7 July 2009: Opinion on TV content access exclusivity offers by Internet service providers

Published on October 12, 2009

The Autorité de la concurrence states its position:

- **Exclusive access must remain an exceptional solution, strictly limited in time and scope.**
- **Auto-distribution appears to be a satisfactory balancing solution, to the benefit of actors in the value chain and of consumers.**
- **Regulation of the wholesale market for pay-TV channels remains an indispensable complement.**

> Version française

After a January 2009 referral from the French Minister for the economy, industry and employment, regarding exclusive relations between the activities of electronic communication operators and those of contents and services distribution, the *Autorité de la concurrence* issues today its opinion and publishes it on its Internet site www.autoritedelaconcurrence.fr.

As foreseen in the government's "Digital France 2012" plan, the minister queried the *Autorité* on the compatibility with competition rules of the exclusive access offers to very attractive contents that certain ISPs (Internet service providers) reserve for their subscribers. It was also asked by the minister on the timeliness of a specific legal framework intended to prevent the risks of such exclusive offers.

Double exclusivity: a new question

Exclusive offers are frequent in the pay-TV sector. However, those set up by Orange after the acquisition of premium sports or cinema content are presented as a new model that is expected to be extended to other contents as well as to other media - ADSL today, optical fibre tomorrow.

This model is that of double exclusivity: **distribution exclusivity**, resulting in a subscription to the television service itself, and **transport and access exclusivity** that requires payment for a subscription to the Internet service provider's triple-play offer to access the contents.

In its opinion, the *Autorité* examines the opportunities and risks resulting from this recent model: possible opening of the pay-TV market, which appears to be desirable; probable closing of the high and very high-speed market, which would be very worrisome - particularly if such a model were to be imitated by other operators and becomes generalized, with the outlook of the deployment of optical fibre networks.

In the current situation in the pay-TV sector, the arrival of new actors in this market is desirable

Most Internet service providers are unable to put together attractive bouquets, primarily due to the distribution exclusivity available to Canal+; they are often limited to the role of a simple carrier, while allowing their customers to directly subscribe to the Canal+ France ADSL-based offers.

A newcomer to the pay-TV market encounters several roadblocks to acquiring rights to new channels: the market lacks transparency as to the expiry dates of exclusivity arrangements; the entry cost can be significant since the holders of the rights will demand compensation for the loss of earnings that would result from non-exclusive distribution.

Moreover, the *Autorité de la concurrence* considers that all incentives that can encourage the arrival of newcomers to the pay-TV market have a positive effect, in principle, notably for consumers who can expect to see lower prices, greater diversity of the proposed content as well as access to new intermediate offers,

that are more accessible in price terms than the high-end premium offers currently proposed by Canal+.

However, the Autorité de la concurrence considers that the answer must be sought elsewhere than in the questionable double exclusivity economic model claimed by Orange, for three reasons:

- **Firstly, because there are other proposals for encouraging incentives to invest in contents, ones that are less harmful to competition,**
- **secondly, because the proper response to insufficient upstream competition is not to encourage a strategy that could have the potential effect of putting a lock on downstream competition,**
- **thirdly and most importantly, because the imitation and generalization of the double exclusivity model entail serious risks for the intensity of competition and the freedom of consumers on the current high-speed and future very high-speed markets.**

Indeed, double exclusivity serves to restrict the consumer's choice, as the latter can no longer have access to all attractive contents, or is obliged to pay a much higher price in order to have universal access to the contents.

Over and above the single Orange Sport channel case - which is not the subject of the opinion -, there are grounds to fear that, were the double exclusivity economic model to extend to other content or be taken up by other operators, consumers would be locked into a "**closed ecosystem**". The consumer would then remain with a telecom operator solely or primarily because of the content that the latter has exclusively acquired.

Moreover, by acquiring premium contents and reserving them solely for its own Internet subscribers, Orange's strategy also runs the risk of destabilizing the high-speed market, to the detriment of competing operators. Though this strategy has not had any concrete results in terms of drawing subscribers away from competitors for now, its objective is at least to secure the loyalty of its own subscribers, who can no longer play on the competition from other Internet service providers without losing the contents to which they are attached.

If the double exclusivity economic model became generalized, it could in time lead to a duopoly, both on the pay-TV market and on the high-speed market. Telecom operators not wishing to or lacking the means to integrate vertically would be unable to maintain themselves within the high-speed market. There would then be a great risk of creating an entrenched duopoly with two integrated operators facing off against each other, on the one side Canal+/SFR after the end of the commitments assumed during recent mergers, and Orange on the other.

The position of the *Autorité de la concurrence*

1) Exclusive access must remain an exceptional solution, strictly limited in time and scope.

While for telecom operators it is necessary to maintain the incentives for investing in contents and developing associated and interactive services, the Autorité would like to see any exclusivity limited to one or two years and for its scope to be limited to true innovations of technical nature (interactive services associated with linear streams) or of commercial nature (innovative linear programmes intended to enhance the range of intermediate offers), for which it is necessary to facilitate learning by subscribers or to test the market.

2) Auto-distribution (1) is a satisfactory balancing solution.

At the end of the possible access exclusivity, it is understandable that an ISP would not wish to make its channels available on the wholesale market and see them integrated into the proprietary bouquets of other service providers. The incentives to invest in contents would then be too low for an actor that does not dominate in pay-TV, since the other distributors could, without taking industrial risks, directly integrate the channels into their proprietary bouquets.

On the other hand, auto-distribution would allow an ISPs such as Orange to control the commercial relation with the subscriber and to develop its potential stock of subscribers for the most extensive, and therefore most profitable, broadcast of channels. For consumers, the solution will allow them to have

access to all of the most attractive contents, without being locked into an Internet service provider.

3) Regulation of the wholesale market for pay-TV channels remains an indispensable complement.

An uneven sharing of value between content distributors and network operators could hinder investment, which is necessary for the development of interactive services and the deployment of optical fibre. However, this matter will only find a satisfactory long-term solution in the development of competition on the pay-TV markets, and not by any limitation of the fluidity of the high speed and very high-speed markets.

For that reason, the *Autorité de la concurrence* would like to see a quick and noticeable development of the current operating terms of the wholesale market for pay-TV channels, as a supplement to the strict limitations that must be applied to the double exclusivity model upheld by Orange.

Conclusion

The *Autorité de la concurrence* considers that it is time to set **clear rules of the game**: firstly, to define very strict **duration conditions** - maximum of one or two years - during which **exclusive access reserved to innovative services** could be tolerated, and secondly, to allow a sufficient **opening of the wholesale market for pay-TV channels, notably in the areas of sports and cinema**, which would require regulation of the amounts and scope of the dominant distributor's exclusivity clauses, as well as the perpetuation and extension of the commitments that it has made.

The **clarity of the rules of the game** is an essential element for **promoting dynamism of the various actors**, and therefore **investment and innovation**, both in the pay-TV and telecom sectors.

These rules may be imposed on a case-by-case basis through litigious decisions that the *Autorité de la concurrence* would have to make relative to the various complaints referred to it. But their definition will take time, it will only apply to the

examined practice, without having the possibility to provide a more general and more foreseeable framework, and it will result in incessant disputes.

Such uncertainty is good for no one. One must therefore envisage an "exit from the top", which cannot depend solely on judgments of the courts before which these matters have been brought or on decisions from the competition authority, as these will never be able to guarantee - not more than any complementary ones by sector-specific regulators - the same legal security as a written standard.

At a time when the massive deployment of optical fibre networks and thus very high-speed service is getting underway, this will itself result in new usages and lawmakers must provide a strong signal.

(1) A distributor can reserve the exclusivity of certain channels for itself. This does not mean that it could not distribute its offer to the greatest possible number of platforms: satellite, television by ADSL, FTTx networks. The bouquet's distributor then maintains the commercial relation with the subscriber. That is why this is called auto-distribution.