2 May 2007: Terrestrial analogical broadcasting of TV services

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Conseil de la concurrence imposes interim measures against TDF and orders not to prevent TV channels from entrusting to other operators the broadcasting of their programmes from secondary network sites

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Following a referral on December 2006 by Emettel company of practices implemented by TDF company on the wholesale market for terrestrial analogical broadcasting of TV programmes, the Conseil de la concurrence imposed interim measures against TDF.

The facts denounced by Emettel

Emettel considers that TDF abuses its dominant position following the conclusion of exclusive agreements with public channels France 2, France 3 and France 5/ Arte for 7 years, giving TDF the broadcasting monopoly of 3 public TV channels, a few weeks before the adaptation of a European directive which led to open up competition in the terrestrial analogical broadcasting sector.

Besides, Emettel also challenges provisions, which are held in the agreements concluded by TDF with the companies TF1 and Métropole Télévision (producer of M6 channel) and France Télévisions. These companies significantly restrict the number and the power of broadcasting stations, which can be excluded from the agreements every year.

Emettel considers that these provisions lead to market foreclosure and notably

reduce the possibilities to see new markets being allocated to it, as part of the ongoing reorganisation of analogical frequencies of channels TF1, M6, France 2, France 3, France 5/ Arte.

The exclusivity clauses and clauses of partial exclusion of broadcasting sites, held in contracts signed between TDF and new players of the broadcasting market are likely to constitute a barrier to entry

Almost all analogical terrestrial broadcasting sites of TV programmes and frequencies are under long-term contract with TDF, only a few dozen sites of low power may be transferred to competition. The exclusion possibilities are limited to less than 0.5% of France 2 and France 3 sites and less than 7% of TF1 sites and have to be shared between site closures and potential transfers to competition . They are very limited for M6 as a result of TDF's control over infrastructures (grounds and pylons).

The competition stakes linked to the presence of alternative broadcasters on the secondary network of terrestrial broadcasting have to be examined in the context of the planned extinction of analogical broadcasting and also in the light of digital broadcasting development, which ought to replace it. Secondary network sites of the market for terrestrial analogical broadcasting shall indeed be reused for the secondary network of terrestrial digital broadcasting market. However, the combination of excessive contract duration and their quasi-exclusive nature is likely to deter the entry or the development of competitors on the network, for both national and European operators.

The Conseil de la concurrence therefore considered that the act for TDF to have concluded such contracts with France 2, France 3, TF1 and M6 channels, is likely to constitute an abuse of dominant position with respect to national and Community competition law.

The Conseil de la concurrence imposed interim measures to prevent any serious damage to the competitive operating of the sector

Technological breaks - as the one constituted by the adaptation from analogical to digital broadcasting - opens a possibility and may allow for the challenging of

positions acquired by incumbent operators, even on markets protected by strong barriers to entry. The reorganisation of analogical frequencies constitute an opportunity for TDF's competitors to enter the market. The reorganisation is nevertheless expected to stop at the end of 2008. The Conseil therefore considered justified to take urgent measures so as to abolish the artificial barrier to entry constituted by the quasi-exclusive nature of contracts.

To that end, awaiting the decision on the merits, the Conseil de la concurrence orders TDF:

· not to oppose to any request for transferring the secondary network of the wholesale market of analogical terrestrial broadcasting of TV services, which have a power inferior or equal to 25 watt, which could be made by TF1, France 2, France 3, France 5/Arte and M6 channels to the advantage of another technical broadcaster;

· not to include in future contracts signed with TF1, France 2, France 3, France 5/Arte et M6 channels, clauses restricting the number of secondary network sites for the wholesale market of analogical terrestrial broadcasting of TV services with a power inferior or equal to 25 watt, which may be transferred to the advantage of any other technical broadcaster;

· to inform TV channels of this decision