5th April 2005 : MVNOs - The Conseil de la concurrence calls for the regulator to intervene to prevent the risk of insufficient competition on the wholesale mobile telephony market

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> Version française

In accordance with the market analysis procedure introduced by the French code of postal and electronic communications law (*code des postes et communications électroniques*), the *Conseil de la concurrence*, that received the request on 21st February 2005, has just issued an opinion to the *Autorité de régulation des télécommunications* (ART, the Telecommunications Regulation Authority) regarding the **wholesale market for access and call origination on public mobile networks** (1).This is the fourth opinion issued by the *Conseil* in this way (see 04-A-17, 05-A-03, 05-A-05).

The wholesale market for access and call origination on the mobile telephone networks is developing strongly

The *Conseil* begins by emphasising that the market in question is a nascent market, which is developing rapidly. The ART's analysis was conducted during the period in which the virtual operators were still very weak, restricting themselves to specific niche strategies or developing basic retail models. However, in early 2005, negotiations between mobile operators and virtual operators have intensified. MVNO (Mobile Virtual Network Operators) (2) contracts have been signed with major players (NRJ and M6 in February 2005, Cegetel and 9Télécom in March 2005). Meanwhile, other contracts are set to be agreed and a range of associated new offers are to be sold on the retail market.

There are a number of obstacles to the effective development of competition in this market : MVNOs are not currently in a position to compete with the three biggest telecommunications operators (Orange, SFR and Bouygues Télécom)

The *Conseil* believes that existing conditions on the wholesale market in question are such that any attempt to solve the competition issues identified on the retail market will prove unsuccessful. In the retail market, competition is hindered by the predominance of subscription-based contracts requiring long-term commitments, difficulties in implementing number portability, problems with transferring numbers, and long cancellation times for contracts. There is greater competitive pressure on brands and services than on prices.

The *Conseil* observes that existing MVNO contracts restrict the freedom of virtual operators and reduce the competitive pressure they are likely to exert on network operators. There are several possible reasons for this. It may be because the contracts include narrow definitions of which clients MVNO's are entitled to approach, or because wholesale prices prevent them from reaching certain client segments. Alternatively, it may be due to the fact that the contracts limit the possibilities for price competition. Finally, it may be because they impose technical constraints, making it difficult to introduce innovations such as fixed/mobile convergence.

The current pricing method, for example, enables network operators to control the competitive price pressure likely to be exerted by MVNOs. The virtual operators are able to offer certain targeted clients prices that are competitive with those of the host operator ; but for other types of products, they are unable to offer competitive prices due to the high wholesale prices negotiated. These scissor effects enable the host operators to target precisely which clients they make available to the MVNOs, thereby avoiding direct competition.

The *Conseil* also believes that the long contract periods involved (up to 9 years) and the inclusion of exclusivity clauses, as well as the fact that virtual operators are denied access to subscriber databases (HLR bases), are likely to prevent MVNOs from competing effectively on the retail market.

The *Conseil* underlines the potential risk of Orange, SFR and Bouygues Télécom exerting a significant collective influence on the wholesale market, and indicated that it would like to see *ex ante* regulations introduced to prevent the risk

The ART believes there is sufficient evidence to suggest that the three main operators are in a collective dominant position under competition law, and that this could potentially result in tacit collusion between them.

Meanwhile, the *Conseil* acknowledges that the three cumulative criteria specified by European case law concerning Airtours/First Choice - and which are used to determine whether a collective dominant position exists - may not be completely met. Nonetheless, it does believe that under the law specifically governing electronic communications, a recap of which is given in the opinion, the wholesale market in question presents **structural features that do not rule out the risk of a significant collective influence by the mobile operators on this market** during the reference period considered (2005-2007).

In this respect, the *Conseil* emphasises that the law governing the electronic communications sector does not require proof that a situation of tacit collusion is definitely developing. It simply requires that the market structure make collusion possible and reasonably probably. This approach seems appropriate in the case of a nascent market, in which it is difficult to assess the players' strategy at this point in time.

Given this potential risk, the *Conseil* shares the ART's view that ex ante regulation should be introduced in the wholesale market for access and call origination on public mobile networks.
In addition to the introduction of regulatory measures on the wholesale market, action also needs to be taken to deal with the obstacles identified on the retail market

The *Conseil* believes that by requiring mobile operators to satisfy reasonable requests for access to network infrastructures or associated facilities, the ART can guarantee that MVNOs are able to demand that the terms of their contracts

be revised, and can survive until they attain critical size.

It reiterates that MVNOs or retailers can only achieve sustained development if the obstacles to competition identified on the retail market (number portability, length of contracts, loyalty schemes, etc.) are removed. If the obstacles are not eliminated, MVNOs will be unable to achieve critical size, and the ART's action will rapidly be restricted. The public authorities must consider intervening to deal with these obstacles, whilst regulatory measures must be taken in the wholesale market for access and call origination. However, the regulator must ensure that its actions do not serve to further distort competition, by promoting the emergence of a particular type of player or failing to take account of existing disparities between the mobile networks.

(1) i.e. market 15 identified by the European Commission (Recommendation of 11th February 2003 and Annex 1 of Directive 2002/21/EC)
(2) MVNOs are mobile operators who do not own their own radio network infrastructures. Instead, they are forced to enter into agreements with operators to gain access to their networks