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French Competition Authority Withdraws Merger Control Clearance Granted to Canal Plus in 2006 for Breach of its Commitments

By: Matthieu Adam | Paris

Introduction

On September 21, 2011, the French Competition Authority (the "*Autorité de la concurrence*") issued a landmark decision (Decision No.11-D-12) involving the broadcasting/pay television sector ordering, for the first time since a merger control regime exists in France^[1], the de-merger of a notified and cleared merger for breach of the commitments subscribed by the acquirer at the time the transaction was authorized in 2006^[2].

The *Autorité de la concurrence* considered that Canal Plus Group (French pay-TV operator, a subsidiary of communication company Vivendi Universal) did not comply with 10 out of the 59 commitments - including key-ones - imposed by the Minister of the Economy (he was at that time the authority in charge of merger control review) when it took over its pay-TV competitor TPS.

Background

The merger notified to the Minister of the Economy in 2006 involved the two main operators on the pay-TV market. It led to the creation of a monopoly in channel publishing and the distribution of premium pay-TV offerings and had the effect of strengthening Canal Plus Group's dominant position on the downstream market for the retail distribution of pay-TV.

Telecom operators (e.g., Orange) challenged the merger and fought vigorously against Canal Plus Group.

Due to numerous risks identified at the time of the review of the merger in 2006, the merger had been subject to the implementation of numerous commitments during a period of five or six years aimed at addressing the competition concerns identified.

The objective of the commitments embodied in the 2006 clearance decision was to grant remaining pay-TV operators (mainly internet access providers) the access to programmes/channels sufficiently attractive to enable them to offer competitive pay-TV channel packages preserving competition on the downstream market of subscription based pay-TV.

Breaches of Commitments

The *Autorité de la concurrence* considered that serious breaches of commitments resulting from negligence, repeated lack of diligence and ill will from Canal Plus Group as well as the existence of harm to competition had been established.

The *Autorité de la concurrence* considered that Canal Plus Group:

- was late in giving third party distributors access to the 7 TV channels (TPS Star, Cinéstar, Cinéculte, Cinétoile, Sport+, Piwi and Télétoon) it had to unbundle, the consequence of which was to give an advantage to its new offer "Le Nouveau CanalSat",
- undermined the quality of the TV channels that were to be unbundled, and
- did not comply with some of its commitments related to the relations with independent and third party TV channels.

The *Autorité de la concurrence* rejected the argumentation put forward by Canal Plus Group as a mitigating circumstance relating to the fact that it had complied with more than 80% of the commitments subscribed. In addition to the fact that the *Autorité de la concurrence* objected that such proportion was itself questionable as the various commitments are not on the same level and their nature and scope varies significantly from one to another, it stated that compliance with all the 59 commitments was in any case required to prevent the risks to competition that had been identified.

Although Article L.430-8 of French Commercial Code gives the option to the *Autorité de la concurrence*, in the case of a breach of commitments, either to withdraw the decision authorizing the merger or enjoin the party bound by the commitments, subject to a penalty, to comply with them, the *Autorité de la concurrence* decided to directly order the de-merger as any late compliance with the 2006

commitments (the most important of which were to expire on April 2012) would have not been likely in its opinion to ensure sufficient competition in the pay-TV market.

Consequences of the Decision

The consequences of this decision are huge as Canal Plus Group will either have to restore the prior situation (before the 2006 merger) or re-notify the transaction to the *Autorité de la concurrence* within one month.

Any new merger control review by the *Autorité de la concurrence* will have to take into account all the factual data existing at the date of the new decision, i.e., taking into account all modifications having occurred since the 2006 clearance decision in the competition structure of the pay-TV market and related markets. Considering the circumstances that led the *Autorité de la concurrence* to issue this decision, it is very likely that it will make any new clearance subject to very strict and different commitments. In this regard, the President of the *Autorité de la concurrence* already declared in an interview published in French newspaper *Le Monde* on September 22, 2011 that any new green light would be subject to the implementation of "strong regulation mechanisms".

€30 Million Fine

In addition, it should also be noted that Canal Plus Group has been fined €30 million on account of what the *Autorité de la concurrence* considered as wilful breaches to the commitments resulting from the 2006 merger clearance decision. This is the largest fine ever imposed in France for non-compliance with commitments in connection with a merger clearance decision.

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This decision, although issued in a specific context, usefully reminds that each operator having subscribed to commitments within the framework of a merger transaction, must comply with them fully, which renders necessary to assess beforehand the practical consequences of such commitments, in particular where they include, as in the instant case, behavioral commitments over a long period of time.

For more information on the subject of this bulletin, please contact the author:

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[1] On November 13, 2006, the Minister of Economy already withdrew a merger control clearance decision that he had granted on October 4, 2006 (acquisition of Lorenz Bahlsen Snack-World SAS France by Vico SA) but this was on account of inaccurate information that had been provided to the Minister in the merger notification.

[2] See the *Autorité de la concurrence*'s press release in [English](#) or in [French](#), and the *Autorité de la concurrence*'s [decision](#) (in French)

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