

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 3 March 1999

relating to a proceeding pursuant to Article 85 of the EC Treaty

(Case No IV/36.237 — TPS)

*(notified under document number C(1999) 387)*

**(Only the French text is authentic)**

(1999/242/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

## I. THE FACTS

## A. Introduction

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 2, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation No 17, on 18 October 1996, by Télévision Française 1, France Télévision Entreprises, France Télécom, Compagnie Luxembourgeoise de Télédiffusion, Métropole Télévision and Lyonnaise des Eaux, concerning the agreements creating the company Télévision par satellite,

Having regard to the summaries of the application and notification published <sup>(2)</sup> pursuant to Article 19(3) of Regulation No 17,

After consulting the Advisory Committee on restrictive practices and dominant positions,

- (1) The parties first contacted the Commission in connection with this operation in the summer of 1996, with a view to notification under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings <sup>(3)</sup>, as last amended by Regulation (EC) No 1310/97 <sup>(4)</sup>. However, having been informed by the Commission that Télévision par satellite (hereinafter referred to as 'TPS') was not a joint venture in the sense of an undertaking under the joint control of its members, on 18 October 1996 they notified the operation to the Commission and requested negative clearance and/or exemption pursuant to Regulation No 17.
- (2) The agreements creating the company were notified to the Commission by the abovementioned parties, namely Télévision Française 1 (hereinafter referred to as 'TF1'), France Télévision Entreprises, France Télécom, Métropole Télévision (hereinafter referred to as 'M6'), Compagnie Luxembourgeoise de Télédiffusion (hereinafter referred to as 'CLT') and Lyonnaise des Eaux, now called Suez Lyonnaise des Eaux. TPS was set up in the form of a

<sup>(1)</sup> OJ L 13, 21.2.1962, p. 204/62

<sup>(2)</sup> OJ C 65, 28.2.1998, p. 5.

<sup>(3)</sup> OJ L 395, 30.12.1989, p. 1; corrected and republished in OJ L 257, 21.9.1990, p. 13.

<sup>(4)</sup> OJ L 180, 9.7.1997, p. 1.

partnership (société en nom collectif) under French law with a view to launching and managing a digital platform for the distribution in France of satellite pay-TV programmes and services. The stated object of the company also permits its activities to be extended to other French-speaking areas in Europe.

- (3) On 13 March 1998 the parties informed the Commission of a change in the shareholder structure that had taken place after notification of the agreements. CLT had withdrawn from TPS and sold its shares to M6 Numérique and Lyonnaise Satellite, which now each hold 25 % of the capital of TPS.

At the time of notification, the ownership structure of TPS was as follows:

— TF1 Développement:	25 %,
— France Télévision Entreprises:	25 %,
— M6 Numérique:	20 %,
— Société pour le Numérique Francophone (CLT):	20 %,
— Lyonnaise Satellite:	10 %.

Following the withdrawal of Société pour le Numérique Francophone, the stakes held in TPS are distributed as follows:

— TF1 Développement:	25 %,
— France Télévision Entreprises:	25 %,
— M6 Numérique:	25 %,
— Lyonnaise Satellite:	25 %.

TF1 Développement is wholly owned by TF1. The capital of France Télévision Entreprises is divided between France Télécom (66 %) and France Télévision (34 %), itself owned in equal proportions by the public television companies France 2 and France 3. M6 Numérique and Lyonnaise Satellite are wholly owned subsidiaries of M6 and Suez Lyonnaise des Eaux respectively.

- (4) On 27 July 1998 the parties also notified the Commission of an amendment which deleted the clause whereby the cable operators holding shares in TPS undertook to coordinate their programmes and services with those supplied by the digital platform. The scope of the non-competition clause was, at the Commission's request, spelt out by two amendments dated 17 September 1998, and a provision on possible exclusive broadcasting of the

'Arte' and 'La Cinquième' channels was deleted by another amendment dated 17 September 1998.

## B. The parties

### 1. TF1

- (5) Télévision Française 1 (TF1) operates the first French television channel broadcast in clear via the terrestrial network. It has a broadcasting licence which was renewed in 1996. TF1 is also distributed by cable in the French-speaking parts of Belgium and in Luxembourg.
- (6) With a holding of 39 %, the Bouygues group, which operates mainly in the construction and property development sectors, has, *de facto*, control of TF1.
- (7) TF1's main activity is the unencrypted broadcasting of general-interest television programmes. TF1 is also active via its subsidiaries in the advertising, production and services sectors, audiovisual and film production, the marketing of audiovisual rights, the broadcasting of two special-interest channels, and the production and distribution of derived products and services.
- (8) In 1996, the Bouygues group generated a worldwide turnover of ECU 11 180,5 million, while that of TF1 was ECU 1 475,8 million.

### 2. France Télévision

- (9) France Télévision is made up of France 2 and France 3, two limited companies wholly owned by the French State which operate the second and third French television channels broadcast by terrestrial transmission. In so doing, they are required to comply with the conditions and public-service obligations laid down by the law defining their activities. France 2 and France 3 programmes are broadcast in clear and are financed by television-licence revenues and advertising.
- (10) France 2 and France 3 broadcast general-interest programmes nationally. France 3 also broadcasts regional and local programmes. Both channels are also distributed by cable in Belgium and Luxembourg.
- (11) In addition to their general-interest broadcasting activities, the two channels are also involved, via various shareholdings and subsidiaries, in the following audiovisual activities: advertising production, audiovisual and film production, marketing of audiovisual rights, broadcasting of special-interest channels (cultural and educational), and the production and distribution of derived products and services.

- (12) In 1996, France 2 generated turnover of ECU 760,3 million, while that of France 3 was ECU 784,7 million.

### 3. France Télécom

- (13) France Télécom is the long-standing telecommunications operator in France. It was partially privatised in 1997, with 25 % of its capital now being held by members of the public, institutional investors and its staff. France Télécom operates voice-telephony (fixed and mobile) services, public networks, terminals (telephones and fax machines, telephone exchanges), cable networks and telematic and multimedia services.
- (14) It owns the 'Viaccess' conditional access technology used by TPS and its rival platform AB-Sat.
- (15) In the cable distribution sector, France Télécom Cable, a subsidiary of France Télécom, operates a network of more than 1,2 million possible connections and has achieved a market penetration<sup>(5)</sup> of 23 %. In terms of the number of subscribers, France Télécom Cable has a market share of around 29,5 %.
- (16) In 1996, the France Télécom group generated a turnover of ECU 23 049,13 million.

### 4. M6

- (17) Métropole Télévision (M6) is a company governed by French law which received a broadcasting licence on 26 February 1987 to operate a national terrestrial channel. Its main shareholders are CLT and Suez Lyonnaise des Eaux. Its licence was renewed in 1996 with effect from 1 March 1997.
- (18) M6 is also active in various branches of the audiovisual industry, including advertising production, cinema and audiovisual production, the marketing of rights to audiovisual programmes and films, the operation of special-interest channels, record, magazine and video production, and teleshopping.
- (19) In 1996, M6 generated a turnover of ECU 315,93 million.

### 5. Suez Lyonnaise des Eaux

- (20) As of October 1997, the capital of Suez Lyonnaise des Eaux was divided between the following shareholders: Electrafina (GBL) (10 %), Crédit Agricole (7,6 %), AXA-UAP (6,2 %), CDC (4,5 %), Saint-

Gobain (4 %), Cogema (3 %) and staff (1,1 %), the rest (63,6 %) being in the hands of the general public.

- (21) Suez Lyonnaise des Eaux is developing its activities in the areas of water distribution, cleansing, energy, public works, infrastructure concessions and financial services. It is also present in the communications sector, principally via M6, of which it holds 34,45 % of the capital, and via its subsidiary Lyonnaise Communications, which operates a cable network in France with more than 1,5 million possible connections and has achieved a market penetration of 18,8 %. In terms of the number of subscribers, Lyonnaise Communications has a share of around 26 % of the French market.
- (22) In 1996, its consolidated *pro forma* turnover was ECU 26 394,52 million (the merger having taken place on 19 June 1997).

## C. The relevant markets

### 1. Product markets

- (23) The notified operation chiefly affects the **pay-TV market**, that being the market on which TPS operates. As producer of some of the special-interest channels it distributes, TPS is also active on the market in the acquisition of broadcasting rights and the distribution and operation of special-interest channels.
- (24) The market in technical services for pay-TV also has to be taken into account since the object of TPS includes the development, marketing, purchase and sale of all conditional access systems and the operation and marketing of subscriber management systems.

#### 1.1. The pay-TV market

- (25) As may be seen from Commission Decision 94/922/EC<sup>(6)</sup>, and also from the Commission Decision of 7 October 1996 (Bertelsmann/CLT)<sup>(7)</sup> and from the Commission Decision 1999/153/EC (Bertelsmann/Kirch/Premiere)<sup>(8)</sup>, pay-TV constitutes a product market that is separate from free-access television, whether the latter is financed wholly or partly by advertising revenues. Whereas in the case of free television there is a trade relationship between the broadcaster and the advertiser, in the case of pay-TV there is a trade relationship between the broadcaster and the viewer as subscriber. The conditions of competition are accordingly different for the two types of television.

<sup>(5)</sup> The ratio of actual subscribers to the number of possible connections.

<sup>(6)</sup> OJ L 364, 31.12.1994, p. 1, at recitals 32 and 33; Case No IV/M.779 — Bertelsmann/CLT of 7 October 1996; Case No IV/M.993 — Bertelsmann/Kirch/Premiere of 27 May 1998.

<sup>(7)</sup> OJ C 364, 4.12.1996, p. 3.

<sup>(8)</sup> OJ L 53, 27.2.1999, p. 1.

Whereas in the case of free TV the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups, with the emphasis on the first transmission of feature films and sports coverage, and the level of subscriptions charged. Other features of pay-TV are the need for viewers to have a decryption module (decoder), the fact that it is marketed through a network of distributors or using a sales team, and the need for a subscriber management system and (in the case of the operator) for conditional access technology.

in September 1998), although the channel can also be received by satellite and cable. As in the case of satellite and cable transmission, terrestrial pay-TV offers programmes mainly based on feature films and sport, is marketed via a distribution network, uses a terminal associated with a decoding system and requires a subscriber management system.

(26) The relevant product market of pay-TV cannot be subdivided into analog and digital pay-TV, as the Commission has already pointed out<sup>(9)</sup>. Digital pay-TV is only a further development of analog pay-TV. Although the two technologies currently coexist on satellite and cable in France, analog pay-TV is to be expected to be completely superseded by digital pay-TV in future. The case of CanalSatellite Analogique is instructive here: some of its subscribers having migrated to digital pay-TV, CanalSatellite decided to withdraw its analog 'bouquet' in October 1998, a little more than two and a half years after launching its digital bouquet. In any event, whether it uses analog or digital technology, pay-TV displays the same features: need for a conditional access system, same method of marketing, subscriber management, choice of programmes<sup>(10)</sup>, etc.

(29) As far as cable is concerned, subscriptions to special-interest channels, whether analog or digital, are, as in the case of satellite transmission, marketed in the form of packages: a basic subscription and a set of options. The cable operators market most of the channels offered by the satellite platforms and offer a mix of the channels broadcast by CanalSatellite, TPS<sup>(11)</sup>, AB-Sat and Canal+, which makes their content similar to what is offered by the satellite operators. It should also be pointed out that the satellite platforms each apply the same pricing policy throughout France and do not charge different rates according to whether or not they are operating in a cabled area.

(27) Pay-TV services can be delivered in France via terrestrial transmission, by satellite or by cable.

(30) The penetration of cable is low in France: market penetration in the pay-TV sector, excluding the 'antenna service', which relays only the general-interest channels that are broadcast unencrypted, is a little more than 22 % (number of actual subscribers/number of possible connections) and the overall level of penetration (number of cable subscribers/number of households with television) around 10 %. Furthermore, in cabled areas, where consumers have a choice between cable and satellite — in urban and suburban areas — satellite television is generally subject to a number of constraints (rules governing apartment buildings, municipal by-laws) relating to the installation of satellite dishes which are favourable to cable. These considerations do not, however, provide sufficient

(28) Traditionally, the pay-TV services of Canal+ have been transmitted via terrestrial transmission. Today, the terrestrial Canal+ service still has by far the largest number of subscribers (around 3,5 million

<sup>(9)</sup> See footnote 8.

<sup>(10)</sup> A comparison of prices charged in 1996 shows that the subscription for Canal+ broadcast via analog terrestrial transmission (FRF 175) was similar to that charged for CanalSatellite Numérique (FRF 98 for the basic subscription plus FRF 55 for the cinema option plus FRF 30 for the music option).

<sup>(11)</sup> However, the NumériCâble network controlled by Canal+ does not carry the TPS cinema channels.

justification for treating cable and satellite as separate markets. The fact that the penetration of satellite in cabled areas is low or very low tends, on the contrary, to prove that, where cable pay-TV exists, it is a substitute for satellite pay-TV, with consumers preferring the convenience of cable connection to the formalities usually involved in the installation of a satellite dish. It can therefore be concluded that the French pay-TV market currently comprises the three methods of transmission: terrestrial, satellite and cable.

- (31) According to data provided by the French Conseil supérieur de l'audiovisuel, the three satellite bouquets (CanalSatellite, TPS and AB-Sat) accounted in June 1998 for 15 % of subscribers in France, while 28 % were served by cable and 57 % by Canal+ broadcast via the terrestrial network.

#### 1.2. *The market in technical services for pay-TV*

- (32) The operation of pay-TV requires a special technical infrastructure for encrypting broadcasts and enabling authorised viewers to decode them. To that end, a terminal has to be installed in each subscriber's home. In the case of digital pay-TV, the terminal usually combines functions for demodulating the satellite or cable signal, decompressing the digital signal, demultiplexing the different channels, unscrambling the encrypted signal and managing conditional access, together with a bank card interface.

- (33) The pay-TV operator must have a conditional access system allowing the transmission of encrypted data containing information on programmes subscribed to and on the subscribers entitled to receive those programmes, together with the television signals themselves. The system usually also comprises a smart card which is issued to the subscriber and is able to decipher the

authorisation data and transfer them to the terminal.

#### 1.3. *The market in the acquisition of broadcasting rights, in particular for films and sporting events*

- (34) It is universally acknowledged that films and sporting events are the two most popular pay-TV products. It is necessary to have the corresponding rights in order to put together programmes that are sufficiently attractive to persuade potential subscribers to pay for receiving television services. Films and sport are therefore pay-TV's loss leaders. There is no need for the purposes of this case to determine whether separate markets exist for film broadcasting rights and rights to broadcast sporting events.

- (35) As far as films are concerned, the rights acquired fall into the following categories: unencrypted TV broadcasting, pay-TV, pay-per-view, near video-on-demand and video-on-demand<sup>(12)</sup>. In accordance with the sequence of film distribution in France, rights to unencrypted terrestrial transmission may be exploited at the earliest 36 months after a film's release for cinema showing, while pay-TV rights are accessible after 12 months, with shorter periods applying to co-productions. Pay-TV rights for satellite or cable transmission can be divided into 'first-window' and 'second-window' rights. This trend was launched by the major Hollywood studios but has not yet taken root among French producers/distributors. It should also be noted that no distinction is made according to whether the rights are to be exploited through analog or digital transmission.

- (36) Rights to sporting events are also broken down into rights for broadcasting in clear, pay-TV and pay-per-view.

#### 1.4. *The market in the distribution and operation of special-interest channels*

- (37) Special-interest channels are essential for putting together pay-TV services. Although certain French or foreign general-interest channels are also distributed by cable or satellite, the fact remains that they do not constitute a category of programmes that are specific to pay-TV.

<sup>(12)</sup> Pay-TV refers to the encrypted transmission, by whatever means, of television programmes or channels which can be accessed on payment of a subscription.

Pay-per-view offers access to individual encrypted programmes, for which a charge is made per viewing, at a time scheduled by the operator. Near video-on-demand is a pay-per-view service accessible on several channels (multiplex); video-on-demand offers the consumer access to a programme, for which a charge is made per viewing, at a time chosen by the consumer.

(38) This market is enjoying rapid growth owing to the introduction of digital technology which, thanks to compression, enables a much higher number of channels and services to be distributed than analog technology.

(39) Initially limited to a few channels produced for cable in France, this market now comprises more than 140 French, European and non-European special-interest channels transmitted by satellite and cable.

## 2. Relevant geographic markets

(40) TPS currently markets its services only in France but may in future extend its coverage to other French-speaking countries in Europe, as provided for in the notified agreements. However, it is not necessary for the purposes of this case to determine whether the geographic market should be defined as the French market or the French-speaking European market.

(41) The same applies to the market in technical services for pay-TV, which the Commission has already recognised in Decision 94/922/EC and in its decision regarding Bertelsmann/Kirch/Premiere<sup>(13)</sup> as being closely linked to the supply of pay-TV programmes.

(42) As far as the market in the distribution of special-interest channels is concerned, although foreign channels are distributed in France, the fact remains that their inclusion in the satellite bouquets and in the range of programmes distributed via cable is negotiated and organised at most at national level.

(43) As regards the geographic market for the acquisition of broadcasting rights, although rights can be sourced from anywhere in the world and some operators acquire rights for more than one territory at a time, it has to be borne in mind that broadcasting rights are still acquired mainly on a national basis or, at the most, by language area<sup>(14)</sup>. Thus, in Commission Decision 89/536/EEC the Commission noted that film broadcasting rights are usually granted for a given language version and broadcasting area. It is not necessary for the purposes of this case to determine whether the market for the acquisition of broadcasting rights should be defined as the French market or the French-speaking European market.

## 3. Structure of the markets

### 3.1. The pay-TV market

(44) The longest-established competitor on the French pay-TV market is Canal+. Launched in 1984, this pay-TV service is accessible chiefly via analog terrestrial transmission, but is also offered in a digital multiplexed version (Canal+ bleu, jaune and vert) broadcast by satellite and is transmitted in both analog and digital form on cable. Canal+ currently has a total of 4,3 million subscribers. Its programming, as a premium channel, focuses on exclusive first transmissions of feature films and top-quality sporting events. Canal+ enjoys a strong brand image in France and possesses highly developed know-how in the management of pay-TV services thanks to its long experience in the field.

(45) The Canal+ group is also active in cable distribution since it controls the NumériCâble cable network, which has a share of around 21 % of the cable market in France.

(46) In 1992 CanalSatellite, a 70 % controlled company by Canal+, launched a bouquet of analog pay-TV channels broadcast by satellite. A CanalSatellite Numérique service was launched in 1996. By the end of 1997, CanalSatellite Analogique still had around 100 000 subscribers whereas CanalSatellite Numérique had already recruited 650 000. CanalSatellite Analogique decided to cease operations in October 1998. CanalSatellite Numérique had 900 000 subscribers by the end of June 1998 and expected to reach the figure of one million subscribers in the autumn of the same year.

(47) In terms of numbers of subscribers, the Canal+ group, including the premium channel Canal+, CanalSatellite and the NumériCâble network, accounted for approximately 70 % of the French pay-TV market by 30 June 1998.

(48) The Canal+ group is also active on several pay-TV markets outside France: Spain, Italy, the Nordic countries, French-speaking Belgium, Flanders, the Netherlands, Poland and Africa. The group has launched or is preparing to launch digital platforms alongside the premium channels in most of these countries. The group had a total of 10,3 million subscribers in Europe by 30 June 1998<sup>(15)</sup>.

<sup>(13)</sup> See footnotes 6 and 8.

<sup>(14)</sup> OJ L 284, 3.10.1989, p. 36.

<sup>(15)</sup> Satellifax, 24 July 1998.

(49) In April 1996, the AB group, whose main activity is programme production and the distribution of television rights, launched another bouquet on the French market composed of some 20 satellite pay-TV channels produced by the group. As at 30 June 1998, this bouquet had 100 000 subscribers. In March 1997 AB-Sat concluded a Simulcrypt agreement with CanalSatellite enabling subscribers to the two bouquets to receive both operators' programmes on a single digital terminal and with a single card. AB-Sat and CanalSatellite have also signed an agreement whereby some of AB-Sat's channels, and in particular the sports channel, are transmitted by CanalSatellite. An agreement was also concluded in July 1998 with TPS for the distribution of one of AB-Sat's channels as part of TPS's basic bouquet and five more as an option.

(50) TPS, for its part, had 457 000 subscribers by 31 July 1998 and estimated that it would have 600 000 by the end of the year.

(51) On the pay-TV market, the largest cable operators, taking part in the 'Plan-Câble' launched by the French Government in 1982, are France Télécom, Lyonnaise Câble, both of which have stakes in TPS, and NumériCâble, which is controlled by Canal+. As at 31 January 1998, France Télécom had 442 000 subscribers (6,22 % of the pay-TV market), Lyonnaise Communications had 439 212 subscribers (6,18 % of that market) and NumériCâble 357 210 (5,1 %) <sup>(16)</sup>. Those three operators together hold around 80 % of the cable market. The remaining 20 % is shared between a number of smaller cable operators.

### 3.2. *The market in technical services for pay-TV*

(52) The notified agreements allow TPS to develop and market conditional access systems and subscriber management systems. However, for its operations TPS has for the time being opted for the Viaccess conditional access system, in respect of which it

has a licensing agreement with France Télécom, and it looks after its own subscriber management.

(53) France Télécom, as the designer and owner of the Viaccess conditional access system (a digital version of the Eurocrypt system), is active on this market, where it competes with the Canal+ group, which owns the Mediaguard conditional access system and has developed the Mediasat digital terminal.

(54) The Viaccess system is also used by AB-Sat, which has concluded a licensing agreement with France Télécom, and by the cable operator Lyonnaise Communications.

### 3.3. *The market in the acquisition of broadcasting rights, in particular for films and sporting events*

(55) The TPS Agreement provides for the creation of movie channels, a pay-per-view service and companies to produce them <sup>(17)</sup>. Three movie channels and a children's channel, which broadcasts almost exclusively cartoon films, are currently produced by TPS Cinéma, a wholly owned subsidiary of TPS. Pay-per-view services (films and sporting events) are produced by the company Multivision, which is 78 % controlled by TPS, alongside France Télécom and Suez Lyonnaise des Eaux.

(56) Via its two subsidiaries which produce channels and services, TPS is therefore active on the market in the acquisition of television rights, particularly for films and sporting events.

(57) As far as film rights are concerned, TPS has signed agreements with five large American studios for the acquisition of pay-TV and pay-per-view rights; however, in three of these cases the rights acquired are for 'second window' pay-TV (after broadcasting on Canal+). TPS also has pay-per-view rights to the Roland-Garros tennis tournament, to the European Champions League football matches and to some of the Coupe de France football championship matches.

<sup>(16)</sup> Avica publication, January 1998. These figures include only subscribers who have an individual contract with the cable operator and exclude subscribers to the 'antenna service'. The latter relays the channels broadcast in clear and does not constitute a pay-TV service proper since there is no direct relationship between the subscriber and the cable operator (the price of the service is billed along with the building maintenance charges).

<sup>(17)</sup> Traditionally, a company producing special-interest channels acquires broadcasting rights, devises programmes and manages and markets the channels it produces.



(58) Its main competitors in this field, and in particular in the purchase of film rights, are Canal+ and the special-interest channels in which Canal+ has a stake, notably via the Multithématiques company. The Canal+ group enjoys a particularly strong position on this market. As a premium channel that has built its reputation chiefly on first transmissions of quality feature films, Canal+ has signed contracts with five of the seven major Hollywood studios and with Polygram in order to obtain exclusive rights over the first transmission of their films on pay-TV. Canal+ is said to hold rights equivalent to around 87 % of Hollywood's output, expressed in terms of box-office receipts<sup>(18)</sup>. It should also be mentioned that the price paid by Canal+, on the basis of its 4,3 million subscribers, constitutes the floor price in negotiations between distributors and purchasers of pay-TV rights.

(59) The Canal+ group also owns the UGC DA/Canal+ DA film catalogue, which comprises some 4 800 films as well as fiction films, cartoon films and documentaries.

(60) As far as rights to sporting events are concerned, the Canal+ group has exclusive encrypted transmission and pay-per-view rights to the French football championship and to football championships in certain other European countries. It also has exclusive encrypted transmission and pay-per-view rights to Formula 1 racing. The exclusive rights to other sporting events held by Canal+ are sometimes limited (rights shared with unencrypted channels).

(61) Although the AB group operates mainly in the programme production and rights distribution sector and owns a catalogue comprising more than 30 000 hours of programmes<sup>(19)</sup>, AB-Sat also uses the broadcasting rights acquisition market in order to purchase rights to fiction films and sporting events.

(62) The general-interest channels are also active in this market, both for the purposes of acquiring rights to sporting events for their broadcasts in clear and with a view to acquiring rights to existing films or to new films, in particular through co-production in the case of French cinema films. The general-interest channels are above all very active in

commissioning audiovisual works (TV series, television films, cartoon films and TV programmes)<sup>(20)</sup>.

(63) Of a total of 163 new French films produced in 1997, 73 were co-produced by the general-interest channels; Canal+ purchased in advance the pay-TV rights to 134 of those films<sup>(21)</sup> and TPS the rights to four<sup>(22)</sup>.

(64) As producers of special-interest channels, the members of TPS are also present on this market.

### 3.4. *The market in the distribution and operation of special-interest channels*

(65) The market in the distribution and operation of special-interest channels is enjoying extremely rapid growth, particularly with the appearance of digital platforms.

(66) Stakes in the long-standing channels, referred to as the 'cable channels', were held by the leading pay-TV operators: Canal+ and the three largest cable operators, namely Lyonnaise des Eaux, now Suez Lyonnaise des Eaux, Générale des Eaux and, to a lesser extent, France Télécom. Most of the unencrypted TV operators also had stakes in special-interest channels, although their holdings were more modest.

(67) Since the emergence of satellite platforms, the companies involved in pay-TV all have holdings in special-interest channels operating on the market.

(68) The stakes held in special-interest channels are fairly evenly distributed among the main players on this market. Canal+ is a major player, however, since it has holdings in the longest-standing channels which have achieved the best penetration of the cable market and have the largest number of subscribers<sup>(23)</sup>.

<sup>(18)</sup> Opinion 98-A-14 delivered on 31 August 1998 by the Conseil de la concurrence concerning the takeover of Havas by Compagnie Générale des Eaux — *Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes* of 7 October 1998.

<sup>(19)</sup> AB group presentation, September 1997.

<sup>(20)</sup> French legislation requires the general-interest channels to invest 15 % of their turnover in commissioning audiovisual works filmed in French and to devote 3 % of their turnover to developing the production of French-speaking and European cinema films.

<sup>(21)</sup> Canal+ is under the obligation to invest 9 % of its turnover in the acquisition of cinema films made in French.

<sup>(22)</sup> CNC Info No 268, April 1998.

<sup>(23)</sup> Report by the Conseil supérieur de l'audiovisuel entitled 'La télévision à péage par satellite', August 1997.



- (69) Certain foreign companies are also active on this market: American channels such as CNN, ABC and NBC and recently Arabic-speaking channels distributed via TPS and certain cable networks. The Hollywood studios (Disney, Fox, Paramount, Universal) are also suppliers of special-interest channels, the distribution of which is usually negotiated and sometimes imposed as part of a package with film rights.

#### **D. The operation: the notified agreements**

- (70) Four agreements have been notified. The basic principles governing the operation of TPS are set out in the Agreement of 11 and 18 April 1996, subsequently expressed in more concrete and structured terms in the Associates' Pact, signed on 19 June 1996, and in the TPS and TPS Gestion ('TPSG') Articles of Association of the same date.
- (71) These agreements and the contractual clauses referred to below are valid for 10 years.

#### **1. Administration of TPS**

- (72) TPS's management is entrusted to a second company, TPSG, which has exactly the same shareholder structure as TPS.
- (73) TPSG is governed by a board of directors with 12 members, three of whom are appointed by TF1, three by France Télévision Entreprises and six by M6 Numérique and Lyonnaise Satellite. The board of directors has to give its prior approval to any decision concerning changes in the activities of TPS and TPSG, substantial modifications to TPS's development plan and operating forecast, the adoption of annual operating and investment budgets, the general policy on the composition of the digital services offered, pricing policy, etc. The board of directors decides by simple majority on any matters relating to TPS's commercial policy, and the chairman does not have a casting vote.
- (74) It has to be concluded from these provisions that the shareholders in TPS do not exercise joint control over the company's commercial policy.
- (75) In the event of sale of shares in TPS or in TPSG, a pre-emption procedure is set in motion in order to give preferential treatment to the initial partners.

#### **2. Aims of the TPS agreements**

- (76) Under the notified agreements, TPS's object is to devise, develop and distribute a range of programmes and services aimed at French-speaking television viewers in Europe, for which they are required to pay. This service is to be broadcast in digital mode by satellite and to be received directly by satellite dishes and cable networks. The company's object covers all operations which might be linked to this activity, including:
- the purchase, sale, marketing, advertising and broadcasting of television programmes and services;
  - the purchase, hiring and supply of technical services necessary for routing and access to the digital service,
  - the development, marketing, purchase and sale of all conditional access systems, and the operation and marketing of subscriber management systems,
  - the negotiation of agreements concerning the production, co-production and creation of television programmes and services intended for TPS.

#### **3. Contractual clauses**

- 3.1. *Non-competition clause (amendments to Article 11 of the Agreement of 11 and 18 April 1996 and Article 5.3 of the Associates' Pact of 19 June 1996: 'Exclusivity')*
- (77) Except for ongoing cases as at the date of conclusion of the agreements, and except for the sale of new programmes and services that are not under contract to TPS, the parties undertake not to become in any way involved, even indirectly, and for as long as they remain TPS shareholders, in companies engaged in or whose object is the distribution and marketing of a range of television programmes and services for payment which are broadcast in digital mode by satellite to French-speaking homes in Europe.
- 3.2. *Clause concerning TPS's programmes and services (Article 6 of the Agreement of 11 and 18 April 1996: 'Digital programmes and services')*
- (78) 3.2.1. In order to supply TPS with the programmes it requires, the parties have agreed to give TPS first refusal in respect of the programmes

or services which they themselves operate or over which they have effective control within the producing company, and in respect of the programmes and services which they produce. TPS is also entitled to final refusal or acceptance on the best terms proposed by competitors with regard to any programmes or services which its shareholders offer to third parties. If it accepts them, whether on exclusive terms or not, TPS will apply financial and contractual terms which are at least equivalent to those which the programmes and services could receive elsewhere.

(79) As regards the acquisition of these channels and services, TPS will freely decide, on the basis of its own assessment, whether or not to agree to integrate them into its digital bouquet, either exclusively or non-exclusively; however, the parties underline their objective of having programmes and services in TPS's digital bouquet on an exclusive basis.

(80) Since the general-interest channels are dealt with separately and in detail below, these provisions concern only the special-interest channels and television services controlled by the members of TPS.

(81) 3.2.2. A provision relating specifically to the general-interest channels (TF1, France 2, France 3 and M6) lays down that those channels are to be exclusively transmitted by TPS, which will meet the technical costs of transporting and broadcasting the programmes but will not pay any remuneration for them. The possibility of entrusting exclusive transmission of the Arte and La Cinquieme channels to TPS was also originally provided for in the agreements, but the relevant clauses have been deleted by the parties.

(82) If, as a result of an external legislative or regulatory constraint, one of the general-interest channels were no longer exclusively transmitted by TPS, that channel would have to bear the satellite and transport costs.

### 3.3. *Clause concerning cable (Article 5 of the Agreement of 11 and 18 April 1996: 'Coordination with the cable service')*

(83) The clause whereby the cable operators who hold shares in TPS undertook to give priority to including the programmes and services supplied by TPS on their networks, in particular its pay-per-view services, and to consult with each other on

coordinating these programmes and services with those already on cable, has been deleted by the parties at the Commission's request. An amendment to the Agreement of 11 and 18 April 1996 was notified to the Commission on 27 July 1998.

### ***E. Observations by third parties***

(84) A number of interested third parties have submitted observations in response to the notice published pursuant to Article 19(3) of Regulation No 17. Most comments relate to the clause concerning cable: these stressed that its application would weaken the independent channels. Given the small size of the cable sector in France and the position of the two cable operators who are shareholders in TPS and together hold 56 % of the cable market, restricting the access of independent channels to their network would seriously threaten their viability.

(85) As is indicated above, the parties to the TPS agreements have deleted the clause concerning cable: on 27 July 1998 they notified the Commission of an amendment deleting the clause with effect from 2 April 1998.

(86) Certain third parties have also commented on the preferential right which the shareholders have granted to TPS in respect of the programmes and services they operate. Since the term 'programmes' can be interpreted extensively, the clause in question would have the practical effect of granting TPS a preferential right not only in respect of the national channels (which are the subject of a specific provision) and the special-interest channels and interactive services produced and operated by the parties, but also in respect of all the broadcasting rights held by the TPS shareholders. The preferential right over broadcasting rights would have a clear crowding-out effect on producers of special-interest channels who are not linked to TPS.

(87) The Commission considers that the clause in question should be construed strictly and should be applied solely to the channels and television services produced and operated by TPS's shareholders. The broadcasting rights held by the members of TPS are therefore not covered by any preferential right granted to TPS. This interpretation has been confirmed by the parties to the agreements by letter of 9 October 1998.

- (88) As to the provision concerning exclusive transmission of the general-interest channels by TPS, interested third parties have stressed that the presence of those channels in the bouquet offered to subscribers confers a substantial competitive advantage. According to a survey carried out in January 1998 by Audicabsat-Médiamétrie, the general-interest channels traditionally attract by far the largest audience shares in France, namely 90 % of viewers, all methods of transmission combined, and 75,1 % of cable viewers. Moreover, the often poor reception of the terrestrial channels in a large number of homes (estimated by some sources at over 8 million) makes the possibility of receiving them in digital mode particularly attractive to the public. In areas where reception of terrestrial broadcasts is poor, there was therefore said to be a serious risk that competition might be eliminated in favour of TPS.
- (89) Lastly, some third parties have put forward the view that the composition of the TPS pool could give rise to competition problems. It should be pointed out in this connection that the project was only able to go ahead thanks to the presence of all the shareholders in TPS, who brought not only the financial capacity necessary for the investments needed to launch TPS and for covering the resulting losses, but also a great deal of experience and know-how essential for gaining a satisfactory market share.
- (90) The Commission has examined these observations, which confirmed comments it had previously received. The concerns voiced had already been discussed with the parties and had been taken into account by the Commission in its assessment of the notified agreements. Therefore, with the exception of the clause concerning cable, which has been deleted by the parties, the observations received have not prompted the Commission to make any substantial change to its position on the notified agreements as announced in the abovementioned notice and presented below.
- (91) Through the TPS agreements, the parties have set up a company that is not under the joint control of its shareholders. An agreement to set up a company does not, however, in itself constitute a restriction of competition within the meaning of Article 85(1).
- (92) Having received comments from third parties voicing concern at the risks of collusive behaviour between the members of TPS, and particularly the broadcasters with shares in it, the Commission nevertheless examined the impact of the creation of TPS on the relevant product markets, and concluded that there was no risk of coordination between the parties to the TPS agreements.
- (93) On the pay-TV market, the broadcasters who are members of TPS are not present outside TPS. They operate mainly on the unencrypted television market, where they have continued to compete fiercely since the creation of TPS. Neither are the two cable operators who are parties to the TPS agreements to be regarded as genuine competitors on the pay-TV market since they operate in different geographic areas, and the overlap between cable and satellite pay-TV is very small in France.
- (94) On the market in technical services for pay-TV, France Télécom is not for the time being in competition with any of the other TPS shareholders.
- (95) On the market in the acquisition of broadcasting rights, in particular for films and sporting events, where the unencrypted broadcasters with shares in TPS are extremely active in purchasing unencrypted broadcasting rights there is little risk of coordination as long as TV broadcasting in clear continues to account for the bulk of their activities and the resulting competition between them is maintained<sup>(24)</sup>. The members of TPS also acquire pay-TV rights as producers of special-interest channels. However, none of them produce or directly control movie channels; as far as sports channels are concerned, only TF1 holds shares in the Euro-sport channel, alongside Canal+.

## II. LEGAL ASSESSMENT

### A. Application of Article 85(1) to the creation of TPS

- (91) Through the TPS agreements, the parties have set up a company that is not under the joint control of

<sup>(24)</sup> Third parties voiced their concern to the Commission at the possibility of collusion between the broadcasters with shares in TPS as regards the acquisition of broadcasting rights, quoting the example of TCM. The company TCM was set up by some of the broadcasters with shares in TPS (TF1, M6 and CLT, which subsequently withdrew) when an overall agreement was concluded with Paramount. That agreement, which was vitally important to the creation of movie channels and therefore to the launch of TPS, provided for the purchase not only of pay-TV and pay-per-view rights, but also of unencrypted broadcasting rights, which were acquired by TCM with funds provided by its shareholders. The Commission sent the parties to the agreement setting up TCM, which was the subject of a separate investigation, a comfort letter stating that the agreement did not restrict competition provided that TCM's activities were confined to the conclusion of agreements essential to the operation of TPS; it took that view particularly because the parties undertook to place all the unencrypted broadcasting rights on the market and to resell them at market prices and without discrimination.

(96) On the market in the distribution of special-interest channels, there is, admittedly, some competition between TPS shareholders and TPS itself in so far as they all have stakes of varying sizes in special-interest channels. As far as satellite transmission is concerned, however, the risk that they might coordinate their behaviour is now ruled out by the clause granting TPS a priority right to its shareholders' special-interest channels. As regards the distribution of special-interest channels via cable, coordination between TPS shareholders, particularly on price, is hardly conceivable given the differences between the commercial value of the different channels: some channels are much longer established and more popular and consequently have a higher commercial value than more recently created and less well known channels. Price differentials range on average between FRF 6 and FRF 2 per month and per subscriber depending on the channel concerned, with subscriptions to movie channels costing up to FRF 20.

**B. Application of Article 85(1) to the contractual clauses**

(97) The following clauses are examined below:

- (1) non-competition clause (Article 11 of the Agreement of 11 and 18 April 1996 and Article 5.3 of the Associates' Pact, as amended by the codicils dated 17 September 1998);
- (2) clause granting TPS first refusal over programmes and services produced and distributed by its shareholders (Article 6 of the Agreement of 11 and 18 April 1996);
- (3) clause in Article 6 of the Agreement of 11 and 18 April 1996 concerning the exclusive transmission of the general-interest channels in TPS's bouquet.

1. The non-competition clause, the scope of which was spelt out by the two amendments dated 17 September 1998, may be regarded as a restriction ancillary to the creation of TPS for the period deemed necessary to start up the company.

(98) TPS was chosen by its shareholders as the vehicle for penetrating the French pay-TV market. When TPS was launched, major doubts were raised as to its chances of success. The heavy investments required, the difficulty of establishing itself on a market dominated by an experienced operator

possessing a strong subscriber base, the difficulties of gaining access to quality programmes, and major uncertainty surrounding consumer response to the provision of a wider range of pay-TV services made TPS a high-risk venture. Under these circumstances, it is logical for the parties to concentrate all their efforts on the project during the launch phase in order to enable this new operator to emerge on the pay-TV market.

(99) The non-competition clause can therefore be regarded as ancillary to the creation of TPS during the platform's crucial launch phase and can therefore be deemed pro-competitive in that it contributes to the creation of a new entrant on the French pay-TV market during that period. On the basis of the data supplied by TPS on the amount of the investments necessary for launching the platform, forecasts regarding accumulated losses, the time and the number of subscribers needed to reach break-even point and the rate of cancellation of subscriptions, and the company's performance over the first 18 months, the length of the launch phase can be estimated at three years. Consequently, the clause does not fall within the scope of Article 85(1) during the first three years of its application.

2. The clause concerning programmes and services (Article 6 of the Agreement) requires the parties to give TPS first refusal in respect of all the special-interest channels and television services they operate or over which they have effective control within the producing company. They also undertake to give TPS final refusal or acceptance on the best market conditions in respect of any programmes or services which they offer to third parties, with TPS having the option of carrying those channels and services on an exclusive or non-exclusive basis.

(100) This provision comprises four different obligations: a right of first refusal for TPS, which binds the parent companies to TPS; a right of final refusal for TPS, which also binds the shareholders to the company; the obligation on TPS to grant its shareholders the best market conditions should they accept a channel or a television service; and the right for TPS to distribute a channel or a service on an exclusive basis, a provision which binds the parties.

(101) The obligation on the members to give TPS first refusal over their special-interest channels might possibly be regarded as ancillary to the launch of the platform; this obligation, which is imposed for a period of ten years, nevertheless results in a limitation of the supply of special-interest channels and television services. In this respect, the clause in question falls within the scope of Article 85(1).

**3. The provision appearing in Article 6 of the Agreement concerning the exclusive transmission of the general-interest channels (TF1, France 2, France 3 and M6) by TPS calls for special examination.**

(102) This provision grants TPS the exclusive right to broadcast the general-interest channels (also referred to as terrestrial channels) in encrypted form and digital mode by satellite, those channels also being retransmitted by the cable network, on which they are offered as part of the 'antenna service'.

(103) The general-interest channels traditionally attract the largest audience shares in France, namely 90 % of viewers, if all methods of transmission are aggregated, and 75,1 % of cable viewers.

(104) There is also potential demand for the general-interest channels broadcast in digital mode, which could largely be accounted for by a peculiarity concerning the reception of terrestrial broadcasts in France. Although broadcasting via terrestrial frequencies is by far the most common method of transmission, reception of the programmes is occasionally poor or even impossible in some areas of France. According to a survey conducted by Médiamétrie over the period November to December 1997 <sup>(25)</sup>, 9 254 000 of the 22 330 000 homes with a television set were located in areas where reception of the general-interest channels is poor. These figures are only indicative, however, because in addition to the four general-interest channels broadcast exclusively on TPS they also include Arte and La Cinquième, for which the initialisation rate is 80,6 % of households, and the terrestrial Canal+ service, which approximately [...] <sup>(\*)</sup> households are thought to receive in poor conditions.

(105) The attractiveness of the general-interest channels as part of TPS's bouquet was estimated in surveys carried out on behalf of the company: [...] of interviewees stated that they had decided to

subscribe because of the presence of the general-interest channels.

(106) Consequently, although they do not constitute a separate programme category or a type of content that is essential for pay-TV, since the two other digital bouquets have been launched — with great success in the case of CanalSatellite — without offering them as part of the deal, the general-interest channels are undeniably important and attractive to viewers, to the sole benefit of TPS.

(107) The exclusive right to broadcast the four channels concerned for the duration of the agreements, namely 10 years, albeit limited to encrypted satellite transmission in digital mode, does constitute a restriction of competition since it denies TPS's competitors access to attractive programmes.

(108) It therefore has to be concluded that Article 85(1) does apply to Article 6 of the Agreement of 11 and 18 April 1996.

(109) The provision concerning possible exclusive broadcasting of the Arte and La Cinquième channels on TPS has not been applied since TPS has concluded a non-exclusive agreement with those channels. The parties furthermore deleted the provision in question by an amendment dated 17 September 1998.

**C. Effect on trade between Member States**

(110) The TPS agreements provide that the platform is aimed at serving all French-speaking homes in Europe: first in France, but subsequently in Belgium and Luxembourg as well. The range of services offered also includes a number of channels originating in other Member States. The TPS agreements will therefore have an appreciable effect on trade between Member States on the pay-TV market.

(111) The market in the acquisition of television rights will also be affected by the creation of TPS insofar as the company, as a producer of special-interest channels, has to source programmes from European rightholders.

**D. Application of Article 85(3)**

(112) As demonstrated above, the provisions concerning programmes and services controlled by the members of TPS and the exclusive transmission of the general-interest channels on TPS are caught by Article 85(1) of the EC Treaty.

<sup>(25)</sup> Médiamétrie, bi-monthly initialisation survey, November of December 1997.

<sup>(\*)</sup> Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.

- (113) It is therefore necessary to examine whether the provisions fulfil the conditions for the application of Article 85(3).

#### IMPROVING THE PRODUCTION AND DISTRIBUTION OF GOODS, AND BENEFIT FOR CONSUMERS

##### 1. Improving the range of services on offer and increasing distribution and production

- (114) By facilitating the successful launch of a new platform on the pay-TV market, the provisions concerning TPS's first refusal over the special-interest channels and television services produced or controlled by its members and its exclusive right to transmit the general-interest channels enable a new operator to emerge and increase the range of pay-TV services available to French viewers.
- (115) Furthermore, creation of a new platform automatically leads to the development of new special-interest channels and new services: TPS has produced four channels, its shareholders have created another four, and contracts have been concluded with foreign channels, and in particular Arabic-speaking channels, for broadcasting them on the platform. Both as regards the production of new channels, resulting in the purchase of rights and the making of programmes, and in broadcasting terms, the creation of TPS clearly has a positive impact on increasing the production and distribution of goods.
- (116) In general terms, the introduction of competition on the pay-TV market has the effect of stimulating operators, who endeavour to develop and further improve their range of programmes and services.
- (117) The increase in the number of special-interest channels also leads to an increase in the content available for cable distribution, since the channels broadcast as part of satellite packages are usually included in the range available on cable networks. Cable distribution is therefore also improved.

##### 2. Benefits for consumers

- (118) By allowing a new operator to emerge, the above-mentioned two provisions lead to an increase in the range of services on offer and to the development of new services based on the use of a new technology, something which cannot but be beneficial to television viewers.

- (119) Neither can it be disputed that the extremely keen competition that developed as soon as TPS was created between that platform and CanalSatellite/Canal+ has also benefited consumers. The first tangible result of that competition was special offers and advantageous financial conditions for subscribers: the subscription to CanalSatellite Numérique fell from FRF 153 for the basic service plus the movie channels plus the music programmes in 1996 to FRF 130 in early 1997, as part of a special offer valid for the first year's subscription for the basic service plus four movie channels plus Disney Channel, which was equivalent to the introductory subscription charge for the full TPS service during the same period; another result was a subscription to CanalSatellite's basic service for FRF 50 instead of FRF 98 per month for all Canal+ subscribers in the autumn of 1997. TPS's introductory offer (four months' free subscription) also prompted other promotions by CanalSatellite (such as a free satellite dish, also offered by TPS).

- (120) TPS's market entry and the resulting competition has therefore had a beneficial effect on the prices and terms offered to final consumers.

##### 3. Indispensable nature of the restrictions

###### (a) *Clause concerning TPS's channels and television services*

- (121) In order to secure a minimum content, and in particular a minimum number of special-interest channels, so that it could put together and market its bouquet, TPS had to have recourse to the channels and services produced or controlled by its shareholders. Channels such as LCI, Série Club, Teva and Festival were thus offered by the different TPS shareholders for inclusion in the bouquet.
- (122) Without preferential access to those channels, TPS would have had to produce a large number of channels itself, which would have greatly increased the already extremely high costs of launching the platform, or else it would have had to look to other channels. However, the special-interest channels transmitted by CanalSatellite, which are among the best established on the French market, are covered by exclusivity terms and are therefore unavailable, at least for some time; furthermore, while it was theoretically possible to transmit channels produced by AB-Sat and wholly owned by it, that would have made no sense for two platforms being launched on the market at the same time, which



needed to build a brand image and therefore to differentiate the range of channels they offered. It is therefore particularly important for TPS, as a new market entrant facing competition from a well-established first operator possessing attractive and plentiful programme content, to have priority access to its members' special-interest channels during the launch period so that it can create an identity for itself and ensure continuity in the services it offers during that period. In estimating the length of time during which TPS should be allowed to have such priority access, the Commission has taken into account the data and forecasts provided by the parties — such as the amount of investment necessary for launching TPS, forecasts regarding accumulated losses, the time and the number of subscribers needed to reach break-even point and the rate of cancellation of subscriptions — and the company's performance over the first 18 months of operations. This information, assessed in the light of current market conditions and the relative strengths of TPS, on the one hand, and of Canal+ and CanalSatellite, on the other, has led the Commission to take the view that the minimum period during which the priority access under consideration is to be deemed essential to TPS is three years.

(b) *Provision concerning exclusive transmission of the four general-interest channels*

- (123) As a new entrant facing an operator which had, at the time TPS was launched, 4,2 million subscribers to Canal+ and 350 000 subscribers to CanalSatellite Analogique and had launched CanalSatellite Numérique in February 1996, TPS suffers from a considerable handicap in penetrating the market.
- (124) When acquiring pay-per-view rights to films and sporting events, TPS also has to contend with the strong position of Canal+.
- (125) In dealing with the American film makers, TPS is in a much weaker position than Canal+, which has been their sole partner for 12 years in France. TPS has succeeded in concluding an overall agreement with two studios and in negotiating the acquisition of TV rights for its movie channels, mainly for second showings of films that have already been broadcast on Canal+. The situation is even more one-sided in terms of the value of films (based on box-office figures in France), since Canal+ holds rights representing 85 % of Hollywood's output, as compared with 15 % for TPS.
- (126) It should also be stressed that the cost is very high for new entrants, since the price of pay-TV rights is determined by the number of subscribers, and Canal+'s current customer base of 4,3 million subscribers is taken into account by the distributors of film rights when determining the reference price in France.
- (127) AB-Sat has, for its part, as a producer and distributor of rights, a catalogue of over 30 000 hours of programmes and has concluded partnership agreements with certain American studios. It should be noted here that AB-Sat has chosen not to launch a premium platform that would have competed head-on with CanalSatellite, based on exclusive first showings of films and top-quality sporting events, but has instead opted for a complementary range of services.
- (128) As regards sporting events and in particular football — an extremely popular sport in France according to a study by Eurostat — TPS has rights to broadcast 132 football matches per year, whereas CanalSatellite has the rights to the 242 matches played during the French football championship<sup>(26)</sup>.
- (129) In order to put together an attractive choice which differs from that of its competitors and to circumvent the difficulty of acquiring rights to films and sporting events, TPS has relied on the exclusive presence of the general-interest channels in order to offer a wide range of programmes.
- (130) The exclusive transmission of the general-interest channels is the factor which differentiates TPS's package from the others. Given the reception problems with terrestrial broadcasts in certain areas of France, the inclusion of those channels gives TPS considerable consumer appeal in those areas.
- (131) Without the general-interest channels, TPS would have no chance of successfully penetrating the French pay-TV market and standing as a genuine alternative to Canal+/CanalSatellite, particularly in view of the fact that the range of films offered by TPS comprises fewer exclusive first showings than Canal+ and that CanalSatellite broadcasts exclusively most of the longest-established and best-known special-interest channels in France, therefore those which are capable of recruiting most subscribers. It should be mentioned in this connection that CanalSatellite also used to, and continues to, broadcast channels some of whose shareholders also hold stakes in TPS (LCI, Eurosport and Paris Première, which is not broadcast on TPS)<sup>(27)</sup>.

<sup>(26)</sup> Opinion 98-A-14 delivered on 31 August 1998 by the Conseil de la concurrence concerning the takeover of Havas by Compagnie Générale des Eaux.

<sup>(27)</sup> Paris Première, whose main shareholder is Suez Lyonnaise des Eaux, is broadcast exclusively on CanalSatellite.



(132) It should therefore be concluded that the exclusive transmission of the general-interest channels, by making the TPS package attractive to consumers and differentiating it from other services, is indispensable to its penetration of the French pay-TV market.

(133) Nevertheless, the indispensable nature of the exclusivity will naturally diminish over time, as TPS recruits subscribers and gains experience in the pay-TV field that will enable it to improve its service, thereby meeting the expectations of its viewers and securing their loyalty and raising awareness of the service. The promising performance of TPS over its first 18 months of operation, in excess of its original forecasts (457 000 subscribers in July 1998 as against an initial forecast of [...]), confirm both the effectiveness of the exclusive presence of the four general-interest channels, as a differentiating factor and a loss leader, and TPS's ability to penetrate the market earlier than expected, admittedly in the face of competitors, Canal+ and CanalSatellite, the second of which has also achieved results beyond its initial forecasts.

(134) The duration of the exclusive right to broadcast the general-interest channels, which was to run for 10 years according to the Agreement, was deemed excessive by the Commission, as TPS had to establish itself on the market before the end of that period. It is furthermore extremely important, if this new platform is quickly to gain a market share and act as an effective competitor, for it to be able to build up a subscriber base as quickly as possible, thanks in particular to the distinguishing feature conferred by the presence of the four general-interest channels. Although it is difficult to forecast precisely how the market and the companies operating on it will develop — as is shown by the fact that the performance of CanalSatellite and TPS is currently outstripping forecasts — the Commission has used a set of financial and commercial data in order to estimate how long TPS can reasonably enjoy an exclusive right to transmit the general-interest channels. In doing so it has taken account, *inter alia*, of data on the investments necessary for launching TPS and forecasts regarding accumulated losses, the time and the number of subscribers needed to reach break-even point and the rate of

cancellation of subscriptions to that platform. This information was assessed in the light of current market conditions and the relative strengths of TPS, on the one hand, and of Canal+ and CanalSatellite, on the other. The Commission has come to the conclusion that the minimum period during which the exclusive right to broadcast the four general-interest channels is considered essential to TPS is three years.

#### 4. No elimination of competition in respect of a substantial part of the products in question

(135) Far from eliminating competition, the TPS agreements are pro-competitive. Development of the pay-TV market has been strongly stimulated, particularly through the emergence of keen competition between CanalSatellite and TPS, competition which would not have developed between CanalSatellite and AB-Sat: as mentioned earlier, given its programming policy AB-Sat is not in head-on competition with Canal+ and CanalSatellite.

(136) The results recorded on the pay-TV market demonstrate that competition is far from being eliminated: Canal+ succeeded in recruiting 100 000 more subscribers in 1997, despite being considered by some observers to have reached its ceiling. For its part, CanalSatellite has completely outstripped its own forecasts: 900 000 subscribers as at 30 June 1998 although it expected to reach that target only by [...]. As at 31 May 1998, the total number of subscribers to Canal+, CanalSatellite Analogique and CanalSatellite Numérique and to the NumériCâble cable network accounted for around 70 % of all pay-TV subscribers in France.

(137) The number of cable subscribers is also continuing to increase: 358 456 subscribers to NumériCâble in July 1998 (as compared with 235 680 in May 1997); 504 162 subscribers to France Télécom Câble (as against 258 310 in May 1997); and 416 665 subscribers to Lyonnaise Câble (as against 300 156 in May 1997<sup>(28)</sup>). Clearly, development of satellite TV has had an extremely favourable knock-on effect on cable TV. The impact of large-scale advertising campaigns for satellite TV raises public awareness of the special-interest channels that are also available on cable.

(138) There are consequently no grounds for taking the view that the creation of TPS could eliminate competition on the pay-TV market or on the markets for the purchase of TV rights or the distribution of special-interest channels; competition has, on the contrary, been strengthened on these markets by the entry of a new player.

<sup>(28)</sup> Ecran Total magazine Nos 176 and 232.

*E. Duration of the exemption*

- (139) In accordance with Article 8 of Regulation No 17, a decision in application of Article 85(3) of the Treaty must be issued for a specified period. Pursuant to Article 6 of Regulation No 17, the date from which such a decision takes effect may not be earlier than the date of notification.
- (140) In line with those provisions, as regards the clause concerning the special-interest channels and television services set out in Article 6 of the Agreement of 11 and 18 April 1996 and to the provision concerning the exclusive transmission of the four general-interest channels on TPS, also set out in Article 6 of the Agreement of 11 and 18 April 1996, this Decision should take effect from the date of notification and for a launch period which is estimated by the Commission, on the basis of the data referred to in recitals 121 to 134, at three years. Since TPS began marketing its services in mid-December 1996, the exemption is granted until 15 December 1999,

HAS ADOPTED THIS DECISION:

*Article 1*

On the basis of the facts in its possession, the Commission has no grounds for action pursuant to Article 85(1) of the Treaty in respect of the creation of TPS by TF1, France Télévision Entreprises, M6 and Suez Lyonnaise des Eaux.

*Article 2*

The Commission has no grounds for action pursuant to Article 85(1) of the EC Treaty during the launch period, namely until 15 December 1999, in respect of the non-competition clause set out in the codicil amending Article 11 of the Agreement of 11 and 18 April 1998 and Article 5.3 of the Associates' Pact.

*Article 3*

In accordance with Article 85(3) of the EC Treaty, the provisions of Article 85(1) of the EC Treaty are hereby declared inapplicable, for the period from the date of notification to 15 December 1999, to the clause concerning TPS's special-interest channels and television services, set out in Article 6 of the Agreement of 11 and 18 April 1996, and to the provision concerning the exclusive transmission of the four general-interest channels on TPS, also set out in Article 6 of the Agreement of 11 and 18 April 1996.

*Article 4*

This Decision is addressed to:

- (1) Télévision Française 1  
33, rue Vaugelas  
F-75015 PARIS
- (2) France 2  
Maison France Télévision  
7, esplanade Henri de France  
F-75907 PARIS CEDEX 15
- (3) France 3  
Maison France Télévision  
7, esplanade Henri de France  
F-75907 PARIS CEDEX 15
- (4) France Télécom  
6, place d'Alleray  
F-75015 PARIS
- (5) Métropole Télévision  
16, cours Albert 1<sup>er</sup>  
F-75008 PARIS
- (6) Suez Lyonnaise des Eaux  
72, avenue de la Liberté  
F-92000 NANTERRE.

Done at Brussels, 3 March 1999.

*For the Commission*

Karel VAN MIERT

*Member of the Commission*