



## II-3.6: The French Competition Authority orders the separation of TPS / Canalsatellite and VIVENDI / Canal + following infringement of the terms of their prior merger clearance

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Translated  
Article



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### MAIN INFORMATION

On September 20, 2011, the Autorité de la Concurrence (French Competition Authority) examined whether VIVENDI, Universal, and Canal + had respected the remedies they had made in order to obtain merger clearance during their acquisition of TPS and Canalsatellite. This clearance had been granted by the Minister of the Economy on August 30, 2006, on the condition that remedies be made by the acquirers. In 2009, the Competition Authority unilaterally decided to review whether these remedies were kept. Its decision of 2011 ruled that certain remedies were not kept and ordered the breakup of the new entity and the payment of a fine. In doing so, the Competition Authority behaves as though it were a regulator.

### CONTEXT AND SUMMARY

French legislation had long entrusted the Minister of the Economy with the power of merger review, and only allowed the Competition Authority to issue a non-binding opinion limited to the competition aspects of each operation. The dissociation of these powers was justified by the fact that both performed different tasks: merger review is part of economic policy, so it was natural that the minister decided, whereas competition law could be overseen by an administrative agency. The roles were clear, because the political figure carried out an *ex ante* regulatory power, and in making its decisions relative to economic policy, took the competitive dimension contained in the Competition Authority's opinion into account.

This method was overhauled by the *Loi de modernisation de l'économie* (LME — Economic Modernization Act) passed on August 4, 2008[1], which transferred merger review powers to the Competition Authority, and only left the Minister with a residual power to react. With the advent of these new *ex ante* powers, it was no longer possible to affirm that merger review was nothing more than an anticipation of future anticompetitive effects, according to the logic that it is better to prevent before than to have to cure after. It became apparent that merger review was becoming more similar to regulation, meaning a structural policy for a market or an industry, in order to ensure that they allow worthy interests—such as innovation, the protection of weak companies, information, etc.—to prosper. These finalities, which usually justify the creation of an industry regulator even after liberalization has been accomplished[2], were thereby granted to the Competition Authority by the legislature.

Merger review itself is not a unilateral process, but rather a sort of long negotiation between the companies in question and the Authority, at the outcome of which remedies are made in order to obtain clearance. Merger review thereby contributes to the contractualization of government action.

This explains why the Competition Authority's power is primarily drawn from its ability to review mergers; secondarily, from its ability to demand remedies; lastly, from its power to ensure such

remedies are upheld. If the third panel of this triptych did not exist, the entire structure of power and review would not have any teeth. The essential resides in the ability to ensure that remedies are upheld and to be able to take action if they are not.

The Authority must be able to incentivize companies not to break their remedies. In order to do this, it has an "atomic bomb" at its disposal: withdrawing its clearance decision. We remember how Judge Green broke up AT&T on the grounds that its dominant position on the market was illegal. In French law, Article 430-8 of the Code of Commerce provides that not following engagements can be punished by the withdrawal of the merger clearance previously granted. This article has only been used once before, in a decision made by the Minister of the Economy on August 21, 2007<sup>[3]</sup>.

The Competition Authority, in its September 20, 2011 decision, has therefore made spectacular and maximal use of the powers it has been granted by the law (withdrawal of the merger clearance decision and a 30 million Euro fine). Appeal is possible before the French Council of State.

The Competition Authority's decision points out that the initial merger clearance decision issued on August 30, 2006 had identified risks to competition on both the upstream markets (audiovisual broadcasting rights), and on the downstream markets (distribution of subscription television channels), which would lead to a quasi-monopoly on both segments. Clearance was granted on the condition that the purchasers follow the 59 remedies they had agreed to on August 24, in order to allow ISPs to continue to provide competitive subscription television packages on the downstream market.

These remedies concerned competitors' access to cinematographic rights, sports rights, and rights to American television series. Therefore, the acquirers would have to agree not to use many types of contractual clauses (exclusivity, length of contracts, etc.), in order so that their competitors would continue to have access to this lucrative content on the downstream market. Furthermore, the acquirers had to supply a certain number of channels (cinema, sports, youth) to competing distributors. This was supposed to allow "the emergence of a wholesale market for thematic television channels (...) alone able to stimulate competition on the downstream market." Lastly, the new company resulting from the merger had to agree to distribute independent television channels that reasonably requested it under transparent conditions, in order to allow them to develop on the downstream market.

An authorized representative was appointed to ensure that the remedies were upheld.

On July 4, 2008, the Minister of the Economy asked the Competition Authority to look into suspected infringements on behalf of the new entity. The aforementioned modification of the law had since transferred review powers in this area to the Competition Authority, and it began to investigate.

It is not possible to reproduce here all of the analyses of the various remedies that the decision contains. We will only take the most remarkable and those most pertinent to regulation, especially as concerns access, contract law, and the power to broadly interpret (or not) the remedies.

Indeed, the Authority first observed that it is more difficult to review whether behavioral remedies were upheld than structural remedies, and that they should therefore be appreciated globally rather than individually. This is why, even if the majority of remedies had been upheld, one cannot exclude infringement, and symmetrically, even if all remedies had been upheld to the letter, but had been made nugatory by the corporation's actions, the Authority would decide that there had been infringement.

These two elements affirmed by the Authority are very important because they are new and methodological in nature. We know that behavioral remedies are more difficult to review than structural remedies, because they take place at a definite moment in time (divesting an asset), which is not the case for behavioral remedies (which is why European Union law has implemented an arbitration procedure for third-parties when such remedies are not upheld).

The second affirmation according to which “not upholding everything means not upholding anything” is plausible because one can consider that it is a reflection of the obligatory force of contracts, but it is nonetheless true that the penalty seems disproportionate to the number of remedies the Authority recognizes were upheld, in comparison to those it believes were not.

The third affirmation is more surprising: if all of the remedies were upheld, this still might not be enough. The Authority expressly declares that this would be the case if the corporation took measures to make the remedies nugatory. This is a reflection of the theory of the “useful effect”. But it would seem that the Authority is making reference to the hypothesis of fraud, which requires very specific evidence to prove.

The September 20, 2011 decision is nonetheless an analysis of what the Authority believes were infringements of the remedies agreed upon. Thereby, regarding the availability of platforms, the Authority believes that the remedy obliged the new entity to “effectively make channels available to third-party distributors,” but the defendants argue that they had begun negotiations in order to arrange such access, and so the remedy had been upheld, since the Authority cannot decide how fast negotiations should go forward<sup>[4]</sup>. An analogous legal and technological dispute concerned remedies relative to Internet service providers. The Authority asserted that the remedy obliging the entity to “put channels at the disposal” of ISPs was an obligation of results, even though the necessary negotiations with third parties might modify the deadline for this result. Usually, the remedy is considered to have been upheld when the entity has begun negotiations with third parties in order to uphold it. The defendants affirm that this is the case, and that it is sufficient proof that they upheld their obligations, but the Authority does not agree. Even if negotiations fail, it is usually considered that the remedy was upheld. Similarly, concerning competitors’ access to American television series, the new entity had to renegotiate its contracts with the relevant producers in order to end their exclusivities, but the delays involved led the Authority to conclude that the remedy had not been upheld.

The Authority relied on an opinion<sup>[5]</sup> provided by the *Conseil Supérieur de l’Audiovisuel* (CSA—French media content regulator) in order to assert that it had enough objective proof to demonstrate that the acquirers had not upheld their commitment to make TPS Star as attractive a channel as its own, in order to preserve competition on the downstream market. The defendants protest that the notion of a television channel’s quality is subjective.

After having listed what it believes are infringements of the remedies agreed upon by the acquirers, the Competition Authority states that Article L.430–8 of the Code of Commerce allows it to withdraw the merger clearance decision, and the parties must then either return to the state in which they were before the authorization, or request a new merger clearance. The law also allows it to enjoin the parties to uphold their remedies. Finally, the Authority can also issue fines.

In this affair, the Competition Authority believes that the law should be understood as saying that the decision to withdraw the merger clearance and an injunction are alternatives. As concerns the possibility of issuing fines, the Authority, adopting the economic analysis of law approach, states “sanctions (...) must be determined in such a way that the company having agreed to the remedies will not be incited to make an economic calculation that it would be better to agree to the remedies in order to obtain merger clearance, but without wanting to effectively execute these remedies or to abstain from taking the necessary measures to fulfill them.”

The Authority points out that “the remedies that were not executed were behavioral in nature and were intended to regulate the competitive behavior of the entity that emerged from the merger.” Therefore, an injunction seems insufficient, because it would only have a very brief effect. It is now 2011 and the remedies were agreed to in 2006. The Authority believes that some of these infringements are serious, especially concerning the delays in execution, since these remedies were designed to prevent damage to competition on upstream and downstream markets.

The decision was therefore taken to withdraw merger clearance. Either the parties will have to return to the state in which they existed before the merger, or they will have to submit a new request for

merger review.

As for the fine, the Authority believes that only Canal + and its affiliates should be fined the sum of 30 million Euros.

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[1] Cf. J.-P. de la Laurencie, "The Competition Authority between "regulation" and competition policy", *The Journal of Regulation*, 2011, 1-1.31.

[2] All the more so since it is now believed that the telecommunications and media industries should no longer be subject to "asymmetrical regulation," a temporary instrument used to liberalize an industry, and instead should be subject to "symmetrical regulation," a definitive instrument wielded by a regulator whose goal is to cause an industry to pursue goals that it does not spontaneously fulfill.

[3] Arr. Min. de l'Economie, 21 août 2007, BOCCRF, n°7 bis, 14 septembre 2007.

[4] This is a reference to the vast issue of the relationship between regulation and contract, since access to essential facilities is at the center of this debate.

[5] Avis n° 2010-13 du 27 mai 2010 à l'Autorité de la concurrence sur l'exécution des engagements pris en application de la décision du ministre chargé de l'économie du 30 août 2006 autorisant l'acquisition des sociétés TPS et Canal Satellite par les sociétés Vivendi Universal et Groupe Canal+

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### **BRIEF COMMENTARY**

Independently of its own interest, this decision is an exemplary demonstration of the confluence of competition law and regulatory law. Indeed, a situation of this type should only be found in regulatory law, since it involves an ex ante projection of how a particular industry should be organized (in this case, the audiovisual industry) in order to preserve innovation and pluralism.

Because France's legislature has entrusted the Competition Authority with the power of merger review, and the President of that Authority has stated that he is a "horizontal regulator," this Authority has developed a newfound tendency to structure markets, rather than protecting them (even by anticipation) from anticompetitive behavior.

It is indeed difficult to go against the winds of change and declare that the Competition Authority is not a regulatory authority, since the legislature itself in its Act of August 4, 2008 (cf. above) entrusted the Authority with an ex ante merger review.

Furthermore, when dealing with structural remedies (such as divesting assets, etc.), one might

consider that its regulatory power is brutal but temporary, such as when regulators open markets to competition. When dealing with behavioral remedies, the Competition Authority becomes not only a regulatory authority over the industry, but also a supervisory authority over its economic agents.

This is why it has begun reviewing and drawing up their contracts, for example. The Competition Authority, going beyond regulatory authorities, is becoming a supervisory authority for regulated industries. The potential for institutional power struggles is palpable.

This is all the more true since the tool—if not weapon—used is the engagement to uphold a remedy. The engagement is the archaic form of the contract. The contract is becoming the method for constructing regulatory systems, since regulators contract with corporations when they agree to remedies within the framework of a merger clearance <sup>8</sup>.

All regulators have the ability to punish or to come to settlement (settlements are simply a form of contract), as can be observed regarding the Autorité des Marchés Financiers' (French Financial Market Authority's) powers.

The Competition Authority's decision of September 20, 2011, illustrates this perfectly. Even if the decision is perhaps not legally irreproachable, the fact that it simultaneously uses remedies, supervision, sanctions, and a forced invitation to renegotiate new remedies, will make the guardian of competition the active player in constructing industries.

This dialectic increases the power of a competition authority that definitively behaves as though it were a regulatory authority in charge of governing industries *ex ante* in order to better liberalize and construct them.

8. Cf. generally: FRISON-ROCHE, Marie-Anne, Régulation et contrat : présentation du thème et synthèse du 11<sup>ème</sup> forum de la régulation, Petites Affiches, 3 mai 2005, pp.3-10.