7 May 2008:“Catch up TV”

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The Conseil de la concurrence dismisses AFORST complaint against France Télévisions and France Télécom

>Version française

In October 2007, The French Association for network operators and telecommunication services (AFORST)* referred the case to the Conseil de la concurrence to denounce a partnership concluded on 28 December 2007 between France Télévision group and France Télécom group. The agreement states that France Télécom will have exclusive rights to distribute certain France Télévisions programmes as “catch up TV”(allows the viewing of pre-recorded TV programmes over a short period of time after their broadcasting).

AFORST argued that the exclusive agreement was anti-competitive on the ground that the competing Internet access providers were denied access to these contents, and could not make alternative attractive offers, AFORST also asked the Conseil to suspend the contentious agreement on an interim basis.

The complaint dismissal

Competition law does not prohibit in itself an exclusive agreement, even if it is concluded between operators in a dominant position. The Conseil de la concurrence makes a case by case assessment of the impact on the market while taking into account certain criteria (field and exclusivity duration, technical justifications or the agreement’s economic compensations).

In the case in point, the Conseil estimated that the referral did not bring convincing elements likely to demonstrate - as it appears - the anticompetitive nature of the agreement and dismissed the referral on the merits and the

request for interim measures.

The Conseil notably considered that the exclusivity field was limited (the partnership concerns only programmes of the 6-12pm slot excluding movie, news and sport, i.e. “prime” programmes and that its duration was limited (two years after the launching).

The Conseil noted that for all the consumers (whatever their access providers) some possibilities remained (via catch up TV) to view the programmes concerned on France Télévisions internet website and that the exclusivity conferred an economic equilibrium to the partnership which meets both the needs of the parties to the agreement and the producer’s, who for the first time are paid as part of the broadcasting of their programme via catch up TV.

The Conseil also estimated that the programmes concerned by the exclusivity were not indispensable and that the competing DSL operators could differentiate their offers in offering their customers other interactive services (such as music catalogues) or develop partnerships with other channels, and even negotiate an agreement with France Télévisions to broadcast, via catch up TV, programmes which are not covered by the incriminated partnership.

The Conseil de la concurrence stressed that such a dismissal, concerning a still budding market and whereas the incriminated partnership has not been implemented yet, does not however hinder the fact that companies of the sector, in the case when they would bring new elements resulting from the subsequent observation of the market, can refer to the Conseil in the future.

*The AFORST gathers among: Neuf Cegetel, SFR, Telecom Italia, Altitude Telecom, B3G Telecom, Bouygues Telecom, BT, Colt Télécommunication France, Completel, Hub Télécom, Ipnotic Telecom, Prosodie, Société Réunionnaise du Radiotéléphone (SRR) and Verizon France.