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

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Background

Following a referral by the French Telecommunications Regulator (ARCEP), the Autorité de la concurrence today issued an opinion in favour of the extension of ex-ante regulation of the upstream wholesale DTT broadcasting services market envisaged by the ARCEP.

The Autorité de la concurrence considers that the market still meets 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.

The Autorité also considers that regulation should be extended by three years rather than two, as envisaged by the ARCEP, since the vast majority of broadcasting contracts will be renewed in 2020 and especially in 2021.

DTT broadcasting services

To broadcast their programmes over the air, multiplexes, which group television channels sharing the same frequencies, broadcast their programmes via operators. These operators transmit their signals from broadcasting sites all over the country to television viewers' antennas. These broadcasting operators are

chosen by the multiplexes on the basis of invitations to tender.

In order to offer their broadcasting services to the 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.

Since 2016 and the acquisition by TDF of Itas Tim, the leading alternative DTT infrastructure operator, competition in the market has decreased with only two broadcasters now offering their services to the multiplexes: the incumbent broadcaster TDF, which is present across almost all the broadcasting areas, and Towercast, which has broadcasting sites of its own but also operates from TDF's sites.

Extension of regulation envisaged by the ARCEP

In view of TDF's significant influence in the upstream wholesale DTT broadcasting services market, the ARCEP has imposed obligations on the incumbent operator since 2006 and throughout the first four cycles of regulation. These include obligations regarding access to its infrastructures, non-discrimination, transparency and price control. The 2015 market analysis decision on the fourth cycle of ex-ante regulation of the upstream wholesale digital terrestrial television broadcasting services market expired in December 2018.

The ARCEP initially considered proposing that regulation should end in 2019, mainly on the grounds that IPTV[1] consumption exceeded DTT consumption for the first time in 2017, and that high-speed and very high-speed[2] access had increased .

However, the stakeholders consulted by the ARCEP were unanimously opposed to the cessation of regulation that it was considering. In particular they highlighted the fact that a speed of 8 Mbit/s was not sufficient to support a household's audiovisual consumption, given not only the number of televisions per household but also the other uses that consume bandwidth. As a result, the ARCEP abandoned the prospect of deregulation from 2019 and, in the draft decision referred to the Autorité for an opinion, considers extending application of the previous market analysis decision by two years.

Regulation justified by a reduction in competition

The Autorité notes firstly that the competitive situation has changed compared to the last analysis cycle. Since TDF acquired Itas Tim, the leading alternative operator of infrastructure, in 2016, TDF's market share in infrastructure has grown significantly to 90.4% at the end of 2017.

The Autorité also notes the persistence of high, non-transitory barriers to entry for alternative operators wanting to set up broadcasting sites, which include constraints on the location of alternative sites because television viewers' antennas are already orientated towards TDF's historic sites, natural and administrative barriers mainly due to planning rules, and hosting contract exit conditions, which can delay the migration of service points to newly deployed sites.

Moreover, the acquisition of Itas Tim has contributed to a reduction in competition between services, reflected in a decrease in the downstream alternative operators' overall market share: at the end of 2017, only 23.1% of the multiplexes' frequencies were broadcast by Towercast; by comparison, 33.7% of those frequencies were broadcast by alternative operators in 2015. This reduction in competitive pressure in the downstream wholesale market could therefore enable TDF to increase its tariffs in areas where infrastructure competition is non-existent and reduce them in areas where there is an alternative broadcasting site.

Without regulation, the survival of alternative operators in the downstream wholesale market appears to be under serious threat, in a context where the multiplexes will be putting the vast majority of their service points back out to tender in 2020 and especially in 2021.

In view of this, the Autorité considers that the ARCEP's decision to extend the ex-ante regulation of the upstream wholesale DTT broadcasting services market is justified.

The Autorité favours extending regulation by three years instead of the two years envisaged by the ARCEP

The ARCEP considers that extending regulation by two years is necessary, justified and proportionate in view of the duration of the audiovisual reform legislative process, which will not be completed until the end of 2019, and the need for sufficient time then to carry out its market analysis.

The Autorité considers that regulation should be extended by three years since the vast majority of broadcasting contracts will be renewed in the next three years (in 2020 and especially in 2021), at a time when the development of alternative sites is not sufficient to ensure effective and fair competition between broadcasters, and is likely still to be so in 2021.

In this context, to enable sustainable competition to develop, the Autorité considers it, at a minimal level, essential that Towercast has, in particular, ongoing access to TDF's infrastructure in the upstream wholesale market for the next three years.

[1] Distribution of television services by an internet service provider.
[2] The Autorité considers that strong growth in audiovisual consumption on high-speed or very high-speed fixed networks is unlikely to challenge in the short term the specific advantages still offered by DTT in terms of both population coverage and television reception quality, compared to other digital broadcasting platforms.

> Text of opinion 19-A-01 of 23 January 2019 on a referral by the ARCEP for an opinion in application of Articles L. 37-1, D. 301 and D.302 of the French Postal and Electronic Communications Code (Code des postes et des communications électroniques) on extending ex-ante regulation of the upstream wholesale market in digital terrestrial television broadcasting services

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