24 July 2015: Audiovisual broadcasting

Published on January 06, 2016

The Autorité de la concurrence is in favour of maintaining ex-ante regulation of the upstream wholesale DTT broadcasting services market

> *Version française*

In brief

In an opinion issued today to French Telecommunications Regulator (ARCEP), the *Autorité de la concurrence* is in favour of maintaining ex-ante regulation of the upstream wholesale DTT broadcasting services market for the 2015-2018 period. It is a market in which broadcasters who do not have their own broadcasting infrastructures can buy hosting services for their equipment, on the sites and pylons of other operators, generally located on "high places" managed by the incumbent operator, TDF.

Both the *Autorité de la concurrence* and the ARCEP consider that the market meets all the cumulative conditions required for ex-ante regulation. These include high, non-transitory barriers to entry, absence of prospects of evolution towards effective competition and insufficiency on the part of competition law alone to address market failures. This is compounded by the fact that TDF continues to exert a significant influence on the market.

The *Autorité* also provides recommendations aimed at promoting development of full infrastructure competition. This would require replication of the incumbent operator's broadcasting sites, as this is the only real vector of independence and development for alternative broadcasters in view of the drop in broadcasting demand which will result from the decrease in the number of multiplexes following the transfer of the 700 MHz band to telecommunications services (until now it has been used exclusively for DTT).

The wholesale markets for DTT broadcasting services

The multiplexes, which group together television channels sharing the same frequencies, broadcast their programmes via operators. These operators transmit their signals from broadcasting sites, which are high places covering the 1,626 DTT broadcasting areas defined by the CSA (French Broadcasting Regulator), to television viewers' antennas.

These services are known as the downstream wholesale DTT broadcasting services market. Three broadcasters offer services on this market: the incumbent broadcaster TDF, which is present across all the broadcasting areas, and alternative operators, Towercast and Itas Tim-Onecast, which are only present

across half the broadcasting areas.

In order to offer their broadcasting services to multiplexes, TDF's competitors may set up and operate from their own broadcasting sites (full infrastructure competition) or just offer broadcasting from TDF's sites. In the latter case, they currently have two options open to them, namely installing their own antenna systems on TDF's pylons (partial infrastructure competition) or using those belonging to TDF (service competition).

Regulation in place since 2006

In view of TDF's significant market influence, the ARCEP has imposed obligations on the incumbent operator since 2006 and throughout the first three cycles of regulation. These include obligations regarding access to its infrastructures, non-discrimination, transparency and price control.

For this new cycle (2015-1018), the ARCEP wishes to continue lifting barriers to full infrastructure competition, while at the same time proposing steps aimed at progressive removal of regulation.

Relevance of development of alternative infrastructures

Although market share of alternative operators has increased over the last few years, it is still clearly a minority (31.9% of service points and 30.8% in terms of value). However, competition can only continue to grow on the downstream wholesale DTT broadcasting services market through the upstream development of full infrastructure competition. This would grant alternative operators independence from TDF's hosting services, through the replication of its high places and pylons.

This development remains pertinent in the context of the transfer of the 700 MHz band to high speed mobile services (until now it has been used entirely for DTT broadcasting). The consequence of this transfer will be a reduction in downstream demand following the removal of two multiplexes in April 2016, reducing the number of multiplexes from 8 to 6.

The Autorité de la concurrence's recommendations

The Autorité makes the following detailed recommendations:

- *The Autorité is in favour of lifting the obligations incumbent upon TDF to provide hosting services to alternative antenna systems*

Until now, TDF has been obliged to offer hosting services to alternative broadcasters for their antenna systems, which are only designed for DTT broadcasting. However, over the next few years, alternative broadcasters will be obliged to compensate the drop in DTT demand with radio broadcasting or hosting mobile-operator equipment. It is therefore no longer relevant to maintain an incentive to invest in single-service infrastructures.

For this reason the *Autorité* agrees with the ARCEP in considering that encouraging partial infrastructure competition may be abandoned and the obligation that until now has been incumbent upon TDF to accede to requests for antenna hosting lifted.

However, the Autorité has asked the ARCEP to ensure that investments already agreed by alternative broadcasters for the development of this form of competition are maintained, by specifying the conditions under which access that has already been agreed must be maintained.

- *The Autorité de la concurrence is favourable to TDF amending the "early exit" clauses of its hosting contracts*

An alternative broadcaster, who, in the course of a contract, wishes to switch the points of service that it broadcasts to its own site from a TDF site, is currently subject to very high penalties.

In order to lift the barriers to development of full infrastructure competition, both the Autorité and the ARCEP are favourable to TDF being obliged to propose reasonable conditions for early exit.

- *The Autorité de la concurrence is not favourable to abandoning the non-eviction obligation*

During the third cycle of regulation, in order to provide alternative broadcasters with an incentive to invest in setting up their own sites, the ARCEP prohibited TDF from applying "eviction" hosting tariffs, namely tariffs lower than the costs of an "*effective new en*trant" on sites likely to be replicated. The ARCEP now considers that maintaining this obligation over too long a period could allow alternative broadcasters to profit from a guaranteed income.

However, the *Autorité* considers that the non-eviction obligation must be maintained across all replicable or replicated sites. Indeed, without this obligation the incumbent operator might be tempted to drop its access tariffs both across easily replicable sites (in order to discourage alternative broadcasters from replicating these sites) and sites that have already been replicated. This would in turn threaten the profitability of investments already made by alternative operators. Therefore, the Autorité considers that if it appears necessary, the ARCEP might be better reviewing how the non-eviction obligation is implemented.

- *The Autorité is favourable to changing the method of assessing whether or not access tariffs are excessive*

In order to prevent TDF from being in a position where it can increase its tariffs in areas where there is no competition, the ARCEP proposes to continue to impose an obligation on TDF not to apply excessive tariffs. However, it is changing its method of assessing whether or not tariffs are excessive, in order to avoid any increase that may appear excessive in comparison with sites with similar characteristics. The Autorité is favourable towards such a change.

>Full text of opinion 15-A-10 of 24 July 2015 on a referral to the Autorité for an opinion on regulation of electronic and postal communications in application of Article L. 37-1 of the Postal and Electronic Communications Code, on analysis of upstream wholesale terrestrial Hertzian broadcasting of audiovisual programmes market.

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