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)

(notified under document number C(2007) 3443)

(Only the French version is authentic)

(Text with EEA relevance)

(2007/784/EC)

On 18 July 2007 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1], and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html

SUMMARY

(1) On 28 November 2006 the Commission received a notification, pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the Merger Regulation), of a proposed concentration by which SFR S.A. (SFR, 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) SFR is a French company operating in the mobile telephony sector in France. It is controlled by Vivendi and Vodafone.

(3) Vivendi is the parent company of a French 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.

(4) Vodafone is the parent company of a British group which is active as an operator of mobile telephony networks and provider of other telecommunications services in various EU Member States and non-EU countries.

(5) Télé 2 France (Télé 2) is the French subsidiary of the Télé 2 group. It is engaged in the sectors of fixed telephony, Internet access provision, and also pay-TV since DSL [2] television services were launched in June 2006. Télé 2 is also engaged in the mobile telephony sector.

(6) The market survey showed that the transaction as notified is liable to weaken significantly the 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. There are therefore serious concerns that the transaction as notified might significantly impede effective competition in the common market or in a substantial part of it. SFR and Vivendi have, however, proposed appropriate remedies which overcome these concerns.

I. MARKET DEFINITIONS

Introduction

(7) The transaction at hand concerns the pay-TV sector in France. This sector is organised essentially as follows. Upstream are the holders of rights to broadcast programmes (films, series, sports events, etc.). At the intermediate level, channel producers produce their own programmes internally and/or acquire the broadcasting rights for the programmes (films, series, sports events, etc.) that are to constitute the channel content. Downstream, distributors purchase from producers the right to broadcast their channels and offer subscription-based pay-TV channel packages. Pay-TV offerings can be delivered to final consumers by various means, the main ones in France being cable, satellite, DSL and terrestrial (analogue and digital).

[1] OJ L 24, 29.1.2004, p. 1.

[2] 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).

Product markets

'Upstream' markets for the acquisition of broadcasting rights

(8) The main criteria for the breakdown and differentiation of broadcasting rights are:

(i) the nature of the programme: films and recent series; sports events; other broadcasting content (stock and flow programmes);

(ii) the distribution platform: cable, satellite, DSL and terrestrial (analogue and digital); and

(iii) the form of delivery: conventional (linear) TV channels and 'non-linear' TV services (pay per view (PPV) and video on demand (VoD)).

(9) On upstream markets, DSL television operators in France are engaged mainly in the purchase of VoD broadcasting rights. Although it did not produce a VoD service prior to the transaction, Télé 2 was nevertheless a potential entrant to the market for purchase of VoD broadcasting rights. For purposes of the competition assessment of the transaction at hand and on the basis of the findings of the market survey, a separate market must be defined for the acquisition of VoD broadcasting rights to films.

'Intermediate' markets for the distribution of channels

(10) These intermediate markets bring together TV channel producers and distributors of pay-TV services. Commission decisions have consistently drawn a distinction between free channels, which are chiefly financed by advertising revenues (public channels may also be financed by public funds), and pay-TV channels, which are mainly financed by the fees paid by distributors.

(11) The Commission has on several occasions considered a breakdown based on the themes of the channels (in particular premium and sports channels), but has not yet reached a definite decision on this issue. Although it is not necessary to reach a definitive conclusion on this question, the Commission's analysis is that 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.

(12) 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.

The downstream market for retail distribution of pay-TV services

(13) The Commission's consistent practice has been to consider distribution of pay TV and free TV as two separate product markets. Pay TV and free TV service offerings are not very substitutable from the standpoint of demand. The investigation of the case at hand does not challenge this basic distinction.

(14) The market survey carried out in connection with the transaction tends to confirm that it is not necessary to segment the market according to the different means of broadcasting pay TV (cable, satellite, DSL, terrestrial), particularly in view of the growing convergence of different platforms in terms of content. Nor, for the purposes of the case at hand, is it necessary to give an opinion on whether the emerging TV services via mobile telephony platforms form a separate market, since, on the one hand, SFR is a mobile telephony operator prior to the transaction and, on the other, Télé 2's mobile telephony business is not involved in the transaction.

Geographic markets

(15) In line with the position consistently taken in its decisions, the Commission has applied a national dimension to all the markets defined above. 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.

II. COMPETITION ANALYSIS

Operation of the market before the notified transaction

(16) At present, before the transaction, the Vivendi group distributes pay TV in France direct by satellite and by terrestrial transmission. Vivendi's channel packages are also available by DSL. But without the transaction Vivendi has no DSL infrastructure of its own, and to distribute these channels it has to make use of DSL operators' networks. Thus the DSL operators act only as carriers of Vivendi's packages and never as distributors; Vivendi keeps the direct commercial relationship with subscribers to its packages for itself.

(17) 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.

(18) The DSL and digital terrestrial television (DTT) platforms are the most dynamic forms of distribution and the main vectors of growth in the market for pay TV in France, while growth in the numbers of satellite and cable subscribers has been relatively moderate. Given the increase forecast in the number of households with a DSL connection in France in the next few years, the number of subscribers to the DSL operators' multiple-play offerings should in the nature of things continue to grow rapidly.

(19) The dynamism of the DSL operators is due to the comparative advantages they have over other platforms:

— they have the commercial advantages of multiple-play, which are not available to satellite and DTT (high-speed Internet, IP telephone services, television, and gradually also mobile telephone services);

— they also have technical advantages, in that their services are provided by conventional telephone line (copper pair), and they can offer innovative services such as VoD (unlike satellite and DTT, for want of a return path) as well as conventional PPV services.

(20) However, the market survey showed that the DSL operators' own television packages currently exert only weak competitive pressure on the Vivendi group's offerings as a result of their lack of access to attractive television content. This is the direct result of the exclusive 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.

Horizontal effects

(21) On the basis of the information gathered during the second stage of the investigation, 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.

(22) Télé 2 has a very small market share, at less than 1 %. According to the figures supplied by the notifying party, Télé 2 accounted for less than 2 % of net recruitment over the whole market in 2006.

(23) The small size of Télé 2's market share may be due to its relatively late entry into the market in pay TV (June 2006), but there is nothing to suggest that Télé 2 plays a special role in the market, or that it can be expected to play such a role in the foreseeable future. According to the factual evidence provided by the notifying party and the third parties questioned during the course of the market survey, Télé 2's current market share is generally representative of the competition it exerts or might come to exert in the market. The market survey showed 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.

(24) But the market survey also showed that, if Vivendi were to give Télé 2 privileged access to programme content, Télé 2 could strengthen its position in the downstream market for the distribution of pay TV rapidly and substantially.

Vertical effects

(25) The second stage of the investigation — bearing out the serious concerns expressed in the decision to initiate proceedings — clearly confirmed that 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. Once Vivendi becomes a fully fledged DSL operator, its incentive to avoid discriminating between DSL operators will be removed. 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.

(26) Vivendi's very substantial position in the upstream and intermediate markets would enable it to boost the proprietary package of SFR/Télé 2 considerably by giving it attractive and/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 granted to SFR/Télé 2. Insofar 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 offering would differentiate it strongly and would make it a great deal more attractive.

(27) These discriminatory measures would bring about a substantial increase in the 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 broadcasting of television programmes. Vivendi's negotiating position in the upstream and intermediate markets would be greatly reinforced by the broadening of its subscriber base.

Conclusion

(28) In conclusion, the proposed transaction as originally 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 in all markets for pay TV in France. The weakening of potential competition from DSL operators in the downstream market would produce a corresponding reinforcement of the very strong positions held by Vivendi in the upstream and intermediate markets.

III. **REMEDIES**

(29) In order to address the risks to competition set out above, SFR and Vivendi submitted commitments on 13 June 2007. Essentially, the commitments concern access conditions for three types of content: channels (commitments 1 and 2), channel packages and mini-packages (commitment 3) and VoD rights (commitment 4).

(30) The commitments concern three types of channel:

— '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'; and

— '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'.

(31) Under commitment 1, Vivendi undertakes not to offer more favourable conditions to SFR/Télé 2 than to other DSL operators in respect of the channels it produces or the channels for which it holds or would hold exclusive xDSL distribution rights. Under this commitment, Vivendi must offer the channels distributed by SFR/Télé2 to all DSL operators on normal market conditions which are not less favourable than those granted to SFR/Télé 2.

(32) Commitment 1 does not concern the channels referred to in point 21 of the commitments given by Vivendi and Canal+ Group to the French Minister for Economic Affairs as part of the Canal Satellite/TPS merger. 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.

(33) Under commitment 2, SFR/Télé 2 undertakes not to acquire or make use of exclusive DSL distribution rights. The importance of this commitment stems from the fact that Category 3 channels are the only channels available to DSL operators wishing to differentiate themselves from Vivendi's offerings by developing proprietary television offerings independently of Vivendi. SFR/Télé 2 would have been able to acquire exclusive DSL distribution rights for these channels on the basis of Vivendi's strong position in the world channel acquisition market post-merger.

(34) Commitment 2 includes a revision clause enabling the Commission to have *ex ante* control over any possible acquisition of exclusive DSL 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.

(35) Commitment 3 bars Vivendi from granting SFR/Télé 2 subscribers preferential access to the channel packages it distributes, namely: 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 premium pay-TV offerings in France, for which there is no immediate alternative in 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.

(36) Commitment 3 is also applicable to PPV services produced by Vivendi, now or in the future. It therefore applies to, among others, the PPV service Foot+, which distributes sport content that is highly attractive (and therefore important in terms of winning customers) and sets the service apart from the rest.

(37) Under commitment 4, Vivendi and SFR undertake not to acquire exclusive VoD rights to recent American and French films. The aim of this commitment is to enable DSL operators competing with SFR/Télé 2 to acquire VoD rights to such films, inasmuch as they constitute important content which helps to distinguish the various pay-TV offerings. A revision clause has been introduced in case market practice trends show that Vivendi's competitors are acquiring exclusive VoD rights.

(38) Provisions relating to the application and monitoring of the commitments ensure better monitoring of the commitment proposals and ultimately make them more effective. In particular, the commitments set up a fast dispute-resolution procedure (arbitral tribunal).

(39) The duration of the commitments is five years. This appears 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 at the time of the Canal Satellite/TPS merger.

(40) In the light of the above, it can be concluded that the commitments submitted by SFR and Vivendi, once implemented, are sufficient to remove all the competition concerns raised by the notified transaction in France's pay-TV market.

IV. **CONCLUSION**

(41) Provided that SFR and Vivendi fully adhere to their commitments, it can be concluded that the proposed transaction will not significantly impair effective competition in the common market or a in substantial part thereof. Consequently, the notified merger, as amended by the commitments submitted by SFR and Vivendi, is declared compatible with the common market and the functioning of 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.