

22 June 2017: Pay TV sector

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The *Autorité de la concurrence* modifies the framework of measures previously imposed on Vivendi and GCP in the context of the acquisition of TPS.

Certain injunctions have been lifted, or adapted to take into account the evolution of the markets. Others, however, have been kept to preserve the competitive dynamics.

BACKGROUND

- **30 August 2006**: The French economy minister approved acquisition of TPS and CanalSatellite by Vivendi and GCP, subject to the compliance with 59 commitments.
- **20 September 2011**: After noting non-compliance with several of the aforementioned commitments, the Autorité de la concurrence withdrew its approval (Decision 11-D-12, see press release), obliging Vivendi and Groupe Canal Plus (hereinafter "GCP") to re-notify the transaction.
- **23 July 2012**: The Autorité de la concurrence issued a new approval, subject to compliance with 33 injunctions (Decision 12-DCC-100, see press release). These 33 measures were stipulated for a period of five years, after which a new competitive analysis would be performed, to examine whether or not all or part of these should be maintained. The parties can also solicit the Autorité, at any one time, to lift or adapt these measures.
- **16 February 2016**: GCP requested a partial advance review of one of the measure with a view to entering into an exclusive distribution agreement with the beIN Sports channels.
- **9 June 2016**: The Autorité declined this request, considering that the conditions were not fulfilled (see press release of 9 June 2016).
- **9 June 2017**: Following exchanges with the Autorité and a consultation with the market stakeholders, GCP formulates a request to the Autorité to review the commitments.

Five years after its Decision issued in 2012, the Autorité must now state its position regarding the appropriateness of maintaining or lifting the injunctions, in light of the changing competitive landscape in the relevant markets

1/ The injunctions issued in 2012 : Objectives and principal measures

Objectives pursued

In 2012, the Autorité observed significantly weakened competition in several markets in the pay TV sector: film rights purchasing, specialty channel production and marketing, and pay TV service distribution.

The imposed injunctions were framed by three objectives:

- 1) promote diversity among stakeholders in the pay TV sector, to foster the emergence of an alternative offering to GCP that would be affordable to consumers;
- 2) prevent GCP from pre-empting emerging modes of content consumption such as video on demand (VoD) and subscription video on demand (SVoD);
- 3) protect the French film industry's funding system, which is organised around a vertically integrated stakeholder (producer of a premium channel /distributor) that, at the time, was the leading contributor of funding for French audiovisual production.

Plan adopted in 2012: reminder of the core measures

Regarding film rights

The purchasing behaviour of GCP was regulated (injunction 1), in particular by:

- limiting film purchasing framework agreements with American studios to a maximum of three years;
- requiring a different contract for each type of right (first window, second window, series, etc.);
- prohibiting framework contracts for the purchase of films with French producers.

To enable the Orange Cinéma Séries (OCS) package to exert genuine competitive pressure on GCP, the latter was required to divest its shareholding in OCS within a set time phase or, failing that, to adopt behavioural measures intended to ensure the commercial independence of OCS (**injunction 2**).

Regarding the distribution of specialty channels

GCP was required to ensure clear ground rules for access by independent channels to distribution via CanalSat (**injunctions 3 and 4**), and in particular had an obligation to:

- include at least a specified proportion of independent channels;
- include non-exclusively any channels with premium rights;
- develop reference offers supporting their transaction and make them available to channels.

GCP was also compelled to enable alternative distributors, including Internet Service Providers (ISPs) in particular, to compete effectively with the exclusive distribution arrangements on CanalSat (**injunction 5**). Lastly, it was ordered to GCP to make available to third-party distributors all the cinema channels (Ciné +) that it produced for its CanalSat package (**injunction 6**).

Regarding Video-on-demand (non-linear) services

GCP was required to:

- enter into separate, non-exclusive purchasing agreements for VoD and SVoD rights, without bundling them with rights purchases for linear broadcasting on pay TV (**injunction 7 (a)**);
- sell VoD and SVoD rights owned by its subsidiary StudioCanal on a non-exclusive basis to any interested operator (**injunction 7 (b)**);
- refrain from entering into distribution agreements relating to GCP VoD and SVoD services that give them an exclusive or privileged presence on ISP platforms (**injunction 7 (c)**).

2/ Market changes since 2012 - Growing challenges to GCP's position

GCP currently still enjoys a quasi-monopsony -i.e. a quasi-single buyer position- in terms of purchasing broadcasting rights for recent French-language films. At an intermediary stage, it remains the market's only producer of a mixed premium

channel (the Canal+ channel along with its other channels). GCP is also an inevitable choice for channel producers seeking distribution. The dependency of the distributors towards GCP remains relevant, including in the new model, recently set up by GCP, in which it markets in bulk its offers "by Canal" to two ISPs (Free's "TV by Canal" and Orange's "Famille by Canal").

Nevertheless, the Autorité's analysis revealed that GCP's position is increasingly being challenged across all markets in which it operates.

First major change – Offensive and ambitious strategy by the Altice group

The Altice group is pursuing an ambitious, offensive global strategy based on convergence between its ISP, television production and distribution activities.

This strategy first became clear in the field of sports broadcasting rights, and specifically the acquisition of the rights to the Premier League, before being confirmed in the area of cinema and series' rights, in particular through an output deal with NBCUniversal (a contract previously held by GCP). Altice also bought very recently the broadcasting rights for the football Champions League. All these premium rights were acquired with a view to broadcasting on the SFR Sport and SFR Studio channels; the second of these channels, devoted to films and series, is scheduled to be launched in the summer of 2017 according to Altice's announcements.

In addition to these content acquisitions activities, a number of all-platform exclusive distribution agreements were concluded relating to channels operated by the Discovery group (Discovery Science, Discovery Channel, Discovery Investigation and Discovery Family) and NBCUniversal (Syfy, 13ème Rue and E!), which were previously distributed exclusively by GCP. Its non-linear offering (SFR Play-VOD Illimitée) was also strengthened. Lastly, the Altice group engaged into an acquisition process of the NextRadioTV group, which should soon enable it (subject to the ongoing proceeding of the French Broadcasting Regulator CSA) to own the "free-to-air" channel Numéro 23.

Publicly available information refers to numerous other projects by the Altice

group relating in particular to launching a satellite offering, buying American - and to a lesser extent French - film content, producing specialty premium channels and distributing non-linear services.

Second significant change - Development of international non-linear operators

The non-linear television services have grown strongly since 2012, along with the demand for new forms of roaming and multi-screen pay TV consumption. Contents provided by certain VoD and SVoD operators are, for some of them, now available directly to consumers in Over The Top (OTT) mode, via a standard Internet connection.

Furthermore, global operators such as Amazon and Netflix are now able to leverage synergies between the various geographical markets in which they operate. These operators are competing strongly with GCP in non-linear services markets, in particular with regard to the acquisition of American contents.

3/ the modifications of the framework

The Autorité, in view of these evolutions, decided either to maintain, to lift or to adapt the injunctions weighing in on GCP.

Measures relating to the acquisition of film rights

For American content

In view of the above elements and, in particular, the proactive strategy to buy American content implemented by Altice, the Autorité decided to lift the restrictions on GCP's behaviour regarding the acquisition of film rights from American studios (**injunctions 1 (a) and (b)**).

For French films

As GCP has maintained its position in the market for purchasing such rights since 2012, the *Autorité* considers that the ban on framework agreements with French

film rights holders should be maintained (injunction 1 (c)). However, in order to allow for potential future changes, a mechanism of conditional lifting of the injunction shall apply if another producer of pay TV channels were to enter into a framework agreement with any of the five main producers/coproducers of French films. This measure is intended to anticipate the competitive pressure that would be exerted on GCP in such an event, while ensuring that the measure is proportionate.

Lastly, the obligation relating to non-discrimination between original French-language film producers and the obligation to enter into separate contracts with French rights holders for films in the first and second release windows have been maintained (**injunctions 1 (d) and 1 (e)**), inasmuch as GCP's contribution to funding the French film industry remains essential for French producers.

Although it has not reinstated the measure (stipulated in the original injunction) ordering GCP to divest of its share in OCS, in view of preserving the competitive pressure exerted by OCS on GCP in the upstream market (film rights purchasing) and the intermediate market (cinema channel production) since 2012, the Autorité considers appropriate to maintain **injunction 2**, the purpose of which is to enable OCS to retain its commercial autonomy from GCP.

Measures relating to the distribution of specialty channels

[Inclusion of specialty channels by GCP](#)

Examining the case reveals that GCP still has a dominant position in the downstream market for specialty channel distribution and channels remain dependent on GCP.

The *Autorité* considers that it remains necessary to continue ensuring clear ground rules regarding access by independent channels to distribution via CanalSat or any substitute or additional offering. In addition, the Autorité considers that injunction 3, intended to regulate relationships between GCP and producers seeking inclusion, irrespective of the chosen distribution arrangements, applies to the "wholesale" offering introduced by GCP with Free

and Orange in October 2016.

The requirement for GCP to include a minimal proportion of independent channels has therefore been maintained, subject to a concession in cases where including a premium channel on an exclusive basis would neutralise its contribution to the value-based inclusion quota to which GCP is subject (**injunction 3 (a)**). GCP shall continue to uphold the principles of transparent, objective and non-discriminatory inclusion conditions (**injunction 3 (b)**).

The requirement for drafting a reference offering, regarding the inclusion of independent channels, is also maintained (injunction 3 (c)). The requirement to value catch-up TV and the HD version of a channel separately has been lifted as these two type of services have now become standard market practice. On the other hand, the Autorité considers that the requirement to value related non-linear services separately should be maintained, as such services have acquired a strategic significance in the context of the market changes.

The requirement to refrain from making commercial distribution of a channel conditional upon provision of transmission services by GCP has also been maintained; only the obligation to enter into separate agreements for the two activities has been removed (**injunction 3 (d)**).

Specific issue - Premium channels

With regard to the inclusion of premium channels (**injunction 4 (a)**), after considering the dependency on GCP of independent producers, the Autorité has maintained the requirement on GCP to include premium channels. The technical and pricing terms and conditions for inclusion shall remain subject to the stated principles of transparency, objectiveness and non-discrimination (**injunction 4 (b)**).

However, the Autorité considers lifting the ban on including premium channels on an exclusive basis to be justified. As described above, the Altice group is now in a position to negotiate exclusive distribution agreements with channel producers. Maintaining the ban would therefore have a disproportionate impact

on GCP.

In order to take into account the position still occupied by GCP as a premium channel editor and distributor in the downstream market, and enable consumers to access such channels regardless which distributor they use, certain requirements shall apply despite the lifting of the ban. If a premium channel is included by GCP on an exclusive basis, GCP shall be required to enter into a self-distribution agreement with any distributors that request one. This will enable a distributor to continue providing its own pay TV offering, supplemented by this premium channel available via self-distribution as part of its own service plan.

Platform exclusivity

Regarding the measure regulating GCP's behaviour intended to enable alternative distributors, (particularly ISPs) to effectively compete with exclusive distribution on CanalSat (injunction 5 (a)), the Autorité considers that the restriction may be lifted. In view of the recent exclusive distribution agreements recently negotiated by Altice, GCP is henceforth no longer the only operator in a position to pay for exclusive cross-platform distribution. The requirement to value the exclusivity for each proprietary platform and prohibiting any reduction in the value of the exclusivity on other platforms following an end to the exclusivity on a particular platform are no longer strictly necessary in order to maintain sufficient competition; furthermore, such measures may lead to excessive repercussions.

However, the conditions relating to transparent, objective and non-discriminatory inclusion of independent channels by GCP, taking into consideration the number of subscribers served by the relevant platforms, remains necessary, in view of the position still occupied by GCP relative to distributors (**injunction 5 (b)**).

Unbundling of Ciné+ channels

Lastly, concerning the obligation to provide the Ciné+ channels to third-party distributors, the Autorité considers that the significant changes that have taken place in the cinema channel production market (increasing attractiveness of the

OCS offering, forthcoming launch of SFR Studio, etc.) justify unconditionally lifting **injunction 6**.

Measures relating to the acquisition of VoD and SVoD rights and production of the corresponding services

With regard to non-linear services, the investigation revealed changes in the upstream rights acquisition market comparable to those identified in the markets for linear broadcasting markets, driven by massive investment by international VoD and SVoD operators.

Regarding American studios, lifting **injunction 7 (a)** is justified. However, this measure has been maintained with respect to the acquisition of broadcasting rights for French-language films from French right holders. For such content, GCP shall negotiate separate non-exclusive acquisition agreements for VoD rights and SVoD rights, and refrain from linking the purchase of such rights to linear rights. To ensure that this measure is appropriate and proportionate, the Autorité considers, in view of the changing market and in particular, the behaviour of global SVoD operators, that GCP should be able to broadcast series pre-financed by the group on an exclusive basis via its CanalVOD and CanalPlay platforms. Furthermore, in the light of changing market practices, the Autorité estimates that it is justified to authorise GCP to screen five digital previews of French-language films for a period not exceeding seven days on its VoD platform.

Although StudioCanal still has France's largest quota-based film catalogue, allowing to fulfil French language films' quotas, the Autorité notes a trend among operators to diversify their procurement activities, and observes that exclusivity-oriented practices are becoming increasingly common. As a result, the Autorité considers that the transfer by StudioCanal of exclusive rights to GCP's third party non-linear platforms is henceforth justified (**injunction 7 (b)**). Regarding divestitures to GCP's platforms, they could be exclusively implemented up to 50%, which will enable competing operators to remain attractive while fulfilling their regulatory obligations.

Lastly, with regard to the ban on GCP entering into agreements providing for or encouraging the exclusive or privileged presence of its VoD or SVoD offering on ISP platforms, the Autorité considers that the ban should remain in force, in view of the position GCP's stills holds in the market for distribution of linear pay TV services, at the time of this Decision **(injunction 7 (c))**.

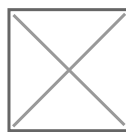
The new measures shall apply until 31 December 2019

In view of the significant market changes that have taken place since 2012, it would not be proportionate to apply the aforementioned remedies for a five-year period.

The boom in the affected markets in particular since the past 18 months is making GCP's operating environment increasingly competitive. Alternatives to GCP are also likely to emerge or become consolidated in the relatively near future. Accordingly, the Autorité considers that the injunctions set out in this decision shall remain in effect until 31 December 2019.

> *See the full text of the decision 17-DCC-92*

> ***This decision was submitted before the Conseil d'Etat (Supreme administrative court)***



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