



## Decision

# Prohibition of concentration of RTL Group S.A. and Talpa Network B.V.

**Reference** ACM/UIT/598093  
**Case number** ACM/22/176906  
**Date** March 3, 2023

*Please note that, although every effort has been made to ensure this translation is accurate and consistent, it is for informational purposes only. In case of any dispute or inconsistencies, the Dutch version is authentic.*

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## 1 Summary and structure of this document

1. **The Netherlands Authority for Consumers and Markets (ACM) has decided not to grant a license for the acquisition of Talpa by RTL, because it would have created too powerful a company in the media industry. In October 2021, RTL notified ACM of the acquisition plan. This acquisition would bring the country's foremost commercial television channels RTL4 and SBS6, and the related activities of RTL and Talpa, under one roof. Based on an extensive investigation, ACM concludes that if the acquisition were to go through, it would lead to higher prices for television advertisements and to higher prices for the retransmission of television channels via telecom companies. Such higher prices would ultimately be passed on to consumers. In December, RTL and Talpa put forward proposals to eliminate the problems identified. ACM has deemed those proposals to be insufficient.**

**Though the media industry is changing, television will continue to be a major medium in the foreseeable future**

2. The investigation into the impact of this acquisition shows that the media industry is changing because the supply of audio-visual content and consumers' viewing behavior are changing. In addition to television, consumers can increasingly choose from on-demand video content offered by various Dutch and foreign providers. Media industry stakeholders adapt accordingly.
3. ACM has assessed this acquisition against this background. It concludes that notwithstanding these developments for viewers, and thus also for broadcasters, telecom companies and advertisers, television is still a major medium and will continue to be so for at least the coming three to five years. The acquisition will allow the RTL/Talpa combination to become by far the largest provider of television channels.

**Too dominant a company in the television advertising market**

4. Based on its investigation, ACM expects that television advertising will remain an important and independent market in the Netherlands in the coming years. ACM also observes that companies spend more and more on online advertising. However, those expenditures usually do not come at the expense of their advertising budgets for television. Other media channels, including online advertising, are used in addition to television advertising. Advertisers and media agencies have indicated that they still see significant differences between online advertising and television advertising, and that advertising on television is crucial for marketing products to consumers.
5. ACM's quantitative analysis also shows that online advertisements and television advertisements are two non-interchangeable 'products'. That means that, if prices of television advertising were to go up, advertisers would not switch to online advertising to any significant degree. Therefore, online advertising pricing does not keep the prices of television advertisements in check, at least not at this time and in the coming years.
6. If RTL and Talpa were to merge, advertisers would have too few alternatives to advertise on television channels. Advertising organization Ster, which offers advertising space on the channels of the Dutch public service broadcaster NPO, would not be able to exert sufficient counterweight. A combined RTL/Talpa would thus be able to increase the prices for television advertising without any repercussions. Higher advertising prices for advertisers ultimately lead to higher prices for consumers.

**Too dominant a company in the market for the distribution of television channels**

7. Telecom providers, such as KPN and VodafoneZiggo, include commercial television channels in their television packages. As it stands, they can already hardly bypass RTL and Talpa as separate entities, since not including either RTL or Talpa in their packages will result in a number of consumers switching to other telecom providers. If RTL's acquisition of Talpa were to go through,

this would worsen the negotiating position of telecom companies as they will then face the RTL/Talpa combination. After the acquisition, a combined RTL/Talpa would be able to charge higher prices than they can now each do individually. That means that consumers will pay more for their television subscriptions. A combined RTL/Talpa could also lead to a deterioration of the quality of services.

#### **Consequences for television production companies**

8. Both RTL and Talpa produce their own television programs, such as game shows. Additionally, independent production companies also produce television programs. ACM has examined different competition risks related to this. One of these risks pertains to the optimized procurement position of a combined RTL/Talpa, as a result of their merger. As a possible consequence, it will provide content producers fewer opportunities to get competitive prices for their productions.
9. Given the fact that ACM already blocks the acquisition due to competition problems identified in the advertising market and the market for the distribution of television channels, ACM leaves the question of whether this consequence will actually materialize unaddressed. Other competition risks investigated by ACM in this context are not plausible at present.

#### **Proposals to counter market power deemed insufficient**

10. RTL and Talpa have submitted proposals to eliminate the problems in the advertising market and the market for the distribution of television channels. In short, Mediahuis was to undertake the advertising sales of the Talpa channels, thus allowing, in addition to Ster, two companies to continue to exist for the sale of advertising space on television. In terms of the distribution of television channels, for Talpa's and RTL's television packages there would be separate negotiations with telecom providers over time.
11. ACM has assessed these proposals, thereby having consulted various market participants, including advertisers, media agencies and telecom providers. ACM concludes that the proposals do not provide sufficient assurance that they will eliminate both problems. For this reason, ACM has decided not to grant a license for this acquisition.

#### **Extensive quantitative and qualitative analysis**

12. ACM has performed extensive quantitative and qualitative analyses. In addition to the information that RTL and Talpa submitted at the time of the notification and the license application, ACM has requested additional information from both companies on several occasions, including RTL's and Talpa's internal strategic documents.
13. ACM has conducted market research by means of interviews with and/or written questions to advertisers, media agencies, telecom companies, broadcasters, video-on-demand service providers, providers of advertising space and producers of television programs. In addition, a survey was conducted among producers. ACM has received various written opinions from different companies. ACM has also requested data from different companies. Additionally, ACM has performed a quantitative analysis of the price effects to be expected as a result of the acquisition.

#### **Structure of this document**

14. The structure of this Decision is as follows:
  - **Chapter 2** explains the procedure;
  - **Chapter 3** provides a description of the Parties;
  - **Chapter 4** describes the reported operation;
  - **Chapter 5** explains the applicability of merger control;
  - **Chapter 6** specifies the audiovisual services supply chain and its stakeholders, as well as certain relevant market developments;
  - **Chapters 7 to 9** successively present an assessment of the impact of the proposed concentration in the market for the sale of advertising space, hereinafter also referred to as

**advertising markets**, the wholesale markets for the distribution of television channels, hereinafter also referred to as **distribution markets**, and the markets involved in the production and procurement/licensing of audiovisual content, hereinafter also referred to as **content markets**;

- **Chapter 10** sets out the Parties' remedy proposals for a license subject to provisions;
- Lastly, **Chapter 11** finalizes the Decision with a conclusion.

## 2 The procedure

15. On October 14, 2021 RTL Group S.A. (hereinafter: **RTL Group**) submitted a notification of a proposed concentration.<sup>1</sup> RTL Group seeks to acquire Talpa Network B.V. (hereinafter: **Talpa**). On January 28, 2022, ACM decided that this notification requires further investigation and that RTL Group and Talpa will need to apply for a merger license to establish the concentration. This was announced in the Government Gazette, no. 3695 of February 1, 2022.
16. On February 14, 2022, RTL Group submitted a license application. ACM has published the notification of this application in the Government Gazette, no. 5327 of February 17, 2022. ACM has received opinions from third parties and addresses these opinions where relevant for the assessment.
17. ACM conducted a further investigation into the relevant market definition and potential effects of the proposed concentration on competition. This involved written and oral questions posed to RTL Nederland Holding B.V. (hereinafter: **RTL**) and Talpa (hereinafter jointly referred to as: **the Parties**) and to various market participants such as advertisers, distributors, broadcasters and video-on-demand (hereinafter: **VOD**) services<sup>2</sup> and audiovisual content producers. ACM also conducted a written survey among content producers and engaged an external expert to provide an opinion on the bilateral nature of the markets in which the Parties operate.
18. ACM performed economic analyses based on data it had requested from the Parties, from media agencies and competitors. The Parties were given access to details of how these investigations were conducted using a data room procedure.
19. On February 25, 2022, ACM requested the Parties to provide a supplement to the license application. ACM received this supplement on March 15, 2022. Thereafter, ACM again posed additional questions on March 18, 2022, April 24, 2022, May 18, 2022, June 16, 2022, June 24, 2022 and July 22, 2022. ACM received these supplements on April 14, 2022, May 6, 2022, on June 1, 2022, July 12, 2022, December 16, 2022 and January 30, 2023, respectively. The thirteen-week processing time<sup>3</sup> was consequently suspended for a total of 296 days.
20. On August 23, 2022, ACM provided the Parties with its preliminary findings (hereinafter: **Points for Consideration**). These Points for Consideration were based on the results of the investigation conducted up to that point.
21. The Parties provided various responses to the Points for Consideration. Following these responses, ACM then took a number of additional investigative actions. The Parties were given access to these additional investigative actions by means of a second data room procedure. The Parties submitted a response to these additional investigative actions.

<sup>1</sup> The Parties' notification of the proposed concentration of October 14, 2021, with reference ACM/IN/651611 (hereinafter: **Notification**).

<sup>2</sup> When it comes to video-on-demand, viewers decide when they watch audiovisual content.

<sup>3</sup> Pursuant to Article 44(1) of the Dutch Competition Act.

22. In December 2022, the Parties submitted two proposals for a license subject to provisions. ACM widely marketed these proposals to assess whether the proposals would eliminate the identified competition problems.

### 3 The Parties

23. This Chapter describes the Parties' activities and is structured as follows:
- First, is a description of RTL Group's activities (**Section 3.1**);
  - What follows is a description of Talpa's activities (**Section 3.2**);
  - This Chapter concludes with a description of the overlap of their activities (**Section 3.3**).

#### 3.1 RTL Group

24. RTL Group is a company under Luxemburg law and a subsidiary of Bertelsmann SE & Co. KGaA (hereinafter: **Bertelsmann**). Bertelsmann has been the majority shareholder in RTL Group since July 2001. Bertelsmann is a German multinational conglomerate, active in the media, services and educational industries.
25. Through RTL Group, Bertelsmann operates in the production, collection and distribution of audiovisual content (hereinafter: **AV content**) on various platforms in the Netherlands, Germany, France and Belgium, among others. Through RTL, RTL Group operates in the area of the following activities in the audiovisual industry, among others<sup>4</sup>:
- **Wholesale broadcasting transmission services** RTL broadcasts five television channels<sup>5</sup> (RTL4, RTL5, RTL7, RTL8 and RTLZ) and three digital specialty channels (RTL Lounge, RTL Crime and RTL Telekids).
  - **Supplying AV services at retail level.** RTL offers consumers streaming services via RTL XL<sup>6</sup>, Videoland and NLZIET. RTL XL is a free service enabling viewers to catch up on programs they have missed. Videoland is a Subscription Video on Demand<sup>7</sup> (hereinafter: **SVOD**) service that offers both Dutch and international AV content. NLZIET is also an SVOD service and is a collaboration with Talpa and the Dutch public service broadcaster NPO (hereinafter: **NPO**). RTL also offers livestreams to its linear AV/TV content on its VOD platforms.
  - **The sale of advertising space on its television channels and online platforms.** Through its subsidiary Ad Alliance, RTL is active in the sale of advertising space. Ad Alliance sells advertising space on behalf of RTL and on behalf of third parties.<sup>8</sup> In addition, Ad Alliance has a cooperation agreement with DPG Media B.V. (hereinafter: **DPG**) based on which Ad Alliance sells DPG's online video advertising space and DPG sells Ad Alliance's online display advertising space.
26. Additionally, RTL Group operates in the field of development, production and procurement of AV content and licensing in the Netherlands. RTL Group operates in the field of the production of programs in the Netherlands via its subsidiary Fremantle Media Netherlands B.V. (hereinafter:

<sup>4</sup> See Section 3.1 of ACM's Decision of January 28, 2022, with reference ACM/UIT/570553 (hereinafter: **Notification Decision**) for a more extensive description of RTL Group's activities.

<sup>5</sup> Linear television means that the viewer watches content at a set time. Non-linear television means that the viewer decides what to watch and when to watch it.

<sup>6</sup> RTL Nederland will discontinue RTL XL in early 2023. See: [RTL Nederland stopt begin 2023 met gratis on demand dienst RTL XL \(nederlandsmedianieuws.nl\)](https://www.rtlnieuws.nl/nieuws/mediabedrijf/rtl-nederland-stopt-begin-2023-met-gratis-on-demand-dienst-rtl-xl) (RTL Nederland discontinuing its free on-demand service RTL XL as of the beginning of 2023), consulted on December 9, 2022.

<sup>7</sup> A subscription VOD model gives access to content on a subscription basis, advertising based VOD (AVOD) enables consumers to get free access to on-demand content in exchange for watching commercials.

<sup>8</sup> RTL sells advertising space on behalf of Discovery Benelux, the Dutch television branch of Walt Disney Company, DPG Media, Viacom and VodafoneZiggo (Ziggo Sport). The advertising sales network thus includes RTL XL, RTL 4, RTL 5, RTL 7, RTL 8, ESPN, Ziggo Sport, Eurosport 1, Comedy Central, 24 Kitchen, Discovery, TLC, MTV, Fox, National Geographic and E! Popcultuur.



**Fremantle Nederland**). Fremantle Nederland is full owner of content producers Blue Circle and No Pictures Please, and of drama producer Fiction Valley. Fremantle Nederland and RTL are joint owners of Fremantle Productions B.V. (hereinafter: **Fremantle Productions**). Fremantle Productions only produces content for RTL, e.g., for Videoland. Together with RTL, Fremantle Productions develops different formats, which it then also produces. For its channels and platforms, RTL purchases AV content and licenses for broadcasting rights from producers and rights holders.

### 3.2 Talpa

27. Talpa is a wholly-owned subsidiary of Talpa Holding N.V. (hereinafter: **Talpa Holding**). Talpa Holding is controlled by Mr. John de Mol. Talpa has subsidiaries operating television and radio channels, which run different online platforms and publish magazines.
28. In the Netherlands, Talpa is involved in the following activities in the AV sector through its subsidiaries<sup>9</sup>:
  - **Procurement of AV content and licenses.** For its different television channels and platforms, RTL purchases AV content and licenses for broadcasting rights from producers and rights holders. Talpa owns production company Talpa TV Productions, which produces television programs for Talpa's channels.
  - **Wholesale broadcasting transmission services** Talpa operates television channels SBS6, Net 5, Veronica and SBS9. Furthermore, Talpa has theme channel TV538.
  - **Supplying AV services at retail level.** Talpa provides AV services at retail level with AVOD service KIJK, which offers the possibility of watching missed programs. Together with RTL and NPO, Talpa also runs the SVOD platform NLZiet, and it offers livestreams to its linear AV/TV content on its VOD platforms.
  - **The sale of advertising space on its television channels and online platforms.** Talpa is active in the sale of advertising space through Talpa Media Solutions. Talpa Media Solutions sells online video advertising space on AVOD service KIJK, and linear television advertising space on its linear television channels and for BBC First. One Media Sales B.V. (hereinafter: **OMS**) engages in the sale of advertising space on radio channels and online audio platform of Talpa Radio Holding B.V. (hereinafter: **Talpa Radio**). OMS also sells advertising space on behalf of radio channels 100%NL and SLAM! (owned by RadioCorp Holding B.V.) and Sublime (owned by NRC Media). In addition, OMS sells digital audio advertising space on behalf of different other parties such as QDance and KINK. Talpa Media Solutions and Mood for Magazines B.V. (hereinafter: **MfM**) also sell advertising space in printed magazines and the online environment offered by MfM.
29. In addition to the activities in the AV industry, Talpa also publishes magazines, and runs the associated websites and socials. These magazines are LINDA, LINDA.MEIDEN and LINDA.loves. Talpa also operates online auction platforms and deal sites VakantieVeilingen, ActieVandeDag and SlajeSlag. Talpa Music Rights deals with the management, publication and exploitation of music rights that pertain to Talpa's radio and television activities.
30. In addition to Talpa, Talpa Holding has two other subsidiaries active in developing and producing AV content:
  - Talpa Concepts B.V. (hereinafter: **Talpa Concepts**) develops television formats in a variety of genres, such as quiz, reality, dating, daily shows and entertainment shows.
  - Talpa Entertainment Producties B.V. (hereinafter: **TEP**) is a production company that produces the formats developed by Talpa Concepts. TEP is currently not selling any productions to third parties in the Netherlands, apart from the program 'Koffietijd', which it produces for RTL.<sup>10</sup>

<sup>9</sup> See Section 3.2 of the Notification Decision for a more extensive description of Talpa's activities.

<sup>10</sup> A limited number of programs produced by TEP are also available on Videoland. This is turnkey content for Talpa's television channels, as opposed to content specifically produced for Videoland. Notification, marginal 21, footnote 31.

### 3.3 Relationship between the activities of RTL Group and Talpa

31. The Parties' activities overlap horizontally in various areas. There are also vertical relationships between the Parties' activities and there may be a conglomerate relationship. **Table 1** shows this in terms of the activities relevant to this Decision.

**Table 1** Overlap of the Parties' activities

	RTL Group	Talpa
<i>Sale of online advertising space</i>	X	X
<i>Sale of television advertising space</i>	X	X
<i>Sale of radio advertising space</i>	-	X
<i>Sale of print advertising space</i>	-	X
<i>Production of AV/TV content</i>	X	X
<i>Procurement of AV/TV content</i>	X	X
<i>Provision of television channels</i>	X	X
<i>Provision of radio channels</i>	-	X
<i>Provision of retail television services</i>	X	X

## 4 The notified operation

32. The Parties intend to execute the following transaction. The acquisition will be given the form of a joint venture (hereinafter: **JV**). This joint venture will bring together both Talpa's and RTL's activities. RTL Group will acquire an indirect 70% of the shares in the JV via this transaction. After the transaction, Talpa Holding will hold a minority interest of 30% in the JV.<sup>11</sup>
33. RTL Group already has control over RTL.<sup>12</sup> According to the Parties, RTL Group will acquire indirect exclusive control of the JV and thus also indirect exclusive control of Talpa.<sup>13</sup>
34. Put simply, according to the Parties, the JV will be established as shown in **Figure 1**.<sup>14</sup>

<sup>11</sup> Notification, marginal 26.

<sup>12</sup> Notification, Annex 3: Structure overview of RTL Nederland.

<sup>13</sup> Notification, marginal 26.

<sup>14</sup> Additional information from the Parties of June 29, 2022, with reference ACM/IN/701565, adjusted structure overview of the JV.

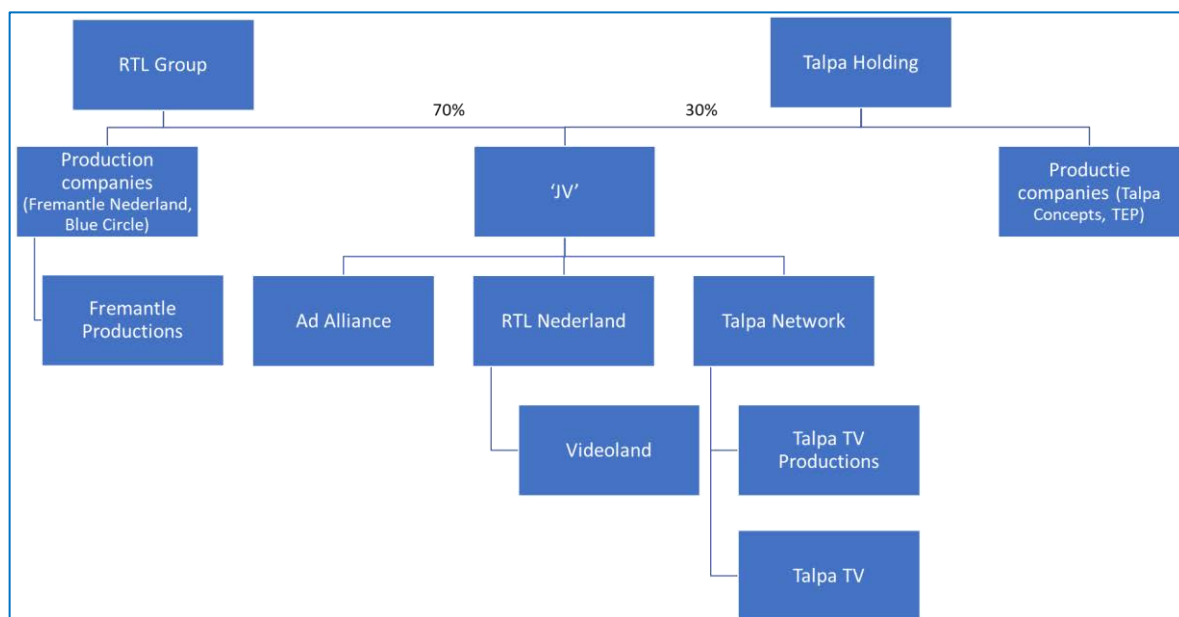


Figure 1 The structure of the proposed JV

35. Talpa Holding will acquire certain rights over the JV, including [confidential]\* of JV's [confidential].<sup>15</sup>
36. The proposed transaction is, among other things, evidenced by the *Signing Protocol* that was signed by the Parties on June 23, 2021, and the *Subscription and Contribution Agreement* of September 22, 2021, which included the draft *Shareholders' Agreement* and the *Content Agreement*.<sup>16</sup>
37. Based on the *Content Agreement* that is to be concluded, Talpa Concepts and TEP will produce content for the JV.<sup>17</sup> Based on the *Content Agreement*, Talpa Concepts [confidential]. The *Content Agreement* states that Talpa Holding reserves the right to [confidential]. Furthermore, Talpa Holding reserves the right to [confidential].<sup>18</sup>

## 5 Applicability of the merger control

### 5.1 General information

38. As established in the Notification Decision, the proposed transaction should be considered, given the turnover data of the companies involved, as a concentration with a Community dimension within the meaning of Article 1(2) of Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (hereinafter: **Merger Regulation**).
39. On August 27, 2021, the Parties submitted an amendment request to the European Commission (hereinafter: **Commission**) within the meaning of Article 4(4) of the Merger Regulation. On

\* In this public version of the decision, parts of the text have been replaced or omitted for confidentiality reasons. The replaced or omitted parts are indicated by hard brackets. Numbers or percentages may have been replaced by an indication of their range.

<sup>15</sup> Notification, marginal 40.

<sup>16</sup> Notification, Annexes 5 and 6: the *Signing Protocol* and the *Subscription and Contribution Agreement*, respectively.

<sup>17</sup> Talpa Holding will only transfer Talpa to the JV, which means that production companies Talpa Concepts and TEP are not included in the JV that is to be established.

<sup>18</sup> Notification, marginal 22.

September 29, 2021, the Commission decided to<sup>19</sup> partially refer the transaction to ACM as far as the transaction relates to the AV/TV industries in the Netherlands.<sup>20</sup>

40. On October 14, 2021, the Parties submitted a Notification to ACM of the proposed concentration, as far as this pertains to RTL Group's and Talpa's AV/TV activities in the Netherlands.<sup>21</sup> On February 14, 2022, the Parties filed a license application for the proposed concentration, as far as this pertains to RTL Group's and Talpa's AV/TV activities in the Netherlands.<sup>22</sup>
41. According to the Parties, the proposed transaction results in RTL Group acquiring indirect exclusive control of the JV and thus also indirect exclusive control of Talpa.<sup>23</sup> According to the Parties, the transaction will not result in a joint control of RTL Group and Talpa Holding over **[confidential]**.<sup>24</sup>
42. In its Notification Decision, ACM concluded that, consequent to the proposed transaction, RTL Group is to gain indirect exclusive control of the JV that is to be set up with the exception of **[confidential]** – and thus also acquires indirect exclusive control of Talpa. This qualifies as a concentration within the meaning of Article 27(1)(b) of the Dutch Competition Act.<sup>25</sup>
43. Another conclusion drawn by ACM in its Notification Decision is that the specific rights that Talpa Holding acquires consequent to the proposed transaction result in a joint control for RTL Group and Talpa Holding of the JV's **[confidential]**. ACM's preliminary opinion in the Notification Decision was that **[confidential]** qualifies as a full-function joint venture within the meaning of item 91 et seq. of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter: **Jurisdictional Notice**).<sup>26</sup>
44. In keeping with the Notification Decision, and based on its investigation in the licensing phase, ACM concludes that JV's **[confidential]** qualifies as a full-function joint venture. This is discussed in more detail in **Section 5.2**.
45. In principle, the acquisition of joint control by RTL Group and Talpa Holding of JV's **[confidential]** is thus a separate concentration within the meaning of Article 27(2) of the Dutch Competition Act. However, given the fact that both acquisitions of control, i.e., RTL Group's acquisition of indirect exclusive control of Talpa and the joint acquisition by RTL Group and Talpa Holding of JV's **[confidential]**, are closely interrelated and that, as an entity, RTL Group acquires both sole control as well as joint control, both acquisitions form one single concentration.<sup>27,28</sup>
46. The undertakings concerned are RTL Group, Talpa and Talpa Holding.
47. The transaction is covered by the merger control set out in Chapter 5 of the Dutch Competition Act.

<sup>19</sup> Notification, Annex 26: The Commission's decision of September 29, 2021, Case COMP/M.10391 – *RTL Group / Talpa Network*.

<sup>20</sup> The Commission assessed the vertical effects between the upstream IT related activities of RTL Group/Bertelsmann and the downstream e-commerce activities of Talpa, also insofar as those vertical effects concern the Netherlands, Decision in case M.10391 - *RTL Group / Talpa Network* of July 11, 2022.

<sup>21</sup> Notification.

<sup>22</sup> The Parties' license application dated February 14, 2022, with reference ACM/IN/676924 (hereinafter: **License Application**).

<sup>23</sup> Notification, marginal 26.

<sup>24</sup> The Parties' responses dated January 17, 2022, with reference ACM/IN/671281, marginal 1.

<sup>25</sup> Notification Decision, marginal 46.

<sup>26</sup> Notification Decision, marginals 44 and 45.

<sup>27</sup> Jurisdictional Notice, item 42.

<sup>28</sup> In this regard, ACM notes the following for the sake of completeness. Even if ACM had come to the conclusion that the acquisition of joint control by RTL Group and Talpa Holding of **[confidential]** would not qualify as a single concentration, ACM would be authorized to include that acquisition of control in its material assessment on RTL Group's acquisition of indirect exclusive control of Talpa Network, which qualifies as a concentration. The first acquisition of control is in fact inextricably linked to the concentration, so that its effects should be included in the assessment as a direct and immediate consequence of the concentration. See by comparison the ruling of the District Court of Rotterdam of June 14, 2018, ECLI:NL:RBROT:2018:4679, item 8.11.

## 5.2 [confidential] qualifies as a full-function joint venture

48. The creation of a joint venture is a concentration within the meaning of Article 27(2) of the Dutch Competition Act if the joint venture is to perform on a lasting basis all the functions of an autonomous economic entity. To this end, the joint venture must operate in a market and perform all functions typically performed by other undertakings operating in that market. In operational terms, the joint venture must be autonomous with respect to the parent companies.<sup>29</sup> The assessment of this so-called full-function criterion is consistent with the different elements mentioned by the Commission in the Jurisdictional Notice.<sup>30</sup>
49. One key element in assessing the full functionality of a joint venture is the question of whether the joint venture has its own access to or presence in the market beyond a specific function that it performs on behalf of the parent companies' business activities. The joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources, including finances, staff, and both tangible and intangible assets.<sup>31</sup> ACM concludes that this is the case here. It will explain this conclusion below.
50. First, ACM established that [confidential] has a management dedicated to its day-to-day operations. [confidential] has its own program director responsible for the content procurement and the programming of the channel.<sup>32</sup> This program director will work exclusively for [confidential].<sup>33</sup>
51. The Parties' argument<sup>34</sup> that [confidential] is neither autonomous nor free to determine its policy is not convincing. The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture.<sup>35</sup>
52. Secondly, ACM establishes that [confidential] has access to sufficient financial means. [confidential] generates turnover by way of distribution and advertising revenues.<sup>36</sup> The fact that Talpa does not offer [confidential] autonomously to distributors and advertisers, and that the joint venture can also not offer this autonomously, as put forward by the Parties<sup>37</sup>, does not alter this.<sup>38</sup>
53. Thirdly, ACM establishes that [confidential] has access to sufficient staff. The foregoing applies despite the fact that, as argued by the Parties<sup>39</sup>, JV's staff will be employed and recruited exclusively by the JV. If needed, JV's staff may work for multiple channels of the JV. And finally, there is no deployment of staff at arm's length at [confidential]. For ACM, the following is important in this context.
54. In reply to ACM's question, the Parties have indicated that [confidential] may hire/source staff from external sources. The Parties do so now as well.<sup>40</sup> While the Parties do not currently employ

<sup>29</sup> Jurisdictional Notice, item 93.

<sup>30</sup> Jurisdictional Notice, items 94 to 109.

<sup>31</sup> Jurisdictional Notice, item 94.

<sup>32</sup> Notification, Annex 5: *Signing Protocol*, segment *Shareholders Agreement*, Article 24.3.1.

<sup>33</sup> The Parties' responses dated July 12, 2022, with reference ACM/IN/703991, marginal 59.

<sup>34</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690143, marginals 115 and 116; and the Parties' responses of July 12, 2022, with reference ACM/IN/703991, marginal 56, marginal 57 and marginal 68 through marginal 70.

<sup>35</sup> Jurisdictional Notice, item 93.

<sup>36</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690143, marginal 112.

<sup>37</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690143, marginal 111 through marginal 114.

<sup>38</sup> See the decision of the Netherlands Competition Authority (now: ACM) of August 13, 2007 in case 6216/143 – *RTL NL/ Radio 538*, marginal 17 and marginal 18.

<sup>39</sup> The Parties' responses of July 12, 2022, with reference ACM/IN/703991, marginals 49 through 54 and marginal 60; and the Parties' responses of April 14, 2022, with reference ACM/IN/690143, marginal 114.

<sup>40</sup> The Parties' responses of July 12, 2022, with reference ACM/IN/703991, marginal 55.

staff through an agency and do not expect to do so in the future for the JV, this does not alter this fact.<sup>41</sup>.

55. ACM considers it plausible that **[confidential]** key staff members as well as other staff members who are to work under the leadership of **[confidential]** program director, will virtually perform their work for **[confidential]** in a dedicated manner. As for **[confidential]** program director, the Parties themselves indicate that this will be exclusively the case.<sup>42</sup> Based on the nature of the work for **[confidential]**, ACM considers this plausible for other key officials, who, according to the Parties, are channel coordinators and running order and traffic staff at television programs, among others. According to the Parties, these key staff members are jointly responsible for the channel programming and the operational realization of **[confidential]**.<sup>43</sup> The Parties' argument that staff, except for the program director, could be deployed for the other channels of the JV if necessary in the absence of specific further agreements between the Parties in this regard,<sup>44</sup> does not alter this.
56. Fourthly, ACM establishes that **[confidential]** has access to both tangible and intangible assets. The foregoing applies in spite of the fact that, as put forward by the Parties<sup>45</sup>, **[confidential]** does not own any technical facilities and non-technical assets/other services that are essential to its day-to-day operations. Instead, it will make use of those belonging to the JV. No specific arrangements/conditions have been agreed on **[confidential]** use thereof, and arm's length transactions would not apply.
57. A key element for ACM is that **[confidential]** would be able to hire a substantial part of the technical facilities from external parties and also easily hire or purchase non-technical assets/other services from external parties – as the Parties have indicated in response to ACM's question<sup>46</sup> and as evidenced from the fact that the Parties are currently making use of outside parties themselves for this.<sup>47</sup> The fact that the Parties would not presently anticipate that **[confidential]** will hire technical facilities from outside parties<sup>48</sup> is irrelevant.
58. Given that the Parties are now, on a more than occasional basis, hiring/purchasing technical facilities and non-technical assets/other services from outside parties, ACM is not convinced by the Parties' argument<sup>49</sup> that hiring technical facilities from outside parties would not be preferred for **[confidential]** on account of the rapidity and flexibility with which in-house facilities can be deployed, among other things.

### Conclusion

59. Based on the above, ACM concludes that **[confidential]** qualifies as a full-function joint venture.<sup>50</sup>

## 6 Context

60. ACM sets out the context of the proposed concentration in this Chapter. This Chapter is structured as follows:

<sup>41</sup> The Parties' responses of July 12, 2022, with reference ACM/IN/703991, marginal 55.

<sup>42</sup> Idem, marginal 59.

<sup>43</sup> Idem, marginal 58.

<sup>44</sup> Idem, marginal 59.

<sup>45</sup> Idem, marginals 38 through 48 and 61 through 65; the Parties' responses of April 14, 2022, with reference ACM/IN/690143, marginal 114.

<sup>46</sup> The Parties' responses of July 12, 2022, with reference ACM/IN/703991, marginal 41, marginal 46 and marginal 66.

<sup>47</sup> The Parties' responses of November 19, 2021, with reference ACM/IN/665996, marginal 4, marginals 6-10, marginal 46 and marginal 66.

<sup>48</sup> The Parties' responses of July 12, 2022, with reference ACM/IN/703991, marginal 41 and marginal 66.

<sup>49</sup> Idem, marginal 41.

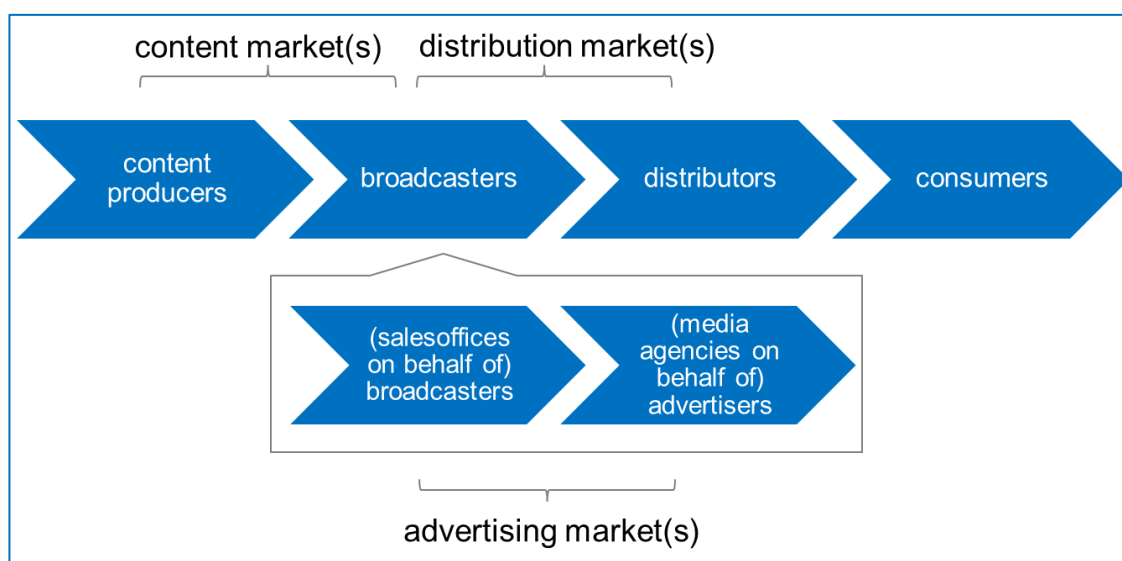
<sup>50</sup> For the sake of completeness, ACM notes that, in its referral decision, the Commission did not provide a substantive assessment on the full functionality of **[confidential]**. (See: Notification, Annex 26: The Commission's Decision of September 29, 2021, Case COMP/M.10391 – *RTL Group / Talpa Network*, marginal 8.)



- It starts with a brief outline of the AV chain and the different participants active in the Netherlands (**Section 6.1**);
- The next section describes market developments relevant to the AV chain (**Section 6.2**);
- ACM dedicates **Section 6.3** to its view on these market developments and the extent to which the developments are included in the assessment.

## 6.1 The AV chain and its participants

61. The AV industry is that part of the media industry that focuses on AV content, i.e., ranging from the production of AV content to the consumption thereof. **Figure 2** below provides a schematic overview of this chain in the Netherlands.



**Figure 2 The AV chain**

62. Producers produce the AV content. AV content includes films, series, current affairs programs and game shows. Content producers may be independent producers who develop or produce programs on behalf of a broadcaster (television channel/ broadcasting network/VOD provider), such as Banijay and ITV. Broadcasters, too, may be producers. RTL, for example, has its own production companies, such as Fremantle Nederland. Also, Talpa Holding has production companies TEP/Talpa Concepts and Talpa TV Productions.
63. Broadcasters purchase the content. They then offer the content in the Netherlands via television and other services. The Netherlands has different commercial television channels, such as RTL, which broadcasts RTL4, and Talpa, which has SBS6. Additionally, there is NPO under which broadcasting associations broadcast their programs. Finally, there are different subscription-based and advertising-based VOD providers operating in the Netherlands. Examples include Netflix and Disney+, as well as RTL with Videoland, Talpa with KIJK, NPO with NPO Start/NPO Plus, and RTL, Talpa and NPO in a joint collaboration in NLZIET. Unlike other broadcasters, VOD providers have a direct retail relationship with viewers. The VOD offer concerns a so-called non-linear service provision; consumers can decide for themselves when to watch the content. This is not possible in case of linear service provision, such as provided by television channels and NPO: consumers watch the content at a set time.
64. Distributors, such as KPN and VodafoneZiggo, offer television subscriptions to consumers enabling them to watch the broadcasters' content. Distributors pay a fee (hereinafter: **retransmission fee**) to broadcasters for including the broadcasters' offer in their television subscriptions. In over 90% of the cases, television subscriptions form part of a package that also covers other telecom services;

typically in any case internet and possibly also fixed telephony and/or mobile services.<sup>51</sup> Distributors may complement their television subscriptions with additional services, such as the option to record programs or watch missed programs (Network Personal Video Recording; NPVR). By offering such additional on-demand services, distributors are also VOD providers.

65. Content provided via the internet is also referred to as over-the-top (hereinafter: **OTT**). This is true in practice for all broadcasters' VOD services.
66. Finally, advertisers play a role within the AV chain. They purchase advertising space on television and other media channels. A large proportion of advertisers make use of media agencies, which take care of the procurement of advertising space. The sale of advertising space on television and other media channels is done via sales offices, such as RTL's Ad Alliance and Talpa Media Solutions.
67. The commercial broadcasters finance the production or procurement of content by selling advertising space to advertisers and via the retransmission fees they receive from distributors.

#### **Regulations in the audiovisual industry**

68. The Dutch Media Act limits the linear airtime that operators can use to sell advertising space for both NPO and the commercial broadcasters. NPO may dedicate no more than a daily 15% of airtime to commercials. In the coming years, this percentage will be phased out to a maximum of 5%. In addition, NPO is not allowed to broadcast commercials before, during and after children's programs and on its online channels. Programs may not be interrupted. Commercial broadcasters, however, may interrupt programs. Commercial broadcasters may dedicate a maximum of 20% airtime to commercials.<sup>52</sup> Providers of linear television services with more than 100,000 subscribers have a so-called must-carry obligation for the composition of television subscriptions with regard to the NPO channels and a minimum package size of 30 channels.<sup>53</sup>
69. The Dutch Media Act further stipulates that for each television channel, the programming must consist of European productions for at least 50% of the time. On-demand audiovisual media services (VOD) consist of at least 30% European productions per supply channel.<sup>54</sup> Furthermore, the program selection for all television channels of national or regional public service broadcasters need to include original Dutch or Frisian productions for at least 50% of the time, which is 40% for other television channels.<sup>55</sup>
70. Lastly, the Dutch Media Act deems the rules relevant for commercial media institutions. For instance, commercial media institutions need to provide for an editorial charter that, in accordance with those employees in charge of the provision and composition of the program selection, sets out the journalistic rights and duties of these employees.<sup>56</sup> In addition, under the Dutch Media Act, these parties are subject to rules on advertising, sponsorship and product placement, among other things.

<sup>51</sup> Telecommonitor ACM, 2022Q2, segment *Bundels* and segment *Televisie*.

<sup>52</sup> Article 2.95 and Article 3.8(1) of the Act of December 29, 2008 establishing a new Media Act (2008 Media Act).

<sup>53</sup> Article 6.13(3)(4) and Article 6.14(3)(4) of the 2008 Media Act. The idea behind the 'must carry' is that public media should be accessible to everyone in order to be able to effectively carry out the public mission and to also justify the funding from tax resources.

<sup>54</sup> Article 2.115 and Article 3.20 of the 2008 Media Act. See Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (The Audiovisual Media Services Directive, as amended by Directive (EU) 2018/1808, Pub EU 2010, L95/1, Article 13: 1. Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure prominence of those works. Moreover, the third Rutte administration drafted a legislative proposal stipulating that 6% of the revenues from SVOD service providers, among others, which is generated in the Netherlands, must be invested in Dutch content. The proposal amending the 2008 Media Act in respect of introducing an obligation to invest for the benefit of Dutch cultural audiovisual products, <https://www.parlementairemonitor.nl/9353000/1/j9vviij5epmj1ey0/Mdbozf7rkz2>.

<sup>55</sup> Article 2.122 and Article 3.24 of the 2008 Media Act.

<sup>56</sup> Article 3.5 of the 2008 Media Act.



71. Supervision of compliance with the rules of the Dutch Media Act is vested in the Dutch Media Authority. The Dutch Media Authority's supervision of compliance with the Dutch Media Act covers public and commercial audiovisual media service providers based in the Netherlands and/or audiovisual media service providers oriented to the Netherlands.<sup>57</sup> RTL, forming part of the Luxembourg RTL Group, carries out its broadcasting activities under a Luxembourg concession and is thus subject to the Luxembourg Media Act.<sup>58</sup>

#### **The relationships between the different links**

72. There is a strong correlation between the different links in the AV chain.<sup>59</sup> The more engaging the content, for example, the more viewers there will be; more viewers makes a broadcaster more interesting to advertisers, which in turn leads to more advertising revenues. More advertising revenues enable broadcasters to purchase more engaging content, resulting in more viewers. In the context of an assessment of the two-way effects as a result of the proposed concentration, **Section 7.6.5** takes a closer look at this interrelationship in the AV chain.

## **6.2 Market developments**

73. The media industry is in development. A number of these developments may be significant for the assessment of the impact of the proposed concentration. Examples of such developments include the change in viewing behavior, the rise of VOD providers and the upsurge of online advertising.
74. The Parties have indicated that their transaction has to be considered in light of the developments in the industry. According to the Parties, the rationale for this transaction stems from the fact that they seek the capacity to meet the competition of VOD providers in the target markets, and technology platforms such as Google and Facebook in the advertising markets.<sup>60</sup> To that end, the Parties would like to ensure that their purchasing budget and thus the provision of qualitatively engaging local (and other) content maintains a consistent level and, where possible, increases substantially.<sup>61</sup> This would allow the Parties to sustainably compete with the aforementioned major and mostly internationally operating providers<sup>62</sup> and to slow down the migration from linear to online and keep the advertising opportunities on linear television appealing.<sup>63</sup>
75. Below, ACM explains a number of market developments in more detail. Next, ACM addresses the way in which these developments can or cannot be included in the assessment of the proposed transaction.

#### **Change in viewing behavior**

76. The advent of internet and the introduction of streaming services are changing consumer viewing behavior. Where consumers could previously only watch AV content by means of linear television, nowadays they can watch AV content by watching missed programs, also referred to as catch-up TV, provided by streaming services and providers such as YouTube and apps such as TikTok.<sup>64</sup>

<sup>57</sup> <https://www.cvdm.nl/over-het-cvdm>. If a media service provider has its head office in one Member State but editorial decisions on audiovisual media services are taken in another Member State, it will be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (The Audiovisual Media Services Directive, as amended by Directive (EU) 2018/1808, Pub EU 2010, L95/1, Article 2(2) and 3.

<sup>58</sup> Notification, marginal 28. Incidentally, RTL voluntarily complies with specific Dutch requirements in practice, the Dutch Media Authority's viewpoint with reference ACM/IN/706216, pages 5 and 7.

<sup>59</sup> Notification Decision, marginal 73.

<sup>60</sup> Notification, marginals 2-5.

<sup>61</sup> Notification, marginal 6.

<sup>62</sup> The Parties' responses dated March 15, 2022, with reference ACM/IN/683966, marginal 3.

<sup>63</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718474, marginal 22.

<sup>64</sup> Dutch Media Authority, *Televisieaanbod en kijkgedrag 2022 - Onderzoek naar de diversiteit van televisiepakketten*

77. In recent years, daily linear viewing time dropped from 179 minutes in 2012 to 154 minutes in 2021.<sup>65</sup> By contrast, the number of minutes of watching missed programs is on the rise in recent years; the rate of catch-up TV climbed from 24 minutes per day in 2020 to 27 minutes per day in 2021.<sup>66</sup> The audience ratings of 2022 provided by SKO, the Dutch viewer audience measurement service in the Netherlands, shows that the trend of the drop in linear viewing time continues. In 2022, people in the Netherlands watched television channels for an average of 138 minutes a day.<sup>67</sup> The total viewing time of content on television, including the content of streaming services and catch-up viewing increased from 17 to 70 minutes per day from 2012 to 2021.<sup>68</sup> In 2022, this increase appears to be somewhat leveled off. The TV Screen time, i.e., the total time spent in front of a television screen, was 181 minutes in 2022. This is 19 minutes less than in 2021. In addition to watching live and missed television programs, TV Screen time also includes the time spent watching VOD services, such as Netflix, Videoland and Disney+.<sup>69</sup>
78. It is mostly young people who watch increasingly less television and who make use of other ways to watch video content, such as via their smartphones or other devices.<sup>70</sup> According to SKO, the most viewing time is enjoyed by people in the 65-and-over age group, followed by the 50-64 age group.<sup>71</sup> The Media Monitor shows that among those aged up to 34, 50% to 60% watch content from television channels.<sup>72</sup> This group uses the television screen mostly to watch other content, such as from streaming services.

#### **Increase in VOD providers and innovations among VOD providers**

79. In recent years, the Netherlands has seen an increasing number of streaming services offering VOD. HBO Max, Viaplay and SkyShowTime started in 2022. Currently there are over fifteen providers, mostly broadcasters and film studios,<sup>73</sup> but national newspaper Algemeen Dagblad is another example of a party that has launched its own video-on-demand platform in 2022 (in this case aimed at news and sports): Play.<sup>74</sup> Partly due to this growing competition, Netflix lost a substantial number of subscribers in 2022 for the first time in ten years.<sup>75</sup>
80. The competition among VOD providers also leads to providers adjusting their selection. VOD providers, for example, are launching new films or series on a set date and time or offer livestreams of entertainment shows or sporting events. Due to the high production costs of AV content, VOD providers are raising their subscription fees or exploring other revenue models.<sup>76</sup> Most VOD providers operate a paid subscription model with no advertising, the subscription Video-On-Demand model. A number of VOD providers, including Netflix, are introducing ad supported subscriptions in a number of countries; a cheaper version of the current subscription that includes a few minutes of advertising per hour.<sup>77</sup> Also Viaplay is showing advertising banners during the

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*en de tevredenheid en het kijkgedrag van de consument (2022 television selection and viewing behavior - Study of the diversity of television packages and consumer satisfaction and consumer viewing behavior), Kijkgedrag 2014-2022, page 26.*

<sup>65</sup> Dutch Media Authority, 2021 Media Monitor, page 13; 2021 SKO Annual Report, page 6.

<sup>66</sup> 2021 SKO Annual Report, page 6.

<sup>67</sup> 2022 SKO Annual Report, page 5.

<sup>68</sup> Dutch Media Authority, 2021 Media Monitor, page 13.

<sup>69</sup> 2022 SKO Annual Report, page 5

<sup>70</sup> Dutch Media Authority, 2021 Media Monitor, pages 12-13 and page 16; Dutch Media Authority 2019, *Televisiepakketten en kijkgedrag* (Television packages and viewing behavior), page 24.

<sup>71</sup> SKO's 2021 Annual Overview, page 49. The viewing time expressed in minutes for the 65-and-over age group between 02:00 – 26:00 hours is 292 minutes and for the 50-64 age group, this is 216 minutes.

<sup>72</sup> Dutch Media Authority, 2021 Media Monitor, page 14.

<sup>73</sup> <https://www.internetvergelijk.nl/info/streamingdiensten/>

<sup>74</sup> Press release of DGP Media, [AD lanceert nieuw video-on-demand-platform 'Play'](#) (AD launches new video-on-demand-platform Play), June 8, 2022.

<sup>75</sup> News release of NOS, [Netflix verliest bijna miljoen abonnees, daling minder groot dan verwacht](#) (Netflix loses nearly one million subscribers; drop is less than expected), July, 19 2022.

<sup>76</sup> News release of Serie Totaal, [Streaming in 2023: prijsverhogingen en meer advertenties](#) (Streaming in 2023: price increases and more advertising), January 1, 2023.

<sup>77</sup> Press release of Netflix, [Netflix Starting From \\$6.99 a Month](#), October 13, 2022. This relates to an introduction in twelve countries: Canada, Mexico, Australia, Brazil, France, Germany, Italy, Japan, Korea, the UK, the US and Spain. HBO Max and Disney+ have also introduced an ad supported subscription.

Formula One Races.<sup>78</sup> As yet, only Videoland has an ad supported SVOD subscription option in the Netherlands.

#### Slight drop in television subscriptions

81. The availability of Dutch television channels via the internet (NPO Start, KIJK, RTL XL<sup>79</sup>) and the VOD offer also result in Dutch people cancelling their television subscriptions with distributors and/or not taking out new television subscriptions. The group of Dutch people not watching any television is limited in volume, but is in fact increasing.<sup>80</sup> Over the past two years, the average year-over-year decline in television subscriptions has been 2.0%.<sup>81</sup> Research by the Dutch Media Authority shows that consumer doubt about subscribing to television is increasing. Nevertheless, consumer satisfaction with television packages is high.<sup>82</sup>

#### Price increase of advertising on television

82. In recent years, there has been a shortage of advertising space on linear television. The shortage of linear television advertising space is closely related to the fact that the audience ratings for linear television have fallen in recent years. Another factor is that despite declining audience ratings, there is a demand for television advertising space from advertisers. However, the airtime allowed for advertising is statutorily capped for broadcasters, preventing them from expanding the range of airtime available to advertisers.
83. The price for advertising space on television is expressed in Gross Rating Points (hereinafter: **GRP**). One GRP equals reaching one per cent of an advertiser's intended audience. Advertisers use GRPs to purchase a certain percentage of reach among a certain target audience. Broadcasters then tailor the frequency of the advertising broadcast and the placement around a program based on the number of GRPs purchased, depending on the expected audience ratings representative of the expected reach. Whether the purchased reach or number of purchased GRPs is realized depends on the realized audience share (the percentage of viewers of the target audience who watch the program on average) in the time period in which the commercial is broadcast and the frequency with which the commercial is broadcast.<sup>83</sup> The current dip in viewing time on linear television results in less reach. To maintain the same level of reach required and purchased by an advertiser, the commercial will either need to appear on air more frequently or around a program with a higher expected audience share within the intended target audience.<sup>84</sup>
84. Consequently, the prices for advertising on television have skyrocketed in recent years, with an average price increase at around 10% per year for the past few years. Between 2014 and 2021, prices for television advertisements have risen more steeply than for other types of media.<sup>85</sup> A strong price inflation is also expected next year for advertising space on television.<sup>86</sup>

<sup>78</sup> News release of Totaal TV, [Viaplay begint met reclame tijdens Formule 1-races](#) (Viaplay introduces advertising during Formula One races), October 4, 2022.

<sup>79</sup> In 2023, RTL XL will be incorporated into Videoland; RTL XL help page, [Waarom wordt er gekozen om te stoppen met RTL XL? \(Why choose to cancel RTL XL?\)](#), undated.

<sup>80</sup> Dutch Media Authority, *Televisieaanbod en kijkgedrag 2022 - Onderzoek naar de diversiteit van televisiepakketten en de tevredenheid en het kijkgedrag van de consument* (2022 television selection and viewing behavior - Study of the diversity of television packages and consumer satisfaction and consumer viewing behavior), page 10.

<sup>81</sup> Based on the ACM Telecom Monitor, 2022Q2, segment *Televisie*.

<sup>82</sup> Dutch Media Authority, *Televisieaanbod en kijkgedrag 2022 - Onderzoek naar de diversiteit van televisiepakketten en de tevredenheid en het kijkgedrag van de consument* (2022 television selection and viewing behavior - Study of the diversity of television packages and consumer satisfaction and consumer viewing behavior), page 4-5.

<sup>83</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 32.

<sup>84</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginals 34-35.

<sup>85</sup> Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, Annex 3 *Cijfers RTL Talpa fusie DEF* (Figures RTL Talpa merger FINAL), slide 7.

<sup>86</sup> Financieel Dagblad, November 14, 2022, *Adverteerders maken zich zorgen over snelle prijsstijging tv-reclame* (Advertisers worried about price surge in TV commercials). ([Adverteerders maken zich zorgen over snelle prijsstijging tv-reclame \(fd.nl\)](#))

### Increase in advertising expenditure

85. The 2021 Media Monitor, among others, shows that more money than ever is being spent on advertising in the Netherlands.<sup>87</sup> The total net advertising sales increased by 28% in 2021 compared to 2020. All types of media have profited from this increase.<sup>88</sup> Screenforce's figures show that expenditure on television advertising increased with 14% in the first six months of 2022 compared to the first six months of 2021. The expenditure on television advertising has thus reached its highest level ever.<sup>89</sup>
86. Major growth is taking place in online advertising.<sup>90</sup> In 2021, expenditures on online advertising increased by 34%. Up to 69% of total advertising expenditures in 2021 went to online commercials. This was only 58% in 2018.<sup>91</sup> Online advertising comprises both advertising on online video platforms such as YouTube, as well as advertising via social media platforms such as Facebook and advertising via search engines such as Google Search. The greater part of online advertising goes to the 'paid search' category; advertising via search engines such as Google Search.<sup>92</sup> Also, online video advertising witnessed strong growth.<sup>93</sup>
87. The increase in consumers' use of ad blockers and the discontinuation of the use of third party cookies by Google prompt media companies and advertisers, often in a partnership, to seek new opportunities to draw advertisements to the attention of consumers.<sup>94</sup> Examples of these include the use of branded content and influencers.<sup>95</sup>

### Role of data

88. Providers of content and advertising space value usage data and user data. Insights into consumers' viewing behavior provides opportunities to improve the provision of content to consumers. Moreover, they allow advertisers to reach their target audiences in a more targeted manner. Major foreign parties such as Google, Meta and TikTok dispose of an enormous amount of data on their customers' behavior. As a result, they excel in personalizing content, used to entice consumers to stay.
89. Dutch media companies have been broadening their business operations in recent years by investing in influencers and e-commerce activities. In doing so, traditional media companies sought to retain consumers by developing an 'ecosystem' of activities and services to entice them into taking out paid online services and having information shared on their preferences. This information adds to the user and usage data, allowing the provision of content to be more tailored to consumers, and providing advertisers a better proposition as the reach is greater and the target audience can be better targeted.

<sup>87</sup> Dutch Media Authority, 2021 Media Monitor, page 7.

<sup>88</sup> Dutch Media Authority, 2022 Media Monitor, page 22; VIA/Deloitte, *Digital Advertising Spend 2021, the Netherlands*, April 2022, page 8; Annex 3 of the additional information from the Parties of June 14, 2022, with reference ACM/IN/699959.

<sup>89</sup> 2022 Screenforce TV semi-annual report, page 7.

<sup>90</sup> See, for example Annex 11 to the Parties' response with reference ACM/IN/718476, *IAB The state of online video advertising in Europe*, page 9; Annex 3 to the Parties' response with reference ACM/IN/718476, *GroupM rapport TYN Y Preview september 2022*, page 24.

<sup>91</sup> Dutch Media Authority, 2022 Media Monitor, page 22; VIA/Deloitte, *Digital Advertising Spend 2021, the Netherlands*, April 2022, page 9.

<sup>92</sup> VIA/Deloitte, *Digital Advertising Spend 2021, the Netherlands*, April 2022, page 13.

<sup>93</sup> VIA/Deloitte, *Digital Advertising Spend 2021, the Netherlands*, April 2022, pages 12 and 18.

<sup>94</sup> VIA/Deloitte, *Digital Advertising Spend 2021, the Netherlands*, April 2022, pages 26 and 27. Examples are NLProfiel, which has since been discontinued, the cooperation between RTL and DPG Media and more recently, the joint research into the use of personal data via users' personal environment; press release of NPO, [DPG Media, Mediahuis, NPO, RTL Nederland en Talpa Network gaan samenwerken in onderzoek naar Nederlandse Datakluis](#) (DPG Media, Mediahuis, NPO, RTL Nederland and Talpa Network joining forces in research into Dutch Data Safe), October 17, 2022.

<sup>95</sup> Branded content involves a wraparound message in a broader story. Social influencers create content and post this on social media. Advertisers may use this content for visuals or to promote their products. In addition, it is possible to advertise through the influencers' channels. Influencer marketing means that one or more persons are used to exert influence on the behavior of the intended audience. Particularly well-known influencers usually have many followers on social media.

90. RTL and Talpa also collect and use data.<sup>96</sup> ACM's investigation did not reveal any indications that the proposed concentration could potentially lead to anticompetitive effects due to a joint position in the area of data collection or data use. The collection and use of data will therefore not be addressed in any more detail in this Decision.

### 6.3 Outlook

91. There is no certainty of what the media industry will look like in a number of years. Although the decline of TV linear viewing time is slowly continuing, a significant part of the market is convinced of the relevance of television.
92. Viewing behavior is developing, yet the prevailing preference is given to the traditional form of watching television.<sup>97</sup> Most 'viewing time' is spent on linear television, whereby consumers increasingly often use other sources to watch content.<sup>98</sup> From the average 181 minutes of TV *screen time* per day in 2022, 138 minutes are spent watching television channels and 43 minutes are spent watching streaming services.<sup>99</sup> While the decline of linear viewing time is expected to continue, it is also expected that linear television will continue to attract a large and stable group of viewers in the coming years.
93. The advertisers that ACM involved in its investigation also see a change in viewing behavior and express their concerns about declining audience ratings and increasing television costs. Although a group of advertisers presently consider television to be essential for their advertising campaigns, this could change over time.<sup>100</sup> Advertisers cannot as yet make a concrete estimate of when that would be. One advertiser mentioned that this may change *sometime in the next few years*<sup>101</sup>, another advertiser is certain that this will not change in the course of the next three years<sup>102</sup> and again, another advertiser estimates that, in its present form, television will no longer prove to be a sustainable solution for advertisers in less than five years.<sup>103</sup> The largest media agency of the Netherlands expects that in a somewhat longer term of five years linear TV viewing time will plummet, which will result in a new playing field.<sup>104</sup>
94. Distributors express their intention to continue to invest in the distribution of linear television channels. They mention timeframes varying from five to ten years.<sup>105</sup>
95. The Parties indicate that the market developments mean that the playing field will continue to be typified by the battle for viewers' attention. This playing field where the Parties (i) face fierce competition in the area of linear television advertising due to other advertising options, including providers such as Meta and Google, (ii) but above all face additional and increasing competition from AVOD providers offering advertising space to advertisers in direct competition with the

<sup>96</sup> Notification Decision, marginals 22, 23 and 28.

<sup>97</sup> Dutch Media Authority, *Televisieaanbod en kijkgedrag 2022 - Onderzoek naar de diversiteit van televisiepakketten en de tevredenheid en het kijkgedrag van de consument* (2022 television selection and viewing behavior - Study of the diversity of television packages and consumer satisfaction and consumer viewing behavior), Kijkgedrag 2014-2022, page 26.

<sup>98</sup> Dutch Media Authority, *Televisieaanbod en kijkgedrag 2022 - Onderzoek naar de diversiteit van televisiepakketten en de tevredenheid en het kijkgedrag van de consument* (2022 television selection and viewing behavior - Study of the diversity of television packages and consumer satisfaction and consumer viewing behavior), Kijkgedrag 2014-2022, page 17.

<sup>99</sup> 2022 SKO Annual Report, page 49.

<sup>100</sup> See, for example: Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 4;

<sup>101</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 4.

<sup>102</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 2;

<sup>103</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 3 and 6.

<sup>104</sup> Minutes of the interview with reference ACM/UIT/563613, page 2.

<sup>105</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575793, page 2; Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 2; Minutes of the interview of June 15, 2022, with reference ACM/UIT/576776, page 5.



Parties.<sup>106</sup> According to the Parties, this poses an existential threat to the Parties' business model.<sup>107</sup>

96. On the other hand, the Parties also recognize the relevance of television.<sup>108</sup> They indicate that they will continue to invest in linear television and additional services to maintain the appeal of the distribution of content via distributors.<sup>109</sup>

#### Legal framework

97. In assessing the competitive effects of a concentration, the situation created as a result of the concentration will be compared to the situation that would have existed in the absence of the concentration. In most cases, the existing competitive situation is the most relevant point of comparison in terms of assessing the impact of a concentration. Under certain circumstances, ACM may take future market developments into consideration that are reasonably predictable and of a non-temporary nature. In this regard, it is standard practice to look three to five years ahead.<sup>110</sup> That is also the period over which reasonable estimates can generally be made about market developments. ACM sees no reason to depart from this standard practice in this case. Incidentally, ACM is under no obligation to include any developments that cannot be reasonably predicted or that are uncertain.<sup>111</sup> ACM adheres to the Commission's Guidelines on the assessment of horizontal mergers.
98. As shown above, the media industry is in development. ACM recognizes that media companies have to compete heavily to gain consumers' attention, and to prepare for the future in search of alternative revenue models. However, developments are not so rapid, and are not so sufficiently certain, that these developments discipline the Parties in their behavior; the Parties are aware of the developments, however, these developments do not prevent them from potentially abusing the dominant position they would take up in the AV chain following an acquisition. Taking all factors into account, ACM concludes that television will continue to be relevant for the coming three years; relevant for consumers, and thus for broadcasters, distributors and advertisers.
99. Within the context of the assessment of the proposed concentration, ACM examined whether online advertising – e.g., by means of videos on websites or in apps – constitutes an alternative to advertising on television (see Section 7.3). ACM also examined whether online advertising exerts such competitive pressure on the Parties that it disciplines them in their behavior with regard to the sale of advertising space on television (see Sections 7.4 and 7.6).
100. ACM completed the majority of its investigation in August 2022. Its investigation is thus mostly based on year 2021 figures. Where possible, it has included information on 2022. Market data and revenue figures for 2022 do not show any significant changes towards 2021 and do not prompt a different opinion.

#### COVID-19

101. The year 2020 proved to be an atypical year for the media industry due to the COVID-19 pandemic. Although consumers, in fact, frequently watched linear and nonlinear television, the advertising revenues fell sharply as advertisers were cautious about their expenditures. The industry recovered again as of 2021 and the advertising revenues once again match pre-pandemic

<sup>106</sup> Additional information from the Parties of August 5, 2022, with reference ACM/IN/707753.

<sup>107</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 2.

<sup>108</sup> See for example an internal presentation of Talpa, Annex 6.6 to the License Application, *Addressable Linear TV Update*, slide 2.

<sup>109</sup> Additional information from the Parties of November 17, 2021, with reference ACM/IN/665996, marginal 26 and marginal 34.

<sup>110</sup> See for example ACM's decision in the matter of ACM/19/035460 – *PostNL-SANDD*, marginal 576.

<sup>111</sup> ACM adheres to the Commission's Guidelines on the assessment of horizontal mergers, marginal 68.

levels, and even exceed them.<sup>112</sup> In assessing the proposed concentration, ACM thus not need to take into account any special circumstances caused by the pandemic.

### Consumer markets

102. In the Notification Decision, ACM addressed the retail market for television services and the target market. It concludes that a significant restriction of competition is not plausible in the retail market or in the narrower market of VOD services, given the Parties' joint market share. ACM does note that the potential relationship with other markets may have implications.<sup>113</sup>
103. In the Notification Decision, ACM mentions that the Parties' joint market share for the target market is above **[40-50]%**. ACM observes that the impact on this market will be limited, but indirect network effects may amplify possible competition risks in other markets.<sup>114</sup>
104. Since competition issues in the target market and retail market for television services are not plausible, ACM will not elaborate on these markets in this Decision. Where relevant, this Decision will address the consumer markets, wherever connections with other markets and indirect network effects exist.

## 7 Advertising markets

105. The Parties both operate by selling advertising space in the Netherlands, as described above in Section 3.3. Via its subsidiary Ad Alliance, RTL not only sells advertising space for itself but also on behalf of third parties. RTL sells advertising space on television and online. Talpa is also active in the sale of advertising space in the Netherlands. Talpa sells advertising space on television, online, radio and print.
106. In this chapter, ACM assesses the impact of the proposed concentration for the markets for the sale of advertising space in the Netherlands.
107. This Chapter is structured as follows:
  - It first discusses the theories of harm (**Section 7.1**);
  - Next, the Chapter addresses the relevant geographic market (**Section 7.2**);
  - This is succeeded by the qualitative analysis (**Section 7.3**) and the quantitative analysis (**Section 7.4**) into the relevant product market (**Section 7.5**);
  - It then considers the horizontal impact of the proposed concentration (**Section 7.6**);
  - Subsequently, this Chapter focuses on the proposed concentration (**Section 7.7**);
  - Finally, the conclusion is drawn in **Section 7.8**.

### 7.1 Investigation during the licensing phase

108. Based on its investigation, ACM started its Notification Decision from a market limited to the sale of advertising space on television.<sup>115</sup> It mentions that a potential licensing phase involves further investigation into the scope of the possible product markets for the sale of advertising space. During the licensing phase, ACM investigated the following theories of harm.

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<sup>112</sup> 2022 Screenforce TV semi-annual report, page 7.

<sup>113</sup> Notification Decision, marginal 306.

<sup>114</sup> Notification Decision, marginal 325.

<sup>115</sup> Notification Decision, marginal 127.

### Horizontal impact

109. Following the proposed concentration, the Parties are to gain an extremely strong foothold in the national market for the sale of advertising space on television (between [60-70]% and [70-80]% in 2020)<sup>116</sup> and a substantial position in the national market for the sale of advertising space comprising both television as well as online videos (between [40-50]% and [50-60]% in 2020).<sup>117</sup> The Parties are each other's closest competitors in the potential national market for the sale of advertising space on television, given the similar profile of the channels and associated provision of content.<sup>118</sup> It is not plausible that the third largest competitor, i.e., Ster/NPO, or smaller commercial channels are sufficiently capable of exerting competitive pressure on the Parties. Nor do the Parties face sufficient competitive pressure from potential entry to the market or expansion by competitors (or potential competitors), and purchasers are unable to discipline the Parties. In view of the foregoing, the proposed concentration could lead to a significant impediment to actual competition, resulting in the possibility for the Parties to raise their prices for advertising space on television.<sup>119</sup>

### Conglomerate impact

110. Starting from a separate market for the sale of advertising space on television, there is a risk that the Parties could transfer their strong position in the area of selling advertising space on television to adjacent advertising markets, including radio or online advertising. This requires an investigation into whether the Parties' strong position owing to the proposed concentration may present them with the opportunity and incentive to adversely affect competition on the market for the sale of radio advertising space or online advertising space by bundling their services or via other practices of foreclosure.<sup>120</sup>

### Conclusion

111. Following its investigation in the licensing phase, ACM concludes that there is a national market for the sale of advertising space on television in which the Parties will gain an extremely strong joint market position as a result of the proposed concentration. ACM considers it plausible that this will lead to significantly higher prices that advertisers will have to pay the Parties for the advertising space on television. ACM has found insufficient confirmation for a conglomerate impact.
112. Below, ACM explains how it arrived at these conclusions.

## 7.2 Relevant geographic market

113. The Notification Decision is based on potential advertising markets that are national in scope. ACM's market research during the notification phase revealed no indications that gave cause to deviate from the Commission's decision practices/previous decisions made by ACM.<sup>121</sup> Also, the licensing phase did not provide any indications that lead to a different conclusion.
114. In this Decision, ACM therefore assumes possible advertising markets that are national in scope.

## 7.3 Qualitative analysis of the relevant product market

115. After extensive investigation, ACM concludes that there is a relevant market for the sale of advertising space on television. This section explains this on the basis of the qualitative analysis.

<sup>116</sup> Notification Decision, marginal 141.

<sup>117</sup> Notification Decision, marginal 142.

<sup>118</sup> Notification Decision, marginal 150.

<sup>119</sup> Notification Decision, marginals 144 through 150.

<sup>120</sup> Notification Decision, marginal 155.

<sup>121</sup> Notification Decision, marginal 132.



### 7.3.1 The importance of product characteristics of television

#### 7.3.1.1 The Parties' viewpoints

116. According to the Parties there is a market for the sale of advertising space consisting of media channels (i) television, (ii) radio, (iii) online and (iv) print combined, and at least a market for the sale of video advertising space on television and online.<sup>122</sup>
117. During the notification phase, the Parties presented the following arguments: First of all, the Parties state that it is not the media channel, but the consumers' media consumption that is the focal point. They assert that advertisers purchase advertising space with the aim of reaching a specific audience. The providers of advertising space therefore compete to secure a share of the advertisers' media budgets, regardless of which media channel.<sup>123</sup> Secondly, the Parties consider that, also from the supply side, the differentiation between offline and online advertising space is blurring as providers of offline television advertising space now also usually offer their own online advertising space. This is the case, for example, for the three major broadcasters in the Netherlands, i.e., RTL, Talpa and NPO, which provide their own AVOD services and the combined SVOD service NLZiet.<sup>124</sup> Finally, the Parties point out that the outcome of the research conducted by Oxera on behalf of RTL into the definition of the relevant markets for the sale of advertising space confirms that the market is more wide ranging than just the provision of linear television advertising space.<sup>125</sup>
118. In the licensing phase, the Parties contested that television has distinctive features relative to other media channels, such as its reach, the effectiveness/impact, the objective and the pricing mechanism, which would result in the fact that advertising on television would not at this stage be interchangeable with advertising on other media channels.<sup>126</sup>
119. Additionally, the Parties explained that in terms of competition law, television is interchangeable with other media channels to a relevant degree, also assuming certain differences between advertising on television and online advertising (including video advertising), and also if television would be indispensable for some advertisers as a component of the media mix in certain campaigns. It is crucial for the Parties to compete with providers of advertising space on other media channels, meaning not to only compete with other broadcasters, but, particularly, also with providers of at least online advertising space, in order to obtain a bigger share in that media mix.<sup>127</sup>
120. During the licensing phase, the Parties also stressed the relevance of two market developments; as a result of which the Parties not only compete with other broadcasters to get their viewer's attention, but also increasingly compete with VOD platforms such as Netflix, Viaplay and Amazon Prime and other international platforms such as YouTube and TikTok.<sup>128</sup> According to the Parties, this poses an existential and widely recognized threat to the Parties' business model.<sup>129</sup>
121. First, there is a prolonged decline of linear viewing time due to the shift from linear to online viewing behavior.<sup>130</sup> This decline is expected to continue in the coming years.<sup>131</sup>

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<sup>122</sup> Notification, marginal 108.

<sup>123</sup> Notification, marginal 109.

<sup>124</sup> Notification, marginal 117.

<sup>125</sup> Notification, marginals 118 through to 122.

<sup>126</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 3.

<sup>127</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 4.

<sup>128</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginal 7; The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginals 11 through 14; The Parties' response to the additional investigation of October 17, 2022, with reference ACM/IN/730649, page 2.

<sup>129</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 2.

<sup>130</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginals 7 through 9; The Parties' response to the Points for Consideration, segment

122. Secondly, the Parties draw attention to the possible entry of national and international VOD providers to the Dutch market; several providers have since started operating in the Netherlands, others have concrete plans for entering the market or plans for a substantial expansion.<sup>132</sup> This will undoubtedly lead to a further shift from linear to online viewing behavior.<sup>133</sup> In this regard, the Parties note that VOD providers can offer personalized content by means of their algorithms and they increasingly invest in local content, enabling them to attract more viewers.<sup>134</sup> Moreover, these providers increasingly intend to opt for an AVOD model; some providers already offer a hybrid model, others intend to do so in the nearby future.<sup>135</sup> This will allow viewers to take out subscriptions at lower prices.<sup>136</sup> This, too, has the effect of allowing these providers to offer spots to advertisers, in direct competition with the Parties, centered around engaging video content, with a wide reach and on the television screen.<sup>137</sup> The introduction of these hybrid models will thus facilitate a further shift in viewing time and consequently also in advertising budgets.<sup>138</sup> Moreover, these VOD services are able to personalize their spots, owing to their subscribers' user data, something that is not possible for linear television at this stage. According to the Parties, this therefore gives these providers a significant additional competitive advantage over broadcasters.<sup>139</sup>
123. Finally, the Parties contend that ACM's qualitative analysis in the licensing phase was incomplete. The group of market participants interviewed by ACM was too small in size nor otherwise representative for the entire advertising market.<sup>140</sup> According to the Parties, the file shows that the qualitative analysis lacked sufficient depth and proves insufficient for the conclusions drawn from it by ACM.<sup>141</sup> For instance, the alleged product characteristics do not provide sufficient basis for the conclusion that online video does not form part of the relevant market.<sup>142</sup> Nor can these two external reports as well as the Parties' internal documents to which ACM refers in its Points for Consideration contribute to the position that online video does not form part of the relevant market, according to the Parties.<sup>143</sup>

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*advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginals 11 through 14; The Parties' response to the additional investigation of October 4, 2022, with reference ACM/IN/721586, page 10.

<sup>131</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 11.

<sup>132</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginals 6 and 23; The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 14; The Parties' response to the additional investigation of October 4, 2022, with reference ACM/IN/721586, page 10.

<sup>133</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginal 6; and the Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 14.

<sup>134</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 14.

<sup>135</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginals 20 and 21; The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 23; The Parties' additional information of August 5, 2022, with reference ACM/IN/707753, page 1.

<sup>136</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 23. See also: Additional information from the Parties dated August 5, 2022, with reference ACM/IN/707753, page 1.

<sup>137</sup> Additional information from the Parties dated August 5, 2022, with reference ACM/IN/707753, page 1.

<sup>138</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959 *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginal 23.

<sup>139</sup> Additional information from the Parties dated August 5, 2022, with reference ACM/IN/707753, page 1.

<sup>140</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 4 and marginals 67 through 95; and the Parties' presentation of October 4, 2022, with reference ACM/IN/721586, page 10.

<sup>141</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginals 96 through 103; and the Parties' presentation of October 4, 2022, with reference ACM/IN/721586, page 10.

<sup>142</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginals 5, 63, 104 through 157.

<sup>143</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginals 171 through 185.

### 7.3.1.2 Views of market participants

124. As part of the investigation, ACM contacted different market participants for information. This involved careful consideration in selecting the market participants, taking into account their position, the nature of their business and the industry in which the advertisers operate. Consequently, ACM considers the qualitative analysis among market participants to be sufficiently representative. ACM draws conclusions from the full set of investigation steps as explained in this Decision.
125. During the notification phase, ACM spoke with advertisers, media agencies, Ster, VOD providers, a provider of offline and online advertising space, and the Dutch Association of Advertisers about possible differences in terms of product characteristics between advertising space on television and other media channels, as well as about the importance of those differences for advertisers. The Dutch Association of Advertisers and the provider of offline and online advertising space have furthermore submitted opinions that relate to this.
126. The views of the market participants in the notification phase showed that advertising on television has special characteristics and is therefore not interchangeable with advertising on other media channels, i.e., radio, online, print.<sup>144</sup> There is no media channel other than television capable of achieving high-volume and high-impact cover in a short period of time.<sup>145</sup> There is also no other media channel that can create brand awareness the way television does, a reason why advertising on television is particularly used.<sup>146</sup> In developing an advertising strategy, television is therefore the starting point.<sup>147</sup> Other media channels rather serve as a supplement than provide an alternative to television.<sup>148</sup>
127. In addition, the views of market participants in the notification phase highlighted significant differences between advertising on television and, more specifically, advertising via online video. These differences include the range, price, impact/effectiveness and consumer confidence. Online video is therefore an important addition but forms no substitution for television.<sup>149</sup> Specific to the younger target audience (<25 years), the notification phase did not provide an unambiguous representation regarding the degree of substitution between television and online video.<sup>150</sup>
128. During the licensing phase, ACM conducted in-depth interviews with advertisers, a media agency, and providers (or potential providers) of offline and online advertising space and requested information from them in writing. ACM furthermore received examples of advertising campaigns that have actually been carried out. The findings thereof provide an unambiguous overview as to the distinctiveness of the television medium, which is in line with the views of the market participants in the notification phase. Below represents the main findings of the investigation in the licensing phase.

#### Television cannot be replaced by other media channels

129. Market participants indicate that television is a unique media channel for advertisers that cannot be replaced by other media channels.<sup>151</sup> They particularly mention two characteristics in this context. First, television is the only media channel capable of effectively reaching out to a large number of

<sup>144</sup> Notification Decision, marginal 110.

<sup>145</sup> Notification Decision, marginal 112.

<sup>146</sup> Notification Decision, marginal 113.

<sup>147</sup> Notification Decision, marginal 111.

<sup>148</sup> Notification Decision, marginal 110.

<sup>149</sup> Notification Decision, marginal 116.

<sup>150</sup> Notification Decision, marginal 116.

<sup>151</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 3; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 3; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; marginal 6; Minutes of the interview of May 02, 2022, with reference ACM/UIT/576603, page 2; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3 and 5; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 4; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 3, marginals 7-8; Minutes of the interview of April 26, 2022, with reference ACM/UIT/577181, page 4, marginal 17; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, pages 2-3, marginals 7-8. Minutes of the interview of April 13, 2022, with reference ACM/UIT/575290, page 2.

consumers in a short amount of time with an advertising message.<sup>152</sup> Secondly, video images have a unique audiovisual power and are therefore ideally suited for conveying emotions to consumers.<sup>153</sup> This is why advertisers particularly make use of television for advertising objectives in which emotions play an important role.<sup>154</sup>

130. The interviews also show that, owing to the combination of the two aforementioned characteristics, television is indispensable for advertisers to create brand awareness<sup>155</sup> and that they use television almost exclusively for that purpose.<sup>156</sup> To underline/clarify the key importance of brand awareness as an advertising objective, market participants also point out the place it has in the so-called marketing funnel.<sup>157</sup> This is a marketing model that distinguishes different stages of objectives when deploying advertising campaigns. Creating brand awareness is the first stage/fundamental objective; this basis is thus essential for a successful advertising campaign.<sup>158</sup> Market participants therefore indicate that television is the starting point for advertisers in the setup of their advertising campaigns.<sup>159</sup>
131. Advertisers supplement television by using other media channels. The interviews show that this could be useful for example to achieve the projected number of times the intended audience will engage with the advertisement.<sup>160</sup> It may also be needed to achieve advertising objectives other than brand awareness; for example, advertisers rely (in part or entirely) on other media channels to generate actual conversion/sales.<sup>161</sup>

#### **Television cannot be replaced by online video**

132. The interviews during the licensing phase suggest that online video advertising does not substitute advertising on television.

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<sup>152</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 3; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; marginal 4; Minutes of the interview of May 02, 2022, with reference ACM/UIT/576603, pages 2; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2; additional information of May 11, 2022, with reference ACM/IN/694442, page 1; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 3; Minutes of the interview of April 26, 2022 with reference ACM/UIT/577181, page 4; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, pages 2-3. Minutes of the interview of April 13, 2022, with reference ACM/UIT/575290, page 2.

<sup>153</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 4; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 3-4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 5; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, pages 2 and 3, marginals 7-8; Minutes of the interview of April 26, 2022, with reference ACM/UIT/577181, page 4, marginal 14; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300, page 3; Minutes of the interview with reference ACM/UIT/577808; page 2.

<sup>154</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 5; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 2.

<sup>155</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, pages 3, marginal 7 and page 4, marginal 19; Minutes of the interview with reference ACM/UIT/577808, marginal 6; Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 3 and 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 5; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, margin number 4, page 2; additional information of May 13, 2022, with reference ACM/IN/695348, page 2;

<sup>156</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, pages 3, marginal 7; Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 3 and 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 5; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, page 2, marginal 4.

<sup>157</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 3 and 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 2 and 5; Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603; page 2, marginal 3; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 2.

<sup>158</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 3; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, page 1 and 2.

<sup>159</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3; Cf. Notification Decision ACM, marginal 111.

<sup>160</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 4; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2;

<sup>161</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 4; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, pages 3-4; Minutes of the interview with reference ACM/UIT/577808; pages 2-3; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 3; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, page 2;



133. Market participants indicate that the effective reach of online video is lower than that of television.<sup>162</sup> The reason for this is that online video advertisements are viewed differently – more briefly/less attentively – from television commercials.<sup>163</sup> For example, it is possible to fast-forward online video advertisements, which also happens in practice,<sup>164</sup> and online video advertisements may be viewed on smaller smartphone screens.<sup>165</sup> Also, the advertising format differs; online videos are short pre-roll advertisements, while television has a fixed and longer commercial break with longer commercials.<sup>166</sup> On top of that, the provision of online video media channels is broad and/or fragmented, meaning there is less insight into the quality of the content of the media channel and less insight into the viewers of the content advertisements.<sup>167</sup>
134. The interviews also show that television's higher cost efficiency plays an important role in the choice whether or to advertise on television.<sup>168</sup> Owing to the wider and more effective reach of television vis-à-vis online video, advertising on television is relatively cheaper than online video advertising. Put differently; the costs of television are lower per target audience's contact with the advertisement.<sup>169</sup> According to market participants, television is thus also less expensive if the revenue generated is taken into account; the return on investment of television is thus higher than for online video.<sup>170</sup>
135. Incidentally, the interviews with market participants do indicate that television, specifically for reaching young people, is either not indispensable or indispensable to a lesser extent.<sup>171</sup> Young people watch less television, making its effective reach less substantial in their case.<sup>172</sup> However, market participants apply a different definition of the age group of such young people; this varies

<sup>162</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 3; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 2; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 4; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, pages 4; Minutes of the interview of April 26, 2022, with reference ACM/UIT/577181, pages 2 through 4; additional information of May 13, 2022, with reference ACM/IN/695348, page 3.

<sup>163</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, pages 4; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, page 2; Minutes of the interview of April 26, 2022, with reference ACM/UIT/577181, page 2; Minutes of the interview with reference ACM/UIT/577808; page 3; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 5. See also the previous information on this item from the notification phase: Minutes of the interview of November 5, 2021, with reference ACM/UIT/563612, page 5; Minutes of the interview of November 8, 2021, with reference ACM/UIT/564058, pages 2-3;

<sup>164</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 3. Minutes of the interview of November 8, 2021, with reference ACM/UIT/564058, pages 2-3 Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 5; Minutes of the interview with reference ACM/UIT/577808; page 3; Minutes of the interview of April 26, 2022 with reference ACM/UIT/577181, page 3.

<sup>165</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 3.

<sup>166</sup> Minutes of the interview of November 8, 2021, with reference ACM/UIT/564058, pages 2-3 Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 5; Minutes of the interview with reference ACM/UIT/577808; page 3.

<sup>167</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 4; Minutes of the interview of April 26, 2022, with reference ACM/UIT/577181, page 2; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, page 2; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, pages 3-4.

<sup>168</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 3; Additional information of May 11, 2022, with reference ACM/IN/694442, page 1; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 4; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, page 2; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 2; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, pages 4 and 5; Additional information of May 13, 2022, with reference ACM/IN/695348, page 3.

<sup>169</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, pages 4 and 5; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 2

<sup>170</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 2; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 3; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 3; Minutes of the interview of May 2nd, 2022, with reference ACM/UIT/576603, page 2

<sup>171</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 4 and 5; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, pages 3 and 4; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 3; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 4; additional information of May 13, 2022, with reference ACM/IN/695348, page 2;

<sup>172</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 4; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; pages 2 and 3.

from under 25 to under 35 years of age.<sup>173</sup> Multiple market participants indicate that their core business primary target audience does not pertain to the age category they consider such young people to be, although these young people could form part of their non-primary target audience.<sup>174</sup>

136. In practice, market participants engage with the younger part of their target audience with varying degrees of success. Two market participants only opted for online advertising for an advertising campaign of a product exclusively aimed at the younger target audience.<sup>175</sup> Two other market participants indicate that they had turned to online video as a supplement to television to achieve the projected reach specifically among the younger part of their target audience.<sup>176</sup> Another market participant indicates that it no longer uses television to appeal to the younger target audience. This market participant has also set up purely digital campaigns for the younger target audience, although offline advertising continues to be a useful addition according to this market participant.<sup>177</sup>
137. Taking all factors into account, the market research among advertisers indicates a distinctive nature of the television medium. The fact that television is less effective in reaching young people does not detract from it.
138. Finally, the above overview based on the interviews with market participants is supported by confidential information provided to ACM by those advertisers, in particularly in the form of examples of campaigns actually launched. This confidential information illustrates the following situation. Advertisers consider several factors in their choice of media channels, such as budget, intended reach, target audience, type of product and advertising objective. Advertisers select a mix of media channels. Television is always and almost exclusively used to create brand awareness. Advertisers consider television to be both highly suitable for that purpose as well as crucial. Television is therefore the starting point in the campaign's setup. Other media channels, including online video, are used complementary to television, for example to reinforce the message or to realize the intended reach. To appeal to the younger part of their target audience, advertisers make additional use of online video, social media and/or online radio.<sup>178</sup>

### 7.3.1.3 Public research

139. Various public studies focus on the differences and similarities between advertising on television and online video. Parts of these studies confirm the Parties' position that advertising on online channels bears strong resemblances to advertising on television channels, while other parts negate their viewpoints and are in line with the findings from the market research.
140. One study shows that the impact of television commercials on product sales is much more long-term and higher than the impact of advertisements on YouTube.<sup>179</sup> This study also shows that television generates twice as much in terms of sales per invested dollar than YouTube<sup>180</sup> and that

<sup>173</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 4 and 5; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 4; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 5; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; pages 1 and 3.

<sup>174</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, pages 2 and 3; Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603; page 3; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 1; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 3.

<sup>175</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3.

<sup>176</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; pages 2 and 5; Additional information of May 11, 2022, with reference ACM/IN/694442, page 1; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3.

<sup>177</sup> Additional information of May 13, 2022, with reference ACM/IN/695348, pages 2 and 3.

<sup>178</sup> Due to the fully confidential nature of this information, ACM has drawn up a confidential file note; see File note on advertising campaigns of March 2, 2023, with reference ACM/INT/465253.

<sup>179</sup> Annex 22 with reference ACM/IN/665705, study by Professor Karen Nelson-Field, *Not all reach is equal*, page 36, accompanying the responses from the Parties of November 17, 2021, with reference ACM/IN/665996.

<sup>180</sup> Annex 22 with reference ACM/IN/665705, study by Professor Karen Nelson-Field, *Not all reach is equal*, page 54, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

the price of YouTube needs to drop by one-third in order to achieve a similar return on investment as television.<sup>181</sup>

141. The Parties note that the report does not clarify the use of method applied to measure the effectiveness and impact, nor makes it insightful which product groups and target audiences were used to conduct this study. Consequently, the Parties hold that no value should be attributed to the study. In addition, they observe that a difference in effectiveness between linear television and YouTube is not relevant for the question whether online video and television substitute one another. Finally, they note that the study was conducted two years ago and that more recent studies might present a different perspective, given the declining linear viewing time.<sup>182</sup>
142. Another study, performed by Ad Alliance and Unravel Neuromarketing Research in July 2021, shows that the effectiveness of advertising on linear television surpasses that of advertising on platforms such as YouTube and Videoland. This study inter alia observes: 'Viewers of Videoland and television watch approximately three quarters of the broadcast. This is significantly lower for YouTube, where viewers actually watch only 51% of the entire broadcast.'<sup>183</sup> In that regard, viewer attention is most fleeting when it comes to YouTube; viewers glance away on average once per broadcast. Viewers of linear television glance away the least per broadcast; on average only 0.4 times.<sup>184</sup>
143. This study also concludes that the viewing experience affects the extent to which the broadcast is processed in the brain and thus the effectiveness of commercials. Television content is compared in a more laid-back approach, allowing for the most optimal processing per broadcast.<sup>185</sup>
144. In terms of YouTube, this study therefore concludes as follows: 'Processing is lowest on YouTube and shows cognitive overload most often.' This is also shown by the eye tracking results: YouTube experiences significantly more moments of viewers glancing away.'<sup>186</sup> This study also confirms that advertisements on YouTube are often perceived as annoying,<sup>187</sup> as also indicated by some advertisers.<sup>188</sup>
145. The Parties assert that the conclusions drawn by ACM cannot be drawn reliably without taking the relevant target audience and product on offer into consideration. They furthermore contest the interpretation that the study shows that the effectiveness of advertising on linear television surpasses that of advertising on platforms such as YouTube and Videoland. They point out that the

<sup>181</sup> Annex 22 with reference ACM/IN/665705, study by Professor Karen Nelson-Field, *Not all reach is equal*, page 56, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

<sup>182</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginals 173 through 175.

<sup>183</sup> Annex 21 with reference ACM/IN/665705, study by Ad Alliance, *De kracht van het platform: Onderzoek naar de effectiviteit van adverteren op de platformen YouTube, Videoland en TV op het grote scherm* (Platform power: Study into the effectiveness of advertising on platforms YouTube, Videoland and television on the big screen), page 7, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

<sup>184</sup> Annex 21 with reference ACM/IN/665705, study by Ad Alliance, *De kracht van het platform: Onderzoek naar de effectiviteit van adverteren op de platformen YouTube, Videoland en TV op het grote scherm* (Platform power: Study into the effectiveness of advertising on platforms YouTube, Videoland and television on the big screen), page 8, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

<sup>185</sup> Annex 21 with reference ACM/IN/665705, study by Ad Alliance, *De kracht van het platform: Onderzoek naar de effectiviteit van adverteren op de platformen YouTube, Videoland en TV op het grote scherm* (Platform power: Study into the effectiveness of advertising on platforms YouTube, Videoland and television on the big screen), page 11 and page 17, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

<sup>186</sup> Annex 21 with reference ACM/IN/665705, study by Ad Alliance, *De kracht van het platform: Onderzoek naar de effectiviteit van adverteren op de platformen YouTube, Videoland en TV op het grote scherm* (Platform power: Study into the effectiveness of advertising on platforms YouTube, Videoland and television on the big screen), page 17, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

<sup>187</sup> Annex 21 with reference ACM/IN/665705, study by Ad Alliance, *De kracht van het platform: Onderzoek naar de effectiviteit van adverteren op de platformen YouTube, Videoland en TV op het grote scherm* (Platform power: Study into the effectiveness of advertising on platforms YouTube, Videoland and television on the big screen), page 15, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

<sup>188</sup> See, for example the Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, page 2.

report concludes that 'a commercial on Videoland triggers action [the most]'.<sup>189</sup> They also point out that 99% of the commercial broadcasts on Videoland are noticed, in contrast to 89% of the commercial broadcasts on linear television. Additionally, Videoland and YouTube bring about more emotional triggers for both advertisements and content than linear television. In conclusion, the Parties contend that another presentation of YouTube shows that one and the same budget can reach more viewers when the budget is spread across online advertising on YouTube and linear television commercials, compared to spending the entire budget on linear television advertising.<sup>190</sup>

146. ACM does not fail to recognize that there are market studies that indicate that advertisers can reach consumers, especially younger consumers, in an impactful manner, by the very means of online channels, including for the objective of brand awareness. At the same time, there are studies indicating that television is particularly suited for this. Taking this into consideration, ACM concludes that the validity of these reports is too limited to answer the question to what extent online advertising exerts a significant competitive pressure on linear television advertising.

#### 7.3.1.4 ACM's assessment

147. ACM establishes that the findings in the qualitative analysis among market participants in the notification phase and the licensing phase suggest that advertising on television cannot be replaced by advertising on other media channels, including online video. According to market participants, television is a unique media channel that cannot be replaced by other media channels, particularly owing to its large, quick and effective reach and its ability to evoke emotions to consumers. It is therefore indispensable for creating brand awareness, which is a key objective when deploying an advertising campaign, and is used almost exclusively for that purpose. For the setup of an advertising campaign, television is the starting point; other media channels are used supplementarily to this. Specifically for online video, the effective reach of online video is lower than that of television. Additionally, television is cheaper relative to reach/turnover than online video, which then becomes an important option parameter for the use of media channels.<sup>191</sup>
148. However, the findings of the qualitative analysis do indicate that advertising on television, specifically for reaching young people, is either not indispensable or indispensable to a lesser extent. Market participants do appear to apply a different definition of the age group of such young people.<sup>192</sup>
149. **Section 7.5** provides a further assessment of ACM, based on the entirety of its investigation during the notification phase and licensing phase into the product characteristics of television, budget shifts, the quantitative analyses and the Parties' internal documents (and their significance).

### 7.3.2 Budget shifts from television to online channels (including video channels)

#### 7.3.2.1 The Parties' viewpoints

150. The Parties note that advertising expenditures are gradually shifting from traditional media to digital media and that such budget shifts are illustrative for the substitution between online and offline advertising spaces and in particularly between television and online advertising (including video advertising).<sup>193</sup> In this regard, the Parties stress that evidence of shifts and thus substitution in the

<sup>189</sup> Annex 21 with reference ACM/IN/665705, study by Ad Alliance, *De kracht van het platform: Onderzoek naar de effectiviteit van adverteren op de platformen YouTube, Videoland en TV op het grote scherm* (Platform power: Study into the effectiveness of advertising on platforms YouTube, Videoland and television on the big screen), page 14, accompanying the responses from the Parties of December 17, 2021, with reference ACM/IN/665996.

<sup>190</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginals 178 through 180.

<sup>191</sup> See also 129134 Notification Decision, marginals 110 through 117;

<sup>192</sup> See also the Notification Decision, marginal 124.

<sup>193</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 4. See also: The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginals 10 through 16; and the Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 2, marginals 16 through 31 and marginals 59 through 66.



past is essential for the question of whether advertisers would shift 5% to 10% of their total advertising budget from television to other channels due to hypothetical sustainable price increases of advertising on television.<sup>194</sup>

151. For a more detailed substantiation of the existence of such budget shifts, the Parties refer to different external reports<sup>195</sup>, as well as to the statements and public comments of the market participants interviewed by ACM and other market participants<sup>196</sup>.

### 7.3.2.2 Views of market participants

152. The findings in the notification phase did not yield a clear picture on whether advertising budgets have shifted, and whether any shift to online advertising has come at the expense of television advertising expenditures.<sup>197</sup>
153. Also the investigation during the licensing phase does not yield a clear picture with regard to any budget shifts in the past or possible future budget shifts in response to a price increase of 5% to 10%, as explained below.
154. As for any budget shifts in the past, a number of market participants indicate that they have increased their spending on advertising space on inter alia/specifically online advertising space, at the expense of their expenditure on advertising space on television, the extent of which varies widely.<sup>198</sup> By contrast, another market participant indicates that the increase of its online expenditures has not been at the expense of its television expenditures.<sup>199</sup> For two other market participants, the share of their advertising budget spent on television and online media, respectively, for the past years has remained virtually unchanged.<sup>200</sup> For one of these market participants, its expenditure in absolute terms on online video advertising space has declined sharply in recent years.<sup>201</sup> This market participant indicates that a shift in budget from television to online media was in motion in the past, but that this has come to a halt.<sup>202</sup>
155. With regard to any future shifts, some market participants indicate that they expect that television will become too expensive for them and that, as a result, they will spend less or no budget on television, in favor of other media channels/online media.<sup>203</sup> Conversely, another market participant indicates that if the price of advertising space on television increases, they will not mean an increase of its use of online advertising.<sup>204</sup> Other market participants also indicate that they will not

<sup>194</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market), of September 28, 2022, with reference ACM/IN/718476, marginal 60.

<sup>195</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 4; The Parties' additional information of June 14, 2022, with reference ACM/IN/699959 *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginals 11 through 14.

<sup>196</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginal 15 and marginal 16; The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 5 and marginals 158 ff.; The Parties' response to the additional investigation of October 4, 2022, with reference ACM/IN/721586, page 10.

<sup>197</sup> Notification Decision, marginals 118, 119 and 125.

<sup>198</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 3, marginal 10 and page 4, marginal 21; Minutes of the interview of April 26, 2022, with reference ACM/UIT/577181, pages 1 and 2; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 6; Additional information of August 19, 2022, with reference ACM/IN/710581, page 1; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 5.

<sup>199</sup> Minutes of the interview of May 13, 2022, with reference ACM/IN/695348, page 2; Additional information of April 7, 2022, with reference ACM/IN/691819, page 1.

<sup>200</sup> Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 2; Additional information of April 7, 2022, with reference ACM/IN/691819, page 1.

<sup>201</sup> Additional information of April 7, 2022, with reference ACM/IN/691819, page 1.

<sup>202</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, pages 3.

<sup>203</sup> Minutes of the interview of April 26, 2022, with reference ACM/UIT/577181, pages 1 and 2; Minutes of the interview of May 13, 2022, with reference ACM/IN/695348; page 2.

<sup>204</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 3, marginal 9.

switch from television to other media channels if prices increase from 5% to 10%.<sup>205</sup> However, there may come a tipping point for some of them, where advertising on television becomes too expensive for them and at which point they will switch.<sup>206</sup>

### 7.3.2.3 Public research

156. As previously described in Section 6.2, more money than ever is being spent on advertising. The majority of which is spent on online advertising. Channels that have seen a decline in advertising expenditures in recent years mainly involve print; magazines and newspapers. Radio is stable. Like television, radio had an extremely good year in 2021, as shown in **Figure 3** below. The year 2022 also proved to be a successful year for television.<sup>207</sup> Providers of advertising space achieved good turnovers.<sup>208</sup> The CEO of RTL Nederland says the following about this: 'The first part of 2022 has been the most successful six months in our history, both in terms of turnover as well as Adjusted EBITA. The growth in the television advertising market has continued. Thanks to excellent audience ratings we were also able to amply capitalize on that growth.'<sup>209</sup>

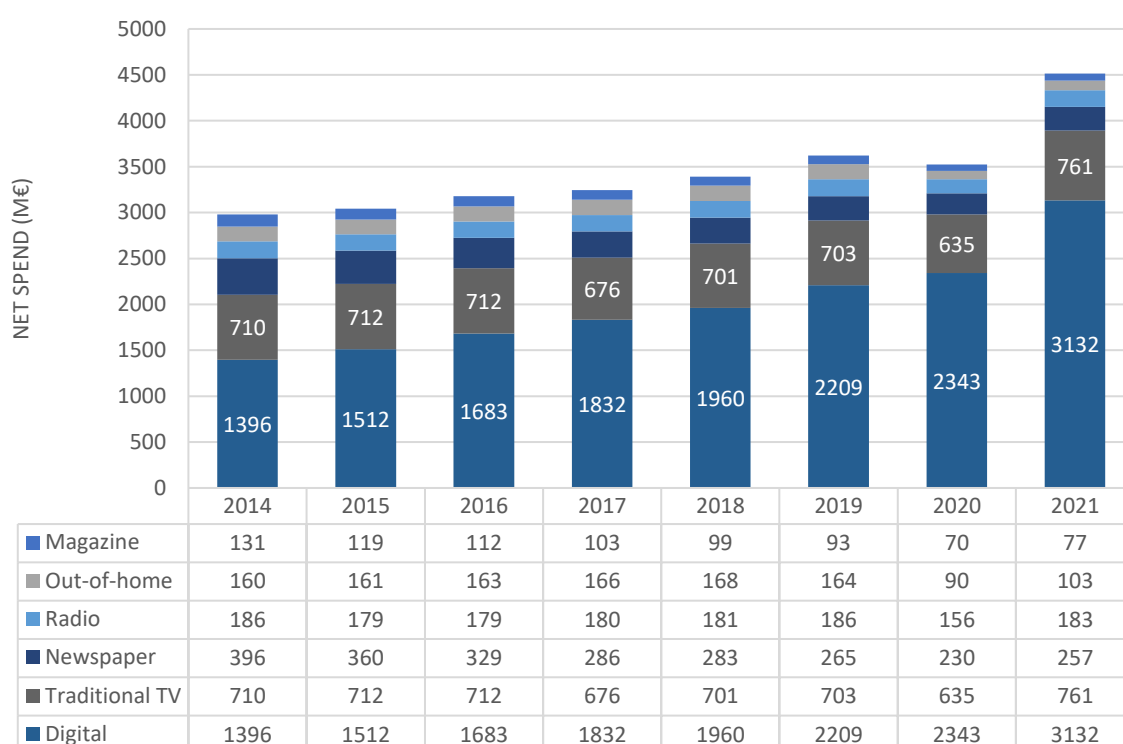


Figure 3 Annual advertising budgets in the Netherlands<sup>210</sup>

157. There is no doubt that advertisers' expenditure on online channels is on the rise. Advertisers want to advertise where consumers' attention is.<sup>211</sup> The growth in online has partly come at the expense of print<sup>212</sup>, in part it is organic growth as expenditures as a whole are also increasing.

<sup>205</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 5; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 6; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; pages 3 and 4.

<sup>206</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; pages 3 and 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 5.

<sup>207</sup> 2022 Screenforce TV semi-annual report, page 7.

<sup>208</sup> News release of Marketing Tribune, [Omzet RTL Nederland bijna 20% hoger: 'Beste halfjaar ooit'](#) (Turnover RTL Nederland up by nearly 20%: 'Best six months ever'), August 5, 2022; News release of Screenforce, [Halfjaarcijfers Ster: 109.5 miljoen euro omzet](#) (Six-month results for Ster: 109.5 million euros in sales), July 19, 2022.

<sup>209</sup> Press release of RTL, [CEO Sven Sauv e reageert op halfjaarcijfers 2022](#) (CEO Sven Sauv e responds to 2022 six-month results), August 5, 2022.

<sup>210</sup> VIA/Deloitte, Digital Advertising Spend 2021, the Netherlands, April 2022, page 8.

<sup>211</sup> See, for example: News release of Emerce, [Media2030: verschuivingen in mediaconsumptie in de afgelopen twintig jaar](#) (Media 2030: shifts in media consumption over the past twenty years), January 21, 2022.

158. The Parties also point out Deloitte's report, which shows that the share of television advertising has declined in total advertising spending, while the share of online channels has risen sharply.<sup>213</sup> According to the Parties, these figures indicate that advertisers are increasingly shifting their advertising budgets to online channels.<sup>214</sup>

#### 7.3.2.4 ACM's assessment

159. ACM establishes that the findings based on the qualitative analysis during the notification phase and the licensing phase do not convincingly point towards substitution with regard to any budget shifts in the past or possible future budget shifts in response to 5% to 10% price increases.
160. On the one hand, the analysis has indications of *shifts* between advertising on television and online advertising (including video advertising), for example market participants stating that they have spent more budget on online advertising space at the expense of their expenditures on advertising space on television<sup>215</sup> and the expectation of some market participants that they will not or spend less of their budget on television, in favor of other media channels/online media<sup>216</sup>. However, these findings do not lead to the conclusion that these shifts entail a *substitution*, such that this involves disciplining providers of advertising space on television.
161. On the other hand, the analysis contains indications that point to no further shifts, such as a market participant that states that the shift of advertising budgets has stalled,<sup>217</sup> a market participant that indicates that its online expenditures have not been at the expense of its expenditures on television,<sup>218</sup> market participants that state that the share of their advertising budgets spent on television and online media has remained virtually the same in recent years,<sup>219</sup> and market participants that indicate that they will not switch from television to other media channels in the event of a 5% to 10% price increase<sup>220</sup>.
162. The market research shows that advertisers seek the ideal media mix for their advertising campaigns, in which the different media types are used complementarily to each other. Each medium has its own characteristics and is used in a campaign for a specific purpose.<sup>221</sup> This may change per campaign, depending on the campaign's objective. The fact that advertisers switch between different types of media within their budget does not necessarily reflect the substitution between the different types of media.
163. ACM does not agree with the Parties that the drop in the expenditure share of television in combination with the increase in the share of online advertising space, is plainly indicative of substitution. Market data show that the absolute expenditures on television have been on the rise in recent years, with an exception for the 2020 COVID-19 year, with a peak being reached in 2022.<sup>222</sup> Also, absolute expenditures on online channels have surged. However, these data do not provide any information about substitution between the different media channels. It is clear, however, that advertisers continue to focus on the television medium, despite the price inflation in recent years.

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<sup>212</sup> See, for example: News release of Marketing Tribune, [Dossier Media: Top 100-Adverteerders en de stille kracht van tv](#) (Media dossier: Top 100 - Advertisers and the silent force of television), April 13, 2022.

<sup>213</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 17.

<sup>214</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 22.

<sup>215</sup> See marginal 154.

<sup>216</sup> See marginal 155.

<sup>217</sup> Notification Decision, marginal 119; and marginal 154 154 of this Decision.

<sup>218</sup> See marginal 154154.

<sup>219</sup> See marginal 154154.

<sup>220</sup> See marginal 155155.

<sup>221</sup> See Notification Decision, marginals 11-113. Also see the Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, pages 3 and 4; Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, marginals 21 ff.

<sup>222</sup> 2022 Screenforce TV semi-annual report, page 7; Section 6.2 of this Decision.

Information from the Dutch Association of Advertisers shows that rates have gone up for all types of media, but that the relatively sharpest increase has been for television.<sup>223</sup>

164. **Section 7.5** provides a further assessment of ACM, based on the entirety of its investigation during the notification phase and licensing phase into the product characteristics of television, budget shifts, the quantitative analyses and the Parties' internal documents (and their significance).

### 7.3.3 The Parties' internal documents

165. The Parties' internal documents show that the Parties particularly consider the other broadcasters as their competitors for advertising space on their television channels, and not the providers of online advertising space. In internal documents of RTL, which consist of presentations from 2020 and 2021 for the supervisory board meetings, RTL analyses the 'TV spot market' and the providers RTL, **[confidential]** are compared on the aspects of **[confidential]**.<sup>224</sup> These documents clearly show that RTL closely monitors both Talpa's and Ster's activities, for example:
- 'During corona period Ster and Talpa **[confidential]** (**[confidential]** in April-May) are **[confidential]** than RTL **[confidential]** (**[confidential]** in April-May).<sup>225</sup>
  - 'Ster offers **[confidential]** on running campaigns.<sup>226</sup>
  - 'Talpa offers **[confidential]**'.<sup>227</sup>
  - 'Talpa and Ster **[confidential]** their **[confidential]** significantly **[confidential]**.<sup>228</sup>
  - '**[confidential]** Talpa and Ster mainly due to **[confidential]**.<sup>229</sup>
  - 'Talpa and Ster very aggressive **[confidential]** advertisers.<sup>230</sup>
166. Providers of online advertising space (including video advertising space) are in no way involved in these comparisons and analyses of the television spot market. Only in terms of its online video offer does RTL compare itself with **[confidential]**.<sup>231</sup> Talpa's internal documents also show that Talpa considers the other broadcasters as its competitors in the area of providing advertising space on television. Talpa, for example, checks the **[confidential]** of Ad Alliance (RTL) and Ster (NPO) for **[confidential]**, based on **[confidential]**.<sup>232</sup> In that same presentation, **[confidential]**, Talpa analyses the different media channels separately, under the headings 'TV spot', 'Radio Spot', 'Billboarding' and 'Digital', for the years **[confidential]** in terms of **[confidential]**.<sup>233</sup>
167. On this subject, the Parties observe that they can readily compare the competitive position of providers of advertising space, but that it is not possible to specifically include providers of online advertising space as there is no useful information available on these market participants. Furthermore, the Parties indicate that a differentiation in reporting is driven by the fact that for television advertising space provision, a comparison is made based on occupancy rates per GRP. In the online segment, this KPI, where prices are expressed in CPM as opposed to GRP, is not relevant, according to the Parties. The fact that the Parties draw up different analyses of competitors in relation to television on the one hand and online on the other hand, says nothing about the scope of the product market, according to the Parties.<sup>234</sup>

<sup>223</sup> Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, Annex 3 *Cijfers RTL Talpa fusie DEF*, slide 7.

<sup>224</sup> License Application, Annex 5.1, page 38; License Application, Annex 5.2, pages 15 and 18; License Application, Annex 5.3, pages 9 through page 11; License Application, Annex 5.4, pages 9 through page 11 and page 14; License Application, Annex 5.5, page 8; License Application, page 13 and page 14; License Application, Annex 5.6, page 18, pages 21 through page 22 and page 25.

<sup>225</sup> License Application, Annex 5.2, page 18.

<sup>226</sup> License Application, Annex 5.2, page 18.

<sup>227</sup> License Application, Annex 5.2, page 18.

<sup>228</sup> License Application, Annex 5.2, page 19.

<sup>229</sup> License Application, Annex 5.3, page 11.

<sup>230</sup> License Application, Annex 5.5, page 14.

<sup>231</sup> License Application, Annex 5.2, page 16; License Application, Annex 5.3, page 10; License Application, Annex 5.4, page 12; License Application, Annex 5.5, page 14; License Application, Annex 5.6, page 23.

<sup>232</sup> License Application, Annex 6.1, page 23.

<sup>233</sup> License Application, Annex 6.1, page 20 through page 38.

<sup>234</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginals 181 through 185.

168. ACM perceives in the Parties' separate competitive analyses an indication that the Parties focus on the competitors of a specific type of medium in terms of their positioning and strategy, as the Parties have previously indicated that despite the difference in price settings for television and online (GRP versus CPM), the prices of the different types of media can easily be translated or compared with one another.<sup>235</sup> The Parties **[confidential]** do so in their internal documents, **[confidential]**, and for the Parties' provision in relation to television, ACM **[confidential]** sees comparisons with other providers of advertising space on television. For example, RTL's strategic documents state that in its commercial policy of its sales office Ad Alliance, it takes into account the **[confidential]** of Talpa and Ster's **[confidential]**: **[confidential]**<sup>236</sup> It further appears that Ad Alliance compares itself, as far as it concerns sales performances on the market, to Talpa's and Ster's **[confidential]**.<sup>237</sup> In terms of market developments, RTL/Ad Alliance considers **[confidential]** Talpa and Ster.<sup>238</sup>
169. Finally, ACM points out that RTL describes itself as 'the leading commercial TV broadcaster in the Netherlands both in **[confidential]**'.<sup>239</sup>

## 7.4 Qualitative analysis of the relevant product market

170. For the purpose of the product market definition, both Oxera (on behalf of the Parties) and ACM have performed several econometric analyses. These are all based on the critical loss analysis.<sup>240</sup> Below follows a brief description of the analyses performed by Oxera and ACM, which are further detailed in the Annex (hereinafter: **Annex**. This Annex forms an integrated part of this Decision.

### 7.4.1 Critical loss analysis

171. A critical loss analysis examines whether a hypothetical monopoly holder can profitably drive up the price in a conceivable market by a small but significant percentage. The profitability of such a price increase first of all depends on the price sensitivity of advertisers, measured by a price elasticity. After all, it is important to know to what extent advertisers accept the price increase, and to what extent they will switch to another medium or decide to no longer advertise.
172. Secondly, the variable costs that can be saved in a price increase are also important. In fact, as a result of a price increase and decreasing demand, less volume needs to be produced, thus saving on certain costs. This level of cost savings can be denoted by a contribution margin: the difference between the revenue from television advertising sales and the costs that vary according to sales volume.<sup>241</sup>
173. If a profitable price increase is possible, this means that the hypothetical monopoly holder is insufficiently disciplined by products outside the assessed market and the products used to determine the price sensitivity and cost savings form the relevant market.
174. A critical loss analysis thus requires a price elasticity and a contribution margin or cost savings in general.

<sup>235</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 3.

<sup>236</sup> License Application, Annex 5.1, page 24 and page 38.

<sup>237</sup> License Application, Annex 5.1, page 38; License Application, Annex 5.2, page 15.

<sup>238</sup> License Application, Annex 5.2, page 18.

<sup>239</sup> The Parties' responses of November 18, 2021, with reference ACM/IN/659717, Annex 9, **[confidential]**, dated June 22, 2021, page 1.

<sup>240</sup> Notification, Annex 14, Oxera's hypothetical monopoly test for TV advertisements in the Netherlands.

<sup>241</sup> Notification, Annex 14, Oxera's hypothetical monopoly test for TV advertisements in the Netherlands, marginal 1.12.



#### 7.4.2 Assumptions of the Parties vs ACM on cost savings

175. The main difference between the analyses of the Parties (Oxera) and those of ACM pertain to the assumption on costs on which savings can be made due to a decreasing demand following a price increase. Oxera assumes that savings can only be made on costs directly involved in the *sale* of advertising space, while ACM argues that savings can also be made of costs associated with the *creation* of advertising space. After all, it requires investments in content to create advertising space and if the demand for advertising space drops, this also implies that less advertising space needs to be created.
176. In terms of cost savings, Oxera applies a contribution margin of **[95-100]**%. In its response to ACM's questions, Oxera describes the different cost items of Ad Alliance and concludes that there are only few variable costs involved in selling an advertisement: 'All things considered, there are thus a number of **[confidential]** thus variable.'<sup>242</sup> This would result in **[confidential]** little cost savings in lower sales.
177. The Parties do not agree with the cost savings included by ACM in the critical loss analysis. According to the Parties, content costs should not be included in the analysis given the fact that i) the necessary direct link between the level of costs and reach is lacking, creating a high risk that savings would result in a higher GRP loss than the fall in demand due to the price increase, and ii) there is no economic rationale for reducing the content costs as this may affect the revenue models in the long term.<sup>243</sup>
178. ACM does consider it necessary to also include the impact of the price increase of advertising on the other sides of the market as it affects the profitability of the price increase. In other words, not only the selling costs of advertising space, but also the variable costs for creating advertising space are relevant for the assessment. This is crucial as total profit is the determining factor for a company, not component profit.
179. Like the Parties, ACM agrees that it is difficult to accurately predict the link between savings on content and loss in reach. However, the fact that there is link, which is already being considered today, is clear. For example in the option to invest in content at the beginning of each season.
180. It then requires the right volume unit to correctly calculate the cost savings. According to ACM, this is the number of GRPs. During its investigation, ACM found that providers of television advertising space compete with one another in the number of GRPs to be sold. As explained in marginal 83, this is the measuring unit of audience reach. The price is also set per GRP. The spot length index, which looks at the number of seconds of an advertisement, is only part of the setup of a GRP price.<sup>244</sup> Ad Alliance, the organization affiliated with RTL that sells television advertisements among others, notes in its memorandum submitted to ACM:

'A key starting point in the approach to and analysis of the TV market is that advertisers have a demand for GRPs (rating point in a target audience), they determine and purchase GRP objectives based on a negotiated price per GRP. If we refer to price in this memorandum, we refer to the price that advertisers pay per GRP. This differs for each advertiser and is the result of the negotiations **[confidential]**. See Annex 1 for the TV spot rate card. We do not negotiate the set advertising time with clients. The number of seconds it takes to realize the required GRP objective depends on the GRP score of those seconds. The GRP score is determined by the number of viewers reached by

<sup>242</sup> The Parties' responses dated January 30, 2023, with reference ACM/IN/704183, Annex. 3. Oxera question 6, on contribution margin.

<sup>243</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 209.

<sup>244</sup> See for example: <https://adalliance.nl/wp-content/uploads/Ad-Alliance-ratecard-2023-ENG-1.pdf>; and Annex 1, *Ad Alliance TV Spot Ratecard 2022*, with reference ACM/IN/699960 – accompanying the Parties' additional information of June 14, 2022, with reference ACM/IN/699959, memorandum of Ad Alliance.

the content.<sup>245</sup> Supplementary reference is made in the Parties' internal documents to the GRP stock. In the same memorandum, Ad Alliance writes: 'We express our stock in the number of GRPs in the target audience **[confidential]** that we achieve within the legally permitted advertising time. The number of GRPs is derived from the audience ratings we achieve with the content that we broadcast.'<sup>246</sup>

181. ACM considers that at a time when fewer GRPs are sold, savings can also be made on the *creation* of these GRPs. Reach is created by means of content. If less GRPs need to be sold, this also means that less money needs to be spent on content, which thus makes content costs part of the savings in the critical loss analysis. A hypothetical monopoly holder, being a profit-maximizing company, that company will not incur unnecessary costs if the associated additional volume, or reach in the current context, cannot be sold.
182. ACM thus disagrees with the contribution margin of **[95-100]**% as drawn up by the Parties, given that this percentage is only based on selling costs. ACM therefore includes the savings in content costs in the critical loss analysis. In doing so, it is important to determine what portion of the content costs are variable<sup>247</sup>, as it requires a certain level of content costs for the broadcaster to continue to exist irrespective of the amount of advertising space being sold. These costs can be considered as fixed costs and are not included in a critical loss analysis. Based on the annual procurement costs for content and the number of GRPs sold by RTL and Talpa, ACM arrives at an estimate of the variable costs.<sup>248</sup> For this calculation, ACM makes conservative assumptions that all Talpa's content costs are fixed costs and that the variable costs are constant.<sup>249</sup> These assumptions underestimate the variable costs and therefore potential cost savings, in favor of the Parties.

### 7.4.3 Findings based on the quantitative analysis

#### 7.4.3.1 Findings from Oxera

183. Oxera makes use of the MDCEV model to establish the price elasticity for the market definition.<sup>250</sup> This model can estimate the price sensitivity of the demand for different advertising channels. Oxera also takes the 'satiation effect' into account in the specification: with increasing consumption, the marginal advantage that advertisers have in acquiring additional advertising space for a particular media channel may decline. If, for example, an advertiser already frequently advertises on television, additional advertising space on television will then be less appealing relatively speaking.
184. For the data, Oxera makes use of survey data of 831 advertisers that divide 5% extra budget, i.e., on top of their current budget, among the different channels in different hypothetical situations. Based on the MDCEV model it concludes that the price elasticity of television is -1.13.
185. Based on the price elasticity and the contribution margin of **[95-100]**%, Oxera concludes that a hypothetical monopoly holder cannot profitably raise its price by 5-10%, and that because of this, the relevant market is wider than the television advertising market.

<sup>245</sup> The Parties' additional information of June 14, 2022, with reference ACM//IN/699959, memorandum of Ad Alliance, page 1.

<sup>246</sup> The Parties' additional information of June 14, 2022, with reference ACM//IN/699959, memorandum of Ad Alliance, page 1.

<sup>247</sup> A critical loss analysis differentiates between fixed costs and variable costs. Fixed costs are independent of the volume produced while variable costs are directly linked to the level of production. Fixed costs are excluded from the critical loss analysis since these costs do not change if volume slightly drops, which is why only the variable costs are relevant for this analysis.

<sup>248</sup> For further details see the Annex to this Decision.

<sup>249</sup> The variable content costs are calculated in the following way: the difference in content costs between RTL and Talpa is divided by the difference in the number of realized GRPs between RTL and Talpa to arrive at variable costs per GRP. The intuition behind this is as follows. The number of GRPs realized at the Talpa channels can be created with Talpa's content costs. ACM make a conservative assumption that these are all fixed costs, while it is likely that at least some of these costs are variable. ACM considers the extra costs incurred by RTL on top of Talpa's content costs to be variable. These extra costs enable RTL to create the extra GRPs for the RTL channels on top of the GRPs on the Talpa channels. The difference in content costs between RTL and Talpa over the years 2018 through 2021 is approximately **[confidential]** and the difference in GRPs is approximately **[confidential]** GRPs. It follows from these figures that the average variable costs are about **[confidential]**.

<sup>250</sup> Notification, Annex 14, Oxera's hypothetical monopoly test for TV advertisements in the Netherlands.

#### 7.4.3.2 Findings from ACM

186. ACM particularly made use of two models to establish the price elasticity: a multinomial logit model (hereinafter: **MNL**) and a nested logit model (hereinafter: **NL**).<sup>251</sup> These models are frequently used in empirical literature to estimate the demand for a certain product, as well as in competition cases.<sup>252</sup> With the use of these models, ACM can estimate the price elasticity on the basis of television advertising data and include different correction factors in the analysis. The models are further explained in the Annex.
187. The data serving as input for these models originate from Ster, Ad Alliance, Talpa, SKO and Google.
188. The competitive pressure from other advertising channels is expressed in these models, as is standard practice for these types of models, by a so-called outside option relative to television advertising.<sup>253</sup> Both models correct for developments relative to the outside option by including additional control variables, including online prices, and for possible endogeneity<sup>254</sup> of prices. The price sensitivity estimated by means of the MNL model produces a market-wide price elasticity of -0.86. The price sensitivity estimated by means of the NL model produces a market-wide price elasticity of -0.97.
189. In addition to the abovementioned analyses performed by ACM and the Parties, in its assessment, ACM also includes the results from a previous SEO study performed on behalf of ACM.<sup>255</sup> This study estimated a price elasticity of -0.89 by means of an AIDS model and a survey among advertisers. ACM has adjusted the calculation of this price elasticity<sup>256</sup> such that it was calculated in the same way as the price elasticities from the recent analyses of Oxera and ACM.<sup>257</sup> Based on this adjusted calculation, the price elasticity from the SEO study is -1.11.
190. **Table 2** provides an overview of the estimated elasticities and the results of the different critical loss analyses for the ACM models and the models of the Parties. This table shows that the estimated elasticities of Oxera, SEO and ACM do not substantially differ from one another.
191. The two top rows in **Table 2** present the results of the critical loss analysis. This is done in terms of profit or loss resulting from a 5% price increase. A distinction was made between included and excluded content savings. The positive figures in green indicate that the price increase in combination with the associated price elasticities is profitable. The positive figures in red indicate that the price increase in combination with the associated price elasticities is not profitable.

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<sup>251</sup> ACM also made an attempt to estimate an AIDS model based on data from media agencies. However, ACM did not deem the dataset received to be appropriate for drawing reliable conclusions on the substitution patterns between the different media channels. The results of the AIDS model are thus not used in the assessment. See the Annex for further details.

<sup>252</sup> See, for example the Commission's Decision in Case COMP/M.5644 – *Kraft Foods / Cadbury*; Ivaldi, M., & Zhang, J. (2021), *Simulating media platform mergers*. International Journal of Industrial Organization, 79, 1027-29. Ivaldi, M., & Zhang, J. (2022), *Platform mergers: Lessons from a case in the digital tv market*, The Journal of Industrial Economics, 70(3), 591-630.

<sup>253</sup> The outside option allows a choice model to model market-wide developments and to include the competitive pressure from other media channels in the analysis.

<sup>254</sup> To arrive at a market definition, it is necessary to examine how the demand for advertising space on television responds to price increases. This cannot be directly estimated with the use of market data as prices and quantities mutually influence each other: they result from the interaction between supply and demand. The effects of supply must thus be filtered to be able to understand the effects of demand. This is the crux of the endogeneity problem. See the Annex for more details.

<sup>255</sup> SEO (2018), *Productmarkt van advertentieruimte (Product market of advertising space)*, on behalf of ACM, SEO report no. 2018-26.

<sup>256</sup> ACM has calculated so-called non-compensated elasticities. The original SEO study applied compensated elasticities.

<sup>257</sup> Oxera has indicated that it agrees with this adjustment of the elasticity. See the Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, Annex 19 Oxera memorandum, Section 2.3.



Table 2 Results of the critical loss analysis (profits, in millions of euros).

	SEO	Oxera	MNL	NL
Elasticity of television	-1.11	-1.13	-0.85*	-0.97*
No content savings	-6.2	-7.0	4.0	-0.7
Content savings included	21.6	21.3	25.3	23.6
Tipping point	85%	83%	113%	98%

\* The differences in the market-wide price elasticity between the MNL and the NL are the result of differences in the size of the outside option (See Annex marginal 25).

192. As concluded in marginal 182, ACM considers that the savings on content need to be included. **Table 2** shows that a price increase introduced by a hypothetical monopoly holder is profitable. This applies to all models used, those of ACM and those of the Parties.
193. This outcome is robust. Based on the four elasticities in **Table 2**, ACM has calculated the contribution margin that is the tipping point between a narrow and broad market, i.e., between a profitable and non-profitable price increase. These values are close to the contribution margin provided by the Parties. Thus, the savings need only be limited to already conclude that the market is limited to advertising on television. So even if ACM is slightly off with its estimate, the price increase clearly remains profitable in all cases.

#### 7.4.3.3 The Parties' points of criticism on choices made by ACM

194. The Parties criticize the model-based choices made for the critical loss analysis by ACM. Those points of criticism and ACM's response to them are briefly discussed below and detailed in the Annex. This is done in addition to the criticism on the assumption of cost savings as discussed in marginal 177.
195. The Parties dispute that logit models can be used to study the advertising market.<sup>258</sup> According to the theoretical substantiation of these models, consumers only choose one of the options available, while, in practice, advertisers choose several channels at the same time.
196. Although it follows the line of reasoning theoretically outlined by Oxera with regard to choice models, ACM asserts that logit models can also be used in situations where multiple options are chosen simultaneously.<sup>259</sup> It is therefore not a prerequisite for the use of logit models that only one of the possible alternatives is chosen.
197. Secondly, the Parties point out that ACM's logit models are only based on television advertisements. In order to study the substitution from television to online in a reliable way, ACM should have used the data of the online channel as opposed to subsuming them as part of the outside option.<sup>260</sup>
198. Despite the fact that ACM has no data on the other channels, it is standard practice to subsume them by means of an outside option. Moreover, ACM corrects the developments in the outside option<sup>261</sup> and explicitly includes the developments of online video and online search advertising

<sup>258</sup> *Main findings on ACM's updated quantitative analyses of Oxera* with reference ACM/IN/728565, page 3: 'Discrete choice models are set up to deal with a scenario where users make one, and only one, choice among available choice possibilities (e.g. the choice to advertise with either Ster, Ad Alliance or Talpa).'

<sup>259</sup> See Verboven, F. (1996), *The nested logit model and representative consumer theory*, *Economics Letters*, 50(1), 57-63 and Anderson, S. P., De Palma, A., & Thisse, J. F. (1988), *A representative consumer theory of the logit model*, *International Economic Review*, 461-466.

<sup>260</sup> *Main findings on ACM's updated quantitative analyses of Oxera* with reference ACM/IN/728565, page 2: 'This choice of specification for the NL model is, therefore, not an additional independent quantitative analysis of the market and the effects of the merger. For that to be the case, the model should have at least allowed for the choice of online advertising as a possible substitute for TV advertising rather than packaging online advertising in with the outside option.'

<sup>261</sup> By means of fixed effects (See the Annex for further details).

prices. This enables ACM to isolate and identify the price elasticity of television in a reliable manner.

199. Thirdly, the Parties claim that ACM is artificially increasing the substitution between the Parties in the NL model by choosing a nesting structure. In so doing, ACM is thus steering towards a certain result, according to the Parties.<sup>262</sup>
200. With regard to the nesting structure chosen in the model, ACM states that it thus leaves the option open and does not force substitution of television to online to be lower than the substitution within television. The data determine whether this is actually the case. Moreover, and this is crucial, the value of the nesting parameter, i.e., the parameter that indicates the degree of substitution between nests, has no effect whatsoever on the market-wide price elasticity and thus on the market definition. By definition, the market-wide elasticity only concerns substitution of television to other channels (that are outside the scope of the nest of television) and therefore only depends on the price sensitivity of television advertisers, and not on the composition of the other nests.<sup>263</sup>
201. ACM considers the abovementioned criticism given by the Parties not convincingly substantiated. ACM therefore deems the calculated price elasticities robust and reliable, as are the results of the critical loss analysis.

#### **7.4.3.4 Interim conclusion quantitative analysis of the size of the product market**

202. ACM observes that the results of the quantitative analysis suggest a separate product market for the sale of advertising space on television.

## **7.5 Final assessment on relevant product market**

203. Based on the entirety of its qualitative and quantitative analysis during the notification phase and licensing phase, ACM concludes that there is a separate product market for the sale of advertising space on television.
204. First of all, the findings of the investigation into the product characteristics of television and their relevance suggest that television advertising cannot be replaced by advertising on other media channels, including online video. The fact that television is not always used for an advertising campaign does not alter this.
205. The budget shifts towards online advertising brought forward by the Parties do not point to substitution of advertising on television.
206. ACM observes that in determining the media mix for advertising campaigns, advertisers/media agencies consider a multitude of factors varying from the advertising objective, the target audience, the type of product to the size of the budget. This could lead to budget shifts between media channels, including shifts from television to other media channels, and may even mean that television is left out altogether, whether or not temporarily. The indispensability of television is therefore not in absolute terms, nor does it mean that television is actually used for each advertising campaign, aimed at creating brand awareness. However, ACM establishes that the composition of the media mix by advertisers and the allocation of the budget across different media channels are actually indicative of the fact that advertisers consider the different media channels

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<sup>262</sup> *Main findings on ACM's updated quantitative analyses of Oxera* with reference ACM/IN/728565, page 2: 'We would like to point out that, by devising the model to include the TV broadcasters in one nest and all other options in the outside option, the ACM steers the model towards a higher correlation between the broadcasters themselves than between the broadcasters and the outside option. This is unwarranted and cannot be relied upon, as it artificially reinforces the (contested) conclusions already adopted by the ACM in its SO.'

<sup>263</sup> The fact that the NL and MNL produce different estimated market-wide price elasticities, does not follow from the nesting structure, but from small differences in the chosen sizes of the outside option between the two models. A further substantiation of these differences is included in the Annex.

complementary to one another. Not selecting television for a particular campaign or shifting part of the budget does not discipline providers of television advertising space.

207. ACM agrees with the Parties that proof of substitution is relevant in the context of the market definition, but that on top of that, the level of substitution also matters. In addition, the substitution also needs to be the direct effect of a price increase of advertising on television. Moreover, profit margins on television advertising need to be taken into account. The results of ACM's quantitative analysis carried out in this context suggest a separate product market for the sale of advertising space on television.
208. Finally, the Parties' internal documents show that they prepare competitive analyses of separate media channels, while arguing against ACM that the channels can be compared with one another irrespective of characteristics and units of account used. Also in terms of their pricing, the Parties monitor the other providers of television advertising space. This constitutes an indication of a separate product market.
209. For the sake of completeness, ACM notes that the market research revealed indications that television, specifically for reaching young people, is either not indispensable or indispensable to a lesser extent. However, this does not affect the assessment. Most of the purchased television advertising space concerns the 25-49 age category, the so-called shoppers.<sup>264</sup> Commercial channels, in particular, take this category into consideration and even adjust their programming to it. RTL (Ad Alliance) considers [confidential] as its basic target audience.<sup>265</sup> Talpa starts from a wide-ranging target audience [confidential].<sup>266</sup> The Parties' broadcast profiles show that the Parties' main channels focus on [confidential].<sup>267</sup>
210. ACM thus concludes that there is a separate market for the sale of television advertising space that is national in terms of size.

## 7.6 Horizontal impact of the proposed concentration

211. In 2021, the Parties had a joint market share of [60-70]% to [70-80]% in the Dutch market for the sale of advertising space on television. In this section, ACM considers the possible impact of the proposed concentration on this market.
212. ACM comes to the conclusion that the proposed concentration leads to significantly higher prices that advertisers have to pay to the Parties for advertising space on television.
213. ACM explains its assessment in this section. The market shares of the participants are addressed first (**Section 7.6.1**). ACM then focuses on market competition (**Section 7.6.2**). In **Section 7.6.3**, ACM explains the economic analyses of the Parties, which examined the impact of the proposed concentration. **Section 7.6.4** then addresses factors that may discipline the Parties' behavior. **Section 7.6.5** focuses on the two-sided effects of the concentration. Finally, ACM sets out its assessment (**Section 7.6.6**).

<sup>264</sup> These are nowadays also referred to as 'persons in charge of the household'; press release of SKO, the Dutch viewer audience measurement service in the Netherlands, [Doelgroep boodschapper \(BDS\) wordt huishoudverantwoordelijke \(HHV\) \(Target audience shopper becomes person in charge of the household\)](#), November 10, 2021.

<sup>265</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, memorandum of Ad Alliance, page 1. See also the news release of Mediacourant [Na SBS rekt ook RTL doelgroep op tot 54 jaar \(Subsequent to SBS, RTL also stretches target audience to 54 years\)](#), November 6, 2017.

<sup>266</sup> Minutes of the interview with RTL and Talpa of May 16, 2022, with reference ACM/INT/448658; page 2.

<sup>267</sup> Notification, Annex 5 *Signing Protocol, Schedule 9, Channel Profiles*.

### 7.6.1 The Parties' market shares

214. Market shares provide useful, initial indications of market structure and of the competitive importance of both the merging parties and their competitors.<sup>268</sup>
215. **Table 3** presents the market shares on the national market for the sale of advertising space on television in 2021.

**Table 3** Market shares in the Netherlands in 2021 based on advertising revenue in EUR 1,000. Source: Parties<sup>269</sup>

Market participants	Television advertising	
	(in €1,000)	(in %)
RTL	[confidential]	[30-40]%
Talpa	[confidential]	[20-30]%
<b>The Parties jointly</b>	[confidential]	[60-70]%
RTL revenues for third channels <sup>270</sup>	[confidential]	[10-20]%
Talpa revenues for third channels <sup>271</sup>	[confidential]	[0-5]%
<b>The Parties combined including third channel revenues</b>	[confidential]	[70-80]%
Ster	[confidential]	[20-30]%
Other (ORN <sup>272</sup> )	[confidential]	[0-5]%
Total	[confidential]	100.0%

216. The Parties' market share in 2021 is **[70-80]%**, if revenues for third parties are included, and **[60-70]%** if only the Parties' revenues are taken into account<sup>273</sup>. Extremely high market shares – 50% or more – may in themselves be sufficient evidence of the existence of market dominance.<sup>274</sup> It concerns a proposed concentration with a substantial delta of **[20-30]%** or **[20-30]%**.
217. The Parties' position in the target market is also relevant: the importance of channels to consumers partly determines the importance of channels to advertisers. After all, advertisers want to reach viewers. In 2021, the Parties realized a joint market share of **40.5%** in the **target market**, calculated across all target audiences. The channels of RTL Nederland realized a market share of **24.6%** and the Talpa channels **15.9%**. The public service broadcasters realized an average market share of 36.3% collectively across the full day in 2021. In the evening hours (6pm to midnight) the public service broadcasters realized a market share of 38.0%, the channels of RTL Nederland

<sup>268</sup> [Guidelines on the assessment of horizontal mergers](#), item 14.

<sup>269</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959 *Recente ontwikkelingen na de Melding op het gebied van kijkgedrag en advertentie* (Recent developments following the Notification in the area of viewing behavior and advertising), marginal 4.

<sup>270</sup> RTL sells advertising space for Discovery Benelux, Walt Disney Company, DPG Media, Viacom and VodafoneZiggo (Ziggo Sport). The sales network thus includes the following channels: RTL XL, RTL 4, RTL 5, RTL 7, RTL 8, ESPN, Ziggo Sport, Eurosport 1, Comedy Central, 24 Kitchen, Discovery, TLC, MTV, Fox, National Geographic and E! Pop Culture.

<sup>271</sup> Talpa sells advertising airtime for its own channels and the BBC First channel.

<sup>272</sup> Sales organization for 13 regional public service broadcasters.

<sup>273</sup> In accordance with contractual agreements with the respective third parties, RTL Nederland receives a limited share of the revenues generated by Ad Alliance from the sales for third parties: Notification, marginal 198. ACM will refrain from expressing an opinion on whether the turnover for third parties must actually be allocated to RTL and Talpa as it is not relevant for the material assessment. Within the industry and depending on agreements made, providers of advertising space usually set up the commercials themselves with the aim of achieving the intended reach. Advertisers pay extra if they want their commercials aired on a specific channel or at a specific time. At Ad Alliance, for example, **[confidential]** is more expensive than other channels, and the GRP price is less expensive during the day than during prime time in the evening hours. See Notification, marginals 253 through 265.

<sup>274</sup> [Guidelines on the assessment of horizontal mergers](#), item 17.

29.2% and the Talpa channels 18.2%.<sup>275</sup> The difference in market shares between the Parties and NPO of viewing time versus advertising revenues may be explained (or partly explained) by the fact that owing to the applicable regulations, NPO has less advertising space available for advertising purposes, i.e., approximately 6 to 7 minutes per hour as opposed to the circa 12 minutes per hour that commercial broadcasters have at their disposal.

218. The concentration creates a provider with a particularly high market share, whereby Ster remains the sole provider of significant stature with a market share of [20-30]%. There are also two small providers active: ORN, which sells advertising airtime for regional public service broadcasters, and Bionic Media, a sales house that sells airtime on behalf of a number of specialty channels.

## 7.6.2 Market competition

### 7.6.2.1 The Parties' viewpoints

219. During the notification phase, the Parties asserted that their market shares are not representative for their actual market position. According to the Parties, there will remain sufficient competition subsequent to the proposed concentration. In this regard, they *inter alia* refer to the fierce disciplining from their main competitor Ster/NPO and from outside the market, more specifically from providers of online video advertising.<sup>276</sup>
220. To substantiate their viewpoint, the Parties explained that there is competition for advertisers' budget share, both within one and the same media channel as well as spread across different media channels. Put differently; if, for example, Ad Alliance was to offer GRP prices that are too high, advertisers will switch to other providers of advertising space (including video advertising space). That could mean that they will no longer turn to Ad Alliance for their advertising campaigns, but it could also mean that advertisers will shift part of their media budgets to other providers. Advertisers do not contract exclusively with Talpa Media Solutions, Ad Alliance or Ster (NPO). Instead, they spread their budgets across these three competitors and different providers of online video advertising space, but also other online advertising space, such as radio advertising space and print advertising space.<sup>277</sup>
221. Moreover, it is true for both Ad Alliance and Talpa that volume commitments with regard to the advertising space to be purchased play a key role in negotiations with media agencies/advertisers. Depending on the size of such commitments, media agencies/advertisers may negotiate better net GRP basic prices, according to the Parties.<sup>278</sup>
222. During the licensing phase, the Parties argued that the price-based competition between RTL and Talpa is extremely limited.<sup>279</sup>
223. First, according to the Parties, much of the television advertising is purchased in the form of multiparty deals with both Ad Alliance and Talpa Media Solutions, whether or not in addition to Ster. In case of multiparty deals, the Parties only compete with each other to a limited extent; the advertisers' choice is not based on Ad Alliance or Talpa Media Solutions, but on the Parties' channels, as these advertisers need both Parties to achieve their objectives of reach.<sup>280</sup> Thus, the Parties' offer is not substitutable in this respect, but in fact complementary.<sup>281</sup>

<sup>275</sup> SKO, the Dutch viewer audience measurement service in the Netherlands [2021 SKO Annual Report](#), January 18, 2022, page 6 and page 7.

<sup>276</sup> Notification, marginals 285 and 286.

<sup>277</sup> Notification, marginal 264.

<sup>278</sup> Notification, marginal 262.

<sup>279</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginals 245 ff. and the Parties' presentation of October 4, 2022, with reference ACM/IN/721586, slides 10 and 13.

<sup>280</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 247 and marginals 249 through 258.

<sup>281</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 247, 249-258; and the Parties' presentation of October 4, 2022, with reference ACM/IN/721586, slide 13.

224. Secondly, the fact that the Parties are almost completely sold out means that they only compete with each other for the advertisers' budget share to a limited extent. Due to scarcity in the market combined with statutory restrictions on advertising, the Parties have little to no options or incentives to compete with each other in terms of price in order to attract more volume to themselves.<sup>282</sup> This has translated into the fact that for its pricing, Ad Alliance [confidential] of Talpa Media Solutions (or Ster) [confidential]. The same applies to Talpa Media Solutions with regard to Ad Alliance (or Ster).<sup>283</sup>
225. Lastly, the Parties argue that without the proposed concentration, the scarcity and associated price inflation will increase. The Parties need the concentration to be better able to invest in quality content. This will mean that the drop in linear viewing time will continue, causing the reach to decrease for advertisers.
226. According to the Parties, a lower audience share leads to upward price pressures. This is partly driven by the need to increase the price per GRP in the event of continuous declining GRP volumes in order to continue to cover the content costs. The upward price pressure is also driven by the scarcity created by a drop in viewing time. By increasing the price per GRP, broadcasters are better able to match supply and demand and avoid being sold out.<sup>284</sup> This trend of scarcity and ensuing price increases is not sustainable according to the Parties, as GRPs are becoming increasingly more expensive and increasingly less effective. An increasingly lower overall audience share will make it increasingly difficult to achieve the required reach in unique viewers. The GRPs that have been purchased can usually still be provided by broadcasting commercials more frequently, for example, however there is a growing likelihood that the commercials in question keep reaching the same people on different occasions, as opposed to different people within the target audience.<sup>285</sup>
227. Advertisers eventually focus on the effective reach of their advertisements within the intended target audience. Diminishing effectiveness combined with rising prices will result in advertisers shifting their media budgets even more quickly and to an even greater extent from linear television to other media channels, particularly online.<sup>286</sup>
228. The proposed concentration aims to slow down this development. According to the Parties, it is plausible that the concentration will lead to positive price effects driven by a larger GRP stock as a result of better aligned programming and investments in content.<sup>287</sup> The Parties contend that even if there was an upward price effect due to reduced competition among them in the advertising market, this effect would largely and possibly completely be offset by the downward price effect that follows from the increase of the GRP stock by virtue of a more optimal programming.<sup>288</sup> The Parties substantiate this viewpoint with an opinion of Filistrucchi and Klein. See Sections 7.6.3 and 7.6.5 below.
229. Despite the anticipated positive effects of the Transaction, the Parties consider it unlikely that they can fully turn today's market dynamics. Even though it is expected that more efficient programming

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<sup>282</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginals 248 and 259 ff. and the Parties' presentation of October 4, 2022, with reference ACM/IN/721586, slide 13.

<sup>283</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 261.

<sup>284</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718474, marginal 36.

<sup>285</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718474, marginal 46.

<sup>286</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718474, marginal 47 and 263.

<sup>287</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718474, marginal 264.

<sup>288</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718474, marginal 295.



could slow the declining viewing time, it is not likely that the Transaction will result in an increase of linear viewing time to the effect that scarcity will end. In the counterfactual, at least, there will be scarcity and thus limited mutual competition (including on price).<sup>289</sup>

#### 7.6.2.2 Views of market participants

230. A number of purchasers of advertising space consider the proposed concentration a logical step and show understanding. Merging RTL and Talpa could create a solid national television channel that can compete with large, digital global providers.<sup>290</sup>
231. Advertisers and media agencies indicate that there is scarcity at this time; the demand for GRPs exceeds the supply, causing prices to soar in recent years.<sup>291</sup> Despite this scarcity, advertisers and media agencies have opportunities in the present situation to negotiate with providers, which they seize. They fear that the concentration will take away that margin for negotiation, causing prices to rise.

#### Procurement of advertising space

232. Advertisers purchase advertising space from television channels and other types of media such as radio, print and Out-of-Home, whether or not through the intermediary of a media agency.<sup>292</sup> A media agency acts as an intermediary that purchases advertising space on behalf of advertisers from content providers or their sales offices, such as RTL's Ad Alliance and Talpa Media Solutions from Talpa and negotiates with them the volumes to be purchased and the prices.<sup>293</sup>
233. The market research shows that purchasers, advertisers and media agencies can benefit from the market's current supply structure. Despite the fact that the market is concentrated by having three major providers RTL, Talpa and Ster, advertisers can choose from which provider to purchase or to subdivide more or less of their budget between the different providers. A number of advertisers indicate that they need multiple providers in order to be able to meet the intended reach among viewers.<sup>294</sup> That is why they purchase advertising space from two or three providers, the so-called multiparty deals. According to one media agency, it takes at least two commercial providers to 'play the game'.<sup>295</sup> For those advertisers indicating that they need all three providers in order to achieve their intended reach, it is possible to shift budgets between the providers.<sup>296</sup> For example, a number of market participants indicate that they now have the option to shift parts of their budget between Ad Alliance and Talpa to arrive at the most favorable price on a negotiated basis.<sup>297</sup> One advertiser states that the negotiating power already lies with RTL and Talpa.<sup>298</sup>

<sup>289</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718474, marginal 267.

<sup>290</sup> Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 2; Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 6.

<sup>291</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 2; Minutes of the interview ACM/UIT/563289, page 7; Minutes of the interview with reference ACM/UIT/575290; page 3; Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 2; Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2; Minutes of the interview of November 8, 2021, with reference ACM/UIT/564058, page 3; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 4.

<sup>292</sup> Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 3; Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 3; Minutes of the interview of November 1, 2021, with reference ACM/UIT/564055, page 2.

<sup>293</sup> All media agencies combined purchase approximately 80% of the television advertising space for their advertisers, opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, page 11. Also see for example the minutes of the interview of October 11, 2021, with reference ACM/UIT/565744, page 3.

<sup>294</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808, marginal 30.

<sup>295</sup> Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 2.

<sup>296</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3.

<sup>297</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3; see Minutes of the interview of November 5, 2021, with reference ACM/UIT/563612, page 6, marginal 27; Minutes of the interview of November 10, 2021, with reference ACM/UIT/564939; Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2.

<sup>298</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; pages 5 and 6.

234. With regard to the procurement, one media agency states that both Ad Alliance and Talpa are already currently of great consequence, but because it has the ability of shifting advertising budgets between the two, it can use this to exert some negotiating pressure.<sup>299</sup> Market participants have the option of pitting RTL and Talpa against each other in the negotiating process to thus be able to reduce the price.<sup>300</sup> One media agency states that Ad Alliance and Talpa 'compete for the advertiser's euro'.<sup>301</sup> Another advertiser, which does not conclude contracts with all providers, bases the decision to purchase advertising from RTL, Talpa or Ster on pricing.<sup>302</sup>
235. Volume is relevant; larger advertisers and media agencies are able to negotiate discounts on account of the volumes they purchase.<sup>303</sup> The negotiations between advertisers and providers are held on an annual basis and result in annual agreements<sup>304</sup>, whereby volumes and a number of rates such as the basic annual price are agreed.<sup>305</sup> The negotiations usually take place at multiple levels; at the media agency's level, at the customer's level, i.e., the advertiser, and at the level of the campaign.<sup>306</sup> The Dutch Association of Advertisers indicates that it is standard practice during price negotiations for channels to offer more discounts as the share of the advertiser's total budget (the so-called expenditure share) allocated to that channel increases: for example a 25% discount when only one provider is used, a 15% discount when two providers are used, etc.<sup>307</sup> Media agencies conclude the so-called 'agency contracts' with providers in which they make agreements based on the total amount of volumes of advertisers that they represent. They receive a percentage discount on this.<sup>308</sup>

#### **The loss of the margin for negotiation**

236. The acquisition will mean the loss of a major provider of advertising space on television. Advertisers and media agencies perceive a great risk that the concentration will lead to the loss of the current margin for negotiation and a deterioration of their current negotiating position.<sup>309</sup> It is important to note in this regard that negotiations are not possible with Ster, as Ster applies set rates. That makes it difficult to pit Ster and the commercial channels against one another.<sup>310</sup>
237. Market participants have indicated that the proposed acquisition will result in one single dominant party in the market holding a dominant position.<sup>311</sup> The Dutch Association of Advertisers indicates that advertisers will then be left without any options to reach their target audiences in a cost efficient manner.<sup>312</sup> The dependency on RTL and Talpa will increase as a result of the concentration, and, according to the Dutch Association of Advertisers, the same applies to media

<sup>299</sup> Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2.

<sup>300</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 4; see Minutes of the interview of November 5, 2021, with reference ACM/UIT/563612, page 6, marginal 27; Minutes of the interview with reference ACM/UIT/564939; Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2.

<sup>301</sup> Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2.

<sup>302</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2.

<sup>303</sup> Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 7; Minutes of the interview of November 4, 2021, with reference ACM/UIT/564056, page 2.

<sup>304</sup> Minutes of the interview during the Notification phase with reference ACM/UIT/563612, marginal 5; Minutes of the interview of November 19, 2021, with reference ACM/UIT/565744, marginal 16; Minutes of the interview page of October 21, 2021, with reference ACM/UIT/563289, page 5 and page 6.

<sup>305</sup> See, for example: The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, the Memorandum of Ad Alliance, page 2; and Annex 1, *Ad Alliance TV Spot Ratecard 2022*, with reference ACM/IN/699960 – accompanying the Parties' additional information of June 14, 2022, with reference ACM/IN/699959, memorandum of Ad Alliance;

<sup>306</sup> Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 3.

<sup>307</sup> Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, page 2.

<sup>308</sup> Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 5. It is often unclear whether and to what extent the volume discounts received by media agencies are passed on to their customers, the advertisers.

<sup>309</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3; Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 14; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 2. Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2; Minutes of the interview of November 1, 2021, with reference ACM/UIT/564055, page 2; Minutes of the interview of November 4, 2021, with reference ACM/UIT/564056, page 4.

<sup>310</sup> Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 2.

<sup>311</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 4; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 5; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of November 1, 2021, with reference ACM/UIT/564055, page 3.

<sup>312</sup> Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, page 11.

agencies. They negotiate rates and discounts on the basis of the individual volume of a specific advertiser. The leading advertiser realized a share based on gross expenditures of 2.2% in 2019, the most recent representative year. The procurement side can therefore not outweigh the supply side of the market, according to the Dutch Association of Advertisers.<sup>313</sup>

#### Price increases

238. Due to the loss of a provider of advertising space, and thus a reduced choice for purchasers and no more margin for negotiations, the majority of advertisers and media agencies expect that the proposed concentration means that prices for advertisers will rise and media agency revenues will decline.<sup>314</sup> According to a number of advertisers, negotiations will soon be a thing of the past, which will then drive up the prices.<sup>315</sup>
239. If these two companies were to merge, the next two to three years could mark a potentially steep increase in prices, according to Netherlands' largest media agency.<sup>316</sup> Another media agency states that it expects that the rates for the Talpa channels, which are now cheaper than the RTL channels, will be adjusted to the level of the RTL channels.<sup>317</sup>
240. Advertisers also recognize that, even without the proposed concentration, prices for television commercials will increase anyway due to declining viewing time, however, they expect that prices will spike even more dramatically as a result of the proposed concentration.<sup>318</sup>
241. As an example of a price increase, a number of market participants cite RTL's acquisition of BrandDeli; as of 1 January 2019, RTL's Ad Alliance manages the sale for a number of channels previously represented by BrandDeli.<sup>319</sup> According to market participants, this acquisition had the effect of increasing prices for advertisers and decreasing revenues for media agencies.<sup>320</sup> Moreover, this acquisition led to a more concentrated market and less options for purchasers.<sup>321</sup>
242. In addition to the loss of negotiating opportunities and the anticipated price increase, a number of advertisers expect that channels will disappear at RTL and/or Talpa as a result of the proposed concentration, because of the overlap that currently exists.<sup>322</sup> Channels that are now competing with one another for audience ratings and that provide more or less similar content, could be combined after the acquisition.<sup>323</sup> One advertiser mentions the overlap between channels RTL7 and Veronica and channels RTL8 and Net5 as examples.<sup>324</sup> Cancelling channels could on the one

<sup>313</sup> Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, page 3 and page 12.

<sup>314</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 7; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 6; Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 2; Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, page 4; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3; Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2. Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2; Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 2.

<sup>315</sup> Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 14; Information of April 12, 2022, with reference ACM/IN/689865, page 1; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3.

<sup>316</sup> Minutes of the interview with reference ACM/UIT/563613, page 2.

<sup>317</sup> Minutes of the interview of November 11, 2021, with reference ACM/UIT/565744, page 7.

<sup>318</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 2; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 6; Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2; Minutes of the interview of November 11, 2021, with reference ACM/UIT/565744, page 2; Minutes of the interview of October 21, 2021, with reference ACM/UIT/563613, page 2.

<sup>319</sup> News release of Adformatie, [RTL neemt BrandDeli over \(RTL takes over BrandDeli\)](#), December 20, 2018.

<sup>320</sup> Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2. Minutes of the interview of November 11, 2021, with reference ACM/UIT/565744, page 7.

<sup>321</sup> Minutes of the interview of November 1, 2021, with reference ACM/UIT/564055, page 2. Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, page 2.

<sup>322</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 5. Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 14.

<sup>323</sup> Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 14.

<sup>324</sup> Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 14.

hand result in qualitatively better productions, but, on the other hand, it could also mean the loss of television advertising space.<sup>325</sup> With that comes both positive and negative implications.

243. The overview presented above based on the interviews with market participants is supported by confidential information provided to ACM by those advertisers, in particularly in the form of examples of campaigns actually launched. This shows that advertisers negotiate with RTL and Talpa on the actual price they have to pay.<sup>326</sup>

### 7.6.2.3 Competitive pressure

#### The Parties' viewpoints

244. Regarding the alleged strong discipline from NPO, the Parties explained the following in the notification phase. According to the Parties, NPO is a full-function and attractive alternative for leading advertisers, but particularly also for small advertisers, thanks to its lower rates in comparison with the rates charged by the Parties. The Parties expect that the effects of the gradual phase-out of NPO's advertising time will be limited, as it will coordinate its pricing policy with the gradually reduced GRP stock in order to maintain its advertising revenue. Nor do the Parties expect a highly significant shift in budgets, as NPO is and will remain an interesting provider for many advertisers. In this context, the Parties refer to its good representation in the wealthy upper classes in particular and the male target audience, as well as to its content, such as 'Het Journaal' and 'Heel Holland Bakt'.<sup>327</sup>
245. In the licensing phase, the Parties further emphasized that Ster is a full-function alternative for advertisers, and that its competitive position is not restricted.<sup>328</sup> As evidenced by NPO's market share, Ster knows how to attract enough viewers and thus GRPs, which partly springs from a larger programming budget enabling NPO to broadcast more qualitative programs.<sup>329</sup> The audience ratings of the most-watched television broadcasts of NPO are even higher than those of the Parties. Consequently, the channels of NPO are and will continue to be the most interesting channels for advertisers, even if the profiles of RTL and Talpa were more similar than NPO's profile.<sup>330</sup> Furthermore, the Parties emphasize that the effects of the phasing out of advertising airtime by Ster are limited for the time being.<sup>331</sup>
246. Finally, the Parties contend that ACM's qualitative analysis contains strong indications that Ster is a full-function alternative, despite the fact that this analysis failed to be representative according to the Parties. Also some recent statements by advertisers/media agencies and recent developments, such as the partial shifts by advertisers of media budgets from Ad Alliance to Ster, demonstrate that Ster in fact does have a strong competitive position, according to the Parties..<sup>332</sup>

#### Views of market participants

247. The market participants consider RTL and Talpa to be each other's closest competitors in the market for the sale of advertising space on television.<sup>333</sup> Although Talpa, Ad Alliance and Ster are

<sup>325</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 5; Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 14.

<sup>326</sup> Due to the fully confidential nature of this information, ACM has drawn up a confidential file note; see File Note on advertising campaigns of March 2, 2023, with reference ACM/INT/465253.

<sup>327</sup> Notification, marginal 277 and marginal 278.

<sup>328</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 268.

<sup>329</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 269.

<sup>330</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 12.

<sup>331</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 270.

<sup>332</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 269.

<sup>333</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728; page 5; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 5; Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 3.



all capable of reaching high audience ratings, the broadcast profiles differ.<sup>334</sup> The broadcast profiles and target audiences of RTL and Talpa are similar. The broadcast profile and target audience of the NPO channels differ from those of RTL and Talpa.<sup>335</sup> Market participants indicate that the Parties are each other's first alternatives for advertisers given the similar target audiences.<sup>336</sup> According to a number of advertisers, there is no alternative for the channels of RTL and Talpa.<sup>337</sup> Against this background, advertising at Ster is seen more as complementary to advertising at RTL or Talpa rather than as an alternative. In this regard, it is mentioned that the viewers of NPO form part of an older target audience than the target audiences served by RTL and Talpa.<sup>338</sup>

248. In line with the above, market participants confirm that Ster competes with RTL and Talpa, but that this competition is limited.<sup>339</sup> One media agency indicates that Ster is essential when it comes to achieving reach. NPO, on whose behalf Ster sells advertising airtime, is definitely a competitive party when it comes to realizing reach.<sup>340</sup> However, Ster's competition is limited as the NPO channels serve other target audiences<sup>341</sup>, and also because Ster has fixed prices, meaning there is little margin for negotiations.<sup>342</sup> Ster confirms that, in contrast to RTL and Talpa, it does not negotiate with customers on prices.<sup>343</sup>
249. A number of market participants also indicate that Ster's offer is relatively limited due to regulatory requirements, and that it needs to further phase out its offer.<sup>344</sup>

#### **ACM's assessment on Ster's competitive pressure**

250. The Parties contend that Ster is a full-function competitor and serves as an alternative to the Parties.
251. The market research shows that advertisers purchase advertising space from Ster because NPO achieves excellent audience ratings. Using the NPO channels allows advertisers to achieve their intended reach. The market research also shows that the procurement at Ster is often done complementary to the procurement of advertising space from RTL and Talpa. The reason given for this is that the channels of NPO cater to an older audience than the channels of the Parties. Information provided by the Parties<sup>345</sup> and SKO's annual reports<sup>346</sup> confirm this.
252. Although Ster serves as an alternative to the Parties, its offer is more limited than that of the Parties. The NPO channels have less airtime per hour available for advertising. This may not

<sup>334</sup> Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 6.

<sup>335</sup> Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2.

<sup>336</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 2. Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2; Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 3; Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 7.

<sup>337</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 5; Minutes of the interview of May 23, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; page 5.

<sup>338</sup> Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2; Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, pages 2,3; Minutes of the interview of November 11, 2021, with reference ACM/UIT/565744, page 2.

<sup>339</sup> See for example Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; marginal 17; Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 7; Minutes of the interview of May 23, 2022, with reference ACM/UIT/577300; page 2.

<sup>340</sup> Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 2.

<sup>341</sup> Minutes of the interview of November 8, 2021, with reference ACM/UIT/564058, page 4.

<sup>342</sup> See for example Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808; marginal 17; Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 7; Minutes of the interview of May 23, 2022, with reference ACM/UIT/577300; page 2; Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2.

<sup>343</sup> Minutes of the interview of November 8, 2021, with reference ACM/UIT/564058, page 2.

<sup>344</sup> Minutes of the interview of May 13, 2022, with reference ACM/UIT/577728, page 5; Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, page 2; Minutes of the interview of November 2, 2021, with reference ACM/UIT/563291, page 2.

<sup>345</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690143, figure 6 *Profiel tv zenders 2021* (Profile TV channels 2021).

<sup>346</sup> 2021 SKO Annual Report, page 36: *Kijkersprofiel naar leeftijd per zendergroep & zender* (Viewer profile in terms of age per broadcasting group & broadcaster)

exceed 15% on a day-to-day basis.<sup>347</sup> In practice, this means that NPO is allowed to spend six to seven minutes per hour on broadcasting commercials.<sup>348</sup> NPO is then not allowed to broadcast advertising slots during programs.<sup>349</sup> Commercial broadcasters may air a maximum of 20% advertising per timeframe (6 a.m.- 6 p.m. and 6 p.m. to midnight). They are allowed to interrupt programs for advertising slots.<sup>350</sup> In practice, this means that the commercial broadcasters are allowed to spend approximately twelve minutes per hour on broadcasting commercials. The other providers, ORN and Bionic Media, represent regional and specialty channels with specific target audiences. As such, they represent a limited alternative.

253. Also of note is that RTL and Talpa are the leading commercial providers of advertising space and offer the option of negotiating net prices. Ster offers no such option. It has a fixed rate card with net prices.<sup>351</sup>
254. In view of Ster's market share of [20-30]% vis-à-vis the Parties, its offer and the impossibility to negotiate with Ster, ACM concludes that although Ster is a competitor of the Parties, it will not be able to exert sufficient competitive pressure on the Parties to be able to discipline the Parties after the transaction.

#### 7.6.2.4 ACM's assessment on market competition

255. The proposed concentration means the end of the competition between the two leading commercial providers. A concentration may significantly impede effective competition by eliminating important competitive pressures. In this respect, the most immediate effect of a concentration is when competition between the merging companies is eliminated.<sup>352</sup> ACM cannot agree with the Parties' position that they hardly if at all compete with each other.
256. First of all, the market research shows that RTL and Talpa do in fact compete with each other for the advertiser's budget. Though there is scarcity in the market – the demand exceeding the supply – the Parties negotiate rates, discounts and bonuses with purchasers. In the Notification, the Parties explain the purchasing process and confirm that providers of advertising space 'compete to secure a share of the advertisers' media budgets'.<sup>353</sup> Ad Alliance, for instance, negotiates a net basic price with each advertiser. Volume commitments with regard to the advertising space to be purchased play a key role in these negotiations. Depending on the size of such commitments, advertisers may negotiate better net GRP prices. For major advertisers, the net GRP price may be up to [confidential] below the average GRP basic price. For advertisers without commitment that purchase advertising space for separate campaigns, the price could be [confidential] higher than the average GRP basic price.<sup>354</sup> In relation to the price paid by advertisers per GRP, Ad Alliance states: 'This differs for each advertiser and is the result of the negotiations (basic price) and the actual purchase options'.<sup>355</sup> The Parties' argument that they do not check the pricing of other providers is not plausible. By providing discounts on the basic price, RTL and Talpa try to draw in more of the advertisers' budgets. It appears from the Parties' internal documents that they do in fact check their competitors. See Section 7.3.3.
257. The current scarcity and binding capacity restrictions asserted by the Parties<sup>356</sup> therefore do not prevent them from negotiating volumes and rates with advertisers and media agencies. In their

<sup>347</sup> [Rules governing advertising for public broadcasters | Media and public broadcasting | Rijksoverheid.nl](#)

<sup>348</sup> See, for example: Minutes of the interview of November 8, 2021, with reference ACM/UIT/564058, page 2.

<sup>349</sup> [Rules governing advertising for public broadcasters | Media and public broadcasting | Rijksoverheid.nl](#). Furthermore, the offer of NPO will be phased out over the next few years to a maximum of 5% advertising airtime per year.

<sup>350</sup> [Rules governing advertising for public broadcasters | Media and public broadcasting | Rijksoverheid.nl](#)

<sup>351</sup> Information by Ster [on rates and TV purchase options](#), undated.

<sup>352</sup> Guidelines on the assessment of horizontal mergers, item 24.

<sup>353</sup> Notification, marginal 250.

<sup>354</sup> Notification, marginal 262.

<sup>355</sup> The Parties' additional information of June 14, 2022, with reference ACM/IN/699959, [confidential], of June 14, 2022, page 1.

<sup>356</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 37 and marginal 45.



response to the Points for Consideration, the Parties acknowledge that they negotiate with purchasers.<sup>357</sup>

258. Market participants in this investigation have expressed their concerns about the loss of margin for negotiations in this case. ACM considers it plausible that the negotiating position of advertisers and media agencies will deteriorate considerably as a result of the proposed concentration. Following an acquisition, purchasing market participants no longer have the option to choose between RTL channels on the one hand and Talpa channels on the other hand, or to shift their budgets (or parts thereof) between RTL and Talpa, in order to influence the negotiations and their outcome. However, purchasers do still need the Parties' channels to achieve their objectives and intended reach. The Parties argue that advertisers need all providers to achieve their intended reach, which is why they conclude multiparty deals. The Parties' channels would as such be complementary to each other, which forms the reason why the Parties only compete with each other to a limited extent. Yet, the market research shows that there is another reason for these multiparty deals, namely that such deals allow purchasers to negotiate the best price for themselves by shifting budgets between the different providers, or threatening to do so. In so doing, they optimize their price, reach and investments.

#### **Prices will increase**

259. Based on the qualitative analysis, ACM also finds it plausible that the loss of competition and the margin of negotiation result in the fact that rates for advertisers will increase. Market participants have clearly indicated that they expect rates to increase as a result of the concentration. If RTL and Talpa no longer need to compete for the advertisers' budgets, this will prompt them to maximize the advertising revenues and to increase the rates for advertisers/media agencies, whether or not by cutting **[confidential]**.
260. ACM does not agree with the Parties' contention that reduced competition among them would be offset by the downward price effect that follows from the increase of the GRP stock by virtue of a more optimal programming. The Parties have presented no evidence to this effect. Moreover, the alleged advantages are unclear and uncertain and do not outweigh the disadvantages quantified by ACM. See also Section 7.6.5 on two-way effects.
261. Supplementary to the qualitative analysis, ACM also conducted a quantitative analysis into the possible price effects of the proposed concentration. The results of this analysis are presented in the following section.

### **7.6.3 Quantitative analyses**

262. To examine the potential impact of the transaction, the Parties as well as ACM both performed a price impact analysis. A price impact analysis not only takes into account the competition in the relevant market, but also considers off-market competition. For example, a merger between two large Parties in a market may not lead to high price effects if the Parties are not close competitors and/or if those Parties experience many competitive pressures from other relevant markets.

#### **7.6.3.1 Capacity constraints**

263. An important conceptual issue within the price impact analysis is whether there are bidding (and other) capacity constraints. The Parties contend that both RTL and Talpa are currently already facing binding capacity constraints, there is already a price-driving effect, meaning that the merger will not lead to further price increases.<sup>358</sup> The rationale behind this is that if merging Parties are at their full capacity, and therefore set prices based on this capacity constraint rather than on competition with each other, there are already limited competitive pressures such that the merger

<sup>357</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginals 274 through 282.

<sup>358</sup> Additional information of Oxera, *RTL/Talpa: competition assessment*, of October 5, 2022, with reference ACM/IN/719714, page 18 and page 19.

will not change prices. According to the Parties, the capacity constraint is caused by the Dutch law that prohibits them from selling more advertising airtime, despite the increase in demand. As a justification for the fact that the Parties are at least partly 'full', they present higher 'sell-out ratios' (between 93% and 99%).<sup>359</sup>

264. This viewpoint is in line with Filistrucchi and Klein's reasoning<sup>360</sup> (hereinafter: **F&K**) who, in their report on duality, drawn up on behalf of the Parties, assert that the maximum capacity for selling advertising space has already been met.
265. ACM does not agree with the Parties' viewpoint on the capacity constraints. First of all, ACM disputes that the capacity cannot be expanded. And secondly, it observes that the market does indeed reflect competition between the Parties, meaning that capacity constraints play no or only a very limited role.
266. With regard to the first item, ACM recognizes that the Parties' airtime is practically full. However, there are ways to influence the number of GRPs through the choice of content to be broadcast. The capacity can therefore be expanded.
267. The Parties state that with respect to this influence, there is a high degree of uncertainty in terms of the relationship between investment in content and the reach you create with it. For example, they say 'creating, producing and programming content is a creative process, that does not guarantee success, especially when it involves new formats, and therefore does not guarantee more GRPs and is sometimes difficult to predict in advance<sup>361</sup>'. However, it does indicate 'it will optimize the estimated total GRP stock. For instance, the choice to broadcast RTL Late Night also on Saturday evenings as of September has had a positive impact on the GRP stock, even if this impact was limited and the viewers' response to this could not be predicted upfront.'<sup>362</sup>
268. According to ACM, however, an exact predictable relationship between investments and content is not relevant. Broadcasters must continually make trade-offs between investment costs and revenues from extra viewers. This, perhaps, cannot be done with precision, though with enough precision for broadcasters to continue to exist and compete. According to ACM, it is not clear why these same estimates could not be used to increase the current GRP stock.
269. The Parties also contend that 'the development and production of new (and existing) programs requires some preparation time, usually at least several months'<sup>363</sup>. However, according to the Guidelines on the assessment of horizontal mergers, the relevant time period in matters of expanding capacity is the same period of time relevant to 'entry'.<sup>364</sup> This time period is 'within two years' according to the Guidelines.<sup>365</sup>
270. Lastly, ACM points out that the Parties have submitted a report from Filistrucchi and Klein, in which they indicate as an advantage of the proposed concentration that the Parties will be better able to finetune their programming, resulting in a larger number of GRPs.<sup>366</sup> This also shows that the Parties consider the number of GRPs to be variable by the influence of content.

<sup>359</sup> Additional information of Oxera, *RTL/Talpa: competition assessment*, of October 5, 2022, with reference ACM/IN/719714, page 13.

<sup>360</sup> Expert opinion of Filistrucchi and Klein on behalf of the Parties of June 1, 2022, with reference ACM/IN/697761.

<sup>361</sup> The Parties' responses dated January 30, 2023, with reference ACM/IN/704183, page 3.

<sup>362</sup> The Parties' responses dated January 30, 2023, with reference ACM/IN/704183, page 3.

<sup>363</sup> The Parties' responses dated January 30, 2023, with reference ACM/IN/704183, page 4.

<sup>364</sup> Guidelines on the assessment of horizontal mergers, footnote 45: 'When analyzing the possible expansion of capacity by competitors, the Commission considers factors similar to those described in Section VI on entry.'

<sup>365</sup> Guidelines on the assessment of horizontal mergers, Section 74.

<sup>366</sup> Expert opinion of Filistrucchi and Klein on behalf of the Parties of June 1, 2022, with reference ACM/IN/697761, page 11; 'As a result, competing channels will tend to diversify content less than channels that are owned by the same media group. The variety of programs broadcasted will thus tend to increase after the merger. As a consequence, some people who do not watch TV without the merger may decide to watch TV after there is a merger, because some content they are interested in is then offered. Therefore, TV viewership will tend to increase.'

271. In terms of the second item, ACM also does not further accept the reasoning that there is already little to no competition between the Parties. As shown above in Section 7.6.2.4, advertisers and media agencies can pit the Parties against each other in the negotiations. Therefore, competition indeed takes place, which can create price effects.
272. The Parties' issue concerning the capacity constraints is thus no reason for ACM to depart from the standard economic analyses for calculating price effects. It does include in its analysis that it may become more expensive to increase reach (and thus expand capacity) through better content.

### 7.6.3.2 The Parties' price impact analysis

273. The Parties have submitted a price impact analysis from Oxera. This analysis indicates price effects between 1.2% and 2.3%. With such low price effects, the proposed concentration cannot significantly impede the competition, according to the Parties. Oxera has carried out a Gross Upward Pricing Pressure Index (GUPPI) and an Indicative Price Rise (IPR) analysis to calculate the price effects.<sup>367</sup>
274. A GUPPI analysis presents a value for the *incentive* that a merging party has to raise its price. Before the merger, a company is deterred from raising its price too much by losing customers to competitors. After the merger, however, this loss is smaller because some of the demand migrates to the merging party, and thus remains within the joint venture. A merging party therefore has an incentive to increase its price.
275. The IPR not only measures the *incentives* for a price increase, it also provides a first indication of the anticipated *price effect*. It is assumed in this regard that the Parties only actually pass on part of these incentives for a price increase to advertisers. This is referred to as a pass-on. The IPR also takes into account the feedback effects between the *merging* companies: in response to the price increase of one of the merging parties, the other merging party also has an incentive to raise its price.
276. Important inputs for both the GUPPI and the IPR are the contribution margin and the shifting ratios<sup>368</sup> between channels. In keeping with its analysis for the market definition, Oxera makes a calculation using a contribution margin of [95-100]%. Additionally, the results are also calculated with a lower contribution margin that takes into account any savings on content costs, to ACM's viewpoint. The other input, the shifting ratios, quantifies the proportion of demand lost due to a price increase that ends up at another broadcaster/channel. For this, Oxera uses the results of its MDCEV model with data from its second experimental research, whereby respondents need to divide an extra budget between two TV broadcasters, two digital video providers and two non-video digital media channels.
277. According to the Parties, the low shift ratios between the Parties ([confidential]% from Ad Alliance to Talpa and [confidential]% from Talpa to Ad Alliance) indicate that there is little competition between the Parties, which is why also the price effects are low: 1.2%. Oxera also calculates the expected price effects with the shift ratios from a previous version of ACM's MNL model<sup>369</sup>, i.e., [confidential]% from Ad Alliance to Talpa and [confidential]% from Talpa to Ad Alliance. Based on this, Oxera also concludes that the price effects are expected to be low: 2.4%-3.3%. Oxera

<sup>367</sup> Additional information of Oxera of October 5, 2022, with reference ACM/IN/719714.

<sup>368</sup> A shift ratio is derived from and closely linked to cross-price elasticities. A shift ratio of 10% from Ad Alliance to Talpa indicates that of every 10 GRPs that Ad Alliance loses due to a price increase, 1 GRP goes to Talpa. As explained in Section 7.4.3, cross-price elasticity, and the shift ratio calculated from it, can be calculated via different models, such as, for example, the MCDEV model, the NL model or the MNL model.

<sup>369</sup> Oxera makes use of the results from ACM's MNL model, as presented in the Points for Consideration. Following the Points for Consideration, ACM made small adjustments to the model. The final version of the model is described in the Annex to this Decision.

recognizes here that the price effects based on the IPR analysis are rather an underestimate of the expected price effects.<sup>370</sup>

278. **Table 4** provides an overview of the expected price effects based on Oxera's IPR analysis under different specifications. Oxera considers the specification based on the MDCEV model and without content savings as the main specification. This is expressed in bold in **Table 4**. According to the Parties, the price effects are so low that the proposed concentration would not impede the competition.

**Table 4 Oxera's price impact analysis**

Source of shift ratios	MDCEV model	Logit model
No content savings	<b>1.2%</b>	2.4% - 3.3%
Content savings included	0.7%	1.4% - 2.0%

### 7.6.3.3 ACM's price impact analysis

279. ACM has performed a merger simulation to identify the expected price effects of the proposed concentration. The idea of a merger simulation is to construct a market model that aligns well with the actual market situation prior to the proposed concentration and to then use this model to predict the price effects. These types of analyses are more commonly used in concentration cases.<sup>371</sup>
280. To assess the impact of the transaction, it is important to realistically identify the substitution between the companies. If the data show that advertisers currently still shift relatively much volume from RTL to Talpa or vice versa due to a price increase, this would imply a relatively high level of competition between the two parties. This high level of competition would cease to exist as a result of the merger, which means a major expected price impact of the merger. Suppose, however, that as a response to RTL or Talpa raising their prices, advertisers would mainly shift volumes to online, this would then imply a relatively low level of competition between RTL and Talpa. Only a low level of competition would then cease to exist as a result of the merger, causing the expected price effects of the merger to be substantial.<sup>372</sup>
281. ACM uses the NL model as a demand model to determine the price effects. It also assumes a standard competitive pricing model with differentiated goods.
282. In order to ultimately calculate the price effects, ACM has to assume a certain cost structure. ACM uses two different versions: (i) with constant marginal costs; and (ii) with increasing marginal costs. The latter specification takes into account that it becomes increasingly expensive to create an additional GRP as more GRPs are already achieved.
283. **Table 5** summarizes the expected price effects under two different model specifications. The NL model (conservative) assumes the most favorable parameters for the Parties. The price effects are in all cases higher than estimated by the Parties and vary between 3.9% - 7.0%.

<sup>370</sup> See the additional information of Oxera of October 5, 2022, with reference ACM/IN/719714: 'Hence, we consider that the IPT formula will slightly underestimate the price effects of the merger as the different marginal costs function increases the scope for the feedback effect between the Parties (currently at around 0.2%).' page 20. And also: 'With reference to the discussion on conditions for the closed form IPR formula used here, we note that a number of the underlying conditions are not fully met. As such, we consider that the values presented here are at the low end for the expected price effects of the merger.' page 21.

<sup>371</sup> See, for example Miller, N. H., & Sheu, G. (2021), *Quantitative methods for evaluating the unilateral effects of mergers*, Review of Industrial Organization, 58(1), 143-177.

<sup>372</sup> And as a result of which, at least in terms of price competition, no problems would arise from the merger.

**Table 5 Price effects in ACM's merger simulation**

	NL (standard)	NL (conservative)*
<b>Constant marginal costs</b>	7.0%	4.7%
<b>Increasing marginal costs</b>	5.6%	3.9%

Source: sales data RTL, Talpa and Ster, audience share data from SKO and estimates and calculations by ACM

284. ACM deems the NL (standard) the most appropriate model to calculate the price effects. This is further substantiated in the Annex to this Decision.

#### **7.6.3.4 The Parties' criticism on ACM's merger simulation**

285. The Parties dispute the results of ACM's merger simulation. Most of the criticism focuses on the demand model used to estimate (cross-price) elasticities and shift ratios derived from them. As discussed for the product market definition, the Parties *inter alia* consider that logit models cannot be used to model the demand for television advertising space, that the substitution between television and online cannot be established by means of the outside option and that the NL model's nesting structure is not appropriate. In assessing the market definition, ACM already addressed this criticism and concluded that this criticism is not convincing. ACM persists in using the models it had selected.

#### **7.6.3.5 ACM's criticism on the Parties' analysis**

286. There are significant differences between ACM's merger simulation and Oxera's price impact analysis, however, in both analyses the price effects are largely determined by the calculated cross-price elasticities of the merging Parties relative to each other, and the merging Parties relative to the other channels. Oxera calculates these cross-price elasticities on the basis of its MDCEV model, while ACM calculates these elasticities on the basis of its NL model.
287. ACM finds the data used by Oxera in combination with the MDCEV model – to calculate the price effects – not suitable for making statements about advertisers' behavior in practice and thus determining the cross-price elasticities. These data were obtained from a survey among advertisers in which they were asked to divide an additional 5% budget. ACM considers that advertisers behave differently if they receive 'extra' budget, as opposed to when they have to divide their own budget. For example, if an advertiser already frequently advertises on television, they may be more inclined to spend the extra budget on online advertising. This question wrongly prompts a quicker conclusion that online is a bigger competitor to television than any other television providers, especially if such saturation effects have a prominent part in the model used. Indeed, all substitution patterns in the MDCEV model are primarily driven by the saturation effect rather than by substitutability of the different products. For example, when an increase in prices on advertising space on RTL channels is made, the model primarily makes the tradeoff of whether there is already abundant television advertising (which would make online an attractive substitute) and less the tradeoff of to what extent Talpa or online would be a better substitute. Oxera's MDCEV model also leads to low cross-price elasticities and shift ratios between the Parties, which is not in line with the findings from ACM's qualitative analysis.
288. In addition, a merger simulation provides a more realistic picture of the expected price effects than a GUPPI/IPR analysis because i) a merger simulation also calculates the response of non-merging competitors, Ster in this case, ii) the merger simulation explicitly models demand, and iii) because there is no need to make separate assumptions about pass-on<sup>373</sup>. As a result of the JV's price increase it may be expected that advertisers will shift part of their budgets from the JV to Ster. As a

<sup>373</sup> Pass-on indicates the extent to which the level of the incentive to increase the prices actually leads to a price increase.

result of this increasing demand, Ster will also be able to raise its prices, which in turn will lead to more demand from the JV. The merger simulation calculates the final price equilibrium. These 'feedback effects' are partly included in Oxera's IPR analysis on the basis of certain assumptions. This leads the IPR analysis to underestimate the expected price effects, which Oxera also recognizes. See footnote 370.

#### 7.6.3.6 Conclusion of the quantitative analyses

289. For the abovementioned reasons, ACM prefers both its analysis (merger simulation) and its calculated cross-price elasticity from the NL model that serves as input for the analysis. Based on the analyses performed by Oxera on behalf of the Parties, and its own analyses, ACM concludes that the proposed concentration leads to significant price effects.

#### 7.6.4 Disciplining factors

290. ACM has examined whether there are any factors that discipline the Parties to such an extent that they will limit the effects of the transaction.

##### 7.6.4.1 Off-market competitive pressure

###### The Parties' viewpoints

291. In the notification phase, the Parties asserted that, following the proposed concentration, they will be heavily disciplined by online video advertising providers competing for a share in the advertisers' advertising budget. Even if based on a separate market for advertising space on television, that competitive pressure will need to be considered. The Parties' combined market shares cannot be assessed without taking this into account.<sup>374</sup> Added to that, the competitive pressure that the Parties face from providers of online video advertising space will only intensify according to the Parties, given the competitive pressure from providers of online video advertising space, the dwindling numbers of linear television viewers and the growing numbers of digital content viewers. According to the Parties, this will exert further pressure on the market share in the linear television segment, meaning that the proposed concentration also for that reason does not result in a significant impediment to effective competition.<sup>375</sup> The outcome of the conjoint analysis performed by Oxera confirms that there is considerable competitive pressure from providers of online advertising space.<sup>376</sup>

292. In the licensing phase, the Parties repeated their viewpoint that ACM needs to consider the disciplinary effect exerted by the increasing offer of online advertising options for advertisers, even if assuming a separate market for advertising space on television.<sup>377</sup> In addition, the Parties further explained the strong competitive pressures from providers of online video advertising that they claim they will face after the proposed concentration, and that, according to the Parties, will only become stronger and more effective. See **Section 7.3.1**). The Parties also point out that the additional advertising possibilities (also on television) and the associated additional competition as a result of the growth of AVOD in the Netherlands are not 'uncertain', but in fact highly certain, significant and fully recognized by market participants.<sup>378</sup> These therefore form key aspects for the

<sup>374</sup> Notification, marginal 285.

<sup>375</sup> Notification, marginal 287.

<sup>376</sup> Notification, marginal 290.

<sup>377</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 8 ff.; The Parties' additional information of June 14, 2022, with reference ACM/IN/699959; The Parties' additional information of October 30, 2022, with reference ACM/IN/724867; The Parties' additional information of August 5, 2022, with reference ACM/IN/707753; The Parties' presentation of October 4, 2022, with reference ACM/IN/721586, slides 10 and 12; The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 9, marginal 11 through 31 and marginal 219 through 244; The Parties' response to the additional investigation of October 17, 2022, with reference ACM/IN/730649, page 1.

<sup>378</sup> The Parties' additional information of October 30, 2022, with reference ACM/IN/724867, page 1; The Parties' response to the additional investigation of October 17, 2022, with reference ACM/IN/730649, page 2.



assessment of the competitive effects of this proposed concentration, from a prospective perspective, according to the Parties.<sup>379</sup>

#### Views of market participants

293. When it comes to off-market competitors disciplining the Parties (for providing advertising space on television), one media agency indicates that the rates of RTL and Talpa are not yet affected by the offer of online video. The reason, according to this purchaser, is the difference in the quality of the content, although the quality content at YouTube is improving. According to this purchaser, online video will be able to offer the same experience as television in time, as a result of which online video will then exert influence on RTL's and Talpa's rates. The media agency foresees this taking place in the longer term of more than five years.<sup>380</sup>

#### ACM's assessment of off-market competitive pressure and market developments

294. The Parties contend that they will be heavily disciplined by online video advertising providers competing for a share in the advertisers' advertising budget. According to the Parties, market developments are moving extremely fast; increasingly more streaming services are establishing operations in the Netherlands to offer advertising space or are making plans to do so. In combination with declining audience ratings for linear television, the Parties consider this to be a major disciplining factor.
295. ACM has included the potential competitive pressure of online video in its quantitative analyses of the product market and price effects. Even when this is taken into account, the merger still leads to significant price increases. See Section 7.6.3. The market research revealed no indications that online advertising is presently significantly affecting the Parties' prices for advertising on television.
296. In assessing the competitive effects of a concentration, the situation created as a result of the concentration will be compared to the situation that would have existed in the absence of the concentration. In most cases, the existing competitive situation is the most relevant point of comparison in terms of assessing the impact of a concentration. Under certain circumstances, ACM may take future market developments into consideration that are reasonably predictable and of a non-temporary nature. This involves a time horizon of three to five years. Incidentally, ACM is under no obligation to include any developments that cannot be reasonably predicted or that are uncertain. ACM adheres to the Commission's Guidelines on the assessment of horizontal mergers<sup>381</sup>
297. The Parties contend that the new advertising possibilities on streaming services are not uncertain, but in fact highly certain, significant and fully recognized by market participants. ACM does not share the Parties' argument.
298. Of note in this context is that none of the streaming services operating in the Netherlands, or planning to operate in the Netherlands, have announced to start selling advertising airtime in the Netherlands within a reasonable timeframe. However, it cannot be ruled out that Netflix, for example, will expand its plans for ad supported subscription models to more countries.<sup>382</sup> Other streaming services may follow this lead. However, all this is not certain and at present does not discipline the Parties in their price setting.

<sup>379</sup> Additional information from the Parties dated August 5, 2022, with reference ACM/IN/707753, page 1; The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, marginal 31 and marginals 226 through 244; The Parties' response to the additional investigation of October 17, 2022, with reference ACM/IN/730649, page 2.

<sup>380</sup> Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 7.

<sup>381</sup> ACM adheres to the Commission's Guidelines on the assessment of horizontal mergers, marginal 68.

<sup>382</sup> News release of Netflix, [Netflix Starting From \\$6.99 a Month](#), October 13, 2022.

299. ACM's research also shows that, despite declining audience ratings, linear television continues to be relevant in the coming years. Public research, market participants and also the Parties themselves confirm this.
300. Research also shows that advertisers adhere particular value to the linear television medium because of the mass reach that can be achieved at a reasonable rate. Advertising offered by streaming services will not serve as an alternative for this. In fact, streaming services can be compared with online advertisers. Market research shows that online advertising has a lower reach than television. It is a fragmented medium as such and not effective in reaching large groups of consumers. In order to reach a large group of consumers in a campaign, comparable to television, advertising space must be purchased at many different websites and apps. This makes online advertising a more expensive medium for advertisers. Also, streaming services will have a lower reach than linear television. The fragmentation of the reach achieved by streaming services will only increase as more streaming services join the market. One advertiser confirms in the market research that there is currently hardly any competitive pressure from the only AVOD model operating in the Netherlands (Videoland) because of the limited reach and the higher price vis-à-vis television advertising.<sup>383</sup>

#### 7.6.4.2 Countervailing buyer power

##### The Parties' viewpoints

301. In the notification phase, the Parties argued that they encounter countervailing buyer power from advertisers and media agencies. The vast majority of the television advertisements are sold through the intermediary of media agencies, particularly [confidential]. Due to the power of these five media agencies, the purchase side of the advertising market is highly concentrated and able to provide sufficient counterbalance to the providers of advertising space, according to the Parties.<sup>384</sup>
302. During the licensing phase, the Parties pointed out that media agencies play a key role in the purchasing process of margins for negotiation and the negotiation process. As many as 95% of advertisers make use of media agencies. Media agencies 'stack' the purchasing volume in the negotiations; all advertisers making use of media agencies can thus get a free ride on the agency contracts that media agencies conclude with providers.<sup>385</sup> Furthermore, media agencies provide advice to advertisers on the use of different media channels and, in so doing, influence media mix spending and any transfers to other media channels. Oxera's research shows that price increases will directly result in such transfers. Another key element in negotiations are the previously negotiated net rates with advertisers; a significant increase in rates lacking any rationale will not be readily accepted.<sup>386</sup>
303. Finally, the Parties contend that ACM's research lacks sufficient basis to conclude that media agencies/advertisers have countervailing buyer power, because ACM has failed to properly investigate the media agencies' negotiating position in concluding these agency contracts and the effects thereof on the contracts that media agencies enter into with individual advertisers.<sup>387</sup> Nevertheless, the Parties also consider that ACM's case file shows that negotiations take place on the basis of market positions and discounts in volumes, that the media agencies' negotiating position depends on the size of the media agencies, and that basic prices may be negotiated.<sup>388</sup>

<sup>383</sup> Minutes of the interview of May 2, 2022, with reference ACM/UIT/576603, marginal 9 and marginal 10; Minutes of the interview of April 13, 2022, with reference ACM/UIT/575290, page 4.

<sup>384</sup> The Parties' response to the opinion of the Dutch Association of Advertisers of December 24, 2022, with reference ACM/IN/667534, marginal 13.

<sup>385</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, reference no. 275 through to 278.

<sup>386</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, reference no. 11.

<sup>387</sup> The Parties' response to the Points for Consideration, segment *advertentiemarkt* (advertising market) of September 28, 2022, with reference ACM/IN/718476, reference no. 275 through to 278.

<sup>388</sup> The Parties' presentation of October 4, 2022, with reference ACM/IN/721586, slide 14;

#### ACM's assessment on countervailing buyer power

304. ACM does not consider it plausible that advertisers or media agencies hold such a purchasing position that this causes a disciplinary effect on the Parties.
305. The Parties particularly argue that especially the media agencies hold a strong purchasing position because they can bundle the volumes of the advertisers that they represent. The Dutch Association of Advertisers disputes this and also indicates that media agencies negotiate at the level of the advertisers. Media agencies have indicated to negotiate with operators *on behalf of the advertiser*. The advertisers' volumes are, however, added up when it involves the bonuses that media agencies annually receive. The media agencies interviewed by ACM all state that they anticipate a price increase as a result of the concentration. Market research shows that only the leading media agency believes that the effects may not be so severe for them.<sup>389</sup>
306. There is no question that the margin of negotiation that purchasers have to pit RTL and Talpa against each other will come to end with the proposed concentration. Advertisers and media agencies need the Parties' channels to carry out effective advertising campaigns. As described above in Section 7.3.1, television is a fundamental medium in advertising campaigns. The loss of margin of negotiation weakens the negotiating position of purchasers and increases their dependency on the Parties.

#### 7.6.4.3 Potential entry

##### The Parties' viewpoints

307. The Parties have argued in the notification phase that the barriers to entry and the associated costs for establishing a linear television channel depend heavily on the positioning of the new channel. According to the Parties, these costs include the broadcasting license and supervisory costs, content, technique, marketing, SKO measurements, staff, overhead and distribution. The costs for launching a new channel generally amounts to about one-and-a-half to two million euros per year, though this will be more for the setup of a large sports channel. Notably, where an entrant already has an established brand and/or relevant differentiating content, those cost items do not present an obstacle.<sup>390</sup>
308. The number of newcomers to the Dutch television market with a linear model was limited in recent years. Channels SBS9, RTLZ, Spike and Ziggo Sport were launched in 2015, and 4K channel Love Nature entered the market in 2019. The reason for the limited number of newcomers, according to the Parties, are the more accessible entry possibilities for providers of an OTT model and consumers' increasing demand for on-demand content. In addition, the declining linear viewing time makes it less appealing to set up a channel with a linear model.<sup>391</sup>
309. The Parties note that the establishment of a new broadcaster recognized by the Dutch Media Authority is an attractive alternative to the establishment of a linear television channel. In case of the establishment of a broadcaster, no channel of its own is obtained, but direct access to viewers through the public service broadcaster is obtained as well as the possibility of receiving funding. Broadcasters ZWART and Ongehoord Nederland are examples of new broadcasters that have entered the Dutch television and radio market with a linear model on 1 January 2022.<sup>392</sup>

##### Views of market participants

310. The market research identified indications that entry to the Dutch television market, and thus the market for the sale of advertising space, is not likely.<sup>393</sup> Market participants confirm that the viewing

<sup>389</sup> Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, page 3

<sup>390</sup> The Parties' responses dated January 11, 2022, with reference ACM/IN/671281, marginal 24 and marginal 25.

<sup>391</sup> The Parties' responses dated January 11, 2022, with reference ACM/IN/671281, marginals 26 through 28.

<sup>392</sup> The Parties' responses dated January 11, 2022, with reference ACM/IN/671281, marginal 24 and marginal 29.

<sup>393</sup> Minutes of the interview of April 20, 2022, with reference ACM/UIT/576181, page 4.

time of linear television is declining.<sup>394</sup> And although market participants consider television to be a relevant medium, it is not a growth market.<sup>395</sup> According to one media agency, there is no entry as the market is too complex.<sup>396</sup>

311. This is in line with the findings from the notification phase that showed that entry is not likely. The Dutch Association of Advertisers, for example, brought up the notion that in order to offer television advertising space that appeals to advertisers, i.e., with sufficient viewers to be able to reach the intended target audience, a television channel needs to have an engaging program selection, something that is a considerable barrier to entry. A market entry thus requires such investments that there are only few capable parties that would venture an entry to today's television market. The Dutch Association of Advertisers therefore notes that Talpa was the last entrant to the market, at the end of 2004.<sup>397</sup>

#### **ACM's assessment on potential entry**

312. ACM observes that there is no disciplinary effect from an actual or potential entry to the market by new participants. The market research shows that it is not likely that any new participants will enter the traditional linear television market. As already concluded in the Notification Decision, it is not likely that there will be a (significant) new entrant to the market in the near future for the sale of advertising space on television.<sup>398</sup> There has been no entry into this market in recent years, nor are there any signs of new participants with the intent of entering the market with a general television channel. Apart from the significant investments needed to purchase or produce content for a television channel and to meet the media regulations, broadcasters also need to attract a substantial group of viewers to be of sufficient interest to advertisers. ACM considers this to be implausible, all the more so because the current market is competing for a declining number of viewers.

### **7.6.5 Two-way effects**

313. In Section 6.1, ACM sets out the way in which the different links in the AV chain are connected. As described in the Notification Decision, the market for the sale of advertising space is linked to the market for the distribution of television channels and content markets. Retransmission by distributors is needed to sell advertising space via the linear television channels to achieve the intended reach for which advertisers make the purchase. The quality of the content, in turn, affects the audience ratings, which feeds through into advertising revenue and distribution revenue.
314. In addition to being part of the AV chain, the Parties' broadcasting activities can also be regarded as a platform that operates in two-sided markets.<sup>399</sup> In literature, media markets are generally considered to be two-sided markets or even multi-sided markets, where the different sides of the market influence each other.<sup>400</sup> A characteristic of multi-sided markets is the presence of so-called indirect network effects.<sup>401</sup> Indirect network effects occur when a platform becomes more or less valuable to one of the groups using it as the group on the other side of the platform is larger or smaller. In the present case, this works as follows.

<sup>394</sup> Minutes of the interview of November 11, 2021, with reference ACM/UIT/565744, page 7; Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, page 8.

<sup>395</sup> Minutes of the interview of November 11, 2021, with reference ACM/UIT/565744, page 7.

<sup>396</sup> Minutes of the interview of November 11, 2021, with reference ACM/UIT/565744, page 6.

<sup>397</sup> Opinion of the Dutch Association of Advertisers of October 25, 2021, with reference ACM/IN/653887, page 11

<sup>398</sup> Notification Decision, reference no. 149.

<sup>399</sup> See, for example: *Mergers in Two-Sided Markets – A report to the NMa*, June 25, 2010; Filistrucchi, L., Geradin, D. A. A. G., van Damme, E. E. C., & Affeldt, P., *Market definition in two-sided markets: Theory and practice*, Journal of Competition Law and Economics 2014, 10(2), page 293-339.

<sup>400</sup> The absence of a direct transaction between the two sides, such as advertisers and viewers, creates this so-called non-transaction market according to the literature cited, involving two separate markets that mutually influence one another.

<sup>401</sup> Filistrucchi, L., Geradin, D. A. A. G., & van Damme, E. E. C. (2012), *Identifying Two-Sided Markets*, (TILEC Discussion Paper; Vol. 2012-008), Tilburg, TILEC. A direct network effect arises if the number of viewers making use of the medium increases, making the medium in itself more attractive. This is less relevant in this case.

315. The Parties provide content to television viewers via various channels, both linear and nonlinear. Being able to watch content on these channels is what attracts television viewers to these channels. It is thus also possible to consider the offer of content as an activity that takes place in the target market. The production or procurement of the content in question is mostly financed from advertising revenue and distribution revenue. Less popular content leads to less viewers, less advertising revenues or distribution revenues and thus less means and options to purchase engaging content. That is why television services may be considered to be a platform that connects advertisers, distributors and viewers.
316. In the Notification Decision, ACM took the possibility into account that in the event of this proposed concentration two-sided effects could as such lead to objections under competition law or that objections under competition law could become more pronounced. Based on its investigation during the licensing phase, ACM concludes that it cannot be established whether this is the case. The two-sided effects in this concentration, in conjunction with the competitive effects, are not unambiguous in scope and direction and therefore not significantly affecting ACM's assessment. ACM explains this in more detail below.
317. With respect to the two-sidedness, the Parties submitted a report of economic experts Filistrucchi and Klein (also F&K). In their report, F&K state<sup>402</sup> that the concentration will lead to greater diversity in programming and therefore attract more viewers. Their reasoning for this is that if one media company competes with another media company, both companies try to steal viewers from each other by showing programs that attract the most viewers. As an example, F&K mention two media companies broadcasting sporting programs at the same time because these programs attract the largest number of viewers for each individual company. If the companies were to merge and they then try to maximize the total number of viewers (as opposed to the number of viewers for each individual company), it will become more interesting to also broadcast a news program on one of the channels, for example. It is advantageous for the Parties to align the programming of the channels and to make it complementary to each other. This diversity of content would lead to a larger number of viewers, an increase in the number of GRPs, and owing to this increased offer of content to lower prices for advertisers. On top of that there would be another advantage according to F&K. Some investments would now be profitable owing to the higher number of viewers, which would then lead to more investments in content.
318. In the Points for Consideration, ACM noted that F&K's report has meaning only in the context of an efficiency defense that was not raised by the Parties as such. Moreover, F&K's report did not meet the requirements of an efficiency defense.
319. In their response to the Points for Consideration, the Parties reiterate F&K's argumentation and claim that ACM should be obligated to include the price-mitigating effects hypothesized in the F&K report in its assessment, irrespective of whether it is an efficiency defense. The Parties again stress the limits to advertising space and how the competitive pressure between the Parties would therefore be limited anyway.
320. With regard to this response of the Parties, ACM considers as follows. The Parties' argumentation with regard to the two-sidedness depends heavily on the F&K report submitted by them. This report, which the Parties present as research, is in fact an opinion based on theoretical assumptions and limited references to American literature that are not supported by data or examples drawn from the Dutch context. According to F&K's logic, media concentration, by definition, leads to more diversity for viewers. From the consumers' perspective, the ideal model for a media market is thus a monopoly. Given the fact that consumers would be better catered to after the concentration, there would be a price mitigating effect on advertising prices owing to the relative increase in the number of viewers.

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<sup>402</sup> Expert opinion of Filistrucchi and Klein on behalf of the Parties of June 1, 2022, with reference ACM/IN/697761.



321. The possible price mitigating effect described by F&K is confirmed by the evaluation of the F&K report carried out on behalf of ACM by Dr Joost Poort from the University of Amsterdam Institute for Information Law.<sup>403</sup> F&K's argumentation is countered, however, by the competitive effects of the merger, which may be negative due to the elimination of competitive pressure, resulting in price increases in advertising markets. This is also pointed out by Dr Poort.<sup>404</sup> These competitive effects are central in the assessment framework of ACM and in the analysis performed by ACM.
322. F&K, too, state that the Parties compete for the same group of viewers with the same type of offer before the concentration. Given that the type of offer is the same, the Parties must compete with one another in the quality of the offer. If, after the concentration, the Parties focus on different groups of viewers and can then broadcast different types of programs, part of the incentive to broadcast good quality content will automatically be lost. The total effect on the number of viewers is therefore uncertain: more variation in the type of programs may indeed be appealing to viewers, yet if the quality of the programs diminishes due to the loss of competition between the Parties, this could result in a loss of viewers.
323. Against the uncertain positive effects are the negative effects of the concentration that appear from ACM's quantitative analysis in Section 7.4.3: the loss of competition between the Parties, with an accompanying price increase of 3.9%-7.0%. These negative effects follow from the analysis of market data and are robust across model specifications. Given that the total effect of matched programming and the reduced incentive to maintain the quality of the content (due to the elimination of the main competitor) is unclear both in terms of size and direction, ACM sees no reason to deviate from the price effects from the quantitative analysis. Also Oxera's price impact analysis submitted by the Parties does not consider the price mitigating effects of the proposed concentration as discussed by F&K.
324. The Parties (like F&K) have made no attempt to weigh the assumed price-mitigating effects and competition effects against each other or to indicate a framework that would allow such a balancing in concrete terms. F&K's study and the Parties' response to the Points for Consideration in this regard therefore do not provide ACM a reason to revise its findings on this matter. First of all, F&K's report provides no concrete data that allow an assessment of the need for such a review. Secondly, ACM's findings and particularly those findings based on modelling with regard to the effect that drives up prices largely date from after F&K's report, yet the Parties have failed to submit any evidence that substantiate F&K's assertions in this respect.
325. As previously stated in the Points for Consideration, the requirements for an efficiency defense are not met, as far as the Parties claim to substantiate an efficiency defense by submitting the F&K report. To this end, a reasoned weighing of the advantages and disadvantages would have to be carried out by the Parties, and, among other things, the necessity to the alleged net advantages of the restrictions on competition brought about by the concentration would have to be argued. This has not been done in the Parties' response to the Points for Consideration either.

#### **Conclusion on two-sided effects**

326. To conclude, ACM establishes the following: (i) no evidence was found in the licensing phase to suggest that a two-sidedness of the markets has, in this case, reinforced the abovementioned competition problems with regard to the television advertising market; (ii) the Parties have asserted that two-sidedness even has a price-mitigating effect in this case, though have failed to include the competitive effects of the concentration, let alone weighed, or even indicated how such a trade-off

<sup>403</sup> Dr Poort points out that this is confirmed by an earlier study for the NMA, of which Filistrucchi is the lead author. It states the following: 'in the absence of efficiency gains, a merger in a two-sided market might still lead to an increase in prices though less than in a single-sided market' (*Mergers in Two-Sided Markets – A report to the NMA*, 2010, marginal 162).

<sup>404</sup> ACM/IN/702926: Findings documents on two-sided markets in relation to the RTL/Talpa merger (ACM/22/17900), Dr Joost Poort, July 7, 2022. Dr Poort concludes: 'The concentration could (...) result in the cancellation of programs or channels rather than their repositioning and (ceteris paribus) in higher advertising rates due to reduced competition for certain advertisers. Also, the contention that the concentration will lead to more investments in the quality of content is less convincing in my view.'



would be concretely possible; (iii) since the asserted advantages are unclear and uncertain they do not outweigh the disadvantages quantified by ACM.

### 7.6.6 Conclusion on the horizontal impact

327. ACM arrives at the conclusion that the Parties are to gain a very strong joint position on the national market for the provision and sale of advertising space on television as a result of the proposed concentration. ACM considers it plausible that this will lead to significantly higher prices that advertisers will have to pay the Parties for the advertising space on television. The concentration reduces the number of leading providers from three to two, i.e., the Parties combined and Ster, with only a few smaller providers in addition. The competitive pressure from Ster is limited. Entry to the market is not likely and advertisers lack countervailing buyer power. Current competitors, potential competitors and purchasers are therefore not able to sufficiently discipline the Parties after the concentration.
328. Developments in the media sector, such as the major surge in the supply of video content via apps, the internet and streaming services and the associated opportunities for online advertising, discipline the Parties insufficiently in terms of their pricing.
329. The higher prices to be paid by advertisers, could lead to higher prices for consumers.
330. Based on the foregoing, ACM arrives at the conclusion that, as a result of the concentration, the actual competition in the Dutch market or a part thereof will be significantly impeded.

## 7.7 Conglomerate impact

331. In the Notification Decision, ACM identified the risk that, starting from a separate market for the sale of advertising space on television, the Parties could transfer their strong position to adjacent advertising markets, including radio or online.
332. As established in Section 7.5, ACM concludes in this Decision that there is a relevant market for the sale of advertising space on television that is national in scope. In line with this conclusion, ACM therefore conducts further investigation in the licensing phase into a potential negative impact as a result of conglomerate theories of harm.<sup>405</sup> This section presents a further assessment of this conglomerate impact based on ACM's investigation during the licensing phase.
333. The setup of this section is as follows:
- The first focus is on the theories of harm whereby the Parties can transfer their strong position in the television advertising market to the relevant markets for the sale of advertising space on the radio (**Section 7.7.1**);
  - The section then addresses the theories of harm whereby the Parties can transfer their strong position in the national market for the sale of advertising space on television to the relevant markets for the sale of online advertising space (**Section 7.7.2**);
  - Finally, the conclusion is drawn in **Section 7.7.3** in which ACM establishes that conglomerate impact is not plausible.

### 7.7.1 Transferring market power from television to radio

#### 7.7.1.1 Views of market participants

334. In its opinion in this case, DPG has pointed out the risks of a conglomerate strategy of the Parties for the position of its subsidiary Qmusic.<sup>406</sup> In DPG's vision, the Parties would have the possibility and the incentive to make concessions to advertisers in the national market for the sale of

<sup>405</sup> After all, for there to be any conglomerate impact as a result of a merger between two undertakings operating in closely related markets, the existence of closely related, though separate markets is a prerequisite.

<sup>406</sup> DPG's opinion of November 8, 2021, with reference ACM/IN/657107.

advertising space on television in order to further expand their position in the relevant markets for the sale of advertising space on the radio at the expense of Qmusic. In this regard, DPG draws attention to the fact that Qmusic's advertiser share is already lagging behind its share in the listeners market, even before the proposed concentration. This, according to DPG already illustrates the dominant position of OMS, Talpa's subsidiary. This development would be further reinforced if, as a result of the proposed concentration, the leverage from the national market for the sale of advertising space on television would continue to increase by merging the television channels of RTL and Talpa. Finally, DPG is of the opinion that the joint venture could transfer market power in the national market for the sale of advertising space on television to video, branded content and media partners.<sup>407</sup>

335. DPG has supplemented its opinion with an economic report drawn up by Radicand Economics and e-Conomics<sup>408</sup> (hereinafter: **Radicand report**), which sets out two possible theories of harm. First, the Parties could opt for a 'depletion' strategy to foreclose the relevant markets for the sale of advertising space on the radio.<sup>409</sup> In doing so, higher prices for advertising space on television would lower advertisers' available budget for advertising space on the radio. (It is assumed that the combined budget for television and radio remains constant in the face of price changes). This would put pressure on the currently already precarious profit margins of radio stations and impede potential entry to the relevant markets for the sale of advertising space on the radio. The Parties could compensate the losses of their own radio stations via cross-subsidization by the higher revenues from the advertising on television. Such a depletion strategy would result in a radio station such as Qmusic to having to eventually exit the market. The Parties would profit from this by taking over the advertising revenues of radio stations such as Qmusic.
336. Secondly, the Parties could pursue a tying and bundling strategy to foreclose the market.<sup>410</sup> RTL/Talpa could give television advertisers a conditional advantage, by way of premium broadcasting times or reduced prices. The condition attached to a perk or price reduction is that advertisers must spend more radio budget at OMS, and therefore less of their budget at channels not forming part of OMS. The Radicand report refers to a previous analysis made by ACM in the decision in the Talpa/Sanoma Image case<sup>411</sup>, in which ACM concluded that a conglomerate impact was implausible. The situation would now be different. The Radicand report claims that the proposed transaction entails such a large volume of the group of relevant advertisers that spend their television budget at RTL/Talpa and not fully at OMS, that in contrast to the Parties in Sanoma-SBS, a relatively small percentage discount may suffice to draw in the group of radio advertisers that do not fully advertise at OMS and thus foreclose the radio advertising market.<sup>412</sup> An additional report of e-Conomics emphasizes that both theories of harm need to be considered in conjunction.<sup>413</sup>
337. The market research among advertisers does not provide a clear picture of the risk of the transfer of market power via the tying and bundling of television to radio advertising. Some advertisers already observe bundling of both products or the possibility that the Parties will bundle their offer after the proposed acquisition.<sup>414</sup> By contrast, another advertiser considers the procurement of television and radio advertising space as two separate channels and does not expect this to change as a result of the proposed acquisition<sup>415</sup>

<sup>407</sup> DPG's opinion of November 8, 2021, with reference ACM/IN/657107, marginal 108.

<sup>408</sup> The report from Radicand Economics and e-Conomics on the impact of RTL's acquisition of Talpa on behalf of DPG of December 3, 2021, with reference ACM/IN/670355.

<sup>409</sup> Radicand report with reference ACM/IN/670355, Section 4.1.

<sup>410</sup> Radicand report with reference ACM/IN/670355, Section 4.2.

<sup>411</sup> Decision of ACM of July 10, 2017 in case 17.0453.22/*Talpa-Sanoma Image*.

<sup>412</sup> Radicand report with reference ACM/IN/670355, pages 19/20.

<sup>413</sup> Additional report of DPG by e-Conomics of March 30, 2022, with reference ACM/IN/688035.

<sup>414</sup> Minutes of the interview of April 12, 2022, with reference ACM/UIT/575408, page 3; Minutes of the interview of May 20, 2022, with reference ACM/UIT/577808, page 7; Minutes of the interview of May 11, 2022, with reference ACM/UIT/577300; page 7.

<sup>415</sup> Minutes of the interview of April 14, 2022, with reference ACM/UIT/575477, page 6.

338. Finally, a number of market participants indicate that the concentration may result in a larger incentive for the Parties to promote the use of all media channels to advertisers and media agencies.<sup>416</sup> It is particularly likely that the Parties would use their powerful positions in the market of linear television as well as radio to draw advertisers to other channels, e.g., digital.<sup>417</sup>

#### 7.7.1.2 The Parties' viewpoints

339. In response to the Radicand report, the National Benchmark Group (RBB) also drew up a report on behalf of the Parties (hereinafter: **RBB report**<sup>418</sup>). In it, the Parties set forth why the theories of harm described would be implausible.
340. With respect to the strategy of 'depletion', the RBB report focuses on two points of criticism. First, the foreshadowed profit data of Qmusic were to be misleading. According to the Radicand report, the increase in license fees in combination with the effect of the transaction driving up prices in the television market would lead to the marginalization of Qmusic. The Radicand report supports this by means of Qmusic's financial results from 2020. However, according to the RBB report, recent developments demonstrate that Qmusic's financial position is anything but precarious. The RBB report also points out that Qmusic's financial results from 2020 concern only one observation and that the profit data, in any case, present a distorted picture since they are based on gross advertising revenues.
341. Secondly, the RBB report is critical of certain assumptions that are made in the Radicand report. For example, the RBB report states that i) there is insufficient evidence that the transaction would lead to higher rates for television commercials; ii) it is not a given that there is a fixed combined budget for advertisements on television and radio, iii) the Radicand report has wrongfully disregarded other media channels; iv) the income impact is not a given; and v) it is not plausible that all non-Talpa radio channels would become loss-making.
342. The RBB report also considers the bundling strategy unlikely. According to the RBB report, there is no substantial change compared to ACM's Talpa-Sanoma Image analysis<sup>419</sup>, which concluded that conglomerate impact was implausible. The discounts that should be given (and thus the relative losses that should be incurred) to convince advertisers to shift their budget to OMS are the same in absolute terms as then and is the relevant yardstick in assessing the plausibility of the strategy. There were also said to be several flaws in the calculation in the Radicand report demonstrating that the strategy would be profitable for the Parties for the long term.

#### 7.7.1.3 ACM's assessment

343. As set out in the Guidelines on the assessment of non-horizontal mergers, a conglomerate impact can only take place if there are two closely related markets with a (i) possibility and (ii) incentive to engage in bundling, tying or other foreclosure practices, as a result of which it is plausible that a substantial anti-competitive (iii) effect will take place along the lines of a price increase or a worsening of the quality of the offer. In particular, it is essential for there to be a significant degree of market power in one of the affected markets, that the group of customers in both affected markets is substantially the same, and that independent providers are unable to establish an effective competitive offer.<sup>420</sup> The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties' products is viewed by many purchasers as particularly important and there are few relevant alternatives for that product, e.g., because of product differentiation or capacity constraints on the part of competitors.<sup>421</sup> Finally, countervailing factors such as buyer power and potential efficiency improvements as a result of the merger that could

<sup>416</sup> Minutes of the interview with reference ACM/UIT/563289, page 2.

<sup>417</sup> Minutes of the interview with reference ACM/UIT/563613, page 3.

<sup>418</sup> RBB Economics, drawn up on behalf of the Parties, March 31, 2022, with reference ACM/IN/687952.

<sup>419</sup> Decision of ACM of July 10, 2017 in case 17.0453.22/*Talpa-Sanoma Image*.

<sup>420</sup> Guidelines on the assessment of non-horizontal mergers, marginals 99, 100 and 103.

<sup>421</sup> Guidelines on the assessment of non-horizontal mergers, marginals 99.

compensate potentially harmful competitive effects need to be taken into account. Below, ACM addresses these different components and the two introduced theories of harm in particular.

344. As shown in Section 7.6.1, the proposed market share leads to an extremely high market share of the Parties in the national market for the sale of advertising space on television. The Parties' market share in 2021 is [70-80]%, if revenues for third parties are also included, or [60-70]%, if only the Parties' revenue is taken into account. In the Notification, the Parties further note that [40-50]% of the advertisers purchase advertisements from both the television advertising market and the radio advertising market.<sup>422</sup>
345. The interviews conducted by ACM in the notification phase and the licensing phase with media agencies and advertisers show that advertisers regard both television and radio advertisements as important products. For a campaign to be successful, it needs to have a reach of 70% of the respective target audience, which is why advertisers often need both media channels to launch a successful media campaign.<sup>423</sup> Television advertisements are then generally used to create brand awareness and the radio channels are a necessary addition to encourage consumers to actually buy a product.<sup>424</sup> From these interviews and the market shares it also transpires that after the proposed concentration, the Parties will be an unavoidable trading partner in the national market for the sale of advertising space on television.
346. Additionally, contrary to what had been cited as a threshold in the Talpa/Sanoma Image case referred to above, OMS does appear to have such a capacity to absorb an increase in demand for advertising space on the radio. Where Talpa realizes an occupancy rate of virtually 100% for advertising space on television, it realizes an occupancy rate of 80%-85% in the radio market.<sup>425</sup>
347. Furthermore, there has been a decline in the number of GRPs in de television advertising market for some time now. It is not plausible that media agencies and/or advertisers can exercise countervailing market power. This is also confirmed by the market research. See Section 7.6.4. Also, given NPO's public mission, it seems unlikely that independent radio stations could bring about an effective competitive offer by collaborating with the only remaining television channel, NPO.
348. In light of the above, there do indeed appear to be circumstances in the market that could execute the *opportunity* to pursue a conglomerate strategy.
349. However, ACM establishes that, particularly in terms of the *incentive*, there is a high degree of uncertainty as to whether the advantages of a possible conglomerate strategy would outweigh the costs. ACM illustrates this by means of an example calculation in the Annex based on the report pertaining to the tying/bundling strategy. That alone demonstrates that it is a risky strategy to risk certain large profits from television advertising in the face of a necessarily uncertain prospect of making up for it through additional advertising revenues on radio.<sup>426</sup>
350. Part of the calculation in the Radicand report also includes the assumption that all non-Talpa associated radio stations would exit the market. However, given its public mission, NPO could continue its activities. Even if the other commercial channels were to exit the market, this would still not serve as a guarantee that all expenditures would go to OMS. The amount to 'win' is therefore in all likelihood smaller than the calculation in the Radicand's report assumes. The report also insufficiently failed to demonstrate that all existing radio channels would be proportionally affected

<sup>422</sup> Notification, table 17.

<sup>423</sup> DPG's opinion of November 8, 2021, with reference ACM/IN/657107, marginal 107.

<sup>424</sup> See Notification Decision, marginals 11-113. Also see the Minutes of the interview of October 21, 2021, with reference ACM/UIT/563289, pages 3 and 4; Minutes of the interview of October 28, 2021, with reference ACM/UIT/563613, marginals 21 ff.

<sup>425</sup> Radicand report with reference ACM/IN/670355, page 18.

<sup>426</sup> The response to question 1 in the supplementary memorandum of Radicand with reference ACM/IN/688035 offers insufficient proof that his conclusion is wrong.

by a bundling strategy. This leaves open the option that, for example, while a particular competitor may be affected by the bundling strategy, other competitors may not be affected or may be affected only slightly.

351. According to the Radicand report, the bundling strategy could also be considered within the context of 'additional tool for an extra push'. The independent radio channels would already be so weakened as a result of the rising television prices and the illustrated 'income impact', that bundling could be an effective measure as such. However, ACM deems some of these key assumptions underlying this theory to be unrealistic. Increasing prices and increasing expenditures on television, for example, need not solely come at the expense of expenditures on radio advertisements. If an advertiser's advertising budget would remain the same, it is plausible that the advertiser fully or partly offsets these higher expenditures on television by spending less on print and/or online advertising. The report goes on to assume that there is no substitution as a result of the price increase for television. Even if the television advertising market is a separate relevant market, it can be expected that there would still be some degree of substitution moving away from television. The fact that there is some degree of substitution is also demonstrated in both ACM's qualitative and quantitative analysis. The analysis in the Radicand report, however, fails to take this into account.
352. Finally, there is a partial overlap between the assessment of the impact and the assessment of the incentive to proceed to a tying strategy in terms of the question to what extent independent radio stations would be marginalized or even eliminated as a result of which the JV would be able to increase the radio advertising prices. As previously described, ACM questions the contention that all independent radio channels would disappear in the event of one or a combination of theories of harm of the Radicand report. ACM has not further investigated the financial position of independent radio channels. The main reason for this is that ACM does not consider an incentive for a conglomerate strategy to be plausible in the first case. In this context, ACM also notes that the financial data of Qmusic used by the Radicand report as a substantiation comprise of only one data point, which may not be representative. Thus, ACM also deems insufficiently demonstrated by this that the conglomerate strategy put forward by the Radicand report will have an anti-competitive effect.
353. All this is taking place in a context of great uncertainty in the radio industry, given the upcoming auctions of FM radio frequencies.<sup>427</sup> It therefore remains to be seen to what extent OMS can maintain its position. After all, Talpa will have to relinquish at least one of its licenses given the maximum of three frequencies per organization.
354. Finally, ACM notes that by rejecting above theories of harm, not every conceivable conglomerate theory has been examined and ruled out. However, a less far-reaching theory of harm in which, for example, not every competitor is eliminated but where competition is in fact limited does not seem prima facie plausible either, given the fact that a major transfer of advertising revenues from radio to the Parties is needed to compensate for the relatively large losses of a conglomerate strategy. If it cannot win over the entire radio market, these profits will be lower. Based on the horizontal competitive concerns in the television advertising market and distribution, the decision was made to also not further investigate this in present case.

### 7.7.2 Transferring market power from television to online

355. A theory of harm regarding the surrender of market power from television to online was put forward by one purchaser of advertising space, but not at all cited by online competitors.<sup>428</sup> Additionally, it is important in this context that the offer in the market for online advertising is still rapidly expanding, while also the number of VOD providers are rapidly growing as well, be it without an advertising

<sup>427</sup> <https://nos.nl/artikel/2454328-kabinet-maximaal-drie-fm-frequenties-per-commerciele-radio-aanbiederu>

<sup>428</sup> Minutes of the interview of April 5, 2022, with reference ACM/UIT/574831, page 6.

model. The Parties are active online with a number of streaming services (particularly Videoland), websites and auction sites.<sup>429</sup>

356. A possible theory of harm means that the Parties can transfer their strong position in the national market for the sale of advertising space on television to the relevant markets for the sale of online advertising space following the proposed concentration by offering discounts on the television advertising prices in exchange for the procurement of online advertising space. This could be a disguised discount by means of a tying strategy. The Parties could eventually displace competitors, which cannot tie advertising space on television and online advertising space, from the markets for online advertising space. The Parties can then make up their losses by increasing their prices for online advertising space.
357. During the licensing phase, ACM found no further indications of an effectively executable conglomerate strategy between television and online. The Parties' offer in terms of online advertising space is relatively small as a result of which there will still be more than enough demand in the market for competitors even if the Parties were to tie advertising space. This particularly applies to OTT/VOD providers with an AVOD model, in addition to Google/YouTube and Netflix, possibly over time, and a large number of smaller participants. New OTT/VOD providers continue to enter the market and interest in advertising-driven models among OTT/VOD providers is increasing. It is thus not plausible that the Parties can displace the providers of online advertising space from the market. Even the condition of possibility is thus not met. ACM therefore does not deem it plausible that the Parties could execute a conglomerate strategy on television advertising and online advertising.

### 7.7.3 Conclusion on a conglomerate strategy

358. Due to the lack of incentive to perform a conglomerate strategy with regard to the transfer of market power in the national market for the sale of television advertising space to the market for the sale of radio advertising space, ACM establishes that this theory of harm is unfounded, even if the possibility thereof were to exist.
359. Due to the lack of even the *possibility* of transferring market power from the national market for the sale of television advertising space to the market for the sale online advertising space, ACM also rejects this theory of harm. Therefore, it is not necessary to assess the potential consequences for either conglomerate strategy.

## 7.8 Conclusion on the advertising market

360. ACM concludes that there is a separate national market for the sale of advertising space on television in which the Parties will gain a very strong joint position as a result of the proposed concentration. This will significantly impede the actual competition on the Dutch market or a part thereof. ACM considers it plausible that this will lead to significantly higher prices that advertisers will have to pay the Parties for the advertising space on television. ACM has found insufficient confirmation for a conglomerate impact.

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<sup>429</sup> RTL's online activities comprise streaming services Videoland, RTL XL and NLZiet, and websites RTL NL, Buienradar and Evajinek.nl. Talpa's online activities comprise streaming services KJK and NLZiet and the Linda.nl website. Talpa also manages online auctions/deal sites: VakantieVeilingen, ActievandeDag and SlaJeSlag. The advertising categories are mainly online video and banner.



## 8 Assessment on wholesale markets for the distribution of television channels

361. As providers of television channels, the Parties are both active in the wholesale market for the distribution of television channels and associated additional on-demand services.<sup>430</sup> This market is also referred to as the distribution market. In this chapter, ACM assesses the impact of the proposed concentration for the distribution markets in the Netherlands.

362. This Chapter is structured as follows:

- It first discusses the theory of harm (**Section 8.1**);
- Next, this Chapter addresses the relevant market (**Section 8.2**);
- This Chapter then considers the consequences of the proposed concentration (**Section 8.3**);
- The conclusion follows in **Section 8.4**.

### 8.1 The theory of harm

363. In the Notification Decision, ACM identified potential competition risks as a result of the proposed concentration. It concluded that the proposed concentration could result in the Parties gaining a significantly stronger negotiating position in the market for the distribution of television channels and associated additional on-demand services. This enables the Parties to i) raise the retransmission fees that distributors need to pay to the Parties and ii) limit the retransmission of additional on-demand services.<sup>431</sup>

364. In the licensing phase, ACM further investigated this theory of harm. It concludes that the proposed concentration leads to the Parties gaining a significantly stronger negotiating position in the national market for the distribution of television channels and associated additional on-demand services, resulting in the competition problems mentioned above.

365. Below, ACM explains how it arrived at this conclusion.

### 8.2 Relevant Markets

366. The Parties both offer television channels that distributors include in their television subscriptions. RTL's selection consists of five television channels and three specialty channels. Talpa operates four television channels and one specialty channel. In addition to the television channels, the Parties offer additional services such as catch-up TV. As such, their services overlap. There is no overlap between the Parties where it concerns premium pay television.

367. In recent decisions, the Commission proceeds from separate product markets for the wholesale distribution of television channels for i) free-to-air television and pay television, and ii) premium pay television, each having their supportive services.<sup>432</sup> In the past, the Commission concluded that the Netherlands is essentially a pay television market.<sup>433</sup> The Commission did consider a further segmentation within the wholesale market for the distribution of television channels based on genre or specialty, but ultimately dismissed such segmentation.<sup>434</sup> ACM has adopted the Commission's

<sup>430</sup> See Section 3.3.

<sup>431</sup> See the Notification Decision, marginal 192.

<sup>432</sup> The Commission's Decision of August 12, 2020, COMP/M.9802, *Liberty Global / DPG Media / JV*, marginal 54; The Commission's decision on November 12, 2019, COMP/M.9064, *Telia Company / Bonnier Broadcasting Holding*, marginal 157.

<sup>433</sup> The Commission's Decision of May 30, 2018, COMP/M.7000, *Liberty Global / Ziggo*, marginal 111.

<sup>434</sup> The Commission's Decision on November 12, 2019, COMP/M.9064, *Telia Company / Bonnier Broadcasting Holding*, marginal 148.

position with regard to the definition of the wholesale market for the distribution of television channels.<sup>435</sup>

368. After additional investigation, ACM sees no grounds to deviate from previous decisions or from the Commission's decisions. The Netherlands has a pay television market. With the exception of public service broadcasters, television channels are available only through a paid television subscription. This makes a distinction between free-to-air and pay television irrelevant in the Netherlands. Market research does not reveal any indications that premium pay television has such an impact that it affects the material assessment.
369. In previous cases, the Commission concluded that the wholesale market for retransmission of television channels is national in nature, given the national-based negotiating processes on the distribution of the channels.<sup>436</sup> In a decision by ACM on an enforcement request, ACM also assessed that this market is national in scope.<sup>437</sup> ACM's market research for present decision and the Parties' viewpoint<sup>438</sup> give no reasons to deviate from ACM's previous decisions and the Commission's decision practices.
370. For the assessment of the impact of the proposed concentration, ACM proceeds from a national wholesale market for the distribution of television channels, which also includes additional services.

### 8.3 Consequences of the proposed concentration

371. In the Notification Decision, ACM highlighted the risk that as a result of the proposed concentration the Parties would be able to i) raise the retransmission fees and ii) limit the distribution of additional on-demand services.<sup>439</sup> They would be able to do so as they gain a significantly stronger negotiating position in the market for the distribution of television channels and associated additional on-demand services.
372. This section presents an assessment of the proposed concentration based on ACM's investigation during the licensing phase.
373. The setup of this section is as follows:
- The first focus will be on the position of the Parties (**Section 8.3.1**);
  - Next, this section addresses the viewpoints of the market participants (**Section 8.3.2**);
  - This is followed by ACM's assessment and corresponding conclusion (**Section 8.3.3**).
374. ACM comes to the conclusion that it is plausible that the proposed concentration will lead to significantly higher retransmission fees for distributors.

#### 8.3.1 The Parties' viewpoints

375. The Parties take the position that the proposed concentration has no material consequences for the competition in the Dutch wholesale market for the distribution of television channels and will not

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<sup>435</sup> ACM's Decision in the enforcement request of CAIW against Eredivisie Media & Marketing C.V. Case 16.0708.29 of June 27, 2017 met reference ACM/DM/2017/203813\_OV, marginal 31 with cross-reference to ACM's Decision in case 7500, marginals 21-23 and the Commission's Decision of December 21, 2011 in the matter of COMP/M.6369 – HBO / Ziggo / HBO Netherlands, marginal 16.

<sup>436</sup> The Commission's Decision of November 12, 2019, COMP/M.9064, *Telia Company / Bonnier Broadcasting Holding*, marginal 169; The Commission's decision on May 30, 2018 in the matter of COMP/M.7000, *Liberty Global / Ziggo*, marginal 121; The Commission's Decision of August 3, 2016 in the matter of COMP/M.7978, *Vodafone / Liberty Global / Dutch JV*, marginal 183.

<sup>437</sup> ACM's Decision of June 27, 2017 in the enforcement request of CAIW against Eredivisie Media & Marketing C.V. Case 16.0708.29 with reference ACM/DM/2017/203813\_OV, marginal 31.

<sup>438</sup> Notification, marginal 166 and marginal 167.

<sup>439</sup> Notification Decision, marginal 192.

lead to a significant impediment of the actual competition.<sup>440</sup> They explain their viewpoint as follows.

376. First, the Parties contend that their offer is complementary to distributors and they do not actually compete with each other in this market.<sup>441</sup> They are not one another's substitutes for distributors, according to the Parties, as a result of which there will be no loss of competitive pressure following the proposed concentration.<sup>442</sup>
377. In addition, the Parties contend that they are indispensable for distributors as a commercially attractive television selection, both before and after the proposed concentration.<sup>443</sup> All distributors have since included the channels of both RTL and Talpa in their television packages.<sup>444</sup> The extent to which distributors depend on the Parties will therefore not change substantially, as a result of which any incentive or option for the Parties to increase the retransmission fees will also remain unchanged. The proposed concentration does not provide the Parties more joint opportunities to threaten to withdraw their channels or additional on-demand services than they each have individually on balance before the proposed concentration.<sup>445</sup> They observe that there is no reason to suppose that more consumers will cancel in case one or both channel packages were to be excluded from a distributor's television subscription<sup>446</sup>, as far as consumers would transfer anyway due to switching barriers.<sup>447</sup> **[confidential]**<sup>448</sup>
378. At the same time, there is and will continue to be a mutual dependency between distributors and the Parties. After all, the Parties depend on distributors to reach consumers with their channels and thus with their advertising, both now and after the proposed concentration. This mutual dependency means that distributors have negotiating power in their dealings with the Parties.<sup>449</sup> In this respect, the Parties note that distributors are increasingly stepping up negotiations on retransmission fees, among other things. They do this as a result of the declining linear viewing time among consumers and the growing group of consumers who do not take out television subscriptions.<sup>450</sup> That is why distributors are said to want to pay reduced retransmission fees.
379. In order to keep their advertising revenues on track, the Parties say they have the incentive to not degrade the service provision to distributors to ensure an optimal consumer reach. This pertains to both the retransmission of channels and the provision of additional services.<sup>451</sup>
380. The Parties contend that they have no incentive to discontinue the distribution of the channels or the selection of additional services to distributors, in consequence of which the distributors cannot include the channels in question in their television subscriptions and, by extension, cannot broadcast them. Towards individual distributors, threatening to do so both before and after the proposed concentration is not plausible since carrying out such a threat is not profitable for the Parties. The Parties contend that television advertisers will be duped and possibly may no longer or only marginally want to advertise with the Parties and in any event will wish to pay much less for

<sup>440</sup> See Section 7.2.4.1 of the Notification Decision.

<sup>441</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 18 and marginal 19.

<sup>442</sup> The RBB's report on behalf of the Parties on RTL/Talpa's retransmission fees of April 22, 2022, with reference ACM/IN/691171, page 2.

<sup>443</sup> The Parties' response of April 14, 2022 to ACM's additional questions with reference ACM/IN/690143, marginal 7.

<sup>444</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 18. This is with the exception of the RTL Z channel, which some smaller distributors do not retransmit.

<sup>445</sup> The RBB's report on behalf of the Parties on RTL/Talpa's retransmission fees of April 22, 2022, with reference ACM/IN/691171, page 2.

<sup>446</sup> RBB's supplementary report to the Parties' response of September 16, 2022 to the Points for Consideration with respect to the distribution markets with reference ACM/IN/716288, page 9.

<sup>447</sup> The Parties' response to the additional investigation by ACM with reference ACM/IN/730649; the Parties' viewpoint on the Points for Consideration – distribution with reference: ACM/IN/716288.

<sup>448</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 18.

<sup>449</sup> Notification, marginal 387 and marginal 388.

<sup>450</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 20.

<sup>451</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 21.

this.<sup>452</sup> In this regard, they note that as a result of the proposed concentration, the Parties collectively have no greater ability to threaten to fail to reach an agreement than they have on balance individually before the proposed concentration.<sup>453</sup>

381. With regard to additional services, the Parties observe that the discontinuation of retransmission is not profitable for the Parties for the sake of two reasons. First, the loss of revenue as a result of not providing the additional services will need to be compensated by means of a growth in their own retail OTT selection. If successful, this may lead to additional loss of revenue as consumers will cancel their linear subscriptions. Secondly, with this, the loss of revenue due to declining distribution revenues will have to be offset by growth in their own retail OTT selection.<sup>454</sup> The Parties indicate that their retail OTT selection will not become a full-function substitute for the retransmission via distributors in the next few years.<sup>455</sup>

### 8.3.2 Views of market participants

382. To be able to offer television subscriptions, distributors depend on RTL's and Talpa's supply. This follows from the broadcasting groups' significant interest in a television product and a television product's significant interest in distributors' telecom supply. The loss of RTL's or Talpa's supply in case no agreement is reached with the parties, could cause great harm to a distributor. Distributors indicate that the Parties obtain a stronger negotiating position in consequence of the proposed concentration, which will enable them to increase prices or lower the quality standards.
383. A television product is essential to provide a commercially appealing offer to consumers.<sup>456</sup> In over 90% of the cases, a television product is also part of a bundled service subscription taken out together with other telecom services such as internet access or mobile services.<sup>457</sup> Also, 95% of all telecom subscriptions with multiple telecom services include a television product.<sup>458</sup> Accordingly, research by the Dutch Media Authority shows that when choosing their television package, consumers value the possibility of purchasing all telecom services from one provider. Price is another important choice factor for consumers.<sup>459</sup> Despite the rise of VOD services, distributors expect that the linear television product will continue to exist in the coming years, because of sports, news and live broadcasts, among other things.<sup>460</sup>
384. Distributors consider RTL's and Talpa's channel supply to be of great importance.<sup>461</sup> They explain that certain television channels, including the channels of RTL and Talpa, are extremely important for a commercially engaging television product.<sup>462</sup> In this regard, they note that broadcasters usually only offer their channels as a bundle or that they present the offer in such a way that it is more advantageous to purchase everything as a bundle.<sup>463</sup> The significance of the Parties'

<sup>452</sup> The RBB's report on behalf of the Parties on RTL/Talpa's retransmission fees of April 22, 2022, with reference ACM/IN/691171, page 6 through 8.

<sup>453</sup> The RBB's report on behalf of the Parties on RTL/Talpa's retransmission fees of April 22, 2022, with reference ACM/IN/691171, page 2.

<sup>454</sup> The RBB's report on behalf of the Parties on RTL/Talpa's retransmission fees of April 22, 2022, with reference ACM/IN/691171, page 9 through page 11.

<sup>455</sup> The Parties' response to the Notification Decision of March 30, 2022, with reference ACM/IN/687173, marginal 20 and marginal 21.

<sup>456</sup> Minutes of the interview of October 25, 2021, with reference ACM/UIT/563282, page 2.

<sup>457</sup> Telecommonitor ACM, 2022Q2, segment *Bundels* and segment *Televisie*.

<sup>458</sup> Ditto.

<sup>459</sup> The research report of the Commissariaat voor de Media (Dutch Media Authority) *Televisiepakketten en kijkgedrag 2019* (Television packages and viewing behavior 2019), 2019. Page 21, Table 2.8.

<sup>460</sup> See marginal 94 and accompanying footnote 105.

<sup>461</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 2. Response to the request for information of April 6, 2022, with reference ACM/IN/688978, pages 1-2. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 3. Minutes of the interview of May 3, 2022, with reference ACM/UIT/576495, page 2. Response to the request for information of April 7, 2022, with reference ACM/IN/689062, page 1.

<sup>462</sup> See also the Notification Decision, marginal 178. Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 2. Minutes of the interview of April 21, 2022, with reference ACM/UIT/575793, page 2. Minutes of the interview of May 03, 2022, with reference ACM/UIT/576495, page 2 and page 3.

<sup>463</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 3. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 2. Minutes of the interview of May 3, 2022, with reference ACM/UIT/576495, page 3. Minutes of the interview of April 26, 2022, with reference ACM/UIT/576151, page 2.

broadcasting selection follows, inter alia, from high audience ratings that both broadcast groups have as well as the consumer ratings of the channels.<sup>464</sup> Distributors note that the Parties serve the same group of viewers and offer similar general interest content. NPO's selection deviates in this respect. Also, NPO's public mission statement deviates from the Parties' commercial approach. Despite the fact that both broadcast groups are highly significant to distributors, they attach different significance to RTL channels than to Talpa channels.<sup>465</sup>

385. Distributors and broadcasters negotiate the retransmission of channels. A possible outcome of such negotiations may be that they fail to reach an agreement. In that case, the channels in question will not be included in the distributor's channel package. The retransmission of the channels will not take place or be discontinued.
386. According to the majority of the distributors surveyed, if the retransmission of the channels of RTL or Talpa are discontinued, this will degrade the entire telecom subscription that can be purchased by consumers.<sup>466</sup> On account of the degradation of the telecom subscription, consumers reserve the right to switch to a competitor with their entire telecom subscription.<sup>467 468</sup> To any distributor, the harm of a switch is thus not limited to the television product. Four out of six distributors expect that more consumers will switch if the retransmission of the RTL and Talpa channels is discontinued.<sup>469</sup> Research by the Dutch Media Authority therefore shows that consumers consider the composition of the television package to be an important reason to switch.<sup>470</sup>
387. Nevertheless, various distributors recognize the mutual dependency between the Parties and themselves.<sup>471</sup> At the same time, they indicate that this does not imply an equal negotiating position between distributors and broadcasters.<sup>472</sup> Different distributors have indicated that the Parties dispose of a stronger negotiating position than themselves.<sup>473</sup>
388. Distributors experience **[confidential]** negotiation towards RTL than towards Talpa.<sup>474</sup> According to distributors, this difference expresses itself in the audience ratings such as made transparent by SKO and leads to differences in the retransmission fees as RTL and Talpa can negotiate.<sup>475</sup> Additionally, most of the distributors expect that more consumers will switch to a competitor, if the

<sup>464</sup> Response to the request for information of April 6, 2022, with reference ACM/IN/688978, page 1 and page 2. Response to the request for information of April 5, 2022, with reference ACM/IN/689013, page 1.

<sup>465</sup> See marginal 388.

<sup>466</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 2. Response to additional request for information of October 20, 2022, with reference ACM/IN/723043, page 6. Response to the request for information of May 18, 2022, with reference ACM/IN/695070, page 2. Response to additional request for information of October 18, 2022, with reference ACM/IN/727374, page 2.

<sup>467</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 2. Response to additional request for information of October 20, 2022, with reference ACM/IN/723043, page 6 and page 7. Response to additional request for information of October 17, 2022, with reference ACM/IN/722174, page 2. Response to the request for information of May 18, 2022, with reference ACM/IN/695070, page 2.

<sup>468</sup> Section 7.2(1a)(1b) of the Dutch Telecommunications Act 2022.

<sup>469</sup> Response to the additional request for information of October 20, 2022, with reference ACM/IN/723062, page 2. Response to the additional request for information of October 20, 2022, with reference ACM/IN/723043, page 4 and page 5. Response to the additional request for information of October 17, 2022, with reference ACM/IN/722174, page 2. Response to the additional request for information of October 18, 2022, with reference ACM/IN/727374, page 4 and page 5.

<sup>470</sup> The research report of the Commissariaat voor de Media (Dutch Media Authority) *Televisiepakketten en kijkgedrag 2019* (Television packages and viewing behavior 2019), 2019. Page 22, Table 2.11.

<sup>471</sup> Minutes of the interview of October 21, 2021, with reference ACM/UIT/563281, page 3. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 3. Minutes of the interview of June 15, 2022, with reference ACM/UIT/576776, page 3.

<sup>472</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 2. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 3.

<sup>473</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 4. Response to the request for information of April 6, 2022, with reference ACM/IN/688978, page 8. Response to the request for information of April 5, 2022, with reference ACM/IN/689013, page 5 and page 6. Response to the request for information of April 7, 2022, with reference ACM/IN/689062, page 3.

<sup>474</sup> Response to the additional request for information of April 6, 2022, with reference ACM/IN/688978, page 6. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 5. Minutes of the interview of May 3, 2022, with reference ACM/UIT/576495, page 3.

<sup>475</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 4. Response to the additional request for information of April 6, 2022, with reference ACM/IN/688978, page 6. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 3.



channels of RTL are no longer transmitted, than if the channels of Talpa are excluded from the channel package.<sup>476</sup> Subsequently, distributors attach a different importance to RTL than to Talpa. Talpa also adopts **[confidential]** approach during negotiations than RTL.<sup>477</sup> Additionally, various distributors indicate that they receive threats, implicit or otherwise, from RTL of non-retransmission.<sup>478,479</sup> Market research shows that Talpa **[confidential]** these threats **[confidential]**.<sup>480</sup>

389. Distributors expect that the proposed concentration will enable the Parties to negotiate better commercial conditions that manifest themselves in i) a higher retransmission fee and ii) the option and incentive to no longer distribute key (non-linear) on-demand rights to distributors and their customers but to reserve them to their own OTT selection. NPO expects that this will lead to distributors conducting tougher negotiations with NPO in order to compensate the higher expenses for RTL and Talpa.<sup>481</sup>
390. Distributors indicate that their negotiating position will weaken as a result of the proposed concentration. This particularly **[confidential]** of negotiations with Talpa.<sup>482</sup> In this regard, they note that the uncertainty they can leverage in negotiations for their own negotiating position will disappear.<sup>483</sup> They therefore expect that the proposed concentration will enable the Parties to jointly negotiate a higher retransmission fee than they can now each do individually.<sup>484</sup> Two distributors also expect that the Parties will receive an incentive from the concentration to lower the quality standards of the additional services to benefit their own retail selection.<sup>485</sup>

### 8.3.3 ACM's assessment

391. The Parties and distributors depend on one another. Distributors need the Parties' channels to compose a commercially attractive retail selection and telecom package. The Parties need distributors to reach the end users to show them their content and the sold advertisements. Accordingly, distributors and broadcasters negotiate with each other for retransmission fees that distributors pay to broadcasters. This is done periodically and one-on-one.<sup>486</sup>

<sup>476</sup> Response to additional request for information of October 20, 2022, with reference ACM/IN/723062, page 2. Response to additional request for information of October 25, 2022, with reference ACM/IN/724073, page 2. Response to additional request for information of October 17, 2022, with reference ACM/IN/722174, page 2. Response to additional request for information of October 18, 2022, with reference ACM/IN/727374, page 4.

<sup>477</sup> Response to the request for information of April 5, 2022, with reference ACM/IN/689013, page 5. Minutes of the interview of May 3, 2022, with reference ACM/UIT/576495, page 2 and page 3. Minutes of the interview of April 26, 2022, with reference ACM/UIT/576151, page 3.

<sup>478</sup> Four market participants indicate that they have received such signs, against one market participant that states not to have received any such signs. Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 4. Minutes of the interview of April 21, 2022, with reference ACM/UIT/575793, page 5. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 4. Minutes of the interview of May 3, 2022, with reference ACM/UIT/576495, page 2. Minutes of the interview of April 26, 2022, with reference ACM/UIT/576151, page 2.

<sup>479</sup> **[confidential]** See the Parties' response of April 14, 2022 to ACM's additional questions of March 18, 2022, with reference ACM/IN/690143, marginal 82.

<sup>480</sup> One market participant states that it receives such signs from Talpa. Two market participants indicate that they do not receive any such signs. Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 4. Minutes of the interview of May 3, 2022, with reference ACM/UIT/576495, page 2. Minutes of the interview of April 26, 2022, with reference ACM/UIT/576151, page 2.

<sup>481</sup> See Section 7.2.4.2 of the Notification Decision.

<sup>482</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 5. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 4. Additional information of April 1, 2021, with reference ACM/IN/662666, page 2 and page 3.

<sup>483</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 5. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 4.

<sup>484</sup> Minutes of the interview of April 21, 2022, with reference ACM/UIT/575791, page 5. Minutes of the interview of October 21, 2021, with reference ACM/UIT/563281, page 4. Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 4. Minutes of the interview of May 3, 2022, with reference ACM/UIT/576495, page 2. Minutes of the interview of April 26, 2022, with reference ACM/UIT/576151, page 5. Minutes of the interview of June 15, 2022, with reference ACM/UIT/576776, page 4.

<sup>485</sup> Minutes of the interview of April 28, 2022, with reference ACM/UIT/576478, page 5. Minutes of the interview of June 15, 2022, with reference ACM/UIT/576776, page 4.

<sup>486</sup> NLconnect negotiates with broadcasters on behalf of multiple smaller-sized distributors.

392. While reciprocal dependency exists, the negotiating positions of broadcasters and distributors are not necessarily on par. These differences in negotiating positions between broadcasters and distributors are reflected in the retransmission fees. Market research shows that a broadcaster's audience share and the distributor's market share greatly impact their negotiating positions. In general terms, a higher audience share translates into a better negotiating position on the side of the broadcaster, which in turn then leads to a higher retransmission fee. An analysis on the retransmission fees performed by ACM confirms the abovementioned described relationship between the audience share/market share in the retail television market and the retransmission fees.<sup>487</sup>
393. The channel packages of RTL and Talpa have a relatively large audience share; 24.6% and 15.9%, respectively, for daytime television and 29.2% and 18.2% during prime time.<sup>488</sup> Subsequently, they hold a strong negotiating position towards distributors. After the proposed concentration, their combined audience share will reach 40.5% for daytime television and 47.4% during prime time. Another broadcaster having an extensive reach is NPO (for daytime television: 36.3%; and prime time: 38.0%). Broadcasters with a smaller reach include Paramount, Walt Disney and Discovery. Based on revenues, the Parties estimate their combined market share at **[70-80]**% with an addition of **[10-20]** percentage point.<sup>489</sup>

### 8.3.3.1 Negotiations by RTL and Talpa

394. RTL's negotiating position towards distributors is **[confidential]** than Talpa's negotiating position, even though both parties are of great value to distributors. Below, ACM explains how it arrives at this conclusion.
395. The difference in negotiating positions is based on the difference in audience ratings. This is reflected in the audience share, among other things, as well as the willingness to switch to another distributor if channels were no longer available in the television subscription.<sup>490</sup> The audience share of RTL's channels combined is higher than the combined audience share of Talpa's channels. Also, more consumers switch to another distributor if the channels of RTL were to be excluded from the channel package, than if the channels of Talpa would be excluded from the package.<sup>491</sup>
396. The difference in negotiating positions is reflected in the retransmission fees and the attitude that the Parties adopt in negotiations. RTL appears **[confidential]**.<sup>492</sup> Where distributors indicate that this difference is a reflection of **[confidential]** audience share **[confidential]**.<sup>493</sup> In negotiations with distributors **[confidential]** for ceasing negotiations, with the risk of channels temporarily (or permanently) not being retransmitted.<sup>494</sup> During a number of negotiations, distributors also hint at a possible discontinuation of the retransmission.<sup>495</sup> More so than in the threats **[confidential]** seem prepared to actually stop retransmission.<sup>496</sup>
397. After the proposed concentration, the Parties will offer their channels as one single bundle to distributors. Together, they will thus gain a higher audience share. Also, distributors expect that more consumers will be willing to switch to other distributors if the channels of RTL and Talpa were to be excluded from the channel package. This will be the case if distributors and the Parties fail to

<sup>487</sup> See Chapter B.6 of the Annex.

<sup>488</sup> Stichting Kijkonderzoek, 2021 Annual Report, January 7, 2022.

<sup>489</sup> See marginal 173 of the Notification Decision.

<sup>490</sup> Where the audience share provides insight into the added value of a particular channel in the channel package, the number of consumers who are expected to switch is an indication of the financial impact if retransmission were to be discontinued; the more consumers switching to other distributors, the more harm there will be. In addition, distributors expect consumers not only to switch television packages, but rather the entire telecom bundle. Also see marginal 386.

<sup>491</sup> Response to the additional request for information of October 20, 2022, with reference ACM/IN/723062, page 3. Response to the additional request for information of October 17, 2022, with reference ACM/IN/722174, page 2. Response to additional request for information of October 18, 2022, with reference ACM/IN/72374, page 4.

<sup>492</sup> Minutes of the interview of April 14, 2022, with reference ACM/IN/690143, Annexes 8 and 9.

<sup>493</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690142, marginal 105.

<sup>494</sup> See marginal 388.

<sup>495</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690142, marginal 92 through marginal 94.

<sup>496</sup> ACM File note with reference ACM/INT/455826, Chapter 2.

reach an agreement. In this regard, ACM deems it plausible that the proposed concentration will mean that they will acquire a stronger negotiating position, which will lead to higher retransmission fees per subscriber. Distributors expect having to negotiate with a broadcaster that negotiates the same way [confidential] and that any room for discipline is stripped.

### 8.3.3.2 Negotiations between distributors and broadcasters

398. In order to determine the extent to which the negotiating positions will change as a result of the proposed concentration, ACM considers the negotiations based on the Nash bargaining model.<sup>497</sup> This model explains the observations from the market research, provides insight into the reason why the negotiating positions will differ as a result of the proposed concentration and how the concentration affects the retransmission fees.
399. The Nash model of bargaining can be applied to negotiations. The model thereby assumes that both negotiating partners have some negotiating power. Also, the Nash bargaining model assumes that both negotiating partners have something to gain from reaching agreement. After all, otherwise both would not engage in negotiations. Within the context of present market, both distributor and broadcaster can realize additional profit in case of an agreement vis-à-vis the situation without an agreement. The latter situation is the so-called outside option. It is relevant to the model that the outside option is possible as an outcome of the negotiations. It is irrelevant in this regard whether the outside option actually occurs or has occurred in practice.
400. The retransmission fee is the result of successful negotiations. This fee follows broadly from the difference in the surplus that the distributor and the broadcaster must in any case realize with the agreement. The retransmission fee is a means to divide the surplus of both participants. The surplus is the difference in profit of the agreement compared to the outside option. What follows from this is that the negotiating party with the largest surplus will sooner be prepared to give in to the demands of their opponent. As such, a distributor will pay a retransmission fee to the broadcaster if the distributor is better served by the retransmission of the channels in question.
401. If the proposed concentration results in the distributor having more to lose than the broadcaster if the retransmission discontinues, the distributor's relative negotiating position weakens. This means that the retransmission fee that a distributor pays to a broadcaster increases. If, on the other hand, the proposed concentration results in the broadcaster having more to lose than the distributor if the retransmission discontinues, the relative negotiating position of the broadcaster then weakens. This means that the retransmission fee decreases.
402. The advantage that distributors and broadcasters derive in present case from successful negotiations does not depend on the proposed concentration; both before and after the proposed concentration, this will come down to the retransmission of the channels of RTL and Talpa. However, the outside option does change as a result of the proposed concentration. Before the proposed concentration, this comes down to temporarily (or permanently) discontinuing the retransmission of the channels of either RTL or Talpa, while after the concentration, this will come down to discontinuing the channels of both RTL and Talpa. After all, the Parties intend to offer their channels as one single package.<sup>498</sup> **Table 6** shows this schematically. Given that the Parties and distributors negotiate on a one-on-one basis, the retransmission of other television channels will not be affected by the negotiations. Thus in the scenario before the proposed concentration, the retransmission of RTL's channels is a given during the negotiations with Talpa, and vice versa. Also the retransmission of channels via other distributors is a given, both before as well as after the proposed concentration.

<sup>497</sup> Nash Jr, J. F. (1950). The bargaining problem. *Econometrica*, Vol. 18, No. 2, pages 155-162.

<sup>498</sup> The Parties' responses to ACM's additional questions of April 14, 2022, with reference ACM/IN/690142, marginal 72.

**Table 6 Possible outcomes of a negotiation.**

	<i>Before the proposed concentration:</i>		<i>After the proposed concentration:</i>
	<i>Negotiations with RTL</i>	<i>Negotiations with Talpa</i>	<i>Negotiations with the Parties jointly</i>
<i>Agreement with the distributor</i>	The RTL channels are transmitted.	The Talpa channels are transmitted.	The Parties' channels are transmitted.
<i>No agreement with the distributor (the outside option)</i>	The RTL channels are <u>not</u> transmitted.	The Talpa channels are <u>not</u> transmitted.	The Parties' channels are <u>not</u> transmitted.

403. The observation that only the outcome of the outside option changes as a result of the proposed concentration means that the change of the outside option is the decisive factor for the change in the negotiating positions. As the outside option changes, so does the surplus. If the surplus of a negotiating party changes more than the other party's surplus, this will lead to a change in the relative negotiating positions and to different retransmission fees.

### 8.3.3.3 The impact of the proposed concentration on the negotiating positions

404. As established in the present case, a change in the outside option may lead to a change in the negotiating positions of the Parties and distributors. Below, ACM outlines the extent to which the proposed concentration will change the outside option for both parties. ACM concludes that the outside option will worsen more for distributors than for the Parties. Consequently, the Parties' negotiating position will improve as a result of the proposed concentration.

405. Before ACM focuses on the proposed concentration's impact on the outside option, it observes that a temporary (or permanent) non-continuation of RTL or Talpa's channels has not previously occurred.<sup>499</sup> ACM therefore lacks historical data in this context and thus bases its assessment on estimates. To arrive at these estimates, ACM has requested distributors to quantitatively estimate the financial impact of the outside option. Four out of six distributors interviewed indicated that they are unable to make this estimate, as such a situation has not yet occurred.

406. ACM did receive an estimate from two distributors. ACM could perform such a quantitative analysis for them, thereby also making use of the Parties' estimate of the financial impact on them in such a situation.<sup>500</sup> It follows that it is plausible that the respective distributors have more to lose than the Parties as a result of the proposed concentration, and that the relative negotiating position of those distributors therefore worsens due to the proposed concentration.<sup>501</sup>

407. In addition, ACM can, partly with the help of the information provided by distributors and the Parties, estimate whether it is true in a general sense that either a broadcaster or a distributor has more to lose as a result of the proposed concentration. This estimate is dealt with below.

408. Above, ACM explains that the proposed concentration changes the outside option for distributors and the Parties. Before the proposed concentration, this was determined by the temporary (or permanent) discontinuation of the retransmission of the channels of either RTL or Talpa, while after the concentration, it is determined by the discontinuation of the channels of both RTL and Talpa.

<sup>499</sup> The Parties' responses to ACM's additional questions of April 14, 2022, with reference ACM/IN/690142, marginal 89 and marginal 90; Response to an additional request for information of October 17, 2022, with reference ACM/IN/722174, page 1; Response to additional request for information of October 18, 2022, with reference ACM/IN/727374, page 5.

<sup>500</sup> Responses from the Parties dated April 14, 2022, with reference ACM/IN/690143, Annex 17; The Parties' responses of April 14, 2022, with reference ACM/IN/690142, marginal 82.

<sup>501</sup> ACM File note with reference ACM/INT/455826, Chapter 3.

409. As broadcasters, the Parties' outside option worsens as a result of the proposed concentration by missing out on more advertising revenue,<sup>502,503</sup> because advertisers may refrain from purchasing television advertising space on a larger number of channels that are temporarily (or permanently) not being retransmitted, due to the reduced GRP reach. For advertising space already purchased, advertisers will demand compensation. This is a certain and direct consequence, according to the Parties.<sup>504</sup>
410. ACM considers it plausible that the impact on advertising revenues will be more limited and shorter in terms of duration after completion of the proposed concentration, than the situation prior to the concentration. First, relatively few advertisers will refrain from purchasing television advertising space. After all, they have fewer alternatives after the proposed concentration and can still continue to profit from the Parties' wide reach via other distributors. Television will continue to be extremely important if not indispensable in advertisers' advertising campaigns.<sup>505</sup> Secondly, advertisers that will refrain from purchasing television advertising space will return more quickly when retransmission resumes. Again, this will be for the sake of the Parties' reach and limited alternatives. The Parties' viewpoint that advertisers may not return to the Parties or, if they do, with reduced budgets, is not a convincing viewpoint. Additionally, and based on the same arguments, ACM deems it plausible that the Parties are better able to mitigate the impact on the advertising revenues after the proposed concentration by charging higher prices for advertising space on television.
411. To conclude, the outside option will worsen for the Parties because more advertising revenues drop if the retransmission of both the RTL and Talpa channels are temporarily (or permanently) discontinued. These are advertising revenues that RTL or Talpa did not realize before the proposed concentration, but that will be realized after the proposed concentration as they will then operate as one single entity. After the retransmission is resumed, the advertisement revenues will also pick up again.
412. For distributors, their outside option worsens as a result of the proposed concentration by missing out on more retail revenues. ACM deems it plausible that significantly more consumers will decide to no longer purchase a television package from a distributor, or even decide to no longer purchase the entire telecom package from the distributor, if a frequently viewed broadcasting group disappears from its retail selection. First, four out of six distributors surveyed expect that more consumers will want to switch to other distributors if both the RTL and Talpa channels were to be excluded from the channel package, as opposed to if the channels of either RTL or Talpa were to be excluded from the channel package.<sup>506</sup> In this regard, distributors stress the great importance consumers attach to the channels of both RTL and Talpa, which is demonstrated by the high audience shares and the high consumer appreciation.<sup>507</sup> One distributor adds that consumers will be more likely to switch if the channels of both RTL and Talpa were to be cut from the channel package.<sup>508</sup> RTL and Talpa have similar broadcast profiles<sup>509</sup> and as a result of the concentration, the possibility for consumers to watch the RTL channels if Talpa is not broadcast, and vice versa, lapses.<sup>510</sup> Secondly, irrespective of the proposed concentration, i) consumers are entitled to cancel

<sup>502</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690142, marginal 75.

<sup>503</sup> The retransmission fee is a means to set off the difference in surplus and is therefore not a relevant parameter in a changing outside option.

<sup>504</sup> The Parties' response to the Points for Consideration of September 16, 2022, with reference ACM/IN/716288, marginal 10.

<sup>505</sup> See marginal 306.

<sup>506</sup> Response to the additional request for information of October 20, 2022, with reference ACM/IN/723062, page 3. Response to the additional request for information of October 20, 2022, with reference ACM/IN/723043, page 5. Response to the additional request for information of October 17, 2022, with reference ACM/IN/722174, page 2. Response to additional request for information of October 18, 2022, with reference ACM/IN/72374, page 4 and page 5.

<sup>507</sup> Also see marginal 384.

<sup>508</sup> Response to additional request for information of October 20, 2022, with reference ACM/IN/723043, page 5.

<sup>509</sup> The Parties' responses of April 14, 2022, with reference ACM/IN/690142, marginal 31 and the Parties' responses of April 14, 2022, with reference ACM/IN/690143, Annex 6. Also see marginal 247.

<sup>510</sup> Owing to the comparable broadcast profiles and the high rating for the channels, ACM deems it plausible that there is an overlap between the group of consumers who will switch if the channels of RTL are no longer transmitted and the group of



their full telecom subscription if the selection deteriorates<sup>511</sup> and ii) in such a case, the distributor has a legal obligation to inform the consumer of its right to switch<sup>512</sup> and iii) more than 90% of the television subscriptions are sold as part of a larger telecom package.<sup>513</sup> In view of the foregoing, the Parties' argument that consumers will not switch due to transfer barriers is not convincing.

413. ACM sees no further reason to presume that the impact on retail revenues will be more limited and/or be of a shorter duration due to the proposed concentration than before the proposed concentration. There is no change in the fact that consumers who have switched to a competitor have no prior incentive to return when retransmission resumes.<sup>514</sup>
414. To conclude, the outside option will worsen for distributors because more retail revenues will drop if the retransmission of both the RTL and Talpa channels are temporarily (or permanently) discontinued. These are retail revenues from telecom subscriptions from consumers who will not switch if RTL or Talpa is not retransmitted, but who will switch if neither of them will be retransmitted. Added to this is the fact that after the retransmission is resumed, the retail revenues will not immediately recover to its original level.
415. Based on the data obtained in its research, ACM was able to make an estimate of the advertising revenues of the Parties vis-à-vis the retail revenues of distributors. This demonstrates that distributors<sup>515</sup> lose an average of seventeen times more revenues than the Parties if all retail customers were to switch.<sup>516</sup> That means that distributors lose more revenues than the Parties if more than one in seventeen additional retail customers switches, as not one, but both channel groups disappear from the channel package. That corresponds to approximately 6% of the number of customers. For their part, several distributors expect an increase in switching customers to be significantly greater than six percentage point.<sup>517</sup> The loss of revenue is thus more poignant for distributors than for the Parties. The aforementioned is an indication that the outside option will worsen more for distributors than the outside option will for the Parties.
416. In view of the above, ACM deems it plausible that the outside option will worsen more for distributors as a result of the proposed concentration than the outside option will for the Parties. The proposed concentration will therefore lead to a weaker negotiating position for distributors, on which basis ACM deems it plausible that the proposed concentration will lead to higher retransmission fees for distributors.

## 8.4 Conclusion

417. ACM deems it plausible that the proposed concentration leads to a significant impediment of the actual competition on the national wholesale market for the distribution of television channels. Research shows that the Parties will obtain a high combined audience share between 40.5% and 47.4% after the proposed concentration and a stronger negotiating position towards distributors. As a result of the stronger negotiating position, the Parties may negotiate higher retransmission fees or reduce the quality of their services. ACM arrives at this conclusion on the basis of estimates of

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consumers who will switch if Talpa's channels are no longer transmitted. However, it follows from the market research that the group of consumers switching when the channels of both are dropped is larger.

<sup>511</sup> Section 7.2(1a) of the Dutch Telecommunications Act 2022.

<sup>512</sup> Section 7.2(1b) of the Dutch Telecommunications Act 2022.

<sup>513</sup> Telecommunitor ACM, 2022Q2, segment *Bundels* and segment *Televisie*.

<sup>514</sup> If consumers switch to a contract of one year or more, they will have to redeem their contract with the new provider for the remaining term of the contract in case of a short-term discontinuation of retransmission.

<sup>515</sup> Data from the Parties and information from distributors demonstrate that the retail revenues from subscriptions from distributors are an average of 65 times higher than the retransmission fees from RTL and Talpa. ACM File note with reference ACM/INT/455826, Section 4.3.

<sup>516</sup> The Parties' data show that they generate approximately [confidential] times more turnover from advertising revenues than from retransmission revenues. The Parties' responses of April 14, 2022, with reference ACM/IN/690142, Annex 9 and marginal 17. ACM File note with reference ACM/INT/455826, Section 4.2.

<sup>517</sup> Six percentage point is derived from the aforementioned seventeen times as much lost revenues;  $1/17 \approx 6\%$ .



market participants, the positive relationship between the audience share and retransmission fees and an analysis based on a bargaining model. Among other things, the consequences of failing to reach an agreement on the transmission of channels are more harmful to a distributor than to the Parties.

418. The increased prices that distributors have to pay may lead to higher prices for consumers.

## 9 Assessment of content markets

419. Both Parties operate in the content market; both on the supply side (production) as producers and sellers of content, and on the demand side (procurement) as broadcasters.<sup>518</sup> In this Chapter, ACM assesses the impact of the proposed concentration for the content markets in the Netherlands.

420. This Chapter is structured as follows:

- The Chapter first considers the context of the market (**Section 9.1**);
- It then discusses the theories of harm (**Section 9.2**);
- Next, this Chapter addresses the relevant market (**Section 9.3**);
- Finally, this Chapter considers the impact of the proposed concentration (**Section 9.4**);

### 9.1 Context of the market

421. As described in Section 6.1, broadcasters, OTT providers and VOD providers purchase content from producers. Procurement is done in different ways. It often involves pitches, to which the purchasers and a number of producers are invited. Among them could be their 'own' producers as well as external producers. It may also be that producers have their own format (an elaborated concept) or production, which they offer to potential purchasers. The procurement could relate to (i) rights to a format, or (ii) an entire production.
422. Purchasers and producers then proceed to negotiate the price, the prefinancing and the use of rights, among others. The ability to hold all or part of the rights is important for the resale and exploitation of the format or production in question. For a number of producers, this is an important business model or supplemental revenue.
423. A limited number of leading producers are active in the Netherlands, such as Banijay (previously EndemolShine) and ITV Studios. In addition, there is a group of medium-sized producers followed by a larger number (dozens) of smaller-sized producers that usually focus on a specific segment.
424. RTL and Talpa are by far the two leading commercial broadcasters in the Netherlands. They have highly comparable broadcast profiles, each having a main channel for a wide audience, RTL4 and SBS6 respectively, and channels aimed at a wide target group of either men or women.<sup>519</sup> Because of this parallel supply, they are each other's closest competitors. They use their main channels to offer their most popular content, most notably entertainment in the form of live shows (including many large-scale Dutch-language productions, also called Shiny Floor Entertainment), sports and news.<sup>520</sup>
425. Considering the decline in linear television ratings, RTL and Talpa have indicated that they will need to continue to invest in engaging content, particularly in large-scale television programs that are usually broadcast live during prime time hours. Such television programs attract a large number

<sup>518</sup> See Table 1 in Section 3.3.

<sup>519</sup> See the Notification, Annex 5 *Signing Protocol, Schedule 9, Channel Profiles*.

<sup>520</sup> Without exception, the ten most-watched RTL programs in 2020 were broadcast on RTL4. Notification, Figure 18. Nine out of the ten most-watched Talpa programs in 2020 were broadcast on SBS6. Notification, Figure 19.

of viewers and ensure that viewers continue to watch linear television and thus also ensure advertising revenues.<sup>521</sup> The Parties contend that, partly due to the competition from OTT/VOD and Big Tech,<sup>522</sup> they have a strong incentive to deliver and purchase competitive productions.<sup>523</sup> There would be no substantial difference between scripted and non-scripted content in that respect.

426. The Parties also claim that Fremantle is at bay and should count as a third party.<sup>524</sup> They assert that captive (in-house) productions do not form part of the market. After all, according to the Parties most programs that are produced in-house are limited to captive use, and thus not offered to third parties, which means they do not form part of the same market. Those in-house productions that are or can also be offered to third parties, may be included in the relevant market.
427. NPO has a statutory media mission defined in the 2008 Dutch Media Act, for which NPO and the broadcasters (mission broadcasters and broadcasting associations) are jointly responsible. NPO's media selection has to be accessible to everyone, be diverse and produced independently of politics or commerce, of high quality and reliable. NPO1, the main channel, aims to bring together a wide audience, while NPO2 focuses on in-depth programs (e.g., on art and culture), and NPO3 is the channel for young people.<sup>525</sup> The NPO programs for the purpose of the independent performance of its public service mission.<sup>526</sup>
428. NPO competes with RTL and Talpa in the area of films and series (scripted content), and holds a solid position in the area of sports. The extent to which NPO competes with RTL and Talpa in the area of non-scripted content, particularly entertainment and large-scale Dutch-language productions, is less evident.<sup>527</sup> According to the industry association of producers, the NCP, RTL and SBS compete with each other most fiercely in non-scripted programs because they specialize in them and there is actually less competition from NPO. The NCP points out that entertainment is not NPO's core mission.<sup>528</sup> ITV Studios, a producer, regards the Parties and NPO as similar except for big talent shows.<sup>529</sup> According to the Parties there is no real commercial content and NPO is in full competition with the Parties, across all dimensions, including when it comes to large-scale studio productions.<sup>530</sup>
429. NPO asserts that its public mission as a service of general economic interest (SGEI), in any case restricts its competitive strength, as the public funds from which it can draw will not increase, for instance, and because legislative intervention limits its advertising opportunities.<sup>531</sup>
430. More and more OTT/VOD providers are operating in the Netherlands, including Netflix, Disney+, Amazon, HBO Max, Prime, VIMN and Viaplay. These providers mostly offer films and series (scripted content), though also increasingly more documentaries and in some cases sports, such the Formula 1 races on Viaplay. According to the NCP, the OTT/VOD providers hardly purchase any productions from Dutch producers and they seek a completely different type of content than broadcasters.<sup>532</sup> Legislation is underway in the area of the procurement of content.<sup>533</sup>

<sup>521</sup> Notification, marginals 344 - 345.

<sup>522</sup> The leading international internet companies such as Google and Facebook.

<sup>523</sup> Responses from the Parties dated November 18, 2021, with reference ACM/IN/659716, marginals 66 and 71; The Parties' responses of November 18, 2021, with reference ACM/IN/659716, Annex 15, RTL document, [confidential] of October 15, 2020, pages 4 and 5.

<sup>524</sup> License Application, marginal 43.

<sup>525</sup> Statement from NPO, [Het publieke bestel](#) (The public system), undated.

<sup>526</sup> Responses of July 28, 2022, with reference ACM/IN/707875, reply to question 4.

<sup>527</sup> NCP's viewpoint of November 19, 2021, with reference ACM/IN/659722, marginal 32 and marginal 54.

<sup>528</sup> NCP's viewpoint of November 19, 2021, with reference ACM/IN/659722, marginal 35.

<sup>529</sup> Responses of April 8, 2022, with reference ACM/IN/689251, reply to the 18th question.

<sup>530</sup> The Parties' response to the viewpoint of December 24, 2021, with reference ACM/IN/667534, marginal 10. In addition, the Parties specifically point out NPO programs 'Heel Holland Bakt' and 'Boer Zoekt Vrouw', as examples of non-scripted entertainment programs. The Parties' response to the viewpoint of December 16, 2021, with reference ACM/IN/665702, marginal 21. Both are purchased from Fremantle.

<sup>531</sup> NPO's viewpoint of November 17, 2021, with reference ACM/IN/660688, slide 4 and page 3.

<sup>532</sup> NCP's viewpoint of November 19, 2021, with reference ACM/IN/659722, marginals 32 and 42.

<sup>533</sup> The proposal amending the 2008 Dutch Media Act in respect of introducing an obligation to invest for the benefit of Dutch cultural audiovisual products, the Dutch House of Representatives, session 2021-2022, 36 176, no. 2, June 18, 2022.

431. According to the Parties, the rationale for this transaction stems from the fact that they seek the capacity to meet the online competition of abovementioned OTT/VOD providers in the target markets, and Technology platforms such as Google and Facebook in the advertising markets.<sup>534</sup> To that end, the Parties would like to ensure that their purchasing budget and thus the provision of qualitatively engaging local (and other) content maintains a consistent level and, where possible, increases substantially.<sup>535</sup> This would allow the Parties to sustainably compete with the aforementioned leading and mostly internationally operating providers.<sup>536</sup>
432. The Parties intend to harmonize the different broadcast profiles following the concentration.<sup>537</sup> Instead of broadcasting competitive programs, they will strive to predominantly broadcast complementary programs. According to the Parties, there are as yet no concrete plans to completely cancel certain channels.<sup>538</sup> In terms of investments in content, the ratio of the concentration, as previously mentioned, would on the one hand consist of expanding the possibilities of investing in leading content and thus differentiate themselves and would involve new investments based on synergy;<sup>539</sup> on the other hand the Parties' responses and internal documents show that any decision-making has yet to take place, while the Parties foresee considerable savings on the procurement of content.<sup>540</sup>
433. Based on the *Content Agreement* that is to be concluded between the Parties, Talpa Concepts and TEP will produce content for the JV.<sup>541</sup> Talpa Concept will [confidential]. The *Content Agreement* states that Talpa Holding then reserves the right to [confidential].<sup>542</sup> Furthermore, Talpa Holding reserves the right [confidential].<sup>543</sup> The Parties claim that they do not have any information available on [confidential] in the *Content Agreement*.<sup>544</sup>

## 9.2 The theories of harm

434. In the Notification Decision, ACM has identified possible competition risks following the proposed acquisition. During the licensing phase, ACM investigated the following theories of harm.

### 9.2.1 Economic dominant position in content production

435. After the concentration, the Parties hold a strong position in the market for the production of content. More specifically, it is plausible that the Parties gain a strong position in the potential market for the production of non-scripted content. The Parties are major providers and close competitors when it comes to this genre. The Parties' solid position may lead to price increases or a

<sup>534</sup> Notification, marginals 2 through 5.

<sup>535</sup> Notification, marginal 6.

<sup>536</sup> The Parties' responses dated March 15, 2022, with reference ACM/IN/683966, marginal 3.

<sup>537</sup> The Parties' responses of November 18, 2021, with reference ACM/IN/659716, Annex 6, broadcasting proposal June 2021.

<sup>538</sup> The Parties' responses of November 18, 2021, with reference ACM/IN/659716 RTL/Talpa, marginal 59.

<sup>539</sup> Responses from the Parties dated July 12, 2022, with reference ACM/IN/703991, marginals 16 - 19; The Parties' responses of December 16, 2022, with reference ACM/IN/735558, marginal 12 through marginal 14 and in reference to Annexes 2 and 3.

<sup>540</sup> The Parties have identified and included content synergies as an objective in Annex 1 of *Schedule 16 (confidential) Budget* of the *Shareholders Agreement* (Notification, Annex 5), a report by 3Rivers to the Parties of June 7, 2021. Also see the Parties' responses of November 18, 2021, with reference ACM/IN/659716, Annex 1. Although these synergies are described in the Parties' responses of November 18, 2021, with reference ACM/IN/659716, marginal 4, as estimates of 3Rivers that do not represent the Parties' final position or plans, the [confidential] budget is linked to the realization of these objectives by *Schedule 16 of the Shareholders Agreement*. The synergies identified by 3Rivers on content (slide 25, cost synergies) are: [confidential]

<sup>541</sup> As stated in footnote 17, production companies Talpa Concepts and TEP are not included in the JV that is to be established.

<sup>542</sup> The Parties' responses of December 16, 2022, with reference ACM/IN/735558, marginals 3 through 5. The Parties have indicated that it requires a calculation of [confidential]. With this, calculated over a [confidential] period, there will be a maximum reduction of [confidential] prime time slots on a total of [confidential] of such slots on RTL4.

<sup>543</sup> Notification, marginal 22.

<sup>544</sup> [confidential] See: The Parties' responses of July 12, 2022, with reference ACM/IN/703991, marginal 20.

reduction in the quality for purchasers. This could affect consumer choice in addition to price and quality.

#### **Input foreclosure**

436. After the concentration, the Parties will no longer provide content productions or provide less content productions, or against less favorable conditions, to the JV's competitors in the procurement market, e.g., NPO.

#### **Coordinated effects**

437. The production companies of RTL Group and Talpa Holding are presently close competitors of each other. They focus primarily on similar content, particularly entertainment, which is purchased by a specific group of purchasers. As a result of the establishment of the JV, in which Talpa Holding will acquire a 30%-interest, and control of [confidential], RTL Group and Talpa Holding can coordinate their market conduct. First, in their capacity as parent companies, RTL Group and Talpa Holding exchange information about the broadcast profiles and associated types of content that will be purchased by the JV or produced in-house. RTL Group and Talpa Holding will thus lack sufficient incentive after the concentration to develop or produce competitive content and to then sell it to JV's competitors. Secondly, RTL Group and Talpa Holding may coordinate their conduct in the development, production and sale of content if it involves the types of content and purchasers.

#### **Significant impediment of competition by the strengthened position in the procurement of content**

438. In the Notification Decision, ACM identified the risk that, depending on the possible product market definition, the Parties' purchasing position may be further strengthened by the proposed concentration.<sup>545</sup> Producers' negotiating position may be affected by the concentration, both in terms of price as well as other conditions. In addition, the loss of competition in the procurement market may likely have consequences for the investments made by producers and needed to develop new content and thus ultimately the quality of the content and the options for consumers.

#### **Customer foreclosure**

439. After the concentration, the JV may possibly no longer purchase or purchase less content from third parties, and instead, have it produced by their in-house production companies. This will lead to independent producers no longer being able to effectively compete in the market, as they will start to miss the required scale, expertise and track record.

#### **Content behind the paywall**

440. This strategy will become an option for the JV as RTL and Talpa will no longer be competing for the availability of their best content. The incentive would be to take a better position on VOD/streaming, in which the future lies, and to compete with mainly American streaming parties. As an effect, a group of consumers unable to afford the transition to streamers are left with impoverished second-rate content. This could lead to an impoverished offer via the package, and thus a reduction in freedom of choice. Moreover, this strategy would entail a cost increase for another group of consumers, i.e., those who want to continue to watch the Parties' content and need a subscription for the JV's streaming service.

#### **Plurality/media diversity**

441. There are several potential plurality/diversity risks of the proposed concentration in terms of news selection/opinion-making, possible impoverishment of the range/reduction of choice, and the effectiveness of media supervision.

#### **Conclusions**

442. Regarding the theory of harm, ACM does not draw any conclusions in this Decision on a potentially significant impediment to competition by a strengthened position on the procurement of content,

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<sup>545</sup> Notification Decision, marginal 250.

more specifically with respect to large-scale Dutch-language productions. ACM does not deem the other theories of harm with respect to content plausible at this point. Below is an explanation of the above.

### 9.3 Relevant markets

443. In the licensing phase, ACM requested information from the Parties, from NPO and from different providers of streaming services operating in the Dutch market. ACM also requested information from the industry association of content producers (the NCP) and from a number of content producers. Also, a written survey was held among producers, i.e., members of the NCP.<sup>546</sup> These producers vary widely in terms of size and orientation/specialization.
444. Additionally, the music composers came forward with complaints about a highly unequal negotiating position that will only continue to worsen once the concentration has taken place.<sup>547</sup>

#### 9.3.1 The Parties' viewpoints

445. The Parties are of the opinion that the relevant markets include the markets for the production and commissioned production of linear and non-linear AV/TV content, and the markets for licensing and procurement of linear and non-linear AV/TV content. They consider that there need not be any further differentiation according to the channel's financial model, nature (linear or non-linear), type/genre of content and the exhibition window.<sup>548</sup>
446. The Parties furthermore contend that the distinction between scripted and non-scripted content is not relevant, as from both the supply and the demand side, all forms of content would in fact be interchangeable.<sup>549</sup> Added to that, the Parties contend that defining a market or market segment for large-scale Dutch-language productions is not easily done.<sup>550</sup>

#### 9.3.2 Views of market participants

##### Producers

447. Most producers support the differentiation between (i) scripted and (ii) non-scripted content,<sup>551</sup> and the existence of a separate market segment for large-scale Dutch-language productions.<sup>552</sup> Moreover, producers generally consider RTL and Talpa to be close competitors of each other.<sup>553</sup>
448. There are different skills and inputs for scripted and non-scripted content.<sup>554</sup> Producers indicate that it is generally possible to switch between scripted and non-scripted, however, due to the scarcity of certain inputs, scripted content entry is more difficult than non-scripted content entry. A limited number of producers provide large-scale Dutch-language productions.<sup>555</sup> Different producers claim that it is difficult to enter the large-scale Dutch-language production market segment because it requires large investments that not all market participants are able or daring to make. Complexity

<sup>546</sup> Results of the ACM survey among producers of June 8, 2022, with reference ACM/IN/697823.

<sup>547</sup> BCMM's viewpoint of March 16, 2022, with reference ACM/IN/683978.

<sup>548</sup> Notification, marginal 140.

<sup>549</sup> The Parties' response to the Notification Decision with reference ACM/IN/687173, marginals 26-28; The Parties' response to the Points for Consideration with regard to content, with reference ACM/IN/717004, marginals 21, 64 ff.

<sup>550</sup> The Parties' response to the Points for Consideration with regard to content, with reference ACM/IN/717004, marginal 97 ff.

<sup>551</sup> Responses of April 8, 2022, with reference ACM/IN/689251, reply to question 11; Responses of April 25, 2022, with reference ACM/IN/691816, reply to question 11; Interview of April 15, 2022, with reference ACM/UIT/575631, reply to question 11.

<sup>552</sup> Responses of April 25, 2022, with reference ACM/IN/691816, reply to question 5; Interview of April 15, 2022, with reference ACM/UIT/575631, reply to question 2.

<sup>553</sup> NCP's viewpoint of November 19, 2021, with reference ACM/IN/659722, marginal 70; Responses of April 20 with reference ACM/IN/690955, reply to question 21c.

<sup>554</sup> Responses of April 25, 2022, with reference ACM/IN/691816, reply to question 12 and question 14; Responses of April 8, 2022, with reference ACM/IN/689251, reply to question 12 and question 14.

<sup>555</sup> Responses of April 8, 2022, with reference ACM/IN/689251, reply to question 7; Responses of April 14, 2022, with reference ACM/IN/690125, reply to question 7; Responses of April 4, 2022, with reference ACM/IN/690955, reply to question 8; Interview of April 15, 2023 report with reference ACM/UIT/575631, reply to question 2.



and experience, among other things, also play a role in this.<sup>556</sup> Some producers state that they are not given the opportunity to pitch these types of productions to the operators.

449. Producers indicate that even though there is a growing demand for production for OTT/VOD providers, this is less interesting for them in terms of content, and mainly concerns scripted content as yet.<sup>557</sup> The actual volume of such opportunities is limited. Moreover, the conditions presented by VOD providers are less attractive and producers usually need to waive their intellectual property rights.<sup>558</sup>
450. A number of producers state that the in-house productions of RTL and Talpa form part of the market and that they fully compete with the production companies of RTL and Talpa.<sup>559</sup>

#### NPO

451. According to NPO, RTL and Talpa one another's closest competitors. NPO endorses the differentiation between scripted and non-scripted and the existence of large-scale Dutch-language productions as a market segment.<sup>560</sup> NPO believes that it is not easy for a participant operating in the production of non-scripted content to simply switch to scripted at short notice and low cost, and vice versa.<sup>561</sup>

#### OTT/VOD providers/purchasers of content

452. These parties show little interest for the proposed concentration. According to them, competition is among all types of content and all providers and there is sufficient growth, and partly for this reason there is thus entry to the market.<sup>562</sup>

### 9.3.3 ACM's assessment

453. Previous decisions by AMC and the European Commission distinguish between procurement and production of content,<sup>563</sup> and distinguish between scripted and non-scripted content,<sup>564</sup> leaving open the possibility that non-scripted content has a large-scale Dutch-language productions segment (*Shiny Floor Entertainment*).<sup>565</sup> The market research in the licensing phase gives no reason to depart from the existing practice with respect to the difference between scripted and non-scripted content. As such, ACM focuses below on the market for non-scripted content, and the associated market segment for large-scale Dutch-language productions.
454. With respect to large-scale Dutch-language productions, the market research has shown that this is a type of non-scripted content with big game shows and entertainment shows based on studio recordings that differs in type of production (including costs) and programming from other non-scripted content. There are specific requirements for such productions that can only be met by a few larger producers. The programs are used for the top prime slots on the Parties' key channels.

<sup>556</sup> Responses of April 25, 2022, with reference ACM/IN/691816, reply to question 5; Responses of April 8 with reference ACM/IN/689251, reply to question 6; Interview of April 15, 2022 report with reference ACM/UIT/575631, reply to question 2.

<sup>557</sup> Responses of April 25, 2022, with reference ACM/IN/691816, reply to question 18b.

<sup>558</sup> Responses of July 3, 2022, with reference ACM/IN/702823.

<sup>559</sup> See, for example the Interview of April 15, 2022 report of July 8, 2022, with reference ACM/UIT/575631, reply to question 11.

<sup>560</sup> Responses of December 3, 2021, with reference ACM/IN/663086, page 4; Responses of December 20, 2021, with reference ACM/IN/666047, page 3 and page 5.

<sup>561</sup> Responses of December 20, 2021, with reference ACM/IN/666047, page 3 and page 5.

<sup>562</sup> Responses of April 20, 2022, with reference ACM/IN/690962; Responses of April 25, 2022, with reference ACM/IN/691503; Responses of April 20, 2022, with reference ACM/IN/690951; Responses of April 11, 2022, with reference ACM/IN/689491.<sup>562</sup> Responses of April 20, 2022, with reference ACM/IN/690962; Responses of April 25, 2022, with reference ACM/IN/691503; Responses of April 20, 2022, with reference ACM/IN/690951; Responses of April 11, 2022, with reference ACM/IN/689491.

<sup>563</sup> Case M.9676 – *LOV GROUP / BANIJAY / ESG*, June 30, 2020, marginals 22 and 32; Case COMP/M.9064 – *Telia COMPANY / Bonnier Broadcasting Holding*, November 12, 2019, marginal 114.

<sup>564</sup> Case M.9676 – *LOV GROUP / BANIJAY / ESG*, June 30, 2020, marginals 50 ff.

<sup>565</sup> Case 7185/Sanoma – *SBS*, July 22, 2011, marginals 53-55; Case 17.0453.22/*Talpa Holding N.V. – Sanoma Image B.V.*, July 10, 2017, marginals 63.

455. NPO and certainly the OTT/VOD providers incorporate significantly fewer to no large-scale Dutch-language productions into their programming. ACM does not define a separate market for large-scale Dutch-language productions, as it finds insufficient indications to do so. ACM considers it to be a market segment that requires extra attention within the market for non-scripted content owing to the extraordinary (procurement) position of the Parties in this segment. See Section 9.4.2 below.
456. The Parties have a relatively high market share on the procurement of non-scripted content, particularly in terms of large-scale Dutch-language productions, though not on productions. TEP, Talpa's production company, is still in its infancy and Fremantle is the third-largest producer of a group of five front-runners.
457. AMC has made several requests to the Parties to provide plans of the JV in terms of content, **[confidential]**. Internal documents show that **[confidential]** after the concentration, **[confidential]**.<sup>566</sup> In their responses, the Parties have indicated that the programming will be complementary.<sup>567</sup> The internal documents also show that the efficiency of the concentration will express itself in **[confidential]**.<sup>568</sup>

#### 9.3.3.1 Demand substitution

458. The demand substitution for non-scripted content, including large-scale Dutch-language productions, is largely limited to the demand for scripted content of OTT/VOD providers. These parties have little demand for non-scripted content, and virtually no demand for large-scale Dutch-language productions. Even as a group, the OTT/VOD providers' demand for non-scripted content is at present still only of limited magnitude, as a whole between 5% and 10% of the total market.<sup>569</sup>
459. OTT/VOD providers may soon face a new minimum purchasing requirement of Dutch-language content under new Dutch regulations. Much is still uncertain about this, including the question as to whether this would lead to more procurement of non-scripted content.<sup>570</sup>
460. NPO is not an alternative to non-scripted content, particularly not as regards large-scale Dutch-language productions, because it purchases this type of content to a lesser extent since entertainment is not part of its mission statement. For this reason, there is no significant demand substitution for non-scripted content, particularly not for large-scale Dutch-language productions.

#### 9.3.3.2 In-house productions

461. ACM considers captive/in-house productions from and made by RTL and Talpa to be part of the market, both in terms of production and procurement. The European Commission has so far left open the question of whether such productions are to be included.<sup>571</sup>
462. The Parties take the position that captive/in-house productions should not be included in the relevant market. They contend that most programs that are produced in-house are limited to captive use, according to the Parties, and are thus not offered to third parties. Those in-house productions that are or can also be offered to third parties, may be included in the relevant market, according to the Parties.<sup>572</sup>

<sup>566</sup> The Parties' responses of November 18, 2021, with reference ACM/IN/659716, of November 18, 2021, Annex 6, broadcasting proposal June 2021.

<sup>567</sup> The Parties' responses of July/June 12, 2022, with reference ACM/IN/703991, marginal 18.

<sup>568</sup> The Parties' responses of November 18, 2021, with reference ACM/IN/659716 Annex 1, 3Rivers Project Palm. Final Report, slides 19, 25-27, 32; Annex 2, RTL Nederland synergy assessment October 22, 2020, slides 8, 12, 14-16.

<sup>569</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>570</sup> The proposal amending the 2008 Dutch Media Act in respect of introducing an obligation to invest for the benefit of Dutch cultural audiovisual products, the Dutch House of Representatives, session 2021-2022, 36 176, no. 2, June 18, 2022.

<sup>571</sup> In its market research in case M.9676 - *LOV GROUP / BANIJAY / ESG*, the European Commission addressed in-house productions. This shows, among other things, that the availability of IP rights is not a decisive factor in whether or not to engage in in-house productions. It further shows that respondents state that they perceive a difference in costs between in-house productions and external productions. The European Commission ultimately does not address whether in-house productions should or should not be included (item 62 of the Decision of June 30, 2020 M.9676 - *LOV GROUP / BANIJAY / ESG*).

<sup>572</sup> The Parties' responses dated March 15, 2022, with reference ACM/IN/683969, marginal 4 ff.

463. ACM considers that, from the demand side perspective, in-house productions and external productions are substitutes. In the same way purchasing broadcasters can switch between producers based on formats and costs, for example, they can also switch between affiliated producers and external producers. This applies to commissioned content as well as content produced with hired production services. Having the rights to a format and having it initially produced exclusively for its own use, does not detract from the fact that such productions and the rights thereof eventually become available on the market.
464. ACM's position is consistent with the Parties' contention (including Fremantle) that Fremantle Nederland, as a producer, and RTL, as a purchasing party, interact with each other in a business-like manner and that they reach agreements at arm's length.<sup>573</sup> This is also consistent with the Parties' assertion that they purchase content from different producers, to thus create sufficient diversity in the selection of content.<sup>574</sup>

### 9.3.3.3 Supply substitution

465. In terms of supply substitution, what matters is whether providers of non-scripted content can switch to other types of content and are able to bring this to market in the short term without significant additional costs or risks.<sup>575</sup> As previously noted, the investigation shows that though supply substitution is possible in principle, there are obstacles to switching between non-scripted and scripted content. It is particularly difficult to switch from non-scripted to scripted due to a lack of sufficiently qualified staff and specialized talent, such as authors/writers. Entry with new productions is difficult by definition, as broadcasters mostly need productions that have already proven themselves to be successful, so-called proven formats. Producers can enter on the basis of proven formats though, as far as these are available. In this regard, particularly smaller market participants may find it difficult to obtain prime time slots necessary to gain experience and build a track record. Financing can be a hurdle in the absence of pre-funding by broadcasters.
466. As for large-scale Dutch-language productions, a limited number of major producers are the main suppliers. Such productions are large-scale productions in terms of staff and required investments. As such, it is more difficult to enter this segment. It is therefore also more difficult to enter this segment from scripted than to non-scripted in general. Given that the growth in the procurement markets is primarily among OTT/VOD providers, and, as shown by the section below on demand substitution, these providers have little demand for non-scripted content, it is also difficult for providers of large-scale Dutch-language productions to divert to other types of non-scripted content, even if the technical and financial barriers are relatively low.
467. The Parties confirm that it is also difficult for them to expand existing production capacity.<sup>576</sup>

### 9.3.4 Conclusion on relevant product markets

468. Based on the foregoing, ACM concludes that there are separate markets for the production and procurement of scripted content and non-scripted content, including a market segment of large-scale Dutch-language productions. This is in line with previous decision practices of ACM and the European Commission.<sup>577</sup> ACM sees no grounds to depart from these practices.

<sup>573</sup> Notification, marginal 357 and marginal 358; Responses of April 14, 2022, with reference to ACM/IN/690125, pages 2 and 3.

Notification, marginals 357-358; Responses of April 14, 2022, with reference to ACM/IN/690125, pages 2 and 3.

<sup>574</sup> The Parties' response to the Notification Decision of March 30 with reference ACM/IN/687173, reference no. 41 and reference no. 43.

<sup>575</sup> [Guidelines on relevant markets](#), item 20.

<sup>576</sup> The Parties' responses of December 16, 2022, with reference ACM/IN/735558, marginals 22 ff.

<sup>577</sup> Case M.9676 - LOV GROUP / BANIJAY / ESG, June 30, 2020, marginal 50 ff.; Case 7185/Sanoma – SBS, July 22, 2011, marginals 53-55; Case 17.0453.22/Talpa Holding N.V. – Sanoma Image B.V., July 10, 2017, marginal 63.

### 9.3.5 Relevant geographic market

469. Previous decisions from ACM<sup>578</sup> and decisions from the European Commission<sup>579</sup>, define the market for the production and procurement of audiovisual content as national or broader, meaning a particular language area. With respect to the procurement/licensing of broadcast rights for content, the Commission considered that this market has a national scope or includes a broader linguistic homogeneous area.<sup>580</sup>
470. ACM's market research in this case did not produce any indications of a broader than national scope for the markets for the production and procurement of scripted content and non-scripted content, respectively, including the market segment for large-scale Dutch-language productions. The market participants contacted by ACM in its market research confirm this.
471. That is why, in this case, ACM proceeds from markets for the production and procurement of scripted content and non-scripted content, respectively, including the market segment for Large-scale Dutch Productions, which are national in terms of scope.

## 9.4 Consequences of the proposed concentration

### 9.4.1 Production of content

#### 9.4.1.1 Production market positions

472. The Parties operate as producers and purchasers of scripted and non-scripted content, including large-scale Dutch-language productions. ACM has collected figures on this. The Parties' positions are limited in terms of the production and procurement of scripted content and sports,<sup>581</sup> which is why this has not been further examined.

#### Total market for the production of audiovisual productions

473. Based on the information provided by the Parties and the market participants, the Parties held an estimated joint position of **[20-30]**% in 2021, **[10-20]**% of which is attributable to RTL and **[5-10]**% to Talpa.<sup>582</sup> NPO holds an estimated position of **[40-50]**% in this total market.<sup>583</sup>

#### Market for the production of non-scripted content

474. Based on the information provided by the Parties and the market participants, the Parties held an estimated joint position on the production of non-scripted content of **[40-50]**% in 2021, **[20-30]**% of which is attributable to RTL and **[10-20]**% to Talpa.<sup>584</sup> Talpa's production is **[confidential]**, and Fremantle's production is captive for more than **[confidential]**.<sup>585</sup>

#### Production of large-scale Dutch-language productions

475. The joint estimated position of the Parties in 2021 as producers of large-scale Dutch-language productions is about **[5-10]**%, **[5-10]**% of which is attributable to RTL, and **[confidential]** (via Fremantle),<sup>586</sup> and **[0-5]**% to Talpa.<sup>587</sup>

<sup>578</sup> See inter alia ACM's decision dated July 22, 2011 in Case 7185/Sanoma-SBS, marginal 62 ff.

<sup>579</sup> See inter alia the Commission's decision in Case COMP/M.7194 - LIBERTY GLOBAL/ CORELIO/ W&W/ DE VIJVER MEDIA, marginal 70 ff.

<sup>580</sup> The Parties argue that it may be inferred from the fact that content is broadcast on a national basis, there are also national content markets. See: Notification, marginals 156-157.

<sup>581</sup> Notification, Table 8, 9 and 10; Responses of July 5, 2022, with reference ACM/IN/702568, reply to question 4.

<sup>582</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>583</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>584</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>585</sup> License Application, Annex 2.

<sup>586</sup> License Application, Annex 2.

<sup>587</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

#### 9.4.1.2 Economic dominant position in market for the production of content and input foreclosure

476. ACM's investigation in the licensing phase showed that the Parties do not hold a key market position in the area of production. In the total market for the production of content, the Parties have an estimated joint market share of **[20-30]**%.<sup>588</sup> Nor do the Parties hold a particular position in the area of the production of certain types of content that would enable them to make use of this to restrict competition. In the potential market for non-scripted productions, the Parties have an estimated joint market share of **[40-50]**%.<sup>589</sup> The Parties have an estimated market share of **[5-10]**% in the market segment for large-scale Dutch-language productions.<sup>590</sup>
477. In addition, Talpa's production is **[confidential]** and Fremantle's production is **[confidential]**, which puts this market position into perspective. Moreover, Fremantle is only one of the five leading producers and not the market leader. Based on the above, it is plausible that there are sufficient alternatives to Fremantle's products.
478. In terms of the impact of the proposed concentration in the production markets, this means that the theories of harm in relation to an economic dominant position in production, or input foreclosure, are not plausible on account of the Parties' market share in combination with the fact that there are sufficient alternatives. It is as such unlikely that purchasers in the area of production will experience any significant impediments from the concentration.

#### 9.4.1.3 Coordinated effects

479. Furthermore, the theory of harm concerning negative effects by means of coordination is not plausible given the expected restricted joint market position of Talpa and the JV as producers during the period relevant for this assessment.

### 9.4.2 Procurement of content

#### 9.4.2.1 Market positions for procurement

##### Total market for the procurement of audiovisual productions

480. Based on the information provided by the Parties and the market participants, the Parties held an estimated joint position of **[30-40]**% in 2021,<sup>591</sup> **[20-30]**% of which is attributable to RTL and **[10-20]**% to Talpa.<sup>592</sup>

##### Market for the procurement of non-scripted content

481. Based on the information provided by the Parties and the market participants, the Parties held an estimated joint position of **[30-40]**% in 2021,<sup>593</sup> **[20-30]**% of which is attributable to RTL and **[10-20]**% to Talpa. NPO has a market share of more than **[50-60]**%.<sup>594</sup>

##### Procurement of large-scale Dutch-language productions

482. ACM has requested procurement figures from all purchasing providers of AV content operating in the Netherlands. Only one party stated that it purchased Large-scale Dutch Productions.<sup>595</sup> Some of the respondents may not have been able to breakdown the 'large-scale Dutch-language productions' segment. However, it is plausible that the broadcasters surveyed, such as Discovery and Disney, and VOD providers do not or hardly purchase content for this segment as they usually do not offer this content to consumers.

<sup>588</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>589</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>590</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>591</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

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<sup>593</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>594</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>595</sup> Responses of December 20, 2021, with reference ACM/IN/666047, replies to questions 5,6 and 7.



483. The joint estimated position of the Parties in 2021 as purchasers of large-scale Dutch-language productions is about **[60-70]%**,<sup>596</sup> **[50-60]%** of which is attributable to RTL and **[10-20]%** to Talpa.<sup>597</sup>

#### 9.4.3 Views of market participants

##### Producers of content

484. Producers are concerned about possible lost procurement due to the Parties. Producers are especially concerned that (i) their own negotiating position as sellers vis-à-vis RTL and Talpa (purchasers) will deteriorate due to the takeover,<sup>598 599</sup> and (ii) the Parties will purchase less content from independent producers after the concentration, leading to a loss of sales.<sup>600</sup>

485. Producers indicate that it is essential for them to obtain favorable time slots for their productions for formats (and thus a producer's success), however, they are generally unable to exert much influence on this. They are concerned that these prime-time slots will primarily be for the Parties' production companies after the merger, preventing other producers from building a track record.<sup>601</sup>

486. At the same time, producers fear that they will lose even more intellectual property rights to the new entity after the merger.<sup>602</sup> They did not, however, express any concerns of a possible impoverishment of the quality of the selection of content after the merger.

487. Music composers came forward with complaints about a poor negotiating position vis-à-vis RTL and Talpa, and they fear that this will only continue to worsen once the merger has been established.<sup>603</sup>

##### NPO

488. In its viewpoint, NPO complains about input foreclosure (the foreclosure of successful formats), followed by examples of a number of specific programs.<sup>604</sup> This has been addressed in the above. NPO furthermore expects that the concentration will lead to an impoverishment of the selection of content for consumers and a focus on investments in Videoland.<sup>605</sup>

##### The Dutch Media Authority

489. In its viewpoint, the Dutch Media Authority highlights the risks regarding the proposed concentration relative to strengthened opinion power, impoverishment of the selection of content and weakened position of niche broadcasters, independent producers and advertisers. Moreover, the Dutch Media Authority stresses the reduced need for cooperation between Dutch broadcasters and a possible disruption of the level playing field if RTL and Talpa would both operate on the basis of Luxembourg licenses to evade Dutch media supervision.<sup>606</sup>

#### 9.4.4 The Parties' viewpoints

490. The Parties contend that producers do not endorse the theory of harm on procurement and that none of the producers have any complaints about reduced prices as a result of the Parties'

<sup>596</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>597</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>598</sup> Reponses of August 16, 2022, with reference ACM/IN/712774.

<sup>599</sup> Results of the ACM survey among producers of June 8, 2022, with reference ACM/IN/697823, cell R9 and R13; response to additional questions with reference ACM/IN/702916.

<sup>600</sup> Reponses of August 16, 2022, with reference ACM/IN/712774; Reponses of April 20, 2022, with reference ACM/IN/690955.

<sup>601</sup> NCP's viewpoint of November 19, 2021, with reference ACM/IN/659722; Results of the ACM survey among producers of June 8, 2022, with reference ACM/IN/697823.

<sup>602</sup> NCP's viewpoint of November 19, 2022, with reference ACM/IN/659722; Results of the ACM survey among producers of June 8, 2022, with reference ACM/IN/697823.

<sup>603</sup> BCMM's viewpoint of March 18, 2022, with reference ACM/IN/683978.

<sup>604</sup> NPO's viewpoint of November 11, 2021, with reference ACM/IN/658264, marginal 70.

<sup>605</sup> NPO's viewpoint of November 11, 2021, with reference ACM/IN/658264, marginal 8.

<sup>606</sup> Viewpoint of the Dutch Media Authority of July 26, 2022, with reference ACM/IN/706216.

procurement position.<sup>607</sup> The Parties furthermore draw the attention to the limited addition by the concentration because Talpa has mostly captive productions, which in any event does not eliminate competition between the Parties. The Parties also stress NPO's position, i.e., having a high market share on the procurement of non-scripted content. The Parties also claim that OTT/VOD providers are also increasingly purchasing non-scripted content. In that regard, the Parties highlight the recent rapid increase of the number of OTT/VOD providers operating in the Netherlands and the expected growth of 10%-15% in their demand in the next three years.<sup>608</sup>

491. The Parties contend that there is fierce competition to engage audiences, including by OTT/VOD providers.<sup>609</sup> As a result of this competition, providers will therefore increasingly compete on the content parameter even in their role as purchasers of content. Strengthening their position in that competition by purchasing engaging content is considered to be the rationale for the Parties behind their proposed concentration.<sup>610</sup>

#### 9.4.5 Assessment of procurement of content

492. As mentioned above, ACM identified possible competition risks on the procurement side during the notification phase. The concern in this matter was that by bundling their television channels, the Parties could potentially gain a dominant position as one single purchaser of content. This may lead to independent producers, such as ITV or Medialane, being forced to cut prices or to the purchase of content on unfavorable terms.

493. In addition, ACM identified certain risks with regard to placing the content behind the paywall and with regard to diversity/pluriformity.

##### 9.4.5.1 The theory of harm in terms of procurement and customer foreclosure

494. In this section, ACM discusses the theory of harm with respect to procurement in terms of the consequences. In view of the Parties' estimated joint market share of **[20-30]**% on procurement as a whole, and of **[40-50]**% on non-scripted content, it is not plausible that there is a dominant market position (EMP) on procurement, or on the procurement of non-scripted content.<sup>611</sup>
495. ACM has investigated the possibility of whether in the absence of a dominant market position there could be a significant impediment to competition based on non-coordinated effects by the Parties' strengthened position on the procurement of non-scripted content, particularly in the market segment for large-scale Dutch-language productions.<sup>612</sup>
496. The Parties hold a position of **[60-70]**% in the market segment for large-scale Dutch-language productions (Shiny Floor Entertainment).<sup>613</sup> A small group of mostly larger producers (including international ones) is active in this area. However, the investigation did not provide sufficient leads to consider Shiny Floor Entertainment productions as a separate product market. See Section 9.3.
497. Producers of non-scripted programs face certain obstacles in their switch to scripted programs, especially in terms of what is referred to in the media industry as a lack of talent (including writing talent). Also, even for scripted content, producers often do not consider OTT/VOD providers as an attractive alternative. The reason for this is, is that the products that they seek are often viewed as little challenging and repetitive, and also because OTT/VOD providers are highly controlling in

<sup>607</sup> The Parties' response to the Points for Consideration with regard to content, of September 21, 2022, with reference ACM/IN/717004, marginal 12.

<sup>608</sup> The Parties' response to the Points for Consideration with regard to content, of September 21, 2022, with reference ACM/IN/717004.

<sup>609</sup> The Parties' response to the Points for Consideration with regard to content, of September 21, 2022, with reference ACM/IN/717004.

<sup>610</sup> Notification, marginals 2 through 10.

<sup>611</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>612</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

<sup>613</sup> ACM's calculation based on figures of the Parties and market participants. File note with reference ACM/INT/455200.

terms of content, meaning that producers have to surrender autonomy, and moreover, have to deliver on worse terms and often have to surrender all their rights.<sup>614</sup>

498. Lastly, it involves relatively low volumes.<sup>615</sup> The volume of purchases from OTT/VOD providers against which to measure the growth rate cited by the Parties is limited, and more focused on scripted than other content. Moreover, there is often vertical integration among OTT/VOD providers and their in-house production companies. The obligation of OTT/VOD providers to 'purchase locally' is limited to 4.5% in the pending bill.<sup>616</sup> It should also be noted here that the turnover threshold for this obligation lies at €30 million, meaning only a limited number of market participants will have to comply with this obligation. Moreover, providers can purchase content from an affiliated producer.
499. Generally speaking, there is therefore an oligopolistic market for the procurement of non-scripted content with three participants: RTL, Talpa and NPO. It constitutes a proposed concentration between the Parties as closest competitors from three to two competitors so that NPO will then be the only remaining alternative purchaser of consequence. The competitive pressure of NPO thus also eases.
500. Given the nature of their offering and the audience, and being the only commercial broadcasters, RTL and Talpa are each other's closest competitors that offer the same type of content to viewers and thus also ask the same type of content from producers, even though Talpa partly makes these productions in-house. RTL and Talpa have similar television broadcast profiles and serve the same target audience. Also, RTL and Talpa focus more on large-scale Dutch-language productions than NPO.<sup>617</sup> NPO is more at bay with a capped budget, negotiates in a different manner, i.e., based on agreements with producers on procurement conditions, and, being a public service broadcaster, it has a different mission, particularly in terms of entertainment.
501. On the other hand, on the supply side, there is scarcity, and demand, despite the stated qualifications, is still rising. So, there may also be an increase in prices on the part of producers, with eventual entry of 'talent' and thus, in time, more opportunities for producers as well as purchasers. The Parties' argument that they do not benefit from the impoverishment of content in their competition for consumers' attention is plausible when considered as a whole on the sum of all procurement. This does not alter the fact that in some areas, precisely because of their intended complementarity following the merger, they may invest less in certain types of content, including large-scale Dutch-language productions. Moreover, after the concentration, the Parties may profitably cut content costs owing to their dominant market position in the relevant market for the sale of advertising space on television. See Section 7.6.
502. With regard to the procurement of large-scale Dutch-language productions there is in fact a merger of two participants to one single participant in the procurement market.<sup>618</sup>
503. Additionally, **[confidential]** via a *Content Agreement*, **[confidential]**.
504. ACM establishes that this will affect the producers' positions, especially producers of large-scale Dutch-language productions. As yet, OTT/VOD providers do not offer large-scale Dutch-language productions to their viewers, as their focus lies on films and series, and therefore on scripted content. The expectations for the future in this area are too uncertain to infer that there would be

<sup>614</sup> Results of the ACM survey among producers of June 8, 2022, with reference ACM/IN/697823.

<sup>615</sup> Responses of April 25, 2022, with reference ACM/IN/691816, reply to question 18b.

<sup>616</sup> The proposal amending the 2008 Dutch Media Act in respect of introducing an obligation to invest for the benefit of Dutch cultural audiovisual products, the Dutch House of Representatives, session 2021-2022, 36 176, no. 2, June 18, 2022, Section 3.29e(2).

<sup>617</sup> Responses of April 8, 2022, with reference ACM/IN/689251, Responses of April 20, 2022, with reference ACM/IN/690955.

<sup>618</sup> NCP's viewpoint of November 19, 2021, with reference ACM/IN/659722, marginal 34.

any counterpressure against the Parties' procurement position.<sup>619</sup> Also, NPO is much less active in large-scale Dutch-language productions.

505. Supply substitution is possible to a certain extent, however, it will also create disadvantages for producers given the procurement position of OTT/VOD providers in the area of scripted content and the requirements they impose on this.
506. The proposed concentration will as such particularly affect a small group of relatively large producers that specialize in large-scale Dutch-language productions. There will be fewer fallback options for these producers in this segment than before. Conversely, being major and mostly internationally operating producers active also in the area of scripted content in a broader market dealing with scarcity and a growing demand, they should ultimately be considered capable of sustaining themselves.
507. In view of the objections under competition law set out in the previous chapters in terms of the sale of television advertising space and wholesale distribution of pay television channels, ACM refrains from commenting on whether there will actually be any adverse non-coordinated effects by a strengthened position of the Parties on procurement of non-scripted content, particularly in the market segment for large-scale Dutch-language productions.
508. In terms of customer foreclosure, the Parties' position on production is insufficiently solid to meet their own demand within the period relevant for this assessment, given that they have a market share of only **[5-10]**% on the production of large-scale Dutch-language productions. **[confidential]** It is therefore not plausible that the Parties have reason to structurally reserve their own demand for their own productions by means of customer foreclosure after the proposed concentration. The fact that they may favor their own productions and disadvantage competing producers more incidentally is insufficient grounds to conclude that this will lead to customer foreclosure.
509. As regards the position of the music producers, ACM establishes that the proposed concentration does not entail a significant adverse effect on the negotiating position since even at present it is not likely that the Parties compete with each other in a significant fashion with respect to their procurement in this area. Consequently, there is also no significant impediment to competition based on non-coordinated effects by a strengthened position of the Parties.

#### **9.4.5.2 The theories of harm regarding content behind the pay wall and plurality/media diversity**

##### *Content behind the paywall*

510. Based on the Parties' arguments and on its own investigation, ACM does not deem it plausible that the Parties are capable of having their viewers switch to Videoland by placing their premium content behind a paywall.<sup>620</sup> Watching this premium content will therefore not entail a cost increase for consumers. Such a strategy is also too risky for the Parties due to the anticipated adverse effects thereof on their television advertising revenues. This means that ACM does not consider this a likely theory of harm.

##### *Plurality/media diversity*

511. The investigation relating to the proposed concentration gives no cause for concern with regard to news and opinion shows, because the target audiences of the relevant programs of the Parties differ, so that it may be expected that they will continue to exist alongside each other. In addition, NPO is laying the foundation in the market in this area.
512. The synergy and overlap, respectively, between the supply of the Parties and the want to achieve post-merger savings could generally come at the expense of the diversity of their Dutch-language

<sup>619</sup> Results of the ACM survey among producers of June 8, 2022, with reference ACM/IN/697823.

<sup>620</sup> The Parties' responses of June 1, 2022, with reference ACM/IN/697760, marginal 13.

programming. This runs counter to the Parties' viewpoint that the proposed concentration would in fact lead to an enrichment of Dutch-language content in order to compete with VOD competitors. Irrespective of whether this will in fact happen, with regard to diversity vis-à-vis the Parties' current programming, there is already actually such an upsurge in the abundance of the Dutch-language OTT/VOD selection (particularly scripted) that these can erase any concerns about this diversity.

513. Therefore, with respect to freedom of choice and/or quality/accessibility in terms of diversity, there is no reason to regard the proposed concentration as problematic from a competition law perspective. The Dutch Media Authority considers it important that its supervision extends to all providers operating in the Netherlands, and identified the risk that the RTL/Talpa combination will operate purely on the basis of Luxembourg licenses.<sup>621</sup> The Parties have indicated not to have any such plans.<sup>622</sup> If this were to change in the future, it cannot be ruled out that issues of choice and/or quality/accessibility in terms of diversity would still arise.
514. As previously noted, NPO is actually laying the foundation in the market in terms of news and opinions shows, but also in terms of accessibility of the audiovisual offerings in general. This also applies to groups of consumers who cannot join in the VOD trend financially.

## 10 Proposals for a license under rules or restrictions

### 10.1 Procedure

515. On December 6, 2022<sup>623</sup> and December 19, 2022<sup>624</sup>, the Parties proposed remedies that could result in restrictions and/or rules that the Parties are prepared to accept if the license were to be granted under those terms.
516. The Parties have proposed two commitments, also referred to as remedies. The first remedy proposal pertains to the market for the sale of advertising space on television and the second remedy proposal pertains to the wholesale market for the distribution of television channels.
517. In consultation with the Parties, ACM asked market participants for their vision on the proposed remedies as of January 11, 2023, after having signed a confidentiality agreement in this respect. The Parties have submitted market test appropriate versions of the proposals to this end.<sup>625</sup> On January 12, 2023, ACM also spoke with Mediahuis in its presence of intended performer of the sale of advertising space on the Talpa channels.<sup>626</sup>
518. On January 26, 2022, ACM informed the Parties of its own assessment and the responses of the market participants on the proposed remedies.

### 10.2 Remedies for television advertising

519. In this section, ACM assesses the Parties' remedy proposal pertaining to the competition problems observed in the television advertising market. First, ACM describes the Parties' proposal, followed by the outcome of the market test. It concludes with its own assessment.

<sup>621</sup> Viewpoint of the Dutch Media Authority of July 26, 2022, with reference ACM/IN/706216.

<sup>622</sup> The Parties' responses of June 1, 2022, with reference ACM/IN/697760, marginal 1 and marginal 3.

<sup>623</sup> The Parties remedy proposal with regard to advertising of December 6, 2022, with reference ACM/IN/733777.

<sup>624</sup> The Parties remedy proposal with regard to retransmission of December 19 with reference ACM/IN/736018.

<sup>625</sup> Email of December 19, 2022, with reference ACM/IN/736018; Email of January 5, 2023, with reference of ACM/IN/750802.

<sup>626</sup> Minutes of the interview of January 12, 2023, with reference ACM/UIT/590132, supplemented by Mediahuis via email of January 25, 2023, with reference ACM/IN/755995.



### 10.2.1 The Parties' proposal

520. The Parties suggest to fully and exclusively subdivide the sale of advertising space on the Talpa channels to Mediahuis for a duration of ten years. To facilitate this, Mediahuis will take over Talpa's assets, including the rights and obligations arising from the contracts with advertisers and media agencies, staff and IT systems.<sup>627</sup>
521. The Parties agree to a minimum guarantee in the proposal (hereinafter: **MG**). This MG means that Mediahuis will have to pay at least a predetermined fixed amount of revenue to RTL/Talpa. This MG is determined based on the available stock of GRPs in the market and among the Parties, among other factors, as well as the advertising revenues in the market and at the Parties. Mediahuis receives an annual sales fee in the amount of a predetermined fixed percentage on sales realized.<sup>628</sup> The remedy proposal includes a provision to guarantee the quality of the Talpa channels so as to ensure Mediahuis that the Talpa channels will continue to generate sufficient GRPs to remain a fully-fledged competitor in the advertising market, according to the Parties.<sup>629</sup> On January 24, 2023, the Parties submitted a supplementary note<sup>630</sup> to ACM, indicating their preparedness to include additional safeguards to maintain the level of quality of the Talpa channels, such as prior approval of Mediahuis to change the broadcast profile and the transfer of programs from Talpa to RTL channels.
522. According to the Parties, this remedy proposal takes away the entire overlay of activities between the Parties with regard to the sale of advertising space on television. The implementation of the remedy will immediately and sustainably transfer Talpa's market share on the market for the sale of advertising space on television to Mediahuis. Mediahuis will fully independently determine its own pricing policy. According to the Parties, Mediahuis is equipped for this as it is independent and qualified, financially sound and will be an actual competitor of the Parties in the market for the sale of advertising space on television.<sup>631</sup> Lastly, according to the Parties, the remedy is both feasible and monitorable.<sup>632</sup>

### 10.2.2 Outcome of the market test

523. ACM has presented the proposed remedies to the market. In doing so, it has approached a large number of market participants such as advertisers and media agencies. Most market participants addressed by ACM have provided a written response.
524. The market participants mostly responded negatively to the remedy proposal. With three neutral responses and two moderately positive responses, all market participants indicate that the Parties' remedy proposal will not solve the competition problem. In broad terms, these are the findings of the market participants:
- The relationship between the Parties and Mediahuis may lead to conflicts of interest;
  - RTL/Talpa will continue to determine the offer of GRPs on Talpa channels;
  - The Parties may transfer engaging content from Talpa channels to RTL channels;
  - The Parties continue to hold influence on the competitive position of Mediahuis, which heavily restricts Mediahuis in its options;
  - By means of the MG, RTL/Talpa is able to exert influence on Mediahuis' rates and can tailor its own rates accordingly;

<sup>627</sup> Commitment proposal on advertising – Version market test of January 5, 2023, with reference of ACM/IN/750802, Section 3.1 and 3.2.

<sup>628</sup> Commitment proposal on advertising – Version market test of January 5, 2023, with reference of ACM/IN/750802, Section 3.1 and 3.2.

<sup>629</sup> See the email of December 19, 2022, with reference ACM/IN/736018 and the Commitment proposal on advertising - market test version of January 5, 2023, with reference of ACM/IN/750802, Section 3.3.

<sup>630</sup> The Parties' email dated January 24, 2023, with reference ACM/IN/744429, note on safeguarding the quality of channels after the remedy.

<sup>631</sup> Commitment proposal on advertising – Version market test of January 5, 2023, with reference of ACM/IN/750802, Section 2 under a.

<sup>632</sup> Commitment proposal on advertising – Version market test of January 5, 2023, with reference of ACM/IN/750802, Section 2 under b.

- As a result of the MG, both RTL/Talpa and Mediahuis have no incentive to compete in terms of pricing;
- The MG and sales fees push up prices;
- It leads to a loss of incentive for content innovation;
- Concerns regarding monitorability of the agreements: complexity of the subject matter, many non-transparent agreements that could be circumvented by the Parties;
- Mediahuis lacks/may not be able to recruit the necessary expertise;
- Risk of exchanges of information and collusion (or tacit collusion) between Mediahuis and RTL/Talpa.

525. A number of market participants indicate that this remedy may be successful and monitorable with quite a few additional agreements, in which case the suggestion of a price ceiling is made.

### 10.2.3 ACM's assessment

526. ACM considers the remedy proposal insufficient to eliminate the competition problem observed in the market for the sale of advertising space on television. The market test confirms ACM's assessment.
527. The assessment framework, laid down in the remedies guidelines<sup>633</sup>, indicate that an acceptable remedy:
- unquestionably and fully eliminates the identified competition problems;
  - does not lead to a new competition problem;
  - is transparent and detailed and leaves no room for interpretation;
  - is monitorable and enforceable; and
  - entails no additional supervisory (or other) burdens.
528. The remedy proposal does not enable Mediahuis to compete with the Parties in an autonomous and independent manner. With that, the proposal does not unquestionably and fully eliminate the observed competition problem.
529. The Parties' remedy proposal is a behavioral remedy. Though some assets will be transferred to Mediahuis, Mediahuis continues to be a mere reseller of the advertisement broadcast time that remains in place with the Parties. The Parties and Mediahuis will form a contractual relationship.
530. ACM prefers structural remedies. Contrary to behavioral remedies, structural remedies change the structure of the market in a sustainable manner and, in principle, do not require any further supervision. Behavioral remedies, on the other hand, require an ongoing regulation of companies' behavior and will, as a rule, entail additional costs for ACM, e.g., supervisory charges. Monitoring compliance with behavioral remedies in particular can be problematic because behavioral remedies often leave room for interpretation in certain areas. Consequently, companies can undermine the effectiveness of remedies.<sup>634</sup>
531. For its competitive position in the market, Mediahuis will be dependent on the Parties. First, the Parties enforce a minimum turnover guarantee on Mediahuis via the MG. This enables them to exert influence on the rates applied by Mediahuis. After all, the MG prevents Mediahuis to apply rates below a certain level, unless Mediahuis is prepared to incur costs for this. The Parties thus know the lower limit Mediahuis can apply and they can use this knowledge for their own pricing and negotiations with purchasers of advertising space.
532. The extra link formed by Mediahuis will logically lead to additional costs and thus higher rates for purchasers of television advertising space. The Parties can use this knowledge in negotiations and

<sup>633</sup> ACM's 2007 remedies guidelines, [https://www.acm.nl/sites/default/files/old\\_publication/publicaties/11612\\_richtsnoeren-remedies-2007.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/11612_richtsnoeren-remedies-2007.pdf).

<sup>634</sup> 2007 remedies guidelines, marginal 15.

they lack any incentive to offer any advertising space below these higher rates set by Mediahuis. This reasonably also increases the rates charged by the Parties.

533. At the same time, the Parties maintain control of the GRP stock, which is a determining factor for the price. This, too, is a means for the Parties to exert influence on the price for advertising space on the Talpa channels.
534. Furthermore, Mediahuis continues to depend on the content broadcast by the Parties on the Talpa channels for the appeal of the television advertising space it sells. The guarantees offered by the Parties to maintain the level of quality of the Talpa channels are insufficient and open to interpretation, and consequently offer no certainty that Mediahuis can and will be a fully-fledged competitor of the Parties.
535. Currently, there are sales companies active in the field of selling advertising space for operators, while these sales companies exert no influence on programming. RTL's Ad Alliance is an example of this. A key difference with other sales companies is that in this case the channel operator is not only a client of the sales company, but also a major competitor in the area of selling advertising space (the Parties continue to make their own sales for the RTL channels), and it therefore has other incentives than the 'regular' operators that fully outsource sales. As a result, a contractual relationship between the Parties and a third party, Mediahuis, which is to perform the sales of advertising space for a number of the Parties' channels, will in any case involve risks in the area of (i) influencing the competitive behavior of Mediahuis, (ii) exchange of information and (iii) conflicts of interest between the Parties and Mediahuis.
536. The Parties maintain control of other types of advertising on the Talpa channels, while these sales are usually combined with the sales of advertisement broadcast time. This leads to additional dependency between Mediahuis and the Parties.
537. The proposal is insufficiently monitorable and enforceable for ACM due to the open standards in the proposal, the complexity and the two-sidedness of the market.
538. Also, due to the non-structural nature of the proposal, it is not clear in advance whether the identified competition problem will not still occur after the expiration of the term.

### 10.3 Remedies for the distribution of television channels

539. In this section, ACM assesses the Parties' remedy proposal pertaining to the competition problems observed in the market for the distribution of television channels. First, ACM describes the Parties' proposal, followed by the outcome of the market test. It concludes with its own assessment.

#### 10.3.1 The Parties' proposal

540. The Parties commit to negotiations with distributors for a period of five years at different moments of time to negotiate the distribution and retransmission fees of the RTL and Talpa packages, respectively. This will prevent the Parties from making a joint offer for the retransmission of the RTL and Talpa channels. It also means that negotiations on one channel package cannot influence the negotiations on the other channel package.<sup>635</sup>
541. The Parties have noted that, in their opinion, these proposals eliminate all possible competition concerns that may reasonably occur as a result of the proposed concentration.

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<sup>635</sup> The Parties' remedy proposal with regard to retransmission with reference ACM/IN/736018.

### 10.3.2 Outcome of the market test

542. ACM has presented the proposed remedies to the market. In doing so, it has approached a large number of market participants such as distributors and providers of television channels.<sup>636</sup> Most market participants addressed by ACM have provided a written response.
543. The market participants mostly responded negatively to the remedy proposal. Apart from two neutral responses, all market participants indicate that the Parties' remedy proposal is insufficient to solve the competition problem. In broad terms, these are the findings of the market participants:
- Distributors face a power block with which to negotiate after the proposed concentration. The remedy proposal does not detract from this;
  - The remedy proposal is neither enforceable nor monitorable;
  - The Parties can exploit insights from the negotiations for one group of television channels in the negotiations for the other group of television channels;
  - As far as these remedies would be effective, the suggested time frame is too short.
544. In addition, the market participants miss elements in the remedy proposal to prevent those price increases. They also miss elements that allow distributors a freedom of choice within the Parties' selection, with associated lower retransmission fees.

### 10.3.3 ACM's assessment on the remedy proposal for the distribution of television channels

545. The remedy proposal still enables the Parties to reinforce their negotiating position. With that, the proposal does not unquestionably and fully eliminate the observed competition problem, which is a relevant criterion as indicated in marginal 527.
546. The Parties' remedy proposal is a behavioral remedy, while ACM prefers structural remedies. As indicated in marginal 530, behavioral remedies require the additional burden of supervision and monitoring, and enforcing the suggested remedies may be problematic. With regard to the remedy proposal, the Parties maintain control of both channel groups, enabling the Parties to undermine the effectiveness of the remedies.
547. ACM is of the opinion that the proposal improves the Parties' outside option vis-à-vis the situation before the proposed concentration. After all, the Parties retain control over the closest competitor as far as television advertising is concerned. If the retransmission of some channels were to cease, consumers will switch to the other Parties' channels. This will enable the Parties to sustain their advertising reach, which improves their outside option. Consequently, the proposal does not unquestionably and fully eliminate the observed competition problem.
548. The proposal provides the Parties to gain and maintain insight into both negotiations and can de facto align them. Incentives also lapse in the battle for viewers, reducing competition in retransmission fees and ancillary rights.
549. The market test confirms ACM's analysis that the proposal does not eliminate the identified competition problem. The market participants observe that the proposal brings about no net change. As far as the proposal would at all be effective, different market participants observe that the suggested time frame is insufficient.

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<sup>636</sup> Commitment proposal on retransmission - market test version of December 19, 2022, with reference ACM/IN/736018.

## 10.4 Conclusion on remedy proposals

550. ACM establishes that the remedy proposals are insufficient to unquestionably and completely eliminate the competition problem identified in the market for the sale of advertising space on television and the wholesale market for the distribution of television channels.

## 11 Conclusion

551. RTL wants to take over Talpa. RTL and Talpa have submitted a license application with ACM thereto. ACM concludes that the notified operation falls within the scope of the merger control, as set out in Chapter 5 of the Dutch Competition Act.

552. ACM is of the opinion that if the proposed concentration were to be concluded, it will significantly impede the actual competition in the Dutch market or a part thereof. For this reason, ACM has decided not to grant a license.

553. In 2011, ACM approved SBS' acquisition of Sanoma under conditions.<sup>637</sup> The conditions to this decision from 2011, which Talpa Holding still needs to comply with, continue to apply.

The Hague, March 3, 2023

Netherlands Authority for Consumers and Markets,  
on its behalf:

T.M. Snoep  
Chairman of the Board

*If you are an interested party, you can lodge an appeal against this decision. Send your appeal with reasons to the District Court of Rotterdam, Administrative Law Sector, P.O. Box 50951, 3007 BM Rotterdam . You must do this within six weeks of the day on which this Decision was announced. More information about the appeal procedure can be found at [www.rechtspraak.nl](http://www.rechtspraak.nl).*

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<sup>637</sup> See the Decision of ACM of July 22, 2011 in case 7185/Sanoma – SBS, item 129. One of the conditions from this decision is that Talpa Holding may not take an interest in RTL, as long as it has an interest in SBS.



## Annex:

## B.1. Introduction

1. In this Annex, ACM provides a technical description of the economic analyses performed to substantiate the assessment of the proposed RTL - Talpa concentration. The focus is on the presentation of the models used and the underlying assumptions. The conclusions and the assessment of the concentration are discussed in the main text of the Decision.
2. ACM has performed a number of quantitative analyses as described in Chapters 7 and 8 of the Decision:
  - An estimate of a nested logit model for the demand for television advertising based on volumes and prices of television advertisements of Ad Alliance, Talpa and Ster and online advertising prices of market participants. See Section 7.4.3.2.
  - An approximation of the costs associated with the offering of television advertisements on the basis of data on procurement costs of the Parties' content. See Section 7.4.2.
  - The outcomes of abovementioned analyses are used for a critical loss analysis to define the market for television advertising. See Section 7.4.3.2.
  - A merger simulation using the estimated nested logit demand model, the cost model and the Bertrand model of competition to estimate the price effects of the proposed concentration. See Section 7.6.3.3.
  - An approximation of the parameters of the game theoretical negotiation model for the distribution market on the basis of data on retransmission fees of RTL, Talpa, NPO and a number of other market participants. See Section 8.3.3.

*Application of AIDS model not possible*

3. In addition to the abovementioned analyses, ACM has attempted to also estimate the price elasticity of the demand for television advertising space via another means by making use of the AIDS model. However, this proved to be unsuccessful, due to a lack of useful sufficient data.
4. ACM attempted to collect a data set of advertising expenditure by surveying a number of media agencies. Based on these data, ACM attempted to estimate a demand model using the AIDS model<sup>638</sup> that can include the development in volumes and prices of the most common types of advertising, i.e., print, out-of-home, radio, television and digital. However, it turned out that only two out of four media agencies were able to produce a data set comprising all channels. One of the data sets that had been submitted, showed only a limited portion of their clients' data. This raises questions as to the representativeness of the data set. Also, within this dataset, the share of advertising expenditures appears to be very small. ACM therefore does not deem the dataset received to be appropriate for drawing reliable conclusions on the substitution patterns between the different media channels. The results of the AIDS model are thus not used in the assessment and therefore not further discussed in this Annex.

*Structure of this document*

5. This document is structured as follows:
  - Chapter B.2 discusses the estimate of different versions of the demand models. This analysis provides the price elasticities used as inputs in the critical loss analysis and in the merger simulation;
  - Chapter B.3 discusses the estimate of the cost model for the production of advertising space for the benefit of the critical loss analysis and the merger simulation;
  - Chapter B.4 discusses the critical loss analysis to define the advertising market;
  - Chapter B.5 discusses the merger simulation for the advertising market and the anticipated price effects of the proposed concentration;

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<sup>638</sup> See Deaton, A., & Muellbauer, J. (1980). An almost ideal demand system. *The American Economic Review*, 70(3), 312-326.

- Chapter B.6 discusses the negotiation model for the distribution market; and
- Chapter B.7 responds to the points of criticisms expressed by the Parties that were not fully addressed in the Decision on account of the technical nature of these points.

## B.2. Models for the demand for television advertising

### B.2.1 Introduction

6. ACM performed a critical loss analysis for the purpose of answering the question of whether television advertisements form a market of their own. On the one hand, this requires an estimate of the price elasticity, and, on the other hand, the possible cost savings. In this Chapter, ACM explains how it estimated the price elasticity. To determine the price elasticity, ACM primarily made use of two models: a multinomial logit model and a nested logit model. These models are explained below.

### B.2.2 Modes used

#### B.2.2.1 The multinomial logit model

7. The multinomial logit model (MNL) is a widely used empirical model for estimating demand for heterogeneous goods.<sup>639</sup> The principle idea behind the model is that each product creates a certain amount of utility for the customer. This utility is influenced by prices and product characteristics as well as by individual-specific preferences. Customers choose the product version that provides the most utility and thus best matches their preferences. Adding up the individual choices across products ultimately leads to the market-wide demand for the various products.
8. In the context of television advertising, the model presumes that advertisers can choose between four products: an television advertisement from RTL, from Talpa or from Ster or from an outside option<sup>640</sup>. The utility of a given product  $i$  for an advertiser is indicated by

$$U_i = u_i - \alpha p_i + \epsilon_i, (1)$$

whereby  $u_i$  is the basic utility of product  $i$ ,  $p_i$  is the price of product  $i$ ,  $\alpha$  is a parameter for price sensitivity and  $\epsilon_i$  contains an error term representing the effect of unobserved product characteristics and advertisers' differences in preferences. According to the model, the demand for television advertising space at RTL, Talpa and Ster, or for the outside option, therefore depends on the basic level, the price and individual differences.

9. Under the assumption that  $u_i$  follows a Gumbel distribution, the probability that product  $i$  is chosen is denoted by

$$P_i = \frac{\exp(u_i - \alpha p_i)}{\sum_j \exp(u_j - \alpha p_j)}. (2)$$

10. In aggregate applications, the probability  $P_i$  equals share  $s_i$  indicating the proportion of total demand for all products combined that belongs to product  $i$ , or the market share of product  $i$ . After normalizing the utility level of the outside option to 0 and some calculations, (2) leads to the following:

$$\log(s_i) - \log(s_0) = u_i - \alpha p_i, (3)$$

whereby  $s_0$  is the share of the outside option. This formulation shows that the outside option functions as a reference point: the utility of product  $i$  is actually the additional utility relative to the outside option.

<sup>639</sup> See, for example Gandhi, A., & Nevo, A. (2021). Empirical models of demand and supply in differentiated products industries. In *Handbook of Industrial Organization* Vol. 4, No. 1, pages 63-139. Elsevier; Chapter 5.4 in Belleflamme, P., & Peitz M. (2015). *Industrial organization: markets and strategies*. Cambridge University Press, and further references in this Chapter of this Annex.

<sup>640</sup> This outside option contains all other advertising channels and the option of whether or not to advertise.

11. The estimate of price sensitivity parameter  $\alpha$  can be used to calculate the market-wide price elasticity. ACM uses the formula derived from Werden and Froeb (1994)<sup>641</sup>:

$$\varepsilon = \alpha \bar{p} s_0, \quad (4)$$

where  $\alpha$  is the estimated price coefficient in (3),  $\bar{p}$  is the weighted average price and  $s_0$  is the share of the outside option. This price elasticity is then used as input in the critical loss analysis and in the merger simulation.

### B.2.2.2 The nested logit model

12. A feature of the MNL model is that each choice is an equal substitute for the other choices. Indeed, the core assumption of the MNL model is that the unobserved utility from alternative  $i$  i.i.d. is extreme value distributed, so the logit probabilities and elasticities are given as presented in Section B.2.2.1.
13. In order to take into account that certain options are closer substitutes than others, Generalized Extreme Value (GEV) models can be used of which the nested logit model (NL) is the best-known example. See, for example, Train, 2009<sup>642</sup>). The NL model allows a correlation between the  $\epsilon_i$ s of certain alternatives. This correlation leads to the relevant alternatives being closer substitutes, i.e., customers switch to a greater extent to alternatives with correlated  $\epsilon_i$  than to other alternatives. The NL model divides the alternatives in groups, the so-called nests.
14. The utility of a consumer from alternative  $i$  can still be denoted as:

$$U_i = u_i - \alpha p_i + \epsilon_i = V_i + \epsilon_i. \quad (5)$$

15. In an NL model, we make a different assumption about the distribution of the unobservable part of the utility ( $\epsilon_i$ ). Alternatives  $i$  are distributed among  $K$  nests  $B_k$ , whereby  $k = \{1, \dots, K\}$  and the distribution of  $\epsilon_i$  is generated by:

$$\exp\left(-\sum_{k=1}^K \left(\sum_{j \in B_k} e^{-\frac{\epsilon_j}{1-\lambda}}\right)^{1-\lambda}\right). \quad (6)$$

16. Parameter  $\lambda$  approximates the degree of correlation within each nest  $k$  (between  $\epsilon_j$ ,  $j \in B_k$ ). See McFadden (1978). ACM adheres to the parametrization of McFadden (1981), Berry (1994), Verboven (1996) and Cardell (1997), among others<sup>643</sup> to be consistent with the literature on estimating demands by means of NL models. The nesting parameter is defined as  $1 - \lambda$  (therefore not as  $\lambda$ , see Train, 2009, amongst others).

17. The likelihood of a consumer choosing alternative  $i$  based on the above distribution of  $\epsilon_i$ , is:

$$P_i = \frac{e^{\frac{V_i}{1-\lambda}} \left(\sum_{j \in B_k} e^{\frac{V_j}{1-\lambda}}\right)^\lambda}{\sum_{l=1}^K \left(\sum_{j \in B_l} e^{\frac{V_j}{1-\lambda}}\right)^{1-\lambda}}. \quad (7)$$

As in the MNL model, this probability is considered as market share  $s_i$  of product  $i$ .

<sup>641</sup> Werden, G. J. and Froeb, L. M. (1994). The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy. *The Journal of Law, Economics, and Organization*, 10(2), 407-426.

<sup>642</sup> Train, K. E. (2009). *Discrete choice methods with simulation*. Cambridge University Press.

<sup>643</sup> McFadden, D. (1981). Econometric models of probabilistic choice. Structural analysis of discrete data with econometric applications, 198272.

Berry, S. T. (1994). Estimating discrete-choice models of product differentiation. *The RAND Journal of Economics*, 242-262.

Verboven, F. (1996). International price discrimination in the European car market. *The RAND Journal of Economics*, 240-268.

Cardell, N. S. (1997). Variance components structures for the extreme-value and logistic distributions with application to models of heterogeneity. *Econometric Theory*, 13(2), 185-213.

18. If  $\lambda = 0$  (no correlation within a nest), NL reduces it to an MNL. If  $\lambda \rightarrow 1$  the nested logit approximates the 'elimination by aspects' model of Tversky (1972)<sup>644</sup>. Only values of  $\lambda$  between 0 and 1 are consistent with the utility maximization interpretation of the nested logit model for all values of  $V_i$ .

19. Nests can consist of multiple levels, i.e., sub nests can be defined within nests. In what follows, ACM assumes one single set of nests creating two levels of choice: i) a choice for a nest of alternatives, and ii) a choice for an alternative within the selected nest. This structure makes it possible to consider the nested logit model as a combination of two MNL models. The consumers' utility  $n$  from alternative  $i$  can be divided in the utility of attributes associated with the nest and the attributes of the alternative. This can be presented as follows:

$$U_i = W_k + Y_i + \epsilon_i, \quad i \in B_k$$

where  $W_k$  is the utility of the attributes of nest  $B_k$  and  $Y_i$  is the utility of the attributes of alternative  $i$ .

20. It follows that likelihood  $P_i$  can be viewed as the product of two likelihoods:

$$P_i = P_{i|B_k} P_{B_k}$$

where  $P_{B_k}$  is the likelihood of consumer  $n$  choosing a product within nest  $B_k$  and  $P_{i|B_k}$  is the likelihood that product  $i \in B_k$  is selected given the choice for nest  $B_k$ . The latter likelihood is thus conditional.

21. The marginal and conditional likelihoods,  $P_{B_k}$  and  $P_{i|B_k}$ , respectively, are defined as follows:

$$P_{B_k} = \frac{e^{W_k + (1-\lambda)I_k}}{\sum_{l=1}^K e^{W_l + (1-\lambda)I_l}}$$

$$P_{i|B_k} = \frac{e^{\frac{Y_i}{1-\lambda_k}}}{\sum_{j \in B_k} e^{\frac{Y_j}{1-\lambda_k}}}$$

where

$$I_k = \ln \sum_{j \in B_k} e^{\frac{Y_j}{1-\lambda_k}}$$

22. The nested logit can thus be viewed as two MNL models: one for choosing a nest and one for choosing an alternative within the chosen nest. Value  $I_k$ , which connects the two models, is often referred to as the inclusive value.  $I_k$  is the logarithm of the denominator of the marginal likelihood  $P_{i|B_k}$  and can be interpreted as the expected utility of the choice for an alternative from nest  $B_k$ .

23. The NL model provides different price elasticities than the MNL model. In case of a nested logit model, the personal elasticity of product is  $i$  if the price  $p_i$  changes equal to:

$$\varepsilon_{ii} = \left( \frac{1}{1-\lambda} - \frac{\lambda}{1-\lambda} s_{i|B_k} - s_i \right) \alpha p_i, \quad (8)$$

whereby  $s_{i|B_k}$  is the share of product  $i$  within nest  $B_k$ .

24. The cross elasticity to product  $i$  as the price of product  $j$ ,  $p_j$ , changes is equal to:

$$\varepsilon_{ij} = \begin{cases} -\left( \frac{\lambda}{1-\lambda} s_{j|B_k} + s_j \right) \alpha p_j, & \text{if } i, j \in B_k \\ -\alpha s_j p_j, & \text{if } i \in B_k, j \notin B_k \end{cases}. \quad (9)$$

25. The market-wide elasticity can still be calculated by using formula (4). That means that the market-wide elasticity does not depend on the value of the nesting parameter but that it is fully determined by

<sup>644</sup> Tversky, A. (1972). Elimination by aspects: A theory of choice. *Psychological review*, 79(4), 281.



price sensitivity, prices and the size of the outside option. The own- and cross-price elasticities in formulas (8) and (9) are relevant to the merger simulation.

26. Formula (9) shows that the substitution between products belonging to the same nest score higher than products from different nests. The size of the substitution between products from the same nest depends on the estimated value of parameter  $\lambda$ . This is an empirical question. It is important to note that ACM does not determine or influence this value in advance. If the estimate for  $\lambda$  is not statistically significant, the conclusion can be drawn that the nests are not relevant (i.e., substitution within a nest is not greater than substitution between nests).
27. ACM proceeds from one single nest for television advertisements at RTL, Talpa and Ster and a separate nest for the outside option. This structure means that television advertising at the different broadcasters can serve as better substitutes for one another than the outside option. This choice is motivated by the findings from the qualitative research and, as shown by Section B.2.5, supported by data.

### B.2.3 Data

28. ACM requested data from the Parties and Ster on monthly turnover, prices, delivered GRPs and broadcast seconds of television advertisements per target audience over the period January 2017 up to and including December 2021. Although the data set is at the level of target audiences, the price and the GRP are converted to the largest target audience<sup>645</sup> and ACM has aggregated the data across the different target audiences.<sup>646</sup> The price is normalized at the length of a 30-second spot and a standard spot length of 30" is also used for the GRPs.<sup>647</sup>
29. In addition to the data from the Parties and Ster, ACM also uses a data set on ratings per channel, received from the Dutch viewer audience measurement service (SKO). This data set contains monthly data on audience share, catch-up TV share and the average number of viewers per channel for the period January 2016 up to and including December 2021. The audience share is defined as the percentage of the target audience (6+ in this data set) that watched the channel on average. The audience share is determined per second and averaged over the day. The variables have two versions: one covers the whole day, while the other variable focuses on prime time (6 p.m. to midnight). These variables are used to correct the endogeneity problem, which is further explained in Section B.2.5.
30. ACM furthermore uses the nested logit model online prices of Google to serve as additional control variables to check the robustness of the results. This data set comprises monthly average net prices of different types of advertisements on YouTube and Google Search for the period January 2017 up to and including December 2021. The dataset is composed of data from advertisers with a billing address in the Netherlands.

### B.2.4 Estimate

31. ACM estimates the MNL model in the form presented by (3). It explains  $\log(s_i) - \log(s_0)$  by means of the following variables: price broadcaster dummies and monthly fixed effects (for each year-month

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<sup>645</sup> Converting GRPs means the following. For an advertisement that focuses on a specific target audience A, it is calculated how many GRPs the advertisement generates among the *largest* target audience. All GRP figures are thus expressed in terms of the largest target audience. This conversion is done by the Parties and Ster themselves. The GRPs cannot be summed across target audiences, because they are about 1% of a given target audience, so it requires a conversion to the largest target audience to aggregate the data.

<sup>646</sup> ACM originally wanted to estimate a model at target audience level. However, it observed that the broadcasters apply slightly different definitions of target audiences. The different target audiences cannot be uniformly linked, and there have also been changes in target audience definitions over the years. An analysis at target audience level is thus not feasible, which is why ACM estimates an aggregated version of the model.

<sup>647</sup> In RTL's original data set, the GRP figures are not normalized to 30". Given the fact that the data of Talpa and Ster are normalized to 30", ACM normalized the original GRP figures of RTL in a converted data set in order to have a consistent data set. The normalized GRPs are calculated as revenue divided by the price for each month. By this method, the GRP figures follow the same normalization as the price.

combination) to control for exogenous developments that affect market-wide demand for television advertisements.

#### B.2.4.1 Correction for endogeneity

32. There may be endogeneity that means that no conclusions can be drawn from the estimation results. ACM uses instrumental variables to correct for the potential endogeneity of prices.
33. There may be endogeneity because of the following two reasons<sup>648</sup>: First, because the marginal costs, which co-determine the price, are affected by non-observed developments associated with non-observed developments in the demand for advertising. It may be that advertisers want to purchase more advertisements at certain broadcasters in certain periods of time, for example, owing to specific content or other unobserved factors. If these factors are known to broadcasters, they will translate these into the chosen margin and therefore also the price. Such correlation in factors affecting demand and price could create an endogeneity issue. It is not plausible in this market that the marginal costs change from month to month, which is why this first reason of endogeneity (by means of the marginal costs) is not relevant in this market.
34. Secondly, the margin, which co-determines the price, is affected by unobserved developments associated with unobserved developments in the demand for advertisements on television. This form of endogeneity based on margins, as opposed to on marginal costs, is frequently discussed in economic literature<sup>649</sup>.
35. An estimate with instrumental variables can be used to correct for endogeneity. So-called markup-shifters<sup>650</sup> are suitable instruments for this. Markup-shifters can be derived from the first-order conditions of a company's profit-maximization problem, as margins (as well as prices) come about in competition with other companies in the market. The competitive pressure emanating from these competing products then helps to determine the profit-maximizing margin (and thus also the price). Functions of characteristics of competing products are used as tools to approximate the influence of these competitive pressures to resolve endogeneity.<sup>651</sup>
36. When choosing instruments, care should be taken that the instruments are solid. The econometric literature has identified risks for bias due to the use of weak instruments<sup>652</sup>. Andrews and Armstrong (2017) and Angrist and Kolesár (2021)<sup>653</sup> suggest to only use instruments with an expected sign. Determining the expected sign for instruments is conceivable in many situations<sup>654</sup>.

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<sup>648</sup> Factors that influence the total demand for television advertising are already corrected by the monthly fixed effects.

<sup>649</sup> See, for example:

Nevo, A. (2001). Measuring market power in the ready-to-eat cereal industry. *Econometrica*, 69(2), 307-342.

Villas-Boas, S. B. (2007). Vertical relationships between manufacturers and retailers: Inference with limited data. *The Review of Economic Studies*, 74(2), 625-652.

Miller, N. H., & Weinberg, M. C. (2017). Understanding the price effects of the MillerCoors joint venture. *Econometrica*, 85(6), 1763-1791.

<sup>650</sup> See, for example Berry (1994).

<sup>651</sup> See, for example:

Berry, S. T. (1994). Estimating discrete-choice models of product differentiation. *The RAND Journal of Economics*, 242-262.

Berry, S., Levinsohn, J., & Pakes, A. (1995). Automobile prices in market equilibrium. *Econometrica*, 841-890.

Gandhi, A., & Nevo, A. (2021). Empirical models of demand and supply in differentiated products industries. In *Handbook of Industrial Organization* (Vol. 4, No. 1, pages 63-139). Elsevier.

<sup>652</sup> See, for example, the following articles and references in them:

Andrews, I., & Armstrong, T. B. (2017). Unbiased instrumental variables estimation under known first-stage sign. *Quantitative Economics*, 8(2), 479-503.

Angrist, J., & Kolesár, M. (2021). One instrument to rule them all: The bias and coverage of just-id iv (No. w29417). National Bureau of Economic Research.

Stock, J., & Yogo, M. (2005). Asymptotic distributions of instrumental variables statistics with many instruments. *Identification and inference for econometric models: Essays in honor of Thomas Rothenberg*, 6, 109-120.

<sup>653</sup> See footnote 649 for the references.

<sup>654</sup> See, for example:

Angrist, J. D., & Krueger, A. B. (1991). Does compulsory school attendance affect schooling and earnings?. *The Quarterly Journal of Economics*, 106(4), 979-1014.

Imbens, G. W., & Angrist, J. D. (1994). Identification and Estimation of Local Average Treatment Effects. *Econometrica*, 62(2), 467-475.

37. ACM uses the audience share figures of SKO as a characteristic of a product.<sup>655</sup> ACM particularly applies the following features of the audience share figures:
- The sum of audience share of the competitive broadcasters in the previous month;<sup>656</sup>
  - the sum of the audience share of external broadcasters (third parties) at the same sales house in the previous month.
38. In addition to the abovementioned instruments, ACM also makes use of the changes in the establishment of equilibrium and in doing so follows Miller and Weinberg (2017) and Porter (1983)<sup>657</sup>. Specifically, ACM uses dummies for changes in Ster's price policies as of 2018, the acquisition of BrandDeli by Ad Alliance as of 2019 and the inclusion of third-party channels in Talpa's portfolio as of 2020. All these developments have affected the price setting of the providers in this market from the supply side of the market and have no direct impact on demand. These are thus valid instruments.

#### B.2.4.2 Model specification

39. ACM estimates the following regression for the MNL model:

$$\log(s_i) - \log(s_0) = \alpha_1 p_i + \beta \text{month dummies} + \gamma \text{broadcaster dummies} + \varepsilon_i, \quad (10)$$

where different instruments are used to estimate price parameter  $\alpha_1$ .

40. The NL model is estimated in two steps based on the division of likelihoods explained in marginal 20 of this Annex:

$$\log(s_{i|B_k}) - \log(s_{1|B_k}) = \alpha_1(p_i - p_1) + \beta \text{month dummies} + \gamma \text{broadcaster dummies} + \varepsilon_i, \quad (11)$$

$$\log(s_{B_k}) - \log(s_0) = \alpha_0 + (1 - \lambda_k)I_k + \delta \text{online prices} + \varepsilon_i$$

41. The conditional likelihoods model does not contain an outside option because it does not belong in nest  $B_k$ . That is why one of the broadcasters chose alternative ( $i = 1$ ) as a reference in a nest for identification purposes of the parameters.
42. The nest selection model does not include month dummies because there is only one nest and thus no variation is left otherwise. ACM does use the online prices of Google to approximate the potential competitive pressure from outside the nest. ACM observes that the correction for the developments in the outside option captured by the month dummies does feed through to the estimate of the price parameter in the first step.
43. An alternative method is to expand the model (10) with conditional share  $s_{i|B_k}$  such as in Verboven (1996). However, conditional share  $s_{i|B_k}$  is endogenous. ACM thus follows Verboven (1996) and uses features of characteristics of competitive products within the nest as an instrument. This second method is meant as a robustness check to make sure that the estimate of the nesting parameter is not driven by unobserved developments in the outside option.

Heckman, J. J., Urzua, S., & Vytlacil, E. (2006). Understanding instrumental variables in models with essential heterogeneity. *The Review of Economics and Statistics*, 88(3), 389-432.

<sup>655</sup> ACM uses those audience share figures that are based on whole days. The results would not substantially change if the figures were used on prime time given that the correlation between the two versions is very high: at least 0.93 for all three broadcasters.

<sup>656</sup> The reason for the use of audience share figures of the previous month is that these figures are available in determining the price for the current month.

<sup>657</sup> Miller, N. H., & Weinberg, M. C. (2017). Understanding the price effects of the MillerCoors joint venture. *Econometrica*, 85(6), 1763-1791.

Porter, R. H. (1983). A study of cartel stability: the Joint Executive Committee, 1880-1886. *The Bell Journal of Economics*, 301-314.

44. The inclusion of the month and broadcasting dummies only leaves variation in relative prices and shares to identify both the price parameter and the nesting parameter. It appears that the use of the same set of instruments prevents both parameters to be reliably estimated at the same time. ACM thus uses the estimated price parameter from the MNL model to deduct the variation explained by price differences from  $y_i$ . The remaining variation is then used to identify the nesting parameter.
45. Both methods make use of several follow-up steps. The resulting standard errors based on models with estimated inputs are not valid because uncertainty surrounding the values of these inputs is not taken into account. That is why ACM makes use of bootstrapping to consistently estimate the standard errors.
46. As further explained in Sections B.2.5 and B.5.3 both methods deliver plausible results.

### **B.2.5 Results**

47. To determine the results, ACM uses the standard 2SLS estimation method, where first the price is explained by the instruments (first-stage regression) and then the portion of prices explained by the instruments is used in the main regression.

#### **B.2.5.1 First-stage regression**

48. Table B1 shows the results of the regression of the price (endogenous variable) on all exogenous variables (columns (1) and (2)). As discussed above, in the estimation model of the nested logit model, which serves as a robustness analysis, the share within the nest is also endogenous. ACM also reports the results of the regression of this variable on the exogenous variables in columns (3) and (4).
49. ACM finds that only the sum of characteristics of competing products and the dummy for changes in Ster's price policies are statistically significant for the price. The two parameters also have the expected sign, which is an prerequisite to prevent the use of weak instruments. See marginal 36 of this Annex. Better competitor performance is expected to create more competitive pressure and thus leading to lower prices. A negative sign is thus logical. Ster's price policy involved the termination of negotiations and the change of the target audience definitions. The estimated sign is in line with the public observations in the media<sup>658</sup>. The change is also evident in the price and sales trends at Ster. In response to these results, ACM continues to use these two instruments with significant parameters with a logical sign (column (2)) and uses the full set of instruments (column (1)) as a means to check the level of robustness. ACM handles the conditional share in the nested logit model in a similar fashion. ACM observes that this conditional share is inherently endogenous in the NL model and a logical sign for this exogenous variable can thus not be provided. As a consequence, the instruments in column (4) are selected purely on the basis of statistical significance.

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<sup>658</sup> See, for example: [STER's 2018 Commercial policy - Zuiver Media](#)

Table B1 First-stage results

	Price		Conditional share	
	(1)	(2)	(3)	(4)
<b>Sum of the competitors' audience share (T statistics)</b>	-42.547 (3.11)	-30.093 (3.47)	-0.097 (2.66)	-0.099 (2.69)
<b>Sum of the audience share of in-house products (T statistics)</b>	-6.442 (0.28)	-	-0.123 (1.77)	-0.186 (4.45)
<b>Ster's price policy (T statistics)</b>	190.649 (11.54)	188.544 (12.86)	-0.264 (6.74)	-0.289 (8.18)
<b>Acquisition of BrandDeli (T statistics)</b>	-18.966 (0.73)	-	-0.092 (1.10)	-
<b>Talpa's extra channels (T statistics)</b>	14.043 (0.81)	-	-0.069 (1.55)	-
<b>Broadcaster FE</b>	YES	YES	YES	YES
<b>Month FE</b>	YES	YES	YES	YES
<b>Kleibergen-Paap F statistics</b>	37.05	97.62	28.69	46.26
<b>#observations</b>	<b>177</b>	<b>177</b>	<b>177</b>	<b>177</b>

Source: sales data RTL, Talpa and Ster, audience share data from SKO and estimates and calculations by ACM

### B.2.5.2 MNL model

#### B.2.5.2.1 The outside option

50. As discussed in Section B.2.2., the market-wide elasticity does not solely depend on price sensitivity parameter  $\alpha$  but also on the share of outside option  $s_0$ , see formula (4). Below, ACM explains how it determined the size of the outside option.
51. Television advertisements have a 20%-share of all advertising expenditure according to market-wide annual reports.<sup>659</sup> This means that the outside option in the MNL model should have a share of 80%. This is an overestimate, however. In fact, the relevant question for the market definition is the extent to which *television advertisers* regard the other advertising channels as substitutes. Consequently, the outside option should thus also have to align with the television advertisers' choices. Market-wide annual reports, however, are also influenced by the choice of advertisers who do not consider television advertising an option and mainly opt for online advertising. Setting the expenditures of these advertisers aside, the market share of television advertisements becomes higher and the share of the outside option falls below 80%.<sup>660</sup>
52. The MNL model hypothesizes that the outside option is as much a substitute for television advertising at one of the channels (also referred to as broadcasters) as a television advertisement at another broadcaster. See marginal 12 of this Annex. This limitation affects the results, which is reinforced by

<sup>659</sup> Source: in-house calculation with data from the 2021 Screenforce TV Annual Report, 2020 Digital Advertising Spend The Netherlands (Deloitte) and Digital advertising spending in the Netherlands from 2012 to 2021 (Statista.com).

<sup>660</sup> Oxera's survey data can be used to calculate how much of their budget television advertisers spend on television advertisements. This percentage is about 27.9%. As a comparison, the budget share of television is 19.3% if we consider all respondents of the Oxera survey.



an overestimation of the outside option. In line with the results from the qualitative analysis (see Section 7.3 in the Decision), ACM deems television advertising to be a closer substitute for each other than for the alternative forms of advertising. Giving equal consideration to all advertisements in the MNL model thus means that the competitive pressure of the outside option is overestimated.

53. The outside option, however, should also include the option not to advertise. The share should therefore not only be based on purchased advertisements. Failing to include this in the data may lead to an underestimation of the competitive pressure of the outside option. It is unknown whether or when advertisers decide not to advertise as only the advertising expenditures are registered.
54. In ACM's opinion, the two effects above outweigh one another. In its calculations with the MNL model, ACM proceeds from a market potential of 7 million GRPs for safety's sake, which is an outside option share of 83% in 2021.
55. The use of a large outside option is standard practice in the empirical literature<sup>661</sup>. Also specifically for modeling demand for television advertising, academics assume models based only on data on television advertising expenditure<sup>662</sup> with a large outside option.

#### B.2.5.2.2 Estimated results

56. Table B2 summarizes the results of the estimate of the MNL model. Columns (2) and (3) belong to different combinations of the potential instruments according to Table B1. ACM considers column (3) to be the main specification. Price coefficient  $\alpha$  in the first line is estimated to be higher in absolute value than in column (1) with OLS, in line with the expectations on the course of the bias caused by endogeneity. The F statistics indicate that the instruments used are solid enough to correct for endogeneity.

**Table B2 Estimated results of the MNL model**

	(1)	(2)	(3)
<b>Price sensitivity (x100)</b>	-0.117	-0.146	-0.157
<b>(T statistics)</b>	(6.38)	(10.02)	(11.91)
<b>Broadcaster FE</b>	YES	YES	YES
<b>Month FE</b>	YES	YES	YES
<b>Estimation method</b>	OLS	2SLS	2SLS
<b>Instruments</b>	-	Table B1 (1)	Table B1 (2)
<b>Kleibergen-Paap F statistics</b>	-	37.05	97.62
<b>#observations</b>	180	177	177
<b>Market-wide elasticity (2021 data, <math>s_0 = 0.83</math>)</b>	-0.61	-0.76	-0.85
<b>Market-wide elasticity (2021 data, <math>s_0 = 0.99</math>)</b>		-0.90	-0.97

Source: sales data RTL, Taipa and Ster, audience share data from SKO and estimates and calculations by ACM

<sup>661</sup> See, for example: Ivaldi, M., & Verboven, F. (2005). Quantifying the effects from horizontal mergers in European competition policy. *International Journal of Industrial Organization*, 23(9-10), 669-691, which applies an outside option with a market share of 75%.

<sup>662</sup> Ivaldi, M., & Zhang, J. (2021). Simulating media platform mergers. *International Journal of Industrial Organization*, 79, 102729. Ivaldi, M., & Zhang, J. (2022). Platform mergers: Lessons from a case in the digital tv market. *The Journal of Industrial Economics*, 70(3), 591-630.

### B.2.5.3 NL model

57. The NL model below explicitly includes the difference between substitution between television advertising and other forms of advertising. See marginal 13 of this Annex. The argument in marginal 52 of this Annex therefore no longer applies and another choice for the size of the outside option is therefore evident. ACM assumes a highly conservative scenario with  $s_0 = 0.99$ , resulting in the total market potential of 100 million GRPs.<sup>663</sup>
58. Table B3 summarizes the results of the NL model's estimate. Columns (1), (2) and (3) use all available instruments for price. Columns (4), (5) and (6) are estimated by using the selection of instruments that are statistically significant and have a logical sign (column (2) in Table B1).

**Table B3 Estimated results of the NL model**

	(1)	(2)	(3)	(4)	(5)	(6)
<b>Price sensitivity (x100)</b>	-0.146	-0.146	-0.146	-0.157	-0.157	-0.157
<b>(T statistics)</b>	(5.69)	(5.69)	(5.69)	(6.87)	(6.87)	(6.87)
$1 - \lambda_k$	0.706	0.470	0.738	0.707	0.473	0.740
<b>(T statistics)</b>	(10.93)	(7.24)	(11.97)	(10.95)	(7.29)	(12.01)
<b>CPM Price YouTube video</b>		-0.035			-0.035	
<b>(T statistics)</b>		(0.35)			(0.34)	
<b>CPM Price YouTube video non-skippable</b>		-0.095			-0.094	
<b>(T statistics)</b>		(1.10)			(1.36)	
<b>CPM Price YouTube video skippable</b>		0.226	0.250		0.228	0.250
<b>(T statistics)</b>		(1.35)	(2.38)		(1.36)	(2.39)
<b>CPM Price YouTube in-display video</b>		0.126			0.126	
<b>(T statistics)</b>		(1.71)			(1.71)	
<b>CPM Price YouTube display</b>		-0.073			-0.074	
<b>(T statistics)</b>		(0.50)			(0.51)	
<b>CPC Price Google Search</b>		-0.091			-0.090	
<b>(T statistics)</b>		(0.44)			(0.44)	
<b>Broadcaster FE</b>	YES	YES	YES	YES	YES	YES
<b>Month FE</b>	YES	YES	YES	YES	YES	YES
<b>Price instruments</b>	Table B1 (1)			Table B1 (2)		
<b>#observations</b>	180	180	180	180	180	180
<b>Market-wide elasticity (2021 data, <math>s_0 = 0.99</math>)</b>	-0.90	-0.90	-0.90	-0.97	-0.97	-0.97

Source: sales data RTL, Talpa and Ster, audience share data from SKO and estimates and calculations by ACM

59. These estimated results are used in the critical loss analysis in Chapter B.4. As clearly shown by the values of the market-wide elasticity in Tables B2 and B3 and formula (4), the market definition does not depend on the value of the nesting parameter. Realistically estimating relative competitive pressure within the nest as made possible by the NL model is relevant however for the merger simulation (Chapter B.5) because the competitive pressure experienced by individual companies is decisive for the price effects.
60. Table B4 shows the results of the robustness checks with an alternative estimation method. The results do not materially deviate from those in Table B3.

<sup>663</sup> This scenario is to the advantage of the Parties: the larger the outside option is, the greater the associated competitive pressure.

**Table B4 Robustness checks NL model (derived from the MNL price parameter)**

	(1)	(2)	(3)	(4)
<b>Price sensitivity (x100)</b>	-0.146	-0.146	-0.157	-0.157
<b>(T statistics)</b>	(5.69)	(5.69)	(6.87)	(6.87)
<b>Nesting parameter (<math>\lambda_k</math>)</b>	0.390	0.378	0.343	0.331
<b>(T statistics)</b>	(2.65)	(2.47)	(2.48)	(2.24)
<b>Broadcaster FE</b>	YES	YES	YES	YES
<b>Month FE</b>	YES	YES	YES	YES
<b>Price instruments</b>	Table B1 (1)		Table B1 (2)	
<b>Nest instruments</b>	Table B1 (3)	Table B1 (4)	Table B1 (3)	Table B1 (4)
<b>#observations</b>	177	177	177	177
<b>Market-wide elasticity (2021 data, <math>s_0 = 0.99</math>)</b>	-0.90	-0.90	-0.90	-0.97

Source: sales data RTL, Talpa and Ster, audience share data from SKO and estimates and calculations by ACM

61. The estimates of all nested logit demand model specifications performed indicate that the substitution within the nest consisting of television advertising providers is larger than the substitution between television advertisements and other forms of advertising. This outcome is robust even when prices of online advertisements of Google (used as proxy for the development in online prices) are included in the model.

### B.3 Cost model

62. ACM estimates the variable costs of creating advertising space for the benefit of the critical loss analysis and the market definition.
63. In its analysis, Oxera assumes a contribution margin of **[95-100]**% based on the efforts to sell an extra GRP. As discussed in detail in the Decision (see Section 7.4.2), according to ACM, this approach fails to consider the fact that the available GRPs result from the reach achieved in the target market. Reaching viewers and thus being able to offer advertising requires valuable content. These costs should be included in the analysis because a rational company maximizes the total profit, not just the profit based on part of the revenues and costs. ACM thus includes savings in content costs in the critical loss analysis and includes estimated changes in marginal costs in the merger simulation. In this chapter, ACM explains how variable costs are estimated.
64. ACM assumes two versions of the cost model to account for potential practical limitations in expanding reach:
- Model with constant marginal costs;
  - Model with increasing marginal costs.
65. As explained below, both models lead to similar estimates of the variable costs.

#### B.3.1 Constant marginal costs

66. For the constant marginal cost model, it is only necessary to determine what portion of the content costs are variable. It is conceivable that it requires a certain level of content costs for the broadcaster to continue to exist. These costs can be regarded as fixed costs. It is then plausible that as reach increases, it becomes increasingly difficult and thus more expensive to produce an extra GRP in competition in the target market.

67. Based on the annual procurement costs for content and the number of GRPs, ACM arrives at an estimate based on the difference between RTL and Talpa in terms of content costs and the number of GRPs sold. These variable costs are then used to approximate possible savings due to the price increases in the advertising market.
68. The variable costs per GRP are thus calculated as the difference in total content costs in the years 2018 through 2021<sup>664</sup> between RTL and Talpa divided by the difference in the total number of GRPs sold in the years 2018 through 2021<sup>665</sup> between RTL and Talpa. In principle, Talpa's content costs are thus regarded as fixed costs and the variable costs of content are determined by the extra GRPs that RTL can sell vis-à-vis Talpa with the additional spending on content. ACM deems this assumption on the size of the fixed costs to be conservative.
69. To prevent results from being overly influenced by ad hoc fluctuations in content costs and reach, ACM makes use of the sum of content costs and the number of GRPs sold in four years.
70. The resulting estimate of the variable costs per GRP round up to **[confidential]**.

### B.3.2 Increasing marginal costs

71. The model with increasing marginal costs shows that it is becoming increasingly costly for the broadcasters to create a new reach with increasing production.
72. ACM uses the data on GRP production and the content costs of the Parties to estimate a simple cost model in which the costs increase exponentially with the number of GRPs. The logarithm of the content costs is thus explained in terms of the number of GRPs.

$$\ln costs_i = \beta_0 + \beta_1 GRP_t + \varepsilon_i$$

73. Table 5 sums up the results. Despite the limited number of observations, the coefficient of GRP is statistically significant. The marginal content costs of RTL and Talpa can be calculated based on the above cost function and the parameter estimates. Those marginal costs are included in Table B5.

**Table B5 Estimated results of the cost model**

cost model	
Number of GRPs (millions) (T statistics)	<b>[confidential]</b> <b>[confidential]</b>
RTL's marginal costs	<b>[confidential]</b>
Talpa's marginal costs	<b>[confidential]</b>
#observations	8

Source: sales data RTL, Talpa and Ster, audience share data from SKO and estimates and calculations by ACM

74. ACM notes that the estimate matches both the variation between broadcasters and the variations over the years relatively well. Figure B1 illustrates this. The estimated cost model is used to draw a line through the observations. This line matches the observations relatively well both for the two broadcasters individually and over the years.

<sup>664</sup> Sources: EUO3-#2006622641-v1 Annex 24 - content figures version January 14, 2022 (254581769.1), and Annex 2 - 2021 figures.

<sup>665</sup> Sources: EUO3-#2008548694-v1 RTL - ACM additional data 25-54 years and EUO3-#2008548681-v1 Talpa - GRPs Output price Revenue target audience and 25-54.

Figure B1 Illustration of the cost model

[confidential]

### B.4 Critical loss analysis

75. For the product market definition, ACM further calculates from available estimates whether it could be profitable for a hypothetical monopoly holder in a television advertising market to increase the prices by 5%. See Section 7.4 of the Decision.
76. To calculate the profit/loss in the advertising market, ACM asserts that content cost savings from a price increase need to be taken into account. The drop in the number of GRPs sold based on the price increase and the elasticity multiplied by the variable costs of [confidential] per GRP result in the estimated savings on content costs.
77. Table B6 provides an overview of the results of the critical loss analysis<sup>666</sup>. The values for the elasticities estimated by ACM originate from the estimates in Tables B2 and B3. The results show that cost savings can make the price increase profitable. Moreover, the savings are such that even if there is uncertainty about the exact value of the variable content cost per GRP, the price increase remains profitable. As an additional clarification, for the highest estimated elasticity of -1.13, the content saving costs already make the price increase profitable enough if the variable costs per GRP are [confidential]. This is considerably less than the [confidential] calculated by ACM.

Table B6 Results of the critical loss analysis (profit, in millions of euros)

Elasticity of television	SEO	Oxera	ACM	ACM
	-1.11	-1.13	-0.85	-0.97
No content savings	-6.2	-7.0	4.0	-0.7
Content savings included	21.6	21.3	25.3	23.6
Tipping point	85%	83%	113%	98%

78. ACM also demonstrates that its conclusions are robust via other means. Based on the four elasticities in Table B6, ACM calculates the contribution margin that would be the tipping point between a narrow and a broad market, i.e., between a profitable and a non-profitable price increase.<sup>667</sup> They are 85%, 83%, 113%<sup>668</sup> and 98% for SEO, Oxera, MNL and NL, respectively. These margins are not much lower than the [95-100]% applied by Oxera. The savings thus need only be limited to already arrive at the conclusion that the market is limited to advertising on television. So even if ACM is slightly off with its estimate, the price increase clearly remains profitable in all cases.
79. The results in Table B6 are based on constant marginal costs. With rising marginal costs, the potential savings are even greater because the final units have increasingly higher production costs than the previously created GRPs. This further supports ACM's conclusion.
80. ACM observes that the impact on revenues from retransmission fees are not included in the above analysis despite the fact that they are also part of the total revenues optimized by the hypothetical monopoly holder. ACM does establish that the hypothetical monopoly holder would have a dominant position in the negotiations with distributors. The analysis in Chapter B.6, for example, points out that

<sup>666</sup> The SEO (non-compensated) elasticity of -1.11 is from the SEO's data set. ACM has calculated the non-compensated elasticities.

<sup>667</sup> In order to calculate the tipping point, the critical demand loss  $\frac{5\%}{5\%+CM}$  is compared with the actual demand loss  $\epsilon-5\%$ . The two losses are equal in the tipping point. This applies if the contribution margin is denoted by  $CM = \frac{1}{\epsilon} - 5\%$ . If the actual contribution margin is lower than the tipping point, the price increase will be profitable for the hypothetical monopoly holder.

<sup>668</sup> Needless to say, a contribution margin can never exceed 100%. The tipping point is calculated according to the formula set out in footnote 667. The interpretation of the tipping point of 113% is that the price increase is profitable for all reasonable values of the contribution margin.

the proposed concentration already added to the Parties' negotiating power. In view of this and the fact that the retransmission fees represent a relatively smaller part of the revenues than advertising revenues, ACM concludes that the inclusion of the retransmission fees does not change the outcome of the critical loss analysis.

81. The critical loss analysis based on all available estimates of price elasticity suggests that a hypothetical monopoly holder in the television advertising market in the Netherlands can profitably increase the prices. The analysis also shows that the content cost savings need to be very limited for the price increase to be profitable.

## B.5 Merger simulation

82. In this section, ACM describes the merger simulation performed. See Section 7.6.3.3 in the Decision. The simulation approximates the prices after the proposed concentration based on a combination of a supply model and a demand model.

83. The results are determined by the assumption that each company  $i$  maximizes its profits  $\Pi_i$ :

$$\Pi_i = \sum_j I_{ij} (p_j q_j - C(q_j)) - F_i$$

$p_j$  is the price of product  $j$ ,  $q_j$  is the sold quantity of product  $j$ ,  $C(q_j)$  is the cost of the production  $q_j$  of product  $j$ ,  $I_{ij}$  is a dummy equal to one if product  $j$  is sold by company  $i$ , and  $F_i$  are fixed costs.

84. The solution of the profit maximization issue depends on the type of supply and demand models discussed below.

### B.5.1 Supply and demand model

85. The most frequently used model of competition in practice is the Bertrand model. This model presupposes that companies set prices to maximize a profit. The volumes sold are determined by the demand in response to the price chosen.

86. The heterogenous Bertrand model also allows product differentiation. That means that the products in the market need not be perfect substitutes, but the substitution options differ from each other to a certain extent. This differentiating ability gives companies some degree of economic market power in the sense that they can set a price above marginal cost.

87. Given the broad worldwide experience in applications of the Bertrand model in the competition analysis, ACM considers this model suitable to approximate the consequences of the concentration.

88. ACM proceeds from the nested logit demand model for the merger simulation, as discussed in Section B.2.5.3. The results are also calculated for the multinomial logit model, however, as explained below, the NL model is better suited for the merger simulation.

### B.5.2 Simulation

89. In the simulation, ACM distinguishes Ad Alliance (RTL), Talpa and Ster as the three leading providers of television advertisements. The simulations are based on figures from 2021.

90. The maximization of profits in terms of price leads to the following first-order conditions for each product  $k$ :

$$\frac{\partial \Pi_i}{\partial p_k} = q_k + \sum_j I_{ij} \left( p_j - \frac{\partial C(q_j)}{\partial q_j} \right) \frac{\partial q_j}{\partial p_k} = 0$$

where  $\frac{\partial C(q_j)}{\partial q_j}$  are the marginal costs and  $\frac{\partial q_j}{\partial p_k}$  the marginal effect of the price change of product  $k$  on the demand for product  $j$ .



91. Based on the elasticities of both demand models, market shares and average prices, the marginal costs are calculated by filling in the data in the above first-order conditions and solving the corresponding system of equations.
92. The new market equilibrium needs to be determined to calculate the price effects of the proposed concentration. This takes into account the changed market structure, i.e., the RTL-Talpa combination optimizing the prices of all products of Ad Alliance and Talpa combined after the acquisition. The new equilibrium can be calculated by filling in the estimated demand parameters and marginal costs in the first-order conditions associated with the new market situation, and then collectively solving the equations to the new prices. The prices in the new equilibrium are then compared to the prices before the concentration in order to calculate the anticipated price effects.

### B.5.3 Results

93. As explained in Section B.2.2, the NL model can take the difference in substitution patterns within and outside a nest into account. In addition, ACM deems the NL model applied with a nest for television advertising more realistic than the MNL model based on the results of the qualitative analysis, diversion ratios, company-specific price elasticities and implied marginal costs. The MNL is included in the analysis for the sake of completeness and for a check on robustness, the results are less relevant than the outcomes based on the NL model.
94. ACM reports the results for three model specifications:
- MNL model (3) from Table B2 (highest price sensitivity),
  - NL model (6) from Table B3 (highest price sensitivity, lowest nesting parameter),
  - NL model (5) from Table B3 (maximum correction for online prices).
95. All analyses take the year 2021 as the starting point. For the MNL model, ACM proceeds from the market potential of 7 million GRPs. See marginal 56 of this Annex. For the NL model, ACM proceeds from a market potential of 100 million GRPs. See marginal 59 of this Annex. This difference in market potential is the result of the difference in approach regarding the degree of substitution to the outside option. See marginal 59 of this Annex.
96. Tables B7 through B9 present the diversion ratios implied by the three demand models. The diversion ratios quantify which part of the demand lost by the price increase from one broadcaster ends up with the other broadcasters. The first column of the tables indicates which broadcaster increases their prices and the other columns indicate where some of the lost demand ends up. As expected, in view of the statistical significant nesting parameter, the NL models lead to more substitution between the broadcasters.

**Table B7 Diversion ratios based on the MNL model (3)**

	Talpa	Ster	Ad Alliance	Outside option
Talpa	-	[confidential]	[confidential]	[confidential]
Ster	[confidential]	-	[confidential]	[confidential]
Ad Alliance	[confidential]	[confidential]	-	[confidential]

**Table B8 Diversion ratios based on the NL model (6)**

	Talpa	Ster	Ad Alliance	Outside option
Talpa	-	[confidential]	[confidential]	[confidential]
Ster	[confidential]	-	[confidential]	[confidential]
Ad Alliance	[confidential]	[confidential]	-	[confidential]

Table B9 Diversion ratios based on the NL model (5)

	Talpa	Ster	Ad Alliance	Outside option
Talpa	-	[confidential]	[confidential]	[confidential]
Ster	[confidential]	-	[confidential]	[confidential]
Ad Alliance	[confidential]	[confidential]	-	[confidential]

97. Table B10 summarizes the estimated indicative price increases for the different model specifications. ACM also presents the implied marginal costs for Talpa so that these can be compared to the outcome of the cost model in Chapter B.3. This comparison is not completely accurate for Ad Alliance as it also comprises more channels than just the RTL channels.
98. As indicated above, the MNL model is included in the analysis for the sake of completeness. ACM considers the outcome of the NL models to be more reliable. This is also evidenced by the outcome. For some providers, it appears that the implied marginal costs are negative based on the MNL model. That is why the specification with the rising marginal costs do not lead to sensible results based on the MNL model. The fact that the implied marginal costs are negative in the MNL model is not surprising as the model fails to take sufficient account of the proximity of the competition between the broadcasters. In MNL, a broadcaster primarily faces competition from the outside option because it has the largest share. Without additional competition on top of that from competing television advertisements (better substitutes), broadcast-specific elasticities are too low, which is why they imply negative marginal costs in some cases.

Table B10 Estimated indicative price increases

	MNL (3)	NL (5)	NL (6)
Constant marginal costs	3.5%	7.0%	4.7%
Increasing marginal costs	-	5.6%	3.9%
Talpa's implied marginal costs	[confidential]	[confidential]	[confidential]

Source: sales data RTL, Talpa and Ster, audience share data from SKO and estimates and calculations by ACM

99. Given the consistency in implied marginal costs and realistic diversion ratios, ACM deems the NL model (5) the most appropriate. The NL model (6) provides a conservative estimate of the effect. All models, however, provide significant price increases, even if increasing costliness of GRP production is taken into account.

## B.6 The negotiation model for the distribution market

100. ACM estimated a simple negotiation model to substantiate the theoretical analysis of the distribution market. ACM already proceeds from Nash bargaining.<sup>669</sup> Nash bargaining assumes that the outside option will significantly worsen for distributors if neither RTL nor Talpa enter into a contract. The objective of this Chapter is to demonstrate that this bargaining model is consistent with empirical data and to illustrate what this means for the consequences of the proposed concentration.
101. Next, ACM describes the bargaining model based on one single negotiation between a broadcaster and a distributor. ACM refers the participants to the negotiation as 'the broadcaster' and 'the distributor'.

<sup>669</sup> Nash Jr, J. F. (1950). The bargaining problem. *Econometrica*, Vol. 18, No. 2, pages 155-162.

102. The model makes the following assumptions on the elements that determine the results of a successful negotiation for the broadcaster and the distributor:

- Results for the broadcaster:

$$W_{agree}^{broadcaster} - W_{outside}^{broadcaster} + P$$

- Results for the distributor:

$$W_{agree}^{distributor} - W_{outside}^{distributor} - P$$

$W_{agree}$  is the profit in an agreement and  $W_{outside}$  is the profit in a failed negotiation.  $P$  is the retransmission fee established in the negotiation.  $P$  is thus a revenue for the broadcaster and a cost for the distributor.

103. The theoretical outcome in equilibrium is the value of the fee  $P$  that maximizes the product of revenues of both negotiating undertakings:

$$\max(W_{agree}^{broadcaster} - W_{outside}^{broadcaster} + P)(W_{agree}^{distributor} - W_{outside}^{distributor} - P) \quad (12)$$

104. The resulting price was calculated by taking the derivative of the above vis-à-vis the retransmission fee  $P$ . This yields the following solution for  $P$ :

$$P = \frac{W_{agree}^{distributor} - W_{outside}^{distributor} - W_{agree}^{broadcaster} + W_{outside}^{broadcaster}}{2} = \frac{G^{distributor} - G^{broadcaster}}{2}, \quad (13)$$

105. The revenue of the negotiations for the distributor  $G^{distributor}$  can be approximated by a willingness-to-pay (WTP) indicator. The WTP indicators are derived from logit models. The indicator equals the additional utility of adding the option to the relevant party's offering. These indicators are often used in research on negotiations between hospitals and health insurers<sup>670</sup> but are broadly applicable for modelling negotiations, also specifically in the context of distributors that compose bundles of inputs that they offer to end users<sup>671</sup>. The negotiation model sets up uses similar principles as Crawford and Yurukoglu (2012)<sup>672</sup>.

106. ACM presupposes that viewers at some point choose between available channels and that this choice process can be approximated by a logit model similar to that in Ivaldi and Zhang (2021, 2022)<sup>673</sup>. If a certain channel is missing in a viewer's channel package, the viewer will be forced to adjust their viewing behavior. This leads to a drop in the viewer's perceived utility. The WTP indicator approximates this drop in utility. The distributor can translate the viewers' willingness to pay for the broadcaster's channels into extra revenues  $G^{distributor}$ . The WTP can be calculated based on viewer shares:

$$G^{distributor} = \alpha_{viewers} U_{viewers} = \alpha_{viewers} \sum_{n=1}^N \log \frac{1}{1 - k_n}$$

where  $\alpha_{viewers}$  is the money value for viewers of the utility of the broadcaster's channels in the distributor's channel package,  $U_{broadcaster}$  is the utility derived from the model for viewer behavior,  $k_n$  is the share of a subscriber's viewing time  $n$  spent on the broadcast involved in the negotiations.

107. ACM uses SKO's market share,  $MADL$ , to approximate the audience shares:

$$G^{distributor} \approx \alpha_{viewers} N \log \frac{1}{1 - MADL} = \alpha_{viewers} \hat{U}_{broadcaster}$$

where  $\hat{U}_{broadcaster}$  is an approximation of  $U_{broadcaster}$ .

<sup>670</sup> Capps, C., Dranove, D., & Satterthwaite, M. (2003). Competition and market power in option demand markets. *RAND Journal of Economics*, 737-763.

<sup>671</sup> Hemphill, C. S., & Rose, N. L. (2018). Mergers that harm sellers. *The Yale Law Journal*, 2078-2109.

Nevo, A. (2014). Mergers that increase bargaining leverage. Remarks as Prepared for the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries.

<sup>672</sup> Crawford, G. S., & Yurukoglu, A. (2012). The welfare effects of bundling in multichannel television markets. *American Economic Review*, 102(2), 643-85.

<sup>673</sup> Ivaldi, M., & Zhang, J. (2021). Simulating media platform mergers. *International Journal of Industrial Organization*, 79, 102729.

Ivaldi, M., & Zhang, J. (2022). Platform mergers: Lessons from a case in the digital tv market. *The Journal of Industrial Economics*, 70(3), 591-630.

108. ACM assumes that broadcasters face greater counterbalance from larger distributors in the negotiations. This is consistent with the assertions made by the Parties about mutual dependency between broadcasters and distributors and the huge impact of distributors blacking out the Parties' channels in the event of failed negotiations. Formally, ACM assumes that advertisers attach importance to reaching a wide audience. Based on the viewing behavior model described above, advertisers are more likely to reach extra viewers via a channel that is available to more subscribers. ACM assumes that advertisers' utility decreases with a growing number of subscribers to whom their advertisements are shown. This is the only way to create a situation where larger subscribers can command a lower fee per subscriber. If the utility for advertisers and the associated willingness to pay were to be equal for all subscribers, the impact on the negotiations on the fees per subscriber would be equal irrespective of the size of the distributor.

109. The WTP indicator creates this pattern of diminishing utility and is therefore applied by ACM with the share of subscribers,  $s_{distributor}$ , as a starting point:

$$G^{broadcaster} \approx \alpha_{advertisers} \log \frac{1}{1 - s_{distributor}} = \alpha_{advertisers} \hat{U}_{advertisers}$$

where  $\hat{U}_{advertisers}$  is an approximation of  $U_{advertisers}$ .

110. The fee per subscriber paid by the distributor to the broadcaster based on abovementioned negotiation model is equal to:

$$\begin{aligned} \frac{p_{distributor}^{broadcaster}}{N_{distributor}} &= \frac{G^{distributor} - G^{broadcaster}}{2N_{distributor}} \\ &= \frac{1}{2} \left( \alpha_{viewers} \log \frac{1}{1 - MADL_{broadcaster}} - \frac{\alpha_{advertisers}}{N_{distributor}} \log \frac{1}{1 - s_{distributor}} \right) \end{aligned}$$

111. This model implies that the fee per subscriber drops with the number of subscribers of the distributor (expected spot revenues) and increases with the WTP of subscribers. Broadcasters that have more viewers are thus given an higher retransmission fee than broadcasters that have fewer viewers, and distributors that have more subscribers pay lower fees than distributors that have fewer subscribers.

112. This theoretical result can be assessed empirically on the basis of actual negotiation results and developments in viewing behavior and numbers of subscribers. A regression confirms this outcome for the years 2017 up to and including 2021. Table B11 sums up the results.

113. Column (1) contains the basic specification with the symmetrical WTP indicators to include mutual negotiation power of both broadcasters and distributors. Column (2) no longer proceeds from the negotiation power of distributors on the basis of the number of subscribers and instead, it includes a dummy to correct any differences in negotiation power, knowledge, experiences and objectives among the distributors. The parameter for the negotiation power of the broadcaster does not significantly deviate from column (2). Column (3) includes a dummy for each broadcaster. That means that the parameter for the negotiation power of broadcasters is no longer based on the differences between broadcasters in these specifications but only on developments in viewing behavior over time. Even in this specification, the estimate is statistically significant at 10% significance level.

Table B11 Estimated results of the negotiation model for distribution

	(1)	(2)	(3)
$\hat{U}_{viewers}/N$ (T statistics)	54.52 (6.73)	52.53 (7.03)	102.70 (1.90)
$\hat{U}_{advertisers}/N$ (x1.000.000) (T statistics)	-50.71 (1.79)	-	-76.48 (3.47)
Intercept (T statistics)	6.50 (1.38)	-	-
Distributor FE	NO	YES	NO
Broadcaster FE	NO	NO	YES
R <sup>2</sup>	0.434	0.626	0.696
#observations	68	68	68

Source: fees RTL, Talpa, market participants, audience share data from SKO and estimates and calculations by ACM

114. The estimates in Table B11 show that the theoretical assumptions of ACM are consistent with the actual behavior of undertakings in this market and that these are robust findings. For the data from 2021<sup>674</sup>, the estimated parameters of the negotiation model in column (1) imply an increase of 17.3% in the negotiated retransmission fees for the Parties.

## B.7 The Parties' criticism on ACM's analyses

### B.7.1 The Parties' points of criticism

115. The Parties have multiple points of criticism with respect to the logit models applied by ACM. ACM responds to several of these points of criticism in the Decision. See Section 7.4.3.3. Below, ACM focuses on the detailed technical points of criticism.
116. First, the Parties dispute that logit models can be used to study the advertising market. According to the theoretical substantiation of these models, consumers choose one of the options available, while advertisers simultaneously advertise on multiple channels/broadcasters. Consequently, logit models do not match well with the advertisers' actual choice process, according to the Parties.
117. Secondly, the Parties contend that the outside option's market share is too high. The Parties claim that an outside option with an 80% market share means that the model only makes use of 20% of the actual data, the remaining 80% has been created virtually.
118. Thirdly, the Parties are of the opinion that ACM solves the endogeneity problem in an inappropriate manner when estimating the logit models: the instruments used are not valid, i.e., exogenous, and not solid enough. According to Oxera, ACM should have performed a so-called J test in order to test whether the instruments are exogenous. Furthermore, the F statistics in the estimation results need to be over 100 to be able to conclude that the instruments are solid enough. Last, reference is made to the article of Lee et al (2022)<sup>675</sup> for this latter result.

<sup>674</sup> The outcome is not sensitive to the choice of a year.

<sup>675</sup> Lee, D.S., Moreira, M.J., McCrary, J., Porter, J. (2022), 'Valid t-ratio Inference for IV', *American Economic Review*, October 2022.

## B.7.2 ACM's response

### B.7.2.1 The use of logit models

119. The use of logit models is motivated in Chapter B.2 of this Annex as a selection process in which consumers select one product from a set of available alternatives. However, in the advertising market, advertisers choose how much they spend on the various alternatives and also choose multiple forms of advertising at the same time. This selection process appears to be less fitting to the description in Chapter B.2. However, this interpretation of the logit models is not the only interpretation and does not form a necessary assumption for the use of such models.
120. Verboven (1996)<sup>676</sup> and Anderson et al. (1988)<sup>677</sup> show that the same logit models fit equally well with a utility function based on a representative consumer describing the aggregate demand of all consumers. Given the fact that the total demand determines the effects of the concentration, the logit models are suitable for modeling the demand irrespective of the consumers' selection process. The description in Section B.2.2 therefore does not form an assumption, but serves as an illustration.
121. In the past, other competition authorities have also worked with the interpretation of Verboven and Anderson. For example, a nested logit model was used in the Kraft Foods/Cadbury concentration case<sup>678</sup> of the European Commission to model the choice of consumers for chocolate bars. Another example is the analysis from Ivaldi and Zhang (2021, 2022)<sup>679</sup> on the French television market in which the viewing behavior is modelled by means of a nested logit model.

### B.7.2.2 The size of the outside option

122. In terms of the outside option's high market share, ACM's choice is not uncommon in literature. The study by Ivaldi and Verboven (2005) has a 75% market share for the outside option, and is thus of a similar size as the share in the MNL model. This demonstrates that the logit model can be used even if the outside option has a large market share. This is not surprising considering the fact that the model involves a particular selection process and consequently, there is no theoretical condition about the size of the outside option to use the model.

### B.7.2.3 Correction for endogeneity

123. ACM uses instrumental variables to correct for the potential endogeneity of prices. It is essential for the estimate to have valid (exogenous) and strong instruments, otherwise the results may be unreliable. ACM was careful in its choice of instruments and therefore disagrees with the Parties' criticisms.
124. Contrary to the Parties' contention, the validity of instruments cannot be tested. Scientific literature has mathematically proven that the validity cannot be tested if the endogenous variable is continuous<sup>680</sup>. That is exactly the case in demand models, which is explicitly made clear by Gunsilius (2021)<sup>681</sup>. The J test referred to by the Parties assesses the so-called overidentifying restrictions, not directly the validity of instruments. Given that the value of the so-called sample moment conditions is determined by different elements of the model, it cannot be used as evidence supporting the validity of instruments.
125. ACM proceeds from validity of the instruments because they are standard practice in literature and delayed by a month, which is why ACM sees no mechanism by which these instruments would

<sup>676</sup> Verboven, F. (1996). The nested logit model and representative consumer theory. *Economics Letters*, 50(1), 57-63.

<sup>677</sup> Anderson, S. P., De Palma, A., & Thisse, J. F. (1988). A representative consumer theory of the logit model. *International Economic Review*, 461-466.

<sup>678</sup> Case No COMP/M.5644 – Kraft Foods / Cadbury

<sup>679</sup> Ivaldi, M., & Zhang, J. (2021). Simulating media platform mergers. *International Journal of Industrial Organization*, 79, 102729.

Ivaldi, M., & Zhang, J. (2022). Platform mergers: Lessons from a case in the digital tv market. *The Journal of Industrial Economics*, 70(3), 591-630.

<sup>680</sup> Gunsilius, F. F. (2021). Nontestability of instrument validity under continuous treatments. *Biometrika*, 108(4), 989-995.

Pearl, J. (1995, August). On the testability of causal models with latent and instrumental variables. *Proceedings of the Eleventh conference on Uncertainty in artificial intelligence* (pages 435-443).

<sup>681</sup> See footnote 682 for the reference.



cause the non-price related shifts in demand for advertising on certain channels. More so, the audience share among competitors of a broadcaster in the previous month has no impact on the utility perceived by the advertiser of advertisements on this broadcaster in the current month<sup>682</sup>. The lack of the instrument's impact on the variable outcome is the only prerequisite for validity of instruments as evidenced by the below figure from Gunsilius (2021)<sup>683</sup>.

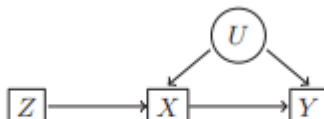


Fig. 1. A directed acyclic graph representation of the instrumental variable model with outcome  $Y$ , endogenous treatment  $X$ , instrument  $Z$  and latent confounder  $U$ .

126. It is thus not surprising that empirical articles in renowned journals do not mention any J test. See for example: Berry et al. (1995), Verboven (1996), Nevo (2000)<sup>684</sup> of Ivaldi en Zhang (2021, 2022)<sup>685</sup>. For the sake of completeness, ACM estimated a specification of the model using only the change in price policy of Ster as an instrument, because the J test also indicates exogeneity of the remaining instruments in a specification without competitors' audience ratings as an instrument. The dummy in Ster's price policy therefore meets all imposed prerequisites, including the J test suggested by the Parties, and leads to results that do not fundamentally deviate from the presented outcome.
127. Relative to the article cited by the Parties on the strength of instruments, ACM observes that it concerns an analysis with exactly one instrument, which says nothing about a relationship between the  $F$  statistics and the purity of the estimate. The model in question concerns multiple instruments and is aimed at obtaining the parameter values that provide a realistic and purer representation of the demand for television advertisements. The cited result that the  $F$  statistics would be at least 100 is therefore not applicable to ACM's analysis.

<sup>682</sup> See Berry (1994) page 249 for a similar line of argumentation.

<sup>683</sup> See footnote 682 for the reference.

<sup>684</sup> Nevo, A. (2000). Mergers with differentiated products: The case of the ready-to-eat cereal industry. *The RAND Journal of Economics*, 395-421.

<sup>685</sup> Ivaldi, M., & Zhang, J. (2021). Simulating media platform mergers. *International Journal of Industrial Organization*, 79, 102729.

Ivaldi, M., & Zhang, J. (2022). Platform mergers: Lessons from a case in the digital tv market. *The Journal of Industrial Economics*, 70(3), 591-630.