[FR] Opinion of the Authority on Competition on IAPs' Exclusive Access to TV Content

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After the recent cases involving Orange Sports and the courts' examination, in terms of consumer law, of exclusive content distributed by Internet access providers (IAPs) (see IRIS 2009-6: 12), it is now up to the Authority on Competition (*Autorité de la Concurrence*) to adopt a position. The matter was referred to the Authority by the Minister of the Economy; she invited the Authority to make a statement on the compatibility of the exclusive access to highly attractive content that some IAPs reserved for their subscribers with the regulations on competition. She also invited it to draw up an opinion on whether it would be advisable to set up a specific legal framework with the intention of preventing the risk of such exclusive practices.

In a consultative opinion on 7 July 2009, the Authority on Competition presented the advantages and risks of the recent model for exclusive content set up by Orange further to its acquisition of "premium" content (sports and cinema films). The model involves double exclusivity - exclusive distribution, through subscription to the actual television service, and exclusive transport and access requiring subscription to the IAP's triple-play offer in order to be able to access the content in question. This new model is likely to spread to other content and other media (ADSL today, fibre optics tomorrow).

While the Authority holds that anything that encourages the arrival of new players on the pay television market is bound to have a positive effect, particularly for consumers who can expect a drop in prices and an increase in diversity of the content on offer, it considers that the response should be sought elsewhere rather than in the - questionable - economic model of double exclusivity put forward by Orange. This model actually restricts the choice of the consumer, who ceases to have access to all attractive content or who is obliged to pay a great deal more to have universal access to content. There is also a risk that Orange's strategy will destabilise the broadband market to the detriment of competitive operators. Thus if the economic model of double exclusivity were to become generalised, it could eventually lead to a duopoly on both the pay television market and the broadband market. The Authority therefore recommends that IAPs should only operate exclusive access to television content in exceptional cases, and should be strictly limited in duration (one or two years) and scope. It should also be restricted to true technical or commercial innovations (associated interactive services, for

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example). The Authority considers "auto-distribution" to be a satisfactory, balanced solution for both players and consumers. This would enable a distributor to reserve exclusivity for certain channels. This would not prevent it distributing its offer on as many platforms as possible (satellite, ADSL, etc) while retaining its commercial relationship with the subscriber.

The Authority on Competition would therefore like to see in the near future a substantial change in the current operating conditions for the wholesale pay television market, in addition to the strict limits that ought to be placed on the double exclusivity model put forward by Orange. The Authority feels that the time has come to lay down clear rules covering all these issues, and is calling on the legislator to put out "a strong signal" in the context of the upcoming development of fibre optics and super-broadband.

Autorité de la concurrence : Avis 09-A-42 du 7 juillet 2009 sur les relations d'exclusivité entre activités d'opérateurs de communications électroniques et activités de distribution de contenus et de services

http://www.autoritedelaconcurrence.fr/pdf/avis/09a42.pdf

Authority on Competition: Opinion No. 09-A-42 of 07 July 2009 on exclusive relations between the activities of electronic communications activities and content and services distribution activities

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