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Case No COMP/M.4504 - SFR/Télé 2 France

Only the French text is authentic.

REGULATION (EC) No 139/2004 MERGER PROCEDURE

Article 8 (2)
Date: 18/07/2007

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18/VII/2007

C(2007)3443

NON-CONFIDENTIAL VERSION

COMMISSION DECISION

of 18 July 2007

declaring a concentration to be compatible with the common market and the functioning of the EEA agreement

(Case COMP/M.4504 – SFR/Télé 2 France)

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("the Merger Regulation")[1], and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 19 March 2007 to initiate proceedings in this case,

Having consulted the Advisory Committee on Concentrations[2],

Having regard to the final report of the Hearing Officer in this case[3],

Whereas:

1 OJ L 24, 29.1.2004, p. 1.

2 OJ C…,…200., p. ...

3 OJ C…,…200., p. …

I. INTRODUCTION

1. On 28 November 2006, the Commission received a notification, pursuant to Article 4 of the Merger Regulation, of a proposed concentration by which SFR S.A. ("SFR" or "the notifying party", France), an undertaking jointly controlled by Vivendi S.A. ("Vivendi", France) and Vodafone Group plc ("Vodafone", UK), acquires, within the meaning of Article 3(1)(b) of the Merger Regulation, sole control of the Internet access and fixed telephony business of the undertaking Télé 2 France ("Télé 2", France, a subsidiary of the Télé 2 group) by way of a purchase of shares. The transaction does not concern Télé 2's business in mobile telephony services.

2. By Commission decision of 11 December 2006, the notification was declared incomplete. On 29 January 2007 the notifying party provided additional information. By letter dated 5 February 2007, the Commission informed the notifying party that the notification could be considered to be complete as of that date. Under Article 5(2) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings[4], notification of the operation became effective on 29 January 2007.

3. After a preliminary examination of the notification, the Commission considered that the transaction as notified fell under the Merger Regulation and raised serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement. Consequently, by decision of 19 March 2007, the Commission launched the procedure provided for in Article 6(1)(c) of the aforementioned Regulation, thereby initiating an in-depth examination of the merger.

4. During this second stage of examination, on 26 April 2007 Vivendi and the notifying party submitted proposals for commitments to make the concentration compatible with the common market and the functioning of the EEA Agreement. These proposed commitments were amended on 30 May 2007. The final version of the commitments was submitted on 13 June 2007.

II. THE PARTIES

5. SFR is a public limited-liability company operating in the mobile telephony sector in France. It also owns a non-controlling shareholding (40.66%) in Neuf Cegetel, a French company chiefly engaged in the fixed telecommunications sector (voice, data transmission and high-speed Internet access).

6. SFR is controlled by Vivendi and Vodafone. Vivendi is the parent company of a group engaged in the media and telecommunications sectors. The Vivendi group is chiefly engaged in the pay-TV (via the Canal+ group), cinema, music, interactive games and telecommunications sectors. Vodafone is the parent company of a group which is active as an operator of mobile telephony networks and provider of other telecommunications services in various Member States and outside the Community.

4 OJ L 133, 30.4.2004, p. 1. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

7. Télé 2, a subsidiary of the Télé 2 group, is engaged in the sectors of fixed telephony, Internet access provision, and also pay TV since DSL television services[5] were launched in June 2006. Télé 2 is also engaged in the mobile telephony sector through its MVNO[6] activity in the Orange/France Telecom network. This latter activity is outside the scope of the notified transaction.

III. THE TRANSACTION

8. The proposed transaction involves acquisition by SFR of sole control of Télé 2 through a share purchase. Pre-merger, Télé 2's mobile telephony business, which is not affected by the transaction, will be transferred to another entity in the Télé 2 group through a partial transfer of assets. Post-merger SFR will control all the capital of Télé 2.

IV. THE CONCENTRATION

9. The transaction as notified therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

V. COMMUNITY DIMENSION

10. SFR's capital is held 56% by Vivendi and 44% by Vodafone. The notifying party considers that Vivendi has sole control of SFR. Under the shareholders' agreement between Vivendi and Vodafone, Vodafone, it is argued, does not have any of the rights or powers listed in Article 5(4)(b) of the Merger Regulation with regard to fixed telephony activities. It is solely with regard to mobile telephony activities that Vodaphone is said to have in SFR the rights or powers listed in Article 5(4)(b) of the Merger Regulation. The notifying party argues that Vodafone's turnover should not be taken into account when considering the Community dimension of the merger[7].

11. The notifying party does not dispute the fact that under the shareholders' agreement between Vivendi and Vodafone, Vodafone has the right to manage SFR's affairs with regard to its mobile telephony activities. The Commission notes that at the date of notification of the transaction, SFR was engaged solely in the mobile telephony business. Outside mobile telephony, SFR has only one non-controlling holding of 40.66% in Neuf Cegetel (a company engaged in the fixed telephony and Internet access sector) and the notifying party has stated that it has no controlling influence over Neuf Cegetel. This therefore means that Vodafone has one of the rights listed in Article 5(4)(b) of the Merger Regulation in respect of SFR's activities as a whole.

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5 Digital Subscriber Line. DSL technology makes it possible to significantly increase the speed of normal telephone lines. The most common DSL technology is ADSL (Asymmetric Digital Subscriber Line). In this Decision, the term "DSL" covers all the types of service provided through DSL technology, including not only ADSL, in the strict sense of the term, but also the other related technologies, in particular VDSL and ADSL 2+.

6 Mobile Virtual Network Operator.

7 Comments by SFR on the Commission decision of 19 March 2007.

12. The companies concerned, SFR and Télé 2, have an aggregate worldwide turnover of over €5 billion[8]. SFR's worldwide turnover is €8.401 billion, to which should be added Vivendi's worldwide turnover (€19.484 billion) and Vodafone's worldwide turnover (€41.106 billion). Télé 2 has a worldwide turnover of €619 million. SFR and Télé 2 each have a Community-wide turnover of over €250 million. SFR's Community-wide turnover is €8.4 billion, to which should be added Vivendi's Community-wide turnover (€14.048 billion) and Vodafone's Community-wide turnover (€37.358 billion). Télé 2's Community-wide turnover is €618 million. Unlike Télé 2, which achieved more than two thirds of its Community-wide turnover within one and the same Member State (France), SFR, taking into account Vivendi and Vodafone's turnover, did not achieve more than two thirds of its Community-wide turnover within one and the same Member State.

13. In view of the above, the notified transaction has a Community dimension within the meaning of Article 1 of the Merger Regulation.

VI. MARKET DEFINITIONS

Product markets

14. The notified transaction does not entail any overlap between the parties' fixed telephony, mobile telephony and Internet access activities[9]. Accordingly, these markets will not be discussed in this Decision. Also, the transaction does not entail any overlap outside mainland France. Accordingly, taking into account the activities in mainland France of SFR/Vivendi and Télé 2, the markets affected by the transaction are in the pay-TV sector in France.

15. The pay-TV sector in France is organised broadly as follows.

16. At the intermediate level of the value chain of the pay-TV sector in France, the producers decide on the themes and programming strategy of their channels and either produce their own programmes internally or acquire the broadcasting rights for the programmes that are to constitute the channel content (films, series, sports events, etc.) from third parties, on upstream markets.

17. The producers then sell the right to market their channels to distributors. The distributors offer subscription-based or pay-per view TV channel packages. The distributor is responsible for promotion of the packages (through advertising or direct marketing), selling them and subscriber relations. The distributor either sells or rents a terminal to the subscriber, providing decoding and decryption, and in some cases reception equipment.

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8 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and with the Commission notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 25).

9 In April 2007, SFR launched its Internet access services. Bearing in mind the very recent launch of this new activity, the overlap with Télé 2's Internet access activity, which is very limited (less than 3% market share) is not significant in terms of competition.

Delivery is by various different methods. The main ones in France are cable, satellite, DSL and terrestrial (analogue and digital[10]).

18. Historically, the main distribution means for pay TV in France was cable, in the early 1980s. French cable operators currently have around 1.9 million subscribers to pay TV and around 1.6 million subscribers to the "antenna service"[11]. In 1984 the Canal+ group launched, via analogue terrestrial transmission, the pay-TV channel Canal+, whose digital arm, Canal+ Le Bouquet, currently has around 4.5 million subscribers for all distribution means (terrestrial, cable, satellite and DSL). In the late 1980s satellite pay-TV services appeared in the French market. French satellite operators currently have around 3.7 million subscribers (around 2.5 million for Canal Satellite and 1.2 million for TPS). Lastly, at the end of 2003 Internet access providers started to offer DSL pay-TV services. Today these operators offer "multiple play" television services to around 2.6 million subscribers. 400 000 of these subscribers also subscribe to pay-TV services distributed by the satellite operators (the services currently on offer are TPSL and CanalSatDSL) and to the Canal+ channel and mini-package.

19. In the last two years the French pay-TV distribution sector has undergone considerable consolidation. Following several successive mergers, the main cable operators are now grouped within a single entity (Ypso)[12]. In addition, in 2006 the Canal + group, which is controlled by Vivendi and which in turn controls Canal Satellite, acquired control of the second largest French satellite television operator, TPS[13]. The DSL Internet access sector has also undergone consolidation, in particular as a result of the takeover of AOL France by Neuf Cegetel (the company resulting from the merger of Neuf Telecom and Cegetel), which is currently proposing to take over Club Internet.

20. Against this backdrop of consolidation of the cable and satellite sectors, the other significant feature of the pay-TV distribution sector in recent years has been the rapid development of DSL operators.

21. Lastly, it should be noted that the two main satellite pay-TV distributors, Canal Satellite and TPS, which now form a single entity, also have significant business in the production of pay-TV channels and services. In addition, in most cases, before they merged, Canal Satellite and TPS each had exclusive rights vis-à-vis the other of satellite distribution of the channels they produced, and in most cases these exclusive rights also included distribution of their packages by DSL. In order to differentiate their offerings, these two operators had gradually acquired exclusive distribution rights by satellite and DSL of many of the most attractive channels produced by third parties. Accordingly,

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10 Digital Terrestrial Television (DDT).

11 "Antenna service" means a technical service which is provided by cable operators to people with access to a cable network and which enables them to receive the free terrestrial channels by replacing the signal supplied by an outside antenna at a cost of only 2 to 3 euros per month.

12 See, most recently, the Commission Decision of 13 July 2006 in Case COMP/M.4206 – Cinven/UPC France.

13 Letter from the Minister for Economic Affairs, Finance and Industry of 30 August 2006 to Vivendi Universal's advisors concerning a merger in the pay-TV sector (Case C2006-02) (hereinafter referred to as the "Canal Satellite/TPS decision").

before the proposed transaction, the company resulting from the merger of Canal Satellite and TPS, in addition to exclusive satellite distribution rights, has exclusive DSL distribution rights for all the channels produced by the new Canal+ group[14], as well as for numerous other channels produced by third parties.

22. In view of the foregoing, and taking into account in particular the vertical integration which the acquiring group enjoys, the pay-TV markets affected by the transaction are the following:

- the upstream and intermediate markets in the pay-TV value chain, relating to the acquisition and sale of broadcasting rights, i.e. the market for the acquisition of the rights to broadcast programmes and that for the sale of rights to distribute pay-TV channels and services (A);

- the downstream pay-TV distribution market (B).

14 With the exception of seven channels concerning which a commitment has been made to the French competition authorities as described in this Decision.

A. The upstream and intermediate markets for broadcasting rights

23. Commission decisions have consistently distinguished between two categories of market relating to broadcasting rights[15]: (i) "upstream" markets for the acquisition of rights to broadcast programmes (films, series, etc.) or events (in particular, sporting events) and (ii) "intermediate" markets for the marketing of pay-TV channels and services (on the demand side: purchase of the right to distribute the channel).

A.1. "Upstream" markets for the acquisition of broadcasting rights

24. Upstream in the pay-TV sector value chain are the holders of programme broadcasting rights which are acquired by different operators, chiefly TV channel producers or, to a lesser extent, distributors of TV services. The main criteria for the breakdown and differentiation of broadcasting rights are: the nature of the programme, the distribution platform and the form of delivery.

25. As regards the nature of the programmes, the notifying party points out that the French and Community competition authorities have traditionally distinguished between three types of market based on the nature of the programmes. These are the acquisition of rights to films and recent series; the acquisition of sports rights; and the acquisition of other broadcasting programmes (stock and flow programmes).

26. As regards distribution platforms, in France programme broadcasting rights usually relate to all the main distribution platforms: satellite, terrestrial (analogue and digital), cable and DSL, with the exception of rights to broadcast audiovisual content on mobile telephones. It should also be noted that in France the rights to broadcast Ligue 1 football matches on mobile telephones constitute a separate lot among the most recent calls for tenders launched by the French professional football league (LFP).

27. As regards the distinction between the various rights on the basis of the delivery method, the development of new modes of pay-TV consumption as a result of new technology has made it possible to distinguish between rights relating to conventional ("linear") TV and those relating to "non-linear" TV services, in particular Video on Demand ("VoD"[16]) and Pay Per View ("PPV")[17]. Non-linear services differ significantly from conventional TV channels in terms of demand, the applicable legislation and prices.

28. On upstream markets, DSL television operators in France are engaged mainly in the purchase of VoD broadcasting rights.

29. Although it did not produce a VoD service prior to the notified transaction, Télé 2 was nevertheless a potential entrant to the market for the purchase of VoD broadcasting

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15 See Commission Decision 2004/311/EC of 2 April 2003 in Case COMP/M. 2876 - Newscorp/Telepiù (OJ L 110, 16.4.2004, p. 73).

16 VoD is a pay-as-you-go service that makes a programme available for a certain period to the viewer, who can choose when to view it. The term "VoD" is here used in a general sense. It covers all VoD services as well as the various specific forms, in particular near VoD ("nVoD") and subscriber VoD ("sVoD").

17 PPV is a pay-as-you-go service that broadcasts a programme at a particular time.

rights. For the purpose of the merger, the definition of upstream markets must be based on the market(s) relating to acquisition of VoD broadcasting rights. As far as the acquisition of VoD broadcasting rights is concerned, there are significant differences compared with the acquisition of other TV broadcasting rights in terms of demand[18], the level of prices and the structure of remuneration[19] which make it possible to identify this type of rights separately within the upstream market.

30. Furthermore, the market survey carried out for the purposes of this case showed the relevance of defining a separate market for the acquisition of VoD broadcasting rights for recent films. Differences in terms of nature and especially of price compared with other types of VoD content (series, documentaries, etc.; see below) bear out the relevance of such a breakdown. Moreover, according to a recent independent study[20], films (American and French) accounted for almost 60% of all programmes downloaded in VoD in France. It is therefore clear that this type of content is essential to the make-up of any attractive VoD offering.

31. A more detailed breakdown between VoD broadcasting rights for recent films and those for library films could be considered[21].With regard to recent films, there are significant differences between the rights to broadcast on conventional pay-TV channels and PPV, on the one hand, and VoD broadcasting on the other. These differences are illustrated by the media chronology[22] into which VoD broadcasting rights are being introduced. This chronology provides for strict release windows for recent films for the different exploitation methods (cinemas, VoD, PPV, pay TV, free TV). Specifically as far as VoD is concerned, an inter-professional agreement signed in December 2005 between French TV and film operators has set the exploitation window at 33 weeks following the release

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18 Several TV, Internet and telecommunications operators have recently entered the market for the purchase of film rights for VoD broadcasting. Consequently, contrary to the situation on the markets for the purchase of rights for broadcasting on "conventional" pay-TV, there is a sizeable number of players involved in the purchase of VoD rights.

19 The prices paid for the acquisition of rights for broadcasting on "conventional" pay-TV are out of all proportion to those paid for VoD broadcasting. This situation is due to two factors in particular: the exclusive acquisition of the conventional TV content and the fact that the remuneration for VoD broadcasting is usually based on the number of viewings and not on the number of subscriptions.

20 "Pratiques de la VoD en France", study carried out by the Centre National de la Cinématographie, December 2006.

21 See replies to questions 3, 4 and 11 of the questionnaire sent to competitors on 6 February 2007, the replies to questions 6 to 8 of the questionnaire sent to rights-holders on 6 February 2007 and the replies to the questionnaire sent to broadcasters on 6 February 2007.

22 Recital 32 of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 202, 30.7.1997, p. 60) states that: "the question of specific time scales for each type of television showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned". Directive 97/36/EC was transposed into French law by the Law of 1 August 2000.

of a film in cinemas[23]. However, it is not necessary to decide in this Decision whether to apply this more detailed breakdown since it does not affect the competition analysis.

32. Consideration could also be given to the relevance of a breakdown as between US film rights and national (in this case French) film rights on the basis in particular of differences in terms of identity, supply and above all in terms of price and appeal. The relevant markets would then be the acquisition of recent US film rights for VoD and the acquisition of recent French film rights for VoD[24]. For the purposes of this analysis, however, the question of this possible breakdown may be left open since the conclusions of the analysis remain the same.

33. Other types of programme can also be identified, e.g. series, cartoons, documentaries and, to a lesser extent, certain competitive sporting events. However, for VoD broadcasting rights relating to programmes other than films, the investigation did not conclusively show the relevance of a breakdown based on type of delivery.

34. With regard to rights for sporting events, the market survey carried out during the second stage of the examination showed that market structure is strongly influenced by supply, and in particular by the sports rights allocation policy employed by the main holders of these rights[25]. Thus, the professional football league is the only sports rights holder to have sold broadcasting rights for pay-as-you-go services (PPV and VoD). Since it is difficult to predict with reasonable certainty how the allocation policies of the main sports rights holders will evolve in the future, it is not possible to draw any conclusions regarding the existence of one or several separate markets for the acquisition of such broadcasting rights as regards VoD.

35. In any case, most of the programmes sold through VoD appear to be French and American films. VoD sales of other types of programme are currently low or even marginal.

36. In view of the considerations set out in this section and for the purposes of the competition assessment of the transaction, the analysis will be carried out on the market for the acquisition of film rights for VoD.

A.2. "Intermediate" markets for distribution of channels

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23 The other windows for the showing of films in France are the following: video hire or sale (DVD/VHS): from the 6th month following cinema release; PPV: from the 9th month following cinema release; broadcasting on a pay-TV channel: from the 12th month following cinema release, for 6 months, and the second window from the 18th month following cinema release, also for 6 months; broadcasting on an unencrypted TV channel: 24 months following cinema release, if the channel is a co-producer of the film, otherwise 36 months following cinema release.

24 This was the position taken by the French competition authorities with respect to the Canal Satellite/TPS decision.

25 See replies to questions 3, 4 and 11 of the questionnaire sent to competitors on 6 February 2007, the replies to questions 6 to 8 of the questionnaire sent to right-holders on 6 February 2007 and the replies to the questionnaire sent to producers on 6 February 2007.

37. These intermediate markets bring together TV channel producers and distributors of pay-TV services. Commission decisions have consistently drawn a distinction between free and pay TV channels[26]. This distinction is based mainly on the differences between the financial models of these channels. The free channels are chiefly financed by advertising revenues (public channels may also be financed by public funds) whereas pay-TV channels are mainly financed by the fees paid by distributors.

38. The difference in remuneration as regards pay-TV channels and free channels affects mainly TV distributors, who have to bear a cost only for distribution of pay-TV channels (the fee they pay the producer or, in the case of optional channels, the fees paid by the customer are shared between the producer and distributor), since distribution of the free channels costs them nothing. Thus, on the demand side, i.e. for TV distributors, these two types of channel are not substitutable. As regards supply-side substitutability, not all producers can alter the financial model of their channel, and in any case this would take time and involve substantial risks. The transformation of a pay-TV channel into a free channel involves considerable risks. The channel must be sufficiently reputable to attract advertisers and should preferably have good advertising back-up. Furthermore, the advertising market is not inexhaustible and therefore cannot finance an infinite number of channels. If a pay-TV channel is to be transformed into a free channel it must therefore really stand out from its competitors if it is to appeal to advertisers. It is also a complex matter transforming a free channel into a pay-TV channel (or, as is usually the case, to launch a pay-TV channel), since good distribution of the channel is necessary if sufficient fees are to be received.

39. Lastly, the "free" channels, which operate through advertising revenues, are in principle broadcast by all the distributors[27], unlike a significant number of pay-TV channels to which distributors have exclusive rights (currently only the Canal+ group). Thus, while they serve to enhance the services offered by pay-TV distributors, in particular those of DSL TV operators, the programmes offered by the free channels are not of a kind enabling distributors to provide pay-TV offerings that are sufficiently attractive to generate enough profit.

40. In the light of all the aspects examined in this section, a distinction must be made between free and pay-TV channels, as was also confirmed by the responses to the market survey carried out in connection with this case[28].

41. In addition, the Commission has on several occasions[29] considered a breakdown based on the themes of the channels (in particular premium and sports channels), but has not

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26 Decision COMP/M.4204 - Cinven/UPC France referred to above.

27 Exclusive broadcasting rights for free channels in France existed when the TPS package was owned by the groups producing channels TF1 and M6. These exclusive rights disappeared following the merger of Canal Satellite with TPS. As part of the merger procedure, the French competition authorities obtained an undertaking by the Vivendi group not to oppose the distribution of the free channels TF1 and M6 by other distributors.

28 See replies to question 8 of the questionnaire sent to competitors on 6 February 2007 and the replies to question 8 of the questionnaire sent to producers on 6 February 2007.

29 See in particular Decision 2004/311/EC referred to above and the Commission Decision of 7 February 2003 in Case COMP/M.2845 - Sogecable/Canalsatélite Digital/Vía Digital.

yet reached a definite decision on this issue. The French competition authorities, in the decision on Canal Satellite/TPS, divided channels into six markets: premium, sports, films, news and youth, plus another market comprising all the other themes. The notifying party has stated that while it is not totally opposed to such a breakdown, it does not consider that the Canal+ channel belongs to the premium channel production market. It points out that the Canal+ channel's financial model and regulatory framework are based on the principle of self-distribution, i.e. the Canal+ group retains control at all times of commercial relations with subscribers[30].

42. Although it is not necessary to reach a definitive conclusion on this question, and although the investigation shows that the Canal+ channel appears to be present on the intermediate market[31], the market survey bore out the Commission's analysis whereby an attractive package is a "basic" package made up of several main themes (premium, film, youth, sport and news) plus a number of other themes that are more or less substitutable for one another. The Commission reaffirmed this position in a recent decision as follows: "The concept of diversity and the availability of channels covering all the main themes remains a significant incentive for subscribers"[32].

43. In previous decisions a distinction was also envisaged between the classical or "linear" channels and the non-linear channels (VoD, PPV), as well as within the non-linear services. However, there is no need to reach a definite conclusion regarding this breakdown in this Decision, since the competition analysis remains unchanged.

44. In principle the competition authorities do not apply a breakdown by technical means of delivery, i.e. do not distinguish between different broadcasting platforms such as cable, satellite or, more recently, DSL, since in principle producers want their channels to be distributed as widely as possible in order to maximise revenues and, at the very least, to have a presence on all the broadcasting platforms through exclusive rights for more than one platform. In the case at hand it is not necessary to reach a definite conclusion concerning the relevance of a further breakdown of markets on the basis of broadcasting platform (and therefore demand) since the conclusions of the analysis remain unchanged. With regard to demand, a general analysis will therefore be made of the markets.

B. The downstream market for retail distribution of pay-TV services

45. The Commission's consistent practice, which was confirmed by a recent decision[33], has been to consider distribution of pay TV and free TV as two separate product markets.

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30 Thus, if a Canal+ subscriber receives this channel (or the Canal+ Le Bouquet digital channel) via cable or DSL, the cable or DSL operator is acting merely as a carrier on behalf of the Canal+ group and does not have direct commercial relations with the subscriber.

31 See replies to question 8 of the questionnaire sent to the competitors on 6 February 2007 and the replies to question 8 of the questionnaire sent to the producers on 6 February 2007. This point was confirmed by the Minister for Economic Affairs, Finance and Industry in the Canal Satellite/TPS decision and by the authorities consulted in connection with this operation (in particular the Competition Council and the Broadcasting Council).

32 Decision COMP/M.4204 – Cinven/UPC France referred to above.

33 See Decision COMP/M.4204 – Cinven/UPC France referred to above.

The main argument put forward in support of this breakdown is the different type of financing of these two types of TV. Pay TV establishes a commercial relationship between the TV distributor and the viewer whereas free TV only establishes a relationship between the TV distributor and the advertisers. Similarly, from the viewer's standpoint, while there is undeniably interaction between the two TV markets, a distinction can be drawn based on whether the TV service offering is received for no specified cost or is the result of subscription allowing access to certain programmes not otherwise available. Pay-TV and free-TV service offerings are therefore not very substitutable from the standpoint of demand. The investigation of the case at hand does not challenge this basic distinction.

46. Furthermore, several Commission decisions[34] have defined an overall market comprising all the means of broadcasting pay TV. The market survey[35] tends to confirm that a more detailed breakdown is not necessary, particularly in view of the growing convergence of different platforms in terms of content, despite the technical differences between them[36].

47. In addition, although there are important indicators distinguishing them from the other forms of TV, it is not necessary to give an opinion as to whether the emerging TV services via mobile telephony platforms form part of this overall market, since, on the one hand, SFR is a mobile telephony operator prior to the transaction and, secondly, Télé 2's mobile telephony business is not involved in the transaction.

Geographic markets

48. In line with the position consistently taken in its decisions[37], the Commission has applied a national dimension with regard to all the markets defined in this part. In view of the nature of the activities concerned, the transaction affects only the French mainland. As regards the acquisition of content (rights or channels), the negotiations between providers and customers are organised on a national basis regardless of whether the rights are over national or foreign content. With regard to the downstream pay-TV market, the different means of delivery either cover the whole of the national territory (satellite) or are gradually covering all or a large part of it (DTT, DSL and cable). It should also be noted that pay-TV distributors have a uniform tariff policy for the whole of the country, and that the national dimension of the markets in question is not called into question either by the notifying party or the responses to the market survey.

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34 See in particular the Commission Decision of 3 May 2002 in Case COMP/M.2766 - Vivendi Universal/Hachette/Multithématiques.

35 See replies to question 5 of the questionnaire sent to competitors on 6 February 2007 and replies to question 5 of the questionnaire sent to producers on 6 February 2007.

36 The downstream pay-TV distribution market is different from the radio broadcasting market, aimed at delivering a radio broadcasting content to end users (market No 18 in Commission Recommendation C(2003)497 of 11 February 2003 on the relevant product and service markets within the electronic communication sector susceptible to *ex ante* regulation in accordance with Directive 2002/21 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), which relates to wholesale supply of technical broadcasting services.

37 See in particular, by way of illustration, Decisions COMP.M.2766 - Vivendi Universal/Hachette/Multithématiques and COMP/M.4204 – Cinven/UPC France referred to above.

VII. COMPETITION ANALYSIS

A. Operation of the market before the notified transaction is carried out

The television services offered by Vivendi/SFR and Télé 2

49. At present, prior to the transaction, the Vivendi group distributes pay TV in France direct by satellite[38] and by terrestrial transmission[39]. The packages of channels marketed by satellite - Canal Satellite and TPS – and some channels marketed by themselves[40], in mini-packages[41] or coupled with specific packages[42] are also available by DSL. But prior to the transaction Vivendi has no DSL infrastructure of its own, and to distribute these channels it has to make use of DSL operators' networks. Vivendi allows these operators to carry its packages, but no more: it keeps the direct commercial relationship with the subscriber for itself[43.] Thus the DSL operators act only as carriers of Vivendi's packages, and never as distributors.

50. On the pay-TV market, therefore, DSL operators such as Télé 2 act as distributors only in respect of their own, "proprietary" packages, that is to say packages of channels and television services for which they themselves acquire the broadcasting rights from the producers and which they then offer direct to the final consumer. These proprietary packages are marketed as part of what are known as "multiple-play" offerings, which also include telecommunications services such as telephone services or high-speed Internet access.

51. Vivendi's packages and mini-packages can be offered by DSL only at "second level", meaning that the subscriber has to subscribe first to a multiple-play service offered by a DSL operator, and only then to a service offered by Vivendi.

38 CanalSat, TPS and Canal+ Le Bouquet.

39 Canal+, one channel, by analogue broadcast, and Canal+ Le Bouquet and some mini-packages by digital broadcast.

40 The Canal+ channel, for example, can be bought on its own by satellite, by DSL, by cable or by terrestrial broadcast, both analogue and digital.

41 Canal+ digital, which is available via all distribution platforms, currently comprises the channels Canal+, Canal+ Cinéma, Canal+ Sport et Canal+ Décalé.

42 The group's pay-per-view channels are marketed as part of packages or mini-packages. The pay-per-view channel Foot+, for example, which currently shows seven Ligue 1 football matches per day, can be bought by satellite as part of a Vivendi package, or by DSL as part of a Vivendi package or mini-package, but the DSL service is available only via the Orange network, as Orange has acquired the exclusive right to carry the channel on any wire medium, which for the present means DSL or cable.

43 For example, concluding the distribution contract with the consumer, setting the price of the subscription and arranging the subscription.

52. Lastly, the Vivendi group does not itself distribute by cable. Some of its packages are carried by cable operators[44], while Vivendi handles the direct commercial relationship with the subscriber.

Dynamism of the different pay-TV distribution platforms

53. The DSL and digital terrestrial television platforms are the most dynamic forms of distribution and the main vectors of growth in the market for pay TV in France[45], while growth in the numbers of satellite and cable subscribers has been relatively moderate[46]. The notifying party indicates that DSL accounted for [60-90]*% of net recruitment to Canal Satellite in the period January to October 2006; the figure for 2004 was 10%, and the figure for 2005 was 60%[47].

54. According to the French telecommunications authority, the *Autorité de régulation des communications électroniques et des postes* (ARCEP), the number of DSL television lines increased from a few thousand in 2004 to over 2.6 million at the end of 2006, which included more than 400 000 subscribers to Vivendi's pay-TV packages (CanalSatDSL and Canal+ Le Bouquet; there were another [50 000 - 150 000]* subscribers to the TPSL package). Given the increase forecast in the number of households with a DSL connection in France in the next few years[48], the number of subscribers to the DSL operators' multiple-play offerings should in the nature of things continue to grow rapidly.

The DSL operators' comparative advantages

55. The dynamism of the DSL operators is due to the comparative advantages they have over other platforms:

- commercial advantages of multiple play, which are not available to satellite and digital terrestrial television (high-speed Internet, IP [Internet protocol] telephone services, television, and gradually also mobile telephone services);

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44 Canal+ Le Bouquet.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

45 One operator states that in the first nine months of 2006 the number of households subscribing to an offer of television via DSL almost trebled, while satellite and cable had growth rates of 0.3% and 4.3% respectively. Another potential growth vector, digital terrestrial pay TV, launched in 2006, has so far been marketed only by Vivendi.

46 The coverage of cable cannot be extended rapidly, and the competitive pressure it exerts on the Vivendi group should not change fundamentally in the foreseeable future.

47 Notification (form CO), p. 240.

48 According to ARCEP, the number of subscribers to high-speed Internet in France, 94.5% of whom are DSL subscribers, grew by 34.4% in 2006 (ARCEP reply of 27 April 2007 to a request for information of 3 April 2007).

- technical advantages, in that their services are provided by conventional telephone line (copper pair), and they can offer VoD as well as conventional pay-per-view services[49].

56. In the market as it is currently structured, as far as Vivendi is concerned, these advantages are augmented by the fact that a customer who wishes to subscribe to a television package by DSL must first subscribe to a DSL operator's multiple-play offer and only then to one of the Vivendi packages carried by that operator.

57. The market survey carried out during the second stage of the proceedings confirms the comparative advantages held by DSL operators over satellite operators. In particular, the third parties who were questioned emphasised the simplicity of access to DSL multiple play offerings by conventional telephone line, whereas satellite, for example was more cumbersome, requiring the installation of a parabolic aerial, and the attractiveness of all-in-one offerings of television, telephone and Internet.

58. The dynamism of the DSL platform is due also to the relative facility of subscribing to a DSL television offer once the customer already has high-speed Internet access. As a result, an increasing proportion of the DSL operators' high-speed Internet subscribers also subscribe to a multiple-play offer that includes television[50].

The DSL operators' comparative disadvantages

59. The third parties questioned also pointed out, however, that the DSL operators' own television packages currently exert only weak competitive pressure on the Vivendi group's offerings, as a result of the limited geographic coverage of DSL technology and of Vivendi's own conduct[51].

60. It is clear from the market survey that the DSL operators are not yet in a position to exert competitive pressure throughout the country, for technical reasons[52]. The market survey shows, however, that the competitive disadvantage of limited geographic coverage should diminish gradually in the medium to long term[53]: according to ARCEP, television by ADSL was available to 50% of the population of France at the end of 2006, but that proportion could be expected to rise to 65% by the end of 2007[54].

61. But the main constraint on the competitiveness of the DSL operators' own television offerings, mentioned by all the DSL operators, is their lack of access to attractive television content. The market survey shows that this is the direct result of the exclusive

49 These services likewise cannot be provided today by satellite or digital terrestrial television, for want of a return path.

50 Answers to question 11 in the questionnaire sent to DSL and cable operators on 3 April 2007.

51 Answers to questions 4 to 7, 44, 45, 54 and 55 of the questionnaire sent to DSL and cable operators on 3 April 2007.

52 Answers to question 2 of the questionnaire sent to DSL and cable operators on 3 April 2007.

53 Answers to question 3 of the questionnaire sent to DSL and cable operators on 3 April 2007; answers to question 12 of the questionnaire sent to competitors on 6 February 2007.

54 ARCEP reply of 27 April 2007 to a request for information of 3 April 2007.

contracts concluded by Vivendi with almost all the producers of the most attractive and best-known channels in France, whether outsiders or producers belonging to its own group.

62. DSL operators may, for example, wish to differentiate their offerings, or to make them more attractive than those of their competitors, by centring their packages of channels around a particular theme; but any such differentiation will be very limited, because it has to work on the basis of channels that are marginal in terms of attractiveness and recognition. It is very difficult, therefore, to achieve real differentiation, and to increase the attractiveness of proprietary offerings, because channel producers will deny DSL operators access to their channels even if they do not belong to the Vivendi group, in view of the exclusive contracts they have with the group. It was pointed out earlier that when television offerings by DSL were being designed the Vivendi group already had some exclusive rights for satellite, and decided to extend these exclusive rights to DSL (and in some cases to mobile telephone services). And some channels that were initially included in DSL operators' packages were subsequently withdrawn in view of exclusive contracts concluded with the Vivendi group.

63. Consequently, given the extension of exclusive satellite rights to include DSL too, or the introduction of new exclusive distribution rights for DSL, the DSL operators' own packages have remained at entry level only, and for the present exert little or no competitive pressure on Vivendi's pay TV services, which are positioned at the high end of the market (Canal Satellite, TPS, Canal+ Le Bouquet, pay-per-view channels, etc.). This explains why the Vivendi group's services are very much more substantial and richer than those of the DSL operators, despite the fact that the DSL operators have been trying to broaden their offerings.

Importance of the television component in the multiple-play offerings of DSL operators

64. The DSL operators who were questioned in the market survey take the view that the distribution of pay TV is a major factor in the attractiveness of their multiple-play offerings[55]. The television component, they say, is an important motive for subscribing to such services, and its importance has been growing as the content available has grown richer. By way of illustration, one DSL operator states that when it launched its multiple-play service it invested large sums of money in the purchase of advertising drawing attention to the television component. Another DSL operator states that 40% of customers consider the television service offered when choosing their operator. While it may be very difficult to determine the relative importance of the different components in multiple-play offerings, therefore, it is quite clear from the market survey that all three components – telephone, Internet and television – have to be attractive, and that the potential interest of consumers in DSL television offerings is already important.

65. It was for this reason that the commitments given by Vivendi to the French competition authorities in respect of the Canal Satellite/TPS merger provided that Vivendi was to make seven channels produced by its subsidiary Groupe Canal+ available to DSL operators, unbundled and without discrimination. The French authorities concluded in substance that the comparative advantages of the DSL operators were not sufficient to

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55 Answers to questions 24, 25 and 43 of the questionnaire sent to DSL and cable operators on 3 April 2007; answer to question 61 of the questionnaire sent to competitors on 6 February 2007.

offset the negative effects of the merger, both horizontal and vertical, arising especially out of the DSL operators' lack of access to the content that would be distributed on an exclusive basis by the new entity that was to emerge from the transaction.

66. Several of the commitments given by Vivendi to the French competition authorities in connection with the Canal Satellite/TPS merger were aimed precisely at preserving the growing competitive pressure of the DSL operators on the upstream market and on the intermediate and downstream markets[56].

67. Vivendi also undertook not to conclude exclusive contracts for VoD distribution of recent French and US films. It undertook to grant VoD exploitation rights for the French and US films in its library on a non-discriminatory basis. Lastly, it undertook to allow all DSL operators to carry Canal+ packages on a non-discriminatory basis. These commitments, which were entered into for a period of six years, related only to Vivendi and the subsidiaries it controlled directly, thus excluding SFR.

68. Before the transaction notified here, therefore, as a result in particular of the commitments given by Vivendi to the French competition authorities, the DSL operators' proprietary packages (i.e. the channels and television services they distribute themselves) are likely to exert growing competitive pressure on Vivendi's offerings.

69. This analysis is confirmed by internal Canal+ group papers […]*[57].

Conclusion

70. The market survey carried out during the second stage of the proceedings has confirmed two things. First, the DSL segment is the main vector of growth in the market for the distribution of pay TV by operators independent of Vivendi[58] in France[59]. Second, the DSL operators are the main competitors capable of exerting growing competitive pressure in the markets in pay TV in France[60]. But at present, pre-merger, the development of the competitive pressure exerted by the DSL operators is limited, mainly because they do not have sufficient access to television programmes and channels

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56 The growing pressure from the DSL operators was cited by the Vivendi group as a justification for the Canal Satellite/TPS merger. The Vivendi group argued that pressure between platforms was taking the place of the earlier competition within platforms.

57 In the Canal Satellite/TPS decision, the notifying party itself is quoted by the French Minister [translation]: "The acquiring group points to the potential for the growth of ADSL, stating in particular that 'France is today the European country with the greatest measure of penetration of ADSL television … ADSL television, which did not exist even two years ago, should ... continue to grow steadily, thanks to the arrival of new entrants such as Club-Internet, AOL and Télé 2, and the attractiveness of the content'". The Minister concludes: "The potential for growth of ADSL is a technical and economic reality in the market for pay TV. It is not questioned by the High Council for Broadcasting (CSA), by the Competition Council, or by the respondents to the market survey" (p. 84).

58 The other vector of growth of the market is digital terrestrial pay TV, which is so far marketed only by Vivendi.

59 Answers to questions 4 and 5 in the questionnaire sent to DSL and cable operators on 3 April 2007.

60 Answers to question 45 in the questionnaire sent to DSL and cable operators on 3 April 2007; answer to question 47 of the questionnaire sent to competitors on 6 February 2007.

currently held by Vivendi either directly or indirectly via exclusive broadcasting, exploitation or distribution rights.

71. That is the background against which the specific effects of the transaction at issue must be analysed.

B. Horizontal effects

Market shares of the main operators, in number of households connected, December 2006

72. According to the notifying party, the market shares of the players in the French market for pay-TV distribution, measured in number of households connected, were as follows in December 2006[61]:

Operator	Market share
Vivendi group	**[60-70]*%**
Canal Satellite (via satellite, DSL and DTT)	[20-30]*%
TPS (via satellite, DSL and DTT)	[0-10]*%
Canal + and Canal + Le Bouquet (via satellite, DSL, cable, analogue terrestrial and DTT)	[30-40]*%
Télé 2	**[<1]*%**
DSL operators	**[10-20]*%**
including	
France Telecom	**[0-10]*%**
Free	**[0-10]*%**
Neuf Cegetel	**[0-10]*%**
YPSO (cable)	**[10-20]*%**
AB Sat	**[0-10]*%**

Source: notifying party

73. The market survey carried out during the second stage of the proceedings shows that the notifying party substantially underestimates the share of Canal+, and appreciably overestimates the share held by the cable operator. On the basis of the information gathered in the second-stage market survey, the Commission estimates Vivendi's share of the market at between [60-70]*% in number of subscribers. In any event, Vivendi's market share measured in turnover is very much greater than its market share measured in number of subscribers, because of the difference between the selling price of its offerings and those of its competitors.

74. Télé 2 has a very small market share, at less than 0.2%. According to the figures supplied by the notifying party, Télé 2 accounted for only 1.38% of net recruitment over the whole market in 2006.

The competitive position of Télé 2

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61 Observations by SFR on the Commission decision of 19 March 2007.

75. The small size of Télé 2's market share may be due to its relatively late entry into the pay TV market (June 2006), but there is nothing to suggest that Télé 2 plays a special role in the market, or that, without the merger, it might be expected to play such a role in the foreseeable future. Télé 2's current market share is generally representative of the competition it exerts or might come to exert in the market. The second-stage market survey shows that Télé 2 has no specific advantages over other DSL operators, and consequently that in the absence of the present transaction it could not be expected to grow more rapidly than the average for the market[62].

76. Télé 2 has a large subscriber base for fixed-line telephone services. Given the increasing convergence between fixed-line and DSL telephone services, the Commission has considered whether Vivendi would be able to have these subscribers migrate to voice-over-IP services available as part of its multiple-play offerings, and thus ultimately to secure a rapid and large-scale increase in its subscriber base for DSL television. But the market survey shows that Télé 2's fixed-line telephone subscriber base would be difficult to convert into DSL subscribers in large numbers[63]. The migration would be relatively marginal, and the cost would be comparable to that for the recruitment of a new subscriber (unbundling, modem and line hire). Some market players are of the opinion that the operation would amount simply to the acquisition of a list of customers. The absence of a close correlation between fixed-line telephone and DSL is also shown by the relatively slow growth in Télé 2's DSL subscriber base (15% in 2006) as compared with the growth in the French market (34%). Lastly, Télé 2's fixed-line telephone subscriber base has been dropping rapidly over the last 12 months (down almost 25%). The forecasts for the next three years drawn up by Télé 2 and by SFR confirm this trend.

77. Unlike Free, Neuf Cegetel and Orange, the three main DSL operators on the French market, Télé 2 has not got a large DSL subscriber base that would enable to develop a substantial base of subscribers to DSL television quickly and cheaply.

78. In general, according to the information supplied by the parties[64] and confirmed by the market survey[65], Télé 2, which launched its multiple-play offer in June 2006, had about 28 000 subscribers by December 2006, far fewer than Club Internet, which launched its offer in autumn 2006 and according to the notifying party had about 60 000 subscribers, or Alice, which launched its offer in November 2005 and according to the notifying party had about 65 000 subscribers.

79. In conclusion, there is no evidence to show that Télé 2's small share of the downstream market for the distribution of pay TV results in any underestimation of the competitive constraint that Télé 2 exerts or might exert in this market in the foreseeable future.

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62 Answers to questions 18 and 19 of the questionnaire sent to DSL and cable operators on 3 April 2002.

63 Answers to question 50 in the questionnaire sent to competitors on 6 February 2007.

64 Observations by SFR on the Commission decision of 19 March 2007.

65 Answers to question 3 in the questionnaire sent to DSL operators on 12 April 2007; answers to question 57 in the questionnaire sent to competitors on 6 February 2007.

80. But the market survey also shows that if Vivendi were to give Télé 2 privileged access to programme content Télé 2 could strengthen its position on the downstream market for the distribution of pay TV rapidly and substantially[66]. Privileged access to the programme content held by Vivendi would give Télé 2 an appreciable advantage over other DSL operators, in view of the importance of the television component in DSL operators' multiple-play offerings (see section A) and the absence of any technical obstacle to the growth of Télé 2's DSL subscriber base, as a result in particular of the rules on the unbundling of the local loop and Télé 2's right of access to Neuf Cegetel's network. Such an advantage would more than offset Télé 2's disadvantages by comparison with the three main DSL operators in France (Free, Neuf Cegetel and Orange) described in this section. The strengthening of Télé 2's position in the downstream market for the distribution of pay TV in France would have the indirect effect of improving Vivendi's position on the upstream and intermediate markets for the purchase of content and television channels. This danger of an adverse effect on competition resulting from the vertical integration of Vivendi is examined in section C.

C. Vertical effects

81. As well as the horizontal dimension that has been analysed in section B, the notified transaction would have vertical effects resulting from Vivendi's leading position on the upstream and intermediate markets, because it would affect the incentive for the Vivendi group to avoid favouring any particular DSL operator with regard to access to the content it controls (channels and broadcasting rights). Post-merger, Vivendi would on the contrary have an incentive to favour SFR/Télé 2.

Arguments of the notifying party

82. The notifying party takes the view that there is no danger that the acquisition of Télé 2 by SFR might have anticompetitive vertical effects. Vivendi, it says, has no interest in using its "significant" position on the upstream and intermediate markets to favour Télé 2 to the detriment of the DSL operators competing with SFR/Télé 2 on the downstream market for the distribution of pay TV.

83. The arguments put forward by the notifying party relate mainly to the Vivendi group's dependence on the DSL operators, and to the commitments given by Vivendi to the French competition authorities in connection with the Canal Satellite/TPS merger. As regards the links with the DSL operators, the notifying party points out that more than [60-90]*% of net recruitment to Canal Satellite in the period January to October 2006 came from the DSL operators. It concludes that a strategy aimed at ending the marketing of its packages on DSL platforms operated by competitors with SFR/Télé 2 would not be rational from an economic point of view. As regards the commitments given to the French competition authorities, and especially the availability of seven channels produced by Vivendi on an unbundled and non-discriminatory basis, the notifying party considers that as a result of this commitment Télé 2's competitors will have appreciably stronger proprietary television offerings at their disposal, so that Vivendi will not be able

66 See in particular the answers to question 65 in the questionnaire sent to competitors on 6 February 2007 and the answers to questions 5 and 59 of the questionnaire set to DSL and cable operators on 3 April 2007.

significantly to increase the attractiveness of Télé 2's proprietary package as compared with the proprietary packages of the other DSL operators.

The Commission's position

84. Vivendi's incentive to avoid favouring any particular DSL operator in terms of access to content (channels and programmes) will disappear or will be very substantially reduced post-merger. The change will be the direct consequence of the fact that, post-merger, Vivendi, via SFR/Télé 2, will be a DSL operator in direct competition with the other DSL operators in the downstream market for the distribution of pay TV.

85. As regards Vivendi's alleged dependence on the DSL operators, it should be pointed out that the DSL operators, as has already been said, merely carry Vivendi's packages. Given the DSL operators' great growth potential, Vivendi accepted pre-merger that the operators should carry its packages, though it kept the direct relationship with the subscribers for itself, and refused to allow unbundled access to its own channels or those produced by third parties for which it held the exclusive DSL rights. This strategy enabled it to capture a major proportion of the revenue generated by the growth in purchases of television services via DSL, limiting the attractiveness of the proprietary packages of the DSL operators by comparison with its own second-level offerings.

86. As Vivendi was not a DSL operator, it was in its interest to conclude contracts with all of the DSL operators, or most of them at least, for the transmission of its packages, so that the packages would have the greatest possible exposure and would reach all potential subscribers. But Vivendi never allowed the DSL operators, unlike the cable operators, to have unbundled access to the channels it produced and to market them as part of their own proprietary packages.

87. When there was competition between the satellite operators Canal Satellite and TPS, Vivendi extended the exclusive satellite distribution rights it held over channels produced by third parties to include distribution by DSL too. Even after the merger between Canal Satellite and TPS, Vivendi has continued to renew such exclusive rights or to conclude new ones, whether or not the initiative came from the producers of the channels.

88. Whether the channels concerned are Vivendi's own or third–party channels for which it holds exclusive rights, therefore, the conduct described reflects a strategy on Vivendi's part to limit the attractiveness of the DSL operators' television offerings[67] and thus to impede their ability to become credible competitors on the upstream and intermediate markets[68].

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67 In order to permit the DSL operators to become credible competitors able to contest Vivendi's strong position on the market for the distribution of pay TV, the French competition authorities authorised the Canal Satellite/TPS merger subject to conditions, in particular the requirement that Vivendi was to give DSL operators access on an unbundled and non-discriminatory basis to seven channels it produced.

68 The producers of channels and the holders of rights seek above all to sell their rights to the television distributor with the greatest exposure, that is to say the greatest number of subscribers. Inversely, a large television subscriber base helps to pay for the high cost of acquisition.

89. Thus Vivendi’s incentive to treat all the DSL operators relatively equally – in practice by giving them access to its packages but nothing else - was due only to the fact that it did not control any of the operators and had not got the technical resources to transmit its packages over the DSL networks itself.

90. Once Vivendi becomes a fully fledged DSL operator, its incentive to avoid discriminating between DSL operators will disappear. It will have an interest in favouring SFR/Télé 2, in order to capture for itself the biggest share possible in the growth in the DSL segment of the downstream market in the distribution of pay TV.

91. Vivendi’s very substantial position on the upstream and intermediate markets would enable it to boost the proprietary package of SFR/Télé 2 considerably by giving it attractive or differentiated content (channels or broadcasting rights) which is not accessible to other DSL operators or which is available to them only on terms less advantageous than those given to SFR/Télé 2. In so far as the telecommunications component (telephone and Internet) of DSL operators' multiple-play offerings is relatively standard, such a strengthening of the television component in Télé 2’s multiple-play offer would differentiate it strongly, and would make it a great deal more attractive.

92. The Commission has, through the market survey, identified the following discriminatory measures in particular by which Vivendi might favour SFR/Télé 2 over other DSL operators[69]:

- Vivendi could offer preferential technical and price conditions for the packages, mini-packages or channels which belong to Vivendi and which are distributed on a “self-distribution” basis[70]. Access to these middle-range and high-end second-level channels, packages and mini-packages, which had about [400 000]* subscribers at the end of 2006, is a major factor in consumers’ choice of DSL operator, especially as the DSL operators’ proprietary packages have so far been entry-level offerings;

- Vivendi could enrich Télé 2’s proprietary package by giving it exclusive rights to some channels produced by Vivendi itself or produced by third parties but with Vivendi holding the exclusive rights for DSL distribution. At present, where Vivendi holds an exclusive DSL distribution right for a channel produced by a third party, it does not seem that Vivendi is entitled to use the channel outside its existing packages (currently Canal Satellite and TPS), but it may be encouraged to acquire such an entitlement after the transaction, in order to increase the attractiveness of the SFR/Télé 2 offering. Given its buying power it is probable that Vivendi would succeed in acquiring the entitlement;

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69 Answers to questions 64, 65 and 69 of the questionnaire sent to competitors on 6 February 2007 ; answers to question 59 of the questionnaire sent to DSL and cable operators on 3 April 2007.

70 That is to say where the Vivendi group keeps the link with the end-subscriber, as in the case of the provision of the Canal+ channel by DSL, or the Foot+ channel offered via France Telecom (Ligue 1 matches in pay per view).

- Vivendi could make major technological innovations available to Télé 2 exclusively or on preferential terms (an example being the high-definition version of the Vivendi channels);

- Vivendi could conclude clauses giving Télé 2 exclusive rights for video-on-demand transmission of cinema films. At present turnover on the various VoD services existing in France is relatively small, of the order of a few million euros, but market players are expecting a very big increase in turnover on this business in the next few years, especially by reason of its flexibility as compared with linear television offerings[71]. VoD broadcasting rights for films are very rarely bought on an exclusive basis, but given its buying power Vivendi could easily acquire such rights in order to increase the attractiveness of SFR/Télé 2's VoD offering. According to a recent independent report, recent US and French films accounted for almost 40% of programmes downloaded in VoD in France, which was well in front of library films, both US and French, where the figure was about 14%[72].

93. It should be noted that Vivendi would be able to take the discriminatory measures identified above without contravening the commitments it gave to the French competition authorities in connection with the Canal Satellite/TPS merger. As far as access to television channels is concerned, these commitments require Vivendi to treat DSL operators without discrimination only in respect of access to seven channels produced by Vivendi. They do not include any general non-discrimination clause in respect of the other channels produced by Vivendi or for which Vivendi holds the exclusive DSL distribution rights. As for the VoD broadcasting rights, the commitments apply only to Vivendi and its controlled subsidiaries, but not to subsidiaries controlled jointly, such as SFR.

94. Nor would the discriminatory measures listed have the effect of reducing the attractiveness of the high-end packages of Vivendi, Canal Satellite, TPS or Canal+ Le Bouquet, so great is the difference in quality at present between these packages and the proprietary packages of the DSL operators, including Télé 2. Vivendi has a wide margin of manoeuvre here that it can use to boost the first-level television offer of SFR/Télé 2, and thus to differentiate it appreciably from the proprietary offerings of the other DSL operators, without having to make it a close substitute for Vivendi's own packages.

95. By taking these discriminatory measures Vivendi would in no way deprive itself of the growth potential of DSL pay TV distribution, but it would appreciably limit the other DSL operators' capacity to take advantage of the growth in this market segment, by reducing the attractiveness of their offerings by comparison with that of Télé 2. Vivendi would not restrict its revenue from the marketing of its offerings by these operators at second level. Quite the reverse, Vivendi's overall revenue would increase, because it would no longer have to pay for transport and allow a premium for the recruitment of DSL operators for the transport of its packages.

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71 Answers to question 45 in the questionnaire sent to competitors on 6 February 2007.

72 "Pratiques de la VoD en France", study carried out by the Centre National de Cinématographie, December 2006.

96. The anticompetitive effect of the discriminatory measures would be all the greater because there are sizeable barriers to entry to the upstream market (broadcasting rights) and intermediate market (channels).

97. To acquire broadcasting rights for programmes, a buyer must first enter the intermediate market in the production of channels, or at least do so at the same time. There are substantial barriers to entry to this market too (see below). In addition, a buyer wishing to acquire attractive and diversified content needs a sufficient subscriber base in order to recover the considerable sums that have to be invested. Lastly, entry to these upstream markets for the acquisition of programme broadcasting rights is hampered by Vivendi's very strong position in most of them, which derives in particular from its leading position on the downstream market in the distribution of pay TV. Vivendi has a very large number of exclusive agreements with the main providers of rights: it has the first- and second-window pay-TV broadcasting rights for almost all recent US films, under what are known as "output deals"; the first-window pay-TV broadcasting rights for almost 70% of French films produced in 2005; the second-window broadcasting rights for almost 50% of French films produced in 2005; and all the broadcasting rights for the French professional football championship (Ligue 1). Its competitors consequently face a problem of availability of rights, because of the duration of the exclusive rights contracted for and the automatic renewal clauses included.

98. One notable exception is the VoD broadcasting rights for recent films, both US and French. Because of the commitments given by Vivendi to the French competition authorities in connection with the Canal Satellite/TPS transaction, the Vivendi group cannot acquire exclusive VoD rights. But this commitment is subject to review at the end of 18 months, and relates only to subsidiaries controlled exclusively by Vivendi, and consequently does not apply to SFR.

99. There are likewise substantial barriers to entry to the market for the production and marketing of channels. As the French Competition Council pointed out in connection with the Canal Satellite/TPS merger, the main barriers as regards the supply of channels are technical (know-how), economic (scale of overheads and uncertain profitability), and above all temporal (the time needed for a channel to become known and to stabilise its audience). The main demand-side barrier facing a buyer wishing to buy the right to broadcast channels is the very substantial position held by Vivendi, whose purchases account of 70% by value of the market for the production and marketing of channels, and the very large number of exclusive rights that Vivendi holds, for its own channels and those of third parties. Vivendi produces all the premium channels, 75% of the cinema channels, 25% of the sports channels, and 25% of the youth channels, and is the sole distributor of the main channels produced by third parties in every theme area[73].

100. Given the high barriers to entry and expansion that result from the difficulty of access to content (channels and broadcasting rights) controlled by Vivendi, the discriminatory measures described in this section would have an appreciable effect on competition. The measures would directly[74] or indirectly[75] bring about a substantial increase in the

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[73] Email sent by the notifying party to the Commission on 6 March 2007 regarding the exclusive rights held by Vivendi for channels produced by third parties.

[74] Via the increase in the attractiveness of Télé 2's proprietary package.

attractiveness of Télé 2's offerings, and consequently of its subscriber base, while competing DSL operators would have no real access to equivalent content. The position of DSL operators on the downstream market in the distribution of pay TV would be significantly weakened, and this would also weaken their position as potential buyers of rights for the distribution of channels or the broadcast of television programmes. Vivendi's negotiating position on the upstream and intermediate markets would be greatly reinforced by the broadening of its subscriber base, which already consists of over 8.5 million subscribers.

101. In conclusion, the transaction notified might weaken the emerging competitive pressure exerted by DSL operators on the downstream market in the distribution of pay TV, which is already fragile as a result of the very strong position held by Vivendi on all markets for pay TV in France. It is clear from the above that the weakening of potential competition from DSL operators on the downstream market would produce a corresponding reinforcement of the very strong positions held by Vivendi on the upstream and intermediate markets, and vice versa: the strengthening of Vivendi's position on one market has a direct impact on the other sectors of the market for pay TV, because of the high degree of vertical integration of the group.

D. Conclusion on the competition analysis

102. It is therefore apparent that the notified transaction is liable to weaken significantly the actual or potential competitive pressure exercised by DSL operators on all the pay-TV markets in France and thus, in the longer term, to raise the prices and lower the quality of supply. The proposed merger would thus significantly impede effective competition in the common market or in a substantial part of it.

VIII. REMEDIES

A. Procedure

103. In order to address the risks to competition set out above, SFR and Vivendi submitted their first set of commitment proposals during the first stage of the proceedings on 26 February 2007. The market survey conducted amongst third parties[76] prompted the Commission to conclude that this first set of proposals was insufficient to ensure that the risks to competition identified by the Commission would be eliminated.

104. In response to these findings, SFR and Vivendi put forward a set of additional proposals on 14 March 2007. As these proposals were submitted late, a further market survey could not be carried out during the first stage of the investigation. In any case, the commitment proposals were not sufficiently specific or were indeed contradictory. The commitments proposed by the parties during the first stage were not therefore sufficient to remove the serious doubts raised by the notified transaction.

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75 Via the increase in the attractiveness of the second-level offerings available via Télé 2.

76 Questionnaire on the commitments, 27 February 2007.

105. During the second stage of the investigation, the parties submitted commitment proposals on 26 April 2007 which were similar to those submitted at the end of the first stage, and a market survey was carried out on them.

106. An assessment of the 26 April 2007 commitment proposals – together with the information collected from those responding to the market survey[77] – showed that the premise of non-discrimination underpinning these proposals removed the risk to competition involved in the transaction, i.e. that Vivendi might discriminate against DSL operators in favour of SFR/Télé 2 as regards access to pay-TV channels and services. However, the market survey also revealed the need to widen the scope of the commitment proposals submitted on 26 April 2007 and to improve the methods of verifying that they are being implemented and adhered to.

107. Taking into account the objections raised, on 13 June 2007 SFR and Vivendi proposed new commitments to improve on the previous proposals, as regards both their scope and implementation. The full text of these commitments is annexed to this Decision and forms an integral part of it.

[77] Questionnaire on the commitments, 4 May 2007.

B. Assessment of the commitments

108. Essentially, the commitments aim to remedy the significant weakening, as described in part VII, which the transaction would bring about in the actual or potential competitive pressure exercised by DSL operators. The commitments concern access conditions for three types of content which are essential to the make-up of any attractive pay-TV offering: channels (commitments 1 and 2), channel packages and mini-packages (commitment 3) and VoD rights (commitment 4). Access conditions for these three types of content and the provisions regarding implementation and commitment follow-up will be analysed in turn.

109. An assessment should first be made of the scope and the implementation duration of the commitments entered into by SFR and Vivendi.

1) General provisions

110. Firstly, unlike the initial commitment proposals, which concerned only its subsidiary Groupe Canal+, the commitments submitted on 13 June 2007 were extended to the whole of Vivendi Group.

111. However, given the principle of non-discrimination in favour of SFR/Télé 2 which underpins commitments 1 and 3, the activities of the buyer, SFR, and those of Télé 2 should be separated from the other activities of and entities belonging to Vivendi Group. The expression "Vivendi Group" used in the commitments thus means "the company Vivendi and its current and future subsidiaries and sub-subsidiaries, controlled exclusively or jointly, except SFR".

112. Furthermore, in order to ensure that the commitments are effective whatever capital changes may occur within Vivendi Group affecting control over the activities of SFR and/or Télé 2, it is provided that the commitments will be applicable to "any company of Vivendi Group which is a successor to SFR or holder of rights derived from it in xDSL activities". It is also provided that "the commitments shall continue to be applied in the same way to SFR and Télé 2 even if Télé 2 is no longer controlled by SFR but by Vivendi Group".

113. The commitments concern xDSL technology rights. For the purposes of the transaction, the parties have defined this concept as "DSL technology and related future technological developments, such as fibre technology", taking into account current technological developments and in accordance with the observations made by certain third parties during the market survey.

114. One third party questioned in the market survey expressed its fear that, by virtue of the commitments, this Decision could implicitly authorise exclusive distribution rights which might be concluded or claimed by Vivendi as regards fibre technology. In this regard, it must be highlighted that this Decision does not seek to authorise any possible extension of the scope of the exclusive DSL distribution rights enjoyed by Vivendi, now or in the future, on DSL or fibre technology developments. Furthermore, in no way does this Decision authorise, with regard to Articles 81 and 82 of the Treaty, the exclusive DSL distribution rights held by Vivendi, now or in the future, on channels produced by third parties. This Decision aims only to ensure DSL operators have access to Category 1

and 2 channels under market conditions at least as favourable as those provided by Vivendi to SFR/Télé 2, including in the event of these operators developing the technology of their distribution network.

115. Finally, the initial commitment proposals were to involve a period of three years. Given the structure and operation of the markets in question and the very strong positions held by Vivendi across the entire range of pay-TV markets in France as analysed in this Decision, this duration was not sufficient to ensure that the risks to competition raised by the transaction would be completely eliminated. SFR and Vivendi have thus extended the duration of the commitments to five years. This duration seems sufficient given the dynamics of new technology markets. This five-year period has the added advantage of corresponding to the duration of the commitments given to the French competition authorities during the CanalSatellite/TPS merger.

2) Commitments regarding channel access (commitments 1 and 2)

116. The commitments entered into by SFR and Vivendi concern three types of channel, defined for the purposes of this transaction as follows:

- "Category 1" channels are "linear thematic channels, i.e. not including VoD and sVoD services, produced by Vivendi Group";
- "Category 2" channels are "linear thematic channels produced by third parties (including minority shareholders in Canal+ France), for which Vivendi Group holds exclusive xDSL distribution rights";
- "Category 3" channels are "linear thematic channels produced by third parties (including minority shareholders in Canal+ France), for which Vivendi Group does not hold exclusive xDSL distribution rights".

Commitment 1 concerning Category 1 and 2 channels

117. Under commitment 1, "if SFR distributes a Category 1 or 2 channel, Vivendi Group undertakes to offer this channel to all Internet service providers using xDSL technologies on normal market conditions which are not less favourable than those provided to SFR. In order to ensure this commitment is adhered to, Vivendi Group undertakes to keep separate accounts for each channel distributed wholesale in this way".

118. Firstly, any ambiguity should be eliminated from the scope of this commitment as regards Category 2 channels, i.e. linear thematic channels produced by third parties, for which Vivendi Group holds, now or in the future, exclusive xDSL distribution rights. Some producers questioned in the market survey were surprised to see Vivendi commit to unbundled access[78] for DSL operators to channels produced by third parties, inasmuch as, as far as they are concerned, Vivendi does not have such rights over these channels. The parties themselves confirmed that they did not enjoy such rights[79].

78 "Giving unbundled access to channels" means giving access to individual channels, outside of the packages distributed by Vivendi, with a view to including these channels in DSL operators' own television offers.

79 SFR's comments on the Commission decision of 19 March 2007.

119. It should be highlighted that this Decision does not make any statement from the Commission on the nature and scope of the DSL distribution rights held by Vivendi for channels produced by third parties. In particular, this Decision neither identifies nor recognises any right of Vivendi's to give DSL operators unbundled access to channels produced by third parties, for which it holds, now or in the future, exclusive DSL distribution rights. Commitment 1 therefore only applies if Vivendi enjoys, now or in the future, exclusive DSL distribution rights for channels produced by third parties enabling it to give unbundled access to DSL operators. In this case, commitment 1 aims to ensure access conditions at least as favourable to third-party DSL operators as those provided by Vivendi to SFR/Télé 2.

120. It should also be noted that commitment 1 removes or quite considerably reduces the incentives for Vivendi to acquire, post-merger, the right to give unbundled access to channels, for which it enjoys, now or in the future, exclusive DSL distribution rights. If Vivendi were to acquire such a right for certain channels, it would not be able to ensure SFR/Télé 2 benefited exclusively, but would have to offer the same channels to other DSL operators on normal market conditions which were not less favourable that those provided to SFR/Télé 2.

121. In principle, commitment 1 ensures that Vivendi will not offer more favourable conditions to SFR/Télé 2 than to other DSL operators. This commitment to non-discrimination does not mean that Vivendi must grant identical conditions to all DSL operators; such a commitment could distort competition by encouraging operators to align their market conduct and/or by encouraging Vivendi to implement a general price rise for all operators. This commitment only provides that DSL operators may not be granted less favourable conditions that those granted by Vivendi to SFR/Télé 2; this does not eliminate the possibility of differential treatment between DSL operators and preserves competition incentives.

122. While all third parties questioned agreed that a commitment was needed ensuring DSL operators access to Category 1 and 2 channels under conditions more or less equivalent to those granted to SFR/Télé 2 by Vivendi, several of them[80] also indicated that, given Vivendi's vertical integration, there could be fears that Vivendi might award distribution of Category 1 and 2 channels to SFR/Télé 2 against particularly high fees or on the basis of price structures; this would, in effect, bring about *de facto* exclusivity for SFR/Télé 2. In response to these criticisms, and unlike that which had initially been proposed, Vivendi undertakes in commitment 1 to make channels available under "normal market conditions". It should be pointed out that "normal market conditions" should be assessed in the light of overall market practices, taking particular account of relations between third-party producers and distributors, especially DSL operators.

123. Furthermore, commitment 1 is applicable to the whole of Vivendi group and not just to Canal+ Group, as provided for in the initial commitment proposals. This amendment covers channels which are edited by other entities of the Vivendi group and channels for which other entities of the Vivendi group have exclusive DSL rights.

124. Finally, the initial commitment proposals gave Vivendi, via its subsidiary Canal+ Group, the possibility of granting exclusive DSL distribution rights to SFR via an open,

80 See answers to questions 2 to 7 of the questionnaire of 4 May 2007.

transparent and non-discriminatory procedure (e.g. a call for tender), supervised by an authorised representative.

125. This possibility of exclusive rights was harshly criticised by the third parties questioned in the market survey, as there was the risk that it might compromise the scope and effectiveness of the non-discrimination commitment[81]. This risk was inherent in the fact that Vivendi would have been both the organiser of the call for tender as seller of Category 1 channels (which it produces itself) and Category 2 channels (for which it enjoys, now or in the future, exclusive DSL rights), and a potential buyer, via its subsidiary SFR/Télé 2[82]. Apart from the fact that this would have a left Vivendi much room for manoeuvre – as both seller and buyer – to dictate the conditions under which exclusive rights were awarded, monitoring such a commitment would, in practice, have been very difficult, compromising the very effectiveness of the commitment.

126. The commitments submitted on 13 June 2007 no longer allow for Vivendi's granting exclusive DSL distribution rights to SFR/Télé 2 for Category 1 and 2 channels, even by means of a call for tender.

127. It should finally be noted that commitment 1 does not concern the channels referred to in point 21 of the commitments given by Vivendi and Canal+ Group to the French competition authorities in connection with the Canal Satellite/TPS merger[83]. SFR and Vivendi gave a more specific interpretation of this commitment in a letter dated 13 June 2007, confirming that the commitment eliminated any risk of discrimination in favour of SFR/Télé 2 as regards access to these seven channels.

Commitment 2 concerning Category 3 channels

128. Under commitment 2, "SFR undertakes not to acquire or make use of exclusive xDSL distribution rights for Category 3 channels. The following revision clause shall be implemented for this commitment. The parties may ask the Commission to lift this commitment if market practice trends show that one or more ISPs [Internet service providers] have begun acquiring or making use such exclusive rights. Should the Commission refuse this request, fully or in part, the parties may make a further application, if market trends justify it".

129. Category 3 channels are the only channels available to the DSL operators who are independent of Vivendi. The commitment aims to maintain the availability of these channels and is thus a further element allowing competing operators wishing to differentiate themselves from Vivendi's offerings to develop proprietary television offerings.

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81 See answers to questionnaires 5 and 6 of the questionnaire of 4 May 2007.

82 The third parties were concerned that the vertically integrated Vivendi might get around the non-discriminatory nature of the call for tender by overvaluing the price of the channels to ensure SFR/Télé 2 had exclusivity.

83 Commitment 21 concerns the conditions in which Canal+ Group undertakes to give access to seven of its channels to any DSL operator who requests it.

130. The initial commitment proposals bound SFR not to acquire or make use of exclusive DSL distribution rights for these channels in any other way than via an open, transparent and non-discriminatory procedure (e.g. a call for tender), organised by the producers of these channels.

131. The possibility for SFR/Télé 2 to acquire exclusive DSL distribution rights for Category 3 channels in any other way than via an open, transparent and non-discriminatory procedure would have been particularly difficult to monitor, inasmuch as the producers of these channels are third parties in these proceedings. It was therefore not possible, within this Decision, to oblige these third parties to give access to their internal documents in order to ensure that they had indeed granted SFR/Télé 2 exclusive DSL distribution rights by means of an open, transparent and non-discriminatory procedure.

132. Furthermore, it could not be ruled out that, post-merger, SFR/Télé 2 might acquire exclusive distribution rights for these channels on the basis of Vivendi's strong position in the world channel acquisition market, which derives from its strong position in the pay-TV distribution downstream market.

133. The possibility for SFR/Télé 2 to acquire exclusive DSL distribution rights for Category 3 channels via an open, transparent and non-discriminatory procedure was removed in the commitments submitted on 13 June 2007.

134. A revision clause was established whereby SFR/Télé 2 may ask the Commission to lift the commitment preventing it from acquiring exclusive DSL rights for Category 3 channels if market trends showed that other DSL operators were beginning to do so.

135. This clause will therefore enable the Commission to have *ex ante* control over any possible acquisition of exclusive DSL distribution rights for Category 3 channels by SFR/Télé 2 and to ensure that such an acquisition does not in practice deprive other DSL operators of the possibility of developing their own television offers independently of Vivendi.

3) Commitments concerning access to channel packages (commitment 3) and PPV

136. Under commitment 3, "for those platforms on which Vivendi Group distributes thematic channel packages on xDSL (currently CanalSatDSL and TPSL), the digital Canal+ audiovisual service (currently Canal+, Canal+ Cinéma, Canal+ Sport, Canal+ Décalé) or auto-distribution PPV services on xDSL, Vivendi Group undertakes to carry out the distribution in such a way as to ensure that the conditions offered to subscribers of SFR platforms are not more favourable to those offered to subscribers of other xDSL platforms, in terms of commercial conditions (including possible joint offers), package content, broadcast quality (particularly, high-definition) assuming comparable and compatible technical conditions, and technical and security performance. Vivendi Group undertakes to inform the authorised representative, quarterly, of the content of its offers on the various xDSL platforms".

137. The value of this commitment lies in the fact that it concerns access to middle-range and high-end second-level channels, packages and mini-packages (comprising in particular recent films and the most attractive sporting events) which are a major factor in the

consumer's choice of DSL operator, especially as the DSL operators' proprietary packages have so far been entry-level offerings.

138. Vivendi distributes two types of channel packages: Canal+ Le Bouquet (which currently includes four premium channels, dominated by first transmission of sporting events and films) and the Canal Satellite and TPS packages, which, in their various forms, bring together dozens of thematic channels (youth, news, discovery, repeated films, etc.). Canal+ Le Bouquet and the Canal Satellite and TPS packages are currently available to "second-level" subscribers to DSL operators, i.e. via an additional subscription taken out directly with Vivendi (see part VII, section A). Canal+ Le Bouquet and the Canal Satellite and TPS packages are premium pay-TV offers in France, for which there is no immediate alternative on the French market. They are therefore an important addition for subscribers to DSL operators' multiple play offers who wish to have access to a wide-ranging pay-TV offer.

139. The commitments submitted by SFR and Vivendi on 13 June 2007 are an improvement on the initial commitments. Firstly, commitment 3 is applicable to PPV services produced by Vivendi, now or in the future. Extending the scope to PPV services is particularly important, inasmuch as one of the these services (Foot+) distributes sport content which is highly attractive (and therefore important in terms of winning customers) and sets the service apart from the rest. The commitments submitted on 13 June 2007 also exclude the possibility of any discrimination (not just price discrimination) as regards access to packages for subscribers to DSL operators, both individually and globally, including as part of joint sales.

4) Commitments regarding VoD rights (commitment 4)

140. Under commitment 4, "for future, new or renewed contracts, Vivendi Group and SFR undertake not to acquire or make use of motion picture rights on recent American and French films on VoD (or sVod) exclusively on xDSL. A revision clause shall be implemented after a period of twelve (12) months. Three (3) months before the end of the Decision's first year in force, the parties may ask the Commission to lift this commitment if market practice trends show that Vivendi Group and SFR's competitors have begun to acquire or make use of VoD rights exclusively. Should the Commission refuse this request, fully or in part, Vivendi Group and SFR may make a further application, if market trends justify it".

141. As stated above, market players are expecting a very big increase in turnover on this business in the next few years. VoD broadcasting rights for films are very rarely bought on an exclusive basis, but given its buying power Vivendi could easily acquire such rights in order to increase the attractiveness of SFR/Télé 2's VoD offering. It should be borne in mind that recent US and French films accounted for almost 40% of all programmes downloaded in VoD[84].

142. As regards VoD, in their initial commitment proposals Vivendi and SFR undertook not to acquire or make use of motion picture rights on recent American and French films on VoD (or sVod)[85] exclusively on DSL, with a view to giving DSL operators who are competitors of SFR/Télé 2 access to the content which distinguishes the various pay-TV offers. A revision clause has been established in the event that market practice trends show that Vivendi's competitors are acquiring exclusive VoD broadcasting rights.

143. The commitments submitted by SFR and Vivendi on 13 June 2007 clarify the concept of "recent American and French films" with reference to the definitions given in the agreements entered into in France between broadcasters and holders of rights[86]. These definitions define "recent American films" or "recent French films" as "films available for a first usage cycle from the opening of the usage window concerned (VoD, PPV, first or second windows for television broadcasting rights) until such time as they are classified as library films (second usage cycle) under the agreements negotiated between broadcasters and holders of rights."

144. Furthermore, the commitments given by Vivendi to the French competition authorities as part of the CanalSat/TPS merger oblige Vivendi to give non-discriminatory access to the VoD broadcasting rights of French and foreign films from the Studio Canal catalogue (the largest in Europe). SFR and Vivendi gave a more specific interpretation of this commitment in a letter dated 13 June 2007, confirming that the commitment eliminated any risk of discrimination in favour of SFR/Télé 2 as regards access to the StudioCanal catalogue.

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84 "Pratiques de la VoD en France", study carried out by the Centre National de la Cinématographie, December 2006.

85 Subscriber video on demand.

86 The same solution was used in the commitments given by Vivendi to the French competition authorities as part of the CanalSatellite/TPS merger.

5) Provisions relating to the application and monitoring of the commitments

145. The initial commitment proposal provided for an independent authorised representative to ensure that the commitments were being adhered to. The commitments submitted by SFR and Vivendi on 13 June 2007 are a vast improvement as regards monitoring and checking, as they strengthen the role and powers of the authorised representative and set up a fast dispute-resolution procedure (arbitral tribunal). These provisions, which are applicable to all four commitments, therefore ensure better monitoring of the commitments and ultimately make them more effective.

C. Conclusion on remedies

146. In the light of the above, the Commission concludes that the commitments submitted by SFR and Vivendi on 13 June 2007, once implemented, are sufficient to remove the serious doubts as to the effect on competition raised by the notified transaction in France's pay-TV market.

147. Article 10(2) of the Merger Regulation states that "decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned […]*". The second subparagraph of Article 8(2) of the Merger Regulation states that "the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market". In line with the distinction drawn in paragraph 12 of the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98[87], the requirement to carry out each measure giving rise to a structural change in the market is a condition, while the steps required to obtain this result are the obligations imposed on Vivendi and SFR.

148. Consequently, the decision to declare the notified transaction compatible with the common market must be subject to SFR's fully respecting the commitments set out in point 2 of the Annex and to SFR and Vivendi's fully respecting the commitments set out in point 4 of the Annex. Fully adhering to the other commitments set out in the Annex is an obligation imposed on Vivendi and SFR.

IX. CONCLUSION

149. For the reasons set out in this Decision, and provided that SFR and Vivendi fully adhere to the commitments submitted on 13 June 2007, it has been concluded that the proposed transaction will not significantly impair effective competition in the common market or in a substantial part thereof, particularly by creating or reinforcing a dominant position. Provided that the commitments set out in the Annex are fully complied with, the notified merger should be declared compatible with the common market and the functioning of

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[87] OJ C 68, 2.3.2001, p. 3.

the EEA Agreement, in accordance with Articles 2(2), 8(2) and 10(2) of the Merger Regulation and Article 57 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified merger, as amended by the commitments submitted on 13 June 2007 by SFR S.A. and Vivendi Group, whereby SFR S.A. acquires exclusive control of Télé 2 France's fixed telephony and Internet access business is hereby declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

Article 1 is subject to SFR S.A. and Vivendi Group's full compliance with the commitments set out in points 2 and 4 of the Annex.

Article 3

This Decision is issued subject to the obligation that SFR S.A. and Vivendi Group comply fully with the other commitments set out in points 1, 3 and 5 to 46 of the Annex.

Article 4

This Decision is addressed to:

SFR S.A.
1 place Carpeaux
Tour Séquoia
F-92915 Paris la Défense Cedex

Done at Brussels, 18/VII/2007

For the Commission
(signed)
Neelie KROES
(Member of the Commission)

ANNEX I: Commitments – Case COMP/M.4504 – SFR/Télé2 France

The full text in French of the commitments referred to in Articles 2 and 3 may be viewed on the Commission's website at: http://ec.europa.eu/comm/competition/index_en.html.

EUROPEAN COMMISSION

The Hearing Officer

FINAL REPORT OF THE HEARING OFFICER IN CASE COMP/M.4504 – SFR/Télé 2 France

(pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L 162, 19.6.2001, p. 21)

On 28 November 2006 the Commission received notification of a proposed concentration by which SFR S.A. ("SFR"), an undertaking jointly controlled by Vivendi SA ("Vivendi") and Vodafone Group plc ("Vodafone"), would acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, sole control of the Internet access and fixed telephony business of the undertaking Télé 2 France ("Télé 2", a subsidiary of the Télé 2 group) by way of a purchase of shares.

By Commission decision of 11 December 2006, the notification was declared incomplete. On 29 January 2007 SFR provided additional information. By letter dated 5 February 2007, the Commission informed SFR that the notification could be considered to be complete as of that date. In acordance with Article 5(2) of Commission Regulation No 802/2004, notification of the transaction became effective on 29 January 2007.

After a preliminary examination of the notification, the Commission concluded that the transaction as notified fell under the Merger Regulation and expressed serious doubts as to its compatibility with the common market. Consequently, it decided on 19 March 2007 to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

SFR was given access to the key documents in the file, in accordance with the Best Practices rules for merger cases, in the form of non-confidential versions of third parties' replies to the phase-one requests for information; these were provided to SFR on 30 March 2007.

Following an in-depth market investigation, the Commission took the view that the notified transaction could result in a significant weakening of competitive pressure on all the pay-TV markets in France.

In order to address the risks to competition, SFR and Vivendi submitted an initial set of commitment proposals on 26 February 2007. Having been informed that the Commission deemed this first set of proposals insufficient, they submitted further proposals on 14 March and 26 April 2007. In the light of the findings of a market survey carried out by the Commission, they then submitted the final version of the commitments on 13 June 2007.

Provided that SFR and Vivendi fully adhere to the commitments submitted on 13 June 2007, the Commission has concluded that the proposed transaction will not significantly impede effective competition in the common market or in a substantial part thereof, in particular by creating or strengthening a dominant position. Accordingly, no statement of objections was sent to the parties.

No queries or submissions have been made to me by the parties or any third party. The case does not call for any particular comments as regards the right to be heard.

Brussels, 11 July 2007

(signed)

Serge DURANDE

EUROPEAN COMMISSION
Competition DG

Policy and Strategic Support
Antitrust Policy and Scrutiny

OPINION

of the ADVISORY COMMITTEE on CONCENTRATIONS

given at its 152nd meeting on 2 July 2007

concerning a draft decision relating to

Case COMP/M.4504 – SFR/ Télé 2 France

1. The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of the EC Merger Regulation No. 139/04.

2. The Advisory Committee agrees with the Commission that the notified operation has a Community dimension pursuant to Article 1(2) of that Regulation.

3. The Advisory Committee agrees with the Commission that for the purposes of assessing the present operation, the relevant product markets are:

   a) The upstream market for the acquisition of broadcasting rights, and in particular of Video on Demand broadcasting rights for recent films;
   b) The intermediate market for the wholesale distribution of pay television channels; and
   c) The downstream market for the retail distribution of pay television services.

4. The Advisory Committee agrees with the Commission that the geographic market is mainland France.

5. The Advisory Committee agrees with the Commission that the proposed concentration will significantly impede effective competition in the common market or in a substantial part of it in relation to the French market for the retail distribution of pay television services resulting from Vivendi's strong position in the upstream market for the acquisition of broadcasting rights and in the intermediate market for the wholesale distribution of pay television channels, and from the change in its incentives vis à vis DSL operators active in the downstream market for the retail distribution of pay television services.

6. The Advisory Committee agrees with the Commission that the commitments concerning:
   (a) Channel access;
   (b) Access to channel packages and pay per view services; and
   (c) Broadcasting rights for Video on Demand

   are sufficient to remove the significant impediments to effective competition identified in Question 5.

7. The Advisory Committee agrees with the Commission that, subject to full compliance with the commitments offered by the parties, and considered all commitments together, the notified concentration must be declared compatible with the common market and the functioning of the EEA Agreement pursuant to Articles 2(2), 8(2) and 10(2) of the EC Merger Regulation and Article 57 of the EEA Agreement.

BELGIË/BELGIQUE	**BULGARIA**	**ČESKÁ REPUBLIKA**	**DANMARK**	**DEUTSCHLAND**
A. GODFURNON	---	---	---	---
ÉIRE/IRELAND	**EESTI**	**ELLADA**	**ESPAÑA**	**FRANCE**
---	---	---	A. NUCHE BASCÓN	A. DARODES/ O.HERY

ITALIA	**KYPROS/KIBRIS**	**LATVIJA**	**LIETUVA**
G. NIZI	---	---	---

LUXEMBOURG	**MAGYARORSZÁG**	**MALTA**	**NEDERLAND**
---	---		I. NOBEL / A. BUDD

ÖSTERREICH	**POLSKA**	**PORTUGAL**	**ROMÂNIA**	**SLOVENIJA**
H. NEUMANN	---	P. GONCALVES	---	

SLOVENSKO	**SUOMI-FINLAND**	**SVERIGE**	**UNITED KINGDOM**
---	L. PASSI	C. NYROOS	M. TAVANTZIS/ L. PEREIRA