estimated turnover (2022-2024)

	JV turnover (EUR million)[196]	% of ViacomCBS total estimated turnover[197]	% of Comcast/Sky total estimated turnover[198]
2022	[Turnover]	[Proportion]	[Proportion]
2023	[Turnover]	[Proportion]	[Proportion]
2024	[Turnover]	[Proportion]	[Proportion]

(190) Third, the Commission notes that antitrust compliance protocols will be in place. These include, *inter alia*, information barriers governing the relationship between the JV and its parents to prevent any illegitimate coordination between them in respect of activities outside the JV.[199]

194 Form CO, paragraphs 468, 489, 546 (in relation to the Rest of the EEA).

195 M.9604 – *NENT / Telenor / JV*, para. 642 and Commission decision of 6 March 2020 in case M.9674 - *Vodafone Italia / TIM / INWIT JV*, para. 434.

196 Form CO, Table 13 [reference to the transaction documents].

197 Based on median broker consensus estimates dated September 2021.

198 Based on Comcast/Sky's best estimates of its consolidated worldwide revenues in each of 2022, 2023 and 2024.

199 Form CO, paragraphs 470-471, 491, 515, 549 (in relation to the Rest of the EEA), footnote 314 and Annex 19. [Reference to the transaction documents].

(191) Fourth, the markets for the wholesale supply of TV channels, and the retail supply of AV services to end customers, are national (see **paragraphs (56) and (78)** above). AV content and TV channels are primarily licensed on a national basis. Therefore, the respective agreements often contain different terms. The JV Territories in which the JV is active are therefore different markets than the territories where the activities of the Notifying Parties overlap. Therefore, the JV is unlikely to increase each Notifying Party's visibility of the other Notifying Party's activities in the Rest of the EEA.

(192) Fifth, certain features of the relevant markets listed above (**paragraphs (178) and (179)**) make it difficult to reach or sustain a tacit, or overt, coordinated outcome. The creation of the JV does not change any of these features of the markets and cannot therefore increase the likelihood of a coordinated outcome on these markets. These markets are complex and constantly evolving. *E.g.*, in the retail supply of AV services, retailers adjust permanently to evolving demand patterns.[200] Further, these markets lack transparency as, *e.g.*, negotiations are bilateral, and highly confidential.[201] Last, these are highly competitive markets. Any potential coordination strategy could be immediately undermined by competing firms.

(193) Finally, none of the respondents to the market investigation considered that the Transaction could give rise to cooperative effects.[202]

5.5.3. Conclusion

(194) In light of the above, the Commission concludes that the Transaction does not give rise to serious doubts as to its compatibility with the internal market in relation to cooperative effects in the EEA in the markets for: (i) the production and supply of AV content; (ii) the wholesale supply of TV channels; (iii) the retail supply of AV services to end-customers; and (iv) the sale of advertising space.

6. CONCLUSION

(195) For the above reasons, the European Commission has decided not to oppose the notified 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 and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

[200] For the Notifying Parties' description of such evolving demand patterns, *see* Form CO, paragraph 552 (in relation to wholesale and retail supply of TV channels/AV services).

[201] Form CO, paragraphs 474 (between ad sales houses and their main customers) and 553 (between wholesale suppliers and their customers).

[202] Q2 – Questionnaire to market participants in the AV sector (Denmark), replies to questions 51.1-51.5.