23 July 2012: Pay TV

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The *Autorité de la concurrence*, ruling again on the acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus, has cleared the transaction subject to several injunctions

> Version française

On 23 July 2012 the *Autorité de la concurrence* cleared the acquisition of TPS and CanalSatellite's sole control by Vivendi Universal and Canal Plus, subject to compliance with injunctions ordered to restore sufficient competition in the pay TV markets.

Subsequent to the withdrawal of a previous decision authorising the acquisition on 20 September 2011[1], Vivendi Universal and the Groupe Canal Plus ("GCP") ("the Parties") re-filed a merger notification with the *Autorité de la concurrence* on 24 October 2011. Investigations began on 21 February 2012, at which date the companies satisfied merger filing requirement.

After an initial investigation, the *Autorité* decided to open an in-depth investigation of the acquisition on 27 March 2012. The investigation involved a broad consultation of market players as well as opinions from the Audiovisual Regulator (*Conseil Supérieur de l'Audiovisuel*, or "CSA") and the Telecommunications and Posts Regulator (*Autorité de Régulation des Communications Électroniques et des Postes*, or "ARCEP").

The 2006 acquisition strengthened GCP's position on all markets concerned and weakened competition

At the end of the investigation the *Autorité* found that, after the 2006 acquisition, whose effects were not prevented due to GCP's failure to implement certain

commitments which conditioned the merger's clearance, competition was significantly weakened in several pay TV markets, particularly with respect to the acquisition of movie rights, channel publishing, pay-TV channels' marketing and services distribution.

In particular, the fact that the quality of unbundled channels was lessened, GCP's failure to implement commitments relating to distribution conditions for independent channels and CanalSat's exclusive distribution deals with independent channels, had the combined effect of preventing the emergence of competition in downstream markets:

> - Orange attempted to respond to the lack of availability of pay channels at wholesale by problishing its own channels and by investing in the acquisition of premium content (sport, movies) and launching the distribution of the Orange Cinema Series bundle of channels. However, as the *Conseil de la concurrence* had anticipated in 2006, in the course of its attempt, Orange encountered serious barriers to entry in trying to purchase content. Orange Cinema Series therefore finally signed a partnership agreement with Canal Plus, thereby reducing the only source of competition on the market.
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> - While Internet Service Providers (ISPs) were able to expand significantly thanks to the success of triple-play offers, their development as distributors of pay television was limited because they were unable to constitute attractive bundles, given the lack of available content. They were also encouraged to propose GCP's offers to their subscribers, and were therefore reduced to carrying offers that GCP distributed.
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> - The growth of broadband and very high speed internet services mainly benefitted GCP's pay television offers, with the result that GCP recruits now most of its subscribers on ADSL platforms.

Today, more than five years after the merger, GCP still accounts for [90-100%] of the market's turnover, whereas all of the ISPs combined represent [0-10%]. These figures reflect the fact that the merger led to the creation of an enduring monopoly to the benefit of GCP. The market for premium sports content now seems to constitute the sole exception because Al Jazeera was able to acquire

premium content for its BeIn Sport channels.

GCP offered insufficient commitments in the context of the renewed merger review, leading the *Autorité* to order injunctions: the order is intended to guarantee competitive pay TV markets, while taking account of specific characteristics of the pay TV sector in France

GCP offered commitments to remedy competition issues. The commitments were found inadequate, and the *Autorité* therefore decided to require Vivendi and GCP, in accordance with Article L 430-7 III of the French Commercial Code, to adopt measures to restore adequate competition in the various pay TV markets, which will apply in both metropolitan France and overseas departments and regions.

In defining the measures intended to restore competition to the affected markets, the *Autorité* took account of the specific characteristics of this sector in France and the changes expected from technological innovation and globalisation in affected markets.

Three objectives underlie and give consistency to all the injunctions ordered:

- The first objective is to **encourage diversity in pay TV providers**, by creating conditions favourable to the development of less expensive pay TV offers, albeit of smaller scale than GCP's, and therefore more accessible for consumers.

  Broadband and very high-speed internet services create new opportunities for diversified pay TV offers in terms of innovative additional services and new growth prospects. The ability of ISPs to access of attractive pay TV channels at wholesale is therefore a major objective.

  Corrective measures must also preserve editorial diversity by ensuring that the distribution conditions for independent channels are equivalent to those of GCP's own channels, by strengthening their negotiating powers vis-à-vis GCP. They must also enable alternative distributors to negotiate distribution deals with them in order to create attractive bundles.

- The second objective is **to preserve the competitive potential of new markets** by preventing GCP from pre-empting new ways for consumers to access content, particularly non-subscription and subscription video on demand. Non-linear methods of accessing media services create a significant opportunity for the future of competition in the pay TV sector, and the development of connected TV could give viewers much wider access to programs, by accessing content available directly on the internet. However, GCP's position in the markets for the acquisition of rights and the size of its subscriber base are such that it holds a considerable advantage, allowing it to pre-empt the market, if the non-exclusive model for rights acquisitions, which is now the rule, were to be challenged.

- The final objective is **to preserve the French movie system for financing the movie industry**, which is structured around a vertically integrated player (producer/distributor) and a premium channel which is the first contributor to French film production. The abundance and quality of this production benefits end consumers and the *Autorité* does not wish to destabilize this balance.

The injunctions ordered

Movie rights

- The order sets rules governing GCP's purchasing behaviour with respect to movie rights, in particular by limiting the duration of output deals to three years, requiring that GCP enter into separate agreements for different type of right (1st pay TV window, 2nd pay TV window, series, etc) and prohibiting output deals for French films (for more details see orders 1(a) to 1(e)).

- In order to enable the Orange Cinema Series offer to exert actual competitive pressure, independently of GCP, GCP must divest its stake in Orange Cinema Series. Otherwise, GCP will have to adopt measures limiting its influence on Orange Cinema Series (see orders 2(a) to 2(c)).

Distribution of pay TV channels

- GCP will have to guarantee clear rules governing the access of independent channels to distribution services by CanalSat (distribution of a minimum number of independent channels, distribution of any channel holding premium rights and drafting of a model distribution deal) (see orders 3(a) to 3(d) and 4(a) to 4 (b)).

- GCP will have to allow alternative distributors, particularly the ISPs, to compete effectively with CanalSat for exclusive distribution deals (see orders 5(a) to 5(b)).

- GCP will have to make all its own movie channels distributed in its CanalSat offer (Cine+ channels) available for third-party distributors (unbundling) (see orders 6(a) to 6(c)).

Video on demand (VOD) and subscription video on demand (SVOD) (see orders 7(a) to 7(c)).

- Separate contracts must be entered into for the purchase of VOD and SVOD rights on a non-exclusive basis, and must not be combined with rights purchased for linear distribution on pay TV;

- StudioCanal's VOD and SVOD rights must be offered to any interested operator;

- No exclusive distribution deals for the benefit of GCP's VOD and SVOD offers on ISP platforms.

These injunctions are imposed for a period of five years. An independent trustee, approved by the *Autorité*, will be responsible for monitoring their implementation. At the end of the five-year period, the *Autorité* will review the competition situation in order to determine whether the injunctions should be kept in place. If market conditions have changed significantly, the parties will be able to request for the measures to be revised.

Proceedings to date

30 August 2006: Canal Plus and Vivendi are authorised by decision of the Minister of the Economy to acquire TPS, on condition that they implement 59 commitments.
20 September 2011: The *Autorité* withdraws the decision authorising the acquisition of TPS in view of the merging parties' failure to comply with 10 the commitments, including key conditions, and imposes a penalty of €30 million on Canal Plus .
24 October 2011: The Vivendi and Canal Plus groups re-file a merger notification for the acquisition of TPS to the *Autorité de la concurrence*.
21 February 2012: The merging firms' notification file is complete.
27 March 2012: The matter is subject to an in-depth investigation.
25 May 2012: The *Autorité de la concurrence*'s investigation services consult interested third parties on possible remedies
11 June 2012: Hearing before the Board of the *Autorité*.
26 June 2012 and 10 July 2012: The parties offer commitments which are later deemed inadequate by the *Autorité*.
23 July 2012: Decision of the *Autorité de la concurrence* ordering injunctions.

[1]*See the* Autorité *'s Decision no. 11-D-12 of 20 September 2011 and the press release of 21 September 2011. This decision was challenged before the* Conseil d'Etat.

> Read injunctions ordered (in French)

> Read full text of the decision 12-DCC-100 of 23 July 2012

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> Ruling of the Conseil d'Etat (French Administrative Supreme Court) of 22 October 2012