23 July 2012: Television

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**The Autorité de la concurrence clears the acquisition of Direct 8 and Direct Star by Vivendi and Groupe Canal Plus,
subject to conditions**

> Version française

On 23 July 2012, the *Autorité de la concurrence* cleared the acquisition of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi and Groupe Canal Plus, subject to several commitments. With the acquisition of the free-to-air channels Direct 8 and Direct Star, Groupe Canal Plus, the largest pay TV operator in France, strengthens it activities in the free-to-air television markets.

The *Autorité de la concurrence* received this transaction's notification on 5 December 2011, but the companies did not satisfy merger filing requirements until 21 February 2012. As a result of the investigation, and following a first consultation of market players, the *Autorité* considered that the merger raised serious doubts that it would impede competition. On 27 March 2012, Vivendi Universal and Groupe Canal Plus offered commitments to alleviate the *Autorité*'s competition issues. However, these commitments were insufficient to remedy the merger's effects and the *Autorité* decided to open an in-depth investigation on 17 April 2012. New versions of the commitments were submitted, until the final version dated 20 July 2012, which addressed all of the *Autorité*'s concerns.

The *Autorité* identified several risks, notably in terms of acquisitions of rights

1- Risk of pre-emption of the free-to-air broadcasting rights for the most attractive and unreleased American and French films and TV series

Groupe Canal Plus ("GCP") is the largest buyer of movie rights for broadcasting in the 1st and 2nd pay TV windows in France. It could use this position to pre-empt the most attractive broadcasting rights for Direct 8 or Direct Star.

- American programs

  As regards American programs, the most attractive rights for free-to-air TV are films and TV series. The large majority of these rights are marketed by a small number of studios (referred to as "majors") through multi-year "output deals", which guarantee the buyer a first choice or exclusive rights to a studio's production. By leveraging its very strong position in pay TV rights, GCP would be better positioned than competing free-to-air channels to make obtain output deals. Given that limited number of films and, first and foremost, a small number of series provide the best audiences ratings for free-to-air TV channels, GCP's pre-emption of the most attractive rights could significantly threaten their financial balance by decreasing their audience ratings and, therefore, their advertising revenue, to the detriment of TV viewers.

- French films

  As regards French films, Groupe Canal Plus is almost the sole buyer of broadcasting rights for the first two pay TV windows. It could, therefore, use leverage its market power in pay TV to deprive competing free-to-air TV channels competing for the free-to-air broadcasting rights of the most attractive and unreleased French films.

For a company holding market power on a given market (here, on the buying-side of the market for pay-TV broadcasting rights), leveraging that market power to distort competition on another market (here, the buying-side of the market for free-to-air TV broadcasting rights) constitutes one of the anticompetitive effects (referred to as "conglomerate effects") that the *Autorité de la concurrence* must prevent when reviewing mergers. GCP's acquisition of Direct 8 and Direct Star could certainly prove beneficial for TV viewers since it would enable these channels to broadcast attractive programs that would not otherwise be available for free-to-air TV viewers. However, should the improvement in the merged

channels' quality, merely rely on GCP's buying power for pay rights, it would only result from a pre-emption of its competitors' programs and will ultimately weaken the total supply, ultimately damaging TV viewers.

2-Risk of depriving free channels, particularly newly created DTT channels, of access to StudioCanal's library movies

Library movies are films which have already undergone a first broadcasting cycle on pay or free-to-air TV. On the market for French library movies, Groupe Canal Plus, through its affiliate StudioCanal, holds the largest portfolio of rights. These films represent essential content for free-to-air channels because that are required[1] to broadcast at least 60% of European movies, including at least 40% French language movies. These rights are particularly important for the small DTT channels, which broadcast very few unreleased movies and essentially broadcast library films. Therefore, GCP will have the ability to deprive free-to-air channels of access to a large portion of rights, which are essential to them. The acquisition of Direct 8 and Direct Star could therefore create incentives for GCP to implement a foreclosure strategy in order to protect its own free-to-air channels from competition.

3-Risk of pre-emption of majorly important sporting events to Direct 8's and Direct Star's benefit

GCP is in a position to acquire, or already holds, broadcasting rights of so-called "majorly important sporting events", but which until now, pursuant to law[2], it was obligated to sell to free-to-air channels so that they could broadcast them to the general public. After the merger, nothing will prevent GCP from ending this practice and reserving its own channels majorly important sporting events over which it holds broadcasting rights.

In order to prevent these risks, GCP has filed a set of substantial, credible and verifiable commitments to the *Autorité de la concurrence*

1-Limits to acquisitions of rights for American movies, American series and French films

For recent American movies and series and unreleased French films, the

commitments aim at preventing GCP from using its buying power to drain the most attractive rights from the market, however without preventing GCP from supplying the merged channels with attractive programs, to the benefit of TV viewers.

The merging parties have, therefore, undertaken to limit "output deals" combining acquisitions of both free-to-air and pay TV rights to a single American studio among the six majors (Universal, Paramount, Warner, Sony, Fox and Disney), from which GCP currently purchases rights.

For unreleased French films, the parties have undertaken not to acquire, in the same calendar year, the pay and free-to-air broadcasting rights of the same film for more than 20 movies and to devote the majority of their investments to mid-budget films ("middle" films), without being able to pre-empt the rights of a large number of big-budget films (a maximum of 2 films with a budget of more than 15 million euros, 3 with a budget between 10 and 15 million euros and 5 films with a budget between 7 and 10 million euros).

2- Separate negotiations for pay TV and free-to-air TV rights form movies and series

For acquisitions that fall out of the scope of the preceding commitments, the parties have undertaken to use specific staff to negotiate the free-to-air broadcasting rights of recent French and American movies and series, separately and independently from GCP's pay TV activities. These teams will be handled by a separate company for acquiring broadcasting rights for free-to-air TV. GCP will not practice/grant any form of bundling, subordination, benefit or financial consideration between acquisitions of free-to-air broadcasting rights and acquisitions of pay TV broadcasting rights.

3-Limits to acquisitions, by Direct 8 and Direct Star, of StudioCanal's library movies

On the French library films market, the parties have undertaken to limit acquisitions by Direct 8 and Direct Star from StudioCanal to levels reported prior to the merger, to limit the term of assignment of rights to six months and not to grant these channels any preferential terms compared to competing free-to-air

channels.

4-Sale of the free-to-air broadcasting rights of majorly important sporting events

Lastly, the parties have undertaken to sell, for free-to-air broadcasting, the broadcasting rights of majorly important sporting events that they may have acquired. These sales will take place after a transparent and non-discriminatory tender procedures involving all relevant broadcasters. The tender procedure will be organized by an independent trustee approved by the *Autorité* and responsible for monitoring compliance with commitments.

All of these commitments were undertaken by the merging parties for a five-year term. The *Autorité* will strictly monitor compliance with these commitments. An independent trustee who has been approved by the *Autorité* will be in charge of monitoring compliance. The *Autorité* will be able to renew the implementation of all or part of these measures, once and for five additional years, if the competition analysis, to be performed before the five-year term ends, so requires.

[1]*Pursuant to Article 7 of Decree no. 90-66 of 17 January 1990, implementing Act no. 86-1067 of 30 September 1986, and setting out the general principles applicable to broadcasting of cinematographic and audiovisual works by television broadcasters.*

[2]*Pursuant to Article 20-2 of the Law of 30 September 1986, certain sporting events referred to as "majorly important", a list of which is set by Decree no. 2004-1392 of 22 December 2004, must be broadcast "on a free-access television channel".*

> Read the commitments (in French)

> Full text of the decision 12-DCC-101

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> This decision was submittred before the Conseil d'Etat (French Administrative Supreme Court)