# ADSL Broadband Internet Access - The Conseil de la concurrence fines France Télécom 80 million Euros for abuse of a dominant position

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In November 1999, the company Neuf Télécom referred to the *Conseil de la concurrence* regarding practices implemented by France Télécom in the wholesale market for broadband Internet access (ADSL). In February 2000, the *Conseil* subsequently ordered France Télécom to propose a new technical and commercial offer, that would enable other operators to compete effectively in the market.

In May 2004, the *Conseil* observed that France Télécom had breached the injunction, and fined the company a total of 20 million Euros. The fine was subsequently doubled by the Paris court of appeal (see inset below).

Now called upon to rule substantively on the merits of the case, the *Conseil de la concurrence* has decided, in light of the seriousness and duration (1999-2002) of the practices concerned, to fine France Télécom 80 million Euros for preventing its competitors from accessing the wholesale ADSL Internet market, until October 2002.

## In December 1999, France Télécom refused a request by Neuf Télécom concerning access to the wholesale broadband Internet market.

ADSL technology, which was launched in 1999, has resulted in the appearance of several new markets: the provision of broadband Internet access via ADSL,

the routing of ADSL traffic between subscribers and Internet Service Providers (ISPs) by operators. However, France Télécom held a monopoly on the copper lines (the local loop) that link subscribers to the telephone exchange, and the local loop was not actually unbundled until 2002. As a result, competing operators who wanted to provide ISPs with these routing services were forced to buy wholesale services from France Télécom, in order to be able to take delivery of ADSL traffic at an intermediate point on the incumbent operator's network.

The *Conseil* observed that France Télécom had agreed to offer Internet Service Providers (ISPs) these wholesale services, provided they were implemented entirely in its own installations (option 5). However, France Télécom refused to allow competing telephone operators, like Neuf Télécom, the possibility to partly use their own installations instead, according to the conditions set out in option 3. In doing so, it prevented the competitors from making wholesale offers to the ISPs.

## France Télécom then agreed to permit its competitors to replace France Télécom's installations by theirs(option 3), but at prices that prevented them from making the ISPs offers that were competitive with those made by France Télécom under option 5.

The *Conseil* observed that whilst option 3 was eventually proposed at prices enabling competing operators to put together offer for ISPs under economically acceptable conditions, this did not take place until September 2002, after the ART (the French Telecommunications Regulation Authority) obtained concomitant price reductions for all France Télécom's offers, options 3 and 5.

The *Conseil* took the view that France Télécom's refusal of Neuf Télécom's request, and the inappropriate conditions it subsequently proposed, amounted to a refusal of access to the local loop and the installations located between this

loop and the connection points under option 3. It also considered that the loop and the associated installations constituted an essential infrastructure, since the loop had not yet been unbundled.

By refusing access to an essential infrastructure in this way, France Télécom was able to remain the sole supplier of services routing broadband Internet (ADSL) traffic between subscribers and ISPs until 2002, whilst preventing potentially more innovative and efficient competitors from entering the market. The ISPs were unable to take advantage of competition in the market and were therefore deprived of more attractive technical or price conditions, which they could have passed on to consumers.

## The *Conseil* took the view that these practices were extremely serious and had caused significant damage to the economy.

It considered that France Télécom's anticompetitive practices:

- led to the closure of the market for broadband Internet (ADSL), thereby guaranteeing that France Télécom remained the sole ADSL wholesale supplier;
- persisted for almost three years, and this despite the injunctions handed down by the Conseil and the warnings issued by the ART (which has since become the ARCEP) between January 2001 and October 2002, concerning the anticompetitive nature of the practices;
- were committed by a vertically integrated incumbent operator, which owned an essential infrastructure necessary for the establishment of broadband services by competitors. Due to its position, France Télécom therefore had a special responsibility in the broadband market, since it was able to alter the structure unilaterally;
- took place in an emerging market, and served to hold back that market's vitality.

When calculating the fine, the *Conseil* took into account the fine already imposed on France Télécom for the aforementioned breach of injunction.

## Story of the case

**Decision of 18th February 2000 ordering interim measures**

Following a complaint by Neuf Télécom, the Conseil took the view that France Télécom's refusal to allow third party operators to develop their own competing broadband Internet access offers had caused serious and immediate damage to the sector. The Conseil consequently ordered France Télécom to alter its behaviour immediately, whilst awaiting a full decision on the merits. It ordered France Télécom "within a maximum period of eight weeks[...], to propose to third party operators a technical and commercial offer giving them access to the permanent virtual circuit for the provision of Internet access via ADSL, or any other equivalent technical and economic solution allowing operators to exercise effective competition, both in terms of prices and in terms of the nature of services offered".
In a ruling dated 30th March 2000, the Paris court of appeal upheld the Conseil's decision.

**Decision of 13th May 2004 observing breach of an injunction handed down as an interim measure**

Observing that the injunction handed down as an interim measure had gone unheeded, the Conseil fined France Télécom 20 million Euros for breach of injunction. Although on 18th April 2000, France Télécom had indeed sent the third party operators an offer called "ADSL Connect ATM", the offer in question contained a number of technical and price restrictions and, consequently, breached the Conseil's injunction.
In a ruling dated 11th January 2005, the Paris court of appeal upheld the Conseil's substantive analysis on the merits, but doubled the fine from 20 to 40 million Euros (pending an appeal with the Cour de cassation, French Supreme Court of Appeal).

See the decision (05-D-59)