EUROPEAN COMMISSION
DG Competition

Case M.10815 - DEUTSCHE TELEKOM / ORANGE / TELEFONICA / VODAFONE / JV

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 10/02/2023

In electronic form on the EUR-Lex website under document number 32023M10815

Brussels, 10.2.2023
C(2023) 1111 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

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Subject: **Case M.10815 – DEUTSCHE TELEKOM / ORANGE / TELEFONICA / VODAFONE / JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation

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No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 6 January 2023, the European Commission (the "**Commission**") received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Deutsche Telekom AG ("**DT**", Germany), Orange SA ("**Orange**", France), Telefónica S.A. ("**TEF**", Spain) and Vodafone Group plc ("**Vodafone**", United Kingdom). DT, Orange, TEF and Vodafone (the "**Notifying Parties**" or the "**Parties**") will create a new joint venture ("**JV**") within the meaning of Articles 3(1)(b) and 3(4) of the Merger Regulation (the "**Transaction**").[3]

1. THE PARTIES

(2) **DT** is a multinational telecommunications operator with activities in more than 50 countries worldwide providing mobile and/or fixed telecommunications services as well as internet access, television and technology products.

(3) **Orange** is a multinational telecommunications operator with activities in 27 countries worldwide providing a wide range of electronic communications services mainly in the area of fixed and mobile telecommunications and internet access as well as telecommunications services to multinational companies.

(4) **TEF** is a multinational telecommunications operator and mobile network provider with activities mainly in Europe, the United Kingdom and South America providing mobile, fixed, internet and television services.

(5) **Vodafone** is a multinational telecommunications operator with activities in 21 countries predominantly in Europe and Africa providing mobile telecommunication services, fixed telephony services and retail television and technology services.

(6) The **JV** will provide digital identification services for targeted advertising and site optimisation in France, Germany and Spain initially, and expand into Italy at a later stage. At the time of notification of the Transaction, the Parties do not expect that the JV would expand its activities into other Member States.

2. THE OPERATION

(7) Pursuant to a JV Investment Agreement ("**JVIA**") signed on 5 December 2022, the Parties have agreed to create a greenfield JV in which each Party will hold 25% of the shares. The JV will have a two-tier board structure.

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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 Publication in the Official Journal of the European Union No C 12, 13.1.2023, p. 13.

(8) The supervisory board will be composed of four directors, each shareholder can propose a candidate for nomination at the general shareholders' meeting. The removal of any director of the supervisory board will be a matter reserved for the shareholders that appointed the respective member.

(9) The daily business will be run by a management board, comprising of at least three members, appointed by a simple majority of the supervisory board, excluding the Chief Executive Officer ("**CEO**"). The CEO, on a non-binding basis, can make recommendations to the Supervisory Board for appointment of the management board members. As regards the appointment, appointment term and removal of the CEO, this is a matter reserved for the supervisory board, as explained further in paragraphs (14) - (16).

(10) The JVIA also includes an already agreed shareholders' agreement ("**SHA**") which is annexed to the JVIA.[4]

2.1. Joint control

(11) During the first [0-5] years following the creation of the JV ("**Veto Rights Period**"), each Party will have the possibility of exercising decisive influence over the JV.

(12) In line with the SHA, the […] of the JV's […] requires the unanimous consent of all the members of […]. Similarly, during the Veto Rights Period, the […] will require the approval by […]% of the […], thereby, de facto, requiring the consent of each Party.

(13) Furthermore, during the Veto Rights Period, the […] will be a matter reserved for the Parties [...] and will require a majority vote of at least [...]% of the total voting rights. In practice, this requires the consent of each Party to the [...] of the JV during the Veto Rights Period.

(14) After the Veto Rights Period lapses, the control structure changes. [...] and [...] will require [...] majority of the [...]. The [...] will require a majority vote of [...]% of the [...] while the [...] will require a majority vote of [...]% of the [...]. If all members are represented, each of these decisions would thus require [...] out of the [...] to agree, as the case may be.

(15) Accordingly, once the Veto Rights Period lapses, none of the Parties alone will be able to block any decision, [DETAILED DESCRIPTION OF THE TYPES OF DECISIONS]. Thus, after the initial [0-5] years, no Party will exercise control over the JV.

(16) In certain cases, an operation leading to joint control for a starting-up period may not constitute a lasting change of control. However, according to the Consolidated Jurisdictional Notice[5], for such scenario not to have an impact on the structure of the market, the transitory period should, in general, not exceed one year and the

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[4] Form CO, Annex 4, Schedule 5.

[5] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, page 1 ("**Consolidated Jurisdictional Notice**").

joint control should be only transitory in nature.[6] The same transitory time period, i.e. one year, is also normally the maximum time-frame limit considered in transactions involving several operations occurring in succession, where the first transaction is only transitory in nature (i.e. does not constitute concentration), while only the subsequent step constitutes a concentration.[7]

(17) The Transaction will give rise to joint control by all the Parties over the JV during the initial [0-5] years.

(18) The period of [0-5] years is not, in general, considered relatively short and is materially longer than the one-year transitory period foreseen by the Consolidated Jurisdictional Notice.

(19) Furthermore, even during the initial period of [0-5] years, the Transaction will already have an impact on the structure of the market. The JV will be independently active on the market already during the Veto Rights Period of [0-5] years. The JV's start-up period is very short. It is expected to last approximately [0-24] weeks, after which the JV will be able to commence operations.[8]

(20) By the end of Year 1 of operations, according to the initial Business Plan, the Notifying Parties estimate the JV's revenues to amount to EUR [0-1 000] million and the customer pool to consist of [0-100] clients, while the revenues will [0-1 000] million and the client pool will [0-500] clients across Germany, France, Spain and the UK by Year [0-10].[9]

(21) The JV's operations in the first [0-5] years are thus not designed to facilitate any transitory arrangements, but rather to allow the Notifying Parties to jointly exercise decisive influence over the JV at the time of the JV's launch of market activities. Thus, the Notifying Parties will jointly control the JV during a period of [0-5] years, when the JV will start and expand its commercial operations.

(22) Therefore, the Transaction will give rise to joint control by all the Notifying Parties over the JV during the initial [0-5] years, which is sufficiently long for the Transaction to constitute a lasting change of control.

2.2. Full-functionality

(23) The JV will have sufficient staff of approximately […] full-time employees during the first [0-5] years of operations. The JV's staff will be employed by [...] subject to a [...] agreement with [...] that is not expected to last for more than [0-12] months during which the JV will [...].

(24) Furthermore, the JV will have an independent presence on the market. It will have its own management and staff (as per the previous paragraph), assets and brands. It will negotiate and conclude its own contractual relationships with customers and third party input suppliers. All these relationships will be initiated and managed by the JV on its own behalf and at its own risk.

[6] See Consolidated Jurisdictional Notice, paragraph34.
[7] See Consolidated Jurisdictional Notice, paragraph 31.
[8] Reply to RFI 3, paragraph 16.
[9] Form CO, Table 7 and Annex 5.

(25) For an initial period of time, as the JV's products are dependent on the Notifying Parties' input as providers of hashed MSISDN, the JV will be heavily reliant on the Parties for input. However, (i) it is anticipated that the JV will also rely on third party MSISDN providers[10] (*i.e.*, other (a) mobile network operators ("**MNOs**"); or, (b) mobile virtual network operators ("**MVNOs**")[11]); and, (ii) the JV will not merely resell these MSISDN, but will transform these into Tokens that will be used by the JV's customers. As such, the JV will be active on the market with its own product offering distinct from that of the Parties.

(26) In addition, as of Year 1 of operations, sales to the Parties are only expected to generate [10-20]% of the JV's revenues. This figure is expected to drop to [0-10]% in Year [0-10] of operations.[12] As such, the JV will generate most of its turnover from sales to third parties.

(27) Finally, the JV is being created for an indefinite term, and will therefore operate on a lasting basis.

(28) Therefore, the Transaction consists in the creation of a full-function joint venture within the meaning of Articles 3(1)(b) and 3(4) of the Merger Regulation.

3. UNION DIMENSION

(29) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (DT: EUR [...], Orange: EUR [...], TEF: EUR [...], Vodafone: EUR [...]).[13] Each of them has a Union-wide turnover in excess of EUR 250 million (DT: EUR [...], Orange: EUR [...]; TEF: EUR [...], Vodafone: EUR [...]), but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

4.1. Introduction

(30) The JV will operate in a market which has not been previously assessed by the Commission. As described in paragraph (6) above, the JV will provide digital identification services for targeted advertising and site optimisation in France, Germany and Spain […], and Italy […]. The JV will **generate a unique digital code ("Token")** derived from a user's mobile (or, at a later stage, also fixed) network subscription, relying on hashed mobile subscriber identifiers ("**MSISDN**")[14]. The Tokens will allow the JV's customers (advertisers and

10 For instance, the business plan of the Parties considers [THE PARTIES' VIEWS ON THE EVOLUTION OF THE PLAYERS IN THE MARKET].

11 An MVNO is a wireless communications services provider that does not own the wireless network infrastructure over which it provides services to its customers. An MVNO enters into a business agreement with a mobile network operator to obtain bulk access to network services at wholesale rates, then sets retail prices independently.

12 Form CO, table 7.

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

14 MSISDN refers to "Mobile Subscriber Integrated Services Digital Network Number" or "Mobile Station International Subscriber Directory Number" and is a number uniquely identifying a

publishers) to recognize users on their respective website or apps. Advertisers and publishers can group users under different categories and tailor site/app content to groups of users, while not revealing any directly identifiable personal data to the Parties, the JV, advertisers and publishers. The user will be given the possibility to consent to the processing of personal data by the JV for the purposes of giving access to its Token to the JV's customers.

(31) None of the Parties supplies digital identification services for targeted advertising and site optimisation.

(32) The Parties are mainly retail providers of mobile and fixed telecommunications services. With relevance to this Transaction, DT is active in Germany, Orange is active in France and Spain, TEF is active in Germany and Spain, and Vodafone is active in Germany, Italy and Spain.

4.2. Market for the supply of digital identification services for targeted advertising and/or site optimisation

4.2.1. The Parties' activities

(33) The JV will offer a type of digital identification solution which will enable advertisers and publishers to optimize the delivery of online display advertising[15] and perform site/app optimisation.[16] Subject to user consent (on an opt-in basis only), the JV will generate two types of unique Tokens (so-called AdTech tokens for site optimisation and MarTech tokens for targeted advertising on third-party websites). The JV will generate the Tokens from MSISDN numbers (or at a later stage also a fixed network identifier such as internet protocol addresses ("**IP addresses**"))[17] which will be provided only to the JV by the participating network operators ("**ID providers**"). Participating ID providers can be the Parties and/or third-party network operators.

(34) The JV's Tokens will be only temporarily valid. The Parties envisage that AdTech tokens will be session-specific, which means a new AdTech token is generated each time a user (re-)visits a website (provided the user has granted consent). MarTech tokens on the other hand will be valid for a longer period of time (currently 90 days), after which they will be reset and a new MarTech token will be provided for the same user after a new consent.

(35) The Tokens will be encrypted and then "pseudonymised" so that neither the JV nor the Notifying Parties nor any third party will be able to directly identify or access

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subscription in a mobile telecommunications network. See Form CO, paragraph 161 and footnote 144.

15 The optimisation of advertising includes services such as personalized ads, frequency capping (*i.e.*, ensuring a user does not see the same ad too many times), measurement (*i.e.*, quantitative feedback on performance of a campaign) and attribution (*i.e.*, whether a user purchase was due to the delivery of an ad or ads).

16 The Notifying Parties explained that site/app optimisation use cases include analytics in own media, audience management (*e.g.*, creating inclusion/exclusion segments for activation), and personalisation/customisation (*e.g.*, creating personalised experiences for users visiting the site/app).

17 In the future, the JV's Tokens could also be generated via users' activities on connected TVs if those TVs are connected to the internet via a network that is integrated with the JV's platform. The JV's product is in that sense device-agnostic.

any personal information of the user. The Tokens will allow the JV's customers (advertisers and publishers)[18] to identify the pseudonym of the users when they visit either the same brand's or publisher's site/app several times, or another site domain/app that has also obtained user consent. The JV will empower a diversified network of intermediaries that provide technologies and/or data to the advertising supply chain ("**AdTech intermediaries**") and will enable advertisers and publishers to tailor site/app content without revealing any directly identifiable personal data.

(36) The JV will offer its solution to all advertisers and publishers, regardless of, *e.g.*, industry and size. It will require a simple technical integration with advertisers, publishers and AdTech intermediaries. The JV's solution does not require additional infrastructure as it is designed to be open and interoperable (subject to compliance with privacy requirements). Technically, the JV's tokens are built as first-party identities (i.e., information a company collects directly from its customers and owns). Therefore, the JV's tokens will be able to work with any platform that can consume/use other first-party identities.

(37) The JV will invoice its customers (advertisers and publishers) for access to the tokens. Going forward, the JV's ID providers can be any telecommunications operator, including but not limited to the Parties. In order to increase its scale – which in turn will make it more attractive for customers (advertisers and publishers) and AdTech intermediaries – the JV will seek to on-board additional operators as ID providers.

(38) The Parties do not have any material activities in the field of digital identification services for targeted advertising and/or site optimisation. DT controls emetriq GmbH ("**emetriq**", Germany), which developed a multi-identity graph to combine multiple external solutions for digital identification, which are provided by third parties. However, [DESCRIPTION OF DT'S AND EMETRIQ'S PLANS REGARDING THE MULTI-IDENTITY GRAPH].[19]

(39) Furthermore, the Notifying Parties have very limited activities, beyond those of emetriq, in the market for the online advertising intermediation services in the EEA.

4.2.2. Product market definition

4.2.2.1. Past Commission decisions

(40) The Commission has not previously assessed the supply of digital identification services for targeted advertising and/or site optimisation. In a recent decision, the Commission has assessed the market for online advertising intermediation services in light of developments in the ad tech sector.[20] In particular, in relation to display advertising, the Commission previously considered, but ultimately left open, that the market for non-search display advertising intermediation services could be

[18] Separate consent must be requested/given for each individual site domain and/or app. Consequently, Tokens will be different for each brand or publisher.

[19] Form CO, paragraphs 315 and 379.

[20] Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*.

segmented between (i) the supply of supply-side platforms ("**SSP**");[21] (ii) the supply of demand-side platforms ("**DSP**");[22] (iii) the supply of ad network services;[23] (iv) the supply of advertiser ad servers;[24] and, (v) the supply of publisher ad server services.[25, 26]

4.2.2.2. The Notifying Parties' view

(41) The Notifying Parties explain that the JV may be seen as operating in the market for online intermediation services for display advertising, in a segment not previously assessed by the Commission. In particular, the Notifying Parties submit that this is due to the fact that the JV's activities do not fall neatly within the perimeter of any previously considered advertising intermediation services markets/segments. In particular, taking into account the Commission's precedents, the JV will not be providing SSP services, DSP services, ad network services, an advertiser ad server, a publisher ad server, or data analysis services. Similarly, the JV will not be able to perform the function of any other player in the field of online advertising intermediation services or data providers.

(42) Accordingly, the Notifying Parties submit that should the JV be considered as part of the market for online intermediation services for display advertising, it could be part of a sub-segment for "digital identification". This segment should include the provision of digital identification services to enable advertisers and publishers to carry out optimised digital advertising and site optimisation.

(43) Alternatively, the Notifying Parties submit that the JV could be considered to operate in a separate market for the provision of digital identification for optimised digital advertising and site optimisation. The Notifying Parties submit that such a conclusion may fail to capture the commercial reality of the competitive constraints that the JV and providers of intermediary advertising services will exercise over each other, unless all competitors are included in the scope of this market.

(44) The Notifying Parties submit that such product market should not be segmented by technical solutions and business model or by categories of customers.

4.2.2.3. The Commission's assessment

(45) First, in the course of the market investigation the Commission did not receive indications that it should depart from its decisional practice with regard to the market for online advertising intermediation services.

21 Platforms that automatize the sale of digital inventory. Their core purpose is to help publishers to sell their inventory. Those platforms allow real-time auctions by connecting to multiple DSPs, collecting bids from them and performing the function of exchanges.

22 Platforms that allow advertisers and media agencies to buy advertising inventory from many sources.

23 Platforms that integrate most intermediation functions into a single service. They aggregate inventory supply from publishers and match it with advertisers.

24 Solutions used by advertisers and media agencies to store the ads, deliver them to publishers, keep track of this activity and assess the impact of their campaigns by tracking conversions.

25 Publishers use ad servers to manage their inventory. Those servers make the final choice of which ad to display, based on the offer received from different SSPs and DSPs and the direct deals agreed between the publisher and advertisers.

26 Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraph 168.

(46) Second, the market investigation has not provided any evidence suggesting that the services that the JV will provide form part of the overall market for online advertising intermediation services, in any existing or new product market segment. In light of the above, the Commission considers that the JV will operate in a market for the supply of digital identification services for targeted advertising and/or site optimisation which is distinct from the market for online advertising intermediation services. The Notifying Parties are, however, active to a limited extent in the market for online advertising intermediation services. The Commission will assess the potential vertical relationship between these activities and the activities of the JV in Section 5.4.2.3.2.1.1 below.

(47) With regard to the specific activities that the JV will perform on the overall market for the supply of digital identification services for targeted advertising and/or site optimisation, the results of the market investigation have suggested that, from a demand side, the services that will be supplied by the JV are substitutable with existing alternative identification services. In particular, almost all potential customers of the JV who expressed a view in the market investigation explained that they would be able, at least partially and depending on the commercial terms that will be offered by the JV, to switch from their current provider of digital identification solutions for targeted advertising and/or site optimisation to the JV without incurring significant costs and in a short amount of time.[27]

(48) From a supply-side, the market investigation has yielded mixed results as to the possibility for current suppliers of digital identification solutions to start offering the services such as those offered by the JV in a short amount of time with a limited investment.[28] In particular, one competitor of the JV explains that it has incurred significant investments to develop the technical ability to provide services similar to the JV. Other market participants have stated that they would be able to start offering the JV's products in a short time and with limited investment.[29]

(49) In light of the above and for the purpose of this decision, the Commission concludes that the relevant product market is the market for the supply of digital identification services for targeted advertising and/or site optimisation.

4.2.3. Geographic market definition

4.2.3.1. Past Commission decisions

(50) The Commission has not previously assessed the geographic scope of a market for the supply of digital identification services.

(51) In a recent decision, the Commission has assessed the market for online advertising intermediation services in light of developments in the ad tech sector.[30] In that case, the Commission concluded that the relevant geographic scope for the various

27 Response to questionnaire 01 to (potential) customers of the JV, question C.A.A.3.

28 Responses to questionnaire 03 to providers of digital identification services for targeted advertising, question C.A.A.3.

29 Responses to questionnaire 03 to providers of digital identification services for targeted advertising, question C.A.A.3.

30 Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*.

segments of the market for the supply of non-search display advertising intermediation services should be at least EEA-wide.

4.2.3.2. The Notifying Parties' view

(52) The Notifying Parties submit that the exact geographic scope of the market for non-search (display) advertising intermediation services can be left open as the Transaction does not raise competition concerns under any plausible market delineation.

4.2.3.3. The Commission's assessment

(53) First, in the course of the market investigation the Commission did not receive indications that it should depart from its decisional practice with regards to the market for online advertising intermediation services. While the JV will not be active in this market, the Notifying Parties have limited activities in digital identification services.

(54) Second, with regards to the market for the supply of digital identification services, the market investigation has provided mixed results with regards to the exact geographic scope of the market for the supply of digital identification services.

(55) While more than half of potential customers of the JV who expressed a view on this topic as well as more than half of providers of retail telecommunications services who expressed a view on this topic argue that they select providers of digital identity services at national level,[31] only a quarter of providers of digital identification services who expressed a view on this topic take this view. Instead, more than half of providers of digital identification services who expressed a view on this topic consider that the market should be EEA-wide or global.[32]

(56) Similarly, all providers of retail telecommunications services who expressed a view and the vast majority of providers of digital identification services consider that providers of digital identification services will be unable to enter a new Member State in a short amount of time with limited investment.[33] Potential customers of the JV have expressed inconclusive views in relation to whether providers of digital identification services would be able to enter a new Member State in a short amount of time with limited investment.[34]

(57) Finally, more than half of potential customers of the JV who expressed a view on this topic and all retail providers of telecommunications services who expressed a view on this topic consider that due to the national scope of the input provided by the Parties to the JV, the geographic scope of the market for the supply of digital identification services should be national.

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31 Responses to questionnaire 01 to (potential) customers of the JV, question C.A.B.1 and to questionnaire 02 to providers of retail telecommunications services, question C.C.B.1.

32 Responses to questionnaire 03 to providers of digital identification services for targeted advertising, question C.A.B.1.

33 Responses to questionnaire 02 to providers of retail telecommunications services, question C.C.B.2 and to questionnaire 03 to providers of digital identification services for targeted advertising, question C.A.B.2.

34 Responses to questionnaire 01 to (potential) customers of the JV, question C.A.B.2.

(58) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic market for market for the supply of digital identification services could be national, EEA-wide or global. However, the Commission will assess the Transaction based on the narrowest plausible geographic market, *i.e.*, under the assumption that the relevant geographic market is the territory of each of France, Germany, Italy and Spain.

4.3. Market for the retail supply of mobile telecommunications services

(59) The market for the retail supply of mobile telecommunications services is the market on which MNOs and MVNOs sell voice, messaging and data services to end-customers via a mobile network.

4.3.1. The Parties' activities

(60) DT is active in the market for the retail supply of mobile telecommunications services in Germany.

(61) Orange is active in the market for the retail supply of mobile telecommunications services in France and Spain.

(62) TEF is active in the retail supply of mobile telecommunications services in Germany and Spain.

(63) Vodafone is active in the retail supply of mobile telecommunications services in Germany, Italy and Spain.

4.3.2. Product market definition

4.3.2.1. Past Commission decisions

(64) In previous decisions, the Commission has identified an overall retail market for mobile telecommunications services constituting a separate market, distinct from retail fixed telecommunication services. The Commission considered that the retail mobile market does not need to be further segmented based on the type of service (voice calls, SMS, MMS, mobile Internet data services), or the type of network technology (2G, 3G, 4G, 5G).[35] The Commission considered a number of possible segmentations of the overall retail market for mobile telecommunication services (pre-paid vs post-paid services;[36] private customers vs business customers;[37] high-

[35] Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 66; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 207; of 1 September 2016 in case M.7758, *Hutchison 3G Italy/Wind/JV*, recitals 135 to 140; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 74; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 259 to 265 and 287; of 02 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31 to 55; of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 141; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 43 to 58.

[36] Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 64 to 67; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recital 202; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 200 to 207; of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, recitals 146 to 149; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 72 to 74; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 266 to 270 and 287; of 2 July 2014 in case M.7018 – *Telefónica*

value vs low-value customers;[38] sim-card only ("**SIMO**") and handset subscriptions;[39] different distribution channels[40]) but considered that they do not constitute separate product markets but rather segments of the same market.

(65) The Commission considered that over-the-top ("**OTT**") services (*e.g.*, instant messaging or voice over Internet Protocol ("**VoIP**") applications), whether provided over Wireless Fidelity ("**Wi-Fi**") or via mobile telecommunications data networks, were not part of the market for mobile telecommunications services, as OTT rely on mobile telecommunications (data) services and/or fixed broadband services to function.[41] Finally, the Commission excluded Machine-to-Machine ("**M2M**") services from the overall retail mobile market, due to the particular characteristics of the demand for and supply of these services.[42]

4.3.2.2. The Notifying Parties' view

(66) The Notifying Parties submit that the exact scope of the relevant product market can be left open as the Transaction does not raise competitive concerns under any plausible product delineation.

4.3.2.3. The Commission's assessment

(67) The results of the market investigation did not provide reasons to depart from the Commission's decisional practice.[43]

(68) In light of the above and for the purpose of this decision, the Commission concludes that the relevant product market is the market for the retail supply of mobile telecommunication services, excluding OTT and M2M services.

Deutschland/E-Plus, recitals 37 to 39 and 65 to 71; of 28 May 2014 I case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recitals 141 to 143; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 38 to 41 and 58.

37 Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 64 to 67; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 200 to 207; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 72 to 74; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 276 to 279; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 30 to 36; of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recitals 141, 149 and 150; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 32 to 35.

38 Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 40 to 44.

39 Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 271 to 275.

40 In Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 280 to 286, the Commission took into account the segmentation between direct distribution and independent specialist retailers in view of the important role played in the retail market by independent specialist retailers and since direct distribution and independent specialist retailers account for the largest part of the market.

41 Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 65 to 66; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recitals 168 to 169; of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/WIND/JV*, recitals 138 to 145 and 162, of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 262 to 265 and 286.

42 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 22; of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraphs 39 to 42; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recitals 223 and 224.

43 Response to questionnaire 02 to providers of retail telecommunications services, question C.B.A.1.

4.3.3. *Geographic market definition*

4.3.3.1. Past Commission decisions

(69) In previous decisions, the Commission found that the market for the retail supply of mobile telecommunications services is national in scope.[44]

4.3.3.2. The Notifying Parties' view

(70) The Notifying Parties submit that the exact scope of the relevant geographic market can be left open as the Transaction does not raise competitive concerns under any plausible geographic delineation.

4.3.3.3. The Commission's assessment

(71) The results of the market investigation did not provide reasons to depart from the Commission's decisional practice.[45]

(72) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic market for the retail supply of mobile telecommunication services is the territory of each of France, Germany, Italy and Spain.

4.4. Market for the retail supply of fixed internet access services

(73) Fixed internet access services consist of the provision of a telecommunications link enabling customers to access the Internet. Internet access may be provided as dial-up ("**narrowband**") access, as higher bandwidth ("**broadband**") access via digital subscriber line ("**xDSL**"), a cable modem or mobile broadband technology, or in the form of dedicated access involving leased lines connecting a specific location to the Internet and guaranteeing higher levels of performance and security ("**dedicated access**").[46]

4.4.1. *The Parties' activities*

(74) DT is active in the market for the retail supply of fixed internet access services in Germany.

(75) Orange is active in the market for the retail supply of fixed internet access services in France and Spain.

(76) TEF is active in the retail supply of fixed internet access services in Germany and Spain.

(77) Vodafone is active in the retail supply of fixed internet access services in Germany, Italy and Spain.

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[44] Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 26; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 70; of 2 October 2008 in case M.5148 – *Deutsche Telekom/OTE*, paragraphs 18 to 20.

[45] Response to questionnaire 02 to providers of retail telecommunications services, question C.B.B.1.

[46] Commission decision of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 37 and of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraph 7.

4.4.2. Product market definition

4.4.2.1. Past Commission decisions

(78) In recent cases, the Commission has considered that the relevant product market is the overall retail market for the provision of fixed internet access services, including all product types (narrowband, broadband, dedicated access), distribution modes (xDSL, cable, fibre, fixed wireless access ("**FWA**")) and speeds/bandwidths, to residential and small office/home office ("**SOHO**") customers.[47]

(79) Furthermore, in previous decisions, the Commission excluded from the scope of the market for the retail supply of fixed internet access services, those fixed internet access services provided through mobile network infrastructure (*e.g.*, fixed Long-Term Evolution ("**fLTE**")) which form part of the market for retail mobile telecommunications services.[48] The Commission also excluded from the scope of the market fixed internet access services provided to large business and government customers, which form part of a separate market for the retail supply of business connectivity.[49]

4.4.2.2. The Notifying Parties' view

(80) The Notifying Parties submit that the exact scope of the relevant product market can be left open as the Transaction does not raise competitive concerns under any plausible product delineation.

4.4.2.3. The Commission's assessment

(81) The results of the market investigation did not provide reasons to depart from the Commission's decisional practice.[50]

(82) In light of the above and for the purpose of this decision, the Commission concludes that there is an overall market for the retail supply of fixed internet access services without further segmentations, excluding fLTE and retail business connectivity services.

4.4.3. Geographic market definition

4.4.3.1. Past Commission decisions

(83) In previous decisions, the Commission has found the market for the retail supply of fixed internet access services to be national in scope.[51]

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47 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 46; 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraphs 74; and, of 24 March 2021 in case M.10087 – *Proximus/Nexus/JV*, paragraphs 74.

48 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 40; of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraphs 74; and, of 24 March 2021 in case M.10087 – *Proximus/Nexus/JV*, paragraphs 74.

49 Commission decisions of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraphs 74; and, of 24 March 2021 in case M.10087 – *Proximus/Nexus/JV*, paragraphs 74.

50 Response to questionnaire 02 to providers of retail telecommunications services, question C.A.A.1.

4.4.3.2. The Notifying Parties' view

(84) The Notifying Parties submit that the exact scope of the relevant geographic market can be left open as the Transaction does not raise competitive concerns under any plausible geographic delineation.

4.4.3.3. The Commission's assessment

(85) The results of the market investigation did not provide reasons to depart from the Commission's decisional practice.[52]

(86) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic market for the retail supply of fixed internet access services is the territory of each of France, Germany, Italy and Spain.

4.5. Market for the retail supply of audio-visual services

(87) The retail supply of audio-visual ("**AV**") services consists of the distribution of TV channels to end-customers. The distributor is responsible for the promotion and sale of the packages (through advertising or direct marketing), as well as subscriber relations.

4.5.1. The Parties' activities

(88) DT is active in the market for the retail supply of AV services in Germany.

(89) Orange is active in the market for the retail supply of AV services in France and Spain.

(90) TEF is active in the retail supply of AV services in Germany and Spain.

(91) Vodafone is active in the retail supply of AV services in Germany, Italy and Spain.

4.5.2. Product market definition

4.5.2.1. Past Commission decisions

(92) In previous cases, the Commission split the retail supply of AV services in two separate markets: free-to-air ("**FTA**") and pay AV services.[53] In other more recent cases, the Commission ultimately left open the product market definition.[54] The

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51 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 50; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 40; of 29 September 2019 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 197; of 26 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraph 47; of 29 January 2010 in case M.5370 – *Telefónica/Hansenet Telekommunikation*, paragraph 28.

52 Response to questionnaire 02 to providers of retail telecommunications services, question C.A.B.1.

53 Commission decision of 18 July 2007 in case M.4504 – *SFR/Télé 2 France*, paragraph 45.

54 Commission decisions of 22 December 2021 in case M.10343 – *Discovery/Warner Media*, paragraph 63; of 6 November 2018 in case M.8785 – *The Walt Disney Company/Twenty-First Century Fox*, paragraph 98; of 8 October 2018 in case M.8842 – *Tele2/ComHem*, paragraph 37; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 137; of 6 February 2018 in case M.8665 – *Discovery/Scripps*, paragraph 33; of 7 April 2017 in case M.8354 – *Fox/Sky*, paragraph 101; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 56;

Commission has also considered whether the market for retail pay AV services should be segmented further according to: (i) premium pay AV vs basic pay AV services;[55] and (ii) linear vs non-linear AV services (Pay-per-View ("**PPV**"), Video-on-Demand ("**VOD**"));[56] but ultimately left the market definition open.[57] In past decisions, the Commission has considered that all distribution technologies are part of the same product market (*e.g.*, cable, satellite, terrestrial television and internet protocol television ("**IPTV**")).[58]

4.5.2.2. The Notifying Parties' view

(93) The Notifying Parties submit that, given that the Transaction does not raise competition concerns under any plausible market delineation, the definition of the relevant product market can be left open.[59]

4.5.2.3. The Commission's assessment

(94) In the course of the market investigation the Commission did not receive indications that it should depart from its decisional practice.

(95) In light of the above, the Commission considers that, for the purposes of this decision, the relevant product market at retail level is the market for the retail supply of AV services encompassing all distribution technologies. The question whether the retail supply of AV services should be further segmented between (i) FTA and pay AV services, as well as the question whether the retail supply of pay AV services should be segmented according to (ii) linear and non-linear pay AV services, and, (iii) premium and basic pay AV services can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any plausible product market definition. The question of whether the market for the retail supply of FTA AV services should be segmented according to linear and non-linear FTA AV services can also be left open as it would not materially affect the assessment of the Transaction.

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of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, paragraph 152.

55 Commission decisions of 22 December 2021 in case M.10343 – *Discovery/Warner Media*, paragraph 63; of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 119.

56 Commission decisions of 22 December 2021 in case M.10343 – *Discovery/Warner Media*, paragraph 63; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 109-110; of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 124; of 25 June 2008 in case M.5121 – *News Corp/Premiere*, paragraph 21.

57 Commission decisions of 22 December 2021 in case M.10343 – *Discovery/Warner Media*, paragraph 63; of 26 August 2020 in case M.9299 – *Discovery/Polsat/JV*, paragraph 82; of 6 November 2018 in case M.8785 – *The Walt Disney Company/Twenty-First Century Fox*, paragraph 93.

58 Commission decisions of 22 December 2021 in case M.10343 – *Discovery/Warner Media*, paragraph 63; of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, recital 195; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 137; of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 127; of 21 December 2010 in case M.5932 - *News Corp/BskyB*, paragraph 105; of 25 June 2008 in case M.5121 – *News Corp/Premiere*, paragraph 22.

59 The Notifying Parties' reply to RFI 11, question 4, paragraph 9.

(96) However, the Commission will assess the effects of the Transaction on the basis of the overall market for the retail supply of AV services as the same elements justify the same conclusion on all possible segmentations.

4.5.3. Geographic market definition

4.5.3.1. Past Commission decisions

(97) The Commission has generally concluded that the market for the retail supply of AV services is national in scope or at most corresponds to linguistically homogenous areas.[60]

4.5.3.2. The Notifying Parties' view

(98) The Notifying Parties submit that, given that the Transaction does not raise competition concerns under any plausible market delineation, the definition of the relevant geographic market can be left open.[61]

4.5.3.3. The Commission's assessment

(99) The results of the market investigation did not provide reasons to depart from the Commission's decisional practice.

(100) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic market for the retail supply of AV services is either the territory of each of France, Germany, Italy and Spain, or at most linguistically homogeneous areas. However, the Commission will perform its assessment only for the national markets, as the same elements justify the same conclusion on all possible segmentations.

4.6. Market for the supply of online advertising space

4.6.1. The Parties' activities

(101) DT is active in the market for the supply of online advertising space in the EEA to a very limited extent via One App, the central European customer service app of DT and other local sales and service apps.

(102) Orange is active in the market for the supply of online advertising space in France.

(103) TEF is active in the market for the supply of online advertising space to a limited extent as a publisher of banners from vendors in its online properties in the EEA.

(104) Vodafone is active in the retail supply of online advertising space in the EEA to a limited extent on its app and, specifically in Germany, on its respective websites.

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60 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 58; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 89; of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, paragraph 139; of 21 December 2011 in case M.6369 – *HBO/Ziggo/HBO Nederland*, paragraph 42; of 21 December 2010 in case M.5932 – *NewsCorp/BSkyB*, paragraph 110.

61 The Notifying Parties' reply to RFI 11, question 4, paragraph 11.

4.6.2. *Product market definition*

4.6.2.1. Past Commission decisions

(105) In previous decisions, the Commission identified four main categories of ads or advertising services:[62]

(a) Offline ads or advertising services, such as in newspapers, on television, etc.;

(b) Online search ads or advertising services, which are selected on the basis of search queries entered by users into internet search engines and are typically presented next to the search results on the search engine's own pages or other search results pages;

(c) Online non-search or display ads or advertising services on domains other than social networks, which can be either contextual ads, selected according to the content of the page on which they appear, or non-contextual ads; and,

(d) Online non-search or display ads or advertising services on social networks.

(106) Based on the above, in previous merger decisions, the Commission considered the market for the supply of online advertising space to be a market separate from the one for the supply for offline advertising space. It also considered possible further segmentations between the supply of online search and non-search advertising space, between the supply of ads on social networks or off social networks, or on the basis of the platform (PC versus mobile), but it ultimately left the market definition open.[63] In *Google AdSense*, the Commission concluded that online search advertising constitutes a separate relevant product market.[64]

4.6.2.2. The Notifying Parties' view

(107) The Notifying Parties submit that the exact scope of the relevant product market can be left open as the Transaction does not raise competitive concerns under any plausible product delineation.

4.6.2.3. The Commission's assessment

(108) In the course of the market investigation, the Commission did not receive indications that it should depart from its decisional practice.

(109) In light of the above and for the purpose of this decision, the Commission considers that the market for the supply of online advertising space to be a market separate from the one for the supply for offline advertising space. The Commission further considers possible segmentations between the supply of online search and non-search advertising space, between the supply of ads on social networks or off social networks, or on the basis of the platform (PC versus mobile). However, the Commission considers that it is not necessary to conclude on the exact product

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[62] Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, recital 148.

[63] Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, recitals 133-135; Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 159-161; Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraphs 74-79.

[64] Commission decision of 20 March 2019 in case AT.40411 – *Google AdSense*, recitals 121-183.

market definition, as the Transaction does not raise any concerns irrespective of the exact product market definition. As the JV will only provide input to the operators providing online non-search or display ads or advertising services on domains other than social networks, which can be either contextual ads, selected according to the content of the page on which they appear, or non-contextual ads, the Commission will only consider this segment.

4.6.3. Geographic market definition

4.6.3.1. Past Commission decisions

(110) In previous decisions, the Commission found that the market for the retail supply of online advertising space is national in scope or along the linguistic borders within the EEA.[65]

4.6.3.2. The Notifying Parties' view

(111) The Notifying Parties submit that the exact scope of the relevant geographic market can be left open as the Transaction does not raise competitive concerns under any plausible geographic delineation.

4.6.3.3. The Commission's assessment

(112) The results of the market investigation did not provide reasons to depart from the Commission's decisional practice.

(113) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic market for the market for online non-search or display ads or advertising services on domains other than social networks, which can be either contextual ads, selected according to the content of the page on which they appear, or non-contextual ads could be national or along the linguistic borders within the EEA-wide. However, the Commission will assess the Transaction considering that the relevant geographic market is the territory of each of France, Germany, Italy and Spain as the Transaction does not raise any competition concerns irrespective of the exact geographic scope considered.

5. COMPETITIVE ASSESSMENT

5.1. Identification of affected markets

(114) Based on the information provided by the Notifying Parties, the Transaction will not lead to any horizontally affected markets.

(115) The Transaction leads to the following vertically affected markets:

(a) The vertical relationship between the Parties' activities on the markets for the retail supply of mobile telecommunication services in each of France, Germany, Spain and Italy and retail supply of fixed internet access services in each of France, Germany and Spain (upstream) that allow the Parties to provide customer identification as an input to the JV's activities on the

65 Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, recital 160.

market for the supply of digital identification services in each of France, Germany, Spain and Italy (downstream) ("**Identification Vertical Relationship**").

(b) The vertical relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities as customers of online advertising space (and therefore as customers for the JV's digital identification services) in each of France, Germany, Spain and Italy (downstream) ("**Advertisement Vertical Relationship**"). This vertical relationship does not lead to any vertically affected market, due to the JV's limited market share upstream and the Parties' limited share of demand as customers of online advertising space. However, the Parties' activities as customers of online advertising space result from their activities on the markets for the retail supply of mobile telecommunication, retail supply of fixed internet access and the retail supply of AV services (collectively referred to as "**markets for the retail supply of telecommunication and AV services**"). When looking at the Parties' combined market shares on these markets, they are higher than [30-40]% in certain markets and certain countries (see Section 5.3 below). The Commission considers that the Parties' position in the downstream retail markets is not a good proxy for their position as customers of online advertising space, as telecommunications operators are only one group of customers of digital identification services among many. However, given the Parties position in the downstream retail markets, the Commission will take a conservative approach and assess this vertical relationship in Section 5.4.2.3 below.

(116) The Transaction also leads to an affected conglomerate relationship between the Parties' activities in the retail supply of AV services in each of France, Germany and Spain, and the JV's activities on the market for the supply of digital identification services in each of France, Germany and Spain. The Commission will assess this relationship in Section 5.4.3 below.

(117) In addition, the Transaction leads to a non-horizontal relationship that does not result in affected markets, but which the Commission will briefly assess in the Section 5.4.2.3.2.1.1 below on the vertical relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities in the market for online intermediation services for display advertising in the EEA (downstream).

5.2. Analytical framework

(118) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration 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.

(119) In this respect, a merger may entail horizontal and/or non-horizontal (namely, 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. Vertical effects are those deriving from a concentration where the undertakings concerned are active on different or multiple levels of the supply chain. Conglomerate effects are those

deriving from a concentration where the undertakings concerned are in a relationship which is neither horizontal nor vertical. A concentration may involve all three types of effects. In such a case, the Commission will appraise horizontal and non-horizontal effects in accordance with the guidance set out in the relevant notices, that is to say the Horizontal Merger Guidelines[66] and the Non-Horizontal Merger Guidelines.[67]

(120) In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases, the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.[68]

5.3. Market shares

(121) According to the Non-Horizontal Merger Guidelines,[69] in the assessment of the effects of a merger, market shares constitute a useful first indication of the structure of the markets at stake and of the competitive importance of the relevant market players.

(122) In the following paragraphs, the Commission presents the market shares of the Parties to the Transaction and their competitors, in all non-horizontally affected markets where the Parties have an individual or combined market share close to or above [30-40]%.

Table 1 – Vertically affected markets in France (2021)

Upstream market	Downstream market
Retail supply of mobile telecommunications services: **Revenue:** Orange (only): [30-40]% **Subscribers:** Orange (only): [30-40]%	**Supply of digital identification services (excl. "walled gardens"[70]):** **Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025
Retail supply of fixed internet access services: **Revenue:** Orange (only): [30-40]% **Subscribers:** Orange (only): [40-50]%	

66 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("**Horizontal Merger Guidelines**"), OJ C31, 5.2.2004, p. 5.

67 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, 190.2008.

68 Horizontal Merger Guidelines, paragraph 9; Non-Horizontal Merger Guidelines, paragraph 20.

69 Horizontal Merger Guidelines, paragraph 14; Non-Horizontal Merger Guidelines, paragraph 24.

70 Walled gardens are vertically integrated AdTech platforms using their internally created digital identities, such as Google's or Meta's consumer websites or apps. The Parties have been unable to provide market shares including walled gardens, but the Commission considers that the market shares of the JV would be smaller should walled gardens be included. Therefore, the Commission will make its assessment on the basis of the market shares provided by the Parties.

Upstream market	Downstream market
Supply of digital identification services (excl. "walled gardens"): **Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025	**Retail supply of mobile telecommunications services:** **Revenue:** Orange (only): [30-40]% **Subscribers:** Orange (only): [30-40]%
	Retail supply of fixed internet access services: **Revenue:** Orange (only): [30-40]% **Subscribers:** Orange (only): [40-50]%
	Retail supply of pay AV services[71]: **Revenue:** Orange (only): [20-30]% **Subscribers:** Orange (only): [20-30]%
	Share as advertiser for total display ad spend: Orange (only): [0-5]% **Share as advertiser for display ad spend on social networks:** Orange (only): [0-5]% **Share as advertiser for display ad spend off social networks:** Orange (only): [0-5]%

Form CO, Annex 41 (based on data from Analysys Mason), Annex 33 (based on the Parties' market shares projections for the JV), as well as the Notifying Parties' reply to RFI 10 (based on data from Analysys Mason).

(123) Orange is the largest of four main suppliers of mobile telecommunications services in France. Its market shares by value and by volume have slightly decreased from 2019 to 2021. Its main competitors are Altice (SFR) with a market share of [20-30]% by revenues and [20-30]% by subscribers, Bouygues with a market share of [20-30]% by revenues and [10-20]% by subscribers and Iliad (Free) with a market share of [10-20]% by revenues and [10-20]% by subscribers and in 2021.

(124) Regarding the supply of fixed internet access in France, Orange is the largest of four main suppliers with market shares by value and by volume slightly decreasing from 2019 to 2021. Its main competitors are Iliad (Free) with a market share of [20-30]% by revenues and [20-30]% by subscribers, Altice (SFR) with a market share of [20-30]% by revenues and [10-20]% by subscribers, and Bouygues with a market share of [10-20]% by revenues and [10-20]% by subscribers in 2021.

(125) Regarding the retail supply of AV services in France, the Notifying Parties were only able to provide market shares for the market for retail supply of pay AV services. However, the Notifying Parties have confirmed that their market shares would not be higher on the overall market for the retail supply of AV services, or

[71] The Notifying Parties were not able to provide market shares for the overall market or any other plausible segmentations of the market for the retail supply of AV services. However, in their reply to RFI 11, question 3, each Notifying Party confirmed that their respective market shares on (i) the overall market for the retail supply of AV services; and (ii) the market for the retail supply of free-to-air AV services would not be higher than the market shares on the market for the retail supply of pay AV services.

on the market for the retail supply of free-to-air AV services. The Commission therefore uses a conservative approach when basing its assessment on the market for the retail supply of pay AV services. On this market, Orange is the (second) largest of five suppliers. Its main competitors are Iliad (Free) with a market share of [10-20]% by revenues and [20-30]% by subscribers, Altice (SFR) with a market share of [20-30]% by revenues and [20-30]% by subscribers, Bouygues with a market share of [10-20]% by revenues and [10-20]% by subscribers, and Canal+ with a market share of [20-30]% by revenues and [10-20]% by subscribers in 2021.

Table 2 – Vertically affected markets in Germany (2021)

<table>
<tr><th>Upstream market</th><th>Downstream market</th></tr>
<tr><td>Retail supply of mobile telecommunications services:
Revenue: DT: [30-40]%; Vodafone: [20-30]%; TEF: [20-30]%; Combined: [70-80]%
Subscribers: DT: [20-30]%; Vodafone: [20-30]%; TEF: [20-30]%; Combined: [70-80]%</td><td rowspan="2">Supply of digital identification services (excl. “walled gardens”):
Revenue: JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025</td></tr>
<tr><td>Retail supply of fixed internet access services:
Revenue: DT: [40-50]%; Vodafone: [20-30]%; TEF: [5-10]%; Combined: [80-90]%
Subscribers: DT: [30-40]%; Vodafone: [30-40]%; TEF: [5-10]%; Combined: [70-80]%</td></tr>
<tr><td>Supply of digital identification services (excl. “walled gardens”):
Revenue: JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025</td><td>Retail supply of mobile telecommunications services:
Revenue: DT: [30-40]%; Vodafone: [20-30]%; TEF: [20-30]%; Combined: [70-80]%
Subscribers: DT: [20-30]%; Vodafone: [20-30]%; TEF: [20-30]%; Combined: [70-80]%</td></tr>
</table>

Upstream market	Downstream market
	Retail supply of fixed internet access services: **Revenue:** DT: [40-50]%; Vodafone: [20-30]%; TEF: [5-10]%; **Combined: [80-90]%** **Subscribers:** DT: [30-40]%; Vodafone: [30-40]%; TEF: [5-10]%; **Combined: [70-80]%**
	Retail supply of pay AV services[72]: **Revenue:** DT: [10-20]%; Vodafone: [30-40]%; **Combined: [50-60]%** **Subscribers:** DT: [10-20]%; Vodafone: [30-40]%; **Combined: [50-60]%**
	Share as advertisers for total display ad spend: DT: [0-5]%; Orange: [0-5]%; Vodafone: [0-5]%; TEF: [0-5]%; **Combined: [5-10]%** **Share as advertisers for display ad spend <u>on</u> social networks:** DT: [0-5]%; Orange: [0-5]%, Vodafone: [0-5]%; TEF: [0-5]%; **Combined: [5-10]%** **Share as advertisers for display ad spend <u>off</u> social networks:** DT: [0-5]%; Orange: [0-5]%; Vodafone: [0-5]%; TEF: [0-5]%; **Combined: [5-10]%**

Form CO, Annex 41 (based on data from Analysys Mason), Annex 33 (based on the Parties' market shares projections for the JV), as well as the Notifying Parties' reply to RFI 10 (based on data from Analysys Mason).

(126) Deutsche Telekom, Vodafone and Telefónica are the three largest of five main suppliers of mobile telecommunications services in Germany. The two other, significantly smaller competitors are United Internet (1&1) with a market share of [5-10]% by revenues and [5-10]% by subscribers and Freenet (mobilcom-debitel) with a market share of [5-10]% by revenues and [5-10]% by subscribers in 2021.

(127) Regarding the supply of fixed internet access in Germany, Deutsche Telekom, Vodafone and Telefónica are the three largest of five main suppliers. The two other, significantly smaller competitors are United Internet with a market share of [5-10]% by revenues and [5-10]% by subscribers and Tele Columbus with a market share of [0-5]% by revenues and [0-5]% by subscribers in 2021.

(128) Regarding the retail supply of AV services in Germany, the Notifying Parties were only able to provide market shares for the market for retail supply of pay AV services. However, the Notifying Parties have confirmed that their market shares would not be higher on the overall market for the retail supply of AV services, or on the market for the retail supply of free-to-air AV services. The Commission therefore uses a conservative approach when basing its assessment on the market

72 *Ibid*.

for the retail supply of pay AV services. On this market, Deutsche Telekom and Vodafone are the first and second largest of three main suppliers. The other main competitor is Sky, with a market share of [30-40]% by revenues and [20-30]% by subscribers in 2021.

Table 3 – Vertically affected markets in Italy (2021)

<table>
<tr><th>Upstream market</th><th>Downstream market</th></tr>
<tr><td>Retail supply of mobile telecommunications services:
Revenue: Vodafone (only): [30-40]%
Subscribers: Vodafone (only): [20-30]%</td><td>Supply of digital identification services (excl. “walled gardens”):
Revenue: JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025</td></tr>
<tr><td rowspan="2">Supply of digital identification services (excl. “walled gardens”):
Revenue: JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025</td><td>Retail supply of mobile telecommunications services:
Revenue: Vodafone (only): [30-40]%
Subscribers: Vodafone (only): [20-30]%</td></tr>
<tr><td>Share as advertisers for total display ad spend: Vodafone: [0-5]%; Orange: [0-5]%; Combined: [0-5]%
Share as advertisers for display ad spend <u>on</u> social networks: Vodafone: [0-5]%; Orange: [0-5]%; Combined: [0-5]%
Share as advertisers for display ad spend <u>off</u> social networks: Vodafone: [0-5]%; Orange: [0-5]%; Combined: [0-5]%</td></tr>
</table>

Form CO, Annex 41 (based on data from Analysys Mason), Annex 33 (based on the Parties' market shares projections for the JV), as well as the Notifying Parties' reply to RFI 10 (based on data from Analysys Mason).

(129) Vodafone is the largest of four main suppliers of mobile telecommunications services in Italy. Its market shares by value and by volume have slightly decreased from 2019 to 2021. Its main competitors are telecom Italia (TIM) with a market share of [30-40]% by revenues and [20-30]% by subscribers, 3 Groupe Europe (Wind Tre) with a market share of [20-30]% by revenues and [20-30]% by subscribers and Iliad with a market share of [5-10]% by revenues and [10-20]% by subscribers and in 2021.

Table 4 – Vertically affected markets in Spain (2021)

Upstream market	Downstream market
Retail supply of mobile telecommunications services: **Revenue:** TEF: [30-40]%; Vodafone: [20-30]%; Orange: [20-30]%; **Combined: [70-80]%** **Subscribers:** TEF: [20-30]%; Vodafone: [20-30]%; Orange: [20-30]%; **Combined: [70-80]%**	**Supply of digital identification services (excl. “walled gardens”):** **Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025

Upstream market	Downstream market
Retail supply of fixed internet access services: **Revenue:** TEF: [40-50]%; Vodafone: [10-20]%; Orange: [20-30]%; **Combined: [80-90]%** **Subscribers:** TEF: [30-40]%; Vodafone: [10-20]%; Orange: [20-30]%; **Combined: [70-80]%**	
Supply of digital identification services (excl. "walled gardens"): **Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025	**Retail supply of mobile telecommunications services:** **Revenue:** TEF: [30-40]%; Vodafone: [20-30]%; Orange: [20-30]%; **Combined: [70-80]%** **Subscribers:** TEF: [20-30]%; Vodafone: [20-30]%; Orange: [20-30]%; **Combined: [70-80]%**
	Retail supply of fixed internet access services: **Revenue:** TEF: [40-50]%; Vodafone: [10-20]%; Orange: [20-30]%; **Combined: [80-90]%** **Subscribers:** TEF: [30-40]%; Vodafone: [10-20]%; Orange: [20-30]%; **Combined: [70-80]%**
	Retail supply of pay AV services[73]: **Revenue:** TEF: [70-80]%; Orange: [5-10]%; Vodafone: [5-10]%; **Combined: [90-100]%** **Subscribers:** TEF: [60-70]%; Orange: [5-10]%; Vodafone: [10-20]%; **Combined: [80-90]%**
	Share as advertiser for total display ad spend: TEF: [0-5]%; Vodafone: [0-5]%; Orange: [0-5]%; **Combined: [0-5]%** **Share as advertisers for display ad spend <u>on</u> social networks:** TEF: [0-5]%; Vodafone: [0-5]%; Orange: [0-5]%; **Combined: [0-5]%** **Share as advertisers for display ad spend <u>off</u> social networks:** TEF: [0-5]%; Vodafone: [0-5]%; Orange: [0-5]%; **Combined: [0-5]%**

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Form CO, Annex 41 (based on data from Analysys Mason), Annex 33 (based on the Parties' market shares projections for the JV), as well as the Notifying Parties' reply to RFI 10 (based on data from Analysys Mason).

(130) TEF (Movistar), Vodafone and Orange are the three largest of five main suppliers of mobile telecommunications services in Spain. The two other, significantly smaller competitors are Másmóvil/Euskatel with a market share of [10-20]% by revenues and [10-20]% by subscribers and Digi with a market share of [0-5]% by revenues and [5-10]% by subscribers in 2021.

(131) Regarding the supply of fixed internet access in Spain, TEF (Movistar), Vodafone and Orange are the three largest of five main suppliers. The two other, significantly smaller competitors are Másmóvil/Euskatel with a market share of [10-20]% by revenues and [10-20]% by subscribers and Digi with a market share of [0-5]% by revenues and [0-5]% by subscribers in 2021.

(132) Regarding the retail supply of AV services in Spain, the Notifying Parties were only able to provide market shares for the market for retail supply of pay AV services. However, the Notifying Parties have confirmed that their market shares would not be higher on the overall market for the retail supply of AV services, or on the market for the retail supply of free-to-air AV services. The Commission therefore uses a conservative approach when basing its assessment on the market for the retail supply of pay AV services. On this market, TEF (Movistar) is the clear market leader, while Orange and Vodafone are the second and third largest suppliers. The only other supplier with market shares above 5% (and only by subscribers) is Másmóvil with a market share of [0-5]% by revenues and [5-10]% by subscribers in 2021.

(133) In addition to the vertically affected markets described in paragraphs (124) to (134) above, during the market investigation, some suppliers of wholesale TV channels (i.e., broadcasters) expressed concerns that the Parties could leverage their position as suppliers of retail AV services to force broadcasters to purchase the digital identification services of the JV.[74] Accordingly, the Commission will assess the possible competitive concerns that may arise from the conglomerate relationship between the neighbouring markets for the retail supply of AV services (where the Parties are active) and the market for the supply of digital identification services (where the JV is active) in France, Germany and Spain.

Table 5 – Conglomerate affected markets in France (2021)

Affected markets	Market share
Retail supply of pay AV services[75]	**Revenue:** Orange (only): [20-30]% **Subscribers:** Orange (only): [20-30]%

[74] Responses to questionnaire 01 to (potential) customers of the JV, question D.2.

[75] The Notifying Parties were not able to provide market shares for the overall market or any other plausible segmentations of the market for the retail supply of AV services. However, in their reply to RFI 11, question 3, each Notifying Party confirmed that their respective market shares on (i) the overall market for the retail supply of AV services; and (ii) the market for the retail supply of free-to-air AV services would not be higher than the market shares on the market for the retail supply of pay AV services.

Affected markets	Market share
Supply of digital identification services (excl. “walled gardens”)	**Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025

Form CO, Annex 33 (based on the Parties’ market shares projections for the JV), as well as the Notifying Parties’ reply to RFI 10 (based on data from Analysys Mason).

Table 6 – Conglomerate affected markets in Germany (2021)

Affected markets	Market share
Retail supply of pay AV services[76]	**Revenue:** DT: [10-20]%; Vodafone: [30-40]%; **Combined: [50-60]%** **Subscribers:** DT: [10-20]%; Vodafone: [30-40]%; **Combined: [50-60]%**
Supply of digital identification services (excl. “walled gardens”)	**Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025

Form CO, Annex 33 (based on the Parties’ market shares projections for the JV), as well as the Notifying Parties’ reply to RFI 10 (based on data from Analysys Mason).

Table 7 – Conglomerate affected markets in Spain (2021)

Affected markets	Market share
Retail supply of pay AV services[77]	**Revenue:** TEF: [70-80]%; Orange: [5-10]%; Vodafone: [5-10]%; **Combined: [90-100]%** **Subscribers:** TEF: [60-70]%; Orange: [5-10]%; Vodafone: [10-20]%; **Combined: [80-90]%**
Supply of digital identification services (excl. “walled gardens”)	**Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025

Form CO, Annex 33 (based on the Parties’ market shares projections for the JV), as well as the Notifying Parties’ reply to RFI 10 (based on data from Analysys Mason).

(134) During the market investigation, some competitors of the JV expressed concerns that the JV’s Tokens may not be interoperable with existing operators active on the market for non-search (display) advertising intermediation services in the EEA.[78] In particular, a competitor of the JV explained that some of the functionalities that the JV will offer will rely “*on the ability to decrypt the described tokens and match the contained pseudonymous internal identities across the different parties by an infrastructure operated by the JV itself or by select service providers which are enabled by the JV.*”[79] The Notifying Parties have confirmed that “*to protect consumer data and privacy rights, the JV will not support any players in the industry that do not share/meet these standards and values.*”[80]

76 *Ibid*.
77 *Ibid*.
78 Responses to questionnaire 03 to providers of digital identification services, question C.A.A.2.
79 Responses to questionnaire 03 to providers of digital identification services, question C.A.A.2.
80 Response to RFI 10, question 10.

(135) Accordingly, and for completeness the Commission will assess the possible competitive concerns that may arise from the vertical relationship between the upstream activities of the JV as a provider of digital identification services and the downstream activities of the Notifying Parties as providers of intermediation services for online advertising even though this vertical relationship is not vertically affected, in light of the very small market shares of the Parties both on the upstream and downstream market.

Table 8 – Vertical non-affected markets relevant in view of relationship with other affected markets (2021)

Upstream markets	Downstream market
Supply of digital identification services (excl. "walled gardens") in France: **Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025	**Intermediation services for online display advertising, including in all plausible product market segments, in the EEA:** DT: <[0-5]%; Orange: [0-5]%; TEF: <[0-5]%; Vodafone: <[0-5]%; **Combined: <[0-5]%**
Supply of digital identification services (excl. "walled gardens") in Germany: **Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025	
Supply of digital identification services (excl. "walled gardens") in Spain: **Revenue:** JV: [0-5]% in 2023; [0-5]% in 2024; [0-5]% in 2025	

Form CO, Annex 33 (based on the Parties' market shares projections for the JV), as well as Form CO, paragraph 383.

(136) As shown in Table 8 above, the Notifying Parties estimate their combined shares to be well below 20% in the market for intermediation services for online display advertising, as well as potential segments thereof. The Notifying Parties submit that the market player with the largest market share by far in this market is Google.

5.4. Non-horizontal assessment

5.4.1. Preliminary remarks

(137) In *Apple/Shazam*, the Commission noted that there are certain regulatory limitations to prevent the illegal combination of datasets.[81]

(138) First, as regards the ability to foreclose the data, the Commission recalls that the processing of personal data is subject to the applicable Union rules dealing with data protection, and most notably the Regulation (EU) 2016/679 of the European Parliament and of the Council[82] ("**GDPR**"). Such rules apply to personal data, that is "*any information relating to an identified or identifiable natural person ('data*

[81] Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, recitals 225-235.

[82] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".[83]

(139) Pursuant to Article 5(1)(b) GDPR, personal data which has been collected for specified, explicit and legitimate purposes may not be further processed in a manner that is incompatible with those purposes. Data which qualifies as personal data under the GDPR can be transmitted to and processed by a third party only to the extent that there exists a legal basis for the transmission to the third party and a legal basis for the processing by that third party. Any consent must meet the conditions of Article 4(11) GDPR.

(140) Further, the GDPR requires that individuals concerned by the processing must be informed in a transparent manner on all relevant circumstances of the processing, including on the identity of each controller and the purposes of the processing.[84]

(141) In addition, Directive 2002/58/EC ('ePrivacy Directive')[85] lays down the rules about the end-users' right to privacy and confidentiality of their electronic communications and the protection of the integrity of their terminal equipment. The ePrivacy Directive is applicable, at least, in relation to certain activities of the Joint Venture as described in the notification, which entail the storing of information in the users' terminal equipment or accessing of information already stored therein.

(142) Wherever relevant in this decision, the Commission discusses the rules under the GDPR and the ePrivacy Directive only for the purposes of the assessment of the Transaction under the Merger Regulation. The analysis in this section is therefore entirely without prejudice to any relevant administrative or legal procedures where the Parties' compliance with those rules may be assessed. Furthermore, this decision is without prejudice to an assessment of the JV's compliance with any relevant consumer or data protection legislation.

5.4.2. Vertical assessment

5.4.2.1. Introduction

(143) In this section, the Commission will assess whether the proposed Transaction would give rise to foreclosure in any of the markets that are vertically affected. A merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the Transaction, thereby reducing these companies' ability and/or incentive to compete.[86]

(144) Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an

83 GDPR, Article 4.

84 GDPR, Article 5.

85 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

86 Non-Horizontal Merger Guidelines, paragraph 29.

important input (input foreclosure). The second is where the merger is likely to result in foreclosure of upstream rivals by restricting their access to a sufficiently large customer base (customer foreclosure).

(145) Input foreclosure arises where, post-merger, the merged entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger.[87]

(146) In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream.[88]

(147) Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete.[89]

(148) In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines the three following cumulative elements: first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals; second, whether it would have the incentive to reduce its purchases upstream; and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market intertwined.[90]

5.4.2.2. Identification Vertical Relationship

(149) As explained in paragraph (120)(a) above, the Commission has identified a vertically affected relationship between the Parties’ activities on the markets for the <u>retail supply of mobile telecommunication services</u> in each of France, Germany, Spain and Italy and <u>retail supply of fixed internet access services</u> in each of France, Germany and Spain respectively (upstream) that allow the Parties to provide customer identification as an input to the JV’s activities on the market for the <u>supply of digital identification services</u> in each of France, Germany, Spain and Italy (downstream).

5.4.2.2.1. Notifying Parties’ views

(150) The Notifying Parties submit that, as a result of the Transaction, the Parties will not have the ability or the incentive to engage in total or partial input or customer foreclosure of rival retail providers of mobile telecommunications services or of

[87] Non-Horizontal Merger Guidelines, paragraph 31.
[88] Non-Horizontal Merger Guidelines, paragraph 32.
[89] Non-Horizontal Merger Guidelines, paragraph 58.
[90] Non-Horizontal Merger Guidelines, paragraph 59.

fixed internet access services, or rival providers of digital identification services in each of France, Germany, Italy and Spain.

(151) With regards to a possible input foreclosure strategy, the Notifying Parties consider that the Parties would not have the ability to engage in any input foreclosure as the JV will not have a sufficient impact on the market, nor will it constitute an important channel for retail providers of mobile telecommunication services to become ID providers.

(152) With regards to a possible customer foreclosure strategy, the Notifying Parties submit that impeding providers of retail mobile telecommunications services and providers of retail fixed internet access services from becoming ID providers, whether through the JV or other means, does not impact their ability to offertheir retail services in France, Germany, Italy and Spain. Furthermore, the Notifying Parties submit that the JV is not an important channel for retail providers of mobile and fixed internet access services to become providers of digital identification services. Finally, the Notifying Parties submit that the Parties will not have the incentive to engage in any customer foreclosure strategy as the JV will seek to reach agreements with as many retail providers of mobile telecommunications services as possible and retail providers of fixed internet access services to increase its reach.

5.4.2.2.2. The Commission's assessment

(153) On the basis of its investigation, the Commission has preliminarily identified potential input and customer foreclosure strategies arising from the Identification Vertical Relationship, which the Commission will assess in turn.

5.4.2.2.2.1. Input foreclosure

(154) Any hypothetical total or partial input foreclosure of rivals of the JV would occur by blocking or making access to the Notifying Parties' input available at worse terms than the JV.

5.4.2.2.2.1.1. Ability to engage in total or partial input foreclosure

(155) The Commission considers that irrespective of any possible market definition, the Notifying Parties will not have the ability to engage in foreclosure by restricting access to the Notifying Parties' input to the competitors of the JV in each of France, Germany, Italy and Spain.

(156) First, the Notifying Parties do not currently provide MSISDN and/or IP addresses to any third party competitors of the JV as an input for the downstream supply of digital identification services. As such, none of the JV's actual or potential competitors could be foreclosed by restricting access to the Notifying Parties' input, which they do not currently rely upon. This was further confirmed by the market investigation in which all market participants who expressed a view confirmed that the JV's competitors do not rely on input from the Notifying Parties to provide their digital identification solutions downstream.[91]

91 Response to questionnaire 03 to providers of digital identification services, question D.A.1.

(157) Second, the Commission considers that there are alternative inputs available on the market to which the JV's rivals could turn to. For instance, one market participant in the market investigation explained that: "*MSISDN and/or IP Address may be used as an input but it is one of multiple inputs and therefore such providers do not rely solely on MSISDN/or IP addresses*".[92] Accordingly, the JV's competitors will continue to have access to alternative inputs of a different nature to provide digital identification services. For instance, walled gardens can identify users via their log-in details (both on their owned-and-operated platforms, but also on third-party websites/apps that offer e.g., Google/Facebook Login).

(158) In any event, the JV's competitors will be able to source the same input that the Notifying Parties will provide to the JV from alternative providers of retail mobile telecommunications services and fixed internet access services. For instance, based on volume,[93] alternative providers of retail mobile telecommunications services account for more than [20-30]% of the subscriptions in Spain and up to more than [70-80]% in Italy.[94] Similarly, alternative providers of fixed internet access services account for almost [20-30]% of the total number of subscriptions in Spain to almost [60-70]% of subscriptions in France.[95] Accordingly, the Commission cannot exclude that alternative providers of digital identification services would be able to rely on third party MSISDN and/or IP addresses going forward.[96]

(159) As such, the Commission considers that the input that the Notifying Parties will provide to the JV will not be an important input for rivals of the JV to compete on the downstream market for the supply of digital identification services.

(160) In light of the above, the Commission considers that, in all of the relevant Member States, there are sufficient economic alternatives for the downstream rivals of the JV to purchase their input from third parties and that the Notifying Parties would lack the ability to engage in an input foreclosure strategy, irrespective of the market definition.

5.4.2.2.2.1.2. Incentive to engage in total or partial input foreclosure

(161) The Commission considers that, in all of the relevant Member States and irrespective of any possible market definition, the Notifying Parties will have the incentive to engage in foreclosure by not providing access to the Notifying Parties' input to the competitors of the JV in each of France, Germany, Italy and Spain.

(162) In particular, the Commission understands from […] that the Notifying Parties may not, as long as they remain shareholders of the JV and for a duration not exceeding

92 Responses to questionnaire 03 to providers of digital identification services, question D.1.

93 The Commission considers that since input to the JV will be provided by the Notifying Parties on the basis of each active line, the relevant metric to be used here is the volume-based market share, as opposed to the value-based market share.

94 For completeness, the exact figures are [60-70]% for France, [20-30]% for Germany, [70-80]% for Italy and [20-30]% for Spain.

95 For completeness, the exact figures are [50-60]% for France, [20-30]% for Germany, more than [60-70]% for Italy (as it does not give rise to a vertically affected market) and [20-30]% for Spain.

96 For instance, the Commission notes a competitor provides products similar to those that will be offered by the JV on the basis of the same input (see responses to questionnaire 03 to providers of digital identification services, question C.A.A.1). As such, competitors of the Notifying Parties may start supplying their input to such competitors.

[0-10] years, provide the same input that they provide to the JV to any rival of the JV.[97]

(163) In light of the above, the Commission considers that, since it will not be possible, without amending the SHA, for the Notifying Parties to supply rivals of the JV with input that the Notifying Parties will supply to the JV, that the Notifying Parties will have an incentive to engage in total or partial input foreclosure of the JV's rivals in the downstream market for the supply of digital identification services.

5.4.2.2.2.1.3. Overall likely impact on effective competition

(164) Due to the lack of ability of the Parties to engage in input foreclosure as a result of the Identification Vertical Relationship, it is not necessary to assess whether any such foreclosure strategy would have an impact on effective competition.

(165) In any event, the Commission considers that any input foreclosure strategy resulting from the Identification Vertical Relationship would not have any impact on effective competition.

(166) First, as explained in paragraphs (156) to (158) above, rivals of the JV would be able to rely on input from rivals of the Notifying Parties or from alternative input providers, which do not use MSISDN and/or IP addresses.

(167) Furthermore, due to the JV's activities being greenfield, the input that the Notifying Parties will provide to the JV cannot be considered important for the JV's rivals to compete on the downstream market for the supply of digital identification services. Indeed, current providers of digital identification services rely on alternative sources of input, which will not change as a result of the Transaction.

(168) Second, the JV's expected market share in the market for the supply of digital identification services is expected to be very small, in the range of [0-5]% in the next three years (2023 to 2025). As such, it does not appear, on the basis of the market share data provided by the Notifying Parties, that the JV will cause significant switching from the JV's rivals to the JV. Consequently, there will continue to be a large proportion of demand for digital identification services that will be addressable by the JV's rivals, which currently do not, rely on any input from the Parties.

(169) In light of the above, the Commission considers that any input foreclosure strategy would not have any effect on the JV's rivals.

5.4.2.2.2.1.4. Conclusion on the input foreclosure strategies resulting from the Identification Vertical Relationship

(170) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential input foreclosure arising from the relationship between the Parties' activities on the markets for the <u>retail supply of mobile telecommunication services</u>

[97] Form CO, paragraph 74 and footnote 47.

in each of France, Germany, Spain and Italy and retail supply of fixed internet access services in each of France, Germany and Spain respectively (upstream) that allow the Parties to provide customer identification as an input to the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (downstream).

5.4.2.2.2.2. Customer foreclosure

(171) Any total or partial customer foreclosure of rivals of the Notifying Parties would occur through the JV's refusal to acquire inputs from the Notifying Parties' rivals, or deal with such rivals at worse terms than with the Notifying Parties.

5.4.2.2.2.2.1. Ability to engage in total or partial customer foreclosure

(172) The Commission considers that, in all of the relevant Member States and irrespective of any possible market definition, the Notifying Parties will not have the ability to engage in foreclosure by restricting access to the JV to rival suppliers active in the upstream markets for the retail supply of mobile telecommunications services and fixed internet access services in each of France, Germany, Italy and Spain.

(173) First, from the outset, the Commission notes that the market shares of the Parties in the downstream market are significantly below 30%, which means that any anticompetitive effect is unlikely to result from the Transaction.[98] Indeed, given its very limited market share of less than [0-5]% on the market for the supply of digital identification services, the JV will not be an important customer for MSISDN and/or IP addresses.

(174) Second, the market investigation confirmed that the vast majority of retail providers of mobile telecommunications services and retail providers of fixed internet access services do not monetise their MSISDN and/or IP addresses to date.[99] Similarly, the vast majority of retail providers of mobile telecommunications services and retail providers of fixed internet access services are not planning on engaging in services that are the same or similar to the services that the JV will offer. As such, the Commission notes that upstream competitors of the Parties do not, to date, rely on sales to the JV's competitors and are therefore unable to be foreclosed by any customer foreclosure strategy of the JV.[100] Accordingly, in line with the Notifying Parties' views, the revenue share for identity providers cannot be necessary for upstream retail providers of mobile telecommunications services and retail providers of fixed internet access services to continue providing their services upstream.

(175) Third, competition concerns regarding customer foreclosure are unlikely to arise when there is a sufficiently large customer base, at present or in the future, that is likely to turn to other suppliers active in the upstream market.[101] In this regard, the

98 Non-Horizontal Merger Guidelines, paragraph 25.

99 Response to questionnaire 02 to retail providers of telecommunications services, question D.1.

100 Furthermore, the JV's revenue-generating capacity will be of approximately EUR [1 – 1 000] million after the JV's fifth year of operation. As such, the activities of the JV will represent a limited side business for the upstream rival providers of telecommunication and AV services.

101 Non-Horizontal Merger Guidelines, paragraph 60.

Commission notes that market participants have been able to identify a number of alternative providers of the type of services like those offered by the JV which rely on MSISDN and/or IP addresses. For instance, one competitor explains that it relies on hashed MSISDN and that ID5, Zeotap ID+ and Lotame rely on IP addresses.[102]

(176) Fourth, the Commission notes that the JV's services may be offered on the basis of inputs different from those that the Parties will provide to the JV. For instance, one market participant explained that: "*MSISDN and/or IP Address may be used as an input but it is one of multiple inputs and therefore such providers do not rely solely on MSISDN/or IP addresses*".[103]

(177) In light of the above, the Commission considers that, in all of the relevant Member States, there are sufficient economic alternatives for the upstream rivals to sell their output, without incurring significantly higher costs, and that the JV would lack the ability to engage into a customer foreclosure strategy, irrespective of the market definition.

5.4.2.2.2.2.2. Incentive to engage in total or partial customer foreclosure

(178) The Commission considers that, in all of the relevant Member States and irrespective of any possible market definition, the Notifying Parties will not have the incentive to engage in foreclosure by restricting access to the Notifying Parties' input to the competitors of the JV in each of France, Germany, Italy and Spain.

(179) First, due to the greenfield nature of the JV's activities, the Parties will maintain a strong incentive to provide sufficient scale to the JV's services in order to attract a sufficient downstream customer base which would, in turn, generate profits for the Parties. As such, the Commission considers that reducing the scale of the JV could imply foregone downstream revenues which the Parties would not be able to recoup otherwise. Indeed, as submitted by the Parties: "*Going forward, the JV's ID providers can be any telecommunications operator, including but not limited to the Parties. In order to increase its scale – which in turn will make it more attractive for customers (*[advertisers] *and publishers) and AdTech intermediaries – the JV will seek to on-board additional operators as* [input] *providers.*"[104]

(180) Second, the Parties' incentives would not be aligned due to the different geographic market presence in the upstream markets for the retail supply of mobile telecommunications services and fixed internet access services. Accordingly, given the number of Member States in which the JV will operate and the fact that the Parties are not all active in all Member States in which the JV will operate (or even, all active in one and the same Member State), it is unlikely that the Parties would have the incentive to engage in any customer foreclosure strategy.

(181) For example, in France, only Orange will be a shareholder of the JV, and the inability to seek input from alternative retail providers of mobile telecommunications services and retail fixed internet access services would directly affect the scale that the JV may reach in France. In turn, this lack of scale would

102 Responses questionnaire 03 to providers of digital identification services, question D.1-3.
103 Responses to questionnaire 03 to providers of digital identification services, question D.1.
104 See the Parties' non-confidential summary of the activities of the JV.

imply that the JV would be unable to on-board a sufficient number of publishers and advertisers downstream, which would have a direct effect on the profitability of the JV for Orange, without affecting the other Parties who would still benefit from their compensation per hashed MSISDN provided to the JV in other Member States.

(182) In light of the above, the Commission considers that the Parties will not have the incentive to engage in any customer foreclosure strategy.

5.4.2.2.2.2.3. Effects of a total or partial customer foreclosure strategy

(183) Due to the lack of ability and incentive for the Parties to engage in customer foreclosure as a result of the Identification Vertical Relationship, the Commission considers that it is not necessary to assess whether any such foreclosure strategy would have an impact on effective competition.

(184) In any event, the Commission considers that irrespective of any possible market definition, any customer foreclosure strategy would not have any impact on effective competition on rival suppliers active in the upstream markets for the retail supply of mobile telecommunications services and fixed internet access services in each of France, Germany, Italy and Spain.

(185) In particular, in all Member States except Germany, market participants have confirmed that it is unlikely that the creation of the JV by the Parties would increase the barriers to entry or otherwise impact competition in the markets for the retail supply of mobile telecommunications services and fixed internet access services.[105]

(186) With regards to Germany, one market participant expressed concerns that the Transaction may reduce the Parties' marketing costs and, accordingly, increase the Parties' ability to compete vis-à-vis MVNOs. The Commission will address this concern in the next section 5.4.2.2.2.2.4 below.[106]

5.4.2.2.2.2.4. Possible targeted customer foreclosure vis-à-vis MVNOs

(187) The Commission considers that, irrespective of any possible market definition, the JV will not have the ability or the incentive to engage in targeted customer foreclosure by restricting access to the JV to rival MVNOs active in the upstream markets for the retail supply of mobile telecommunications services in each of France, Germany, Italy and Spain.

(188) First, the Commission's reasoning in section 5.4.2.2.2.2.1 and 5.4.2.2.2.2.2 above equally applies to any targeted customer foreclosure strategy vis-à-vis MVNOs.

(189) Furthermore, with regards to the Parties' ability to engage in a targeted customer foreclosure vis-à-vis MVNOs, the Commission notes that the Notifying Parties

[105] See responses to questionnaire 02 to retail providers of telecommunications services, question D.A.4.

[106] See responses to questionnaire 02 to retail providers of telecommunications services, question D.A.4.

have explained that the Parties would not be able to engage in any targeted customer foreclosure strategy vis-à-vis MVNOs for the following reasons.[107]

(190) First, [...] between each of the Parties and MVNOs in France, Germany, Italy and Spain that would prevent MVNOs from becoming input providers to the JV, and [...] would be necessary for MVNOs to become input providers of the JV. Similarly, [...] in the Parties' contracts with MVNOs [...] to become providers to the JV.[108]

(191) Second, the Parties would be unable to provide input of MVNO's end-users hosted on their network to the JV in France, Germany, Italy or Spain for the following reasons:

(a) From a privacy perspective, […]. Thus, in line with the GDPR, the Parties or the JV will not be able to collect consent for those end-users, which in turn implies that the JV's services cannot be provided to those end-users.

(b) The MSISDNs are identification data of the MVNO's customers and, as such, are sensitive business information of the MVNOs and resellers (rather than information of the host MNO). The Parties consider […], meaning that the Parties would not be permitted to use them for a business purpose that is not related to their MNO-MVNO relationship. In particular, the Notifying Parties submit that […]. For instance, the Italian Communications Code imposes on MNOs an obligation to respect the security of commercial information and Section 242 of the German Civil Code imposes a duty of loyalty (duty on confidential treatment or exclusive use within the framework of bilateral contractual cooperation).[109]

(c) The telecommunication regulation[110] with regards to access and interconnection could be read as establishing a duty to use the information acquired by an MNO in the process of negotiating access or interconnection arrangements (*i.e.*, including MVNO contracts) solely for the purpose for which it was supplied. An MNO could not use information obtained for another purpose for which it was supplied.

(192) In addition to the above, the Commission stresses that the Parties submit that: "*Going forward, the JV's ID providers can be any telecommunications operator, including but not limited to the Parties. In order to increase its scale – which in turn will make it more attractive for customers (*[advertisers] *and publishers) and AdTech intermediaries – the JV will seek to on-board additional operators as ID providers.*"[111] This statement does not foresee any distinction between MNOs and MVNOs or the ability of the latter to become an ID provider to the JV.

(193) In light of the above, the Commission considers that the Notifying Parties would not have the ability or incentive to engage in any targeted customer foreclosure strategy vis-à-vis MVNOs.

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107 See, in particular, the Notifying Parties' response of 31 January 2023 to the request for information 10, question 1.

108 Response to RFI 10, questions 1(a) and 1(b).

109 Response to RFI 10, question 2.

110 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

111 See the Parties' non-confidential summary of the activities of the JV.

(194) Therefore, given the lack of ability or incentive to foreclose, it is not necessary to conclude as to the impact on effective competition of any possible targeted customer foreclosure strategy in France, Germany, Italy and Spain.

5.4.2.2.2.2.5. Conclusion on the customer foreclosure strategies resulting from the Identification Vertical Relationship

(195) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential customer foreclosure arising from the relationship between the Parties' activities on the markets for the retail supply of mobile telecommunication services in each of France, Germany, Spain and Italy and retail supply of fixed internet access services in each of France, Germany and Spain respectively (upstream) that allow the Parties to provide customer identification as an input to the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (downstream).

5.4.2.2.2.3. Conclusion on the vertical effects resulting from the Identification Vertical Relationship

(196) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market arising from the relationship between the Parties' activities on the markets for the retail supply of mobile telecommunication services in each of France, Germany, Spain and Italy and retail supply of fixed internet access services in each of France, Germany and Spain respectively (upstream) that allow the Parties to provide customer identification as an input to the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (downstream).

5.4.2.3. Advertisement Vertical Relationship

(197) As explained in paragraph (120)(b) above, the Commission has identified a vertically affected relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities as customers of online advertising related to their activities on the markets for the retail supply of telecommunication and AV services in each of France, Germany, Spain and Italy (downstream).

(198) In addition, the Transaction leads to a non-horizontal relationship that does not result in affected markets, but which the Commission will briefly assess in this section below, namely the vertical relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities in the market for online intermediation services for display advertising in the EEA (downstream).

5.4.2.3.1. Notifying Parties' views

(199) The Notifying Parties submit that, as a result of the Transaction, the Parties will not have the ability or the incentive to engage in total or partial input or customer foreclosure of rival retail providers of mobile telecommunications services in each of France, Germany, Italy and Spain and retail providers of fixed internet access

services or rival providers of digital identification services in each of France, Germany, Italy and Spain.

(200) With regards to a possible input foreclosure strategy, the Notifying Parties consider that the JV would not have the ability to engage in any input foreclosure as the JV's Tokens will not constitute an important input for downstream market participants.

(201) With regards to a possible customer foreclosure strategy, the Notifying Parties submit that any such customer foreclosure strategy would run counter to the purpose of the JV.

5.4.2.3.2. The Commission's assessment

(202) On the basis of its investigation, the Commission has identified possible input and customer foreclosure strategies arising from the Advertisement Vertical Relationship, which the Commission will assess in turn.

5.4.2.3.2.1. Input foreclosure

(203) On the basis of its investigation, the Commission has identified two possible input foreclosure strategies, one affecting rival providers of intermediation services for digital advertising solutions of the Notifying Parties, and another one on the potential foreclosure of rival providers of telecommunication and AV services of the Notifying Parties. In the following sections, the Commission will assess these two potential input foreclosure strategies in turn.

5.4.2.3.2.1.1. Potential foreclosure of suppliers of intermediation services for digital advertising solutions

(204) Some market participants have expressed concerns regarding a possible vertical relationship arising from the JV's activities as a supplier of digital identification services (i.e., the Tokens) (upstream) and the Parties' activities on the market for the supply of intermediation services for digital advertising solutions ("**Parties' IS Solutions**") (downstream). The concern is that the Parties may render the JV's Tokens interoperable only with the Parties' IS Solutions, or provide a lower degree of interoperability between the JV's Tokens and rival solutions to the Parties' IS Solutions ("**Intermediation Foreclosure**").[112]

(205) The Commission considers that, in all of the relevant Member States and irrespective of any possible market definition, the JV will not have the ability or incentive to engage in Intermediation Foreclosure to rival providers of the Parties' IS Solutions in each of France, Germany, Italy and Spain.

(206) First, the Parties would not have the ability to engage in any Intermediation Foreclosure strategy. In particular, the vertical relationship is not affected by the present Transaction in light of the greenfield nature of the JV's activities[113] and the

[112] Given the very limited market shares of the Parties in the downstream market, the Commission considers that any customer foreclosure strategy is unlikely to occur as a result of this vertical relationship. As such, the Commission will not assess any customer foreclosure concerns relating to his vertical relationship.

[113] As well as the limited expected market shares of the JV after its creation.

Parties' IS Solutions give rise to very limited combined market shares of less than [0-5]% under any plausible market definition of the overall market for the supply of intermediation services for digital advertising solutions. Furthermore, […].[114]

(207) Second, the Commission considers that the Parties would not have the incentive to engage in any Intermediation Foreclosure. In particular, since the JV will start operations without any market share, the Parties will have the incentive to ensure that the JV's services can reach as wide as possible of an audience, which in turn implies that the JV will need to integrate with as many competitors of the Parties' IS Solutions as possible going forward.

(208) Indeed, as submitted by the Parties: "*The JV will offer its solution to all* [advertisers] *and publishers, regardless of, e.g., industry and size. It will require a simple technical integration with* [advertisers], *publishers and AdTech intermediaries. However, the JV's solution does not require additional infrastructure as it is designed to be open and interoperable (subject to compliance with privacy requirements). Technically, the JV's tokens are built as first-party identities. Therefore, the JV's tokens will be able to work with any platform that can consume/use other first-party identities (e.g., Data Management Platform or related technology).*" [115]

(209) Furthermore, given the lack of ability or incentive to foreclose, it is not necessary to conclude as to the impact on effective competition of any Intermediation Foreclosure strategy in.

(210) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential input foreclosure with respect to any Intermediation Foreclosure.

5.4.2.3.2.1.2. Potential foreclosure of rival retail suppliers of telecommunication and AV services

(211) The Commission considers that, in all of the relevant Member States and irrespective of any possible market definition, the JV will not have the ability or incentive to engage in foreclosure by restricting access to the JV's Tokens to rival downstream providers of retail supply of telecommunication and AV services in France, Germany, Italy and Spain.

(212) First, from the outset, the Commission notes that the market shares of the Parties in the upstream market are significantly below [30-40]%, which means that any anticompetitive effect is unlikely to result from the Transaction.[116]

(213) Second, the Commission considers that the JV would not have the ability to foreclose rival providers of retail mobile telecommunications services and retail fixed internet access services as there are sufficient alternative providers of digital identification services, including large walled garden market participants such as Google or Meta as well as other significant market players such as Apple, Amazon and ByteDance/TikTok.

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114 Form CO, paragraph 385.
115 See the Parties' non-confidential summary of the activities of the JV.
116 Non-Horizontal Merger Guidelines, paragraph 25.

(214) Furthermore, the Transaction will not reduce the number of existing providers of digital identification. Quite the contrary, the JV will be a new solution available on the market, which in turn implies that the market has sufficient capacity to cover the needs of the Notifying Parties' rival providers of retail mobile telecommunications services and retail fixed internet access services as there are sufficient alternative providers of digital identification services.

(215) Finally, due to the greenfield nature of the JV, rival providers of retail mobile telecommunications services and retail fixed internet access services do not currently rely on the JV's input, which could not be plausibly considered as an important input for downstream rival providers of retail mobile telecommunications services, retail fixed internet access services and AV services as there are sufficient alternative providers of digital identification services.

(216) Second, the Commission considers that the JV will not have the incentive to engage in any form of input foreclosure strategy as a result of the Advertisement Vertical Relationship as the JV is expected to generate the vast majority of its revenues from sales to third parties. Indeed, according to the Notifying Parties, sales to the Notifying Parties would represent [10-20]% of the JV's revenues in its first year of operation, which would ultimately decrease to [0-10]% in the JV's [0-10] year of operation.[117] As such, it does not appear plausible that the Notifying Parties would want to forego more than all non-captive the revenue opportunities of the JV.

(217) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential customer foreclosure arising from the relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities in the market for online intermediation services for display advertising in the EEA (downstream).

5.4.2.3.2.1.3. Conclusion on the input foreclosure strategies resulting from the Advertisement Vertical Relationship

(218) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential input foreclosure arising from the relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities as customers of online advertising related to their activities on the markets for the retail supply of telecommunication and AV services in each of France, Germany, Spain and Italy (downstream).

(219) Similarly, in view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential input foreclosure arising from the relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities in the

117 Form CO, table 7.

market for online intermediation services for display advertising in the EEA (downstream).

5.4.2.3.2.2. Customer foreclosure[118]

(220) The Commission considers that, irrespective of any possible market definition, the Notifying Parties will not have the ability or incentive to engage in customer foreclosure by the Notifying Parties not purchasing digital identification services from rivals of the JV in France, Germany, Italy and Spain.

(221) While the Parties' combined market share in the downstream market for retail mobile telecommunications services, retail fixed internet access services and AV services are not insignificant in France, Germany, Italy and Spain, the Commission considers that the appropriate metric to determine whether any customer foreclosure strategy is plausible is the Parties' market share on the supply and demand side of the market for the supply of online advertising space.

(222) Indeed, as the JV's products and services […], the JV will only […]. As such, any customer foreclosure strategy would only be plausible if the Parties had a significant market power in the market in which the JV will provide its services, i.e., the market for the supply of online advertising space to publishers) and advertisers.

(223) In this regard, the Parties' combined market shares are negligible, and consistently below 10% in each relevant product and geographic market, both on the supply[119] and demand[120] side of the market for the supply of online advertising space. On this basis, the Commission considers that the Parties will not have the ability to engage in any customer foreclosure strategy as there will continue to be, post-Transaction, a sufficient addressable demand to which the JV's rivals will be able to supply digital identification services.

5.4.2.3.2.2.1. Conclusion on the customer foreclosure strategies resulting from the Advertisement Vertical Relationship

(224) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential customer foreclosure arising from the relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities as customers of online advertising related to their activities on the markets for the retail supply of telecommunication and AV services in each of France, Germany, Spain and Italy (downstream).

118 The Commission has further considered the possibility that the JV may facilitate the targeting, by the Notifying Parties, of advertising of retail products of the Notifying Parties. However, the Notifying Parties have confirmed that this is already possible pre-Transaction on the basis of existing intermediaries (see Form CO, paragraph 404). Accordingly, the Commission will not discuss this possible targeted foreclosure strategy further.

119 Form CO, paragraphs 299-303.

120 Form CO, paragraphs 304-308.

5.4.2.3.3. Conclusion on the vertical effects resulting from the Advertisement Vertical Relationship

(225) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market arising from the relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities as customers of online advertising related to their activities on the markets for the retail supply of telecommunication and AV services in each of France, Germany, Spain and Italy (downstream).

(226) Similarly, in view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential input foreclosure arising from the relationship between the JV's activities on the market for the supply of digital identification services in each of France, Germany, Spain and Italy (upstream) and the Parties' activities in the market for online intermediation services for display advertising in the EEA (downstream).

5.4.2.4. Conclusion on vertical relationships

(227) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the vertical relationships resulting from the Transaction.

5.4.3. Conglomerate relationships

5.4.3.1. Introduction

(228) The Non-Horizontal Guidelines[121] indicate that competition concerns can arise in circumstances where a merger involves companies that are active in closely related markets. While in the majority of circumstances conglomerate mergers will not lead to any competition problems, in certain circumstances they can lead to anticompetitive effects. One such example is when the combination of products in related markets would give the merged entity the ability and incentive to leverage a strong market position in one of the markets to the other market by means of tying or bundling. Where tying or bundling is likely to lead to a reduction in actual or potential rivals' ability or incentive to compete it may reduce competitive pressure on the merged entity, allowing it to increase prices.

(229) The Commission's assessment of conglomerate effects, in light of the results of the market investigation, is set out in the following paragraphs. For this purpose, consistent with paragraph 94 of the Non-Horizontal Merger Guidelines, in relation to each of these practices, the Commission examines, (i) whether the merged entity would have, post-transaction, the ability to foreclose its rivals, (ii) whether it would have the incentive to do so, and (iii) whether a foreclosure strategy would have an overall negative impact on effective competition.

121 Non-Horizontal Merger Guidelines, Section V.A.

5.4.3.2. Conglomerate foreclosure of TV broadcasters

(230) As part of the market investigation, two market participants expressed concerns regarding a possible bundling of the Notifying Parties' activities as retail providers of AV services with the JV's digital identification services.[122] In particular, these market participants were concerned that the Notifying Parties may rely on their market power as distributors of TV channels to force TV broadcasters to rely on the JV's services for such broadcasters' OTT platform.

5.4.3.2.1. Notifying Parties' views

(231) The Notifying Parties submit that the Transaction would not give rise to any conglomerate foreclosure of TV broadcasters as a result of any tying or bundling strategy between the Notifying Parties' existing activities as distributors of TV channels and the JV's future activities for the following reasons.

(232) First, the Notifying Parties submit that they would not have the ability to engage in any such conglomerate foreclosure and/or bundling strategy, notably because (i) the Notifying Parties compete for the provision of retail AV services with each other and any agreement between themselves relating to the strategy vis-à-vis TV broadcasters would not be permitted under Article 101 TFEU; (ii) the Notifying Parties do not individually have a significant degree of market power; and, (iii) [INFORMATION ABOUT THE RELATIONSHIPS BETWEEN OPERATORS AND BROADCASTERS]. In addition, the Notifying Parties submit that (i) the relevant products are not bought simultaneously; (ii) there is no sufficient commonality of customers for the services at issue; and, (iii) broadcasters represent a small percentage of the JV's potential customers for the provision of digital identification services.

(233) Second, the Notifying Parties submit that the Parties would not have the incentive to engage in any such conglomerate foreclosure and/or bundling strategy, as it would as it would […] affect the Notifying Parties' relationship with TV broadcasters […].

(234) In any event, the Notifying Parties explain that any such conglomerate foreclosure and/or bundling strategy would not have any impact on effective competition as TV broadcasters have significant countervailing buyer power.

5.4.3.2.2. The Commission's assessment

(235) The Commission considers that the Parties will not have the ability or incentive to engage in conglomerate foreclosure strategies by leveraging its potential market power in the possible markets for the retail supply of AV services to the market for the supply of digital identification services in France, Germany and Spain for the reasons set out below.

5.4.3.2.2.1. Ability to engage in conglomerate foreclosure of TV broadcasters

(236) The Commission considers that the Parties will not have the ability to engage in conglomerate foreclosure strategies by leveraging its potential market power in the

[122] Response to questionnaire 02 to (potential) customers of the JV, question D.2.

market for the retail supply of AV services, including all plausible product market segments, to the market for the supply of digital identification services in France, Germany and Spain for the reasons set out below.

(237) First, with regards to the market for the retail supply of AV services, the Transaction does not impact the market power that any of the Notifying Parties may have prior to the Transaction. Indeed, as explained by the Notifying Parties, the relationship between TV broadcasters and the Notifying Parties will remain largely unchanged post-Transaction as each Party will continue to contract with TV broadcasters individually and independently.[123]

(238) Second, the Commission considers that any ability to engage in any conglomerate foreclosure or tying strategy vis-à-vis TV broadcasters would only materialize at the time at which any agreements for the distribution of TV channels would be up for renewal. For instance, the Commission notes that the agreement that […] has with [...] will last until [...]. Other agreements may last for much longer, such as [...] agreements for distributing some [...] TV channels. Accordingly, the Parties would not be able to exercise any market power against these TV broadcasters as long as these agreements remain in place.

(239) Third, the JV's services will be offered to a wide range of customers, for which TV broadcasters would only represent a small percentage of the overall customer base of the JV. As such, the Commission considers that the Notifying Parties' services as TV distributors and the JV's services for digital identification services are not complementary, nor that there would be any sufficiently large common pool of customers for each of these products individually.

(240) Finally, the Commission considers that given the need for retail providers of AV services to offer as wide a retail TV product as possible, retail providers of AV services have an incentive to have distribution agreements with as many TV broadcasters. In this regard, the Commission notes that TV broadcasters enjoy some countervailing buyer power vis-à-vis the Notifying Parties.

(241) In light of the above, the Commission considers that, in all of the relevant Member States, there is an insufficient common customer pool that would simultaneously purchase the services of the Notifying Parties as retail providers of AV services and the JV's digital identification services, and that the Parties would lack the ability to engage in a conglomerate foreclosure strategy, irrespective of the market definition.

5.4.3.2.2.2. Incentive to engage in conglomerate foreclosure of TV broadcasters

(242) The Commission considers that the Parties will not have the incentive to engage in conglomerate foreclosure strategies by leveraging its potential market power in the market for the retail supply of AV services, including all its possible sub-segments, to the market for the supply of digital identification services in France, Germany and Spain for the reasons set out below.

(243) In particular, the Commission notes that retail providers of AV services have an incentive to offer to their end-customers as wide a TV channel bouquet as possible.

[123] Response to RFI 10, question 5(a).

Accordingly, the Commission considers that it is highly unlikely that retail providers of AV services would risk losing a distribution agreement with a major TV broadcaster, which would, in turn, result in customers switching provider of retail AV services, to try to force such TV broadcaster to subscribe to the JV's services, from which the retail provider of TV channels would only gain [...]% of the overall JV's profits. In comparison, the Notifying Parties confirmed that they generate approximately EUR [...] for DT, EUR [...] for Orange, EUR [...] for TEF and EUR [...] from the supply of retail AV services.[124]

(244) Furthermore, due to the greenfield nature of the JV's activities, the success of the JV remains uncertain and, […]. After its fifth year of operation, the JV is expected to generate approximately EUR [0-1 000] million, which is […] than the Parties' individual sales of retail AV services to end-customers. For instance, the Notifying Parties confirmed that they generate […] for DT, EUR […] for Orange, EUR […] for TEF and EUR […] from the supply of retail AV services. As such, any risk of losing a TV broadcasters' TV channels may, in turn, reduce the revenues each Notifying Party generates from the sale of retail AV services, as opposed to the […] revenues it would recoup from the JV.

(245) In light of the above, the Commission considers that the Parties will not have the incentive to engage in any conglomerate foreclosure strategy, irrespective of the market definition.

5.4.3.2.2.3. Effects of a conglomerate foreclosure strategy of TV broadcasters

(246) The Commission considers that in all of the relevant Member States and irrespective of any possible market definition, any conglomerate foreclosure strategy would not have any overall likely impact on prices and choice with regard to TV broadcasters in France, Germany and Spain for the reasons set out below.

(247) First, the JV's services would represent an insignificant proportion of TV broadcasters' costs. For instance, on the basis of the business plan, the JV will sell its services at approximately EUR […] *per* customer (*i.e.*, *per* TV broadcaster).[125] In France, for example, TF1 has a total operating cost of approximately EUR […] million. Accordingly, with regards to TF1, the overall increase in costs would be significantly lower than [0-5]%, which the Commission does not consider material enough to impact effective competition. The Notifying Parties' submit that in each of France, Germany and Spain, any cost increase would remain significantly below [0-5]% of TV broadcasters' total costs.[126] Accordingly, the Commission does not consider that any tying and/or bundling practice would significantly affect the TV broadcasters' cost structure.

(248) Second, in light of the Commission's assessment on joint control in section 2.1 above, on the basis of the information provided by the Notifying Parties, the Transaction will lead to joint control during the Veto Rights Period, i.e., for [0-5] years. […].[127] Accordingly, any potential negative (and in any case very limited)

[124] The Commission recalls that the Notifying Parties anticipate, in comparison, that the JV will generate approximately EUR [0 – 1 000] million in its fifth year of operation.
[125] Response to RFI 10, question 7.
[126] Response to RFI 10, question 7.
[127] Form CO, Annex 5.

impact on the cost structure of TV broadcasters would not last for more than two years, as the Notifying Parties may no longer be able to exercise decisive influence over the JV.

(249) In light of the above, the Commission considers that, in all of the relevant Member States, any conglomerate foreclosure strategy on TV broadcasters would have very limited and short-lived impacts on effective competition. As such, the Commission considers that any conglomerate foreclosure strategy on TV broadcasters would not have any impact on effective competition.

5.4.3.2.2.4. Conclusion on conglomerate foreclosure of TV broadcasters

(250) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential conglomerate foreclosure of TV broadcasters with respect to the conglomerate relationship resulting from the Notifying Parties' activities as retail providers of AV services with the JV's digital identification services.

5.4.3.3. Conclusion on conglomerate relationships

(251) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the conglomerate relationships resulting from the Transaction.

5.5. Cooperative effects

5.5.1. Introduction

(252) Under Article 2(4) of the Merger Regulation, to the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 101(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

(253) Under Article 2(5) of the Merger Regulation, in making this appraisal, the Commission shall take 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.

(254) A restriction of competition under Article 101(1) TFEU is established when the coordination of the parent companies' competitive behaviour is likely and appreciable and results from the creation of the joint venture, be it as its object or its effect.

(255) A detailed description of the JV's activities is included in paragraphs (6) and (33)-(37) above.

5.5.2. *The Notifying Parties' views*

(256) The Notifying Parties submit that the Transaction will not give rise to any cooperative effects as there will be sufficient safeguards regarding (i) information flow; (ii) meeting participation; and, (iii) envisaged competition law and information management trainings to ensure that the creation of the JV does not entail any spill-over effects.

5.5.3. *Commission's assessment*

(257) The Commission considers that the Transaction will not lead to any material increase of risk of cooperative effects on the market for the retail supply of mobile telecommunications, fixed internet access and AV services in Germany and Spain for the following reasons.

(258) First, the Parties confirmed that the JV will generate Tokens from hashed MSISDN provided by the participating network operators. As such, information will only flow between the relevant operator and the JV and never between operators.

(259) Second, the Parties will prevent the supervisory board members from having access to competitively sensitive information that are not strictly necessary for the supervisory board to fulfil its obligations. JV employees and the management board will be required to take specialist antitrust advice before sharing information with the supervisory board.

(260) Third, it is foreseen that employees of the Parties will not be able to attend any of the meetings of the JV's supervisory or management board, with the exception of the supervisory board members. Similarly, no JV employees will be allowed to attend any of the Parties' board or executive level meetings, except when exceptionally necessary and after receiving antitrust guidance.

(261) Fourth, any seconded employees during the [0-10] month start-up period will be subject to, whenever necessary, a ring-fencing of their role once they finish their secondment.

(262) Fifth, the JV will provide its employees with competition law and information management trainings and ensure that, in case of doubts, the JV and its shareholders will seek advice from competition lawyers.

(263) Finally, given the […] revenue-generating capacity of the JV up to […] (*i.e.*, EUR […] million), it is unlikely that the activities of the JV will materially affect the risk of coordination on other markets. Furthermore, as the JV will not be active in the markets for the retail supply of mobile telecommunications, fixed internet access and AV services in Germany and Spain, the creation of the JV will not provide the Parties' with any increased ability to guess each other's production costs.

(264) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to cooperative effects in the retail supply of mobile telecommunications, fixed internet access and AV services in Germany and Spain.

5.5.4. Conclusion

(265) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to cooperative effects resulting from the creation of the JV.

6. CONCLUSION

(266) 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