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Conseil de la concurrence in favour of ARCEP's proposal to impose account unbundling requirements on TDF

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As part of the procedure for analysing electronic communications markets, the Conseil de la concurrence has issued the French Telecommunications Regulator, ARCEP, with an opinion on the wholesale markets for audiovisual broadcasting services in France. This is the sixth opinion issued by the Conseil following this procedure (see 04-A-17, 05-A-03, 05-A-05, 05-A-09, 05-A-10).

These markets, which are referred to collectively as "market 18" by the European Commission (in a recommendation dated 11 February 2003), include broadcasting services designed to deliver radio and television content to end users. It comprises two segments:

- downstream, the services offered by broadcasters to channel producers or multiplex operators for digital terrestrial television;
- upstream, the services offered by one broadcaster to another, representing an "access" market (hosting on existing pylons, for example).

Market 18, which has never previously been directly overseen by regulatory authorities, is currently subject to scrutiny by two regulators

The CSA (Conseil Supérieur de l'Audiovisuel, French Broadcasting regulator) has the power to regulate (notably by settling disputes ex post) the downstream part of the market (relations between channel producers/multiplexes and broadcasters/distributors). Meanwhile, the upstream part of the market (relations between broadcasters) falls within the competence of the ARCEP.

Competition law has served to open up the markets to competition on two occasions

On 1 December 2003 and 11 April 2002, the Conseil de la concurrence handed down interim measures which, on the one hand, opened up the FM broadcasting of radio services by Radio France to competition, and on the other hand, opened up the wholesale market for access to TDF's sites for digital terrestrial television.

The deployment of digital terrestrial television has allowed new players to gain in strength, since they are more able to compete with TDF

In France, digital terrestrial television is being deployed in a succession of phases according to a calendar set down by the CSA. By March 2007, the 115 main sites initially targeted by the CSA will be open, and should cover some 85% of the French population.
For each phase and each site, calls for tenders are organized to select the broadcast operator for the different multiplexes. This selection process subjects the broadcasters to substantial competitive pressure, and facilitates the entry into the market of newentrants such as Antalis and Towercast, who would have had greater difficulty in acquiring market share if the calls for tenders had been launched on a nationwide scale.

This is shown clearly by the growth in the market share held by TDF's competitors. They currently hold a total of 25% of the market in value terms and 30% in volume terms, for digital terrestrial television.

On the upstream part of market 18 (relations between broadcasters) concerning digital terrestrial television, it cannot be denied that TDF has a special position as the owner of an already existing infrastructure

The Conseil de la concurrence notes that the indispensable character of some of TDF's sites is largely due to the administrative or regulatory barriers pertaining to this sector: for example, the CSA's decision to organize the deployment of digital terrestrial television with zones centred on TDF sites, the speed of the deployment phases imposed by the CSA and the public authorities, or the usual administrative barriers (planning permission, environment, town planning).

It appears that, in the medium term, these barriers could prevent or at least delay the market's development towards effective competition.

The Conseil de la concurrence also observes that there are a number of problems with related services (procedure for intervention at sites, energy supply, etc.). Individually, these may prevent new market entrants from presenting their offer or may subsequently threaten their economic viability.

The Conseil de la concurrence is in favour of a targeted and temporary intervention by the ARCEP

The Conseil de la concurrence acknowledges that there has been real progress towards effective competition in the downstream part of market 18 (relations between broadcasters and channel producers/multiplexes), and that this progress has been made more quickly and more substantially than in other European countries. However, the Conseil believes it is legitimate for the ARCEP to take certain ex ante remedial measures in order to, albeit temporarily, ensure market conditions likely to promote this development.

Priority should be given to imposing account unbundling requirements on TDF

This account unbundling must help provide a clearer picture of the way the company's costs are broken down between analogue television broadcasting on the one hand, and digital terrestrial television and other activities on the other hand.

Analytical accounting methods are usually the only way of guaranteeing the success of injunctions imposed on companies with monopolies or dominant positions, designed to eliminate scissoring effects or price discrimination, or to impose a cost-based price system. The introduction of these kinds of accounting practices must be driven by the industry regulator.

Lastly, the Conseil believes that the power to settle disputes ex post, notably on the developing market for digital terrestrial television, should enable the ARCEP to regulate the move to real competition both effectively and flexibly, according to a framework of its own definition.