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The *Conseil de la concurrence* fines France Télécom and SFR for implementing anticompetitive pricing practices (decision 04-D-48)

For the future and as part of moves to introduce new regulations in the telecommunications sector, the *Conseil* has issued the ART (French Telecommunications Regulation Authority) with a favourable opinion on ex-ante regulation in this market (opinion 04-A-17)

As part of litigation proceedings concerning pricing practices implemented between 1999 and 2001, the* Conseil *has fined France Télécom €18M and SFR €2M*

Following a referral from the professional association TENOR (which has now become ETNA), the *Conseil de la concurrence* took the view that France Télécom and Cegetel, vertically integrated operators in the fixed and mobile telephony markets, had implemented “price scissor” practices between 1999 and 2001. Via their respective fixed telephony divisions (France Télécom and Cegetel), the offending parties offered retail "*landline to mobile*" services to medium-sized firms and "*major accounts*", at prices that were not compatible with the call termination charges (CTCs) practised by their respective mobile telephony divisions (FTM, which has since become Orange, and SFR).

France Télécom offered companies a range of Itinéris "*landline to mobile*" services, at tariffs that did not cover the variable costs incurred for the supply of

these services (including the CTC set for its mobile network). The same applied to the SFR "*landline to mobile*" offers proposed to companies by Cegetel.

This practice is known as "*price scissoring*". It involves an operator, which is usually vertically integrated, setting both retail prices on a market and the intermediary service price paid for access to the retail market, without leaving a sufficient difference between the two to cover the other costs incurred for supplying the retail service. The *Conseil* considers that such a practice has the aim and effect of distorting competition, since it can lead to other operators being excluded from the market.

In the case in point, the practices of which the two companies were accused had the effect of restricting the emergence of competition on this market, and delaying the interconnection of alternative fixed telephony operators: operators entering the fixed telephony markets were unable to offer companies competitive offers for services between landlines and Itinéris or SFR mobiles via a direct interconnection to the FTM or SFR networks, without incurring losses.

These practices were all the more damaging, in that they took place at a key time, when alternative operators had no choice but to opt for the direct interconnection solution. International rerouting techniques (*tromboning*) had ceased to be an alternative solution in April 1999, whilst "*hedgehog*" type solutions (whereby calls from landlines are rerouted via mobiles) were only really put into practice in the first six months of 2002.

However, the *Conseil* considered that Bouygues Télécom was not in a position to distort competition on the downstream market for calls from fixed networks to mobiles. It took into account the fact that Bouygues Télécom is not an integrated operator, and that its share of the call termination market is very low.

Bouygues Télécom is only present on the downstream "*landline to mobile*" market on a virtual basis, via private networks placed under the responsibility of client companies. The fixed telephony offers which form the object of the referral only concerned communications from landlines to Bouygues Télécom by those companies, which were already clients. Due to their limited nature, the

Conseil took the view that they could not have distorted competition.

**The offence was attributed to the group's parent company which, at the time of the facts, was the Cegetel group. In 2003, the company Cofira absorbed the company SFR before merging with the Cegetel group, which subsequently changed its corporate name to SFR. Consequently, the offending practice can now be attributed to SFR.*

> Decision 04-D-48 relative to practices implemented by France Télécom, SFR Cegetel and Bouygues Télécom

As part of moves to introduce new regulations in the telecommunications sector, the* Conseil de la concurrence *has issued the ART (the French Telecommunications Regulation Authority) with an opinion, in which it declares itself favourable to ex-ante regulation in the market for termination of calls on the Orange, SFR and Bouygues Télécom mobile networks.

The *Conseil* has issued the ART with this opinion as part of the consultation process required under article L. 37-1 of the French code of posts and electronic communications. This code was laid down by the law of 3rd June 2004 relative to electronic communications and audiovisual communication services (which itself transposed the "*telecoms package*" into French law). This first consultation concerned the delimitation of relevant markets, and dominant situations in the wholesale market for termination of voice communications on mobile networks in France.

This market has developed on the basis of pricing imbalances resulting from the "bill and keep" system (whereby mobile operators do not bill each other for call termination on their networks). This set-up has led to ineffective technical solutions, intended to avoid invoicing the termination of "*landline to mobile*" calls ("*hedgehogs*"). The *Conseil* took the view that this state of affairs has not allowed competition to develop sufficiently for the benefit of the consumer.

The "bill and keep" system is set to disappear in the near future, whilst virtual mobile operators are expected to expand considerably. However, these two factors alone seem unlikely to create effective competitive pressure on call termination charges by 2007, the year to which the *Conseil*'s market analysis extended.

Given these conditions, the *Conseil* would be happy to see the causes for the current imbalance eliminated, with alternative operators moving to direct interconnection.

Such a migration will require substantial investment and numerous negotiations with mobile operators. To ensure that it is carried out smoothly, the *Conseil* believes that a transitional phase is required for re-orienting the market. It also believes that *ex ante* regulatory instruments appear more suited to managing this migration than *ex post* instruments.

The *Conseil de la concurrence* takes the view that such regulations can be applied to the three mobile operators (Orange, SFR and Bouygues Télécom), each of which exert a significant influence on their respective wholesale call termination markets in mainland France. The ex ante regulations must be limited in time and must be based on instruments that are in strict proportion to the nature of the obstacles identified in the competitive market analysis.

This is the first opinion of its kind, issued as part of regulatory reform in the telecommunications sector. Similarly, at the ART's request, the *Conseil* will be required to issue opinions on 17 other "*potentially regulatable*" markets predefined by the European Commission.

> Opinion 04-A-17 relative to a request for opinion submitted by the Autorité de Régulation des Télécommunications (Telecommunications Regulation Authority), in application of article L. 37-1 of the French code of posts and electronic communications



> See decision of the Paris Court of Appeal (12th April 2005)

> See decision of the Cour de cassation (Supreme Court of Appeals) (10th May 2006)

> See decision of the Paris Court of Appeal (2nd April 2008)

>See decision of the Cour de cassation (Supreme Court of Appeals) (3rd March 2009)

> See decision of the Paris Court of Appeal (27th January 2011)

> See decision of the Paris Court of Appeal (Supreme Court of Appeals) (17th January 2012)