

13 December 2012: Mobile telephony

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The Autorité de la concurrence fines Orange and SFR a total of €183 million for implementing anticompetitive practices in the mobile telephony sector.

Orange and SFR marketed offerings, mainly between 2005 and 2008, allowing for unlimited calls solely within their own networks.

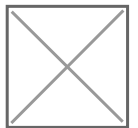
These packages, which represented the core of the post paid offering proposed to household customers, gave way to an abusive rate differentiation between 'on net' calls (within their respective networks) and 'off net' calls (to rival networks).

These offerings put a break on competition in two different ways.

They contributed, on the one hand, to freezing the market by drawing consumers to the two biggest networks and keeping them 'locked in' once their choice was made.

They were also liable, on the other hand, to weaken the third operator – Bouygues Télécom –, which had to strike back by launching offerings that significantly increased its costs.

> *Version française*



Following a complaint filed by Bouygues Télécom, the Autorité de la concurrence has just issued a decision, by which it fines France Télécom, Orange France and SFR a total of €183.1 million for implementing anticompetitive practices in the mobile telephony sector, by marketing unlimited 'on net' offerings, that is, by giving their subscribers unlimited calls to interlocutors that were subscribers of the same network.

By marketing these offerings, Orange and SFR implemented excessive rate differentiation practices between 'on net' calls (made within their own network) and 'off net' calls (to a rival network); thus, they abused the dominant position each of them holds in their respective call termination markets (that is, in the interconnection service they offer other operators by 'terminating' calls on their networks). (For more information, please refer to [Background notes 1 and 2](#) of the press kit.)

Although they seemed attractive at first to consumers, these offerings hampered the market dynamics by keeping subscribers locked in and by weakening Bouygues Télécom, the most likely to stimulate the market, being the latest entrant at the time of the facts.

It should be noted that over the last few years, the three operators, Orange, SFR and Bouygues Télécom, have all in turn denounced the implementation, by their competitors, of rate differentiation practices between on net and off net calls, which they unanimously considered to be abusive. Consequently, these complaints gave rise to numerous decisions of the Conseil, and then of the Autorité de la concurrence (for more information, please refer to [Background note 3](#) of the press kit).

The unlimited call offerings denounced by Bouygues Télécom

As of 2005, Orange and SFR, holding respectively 47% and 36% of the mobile telephony market for household customers, thus a total of 83%, marketed on net unlimited offerings, thus giving their customers unlimited calls to subscribers of the same operator, that is, for an inclusive price, regardless of the quantity and duration of the calls.

Orange, for instance, marketed the package lines Orange Classique, Orange Intense and Orange Pro that allowed subscribers to make free calls to three favourite Orange numbers 24/7 without these calls being billed. The "3 N° KDO" ("3 gift-numbers") option also offered unlimited calls to Orange numbers for packages that did not include an unlimited call component. At SFR's, the lines

SFR Essentiel and SFR Evolution Pro offered unlimited calls to three SFR numbers. These offers have not been marketed since the 1st term of 2008 but the many subscribers who have not changed their package still benefit from it today.

These offerings had become the core of the post-paid offer proposed to household customers. As a matter of fact, customers who wished to subscribe to or renew their package with Orange and SFR had no other choice than unlimited call offerings between 2005 and early 2008. Moreover, these offerings contributed up to a third to household customer turnover of SFR and up to over 40% for Orange.

This rate differentiation is not objectively justified

All these offers include a rate differentiation between on net and off net calls, the advantage of unlimited calls being reserved solely to on net calls.

Orange and SFR did not demonstrate that the rate differentiation between “on net” calls (within their own network) and “off net” calls (to a rival network) were objectively justified, i.e. by a difference between the costs borne for the supply of the two types of calls. They could not either demonstrate that it would be indispensable to the achievement of efficiency gains, prevailing over its anticompetitive effects, particularly since both operators could have marketed unlimited calls offerings to all operators (“cross net” offerings), in which there is no differentiation between both types of call.

The practices complained of and implemented by Orange and SFR had several negative effects in the mobile telephony market

• **These offerings accentuated the « club » effect and damaged the fluidity of the market**

These offerings first of all artificially accentuated the “club” effect, that is, the propensity for close relatives to regroup under the same operator, by

encouraging consumers to switch operators and join that of their relatives. These offerings played a great role as this factor was, above price, the main incentive for subscriptions (70% of a subscriber's consumption is used towards its three favourite interlocutors).

Once the clubs were formed, these offerings "locked" consumers in durably with their operator¹ by significantly raising the exit costs incurred by the subscribers of on net unlimited offerings as well as by their relatives who wish to subscribe to a new offering with a competing operator.

The rate differentiation between « on net » and « off net » calls puts off any operator switch because the subscriber or its relatives would consequently no longer be able to make or receive "unlimited" calls.

This differentiation between "on net" and "off net" calls therefore consequently damaged the fluidity of the retail market by hampering customers' migration towards another existing operator.

• These offerings automatically favoured large operators over small operators ("network effect")

Since subscribers were interested in calling the largest number of people without these calls being billed, the "on net" unlimited offerings automatically favoured Orange and SFR because they had the largest number of subscribers. In this way, indeed, customers would optimise their chances of finding subscribers of the same operator as them and therefore benefit more from the on net offering.

In view of the small size of its subscriber base, Bouygues Télécom (17% of all subscribers) found it impossible to align itself with Orange' and SFR's on net offerings.

Bouygues Télécom was consequently obliged to market "cross net" unlimited call offerings allowing its customers to make unlimited calls to their interlocutors, whatever their network (launch of the Néo offering in 2006), but at

the expense of a sharp increase in its costs.

By launching this offering, Bouygues Télécom had to bear much greater call termination costs, which weakened its ability to stimulate competition in the market. In view of the negative effects of these offerings on its financial health, there was a great danger of Bouygues being driven out of the market.

Financial penalties are proportionate with the seriousness of the infringements, with the importance of the harm done to the economy and with the situation of Orange and SFR

In order to determine the penalties, the Autorité de la concurrence relied on the method outlined in its Notice of 16 May 2011, with respect to the principle of proportionality and the criteria specified by the Commercial Code.

The Autorité took into account the indisputable seriousness of the infringements, since they reflected abusive pricing practices aiming to weaken smaller competitors or even drive them out of the mobile telephony retail market by significantly increasing their costs. The Autorité, however, also took into account the moderate extent of the harm done to the economy in the case in point; the Bouygues Télécom company was, as a matter of fact, able to remain on the market by proposing "cross net" unlimited call offerings.

The Autorité also took account of the elements specific to the behaviour and the individual situation of each company, particularly the fact that all of them were or belonged to a global company, ran varied businesses and had highly significant resources. The amount of the fine imposed on France Télécom includes a 50% additional charge on account of the reiteration, because of six similar infringements of competition law committed over the last fifteen years. Moreover, the Autorité has factored in, for both operators, a mitigating circumstance: the progressive drop in ceiling rates for termination calls imposed by sector regulation created a transitional economic interest for operators to encourage their customers to make "on net" calls. In light of this, the Autorité reduced the amount of the fines imposed on both companies by 50%.

The Autorité consequently imposes the following fines:

- **€117,419,000 to the companies Orange France and France Télécom**, divided up as follows : €78,279,000 imposed jointly and severally to the companies Orange France and France Télécom, and €39,140,000 imposed on France Télécom;
- **€65,708,000 on the SFR company.**

(1) The very low cancellation, among subscribers, of these on net offerings is an indicator of this lock in effect. The cancellation rate among subscribers of Orange's Classique 2h offerings, which use indeed the unlimited call component, is, for instance, sixteen times lower than that of all Orange customers.

> For more information, please consult Decision 12-D-24 of 13 December 2012 on practices implemented in the mobile telephony sector for residential customers (in French) as well as the press kit information (in French):

Background Note 1: What is call termination?

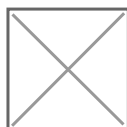
Background Note 2: Why were on net unlimited call offerings commercialised starting from 2005?

Background Note 3: Cases where rate differentiation practices were examined by the Autorité de la concurrence

Background Note: The stages of the procedure

Background Note 5: Glossary

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> ***See decision of the Paris Court of Appeal (19th May 2016)***

> ***See the decision of the Cour de cassation (Supreme Court of Appeals) - 5th April 2018***