

## Media & Entertainment - France

### Proposed remedies for effects of CanalSat/TPS merger sought

Contributed by **Nomos**

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The Competition Authority has invited broadcasting market participants to file their observations on measures that could be adopted to remedy the distortion of competition from the merger between CanalSat and TPS.

In 2006 the French government, further to an opinion delivered by the Competition Council, authorised the establishment of Canal+ France, to consolidate the country's two main direct-to-home satellite operators, TPS and Canalsatellite.

Taking into consideration that the significant size of the operation may have affected the economic balance of the French broadcasting market - and more specifically, the distribution of pay television services - the authorisation was subject to the implementation of 59 commitments intended to avoid the risks of anti-competitive effects.

The main commitments were intended to decompartmentalise the conditions necessary to access attractive content, in particular by:

- facilitating the acquisition of film and sport rights by competitors of the Canal Plus group, in order to enable them to supply their own channels;
- compelling the Canal Plus group to include seven of its channels offered in the package to competing broadcasters (TPS Star, Cinéstar, Cinéculte, Cinétoile, Sport +, Piwi and Télétoon); and
- guaranteeing that negotiations regarding the distribution of independent channels in its package be held objectively and openly, so as to preserve their independence.

However, due to the number of key commitments that the Canal Plus group failed to honour, the Competition Authority withdrew the authorisation ratifying the merger on September 21 2011. The authority objected in particular to "a lack of diligence and the repeated unwillingness of Canal Plus". It criticised the Canal Plus group for:

- taking a long time to put the seven channels it had to unbundle at the disposal of third-party broadcasters;
- contributing to a deterioration in their editorial qualities (which, among other things, led to the switch-off of TPS Star broadcasts in April 2012); and
- maintaining opaque and discriminatory relations with several independent channels.

These breaches were therefore likely "to thwart the objectives of the authorisation, namely to restore and maintain a sufficient degree of competition on the Pay TV market".

In view of these findings, and in addition to withdrawal of the authorisation, the Canal Plus group was sentenced to pay a fine of €30 million, while retaining the option to re-notify the merger within one month in order to obtain a new authorisation.

The decision was challenged before the French administrative supreme court, the Council of State. In parallel, Vivendi and Canal Plus filed a new request for clearance and an in-depth investigation was initiated by the Competition Authority. In this respect, a consultation was held on May 25 2012, which gave interested third parties the opportunity to file written observations on proposed measures to remedy the distortion of competition.

While favouring the objective of a balanced pay television market, the Competition Authority still has concerns about the effects that these measures could have on closely related sectors such as film production. Indeed, insofar as the merger has given the Canal Plus group a leading role in the funding of French film making, any measure

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aimed at challenging its economic model could have a significant impact on its investments in film production. This distinctive feature could explain the unusual approach adopted by the authority, which has made the envisaged remedies public for consultation by third parties.

The main aims of these measures are, on one hand, to protect independent film channels by guaranteeing them access to content and adequate distribution; and on the other, to create a sufficiently rich and sustainable pay television market.

To achieve these aims, the Competition Authority suggests introducing obligations that restrict the pre-emptive acquisition rights of the Canal Plus group and promote the circulation of film and sport contents.

The proposals would primarily involve:

- limiting the number of US studios with which Canal Plus may enter into framework agreements, and limiting their term (a non-renewable term of three years);
- banning Canal Plus from entering into framework agreements with French producers for their catalogues;
- banning the combined acquisition of video-on-demand rights and television broadcasting rights in favour of the group's channels;
- banning the acquisition of exclusive video-on-demand rights;
- limiting the term of contracts granting rights to broadcast Ligue 1, Champions League and attractive foreign championship football matches; and
- banning Canal Plus from submitting a bundled offer to acquire broadcasting rights for matches in free-to-air and pay mode, in the event of separate commercial quotations.

Furthermore, the remedial actions consider extending the unbundling obligation to certain channels published by Canal+ and identified by its '+' brand name (eg, Ciné+Premier, Ciné+Frissons and Ciné+Emotion) in such a way that the quality of the programming of these channels cannot deteriorate without affecting the group's image and reputation.

Regarding the distribution of thematic channels, the Competition Authority suggests, among other things:

- distributing a minimum proportion of independent channels;
- setting a minimum payment threshold; and
- interrupting the exclusive distribution of certain channels on CanalSat.

Finally, regarding the video-on-demand market, one of the proposed measures stipulates that Canal Plus be required to transfer the video-on-demand rights for foreign and French films of the StudioCanal catalogue to any video-on-demand service requesting them, on a non-exclusive basis, under normal, transparent and non-discriminatory conditions.

However, the question is whether the authority will consider that the various remedial actions are sufficiently effective, precise and fast to implement, in order to maintain competition in the pay television market.

The closing date for submitting observations was June 6. In support of these various (non-public) opinions, and the application filed by Vivendi and Canal Plus, the members of the Competition Authority will meet in plenary session to deliberate. The decision was initially expected on July 4, but has been postponed to July 24 2012. However, in a public statement, the president of the Competition Authority, Bruno Lasserre, has announced that the demerger of the Canal Plus Group or the implementation of remedies for structural separation has been excluded.

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