

Decision on objection

Reference: 946324 / 951739.

Re: Decision on objection against the decision of 14 June 2023¹ on the regulatory fees for the year 2022, payable by Rituals Cosmetics Enterprise B.V. (hereinafter: the objector) for its on-demand commercial media service.

The Dutch Media Authority (hereinafter: the Authority),

having regard to the decision of 14 June 2023,

having regard to the notice of objection as lodged on 24 July 2023,

according to the provisions of the Dutch General Administrative Law Act [*Algemene wet bestuursrecht*],

according to the provisions of Articles 3.29a and 3.30 of the 2008 Dutch Media Act [*Mediawet*] (hereinafter: the Media Act), Article 17 of the 2008 Dutch Media Regulation [*Mediaregeling*], and Article 7 of the annex to Article 17 of the 2008 Media Regulation, and the 2022 Qualification of On-Demand Commercial Media Services Policy Rule [*Beleidsregel kwalificatie commerciële mediadiensten op aanvraag*] (hereinafter: the Policy Rule),

holds as follows:

A. Summary

1. As from 1 July 2022, certain video uploaders must register with the Authority and comply with the Media Act. The objector has a channel on the Instagram video platform service under the name of 'ritualscosmetics'. On 2 December 2022, the objector registered with the Authority as a video uploader.
2. Video uploaders come under the scope of the Audiovisual Media Services Directive² and the Media Act if the services that they provide qualify as 'audiovisual media services', and more specifically as on-demand commercial media services.
3. The objector objects to the determination of the regulatory fees. It believes that the Authority should not charge regulatory fees because its Instagram channel does not meet the requirements to qualify as an on-demand commercial media service. In this respect, it refers to relevant laws and regulations and the Peugeot Deutschland judgment of the Court of Justice of the European Union.³

¹ Reference: 937836 / 937837.

² 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.

³ CJEU 21 February 2018, C-132/17, ECLI:EU:C:2018:85 (*Peugeot Deutschland*).



4. The Authority has viewed the objector's channel and the media content posted thereon. Subsequently, the Authority has made an analysis viewing, inter alia, the content of several videos and how the channel was viewed by users. The Authority has thereby also considered the objector's regular business activities. The Authority concludes that the objector's channel does not primarily consist of media content for purposes of information, entertainment or education of the general public. The Authority, thus, decides that the objector's channel does not meet the 'principal purpose requirement', which is one of the (qualification) requirements of the Policy Rule.
5. As the objector's channel does not meet all the (qualification) requirements, the channel does not qualify as an on-demand commercial media service. Therefore, the objector will not be required to pay regulatory fees for the year 2022.

B. Course of the proceedings

Registration as an on-demand commercial media service

6. On 2 December 2022, the objector registered as an on-demand commercial media service through the Authority's E-desk. The objector has a channel on the Instagram video platform service under the name of 'ritualscosmetics' (hereinafter: the channel).⁴
7. On 12 January 2023, the objector indicated, during the Authority's telephone consultation hours and by email, that it had doubts as to the qualification of the channel as an on-demand commercial media service.⁵ By email dated 16 January 2023, the Authority notified the objector that it did, indeed, qualify the channel as an on-demand commercial media service.
8. On 30 January 2023, the objector indicated to the Authority that it still believed that its channel did not qualify as an on-demand commercial media service and requested the Authority to cancel its registration as a video uploader.⁶ By email dated 13 March 2023, the Authority rejected this request. On 20 April 2023, the objector objected thereto.
9. Further to this objection, the Authority contacted the objector, indicating that the message from the Authority dated 13 March 2023 did not constitute a decision within the meaning of Article 1:3(1) of the General Administrative Law Act. Not until the Authority issued a decision, in which the objector was an interested party, could the objector lodge an objection against that decision. This could, for example, be the decision on the regulatory fees (which, at the time, was yet to be issued).
10. At the request of the objector, and with the consent of the Authority, the hearing of the objection of 20 April 2023, was subsequently stayed.

Determination of regulatory fees and objection

11. The Media Act provides that commercial media institutions, including video uploaders, that come under the supervision of the Authority, owe an annual financial contribution, namely the regulatory fees. On 14 June 2023, the Authority issued a decision in that respect.⁷ That decision set the

⁴ The Authority uses the words 'video uploader' on its website (<https://www.cvdn.nl/voor-mediamaakters/video-uploaders/video-uploader-registreren/>). According to the Media Act, this is an on-demand commercial media service.

⁵ Reference: 926308 / 926075.

⁶ *Inter alia* in the register of video uploaders, which can be viewed on the Authority's website at: <https://www.cvdn.nl/register/>.

⁷ Reference: 937836 / 937837.



regulatory fees for the objector for the year 2022 at an amount of EUR 226.86. On 24 July 2023, the objector lodged an objection against that decision.⁸

12. Subsequently, the Authority had telephone contacts with the objector about the course of the objection proceedings. On 2 August 2023, the Authority confirmed receipt of the objection and invited the objector to a hearing on 14 September 2023. The objector thereby agreed to an extension of the term for rendering a decision (according to Article 7:10(4) of the General Administrative Law Act) until six weeks following the hearing.
13. On 14 September 2023, the hearing was held. During the hearing, the objector explained its objection.
14. On 24 October 2023, the Authority had telephone contacts with the objector about the term for rendering a decision on the objection. The Authority indicated that it expected to be able to render a decision on the objection in the week of 6 November 2023.

Structure of decision on objection

15. The decision on the objection is structured as follows. Above, the Authority first summarized the objection (A) and discussed the course of the proceedings (B). Below, the Authority will first refer to the legal framework (C). Then, the Authority will indicate that the objection is allowable (D). Subsequently, the Authority will address (the substance of) the objector's objection (E), the statutory framework (F), and the grounds for the Authority's decision (G), and come to an interim conclusion (H). The Authority will conclude the decision on the objection by providing information on publication (I) and the final decision on the objection (J).

C. Legal framework

16. For the relevant legal provisions, reference is made to annex 1 to this decision on the objection.

D. Allowability of the objection

17. The objection was filed in good time and otherwise meets the requirements set by the General Administrative Law Act. Therefore, the objection is allowable, so that a full reconsideration of the challenged decision will take place.

E. Objections

18. In sum, the objector indicates that the Authority has misinterpreted Article 1 of the Audiovisual Media Services Directive.
19. In the notice of objection, the objector first addresses its own 'Rituals' trademark. Under this trademark, the objector not only offers 'more traditional' beauty products but it also focuses on

⁸ Any reference below by the Authority to 'the objection' will refer to the objection dated 24 July 2023, unless expressly stated otherwise.

wellbeing in a broad sense. The objector, thus, offers several wellbeing-related products and services. It advertises those products and services (inter alia) on billboards and in magazines, but also on its own Instagram channel.

20. The objector frequently posts media content on the Instagram channel, consisting of both moving images and still images (sometimes with audio). It states that it uses that media content (solely) to advertise its own products and services. The objector subsequently refers to the Peugeot Deutschland judgment of the Court of Justice of the European Union, stating that "*the principal purpose of the Instagram account, as well as any individual video and other post on the Instagram account, is only to promote the trademark and the associated products and services.*"⁹
21. According to the objector, the Authority disregards the purpose and the meaning of the Audiovisual Media Services Directive, by declaring that its channel is also governed by the rules of the Media Act and the various policy rules. It is of the opinion that it was never the intention that the policy rules of the Authority would be directed at 'advertisers' (as it claims to be). Other than, for example, influencers, the objector only creates media content for advertising purposes (which are evident to the viewer). Such media content is always to promote its own products or services.
22. Since the objector's channel does not qualify as an on-demand commercial media service, the objector believes that the Authority does not have any ground for charging regulatory fees either. The objector requests the Authority to revoke the challenged decision and cancel the registration dated 2 December 2022 in the register of the Authority.

F. Statutory framework

23. In this paragraph, the Authority will outline the statutory framework. This framework follows from the Audiovisual Media Services Directive, the 2008 Media Act and the Authority's Qualification of On-Demand Commercial Media Services Policy Rule.¹⁰
24. The Audiovisual Media Services Directive has been in effect in the European Union since 2010. Technical developments have allowed for new types of services and user experiences. Viewing habits, particularly those of the younger generations, have changed considerably. A television set is still an important means of sharing audiovisual experiences, but other, more mobile, devices, such as a telephone or a tablet, now also meet that need. Providers of on-demand media services are ubiquitous in today's media landscape, as are video uploaders and the platforms that they use. In light of these developments, the Audiovisual Media Services Directive needed to be updated.¹¹ For that reason, the Revision Directive was adopted.¹² The Revision Directive envisaged to create a more level playing field for the European media industry and, thus, to improve its competitiveness. At the same time, media users, and particularly minors, will be better protected.¹³

⁹ CJEU 21 February 2018, C-132/17, ECLI:EU:C:2018:85 (*Peugeot Deutschland*).

¹⁰ Dutch Media Authority Policy Rule on the Qualification of On-Demand Media Services (Government Gazette 2022, 12438).

¹¹ See also *Parliamentary Papers II* 2019/20, 35 361, no. 3, p. 2.

¹² Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (hereinafter: the Revision Directive).

¹³ Dutch Media Authority Policy Rule on the Qualification of On-Demand Media Services (Government Gazette 2022, 12438), p. 4.

Video-uploaders under the scope of the Media Act

25. As a result of the Revision Directive, the Dutch Media Act needed to be adjusted. This adjustment was made on 1 November 2020. The rules of the Revision Directive were, thus, implemented in Dutch laws and regulations.
26. The Authority worked out these rules in further detail in the Policy Rule. The Policy Rule provides that on-demand commercial media services cannot just be provided by providers that make media content available on their own platforms, such as Netflix and Disney+, but also by providers that, for the distribution of their media content, use and depend on third-party video platform services, such as YouTube (Google), Instagram (Meta) and TikTok (ByteDance). The latter providers are referred to by the Authority as 'video uploaders'.
27. Video uploaders come under the scope of the Media Act if the services that they provide qualify as on-demand commercial media services. A video uploader is an on-demand commercial media service which, for purposes of the service, uses a third-party video platform service. The Policy Rule works out the requirements to be met for a media service to qualify as an on-demand commercial media service.
28. In its assessment of whether a service is (a provider of) an on-demand commercial media service established in the Netherlands, the Authority tests it against five requirements. These requirements have been derived from the Audiovisual Media Service Directive and the Media Act. The five requirements apply cumulatively, i.e. all the requirements must be satisfied for a service to qualify as an on-demand commercial media service. The requirements are as follows:
 1. The audiovisual media content is provided on the basis of a catalogue (Article 3 of the Policy Rule).
 2. The principal purpose or an essential function of the service is to provide audiovisual media content for purposes of informing, entertaining or educating the general public (Article 4 of the Policy Rule).
 3. The service is of a mass media nature (Article 5 of the Policy Rule).
 4. The service qualifies as an economic service (Article 6 of the Policy Rule).
 5. The audiovisual media content comes under the editorial responsibility of the commercial media institution providing the service (Article 7 of the Policy Rule).
29. All video uploaders that meet the requirements subsequently come under the scope of the Media Act. But, for now, the Authority focuses its active supervision solely on a limited group of video uploaders, namely the video uploaders which, in addition to the requirements referred to in paragraph 28, also meet the following requirements:
 - Active on YouTube, Instagram and/or TikTok;
 - With 500,000 or more followers/subscribers per platform;
 - Frequently posting videos (at least 24 videos in the past 12 months);
 - Generating an income from the videos (in the form of cash or free products or services); and

- Registered as entrepreneurs with the Chamber of Commerce.¹⁴
- 30. Once a service - in this case an Instagram channel - qualifies as an on-demand commercial media service and meets the requirements of paragraph 29, the provider must register with the Authority. This follows from Article 3.29b(1) of the Media Act. The Authority then includes the provider in its register.

Regulatory fees

- 31. Once a video uploader is registered with the Authority, it owes regulatory fees for the on-demand commercial media service. This follows from the Media Act and Article 17 and the annex thereto of the 2008 Media Regulation.
- 32. The question to be answered by the Authority in the context of this objection is whether the objector's channel qualifies as an on-demand commercial media service. The basis for determination of the regulatory fees is cancelled if the Authority establishes that the objector's channel does not meet the principal purpose requirement (included as the second requirement in paragraph 28). In such event, the objector's channel does not qualify as an on-demand commercial media service.

G. Grounds for the Authority's decision

- 33. Below, the Authority will set forth the grounds for its decision, first giving a description of the specific assessment framework that is applicable to this objection. Subsequently, the Authority will indicate what products and services the objector offers, after which it will assess whether the objector's channel principal purpose is informing, entertaining or educating the general public.
- 34. When determining the principal purpose or the essential function of a service, first of all, the provision of audiovisual media content must be the essence or at least have a clear, independent qualitative function and relevance. The latter means that the media content does not simply serve to support possible other activities. The simultaneous provision of videos together with non-audiovisual media content, such as photographs or podcasts, can, therefore, still meet this requirement. Even where the share of the (other) content may be greater than the audiovisual media content.
- 35. Conversely, the requirement entails that the audiovisual media content of (a provider of) an on-demand commercial media service must serve to inform, entertain or educate the general public. For that reason, purely commercial videos, such as commercials or other short advertising videos that are completely stand-alone and do not form part of any other media content, do not come under the scope of the definition of an 'audiovisual media service'. This follows from the *Peugeot Deutschland judgment*, which will be discussed in further detail below.¹⁵
- 36. Peugeot Deutschland had a YouTube channel, on which, on 17 February 2014, it posted a video of approximately 15 seconds titled 'Peugeot RCZ R Experience: Boxer'. The Court of Justice of the

¹⁴ These requirements are also included in the 'decision tree'; see page 3 of the Policy Rule: Dutch Media Authority Policy Rule on the Qualification of On-Demand Media Services (Government Gazette 2022, 12438), p. 3. Or see the website of the Authority: <https://www.cvdm.nl/voor-mediamaakters/video-uploaders/video-uploader-registreren/doe-de-registratiecheck/>.

¹⁵ CJEU 21 February 2018, C-132/17, ECLI:EU:C:2018:85 (*Peugeot Deutschland*).

European Union had to decide whether the YouTube channel, on which Internet users could view short advertising videos for new models of passenger cars, constituted an 'audiovisual media service' within the meaning of the Audiovisual Media Services Directive. The Court of Justice of the European Union held, in sum, that the YouTube channel did not constitute an audiovisual media service within the meaning of the Audiovisual Media Services Directive. In this respect, the Court of Justice of the European Union held, *inter alia*:

"Without it being necessary to determine whether a promotional video constitutes a programme as referred to in Article 1(1)(a)(i) of Directive 2010/13 and defined in Article 1(1)(b), it is clear that the purpose of such a video is to promote, for purely commercial purposes, the product or service advertised.

*In that regard, to the extent that a promotional video can inform, entertain or educate viewers, as Peugeot Deutschland claims, it does so with the sole aim of, and as a means of, achieving the promotional purpose of the video in question."*¹⁶

37. Furthermore, video's should be directed at the general public. What distinguishes videos for informational, entertainment or educational purposes from videos that do not come under the definition is an entertainment element. This means that the content of the video is presented in such a manner that it raises the interest of users, particularly those who, until then, were not yet attracted by the subject of the video.¹⁷ Where this is not the case, and the videos merely satisfy the need for information of a dedicated group, this may be an important indication that the videos are not directed at the general public.¹⁸

38. Below, the Authority will apply the framework as explained above to the channel of the objector.

Assessment of the Instagram channel under the name of 'ritualscosmetics'

39. The objector's Instagram channel is named 'ritualscosmetics'. The objector is a Dutch cosmetics company. The objector's offering consists of home, body and beauty products, a large part of the range consisting of hygiene products, such as body scrubs, creams and soaps, oriental fragrances often being the starting point.
40. In the notice of objection as well as during the hearing, the objector indicated that, in addition to the home, body and beauty products, it also offers the following services and products:
1. Massage and spa treatments, namely the 'Body Spa';¹⁹
 2. A 'Mind Oasis';²⁰
 3. A book titled 'The Book of Rituals', explaining the objector's wellbeing philosophy;²¹
 4. The Rituals app offering products and paying extensive attention to 'The Art of Soulful Living' wellbeing philosophy and topics such as *Mind & Soul, Body, Energy* and *Sleep & Relax*.²²

¹⁶ CJEU 21 February 2018, C-132/17, ECLI:EU:C:2018:85 (*Peugeot Deutschland*) legal grounds 21-22 [22-23?].

¹⁷ This is in line with Directive 2010/13/EU. For grounds 21 and 22 hold that the videos must be "*intended for reception by (...) the general public.*"

¹⁸ ERGA Report, 'Analysis and recommendations concerning the regulation of vloggers', ERGA 2021, <https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Vloggers>, p. 21.

¹⁹ See also the Rituals website: [Rituals Body Spa's - Relax. Breathe. Revitalise. | RITUALS](https://www.rituals.com/en-us/body-spa).

²⁰ See also the Rituals website: [Mind Oasis | Rituals.com](https://www.rituals.com/en-us/mind-oasis).

²¹ See also the Rituals website: [RITUALS® Luxury coffee table book](https://www.rituals.com/en-us/the-book-of-rituals).

²² See also the Rituals website: [Application Rituals | RITUALS](https://www.rituals.com/en-us/application-rituals).



41. According to the objector, it "*focuses on wellbeing in a broad sense*," its motto being: "*We're not here to sell you beauty, we are here to make you feel good* (<https://www.rituals.com/en-nl/about-rituals.html>).\" Under the Rituals trademark, the objector, thus, offers several products and services related to wellbeing in a broad sense. The objector thereby indicates that it does not offer any products or services (directly) serving to inform, entertain or educate the general public.
42. In the notice of objection, the objector indicates that 1 "*the principal purpose of (its channel), as well as any individual video and other post on the Instagram account, is only to promote the trademark and the associated products and services*." The objector thereby refers to the aforesaid Peugeot Deutschland judgment. The Authority does not immediately concur with the objector's statement that the principal purpose of any individual video on the channel is to promote the objector's own products or services, since the objector's channel also contains videos of which it cannot simply be stated that they serve solely to promote its own products or services. The Authority already notified the objector of this finding previously (by email dated 13 March 2023).²³ At that time, the Authority indicated that the objector's channel also contained several videos that inform, entertain or educate the viewer, for example in the field of wellbeing and (self-)care.
43. For purposes of this objection, the Authority must assess the objector's channel in its entirety. For the requirement of Article 4 of the Policy Rule provides that the principal purpose or an essential function of the on-demand commercial media service must be the provision of audiovisual media content for purposes of informing entertaining or educating the general public. Moreover, in the Policy Rule, the Authority also indicates that it is aware that (e.g. in marginal cases), there may still be some discussion about the question as to whether the requirements for qualification as an on-demand commercial media service, including the 'principal purpose requirement', have been met.²⁴ This discussion also presents itself in the course of the hearing of this objection. If it is not evident whether a channel on a video platform service meets the requirements, the Authority will have to gain an insight into the relevant facts and circumstances of the concrete case, based on which it can determine the principal purpose of the channel.²⁵ Below, the Authority will set forth and assess those relevant facts and circumstances in respect of the objector's channel.
44. In the assessment, the Authority not only reviews the intention of the objector when creating videos, but also the perception of the viewer. This is in line with the key principles of Directive 2010/13/EU. That directive contains several rules. The purpose of the directive is, among other things, to protect consumers and minors. Therefore, (for example) commercial influencing must always be recognizable. The Authority can concur with the objector's statement that its own intention when posting each video is to promote products or services as well as, in a broader sense, the Rituals trademark. But the Authority holds that that intention will not be clear to the viewer with each video.
45. In its assessment, the Authority considers that videos of the objector may also be viewed outside the context of its own Instagram channel (as composed by the objector itself). For example in the 'Reels' page on Instagram, where Instagram displays videos to its users on the basis of an algorithm. That Reels page also displays videos from channels that are not followed by the user in question. According to the Authority, the objector's statement to the effect that it is solely responsible for the

²³ See also para. 8.

²⁴ Dutch Media Authority Policy Rule on the Qualification of On-Demand Media Services (Government Gazette 2022, 12438), p. 5.

²⁵ In this respect, the consultative body of European media regulators (ERGA - European Regulators Group for Audiovisual Media Services), whose objective it is to promote consistent application of the harmonised rules in Europe, may also contribute to more clarity and legal certainty on the qualification as an on-demand commercial media service.



recognizability of advertising videos within the context of its own Instagram channel, and that Instagram is responsible for anything beyond that, is not supported by the Media Act.

46. An example of a video where the purpose (the promotion of the objector's own products or services) is not clear is a video on the objector's channel showing sport exercises.²⁶ That video and the associated description do not create any direct link to the objector's products or services. During the hearing, the objector indicated that a video such as this one fits the broader purpose of the Rituals trademark. For the broader purpose of the trademark is to promote the wellbeing philosophy. The viewer can recreate the exercises at home, which can contribute to their wellbeing. The same holds true for videos that come under the 'do it yourself' category or that form part of a master class.²⁷ The objector explained that such videos can also be viewed via the Rituals app. Therefore, they form part of the various services offered by the objector. This type of (free) videos attracts people with an interest in wellbeing to this platform, for the eventual purpose of them purchasing the objector's products or services.
47. Although the objector (also) focuses its products and services at 'wellbeing', the Authority is of the opinion that it cannot be stated that each individual video focusing on 'wellbeing' is, thus, aimed at the promotion of the objector's own products or services. The Authority is of the opinion that the term 'wellbeing' is too broad for that. The Authority holds that videos showing sport exercises, a 'do-it-yourself' element, or master classes, by their nature and substance, in themselves, rather qualify as informational, entertaining or educational.
48. Therefore, the objector's channel contains both videos for a recognizable advertising purpose and videos (also) for a different purpose. From the Peugeot Deutschland judgment (paragraphs 35 to 37 inclusive), the Authority infers that a channel on a video platform service consisting of videos that may serve different purposes, there may, at some point, be a turning point. A channel that is not an audiovisual media service may become an audiovisual media service, or vice versa. This also follows from the Policy Rule, since the channel must be viewed as a whole, so that qualification cannot take place on the basis of individual videos. In order to establish whether, in this concrete case, the channel (viewed as a whole) qualifies as an audiovisual media service, the Authority considers a number of qualitative and/or quantitative indications.
49. In order to create a general image of the objector's channel for purposes of the hearing of this objection, the Authority first viewed a number of (recently posted) videos, which the objector had posted on its channel in the two months prior to the hearing of 14 September 2023.²⁸ In that period, the objector posted, in addition to other media content (such as photographs), a total of 21 videos containing audiovisual media content on its channel.
50. In respect of these 21 videos, the Authority established that 19 of those videos were of a directly sales-promoting (publicity) nature. In other words: in these 19 videos, the objector recognizably drew the attention to its own products or services, for the purpose of inducing the public to purchase those products or services. This became apparent, for example, from the clear identification or display of (figurative) trademarks and products, or the inclusion of a link to the

²⁶ See the video dated 2 July 2023: <https://www.instagram.com/reel/CuMOd6wgaqQ/?igshid=MzRIODBiNWFIZA%3D%3D>.

²⁷ See the video dated 30 June 2023: <https://www.instagram.com/reel/CuHg5QZA7De/?igshid=MTc4MmMlYml2NG==>. This is a video showing facial massage exercises. The description reads: "Our 72-hour #EnergyMasterclass starts today! Kickstart those energy levels with these simple at-home facial massage moves [flame emoticon]. Created by @lestime.desoi, presented by @maya_moliere."

²⁸ The Authority deems it important to obtain a representative image of the channel. In this case, the Authority considered that the media content over the past two months provided a representative image of the channel.

webshop.²⁹ In a video dated 22 August 2023, for example, four products were clearly displayed.³⁰ And a video dated 18 August 2023 occasionally displayed a number of products, but the description and a link to the objector's webshop pertaining to the video clearly show that products of the objector are being advertised.³¹ Here, the Authority sees a clear difference with the videos referred to in paragraph 46, where this advertising purpose was not clear.

51. There were only two videos where the advertising purpose, i.e. the sales-promoting nature, of the videos was less clear. One was a video in which the viewer received information on 'Mangrove Conservation Day'³², and the other was a video asking several people what their favorite book was.³³ This ratio of 2 to 21 videos over a period of two months is an important indication for the Authority that the principal purpose of the objector's service is not to provide media content to inform, entertain or educate the general public. If the other media content on the channel over that period is also counted, it becomes even clearer that the vast majority of the objector's media content is to promote its own products and services.
52. The Authority also reviewed the media content that the objector had posted on the channel in the two months preceding 13 March 2023, the day on which the objector received an email containing an assessment of the channel from the Authority. In that period, 10 videos were posted on the objector's channel. Given the way in which the objector's products or services are promoted, all these videos are of a sales-promoting nature that is immediately recognizable to the viewer. Therefore, the content of these videos shows that the videos serve to promote the objector's own products or services.
53. Furthermore, the Authority deems it important (from the viewer's perspective) that the objector does not advertise any products or services from other persons or organizations on its channel. In other words: the objector's channel does not serve as an advertising platform for the products or services of others, but solely as a means to advertise the objector's own products or services and its own trademark.
54. In addition, the objector is, first and foremost, a business that, as its principal activity, focuses on the sale of products or services other than audiovisual media content.³⁴ This will also be known to the general public. The Authority deems the objector's own products and services sufficiently recognizable in the vast majority of the videos reviewed, so that it is clear to the viewer that these are being promoted. If a person views the objector's media content, it will, therefore, (in principle) not be surreptitious advertising, which is, in fact, the point from the perspective of protection of the viewer.³⁵
55. Given all the foregoing, viewed in their mutual coherence, the Authority concludes that the principal purpose of the objector's Instagram channel is to promote its own products and services. As a result, the objector's channel does not qualify as an on-demand commercial media service.

Going forward

²⁹ According to the Authority, therefore, in these videos the 'entertainment element' (see also paragraph 37) was not first and foremost.

³⁰ See the video dated 22 August 2023: <https://www.instagram.com/reel/CwP7IC4td4T/>.

³¹ See the video dated 18 August 2023: <https://www.instagram.com/reel/CwFg7cnMaj2/>.

³² See the video dated 26 July 2023: <https://www.instagram.com/reel/CvKZPwiAnb9/>.

³³ See the video dated 9 August 2023: <https://www.instagram.com/reel/CvuLAjqsDS-/>.

³⁴ See also paras. 39 and 40. The objector has a business which, primarily, focuses on the sale of certain products or services. It offers such products and services all over the world via its (online) shops.

³⁵ This is in line with the objective of the Audiovisual Media Services Directive and the Media Act.

56. The Authority deems it important to note that the assessment in this decision is a reflection of the situation at that specific time. Especially when provided via the Internet, channels providing audiovisual media content can, over time, undergo the necessary changes in terms of setup, method of presentation, reach and impact. Therefore, channels can, and should, be reassessed from time to time. The Authority may thereby, even after a different previous decision, still qualify a specific service as an on-demand commercial media service (subject to a notification duty) on the basis of changed circumstances or insights.
57. Furthermore, and perhaps unnecessarily, the Authority notes that the conclusion that the objector's Instagram channel does not come under the scope of the Media Act and the various policy rules of the Authority does not mean that the channel is not governed by certain rules. For example, Book 6 of the Dutch Civil Code contains certain rules that must be complied with by all advertisements.

H. Conclusion

58. The Authority holds that the objector's service (the Instagram channel under the name of 'ritualscosmetics') does not constitute an audiovisual media service and, thus, not an on-demand commercial media service. Therefore, the Authority finds that the objector's objections are **founded**. This means that the Authority will revoke the decision of 14 June 2023 and cancel the objector's entry in the 'Video Uploaders Register'. As a result, the basis for determination of the regulatory fees for the year 2022 is cancelled.

I. Publication

59. The Authority will publish the full text of the decision, with the exception of the personal data and confidential business information contained therein, by way of publication on its website. Publication will take place fourteen days of notification of the decision in the manner as required by Article 3:41 of the General Administrative Law Act. The Authority does not see any impediment in this respect pursuant to Article 5.1 of the Freedom of Information Act [*Wet open overheid*].

J. Decision on objection

The Authority:

- I. declares that the objector's objection is founded. This means that the Authority revokes the decision of 14 June 2023 (reference: 937836 / 937837). The objector will not be required to pay the regulatory fees for the year 2022 (EUR 226.86).
- II. cancels the objector's entry in the video uploaders register.³⁶
- III. decides that the full text of this decision will be published by way of publication on the Authority's website, fourteen days of the required notification thereof, with the exception of the personal data and confidential business information contained therein.

³⁶ See the website of the Authority: <https://www.cvdm.nl/registers/>.



Hilversum, 7 November 2023

On behalf of
The Dutch Media Authority

drs. Amma Asante
President

mr. Peter Eijssvoegel
Supervisory Director

Pursuant to the General Administrative Law Act, a private individual or legal entity whose interest is directly involved in this decision may lodge an appeal against this decision within six weeks of the day of notification hereof, with the Court of the district where they are domiciled.

Annex 1: Legal framework

Media Act

Article 3.29a

In this title, commercial media service on demand is understood to mean media service on demand that is provided by a commercial media institution and where the media content relates to products with moving video content, whether or not including audio content. This also includes associated subtitling services and electronic radio/TV guides.

Article 3.29b

1 A media institution that provides or terminates a commercial media service on demand must notify the Media Authority of the start or termination of the media service on demand within two weeks of that moment. If a media institution changes a commercial media service on demand provided by a

third party, this media institution also reports the changed commercial media service on demand. The following data of the media institution is in any case provided:

- a. name;
- b. registered office; and
- c. contact details, including e-mail address or Internet address.

2 A media institution that provides a commercial media service on demand also makes at least the data referred to in the first paragraph readily, directly and permanently available, as well as the name of the

Media Authority and the body charged with monitoring compliance with the provisions of or pursuant to this title.

3 A media institution that provides a commercial media services on demand informs the Media Authority without delay about changes that could affect the jurisdiction of the Netherlands over this media institution.

Article 3.30

1 A commercial media institution owes the Media Authority an annual regulatory fee for any permission obtained and for each of its media services on demand.

2 Rules shall be laid down by ministerial regulation regarding the determination of the regulatory fees, referred to in paragraph 1, whereby in any case:

- a. a distinction can be made between broadcasting services and media services on demand;
- b. a distinction can be made between permissions for radio broadcasting and for television broadcasting; and
- c. account can be taken of the average duration of the broadcasts and the number of households in the Netherlands that can receive the programme content.

3 The Media Authority can collect the regulatory fees owed by writ of execution.

2008 Media Regulation

Article 17

A commercial media institution owes the Media Authority an annual regulatory fee for any permission obtained as referred to in Article 3.1(1) of the Act, and for each of its media services on demand as referred to in Article 3.29a of the Act, which fee will be calculated according to the annex pertaining, and attached, to this regulation.

Annex pertaining to Article 17 Regulatory fee for commercial media institutions

Article 7. Media services on demand

A commercial media institution owes the Media Authority an annual regulatory fee for each media service on demand in the amount of 200 euros.

Article 8. Indexation

The amounts stated in this annex will be indexed annually based on the consumer price index as estimated by the CPB Netherlands Bureau for Economic Policy Analysis for the relevant year.

2022 Qualification of On-Demand Commercial Media Services Policy Rule

Article 1. Definitions

The following terms as used in this policy rule will have the following meanings:

- a. decision tree: the flow chart as included in the annex to this policy rule;
- b. commercial media institution: a commercial media institution within the meaning of Article 1.1(1) of the Act;
- c. Directive: 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 (Audiovisual Media Services Directive);
- d. video platform service: a video platform service within the meaning of Article 3a.1 of the Act;

- e. Act: the 2008 Media Act.

Article 2. Qualification

1 A media service will qualify as an on-demand commercial media service if it satisfies the definition of Article 3.29a in conjunction with the relevant provisions of Article 1.1(1) of the Act. This policy rule provides a clarification of certain criteria that are not identified in those articles, but must be satisfied pursuant to the law and the Directive for a media service to qualify as an on-demand commercial media service.

2 An on-demand commercial media service may be provided by:

- a. a commercial media institution with its own platform on which audiovisual media content is provided for which the commercial media institution bears editorial responsibility; or
- b. a commercial media institution which, through a third-party video platform service, provides audiovisual media content for which it (the video uploader) bears editorial responsibility.

3 A service provided by a commercial media institution within the meaning of paragraph 2, under a or b, will qualify as an on-demand commercial media service if, in addition to the provisions of Article 3.29a of the Act, it also meets the requirements of articles 3 to 6 inclusive of this policy rule.

4 An on-demand commercial media service provided by a commercial media institution within the meaning of paragraph 2(b) (video uploader) will be governed by the notification duty referred to in Article 3.29b(1) of the Act only if the commercial media institution must answer all the questions in the decision tree in the annex in the affirmative.

Article 3. Catalogue

The on-demand commercial media service is based on a catalogue. A catalogue is understood as the arrangement of the audiovisual media content in a database making audiovisual media content accessible to the user.

Article 4. Principal purpose

1 An on-demand commercial media service is a media service the principal purpose or an essential function of which is to provide audiovisual media content for purposes of informing, entertaining or educating the general public.

2 Providing audiovisual media content for purposes of informing, entertaining or educating the general public as part of a broader set of activities will be deemed to be a separate media service within the meaning of paragraph 1 if the provision of such media content has autonomous content and function as compared to the other activities of the provider.

Article 5. Mass media nature

An on-demand commercial media service is of a mass media nature. A mass media nature will be deemed to exist if a service can be received directly or indirectly by the general public in one or more European Union Member States by consumers using standard equipment and could have a clear impact on a significant proportion of the public.

Article 6. Economic service

An on-demand commercial media service is an economic service. This means that the service will normally be provided for remuneration or that the provision of the service will normally otherwise yield a material advantage.

Article 7. Editorial responsibility

For purposes of this policy rule, where more than one party should enjoy influence over the choice of the substance and organisation of the media content, the party enjoying decisive influence over the choice of the substance of the audiovisual media content will be deemed to bear editorial responsibility.



Audiovisual Media Services Directive

Article 1

1 For the purposes of this Directive, the following definitions shall apply::

a) 'audiovisual media service' means:

- I. a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;
- II. audiovisual commercial communication;

(...).