1st February 2005 : The Conseil de la concurrence issues ART (Telecommunications Regulation Authority) with an opinion on the broadband internet market

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Under the consultation procedure carried out in accordance with article L. 37-1 of the French code of postal and electronic communications law (*Code des postes et communications électroniques*), produced as part of the law passed on 9th July 2004, relating to electronic communications and audiovisual services (transposition of "telecoms package"), the *Conseil de la concurrence* has given the ART a second opinion, in which it analyzes the broadband internet markets and names the operators which have significant power within these markets. The Conseil de la Concurrence is not in favour of ex ante regulation of the retail markets

The ART does not consider it necessary to apply specific regulation tools to the retail markets

It has noted the dynamism of competition in this respect, within the ADSL market, which has notably led to a strong growth in the number of subscribers in the space of two years, the obtainment of 50% of facilities by alternative operators, the significant drop in prices offered, the increase in bandwidth offered and the diversification of offers available.

The *Conseil de la concurrence* is in complete agreement with this analysis, and points out once again that, a priori price controls in retail markets are only justified in exceptional cases, where no competition is likely to occur without ex ante regulation, which is not the case with retail offers for ADSL access.

The *Conseil de la concurrence* is not unaware of the existence of risks linked to France Télécom's control of the local loop and the vertical integration of the incumbent operator, which the alternative operators are unhappy about. France Télécom has considerable power on all the downstream markets, which it potentially has the ability to take advantage of, notably through price scissoring practices.

However, the *Conseil de la concurrence* considers that effective regulation of the wholesale markets is a better means of combating the competitors' dysfunctions within the retail markets and that, alongside this regulation, standard competition law can deal with such dysfunctions satisfactorily.

By "effective regulation of wholesale offers", the *Conseil de la concurrence* means a regulation which is careful, at the time of their prior approval or when settling disputes, to verify not only that these offers respect the principle of cost orientation where applicable, but also that they effectively allow for France Télécom's retail offers to be replicated under normal market conditions – from a technical, operational and economic point of view.

The *Conseil* also stresses the need for separate accounting to rule out discrimination

Lastly, it issues a reminder that two exceptional procedures exist, which can be seen as a "safeguarding clause" in the retail market :

- One, already implemented by the European Commission, is the monitoring of Wanadoo's prices until 2005, following the guilty verdict brought against it in July 2003 ;
- The other, created by the recent article L. 37-3 of the code of postal and electronic communications law, is the possibility, in exceptional circumstances, of the use of interim measures (6 months maximum), justified by the need to protect competition and consumer interests – despite the retail market never having been considered to be subject to specific regulation.

Given that there are no plans to apply specific regulation to the retail markets, the *Conseil* does not consider it necessary, under the present market analysis procedure, to draw up precise contours and segments.

Ex ante regulation of wholesale offers is necessary

The *Conseil de la concurrence* agrees with the ART's analysis, which depicts three types of services within the wholesale market, which are not substitutable by operators and which therefore form pertinent markets : unbundled access to the local copper loop, DSL broadband access delivered regionally and DSL broadband access delivered to a national point.

The competition dynamics within the wholesale DSL broadband access markets depend on rival operators' ability to develop a network to rival France Télécom's, from the installation of unbundling equipment through to the service provider's connection point, and on the relative prices implemented by France Télécom, for both retail and wholesale. Both of these conditions are linked. The current stage of implementation of the third party operators and their ability to provide offers to rival France Télécom are covered by *ex ante* regulation governing the incumbent operator since DSL technology was first introduced in late 1999.

Noting the lack of dynamism in competition within these markets and the existence of strong barriers deterring entry into the wholesale DSL broadband access market, the *Conseil de la concurrence* considers that maintaining sufficient economic spacing between France Télécom's various wholesale offers – as sought until now by the regulator – remains essential in ensuring that third party operators enter and remain within these markets. It is therefore in favour of maintaining ex-ante regulation of offers in the wholesale market, by the ART.

France Télécom, a powerful operator within the wholesale broadband market

With regard to France Télécom's position within the market, the *Conseil de la concurrence* diverges from the ART's analysis. The ART considers that, despite the reintegration of Wanadoo within France Télécom, the wholesale offers which were previously purchased by Wanadoo from France Télécom must continue to be accounted for in the same way as those purchased by third party operators, for the evaluation of market size.

Based on the case law issued regularly by the competition authorities, both nationally and on a European level, the *Conseil* makes the point, to the contrary, that given that Wanadoo no longer exists as a separate entity, these services now correspond to internal consumption, and should therefore not be included in this calculation.

However, despite this difference in analysis, the *Conseil de la concurrence*, like the ART, considers that France Télécom is dominant in the wholesale broadband markets, even when using France Télécom's market share in the market for wholesale offers delivered regionally of under 50%, due to the non-inclusion of its own internal consumption. The size of France Télécom, its vertical integration, its presence across all electronic communications markets and, above all, its control of the copper wire local loop are all elements which enable it, within these markets and to a great extent, to act independently of its competitors, its customers and, ultimately, consumers.