

Official Journal of the European Union

C 2



English edition

Information and Notices

Volume 66

4 January 2023

Contents

II *Information*

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

European Commission

2023/C 2/01	Communication from the Commission – Financial sanctions in infringement proceedings	1
2023/C 2/02	Non-opposition to a notified concentration (Case M.10944 – MITSUBISHI / HERE) ⁽¹⁾	17

IV *Notices*

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

European Commission

2023/C 2/03	Interest rate applied by the European Central Bank to its main refinancing operations: – 2,50 % on 1 January 2023 – Euro exchange rates	18
2023/C 2/04	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 (Case C.1886 – Iliad – Article 265 Invitation to Act) (notified under document C(2022) 78)	19

EN

⁽¹⁾ Text with EEA relevance.

II

*(Information)*INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

Financial sanctions in infringement proceedings

(2023/C 2/01)

1. INTRODUCTION – DEVELOPING A PROPORTIONATE AND DISSUASIVE APPROACH

Under the Treaty on the Functioning of the European Union (‘TFEU’), where the Commission refers a Member State to the Court of Justice of the European Union (‘the Court’) for failing to fulfil an obligation under the Treaties, it may propose to the Court to impose financial sanctions on that Member State in two situations:

- where the Member State has not taken the necessary measures to comply with an earlier judgment of the Court finding an infringement of Union law (Article 260(2) TFEU) ⁽¹⁾,
- where the Member State has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure (Article 260(3) TFEU).

In both cases, the sanction imposed by the Court may be composed of a lump sum payment, as a consequence of the continuation of the infringement until the delivery of its judgment or full compliance, if reached earlier, and a daily penalty payment, to prompt the Member State concerned to bring the infringement to an end as soon as possible after the delivery of the judgment. The Commission proposes the amounts for the financial sanctions to the Court, but it is for the Court, in the exercise of its discretion ⁽²⁾, to determine the amounts that it considers appropriate to the circumstances and proportionate both to the breach that has been established and to the capacity to pay of the Member State concerned ⁽³⁾.

The possibility for the Court to impose financial sanctions on Member States – and for the Commission to request the imposition of such sanctions – dates back to the Maastricht Treaty of 1992. To ensure transparency and equal treatment, the Commission has, since 1996, published a number of communications and notes laying out its policy and the methodology it applies to the calculation of financial sanctions ⁽⁴⁾.

⁽¹⁾ Or where the Member State has not taken the necessary measures to comply with a judgment finding an infringement of a State aid decision under Article 108(2) TFEU.

⁽²⁾ This discretion is limited in the case of Article 260(3) TFEU cases, where the Court cannot go beyond the amount specified by the Commission.

⁽³⁾ See judgments of 12 July 2005, *Commission v France* (C-304/02, EU:C:2005:444, paragraph 103); of 14 March 2006, *Commission v France* (C-177/04, EU:C:2006:173, paragraph 61); and of 10 January 2008, *Commission v Portugal* (C-70/06, EU:C:2008:3, paragraph 38).

⁽⁴⁾ See Annex II ‘List of previous communications on financial sanctions’.

This Communication reviews all Commission Communications on financial sanctions adopted from 1996 to 2021 (see Annex II for the list). It replaces and subsumes their content, while updating them where necessary in the light of the most recent case-law of the Court. This is notably the case for the removal of any reference to the institutional weight of the Member State concerned in the calculation of the financial sanctions proposed by the Commission to the Court (see section 3.4).

This Communication also applies in relation to the Euratom Treaty, insofar as its Article 106a makes Article 260 TFEU applicable to matters covered by that Treaty.

2. GENERAL PRINCIPLES

Even though the final decision on the imposition of the sanctions laid down in Article 260 TFEU lies with the Court, the Commission plays a central role, as it brings the case before the Court with a proposal for the amount of the financial sanctions. In the interests of transparency and equal treatment, the Commission has consistently published the criteria it applies when proposing financial sanctions.

The Commission considers that the financial sanctions imposed should be based on three fundamental criteria ⁽⁵⁾:

- the seriousness of the infringement,
- its duration,
- the need to ensure that the financial sanction itself is a deterrent to further infringements.

To ensure that sanctions are effective, it is important to set amounts that are sufficiently high to produce a deterrent effect. The imposition of purely symbolic sanctions would deprive the sanctioning mechanism of Article 260 TFEU, which is ancillary to the infringement procedure, of its useful effect and detracts from its ultimate objective, which is to ensure full compliance with Union law.

The sanctions proposed by the Commission to the Court should be consistent and foreseeable for the Member States and determined using a method that respects both the principle of proportionality and the principle of equal treatment among Member States. A clear and uniform method also ensures that the Commission properly justifies the calculation of the amount of the sanctions it proposes to the Court ⁽⁶⁾.

The Commission systematically proposes to the Court to impose both a lump sum and a penalty payment on the Member State concerned. That is the case for actions brought under Article 260(2) TFEU (non-compliance with a previous judgment of the Court) as well as under Article 260(3) TFEU (non-communication of transposition measures for a legislative directive).

Accordingly, where a Member State rectifies the infringement during the Court proceedings, the Commission does not withdraw its action but maintains its claim to impose a lump sum, thereby covering the duration of the infringement until the time that the infringement was rectified. The Commission endeavours to inform the Court without delay whenever a Member State terminates an infringement, at whatever stage in the judicial process. It does the same, when, following a judgment delivered under Articles 260(2) or 260(3) TFEU, a Member State rectifies the situation and the obligation to pay a penalty thus comes to an end.

Financial sanctions paid by the Member States as ordered by the Court, whether in the form of lump sum or penalty payment, constitute 'other revenue' of the Union, within the meaning of Article 311 TFEU and Decision 2007/436/EC, Euratom ⁽⁷⁾.

⁽⁵⁾ The Court has approved the substance of these criteria in consistent case law. See, inter alia, judgment of 4 July 2000, *Commission v Hellenic Republic* (C-387/97, EU:C:2000:356, paragraph 92); judgment of 25 February 2021, *Commission v Spain* (C-658/19, EU:C:2021:138, paragraph 63); judgment of 16 July 2020, *Commission v Ireland* (C-550/18, EU:C:2020:564, paragraph 81), judgment of 25 February 2021, *Commission v Spain* (C-658/19, EU:C:2021:138, paragraph 73).

⁽⁶⁾ See judgment of 16 July 2020, *Commission v Romania* (C-549/18, EU:C:2020:563, paragraph 51).

⁽⁷⁾ Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ L 163, 23.6.2007, p. 17).

2.1. The principle of proportionality

The Court has consistently held ⁽⁸⁾ that financial sanctions should be appropriate to the circumstances and proportionate both to the breach found and to the capacity to pay of the Member State concerned. The Commission carefully examines in each individual case how best to take account of these principles when applying the different criteria used in the calculation of the sanctions it proposes to the Court. In particular, the sanctions should, where appropriate, accommodate in advance the possibility of a change in circumstances ⁽⁹⁾.

Several consequences may be drawn from the principle of proportionality and, more specifically, the principle of proposing sanctions appropriate to the circumstances:

There may be situations where it is appropriate to propose penalties based on a mathematical degressive formula to take account of a Member State's progress towards compliance with its Union obligations. A possible example is where a Member State has infringed Union law because it operates a number of illegal landfills, because some of its cities do not comply with urban waste-water quality standards or for non-compliant air quality zones. Where it is possible to mathematically assess the Member State's progress towards compliance (for instance as a percentage of the total landfills, cities or air quality zones are brought into compliance) of those infringements characterised by a purely 'result-based' obligation, the Commission may propose a degressive formula to the Court ⁽¹⁰⁾.

There may also be situations where the Commission proposes that the penalties accrued are paid only after regular periodic intervals, for instance six months or one year after a Court judgment delivered pursuant to Article 260(2) TFEU ⁽¹¹⁾. This may be appropriate where compliance can only be assessed at periodic intervals, or where the method for assessing compliance depends on the availability of monitoring results. This may be provided by the relevant legislation. This is to ensure that the penalty proposed by the Commission actually corresponds to the number of days during which the infringement persisted – which can sometimes only be ascertained after a certain period of time has elapsed and when sufficient compliance information becomes available.

2.2. Principles related to Article 260(3) TFEU

The purpose of Article 260(3) TFEU ⁽¹²⁾ is to incentivise Member States to transpose directives adopted under a legislative procedure ⁽¹³⁾ within the deadlines laid down by the Union legislator and hence to ensure that Union legislation is genuinely effective. This is not only a matter of safeguarding the general interests pursued by Union legislation, but also and above all of protecting the interests of European citizens who enjoy the rights and benefits flowing from such legislation. Delays are unacceptable in both respects. Ultimately, the credibility of Union law as a whole is undermined when a Member State transposes Union legislation into national law later than it should.

⁽⁸⁾ Case C-658/19, *Commission v Spain* (EU:C:2021:138, paragraph 63); Case C-550/18, *Commission v Ireland* (EU:C:2020:564, paragraph 81); Case C-658/19, *Commission v Spain* (EU:C:2021:138, paragraph 73).

⁽⁹⁾ See judgment of 25 November 2003, *Commission v Spain* (C-278/01, EU:C:2003:635).

⁽¹⁰⁾ See Case C-278/01 *Commission v Spain* concerning quality standards for bathing water set by Directive 76/160/EEC, where, as the Court noted, 'it is particularly difficult for the Member States to achieve complete implementation', and where 'it is conceivable that the defendant Member State might manage significantly to increase the extent of its implementation of the Directive but not to implement it fully in the short term'. In those circumstances, as the Court ruled, 'a penalty which does not take account of the progress which a Member State may have made in complying with its obligations is neither appropriate to the circumstances nor proportionate to the breach which has been found'.

⁽¹¹⁾ See paragraphs 43 to 46 of the judgment in Case C-278/01, *Commission v Spain*, and paragraphs 111 and 112 of the judgment in Case C-304/02, *Commission v France*.

⁽¹²⁾ See judgment of 8 July 2019, *Commission v Belgium* (C-543/17, EU:C:2019:573), where the Court applied for the first time the sanction scheme of Article 260(3) TFEU.

⁽¹³⁾ These are directives adopted under the ordinary or special legislative procedures provided for in the Treaties. It excludes in particular delegated and implementing directives adopted by the Commission pursuant to Articles 290 and 291 TFEU, as well as directives adopted pursuant to the Euratom Treaty.

This means that, for breaches covered by Article 260(3) TFEU, namely failure to notify measures transposing a directive adopted under a legislative procedure, referrals to the Court are directly accompanied by a request to the Court to impose financial sanctions on the Member State concerned. Contrary to breaches falling solely within the scope of Article 258 TFEU, there is no need for a second, separate procedure for the imposition of financial sanctions in the case of such breaches.

Article 260(3) TFEU explicitly provides that the financial sanction imposed by the Court must not exceed the amount proposed by the Commission.

The Commission has consistently considered that the sanction mechanism provided by Article 260(3) TFEU should be used as a matter of principle in all cases where a Member State fails to fulfil an obligation covered by that provision. The importance of ensuring the transposition of legislative directives by the Member States within the deadlines set by those directives applies to all legislative directives equally. The Commission has for its part set itself a target of 12 months to refer infringement cases to the Court if the failure to transpose a directive persists.

Article 260(3) TFEU does not apply to a Member State's failure to notify measures transposing directives that are not adopted under a legislative procedure. Where the Member State breaches its obligation to notify measures in relation to such non-legislative directives, the Commission refers such a breach to the Court, first, through the infringement procedure provided by Article 258 TFEU and, where the Member State fails to comply with a judgment finding an infringement, by a second referral to the Court pursuant to Article 260(2) TFEU. Similarly, Article 260(3) TFEU cannot be used where a Member State fails to notify measures transposing directives adopted pursuant to Articles 31 and 32 of the Euratom Treaty. In such cases, the Commission employs the same dual referral procedure as that used for non-legislative directives adopted pursuant to the TFEU.

Article 260(3) TFEU covers both the total or partial failure to notify measures to transpose a legislative directive. A case of partial failure may occur either where the transposition measures notified do not cover the entire territory of the Member State concerned or where the notification is incomplete since it does not include all transposition measures corresponding to a part of the directive.

The Member State's obligation to notify transposition measures referred to in Article 260(3) TFEU includes an obligation to provide sufficiently clear and precise information ⁽¹⁴⁾ on which national provisions transpose the corresponding provisions of a directive. A failure to provide such clear and precise information may be sanctioned under Article 260(3) TFEU.

The Commission considers that notifications of transposition measures that do not indicate unambiguously for each provision of a directive which national provision ensures its transposition justify a referral pursuant to Article 260(3) TFEU. Without such information, the Commission is unable to verify whether the Member State has actually and completely transposed the directive in question. However, in accordance with the principle of proportionality, where a notification is self-explanatory, the Commission would not have recourse to a referral pursuant to Article 260(3) TFEU even if that notification does not specify for each provision of a legislative directive the corresponding national transposition measure. The Commission therefore only resorts to referrals under Article 260(3) TFEU in the absence of clear indications specifying which provisions of national law transpose which provisions of a directive. Such indications should be provided in the form of explanatory documents, to which a correlation table may be added, matching the directive's provisions with the national law in a systematic manner.

Directives typically contain a clause obliging the Member States to refer to the directive either directly in the provisions of national law adopted to transpose the directive or at their publication ('interconnection clause'). This obligation enables those concerned to ascertain the scope of their rights and obligations in the particular area governed by Union law.

⁽¹⁴⁾ See Case C-543/17, *Commission v Belgium*, paragraphs 51 and 59.

The Court has repeatedly ruled that, with an interconnection clause, a specific transposition measure is required ⁽¹⁵⁾. The mere reference by a Member State, when notifying transposition measures to the Commission, to pre-existing national legislation cannot be qualified as a specific transposition measure. Acts of national law pre-dating the directive may qualify as a specific transposition measure provided the Member State refers to them in an official publication that unequivocally indicates the pre-existing laws, regulations or administrative provisions by means of which it considers that it satisfies the obligations imposed by a directive. Such an official publication should be included in the notification to the Commission.

Any dispute regarding the adequacy of the transposition measures notified, i.e. the question whether these measures constitute a correct transposition of the corresponding provisions of a directive, is dealt with under the procedure provided by Article 258 TFEU.

3. PENALTY PAYMENT

The penalty to be paid by the Member States is an amount, calculated in principle by day of delay – without prejudice to any different reference period in specific cases – running from the date when the Court delivers its judgment pursuant to Article 260(2) or (3) TFEU, until the date on which the Member State brings the infringement to an end. The penalty payment seeks to induce the Member State concerned to put an end to the breach of its obligations as soon as possible after the Court delivers its judgment.

The amount of the daily penalty payment is calculated as follows:

- multiplication of a flat-rate amount by a coefficient for seriousness and a coefficient for duration,
- multiplication of the result obtained by an amount fixed by Member State (the *n* factor) reflecting the capacity to pay of the Member State concerned.

The following formula summarises the resulting calculation method for the penalty payment:

$$Dp = (F-Rap \times Cs \times Cd) \times n$$

where: *Dp* = daily penalty; *F-Rap* = flat-rate amount 'penalty payment'; *Cs* = coefficient for seriousness; *Cd* = coefficient for duration; *n* = 'n' factor reflecting the capacity to pay of the Member State concerned.

3.1. Flat-rate amount

The flat-rate amount is defined as the fixed amount to which the multiplier coefficients are applied. It addresses the violation of the principle of legality, which applies to all cases under Article 260 TFEU. It has been set at a level to ensure that:

- the Commission retains a broad margin of discretion when applying the coefficient for seriousness,
- the amount is reasonable for all Member States,
- the amount, multiplied by the coefficient for seriousness, is high enough to maintain sufficient pressure on the Member State concerned.

The flat-rate amount applicable for penalty payments is set out in point 1 of the Annex I.

⁽¹⁵⁾ Judgments of 29 October 2009, *Commission v Poland* (C-551/08, EU:C:2009:683, paragraph 23); of 11 June 2015, *Commission v Poland* (C-29/14, EU:C:2015:379, paragraph 49); of 4 October 2018, *Commission v Spain* (C-599/17, EU:C:2018:813, paragraph 21); and of 16 July 2020, *Commission v Ireland*, (C-550/18, EU:C:2020:564, paragraph 31).

3.2. **Application of the coefficient for seriousness (factor between 1 and 20)**

An infringement concerning a Member State's non-compliance with a judgment or its failure to notify measures transposing a directive adopted under a legislative procedure is always considered serious. To adapt the amount of the penalty to the specific circumstances of the case, the Commission determines the coefficient for seriousness on the basis of two parameters: the importance of the Union rules breached or not transposed and the effects of the infringement on general and particular interests.

In the light of the considerations developed below, the seriousness of the infringement is determined by a coefficient fixed by the Commission of between a minimum of 1 and a maximum of 20.

3.2.1. ***Failure to comply with a judgment (Article 260(2) TFEU)***

3.2.1.1. *Importance of the provisions breached*

To determine the importance of the breach of Union law that persists, the Commission takes into consideration the nature and extent of the provisions concerned rather than their standing in the hierarchy of legal norms. For example, an infringement of the principle of non-discrimination should always be regarded as very serious, whether the infringement results from a violation of the principle established by the Treaty or from a violation of the principle as set out in a regulation or a directive. Infringements affecting fundamental rights or the four fundamental freedoms protected by the Treaty should generally be considered as particularly serious and should result in an appropriate penalty.

Where the Commission brings an action pursuant to Article 260(2) TFEU, the fact that the Member State fails to comply with a judgment that forms part of established case-law (for example where that judgment follows similar judgments delivered in infringement proceeding or in response to a reference for a preliminary ruling) should be considered an aggravating factor. That is particularly the case where the Court has previously found the Member State concerned to be in breach of similar provisions of Union law.

Similarly, a Member State's failure to cooperate fully with the Commission during the procedure leading up to a referral to the Court pursuant to Article 260(2) TFEU, first subparagraph, constitutes an aggravating factor.

The fact that a Member State has adopted measures it considers sufficient to remedy the breach of which it has been alleged, but the Commission considers insufficient, should be treated differently than the situation where the Member State omits to take any action at all to remedy that breach (where clearly the Member State is in breach of Article 260(1) TFEU).

Finally, account should be taken of such mitigating factors as the fact that the judgment to be implemented gives rise to real questions of interpretation, or particular intrinsic difficulties of compliance in the short term (for instance, the necessity to plan, approve, finance and build infrastructure to reach compliance).

3.2.1.2. *Effects of the infringement on general and particular interests*

The effects of infringements on general or particular interests should be measured on a case-by-case basis, taking into account, for example:

- the loss of Union own resources,
- serious damage to EU financial interests,
- the impact of the infringement on the way the Union functions (such as infringements concerning the Union exclusive powers as referred to in Article 2(1) TFEU read in conjunction with Article 3 TFEU, as well as infringements which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law),
- serious or irreparable damage to human health or the environment,
- economic or other harm suffered by individuals and economic operators,
- the financial sums involved in the infringement,

- any possible financial advantage that the Member State gains from not complying with the judgment of the Court,
- the relative importance of the infringement taking into account the turnover or added value of the economic sector concerned,
- the size of the population affected by the infringement,
- the Union's responsibility with respect to third countries,
- the nature of the infringement, i.e. the systemic or structural character of the infringement or the persistent failure by a Member State to apply EU law correctly.

Other considerations could include whether the infringement is a one-off or a repetition of an earlier infringement.

When taking the interests of individuals into account for the purpose of calculating the amount of a penalty, the Commission does not set out to obtain redress for the damage and loss suffered as a result of an infringement, since such redress may be obtained by means of proceedings before the national courts. The Commission's purpose is rather to take into consideration the effects of an infringement from the perspective of the individuals or economic operators concerned. Thus, for example, the effects are not the same if an infringement concerns a specific case of incorrect application (failure to recognise a qualification), or a failure to transpose a directive on the recognition of qualifications, which would undermine the interests of an entire profession.

3.2.2. Failure to notify transposition measures (Article 260(3) TFEU)

For actions brought under Article 260(3) TFEU, the Commission systematically applies a coefficient for seriousness of 10 in case of a complete failure to notify transposition measures. In a Union based on the respect of the rule of law, all legislative directives are to be considered of equal importance and require complete transposition by the Member States within the deadlines that they set.

In the case of a partial failure to notify transposition measures, the importance of the transposition gap is to be considered when setting the coefficient for seriousness which is lower than 10. In addition, the effects of the infringement on general and particular interests may be taken into account (see the considerations set out in section 3.2.1.2 above).

3.3. Application of the coefficient for duration

For the purpose of calculating the amount of the penalty payment reflecting the duration of the infringement:

- for actions brought under Article 260(2) TFEU, the period taken into account is the period starting from the date of the first Court judgment up to the date the Commission decides to refer the matter to the Court,
- for actions brought under Article 260(3) TFEU, the period taken into account is the period starting from the day following the expiry of the deadline for transposition of the directive in question until the Commission decides to refer the matter to the Court.

The coefficient for duration is expressed as a multiplier of between 1 and 3. It is calculated at a rate of 0,10 per month from the date of the first judgment or from the day following the expiry of the deadline for transposition of the directive in question.

The Court ⁽¹⁶⁾ has confirmed that the duration of the infringement must be taken into account both for the penalty payment and for the lump sum payment, given the specific purpose of each sanction.

3.4. Member State's capacity to pay

The amount of the penalty payment should ensure that the sanction is both proportionate and dissuasive. The deterrent effect of the penalty payment has two aspects. The sanction must be sufficiently high to ensure that:

⁽¹⁶⁾ See paragraph 84 of the judgment in Case C-304/02 *Commission v France*.

- the Member State brings the infringement to an end (it must therefore be higher than the benefit that the Member State gains from the infringement),
- the Member State does not repeat the infringement.

The level of sanction required to serve as a deterrent will vary according to Member States' capacity to pay. This deterrent effect is reflected in the *n* factor. It is defined as a weighted geometric average of the gross domestic product (GDP) ⁽¹⁷⁾ of the Member State concerned compared to the average of the Member States' GDPs, with a weight of two, and of the population of the Member State concerned, compared to the average of Member States' populations, with a weight of one. This represents the capacity to pay of the Member State concerned in relation to the other Member States' capacity to pay:

$$n \text{ factor} = \left(\frac{GDP_n}{GDP_{avg}} \right)^{2/3} \times \left(\frac{Pop_n}{Pop_{avg}} \right)^{1/3}$$

The manner in which the *n* factor is calculated under this Communication represents a modification of the way the *n* factor was previously calculated. Previous communications took both the Member States' GDP and their institutional weight into account. The latter was expressed through the use of a proxy, most recently the number of seats in the European Parliament allocated to each Member State.

By judgment of 20 January 2022, in *Commission v Greece* ⁽¹⁸⁾, the Court examined the elements considered relevant for assessing a Member State's capacity to pay for the purposes of imposing financial sanctions based on Article 260 TFEU. In that judgment, the Court held that '[...] without prejudice to the possibility for the Commission to propose financial penalties which are based on multiple criteria, with a view, in particular, to allowing a reasonable gap between the various Member States to be maintained, it is necessary to rely on the GDP of the Hellenic Republic as the predominant factor for the purposes of assessing its ability to pay, without taking account of the institutional weight of the Hellenic Republic [...]' ⁽¹⁹⁾ According to the Court, 'the objective of setting penalties that are sufficiently dissuasive does not necessarily require that account be taken of the institutional weight in the European Union of the Member State concerned' and 'taking into account the institutional weight of the Member State concerned is not essential to ensuring sufficient deterrence and inducing that Member State to change its current or future conduct.' ⁽²⁰⁾

The Commission has therefore decided to revise its method for calculating the *n* factor, which now predominantly relies on Member States' GDP and secondarily on their population as a demographic criterion allowing a reasonable deviation between the various Member States to be maintained. Taking into account Member States' population for one third of the calculation of the *n* factor reduces to a reasonable degree the variation of Member States' *n* factors, as compared to a calculation based solely on Member States' GDP. It also adds an element of stability in the calculation of the *n* factor, since population is unlikely to vary significantly on an annual basis. In contrast, a Member State's GDP might experience higher annual fluctuations, in particular in periods of economic crisis. At the same time, since the Member State's GDP still accounts for two thirds of the calculation, it remains the predominant factor for the purposes of assessing its capacity to pay.

The *n* factors for each Member State are laid down in point 3 of the Annex I.

4. LUMP SUM PAYMENT

To take full account of the deterrent effect of the lump sum payment and the principles of proportionality and equal treatment, the Commission's proposal to the Court comprises:

- the setting of a fixed minimum lump sum, and

⁽¹⁷⁾ Source: Nominal GDP – Eurostat. Eurostat regularly publishes GDP data for Member States (nama_10_gdp).

⁽¹⁸⁾ Judgment of 20 January 2022, *Commission v Greece* (C-51/20, EU:C:2022:36).

⁽¹⁹⁾ Case C-51/20, *Commission v Greece*, paragraph 116.

⁽²⁰⁾ Case C-51/20, *Commission v Greece*, paragraphs 113 and 115.

- a method of calculation based on a daily amount multiplied by the number of days the infringement persists; this method is applied when the result of the calculation exceeds the fixed minimum lump sum.

4.1. Minimum lump sums

Each time the Commission refers a case to the Court under Article 260 TFEU, it proposes at least a fixed minimum lump sum, set for each Member State according to their *n* factor, irrespective of the result of the calculation in section 4.2.

That fixed minimum lump sum reflects the principle that any case of persistent non-compliance by a Member State with a Court judgment, or any failure by a Member State to transpose a legislative directive, irrespective of any aggravating circumstances, undermines the principle of legality in a community governed by the rule of law, and requires an effective sanction. The minimum lump sum also avoids the proposal of purely symbolic amounts which would have no deterrent effect and could undermine, rather than strengthen, the authority of Court judgments.

The minimum lump sum for each Member State is set out in point 5 of the Annex I.

4.2. Calculation method for the lump sum

The lump sum is calculated in a manner broadly similar to the method for calculating the penalty payment, that is:

- multiplying a flat-rate amount by a coefficient for seriousness,
- multiplying the result by the *n* factor,
- multiplying the result by the number of days the infringement persists (see point 4.2.1).

The following formula summarises the calculation method for the lump sum:

$$LS = F\text{-}Rals \times Cs \times n \times dy$$

where:

LS = lump sum; *F-Rals* = flat-rate amount 'lump sum payment'; *Cs* = coefficient for seriousness; *n* = factor reflecting the capacity to pay of the Member State concerned; *dy* = number of days the infringement persists.

Where the result of this calculation exceeds the minimum lump sum for the Member State concerned, the Commission proposes a lump sum to the Court determined by using this formula.

4.2.1. Number of days the infringement persists

To calculate the lump sum, the daily amount is to be multiplied by the number of days the infringement persists. The latter is defined as follows:

- for actions brought under Article 260(2) TFEU, this is the number of days between the date of the delivery of the first judgment and the date the infringement comes to an end, or, failing compliance, the date of the delivery of the judgment under Article 260 TFEU,
- for actions brought under Article 260(3) TFEU, this is the number of days between the day after the expiry of the deadline for transposition set out in the directive at issue and the date the infringement comes to an end, or, failing compliance, the date of the delivery of the judgment under Article 260 TFEU.

For actions brought under Article 260(2) TFEU, the day from which the period to be taken into account when calculating the lump sum starts running is defined as the date of the judgment establishing that the Member State concerned has infringed Union law ⁽²¹⁾.

⁽²¹⁾ See Case C-304/02, *Commission v France*.

According to the Court, a Member State must comply with such judgement 'at once' and compliance must be 'completed as soon as possible' ⁽²²⁾. Of course, before bringing an action under Article 260(2) TFEU, the Commission must leave sufficient time, determined in the light of the infringement at issue, for the Member State to comply with such a judgment. However, where a reasonable period of time has been given to the Member State and full compliance with the judgment has not been achieved, the Member State must be considered as having failed, as from the date of the judgment finding the infringement, to fulfil its obligation to initiate the process of compliance immediately and to complete it as soon as possible.

For actions brought under Article 260(3) TFEU, the day from which the relevant period starts running is the day after the expiry of the deadline for transposition set out in the directive at issue.

4.2.2. **Other elements of the calculation method for the lump sum**

For the calculation of the lump sum, the Commission applies the same coefficient for seriousness and the same fixed *n* factor as for the calculation of the penalty payment (see sections 3.2 and 3.4). When determining the amount of the lump sum under Article 260(3) TFEU, the Commission takes into account the extent of transposition when determining the seriousness of the failure to transpose.

The flat-rate amount for the lump sum is lower than for penalty payments. It is fair that the daily amount of the penalty payment should be higher than the lump sum payment, because the behaviour of the Member State concerned is more damaging once a judgment under Article 260 TFEU has been delivered, since that involves a persistence of the infringement after such a judgment.

The flat-rate amount applicable for the lump sum is set out in point 2 of the Annex I.

In contrast to the calculation of the penalty payment, a coefficient for duration is not applied when calculating the lump sum, given that the duration of the infringement is taken into account by multiplying the daily amount by the number of days the infringement persists.

5. **TRANSITIONAL RULES FOR THE UNITED KINGDOM**

On 31 January 2020, the United Kingdom withdrew from the Union. However, it was still bound to apply and comply with Union law until the end of the transition period (which lapsed on 31 December 2020) by virtue of the Withdrawal Agreement, which entered into force on 1 February 2020.

Moreover, pursuant to Article 12(4) of the Protocol on Ireland/Northern Ireland and Article 12 of the Protocol relating to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, the Commission and the Court retain the powers conferred upon them by the Treaties in connection with the application of Union law made applicable by those Protocols to and in the United Kingdom, in respect of Northern Ireland and the Sovereign Base Areas. Pursuant to Article 160 of the Withdrawal Agreement, the Court retains jurisdiction under Articles 258, 260 and 267 TFEU in respect of the interpretation and application of certain provisions of Part Five of the Withdrawal Agreement.

Pursuant to these provisions, it is possible for the Commission to request the Court to impose financial sanctions on the United Kingdom after 31 December 2020. In such a case, the Commission will propose financial sanctions which are proportionate to the seriousness of the breach at issue, the duration of that breach and the capacity to pay of the United Kingdom. For that purpose, the Commission will rely on the same formula as that laid down in this Communication for Member States ⁽²³⁾.

⁽²²⁾ See judgment of 12 November 2019, *Commission v Ireland* (C-261/18, EU:C:2019:955, paragraph 123).

⁽²³⁾
$$UK\ n\ factor = \left(\frac{GDP_{UK}}{GDP_{avg}} \right)^{2/3} \times \left(\frac{Pop_{UK}}{Pop_{avg}} \right)^{1/3}$$

6. **DATE ON WHICH THE OBLIGATION TO PAY THE SANCTION TAKES EFFECT**

Where the Court imposes a sanction on a Member State pursuant to Article 260(2) TFEU, the date on which the obligation to pay that sanction normally takes effect corresponds to the date on which the Court renders its judgment.

Where the Court imposes a sanction on a Member State pursuant to Article 260(3) TFEU, that provision specified that the payment obligation 'shall take effect on the date set by the Court in its judgment'. This allows the Court to set the date on which the obligation takes effect as either the date on which it renders its judgment or on a subsequent date. The Court has yet to make use of the possibility to set a date subsequent to the date of its judgment.

7. **DATE OF APPLICATION**

The Commission will apply the rules and criteria set out in this Communication to all decisions it takes to refer matters to the Court under Article 260 TFEU after the publication of this Communication in the Official Journal.

ANNEX I

Data used for determining financial sanctions proposed to the Court

The data in this Annex is to be reviewed and updated by the Commission on a yearly basis, in the light of variations in inflation, Member States' GDPs and their population, based on official data published by Eurostat.

1. Flat-rate amount for the penalty payment

The flat-rate amount for the penalty payment mentioned in section 3.1 of this Communication is fixed at **EUR 3 000** per day.

2. Flat-rate amount for the lump sum payment

The flat-rate amount for the lump sum payment mentioned in section 4.2.2 of this Communication is fixed at **EUR 1 000** per day, that is one third of the flat-rate for penalty payments.

3. 'N' factors

The 'n' factors mentioned in sections 3.4 and 4.2.2 of this Communication are:

	N factor (')
Belgium	0,84
Bulgaria	0,18
Czechia	0,49
Denmark	0,52
Germany	6,16
Estonia	0,06
Ireland	0,55
Greece	0,41
Spain	2,44
France	4,45
Croatia	0,14
Italy	3,41
Cyprus	0,05
Latvia	0,07
Lithuania	0,12
Luxembourg	0,09
Hungary	0,35
Malta	0,03
Netherlands	1,39
Austria	0,68
Poland	1,37
Portugal	0,46
Romania	0,61
Slovenia	0,10

Slovakia	0,22
Finland	0,42
Sweden	0,83
⁽¹⁾ Based on 2020 GDP and population (year n-2) extracted on 7 September 2022, and rounded to two decimals.	

4. Reference lump sum

The reference lump sum used for calculating the minimum lump sums per Member State is set at EUR 2 800 000 ⁽¹⁾.

5. Minimum lump sums per Member State

The minimum lump sums correspond to the reference lump sum multiplied by the 'n' factors.

The minimum lump sums ⁽²⁾ mentioned in section 4.1 of this Communication are set at:

	Minimum lump sums (EUR)
Belgium	2 352 000
Bulgaria	504 000
Czechia	1 372 000
Denmark	1 456 000
Germany	17 248 000
Estonia	168 000
Ireland	1 540 000
Greece	1 148 000
Spain	6 832 000
France	12 460 000
Croatia	392 000
Italy	9 548 000
Cyprus	140 000
Latvia	196 000
Lithuania	336 000
Luxembourg	252 000
Hungary	980 000
Malta	84 000
Netherlands	3 892 000

⁽¹⁾ In 2005, in its Communication 'Application of Article 228 of the EC Treaty', the Commission used EUR 500 000 as a reference lump sum. The reference lump sum has increased over the years following successive revisions due to inflation and to the various changes of methods. In the latest Commission's Communication 'Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings' (C(2022) 568), the reference lump sum used to calculate minimum lump sums was EUR 2 255 000. It is now set at EUR 2 800 000 to ensure that the minimum lump sums remain sufficiently dissuasive, taking account of their previous levels and the change of method set out in this Communication regarding the n factor.

⁽²⁾ Based on 2020 GDP and population (year n-2) extracted on 7 September 2022, and rounded to the nearest thousand.

Austria	1 904 000
Poland	3 836 000
Portugal	1 288 000
Romania	1 708 000
Slovenia	280 000
Slovakia	616 000
Finland	1 176 000
Sweden	2 324 000

ANNEX II

List of previous communications on financial sanctions

This Communication is a review of all these Commission Communications on financial sanctions from 1996 to 2021:

- In **1996**, the Commission issued a ‘Memorandum on applying Article 171 of the EC Treaty’ ⁽¹⁾. This was an initial approach meant to be further refined, but it laid the foundations of today’s policy on financial sanctions, by stating that the amount of the penalty must be calculated based on three fundamental criteria, namely the seriousness of the infringement, its duration, and the need to ensure that the penalty itself is a deterrent to further infringements.

In **1997**, the Commission published for the first time a ‘Method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty’ ⁽²⁾. At the time, there was no method in place for the lump sum calculation. According to the method set out, the daily penalty payment was to be calculated as a uniform flat-rate amount, multiplied by a seriousness coefficient and a duration coefficient, the result of which should be multiplied by a special factor (known as the ‘n factor’) reflecting the capacity to pay of the Member State concerned and the number of votes it has in the Council. This n factor, reflecting at the time both economic and institutional weight, was conceived as a way to ensure that the sanctions are fair, proportionate, but also sufficiently dissuasive for the Member States to bring the infringement to an end and not to repeat the infringement. The document further explained how the seriousness and duration coefficients were to be determined and set the first values for the n factor ⁽³⁾.

- In **2001**, an internal decision ⁽⁴⁾ of the Commission specified that the duration coefficient should be calculated on the basis of 0,1 per month (with 3 as a maximum), as of the 7th month following the ruling of the Court.

In **2005**, the Commission issued a ‘Communication on the application of Article 228 of the EC Treaty’ ⁽⁵⁾, as an update was required in particular with regard to new jurisprudence of the Court, new Member States joining the EU, and evolutions of growth and inflation rates. It established general principles to be respected when requesting financial sanctions, which are still valid today. It also established for the first time a method to calculate the lump sum payment, including minimum lump sums for each Member State, updated the calculation of the n factor ⁽⁶⁾, and set the flat-rate amounts for calculation of the penalty and lump sum payments ⁽⁷⁾.

- In **2010**, following the introduction in the Treaty of Lisbon of the possibility to request financial sanctions in cases of failure to notify transposition measures for legislative directives, the Commission adopted a Communication on the ‘Implementation of Article 260(3) TFEU’ ⁽⁸⁾. In this Communication, it explained how it would apply the existing calculation methods for lump sum and penalty payments to the cases covered by Article 260(3).

⁽¹⁾ Information from the Commission – Memorandum on applying Article 171 of the EC treaty (OJ C 242, 21.8.1996, p. 6).

⁽²⁾ Information from the Commission – Method of calculating the penalty payments provided for pursuant to article 171 of the EC Treaty (OJ C 63, 28.2.1997, p. 2).

⁽³⁾
$$\sqrt{\frac{GDP(n)}{GDP(min)} \times \frac{Votes(n)}{Votes(min)}}$$

⁽⁴⁾ See PV(2001) 1517/2 of 2 April 2001.

⁽⁵⁾ Communication from the Commission – Application of Article 228 of the EC Treaty (SEC(2005) 1658).

⁽⁶⁾
$$\sqrt{\frac{GDP(n)}{GDP(Lux)} \times \frac{Votes(n)}{Votes(Lux)}}$$

⁽⁷⁾ Set at EUR 600 per day for penalty payments and at EUR 200 for lump sum payments.

⁽⁸⁾ Commission Communication – Implementation of Article 260(3) TFEU (SEC(2010) 1371 final).

In **2019**, the Commission issued a new Communication ‘Modification of the calculation method for lump sum payments and daily penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union’ ⁽⁹⁾. This Communication followed a judgment of the Court ⁽¹⁰⁾ in which it had considered that the Commission could no longer rely on the number of votes in the Council for each Member State to reflect institutional weight, as the voting method had changed since 1 April 2017. In addition, the Commission used this opportunity to update the reference GDP value (which used to be the GDP of Luxembourg) and replaced it with the average of Member States’ GDP, when calculating the n factor ⁽¹¹⁾. Finally, in order to ensure that the resulting financial sanctions remained broadly consistent with previous levels, the Commission introduced an adjustment factor of 4,5.

- Most recently, in **2021**, the Commission adjusted the calculation for lump sums and penalty payments ⁽¹²⁾ because of the withdrawal of the United Kingdom from the EU. Given that the n factor took into account the average of all Member States’ GDP, the United Kingdom’s withdrawal resulted in an increase of the n factor, which would result in higher financial sanctions proposed by the Commission. The Commission therefore applied an adjustment factor of 0,836 to ensure that the increase would be limited to inflation.

⁽⁹⁾ Communication from the Commission – Modification of the calculation method for lump sum payments and daily penalty payments proposed by the Commission in infringements proceedings before the Court of Justice of the European Union (OJ C 70, 25.2.2019, p. 1).

⁽¹⁰⁾ Judgment of 14 November 2018, *Commission v Greece* (C-93/17, EU:C:2018:903).

⁽¹¹⁾
$$\sqrt{\frac{GDP(n)}{GDP(avg)} \times \frac{Seats(n)}{Seats(avg)}}$$

⁽¹²⁾ Communication from the Commission – Adjustment of the calculation for lump sum and penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, following the withdrawal of the United Kingdom (OJ C 129, 13.4.2021, p. 1).

Non-opposition to a notified concentration**(Case M.10944 – MITSUBISHI / HERE)****(Text with EEA relevance)**

(2023/C 2/02)

On 19 December 2022, the Commission decided not to oppose the above notified concentration and to declare it compatible with the internal market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004 ⁽¹⁾. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

- in the merger section of the ‘Competition policy’ website of the Commission (<http://ec.europa.eu/competition/mergers/cases/>). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,
- in electronic form on the EUR-Lex website (<http://eur-lex.europa.eu/homepage.html?locale=en>) under document number 32022M10944. EUR-Lex is the online point of access to European Union law.

⁽¹⁾ OJ L 24, 29.1.2004, p. 1.

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Interest rate applied by the European Central Bank to its main refinancing operations ⁽¹⁾:**2,50 % on 1 January 2023****Euro exchange rates ⁽²⁾****3 January 2023**

(2023/C 2/03)

1 euro =

Currency			Exchange rate		
Currency			Exchange rate		
USD	US dollar	1,0545	CAD	Canadian dollar	1,4414
JPY	Japanese yen	137,93	HKD	Hong Kong dollar	8,2392
DKK	Danish krone	7,4370	NZD	New Zealand dollar	1,6932
GBP	Pound sterling	0,88048	SGD	Singapore dollar	1,4188
SEK	Swedish krona	11,1430	KRW	South Korean won	1 346,51
CHF	Swiss franc	0,9879	ZAR	South African rand	18,0190
ISK	Iceland króna	151,70	CNY	Chinese yuan renminbi	7,2863
NOK	Norwegian krone	10,5280	IDR	Indonesian rupiah	16 471,95
BGN	Bulgarian lev	1,9558	MYR	Malaysian ringgit	4,6439
CZK	Czech koruna	24,124	PHP	Philippine peso	59,020
HUF	Hungarian forint	403,33	RUB	Russian rouble	
PLN	Polish zloty	4,6831	THB	Thai baht	36,254
RON	Romanian leu	4,9310	BRL	Brazilian real	5,6656
TRY	Turkish lira	19,7566	MXN	Mexican peso	20,5283
AUD	Australian dollar	1,5708	INR	Indian rupee	87,4095

⁽¹⁾ Rate applied to the most recent operation carried out before the indicated day. In the case of a variable rate tender, the interest rate is the marginal rate.

⁽²⁾ Source: reference exchange rate published by the ECB.

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.

ISSN 1977-091X (electronic edition)
ISSN 1725-2423 (paper edition)



Publications Office
of the European Union
L-2985 Luxembourg
LUXEMBOURG

EN