



# Summary of competition investigations involving pay TV in other jurisdictions

Annex 16 to pay TV market investigation consultation

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## Section 1

# Introduction

- 1.1 This Annex provides summaries of a number of significant cases and regulatory interventions relating to pay TV which have occurred in some other major jurisdictions.
- 1.2 We look at interventions in the following countries:
  - France
  - Germany
  - Italy
  - Spain
  - US

## Section 2

# France

## TPS/CanalSatelite Merger<sup>1</sup>

- 2.1 In 2006 TPS and CanalSatelite merged creating Canal+ France, bringing together the two main French satellite television operators. The French Competition Council (the “Council”) examined the transaction under French legislation and approved the merger after the companies agreed to wide ranging conditions aimed at addressing competition concerns.
- 2.2 TPS was both an acquirer of broadcasting rights and distributor of satellite television services in France (and in the European French-speaking area). CanalSatelite was active in distribution of satellite television services and editing of pay TV channels in France.
- 2.3 The merger raised significant concerns in relation to the acquisition of broadcasting rights for premium content such as movies (both English and French) and football matches. The Council found that Canal+ France would hold a dominant position at every level of the pay TV chain and there was therefore a risk of it foreclosing access to the market. The Council concluded that contracts affording the Canal+ France exclusive rights would foreclose the market and harm consumers.
- 2.4 The Council cleared the merger subject to wide ranging commitments offered by the parties. These are summarised below.

### Conditions unwinding Canal+ France’s exclusivity over existing content rights

- 2.5 In relation to recent American and French movies, where contracts concerning the PPV and VoD rights provide exclusivity, Canal+ France was required to negotiate in good faith with the rights holders for the possibility of exploiting these rights on a non-exclusive basis.

### Conditions limiting the duration and exclusivity of Canal+ France’s future content rights agreements

- 2.6 In relation to recent American movie contracts, contracts would be limited to a maximum duration of three years (with no automatic renewal).
- 2.7 In relation to French movies, Canal+ France would be prohibited from entering into contracts with French producers and negotiate separately contracts for the acquisition of different types and forms of broadcasting rights (e.g. VoD, PPV and first window etc.), without the possibility of bulk purchasing.
- 2.8 In relation to sports contracts new agreements must be limited to a maximum duration of three years.

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<sup>1</sup> An unofficial translation was used as the basis for the content in this section

## **Conditions requiring Canal+ France to wholesale premium channels to other retailers**

- 2.9 Canal+ France must make its channels available to third parties on transparent, objective and non-discriminatory terms (including price and technical procedures). The channels must be made available on a non-exclusive basis.
- 2.10 Canal+ France must distribute the Canal+ Le Bouquet service on all platforms for audiovisual services (satellite, cable, DSL, DTT<sup>2</sup>) to those who request them under transparent, objective and non-discriminatory basis, and without imposing specific conditional access technology (subject only to compliance with the specifications of Canal+ on quality of service, security and anti-piracy).
- 2.11 In relation to cable operators, Canal+ France was required to maintain its existing contracts and renegotiate new contracts in good faith for a similar period.
- 2.12 In relation to DTT, Canal+ France was required to renounce exclusive distribution of its channels, and provide on a non-exclusive and reasonable basis access to all channels controlled by Canal+ France.

## **Conditions protecting independent channels**

- 2.13 Canal+ France must distribute independent channels under transparent, objective and non-discriminatory conditions.
- 2.14 Canal+ France must not require exclusive distribution rights for independent channels and must propose a reasonable contract durations.

## **Other conditions**

- 2.15 In relation to the rights catalogue of Canal+ France for linear and non-linear movies Canal+ France must license (subject to intellectual property rights) those rights to any distribution platform on a non-exclusive basis and under non-discriminatory and normal market conditions.
- 2.16 Conditions relating to publication of applicable contract terms, appointment of a monitoring trustee and a form of accounting separation were also imposed.

## **Tele 2 France/SFR**

- 2.17 In 2006 SFR proposed the acquisition of the internet access and fixed telephony business of Tele 2 France. The European Commission examined the case under the EU Merger Regulation and cleared the merger in July 2007, subject to certain conditions.
- 2.18 The internet access and fixed telephony business of Tele 2 France was active in pay television through the provision of a DSL service. SFR also offers a DSL service and is controlled by Vivendi and Vodafone.
- 2.19 The Commission found that in light of the very strong position held by Vivendi through its subsidiary Canal+ in the French pay TV market, the transaction was likely to give rise to serious competition concerns in the market for retail distribution of pay

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<sup>2</sup> Digital Terrestrial Television is called Télévision Numérique Terrestre (TNT) in France

TV and acquisition of rights for pay TV and audiovisual content. The Commission also found that the transaction could weaken DSL operators thus damaging the emerging competitive pressure exerted by DSL operators in the market for the distribution of pay TV.

- 2.20 The Commission imposed certain clearance conditions for the merger which are summarised below.

### **Conditions requiring Vivendi to wholesale channels**

- 2.21 In relation to linear channels (produced by Vivendi Group and third parties) for which Vivendi holds exclusive distribution rights, and which are distributed by SFR, Vivendi must offer the channel to the other DSL distributors on conditions which are at least as favourable as those provided by Vivendi to SFR/Tele 2.
- 2.22 In relation to linear channels (produced by third parties) for which Vivendi does not hold exclusive distribution rights, SFR should not acquire or exploit exclusive rights for DSL distribution.
- 2.23 For certain groups of “thematic” channels Vivendi must ensure that the retail offer to the end-users on SFR is not more favourable than the retail offer on other DSL platforms.

### **Conditions limiting the exclusivity in future content rights agreements**

- 2.24 In relation to both new and renewed contracts, Vivendi and SFR must not acquire or exploit exclusive VoD film rights for recent American and French films on DSL.

## Section 3

# Germany

## BSkyB/KirchPay TV

- 3.1 In 2000, BSkyB notified the European Commission of its proposed acquisition of a 24% stake in KirchPay TV. The Commission cleared the transaction under the EU Merger regulation subject to commitments imposed on the parties designed to eliminate competition concerns.
- 3.2 Kirch was an audiovisual media group active in various fields including the acquisition of sports rights, film and TV content and channel production, and the provision of pay TV services.
- 3.3 In the pay TV market the Commission found that BSkyB's wealth of know-how and ability to inject funds into Kirch would reinforce KirchPay TV's dominant position on the German pay TV market. In relation to digital interactive television services the Commission found that, as a result of the monopoly position of Kirch TV in Germany, it would be the only company in the foreseeable future to be able to provide pay TV in combination with digital interactive television services - concluding that the merger would lead to the creation of a dominant position on the market for digital interactive services for Kirch Pay TV.
- 3.4 The Commission therefore imposed certain clearance conditions for the transaction which are summarised as below.

### Conditions requiring Kirch to provide access/interoperability to its technical platform

- 3.5 Kirch had to provide access to its technical platform for interested third parties on a fair, reasonable and non-discriminatory basis.
- 3.6 Kirch had to provide access to third party applications to Kirch's "d-box" system provided the third party application is compatible with the d-box.
- 3.7 Kirch undertook to develop and operate simulcrypt arrangements with all digital access providers in German speaking territories on reasonable commercial terms. Kirch had to allow access to its retail pay TV services by subscribers of other technology platforms via simulcrypt arrangements

### Conditions requiring access to Kirch's technology

- 3.8 Kirch undertook to offer licenses for the d-box network (operating system, conditional access system and API) on a reasonable and non-discriminatory basis to all interested manufacturers and also to grant manufacturing licences for production of d-boxes to interested manufactures.

### Conditions relating to the acquisition of rights

- 3.9 Where BSkyB<sup>3</sup> acquired rights for exploitation via pay TV for a major live international sports event on a multi-national basis, it could not give Kirch the status

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<sup>3</sup> The conditions applicable to BSkyB were also applicable to the Newscorp group

of preferred bidder for Germany and similarly where Kirch acquires rights it could not give BSkyB the status of preferred bidder for the UK and Republic of Ireland.

- 3.10 In bidding for programming rights for exploitation on a pay TV basis in the UK, BSkyB could not impose a condition on the rights holders to grant pay TV programming rights to Kirch for Germany. Similarly Kirch, when bidding for programme rights for exploitation in Germany, could not impose a condition requiring the rights holders to grant rights to programmes in the UK to BSkyB.
- 3.11 BSkyB and Kirch would not agree to refrain from bidding for TV rights for international sports events for exploitation via pay TV and could not bid jointly for multinational TV rights to major live international sports events for exploitation via pay TV in other member states.

### **Joint selling of the media rights to the German Bundesliga**

- 3.12 In 1998 Deutscher Fußballbund (DFB - German Football Association) applied to the European Commission for an exemption under Article 81(3) of the EC Treaty in respect to the central marketing of television and radio broadcasting rights and any other technical platforms of exploitation for matches in the first and second national football divisions. The Commission cleared the notification subject to commitments, which are in force until 2009.
- 3.13 The joint marketing arrangement covers all types of broadcasting rights and in particular: free TV, pay TV, pay-per-view TV, terrestrial broadcasting, cable or satellite broadcasting, live or deferred broadcasting, showing of the entire event, of extracts or of compiled highlights and radio. It also covers rights for all kinds of existing and future technologies such as 3G mobile and the internet.
- 3.14 The Commission found that the arrangement affected the markets for upstream programme procurement, the downstream media exploitation market related to programme procurement, and emerging upstream markets in the new media. The Commission concluded that competition concerns would arise in the transfer of media rights to the first and second division matches.
- 3.15 The clearance conditions imposed by the Commission are summarised below.

### **Conditions for exploitation of packages**

- 3.16 The league rights were to be offered in several packages under a transparent and non-discriminatory tender procedure.
- 3.17 The exploitation contracts should not last more than three consecutive seasons. Further detailed conditions were imposed for the exploitation of rights within those packages e.g. conditions relating to live coverage, near live coverage, highlights of the events etc.

### **Conditions for exploitation of rights by Clubs**

- 3.18 Clubs and corporations may conclude agreements on a non-exclusive basis for the coverage of their home games for mobile phone networks.
- 3.19 Each club may sell its home games to a free TV broadcaster 24 hours after the match. Also every club can exploit highlights of its home and away games on the internet.

3.20 Any unused rights may be exploited by the clubs.



## Section 4

# Italy

## NewsCorp/Telepiù

- 4.1 In 2002 Newscorp proposed the creation of Sky Italia through the acquisition and merger of Telepiù and Stream. The European Commission examined the transaction under the EU merger regulation and cleared the merger in April 2003, but subject to a wide variety of strict conditions.
- 4.2 Telepiù operated as a pay TV broadcaster via digital satellite (DSat) and via cable. Its activities included channel provision (in particular through purchase of TV rights for its own sports and films channels) and the operation of its digital platforms. Stream operated Italy's other DSat platform. Stream was at the time jointly controlled by Newscorp and Telecom Italia.
- 4.3 The Commission found that the merger would create a near monopoly over the provision of pay TV in Italy - with the combined DSat platform facing minimal competition from the cable operators and with the potential for competition from DTT being uncertain. Any new entrants on DSat would be entirely dependent on Sky Italia for the provision of technical platform services.
- 4.4 The merger also raised competition concerns regarding the acquisition of broadcasting rights for "premium" content such as movies and football matches. The Commission was of the view that contracts affording the merged entity exclusive rights would foreclose potential entry into the market and harm consumers.
- 4.5 The Commission therefore imposed a wide variety of clearance conditions for the merger. These are summarised below.

### Conditions unwinding Sky Italia's exclusivity over existing content rights

- 4.6 Sky Italia waived any right of exclusivity over existing pay TV rights for: Serie A and Serie B, Champions League, Coppa Italia, and certain world-wide sports rights on other platforms (e.g, cable, DTT, 3G mobile and Internet).
- 4.7 Sky Italia had to renounce exclusive movie rights on transmission platforms other than DSat. It also had to renounce pay per view, VoD/NVoD exclusive rights as well as holdback rights, negative rights or similar protections for the exploitation by 3rd parties of encrypted pay TV rights on all transmission platforms.
- 4.8 Sky Italia also had to grant a unilateral right of termination for content rights holders of: Serie A and Serie B rights, certain world-wide sports rights, and movie rights.

### Conditions limiting the duration and exclusivity of Sky Italia's future content rights agreements

- 4.9 New agreements for pay TV rights relating to: Serie A and Serie B, Champions League, and Coppa Italia are limited to a maximum of two years in duration. Exclusivity may only extend to the DSat platform, and rights holders must have unilateral rights of termination.

- 4.10 New agreements for movie rights must be limited to a maximum of three years in duration and exclusivity may only extend to the DSat platform. Sky Italia must also not acquire exclusive rights with respect to pay-per-view, VoD and/or near VoD exclusive rights on any transmission platform.

#### **Conditions requiring Sky Italia to wholesale premium channels to other retailers**

- 4.11 Sky Italia must offer premium channels (and basic channels containing premium content) on a non-exclusive, non-discriminatory and unbundled basis to third parties, for distribution on platforms other than DSat. The wholesale offer must be made on reasonable terms and conditions and be in line with international best practice taking account of operating and market conditions in different markets. The wholesale price is calculated pursuant to a “retail minus” principle.
- 4.12 Sky Italia must maintain accounting separation between its broadcasting, retail distribution and platform operations.

#### **Conditions requiring Sky Italia to provide third party access to the DSat platform**

- 4.13 Sky Italia must allow third party retailers access to the DSat platform. It must therefore supply the technical platform services necessary for the retailing of channels on cost-oriented terms. Technical platform services in this instance include: conditional access services, accessibility to all decoders used by Sky Italia, direct reception of FTA channels, EPG services, and satellite uplink services.
- 4.14 Access to the platform must be offered on fair, transparent, non-discriminatory and cost-oriented conditions.
- 4.15 Sky Italia must also use reasonable endeavours to enter into simulcrypt arrangements.

#### **Conditions limiting Sky Italia’s activities outside the DSat platform**

- 4.16 Sky Italia is not permitted to operate a platform on DTT or to provide a retail pay TV service on DTT.
- 4.17 Sky Italia was required to divest Telepiù’s terrestrial transmission network.

#### **Mediaset**

- 4.18 In 2006 AGCOM, the Italian competition authority, investigated an abuse of dominance in relation to the acquisition of football content rights by Mediaset.
- 4.19 Mediaset operates: FTA analogue television channels (Canale 5, Italia 1 and Retequattro), broadcast infrastructure (analogue, digital, DVB-H networks), FTA digital terrestrial channels (Boing, Mediashopping), pay-per-view digital terrestrial content (football, films, theatre and other events), and multimedia services (internet and Mobile TV)
- 4.20 Mediaset was found to have abused a dominant position in relation to its contracts for football content rights. Contracts with certain clubs contained long-term exclusivity provisions, pre-emptive rights, and rights of first refusal covering all pay TV platforms. Mediaset made a number of commitments as a result of the investigation:

- It agreed to maintain exclusivity only on the DTT platform and sell rights for other platforms to third parties.
- It agreed not to include any further clauses regarding right of first refusal in its contracts.
- It also agreed to make number of changes to its contracts:
  - It sold the broadcasting rights for the Serie A home matches of Juventus, Inter, Roma and Lazio, giving Sky Italia exclusive satellite broadcasting rights;
  - It agreed with Juventus, Inter, Milan, Lazio, Roma and Livorno to reduce the duration of rights acquired from 2007 to a maximum of two years.

## Section 5

# Spain

### Canal Satellite Digital/Sogecable/Via Digital<sup>4</sup>

- 5.1 In July 2002 the Spanish competition authorities cleared the merger of Via Digital and Sogecable under Spanish Competition law, subject to the certain conditions.
- 5.2 Sogecable's principal areas of business are: the operation of terrestrial television (Canal+ analogue), DSat pay television services (Canal Satélite Digital), the production and distribution of films, the acquisition and sale of sports rights ,and the provision of technology services. Sogecable is controlled by Prisa and by Canal+.
- 5.3 Via Digital also offered pay TV via satellite in Spain and was controlled by Telefónica.
- 5.4 The Spanish competition authorities imposed a wide variety of clearance conditions for the merger. These are summarised below.

#### **Conditions limiting the duration and exclusivity of Sogecable's premium rights agreements**

- 5.5 The duration of Sogecable's premium football rights contracts may not exceed three years. Sogecable was also required to waive its rights of first refusal (and options to extend rights) over Spanish League and Copa del Rey matches. Sogecable must not exercise or acquire exclusive rights for transmission of Spanish League and Copa del Rey matches over mobile and data transmission networks.
- 5.6 Sogecable may not acquire exclusive rights to films produced by the major studios for exploitation through mobile telecommunications and data transmission systems
- 5.7 New contracts between Sogecable and the "major studios" must not have a term longer than three years. In relation to feature films from the major studios whose rights Sogecable has acquired for first and second window release, Sogecable must also limit the period between windows to a maximum of one year.
- 5.8 Sogecable had to waive rights of first refusal over premium movie rights.

#### **Conditions requiring Sogecable to wholesale premium channels to other retailers**

- 5.9 If Sogecable controls or acquires exclusive rights over Spanish League or Copa del Rey matches (and highlights) it is required to offer the rights for wholesale over free-to-air television and pay-per-view television. It was required to ensure as a minimum the maintenance of broadcasts equivalent to those available prior to the merger.
- 5.10 Sogecable was required to offer at least one channel including premium first-run movie content for wholesale to third parties. This wholesale offer must be on fair, transparent and non-discriminatory terms.

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<sup>4</sup> An unofficial translation was used as the basis for the content in this section

- 5.11 Sogecable was required to offer its thematic channels for wholesale to third parties (including those involving the exploitation of second window rights on pay TV for premium films).

### **Conditions relating to internet distribution**

- 5.12 Sogecable may not discriminate in the sale of its audiovisual content in favour of Imagenio<sup>5</sup> or any other project or company in the Telefonica Group, against providers of telephony or Internet access services who use different technologies, especially cable operators.
- 5.13 Sogecable may not discriminate in the sale of its audiovisual content in favour of Imagenio or any other ADSL project or company in the Telefonica Group, against other ADSL providers.
- 5.14 Sogecable may not jointly market its TV platform offer with its Telefonica broadband internet access offer or Imagenio.

### **Conditions requiring Sogecable to provide third party access to its platform**

- 5.15 Sogecable must grant access to third parties for the transmission of their channels over its platform on fair, transparent and non-discriminatory terms.
- 5.16 For a period of three years from the merger, Sogecable was also not allowed to increase the prices charged to subscribers above a specified cap.

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<sup>5</sup> Imagenio is the commercial name of the IPTV service provided over ADSL by Telefonica

## Section 6

# United States

- 6.1 The structure of the United States market is discussed in the summary of the Spectrum report provided at Annex 9. In the United States vertically integrated cable operators have historically been key providers of pay TV.
- 6.2 In 1992 a review of the pay TV industry led to the introduction of the Cable Television Consumer Protection and Competition Act 1992 (the “Act”). The United States Congress found that there was limited competition in the cable-dominated pay TV market. The Federal Communications Commission (FCC) was therefore mandated to put into effect three types of measure in order to foster the development of a more competitive market. Two of these measures are still in force, the third, involving proscribed limits on the number of subscribers that could be served by a single cable operator, is no longer in force.

### “Program Access Rules”

- 6.3 One conclusion reached by Congress in 1992 was that vertically integrated channel providers had the incentive and ability to favour their downstream cable retail operations. The Act was therefore designed to encourage entry into the pay TV retailing market by making certain programming available to all retailers.
- 6.4 The Act led to the introduction by the FCC of Program Access Rules. The Program Access Rules specifically prohibit vertically integrated cable operators from:
- significantly “hindering or prohibiting” a competing retailer from making programming available to subscribers or consumers;
  - discriminating in the prices, terms, and conditions of sale or delivery of channels to competing retailers; or
  - entering into exclusive contracts with cable retailers unless the Commission finds the exclusivity to be in the public interest.
- 6.5 Companies aggrieved by the actions of a cable competitor can file a complaint with the Commission. Remedies for violations of the rules may include the imposition of damages and the establishment of reasonable prices, terms, and conditions for the sale of programming.
- 6.6 The prohibition on exclusivity was renewed in 2002, and then further renewed in October 2007, so that it now applies until 2012.

### “Program Carriage Rules”

- 6.7 The 1992 Act also required the FCC to establish regulations governing channel supply agreements between retailers and wholesale channel suppliers. These rules were brought into effect to prevent retailers from requiring channel suppliers to enter into certain contractual terms as a condition of carrying the content on their network
- 6.8 The Program Carriage Rules therefore prohibit retailers from:

- demanding a financial interest in any channel as a condition of carriage of the content on its system;
- coercing a channel supplier into providing exclusive rights as a condition of carriage; and
- unreasonably restraining the ability of a channel supplier from competing fairly by discriminating on the basis of affiliation or non-affiliation of suppliers in the selection, terms, or conditions of carriage.

6.9 The Program Carriage Rules also specify complaint procedures and remedies for violations of these requirements.