EUROPEAN COMMISSION
DG Competition

Case C.1887 — MEDIASET

(Only the English text is authentic)

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Rejection of a request to act
Date: 19.01.2022

EUROPEAN COMMISSION

Brussels, 19.1.2022
C(2022) 307 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 Where possible the information omitted has been replaced by ranges of figures or a general description.

MFE – MEDIAFOREUROPE N.V.
Viale Europa 46
20093 Cologno Monzese (MI)
Italy

Subject: **Case C.1887 — Mediaset — Article 265 Invitation to Act**
Commission decision rejecting its jurisdiction within the meaning of Articles 1 and 4 of Council Regulation (EC) No 139/2004[1]

Dear Sir or Madam,

(1) On 19 November 2021, the European Commission ("Commission") received an invitation to act ("Invitation to Act") from MFE – MEDIAFOREUROPE N.V., formerly Mediaset N.V., ("Mediaset", Netherlands), pursuant to Article 265 TFEU, requesting the Commission to decide on whether it has jurisdiction to review the proposed concentration concerning Télévision Française 1 S.A. ("TF1", France) and Métropole Télévision S.A. ("M6", France) ("Transaction").

1. THE PARTIES AND THE TRANSACTION

(2) TF1 is solely controlled by Bouygues S.A. ("Bouygues"), which holds a participation of 43.7% in TF1. Bouygues is active in the construction, telecommunications and media sectors. TF1 has, as its main activity, directly or

[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.

European Commission, DG COMP MERGER REGISTRY, 1049 Brussels, BELGIUM
Europese Commissie, DG COMP MERGER REGISTRY, 1049 Brussel, Belgium

Tel: + 32 229-91111. Fax No: + 32 229-64301. E-mail: COMP-MERGER-REGISTRY@ec.europa.eu

through its subsidiaries, the wholesale supply of television channels. TF1 also operates other activities related to its main activity as a television broadcaster, including the production of audio-visual and cinematographic content, the acquisition of audio-visual rights, the marketing of advertising space, the editing and distribution of DVDs and music CDs, the development of antenna derived products and the development of digital and interactive services.

(3) M6 is solely controlled by RTL Group S.A. ("RTL"), which holds a participation of 48.26% in M6 and which is, in turn, solely controlled by Bertelsmann SE & Co. KGaA ("Bertelsmann"), which holds a participation of 76.28% in RTL. M6 has, as its main activity, directly or through its subsidiaries, the wholesale supply of television channels. In addition, M6 operates a series of activities linked to its main activity as a television broadcaster including the production of audio-visual and cinematographic content, the acquisition of audio-visual rights, the marketing of advertising space, the editing and distribution of DVDs and music CDs, the development of antenna derived products and the development of digital services. Finally, M6 controls the radio group RTL France, which has several licences to broadcast radio programmes in France and develops various activities linked to the operation of these radio services.

(4) [Description of the Transaction]. After the Transaction, Bouygues will hold approximately 30 % of the capital of the Merged Entity, while Bertelsmann, via RTL, will hold approximately 16 % of the capital of the Merged Entity.

2. FACTS AND PROCEDURE

(5) On 17 May 2021, TF1, M6, Bouygues and RTL announced having signed an agreement to enter into exclusive negotiations to merge the activities of TF1 and M6. On 17 May 2021, Bouygues and RTL signed two Memoranda of Understanding. These Memoranda of Understanding were followed on 8 July 2021 by the signing of a Framework Agreement between Bouygues and RTL and a Business Combination Agreement between TF1 and M6 ("Agreements"). Bouygues and RTL also agreed on a draft shareholders' agreement to be entered into when the Transaction closes ("SHA").

(6) On 29 October 2021, the French Competition Authority ("ADLC") sent a questionnaire to several market participants, including Mediaset, seeking their views on the Transaction. In the introduction to the questionnaire, the ADLC refers to the fact that "[t]*he questionnaire concerns the proposed merger between TF1 and* [M6]. *The* [Merged Entity] *is solely controlled by* [Bouygues]". In view of this, the introduction of the market test states that "[t]*he* [Transaction] *is subject to the approval of the* [ADLC], *which is, in France, the independent administrative authority responsible for competition regulation*".

(7) On 19 November 2021, Mediaset sent the Invitation to Act to the Commission. In particular, Mediaset submits that, contrary to the ADLC's conclusion, the Merged Entity will be jointly controlled by Bouygues and Bertelsmann and will therefore have an EU dimension.

3. EU DIMENSION

3.1. The legal background

(8) Within the meaning of Article 4(1) of the Merger Regulation, the Commission has exclusive jurisdiction to assess concentrations with a Union dimension. Article 1 of the Merger Regulation sets two alternative sets of thresholds for determining whether a concentration has a Union dimension.

(9) Within the meaning of Article 1(2) of the Merger Regulation, a concentration has a Union dimension where (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (ii) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its total turnover in the Union within a single Member State.

(10) A concentration which does not meet the thresholds laid down in Article 1(2) of the Merger Regulation shall have a Union dimension within the meaning of Article 1(3) where: (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (ii) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (iii) in each of at least three Member States included for the purpose of point (ii), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (iv) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

(11) For the purpose of determining jurisdiction, the undertakings concerned are those participating in a concentration, i.e. a merger or an acquisition of control as foreseen in Article 3(1) of the Merger Regulation.[2]

(12) In the context of the acquisition of sole control, the undertakings concerned are both the acquiring undertaking and the target undertaking.[3]

(13) In the context of the acquisition of joint control over a newly created joint venture where one undertaking contributes a pre-existing subsidiary or a business over which it previously exercised sole control, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture. In this case, the turnover of the contributed subsidiary or business forms part of the turnover of the initial parent company.[4]

3.2. Turnover

(14) In 2020, Bouygues had a worldwide turnover of EUR 34 700 million, a turnover of EUR [turnover figure] million in the Union and a turnover of EUR [turnover figure] million in France. Bouygues thus achieves more than two-thirds of its total turnover in the Union in France.

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2 Consolidated Notice on the Commission's jurisdiction under the Merger Regulation, OJ C 95, 16.4.2008, page 1, paragraph 129 ("Consolidated Jurisdictional Notice").

3 Consolidated Jurisdictional Notice, paragraph 134.

4 Consolidated Jurisdictional Notice, paragraph 139.

(15) In 2020, Bertelsmann achieved a worldwide turnover of EUR 17 300 million, a turnover of EUR [turnover figure] million in the Union and EUR [turnover figure] million in France. Thus, Bertelsmann does not achieve more than two-thirds of its total turnover in the Union in France.

(16) In 2020, M6 achieved a worldwide turnover of EUR 1 274 million, a turnover of EUR [turnover figure] million in the Union and a turnover of EUR [turnover figure] million in France. M6 thus achieves more than two-thirds of its total turnover in the Union in France.

(17) The Commission notes that irrespective of whether the turnovers of (i) Bouygues and M6; or, (ii) Bouygues and Bertelsmann are taken into account, the thresholds laid down in Article 1(2)(a) and (b) are exceeded. However, by taking into account only Bouygues's and M6's turnover, the Transaction would not have a Union dimension, since Bouygues and M6 achieve more than two-thirds of their turnover in the Union in France. Taking into account the turnover of Bouygues and Bertelsmann, the Transaction would have a Union dimension, since Bertelsmann does not achieve more than two-thirds of its turnover in the Union in France.

(18) It is therefore necessary to determine which undertakings are concerned by the Transaction.

3.3. The undertakings concerned by the transaction

(19) The ADLC and Bouygues consider that the Merged Entity will be solely controlled by Bouygues.[5] In this case, the undertakings concerned would be Bouygues and M6 and the concentration would not have a Union dimension.

(20) On the contrary, Mediaset argues that the Merged Entity will be jointly controlled by Bouygues and Bertelsmann.[6] In that case, the undertakings concerned would be Bouygues and Bertelsmann[7] and the concentration would have a Union dimension.

(21) In order to determine the scope of the undertakings concerned by the Transaction, it is first necessary to determine the nature of the control which will be exercised over the Merged Entity.

3.3.1. The nature of control over the Merged Entity

3.3.1.1. Introduction on the governance structure of the Merged Entity

(22) After the Transaction, Bouygues will hold approximately 30 % of the capital of the Merged Entity, while Bertelsmann, via RTL, will hold approximately 16 % of the capital of the Merged Entity.

(23) With regards to the general meeting of the Merged Entity ("General Meeting"), Article 2.5 of the SHA provides that Bouygues and Bertelsmann shall, prior to any General Meeting, agree on a common position on all items on the agenda. In the event of disagreement, Bertelsmann will, in principle, have to vote following the direction of Bouygues.

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5 See the analysis by the ADLC of the applicability of the Merger Regulation to the Transaction of 3 December 2021, p. 7 and Bouygues's Observations, Annex 1, page 7.

6 Invitation to Act, page 2-5.

7 Including M6.

(24) The board of directors of the Merged Entity ("Board of Directors") will be composed of 12 members. Bouygues will have the right to appoint 4 directors, including the Chief Executive Officer and Chairman of the Board of Directors ("CEO"),[8] and to propose 2 independent directors. Bertelsmann will have the right to appoint 2 directors, including the Vice-Chairman of the Board of Directors and to propose [number of independent directors proposed by Bertelsmann]. In accordance with Article 2.1.4 of the SHA, decisions by the Board of Directors are adopted by a majority of the votes casted. In the event of parity, the CEO shall have a casting vote. Article 2.1.2 of the SHA provides that Bouygues and Bertelsmann will have to agree on a common position on all items on the agenda of the Board of Directors. In the event of disagreement, Bertelsmann will, in principle, have to vote following the direction of Bouygues.

3.3.1.2. Mediaset's arguments

(25) Mediaset considers that the Merged Entity will be jointly controlled by Bouygues and Bertelsmann for the following reasons.

(26) First, Mediaset submits that the structure of the Transaction leads to the conclusion that Bouygues and Bertelsmann will have joint control over the Merged Entity. In particular, according to Mediaset, Bouygues will be unable to solely control the Merged Entity as it will only control 30% of the share capital of the Merged Entity. Mediaset points out that, after the conclusion of the Transaction, Bertelsmann (through RTL) will hold 16 % of the capital of the Merged Entity. Bertelsmann will therefore be the second largest shareholder of the Merged Entity.

(27) Second, Mediaset submits that Bertelsmann will be a key and strategic shareholder of the Merged Entity. Mediaset considers that it is apparent, in particular, from an interview with Thomas Rabe, President and Director-General ("CEO") of Bertelsmann and Olivier Roussat, Director-General ("DG") of Bouygues, that Bouygues and Bertelsmann consider themselves to be long-term partners, with a shared view of the markets.[9] This was reflected in a presentation to investors in which TF1 and M6 claimed that RTL will remain a long-term strategic shareholder.[10] According to Mediaset, this is further evidenced by the implementation of a concerted action within the meaning of Article L.233-10 of the French Commercial Code.[11] The existence of such a concerted action is, moreover, an indication used by the ADLC in assessing the nature of the control exercised by one or more undertakings over another undertaking.[12]

(28) Third, Mediaset considers that Bertelsmann will be significantly represented in the governance bodies of the Merged Entity.[13] Mediaset notes that the first CEO of the Merged Entity would be Mr Nicolas de Tavernost, the current president of M6. Mediaset also notes that the number of directors granted to Bouygues and Bertelsmann individually (according to Mediaset, four and two directors

8 The first CEO of the Merged Entity will be Nicolas de Tavernost, the current President of M6.
9 Invitation to Act, page 3.
10 Invitation to Act, page 3.
11 Invitation to Act, page 3.
12 Invitation to Act, page 3.
13 Invitation to Act, page 3.

respectively) does not allow Bouygues or Bertelsmann to act individually, as the Board of Directors will be composed of 12 directors.[14]

(29) Finally, Mediaset claims that Bouygues and Bertelsmann have agreed on a common strategy, as substantiated in the press release and investor presentations.[15]

3.3.1.3. The arguments of the ADLC and Bouygues

(30) The ADLC and Bouygues consider that the Transaction is structured in such a way as to ensure that Bouygues has sole control over the Merged Entity.[16]

(31) With regard to the General Meeting, Bouygues stressed that, pursuant to Article 2.5 of the SHA, Bouygues and Bertelsmann will have to consult each other before any General Meeting in order to try to define a common position on each item on the agenda. In the event of a disagreement between Bouygues and Bertelsmann, the position proposed by Bouygues will prevail and Bertelsmann will be obliged to vote in favour of the decisions sought by Bouygues.[17] An analysis of the historical participation rates in the General Meetings of TF1 and M6 would lead to the conclusion that the combined voting rights of Bouygues and Bertelsmann will give both undertakings a *de facto* majority at the General Meetings.

(32) As regards the Board of Directors, Bouygues notes that Article 2.1.1 of the SHA provides that the Board of Directors of the Merged Entity will be composed of 12 members, half of which will be appointed by Bouygues, including its chairman with a casting vote.[18]

(33) Similarly to the preparation of the General Meetings, Bouygues states that the SHA mandates for a concertation between Bouygues and Bertelsmann prior to any meeting of the Board of Directors.[19] In the event of disagreement between Bouygues and Bertelsmann, the position proposed by Bouygues will prevail and Bertelsmann must align its vote with Bouygues' vote.[20] Bertelsmann may only deviate from Bouygues' position in exceptional circumstances. In particular, Article 2.1.2 of the SHA provides that Bertelsmann will not be required to follow Bouygues's position if Bertelsmann or one of its representatives on the Board of Directors considers that the decision would be illegal or inconsistent with the corporate interest of the Merged Entity.[21] Moreover, Bouygues submits that Article 2.1.4 contains a list of matters over which Bertelsmann will not be required to align its vote with the position of Bouygues, but this should concern only exceptional decisions likely to affect the value of the Merged Entity and designed to protect the interests of a minority shareholder.[22]

(34) Finally, Bouygues states that it will solely control all the strategic decisions of the Merged Entity, including the business plan and the budget, the investments and the

14 Invitation to Act, pages 3-4.

15 Invitation to Act, page 4.

16 See the analysis of the applicability of the Merger Regulation to the ADLC Transaction of 3 December 2021, p. 7 and Bouygues's response to the Commission's request for observations ("Bouygues's Observations"), Annex 1, page 4.

17 Bouygues's Observations, Annex 1, page 3.

18 Bouygues's Observations, Annex 1, page 6.

19 Bouygues's Observations, Annex 1, page 7.

20 Bouygues's Observations, Annex 1, page 7.

21 Bouygues's Observations, Annex 1, page 4.

22 Bouygues's Observations, Annex 1, pages 7-8.

appointment of the managers. In that regard, Bouygues points out that the facts relied on by Mediaset in order to conclude that there was a common strategy between Bouygues and Bertelsmann are based on press releases which do not contain the entire content of the Agreements and the SHA.[23]

3.3.1.4. Commission's assessment

(A) The legal background

(35) The Consolidated Jurisdictional Notice establishes that joint control exists where two or more undertakings or persons have the possibility to exercise decisive influence over another undertaking. By decisive influence, the Commission usually means the power to block decisions that determine the strategic commercial behaviour of an undertaking. Undertakings which acquire joint control of another undertaking must therefore reach a common understanding in determining the commercial policy of the joint venture and are required to cooperate.[24]

(36) The Commission uses several criteria to determine the existence of joint control.

(37) While there may be joint control where two undertakings have equal voting or appointment rights in decision-making bodies, the Commission does not consider this a necessary condition. Therefore, there may be joint control even where there is no equality between the two parent companies in votes or in representation in decision-making bodies. This is particularly the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture.[25] Veto rights that give rise to joint control usually concern decisions on issues such as the budget, the business plan, major investments or the appointment of senior management.

(38) Furthermore, the Commission considers that the joint exercise of voting rights may give rise to joint control. Thus, even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control.[26] This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. Such concertation may result from a legally binding agreement or be demonstrated on the basis of factual circumstances, in particular when a strong common interest exists between the minority shareholders.[27]

(39) Finally, the Commission takes into account other factors, including the existence of a casting vote.[28] For joint control to exist, there should not be a casting vote for one parent company only as this would lead to sole control of the company enjoying the casting vote.[29] However, there may be joint control if, in practice, the relevance and effectiveness of that casting vote are limited.[30]

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23 Bouygues's Observations, Annex 1, page 9.
24 Consolidated Jurisdictional Notice, paragraph 62.
25 Consolidated Jurisdictional Notice, paragraph 65.
26 Consolidated Jurisdictional Notice, paragraph 74.
27 Consolidated Jurisdictional Notice, paragraphs 74-76.
28 Consolidated Jurisdictional Notice, paragraph 82.
29 Consolidated Jurisdictional Notice, paragraph 82.
30 Consolidated Jurisdictional Notice, paragraph 82.

(B) Bertelsmann's veto rights in the Merged Entity

(40) As explained in paragraphs (22)-(24) above and unless otherwise provided, Bertelsmann will have to vote in the same direction as Bouygues both at Board of Directors meeting and at the General Meeting.

(41) In exceptional circumstances, Article 2.1.4 of the SHA provides for a mechanism enabling Bertelsmann […] to vote against a proposal for a set number of matters.[31] The Commission considers that this mechanism is similar to a veto right for Bertelsmann on these matters. [Details on the SHA][32]. Thus, Bertelsmann will have a veto right on the matters listed in Article 2.1.4 of the SHA.

(42) First of all, Article 2.1.4 of the SHA contains a list of matters on which Bertelsmann will exceptionally have a veto right. This concerns in particular the amendment of the articles of association, the replacement of auditors, any change in the dividend distribution policy, any change in the governance rules, any increase in the share capital, a significant increase in debt and the commitment of the Merged Entity to any new business which does not fall within its object. With regard to these veto rights, the Commission notes that, in accordance with paragraph 66 of the Consolidated Jurisdictional Notice, these matters do not concern the strategic decisions of the Merged Entity. Bertelsmann's veto right applies to matters that concern the existence of the Merged Entity and thus cannot, as such, confer on it joint control over the Merged Entity. Rather, these veto rights correspond to those normally granted to minority shareholders to protect their financial interests as investors in the joint venture.

(43) Article 2.1.4 of the SHA also grants Bertelsmann veto rights in respect of certain types of investments. In particular, Bertelsmann will retain the right not to follow Bouygues' proposal for (i) any investment, sale or acquisitions of shares, businesses and assets for an amount exceeding EUR [amount of the threshold] per transaction; (ii) any acquisitions of rights in audio-visual content exceeding EUR [amount of the threshold] per transaction per year; (iii) any commercial distribution arrangement exceeding EUR [amount of the threshold] per transaction per year; (iv) the creation of any joint venture or partnership, or other guarantee, for an amount exceeding EUR [amount of the threshold]; and any commencing of litigation concerning an amount exceeding EUR [amount of the threshold]. In this respect, the Commission notes that the thresholds set out in the SHA were never exceeded by M6 and very exceptionally by TF1 during the last ten years.[33] Bertelsmann's veto rights are therefore not such as to grant it a veto over the normal conduct of the Merged Entity's business. Given the amounts set, these veto rights correspond to rights that ordinarily protect minority shareholders.

(44) Thus, in light of the above, the Commission considers that Bertelsmann will not exercise joint control over the Merged Entity because of the veto rights set out in Article 2.1.4 of the SHA.

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31 This obligation does not extend to the independent directors proposed by Bouygues or Bertelsmann.

32 French Commercial Code, Article L.225-37.

33 Bouygues confirms that these thresholds have been exceeded only three times since 2011 by TF1, and have never been exceeded by M6. Furthermore, in response to RFI 1, Bouygues confirmed that, where relevant, consolidating historical data between groups TF1 and M6 does not lead to any further exceeding of the thresholds set out in Article 2.1.4 (see RFI 1, answer to question 2 and annex). Thus, the Commission considers that the thresholds are high enough not to give Bertelsmann a veto over the strategic decisions of the Merged Entity.

(45) The first CEO of the Merged Entity will be appointed by Bouygues and Bertelsmann.[34] He will be one of the four members of the Board of Directors appointed by Bouygues. During the Lock-up Period,[35] Bouygues may, following discussions with Bertelsmann but without the latter having a right to veto the final decision, dismiss the Merged Entity's CEO. As regards the appointment of future CEOs, Bouygues will have to propose a list of […] candidates […]. Bertelsmann will be able to veto one of the candidates from the list.[36] Bouygues will therefore have the final say on the choice [of the CEO], unless Bertelsmann considers that there are serious ethical concerns on the candidate.[37] […].[38] It follows that, both during and after the Lock-up Period, Bouygues will have the final say with regards to the appointment and dismissal of the CEO of the Merged Entity. Bertelsmann will only have a veto right on […] and on the appointment of a candidate on whom Bertelsmann considers that there are serious ethical concerns. Furthermore, Bertelsmann will have no veto over the dismissal of the CEO. Thus, Bertelsmann's veto rights in the process of appointing the Merged Entity's CEO are akin to a right of consultation, compatible with rights usually granted to ordinarily protect the interests of minority shareholders. The Commission also notes that Bouygues will be able to remove the first CEO of the Merged Entity without delay.

(46) Thus, the Commission considers that Bertelsmann will not exercise joint control over the Merged Entity due to its participation in the appointment and resignation of the Merged Entity's CEO.

(47) As regards the business plan and the budget, the Commission notes that Article 2.2.1 of the SHA establishes an audit committee responsible for the preparation of the budget and the business plan, which will be composed of a director appointed by Bouygues and a director appointed by Bertelsmann.[39] [Bouygues and Bertelsmann will agree on the first business plan].[40] Moreover, future business plans, which Bertelsmann can only object to if it considers the latter to be inconsistent with the corporate interest of the Merged Entity,[41] will have to respect the revenue, synergies and investment targets agreed upon by Bouygues and Bertelsmann […].[42] Thus, [with regards to future business plans, Bouygues will be able to force its decision on the Board of Directors due to its casting vote].[43] These future business plans and budgets constitute strategic decisions of the Merged Entity.

(48) Thus, the Commission considers that Bertelsmann will not exercise joint control over the Merged Entity because of the mechanism for discussing and adopting the Merged Entity's future business plans and budgets.

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34 SHA, Article 2.3.

35 Article 3.2 of the SHA provides that, save in exceptional cases, Bertelsmann will have to retain its holdings in the Merged Entity for [a specific duration] ("Lock-up Period").

36 SHA, Article 2.3.

37 SHA, Article 2.1.2.

38 SHA, Article 2.3.

39 SHA, Article 2.2.1.

40 SHA, Article 2.2.1. In addition, in its reply to RFI 1 request for information, Bouygues confirmed that the Agreements give Bouygues the possibility to amend the business plan in the short term and revoke the first budget (see RFI 1, answer to question 5(b)).

41 SHA, Article 2.1.2.

42 SHA, Article 2.2.1.

43 See below, paragraph (61).

(49) Therefore, the Commission notes that Bertelsmann does not have veto rights over the strategic decisions of the Merged Entity.

(C) Joint exercise of voting rights

(50) With regard to the General Meetings, apart from the reserved matters referred to in Article 2.1.4 of the SHA (discussed in paragraphs (42)-(44) above), Bertelsmann will not be able to oppose Bouygues.

(51) However, with regard to the Board of Directors, in addition to the reserved matters set out in Article 2.1.4 of the SHA and the appointment of the CEO of the Merged Entity (discussed in paragraphs (42)-(46) above), Bertelsmann has the right to object to any decision which Bertelsmann considers to be illegal or inconsistent with the corporate interest of the Merged Entity (Article 2.1.2 of the SHA).

(52) The corporate interest exception at Article 2.1.2 of the SHA is not subject to particular conditions. However, as explained by Bouygues, (i) the corporate interest exception is customary and not specific to the audio-visual sector; (ii) it is intended to apply only in extreme situations; (iii) since its objective is to avoid the personal civil and/or criminal liability of the directors appointed by Bertelsmann.[44] As a result, the Commission considers that the corporate interest exception is limited in its material scope.

(53) It follows that Bertelsmann will not be able *de jure* to exercise decisive influence over the Merged Entity under the terms of the SHA. However, the Commission needs to assess whether the joint exercise of voting rights could also exist *de facto*.

(54) The Commission notes that Bertelsmann possesses the know-how in the audio-visual sector that goes beyond the activities of the Merged Entity. Moreover, even if Bertelsmann cannot impose its position, Bouygues and Bertelsmann will have to try to agree on a common voting position before each meeting of the Board of Directors or general assembly of the Merged Entity. In view of this, Bouygues and Bertelsmann may behave as a single entity in the decision-making bodies of the Merged Entity. In addition, the first CEO of the Merged Entity will continue to play a number of roles within Bertelsmann.[45]

(55) However, the Commission notes that Bouygues has its own knowledge in the audio-visual sector and will not be dependent on Bertelsmann in that regard. Moreover, Bertelsmann will not have significant commercial relations with the Merged Entity.[46] Finally, Bouygues retains the right to remove the CEO from the Merged Entity without Bertelsmann being able to oppose it.

(56) It follows that there is no evidence to support the existence of a strong common interest between Bouygues and Bertelsmann.

(57) In the absence of such a common interest, the Commission considers that the possible emergence of shifting alliances between minority shareholders normally excludes an assumption of *de facto* joint control. In the present case, the

44 See RFI 1, answer to question 1.

45 Invitation to Act, page 3.

46 In its reply to RFI 1, Bouygues confirmed that intra-group relationships between M6 and Bertelsmann are intended to cease (see RFI 1, answer to question 4(b)). Bouygues points out, however, that the Merged Entity, as any other undertaking, could source content or services from Bertelsmann's subsidiaries on market terms.

Commission notes that it is possible that Bouygues and other minority shareholders may vote in a direction that is contrary to the position of Bertelsmann, both at the Board of Directors and the General Meeting.

(58) Furthermore, the Commission notes that, in the event of disagreement between Bouygues and Bertelsmann, Bertelsmann is required to retain its shareholdings only during the Lock-up Period ([duration of the Lock-up Period]). At the end of that period, Bertelsmann will be able to sell its shares by giving Bouygues a pre-emption right for [amount of participations] of the shares. The remainder of the shares may be sold freely, [as long as the choice of the purchaser does not raise competition concerns]. Thus, in the event of disagreement, the Commission considers that the existence of the Merged Entity would not be affected.

(59) Thus, the Commission concludes that the Agreements and the SHA do not give rise to a *de facto* joint exercise of voting rights in the Merged Entity.

(D) The existence of a casting vote

(60) In any event, paragraph 82 of the Consolidated Jurisdictional Notice provides that the existence of joint control means that no casting vote is given to one of the parent companies, as this would result in sole control of the company with the casting vote.

(61) In the present case, Bouygues will control half of the Board of Directors, including the CEO,[47] which will have a casting vote. In that sense, Bertelsmann's vote does not appear necessary to adopt a position of Bouygues on the Board of Directors, unless they are reserved matters within the meaning of Article 2.1.4 of the SHA (which are unable to grant joint control). Similarly, at the General Meeting, Bertelsmann will be able to oppose Bouygues's position only on reserved matters within the meaning of Article 2.1.4 of the SHA (which are unable to grant joint control).

(62) Therefore, as a result of Bouygues's casting vote, Bertelsmann will not have joint control over the Merged Entity.

(E) Sole control of the Merged Entity

(63) As indicated above, the Commission notes that Bouygues will have the power to appoint half of the Board of Directors of the Merged Entity. Due to the provisions of the French Commercial Code,[48] the CEO of the Merged Entity, who will be appointed by Bouygues, will have a casting vote in case of deadlock. In this sense, Bouygues will be able to impose its decisions on the Board of Directors of the Merged Entity. The Commission notes that these rights give Bouygues sole control over the Merged Entity.

(64) Moreover, according to the provisions of Article 2.5 of the SHA and with the exception of matters reserved within the meaning of Article 2.1.4 of the SHA (which

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47 The General Court of the European Union has already held that, for the purposes of the Merger Regulation, independent representatives appointed by a shareholder will inevitably take into account the views of the person appointing them (see, judgment of the General Court of the European Union of 23 February 2006 in Case T-282/02 *Cementbouw Handel & Industrie v Commission*, paragraph 74). In the absence of evidence to the contrary, the Commission considers that the two independent members of the Merged Entity's Board of Directors appointed by Bouygues will act in accordance with Bouygues' interests.

48 French Commercial Code, Article L.225-37.

are unable to grant joint control), Bertelsmann will have to vote in the direction of Bouygues at the General Meetings. In this sense, Bouygues will effectively control about 46% of the voting rights at the General Meeting of the Merged Entity. According to the historical consolidated statistics presented by Bouygues, this represents more than half of the voting rights actually represented at General Meetings.[49] As a result, the Commission notes that Bouygues will also exercise *de facto* sole control over the Merged Entity. The following table shows the historical, consolidated statistics on the participation rate at the general meetings of TF1 and M6 since 2019.

Table 1: Historical consolidated statistics on the participation rate at the general meetings of TF1 and M6

Year	Consolidated participation rate	Estimated rate of Bouygues's shareholding	Bouygues's shareholding in relation to the total consolidated participation rate
2021	[…]%	46%	[More than half]%
2020	[…]%	46%	[More than half]%
2019	[…]%	46%	[More than half]%

Source: Bouygues's reply to RFI 1, question 3

(65) Thus, the Commission considers that Bouygues will have sole control of the Merged Entity, both in law and in fact.

(F) Conclusion on the nature of the control over the Merged Entity

(66) For the reasons set out above, the Commission considers that the Merged Entity will be exclusively controlled by Bouygues.

3.3.2. Conclusion on the undertakings concerned by the Transaction

(67) The Commission considers that, due to the exclusive nature of Bouygues' control over the Merged Entity, the undertakings concerned by the Transaction are Bouygues (including TF1) as acquiring undertaking and M6 as target undertaking.

3.4. Conclusion on the EU dimension of the Transaction

(68) Since both Bouygues and M6 achieve more than two-thirds of their turnover in France, the Commission considers that Transaction does not constitute a concentration with a Union dimension.

49 See RFI 1, answer to question 3.

4. CONCLUSION

(69) The Commission does not have jurisdiction to assess the Transaction.

(70) This Decision shall be notified to Mediaset and published in the Official Journal, excluding any confidential information or business secrets.

For he Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President