In an opinion submitted to the ARCEP, the Autorité expresses reservations about the concessions envisaged in the context of the ex ante regulation of the upstream wholesale market for DTT broadcasting services

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Background

Referred to by the French Telecommunications and Posts Regulator (ARCEP), the Autorité de la Concurrence has issued its opinion on the upcoming launch of the fifth round of *ex-ante* regulation of the upstream wholesale market for DTT broadcasting services (period 2022-2026). The Autorité notes the fact that this new regulatory cycle is based solely on commitments proposed by TDF, instead of the regulatory obligations previously imposed by the French Telecommunications and Posts Regulator (ARCEP). On the other hand, it considers that the proposed commitments contain certain concessions which appear difficult to justify in the absence of an improvement in the competitive situation.

DTT broadcasting services

Channels sharing the same frequency are grouped into multiplexes to ensure the terrestrial broadcasting of DTT. These multiplexes rely on operators (TDF, the incumbent operator, and towerCast), which broadcast audiovisual signals

from broadcasting sites across the country to viewers' antennas. The multiplexes choose these broadcasters after calls for tender.

To offer their broadcasting services to the multiplexes, TDF's competitors can operate from their own broadcasting sites when they have created them (full infrastructure competition) or broadcast from TDF's sites (service competition). Since TDF's acquisition of Itas Tim in October 2016, only two broadcasters have offered their services to multiplexes; they are TDF, the incumbent operator present in almost all broadcasting areas, and towerCast, which has its own sites but also operates from TDF sites. This has led to a reduction in the competitive pressure on the incumbent operator.

A regulated sector since 2006

To allow competition between broadcasters to develop, the French Telecommunications and Posts Regulator (ARCEP) has imposed obligations on TDF since 2006 relating to access, non-discrimination, transparency, tariff control, accounting separation and cost accounting. The terms of this regulation have evolved over time, in particular those relating to tariff control obligations.

Since 2015, the French Telecommunications and Posts Regulator (ARCEP) has been engaged in a regulatory reduction process that led it to announce the end of regulation in May 2020, at the end of the extension of the fourth regulatory cycle, without launching a new market analysis. The French Administrative Supreme Court (Conseil d'Etat)1, which was referred to by towerCast, annulled this decision and ordered the French Telecommunications and Posts Regulator (ARCEP) to conduct a new market analysis. The referral to the Autorité falls within this framework.

Ex ante regulation still necessary

In the Autorité's view, the conditions for the ex ante regulation of the upstream wholesale market for DTT broadcasting services have still not been met.

After a sharp deterioration due to TDF's acquisition of Itas Tim, the competitive situation has changed very little compared to the last cycle. The barriers to entry also remain high.

Furthermore, the development of alternative sites to those of TDF is currently insufficient to ensure effective and fair competition between broadcasters and is likely to remain so for at least the next five years. Access to TDF's broadcasting infrastructure therefore remains essential for an alternative broadcaster. In this context, ex ante intervention by the sector-specific regulator is still necessary to ensure in particular that TDF meets reasonable requests for access to its broadcasting infrastructure.

The French Telecommunications and Posts Regulator (ARCEP) has the means to monitor and the power to impose penalties to control the commitments proposed by TDF

In view of the fifth round of regulation, and for the first time since 2006, ARCEP is considering not imposing regulatory obligations on TDF but basing ex ante regulation solely on commitments proposed by TDF and made binding by ARCEP's decision, as permitted by the French Post and Electronic Communications Code.

The Autorité has no objection in principle to the new regulatory cycle being based on a mechanism of commitments by TDF made enforceable by a decision of the French Telecommunications and Posts Regulator (ARCEP). The latter has the same powers of control and sanction as when it imposes regulatory obligations.

However, the Autorité has reservations about some of the concessions arising from the commitments proposed by TDF

The Autorité considers, by contrast, that some of the concessions resulting from the commitments proposed by TDF do not appear justified.

On the one hand, the fact that the competitive situation has not improved since the last round of regulation makes it difficult to identify a justification for some of these concessions.

On the other hand, some commitments could usefully be formulated in more precise terms and provide for greater transparency to ensure their effectiveness and verifiability.

Lastly, the Autorité invites the French Telecommunications and Posts Regulator (ARCEP) to ensure that TDF's commitments reflect the changes that may occur in the sector as a result of the modernisation of the DTT platform, and increase the quota of hosting contracts that can be terminated without compensation being due to TDF.

[1] See judgment no. 444751 of 31 December 2020

communications (Code des postes et des communications électroniques) concerning the ex-ante regulation of the upstream wholesale market for the terrestrial digital broadcasting services of television programmes

See full text of the opinion

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