

## [FR] Merger of TPS and CanalSat: Competition Authority Pronounces Injunctions

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On 23 July, in deliberating again on the acquisition of TPS and CanalSat by Vivendi Universal and Canal Plus, the Competition Authority made its authorisation conditional on a number of injunctions “such as to re-establish sufficient competition in the pay television market”. The operation had only been authorised in 2006 on condition that 59 undertakings were respected, and the Competition Authority, noting that the Canal Plus Group had failed to observe ten of these - including some that were of crucial importance - decided in September 2011 to withdraw its decision authorising the operation (see IRIS 2011-9/17). The parties therefore notified the operation to the Authority once more, and its thorough investigation was carried out on the basis of a broad consultation of the market’s stakeholders, the audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) and the telecom and post regulatory authority (ARCEP). The Authority found the undertakings offered by Canal Plus for remedying the competition issues raised by the operation insufficient, and therefore announced its injunctions, as provided for in Article L. 430-7 III of the Code of Commerce.

The Authority noted that, because of Canal Plus’ failure to perform a number of its undertakings, competition has been significantly weakened in a number of pay television markets: acquisition of cinema rights, edition of channels, commercialisation of themed channels, and the distribution of services. More particularly, the deterioration of the quality of the unbundled channels, the failure to keep to its undertakings on the conditions for buying independent channels, and the conclusion with these independent channels of exclusive distribution arrangements in favour of CanalSat had had the combined effect of preventing the emergence of competition on markets upstream. More specifically, the development of Internet access providers (IAPs) as competitive distributors offering pay television has been hampered by their inability to constitute attractive packages, for lack of available content. This has left them stuck in the role of carriers of Canal Plus offers. Currently, more than five years after the concentration, the Canal Plus Group represents 90 to 100% of the value of the market, compared with less than 10% for all the IAPs together. The Competition Authority believes these figures reflect the installation, as a result of the operation, of a lasting monopoly in the Group’s favour.

There are three aims behind the injunctions that have been issued. The first is to promote diversity among the players in the pay television sector, so that an offer may emerge that, although it will be less extensive than that of the Canal Plus Group, will be less expensive, and therefore more accessible for consumers. Corrective measures ought to preserve editorial diversity by guaranteeing distribution conditions for the independent channels that are equal to those allowed to the channels edited by Canal Plus, by reinforcing their power to negotiate with the Group. To achieve this, the Authority is calling for more control over the purchasing behaviour of Canal Plus regarding cinematographic rights, more particularly by limiting framework contracts to three years, by signing different contracts for each type of rights (first window, second window, series, etc.), and by prohibiting the signature of framework contracts for French films. Canal Plus will also be required to guarantee clear rules for allowing the independent channels access to distribution on CanalSat, and to enable alternative distributors, and more particularly the IAPs, to compete effectively for exclusive distribution on CanalSat. It will also be required to make all the cinema channels it edits for its CanalSat package available to third-party distributors (unbundling).

The second aim is to preserve the competitive future of the new areas, by preventing Canal Plus from pre-empting pay-per-view or subscription video-on-demand. The Authority therefore requires the signature of separate contracts for the purchase of PPV and subscription VOD rights, on a non-exclusive basis, without coupling them to purchases of rights for linear broadcasting on pay television. Any exclusivity of distribution in favour of Canal Plus' PPV or subscription VOD offer on the IAPs' platforms is also to be prohibited. Lastly, any interested operator may be allowed to acquire VOD rights from Studio Canal.

Thirdly, the Competition Authority stresses the importance of not calling into question the financing of the French cinema industry, which has structured itself around Canal Plus, the main contributor to the financing of French creations.

These injunctions are to be valid for five years, and an independent agent approved by the Competition Authority will be instructed to ensure that they are observed. Canal Plus immediately announced its intention to appeal to the highest administrative authority (the Conseil d'Etat) for the suspension or cancellation of the Competition Authority's decision. At the same time, the Conseil d'Etat is examining the appeal brought by Canal Plus against the Competition Authority's cancellation of its authorisation of the merger in September 2011 and, as part of its investigation, applied to the Constitutional Council at the end of July for a priority ruling on the constitutionality on the powers of the Competition Authority. The saga goes on...

### ***Décision 12-DCC-100 du 23 juillet 2012***

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