SUMMARY OF COMMISSION DECISION

of 10 January 2022

rejecting its jurisdiction within the meaning of Articles 1 and 4 of Council Regulation (EC) No 139/2004 [1] **(Case C.1886 – Iliad – Article 265 Invitation to Act)**

(notified under document C(2022) 78)

(Only the French text is authentic)

(2023/C 2/04)

(1) On 10 November 2021, the European Commission ('Commission') received an invitation to act ('Invitation to act') from Iliad SA ('Iliad', France), in accordance with Article 265 TFEU, requesting the Commission to decide whether it had jurisdiction over the merger between Télévision Française 1 SA ('TF1', France) and Métropole Télévision SA ('M6', France) ('the Transaction').

1. THE PARTIES AND THE TRANSACTION

(2) TF1 is a partly owned subsidiary of Bouygues SA ('Bouygues'), which owns 43,7 % of TF1. Bouygues is active in the construction, telecommunications and media sectors. TF1's principal activity, either directly or *through* its subsidiaries, is the broadcasting of television channels. TF1 also carries out other activities related to its main activity as a television broadcaster: audiovisual and cinematographic production, acquisition of audiovisual rights, marketing of advertising space, publishing and distribution of DVDs and music CDs, development of broadcasting-related products, and development of digital and interactive services.

(3) M6 is a partly owned subsidiary of RTL Group SA ('RTL'), which owns 48,26 % of M6; 76,28 % of RTL is owned by Bertelsmann SE & Co. KGaA ('Bertelsmann'). M6's principal activity, either directly or *through* its subsidiaries, is the broadcasting of television channels. In addition, M6 carries out other activities related to its main activity as a television broadcaster: audiovisual and cinematographic production, acquisition of audiovisual rights, marketing of advertising space, publishing and distribution of DVDs and music CDs, development of broadcasting-related products, and development of digital services. Finally, M6 controls the RTL France radio group, which has several licences to broadcast radio programmes in metropolitan France and which carries out various activities related to the operation of these radio services.

(4) [Description of the Transaction]. After the Transaction, Bouygues will own approximately 30 % of the capital of the New Entity, while Bertelsmann, *through* RTL, will own approximately 16 % of the New Entity's capital.

2. FACTS AND PROCEDURE

(5) On 17 May 2021, TF1, M6, Bouygues and RTL announced that they had concluded draft agreements to enter into exclusive negotiations to merge the activities of TF1 and M6. On 17 May 2021, Bouygues and RTL signed two memorandums of understanding. These memorandums 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 signed when the Transaction had been concluded ('Shareholders' Agreement').

[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.

(6) On 29 October 2021, the French competition authority (Autorité de la concurrence, 'ADLC') sent a questionnaire to several market participants, including Iliad, to obtain their views on the Transaction ([2]). In the introduction to the questionnaire, ADLC refers to the fact that the questionnaire concerns the proposed merger between the TF1 and M6 groups within a New Entity. The New Entity would be controlled solely by Bouygues. Accordingly, the introduction to the market test states that the Transaction in question is subject to authorisation by ADLC, which is the independent public service authority in France responsible for regulating competition in markets.

(7) On 10 November 2021, Iliad sent an Invitation to Act to the Commission ([3]). In particular, Iliad submitted that, contrary to what ADLC claimed, the New Entity would be jointly controlled by Bouygues and Bertelsmann and that it would therefore have a Union dimension.

3. **UNION DIMENSION**

3.1. **Legal background**

(8) Under 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 has two alternative sets of thresholds for determining whether a concentration has a Union dimension.

(9) In accordance with 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 aggregate Union-wide turnover within one and the same Member State.

(10) A concentration that does not meet the thresholds laid down in Article 1(2) has a Union dimension 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 (Article 1(3) of the Merger Regulation).

(11) For the purposes of determining jurisdiction, the undertakings concerned are those involved in a concentration, i. e. a merger or an acquisition of control, within the meaning of Article 3(1) of the Merger Regulation ([4]).

(12) In the context of an acquisition of sole control, the undertakings concerned are the acquiring undertaking and the target undertaking ([5]).

([2]) Invitation to Act, Annex 1.

([3]) On 30 November 2021, in response to the Commission's request for observations ('Bouygues's Observations'), Bouygues informed the Commission that the Invitation to Act had been signed by the Chair of the Board of Directors of Iliad SA, who did not have the power of representation and could not, therefore, act in the name and on behalf of Iliad SA. By letter of ratification (within the meaning of the third subparagraph of Article 1156 and the second subparagraph of Article 1998 of the French Civil Code) and confirmation sent to the Commission on 6 December 2021, Iliad confirmed that its managing director had verbally mandated the Chair of Iliad's board of directors to send the Commission the Invitation to Act (see, to that effect, Iliad's reply to RFI 1). Thus, it is the Commission's view that the Invitation to Act submitted by Iliad was valid.

([4]) Commission Consolidated Jurisdictional Notice under the Merger Regulation, as corrected (OJ C 43, 21.2.2009, p. 10), paragraph 129 ('Consolidated Jurisdictional Notice').

([5]) Consolidated Jurisdictional Notice, paragraph 134.

(13) In the case of acquisition of joint control of a newly-created joint venture after one undertaking has contributed a pre-existing subsidiary or a business (over which it previously exercised sole control) to the joint venture, each of the jointly-controlling undertakings is considered an undertaking concerned. In this case, the turnover of the joint venture is part of the turnover of the initial parent company ([6]).

3.2. **Turnover**

(14) In 2020, Bouygues generated a worldwide turnover of EUR 34,7 billion, a turnover of EUR [turnover] billion in the Union and a turnover of EUR [turnover] billion in France. Bouygues thus generates more than two thirds of its total Union turnover in France.

(15) In 2020, Bertelsmann generated a worldwide turnover of EUR 17,3 billion, a turnover of EUR [turnover] billion in the Union and a turnover of EUR [turnover] billion in France. Bertelsmann thus does not generate more than two thirds of its total Union turnover in France.

(16) In 2020, M6 generated a worldwide turnover of EUR 1,27 billion, a turnover of EUR [turnover] billion in the Union and a turnover of EUR [turnover] billion in France. M6 thus generates more than two thirds of its total Union turnover in France.

(17) Regardless of whether the turnovers of Bouygues and M6 or Bouygues and Bertelsmann are taken into account, there is no doubt that they exceed the thresholds laid down in Article 1(2)(a) and (b). However, if the turnovers of only Bouygues and M6 were taken into account, the Transaction would not have a Union dimension, since Bouygues and M6 generate more than two thirds of their Union turnover in France. If the turnover of Bouygues and Bertelsmann were taken into account, the Transaction would have a Union dimension, since Bertelsmann does not generate more than two thirds of its Union turnover 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) In the view of ADLC and Bouygues, the New Entity will be controlled solely by Bouygues ([7]). In such a situation, the undertakings concerned would be Bouygues and M6 and the concentration would not have a Union dimension.

(20) Conversely, Iliad argues that the New Entity will be jointly controlled by Bouygues and Bertelsmann ([8]). In such a situation, the undertakings concerned would be Bouygues and Bertelsmann ([9]) and the concentration would have a Union dimension.

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

3.3.1. *The nature of the control over the New Entity*

3.3.1.1. Introduction to the governance of the New Entity

(22) After the Transaction, Bouygues will own approximately 30 % of the capital of the New Entity, while Bertelsmann, *through* RTL, will own approximately 16 % of the New Entity's capital.

([6]) Consolidated Jurisdictional Notice, paragraph 139.
([7]) See ADLC's analysis of the applicability of the Merger Regulation to the Transaction of 30 November 2021, p. 7, and Bouygues's Observations, p. 10.
([8]) Invitation to Act, pp. 1-3.
([9]) Including also M6.

(23) As regards the shareholders' meeting of the New Entity ('Shareholders' Meeting'), Article 2.5 of the Shareholders' Agreement stipulates that Bouygues and Bertelsmann must agree on a common position on all items on the agenda prior to any Shareholders' Meeting. In the event of disagreement, Bertelsmann will, in principle, have to vote in line with Bouygues.

(24) The Board of Directors of the New Entity ('Board of Directors') will be composed of 12 members. Bouygues will be able to appoint four members including the Chief Executive Officer and Chair ('CEO') of the Board of Directors ([10]) and put forward two independent members. Bertelsmann will be able to appoint two directors, including the Vice-Chair of the Board of Directors and put forward [number of independent members put forward by Bertelsmann]. In accordance with Article 2.1.4 of the Shareholders' Agreement, any decisions on the Board of Directors must be adopted by a majority of the votes cast. In the event of a tie, the CEO has the casting vote. Article 2.1.2 of the Shareholders' Agreement requires Bouygues and Bertelsmann 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 in line with Bouygues.

3.3.1.2. Iliad's arguments

(25) Iliad argues that the New Entity will be jointly controlled by Bouygues and Bertelsmann.

(26) In support of its position, Iliad contends, first of all, that the structure of the transaction as planned by Bouygues and Bertelsmann supports the conclusion that the New Entity will be jointly controlled by Bouygues and Bertelsmann. Iliad points out that, following the conclusion of the Transaction, Bertelsmann (*through* RTL) will own 16 % of the capital of the New Entity. Bertelsmann will therefore be the second largest shareholder of the New Entity.

(27) According to Iliad, Bertelsmann will thus be a key shareholder of the New Entity, in particular because of RTL's expertise in the audiovisual sector. In Iliad's view, it is apparent from an interview with Thomas Rabe, CEO of Bertelsmann and Olivier Roussat, Director-General of Bouygues, that Bouygues and Bertelsmann see each other as long-term partners, with a shared view of the markets ([11]). This was repeated in a presentation to investors in which TF1 and M6 stated that RTL would remain a long-term strategic shareholder ([12]). Furthermore, Iliad points out that, in so far as neither Bouygues nor RTL individually has sufficient voting rights to have a majority in shareholders' meetings, only joint exercise of their voting rights could ensure they have a majority ([13]).

(28) Secondly, Iliad believes that Bouygues and RTL will act as strategic partners by means of concerted action. Concerted action, within the meaning of Article L.233-10 of the French Commercial Code, is defined as an agreement entered into by persons to acquire, dispose of or exercise voting rights, to implement a common policy vis-à-vis the company or to obtain control of that company. Moreover, such action is an indication used by ADLC in assessing the nature of the control exercised by one or more undertakings over another undertaking ([14]).

(29) Thirdly, Iliad is of the view that Bertelsmann will have particular representation on the Board of Directors ([15]). Iliad points out that the first CEO of the New Entity will be Nicolas de Tavernost, current Chair of the Board of Directors of M6. Iliad also notes that, considering the number of board members granted individually to Bouygues (four) and Bertelsmann (three), neither Bouygues nor Bertelsmann can act alone ([16]).

([10]) The first CEO of the New Entity will be Nicolas de Tavernost, current Chair of the Board of Directors of M6.
([11]) Invitation to Act, Annex 2, paragraph 7.
([12]) Invitation to Act, Annex 2, paragraph 8.
([13]) Invitation to Act, Annex 2, paragraphs 10-12.
([14]) Invitation to Act, Annex 2, paragraphs 16-20.
([15]) Invitation to Act, Annex 2, paragraphs 22-23.
([16]) Invitation to Act, Annex 2, paragraphs 24-26.

(30) Finally, Iliad states that Bouygues and Bertelsmann have devised a common strategy, as substantiated by the press releases and presentations to investors ([17]).

3.3.1.3. The arguments of ADLC and Bouygues

(31) According to ADLC and Bouygues, the Transaction is structured in such a way as to ensure that Bouygues has sole control over the New Entity ([18]).

(32) With regard to the Shareholders' Meeting, Bouygues stresses that, in accordance with Article 2.5 of the Shareholders' Agreement, before any Shareholders' Meeting, Bouygues and Bertelsmann will have to consult each other in order to try to define a common position on each upcoming vote. In the event of disagreement between Bouygues and Bertelsmann, the position proposed by Bouygues would prevail and Bertelsmann would have to vote in line with what Bouygues had decided ([19]). An analysis of past participation rates in TF1 and M6 shareholders' meetings would suggest that the combined voting rights of Bouygues and Bertelsmann would give these companies a *de facto* majority at shareholders' meetings.

(33) As regards the Board of Directors, Bouygues notes that, according to Article 2.1.1 of the Shareholders' Agreement, the Board of Directors of the New Entity will be composed of 12 members, of which Bouygues will appoint half, including the chair with a casting vote ([20]).

(34) As with the preparation for shareholders' meetings, Bouygues states that the Shareholders' Agreement requires a period of consultation between Bouygues and Bertelsmann prior to any meeting of the Board of Directors ([21]). In the event of disagreement between Bouygues and Bertelsmann, the position proposed by Bouygues would prevail and Bertelsmann would have to vote in line with what Bouygues had decided ([22]). Bertelsmann may act independently of Bouygues's position only in exceptional cases. In particular, Article 2.1.2 of the Shareholders' Agreement provides that Bertelsmann will not be required to follow Bouygues's position if Bertelsmann or one of its representatives on the Board of Directors is of the view that a decision would be unlawful or contrary to the corporate interest of the New Entity ([23]). In addition, Article 2.1.4 lists matters on which Bertelsmann will not be required to vote in line with Bouygues, but this should only concern exceptional decisions likely to affect the value of the New Entity ([24]).

(35) Finally, Bouygues states that it will control all strategic decisions of the New Entity, including its business plan and budget, its investments and the appointment of its directors. In that regard, Bouygues points out that the facts on which Iliad relies in order to conclude that Bouygues and Bertelsmann had devised a common strategy are based only on press releases, which do not contain the full content of the Agreements and the Shareholders' Agreement ([25]).

3.3.1.4. The Commission's assessment

(A) Legal background

(36) According to the Consolidated Jurisdictional Notice, joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. By decisive influence, the Commission normally means the power to block decisions which determine the strategic commercial behaviour of an undertaking. Undertakings acquiring joint control of another undertaking must reach a common understanding in determining the commercial policy of the joint venture and are required to cooperate ([26]).

([17]) Invitation to Act, Annex 2, paragraphs 27-33.
([18]) See ADLC's analysis of 30 November 2021 concerning the applicability of the Merger Regulation to the Transaction, p. 7, and Bouygues's Observations, p. 10.
([19]) Bouygues's Observations, p. 5.
([20]) Bouygues's Observations, p. 8.
([21]) Bouygues's Observations, pp. 5-6.
([22]) Bouygues's Observations, p. 5.
([23]) Bouygues's Observations, p. 6.
([24]) Bouygues's Observations, pp. 6 and 9.
([25]) Bouygues's Observations, p. 9.
([26]) Consolidated Jurisdictional Notice, paragraph 62.

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

(38) Although there may be joint control where two parent companies share the voting rights and representation in decision-making bodies equally, the Commission does not consider this a necessary condition. Therefore, there may also be joint control in the absence of equal voting rights or representation. This is particularly the case when minority shareholders benefit from additional rights, such as veto rights over strategic decisions for the New Entity ([27]). Veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management.

(39) Furthermore, the Commission is of the view that the joint exercise of voting rights may result in 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 ([28]). This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis, in particular where there are strong common interests ([29]).

(40) Finally, the Commission takes into consideration other factors, including the existence of a casting vote ([30]). 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 ([31]). However, there can be joint control when this casting vote is in practice of limited relevance and effectiveness ([32]).

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

(41) As explained in paragraphs (22)-(24) above, unless otherwise specified, Bertelsmann will have to vote in line with Bouygues both at Board of Directors meetings and at the Shareholders' Meetings.

(42) By way of exception, Article 2.1.4 of the Shareholders' Agreement [provides for a mechanism enabling Bertelsmann to vote against a proposal for a set number of matters in exceptional cases] ([33]). The Commission considers this mechanism in Article 2.1.4 of the Shareholders' Agreement similar to a veto right for Bertelsmann on these matters. [Details on the functioning of the Shareholders' Agreement]. Thus, Bertelsmann will have a veto right on the matters listed in Article 2.1.4 of the Shareholders' Agreement.

(43) First of all, Article 2.1.4 of the Shareholders' Agreement 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 capital, a significant increase in debt and the commitment of the New 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 New Entity. Bertelsmann's veto right applies to matters that concern the existence of the New Entity and thus cannot, as such, confer on it joint control over the New Entity. Rather, these veto rights correspond to those normally granted to minority shareholders to protect their financial interests as investors in a joint venture.

(44) Article 2.1.4 of the Shareholders' Agreement also grants Bertelsmann veto rights in respect of certain types of investments. In particular, Bertelsmann will retain the right not to follow Bouygues's proposal for (i) any investment, sale or acquisition of shares, businesses and assets for an amount exceeding EUR [amount of the threshold] per transaction; (ii) any acquisitions of rights for audiovisual 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

([27]) Consolidated Jurisdictional Notice, paragraph 65.
([28]) Consolidated Jurisdictional Notice, paragraph 74.
([29]) Consolidated Jurisdictional Notice, paragraphs 74-76.
([30]) Consolidated Jurisdictional Notice, paragraph 82.
([31]) Consolidated Jurisdictional Notice, paragraph 82.
([32]) Consolidated Jurisdictional Notice, paragraph 82.
([33]) This obligation does not extend to the independent members put forward by Bouygues or Bertelsmann.

an amount exceeding EUR [amount of the threshold] per year for each one; and (v) 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 Shareholders' Agreement exceed the value of almost all of the investments by TF1 in the past 10 years (and all investments by M6) ([34]). Bertelsmann's veto rights are therefore not such as to grant it a veto over the normal running of the New Entity's business. Given the amounts set, these veto rights correspond to rights that ordinarily protect minority shareholders.

(45) Thus, in view of the above, the Commission considers that Bertelsmann will not exercise joint control over the New Entity due to the veto rights set out in Article 2.1.4 of the Shareholders' Agreement.

(46) The first CEO of the New Entity will be appointed by Bouygues and Bertelsmann ([35]) and will be one of the four members of the Board of Directors appointed by Bouygues. During the Lock-up Period ([36]), Bouygues may, following discussions with Bertelsmann, but without the latter having a veto over the final decision, dismiss the CEO of the New Entity. As regards the appointment of future CEOs, Bouygues will have to propose a list of [...] candidates [...] and Bertelsmann will be able to veto one of the candidates ([37]). Bouygues will therefore have the last word on the choice [of CEO] unless Bertelsmann considers there to be serious ethical concerns about the candidate ([38]). […] ([39]). It follows that, both during and after the Lock-up Period, Bouygues will have the final say as regards the appointment and dismissal of the CEO of the New Entity. Bertelsmann will have a veto right only over [...] and over the appointment of a candidate about whom Bertelsmann has serious ethical concerns. On the other hand, Bertelsmann will not have a veto over the dismissal of the CEO. Thus, Bertelsmann's veto rights in the process of appointing the CEO of the New Entity are akin to a right of consultation, corresponding to rights that ordinarily protect minority shareholders. The Commission also notes that Bouygues will be able to dismiss the first CEO of the New Entity without delay.

(47) Thus, it is the Commission's view that Bertelsmann will not exercise joint control over the New Entity due to its involvement in the appointment and dismissal of the CEO of the New Entity.

(48) As regards the business plan and the budget, the Commission notes that Article 2.2.1 of the Shareholders' Agreement establishes an audit committee responsible for the preparation of the budget and the business plan, which will be composed of a member of the Board of Directors appointed by Bouygues and a member of the Board of Directors appointed by Bertelsmann ([40]). [Bouygues and Bertelsmann will agree on the first business plan] ([41]). Moreover, future business plans, which Bertelsmann can only object to if it considers the latter to be inconsistent with the corporate interest of the New Entity ([42]), will have to respect the revenue, synergy and investment targets agreed upon by Bouygues and Bertelsmann ([43]). Thus, [with regard to future business plans, Bouygues will be able to impose its decision on the Board of Directors due to its casting vote] ([44]). These future business plans and budgets constitute strategic decisions of the New Entity.

([34]) Bouygues confirms that these thresholds have been exceeded by TF1 only three times since 2011, and have never been exceeded by M6. Furthermore, in response to request for information RFI 2, Bouygues confirmed that, where relevant, consolidating historical data between the TF1 and M6 groups did not lead to any further exceeding of the thresholds set out in Article 2.1.4 (see RFI 2, answer to question 2 and annex). Thus, it is the Commission's view that the thresholds are high enough not to give Bertelsmann a veto over the strategic decisions of the New Entity.

([35]) Shareholders' Agreement, Article 2.3.

([36]) Article 3.2 of the Shareholders' Agreement provides that, save in exceptional cases, Bertelsmann must retain its shareholdings in the New Entity for [a specified period] ('Lock-up Period').

([37]) Shareholders' Agreement, Article 2.3.

([38]) Shareholders' Agreement, Article 2.1.2.

([39]) Shareholders' Agreement, Article 2.3.

([40]) Shareholders' Agreement, Article 2.2.1.

([41]) Shareholders' Agreement, Article 2.2.1. Furthermore, in its reply to request for information RFI 2, Bouygues confirmed that the Agreements give Bouygues the possibility of amending the business plan in the short term and revoking the first budget (see RFI 2, answer to question 5(b)).

([42]) Shareholders' Agreement, Article 2.1.2.

([43]) Shareholders' Agreement, Article 2.2.1.

([44]) See point (62) below.

(49) Thus, it is the Commission's view that Bertelsmann will not exercise joint control over the New Entity due to the mechanism for discussing and adopting future business plans and budgets of the New Entity.

(50) Therefore, the Commission notes that there is no right that gives Bertelsmann a veto over strategic decisions concerning the New Entity.

(C) Joint exercise of voting rights

(51) As regards shareholders' meetings, aside from the matters referred to in Article 2.1.4 of the Shareholder Agreement (discussed in points (43)-(45) above), Bertelsmann will not be able to oppose a position taken by Bouygues.

(52) However, within the Board of Directors, in addition to the matters set out in Article 2.1.4 of the Shareholders' Agreement and the appointment of the CEO of the New Entity (discussed in points (43)-(47) above), Bertelsmann has the right to object to any decision which it considers unlawful or contrary to the corporate interest of the New Entity (Article 2.1.2 of the Shareholders' Agreement).

(53) The concept of corporate interest is not subject to specific conditions. However, as pointed out by Bouygues, (i) the exception provided for in Article 2.1.2 of the Shareholders' Agreement is customary and is not specific to the audiovisual sector, (ii) and it is intended to apply only in extreme situations, (iii) since its objective is to prevent any civil and/or criminal liability arising for the members appointed by Bertelsmann ([45]). The Commission therefore notes that the scope of the exception is limited.

(54) It follows that Bertelsmann will not be able *de jure* to exercise decisive influence over the New Entity under the terms of the Shareholders' Agreement. However, it must be assessed whether the joint exercise of voting rights could also exist *de facto*.

(55) First of all, Bertelsmann has know-how in the audiovisual sector that goes beyond the New Entity's activities. Moreover, even if Bertelsmann will not be able to impose its position, Bouygues and Bertelsmann will have to consult each other in order to try to agree on a common voting position before each meeting of the Board of Directors or Shareholders' Meeting of the New Entity. Therefore, it cannot be ruled out that Bouygues and Bertelsmann could act as a single entity in the decision-making bodies of the New Entity. In addition, the New Entity's future CEO will continue to have several roles within Bertelsmann ([46]).

(56) However, Bouygues also has know-how in the audiovisual sector and will in no way be dependent on Bertelsmann in that regard. Moreover, Bertelsmann will not have significant business dealings with the New Entity ([47]). Finally, Bouygues retains the right to dismiss the CEO of the New Entity without Bertelsmann being able to oppose the decision.

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

(58) In the absence of such an interest, the Commission is of the view that the possible emergence of shifting alliances between minority shareholders normally excludes the assumption of *de facto* joint control. In the present case, it is possible that, both in the context of the Board of Directors and at a Shareholders' Meeting, Bouygues may align itself with other minority shareholders on matters on which Bertelsmann would have an interest in voting against Bouygues.

([45]) See RFI 2, answer to question 1.

([46]) Invitation to Act, Annex 2, paragraph 23.

([47]) In its reply to request for information RFI 2, Bouygues confirmed that there is an intention to cease intra-group dealings between M6 and Bertelsmann (see RFI 2, answer to question 4(b)). However, Bouygues pointed out that the New Entity could, like any other operator, source content or services from Bertelsmann subsidiaries on market terms.

(59) 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, giving Bouygues a right of pre-emption for [the amount of the shareholdings] of the shares. The remaining shareholdings may be sold freely, [provided that the choice of buyer does not give rise to competition concerns]. Thus, the Commission takes the view that, in the event of disagreement, the survival of the New Entity would not be affected.

(60) Thus, the Commission concludes that the Agreements and the Shareholders' Agreement do not give rise to a *de facto* joint exercise of voting rights.

(D) Casting vote

(61) In any case, in accordance with paragraph 82 of the Consolidated Jurisdictional Notice, 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.

(62) In the present case, Bouygues will control half of the Board of Directors, including the CEO ([48]), who will have the casting vote. As a result, Bertelsmann's vote does not appear necessary in order for a position of Bouygues to be adopted by the Board of Directors, unless the matters are reserved within the meaning of Article 2.1.4 of the Shareholders' Agreement (where votes cannot be pooled). Similarly, at the Shareholders' Meeting, Bertelsmann will be able to oppose Bouygues's position only on reserved matters within the meaning of Article 2.1.4 of the Shareholders' Agreement (where votes cannot be pooled).

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

(E) Sole control of the New Entity

(64) As substantiated above, the Commission notes that Bouygues will have the power to appoint half of the Board of Directors of the New Entity. Due to the provisions of the French Commercial Code ([49]), the CEO of the New Entity, who will be appointed by Bouygues, will have a casting vote in the event of a tie. As such, Bouygues will be able to impose its decisions on the Board of Directors of the New Entity. The Commission notes that these rights give Bouygues *de jure* sole control over the New Entity.

(65) Moreover, according to the provisions of Article 2.5 of the Shareholders' Agreement, except on matters reserved within the meaning of Article 2.1.4 of the Shareholders' Agreement (which are not such as to give joint control), Bertelsmann must vote in line with Bouygues at shareholders' meetings. As such, Bouygues will effectively control approximately 46 % of the voting rights at the Shareholders' Meetings of the New Entity. According to the consolidated historical statistics presented by Bouygues, this corresponds to more than half of the voting rights actually represented at shareholders' meetings ([50]). Therefore, the Commission notes that Bouygues will also exercise *de facto* sole control over the New Entity. The following table shows the consolidated historical data on participation in the shareholders' meetings of TF1 and M6 from 2019.

([48]) The General Court of the European Union has already held that, for the purpose of applying the Merger Regulation, independent representatives appointed by a shareholder will inevitably take into account the views of the person appointing them (see, to that effect, the 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 is of the view that the two independent members of the Board of Directors of the New Entity appointed by Bouygues will act in line with Bouygues.

([49]) French Commercial Code, Article L.225-37.

([50]) See RFI 2, answer to question 3.

Table 1

Consolidated historical participation data of TF1 and M6

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

Source: Bouygues's reply to request for information RFI 2, question 3

(66) Thus, the Commission takes the view that Bouygues will have sole control of the New Entity both in law and in fact.

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

(67) For the reasons set out above, it is the Commission's view that the New Entity will be controlled solely by Bouygues.

3.3.2. *Conclusion on the undertakings concerned by the Transaction*

(68) The Commission takes the view that, due to the exclusive nature of Bouygues's control over the New Entity, the undertakings concerned by the Transaction are Bouygues (including TF1) as the acquiring undertaking and M6 as the target undertaking.

3.4. **Conclusion on the Union dimension of the Transaction**

(69) Given that both Bouygues and M6 generate more than two thirds of their turnover in France, the Commission is of the view that the Transaction does not constitute a concentration with a Union dimension.

4. **CONCLUSION**

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

(71) This decision shall be notified to Iliad and published in the Official Journal, without any confidential elements or business secrets.