EUROPEAN COMMISSION

Brussels, 15.03.2022
C(2022) 1723 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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Amazon.com, Inc.
410 Terry Ave N
Seattle 98109, WA
United States of America

Subject: **Case M.10349 – AMAZON / MGM**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 8 February 2022, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Amazon.com, Inc. ("Amazon", USA) will acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of MGM Holdings Inc. ("MGM", USA) (the "Transaction"). Amazon is designated hereinafter as the "Notifying Party" and, together with MGM, as the "Parties".

[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').

1. THE PARTIES

(2) **Amazon** is based in Seattle, Washington, US. It operates a range of businesses including retail, entertainment, consumer electronics, and technology services. Most relevant to the Transaction, Amazon is active in the (co-)production of audio-visual ("AV") content through Amazon Studios, which is available alongside third-party content on Amazon's home entertainment offering, Amazon Prime Video ("Prime Video"), available to consumers in the EEA and internationally. In addition, Amazon produces streaming media player devices and supplies other forms of digital content, including music streaming, audiobooks, and ebooks.

(3) **MGM** is an entertainment company based in Beverly Hills, California, USA. MGM is active in the production and global distribution of AV content. In particular, MGM is involved in the development, production, financing, and acquisition of films for theatrical (*i.e.*, cinema) release, as well as the production and licensing of films for distribution via all other means and media throughout the world, including nontheatrical, free and pay television ("TV"), physical home video, and all forms of digital home entertainment. MGM is not active in theatrical distribution in the EEA, but distributes its content through third parties. With regard to TV content, MGM produces and distributes scripted and unscripted shows. MGM offers a wholesale channel, MGM+, in a number of EEA jurisdictions via retail distributors Prime Video, Zattoo, and Mediaset. MGM is also active in licensing intellectual property ("IP") rights for use in consumer products and interactive games, as well as various other licensing activities.

2. THE OPERATION

(4) On 25 May 2021, the Parties entered into an Agreement and Plan of Merger by which Amazon will acquire the entire issued share capital of MGM for USD 8.45 billion. The Transaction therefore consists of the acquisition of sole control of MGM by Amazon within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

(5) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million[3]. Each of them has a Union-wide turnover in excess of EUR 250 million, and each of them 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 within the meaning of Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

(6) The overall structure of the AV industry comprises different levels: the upstream, intermediate, and downstream, as follows.

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

(7) The upstream level encompasses production of film and TV content and the licensing of distribution rights to such content to parties active in the intermediate (such as wholesale distributors) and downstream levels (such as broadcasters or VOD providers). AV content production includes, *inter alia*, financing, developing scripts, casting actors and directors, shooting, and postproduction. Studios and independent producers produce film and TV content in a number of ways, including through various forms of cooperation with and acquisitions from other production companies.

(8) The intermediate level covers wholesale distribution of content (*e.g.*, the wholesale supply of TV channels or licensing out of exhibition rights to third party distributors for onward supply to the end-user), and related marketing activities. The intermediate level in the value chain is carried out both by third party wholesale distributors (who specialise in distributing content, either individually or in aggregate), and through self-distribution by film and TV content producers.

(9) The downstream level includes both theatrical exhibition (whereby customers pay for tickets to view a film at a theatre or cinema), and retail distribution through home entertainment channels, including physical distribution via DVD and Blu-ray discs, all types of linear TV (*e.g.*, broadcast, cable, satellite), and VOD services.

(10) The Transaction primarily concerns home entertainment at all levels of the AV value chain: (i) the <u>production and supply of AV content</u> (including the supply of pre-produced AV content and commissioned AV content), where both Amazon (through Amazon Studios) and MGM are active in the production and licensing of AV content; (ii) the <u>wholesale supply of TV channels</u>, where MGM is active in the wholesale supply of AV channels in certain countries in the EEA through MGM+; and (iii) the <u>retail supply of AV services to end customers</u>, where Amazon is active in the EEA through Prime Video. The scope of the three markets is assessed below in Sections 4.1 to 4.3.

(11) Considering all plausible product markets and the assessment of the geographic scope of the market for the retail supply of AV services to end customers in Section 4.3 below, as a result of the Parties' overlapping activities the Transaction only gives rise to affected vertical relationships in Germany, Austria and Croatia relating to the retail supply of AV services to end customers under a narrow market definition consisting of only SVOD services. Therefore, this will be the starting point for the Commission's assessment in this decision.

(12) The Transaction further concerns part of the theatrical distribution value chain, namely the production and licensing of distribution rights of films for theatrical exhibition, where both Amazon (through Amazon Studios) and MGM are active. The scope of this market is assessed below in Section 4.4. The Transaction does not concern the other markets that are part of the theatrical distribution value chain, being the market for the distribution to exhibitors of films for theatrical exhibition and the market for theatrical exhibition. On the market for the distribution to exhibitors of films for theatrical exhibition only Amazon is active through Amazon Studios but it is not active in the EEA. Moreover, neither of the Parties is active in theatrical exhibition. Therefore, this decision will not further assess the impact of the Transaction on these markets.

(13) During the Commission's investigation, the question arose whether the distinction between the AV value chain and the theatrical distribution value chain is still relevant.

The distinction between those value chains, both at the level of the production and licensing of films as well as the retail distribution of films, is assessed below in Section 4.5.

(14) The Transaction does not affect the distribution of home entertainment products, which includes products that are distributed in physical form. Only MGM is active in the licensing and supply of home entertainment for physical exploitation and the Transaction does not give rise to relevant vertical relationships.

(15) Home entertainment refers to the provision of copies of films for consumers to buy or rent and watch at their convenience. Home entertainment products can include products in physical format (such as DVDs and Blu-ray discs) and products that are distributed in electronic form. Amazon is not active on this market and MGM is not active in the distribution of home entertainment products in the EEA. Therefore, this decision will not further discuss a market for the distribution of home entertainment products.

(16) Finally, the Parties are both active in the licensing out of IP rights for merchandising. However, as the merchandise licensing industry is very large (according to public sources reaching USD 280 billion in 2017)[4] and the combined market share of the Parties would be very low (less than [0-5]%) under any market definition, this decision will not further discuss a market for merchandise licensing.

4.1. Production and supply of AV content

4.1.1. The Parties' activities

(17) Both Amazon (through Amazon Studios) and MGM are active in the production and supply of AV content.

(18) With regard to the supply-side of the market, Amazon Studios produces original film and TV content, which is offered to customers in over 200 countries and territories, including the EEA, as video on demand ("VOD") service. As regards the production of commissioned AV content, Amazon Studios is not active in the EEA. MGM produces AV content for physical distribution (DVD/Blu-ray) and distribution on video on demand services. Further, MGM occasionally produces AV content commissioned by third parties in the EEA and recently launched MGM International, an international television division with a view to expanding MGM's non-US production capabilities.

(19) With regard to the demand-side of the market, Amazon Studios commissions AV content from third parties and has previously licensed content from MGM. MGM occasionally commissions certain unscripted content from third parties on behalf of EPIX, a premium Pay-TV network that it owns through EPIX Entertainment LLC.

(20) Amazon Studios and MGM are also active in the acquisition and licensing of broadcasting rights for pre-produced AV content.

---

[4] See Licensing International, Global sales of licensed products and services reach US 280.3 billion, fifth straight year of growth for the licensing industry, available at: https://licensinginternational.org/news/global-sales-of-licensed-products-and-services-reach-us-280-3-billion-fifth-straight-year-of-growth-for-the-licensing-industry/.

(21) From the supply side, Amazon generally does not license its content to third parties, [*business secrets concerning Amazon's licensing activities*]. MGM's licensing of broadcasting rights for pre-produced AV content includes films (often following theatrical release), first-run TV shows and library content. Film and TV content is licensed globally on [*business secrets concerning MGM's licensing policy*], and through [*business secrets concerning MGM's licensing policy*].

(22) From the demand side, Amazon Studios licenses in third-party studio content libraries and sourcing content via direct publishing by creators that is distributed through Prime Video. MGM does not typically license in distribution rights for pre-produced AV content. Outside the EEA, EPIX licenses in broadcast rights for pre-produced content for distribution (in the United States and Bermuda).

4.1.2. *Product market definition*

4.1.2.1. Past Commission decisions

(23) In previous decisions, the Commission has concluded that there are separate markets for: (i) the production and supply of commissioned AV content (also referred to as *ad hoc* or new content); and (ii) the licensing of broadcasting rights for pre-produced AV content (available off-the-shelf).[5]

(24) With regard to the market for the **production of commissioned AV content**, the Commission has found the product market to be limited to non-captive AV production, thereby excluding captive AV production (*i.e.*, AV content produced by broadcasters for use on their own TV channels), as this AV content is not offered on the market.[6]

(25) With regard to the market for the **licensing of pre-produced AV content**, the Commission has considered that the market may be subdivided by content type, in particular: (i) films, (ii) sports, and (iii) other AV content (*i.e.*, all non-sport, non-film content), but ultimately left the market definition open.[7] In addition, the Commission had assessed whether AV content could be further sub-divided by distinguishing between: (i) US and non-US films; (ii) premium and non-premium content; or (iii) scripted and non-scripted content. The question whether such further possible sub-segments constituted separate markets has been left open in previous decisions.[8]

---

5 Commission decision of 7 April 2017 in Case M.8354 – Fox / Sky, para. 54; Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 69; Commission decision of 6 November 2018 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 67; Commission decision of 26 August 2020 in Case M.9299 – Discovery / Polsat / JV, para. 50; and Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, paras. 21 and 25.

6 Commission decision of 22 September 2006 in Case M.4353 – Permira / All3Media Group, paras. 11-12; Commission decision of 9 October 2014 in Case M.7360 – 21st Century Fox / Apollo /JV, para. 36; Commission decision of 20 June 2016 in Case M.7865 – Lov Group Invest /De Agostini / JV, para. 18; and Commission decision of 26 August 2020 in Case M.9299 – Discovery / Polsat / JV, para. 50.

7 Commission decision of 21 December 2011 in case M.6369 – HBO / Ziggo / HBO Nederland; and Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, para. 22.

8 Commission decision of 7 April 2017 in Case M.8354 – Fox / Sky, para. 55; M.6369 – HBO / Ziggo / HBO Nederland, para. 18; Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 52; Commission decision of 6 November 2018 in Case M.8785 – The Walt

(26) The Commission has also considered further sub-dividing the market for the licensing of pre-produced AV content by exhibition window:[9] (i) subscription-based video on demand ("SVOD"); (ii) transactional video on demand ("TVOD"),[10] (iii) pay-per-view ("PPV"),[11] (iv) first pay TV window, (v) second pay TV window, and (vi) free-to-air ("FTA"), but has ultimately left this question open.[12]

4.1.2.2. The Notifying Party's views

(27) The Notifying Party argues that the precise scope of the market for the production and supply of AV content can be left open. As regards the production of commissioned AV content and the licensing of pre-produced content, the Notifying Party submits that the definition of the relevant product market can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, given the absence of an overlap.

(28) The question arose during the Commission's investigation whether the distinction between the AV value chain and the theatrical distribution value chain is still relevant. The distinction between those value chains, both at the level of the production and licensing of films as well as the retail distribution of films, is further discussed in Section 4.5 below. The Notifying Party argues in this regard that there cannot be a distinction between markets for the production and supply of films intended for either theatrical or direct-to-streaming ("DTS") release. In any event, the Notifying Party submits that the precise market definition can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.1.2.3. The Commission's assessment

(29) As set out in para. (11) above, the markets in Germany, Austria and Croatia are a starting point for the Commission's assessment as the Parties' overlapping activities only give rise to affected vertical relationships in those countries relating to the retail supply of AV services to end customers under a narrow market definition consisting of only SVOD services.

(30) Overall, the market investigation indicated that there are no reasons for the Commission to depart from the approach taken in previous cases with regard to the definition of the market for the production and supply of AV content.

Disney Company / Twenty-First Century Fox, para. 68; and Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, para. 23.

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

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

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

12 Commission decision of 7 April 2017 in Case M.8354 – Fox / Sky, para. 56; Commission decision of 6 November 2018 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 68; Commission decision of 1 December 2021 in Case M.10456 – Sky / VIACOMCBS / JV, para. 36; and Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, paras. 24-25.

(31) The vast majority of respondents to the market investigation confirm that the general distinction that the Commission has previously recognised (between (i) production and licensing of AV content, (ii) the wholesale supply of TV channels, and (iii) the retail supply of AV services) is still an accurate description of the AV value chain in the EEA and more specifically in Germany, Austria and Croatia, today.[13]

(32) The information gathered during the market investigation does not provide an indication that the Commission should depart from the distinction between the market for the production of commissioned AV content on the one hand and the market for the licensing of broadcasting rights for pre-produced AV content (*i.e.*, content that is available off the shelf) on the other hand. The vast majority of the respondents to the market investigation consider that this still accurately reflects the market reality in the EEA and more specifically in Germany, Austria and Croatia.[14]

(33) As regards a market for the licensing of broadcasting rights for pre-produced AV content, the Commission then considered whether this market could be segmented by type of content including (i) films, (ii) sports, and (iii) other AV content (*i.e.*, all non-sport, non-film content). The majority of the respondents to the market investigation confirm that this distinction is equally still accurate.[15] However, several respondents note that series are missing from this segmentation and wonder whether this should be part of a segment for films or whether there should be a distinction between fictional and non-fictional content.[16] Within a potential market for films, the majority of respondents state that US and non-US films are equally important to attract end-customers.[17] Within a potential market for other AV content, the majority of the respondents to the market investigation confirmed that segmentations between scripted and unscripted AV content as well as between premium and non-premium content are still accurate.[18] In relation to this first segmentation, content providers highlight that "*scripted and non-scripted programming are totally different in terms of production budget, licensing parameters, target audience, etc.*".[19] As regards the distinction between premium and non-premium content, one respondent clarifies that "*[p]remium content usually has a higher production budget to ensure a better technical quality, access to the best talent and the most exciting well-known brands*".[20]

(34) The Commission further investigated whether the market for the licensing of broadcasting rights for pre-produced AV content could be segmented by exhibition windows into (i) SVOD, (ii) TVOD, (iii) PPV, (iv) first pay TV window, (v) second pay TV window, and (vi) FTA. For pre-produced AV content, the results of the market investigation are inconclusive.[21] An equal number of respondents consider that the distinction by exhibition window is entirely relevant or irrelevant. Some other respondents indicate that the distinction by exhibition window is only partly relevant. However, these respondents point to different reasons why this would be the case

13 Questionnaire 1 to content providers, question 6.
14 Questionnaire 1 to content providers, question 15.
15 Questionnaire 1 to content providers, question 16.1.
16 Questionnaire 1 to content providers, question 16.6.
17 Questionnaire 1 to content providers, question 16.2.
18 Questionnaire 1 to content providers, questions 16.3 and 16.4.
19 Questionnaire 1 to content providers, question 16.3.1.
20 Questionnaire 1 to content providers, question 16.4.1.
21 Questionnaire 1 to content providers, question 17.1.

indicating that it might differ per country, that some exhibition windows would be less relevant or that it depends on the specific content.[22]

(35) By contrast, a small majority of respondents indicate that the same segmentation by exhibition window would be relevant for the market for the production and supply of commissioned AV content.[23] Several respondents however seem to indicate that in the case of commissioned AV content, it depends on the commissioner whether there will be a second release window.[24] In view of this, the Commission considers that the results of the market investigation are insufficiently clear to conclude that a segmentation by exhibition window should be distinguished in relation to commissioned AV content.

(36) In light of the above, the Commission concludes, for the purpose of this decision, that the production and supply of AV content forms a relevant product market and that, within this market, there are separate product markets for the production of commissioned AV content and the licensing of broadcasting rights for pre-produced AV content. The question whether the market for the licensing of broadcasting rights for pre-produced AV content can be further segmented according to (i) the type of AV content, (ii) US and non-US films, (iii) premium and non-premium content, (iv) scripted and non-scripted content, or (v) exhibition window 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.

4.1.3. Geographic market definition

4.1.3.1. Past Commission decisions

(37) In past decisions, the Commission has considered the market for the production and supply of AV content (and its relevant segments) to be either national or regional, based on linguistically homogeneous areas.[25]

4.1.3.2. The Notifying Party's views

(38) As regards the production of commissioned AV content, the Notifying Party submits that the definition of the relevant geographic market can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, given the absence of an overlap.

4.1.3.3. The Commission's assessment

(39) The vast majority of the respondents to the market investigation indicated that the geographic scope of the market for the production and supply of AV content is either national in scope or encompassing linguistically homogeneous regions.[26] As a result,

---

22 Questionnaire 1 to content providers, question 17.3.

23 Questionnaire 1 to content providers, question 17.2.

24 Questionnaire 1 to content providers, question 17.3.

25 Commission decision of 7 April 2017 in Case M.8354 – Fox / Sky, para. 69; Commission decision of 26 August 2020 in Case M.9299 – Discovery / Polsat / JV, para. 54; and Commission decision of 22 December 2021 in Case M.10343 – Discovery Warner Media, paras 28-29.

26 Questionnaire 1 to content providers, question 40.

the Commission does not have any indication that it should depart from the approach taken in previous cases.

(40) The Commission concludes that, for the purpose of this decision, the geographic markets for the production of commissioned AV content and the licensing of broadcasting rights for pre-produced AV content are either national in scope or encompass linguistically homogeneous regions. In any event, the precise scope of the geographic market can be left open, as the Transaction does not raise serious concerns as to its compatibility with the internal market under any plausible market definition.

4.2. Wholesale supply of TV channels

4.2.1. The Parties' activities

(41) Only MGM is active in the wholesale supply of TV channels. In the EEA, MGM provides wholesale supply of TV channels through MGM+. MGM+ is available on Prime Video in France, Germany (where it is also available on both Prime Video and Zattoo), Italy, the Netherlands and Spain. More specifically, the genre of TV channels that MGM provides wholesale supply for can be qualified as film and general entertainment.

(42) While Amazon is not active in the wholesale supply of TV channels and does not directly acquire TV channels from wholesale suppliers either, it does act as an intermediary between suppliers and end-customers. For its Prime Video offering in France, Italy, Spain, the Netherlands and Germany, Amazon offers MGM+ as well as similar channels of content produced by other studios to its customers. In addition, Amazon offers an option in Germany for customers to access the public broadcasters' linear free TV channels (*i.e.*, not on a VOD basis), including ARD and ZDF as well as some regional channels, through their Prime Video subscription.

4.2.2. Product market definition

4.2.2.1. Past Commission decisions

(43) In its previous decisions, the Commission has identified a wholesale market for the supply of TV channels. Within that market, in certain decisions, the Commission has further identified two separate product markets for: (i) FTA TV channels, and (ii) pay TV channels.[27] The Commission has further stated that, within the pay TV channels market, there could be different segments for: (i) basic pay TV channels, which are included in the basic subscription fee, and (ii) premium pay TV channels,[28] for which customers pay a premium in addition to their basic subscription fee.

(44) In *Liberty Global / Corelio / W&W / De Vijver Media*, the Commission concluded that, at the level of the wholesale supply of TV channels, there were two separate product markets, one consisting of the wholesale supply of premium pay TV channels and one consisting of the wholesale supply of basic pay TV/FTA channels. In that

27 Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, paras. 90-91.

28 Commission decision of 6 November 2018 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 77; Commission decision of 15 June 2018 in Case M.8861 – Comcast / Sky, para. 50; Commission decision of 6 February 2018 in Case M.8665 – Discovery / Scripps, paras. 19-20; and Commission decision of 7 April 2017 in Case M.8354 – Fox/Sky, paras. 80- 81.

decision, the Commission also considered that there was no need to draw a distinction between linear TV channels and their non-linear ancillary services.[29]

(45) In its previous decisions, the Commission also examined a number of other potential segmentations of the market for the wholesale supply of TV channels but ultimately left the market definition open, as regards: (i) genre or thematic content (films, sports, news, children/youth, and others);[30] and (ii) different means of infrastructure used for the delivery to the consumer (cable, satellite, terrestrial TV and IPTV).[31] In the recent *Telia Company/Bonnier Broadcasting Holding* decision, the Commission considered that the market for the wholesale supply of TV channels should not be further segmented according to the type of infrastructure used for the delivery to the consumer (such as cable, direct to home ("DTH"), digital terrestrial television ("DTT") and internet protocol television ("IPTV")) since the competitive conditions in the market for the wholesale supply of TV channels, and any possible segmentation, would be similar irrespective of the distribution technology and type of infrastructure used for the distribution of the TV channels.[32]

4.2.2.2. The Notifying Party's views

(46) The Notifying Party submits that the definition of the relevant product market for the wholesale supply of TV channels can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, given the absence of a horizontal overlap and the limited vertical links.

4.2.2.3. The Commission's assessment

(47) As set out in para. (11) above, the markets in Germany, Austria and Croatia are a starting point for the Commission's assessment as the Parties' overlapping activities only give rise to affected vertical relationships in those countries relating to the retail supply of AV services to end customers under a narrow market definition consisting of only SVOD services. In the upstream market for the wholesale supply of TV channels, MGM+ is not available in Austria and Croatia. Therefore, the Commission only assessed the scope of the market for the wholesale supply of TV channels in relation to Germany.

---

29 Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, paras. 93-94.

30 Commission decisions of 7 April 2017 in case M.8354 – Fox / Sky, paras. 82-83; Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 92; Commission decision of 2 April 2003 in Case M.2876 – Newscorp / Telepiù, para. 76; Commission decision of 18 July 2007 in Case M.4504 – SFR / Télé 2 France, paras. 41–42; Commission decision of 26 August 2008 in Case M.5121 - News Corp / Premiere, para. 35; Commission decision of 21 December 2010 in Case M.5932 – News Corp / BskyB, para. 81; and Commission decision of 10 October 2014 in Case M.7000 – Liberty Global / Ziggo, para. 89.

31 Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 98; Commission decision of 18 July 2007 in Case M.4504 – SFR / Télé 2 France, para. 44; and Commission decision of 26 August 2008 in Case M.5121 – News Corp / Premiere, para. 22.

32 Commission decision of 12 November 2019 in Case M.9064 – Telia Company / Bonnier Broadcasting Holding, para. 162.

(48) The market investigation generally confirmed the Commission's approach taken in previous cases with regard to the definition of the market for the wholesale supply of TV channels in Germany.

(49) The Commission first considered whether the market for the wholesale supply of TV channels should still be segmented by the supply of FTA TV channels and pay TV channels. In this regard, the majority of the respondents to the market investigation expressing an opinion confirm that the previously recognised segmentation of the market for the wholesale supply of TV channels between the wholesale supply of FTA TV channels and pay TV channels is still accurate today in Germany.[33] One respondent explains that the "*regimes for rights' clearance and acquisition differ significantly between pay TV and FTA. [...] Additionally, the content and exploitation windows available through these channels differ substantially. The same holds true for pricing and carriage conditions etc.*".[34]

(50) Within a market for the wholesale supply of pay TV channels, the Commission then considered whether a distinction should be made between the supply of basic pay TV channels and premium pay TV channels. A majority of the respondents expressing an opinion indicate that, within a market for the wholesale supply of pay TV channels in Germany, the supply of basic pay TV channels and premium pay TV channels can be considered as complements to each other rather than as alternatives.[35]

(51) Further, the Commission investigated whether the market for the wholesale supply of TV channels should be segmented by genre. A small majority of the respondents expressing an opinion further state that, from the point of view of a retail distributor, different thematic pay TV channels (*e.g.*, films, sports, general entertainment, news, youth and others) within a market for the wholesale supply of pay TV channels are complements to each other.[36] One respondent explains that "*segmentations by genre or thematic content becomes relevant in particular with regard to composing respective genres or themes of FTA / pay TV channels, which are often composed to reach specific end-customer groups (Kids, male, female young, old, sports affine etc)*".[37] In relation to kids' TV channels, this is echoed by other respondents as the majority still considers these are complements to non-kids' TV channels.[38]

(52) Another possible distinction the Commission investigated is that between the wholesale supply of linear and non-linear rights. Linear refers to a distribution method that provides for a scheduled program under which the respective content is only available at a specific time (*e.g.*, classic TV channels). Non-linear refers to a distribution method that allows consumers to choose when to watch the available content (*e.g.*, VOD services). A majority of the responding retail suppliers of AV services indicate that they would acquire both linear and non-linear rights rather than buying the two separately or buying linear rights plus ancillary non-linear rights (such as TVE and catch-up).[39] Similarly, a majority of replying wholesale suppliers indicate that they typically supply both linear and non-linear rights to retailers of AV

33 Questionnaire 1 to content providers, question 20.
34 Questionnaire 1 to content providers, question 20.1.
35 Questionnaire 1 to content providers, question 21.
36 Questionnaire 1 to content providers, question 22.
37 Questionnaire 1 to content providers, question 22.1.
38 Questionnaire 1 to content providers, question 23.
39 Questionnaire 1 to content providers, question 24.

services.[40] In relation to ancillary services, the Commission has previously concluded that they have gradually been associated to TV channels to complement the TV offering and enhance the viewer experience of traditional linear channels. The market investigation confirms that this is also accurate in Germany today.[41] As a result, the Commission considers that the results of the market investigation do not support a distinction between the wholesale supply of linear and non-linear rights.

(53) Finally, the Commission considered in previous cases whether the market for the wholesale supply of TV channels should be further segmented according to distribution technology (*e.g.*, cable, IPTV, satellite, terrestrial or OTT). The vast majority of respondents to the market investigation responded that they do not consider that the market in Germany should be further segmented by distribution technology.[42]

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

4.2.3. Geographic market definition

4.2.3.1. Past Commission decisions

(55) In its previous decisions, the Commission found the market for the wholesale supply of TV channels to be either national in scope,[43] regional,[44] or delineated by linguistically homogeneous areas encompassing more than one EU Member State.[45]

4.2.3.2. The Notifying Party's views

(56) The Notifying Party submits that the precise scope of the geographic market for the wholesale supply of TV channels can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, given the absence of a horizontal overlap and the limited vertical links.

---

40 Questionnaire 1 to content providers, question 25.

41 Questionnaire 1 to content providers, question 26.

42 Questionnaire 1 to content providers, question 29.

43 Commission decision of 7 March 2012 in Case M.6369 – HBO / Ziggo / HBO Nederland, para. 39; Commission decision of 15 April 2013 in Case M.6880 – Liberty Global / Virgin Media, para. 41; Commission decision of 10 October 2014 in Case M.7000 – Liberty Global / Ziggo, para. 98; Commission decision of 3 May 2021 in Case M.9299 – Discovery / Polsat / JV, para. 70; and Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, para. 46 onwards.

44 Commission decision of 24 February 2015 in Case M.7197 – Liberty Global / Corelio / W&W / De Vijver Media, para. 106 onwards; and Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, para. 46 onwards.

45 Commission decision of 7 April 2017 in Case M.8354 – Fox / Sky, para. 90 onwards.

4.2.3.3. The Commission's assessment

(57) The vast majority of respondents to the market investigation indicate that they distribute wholesale TV channels to TV/AV service providers on a national basis, while some respondents indicate they do so by linguistic region or at a regional level. No respondents indicate these services are distributed on either an EEA or worldwide basis.[46]

(58) For the purpose of this decision, the Commission concludes therefore that the relevant geographic market for the wholesale supply of TV channels and all its possible sub-segments is national in scope for Germany.

4.3. Retail supply of AV services to end-customers

4.3.1. The Parties' activities

(59) Amazon is active in the retail distribution of AV content. As regards non-linear services, Amazon offers access to VOD services through Prime Video, which is available in more than 200 territories (including the EEA). Prime Video is available either as a Prime membership benefit or, in some territories, via a stand-alone Prime Video subscription. In addition, existing Prime members and Prime Video subscribers have the option to subscribe to add-on third-party channels, depending on their country, such as Starzplay, Hayu, OCS, ZDFtivi etc. Some content on Prime Video is available on a TVOD basis, *i.e.*, customers can either purchase or rent this content on a title-by-title basis.

(60) While Amazon does not offer traditional linear TV content, it does offer some live sports content (*e.g.*, depending on the country, English Premier League matches, NFL Thursday Night Football, etc.) and linear Prime Video Channels. Prime Video Channels principally provide consumers with access to content on a VOD basis, with only a small proportion of overall Channels content provided on a linear basis (such as, for example, public broadcasters' free linear channels in Germany).

(61) MGM is not active in the retail distribution of AV content on either a non-linear or a linear basis in the EEA. As regards non-linear services, MGM operates a small over-the-top VOD service called EPIX in the United States. Further, MGM operates through MGM+ a small wholesale channel. MGM does not operate MGM+ as a direct-to-consumer offering but rather provides the service through third-party distributors like Prime Video.

4.3.2. Product market definition

4.3.2.1. Past Commission decisions

(62) The Commission has split in previous cases the retail supply of AV services in two separate markets: FTA and pay TV,[47] but in other more recent cases has ultimately left this aspect of the product market definition open.[48] The Commission has also

---

46 Questionnaire 1 to content providers, question 41.

47 Commission decision of 18 July 2007 in Case M.4504 – SFR / Télé 2 France, para. 45.

48 Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, para. 63; Commission decision of 6 November 2018 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 98; Commission decision of 8 October 2018 in Case M.8842 – Tele2 / ComHem,

considered whether the market for retail pay AV services should be segmented further according to: (i) premium pay AV vs. basic pay AV services;[49] (ii) distribution technologies (*e.g.*, cable, satellite, or terrestrial);[50] and (iii) linear vs non-linear AV services;[51] but ultimately left the market definition open in this regards.[52]

(63) ***Distribution technologies***: In *Liberty Global / Corelio / W&W / De Vijver Media*, the Commission recognised that at least retail AV services offered over cable and IPTV form part of the same relevant product market.[53] In the recent *Telia Company/Bonnier Broadcasting Holding* case,[54] the Commission concluded that all the different distribution technologies are part of the same product market.

(64) ***Linear and non-linear services***: In the past, the Commission noted that non-linear services have gradually been integrated to complement TV broadcasters' and retail AV service providers' offerings and enhance the consumer's experience of linear TV channels. Most recently, in *NENT/Telenor*, the Commission indicated that linear and non-linear AV services are increasingly regarded as substitutable.[55]

(65) ***Premium and basic pay TV services***: The question whether premium and basic pay TV services constitute separate product markets has been left open in recent cases.[56]

4.3.2.2. The Notifying Party's views

(66) The Notifying Party submits that the appropriately defined product market is a market for all retail distribution of AV content. The Notifying Party argues however that the precise scope of the market can be left open on the basis that there can be no material difference to the competitive assessment of the Transaction, as there are no affected markets.

---

para. 37; Commission decision of 8 May 2018 in Case M.7000 – Liberty Global / Ziggo, para. 137; Commission decision of 6 February 2018 in Case M.8665 – Discovery / Scripps, para. 33; Commission decision of 7 April 2017 in Case M.8354 – Fox / Sky, para. 101; Commission decision of 3 August 2016 in Case M.7978 – Vodafone / Liberty Global/Dutch JV, para. 56; and Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 152.

49 Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 119.

50 Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 127; Commission decision of 25 June 2008 in Case M.5121 – News Corp / Premiere, para. 22; Commission decision of 21 December 2010 in Case M.5932 – News Corp / BskyB, para. 105; and Commission decision of 30 May 2018 in Case M.7000 – Liberty Global / Ziggo, para. 113.

51 Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 124; Commission decision of 25 June 2008 in Case M.5121 – News Corp / Premiere, para. 21; and Commission decision of 30 May 2018 in Case M.7000 – Liberty Global / Ziggo, paras. 109–110.

52 Commission decision of 22 December 2021 in Case M.10343 – Discovery / Warner Media, para. 63; Commission decision of 6 November 2018 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 93 and case law cited; and Commission decision of 26 June 2020 in Case M.9299 – Discovery / Polsat / JV, para. 82.

53 Commission decision of 24 February 2015 in Case M.7194 – Liberty Global / Corelio / W&W / De Vijver Media, para. 126.

54 Commission decision of 12 November 2019 in Case M.9064 – Telia Company / Bonnier Broadcasting Holding, para. 195.

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

56 See, *e.g.*, Commission decision of 26 June 2020 in Case M.9299 – Discovery / Polsat / JV, para. 82.

4.3.2.3. The Commission's assessment

(67) The market investigation has yielded mixed results in relation to the market for the retail supply of AV services to end-customers.

(68) The market investigation first confirmed the segmentation that the Commission previously identified between the retail supply of FTA TV channels and pay TV channels, indicating that this distinction is accurate on the markets in Germany, Austria and Croatia today.[57] In relation to Croatia, a respondent explains that FTA TV channels and pay TV channels have a different consumers reach. A respondent that is active in both Germany and Austria explains that the segmentation is relevant because "*all levels of the value chain operate a differentiated licensing model with respect to FTA and pay TV*".[58]

(69) Within the market for the retail supply of pay TV channels however, the market investigation results are inconclusive as to the question whether the retail supply of basic pay TV and premium pay TV are alternatives or complements.[59] The vast majority of respondents moreover indicate that it would not be accurate in Germany, Austria and Croatia to distinguish between the retail supply of FTA and basic pay TV channels on the one hand and premium TV channels on the other hand.[60]

(70) The Commission further investigated whether the market for the retail supply of pay TV channels could be segmented between linear and non-linear pay TV channels as was concluded in previous decisions. In this regard, a majority of the respondents to the market investigation expressing an opinion indicating that they see linear and non-linear pay TV channels as alternatives in Germany, Austria and Croatia.[61]

(71) Within a market for the retail supply of non-linear pay AV services, a small majority of the respondents expressing an opinion indicate that they consider non-linear pay AV services by local OTT players as an alternative to similar services provided by international SVOD players (*e.g.*, Netflix, HBO GO, Prime Video, Apple TV) for end-customers.[62]

(72) The vast majority of respondents to the market investigate consider that there is no need to further distinguish between the supply of FTA linear channels and AVOD non-linear services in relation to advertising-founded AV services,[63] pointing to the fact that both feature the same business model and that advertisers could simply place the advertising elsewhere.[64]

(73) The Commission finally also investigated whether end customers in Germany, Austria and Croatia would consider different distribution forms (*e.g.*, cable, IPTV, satellite, terrestrial or OTT) through which they access TV channels / AV content as

57 Questionnaire 1 to content providers, question 30.
58 Questionnaire 1 to content providers, question 30.1.
59 Questionnaire 1 to content providers, question 31.
60 Questionnaire 1 to content providers, question 31.2.
61 Questionnaire 1 to content providers, question 32.
62 Questionnaire 1 to content providers, question 33.
63 Questionnaire 1 to content providers, question 34.
64 Questionnaire 1 to content providers, 34.1.

alternatives. A majority of the respondents to the market investigation indicates that this is indeed the case.[65]

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

4.3.3. Geographic market definition

4.3.3.1. Past Commission decisions

(75) The Commission has in the past considered that the geographic scope of the market for the retail provision of AV services could be either (i) national, since providers of retail AV services compete on a nation-wide basis; or (ii) limited to the coverage area of each cable operator.[66]

4.3.3.2. The Notifying Party's views

(76) The Notifying Party submits that the relevant geographic market is national in scope. Nonetheless, for the purpose of the Transaction, the Notifying Party argues that the precise scope of the market can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.3.3.3. The Commission's assessment

(77) The vast majority of respondents indicate that they distribute retail AV services to end-customers on a national basis.[67] This is the case for each of Germany, Austria and Croatia.

(78) The Commission therefore concludes that in Germany, Austria and Croatia, the relevant geographic market for the retail supply of AV services, including all its possible sub-segments, is national in scope.

4.4. Production and licensing of distribution rights of films for theatrical exhibition

4.4.1. The Parties' activities

(79) Both Amazon (through Amazon Studios) and MGM are active in the production and licensing of distribution rights of films for theatrical exhibition.

---

65 Questionnaire 1 to content providers, question 35.

66 M. 10343 – Discovery / Warner Media, para. 67; Commission decision of 6 November 2018 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 100; and Commission decision of 26 June 2020 in Case M.9299 – Discovery / Polsat / JV, para. 86.

67 Questionnaire 1 to content providers, question 42.

(80) From the supply side, Amazon Studios produces and licenses out some films for theatrical release [*business secrets concerning Amazon's marketing policy*]. In 2019, Amazon publicly announced it would shift its strategy away from licensing out for theatrical release. This can also be seen in Amazon Studios' film releases for theatrical distribution in 2018-2020 (2 in 2020, 7 in 2019, and 15 in 2018). MGM is active in the licensing out of films it has produced for theatrical release and the licensing of broadcasting rights for pre-produced AV content. While it does not have studio facilities in the EEA, it sometimes has local film production activities in the EEA (*e.g.*, in [*countries*]).

(81) From the demand side, MGM also acquires films for theatrical release.

4.4.2. Product market definition

4.4.2.1. Past Commission decisions

(82) In previous decisions, the Commission has considered the question of whether the production/acquisition and distribution of films for theatrical release constitute a single or two separate product markets. While in some cases the definition of the market was ultimately left open[68], in others the Commission found that the production and distribution of films for theatrical release constitute two separate markets.[69]

(83) In *The Walt Disney Company/Twenty-First Century Fox*, the Commission assessed the scope of the producers' activities with respect to the licensing of distribution rights to third-party distributors, noting that simply producing a film cannot constitute a market before a market-based exchange, such as the distribution of a film, takes place.[70] For the purpose of that decision, the Commission concluded that a separate market for the production and licensing of distribution rights to third-party distributors of films for theatrical release exists.[71] Moreover, the Commission took the conservative view for the purpose of that decision that licensing of distribution rights to third-party distributors constitute a product market separate from the distribution of films to exhibitors, given that it entails different commercial activities consisting of market, promoting films etc. carried out by different players, with the exhibitors being the distributors' customers.[72]

(84) The Commission has further considered, but ultimately left the question open, whether a distinction needs to be drawn between films produced by US studios and films produced by non-US studios.[73]

---

68 Commission decision of 20 December 2012 in Case M.6791 – The Walt Disney Company / Lucasfilm, para. 53; and Commission decision of 13 July 2010 in Case M.5579 – Comcast / NBC Universal, para. 55.

69 Commission decision of 14 June 2013 in Case M.6866 – Time Warner / CME, para. 152; Commission decision of 21 September 1998 in Case M.1219 – Seagram / Polygram, para. 37.

70 Commission decision of 28 January 2019 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 19.

71 Commission decision of 28 January 2019 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 22.

72 Commission decision of 28 January 2019 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 19.

73 Commission decision of 28 January 2019 in Case M.8785 – The Walt Disney Company / Twenty-First Century Fox, para. 22; Commission decision of 30 March 2005 in Case M.3595 – Sony / MGM, para. 11.

4.4.2.2. The Notifying Party's views

(85) The Notifying Party submits that the industry has seen a blurring of various release windows and a blurring of the distinction between theatrical versus home entertainment release. In light of this transformation, the Notifying Party argues that the question whether there is a market for the production and licensing of films (including captive and non-captive production), without distinguishing between production for theatrical release or direct-to-streaming, can be left open.

(86) In Section 4.5 below, the distinction between the AV value chain and the theatrical distribution value chain is further discussed both at the level of the production and licensing of films as well as the retail distribution of films.

4.4.2.3. The Commission's assessment

(87) The results of the market investigation support the view that the production and licensing of distribution rights of films for theatrical release constitutes a separate market from the distribution of films for theatrical release. The majority of the content providers and cinemas expressing an opinion confirm the existence of a separate market for the production and licensing of distribution rights of films for theatrical exhibition in the EEA and more specifically in Germany, Austria and Croatia, is still accurate.[74]

(88) On the basis of the above, the Commission concludes that for the purpose of this decision the production and licensing of distribution rights to third-party distributors of films for theatrical release constitutes a relevant product market. The question whether a distinction should be drawn between films produced by US studios and films produced by non-US studios can be left open since the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.4.3. Geographic market definition

4.4.3.1. Past Commission decisions

(89) In past decisions, the Commission found the geographic market for the production of films for theatrical release to be at least EEA-wide in scope but ultimately left the precise market definition open.[75]

(90) In *The Walt Disney Company/Twenty-First Century Fox* however, the Commission considered for the purpose of that decision that the relevant geographic market for the production and licensing of distribution rights of films for theatrical release is national in scope as the relationship between producers and distributors is more often than not national.[76]

74 Questionnaire 1 to content providers, question 7; Questionnaire 2 to cinemas, question 4.

75 Commission decision of 20 December 2012 in Case M.6791 – The Walt Disney Company/Lucasfilm, para. 59; and Commission decision of 13 July 2010 in Case M.5779 – Comcast/NBC Universal, para. 53.

76 Commission decision of 28 January 2019 in Case M.8785 – The Walt Disney Company/Twenty-First Century Fox, paras. 25-26.

4.4.3.2. The Notifying Party's views

(91) The Notifying Party submits that the scope of the relevant geographic market can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, given the limited overlap between the Parties.

4.4.3.3. The Commission's assessment

(92) The vast majority of responding content providers indicate that, as a producer/supplier of AV content, they would license distribution rights to third-party distributors of films for theatrical release on a national level.[77] This is confirmed by the responses the Commission received from cinemas, where the majority indicates that they procure the rights to exhibit films from distributors on a national level.[78]

(93) The Commission concludes that, for the purpose of this decision, the relevant geographic market for the production and licensing of distribution rights of films for theatrical release is national in scope.

4.5. The distinction between the AV value chain and the theatrical distribution value chain

(94) As set out in paras. (6)-(13) above, the Commission has previously assessed the markets that are part of the AV value chain and the markets that are part of the theatrical distribution value chain separately. In particular, in relation to the production and licensing of films, the Commission defined separate markets for the production and supply of AV content for home entertainment and production and licensing of distribution rights of films for theatrical exhibition. At the retail level of the market, the Commission defined separate markets for the retail supply of AV services to end-customers and the market for the theatrical exhibition of films.

(95) During the investigation, the Commission received a complaint by a movie theatres chain arguing that recent trends in the AV industry are characterised by the shrinking and skipping of the theatrical release window, such that new films are sometimes not released in theatres but have a direct DTS release or have a simultaneous theatrical and DTS release.[79] As a result, films would be produced both for theatrical exhibition and for home entertainment, and cinemas would compete with SVOD platforms such as Prime Video as channels to release a new film.

(96) Without prejudice to the assessment above, the Commission will therefore assess whether there is a need to reconsider its views on the AV value chain and the theatrical distribution value chain as regards the production and retail supply of films.

4.5.1. Production and licensing of films for home entertainment and for theatrical release

4.5.1.1. The Notifying Party's views

(97) In relation to the production of films, the Notifying Party submits that the decision as to whether a film will be released directly or for home entertainment directly is

77 Questionnaire 1 to content providers, question 38.

78 Questionnaire 2 to cinemas, question 18.

79 Comments on the proposed acquisition of MGM by Amazon, 17 January 2022.

usually taken at the beginning of the production process. However, this decision is not final and there are examples of films initially intended for theatrical release that were subsequently released for home entertainment.

(98) The Notifying Party argues that there is a substantial overlap in the characteristics of films intended for theatrical and DTS release. First, the Notifying Party argues that there is a considerable overlap in budget ranges. While generally films intended for DTS release will be more expensive to produce owing to streaming buyouts that need to be paid to compensate talent for the absence of various profit-sharing mechanisms applicable in the theatrical release model, production budgets are generally higher for theatrically released films as this model allows for greater risk mitigation. The Notifying Party submits however that the practice of content producers allocating more budget for the production of films intended for theatrical release has been changing. Second, there would be no material variability in the time that is required for producing a film and the intended timing for release depending on whether a film is intended for theatrical or DTS release. Third, while the theatrical release process may involve certain pre-release activities that are not part of the DTS release process (such as pre-release test screenings), the Notifying Party argues that analogous pre-release steps may also be taken in the context of the production of a film intended for DTS release (for example marketing campaigns). Fourth, the Notifying Party submits that there are no material differences in the technical elements of the production process, for example in relation to visual effects or soundtracks). Fifth, the marketing strategy would not differ materially between films intended for theatrical release and those intended for DTS release. Sixth, the Notifying Party submits that nowadays films intended for DTSs release are similarly capable of attracting talent and garnering awards.

(99) The Notifying Party submits that in any event it is difficult to identify films intended for theatrical release as a clearly demarcated segment. After all, the release window structure of films is fluid and has evolved over time. Theatrical release windows (which in the past generally lasted around 3 months) have shortened and there is a growing trend of simultaneous or near simultaneous theatrical and DTS release, or even initial release solely via streaming services. Because of the fluidity of release windows and the fact that films will be released DTS and on other home-entertainment channels in any event, the boundaries between films intended for theatrical release and those intended for home entertainment are more difficult to delineate.

(100) As a result of the above, the Notifying Party submits that there cannot be a distinction between markets for the production and supply of films intended for either theatrical or DTS release. In any event, the Notifying Party submits that the precise market definition can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.5.1.2. The Commission's assessment

(101) In light of the complaint the Commission received in relation to the impact of the Transaction on cinemas, the Commission assessed as part of its market investigation whether the distinction between markets in the AV value chain and markets in the theatrical distribution value chain is still relevant.

(102) The Commission first assessed at what stage a content provider decides whether a future film is intended for either theatrical or DTS release.

(103) In line with the statement of the Notifying Party, the majority of responding cinemas indicate that a producer of AV content makes a choice at the beginning of the production process of a new film as to whether it will be released theatrically or DTS.[80] In this regard, one respondent states that "*[b]efore producing the movie the producer has to know his revenue streams to define the budget of the movie. Without knowing the possible revenue streams he can not* [sic] *set up a reliable calculation*".[81] Another respondent adds however that "*[i]t can also be that at the end of the production process, the movie does not meet its initial expectations and the producer decides to stream the movie directly as this is cheaper than a theatrical release*".[82] The response from content providers as to whether they make a choice how a film will be released at the beginning of the production process was inconclusive.[83] The results of the market investigation are equally inconclusive in relation to the question whether content providers have produced any films originally intended for theatrical release but that were finally released DTS or vice-versa.[84] Among the respondents indicating that they changed the intended way of releasing a film, several did so in large part due to COVID-19 restrictions.[85]

(104) In relation to the hypothetical question whether films could have been released differently, the vast majority of responding content providers indicated that 90-100% of the films that are released theatrically could have equally been released DTS[86] while vice-versa a smaller majority also indicated that 90-100% of the films that were released direct-to-streaming could have equally been released theatrically.[87] Relating to the first scenario, one of the respondents states that "*[g]iven the high-quality expectations for both streaming and theatrical release alike, the differences are not fundamental. Furthermore, enhancements in home entertainment technology have increased their substitutability*".[88]

(105) The responses from content providers to the same questions stand in stark contrast to the responses the Commission received from cinemas. A majority of responding cinemas indicate that only 10-20% of the films that are released theatrically could have equally been released DTS.[89] As to the question what percentage of films that are released DTS could have instead been released in theatres, the responses from cinemas are more mixed. However, the majority indicates that this would lie below 50%.[90] In general, one respondent highlights that "*[i]n Germany there are up to 600*

80 Questionnaire 2 to cinemas, question 6.
81 Questionnaire 2 to cinemas, question 6.1.
82 Questionnaire 2 to cinemas, question 6.1.
83 Questionnaire 1 to content providers, question 9.
84 Questionnaire 1 to content providers, question 11.
85 Questionnaire 1 to content providers, question 11.2.
86 Questionnaire 1 to content providers, question 13.
87 Questionnaire 1 to content providers, question 14.
88 Questionnaire 1 to content providers, question 13.1.
89 Questionnaire 2 to cinemas, question 9.
90 Questionnaire 2 to cinemas, question 10.

new releases per year, which means more than 10 per week. It is hardly possible to create an awareness for each of these movies".[91]

(106) Based on the contradictory responses from content providers and cinemas set out above, the Commission considers that there is no ground for concluding that the production of films intended for theatrical and DTS release should be part of the same market as a result of the decision-making process regarding the way a future film will be released.

(107) The Commission further investigated whether there are differences in characteristics between films intended for theatrical release as compared to those intended for DTS release.

(108) In this regard, the results of the market investigation reveal that a majority of responding content providers consider that in relation to the budget range[92], the capability of attracting talent[93], the script of a film[94] and the content of a film[95], there are no significant differences between films intended for theatrical release and those intended for DTS release. Also from the perspective of cinemas, there are no significant differences between films intended for theatrical release and those intended for DTS release in relation to the capability of attracting talent[96], the script of a film[97] and its content[98]. Cinemas do however consider that there are significant differences in the technicalities of the release process, the timing and related costs of those films.[99] One responding cinema chain states that "*[i]n general, streaming releases have much shorter marketing campaigns and the marketing budgets are a lot lower than for theatrical releases. The main purpose for streaming platforms is to attract as much subscribers but the marketing focus is less on the film itself*".[100] The responses from content providers were inconclusive as to whether the technicalities of the release process, the timing and related costs of those films constitute a significant difference between films intended for theatrical release and those intended for DTS release.[101]

(109) In relation to the differences in quality between films intended for theatrical release and those intended for DTS release, content providers and cinemas have widely different views. While the vast majority of responding content providers considers that films produced for theatrical release are not of a better quality overall compared to those that are produced for direct-to-streaming release[102], the vast majority of responding cinemas considers this to be the case.[103]

---

91 Questionnaire 2 to cinemas, question 9.1.
92 Questionnaire 1 to content providers, question 10.1.
93 Questionnaire 1 to content providers, question 10.2.
94 Questionnaire 1 to content providers, question 10.4.
95 Questionnaire 1 to content providers, question 10.5.
96 Questionnaire 2 to cinemas, question 7.2.
97 Questionnaire 2 to cinemas, question 7.4.
98 Questionnaire 2 to cinemas, question 7.5.
99 Questionnaire 2 to cinemas, question 7.3.
100 Questionnaire 2 to cinemas, question 7.3.
101 Questionnaire 1 to content providers, question 10.3.
102 Questionnaire 1 to content providers, question 12.
103 Questionnaire 2 to cinemas, question 8.

(110) Given these different views, the Commission considers that it is not possible to conclude that films intended for theatrical release and those for DTS release share the same characteristics or have a similar quality such that there should be a single market for the production and licensing of films for home entertainment and theatrical release.

(111) Finally, a majority of both content providers and cinemas responding to the market investigation indicate that, in line with the Commission's precedents, there are distinct markets for the production and licensing of AV content for home entertainment and for the production and licensing of distribution rights of films for theatrical release.[104]

(112) Based on the above considerations in relation to the production process, characteristics and quality of films for theatrical and DTS release, the Commission concludes that there is insufficient evidence to depart from the previously recognised distinction between a market for the production and licensing of AV content for home entertainment and a market for the production and licensing of distribution rights of films for theatrical release. Nonetheless, this Decision discusses the potential horizontal overlap as well as a possible foreclosure of cinemas from accessing MGM's new film content in the competitive assessment.[105]

4.5.2. Retail supply of films for home entertainment and for theatrical exhibition

(113) While neither of the Parties is active on the market for theatrical exhibition of films, Amazon is active on the market for the retail supply of AV services. Therefore, the Commission also assessed whether films intended for theatrical exhibition compete with films supplied for home entertainment.

4.5.2.1. The Notifying Party's views

(114) In relation to the retail supply of films, the Notifying Party submits that because of the blurring of film release windows, consumers got even more choice between watching content in a theatrical or home entertainment setting. Whether consumers choose to watch a film at a cinema or at home may be influenced by factors such as the choice of film, availability and timing of its release, and cost. Most consumers have access to free to air TV and/or cable, satellite, or OTT subscriptions, and can choose to view high quality content across any of these services, in addition to choosing to purchase physical copies of DVDs/Blu-ray discs. The Notifying Party therefore submits that all retail distributors of AV content compete for viewership. The factors set out above (*i.e.*, the choice of film, availability and timing of its release, and cost) would be equally relevant for a consumer to choose a specific medium between free to air TV, cable, satellite, or OTT, as it is for the choice between watching a film in a cinema or at home.

(115) Overall, the Notifying Party submits that the appropriately defined product market is one that comprises all retail distribution of AV content. In any event, the Notifying Party argues that the precise product market definition can be left open on the basis that there can be no material difference to the competitive assessment of the Transaction, as there are no affected markets.

---

[104] Questionnaire 1 to content providers, question 8; Questionnaire 2 to cinemas, question 5.

[105] See Section 5.3.1 and Section 5.5.5.

4.5.2.2. The Commission's assessment

(116) First, the Commission investigated whether films released in cinemas and films released via subscription-based video on demand platforms (such as Amazon's Video Prime) are considered as alternatives or complements by end-customers – that is to say, whether customers would still choose between watching a film in a cinema or at home or whether they would continue watching films in cinemas even if they are released in parallel or shortly thereafter on SVOD platforms. The responses from content providers to the market investigation are inconclusive. Around a third of the respondents indicate that cinemas and SVOD platforms are complements, whereas another third indicates these are alternatives and the final third of the respondents indicate that they do not know.[106] The responses from cinemas are clearer. The majority of the responding cinemas indicate that they consider that cinemas compete with other retailers of AV services such as SVOD platforms.[107] One respondent observes that there is a lot of competition in particular where there is no separate theatrical release window, but "*when an exclusivity window is respected (first theatrical and then home entertainment), the media are complementary and allow to maximize both channels to the benefit of the production.*"[108] Despite this distinction based on the release window, a majority of responding cinemas state that cinemas are an alternative to home entertainment platforms.[109]

(117) Second, the Commission investigated whether end-customers would be expected to switch away from watching films in cinemas in the event of a small but non-transitory price increase of cinema tickets. The majority of the responding content providers indicated that they would not know the impact of a price increase between 5 and 10%. The responses from the content providers that expressed an opinion are moreover inconclusive. While some respondents indicated that end-customers would pay the increased ticket prices, others indicated that customers would either wait to see the films they wanted on the SVOD platform they are subscribed to or watch other films on that platform. Some respondents even consider that end-customers would be willing to subscribe to a SVOD platform that they expect will show the films they wanted to see in cinemas.[110] While the response from content providers remains inconclusive, a majority of responding cinemas expressing an opinion indicated that end-customers would continue to pay cinema tickets in the event of a small but non-transitory price increase.[111] Several responding cinemas indicate that the willingness of end-customers to pay increased ticket prices depends on the release window: "*the answer depends on whether or not the theatrical exclusivity has been respected. If this is the case, end customers will pay the increased price to have the first experience of watching the movie. However, if the same movie is released via theaters and streaming at almost the same moment, the consumers will be more reluctant to pay the different price*".[112]

(118) Overall, the results of the market investigation are mixed. In particular, it appears from the results of the market investigation that the theatrical release window has a

---

[106] Questionnaire 1 to content providers, question 36.

[107] Questionnaire 2 to cinemas, question 14.

[108] Questionnaire 2 to cinemas, question 14.1.

[109] Questionnaire 2 to cinemas, question 15.

[110] Questionnaire 1 to content providers, question 37.

[111] Questionnaire 2 to cinemas, question 16.

[112] Questionnaire 2 to cinemas, question 16.1.

significant impact on whether cinemas and home entertainment stand in a competitive relationship for a particular film. While the Commission observes a general trend of shorter theatrical release windows, exclusivity during such window is still the norm. In addition, it remains to be seen to what extent deviations from exclusive theatrical release windows during the last two years will continue if and when measures taken because of the pandemic are lifted.

(119) In light of these uncertainties and as the results of the market investigation do not provide a clear indication to what extent cinemas and home entertainment are substitutable from the perspective of the end-customer, the Commission concludes that there is insufficient evidence to depart from the previously recognised distinction between a market for the retail supply of AV services to end-customers and a market for theatrical release. Nonetheless, this Decision discusses a possible foreclosure of cinemas from accessing MGM's new film content in the competitive assessment.[113]

5. COMPETITIVE ASSESSMENT

5.1. Analytical framework

(120) The Guidelines on the assessment of horizontal mergers ("Horizontal Merger Guidelines")[114] describe two main ways in which horizontal mergers may significantly impede effective competition, in particular by creating or strengthening a dominant position: (i) by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects); and (ii) by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are significantly more likely to coordinate and raise prices or otherwise harm effective competition (coordinated effects[115]) as a result of the proposed concentration.

(121) A merger giving rise to horizontal non-coordinated effects might significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger. Moreover, also mergers that do not lead to the creation of or the strengthening of a single firm's dominant position may create competition concerns under the substantive test set out in Article 2(2) and Article 2(3) of the Merger Regulation. Regarding mergers in oligopolistic markets, the Merger Regulation clarifies that "*under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the*

113 See Section 5.5.5.

114 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C 31, 05.02.2004, paragraph 22.

115 A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.

members of the oligopoly, result in a significant impediment to effective competition”.[116]

(122) The Horizontal Merger Guidelines list a number of factors which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger, such as the large market shares of the merging firms, the fact that the merging firms are close competitors, the limited possibilities for customers to switch suppliers, or the fact that the merger would eliminate an important competitive force. Not all those factors need to be present to make significant non-coordinated effects likely and it is not an exhaustive list.[117]

(123) Further, in some markets, a merger may give rise to coordinated effects where the structure is such that firms would consider it possible, economically rational, and hence preferable, to adopt on a sustainable basis a course of action on the market aimed at selling at increased prices.[118] According to the Horizontal Merger Guidelines, coordination is more likely where it is relatively simple to reach a common understanding on the terms of coordination. Moreover, three conditions need to be met for coordination to be sustainable: (i) the coordinating firms must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to; (ii) there must be some form of credible deterrent mechanism that can be activated if deviation is detected; and (iii) the reactions of outsiders as well as customers should not be able to jeopardise the results expected from the coordination.[119]

(124) Next to horizontal effects, the Guidelines on the assessment of non-horizontal mergers (“Non-Horizontal Merger Guidelines”) sets out that there are also two broad types of non-horizontal mergers that can be distinguished: vertical mergers and conglomerate mergers.[120]

(125) Vertical mergers involve companies at different levels of the supply chain. According to the Non-Horizontal Merger Guidelines, non-coordinated effects may significantly impede effective competition as a result of a vertical merger if such merger gives rise to foreclosure. Foreclosure occurs where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete.[121] Such foreclosure may discourage entry or expansion of rivals or encourage their exit.[122] There are two forms of foreclosure: input foreclosure occurs where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input, and customer foreclosure occurs where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.[123] A vertical merger could also lead to other non-coordinated effects, for instance where the merged entity may, by

---

[116] Merger Regulation, recital 25. Similar wording is also found in paragraph 25 of the Horizontal Merger Guidelines.

[117] Horizontal Merger Guidelines, paragraph 26.

[118] Horizontal Merger Guidelines, paragraph 39.

[119] Horizontal Merger Guidelines, paragraph 41.

[120] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (“Non-Horizontal Merger Guidelines”), OJ C 265, 18.10.2008, paragraph 3.

[121] Non-Horizontal Merger Guidelines, paragraph 18.

[122] Non-Horizontal Merger Guidelines, paragraph 29.

[123] Non-Horizontal Merger Guidelines, paragraph 30.

vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals.[124] Finally, a vertical merger may also give rise to coordinated effects.

(126) Lastly, the Non-Horizontal Merger Guidelines focus, besides vertical mergers, on conglomerate mergers consisting of mergers between companies that are active in closely related markets, for instance suppliers of complementary products or of products which belong to a range of products that are generally purchased by the same set of customers for the same end use.[125] According to the Non-Horizontal Guidelines, in the majority of circumstances, conglomerate mergers will not lead to any competition problems.[126]

(127) However, foreclosure effects may arise when the combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another closely related market by means of tying or bundling or other exclusionary practices. While tying and bundling have often no anticompetitive consequences, in certain circumstances such practices may lead to a reduction in actual or potential competitors' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.[127]

(128) In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals[128], second, whether it would have the economic incentive to do so[129] and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.[130] In practice, these factors are often examined together as they are closely intertwined. Most importantly, these conditions are cumulative so that the absence of any one of them is sufficient to rule out the likelihood of anti-competitive input foreclosure.[131]

(129) In order to be able to foreclose competitors, the merged entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties' products is viewed by many customers as particularly important and there are few relevant alternatives for that product.[132] Further, for foreclosure to be a potential concern, there must be a large common pool of customers, which is more likely to be the case when the products are complementary.[133] Finally, bundling is less likely to lead to foreclosure if rival firms are able to deploy effective and timely counter-strategies, such as single-product companies combining their offers.[134]

---

[124] Non-Horizontal Merger Guidelines, paragraph 78.
[125] Non-Horizontal Merger Guidelines, paragraph 91.
[126] Non-Horizontal Merger Guidelines, paragraph 92.
[127] Non-Horizontal Merger Guidelines, paragraphs 91 and 93.
[128] Non-Horizontal Merger Guidelines, paragraphs 95-104.
[129] Non-Horizontal Merger Guidelines, paragraphs 105-110.
[130] Non-Horizontal Merger Guidelines, paragraphs 111-118.
[131] Judgment of 23 May 2019, *KPN v. Commission*, T-370/17, EU:T:2019:354, paragraph 119.
[132] Non-Horizontal Merger Guidelines, paragraph 99.
[133] Non-Horizontal Merger Guidelines, paragraph 100.
[134] Non-Horizontal Merger Guidelines, paragraph 103.

(130) The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable.[135] Bundling and tying may entail losses or foregone revenues for the merged entity.[136] However, they may also allow the merged entity to increase profits by gaining market power in the tied goods market, protecting market power in the tying good market, or a combination of the two.[137]

(131) It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the concentration that the concentration may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate concentration.[138] The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power or the likelihood that entry would maintain effective competition in the upstream or downstream markets.[139]

5.2. Market share calculation

(132) The market shares for the downstream market of retail supply for AV content for SVOD platforms were calculated using two metrics. The first metric is the revenue that SVOD platforms obtain as a result of the retail supply of AV content. The second metric is the number of subscribers for each SVOD platform. The two metrics correspond to the value and volume calculation respectively. Both metrics were used in the calculation of the SVOD's market share due to the fact that eliminating either of the two would not convey the full picture of the players' position in the market. Since the subscription fee differs among SVOD platforms, the revenues as well as the number of the subscription demonstrate each player's position in the market.

(133) As regards Prime Video in particular, it should be noted that it is not offered as a standalone service. Amazon does not operate merely as an SVOD platform, but operates a wide range of businesses including retail, entertainment, consumer electronics, and technology services. This translates into benefits provided to Amazon Prime subscribers. Amazon offers its Prime subscribers the "Prime Membership Benefits" which include delivery benefits (consisting, among others, of free and faster delivery, and choosing the date and place of delivery), streaming and digital benefits (including access to Prime Video content, to Amazon Music, to Prime gaming and to Amazon's photo storage solution, as well as to Amazon kids consisting of kid-friendly books, movies and educational applications), shopping benefits (discounts applicable when shopping at food markets, clothe and jewellery stores and bookstores), reading benefits (early access to new books and books with audible narration) and other benefits such as linking a user's account account to another user's account.[140]

(134) The fact that Prime Video is offered as part of a bundle, means that the both the revenue and the subscription based market shares for Amazon Prime are not indicative, simply because they reflect the revenue generated by the totality of the

---

135 Non-Horizontal Merger Guidelines, paragraph 105.
136 Non-Horizontal Merger Guidelines, paragraph 106.
137 Non-Horizontal Merger Guidelines, paragraph 108.
138 Non-Horizontal Merger Guidelines, paragraph 113.
139 Non-Horizontal Merger Guidelines, paragraph 114.
140 See more on Amazon Prime benefits here: https://www.amazon.com/primeinsider/about

Amazon Prime services that might, in its turn, include subscribers that do not make use of the Prime Video service but prefer other offerings included in the bundle.

(135) The distinction between Amazon Prime subscribers and Prime Video subscribers is relevant here as, for the purposes of assessing the Transaction, the Commission needed to compare Amazon's Prime Video market shares with the market shares of competing retail suppliers of AV content. However, none of the competing retail supplies of AV content offer their SVOD platform as part of a bundle of other services; they offer it as a standalone service. Based on that, it is safe to assume that when a customer subscribes to any of these platforms, it is because of an interest in the AV content offered by a particular retailer. On the contrary, when a customer subscribes to Amazon Prime, it could be due to the attractiveness of any of the services in the bundle or due to the attractiveness of the bundle overall.

(136) For this reason, the following methodology has been used for the calculation of revenue and subscription based market share of Prime Video.

<u>Prime Video's revenue-based market shares</u>

(137) Prime Video is one out of several components of the Prime subscription. Therefore, estimating the value of each additional SVOD customer to Prime Video depends on several factors, [*business secrets concerning internal processes and calculations*]. To approximate the value that a Prime Video SVOD customer generates for Amazon three main indicators, described below, were taken into account.

(138) The first indicator relates to [*business secrets concerning internal processes and calculations*]. In Member States where the Prime programme is offered, [*business secrets concerning internal processes and calculations*]. Amazon has developed a model that [*business secrets concerning internal processes and calculations*].[141]

(139) In Member States where there is no Prime programme (*e.g.*, Croatia), […] are subscribers to the Prime Video only service. In these Member States, Amazon does not have a dedicated and localized e-commerce website and therefore does not offer a Prime membership as customers could not make use of benefits linked to deliveries. For this reason, as far as these Member States are concerned, Prime Video's revenues reflect […].

(140) In addition to revenues from […], the overall value a paid Prime member generates for Amazon are also based on two additional indicators: [*business secrets concerning internal processes and calculations*].

(141) The total value of each Prime member (from all indicators) is measured by Amazon as [*business secrets concerning internal processes and calculations*]. The value of an average Prime member that [*business secrets concerning internal processes and calculations*] is calculated by [*business secrets concerning internal processes and calculations*]. Finally, this value is then [*business secrets concerning internal processes and calculations*], which arrives at the average value associated with [*business secrets concerning internal processes and calculations*]. In Member States

[141] For instance, in 2020, the […] for Prime Video in France was […]: this means that [*business secrets concerning internal processes and calculations*]. Corresponding numbers for the other EEA countries where an Amazon store is available were as follows: […].

where there is no Prime programme, the average economic value [*business secrets concerning internal processes and calculations*].

Prime Video's subscription-based market shares

(142) The SVOD subscription shares are based on Ampere Analysis[142] estimates of the number of subscriptions of each of the individual services. They capture total subscriptions sold by a given service as a share of total subscriptions sold by all SVOD services in a given territory.

(143) With respect to multi-homing, for example, a customer purchasing both a Prime Video and Netflix subscription would lead to one Prime Video subscription and one Netflix subscription to be added into the total subscriptions sold by all SVOD services used as the denominator in calculating shares. This is no different to calculating volume product category shares in any differentiated product market, where the purchase of two similar products would be added to the total sales in the product category used as the denominator.

5.3. Identification of affected markets

5.3.1. Horizontal relationships

(144) Amazon and MGM are both active in the production and licensing of distribution rights to third party distributors of films for theatrical release. However, the overlap is very limited as Amazon is only active in this segment to a very limited extent, and the combined share of the Parties is small. The Parties' combined shares in box office revenues do not exceed [10-20]% in any EEA country in any of 2018, 2019, or 2020. Even assuming that the relevant market only includes US studios, the combined market shares of the Parties did not exceed [10-20]% in any EEA country during the last three years. Amazon has very limited activities in this market, with Amazon Studios releasing 24 films for theatrical distribution in 2018-2020 (2 in 2020, 7 in 2019, and 15 in 2018). On an EEA-wide level, Disney, NBCUniversal, WarnerMedia, StudioCanal and Sony have all achieved higher market shares than the Parties combined.

(145) The Notifying Party also provided estimates of MGM's market shares in the market for the production and licensing of distribution rights of films for theatrical exhibition in 2021, when MGM released the new *Bond* film *No Time to Die* and Ridley Scott's *House of Gucci*. In 2021, MGM's market shares exceed [20-30]% in a number of Member States[143] and [30-40]% in Austria and Latvia. Also in view of these figures, however, there is no horizontally affected market as Amazon is not active in the production and licensing of distribution rights of films for theatrical exhibition in any of such Member States. As a result, this horizontal link does not give rise to a horizontal overlaps in the EEA.

(146) Even though the Commission considers that there are two separate markets for the production and licensing of AV content for home entertainment on the one hand and for the production and licensing of distribution rights of films for theatrical release on the other hand, it has reviewed the potential combined market shares of the Parties of

142 Ampere is a data and analytics firm specialising in the media sector.

143 [*Countries*]. Notifying Party's reply to Commission's RFI No 11.

a hypothetical market including the production of AV content for home entertainment and for theatrical release (including captive and non-captive productions). Based on the Parties' estimates, their combined revenue share[144] in such hypothetical market would not exceed [10-20]% in any EEA country during the period between 2018 and 2020 and range between [0-5]% and [10-20]% on an EEA-wide level during these three years. Based on the number of films produced, the Parties estimate their combined share to amount to less than [0-5]% in the EEA for each year between 2018 and 2020.

5.3.2. *Vertical relationships*

5.3.2.1. Production of commissioned AV content (upstream) and acquisition of commissioned AV content (downstream)

(147) There is a vertical relationship between MGM's activities in the production of commissioned AV content on the supply side and Amazon's activities in the same market on the demand side (*i.e.*, acquisition of commissioned AV content). First, MGM does not produce commissioned AV content in the EEA, with the exception of [*business secrets concerning production*] in 2019-2020 that generated a *de minimis* share of less than [0-5]% in [*countries*]. Amazon is active in the acquisition of commissioned content from third parties. However, Amazon's market share in each of the EEA Member States is well below 20%. Consequently, this vertical link does not give rise to an affected market.

5.3.2.2. Licensing of rights for pre-produced content (upstream) and acquisition of pre-produced content (downstream)

(148) There is a vertical link between MGM's upstream activities in the licensing of rights for pre-produced content and Amazon's downstream activities in the acquisition of pre-produced content. MGM licenses its films for distribution with individual broadcasters and distributors (*e.g.*, Pay-TV and FTA broadcasters, Apple, Amazon, Google, local digital partners) in relevant territories.[145] Amazon is active in the acquisition or licensing in of rights for pre-produced AV content to be offered via Prime Video.[146] The Parties market shares in the respective markets are low and in any case below 20% in each of the EEA Member States. Consequently, this vertical link does not give rise to an affected market.

5.3.2.3. Wholesale supply and acquisition of TV channels (upstream) and retail distribution of AV content (downstream)

(149) There is a vertical link between MGM's upstream activities in the wholesale supply of TV channels (through MGM+) and Amazon's downstream activities in the retail distribution of AV content. MGM is active in the wholesale supply of AV channels in

---

[144] As no data comparable to box office revenues are available for DTS titles, the Parties based their estimates on IMDb page views for each individual title. They submit that there is a positive correlation between this metric and box office revenues for titles that have been released theatrically.

[145] Amazon generally does not license its content to third parties, [*business secrets concerning licensing deals*]. Note that there are also a small number of legacy titles created before Amazon Studios was active outside the US where Amazon had sold (or never owned) the international rights to content it had produced or co-produced.

[146] MGM does not typically license-in distribution rights for pre-produced AV content in the EEA, although [*business secret concerning strategic decision*] its MGM+ channel.

the EEA only to a limited extent, where MGM+ is available on Prime Video in France, Germany, Italy, the Netherlands and Spain, providing film and general entertainment (*i.e.*, TV series) genres. Amazon acts as an intermediary in the downstream market between the wholesale channel supplier and the end-user. For its Prime Video offering in France, Italy, Spain, the Netherlands, and Germany, Amazon offers MGM's wholesale channel, MGM+, as well as similar channels of content produced by other studios, to its customers. According to the Parties, MGM+'s share in respect of the wholesale supply of channels is unlikely to exceed [5-10]% in any EEA Member State in which MGM+ is available. Amazon's spend on wholesale TV channels is modest and even assuming Amazon's share of total payments to wholesale channel providers is the same as its share of subscribers among Prime Video and Pay-TV services in the respective countries and years, it will in all cases be below 30% as indicated in paragraphs (153) to c) below.[147] Consequently, this vertical link does not give rise to an affected market.

5.3.2.4. Licensing-out of rights for pre-produced content/production and supply of commissioned TV content (upstream) and retail distribution of AV content (downstream)

(150) There is a vertical link between MGM's upstream activities in the licensing out of rights for pre-produced content/production and supply of commissioned TV content and Amazon's downstream activities in the retail distribution of AV content.

(151) MGM's share in the licensing out of rights for pre-produced content does not reach 30% on any plausible market segment. This also applies when we consider the market shares of MGM further segmented by content genre into films (further segmented between US films and non-US films) and other TV content (*i.e.*, excluding sports content, since the Parties do not play any significant role nor overlap in the licensing of sports content). In addition to that, when looking at the shares segmented by exhibition window, in line with sub-segments considered by the Commission in previous cases**.** MGM's estimated share of supply for AV content licensing in the relevant EEA countries and segments is in all cases <30%, and in most countries and segments is significantly lower.

(152) MGM's share in the production and supply of commissioned TV content also does not reach 30% on any plausible market segment. A strategy advisory firm specialised in the media and entertainment sector engaged by the Parties, determined the total segment size based on the amounts that broadcasters and VOD providers spend on commissioned TV content for each country in which they operate.[148] As mentioned above, MGM has limited activities in the production of commissioned AV content in the EEA. The [*business secrets concerning production*] commissioned content that MGM has produced for a retail distributor in the EEA was [*business secrets*

[147] Form CO, Table 19.

[148] The total segment size was determined by deducting estimated sports rights licensing spending from estimated licensed content spending. The total segment size therefore includes only film and TV acquisitions. The Parties' revenues from the licensing of film and TV content were then compared to the estimated total segment size to derive estimates of the Parties' shares of supply for AV content licensing in certain EEA countries. As noted in paragraph 344, Amazon generally does not license its content to third parties. [*Business secrets concerning licensing revenues*]. As such, Amazon's estimated share of supply for AV content licensing in the relevant EEA countries is [0-5]%, except for Germany where it is [0-5]% [*Business secrets concerning licensing revenues*].

concerning sales]. Otherwise, MGM did not produce or sell any commissioned TV content or earn production for hire revenues in 2018 or 2019 in any EEA country. [*Business secrets concerning business strategy*]. In any event, the Parties' estimated shares of supply for commissioned TV production in the relevant EEA countries was [0-5]% for all commissioned content, in the segment of both commissioned scripted and commissioned unscripted content.

(153) Prime Video's share of the downstream market for the retail distribution of AV content was estimated for the years 2018-2020 based on the number of subscriptions compared to the number of subscriptions of competing services as well as based on the revenues it generates compared to the revenues of competing services.

a) Overall market for the retail distribution of AV content. The Notifying Party did not provide market share estimates for Amazon's share in an overall market for the retail distribution of AV content. However, it pointed out that at an EEA-wide level, classical TV accounts for over 50% of the total AV market revenues whereas SVOD services would only account for 6%. Since Amazon only provides SVOD services, its share would be well below 30% in an overall market for the retail distribution of AV content.

b) SVODs, TVODs and Pay-TV. Assuming a market that includes only linear and non-linear Pay-TV services, the market shares of Prime Video where estimated based on the hypothesis that SVOD platforms compete with TVOD platforms as well as Pay-TV. In this hypothetical market, Prime Video's subscription- and revenue-based market share does not exceed 30% in the EEA and in each of the EEA Member States.

c) SVODs and TVODs. The subscription- and revenue-based market shares of Prime Video were also calculated for the hypothetical market that comprises only non-linear distribution of Pay-TV, *i.e.*, SVOD and TVOD platforms.[149] In this market, Prime Video's share does not exceed 30% in the EEA. However, Prime Video's subscription-based market shares for this hypothetical market is [30-40]% in Austria, and [30-40]% in Germany for 2020. The revenue-based market share for the same year exceeds the 30% threshold only in Germany with the share of [30-40]%.[150]

d) SVODs. Prime Video's market shares were also calculated in the hypothetical market comprising only of SVOD platforms. In this hypothetical market, Prime Video's subscription- and revenue-based market share does not exceed 30% in the EEA. However, it exceeds 30% in three individual Member States. As regards subscription-based market shares, Prime Video has a share of [30-40]% in Austria, [30-40]% in Croatia and [30-40]% in Germany for the year 2020. As regards revenue-based market shares, Prime Video's shares do not exceed 30% in any Member State for the same year.

e) SVODs, TVODs, Pay-TV and exhibitors (cinemas). Based on the hypothesis that various categories of retail distributors of AV content compete with exhibitors, the

[149] TVOD is applicable only to the shares by revenue and is reflected only for the EEA countries in which Prime Video generated TVOD revenues in 2020 ([*countries*]).

[150] The market shares do not change if we consider that local OTT players are not considered as competing within the same market.

market shares of Prime Video were estimated for the hypothetical market that includes SVODs, TVODs, Pay-TV and exhibitors. For this market, subscription-based shares were not taken into account as a subscription is not an option offered by most of the exhibitors. In this hypothetical market, Prime Video's revenue-based market share does not exceed 30% in the EEA and in each of the EEA Member States.

f) SVODs and exhibitors. Another hypothetical market concerns the SVODs being in direct competition with cinemas. The current release-window trends would justify such a hypothetical market. Theatrical release windows (which in the past generally lasted around 3 months) have shortened,[151] and there is a growing trend of simultaneous or near simultaneous theatrical and premium video-on-demand ("PVOD"), or other streaming release,[152] or initial release solely via PVOD/streaming services. Similarly, while release windows have traditionally been geographically specific, there has been an increasing trend towards simultaneous global releases. The decision to do a simultaneous global release will also depend on any piracy risk for the specific film and whether there would be global demand for the film. For this market, subscription-based shares were not taken into account as a subscription is not an option offered by all the exhibitors. In this hypothetical market, Prime Video's revenue-based market share does not exceed 30% in the EEA and in each of the EEA Member States.

(154) In conclusion, this transaction results in vertically affected markets for Austria, Croatia and Germany, if one were to assume the narrowest sub-segmentation possible for the downstream market for the retail supply of AV content (*i.e.*, the sub-segmentation where there is a separate downstream market for SVODs). It also gives rise to affected markets in Austria and Germany taking into account the downstream market where SVODs compete with TVODs.

(155) The market shares in the affected markets below and the Commission's assessment focuses on the affected markets that arise from the narrowest sub-segmentation possible for the downstream market for the retail supply of AV content (*i.e.,* the sub-segmentation where there is a separate downstream market for SVODs) since the potential competition concerns are the same for both possible sub-segmentations described in the paragraph above and focusing on the narrowest market possible would enable the Commission to fully assess the impact of the Transaction.

5.4. Market shares in the affected markets

5.4.1. Amazon

5.4.1.1. Overview – SVOD subscription and revenue shares

(156) Table 1 below provides an overview of Amazon's market shares in the hypothetical market for the retail supply of AV services via SVOD platforms, based both on revenues and on subscriber numbers. As mentioned, Amazon's market shares exceed

[151] See https://www.cnbc.com/2020/11/16/universal-and-cinemark-agree-to-shorten-theatrical-window html.

[152] See https://variety.com/2020/film/news/warner-bros-hbo-max-theaters-dune-matrix-4-1234845342/; https://www.adweek.com/convergent-tv/disney-plans-simultaneous-theatrical-premium-streaming-releases-of-raya-andthe-last-dragon/; https://variety.com/2021/film/box-office/theatrical-window-dead-1234973333/.

30% in Austria, Croatia and Germany, for which more details will be provided in Sections 5.4.1.2, 5.4.1.3, and 5.4.1.4 below.

Table 1. All Member States - Amazon's SVOD shares

Member State	Subscription shares			Revenue shares		
	2018	2019	2020	2018	2019	2020
Austria	[40-50]%	[40-50]%	[30-40]%	[30-40]%	[20-30]%	[20-30]%
Belgium	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[5-10]%
Bulgaria	[20-30]%	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[10-20]%
Croatia	[20-30]%	[20-30]%	[30-40]%	[5-10]%	[10-20]%	[10-20]%
Cyprus	[5-10]%	[5-10]%	[10-20]%	[0-5]%	[0-5]%	[5-10]%
Czech Republic	[0-5]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[5-10]%
Denmark	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Estonia	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[5-10]%
Finland	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
France	[30-40]%	[20-30]%	[10-20]%	[10-20]%	[10-20]%	[5-10]%
Germany	[40-50]%	[40-50]%	[30-40]%	[30-40]%	[30-40]%	[20-30]%
Greece	[10-20]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[5-10]%
Hungary	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[10-20]%
Ireland	[10-20]%	[20-30]%	[20-30]%	[0-5]%	[5-10]%	[10-20]%
Italy	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[5-10]%
Latvia	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[5-10]%
Lithuania	[10-20]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[5-10]%
Luxembourg	[10-20]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[5-10]%
Malta	[10-20]%	[20-30]%	[20-30]%	[5-10]%	[5-10]%	[10-20]%
Netherlands	[5-10]%	[5-10]%	[10-20]%	[0-5]%	[0-5]%	[0-5]%
Poland	[0-5]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Portugal	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[5-10]%
Romania	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[10-20]%
Slovakia	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[10-20]%
Slovenia	[10-20]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[10-20]%
Spain	[20-30]%	[20-30]%	[20-30]%	[5-10]%	[10-20]%	[5-10]%
Sweden	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%

5.4.1.2. Austria

(157) In Austria, Amazon's subscription share for 2020 is [30-40]%, behind that of Netflix that had a share of [40-50]% in 2020. In the last years, Amazon' market share has declined from almost [40-50]% in 2018. This is likely the result of the entry of new players into the market, namely Apple TV+ and Disney+ that launched in Austria in 2019 and 2020 respectively and have achieved a market share of [5-10]% and [5-10]% respectively in 2020.

(158) Also in terms of revenue shares, Netflix's market share has increased during the same period despite the entry of the new players from [50-60]% in 2018 to [60-70]% in 2020. Amazon's revenue based market share in Austria has decreased from [30-40]% in 2018 to [20-30]% in 2020.

(159) Table 2 below shows the competing SVOD platforms and their respective subscription-based market shares for the years 2018-2020.

Table 2. Austria - SVOD subscription shares

Service	Subscription share 2018	Subscription share 2019	Subscription share 2020
Prime Video	[40-50]%	[40-50]%	[30-40]%
Netflix	[40-50]%	[40-50]%	[40-50]%
Disney+	[0-5]%	[0-5]%	[5-10]%
DAZN	[5-10]%	[10-20]%	[5-10]%
Apple TV	[0-5]%	[0-5]%	[5-10]%
Total	100%	100%	100%

(160) Table 3 below shows the competing SVOD platforms and their respective revenue-based market shares for the years 2018-2020.

Table 3 - Austria - SVOD revenue shares

Service	Revenue share 2018	Revenue share 2019	Revenue share 2020
Prime Video	[30-40]%	[20-30]%	[20-30]%
Netflix	[50-60]%	[50-60]%	[60-70]%
Disney+	[0-5]%	[0-5]%	[0-5]%
DAZN	[10-20]%	[10-20]%	[10-20]%
Apple TV	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

5.4.1.3. Croatia

(161) In Croatia, only Netflix and Amazon currently offer SVOD services. Netflix is the market leader with a subscription-based market share of [60-70]% in 2020 with Prime Video's share being [30-40]% for the same year. While Amazon's market share has increased (from [20-30]% in 2018 to [30-40]% in 2020) and Netflix's market share has consequently decreased (from [70-80]% in 2018 to [60-70]% in 2020), Netflix is still clearly the market leader.

(162) Revenue-based markets shares also reflect the above picture with Prime Video's share having increased from [20-30]% in 2018 to [30-40]% in 2020 and Netflix's market share having decreased from [70-80]% in 2018 to [60-70]% in 2020.

(163) Table 4 below shows the competing SVOD platforms and their respective subscription-based market shares for the years 2018-2020.

Table 4. Croatia – SVOD subscription shares

Service	Subscription share 2018	Subscription share 2019	Subscription share 2020
Prime Video	[20-30]%	[20-30]%	[30-40]%
Netflix	[70-80]%	[70-80]%	[60-70]%
Total	100%	100%	100%

(164) Table 5 below shows the competing SVOD platforms and their respective revenue-based market shares for the years 2018-2020.

Table 5. Croatia - SVOD revenue shares

Service	Revenue share 2018	Revenue share 2019	Revenue share 2020
Prime Video	[5-10]%	[10-20]%	[10-20]%
Netflix	[90-100]%	[80-90]%	[80-90]%
Other[153]	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

5.4.1.4. Germany

(165) In Germany, Prime Video was among the first global SVOD services to launch in Germany and enjoyed a first mover advantage. However, Prime Video's share has declined form [40-50]% in 2018 to [30-40]% in 2020 after the entry and growth of other SVOD players, namely Apple TV+ (with [5-10]% subscriber share in Germany in 2020) and Disney+ (with [10-20]% subscriber share in Germany in 2020). Netflix's subscriber share in Germany has remained steady, amounting to [30-40]% in 2018 and [30-40]% in 2020, while its absolute number of subscribers has increased (from [5-10] million in 2018 to almost [10-20] million in 2020). Furthermore, in Germany the market tends to be more segmented due to the existence of local SVOD platforms.

(166) As regards revenue-based shares in Germany, they reflect even more clearly the fact that Prime Video is losing ground against Netflix. Prime Video's market share has decreased from [30-40]% in 2018 to [20-30]% in 2020 while Netflix's market share has increased from [40-50]% in 2018 to [50-60]% in 2020. It also reflects the consequences of the entry and growth of new SVOD players as well as the consequences of the existence of many local SVOD platforms.

(167) Table 6 below shows the competing SVOD platforms and their respective subscription-based market shares for the years 2018-2020.

[153] "Other" in the "SVOD – EEA revenue" sheet refers to Voyo. Voyo does not appear in the "SVOD – EEA subscriptions" sheet because the number of subscriptions is based on year-end figures. According to the Ampere Analysis data, Voyo stopped generating revenues as of Q3 2018 and had no subscriptions at the end of Q4 2018 (which is the point in time that the SVOD subscription shares for 2018 are based on).

Table 6. Germany - SVOD subscription shares

Service	Subscription share 2018	Subscription share 2019	Subscription share 2020
Prime Video	[40-50]%	[40-50]%	[30-40]%
Netflix	[30-40]%	[30-40]%	[30-40]%
Disney+	[0-5]%	[0-5]%	[10-20]%
Apple TV	[0-5]%	[0-5]%	[5-10]%
DAZN	[5-10]%	[5-10]%	[0-5]%
TV Now	[0-5]%	[0-5]%	[0-5]%
Joyn Plus+	[0-5]%	[0-5]%	[0-5]%
Sky ticket	[0-5]%	[0-5]%	[0-5]%
Other	[5-10]%	[0-5]%	[0-5]%
Total	100%	100%	100%

(168) Table 7 below shows the competing SVOD platforms and their respective revenue-based market shares for the years 2018-2020.

Table 7. Germany - SVOD revenue shares

Service	Revenue share 2018	Revenue share 2019	Revenue share 2020
Prime Video	[30- 40]%	[30-40]%	[20-30]%
Netflix	[40-50]%	[40-50]%	[50-60]%
Disney+	[0-5]%	[0-5]%	[0-5]%
Apple TV	[0-5]%	[0-5]%	[0-5]%
DAZN	[5-10]%	[5-10]%	[5-10]%
TV Now	[0-5]%	[0-5]%	[0-5]%
Joyn Plus+	[0-5]%	[0-5]%	[0-5]%
Sky ticket	[5-10]%	[0-5]%	[0-5]%
Maxdome	[5-10]%	[5-10]%	[0-5]%
Other	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

(169) The market shares in the above countries are slightly above [30-40]% for 2020 and the markets present similarities in that Prime Video and Netflix are currently losing their market shares to new entrants and the entry of more SVOD platforms (such as HBO max) is envisaged for the coming years. On this basis, the competitive assessment is deemed to concern all of the three countries where affected markets arise and when

there are particularities applicable only to one of the three markets this will be explicitly mentioned.

5.4.2. MGM

(170) As mentioned above, MGM's market share in the upstream markets for the licensing out of rights for pre-produced content and for the production and supply of commissioned TV content do not reach 30% on any plausible basis.

(171) MGM has no or *de minimis* (*i.e.*, less than [0-5]%) upstream activities involving the licensing of SVOD or TVOD distribution rights for pre-produced AV content in the EEA and in each individual Member State including the aforementioned Member States where affected markets arise (*i.e.*, Austria, Croatia and Germany).

(172) As regards the vertical link between MGM's upstream activities as a producer and supplier of commissioned TV content and Amazon's activities as a purchaser of AV content, the following should be taken into account. First, MGM is not active in the production of commissioned TV content in the EEA. Second, Amazon does not produce commissioned AV content for third parties in the EEA. [*Business secrets concerning internal financial processes*]. In any case, Prime Video's revenue market shares are well below 30% for the EEA and for each individual EEA Member State.

5.5. Vertical assessment

5.5.1. Foreclosure of rival SVOD platforms from accessing MGM's AV content (Input foreclosure)

(173) To examine whether the vertical link between MGM's upstream activities in the licensing-out of rights for pre-produced content/production and supply of commissioned TV content and Amazon's downstream activities in the retail distribution of AV content gives rise to competition concerns, the Commission investigated whether the merged entity would have the ability or the incentive to leverage its position in the market in order to foreclose rival SVOD platforms by making MGM's content exclusive to Prime Video or by worsening the terms and conditions under which it licenses MGM's content to rival platforms.

5.5.1.1. The Notifying Party's views

(A) Ability to engage in input foreclosure

(174) The Notifying Party submits that the Transaction will not give rise to any input foreclosure concerns. It submits that the merged entity will not have the ability to engage in input foreclosure, due to the fact that Prime Video is not the leading SVOD player in the EEA, MGM's content represents a small percentage of the content generally available and such content is already licensed out for the following years. Furthermore, MGM's content is not considered particularly important for retail suppliers of AV content.

(175) First, the Notifying Party submits that since Netflix is the leading SVOD player in all EEA countries except Germany (where Prime Video has [*business secrets concerning share evolution*]) and since Prime Video's SVOD revenue share in the EEA is less than 30%, it is implausible that Amazon could credibly marginalise rivals on the

downstream distribution market by strategically manipulating their access to MGM content.

(176) Second, MGM's AV content represents only a small proportion of total output (*e.g.*, under [5-10]% of supply for films in every EEA country for each of the last 3 years, even on the basis of national markets) and significantly less than the output of Netflix and Disney, for example. Therefore, even if Amazon was planning to leverage its position in the market making use of MGM's content, the latter is not considered enough to achieve an input foreclosure strategy against rival SVOD platforms.

(177) Third, according to the Notifying Party, Amazon would have no ability to foreclose rivals' access to a part of MGM's most valuable content at least in the short to medium term, as it is already licensed to third parties in key EEA territories, including [*countrie*s]. Amazon's competitors will therefore continue to have access to a part of MGM's content for [*duration*].

(178) Fourth, [*business secrets concerning sales strategy*].

(179) Fifth, according to the Notifying Party there is no such thing as "must have" content and so, even if access to MGM content were entirely removed, Amazon's competitors would still be able to compete just as effectively and would continue to have access to a wide range of AV content from producers, including through self-producing, commissioning, and coproducing content. Competition in the AV industry is currently considered to be very high and new content is constantly being produced.

(B) Incentive to engage in input foreclosure

(180) The Notifying Party also submits that the merged entity will have no incentive to engage in input foreclosure due to the fact that such strategy would not lure customers away from other platforms in the favour of Prime Video. Consumers also tend to "multi-home", meaning that a subscription to Prime Video would not necessarily prompt the cancellation of a subscription to a rival SVOD platform.

(181) In addition, the prevalence of multi-homing by subscribers for SVOD services would imply that a large number of subscribers of rival SVOD services may subscribe to Prime Video while maintaining their subscriptions to rival SVOD services.

(182) The Notifying Party further submits that Amazon's incentive to license library[154] content flows from its interest in generating consumer interest around new content it produces based on that IP. Moreover, library content is largely fungible, and a vast array of such content is widely available. Making all of MGM's library content exclusive would have a cost to Amazon in terms of licensing revenues foregone, but have limited actual impact on rivals, as SVOD/Pay-TV services have access to alternative library content with similar characteristics.

[154] Generally, film and TV content licensed outside of the Pay 1 and Pay 2 windows are referred to as "library" assets. The age at which content becomes library content differs between different studios and distributors. For example, MGM considers content to be library content at the beginning of the quarter of a title's second anniversary following its initial theatrical release or broadcast date. *See* https://live-mgm2.pantheonsite.io/sites/default/files/2021- 05/Q1%202021%20Financial%20Report_0.pdf, page 41. [*Confidential information relating to internal classification of content*]. The terms "Pay 1" and "Pay 2" windows are used to refer to the fact that there is usually more than one pre-FTA "pay" window, and titles are generally exclusive to the licensee for each of those Pay 1, Pay 2, and/or Pay 3 windows.

(183) Moreover, the Notifying Party points out that even if Amazon were to pursue a strategy of making all MGM content exclusive to Prime Video, the competitive effects would be very limited. In respect of new content, as such content would in any event be licensed exclusively to a single distributor for the duration of the Pay 1 window, the competitive effects would be limited (it would be exclusive to Amazon instead of – potentially – another provider).

(184) Based on the above, the Notifying Party concludes that Amazon's acquisition of MGM cannot result in input foreclosure concerns for Amazon's rivals in the downstream market for the retail supply of AV services due to the fact that exclusive licensing is [*business secrets concerning sales strategy*].

(185) The Notifying Party therefore, concludes that the merged entity will have neither the ability nor the incentive to engage in input foreclosure vis-à-vis other retail suppliers of AV content in Austria, Croatia and Germany.

5.5.1.2. The Commission's assessment

(186) The Commission investigated whether the vertical link between MGM's upstream activities in the licensing-out of rights for pre-produced content/production and supply of commissioned TV content and Amazon's downstream activities in the retail distribution of AV content gives rise to input foreclosure concerns.

(187) The market investigation results point to a lack of ability and incentive from Amazon's side to effectively apply input foreclosure strategies.

(A) Ability to engage in input foreclosure

(188) Input foreclosure concerns may only give rise to competition problems if they concern an important input.[155] The merged entity would need to have a significant degree of market power in the upstream market in order to be able to exercise a significant influence on such market as well as on prices and supply conditions in the downstream market.[156] Neither condition is fulfilled in the present case.

(189) According to the market investigation results, Amazon is not capable of foreclosing rival SVOD platforms by restricting access to MGM's content. Participants in the market for the retail supply f AV content confirm that they are licensing MGM's content [*duration*] and that MGM's overall content is not considered particularly important. As regards the *Bond* franchise[157] in particular, which is considered the most important of MGM's content, the market participants perceive it as more important than MGM's content in general, but eventually the Commission found that no input foreclosure concerns arise in that regard too.

---

155 See Non-Horizontal Merger Guidelines, para. 34.

156 See Non-Horizontal Merger Guidelines, para. 35.

157 For the purposes of this decision, the term "franchise" is used to indicate a film series that is a collection of related films (in succession) that share the same fictional universe, or are marketed as a series of films. Therefore, *Bond* franchise refers to the rights on all the existing *Bond* movies and the right to make future ones.

Market power

(190) First, participants to the market investigation indicate that they licence limited content from MGM. For most of the market investigation participants, MGM content corresponds to less than 20% of the licensing expenses.[158] This means that even in the absence of such content the majority of their offering would remain intact. It also means that they do not heavily rely on MGM's content to attract viewers.

(191) Second, MGM is not amongst the biggest content suppliers. Most of the retail suppliers of AV content that participated in the market investigation indicated that content licensed from other major US studios such as NBCUniversal, WarnerMedia, ViacomCBS, Sony and Disney are the biggest content suppliers. The majority of market participants has higher expenses for licensing from each of these studios than for MGM.[159]

(192) Third, based on current contracts between MGM and retail suppliers of AV content, Amazon would have no ability to foreclose rivals' access in the short term. [*Business secrets concerning the licensing of MGM content*].[160]

(193) Most of the market investigation participants confirmed that they have existing licensing agreements with MGM in Austria, Croatia and Germany as well as in other key EEA territories.[161] According to the market investigation, Prime Video's competitors in Austria, Croatia and Germany will therefore continue to have access to their current MGM's content for the duration of their contracts, [*duration*].[162]

Important input

(194) Fourth, many retail suppliers of AV content participating in the market investigation have indicated that there is an abundance of content, as the market for production, wholesale and retail supply for AV content is characterised by a great degree of competitiveness.[163] The majority of retail suppliers takes the view that there is sufficient pre-produced AV content available for other retail platforms to enter or expand in the market for the retail supply of AV services in Austria, Croatia and Germany.[164]

(195) Fifth, MGM's content in general is not considered particularly important in the sense that it does not contribute significantly to the competitiveness of retail AV services. The market investigation results clearly demonstrate that retail providers of AV content consider the MGM's content to be of average importance (with the exception of certain titles) for the competitiveness of their retail services.[165] The majority of respondents to the market investigation took the view that should Amazon stop licensing or worsens the terms and conditions at which they supply MGM's content in Austria, Croatia and Germany (for instance, by making this content exclusive to Prime

---

[158] See responses to Q1- Questionnaire to content providers and retail suppliers, question 59.

[159] See responses to Q1- Questionnaire to content providers and retail suppliers, question 60.

[160] For instance, [*Business secrets concerning the licensing of MGM content*].

[161] Key EEA territories include [*countrie*s].

[162] See responses to Q1- Questionnaire to content providers and retail suppliers, question 56.3.

[163] Minutes of calls of 02 December, 14 December 2021 and 12 January 2022 with market participants.

[164] See responses to Q1- Questionnaire to content providers and retail suppliers, question 70.

[165] See responses to Q1- Questionnaire to content providers and retail suppliers, question 58.

Video), they would be able to replace it with similar content from other suppliers.[166] Respondents were inconclusive about the potential impact for retail suppliers as a result of the worsening of the terms (or the cease to supply) MGM content, as they could not predict whether they could mitigate the negative impact with effective counterstrategies.[167]

(196) The market participant's view, however, is different when it comes to certain MGM franchises with the *Bond* franchise being considered the most significant. Some market participants took the view that, although MGM's content is generally replaceable, the *Bond* franchise is considered essential.[168] On this basis, some market respondents indicated that they would respond to a potential worsening of the terms for licensing MGM's content (such as price increase) by limiting the acquisition of content to what is most significant. In this case, they would most likely opt for the *Bond* franchise.[169] This means that retail suppliers of AV content will still be able to acquire the content that they consider important for the competitiveness of their platforms. Furthermore, in the context of the market investigation, retail suppliers of AV content also took the view that MGM's licensing terms are similar to the terms requested by other producers of AV content. A few retailers took the view that MGM's content is actually licensed [*business secrets concerning MGM's licensing practices*]. As a result, a few market investigation participants took the view that a potential increase in price for MGM's content is not likely to significantly affect their ability to purchase MGM content.[170]

(197) Finally, the Commission notes that as of the date of this decision and for the three Member States Austria, Croatia and Germany, out of the 27 titles of the *Bond* franchise, MGM [*business secrets concerning MGM's licensing practices*].[171]. Taking into account the high level of competition in the German and Austrian market, it is therefore obvious that *Bond* titles currently play at best a very marginal role for competition and are in no way particularly important titles. In light of these circumstances, the concerns voiced about the availability of the *Bond* titles during the market investigation, seem to reflect rather an expectation of increased competition by Prime Video, that might have an opportunity to include the *Bond* titles as part of its SVOD services, than the fear that an important input would no longer be made available.

(198) Based on the above, it is clear that even though a distinction can be drawn between the *Bond* franchise and the rest of MGM content in terms of significance for players in the downstream market for the retail supply of AV content, the merged entity would not have the ability to foreclose retail suppliers. Even in the case where Amazon reserves the entirety of MGM's content exclusively for Prime Video, retail suppliers of AV content will be able to replace the content with similar content from other wholesale suppliers, as discussed below.

(199) In conclusion, as regards MGM's input and the *Bond* franchise in particular, Amazon will not acquire an "important input" that will have significant influence on the

---

[166] See responses to Q1- Questionnaire to content providers and retail suppliers, question 67.

[167] See responses to Q1- Questionnaire to content providers and retail suppliers, question 69.

[168] See responses to Q1- Questionnaire to content providers and retail suppliers, question 69.

[169] See responses to Q1- Questionnaire to content providers and retail suppliers, questions 72 and 72.1.

[170] See responses to Q1- Questionnaire to content providers and retail suppliers, question 62.

[171] See Annex 5.1 to Response to RFI 11.

conditions of competition in the upstream market, and the merged entity cannot be expected to have a significant influence on the conditions of competition in the upstream market within the meaning of the Non-Horizontal Merger Guidelines.

(200) For these reasons, the Commission concludes that, given the highly competitive market for the retail supply of AV content and the abundance of content available, the merged entity will not have the ability to foreclose rival platforms in Austria, Croatia and Germany.

(B) Incentive to engage in input foreclosure

(201) In the previous section, the Commission analysed how the merged entity has no ability to foreclose its competitors in the downstream market for the retail supply. Nevertheless, for completeness, the Commission has also assessed the potential incentive of the merged entity to foreclose its rivals in the downstream market.

(202) The market investigation results demonstrate that there is a lack of incentive for Amazon to engage in input foreclosure against rival SVOD platforms. The market for the retail supply of AV content in Austria, Croatia and Germany is very competitive with many active players and non-SVOD players exerting additional pressure in the market for the retail supply of AV content. Content is also widely available and MGM's content is not considered particularly important for the competitiveness of the platforms, as it could be easily replaced. Finally, while the *Bond* franchise is considered to be of higher importance than the rest of MGM's content, it represents a very small fragment of the content available and the retail suppliers of AV content might be able to acquire it even under worse terms and conditions. As a result, a few market investigation participants took the view that a potential increase in price for MGM's content is not likely to significantly affect their ability to purchase MGM content.[172]

(203) First, SVOD players face competition by other retail suppliers of AV content (TVOD platforms, Pay-TV etc). This is clearly demonstrated in the market investigation results, according to which, Prime Video is not amongst the top providers of retail AV services in Austria, Croatia and Germany.[173]

(204) More specifically, in Austria, the leading players are Sky and Magenta. Netflix and Prime Video seem to follow in the third and fourth positions after the aforementioned platforms.[174] For Croatia, while the market investigation results were inconclusive as to the leading players, Prime Video was not mentioned as one of the top-5 providers of retail AV services.[175] Finally, in Germany, the market for the retail supply of AV services seems to be quite competitive with multiple active players. ARD/ZDF and Vodafone were indicated by the market participants as the leading players. Netflix, Prime Video and Deutsche Telekom were also indicated as some of the top-5 retail suppliers, but not as the market leaders.[176] As Prime Video is not the market leader, any attempt to restrict access to content will have limited impact. Furthermore, taking into account the current-multi homing trend described below, subscribers are not

[172] See responses to Q1- Questionnaire to content providers and retail suppliers, question 62.
[173] See responses to Q1- Questionnaire to content providers and retail suppliers, question 61.
[174] See responses to Q1- Questionnaire to content providers and retail suppliers, question 61.1.
[175] See responses to Q1- Questionnaire to content providers and retail suppliers, question 61.2.
[176] See responses to Q1- Questionnaire to content providers and retail suppliers, question 61.3.

likely to only have one subscription to Prime Video or to leave their current subscription to a bigger player to obtain a subscription to Prime Video. Even though in this case the affected downstream market includes only SVOD players, the market investigation results point to an out-of-market competitive constraint that exerts significant pressure to SVOD platforms.

(205) Second, and in addition to the above, the respondents to the market investigation took the view that the market for the retail supply of AV content is characterised by rigorous competition in Austria[177] and Germany[178] and high to moderate competition in Croatia.[179] Based on this, in the hypothetical scenario where Amazon would restrict all access to MGM's content, such move would have limited impact in the market as there are many other retail suppliers of AV content and consumers would still have a wide range of choices. Furthermore, vertically integrated platforms, which account for more than half of the market investigation participants,[180] could respond by also making content available exclusively on their own platform. This means Amazon is unlikely to capture demand downstream by restricting access to MGM's content for rival platforms.

(206) Third, the prevalence of multi-homing by subscribers for SVOD services implies that a large number of subscribers of rival SVOD services may subscribe to Prime Video while maintaining their subscriptions to rival SVOD services.[181] The majority of the market investigation participants took the view that end-customers multi-home across 2 to 3 different platforms accessible via a paid subscription.[182]

(207) Fourth, the vast majority of market investigation participants considers that there sufficient pre-produced AV content is available in Austria, Croatia and Germany, for other retail platforms to enter or expand in the market for the retail supply of AV services.[183]Fifth, even if Amazon stops licensing or worsens the terms and conditions at which it supplies MGM's content in Austria, Croatia and Germany (for instance, by making this content exclusive to Prime Video), the market participants clearly stated that they will be able to replace the content with similar content from other suppliers.[184] Similarly, in the case where Amazon raises the price for licensing MGM content by 10%, the majority of the participants to the market investigation indicated that they will respond to the price increase by decreasing the amount of content acquired by MGM.[185]It must be noted, however, that similarly to paragraph (196) above, the market participants take the view that when it comes to the *Bond* franchise, they will not be able to easily replicate the content with content from other suppliers.[186] However, in the scenario where Amazon worsens the terms and conditions under which it licenses MGM, rival platforms will still be able to acquire the content that is they considered important for the competitiveness of their platforms, as indicated the paragraphs above.

---

[177] See responses to Q1- Questionnaire to content providers and retail suppliers, question 64.1.
[178] See responses to Q1- Questionnaire to content providers and retail suppliers, question 64.3.
[179] See responses to Q1- Questionnaire to content providers and retail suppliers, question 64.2.
[180] See responses to Q1- Questionnaire to content providers and retail suppliers, question 55.
[181] See responses to Q1- Questionnaire to content providers and retail suppliers, question 71.
[182] See responses to Q1- Questionnaire to content providers and retail suppliers, questions 71 and 71.1.
[183] See responses to Q1- Questionnaire to content providers and retail suppliers, question 70.
[184] See responses to Q1- Questionnaire to content providers and retail suppliers, questions 67 and 67.1.
[185] See responses to Q1- Questionnaire to content providers and retail suppliers, questions 72 and 72.1.
[186] See responses to Q1- Questionnaire to content providers and retail suppliers, question 67.1.

(208) For completeness, the Commission therefore concludes that the merged entity would not have an incentive to foreclose rival platforms in Austria, Croatia and Germany given that MGM's content is considered replaceable with the content of many other AV content producers.

(C) Overall likely impact on effective competition

(209) For completeness, the Commission further notes that for the same reasons on which it based its conclusion that Amazon would not have an ability to foreclose competing SVOD platforms, any such foreclosure strategy, if it were to be implemented, would have no significant impact on its competitors' ability to compete and would therefore not lead to any significant impact on effective competition.

5.5.2. Foreclosure of producers of AV content (customer foreclosure)

(210) The Commission looked into potential competition concerns stemming from the vertical link between MGM's upstream activities in the licensing-out of rights for pre-produced content/production and supply of commissioned TV content and Amazon's downstream activities in the retail distribution of AV in Austria, Croatia and Germany. In particular, it looked into a potential increase in the bargaining power of Amazon vis-à-vis other content producers as a result of vertical integration. The Commission investigated whether Amazon's acquisition of MGM's content and the exploitation of MGM's IP would make redundant the necessity to deal with other AV content producers and suppliers in the upstream market of licensing-out of rights for pre-produced content/production and supply of commissioned TV content in Austria, Croatia and Germany.

5.5.2.1. The Notifying Party's view

(A) Ability to engage in customer foreclosure

(211) The Notifying Party takes the view that there is no risk of customer foreclosure in Austria, Croatia and Germany due to the fact that Amazon is a relatively small customer for content producers and that [*business secrets concerning licensing costs*].

(212) The Notifying Party submits that Amazon's share of acquisition of pre-produced AV content licensing is sufficiently small that there cannot be credible concerns that content suppliers would be weakened as a result of Amazon licensing less content from them. Prime Video accounts for a limited share in the acquisition of all pre-produced licensed content in each country: the largest proportion in 2019 was [10-20]% in Germany (whether one considers all content, films, or TV content).[187] [*Business secrets concerning internal processes in relation to costs*].

(B) Incentive to engage in customer foreclosure

(213) The Notifying Party takes the view that the merged entity has no incentive to foreclose customers in Austria, Croatia and Germany since MGM's content is not sufficient to attract and retain consumer attention in a highly-competitive market where its competitors are heavily producing or acquiring content.

[187] [*Business secrets concerning internal processes in relation to costs*].

(214) First, the Notifying Party submits that if Prime Video relied only or mostly on MGM content this would reduce its consumer appeal substantially. [*Business secrets concerning licensing costs*], it would not be sufficient to replace Amazon's acquisition of licensed content from third parties. For instance, looking at Germany as an example: Amazon's content spend on licensing is EUR [*business secret*], whilst MGM's revenue from licensing to all downstream services is EUR [*business secret*] (based on 2019 data). The Transaction would not reduce Amazon's appetite for purchasing content from third party content producers, [*business secrets concerning licensing costs*].

(215) Second, Amazon's competitors like Netflix and Apple invest heavily in content. At the same time, traditional large producers, such as Disney, Comcast, and WarnerMedia, are ramping up their direct-to-consumer services in the EEA, and the valuable content available on their services is increasing as existing licenses for their content expire. With such competitors Amazon will always need new and diverse content to keep its Prime Video service attractive to consumers. This cannot be achieved by relying on MGM alone (which, as indicated above, has a very small share of supply) and reducing purchases from other content suppliers.

5.5.2.2. The Commission's assessment

(216) The Commission investigated whether the vertical link between MGM's upstream activities in the licensing-out of rights for pre-produced content/production and supply of commissioned TV content and Amazon's downstream activities in the retail distribution of AV content gives rise to customer foreclosure concerns in Austria, Croatia and Germany.

(217) The market investigation results point to a lack of ability and incentive from Amazon's side to effectively apply customer foreclosure strategies.

(A) Ability to engage in customer foreclosure

(218) The results of the market investigation point to a lack of ability of the merged entity to engage in customer foreclosure as MGM ranks below many other major content producers and its content is not deemed sufficient to confer significant bargaining power to Amazon in a highly competitive market. This means that the acquisition of MGM is unlikely to confer to Amazon the ability to be independent from other production studios or significantly increase Amazon's bargaining power in negotiations with them.

(219) First, as seen in paragraphs (157)-(169) Prime Video is not the leading SVOD platform in Austria and Croatia. In Germany, Prime Video's subscription-based market share marginally exceeds that of Netflix but its revenue-based share is still well below that of Netflix. Therefore, participants active in the upstream market will be able to license a large amount of content to other SVOD players with a significant presence in the downstream market.

(220) Second, and in addition to the above, the respondents to the market investigation took the view that the market for the retail supply of AV content is characterised by rigorous competition in Austria[188] and Germany[189] and high to moderate competition

[188] See responses to Q1- Questionnaire to content providers and retail suppliers, question 64.1.

in Croatia[190]. Croatia is considered to be a small market for producers of AV content[191] and as a result, even in the case where foreclosure in the Croatian market occurred, it would not be sufficient to raise the costs for producers of AV content.

(221) Third, all the retail suppliers of AV content that responded to the market investigation indicated that they license from different suppliers.[192] This is due to the fact that the retail suppliers of AV content are seeking to satisfy the needs of several consumer groups to which they present a diverse portfolio of AV content.[193]

(222) Based on the above it is clear that there are many players interested in the content of AV suppliers and they actively try to have an interesting offering of AV content to maintain their viewers and attract new ones.

(223) Fourth, it is necessary to note that the merged entity will not have the ability to engage in customer foreclosure based on the nature and the particularities of the markets involved. The nature of competition in the market for the production of AV content upstream and the retail supply of AV content downstream is different than the nature of competition in other vertical markets where a certain amount of upstream input is necessary for the production of downstream input. As outlined in the previous paragraphs, sourcing all their content from a single producer would not increase the competitiveness of retail suppliers of AV content as the final offering would not satisfy the needs and tastes of different audiences. Therefore, a scenario where retailers can potentially rely on one wholesaler for their upstream input and be rewarded for their loyalty (*e.g.*, with rebates) is highly unlikely in this market. Here the attractiveness of the final offering is heavily dependent on the diversity of the content offered. Based on this, it is expected that players active in the upstream market of AV content production will continue to license their content to Prime Video as well as its competitors. This is confirmed by the market investigation participants that are vertically integrated (*i.e.*, active in the production and licensing of AV content as well as in the retail supply of AV content). All the vertically integrated market investigation participants indicated that they continue to supply AV content to third parties. The fact that Prime Video will have direct access to MGM's library will not allow it to solely depend on it, taking also into account that MGM is not amongst the biggest AV content producers, as described below.

(224) Fifth, and in relation to the above, all the respondents to the market investigation indicated Disney, WarnerMedia and NBCUniversal as the biggest AV content suppliers. No respondent listed MGM amongst the five top providers of AV content.[194] This means that MGM's content production is limited in comparison to the production of other studios and Prime Video's access to this content does not confer a competitive advantage that enables it to stop licensing from other suppliers.

---

189 See responses to Q1- Questionnaire to content providers and retail suppliers, question 64.3.

190 See responses to Q1- Questionnaire to content providers and retail suppliers, question 64.2.

191 See responses to Q1- Questionnaire to content providers and retail suppliers, question 45.2..

192 See responses to Q1- Questionnaire to content providers and retail suppliers, question 60.

193 Minutes of the call of 02 December 2021 with a market participant

194 See responses to Q1- Questionnaire to content providers and retail suppliers, questions 44 and 44.1, 44.2 and 44.3.

(225) Sixth, the majority of the respondents to the market investigation consider the level of competition in the upstream market for the licensing out of AV content to retailers to be very high in Austria and Germany[195] and high to moderate in Croatia.[196]

(226) Seventh, as regards the bargaining power of the merged entity as a result of the transaction, the majority of the market investigation respondents take the view that it will improve vis-à-vis providers of pre-produced AV content. However, while most of the respondents agree that the merged entity will have an increased bargaining power, they do not agree on the significance of this increase. While some respondents point out that the fact that Amazon will acquire a significant library and the ability to produce in-house film and TV content will increase Amazon's bargaining power, other respondents take the view that MGM's library is not big enough to bring a significant change in Amazon's negotiating power.[197] Based on this, the merged entity is likely to continue licensing content from third production studios.

(227) The Commission concludes that, given the highly competitive upstream market for the licensing-out of rights for pre-produced content/production and supply of commissioned TV content in Austria, Croatia and Germany, the relatively small share of MGM in this market and the need for a wide variety of content in a competitive downstream market, the merged entity has no ability to foreclose customers in the upstream market by ceasing to acquire content from them.

(B) Incentive to engage in customer foreclosure

(228) In the previous section, the Commission analysed how the merged entity has no ability to foreclose its competitors in the upstream market for the production and licensing out of content. Nevertheless, for completeness, the Commission has also assessed the potential incentive of the merged entity to foreclose its competitors in the upstream market for the production and licensing out of content.

(229) The results of the market investigation point to a lack of incentive of the merged entity to engage in customer foreclosure as a wide variety of content is necessary to attract customers and MGM's own offering is not sufficient for the merged entity to rely exclusively on it.

(230) First, the market investigation results clearly indicate that out of the entirety of MGM's offering only certain films are considered particularly important for the retail suppliers of AV content in Austria, Croatia and Germany. This means that the AV content suppliers do not consider MGM's content overall important in the sense that it does not contribute significantly to the competitiveness of retail AV services. Market investigation participants have clarified that they consider mainly the *Bond* franchise important.[198][199]

(231) Second, the majority of the market investigation participants take the view that regardless of the existence or not of an increase in Amazon's bargaining powers vis-à-

---

195 See responses to Q1- Questionnaire to content providers and retail suppliers, questions 45.1 and 45.3.

196 See responses to Q1- Questionnaire to content providers and retail suppliers, question 45.2.

197 See responses to Q1- Questionnaire to content providers and retail suppliers, question 46.

198 See responses to Q1- Questionnaire to content providers and retail suppliers, question 47.

199 Other important franchises are *The Hobbit* and *Rocky/Creed*.

vis content suppliers, Amazon will continue to license content from other suppliers.[200] Vertically integrated players confirmed that as they took the view that in order to attract and maintain viewers, platforms seek to acquire a wide range of AV content from different suppliers.[201]

(232) The Commission concludes that, given the highly competitive market for the supply of AV content and the need for a variety of content much wider than MGM's library can cover, the merged entity no have the incentive to stop dealing with rival AV content producers.

(C) Overall likely impact on effective competition

(233) For completeness, the Commission further notes that for the same reasons on which it based its conclusion that Amazon would not have an ability to foreclose producers of AV content, any such foreclosure strategy, if it were to be implemented, would have no significant impact on its competitors' ability to compete and would therefore not lead to any significant impact on effective competition.

5.5.3. Foreclosure of customers via Amazon's Fire TV platform

(234) Amazon supplies a range of Fire TV devices that enable customers to access content including TV episodes and movies, songs, classes ranging from cooking to fitness and meditation, virtual tours, and live and on-demand video services (including Prime Video and third party services). Amazon licenses Fire OS and the Fire TV software experience for use in smart TVs and sound bars manufactured by third parties.

(235) The vast majority of the market investigation participants indicated that they supply content via Fire TV. In the context of the market investigation, some of the participants took the view that post-Transaction, Amazon will have the ability and incentive to foreclose access by third-party content providers to its Fire TV device, either by denying such access altogether or by worsening the conditions for access. Amazon could achieve this by making MGM's content exclusive on Fire TV and therefore increasing its attractiveness for end-customers. As a result, Amazon could be in a stronger gatekeeper position for other third-party AV services on Fire TV (*e.g.*, regarding terms and conditions to make available and promote third-party applications on TV or excluding third-party providers from the Fire TV platform). Some of the respondents agree that this would have a negative impact on their company and on AV content producers in general, as their exclusion from Fire TV would most likely result in loss or distribution reach and advertising revenues.

(236) First, as regards the importance of Fire TV and its popularity in the market, the Commission notes that the penetration rate of Fire TV in the EEA is quite low, namely [5-10]%. As regards the affected markets and according to data provided by Ampere Analytics, in Germany it is estimated that [20-30]% of households currently own a Fire TV device. The percentage is bigger than the EEA average but still not high. As regards Austria and Croatia, Amazon does not possess information on the percentage of households owning a Fire TV as Amazon does not have a dedicated and localized e-commerce website in these countries.

[200] See responses to Q1- Questionnaire to content providers and retail suppliers, question 49.
[201] Minutes of calls of 13 and 14 December 2021 with market participants..

(237) Second, in order for a third-party retail supplier of AV content (*i.e.*, a third-party VOD service) to distribute its service on Fire TV, the supplier must create a developer account and agree to the Amazon Developer Services Agreement ("ADSA").[202] The ADSA is an online standard form (or "click through") agreement and set of policies which set the terms under which a third-party application developer can have its service distributed as an application on Fire TV devices.

(238) [*Business secrets concerning distribution strategy*].

(239) Based on the above, and as regards the market participants' claims that Amazon will have the ability and incentive to foreclose access by third-party content providers to its Fire TV device, it should be noted that such foreclosure is unlikely due to the low penetration rate of Fire TV in the EEA, Amazon does not have the ability to foreclose access of third-party platforms to Fire-TV devices. In addition, Amazon does not have the incentive to foreclose access of third-party platforms to Fire-TV devices given that even an increased bargaining power as a result of the transaction would most likely result in changes to terms and conditions of the ADSA. More specifically, the increased bargaining power would only concern other retail suppliers of AV content. Based on the information provided above, the ADSA is an online standard form agreement for all application developers. As indicated above, [*business secrets concerning distribution strategy*]. Amazon will not enjoy an increase of bargaining power vis-à-vis providers of other applications. (*i.e.*, applications for songs, classes ranging from cooking to fitness and meditation and virtual tours).

5.5.4. Conclusion on the foreclosure of rival SVOD platforms and producers of AV content

(240) The merged entity will not have the ability and the incentive to foreclose its upstream customers and downstream competitors in the markets of licensing-out of rights for pre-produced content/production and supply of commissioned TV content (upstream) and Amazon's downstream activities in the retail distribution of AV content (downstream) in Austria, Croatia and Germany.[203] The market investigation results also reflect this, with most participants responding that the Transaction will have no material impact on their business.[204]

(241) Based on the above the Commission concludes that the aforementioned vertical link does not raise any competition concerns.

5.5.5. Possible foreclosure of cinemas (downstream) from accessing MGM's new film content (upstream)

(242) As explained in Sections 4.5.1.2 and 4.5.2.2 above, the Commission has concluded that there is a distinction between AV value chain and the theatrical value chain.

(243) However, the Commission notes that, while MGM has traditionally licensed out its films for theatrical exhibition pre-Transaction, Amazon Studios does not usually

---

[202] The ADSA can be found here: https://developer.amazon.com/support/legal/da.

[203] The same conclusion applies as regards Fire TV: the merged entity will not have the ability and the incentive to foreclose its upstream customers and downstream competitors in the markets of licensing-out of rights for pre-produced content/production and supply of commissioned TV content (upstream) and Amazon's downstream activities in the retail distribution of AV content (downstream) in Austria, Croatia and Germany via Amazon's Fire TV platform.

[204] See responses to Q1- Questionnaire to content providers and retail suppliers, question 74.

license out films for theatrical release, except on limited occasions [*business secrets concerning sales strategy*]. On the contrary, Amazon monetizes content production activities mainly through home entertainment retail distribution via Prime Video.[205] Furthermore, as explained in more details below, while Amazon [*business secrets concerning sales strategy*] (See paragraphs (245) and (259) below).

(244) The Commission also notes that, as explained in paragraph (95) above, it received a complaint from a cinema chain. In line with the complaint, almost all responding cinemas to the market investigation consider that MGM's films, especially *Bond* films, are particularly important, such that Amazon could foreclose cinemas that would otherwise have exhibited new MGM titles for a certain period (see Sections 5.5.5.2(A.i) and 5.5.5.2(B.i) below).

(245) While the AV value chain and the theatrical value chain do not form part of the same relevant markets, the Commission has assessed, for the sake of completeness, the possible ability and incentive for Amazon to stop licensing new MGM films to cinemas, as well as the effects of such possible behaviour. For this purpose, the Commission bases itself on a total input foreclosure scenario (*i.e.*, MGM's new films are no longer licensed to cinemas at all). The reasoning applies, *a fortiori,* to a possible partial input foreclosure scenario (*i.e.*, MGM's new films are released in cinemas for a shorter window or in parallel to DTS release).

5.5.5.1. Notifying Party's view

(246) The Notifying Party submits that Amazon [*business secrets concerning sales strategy*].[206] [207]

(247) In any case, the Notifying Party submits that the merged entity would not have the ability to successfully foreclose cinemas by ceasing to license out rights for MGM's films. The Notifying Party points out that Amazon cannot autonomously decide whether or not to discontinue the theatrical release of certain MGM films and to release them DTS.[208] Third parties co-own a number of MGM's top film franchises , and they have to agree t on the release strategy of the relevant films. In particular, MGM and Danjaq/Eon co-own the *Bond* franchise. Danjaq/Eon is the holding company of the Broccoli family co-producing *Bond* [*business secret concerning financing agreement*]. Danjaq/Eon has broad approval rights [*business secret concerning strategic decisions*] relating to the *Bond* franchise, [*business secret concerning strategic decisions*].[209] Likewise, MGM and Warner Bros co-own the *Hobbit* franchise , and Warner Bros controls the distribution rights of the respective films.[210]

(248) Moreover, according to the Notifying Party, a hypothetical foreclosure strategy *vis-à-vis* cinemas would not cause any anticompetitive effects, because MGM's films

205 Form CO, paragraph 212.
206 Form CO, paragraph 447. See also Notifying Party's reply to the Commission's RFI No 11.
207 Notifying Party's reply to the Commission's RFI No 11.
208 Notifying Party's reply to the Commission's RFI No 12.
209 Form CO, paragraphs 244 – 246 and Table 16.
210 Form CO, Table 16.

content is not significant enough to have a meaningful effect on cinemas if it was withheld.[211]

(249) First, the Notifying Party points out that MGM's shares in the production and licensing of film content for theatrical release based on box office revenues are very low, not exceeding [0-5]% in the EEA in each of the three years from 2018 to 2020 and in any case almost always lower than [10-20]% in each and every Member State across the three years.[212] The Notifying Party also provided MGM's shares based on box office revenues of 2021. Such revenues are higher, in relative terms, than in the previous years, accounting for market shares of up to [30-40]% in Austria and [40-50]% in Latvia. However, the Notifying Party submits that such numbers are not indicative of MGM's actual position in the market for the production and licensing of films for theatrical release. In this regard, the Notifying Party notes that such market shares are driven by two particular titles released in 2021, *i.e.*, *No Time to Die* and *House of Gucci,* in a year in which the total box office revenues, especially in Austria and Latvia, were considerably lower than in the pre-pandemic years due to COVID-19 related restrictions imposed on a national basis.[213]

(250) More specifically, considering *Bond* films, the Notifying Party notes that *No Time to Die* has accounted for high proportions of the overall box office revenues in certain Member States, especially in Austria ([20-30]%) and Germany ([10-20]%). However, these shares are not due to an exceptional performance of the *Bond* title, but rather to the low box office revenues of 2021. In this regard, the Notifying Party submits that *No Time to Die* generated lower box office revenues than each of the four previous *Bond* films, even though the latter accounted for much lower shares of the overall box office revenues.[214] In any case, the Notifying Party notes that *Bond* films are released infrequently, meaning that in most years, cinemas do not offer *Bond* titles in any event.[215]

(251) Second, and in connection to the above, the Notifying Party points out that the *Bond* franchise generates less revenues than other famous franchises that collect considerable box office success, such as the *Marvel Cinematic Universe*, *Star Wars* and *Harry Potter*.[216]

(252) Therefore, the Notifying Party considers that, should the merged entity cease to license MGM's content, including new *Bond* films, for theatrical release, the merged entity would not be able to successfully foreclose cinemas. Even assuming that the merged entity pursued such a foreclosure strategy, it would not cause anticompetitive effects on cinemas.

211 Notifying Party's reply to the Commission's RFI No 12.
212 Annex 27 to the Form CO and Form CO, paragraph 422.
213 Notifying Party's reply to the Commission's RFI No 11.
214 Notifying Party's reply to the Commission's RFI No 11.
215 Notifying Party's reply to the Commission's RFI No 12.
216 Form CO, paragraph 243.

5.5.5.2. Commission Assessment

(A) Possible foreclosure of cinemas on the market for the retail supply of films for theatrical exhibition from accessing MGM's overall film content

(A.i) Ability to engage in input foreclosure

(253) The Commission considers that, even if the merged entity could technically release MGM's new films exclusively on Prime Video, in agreement with the relevant third-parties that own rights to certain MGM franchises, the merged entity would not have the ability to foreclose cinemas by ceasing to license MGM's film content for theatrical release.

(254) First, the Commission notes that MGM's content represents a minimal share of the box office revenues compared to the content of competing production studios, reaching a maximum of [0-5]% and [5-10]% in the three years preceding the Transaction at EEA level and at Member State level respectively.[217] In this regard, no cinemas responding to the market investigation indicated MGM as one of the top-10 production studios based on the respective box office revenues in any year from 2015 to 2021.[218] Moreover, responding cinemas indicated that the percentage of their revenues accounted for by MGM films was generally very low in the years from 2015 to 2021, exceeding [10-20]% for some cinemas only in 2021, in correspondence to the release of the new *Bond* franchise film *No Time to Die* (but not in 2015 when *Spectre* was released).[219] MGM's films screened by responding cinemas in the pre-Transaction years ranked among the top-10 films in their respective year of release only on very few occasions, namely when the latest *Bond* films were released in 2015 and 2021.[220]

(255) Second, cinemas have access every year to a large variety of movies from many production studios that generate significant box office revenues compared to MGM. Studios like Warner Bros, Sony Picture Entertainment, Universal and Walt Disney consistently rank among the top production companies in term of box office revenues for all responding cinemas, together with local studios that also represent a significant box office share in the years from 2015 to 2021.[221] Therefore, should the merged entity stop licensing MGM's films for theatrical release, cinemas would continue to have a wide array of content available, both local and international, to build an attractive offer to end-customers.

(256) Third, results of the market investigation indicate that MGM's film content is not particularly important overall compared to that of other production studios. Responding cinemas indicate *Bond* as the only prominent franchise, such that in years when no *Bond* movies are released MGM's film content does not represent an important input for cinemas.[222]

[217] Annex 27 to the Form CO.
[218] See responses to Q2 - Questionnaire to cinemas, question 22.
[219] See responses to Q2 - Questionnaire to cinemas, question 24.
[220] See responses to Q2 - Questionnaire to cinemas, question 23.
[221] See responses to Q2 - Questionnaire to cinemas, question 22.
[222] See responses to Q2 - Questionnaire to cinemas, question 25.

(257) Therefore, the Commission concludes that the merged entity would not have the ability to successfully foreclose cinemas on the downstream market for the theatrical exhibition of films by ceasing to license MGM's film content for theatrical release.

(A.ii) Incentive to engage in input foreclosure

(258) The Commission notes that the conditions for an effective input foreclosure are cumulative. Therefore, as the Commission concluded that the Parties would not have the ability to foreclose cinemas by ceasing to license MGM's film content, the Commission considers that the merged entity's incentive to foreclose cinemas from access to MGM's content is not decisive.

(259) For the sake of completeness, the Commission notes that, while the Notifying Party submitted that [*business secrets concerning sales strategy*].

(A.iii) Effects of a potential foreclosure on competition

(260) As explained in Section (A.i) above, the Commission considers that the merged entity would not have the ability to foreclose cinemas by ceasing to license out MGM's new films for theatrical release. In any event, a hypothetical foreclosure strategy concerning MGM's film content would not have overall a significant detrimental impact on competition on the market for the theatrical exhibition of films.

(261) First, the majority of responding cinemas to the market investigation submitted that the Transaction would have a negative impact on them, should the merged entity stop distributing MGM's new films to cinemas. A few respondents indicated that the impact would be neutral.[223] However, the Commission notes that the replies mostly refer specifically to the *Bond* franchise. As better described in Section (B) below, while such franchise is one of the most successful ones,[224] its films are released approximately only once every three to six years. Considering MGM's production as a whole, as relevant in terms of regular supply of good quality commercial films, it was indicated that MGM's content is not comparable to that of major studios such as Walt Disney, Sony Picture Entertainment, Warner Bros, Universal and Paramount.[225] As indicated in paragraph (254) above, MGM's content represents a minimal share of the box office revenues for cinemas compared to the content of competing production studios.

(262) Second, and consistently with the above, the majority of market participants indicated that only certain MGM films are particularly important in terms of their contribution to the attractiveness of the cinematic offer, referring specifically to the *Bond* franchise.[226] As mentioned by some responding cinemas, generally, the strength of a given studio's film offer depends on the number of films released every year and on

[223] See responses to Q2 - Questionnaire to cinemas, question 31.

[224] See The 13 highest-grossing film franchises at the box office (cnbc.com). The *Bond* film franchise is reported to be among the top-10 highest-grossing film franchises, behind the *Marvel Cinematic Universe, Star Wars* and *Harry Potter.*

[225] See responses to Q2 - Questionnaire to cinemas, question 31.1.

[226] See responses to Q2 - Questionnaire to cinemas, questions 48 and 48.1.

the quality of the titles, and most of MGM's film content can be replaced by films offered by other studios.[227]

(263) Third, as explained in paragraph (254) above, responding cinemas never indicated MGM as one of the top-10 production studios on the basis of the box office revenues in any year from 2015 to 2021.[228] In addition, MGM's films have accounted for very low percentages of cinemas' revenues in the same years, exceeding [10-20]% for some respondents only on occasion of the latest (but not the second-to-last) *Bond* film. Therefore, should Amazon cease licensing MGM's film content for theatrical release, this would not deprive cinemas of a regular and important source of revenues.

(264) For the reasons set out above, the Commission concludes that a hypothetical foreclosure strategy with regard to MGM's film content would not have an overall significant detrimental impact on the market for the theatrical exhibition of films.

(B) Possible foreclosure of cinemas on the market for the theatrical exhibition of films from accessing new releases of the *Bond* franchise

(B.i) Ability to engage in input foreclosure

(265) The Commission considers that, even if the merged entity could technically cease to license new releases of the *Bond* franchise to cinemas, subject to the agreement of Danjaq/Eon, the merged entity would not have the ability to foreclose cinemas by releasing new *Bond* films exclusively DTS.

(266) The Commission notes that the results of the market investigation suggest that *Bond* films represent an important piece of content for cinemas. Almost all responding cinemas indicated that the *Bond* franchise is very important in terms of its contribution to the attractiveness of the cinematic offer and as a source of box office revenues.[229] The majority of producers and retail suppliers of AV content also indicated that *Bond* in particular is important for the attractiveness of the cinematic offer.[230]

(267) Responding cinemas indicated that the two latest *Bond* movies, *Spectre* (2015) and *No Time to Die* (2021), ranked high in terms of box office revenues of each individual cinema in their respective year of release. More specifically, *Spectre* consistently ranked among the top-5 films for respondents to the market investigation, although it never placed first, whereas the more recent *No Time to Die* has almost always ranked first as the highest-grossing film for individual responding cinemas.[231]

(268) Furthermore, as mentioned in paragraph (254) above, while MGM's films have accounted for very low percentages of responding cinemas' revenues in the period from 2015 to 2021, such percentage generally increases in correspondence with the release of new *Bond* films. Responding cinemas indicated that MGM's films accounted for a share of up to approximately [5-10]% of their individual revenues in

227 See responses to Q2 - Questionnaire to cinemas, question 28.1.
228 See responses to Q2 - Questionnaire to cinemas, question 22.
229 See responses to Q2 - Questionnaire to cinemas, question 26.
230 See responses to Q1 - Questionnaire to AV content providers and market participants, replies to question 48 and 48.1.
231 See responses to Q2 - Questionnaire to cinemas, question 23.

2015, and up to approximately [10-20]% in 2021 (with a peak at [20-30]% for one respondent).[232]

(269) However, the Commission considers that, even in light of the importance of the *Bond* franchise as highlighted by the cinemas that responded to the market investigation, a hypothetical total foreclosure strategy by the merged entity would not amount to a significant impediment to the competitiveness of cinemas.

(270) First, the Commission notes that new *Bond* movies are released at time intervals that are quite distanced to one another, generally once every three to six years.[233] As set out in paragraph (261) above, cinemas do thus not rely on *Bond* movies in most years to have a regular supply of good quality commercial films.[234] While the availability of a given blockbuster title can have an impact on cinemas' revenues in the respective year of release, cinemas do not construct their business model based on one and the same blockbuster franchise to remain attractive.

(271) Second, even in years when new *Bond* films are released, they normally represent a share of responding cinemas' revenues below [10-20]%, based on the replies to the market investigation. In this regard, *Bond* movies compete with other blockbuster films and generate less revenues than other famous film franchises such as the *Marvel Cinematic Universe* (Walt Disney)*, Star Wars* (Walt Disney) *and Harry Potter* (Warner).[235] Thus, the performance of a new *Bond* film as a share of individual cinemas' box office revenues also depends on the box office performance of other blockbuster movies released in the same year, which performed better than certain *Bond* films in the past.[236]

(272) In this regard, while *No Time to Die* has ranked first in the list of the highest grossing films for responding cinemas in 2021, accounting for a share of revenues sometimes higher than 10%, the Commission notes that such results were achieved in a year in which cinemas were still at least partially closed due to the COVID-19 pandemic. In this regard, as evidenced by the Notifying Party, it is worth noting that box office data concerning *No Time to Die* show that, in 2021, it accounted for unusually high proportions of the overall box office revenues in certain Member States (up to [20-30]% in Austria and [10-20]% in Germany).[237] However, in both countries, as well as in other Member States[238], the box office revenues generated by *No Time to Die* are considerably lower than those generated by previous *Bond* movies such as *Skyfall* and *Spectre,* which however accounted for a much lower share of the overall box office revenues in their year of release.[239] This is because 2021 saw a significant

---

232 See responses to Q2 - Questionnaire to cinemas, question 24.

233 See https://www.007.com/the-films/. The two latest releases, *No Time to Die* and *Spectre* were released in 2021 and 2015 respectively, preceded by *Skyfall* (2012) and *Quantum of Solace* (2008).

234 See responses to Q2 - Questionnaire to cinemas, question 31.1.

235 Form CO, paragraph 243.

236 *Spectre* for example, despite being a successful movie, has never ranked first among the top-selling films in its year of release for cinemas that responded to the market investigation. See responses to Q2 - Questionnaire to cinemas, question 23.

237 Notifying Party's reply to the Commission's RFI No 11, Annex 4.1.

238 The same applies to [*countries*], see Notifying Party's reply to the Commission's RFI No 11.

239 [5-10]% and [10-30]% in Austria and Germany respectively for *Skyfall,* [5-10]% and [5-10]% for *Spectre.* See Notifying Party's reply to the Commission's RFI No 11.

reduction in the number of theatrical releases and in the overall box office revenues compared to the pre-pandemic years.[240]

(273) Therefore, the 2021 box office performance of the *Bond* franchise is not indicative of its overall relative position *vis-à-vis* other franchises or other new releases more generally. In this regard, the percentage of the overall box office revenues in major EU Member States that previous *Bond* movies account for from 2006 to 2015 reached approximately [10-20]% only on a few occasions and in a few countries, actually setting at below [0-5]% in numerous Member States.[241]

(274) Third, as already mentioned, the merged entity will not have the ability to decide unilaterally whether or not to license new *Bond* films for theatrical release. The *Bond* franchise is co-owned with another entity, Danjaq/Eon, that has broad approval rights on [*business secrets concerning strategic decisions*] concerning *Bond*, [*business secrets concerning strategic decisions*].[242] Danjaq/Eon also has financial interests on the performance of each film, such that the box office constitutes a very attractive source of revenues. Therefore, amendments to the current distribution strategy would have to take into account the need to reach an agreement with Danjaq/Eon. In this regard, the Commission notes that, according to public sources, Danjaq/Eon has a strong preference to continue the theatrical release of *Bond* films.[243]

(275) For the reasons set out above, the Commission concludes that the merged entity would not have the ability to successfully foreclose cinemas on the downstream market for the theatrical exhibition of films by ceasing to license new films of the *Bond* franchise for theatrical release.

(B.ii) Incentive to engage in input foreclosure

(276) The Commission notes that the conditions for an effective input foreclosure are cumulative. As the Commission concluded that the Parties would not have the ability to foreclose cinemas by ceasing to license MGM's film content, the merged entity's incentive to foreclose cinemas from access to MGM's content is not decisive.

(277) For the sake of completeness, the Commission notes that, while the Notifying Party submitted that [*business secrets concerning sales strategy*].[244]

(B.iii) Effects of a potential foreclosure on competition

(278) The Commission considers that the merged entity would not have the ability to foreclose cinemas by ceasing to license out new films of the *Bond* franchise for theatrical exhibition. Nevertheless, the Commission has considered the potential effects that such a distribution strategy would have. In any event, a hypothetical foreclosure strategy concerning new *Bond* films would not have overall a significant detrimental impact on competition on the market for the theatrical exhibition of films.

---

240 See https://www.statista.com/statistics/1238500/box-office-revenue-european-union/. See also Notifying Party's reply to the Commission's RFI No 11.

241 Notifying Party's reply to the Commission's RFI No 11, Annex 4.1.

242 Form CO, paragraph 244.

243 https://www hollywoodreporter.com/movies/movie-news/james-bond-will-stay-on-thebig-screen-inamazon-mgm-era-1234959461.

244 Notifying Party's reply to the Commission's RFI No 11.

(279) First, as mentioned in paragraph (261) above, a large majority of responding cinemas to the market investigation submitted that the Transaction would have a negative impact on their companies should the merged entity stop distributing new releases of the *Bond* franchise.[245] Without denying that the *Bond* franchise represents one of the highest-grossing film franchises that contributes to an appreciable share of cinemas' revenues, the Commission recalls that *Bond* films are released approximately only once every three to six years.[246] Therefore, cinemas do not rely on *Bond* as a source of regular yearly supply of good quality content.

(280) Second, the Commission notes that the majority of market participants indicated that the *Bond* franchise is particularly important in terms of their contribution to the attractiveness of the cinematic offer.[247] In this regard, however, bearing in mind the considerations about the 2021 figures explained in paragraph (272) above concerning *No Time to Die*'s share of the overall box office revenues, the Commission notes that in most Member States previous *Bond* movies have accounted for a portion of the box office revenues below 10%, and often below 5%.[248] Therefore, since the Commission has no reason to believe that the relative performance of the next *Bond* films will vary significantly, post-Transaction cinemas would still be able to obtain most of their revenues from other franchises should the merged entity cease to licence the next *Bond* films for theatrical exhibition. This conclusion is reinforced by the fact that the revenues MGM estimates to obtain from the next *Bond* movie are [*business secret*].[249]

(281) Therefore, the Commission concludes that should the merged entity cease to license the next *Bond* films for theatrical release, such decision would not have a foreclosing effect on cinemas.

5.6. Conglomerate assessment

5.6.1. Leveraging of Amazon's strengthened position in the market for the retail supply of AV services into the market for the provision of marketplace services as a result of the addition of MGM's AV content

(282) The Commission notes that there is no direct conglomerate relationship between the production and supply of AV content on the one hand and the provision of marketplace services on the other hand (*i.e.*, between MGM's products on the one hand and Amazon's products on the other hand).[250] However, Amazon offers Prime

245 See responses to Q2 - Questionnaire to cinemas, question 31.

246 See footnote 205 above.

247 See responses to Q1 - Questionnaire to AV content providers and market participants, replies to question 48 and 48.1.

248 For example, *Casino Royale* represented a percentage of the overall box office revenues [0-5]% in France, Italy, Poland and Spain; *Quantum of Solace* in Austria, France, Italy, Poland and Spain, and only [5-10]% in Germany and Croatia; *Skyfall* in Italy and Spain, and [5-10]% in most other countries examined.

249 Notifying Party's reply to the Commission's RFI No 11.

250 The Commission has previously defined a market for the provision of marketplace services in the context of an antitrust case, which preliminarily found Amazon had been dominant in such a market. See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, last accessed on 7 March 2022. The Autorità Garante della Concorrenza e del Mercato, the national competition authority of Italy, investigated partially similar concerns (with a focus on the Italian market) and similarly defined a market for the provision of marketplace services, in which Amazon was found to have had a dominant position. See https://www.agcm.it/media/comunicati-stampa/2021/12/A528-chiusura, last accessed on 7 March 2022. If the Transaction were to harm effective competition as a result of the conglomerate effects outlined in this section, it would be on the narrowest relevant market on which Amazon is dominant. Given the Transaction

Video, for which MGM's content is an input, as part of the existing Amazon Prime bundle. In addition to Prime Video, Amazon Prime includes services related to its marketplace, most notably free and/or faster shipping as well as other shopping benefits. As a result of this existing bundle, Amazon's offerings on the market for the retail supply of AV services and the market for the provision of marketplace services are complementary products. Consequently, the Transaction, which primarily focusses on the AV content value chain, could have an impact on the market for the provision of marketplace services via the Amazon Prime bundle.

(283) In the present section, the Commission examines whether the merged entity will have the ability and incentive to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content.[251] The Commission then assesses whether such a conduct would have an impact on effective competition in the markets for the provision of marketplace services.[252]

5.6.1.1. Notifying Party's views

(284) The Notifying Party submits that the Transaction does not give rise to any conglomerate concerns, in particular with regard to Amazon's offer of Prime Video and its retail sales in Europe.

(285) First, the Notifying Party considers that MGM does not have any content that is necessary for retail providers of AV content to compete effectively. As such, it is simply not plausible that the addition of MGM content to Prime Video (even if one assumes total foreclosure of MGM content to other retail providers) could harm competition in any relevant market, including in any retail markets.[253]

(286) Second, the Notifying Party submits that, [*business secrets concerning business strategy*], any increase in retail sales through the Amazon Stores due to MGM-related content would be marginal compared to Amazon's current retail sales, and in any case

---

does not raise any serious doubts with regard to any harm to effective competition on the market for the provision of marketplace services, there is no need to conclude on the exact market definition. The Commission therefore proceeds in this instance without concluding on the exact market definition of the market for the provision of marketplace services.

[251] As explained in Sections 4.5.1.2 and 4.5.2.2 above, the Commission has concluded that the distinction outlined in previous Commission decisions between the AV value chain and the theatrical value chain is still accurate. Therefore, given that Amazon Prime Video and hence the Amazon Prime bundle are part of the AV content value chain, this section focusses its assessment on the addition of MGM's position in the market for in the market for the production and supply of AV content. However, in keeping with the reasoning outlined in paragraphs (243)-(245) of Section 5.5.5, the Commission has, for completeness, also assessed this concern taking into account MGM's position in the production and licensing of distribution rights of films for theatrical exhibition (*e.g.*, assuming all MGM content would be released on Prime Video). For the avoidance of doubt, the conclusions remain the same regardless of including in the assessment MGM's position in the production and licensing of distribution rights of films for theatrical exhibition.

[252] For the avoidance of doubt, the Commission does not examine whether the merged entity will leverage Amazon's position in the market for the provision of marketplace services into either (i) the market for the retail supply of AV services, or (ii) the market for the production and supply of AV content via the Amazon Prime bundle. This is because the Transaction does not change Amazon's marketplace services offering, and therefore would not change Amazon's ability to leverage its position in the market for the provision of marketplace services into the market for the retail supply of AV services (and thereby into the market for the production and supply of AV content) via the Amazon Prime bundle.

[253] Form CO, paragraph 488.

not significant enough to harm competition in the highly dynamic retail sector.[254] Further, the Notifying Party considers that [*business secrets concerning business strategy*].[255]

(287) Lastly, the Notifying Party notes that any increase in retail sales attributable to the Transaction would reflect a benefit to consumers, in the form of increased quality of Prime Video and thereby the Amazon Prime bundle as a whole.[256]

5.6.1.2. Commission Assessment

(288) For the reasons set out below, and based on the results of the market investigation, the Commission considers, for the purposes of the present Decision, that the merged entity would not have the ability to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content, and that there would not likely be a significant detrimental effect on competition in the market for the provision of marketplace services.

(A) Ability to foreclose

(289) As noted above in paragraph (282), Amazon offers Prime Video, for which MGM's content is an input, as part of the existing Amazon Prime bundle. In addition to Prime Video, Amazon Prime includes services related to its marketplace and shipping services, most notably free and fast shipping as well as other shopping benefits.

(290) Amazon offers its Prime membership programme to customers in twelve EEA member states: Austria, Belgium, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain and Sweden.[257] The standard pricing of Amazon Prime membership varies across these countries (approximately EUR 3-10 for the monthly fee, and EUR 36-96 for the annual fee), as do the Prime benefits available. However, Prime video is included as part of the Amazon Prime bundle in all of these countries, and is not available via a separate standalone subscription.[258]

(291) Therefore, customers have no choice but to purchase the entire Amazon Prime bundle, even if a customer wants only a part of the bundle. However, [*business secrets concerning sales of various services*]. Further, Amazon estimates that the proportion of the total pool of Amazon Prime members for whom the Prime Video service has been [*business secrets]* in 2021 are as follows: Germany – […]%, France – […]%, Italy – […]%, and Spain – […]%.[259] Amazon was only able to provide data for these countries because (i) there is insufficient data for countries where Prime has only been available since 2020-2021, and (ii) data for countries where Prime is available only

---

254 Form CO, paragraph 490, 505, 516 and 517.

255 Form CO, paragraph 495.

256 Form CO, paragraph 489.

257 Form CO, paragraph 232. Customers in Austria, Belgium, Ireland, Luxembourg, and Portugal can only sign up for the Prime programme via the Amazon website in a neighbouring country. [*Business secrets concerning strategic plans*].

258 Only in the EEA countries where Amazon Prime is not available, can end customers have access to Prime Video via a separate, standalone subscription.

259 Form CO, paragraph 239. Amazon has developed a model that [*business secrets concerning internal processes and calculations*].

via the Amazon website in a neighbouring country is included in the data for said neighbouring country.

Table 8: Amazon Prime usage (specified EEA countries, October 2021)

Country[260]	**Usage of shipping by Prime Video active users**[261]	**Prime Video activity by shipping users**[262]
France	[...]	[...]
Germany[263]	[...]	[...]
Italy	[...]	[...]
Spain	[...]	[...]

Source: Form CO, Tables 6 and 7.

(292) The Amazon Prime bundle therefore provides an avenue through which the Transaction, which primarily focusses on the AV content value chain, could have an impact on the market for the provision of marketplace services. A third-party marketplace provider outlined this concerns during a pre-notification call with the Commission.[264] The steps by which this impact may occur is set out in the following paragraph.

(293) As a first step, the addition of MGM's content on Prime Video may increase the demand for Prime Video, by attracting significant numbers of new customers and binding significant numbers of existing customers to Prime. Second, the increased demand for Prime Video may in turn result in increased demand for Amazon's marketplace services, since Amazon sells them as part of a bundle and they are therefore complementary products. Third, the increased demand for Amazon's marketplace services may increase Amazon's market share and market power in this market. Fourth, the Commission has previously preliminarily found that Amazon held a dominant position in the market for the provision of marketplace services in France and Germany.[265] In addition, the Autorità Garante della Concorrenza e del Mercato, the national competition authority of Italy, found that Amazon held a dominant position in the same market in Italy.[266] Further, France, Germany and Italy together account for [*business secret*] of Amazon's total EEA-wide turnover.[267] Fifth, the Transaction may therefore allow Amazon to strengthen and solidify its potentially dominant position in the market for the provision of marketplace services, by buying an input into its retail supply of AV services (*i.e.*, MGM's content), which in turn may

260 Amazon has recently launched new Amazon Stores in the Netherlands (in 2020), in Poland, and in Sweden (both in 2021). Given that these stores are relatively new, Amazon did not provide data relating to these stores.

261 "Usage of shipping" refers to Prime members that shipped at least one unit that was Prime delivery.

262 Prime Video activity refers to Prime members that viewed more than zero seconds of AV content in a given month (excluding trailers and promotions of available content that are sometimes shown at the start of new titles).

263 The figures for Germany include figures for Austria, since customers in Austria are able to sign-up to Amazon Prime only through the Amazon website in Germany.

264 Agreed minutes of the call of 13 January 2022 with eBay.

265 See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, last accessed on 7 March 2022.

266 See https://www.agcm.it/media/comunicati-stampa/2021/12/A528-chiusura, last accessed on 7 March 2022.

267 Form CO, Section 4.

raise the barriers to entry into the market for the provision of marketplace services. Finally, raising barriers to entry and strengthening Amazon's dominant position in the market for the provision of marketplace services may decrease competition in the market (in the future), which could result in higher prices, and lower quality and innovation. The merged entity could in such a manner leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content.

(294) With respect to the steps above, and for the reasons set out below, the Commission considers that the merged entity would not have the ability to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content. This section proceeds by first presenting the evidence indicating that the merged entity would have the ability, before presenting the evidence suggesting the merged entity would not have the ability and the reasons why, on balance, the Commission considers that the overall evidence suggests that the merged entity would not have the ability to do so.

(295) First, Amazon Prime is currently only offered in 12 EEA countries, whilst in all 18 other EEA countries Prime Video is available on a standalone basis either through Apple iOS or through Amazon's site. [*Business secrets concerning strategic plans*]. Therefore, given that the Commission has concluded that the relevant markets are national (see paragraphs (78) and (293)), the concern outlined above, if any, would be limited to the countries where Amazon offers its Amazon Prime bundle.

(296) Second, as outlined in the Non-Horizontal Merger Guidelines (see paragraph (129)), in order to be able to foreclose competitors, the merged entity must have a significant degree of market power. The Commission however considers that this is unlikely to be the case, for the following reasons.

(297) In the market for retail supply of AV services, Amazon has a limited degree of market power. As outlined in Section 5.4.1, Amazon does not have a market share above 30% in the EEA or in any of the EEA member states, except for in the hypothetical market comprising only of SVOD platforms in Austria and Germany (where Amazon's shares are below [30-40]%).[268] In addition, as outlined in paragraphs(219)-(222) and (225) in the Commission's assessment of vertical effects, the market for the retail supply of AV services is characterized by a high-level of competition with many strong(er) competitors. In the market for the production and supply of AV content, MGM has a low market share. As outlined in Section 5.4.2, MGM's share is below 20% under any plausible market definition (and well below 20% in most relevant markets). In addition, as outlined in paragraphs (194)-(195) in the Commission's assessment of vertical effects, the relevant markets where MGM is present are characterized by a high-level of competition with many strong(er) competitors.

(298) In the market for the provision of marketplace services, Amazon may have a significant market position (see paragraph (293)). However, for the assessment of the concern outlined in paragraph (293), primarily Amazon's position in the market for

[268] Amazon's share in the hypothetical market comprising only of SVOD platforms is also above 30% in Croatia. However, Amazon does not offer Prime in Croatia, and therefore the concern outlined in paragraph 2(293) is not relevant in Croatia.

retail supply of AV services and MGM's market position in the market for the production and supply of AV content are of greater importance, since the concern relates to a strengthening of Amazon's position in the AV retail market, by the addition of MGM's content, in order to then from these markets leverage its market power.

(299) Given the limited market power in the market for the retail supply of AV services (*i.e.*, the market from which Amazon must leverage its market power), the merged entity is unlikely to be able to leverage its market position post-Transaction (*i.e.*, in the absence of the second step outlined in paragraph (293)). Further, MGM's low market share indicates its limited importance for the retail supply of AV services, and therefore the addition of MGM content to Prime Video is unlikely to give rise to market power for Amazon on the market for AV retail supply. This again indicates that the merged entity is unlikely to be able to leverage its market position post-Transaction (*i.e.*, in the absence of the first step outlined in paragraph (293)).

(300) Third, as outlined in the Non-Horizontal Merger Guidelines (see paragraph (129)), in order to foreclose competitors, at least one of the merging parties' products must be viewed by many customers as particularly important and there must be few relevant alternatives for that product. However, the evidence indicates this is not the case for MGM's content.

(301) Notably, similar to the second point above, it is unlikely that MGM's content is an important input or necessary to be competitive for retail suppliers of AV services. Multiple SVOD platforms exist that would still be able to compete effectively with Prime Video even if all MGM content were exclusively available on Prime Video. Indeed, despite some respondents to the Commission's market investigation suggesting otherwise (for a limited amount of MGM's content),[269] MGM's content overall is not considered necessary to be competitive, but rather of average importance for the competitiveness of the retail supply of AV services. Moreover, library content is largely fungible, and a vast array of such content is widely available.[270] Therefore, it is unlikely that the addition of MGM's content on Prime Video would significantly increase the demand for Prime Video (by attracting significant numbers of new customers and binding significant numbers of existing customers to Prime, *i.e.*, in the absence of the first step outlined in paragraph (293)).

(302) Fourth, in relation to the third point above, the market for the retail supply of AV services is characterised by a high-level of competition with strong(er) competitors to Amazon and an abundance of content for expansion and entry into the market (see paragraphs (219)-(222) and (225) above). Further, the Notifying Party notes that "*consumers have demonstrated a desire to expand their choice of content across competing providers of AV content and increasingly multi-home across services*".[271] If consumers multi-home to a significant extent, this would imply MGM's market power, as well as the significance of its content, may be lower than otherwise. Therefore, again, it is unlikely that the addition of MGM's content on Prime Video would significantly increase the demand for Prime Video (by attracting significant

269 For further detail, see paragraph (196) above.

270 For further detail, please refer to paragraph (194) above.

271 Form CO, paragraph 627.

numbers of new customers and binding significant numbers of existing customers to Prime, *i.e.*, in the absence of the first step outlined in paragraph (293)).

(303) Fifth, in relation to points three and four above, as described in more detail in paragraph (315) below, evidence from Amazon's valuation of the Transaction suggests that the addition of MGM's content to Prime Video [*business secrets concerning the internal processes and calculations*]. Amazon's estimates indicate that, [*business secrets concerning the internal processes and calculations*]. Therefore, it is unlikely that the addition of MGM's content on Prime Video would significantly increase the demand for Prime Video (by attracting significant numbers of new customers and binding significant numbers of existing customers to Prime, *i.e.*, in the absence of the first step outlined in paragraph (293)). Similarly, as described in more details in paragraph (316) below, [*business secrets concerning the internal processes and calculations*].

(304) Finally, it is unlikely that the addition of MGM's AV content would raise barriers to entry and exit in the market for the provision of marketplace services. Amazon's closest and strongest competitors in this market do not offer retail supply of AV services. Therefore, it is unlikely that the availability of AV content for bundling with the provision of marketplace services is necessary to compete in the market for marketplace services. Indeed, despite raising the concerns outlined above in this section, a third-party marketplace provider acknowledges that "*the Transaction is unlikely to fundamentally change the competitive landscape in the market for marketplace services*".[272] Further, apart from the sunk cost of the Prime membership, competing online marketplaces are typically accessible at no or low cost for customers. Therefore, it is not necessarily the case that, even if the Transaction were to increase demand for Amazon's marketplace services, barriers to entry and exit would increase as well. In addition, even if there would be increased demand for Amazon's marketplace services, such demand could originate from new customers or existing customers spending more on marketplace services (as opposed to existing customers shifting their spending on other marketplaces to Amazon). To such extend, the Transaction would be expanding the market for the provision of marketplace services instead of raising barriers to entry and exit.

(305) Overall, the evidence above suggests that the merged entity would not have the ability to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content. In particular, in this instance, the evidence suggests that MGM's content is not important or significant enough to raise barriers to entry in the market for the provision of marketplace services.

(306) Nonetheless, the Commission notes that there are other indications that could be considered pointing towards an ability of the merged entity to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content. However, as further explained in the following paragraphs, the Commission considers that, on balance, the overall evidence suggests that the merged entity would not have the ability to do so.

[272] Agreed minutes of the call of 13 January 2022 with eBay, paragraph 13.

(307) First, as set out in the Non-Horizontal Merger Guidelines (see paragraph (129)), for leveraging to be a potential concern, there must be a large common pool of customers. Table 8 above shows that the majority of active Prime Video users [*business secrets concerning sales of various services*]. Therefore, given Amazon's significant market share in the market for the provision of marketplace services (see paragraph (293)] above) and its relatively strong position in certain markets in terms of SVOD subscriptions (see Section 5.4.1), it is likely that there is a large common pool of customers that use both services (relative to the total pool of customers that are using either marketplace services or SVOD platforms). However, even though this is a prerequisite for conglomerate concerns, the fact that there is a large common pool of customers is no evidence of an actual ability to successfully leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content. In particular with respect to this case, as outlined in paragraphs (301)-(303) above, it is unlikely that (i) the addition of MGM's content on Prime Video would significantly increase the demand for Prime Video, and (ii) the resulting increased demand for Prime Video would in turn result in significantly increased demand for Amazon's marketplace services, even with the existence of a large common pool of customers.

(308) Second, evidence from Amazon itself supports the link by which the increased demand for Prime Video may result in increased demand for Amazon's marketplace services. Amazon states that "*Amazon hopes that its investment in MGM will lead to better content that will enhance the quality of Prime Video's customer proposition over time, which in turn* [*considerations regarding Transaction rationale*].[273] This is reflected in Amazon's internal valuation documents, which include in their Transaction valuation calculations the value of [*considerations regarding Transaction rationale*].[274] Further, Amazon has been pursuing this bundling strategy since at least 2016.[275] Indeed, a third-party marketplace provider considers that "*Prime users are more likely to purchase on Amazon and they spend more on Amazon than non-Prime buyers. This has been confirmed by the Italian decision (A528, 9 December 2021) and various public studies. These data show that once consumers subscribe to Prime, they tend to to [sic] purchase from Amazon and make less diversified choices*".[276] And with regard to the Transaction specifically, the same third-party marketplace provider notes that "*the Transaction would have the aim of driving additional Amazon Prime subscriptions, as the Amazon Prime membership is made more attractive by means of the addition of MGM's content to the Amazon Prime Video catalogue*".[277] However, as outlined in paragraphs (301)-(303) above, it is unlikely that (i) the addition of MGM's content on Prime Video would significantly increase the demand for Prime

273 Form CO, paragraph 493.

274 Form CO, Annexes 36-40.

275 As Jeff Bezos, Amazon's CEO, has put it: "*we get to monetize [our subscription video] in a very unusual way. When we win a Golden Globe, it helps us sell more shoes. And it does that in a very direct way. Because if you look at Prime members, they buy more on Amazon than non-Prime members, and one of the reasons they do that is once they pay their annual fee, they're looking around to see, 'How can I get more value out of the program?' And so they look across more categories — they shop more. A lot of their behaviours change in ways that are very attractive to us as a business. And the customers utilize more of our services.*", See https://www.businessinsider.com/amazon-ceo-jeff-bezos-said-something-about-prime-video-that-should-scare-netflix-2016-6?r=US&IR=T, last accessed on 28 February 2022.

276 Agreed minutes of the call of 13 January 2022 with eBay, paragraph 11.

277 Agreed minutes of the call of 13 January 2022 with eBay, paragraph 12.

Video, and (ii) the resulting increased demand for Prime Video would in turn result in significantly increased demand for Amazon's marketplace services, even with the existence of a strong link between the demand for Prime Video and the demand for Amazon's marketplace services.

(309) Third, evidence from Amazon indicates the value of a Prime subscriber may be [*business secrets referencing Amazon's internal strategy documents*], and that gaining a Prime customer (through Prime Video) may lead to [*business secrets referencing Amazon's internal strategy documents*] for Amazon. In contexts unrelated to the Transaction (and prior to the COVID-19 pandemic), Amazon had developed estimates for [*business secrets referencing Amazon's internal strategy documents*]; Amazon also has estimated the profits that it could earn from […].[278] Table 9 provides Amazon's estimates for the profits it earns from […] on Prime Video. The differences across countries are driven by [*business secrets referencing Amazon's internal strategy documents*].[279] However, as outlined in paragraph (303) above, it is unlikely that any increased demand for Prime Video resulting from the Transaction would in turn result in significantly increased demand for Amazon's marketplace services, even with the value of a Prime subscriber being [*business secrets referencing Amazon's internal strategy documents*].

Table 9: Amazon profit per […] (specified countries, USD, 2019)

Country[280]	**[…]**	**[…]**	**[…]**
[…]	[…]	[…]	[…]
[…][281]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…][282]	[…]	[…]	[…]
[…]	[…]	[…]	[…]

Source: Form CO, Annex 37.

(310) Finally, a third-party marketplace provider has stated that "*the Transaction could increase the aforementioned lock-in effect*" whereby consumers are driven into the Amazon ecosystem and are then incentivized to purchase more at Amazon (and less with competitors).[283] Further this market participant submits that "*Amazon Prime is essentially a loyalty scheme that poses challenges to competition because of its lock-in effects on consumers*", and that in this regard "*Amazon has not only established a*

278 Form CO, paragraph 494.

279 The Parties' response to RFI 10, paragraph 14.

280 Amazon has recently launched new Amazon Stores in the Netherlands (in 2020), in Poland, and in Sweden (both in 2021). Given that these stores are relatively new, Amazon did not provide data relating to these stores.

281 The figures for Germany include figures for Austria, since customers in Austria are able to sign-up to Amazon Prime only through the Amazon website in Germany.

282 The figures for the U.K. include figures for Ireland, since customers in Ireland are able to sign-up to Amazon Prime only through the Amazon website in the U.K.

283 Agreed minutes of the call of 13 January 2022 with eBay, paragraph 12.

connection between e-commerce and video streaming services but also offers other services within its Prime bundle at a below-cost price, such as access to music and audiobooks. Amazon is an entity that behaves differently from other players because of its conglomerate structure combined with its market power across commerce and fulfilment".[284] And with respect to the Transaction specifically, this market participant notes that "*content is one driver for customer engagement together with free and fast delivery (i.e. FBA), and contributes to increase the propensity of end-customers to remain within the Amazon ecosystem with regard to all services offered, including e-commerce*".[285] Essentially, this third-party marketplace provider considers that once Amazon has raised barriers to entry, it would be difficult for competitors to win back lost customers, because Amazon is able to incentivize its customers to stay within its ecosystem. The end effect of this would be that "*the dominant position of Amazon (as determined by the recent decicion [sic] A528 of the Italian competition authority) in the market for marketplace services would be further strenghtened [sic] by driving consumers to Amazon Prime via Amazon Prime Video.*"[286] However, as outlined in paragraph (304)above, it is unlikely that the addition of MGM's AV content as a result of this specific Transaction would constitute a raising of barriers to entry and exit in the market for the provision of marketplace services.

(311) Overall, whilst the evidence in paragraphs (295)-(304) above suggests that the merged entity may theoretically have the ability to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content, the Commission considers that in light of the evidence in paragraphs (307)(310), the merged entity would ultimately not have the ability to do so. In particular, in this instance, the evidence suggests that MGM's content is not important or significant enough to raise barriers to entry in the market for the provision of marketplace services.

(312) In light of the above, taking into consideration the overall market results, for the purposes of the present Decision, the Commission considers that the merged entity would not have the ability to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content.

(B) Incentive to foreclose

(313) Since the Commission has concluded above in Section 5.6.1.2.(A) that the merged entity would not have the ability to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content, the question whether the merged entity would have the incentive to engage in such leveraging can be left open for the purposes of the present Decision.

(C) Overall likely impact

(314) For the reasons set out below, the Commission considers that, even if the merged entity would have the ability and incentive to leverage Amazon's strengthened position in the market for the retail supply of AV content into the market for the

284 Agreed minutes of the call of 13 January 2022 with eBay, paragraphs 8 and 12.

285 Agreed minutes of the call of 13 January 2022 with eBay, paragraph 12.

286 Agreed minutes of the call of 13 January 2022 with eBay, paragraph 12.

provision of marketplace services as a result of the addition of MGM's content, there would not likely be a significant detrimental effect on competition in the market for the provision of marketplace services.

(315) First, as set out in the Non-Horizontal Merger Guidelines (see paragraph (131)), for a Transaction to significantly impede effective competition, a sufficiently large fraction of market output must be affected by foreclosure. However, the evidence indicates that an effect (if any) would only relate to a small fraction of the market for the provision of marketplace services. Evidence from Amazon's [*internal strategy*] suggests that [*business secrets referencing Amazon's internal strategy documents*], even if all of MGM's content were exclusively available on Prime Video. As part of [*Amazon's internal strategy*], Amazon estimated [*business secrets referencing Amazon's internal strategy documents*]. This analysis mirrors analyses and assumptions Amazon makes during [*business secrets referencing Amazon's internal strategy documents*], where Amazon had developed estimates for [*business secrets referencing Amazon's internal strategy documents*]. Table [10] below provides Amazon's estimated potential impact of the Transaction […] in the period 2022-2025 for the specified EEA countries (where Prime membership is available). Amazon's estimates indicate that, over the course of the next three years, the Transaction will [*business secrets referencing Amazon's internal strategy documents*]. Therefore, again, it is unlikely that the addition of MGM's content on Prime Video would significantly increase the demand for Prime Video (by attracting significant numbers of new customers and binding significant numbers of existing customers to Prime).

Table 10: Amazon's estimated potential impact of the Transaction on […] (specified countries, 2022-2025)

Country[287]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…][288]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]

Source: The Parties response to RFI 10, question 5; and Form CO, Annex 32.

(316) Second, evidence from Amazon's [*internal strategy*] also suggests that [*business secrets referencing Amazon's internal strategy documents*], even if all of MGM's content were exclusively available on Prime Video. As part of [*Amazon's internal strategy*], Amazon estimated [*business secrets referencing Amazon's internal strategy documents*]. This analysis also mirrors analyses and assumptions Amazon makes during [*business secrets referencing Amazon's internal strategy documents*]. Table [11] below provides Amazon's estimated potential impact of the Transaction on […] in the period 2022-2025 for the specified EEA countries (where Prime membership is

287 Amazon has recently launched new Amazon Stores in the Netherlands (in 2020), in Poland, and in Sweden (both in 2021). Given that these stores are relatively new, Amazon did not provide data relating to these stores.

288 The figures for Germany include figures for Austria, since customers in Austria are able to sign-up to Amazon Prime only through the Amazon website in Germany.

available). Amazon's estimates indicate that [*business secrets referencing Amazon's internal strategy documents*].

Table 11: Amazon's estimated potential impact of the Transaction on […] (specified countries, 2022-2025)

Country[289]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…][290]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]

Source: Form CO, Table 20.

(317) Whilst an increase of Amazon's retail sales by approximately […]% may still be significant in absolute terms given the level of Amazon's retail sales, the additional revenues would by definition account for less than […]% of the market in which Amazon is present at most (i.e. in this case the market for the provision of marketplace services). This share is unlikely to be sufficiently large enough for the Transaction to affect prices and choices on the market for the provision of marketplace services. Indeed, despite raising the concerns outlined above in this section, a third-party marketplace provider acknowledges that "*the Transaction is unlikely to fundamentally change the competitive landscape in the market for marketplace services*".[291]

(318) Third, competitors in the market for the provision of marketplace services will remain in the market with the same offering compared to pre-Transaction. The Transaction and addition of MGM content to Prime is unlikely to hinder competitors' offerings on the market, especially since no other competitors bundle AV content with their products. As consumers still have all the choices they had pre-Transaction, it is unlikely that any harm to competition would occur.

(319) Fourth, competitors would have the possibility of employing counter-strategies. MGM's content accounts for only a small part of the market for the production and supply of AV content (see paragraph (191) above), and is not an important input into the market for the retail supply of AV services (see paragraph (195) above). Therefore, competitors in the market for the provision of marketplace services would still be able to create their own bundle of marketplace services and AV content, should they choose to pursue such a strategy.

(320) In light of the above, taking into consideration the overall market results, for the purposes of the present Decision, the Commission considers that, even if the merged entity would have the ability and incentive to leverage Amazon's strengthened

---

289 Amazon has recently launched new Amazon Stores in the Netherlands (in 2020), in Poland, and in Sweden (both in 2021). Given that these stores are relatively new, Amazon did not provide data relating to these stores.

290 The figures for Germany include figures for Austria, since customers in Austria are able to sign-up to Amazon Prime only through the Amazon website in Germany.

291 Agreed minutes of the call of 13 January 2022 with eBay, paragraph 13.

position in the market for the retail supply of AV content into the market for the provision of marketplace services as a result of the addition of MGM's content, there would not likely be a significant detrimental effect on competition in the market for the provision of marketplace services.

5.6.1.3. Conclusion

(321) In view of the above considerations and in light of the results of the market investigation and the evidence and information available to it, for the purposes of the present Decision, the Commission concludes the Transaction does not raise serious doubts with respect to the compatibility with the internal market and with the EEA agreement as a result of the conglomerate effects of the Transaction on the market for the provision of marketplace services.

6. CONCLUSION

(322) 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