[FR] Conseil d'Etat Cancels Approval of Canal Plus' Purchase of Direct 8 and Direct Star

IRIS 2014-2:1/18

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In two decisions issued on 23 December, the Conseil d'Etat has cancelled the authorisations issued by the *Autorité de la concurrence* (Competition Authority) and the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority - CSA) for Canal Plus's purchase of the channels Direct 8 and Direct Star. The background to the story is that on 23 July 2012, after thorough investigation, the Competition Authority authorised the operation, on condition that the parties abided by their undertakings aimed at reducing the potential for the purchase giving rise to competition issues (see IRIS 2012-8/26). Canal Plus' competitors, the channels TF1 and M6, contested the authorisation before the *Conseil d'Etat* and called for it to be cancelled on the grounds of the Authority having exceeded its powers. They were also calling for the voiding of the deliberation of 18 September 2012 by which the CSA had given its approval for the operation (see IRIS 2012-9/21).

The *Conseil d'Etat* upheld the claim. Beginning by examining the Competition Authority's decision, it declared this to be not only irregular in its form but also partly illegal in its content. In accordance with Articles L. 430-7, L. 461-1 and L. 461-3 of the Commercial Code, any such decision authorising concentration has to be adopted by the Competition Authority sitting in collegial formation, which it did not in the case at issue. On the merits of the case, TF1 held that the Competition Authority had committed an error of appreciation by accepting one of Canal Plus's undertakings intended to prevent the blockage of markets for the rights to repeat broadcasts of French films without encryption: the Group had undertaken to refrain from acquiring the broadcasting rights for both pay television and unencrypted viewing for more than twenty French films per year. The Conseil d'Etat nevertheless upheld TF1's arguments that, despite these undertakings, Canal Plus was able to capitalise on its near-monopoly in the markets for broadcasting rights for French films on pay television in order to attain a dominant position in the markets for broadcasting rights for second- and third-window unencrypted showing of films, thanks to leverage consisting of linking the acquisition of exclusive rights for broadcasting on pay television and for the second- and third-window unencrypted broadcasting. Contrary to the claim of the Competition Authority, however, Canal Plus' undertaking would not have deprived the company of the ability to bring such leverage into play. It was noted, furthermore, that Canal Plus will be encouraged to implement such leverage,

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enabling it to obtain attractive content likely to be programmed on the channels acquired, which would have the effect of erecting substantial barriers to entering the markets for unencrypted second- and third-window broadcasting rights for French films. The Competition Authority had therefore committed an error of appreciation in considering that the undertaking at issue was such as to prevent the anti-competition effects of the operation connected with blocking the markets for rights to French films for unencrypted second-and third-window broadcasting. Nevertheless, in view of the reasons for the cancellation, the *Conseil d'Etat* has decided that this should be deferred until 1 July 2014, and that it would only apply in the future.

Regarding the request for the CSA's deliberation approving the operation to be cancelled, the *Conseil d'Etat* pointed out that the CSA had reasoned on the basis of both the undertakings adopted by Canal Plus and the decision of the Competition Authority. If the decision were to be cancelled, the CSA's deliberation would be deemed illegal as a result. However, only a partial cancellation has been pronounced. The CSA's re-examination should cover this point only, taking account of the new corrective measures the Competition Authority may adopt. The cancellation is not however likely to call into question the actual principle of approval. It is therefore now up to the Competition Authority to re-examine the concentration operation between now and July and determine what new undertakings will be required.

Conseil d'Etat, 23 décembre 2013, Métropole Télévision n° 363978

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