

Unclassified

DAF/COMP/GF/WD(2013)47

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

18-Feb-2013

English - Or. French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from France

-- Session II --

This contribution is submitted by France under Session II of the Global Forum on Competition to be held on 28 February and 1 March 2013.

JT03334777

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/GF/WD(2013)47
Unclassified

English - Or. French

COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- France --

Introduction

1. France wishes, prior to the presentation of the television broadcasting sector from the point of view of competition law, to provide a reminder of the basis for its audiovisual policy and what inspires the general regulations introduced into the sector at both the national and European level.
2. Television broadcasting cannot be viewed solely from the point of view of competition law. The organisation of the audiovisual landscape, insofar that it plays a role in the essential principles of democracy and social cohesion, is a response to the objectives of general interest in guaranteeing pluralism in the media, respect for freedom of communication and cultural diversity recognised by the European Union Treaty¹ and the European Union's Human Rights Charter². In France, the French Constitution safeguards pluralism of the media and expression of currents of thought as well as respect for freedom of communication of principles of constitutional value for which the implementation has been assigned to the legislator.
3. Under such conditions, despite recurring discussions, there has been regular confirmation within the European Union that safeguarding pluralism and cultural diversity fell within the remit of the member states and that these principles could not be subordinated to technical regulations governing competition.
4. Over and above complete respect for the imperatives of general interest as stated above, that are of benefit not only to consumers but to citizens in general, cultural activities cannot be reduced to mere consumption, since cultural assets are not saleable items like any other. The dual economic and cultural nature of cultural goods and services, including audiovisual services, is recognised by the 2005 UNESCO Convention for the Protection and Promotion of Diversity of Cultural Expression which enshrines the legitimate right of sovereign states to develop and implement policies and measures of support to promote cultural diversity.
5. Consequently, although the development of digital technology has changed broadcasting techniques for audiovisual work, it is not a matter of focusing solely on the problem of enabling consumer

¹ Article 2 of the European Union Treaty states: *"The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law, as well as respect for human rights, including minority rights. These values are shared by the member states in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men"*. Article 3 (3) of the European Union Treaty: *"It respects the richness of its cultural and linguistic diversity, and ensures that the European cultural heritage is safeguarded and developed"*.

² Article 11 (2) of the European Union's Charter of Fundamental Human Rights states: *"Freedom of the media and its pluralism shall be respected"*.

access to the works in question³. It is also indispensable to support the creation and production of European audiovisual productions to guarantee the plurality of the cultural offer and challenge the dominance of certain world players, who have resources that are incomparably greater than those of the other participants. The protection and promotion of the diversity of cultural expressions is at stake; a preoccupation that coincides with the consumer interest in accessing a diversified range of content and proves fully compatible with the objectives of combating excessive concentration of the market or abuse of a dominant position.

6. Consequently, **a global approach must be taken to the audiovisual sector**. European players need to be given the resources to rival others in the distribution and promotion of audiovisual productions and thus institute a strong policy aimed at supporting creativity through innovative measures that are well-adapted to the digital age.

1. French audiovisual regulations meet the objectives of pluralism and cultural diversity

7. The French market is typified by the predominance of terrestrial television stations as the means of television reception. Consequently, terrestrial stations are the favourite vector for television network broadcasting, since this represents the main channel for television reception for the general public. In this context, to enable the public to benefit from a pluralist offering, the legislator imposed a legal framework upon which the French audiovisual landscape is structured.

8. The granting of permits to use the air waves for audiovisual purposes is restricted to an independent regulatory body, the *Conseil supérieur de l'audiovisuel* (CSA). French legislation has defined the priorities designed to safeguard pluralism in the socio-cultural currents of expression and the diversification of operators. It also determined that the aim of the CSA should be to favour the free exercise of competition⁴ when exercising its regulatory powers and especially, where appropriate, to inform the Autorité de la concurrence where anti-competitive practices are suspected. The legislator also fixed criteria of a cultural nature (the policy of “the cultural highest bidder”). These commitments apply to the production and distribution of French and European audiovisual and cinematographic productions, as well as to the guarantee of the pluralist nature of expression of currents of thought and opinion and the honesty of information”.

9. The granting of permits to use the air waves is restricted to an independent regulatory body, the *Conseil supérieur de l'audiovisuel* (CSA). French legislation has defined the priorities designed to safeguard pluralism in the socio-cultural currents of expression and the diversification of operators. It also determined that the aim of the CSA should be to favour the free exercise of competition when exercising its regulatory powers and especially, where appropriate, to inform the Autorité de la concurrence where anti-competitive practices are suspected.

10. The objective set by the legislator is thus to introduce a diversified and pluralistic offer of service.

³ The document calling for contributions to the OECD indicates that the Session “will study subjects on which the competition authorities need to concentrate in order to ensure that consumers derive the greatest benefit from broadcasting services”.

⁴ Article 3-1 of the Law of 30 September 1986 states: "It attempts to promote free competition and the establishment of a non-discriminatory relationship between broadcasters and distributors of services, regardless of the electronic communications network they use, in accordance with the principle of technological neutrality".

11. Moreover, the authorisation to provide television broadcasting services is granted per channel, thus enabling the CSA to allocate the same frequency to several network broadcasters. The French law, in its attempt to promote pluralism and competition, does not allow for the granting a complete multiplex to a single broadcaster of services.

2. A diversified and pluralist broadcasting market

12. It is on the basis of the above arrangement that the CSA progressively created the French audiovisual landscape which is pluralistic and diversified. After the adoption of a legal framework making it possible to offer digital terrestrial television (TNT)⁵, France is thus one of the European countries which, through open and transparent tendering procedures for candidates from among new entrants in the field, has reinforced pluralism and has opened the audiovisual sector to competition. On account of the release of certain audiovisual frequencies, there are currently 29 channels being used for free-to-air terrestrial digital television⁶.

13. Part I of this note details the nature of the various entities involved together with their market, based on recent analyses performed by the Autorité de la concurrence.

14. As the European Audiovisual Observatory noted on the basis of the MAVISE database created for the General Communications Directorate of the European Commission⁷, as with other sizeable audiovisual markets (Germany, Spain, Italy and the United Kingdom), French TNT offers a significant number of national and regional networks mostly produced by new broadcasters who were not involved in analogue ground station broadcasting.

15. Over and above the organisation of terrestrial station television broadcasting, there is reason to highlight the fact that since the 1990s there has been considerable growth in audiovisual communication services distributed through other electronic communications networks (cable, satellite, ADSL, Internet, etc.). This development mainly concerns television broadcasts transmitted on networks that do not use frequencies assigned by the CSA (cable, satellite, ADSL, mobile, internet). Thus, as of 31 December 2011, 141 networks had agreements with the CSA. Sports and film offerings dominate, followed by music and then documentaries.

16. Finally, mention should be made of the richness of the public service television offer which includes (in addition to broadcasts outside France⁸) France's television networks⁹, ARTE and La Chaîne parlementaire [parliamentary broadcasts].

⁵ In law no. 2000-719 of 1 August 2000 amending the aforementioned law of 30 September 1986.

⁶ It should be specified that eight channels are used for the transmission of paid TNT broadcasts.

⁷ <http://mavise.obs.coe.int/>

⁸ With France 24, Monte Carlo Doualiya and Radio France Internationale.

⁹ France 2, France 3, France 5, France 4 and France O.

3. Specialist regulation involving three independent administrative authorities

17. In France, case law relating to competition applies to all audiovisual material. Consequently, the *Autorité de la concurrence*, in application of the provisions of the Code of Commerce, is responsible for concentration operations and anti-competitive practices in the audiovisual sector.

18. In this initial field of competence, the *Autorité* seeks advice from the two specialist regulators for the sector, the *Autorité de régulation des communications électroniques et des postes* (ARCEP) and the *Conseil supérieur de l'Audiovisuel* (CSA), before rendering decisions if it has triggered a thorough examination of the issue. Decisions taken by the *Autorité de la concurrence*, the content of which will be developed in Part III of this note, take the viewpoints of the two regulators into account.

19. In the second field of competence, the *Autorité de la concurrence* informs the regulators of information it has received concerning the relevant operators, so that they may send it an opinion, as appropriate.

20. The *Autorité de la concurrence* also has a consultative status. It may render opinions at the request of the two specialist regulators for the sector, the *Autorité de régulation des communications électroniques et des postes* (ARCEP) and the *Conseil supérieur de l'audiovisuel* (CSA), as well as from the government or on its own initiative.

21. The independent regulatory body for the audiovisual sector, the *Conseil supérieur de l'audiovisuel*, also has the power to offer recommendations with respect to the development of competition in the audiovisual sector. Audiovisual regulations¹⁰ thus provide for the CSA to send its recommendations to the Government for the development of competition in radio and television transmissions. For this purpose, the law entitles the *Conseil* to instruct the administrative or judicial authorities to investigate restrictive practices that prevent competition and economic concentrations. When it issues permits for using the air waves, it is also required to monitor “the need to avoid abuse of a dominant position as well as practices that might interfere with the free exercise of competition”.

22. Furthermore, law no. 86-1067 of 30 September 1986 stipulates a set of specific anti-concentration rules for the audiovisual sector required for the purpose of safeguarding the pluralism of socio-cultural currents of expression¹¹. The CSA is responsible for compliance with this anti-concentration provision, and that is required, in general, to ensure compliance with pluralism, when it decides to allocate frequencies, for example. For this purpose it has the powers of investigation and information.

23. Finally, it is up to the *Autorité de Régulation des communications électroniques et des postes* (ARCEP), to study the need for the upstream market regulation of “broadcasting networks or those used for the distribution of audiovisual communication services”, subject to the provisions of the Posts and Electronic Communications Code, so as to promote the emergence and development of new entrants into this market¹².

¹⁰ Article 17 of the law of 30 September 1986

¹¹ Decision no. 86-217 DC of the *Conseil Constitutionnel* dated 18 September 1986, concerning compliance with the Constitution of the law concerning freedom of communication.

¹² Article L 32 ff. of the Posts and Electronic Communications Code.

1. Presentation of the broadcasting and television sectors in France

24. The broadcasting sector comprises key players and operators of electronic communications carrying audiovisual content made available by a content-provider to user terminals, using terrestrial stations, satellite or cable technology. Broadcasting and television broadcasting in particular, refers more specifically to the distribution of audiovisual content via terrestrial station technology.

25. In television, two activities co-exist in the sector in France – pay TV and free (or "free to air") TV.

26. The pay TV sector is organised in such way that pay channel broadcasters define the themes and editorial line of their channels and, on this basis, internally produce their own programs or acquire distribution rights to upstream markets from third parties. Publishers then sell the right to market their channels to different distributors, who develop a pay TV offer in the form of bundles of channels, accessible by subscription or "à la carte". Finally, the distributor must market its offer and manage relationships with the subscriber.

27. The free television sector is organised differently. Distributors of channel bundles do not remunerate channel publishers. While the corresponding activities in the pay TV sector derive most of their revenue from subscriptions paid by final consumers, the publication and distribution of free channels is almost entirely remunerated by revenue generated by television advertising and, to a lesser extent, fees paid by persons equipped with audiovisual receivers.

1.1 The Competition Situation in the Broadcasting Sector

28. On 11 September 2012, the Telecommunications and Posts Regulator ("ARCEP") adopted a decision dated 11 September 2012 bearing on the definition of the wholesale market for the terrestrial station transmission of television programs in digital mode, on the designation of an operator exerting significant influence on this market, and on the obligations imposed on this operator in this market. The decision adopted complies with the opinions addressed to the ARCEP by the Autorité de la concurrence (see above) and the Conseil supérieur de l'audiovisuel ("CSA"), the Audiovisual Council, and takes fully into account the comments made by the European Commission. It upholds several obligations concerning access, transparency and non-discrimination, and specifies the tariff levels imposed on the powerful operator, TDF.

29. This regulation seeks to mitigate several barriers to market entrance, notably:

- a. the difficulty of replicating broadcast sites of the historic operator [for economic, technical and geographical reasons, but also due to regulatory constraints which require the proximity of the alternative site and the historic site;
- b. the pre-existence of a national network of the historic operator covering all of the 1,600 zones defined by the CSA;
- c. the difficulty for alternative operators of winning market share, bearing in mind the traditional length of channel distribution contracts at each site (5 years).

30. The Autorité de la concurrence has issued two opinions to the ARCEP on sectoral regulation plans¹³. In the second opinion, it found that competition in the French market had weakened following the buyout by TDF of two of its most active competitors, Antalis and Emettel, and that there were significant barriers to entry, and it considered that the ARCEP could legitimately resort to certain ex ante remedies to temporarily implement market conditions suitable for facilitating continued effective competition. It declared itself in favour of the envisaged regulation which sought to improve access by the competition to the 113 sites identified as non replicable through an approach focused on costs, while encouraging competitors of TDF to construct alternative sites when a priori possible.

31. In the context of its fight against anti-competitive practices, claims were brought before the Autorité de la concurrence alleging the erection of artificial barriers to competition by infrastructures, through the construction of alternative broadcast sites, and competition due to price squeezing practices in wholesale offers relating to hosting on the historic operator's broadcast sites. Requests for interim measures were upheld in respect of pricing practices, and rejected in respect of the first type of practices. In both cases, it was decided to examine the substance of the practices, the investigation of which is still under way.

32. Furthermore, it is useful to operate distinctions, in the broadcasting sector, between the various businesses, rather than on the basis of the technology used to transmit audiovisual content. Far from opposing the various broadcasting technologies, it is a question of distinguishing the various businesses and recognising the special role played by the audiovisual broadcaster, while the OECD appeal for contributions document indicates that *“Whatever the case, with the lightening speed of technological progress and the increasing convergence between telecommunications, broadcasting and computing, a regulatory model that does not take account of the links between telecommunications and broadcasting no longer reflects reality. It is necessary to adopt an approach that can respond to the dynamic nature of the sector”*. Since 2007, the date of adoption of the current Audiovisual Media Services Directive, new corporate models have been launched and a number of new entrants who initially merely hosted content produced by users have now entered into discussions (taking the examples of *Youtube* and *DailyMotion*) into discussions with rights-owners to distribute their content on these platforms. The positioning of these players within the value chain is currently outside the field of audiovisual regulation, even though their importance in the market is developing as a corollary to the expansion of online services, thus raising the question of competition in the audiovisual sector.

1.2 Recent Changes and the Competition Situation in the Free Television Sector

1.2.1 Presentation of the free television markets and recent changes

33. The French Autorité de la concurrence has revealed the highly evolutionary nature of markets in the free television sector, severely impacted by the digital revolution, which, at the same time, has multiplied the different means of broadcasting audiovisual content and the channels available, as well as fragmenting the corresponding audiences.

¹³ Opinion n. 06-A-01 of 18 January 2006 relating to a request for opinion from the Telecom Regulatory Authority pursuant to article L. 37-1 of the Post and Electronic Communications Code, on the analysis of wholesale audiovisual broadcast markets and Opinion n. 09-A-09 of 17 April 2009 relating to a request for an Opinion by the Telecom Regulatory Authority pursuant to article L. 37-1 of the Post and electronic Communications Code, on the analysis of wholesale audiovisual broadcast markets.

34. In fact, the recent development of the free television sector in France is characterised by the significant increase in the number of channels available on free TV. In March 2005, 11 new free digital channels were added with the launch of terrestrial digital television (“TNT”). The historic channels comprise six private and public channels: TF1, France 2, France 3, France 5, Arte and M6. The “new TNT channels” include Direct 8, W9, TMC, NT1, NRJ12, LCP-Public Sénat, France 4, BFM TV, iTélé, Gulli, France 5 and France Ô. Since the end of 2012, six new free private channels have been chosen by the CSA and have begun broadcasting.

35. Furthermore, the television advertising market, from which free television channels derive their revenue, is a mature market, in which volumes purchased show little growth. Television advertising revenue saw a decline between 2008 and 2010, to reach a total amount of 3.5 billion Euros in 2011, a figure slightly up on 2005, while revenue grew twice as quickly during the 2000-2005 period. The multiplication of free channels financed by advertising therefore resulted in stronger competition for financing, with any increase in the audience and advertising revenue of a channel being to the detriment of the others.

36. The Autorité de la concurrence also noted the two-sided nature of markets. In fact, demand for television advertising depends on the audience figures of channels, this in turn being highly dependent on the audiovisual content acquired by publishers of television channels. Inversely, the purchasing power of free channels in the rights market basically depends on their revenue in the television advertising market. In order to carry out a relevant analysis of the effects of this operation on competition, it is therefore necessary to take the inter-dependant nature of these markets into account.

37. Finally, overall television audience figures have continuously increased since the 1990s, to reach 3 hrs 47 mins of daily viewing per person in 2011.

1.2.2 The competition situation in the free television markets

38. The free television sector encompasses several activities:

- a. upstream, holders of audiovisual content distribution rights (such as catalogue films, sporting events and televised series) market them to TV channel publishers;
- b. downstream, the TV advertising market, which connects TV channels with advertisers (or media agencies) for the sale of televised advertising spots.

39. Several key players co-exist in the free television sector. With the launch of TNT in 2005, the number of free channels in France increased from seven to eighteen. “Historic” channels include TF1, M6, France 2 and France 3, which are non-specialist, the first two in accordance with their CSA agreement, and the others in accordance with their terms and conditions, and to which should be added the freeview part of Canal+ and Arte¹⁴.

40. Among the new TNT channels, there is also a distinction between “general content” channels, special focus channels that also cover more general topics (or semi-specialist) and purely thematic channels, according to their CSA agreement.

¹⁴ ARTE is unusual in not having signed an agreement with the CSA, and is subject only to the oversight and control of its members, Sept-Arte for France and Arte Deutschland for Germany, to the exclusion of any intervention by the public authorities.

41. Non-specialist channels are those that have the greatest programming freedom and those that can present programs with the greatest mass appeal. These are TMC, NT1 and D8. Semi-specialists have a partial obligation to follow a theme. This is music for W9, a subsidiary of M6, and NRJ 12. The first must broadcast 52 live shows a year and dedicate at least 20% of its programming to new French singing talent. France 4 is tasked with promoting live shows in particular, as well as cultural and artistic offers in general.

42. France 5, in application of the France Télévisions terms and conditions, is entrusted with designing and programming educational TV broadcasts and encouraging access to know-how, knowledge, training and employment. D17's programming is three-quarters musical programs. It also has a duty to promote French singing and new talents. The Parliamentary channel has a public duty to inform and educate citizens about public life through parliamentary, educational and civic programs. Gulli channel is published by Jeunesse TV, a company jointly held by the Lagardère group and France Télévisions. Gulli is mainly aimed at children from 6 to 14 years of age. Programming is also aimed at parents and seeks to encourage social links. Finally, I-Télé and BFM TV are rolling information channels.

43. TF1 took control of the TMC and NT1 channels in 2010. On this occasion, the Autorité noted TF1's strong positions in the different rights acquisition markets, in particular American catalogue films and American series, and original French catalogue films. In these markets, TF1's main competitors are the M6 and France Télévisions groups.

44. Generally, the Autorité also found that TF1 held a dominant position in the advertising market, with a market share of between 40 and 50 %, more than double that of its main competitor, the M6 group. The Autorité found that the TF1 group benefitted in this respect from a position that has remained remarkably stable over time, finding that in 1996-1997, TF1's market share in television advertising was already around 50%. The market power of the TF1 group was also underpinned by its ability to charge higher prices than those of its competitors, and to maintain a very high rate of capacity usage, higher than that of its competitors.

1.3 Recent Changes and the Competition Situation in the Pay TV Sector

45. The pay TV sector encompasses several activities at different stages of the value chain:

- upstream, holders of audiovisual content distribution rights (such as cinematographic works, sporting events and televised series), marketing them to publishers of TV channels or non linear television services (such as video on demand);
- at the intermediate stage, publishers market the channels they have set up on the basis of programs produced internally or acquired on the upstream distribution rights market. Publishers receive their remuneration from advertising, royalties paid by distributors and subscriptions;
- downstream, distributors market pay TV television offers to viewers in the form of channels sold as a bundle or à la carte, or non linear services;
- finally, transport involves routing a channel's signal to the viewer, by a variety of transmission methods (cable, satellite, broadband/ very fast broadband, digital terrestrial TV).

46. The pay TV sector is characterised by the co-existence of traditional linear television offers and non linear television offers.

1.3.1 The linear pay TV sector

47. The pay TV sector was historically structured in France around two satellite operators, TPS and the Canal Plus Group (“GCP”, owned by the Vivendi group), vertically integrated into the value chain. These two players merged in 2006 with the takeover of TPS by GCP. Other operators emerged, using new methods of broadcasting and distributing audiovisual content, namely via broadband Internet (ADSL), digital terrestrial TV (“TNT”), television on mobile handsets and video-on-demand (“VOD”). Today, some Internet Service Providers (“ISP”) and cable operators also operate in the different pay TV markets, with variable degrees of vertical integration depending on the company.

48. Since 2006, the development of ADSL has been confirmed, becoming the main method of receiving pay TV television, representing 52% of homes receiving digital pay TV in H1 2011. Consumers therefore have a choice between different broadcast platforms, that is to say satellite, ADSL, fibre optic, cable and terrestrial station. On each of these platforms, several competing channel bundles are offered to consumers, with the exception of terrestrial station and satellite, for which only GCP offers are present.

49. Downstream, competition is intra-platform. GCP offers are available on all broadcast platforms. Third party operators, mainly ISP and cable operators, transport and market GCP offers on their own platform. GCP nevertheless preserves a direct relationship with its subscribers (known as “self-distribution”); competing distributors provide technical and commercial services on its behalf. Alongside GCP offers, each operator that owns technical transmission platforms offers its own pay TV bundles. Intra-platform competition is therefore asymmetric as GCP offers are self-distributed to all platforms, while competing bundles are offered to consumers on each platform concerned.

50. GCP remains dominant in most pay TV markets. In 2012, the Autorité de la concurrence found that this group had very strong positions upstream, in particular holding the vast majority of broadcast rights for cinematographic content on pay TV, publishing the only multi-topic premium channel and the main movie channels on the market, as well as other thematic channels, carrying out the exclusive distribution of a large number of channels published by third party operators, as well as marketing the main pay TV offers to final consumers. In the market of pay TV offers from GCP and its competitors (excluding the basic television component of multiple service subscriptions to Internet, telephone and television from Internet service providers (“ISP”), called “triple play”), in 2011 GCP represented between 70 and 80% of subscriptions and between 90 and 100% of market turnover.

1.3.2 The non linear pay TV sector

51. The toll TV markets are characterised by the emergence of new ways of consuming content, mainly cinematographic and audiovisual. Unlike traditional television services, these new consumption methods are not linear, meaning that consumers do not depend on a programming grid drawn up by a television service provider but rather choose the programs they wish to view from a catalogue, at the time of their choice.

52. The emergence of these new consumption methods has been enabled by several technological changes, including the increased viewing of content through IP or fibre optic networks on computers or televisions connected to the Internet (“smart TV”¹⁵). Offers to final consumers may take the form of Pay-Per-View (market in decline in France) or video-on-demand (“VoD”).

¹⁵ “Smart TV” consists of televisions directly connectable to the home Internet connection, without any additional subscription or digiboxes, enabling online content to be displayed on TV sets.

53. The paying video-on-demand sector comprises three pricing models: one-off film rental (via streaming, or as a temporary download), rental by subscription (video-on-demand by subscription, “VoDs”) and one-off purchase (definitive download). In France, the first date that movies can be rented through an on-demand video service is 4 months (or 3 months for certain films) from the cinema release date, pursuant to an agreement of 6 July 2009 on changes to media chronologies. This agreement, which was the subject of an extension decree from the Minister for Culture, also established the possibility of operating movies on demand by subscription from the 38th month following cinema releases. It follows therefrom that publishers of video-on-demand by subscription cannot acquire rights relating to recent films. Publishers of both video-on-demand and by subscription are, on the other hand, active in the market of the purchase of rights relating to catalogue films and recent and non-recent series.

54. Consumption of video-on-demand remains marginal when the turnover it generated in 2011 (230 million Euros) is compared with that of linear pay TV (over 6 billion Euros). According to the NPA-GtK barometer, in 2011 the paid video-on-demand market represented about €220 million, a 44% increase in comparison with 2010. More than 90% of turnover came from on-the-spot payments (37.5 million transactions performed in this way in 2011, up 20% on 2010). Nearly 42,000 videos were viewed at least once in 2011, an increase of about 8% in comparison with 2010. Of these videos, 50.4% were audiovisual programmes, 27.8% adult content and 21.8% films.

55. Consumption of video-on-demand takes place largely within the framework of pay TV offers, while direct viewing online only represented, for the first ten months of 2011, around 15% of turnover. This mainly involves rentals,¹⁶ although definitive download is also possible.

56. Video-on-demand is typified by the existence of a large number of providers in France. According to the report by the *Centre national de cinématographie et l'image animée*, 68 content producers are active in this market¹⁷.

57. The acquisition of broadcast rights in video-on-demand is, for the moment, carried out non-exclusively, and the same programs are available on several platforms. In total, 5,094 movies were offered in June 2010. Several categories of operators are present in this market: the channels, ISP, “pure players” whose sole speciality is video on demand, video publishers, holders of rights, physical distributors and Internet platforms. The market is nevertheless relatively highly concentrated as five key players share the majority of the market turnover.

58. To date, video-on-demand by subscription has remained marginal (turnover of around 15 million Euros at end of June 2011). This evolution is atypical in Europe as, in a 2010 report, the European Commission found that the subscription model is growing more quickly at European level than video on demand¹⁸. The development of smart TV as well as the trend of viewing on Wi-Fi tablets may change this situation insofar as it gives access to offers which are only accessible online, such as iTunes, with the visual comfort of televisions or tablets.

¹⁶ 99% of video-on-demand consumption in 2010 was for rental according to the IDATE report on economic models for audiovisual media on demand active in the French market of June 2011, but this figure should fall, as before 2011 definitive download was not possible on VoD offers on pay TV.

¹⁷ Excluding hosts of video-on-demand services, editors of Replay television services, and editors of video services specialising in adult programming.

¹⁸ Report on Multi-Territory Licensing of Audivisual Works in the European Union, prepared for the European Commission, DG Information Society and Media, October 2010.

2. The main challenges facing competition policy in the broadcast sector

2.1 The holding of strong positions established by certain television providers

59. The development of television markets shows that the holding of established positions, indeed dominant positions, tends to structure both the free (2.1.1) and pay (2.1.2) television markets, limiting the entrance and development capacity of new operators.

2.1.1 The existence of dominant positions and barriers to entry in the free television markets

60. As indicated above, the Autorité de la concurrence found, in 2010, that the TF1 group enjoyed a dominant position in the TV advertising market. In 2010, the TF1 group was also the leading purchaser of distribution rights to American catalogue movies and American series, and the second-largest purchaser of original French films.

61. When the TF1 group acquired the AB, TMC and NT1 channels, the Autorité found that by adding two additional channels, the TF1 group gave itself the possibility of increasing profits on the rights acquired by the TF1 group to three freeview channels instead of just one and that this constitutes a competitive advantage over all of its competitors. This advantage was increased by the fact that the channels concerned are all non-specialist and face almost no theme-related obstacles, meaning they can broadcast the most popular and therefore most audience-generating programmes, and benefit from exchanging productions and programmes. The operators which benefit least are the new TNT channels which cannot rely on the network of channels and purchasing power of a historic group.

62. Furthermore, these positions are held in markets characterised by strong barriers to entrance. The first is linked to the rarity of terrestrial station frequencies. In fact, in terms of terrestrial station distribution, the publication of a channel depends partly on the existence of available frequencies, and partly on the assignment of these frequencies by the Conseil supérieur de l'audiovisuel ("CSA").

63. Beyond the constraint linked to the scarcity of terrestrial station resources, the publication of free television channels implies very high distribution costs. Finally, the maturity of the television advertising market is another entry barrier for free-to-air channels.

64. There are fewer constraints on the distribution of television channels by satellite, cable, ADSL or fibre optic. Nevertheless, the publication of a new channel for this type of distribution remains subject to delivery problems in rights and distribution markets. In any event, the competitive pressure that these channels may exercise in the television advertising market is very limited, bearing in mind their low audience figures and the fact that advertising only plays a marginal role in their financing.

2.1.2 The existence of dominant positions and barriers to entry in the pay television markets

65. The GCP holding of dominant positions in markets related to the pay TV sector was pointed out by the Minister of the Economy at the time of the acquisition of TPS by GCP and the Vivendi group in 2006¹⁹ and by the Autorité de la concurrence when again inspecting this operation in 2012²⁰. The

¹⁹ Letter n° C2006-02 from the Minister of the Economy, Finance and Industry of 30 August 2006 to the counsel of the company Vivendi Universal, on concentration in the pay television sector, BOCCRF n. 7 bis of 15 September 2006.

²⁰ Decision from the Autorité de la concurrence no. 12-DCC-100 of 23 July 2012 relating to the exclusive taking of control of TPS and CanalSatellite by Vivendi and the Canal Plus Group.

findings described below result from the analysis carried out by the Autorité de la concurrence in the latter case.

66. The acquisition of TPS gives GCP, a subsidiary of the Vivendi group, control of the two French satellite platforms integrating all businesses in the paid audiovisual value chain, from content control to access by viewers. The acquisition added the channels published and marketed by TPS and CanalSat to GCP, as well as their activities of channel bundle distribution and marketing activities. The operation therefore significantly strengthened GCP channel bundles and its subscription data base.

67. The main effect of the operation was to give GCP (i) considerable purchasing power, eliminating its most significant competitor for the acquisition of content; (ii) a monopoly in the publication of premium channels; (iii) a dominant position in the publication of cinema channels; (iv) a position that may lead to a drying up of access to cinema, sports and children's channels for competing distributors; and (v) an unbeatable position for the distribution of thematic channels, given the strengthening of the CanalSat subscriber base.

68. The durability of these findings was confirmed by the Autorité de la concurrence when inspecting the operation again in 2012, the strong positions of GCP partly explaining the difficulties encountered by new operators when joining the market, both in respect of the publication and marketing of channels (a) and in the market of distribution of thematic pay channels (b).

a. Barriers to entry into the broadcasting market and marketing networks

69. Since 2006, several attempts to enter the market have placed competitors of GCP in difficulty, indeed in a relationship of dependency vis a vis the group. Following the acquisition of TPS by GCP, the latter integrated TPS's database, thus consolidating the first subscriber base in the market. In 2011, GCP represented between 70 and 80% of all pay TV subscriptions in France²¹. This operator, the leading acquirer of pay TV broadcast rights, in particular in film and sporting matters, is therefore able to compete with the best with its publication activities. No competing publishers have access to a comparable audience unless distributed as part of the GCP's CanalSat offer.

70. GCP's publication activities thus give it a very important position in different channel publication and marketing markets. In particular, GCP publishes the sole multi-thematic premium channel (offering both sporting and cinema content) in the French market, Canal+ and its off-shoots, the group having ceased broadcasting the channel TPS Star, acquired in 2006, and which offered the same type of content as Canal+.

71. In 2008, France Télécom-Orange, the historic telecom provider in France, launched two bundles of channels backed by the acquisition of content by Orange. One of these bundles, the Orange Cinéma Séries ("OCS") is a movie channel, while the other, Orange Sport, is a sports channel. Both of them have so-called "premium" content, that is to say capable of bringing in subscriptions, which in France means recent cinema films newly released on pay TV, League 1 and Champions League football matches, together with especially popular foreign competitions. The choice of the operator to purchase directly from the rights acquisition market, and not to distribute existing channels, can partly be explained by the inadequate offer of channels available for distribution on the intermediate market. To supply its channels with content, Orange thus concluded framework contracts for the acquisition of distribution rights to recent movies on pay TV with several American studios, pre-purchased original French films and acquired rights to distribute football matches from League 1 and the German championship.

²¹ In a market comprising subscriptions to GCP offers and offers of other distributors, to the exclusion of subscriptions to the basic triple play offers of ISP.

72. Orange, which initially only marketed its channel bundles to its multi-service subscribers, was unable to profit from the investment made. The operator left the rights acquisition and publication of sports channels market after a single rights cycle. Orange in fact encountered significant difficulties amortizing the cost of acquiring rights in a limited database, the subscription rate of ADSL subscribers to Orange Sport being too limited to ensure an adequate profit forecast. Orange therefore withdrew its application for the acquisition of linear lots within the framework of the invitation to tender organised by the French Football League (LFP) in June 2011 for the 2012-2016 period. Moreover, the Orange Sport channel ceased broadcasting at the end of June 2012.

73. Likewise, Orange experienced difficulties in developing a profitable movie activity. The operation therefore chose to conclude a partnership, conferring on GCP a share in capital and joint control of OCS in April 2012.

74. Other examples illustrate the difficulties in entering the sports channel market dominated by Canal+. The channel CFoot, published by the LFP, broadcast a League 2 lot for the 2011-2012 season. Unable to achieve an economically viable balance, the LFP ceased broadcasting the CFoot channel in 2012.

75. These failures illustrate the difficulties for newcomers to the channel market to maintain a sustainable offer. These difficulties are linked to the conjunction of several barriers to entrance, which are added to the difficulty of accessing premium rights and profiting from them over time. The Qatari operator Al Jazeera is a very recent newcomer to the market and feedback is thus limited. The entrance of this operator nevertheless resulted in real competition for the GCP in the rights acquisition market. It has however raised difficulties relating to its distribution terms that refer back to the issues of vertical integration of GCP (see below).

- b. The competitive position of the distribution market and barriers to the emergence of significant competition

76. GCP distributes thematic channels under the CanalSat brand. Within the framework of this activity, GCP purchases from channel publishers the right to market the channels they publish to the public. Channels are distributed either individually (“à la carte”) or, most commonly, in the form of a bundle or pack comprising several channels. Competitors of CanalSat in the thematic channel distribution market are mainly ISP with their second level offer, and a cable operator, Numericable.

77. GCP is the leading distributor in the market, and the royalties it pays to independent channels (excluding channels published by GCP) in respect of this activity represent between 50 and 60% of their total turnover. This position has not changed since 2006, illustrating both the unbeatable nature of CanalSat’s position in the distribution of thematic channels, and the purchasing power GCP enjoys in relation to its providers of channels.

78. As indicated subsequently, GCP represents between 70 and 80% of pay TV subscriptions²². In value, GCP represents between 90 and 100% of turnover from pay TV offers during *triple play* offers and, according to estimates, between 50 and 70% of turnover from pay TV offers including the television component of *triple play* offers from ISP. Competitors of GCP in the thematic channel distribution market therefore represent a minority, indeed marginal, market share.

79. Several factors act as a curb on the competitive capacity of other pay TV distributors, including the absence of sufficient distribution alternatives for channels (i), the contractual conditions surrounding

²² Excluding triple play subscribers not purchasing any specific subscription for a bundle of channels.

the distribution exclusivity held by GCP (ii) and the holding of numerous exclusivity agreements by GCP (iii).

i. Alternative distributors to GCP

80. France's high level of ADSL take-up gives ISP a significant pool of subscribers (over 11.3 million subscribers in 2011). This pool corresponds to subscribers of first level ISP offers, not relevant to analysing the competitive pressure exerted by ISP on GCP. The investigation carried out by the Autorité de la concurrence into ADSL operators showed that the latter do not consider their first level bundles to be in competition with second level operators due to significant differences in the attractiveness of channels. In the same way, channel publishers unanimously find that ISP do not exert real competitive pressure on GCP in the distribution of thematic channels, including at the second level of service, for reasons linked to their relative weighting compared with GCP and their strategic positioning.

81. Accordingly, first level offers differ from second level offers as well as those of GCP both in terms of content, focused on the quantity of channels, and their financing method, these being channels whose turnover comes solely or mainly from their advertising revenue.

82. On the other hand, second level offers to which subscribers of the first level offer may have access by taking out an additional subscription are, for their part, in direct competition with GCP bundles. ISP overall have 2.3 million subscribers to their second level offers, that is to say less than a quarter of the number of subscribers to basic *triple play* offers, and between 50 and 60% of the number of subscribers to CanalSat alone.

83. 82. The Autorité's investigation reveals that thematic pay channels do not consider distribution by ISP to constitute an adequate alternative to distribution by CanalSat. Channel publishers thus find second level bundles cheaper and less varied than the CanalSat bundle, and are thus aimed at a fraction of television viewers who show less appetite for pay TV, homes showing the greatest interest often having already subscribed to GCP offers.

ii. Exclusivity owned by GCP

84. The exclusive arrangement between GCP and publishers of thematic channels limits the size of the wholesale market and reduces the range of channels that ISP can distribute. In fact, these exclusivities, which initially concerned solely the platform satellite, have also been extended to ADSL platforms according to a self distribution system.

85. However, the holding by a distributor of a range of attractive channels in all themes is an essential element of competitiveness. The decision making practice of competition authorities holds that, to be competitive, an offer of pay TV bundles must include channels offering premium content, sporting and cinema, a range of channels covering the themes of cinema, sport, information and children's programmes, as well as other less attractive thematic channels.

86. The Autorité de la concurrence thus found that GCP, through the holding of exclusive distribution rights, reserved the distribution of the most attractive channels for itself and in 2012 represented the majority of the measured audience of cinema, sport and children's programmes.

iii. The conditions contained in GCP's exclusive distribution contracts

87. Exclusivity in the thematic channel wholesale market enables the distributor to differentiate its offer of bundles from those of its competitors, in particular when the exclusivity involves channels whose

content is difficult or impossible to substitute. Nevertheless, the exclusive distribution of a channel on CanalSat stands out as it concerns almost all technical distribution platforms (satellite, ADSL), as CanalSat is self-distributed on all of these platforms (with the exception of cable). In return for this type of exclusivity, which only GCP is able to offer, publishers receive an “exclusivity bonus”, which represents a royalty amount received from GCP greater than the cumulative royalties received from GCP and all ISP in non-exclusive distribution. Publishers must thus decide, given current contractual practices of GCP, between exclusive multi-platform distribution by CanalSat, and the benefit of the exclusivity bonus at the risk of again finding itself in a risk of dependency vis a vis GCP, or the signing of a non-exclusive contract, depriving them of the exclusivity bonus and risking calling into question the financial viability of channels.

88. The switch from an exclusive distribution model to non-exclusive distribution on CanalSat thus marks a fall in royalties, representing, depending on the case, the majority, indeed almost all, the royalties of exclusive channels. The Autorité de la concurrence thus found that the exclusivity “bonus” paid by CanalSat is sufficiently high to ensure that exclusive distribution by CanalSat is sought by most publishers, less by deliberate choice than the impossibility of obtaining equivalent remuneration in non-exclusive distribution. In this context, exclusive remuneration places channels in a situation of dependency, from which there is little encouragement for channels to leave.

89. Finally, the decision by channel publishers between the two distribution models was, in 2012, restricted by the opaqueness of distribution offers from GCP. In fact, the multi-platform exclusivity sold by publishers was not subject to a transparent valuation, being remunerated by a general royalty whose different components were opaque, without distinguishing the value assigned by GCP to exclusivity on each distribution platform. Thus, the value of the exclusivity obtained by GCP for the distribution of channels on the ADSL networks of competing distributors was not subject to a specific valuation. The consequence of this opaqueness was that publishers were unaware of which proportion of the remuneration that they were paid by GCP corresponded to distribution via satellite, and which proportion corresponded to distribution on each ADSL platform.

90. Unlike GCP, third party distributors, essentially ISP, can in fact only offer their own bundles in their proprietary platforms. They cannot therefore individually compete with the multi-platform distribution offers proposed by GCP to channels. The absence of a separate valuation of the exclusivities on each platform in GCP distribution contracts, opaquely disconnecting remuneration of exclusivity from the value it represents on each of them, restricting the capacity of GCP competitors to offer competitive distribution offers.

91. This practice thus enabled GCP to make distribution offers difficult to avoid for the most attractive independent channels, and not replicable by competitor distributors, preventing the latter from competing properly in the distribution market.

2.2 *Aspects Linked to Vertical Integration*

92. The acquisition of TPS enabled GCP to integrate its main competitor as provider and customer on intermediate thematic channel distribution markets. The operation thus improved the vertical integration of GCP, which operates both in the channel distribution market, through CanalSat, and the thematic channel distribution market, in direct competition with the independent channels it distributes. This situation, associated in particular with the dominant position of GCP in the distribution market, gives the group the impetus to exploit its vertical integration, locking access to its competitors in the channel publication market.

93. Concentration had the effect of significantly increasing the number of subscriptions and subscribers in the GCP pool. In 2011, GCP controlled a pool five times greater than its immediate competitor, and much higher than the second level subscribers of all ISP and cable operators together.

94. Access to CanalSat subscribers is thus vital for all publishers, insofar as it is the most important on the market, and is the only offer presented on satellite platforms (its historic base), ADSL and TNT²³. Although in decline, the proportion receiving the offer via the satellite platforms makes up a large majority: at the end of 2011, 70 to 80% of subscriptions were received by satellite, 10 to 20% via ADSL and 10 to 20% via TNT³⁵. Distribution of a channel only on the ADSL platforms of Internet service providers cannot therefore be considered an adequate alternative to distribution on CanalSat. The weakness of subscriber data bases in second level service offers by ISP compared with that of CanalSat indicates that GCP controls access to the vast majority of pay TV customers.

95. The Autorité thus found that GCP boasted considerable capacity to lock access to pay TV by channel publishers to the vast majority of customers. The Autorité thus found that the adequate distribution of channels from Al Jazeera, a newcomer in premium sporting content, was crucial to this operator's capacity to remain in the French market and boost both upstream and downstream competition. GCP's incentive not to distribute or impose inadequate distribution terms for such a publisher, positioned in direct competition with it in sporting rights markets, is therefore significant, bearing in mind the competition which then deliver their respective channels in the publication of premium sporting programs. In fact, distribution of a competing offer in the most attractive portion of the market (premium rights) presents several disadvantages for notifying parties: it increases the penetration of the competing channel, improves its recognition, strengthens its subscriber base and consequently its revenue, in return strengthening the financial capacities of the newcomer and encouraging the latter to stand as a candidate in future invitations to tender and to supply its channel with premium rights. Conversely, by refusing to distribute, or inadequately distributing, the offers of a competing newcomer, GCP may weaken this operator and reduce its financial capacities and motivation to make a lasting impact on the market.

96. Furthermore, the vertical integration of GCP and its control of the first distribution platform could enable the group to be informed of the identity of its future competitors in the upstream rights acquisition market and their intentions before the launch of the invitation to tender. However, the success of the invitation to tender depends on the incentive for each candidate to file the best possible offer, an incentive that results largely from their uncertainty as to the identity of other candidates and the intensity of their willingness to pay. But given the state of the market, the conditions for future invitations to tender may be distorted due to knowledge by the main candidate, GCP, of privileged information on the identity of its competitors, their financial surface and even their programming plans. This situation of asymmetric information may allow GCP to adjust its behaviour in consequence, to the benefit of its own publishing activities.

97. The vertical integration of GCP also encourages it to lock access to customers of thematic channels not distributing premium content. In fact, the cumulative activities of publisher and distributor give the GCP a competitive advantage in the publication markets, especially given that it holds leading positions in both markets. Thus, GCP has an interest in favouring the acquisition of attractive distribution rights exclusively for the channels it publishes, to the detriment of other channels and then, as a distributor, relying on the absence of these airtime rights by competing channels to reduce their royalty levels. Inversely, it may refuse to distribute a thematic channel or provide it with low remuneration, thus weakening it in relation to other competing channels, including channels published by GCP, in particular for the purchase of rights.

²³ See the GCP reporting data at Lagardère group.

98. The combination of publication and distribution activities also enables GCP to provide confidential information on the channels it distributes and be able to adjust its offer (as publisher or distributor) accordingly.

2.3 *The Development of New Forms of Broadcasting*

99. Consumption of on-demand audiovisual media services is growing rapidly. The competitive pressure that these new consumption methods can exert, mainly on linear pay TV offers, nevertheless remains limited to date. This is explained by the existence of barriers to the development of on demand audiovisual media services (2.3.1) and by the difficulty in substituting on demand video services with linear pay TV offers (2.3.2).

2.3.1 The legal environment of the development of non linear television services

a. Regulation

100. In its decisions on concentration in the market (see below), the Autorité took into account the legal framework enabling publishers and distributors to contribute to financing the French film industry and plurality of media, in that they structure the competitive dynamics of this market.

101. This framework has led to the development of video-on-demand operating slots, while preserving those of other distribution methods, including linear pay TV offers. The agreement of 6 July 2009 on restructuring media chronology opened up a first operating slot exclusive to video on demand, similar to that applicable to videos in physical formats (DVD and Blu-Ray) between 4 and 10 months after the cinema release of films.

102. As for video-on-demand by subscription, the recently renewed 2009 agreement only authorises this for films released in the cinema more than 36 months previously.

103. In addition to issues of media chronology, there are obligations to contribute to financing film production. The decree of 12 November 2010 thus imposes obligations upon on-demand audiovisual media services relating to contributions to the development of audiovisual and cinematographic works. This contribution is fixed for video-on-demand and subscription at 15% of turnover in favour of European works, and 12% in favour of French works.

104. Furthermore, a broadcast quota of 60% for European works and 40% for original French works is imposed on the whole catalogue²⁴.

b. The conduct of broadcasters

105. The provisions of the agreement of 6 July 2009 on changes to media chronology enable the exploitation of on-demand video in rental form during the operating slots of pay TV channels (between 10 and 22 months after the cinema release) then free (between 22 and 36 months).

106. Nevertheless, pre-purchase conditions for films systematically provide for the withdrawal of video on-demand products after 10 to 12 months.

107. The freezing of broadcast slots continues for free slots on the initiative of channels that contributed to the pre-financing of the work. Accordingly, numerous films, in particular the most

²⁴ Decree n° 2010-1379 of 12 November 2010 relating to on-demand audiovisual media services.

attractive, are not available for on-demand video hire in the interval between the tenth and the thirtieth month after their cinema release (or even later, depending on contractual provisions) or the thirty-sixth month. This media chronology is specific to the national market. Outside France, key international players in the video-on-demand by subscription sector may negotiate rights to the first or second pay TV slot with American studios, and therefore offer video-on-demand by subscription several months after cinema release, without these films being withdrawn several months later. The rigidity caused by the current media chronology therefore acts as an effective brake on video-on-demand in France.

c. Other factors

108. Other obstacles to the development of video on demand, analysed in the Hubac report and the **IDATE study**, are such as to put the short term outlook for an upheaval to the markets concerned into context:

- difficulties in accessing video-on-demand services by ISP;
- sharing the added value to the detriment of the publisher of the service, in particular when hosted by an ISP;
- the existence of a guaranteed minimum remuneration to beneficiaries by rental agreements, hindering promotional offers.

2.3.2 *The difficulty of substituting video-on-demand services for linear pay tv*

109. The analysis of the Autorité de la concurrence finds that the substitutability of video-on-demand offers with linear pay TV is still far from perfect. In accordance with media chronology, video-on-demand may concern recent films (3 or 4 months after their cinema release), but at a relatively high price. Subsequently, the purchase of 8 recent films is equivalent to the price of one month's subscription to the Canal+ channel bundle, which offers 30 new films a month as well as numerous other programs.

110. From the viewpoint of the final consumer, the service offered is different: linear pay TV services are characterised by the aggregation of various programs or thematic channels selected by the publisher, while consumers of video-on-demand must browse and choose from catalogues with several thousand listings, and among offers from several service providers²⁵. Video on demand offers freedom of choice, control of schedules, the option of pausing the broadcast, rewinding or fast forwarding, these latter advantages being put into context by the number of repeats and linear catch-up services.

111. Accordingly, the consumption of video-on-demand in France has mainly developed to the detriment of video in physical format, rental or purchase, with the overall turnover generated by all video products remaining changed overall.

112. Substitutability should however become more apparent in the future between video-on-demand by subscription and linear pay TV. The price of subscription offers that give access to an unlimited number of films is much more attractive than that of video on demand, and the wide range, renewed on a monthly basis, gives real possibilities of adapting editorial content to the preferences of Internet users.

²⁵ The Hubac report also notes that the offer of video-on-demand “was insufficiently editorialised and promoted”, and “difficult to access or with poor ergonomics for those not subscribing to a triple play who need, on their computer, to browse blindly online to watch films or audiovisual works” (p. 9).

113. However, these prices only currently give access to catalogue films, with recent films being blocked under current media chronology by the 38 month deadline. Compared with the age of films offered in the first and second pay window, competition is still only virtual.

114. We can further note that supply of video-on-demand appears so far not to have affected the level of subscriptions to GCP offers, as the “churn” rate of GCP offers in mainland France has been in constant decline since 2008, and new sign-ups have increased in 2010.

115. It follows therefrom that the competitive pressure exerted by non linear offers in the linear pay TV sector so far remains limited.

3. Experience of the application of competition law in the television broadcast field

116. Most decisions taken by the Autorité de la concurrence, other than the cases relating to sport already presented at the of the OECD round table in June 2010²⁶ result from controls on concentration, both in the free television (3.1) and pay television sector (3.2).

3.1 Control of concentration in the free television sector

117. In its decision n. 10-DCC-11 of 26 January 2010 relating to the exclusive takeover by the TF1 group of the company NT1 and Monte-Carlo Participations (group AB), the Autorité examined in great detail the markets for the acquisition of rights to different audiovisual content, according to the broadcast method and the type of content concerned, both from the point of view of analysing the relevant markets (segmentation according to broadcast methods, depending on sporting content) and actual competitive analysis. It has already been stated that the Autorité thus noted the strong position of TF1 in the purchase of American catalogue films, its pre-eminent position in the acquisition of American series and its strong position in the pre-purchase of original French catalogue films. In terms of sporting rights, the Autorité found that the new grouping of TF1/TMC/NT1, in addition to the pay channels of the TF1 group, Eurosport and Eurosport 2, had a unique position in terms of the exploitation of such rights. The Autorité concluded that the operation envisaged was such as to strengthen the purchasing power of the TF1 group, bearing in mind the possibility it would then have of profiting from its acquisition of three free to view non-specialist channels.

118. Furthermore, the Autorité de la concurrence noted the dominant position of the TF1 group in the television advertising market. The impact of the operation was assessed on the basis of a dynamic eviction scenario inherent to the free television sector, called the “spiral effect”. This scenario, which results from the interdependence existing between the television advertising market, the rights market and the audience for channels, can lead in the longer or medium term to a strengthening of a dominant position and the weakening, indeed exclusion, of competing operators.

119. Free television is in fact a two-sided market connecting advertisers and viewers. A free television channel provides viewers with programs, and its audience figures depend on their quality. In turn, the value of the channel’s advertising spots depends on the audience, and therefore the revenue with which the channel can acquire attractive programs.

120. In such a context, the Autorité found that the strengthening of the market power of the TF1 group in the acquisition of broadcast rights could be passed onto the television advertising market, insofar as the increased attractiveness of its programs gives it the means of getting higher advertising revenue, then again in the rights market, advertising revenue supporting the quality of the content broadcast, and with them the

²⁶ Note by the delegation of France, 7 June 2010, Roundtable on Competition and Sports, DAF/COMP/WD(2010)46, http://www.autoritedelaconcurrence.fr/doc/ocde_cp_06_2010.pdf

audience figures and demand by advertisers. The Autorité also found that this effect would take place in a market context in which the capacity of TNT competitor channels to invest in more attractive programs to increase their audience and fight this dynamic was very limited.

121. To remove the concerns of the Autorité, the TF1 group undertook to facilitate the circulation of broadcast rights in favour of competing channels, ceasing the application of clauses that could restrict access by its competitors to audiovisual and cinematographic works or freeze broadcasting rights. The TF1 group also undertook to limit the rebroadcasting of programs on its channels, such as to limit the impact of the group's increased purchasing power, and encourage the freeing up of rights. Finally, to remedy the effects of the operation on the advertising market, the TF1 group undertook not to carry out any form of coupling or subordination linking advertising spots on channel TF1 with the sale of spots on TMC and NT1. The marketing of the advertising spaces of new TF1 channels will also be carried out by a PLC reporting to TF1.

122. In its decision n. 12-DCC-101 of 23 July 2012 relating to the exclusive control of the channels Direct 8 and Direct Star by Vivendi and GCP, the Autorité examined the effects of the acquisition of free non-specialist and musical channels by the leading pay TV operator.

123. The Autorité found that the operation had conglomerate effects, insofar as GCP was capable of using its dominant position in the acquisition of American and French film rights in pay TV as a lever to obtaining unmissable content for free TV from rights holders, that is to say American series and original French films. Bearing in mind the rarity of this type of content, the Autorité considered that the execution of a lever effect could reach an acquisition volume such as to produce an eviction effect on the other free channels.

124. The Autorité also found that the operation had vertical effects. Via StudioCanal, GCP in effect controls, the leading portfolio of catalogue film distribution rights in the French market, and may have an incentive, following the operation, to favour delivery of its free channels to the detriment of its competitors. Also, with GCP able to hold rights to broadcast major sporting events, the operation brings with it the risk that the group will favour access to these rights by its free channels.

125. GCP responded to the concerns of the Autorité de la concurrence by undertaking several measures restricting both its acquisition of freeview television broadcast rights and the self-provision of its channels to the detriment of competing channels. To remedy the lever effect, the group firstly undertook not to acquire freeview and pay TV rights to films and series through framework contracts from more than one major American studio. GCP also undertakes not to cumulate freeview and pay TV rights to over 20 original French films a year, and not to focus its investments on big budget movies.

126. Furthermore, to remedy the vertical effects of the operation, GCP undertook to maintain acquisitions by its free channels of catalogue films from StudioCanal at a level equivalent to that recorded before the operation. The group also undertook to transfer its broadcast rights to major sporting events within the framework of an invitation to tender organised by the representative entrusted with monitoring the implementation of commitments.

3.2 Control of concentration in the pay television sector

127. The main concentration in the pay television sector brought to the attention of the Autorité de la concurrence concerns the acquisition of TPS and CanalSatellite by the Vivendi group and GCP. This operation, which involves the grouping of the pay television activities of TPS and the Canal Plus Group ("GCP"), in other words the two satellite bundles CanalSat and TPS, Canal+ and the thematic channels of Multithématiques, within the company Canal+ France, was authorised by a decision of the Minister of the Economy on 30 August 2006, after opinion from the Competition Council no. 06-A-13 of 13 July 2006.

128. This operation gave GCP control of the two French satellite platforms integrating all businesses in the paying audiovisual value chain, from content control to access by viewers. The acquisition added the channels published and marketed by TPS and CanalSat to GCP, as well as their activities of channel bundle distribution and marketing activities. The operation therefore significantly strengthened GCP channel bundles and its subscription data base.

129. In 2006, the Minister of the Economy found that the operation involved significant anti-competitive effects on the upstream audiovisual rights acquisition markets, intermediate markets for the publication and marketing of pay TV channels, as well as the significant strengthening of GCP on the downstream pay TV distribution market.

130. To remedy these competition problems, the authorisation was issued subject to the condition of the implementation of fifty-nine undertakings signed by the Vivendi group and GCP on 24 August 2006. To resolve the monopoly of the new entity in the publication and marketing of premium channels, and allow third party operators to distribute such channels, GCP undertook to make the TPS Star channel available to competitor distributors and to maintain quality. Likewise, to avoid the new channel ousting its competitors by drying up the thematic channel market, GCP undertook to provide distributors with three cinema channels (Cinéstar, Cinéculte and Cinétoile), a sports channel (Sport+) and two children's channels (Piwi and Télétoon), also guaranteeing to maintain their quality. Furthermore, to remedy the risk of dependency of channels vis a vis GCP, it undertook to define transparent, objective and non discriminatory conditions, in particular in terms of remuneration. Finally, GCP undertook to conclude separate contracts for commercial distribution and transport of pay TV services.

131. By **decision no. 11-D-12 of 20 September 2011**, the Autorité de la concurrence found that there had been a breach by the Vivendi and GCP group of ten undertakings signed in 2006, relating in particular to the provision of channels to third party distributors, the guarantee to maintain their quality and the distribution conditions of independent channels. The Autorité found that the undertakings breached by GCP were determinant and lay at the heart of the approach aimed at remedying the competition restrictions resulting from the concentration operation. The breaches recorded could therefore *hinder the objectives sought by the authorisation decision, namely the restoration and maintenance of sufficient competition in the pay TV market*.

132. Consequently the Autorité withdrew, on the grounds of section IV of article L. 430-8 of the Code of Commerce, the merger authorisation issued in 2006, and ordered the parties to at least return to their status prior to the merger, and to again notify the operation within one month of the notification date of the withdrawal decision.

133. It is under these circumstances and on the basis of a new notification of the operation, that the Autorité adopted its decision no. 12-DCC-100 of 23 July 2012 relating to the exclusive taking of control of TPS and CanalSatellite by Vivendi and the Canal Plus Group. By this decision, the Autorité found that there was a significant impact by the horizontal, conglomerate and vertical anti-competitive effects referred to above.

134. To remedy this, and bearing in mind the inadequacies of the undertakings proposed by the notifying parties, the Autorité asked the Vivendi group and GCP to implement three series of measures seeking three objectives.

135. Firstly, the Autorité did not wish to destabilise the financing system for French cinema, structured around a strong vertically integrated operator and a premium channel which is the main contributor to French creation. In fact, the abundance and quality of this production benefit the final consumer, and it is appropriate therefore not to weaken the economic model of a channel existing prior to

the controlled operation. The Autorité found that this model was based on high levels of investment in quality content, the risk of which could be difficult to assume without minimum visibility on the outlook for the exposure of this channel, which involves control of the relationship between the publisher of the channel and the subscriber.

136. Secondly, the Autorité defined remedies seeking to favour the diversity of operators in the pay TV sector, to enable the emergence of an offer which is admittedly not as rich as that of GCP but cheaper and, consequently, more accessible to consumers. Faced with this objective, the Autorité found that the market of French Internet TV service via ISP platforms should continue to grow for two reasons. The first relates to changing xDSL technologies which should improve the performances of platforms using France Télécom's traditional copper network for broadband digital signals. The second results from the roll-out of fibre optic cable, a network with significant technical benefits for pay TV services both in terms of the quality of the signal and bandwidth and which should allow consumers to benefit from Internet access and better quality and innovative audiovisual content (interactivity, on-demand services, access to HD and 3D content).

137. This outlook is no different from that envisaged by the Minister of the Economy in 2006. But the effect of both the breaches of undertakings agreed by GCP has been to remove access providers' control over the technical platform on which they are active. Access by Internet service providers to a wholesale market of attractive pay TV channels remains a key objective in this context. To this end, management of the distribution exclusivities offered by GCP to independent channels and the unbundling of movie channels published by GCP should make it possible to secure supply of the wholesale market.

138. Thirdly and finally, the Autorité found that remedies should preserve the future of the markets concerned, avoiding the pre-emption by GCP of the new forms of content consumption, namely video-on-demand or smart TV. Non linear means of consuming audiovisual content offer significant opportunities for the growth in competition in the pay TV sector. This is particularly the case with video-on-demand by subscription, where development is still at an embryonic stage. The special place of domestic cinema in France and the specific details of its financing method differentiate it from other countries, in which a significant fall in non linear service by Internet operators has been recorded.

139. However, GCP's position in the rights acquisition markets and the size of its database, are such as to give it a considerable advantage if the non exclusive model for the acquisition of rights is called into question. The Autorité therefore ensured, using suitable remedies, that the entity resulting from the merger of 2006 does not neutralise the competitive potential created by these new consumption methods.

140. According to these principles, the injunctions adopted by the Autorité de la concurrence include the following remedies:

- a. the Autorité adopted several measures to manage the acquisition of cinematographic content, involving the duration of contracts, negotiation and the treatment of beneficiaries, in order to remedy the purchasing power of GCP;
- b. the Autorité also sought to limit the influence exerted by GCP on OCS after taking a holding giving it joint control over the Orange movie package. The Autorité therefore required GCP to waive its right to be provided with strategic information on the bundle, to waive a clause capping acquisitions of OCS and to ensure its representation on the board of the company Orange Cinéma Série-OCS by independent directors;

- c. the Autorité remedied the economic dependency of independent publishers vis-a-vis GCP, imposing an obligation on the group to take on a minimum proportion of independent channels in its own bundle of thematic channels, with transparent and non discriminatory objective conditions, formalised in a “reference offer”, which should be communicated to any publisher that so requests;
- d. likewise, the Autorité specifically imposed an obligation on GCP to distribute any channel on the French market offering premium movie or sports content, under transparent, objective and non discriminatory technical and pricing conditions;
- e. the Autorité remedied the effects of the operation on channel distribution, imposing an obligation on GCP not to couple the distribution of channels on different broadcast platforms. To this end, GCP was asked to assess, transparently and distinctly, the distribution of channels to each proprietary platform serving over 500,000 subscribers, precisely identifying the value of the exclusivity attributed for distribution on each platform, without the GCP having a right to link this value with obtaining exclusivity on other proprietary platforms;
- f. furthermore, the Autorité asked GCP to make all the movie channels it publishes available to competitor distributors, under transparent, objective and non discriminatory conditions having, in particular, no price squeezing effects;
- g. finally, the Autorité preserved the competitive potential of video-on-demand markets, prohibiting GCP from reserving exclusive distribution rights and restricting the access of competing video-on-demand offers on ISP platforms.

141. This decision and all of the measures adopted were confirmed by the Council of State by decision of 21 December 2012.

142. Over and above the decision by the Autorité de la concurrence, the Ministry of the Economy and the Ministry of Culture and Communications considered the possible adaptations of the regulatory framework to be applied, on the one hand, to broadcasters established in France and, on the other hand, to new operators liable to develop a smart TV product even though they were not established in France. Even though the development of these new modes of access to audiovisual content could open up much wider access to content directly transmitted over the internet and enable market entry to worldwide internet operators such as Google, Apple and Amazon, it should be noted that these operators are not subject to the same rules, and especially the obligations designed to promote diversity of content and pluralism of information, raising questions of distortion of competition and fairness in the application of these obligations.

143. Finally, the development of technologies and practices involve several major changes that could have a serious impact on the way the sector is organised, such as the development of television over IP networks, the delinearisation of content, the multiplication of terminals and the emergence of the internet operators into the competition stakes that were once reserved for television networks. Since 2007, when the current Audiovisual Media Services Directive was adopted, new corporate models have been launched and the number of broadcasters who initially merely hosted content produced by users have now become involved (in the same way as Youtube and DailyMotion) in discussions with rights-holders to distribute their content on their platforms. The positioning of these operators, who are currently outside the field of audiovisual regulation, within the value chain, while their weight in the market is developing as a corollary to their online services, poses the question of competition in the audiovisual sector.

144. These developments affect not only the broadcasters and transmitters of television programmes, but also the operators and suppliers of Internet access who have witnessed a considerable increase in traffic on their networks. For their part, the television networks are particularly afraid of failure to comply with the integrity of their signal by the new transmission services and terminal environments.

145. A meeting with those who are subject to different legal frameworks and whose practices diverge, as well as changes that have occurred to the value chain, could require increased vigilance on the part of the regulators, even if the sectoral and competition contexts already make it possible to deal with certain situations. Thus, although these changes seem, at first glance, to mainly impact the regulation of audiovisual content currently set up by the CSA in France, the ARCEP is studying the new balance of power between those active in the marketplace, especially through its studies of the neutrality of the internet, both on a national and a European level.