



# ***Presumptions in Vertical Mergers: The Role of Evidence Discussion***

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# Outline of the discussion

- Main messages
- Why presumptions for VM
- Condition 1 reviewed
- Right way forward

## Main messages (I)

- Conditions for presumptions
  - Cond. 1: **body of empirical evidence** showing circumstances (A) lead to outcome (B)
  - Cond. 2: problem addressed by a VM presumption should be **intrinsically vertical**
- Cause for concern about some VM and need to revise presumptions in this respect
  - ⇒ (More) evidence needed

## Main messages (II)

- Type of **evidence** for VM presumptions:

### Not relevant:

- Not pertain to sort of industry that normally doesn't raise concerns
- Ex ante merger simulations
- Hypothetical VM simulations

### Relevant:

- Retrospective case studies of a single merger
- Retrospective studies of many mergers
- Stock market event studies

- Retrospective VM studies: today number is small + evidence is mixed
- Message to applied economists

## Presumptions in VM control (I)

- Digital platforms: no-time-to-waste momentum?
- VM: complex theories of harm (ToH) leading to complex (behavioural) remedies
- Structural remedies often not feasible, and behavioural remedies:
  - Complex, and often innovative / future-looking
  - How to monitor and who will monitor?
  - How long to impose? 3 years, 10 years, undetermined,... => evaluation periods? But who bears the cost + how do competitors react (might slow down competition, making competitors “lazy” in case remedies are imposed for a long time)

## Presumptions in VM control (II)

- ⇒ Suggestion for a *Condition 3?*: presumptions should already guide the analyses to identify the most likely ToH's and accompanying remedies
- In line with Baker et. al. (2019): Principles and presumptions for U.S. vertical merger enforcement policy
  - “The agencies should consider adopting presumptions (rebuttable) that a vertical merger harms competition when certain factual predicates are satisfied.”
  - Presumptions linked to the way competition is harmed: Input / customer foreclosure; Elimination of potential entry; Disruptive or maverick seller / maverick buyer; Evasion of regulation; Dominant platform

# Body of empirical evidence (I)

- Retrospective study: a welcome tool
- For academics, but also for authorities to look for opportunities:
- Example of a recent merger case in media:
  - DG Comp (2015): CASE M.7194-LIBERTY GLOBAL/ CORELIO/ W&W/ DE VIJVER MEDIA
  - Vertical merger between a telecom platform and a television distributor
  - Approved with behavioural remedies for input foreclosure (distribution of channels under FRAND conditions + not intentionally reducing quality of channels) and customer foreclosure (modification of distribution agreement)
  - BCA (2019): from joint to sole control
  - DG Comp case as starting point of the analysis

## Body of empirical evidence (II)

- Result of the 2019-analysis:
  - Competitive framework nearly unchanged since 2015 (positions of telecomoperator, importance of channels, behaviour of viewers,...)
  - Most important changes over time: importance of data and opportunities that they provide + advertising revenues
  - From joint to sole control: the extension of the commitments of 2015 + creation two additional commitments related to the following ToH's:
    - Foreclosure of the AVAD-platform for competing broadcasters
    - Foreclosure of access to their own user data for competing broadcasters

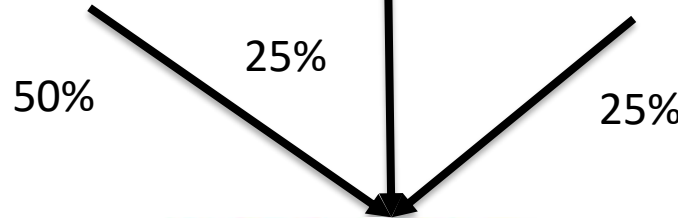


# Body of empirical evidence (III)

## CASE M.7194-LIBERTY GLOBAL/ CORELIO/ W&W/ DE VIJVER MEDIA



Publishing of newspapers, online news and selling of advertising space



3 commercial Dutch-language basic pay TV channels + advertising on these channels



sales of advertising space on third-party channels



("Desert fish"): production of TV content

LG controlling shareholder of Telenet  
 Telenet:
 

- Cable network operator in Flemish Region
- Operates a number of pay tv channels and VoD-services

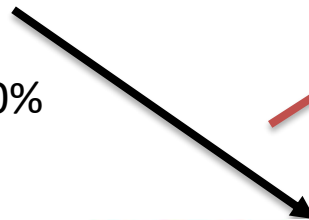
# Body of empirical evidence (IV)

## BCA: from joint to sole control



Publishing of newspapers, online news and selling of advertising space

100%



3 commercial Dutch-language basic pay TV channels + advertising on these channels



sales of advertising space on third-party channels



("Desert fish"): production of TV content

LG controlling shareholder of Telenet  
Telenet:

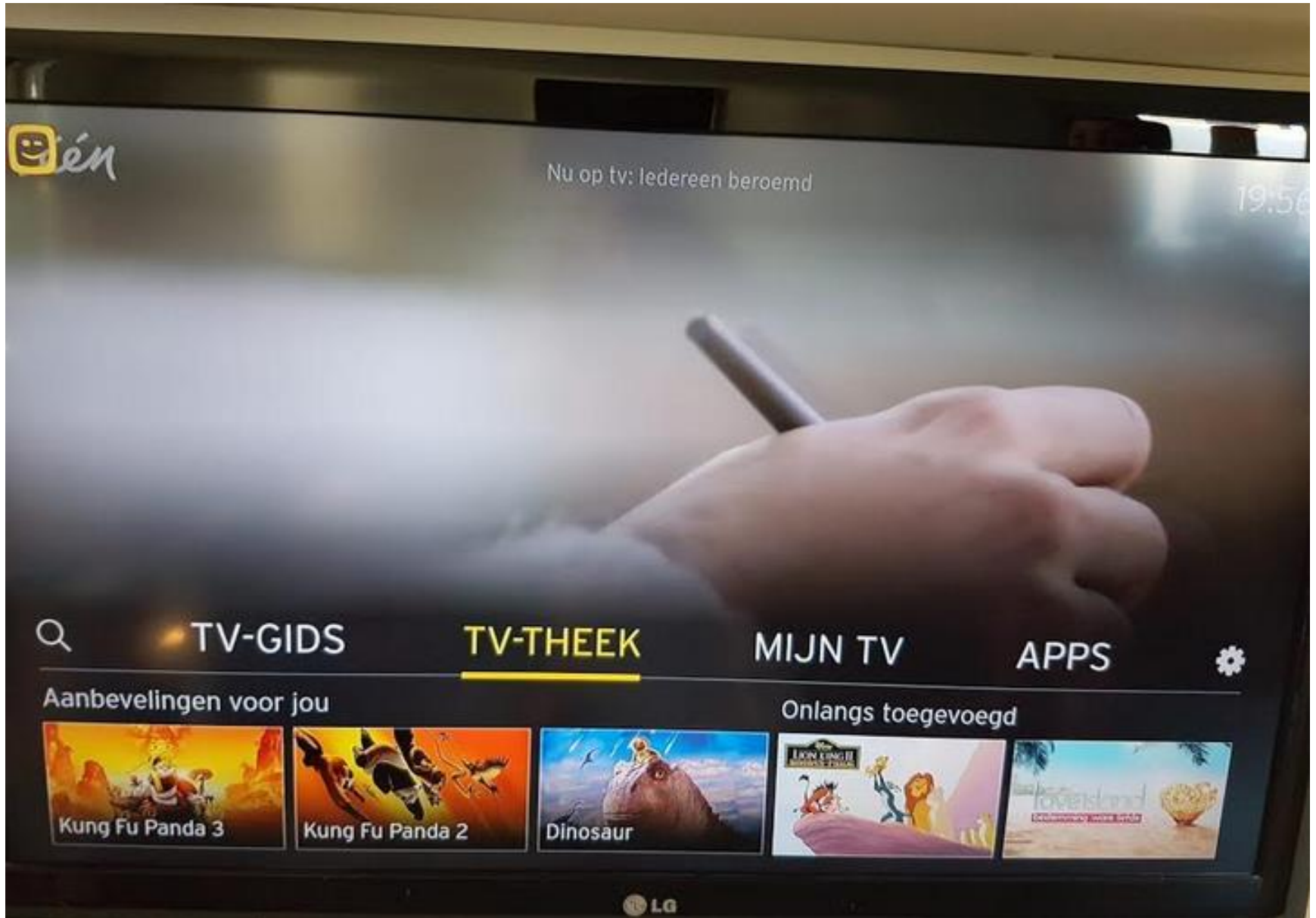
- Cable network operator in Flemish Region
- Operates a number of pay tv channels and VoD-services

## Body of empirical evidence (V)

- Some take-aways from this experience:
  - Analytical framework of Commission extremely helpful to compare competitive dynamics
  - ⇒ **Not a sophisticated econometric study, but important insights from a previous merger**
  - What if 2<sup>nd</sup> transaction would not have taken place => first set of remedies sufficient?
  - AVAD-remedy was redundant: none of the competitors was interested; remedy was “sufficiently safe” to parties, so did not harm them
  - ⇒ **Retrospective studies: focus on solid presumptions, effective remedies or both?**

## Body of empirical evidence (IV)

- Some take aways from this experience:
    - How to “measure” efficiencies and harm where the impact is less clear (no direct price effect, but quality deterioration, privacy issues,...)
    - Example of introduction of new STB’s => more possibilities to impact aggregation and curation >< Importance of EPG-positioning and user interface: highly (or even most) decisive were concrete studies of events where a deterioration of EPG-positioning has led to a significant decrease in viewer share (e.g. Study Ofcom)
- ⇒ **Retrospective studies: focus on solid presumptions, potential effects and efficiencies, or both?**





TV-THEEK

Nu op tv: Iedereen beroemd

19:54

Q ONTDEK LOVE ISLAND SERIES KIDS FILMS A LA CARTE ZENDERS PASSION

**Viktor**  
vlogt 

Viktor Verhulst werpt een blik achter de schermen van Love Island.

Kijken

Verder kijken



LG

## Right way forward? (I)

- Retrospective studies can indeed be a helpful guide when constructing presumptions in VM-control
- Principles and presumptions for US vertical merger enforcement policy => inspiring list that could be further tested by retrospective studies
- Focus on presumptions, or widening the debate immediately to the measuring of effects and efficiencies and solid remedy propositions?

## Right way forward? (II)

- Biggest challenges (apart from resources):
  - data availability after a merger: no “investigation power” to see what has happened over time => how to solve? Certainly wrt information of third parties
  - Even if data available: are we sufficiently able to construct a good control group: e.g. TNT/DVM-case (only 2 competing distribution platforms) and to control for non-merger specific evolutions over time?
- What with ex ante?  
Problem of ex post: you are analyzing the past in (sometimes) fast moving sectors. By the time they are sufficiently covered by ex post evidence they might already be outdated?
- Alternative to solid presumptions in the meantime?