

Unilateral practices

Abuse of a dominant position – Pay-TV: The French Competition Council rejects TPS's complaint against Canal Plus for alleged bundling and predatory practices.

French Competition Council, Decision 05-D-13, 18 March 2005.

On June 5, 1998, TPS filed a complaint with the French Competition Council against rival pay-TV operator Canal Plus. TPS alleged that Canal Plus breached Article L420-2 of the French Commercial Code by resorting to bundling and predatory pricing. Article L420-2 is the equivalent under French competition law of Article 82 of the EC Treaty that prohibits abuse of a dominant position.

In France, the Canal Plus group operates the premium terrestrial wireless channel Canal+ as well as the satellite bouquet CanalSatellite. TPS operates a rival satellite bouquet.

Under TPS's allegations, Canal Plus abused its dominant position on the pay-TV market in France by: (i) offering a single subscription for its Canal+ and CanalSatellite channels; (ii) at a price that was allegedly predatory; and by (iii) offering a series of discounts and promotions designed to drive TPS out of the market. The alleged practices took place for the period from September 1997 to January 1998.

For that period, Canal Plus gave viewers the option to jointly subscribe to Canal + and Canal Satellite for a price inferior than the sum of the two separate subscriptions. A subscription to Canal+ alone cost 175 Francs while a subscription to Canal Satellite alone cost 98 Francs. Under the special offer, consumers could subscribe to both services for 225 Francs. The additional price of subscribing to Canal Satellite therefore amounted to 50 Francs.

The French Competition Council accepted that Canal Plus held a dominant position on the market for pay-TV in France at the time of the alleged practices. The Council found that Canal Plus accounted for approximately 70% of French pay-TV subscribers while the second operator France Telecom only held 8.5% of this market. The Council dismissed Canal Plus's allegations that the relevant market was wider than pay-TV and should also include free-to-air TV. The Council confirmed that complaints should be assessed under the market conditions prevailing at the time of the alleged practices. At that time, the decisional practice of the Council, the French Courts and the EC Commission was to consider pay-TV and free-to-air TV as separate markets. Other services such as pay-TV delivered by cable, satellite or DSL broadband Internet were not available and therefore could not be part of the relevant market assessment.

The French Competition Council then rejected all of TPS's claims regarding Canal Plus's alleged abusive behavior. As regards the joint subscription offer, the Council considered that bundling is not per se illegal for dominant companies and that it was therefore necessary to determine whether Canal Plus's practices had an anticompetitive object or effect.

For the Council, it could not be established that Canal Plus's joint offer had the object of preventing TPS's market entry. The Council noted that Canal Plus had made a similar offer available two years before TPS was launched. Moreover, the Council considered that Canal Plus's joint offer could have generated significant cost savings for Canal Plus in the form of a single invoicing system for both subscriptions and the possibility of delivering both services in one and the same digital set-top box. In these conditions, it was reasonable for Canal Plus to pass on a share of these cost savings to its subscribers in the form of a discount for a combined subscription. Interestingly, the fact that Canal Plus was not in a position to quantify precisely the amount of such cost-savings had little bearing on the Council's findings.

The Council then determined that the joint offer had had limited effect. The Council took into account a number of factual elements such as the short duration of the offer (5 months), the limited marketing

actions developed in support thereof and the uncertainty as to the number of subscribers that had taken advantage of the joint offer. The Council also noted that the joint offer was only an option and that subscribers had the possibility to buy the two services separately. However, the key element in the Council's findings was that TPS had been able to successfully penetrate the market irrespective of Canal Plus's joint offer. The Council noted that the number of TPS's subscribers had tripled during the relevant period, which actually enabled TPS to increase its subscription rate.

As regards the allegations of predatory pricing, the Council reiterated that predatory pricing requires a number of conditions; e.g., a dominant company pricing below relevant costs with the intent and credible prospect of driving a competitor out of the market and the expectation of recouping losses in the longer term through a price increase. On that basis, the Council found that TPS had failed to prove that Canal Plus's practices amounted to predatory pricing. First, TPS had applied an incorrect cost-test by arguing that the additional price for an extra-subscription to Canal Satellite (50 Francs) was insufficient to cover Canal Plus's average variable costs of the joint offer (between 58 and 70 Francs). For the Council, the correct test was whether Canal Plus's average variable costs were covered by the global price of the joint subscription (225 Francs). On that basis, the Council found no indications that Canal Plus had offered the joint subscription below cost. Second, the Council found it very unlikely that Canal Plus's offer would have successfully driven TPS out of the market in view of the short duration of the offer and TPS's financial strength.

Finally, the Council briefly dismissed TPS's allegation that Canal Plus offered a discount and promotion package designed to drive TPS out of the market. The Council found that Canal Plus's discounts were a competitive answer to a series of special offers that TPS launched shortly after its start-up. The Council also noted that each of Canal Plus's discounted offer was isolated and of short duration. On that basis, it was impossible to demonstrate that, when taken together, they amounted to a single operation designed to drive TPS out of the pay-TV market.

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