Telecommunications / Business Market

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The Autorité de la concurrence fines Orange 350 million euros for having abusively hindered the development of competition in the business market since the early 2000s.

The Autorité also takes action to restore market competition for the benefit of business clients

In brief

After complaints were brought firstly by Bouygues Telecom[1] and then by SFR[2] , the ***Autorité de la concurrence*** today issued its decision whereby it fines Orange 350 million euros for having implemented four anticompetitive practices on the markets for fixed and mobile telecommunications services provided to the company's business clientele. The ***Autorité*** is also imposing injunctions in order to immediately restore fair competition within these markets.

Regarding mobile telecommunications services, Orange is fined for having abused its dominant market position by implementing, in a systematic and widespread fashion over an extended period of time, various mechanisms aimed at ensuring the loyalty of its clients through the use, by its entity Orange Business Services (OBS) of marketing programmes ("***change of mobile phone***" programme) and anticompetitive pricing discounts (the "privilege" and "park" discounts). These abusive loyalty practices, which were applied in a cumulative fashion and were conditional to commitments in terms of contract duration or consumption volume, might have prevented client companies from subscribing to other operators, and deterred them from entrusting a part of their park to another operator.

Regarding fixed telecommunications services, the ***Autorité***, in its decision, notably fines a discriminatory practice implemented by Orange, regarding third-party operators and their ability to access and use information gained by Orange via its management of the copper local loop (itself the result of Orange's former monopoly status within the industry). For other service providers, this information (concerning eligibility, line availability, etc.) was a crucial element in their ability to market their retail offers to business clients.

Orange has chosen to cooperate with the ***Autorité de la concurrence***: the company does not challenge the facts or their anticompetitive nature and neither does it challenge the outcome of the case, in terms of both the fine and the injunctions aimed at immediately restoring a competitive functioning of the market.

The business telecommunications market

Providing electronic communications services for business clients constitutes a significant source of revenue for telecoms operators. According to the advisory opinion provided to the Autorité by the French Telecommunications and Post Regulators (ARCEP), these services represented 30% of revenue for telecoms operators in 2011; the market is worth 12.1 billion euros, a figure which comprises fixed telecommunications services (5.3 billion euros), mobile telecommunications services (3.5 billion euros), data transport (2.1 billion euros), line rental (0.06 billion euros) and value-added services (0.6 billion euros). The business telecoms market differs from the residential one due to its specific requirements in terms of service quality and scope, multiplex lines and network management issues, as well as interconnections and sharing of resources between different geographical locations. Thus, telecoms operators offer different services than those available to residential consumers.

The practices complained of ans implemented by Orange

Dawn raids were carried out by the Investigation Services of the Autorité on 9 December, 2010, across several France Télécom and Orange facilities. The information gathered and ensuing investigation have enabled the Autorité to find out that Orange had abused its dominant position in the market by implementing the following practices:

1. Discrimination in terms of access to information concerning the operation of local loops (Objection 1)

Orange oversees the copper local access network that was installed when the company (then operating as France Télécom) had the monopoly as the national telecoms operator; this network represents over 99.99% of copper pairs in France.Orange's copper lines also constitute the bulk of the local loop network (the last link connecting the service provider's network to the user), which is used for 90% of high-speed and very high-speed internet access, in particular for services which use DSL technology (in particular, ADSL).

As operator of the copper local loop, Orange maintains possession, through various technical databases (including one known as "42C"), of certain information pertaining to this network. As the *Conseil de la concurrence* – replaced by the Autorité in 2009 - had already highlighted (in decision 07-D-33), access to this information constitutes a significant competition issue, in that it not only constitutes "*information that is exclusive to the operator of the local loop*", but also "*essential information*" for third-party operators, particularly in terms of their ability to offer their services in the retail market (especially concerning the identification of available lines and eligibility conditions).

However, the investigation has established that since the mid-2000s, various commercial entities of OBS (departments managing large accounts and business agencies) have had access to a scope of information regarding the copper local loop that is more comprehensive than that which is available to their third-party competitors, and furthermore that they were able to access said information within shorter timeframes.

This discriminatory practice in providing access to crucial information has impacted the retail market for fixed telecommunications services aimed at business clients by artificially protecting – and even, reinforcing - Orange's market position. This practice has also affected the commercial relationship between third-party operators and their clients, by making them appear less reactive and less informed than the incumbent operator- this is very likely to have weakened competitive intensity within the sector.

This type of practice has already been penalised by the Conseil de la concurrence in cases where it affected residential clients (Decision 07-D-33), and yet the practice remains in effect today.

2. The implementation of the "change of mobile" programme (Objection 2)

For the market of mobile telecommunications services aimed at business clients, in which Orange enjoys a dominant market position, the company operated a non-residential client loyalty policy that involved the implementation of the "change of mobile" programme.

The "change of mobile" policy (known as PCM) enabled clients to automatically accumulate points every month based on the age of their contract and their consumption volume. Up until the beginning of 2010, non-residential clients were only able to use the points they had acquired if they renewed their subscription to Orange for 12 or 24 months.

This loyalty programme was also used in a more targeted and intensified manner by Orange depending on the level of competition present at a given time. Orange particularly relied on this method to limit the effects of contract cancellations rates ("*churn rate*") during the 2007 implementation of the second version of its mobile number portability process.

The PCM had already been sanctioned by the *Autorité* in 2009, following its use in the French West Indies and Guiana region (Decision 09-D-36).

This practice was in active use between 2002 and 2010.

3. The increase of exit costs by the implementation of loyalty discounts (Objection 3)

Since 2003, Orange has operated a particularly complex system of loyalty reward schemes aimed at non-residential clients. The two main offers are known as "privilege", which focuses on clients' long-term commitment, and "park", which pertains to consumption volume.

The "privilege"offer

This discount involved a 10 or 15% reduction on the client's main subscription in exchange for an extension of the period of the original contract from 12 to 24 (or 36) months. This reduction, which was offered to all non-residential clients, has existed in its current form since 2003, and includes a renewal by tacit agreement for a renewable period of 12 months.

If the client wishes to cancel the contract, they may do so only within the last month before their subscription ends; outside this short timeframe, of which the client is not particularly well-informed in advance, any cancellation will lead to the client having to pay a fine equal to the total cost of remaining subscriptions.

The "park" discount

The "park" reduction concerns the entire non-residential sector (landlines, mobiles, and internet) and is applied in retroactive way based on the total number of phone lines covered by the client's subscription, as well as their effective consumption (which is to say the number of call minutes used). Above and beyond 100 lines, the discounts – which may be quite significant – are awarded in the form of individualised offers. A client having opted to divide their telecommunications-service requirements between several operators would therefore risk severely decreasing the reductions available, making the choice of a multi-operator system more expensive.

The "park" discount is applied in a cumulative manner, and may complement the "privilege" discount; both may be applied at the same time as other commitment (or re-commitment) offers and reductions linked to contract duration or call

volume that the company may be offering at a given time.

The *Autorité* considered that the system of loyalty discounts could have the effect of foreclosing the market and driving competitors out of the market.

The "privilege" reduction locks the customer in through the cumulative effect of extending the initial period of the commitment, increasing it from 12 to 24 or 36 months, as well as the automatic-renewal mechanism at the end of this period and the possible application of early-leaving charges that often act as a deterrent.

As for the "park" reduction, this is an incentive mechanism designed to achieve maximum concentration of the total number of lines that a single customer rents from Orange.

All of these reductions have cumulative effects that are mutually reinforcing and supplementary. In particular, the *Autorité* considered that the "privilege" reduction, on its own or coupled with other reductions, would have the effect of a "plethora" of commitments, the customer being unaware of the date on which the commitment ended, as this would be different for each of its lines, thus inducing the risk of indefinitely locking in the customer. It also increases the costs that other operators would have to incur, especially the costs of the commercial prospecting and acquisition of customers, through early cancellation penalties often paid by a third-party operator instead of by a customer in order to convince the customer to migrate.

These reductions continue to be applied.

4. The introduction of an exclusivity discount for virtual private networks (VPN) (Objection 4)

Setting up a virtual private network (VPN) enables companies who own several sites in the country to interconnect them so that they can exchange data in a securitised manner. Like the other operators, Orange markets a certain number

of “virtual private network” offers (especially its “Equant IP VPN” and “Business VPN” offers).

In the context of these offers, OBS has introduced a number of rate reductions linked, in particular, to commitments involving duration or quantity, although it instructs its sales force only to allow customers to benefit from these reductions on condition that no third-party operators are allowed to connect to the sites.

This exclusivity instruction is translated into the fact that a company cannot obtain any reduction in the rate it pays if it shares the sites of its VPN between Orange and a third-party operator.

This practice, consisting of setting up an exclusivity discount, is considered to be restricting competition, both with respect to its ability to tie in customers as well as its ability to exclude competitors.

The exclusivity-reduction system was implemented between 15 July 2006 and July 2015.

Serious practices

It is first of all appropriate to stress the particular responsibility of Orange which is the incumbent operator and which consequently occupies a strategic position in the electronic communications sector in both the wholesale and retail markets.

Objection 1concerns a discrimination practice concerning access to information involving the copper local loop, while objections 2 to 4, concerning the loyalty and exclusivity discounts, involve exclusionary conduct. When implemented by a company occupying a dominant position, this type of practice is considered to be serious by competition authorities, to the extent that it has the effect of

preventing, through means that do not depend on merit-based competition, access by competitors and their development within the market.

The four practices alleged constituted significant and cumulative obstacles to changing an operator and contributed to stultifying a market that was already suffering from reduced fluidity due to the reluctance of companies to change operator because of the complexity of the migration process.

The victims of these practices are not only those operators that are in competition with Orange, but above all, all the French companies, regardless of size. With respect to third-party operators, it should be noted that over and above their competitive situation in the retail market, there is also their dependency vis-à-vis Orange on the wholesale markets. With respect to customers (all of the French companies and public administrations), electronic communications represent a quasi-mandatory expense and the quality and price of these services directly affect their competiveness. Due to these practices, they have experienced higher prices or have been able to obtain services that are less innovative than if they had had the choice of choosing an operator that is a competitor of Orange.

The fact that Orange had implemented such practices simultaneously for nearly 10 years constitutes an aggravating factor, especially as Orange was fully aware of the scope of its machinations. In fact, Orange had actually been penalised on seven occasions over the past 15 years for similar exclusionary practices or discrimination[3].

Injunctions ans sanctions

Orange chose to cooperate with the Autorité de la concurrence, both in respect of the findings of these practices, whose anticompetitive nature it did not dispute, as well as the result of the case, which took the form of a financial

penalty and injunctions designed to restore the competitive functioning of the marketplace immediately.

In view, on the one hand, of the fact that Orange did not dispute the objections, and the resulting savings in procedure, and, on the other hand, the seriousness of the practices, the harm done to the economy and the fact that repeated nature of the offences, the *Autorité de la concurrence* has decided to impose a fine of 350 million euros on Orange.

This is, to date, the highest fine ever imposed by the Autorité de la concurrence against an individual company.

This financial penalty is accompanied by the following injunctions:

- To introduce, within an 18-month period, an arrangement guaranteeing the provision to operators of information about the local copper loop originating from the same sources, within the same time frames, under the same conditions and at an identical level of reliability and performance as those that are enjoyed by its own sales commercial services. From now on, Orange should implement any temporary measure making it possible to improve the conditions under which operators have access to information by putting them in the closest- possible touch with its sales teams. The ARCEP will be involved in monitoring compliance with this injunction.

- To take any useful and necessary measure to halt the practice of offering loyalty discounts, as covered in objection 3, and to abstain in future from implementing practices with an equivalent purpose or effect.
  Within three months, Orange should have: (i) changed the manner in which it calculates the cost of cancellation linked to subscription to the "privilege" reduction for the initial commitment period of 24 or 36 months, these costs not to exceed the reimbursement of objective counterparts, such as, for example, a subsidy for renewing the terminal, and proposing changes to current contracts for this purpose; (ii) ensuring that customers are provided with clear information at all times concerning the end-dates for

commitment to their lines; (iii) allowing customers to be easily aware of the cost of cancellation of all their lines.

- To cease offering the exclusivity reductions covered in objection 4 and to abstain from implementing any equivalent practice.

[1] Bouygues Telecom withdrew its complaint in April 2014.

[2] The Autorité also received complaints from Colt, but the most recent of these could not be joined to the current investigation due to the timeframe involved.

[3] Decisions 94-D-21 of 22 March 1994 and 97-D-53 of 1 July 1997; judgement of the Paris Court of Appeal of 29 June 1999; décisions 01-D-46 of 13 July 2001; 05-D-59 of 7 November 2005; 07-D-33 of 15 October 2007 and 09-D-36 of 9 December 2009.

> For more details about this case, please consult the full text of decision 15-D-20 of 17 December 2015 concerning practices implemented in the telecommunications services sector available

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