17th April 2009: Wholesale audiovisual broadcasting services market

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The *Autorité de la concurrence* delivers an opinion to the ARCEP in which it declares itself favourable to the strengthening of the *ex-ante* regulation

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In answer to the request from the ARCEP in application of the Postal and Electronic Communications Code (*Code des postes et communications électroniques*), the *Autorité de la concurrence* has just issued an opinion on the regulation of the wholesale audiovisual broadcasting services market in France (market 18 / second analysis cycle 2009-2012).

The *Autorité* considers that the competition has been weakened in this market and that the common law on competition cannot alone address the obstacles arising during the period concerned (2009-2012). It is in favour of the proposal from ARCEP to strengthen the ex-ante regulation which existed already in this market.

Competition in the French market is weakened as a result of the purchase by TDF (*Télédiffusion de France*) of two of its most active competitors, Antalis and Emettel

Since the previous analysis conducted for the first cycle (2006-2009), the *Autorité* finds that competition has been weakened on account of the purchase of the companies Antalis, in 2006, and Emettel in 2008, by the incumbent operator TDF.

Antalis and Emettel were in fact among the most active operators in the broadcasting markets and their recent disappearance has radically changed the dynamic approach to the situation of effective competition over the period 2009-

2012, TDF's position being significantly enhanced.

Furthermore, the *Autorité* finds that strong barriers still exist for entry into this market

The *Autorité de la concurrence* notes the nature of the particularly elevated barriers for entry into this market, including in particular the timescales and the difficulties in obtaining the administrative permits required for the installation of antennas and the ambitious TNT (*Télévision Numérique Terrestre*) DVB (*Digital Video Broadcasting*) roll-out timetable laid down by the CSA.

The *Conseil de la concurrence* has already been forced to intervene within the broadcasting domain during the first Regulation phase (decision 07-MC-02 dated 2nd May 2007 and 07-D-30 dated 5th October 2007 / Emettel case; decision 07-MC-05 dated 11th July 2007 / towerCast case). In addition, the law for modernisation of the economy has given the new *Autorité de la concurrence* new ways of economic regulation as regards a priori merger control and also henceforth giving it the opportunity of intervening a posteriori in order to call into question any merger which would have led to an excessive exploitation of a dominant position or of a state of economic dependency (article L. 430 - 9 of the French Commercial Code).

However, it appears that an *ex-ante* regulation of the ARCEP targeting the TDF costs specifically turns out to be necessary in order to complement the common law action of the *Autorité de la concurrence*. The number of sites affected by the TNT roll-out (more than 1,600) would not allow the *Autorité de la concurrence* to act within timescales that are compatible with the TNT roll-out schedule.

The *Autorité* considers it legitimate for the ARCEP to resort to certain *ex-ante* remedies in order to put in place, in a transitory manner, market conditions suitable for facilitating the maintenance of effective competition

The *Autorité de la concurrence* is in favour of the regulation envisaged by the ARCEP which aims at improving access for the competitors to the non-replicable sites (113 sites have been identified in this category by the sector controller) through the implementation of a new trend towards costs, all of which is

encouraging the TDF's competitors to build alternative sites when a priori this is possible: potentially there are approximately 1,500 sites involved.

Given the forced roll-out timetable and the fact that the broadcasting contracts with the broadcasting companies will be concluded shortly for a period of five years during the next cycle, the *Autorité* must draw the attention of ARCEP to the necessity, in its final decision, to draw up the fullest possible list of sites considered as non-replicable, taking into account all the practical barriers to entry.