Cloud computing: The Autorité de la concurrence issues an opinion on certain provisions of the draft law to secure and regulate the digital space

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Background

Referred to by the French Deputy Minister in charge of the digital transition and telecommunications, the *Autorité* has issued an opinion on three articles of the draft law to secure and regulate the digital space. The *Autorité* shares the concerns expressed in the draft law regarding certain market practices or failures in the cloud computing sector that may warrant regulatory intervention. The *Autorité* nevertheless emphasises that, given the European regulatory context in which the draft law is being introduced, it is important to ensure that the planned measures are properly coordinated with the future European framework, so as not to penalise the stakeholders operating in the French market.

The *Autorité* has therefore issued five recommendations, aimed in substance at:

- drawing the attention of the legislator to the need for consistency between the transitional regime provided for in the draft law and the provisions of the future Data Act
- clarifying the definitions of "cloud computing service" and "cloud computing asset"
- clarifying the conditions for the duration and renewal of cloud computing assets
- clarifying the data transfer fees
- ensuring that the measures related to interoperability and portability are properly coordinated with the future Data Act

Lastly, the *Autorité de la concurrence* started proceedings *ex officio* on 27 January 2022 to issue an opinion to analyse competition conditions in the cloud computing sector. This starting of proceedings *ex officio* was followed by a public consultation and will result in the publication of an opinion from the *Autorité* in the coming weeks. This opinion is intended to analyse some of the practices concerned by the draft law, from among a set of practices that may, alone or together, raise competitive risks.

The importance of the cloud sector warrants special attention from a competition point of view

Cloud computing is a major technological development at the heart of the digitisation of the economy, allowing companies to access supplier-managed computing capabilities online. This sector is evolving rapidly and is expected to grow at an average annual rate of 14% by the end of 2025. However, the *Autorité* notes that the development of cloud computing has so far been slower in France than in other European countries.

The analysis that the *Autorité* is currently conducting as part of the investigation of its opinion tends to show a trend towards concentration around several powerful stakeholders in the French market. The *Autorité* also questioned practices in the cloud sector that could restrict competition on the merits.

The *Autorité* therefore agrees with the need to ensure that markets are as contestable as possible and so considers, as does the Government, that the regulation of certain practices (such as those relating to data transfer fees or egress fees) may be justified.

The Autorité *stresses the importance of linking the planned measures with the European regulatory framework*

The draft law submitted to the *Autorité* for its opinion is part of a rich regulatory context. Several European regulations (Digital Markets Act, Data Act, Data Governance Act) that have recently been or are currently being adopted include provisions that are very similar to those considered by the draft law. As soon as they come into force, these texts will become directly applicable in France and will replace national provisions on the same issues, in accordance with the principle of the primacy of European Union law.

The *Autorité* considers that, in the absence of sufficient coordination, the provisions of the draft law could create temporary imbalances with the regulations implemented at the European level; this would entail sunk adaptation costs for stakeholders operating in the French market.

To limit these risks, the *Autorité* considers that the provisions should be as close as possible to the framework to be established at the European level.

The *Autorité* also notes that many of the implementation details of the proposed obligations will be specified by an implementing decree, which limits its ability to assess their potential competitive consequences.

Recommendation 1 - Promote a framework at the European level

To limit potential temporary imbalances and sunk adaptation costs, the transitional system should as far as possible be aligned with the provisions due to take effect when the Data Act comes into force.

***The other recommendations of the* Autorité**

On Article 7 of the draft law on the control of transfer fees and cloud computing assets

The *Autorité* calls for a clarification of the definition of certain terms in this article.

Recommendation 2- Clarification of the definitions of "cloud computing service" and "cloud computing asset"

Many concepts, such as "cloud computing service" and "cloud computing asset", lack clarity.

The *Autorité* believes that the definition of "cloud computing service" could be clarified to take into account the distinction between Infrastructure as a Service ("IaaS"), Platform as a Service ("PaaS") and Software as a Service ("SaaS").

The same applies to the notion of "cloud computing asset" as presented in the draft law, which should be clarified to encompass the reality of the programmes and credits offered by providers and to avoid possible strategies to circumvent the law based on imprecisions in the legal scope.

Recommendation 3 - Clarification of the durations and renewal conditions of cloud computing assets

The *Autorité* notes that cloud credits can be considered from the point of view of either competition law or restrictive competition practices [1].

If cloud credits are regulated, the *Autorité* recommends making a distinction between cloud credits offered in the form of free tests or trials limited to a few months, and cloud credits offered in the form of business support programmes,

which have a substantially higher value and longer duration.

The *Autorité* notes that, in the context of this opinion, the reference to the decree to determine the duration and conditions of renewal of the assets does not allow it to analyse the competition aspects. However, it recommends setting the duration of cloud credits in the form of support programmes and the conditions for renewing these assets after consultation with stakeholders (clients and suppliers).

In particular, the conditions for the renewal of assets need to be clarified and should at the very least allow providers to continue to offer free tests or trials while limiting the renewal capacity of support programmes.

The *Autorité* also stresses that the legislator must pay particular attention to the question of how the framework for transfer fees at the national level is linked to the provisions of the Data Act on this subject.

Recommendation 4 - Clarifications of data transfer fees

The *Autorité* agrees with the Government that egress fees are likely to have anticompetitive effects related to the risk of customer lock-in, by making it more difficult to migrate cloud services to another provider or to use multiple providers at the same time.

However, the draft law should mirror the proposed Data Act and, as a minimum, provide for a transition period in phasing out these fees.

On Article 8 of the draft law relating to interoperability obligations for cloud computing services.

Lastly, the *Autorité* has put forward a recommendation on Article 8 of the draft law relating to interoperability obligations for cloud computing services.

In particular, it recommends clarifying certain concepts in the article of law, such as interoperability and portability, ensuring consistency with the future Data Act and inviting the regulator to focus on IaaS services.

Recommendation 5 - Ensuring that the measures related to interoperability and portability are properly coordinated with the future Data Act

The *Autorité* agrees with the Government that the market does not currently allow customers to easily use third-party cloud computing services. The future Data Act is likely to include targeted measures to improve interoperability and portability in the sector and it would be appropriate to wait for its adoption, both for reasons of efficiency and to avoid the risk of a conflict with French law and unnecessary expense for French companies. In addition, important details concerning portability and interoperability obligations, the establishment of standards and open technical specifications, and the content of reference offers are to be determined by decree, which means that it is not possible to analyse their competitive aspects in the context of this opinion.

The *Autorité* accordingly recommends:

- clarifying the key concepts in the article of the law and ensuring that they are consistent with the future Data Act;

- inviting the Electronic Communications, Postal and Print media distribution Regulatory Authority (Arcep) to focus its work on IaaS services, which are more homogeneous; given the time available, this would ensure better proportionality in relation to the obligations common to all services;

- ensuring that the missions and powers of Arcep respect the limits set by the future regulation.

[1] "Cloud computing assets are not the most commonly used terms by companies in the cloud sector, who instead use the terms "cloud credits". Cloud credits are trial offers in the form of service allowances offered by a provider and granting free access to a customer within a defined period. In practice, unlike a free trial, it is a sum to be spent in the form of an invoice credit granted before use."

OPINION 23-A-05 OF 20 APRIL 2023

on the draft law to secure and regulate the digital space

See the full text of the opinion (in French)

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Draft law to secure and regulate the digital space (in French)