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Canal Plus and BSkyB cases: towards greater convergence in the regulation of the pay-TV sector?

In August 2011, the UK Competition Commission released a provisional findings report on the movies on pay-TV market.

At the request of Ofcom, the UK's broadcasting and telecommunication sectoral authority, the Competition Commission has investigated the situation on the market for the acquisition of subscription pay-TV movie rights. This request follows the decision of Ofcom to require BSkyB to offer certain of its packages to other pay-TV retailers at a price set by Ofcom.

According to the Competition Commission, the injunction made against BSkyB has proven inefficient. The Competition Commission has provisionally concluded that competition in markets for the acquisition of broadcasting rights for premium films is very limited. Indeed BSkyB holds for a period 20 years all broadcasting rights for premium movies of all the Hollywood major studios and a number of other studios. These are essential for the creation of premium movies services and, consequently, in offering attractive pay-TV channel packages. In addition, the Competition Commission believes that the acquisition of pay-TV movie rights can be economically sensitive for competing distributors. Indeed, the base of subscribers to Virgin Cable and BT Vision (which amounts respectively to 3.7 and 0.5 million subscribers) is currently too small to allow them to recover their investment without putting themselves in economic jeopardy. Therefore, according to the Competition Commission, BSkyB is not subject to any competitive pressure in the pay-TV sector.

According to the Competition Commission, this situation has three consequences on the retail pay-TV market: (i) subscribers to BSkyB packages are paying more than they would otherwise pay, (ii) technological innovations are few which is shown by the limited number of tenders for video on demand and (iii) there is less choice than would be expected in a more competitive market.

The Competition Commission considered that the competitive situation would remain the same in the market for pay-TV if BSkyB retained its exclusive rights to distribute movies from the six largest Hollywood studios and many other studios in the first subscription pay-TV windows, even if developments emerged with the arrival of Internet players and the increasing expansion of new consumer programs, such as video on demand and catch-up TV.

As a result, the Competition Commission proposes to restrict the number of major studios BSkyB may contract with and the nature of the exclusive first subscription pay-TV window rights which BSkyB may license from major studios (e.g. so that rights for distribution methods such as subscription video on demand are made available to other providers).

These remedies are now open to comments from interested parties before a final decision is adopted by the Competition Commission.

If the Competition Commission was to maintain its analysis and its proposed injunctions, this might result in the pay-TV market moving up the value chain and integrating vertically in order to become mimetic competitors to BSkyB.

In France, the approach is significantly different but has consequences as well. The TPS/VU merger was conditionally authorized by the Minister for the Economy in August 2006. In its advisory opinion, the French Competition Council considered the various industrial models that could be adopted by operators in the pay-TV market and those which were desirable from a competition standpoint.

In particular, the Council did not favor a mimetic competitor of Canal Plus considering that the battle to obtain the exclusive movies, audiovisual and sports rights would result in the spread of the most attractive content across multiple incompatible platforms, and consequently, it could be adverse to consumer welfare. Indeed, subscribers would not be able to access the most attractive content without subscribing to various packages of pay-TV premium channels.

It is clear from the UK Competition Commission analysis and proposals for injunctions that it reached the opposite conclusion. The Competition Commission felt that genuine competition in the pay-TV market is possible, but only if distributors can access the most attractive content such as blockbuster movies. Therefore, two conclusions can be reached at this stage.

First, Ofcom has sought to mitigate the effects of the market power of BSkyB in the pay-TV market by offering its most attractive channels to the other pay-TV retailers. Conversely, the French Competition Authority refused to make such a decision, finding that Canal Plus could keep for itself the benefits of its industrial risk.

Second, the Competition Commission is likely to regulate the upstream markets by restricting the number of majors studios BSkyB may obtain licenses from on exclusive pay-TV premium rights. The French Minister in charge of the Economy authorized the concentration between TPS/VU under a different commitment that Canal Plus limits, not the number of studios with which it would contract, but the duration of its contracts to 3 years.

It cannot be ruled out that the doctrines of the French Competition Authority and of the UK regulatory authorities will converge in the near future.

By a decision of 20 September 2011, the French Competition Authority decided to withdraw the TPS/VU merger between TPS and Canal Plus decision on the grounds that Canal Plus had not complied with 10 out of the 59 commitments. Some shortcomings, such as the degradation of the quality of seven pay-TV channels made available to rival operators, were classified as serious. Thus, by failing to maintain the quality of the unbundled pay channels, Canal Plus has prevented its competitors from making attractive and competitive pay-TV offers. According to the Authority, this commitment was the heart of the mechanism intended to enable the emergence of an alternative offer to that of Canal Plus.

Canal Plus and Vivendi will therefore need to re-notify the merger under market conditions which have changed significantly since 2006.

In an opinion N° 09-A-42 of 7 July 2009 concerning the double exclusivity of France Telecom – whereby subscription to Orange Foot was subject to subscription to France Telecom's Triple Play – the French Competition Authority proposed that some pay-TV channels of Canal Plus could be unbundled under conditions similar to those imposed by Ofcom on BSkyB. In addition, the French Competition Authority noted that the length of distribution contracts, remuneration and the scope of

exclusivity provisions of dominant operators should be regulated.

It may finally be noted that a decision similar to the one proposed by the Competition Commission has already been adopted by the European Commission.

The European Commission imposed commitments on the English Premier League preventing BSkyB from being a candidate for all packages of TV rights relating to the Premier League. Indeed, two packages of TV rights had been ring-fenced for the benefit of competitors. However, this measure had limited effects: BSkyB signed an exclusive distribution agreement with the buyer of a package of TV rights, Setanta, which went bankrupt a few years later having failed to recover the cost of acquiring those broadcasting rights.

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http://www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/pdf/provisional_findings_report.pdf

In Brief – Europe

Cartels: the General Court annulled the fines imposed by the European Commission on two Japanese producers in the gas insulated switchgear cartel

In March, several European producers obtained fine reductions in the gas insulated switchgear cartel case. The General Court considered that the aggravating circumstance of 'leading role' was not justified.

In this second set of decisions, the General Court criticized the method of calculating fines applied by the European Commission. If the Court were to confirm that the Japanese producers participated in the cartel, the fines imposed by the Commission on two of the four undertakings concerned would be annulled.

The General Court considered that using a different reference year for the turnover to calculate the basic amount of the fine is contrary to the principle of equal treatment. The Commission had taken into account 2001 (instead of 2003 for the European Undertakings) which was the last year of their individual participation to the infringement, before their participation through a joint venture.

Although the objective pursued by the European Commission was considered legitimate, the Court found that other methods could have been used, such as splitting the 2003 turnover of the joint venture, on the basis of their individual share of sales in 2001.

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=juredj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docdecision=docdecision&docop=docop&docppoag=docppoag&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&alcommjo=allcommjo&affint=affint&affclose=affclose&numaff=T-133%2F07&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>

Investigations: publication of a new decision on breach of seals

In a recent decision involving Suez Environment, the Commission insisted on the seriousness of breaching seals during inspections and explained in detail a company's responsibility when seals are affixed.

The fine imposed in that case (0.065% of Suez Environnement's total turnover) is nonetheless significantly lower than the fine previously imposed on E.ON (0.14% of its turnover). The facts of the case were somehow different, the fault being largely recognized as that of an individual employee.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:251:0004:0005:EN:PDF>

Mergers: the European Commission opened an in-depth investigation into a proposed merger between two leading stock exchanges.

The merger planned between Deutsche Börse and NYSE Euronext will face a Phase 2 review. The review will be conducted in the context of difficult financial markets and with the knowledge that the merger would remove a competitor from the market.

The European Commission indicated that there could be competition concerns in particular in the field of derivatives trading and clearing.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/948&format=HTML&aged=0&language=EN&guiLanguage=en>

In Brief – France

Mergers: The French Competition Authority withdrew the decision authorizing Canal Plus and Vivendi to acquire TPS

By a decision dated 20 September 2011, the French Competition Authority withdrew the decision clearing the TPS/VU merger as a result of non-compliance with commitments. This merger had been authorized provided 59 commitments met. The French Competition Authority stated that 10 of them were not fulfilled.

After opening an action for non-implementation of remedies, the French Competition Authority withdrew the decision and imposed a fine of 30 million on Canal Plus.

Canal Plus and Vivendi must now notify the transaction, to the French Competition Authority again within one month.

According to the French Competition Authority, it was the only possible outcome under the applicable law considering the fact that the commitments were to expire shortly.

<http://www.autoritedelaconurrence.fr/pdf/avis/11d12.pdf>

Mergers: the French Competition Authority handled two transactions as a single merger based on de facto interdependence

The French Competition Authority has clarified the conditions under which it will consider that two parallel transactions constitute a single merger in order to apply the thresholds and for the assessment of the case.

The first transaction was a full merger between mutual insurance companies ("mutuelles") while the second one was a contribution of contracts by a mutual insurance companies' union to the merged entity.

Even if these two transactions were not linked de jure, the French Competition Authority used the Commission jurisdictional notice to conclude a de facto interdependence between the transactions.

The French Competition Authority underlines that the transactions were simultaneous and intended and organized as interrelated by the parties. The recitals of each of the transactions set out the relationship

between them. In addition, the board minutes of all the mutual insurance companies were drafted in similar terms. The French Competition Authority also noted that they had all filed a joint request to the courts to appoint one single special auditor for the purpose of the merger (“*commissaire à la fusion*”).

http://www.autoritedelaconurrence.fr/pdf/avis/11DCC117decision_version_publication.pdf

Mergers: clearance with remedies in the regional press sector

As a result of its new merger, Crédit Mutuel’s press sector will hold all the daily regional newspapers in the East of France.

After setting aside the risks of price increases due in particular to the high sensitivity of consumers to price, the French Competition Authority addressed the risk that the operation could lead to reduced differentiation between the various newspapers, and thereby lowering the quality of information.

As a result, Crédit Mutuel has undertaken not to harmonise the content of the newspapers, which will continue to have their own dedicated chief-editors and journalists. Crédit Mutuel has also agreed to maintain the existence of a number of publications in the future.

All these commitments have been undertaken for 5 years after which the French Competition Authority will decide on their (full or partial) removal.

http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=389&id_article=1664

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