

**Decision no. 12-D-18 of 20 September 2012 on  
practices concerning reciprocal interconnection services in the area  
of internet connectivity.**

English version 

*of the *Décision n°12-D-18 du 20 septembre 2012 relative à des pratiques mises en œuvre dans le secteur des prestations d'interconnexion réciproques en matière de connectivité Internet**

The Autorité de la concurrence (section IV),

Having regard to the letter of 9 May 2011 (registered under number 11/0035 F), whereby Cogent Communications France and Cogent Communications Inc. filed a complaint with the Autorité de la concurrence, relating to certain practices implemented by the France Télécom group in the sector of mutual interconnection services for Internet connectivity purposes and likely to be subject to Section L. 420-2 of the Commercial Code and Section 102 of the Treaty on the Functioning of the European Union.

Having regard to Articles 101 and 102 of the Treaty on the Functioning of the European Union;

Having regard to Volume IV of the Commercial Code on the freedom of prices and competition;

Having regard to the decisions on business secrecy no. 11-DSA-344 of 15 November 2011, no. 11-DSA-350 of 21 November 2011, no. 11-DSA-382 and no. 11-DSA-383 of 21 December 2011, no. 11-DSA-384 and no. 11-DSA-385 of 22 December 2011, no. 12-DSA-08, no. 12-DSA-09 and no. 12-DSA-10 of 2 January 2012, no. 12-DSA-11 of 4 January 2012, no. 12-DSA-12 and no. 12-DSA-13 of 5 January 2012, no. 12-DSA-37 and no. 12-DSA-38 of 20 January 2012, no. 12-DSA-40 and no. 12-DSA-41 of 25 January 2012, no. 12-DSA-54 and no. 12-DSA-59 of 1 February 2012, no. 12-DSA-64 of 13 February 2012, no. 12-DSA-118 of 8 March 2012, no. 12-DSA-121 of 13 March 2012, no. 12-DSA-126 of 15 March 2012 and no. 12-DSA-142 of 30 March 2012;

Having regard to the declassification decision no. 12-DECR-13 of 26 June 2012;

Having regard to the minutes of the hearing with France Télécom on 7 March 2012, relating to the preliminary assessment and competition concerns of the Case Officer;

Having regard to the commitments proposed by France Télécom on 2 April 2012 and published online on 3 April 2012;

Having regard to the observations submitted on 3 May 2012 by Cogent, SFR, OVH, Verizon France, Neuronnexion, the industry associations ASIC and Ilico, and Mr. Jérôme X..., an IP networking consultant;

Having regard to the other documents in the case;

The Case Officer, the General Rapporteur, the Government Commissioner and the representatives of France Télécom, Cogent Communications France and Cogent Communications Inc., heard at the Board hearing held on 28 June 2012;

The representatives of SFR and ARCEP<sup>1</sup>, heard by virtue of Article L. 463-7 of the Commercial Code;

Adopts the following decision:

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<sup>1</sup> The French regulator of the electronic communications and postal sectors ; hereinafter ARCEP

### **Disclaimer**

The Autorité de la concurrence provides the present translation into English of its *Décision n°12-D-18 du 20 septembre 2012 relative à des pratiques mises en œuvre dans le secteur des prestations d'interconnexion réciproques en matière de connectivité Internet* to enhance public access to information about its advisory and decision-making practices.

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## **I. FINDINGS**

### **A. REFERRAL AND PROCEDURE**

1. By letter of 9 May 2011 (registered under number 11/0035 F), Cogent Communications France and Cogent Communications Inc. (hereinafter referred to as “Cogent”), referred “*practices implemented by the France Télécom group in the transit market and related markets*” to the Autorité de la concurrence.
2. In its referral, Cogent denounced, in particular, the refusal of access to an essential facility, namely the subscribers to Orange's domestic network, AS 3215, combined with an obligation to interconnect via international routes with France Télécom's network, the AS 5511. The undertaking also alleged that France Télécom had ceased to allow prefixes to be passed on by Cogent's peers, and in particular by an American company that was its most recent transit operator, and had recently become a peer of France Télécom. The requesting party also reported a practice of tied selling between access to Orange subscribers and transit services. Lastly, Cogent claimed that France Télécom offered service providers a transit service at very low prices, creating a margin squeeze. Additionally, the requesting party emphasised the highly limited interconnection capacity which it was allocated in Paris.
3. Pursuant to Article R. 463-9 of the Commercial Code, the referral was submitted for opinion to ARCEP on 1 July 2011. ARCEP issued its opinion (no. 2011-1241) on 20 October 2011.
4. At a hearing held on 7 March 2012, the Case Officer notified France Télécom of competition concerns arising from the case. The hearing minutes were signed by the representative of France Télécom, who was provided with a copy of the report.
5. Following this hearing, France Télécom indicated its intention, in accordance with Article L. 464-2 of the Commercial Code, to propose commitments that would address the competition concerns arising out of the preliminary assessment in a relevant, credible and verifiable manner.
6. France Télécom submitted its commitments proposal to the Case Officer on 2 April 2012. They were published online the same day, to enable interested parties to comment on them.
7. Cogent, SFR, OVH, Verizon France, ASIC, Ilico and Neuronnexion, as well as Mr. X..., an expert consultant in the field of IP networks (whose observations were adopted in full by the association “*Internet libre en Corrèze – Ilico*”), took part in the market test.

### **B. SECTOR OVERVIEW**

8. The Internet network interconnects all of its end users, that is, information society service providers (hereinafter ISSPs), which provide content and services, as well as the subscribers to Internet access providers (hereinafter IAPs). Transit operators support these

connections. The respective roles of these three types of Internet players, the workings of the interconnection market and, finally, the recent changes in that market are described in turn here below.

## **1. THREE CATEGORIES OF PLAYERS**

### **a) Internet access providers (IAPs)**

9. IAPs provide retail market end users with a connection to the global Internet. To this end, IAPs deploy a national network featuring three segments: the local loop that connects each subscriber; the intermediate backhaul network; and lastly the core network (or backbone network), which acts as a connection interface between the other worldwide networks in order to form the Internet. The IP traffic carried on the IAPs' network consists, on the one hand, of queries submitted to the Internet by end users and, on the other hand, of the data returned to those users in response to their queries. In order to meet their subscribers' demand for Internet content, IAPs must provide interconnectivity between their own network and all other networks (ISSPs and IAPs).

### **b) Information society service providers (ISSPs)**

10. The term "information society service provider" (ISSP) covers a wide range of entities that may be sorted in two categories: content providers (CPs), such as Wikipedia or a television channel's VOD website; and service providers (SPs), which provide online data storage and instant messaging services, for example. Their respective Internet activities are different, sometimes resulting in significant disparities in traffic volumes as well as different IP transit requirements.

### **c) Transit operators**

11. Transit operators such as Cogent, Level3 and Open Transit (a France Télécom brand) pool the interconnections of all end users. As the local networks that provide access to end users are scattered all over the globe, it is necessary to physically connect them by means of interconnecting international and intercontinental cable networks. Accordingly, transit services provide access to the whole Internet, even over long distances, eliminating the need to build and maintain a very large number of bilateral interconnections between each content or service provider and each Internet service provider (IAP).

## **2. OPERATION OF INTERCONNECTION AGREEMENTS**

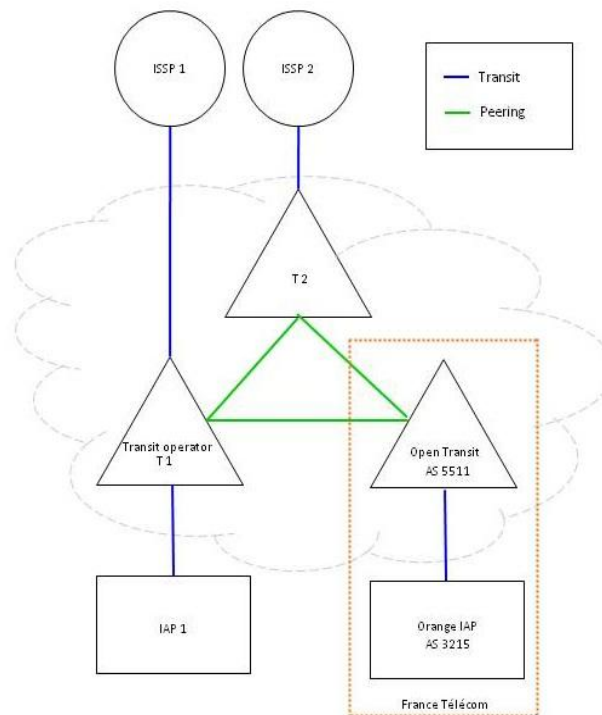
12. The operation of the worldwide Internet network is based on the interconnection of the aforementioned players. Here below follows a concise description of the technical operation of this interconnection (i), which determines the type of contractual relationship (namely "transit" or "peering"), which these players may choose (ii) based, in particular, on their position in the hierarchical structure of the Internet (iii).

### a) Internet routing principles

13. The World Wide Web consists of numerous separate but interconnected networks owned by various operators. Each of these juxtaposed networks is made of an autonomous system of routers and servers, collectively referred to as “*autonomous systems*” or AS. The World Wide Web is formed by interconnecting these ASs.
14. According to the description given by ARCEP, in order for information to be exchanged between one point and another on the Internet, it must be routed from AS to AS and, within each AS, pass from router to router, each of which is identified by a specific IP address. To achieve this, each AS notifies the other ASs with which it is interconnected of its IP prefixes, which refer to groups of IP addresses. These IP prefixes are then propagated throughout the Internet, peer to peer, via the existing interconnections, in order to indicate the routes that can be used to reach the routers or subscribers identified by said IP addresses. This system of notifications and propagation underpins the Internet's global connectivity, and makes it possible for third parties to send traffic. It is still possible for two ASs to not propagate prefixes however, for technical or business reasons. Such non-propagation blocks the corresponding routes.

### b) Various types of interconnection agreements

15. Traditionally, a distinction is made between “transit” and “peering” (peer-to-peer) agreements.



#### - Transit

16. The purpose of transit relations is to provide customers of transit operators, i.e. IAPs or ISSPs, with access to all parts of the global Internet. This is known as “*universal transit*”. This is achieved via a paid service, based on the capacity used, charged from the first megabit sent. In practice, when an IAP purchases a transit service from a transit operator,



the operator grants connectivity to any and all players by propagating the IAP's prefixes via its own transit network or those of partners connected to it.

17. A number of different transit operator profiles have emerged, depending on their target clientele:
  - Transit operators whose customer base consists largely of ISSPs send more traffic to their partners than they receive. This applies to Cogent. Certain uses, such as video serving, result in highly asymmetric data exchanges with IAP networks, as the query submitted by the Internet user is much smaller than the requested data. This is the case, for example, when Internet users connect to the MegaUpload website, which provides video content and is a customer of Cogent;
  - Transit operators set up by IAPs and having mainly IAPs as their customers: some IAPs have deployed an international network of transnational cables, enabling them to develop direct interconnections throughout the world, in the same way as transit operators. Such investments enable IAPs to build a transit handling business. An investment of this type may be justified, for example, by an IAP with multiple subsidiaries in different countries, as is the case for a number of American IAPs and publicly-owned ex-monopoly European IAPs. As the Internet users who are the customers of these IAPs tend to receive more content than they send, these organisations receive more traffic from their partners than they send. France Télécom belongs to this category;
  - Lastly, certain transit operators have balanced levels of traffic between these various players.
- Peering
18. According to the definition provided by ARCEP, a peering (peer-to-peer) agreement is a type of interconnection agreement that enables two players to exchange traffic directly by sending it from one to the other without using the routes provided by the international network. In such an arrangement, the players do not propagate the prefixes of their other partners, thereby rendering the link usable for their mutual traffic only. A third operator entering into a peering agreement with one of the two partners will not, therefore, have access to the second partner's subscribers.
19. In the traditional framework, in which peering is implemented between partners with similar profiles, such exchanges are provided on a settlement-free basis, as the respective contributions of the two parties are balanced. Peering agreements may, however, provide for a charge to be levied if the asymmetry between the two partners is too great. The baseline symmetry ratio - generally in the region of 2 to 1 - and the amounts charged between partners for flows in excess of the permitted asymmetry threshold are usually stated in the operator's peering policy.
20. Although peering agreements generally operate on a settlement-free basis within the aforementioned symmetry ratio limits, the emergence of structurally dissymmetric traffic flows between certain players - typically between ISSPs and IAPs, and in some cases between IAPs and/or transit operators - has recently given rise to so-called "paid peering" agreements that apply from the first megabit sent rather than beyond a specified dissymmetry threshold. Payment per megabit is a typical feature of transit services, raising the question of the characterization of such agreements, also referred to (including hereinafter) as "*truncated transit*" agreements. The emergence of such "*composite*"

agreements with aspects of both peering (direct links) and transit (payment practices) is typical of recent trends in the connection agreement market.

21. In conclusion, ISSPs, transit operators and IAPS are free to choose between transit and peering tools for their connectivity requirements. Transit solutions provide connections to the whole of the World Wide Web, but a charge is payable based on the number of megabits exchanged. Peering solutions enable direct exchanges, and as such are technically preferable and generally settlement-free, but concern only one operator.
22. According to ARCEP, the majority of interconnection agreements are for settlement-free peering between operators: “Non-Tier 1” operators generally have between two and four transit contracts, but may also have several dozen, generally settlement-free, peering agreements.

### **c) Interconnection agreement hierarchy**

23. ISSPs and IAPs, depending on their size and on the interconnected long-distance networks that they have developed, can be divided into three tiered groups.
24. “Tier 1” operators are large organisations that have built long-distance networks with sufficient global coverage, and are deemed, depending on their size, to have no need for transit services in order to access all of the Internet's constituent networks. Such operators are said to be “transit free”. They are all interconnected via peering agreements that give them access to the full network. Depending how they are defined, Tier 1 operators may occasionally use paid peering despite being transit free. There are between 9 and 20 Tier 1 operators, depending how restrictively this category is defined. As Cogent and France Télécom (since 2010) do not purchase transit services, they may be considered to be Tier 1 operators, although this status does not prevent them from maintaining one or more paid peering relations.
25. Tier 2 operators are medium-sized operators that have peering agreements with each other within the same geographical area, but are obliged to buy transit services in order to access the global Internet. The main French IAPs, other than France Télécom, belong to this category.
26. The smallest, Tier 3 operators, rely exclusively on transit services for their connectivity. To this end, they develop relations with one or more transit operators.
27. This organisation forms an ascending hierarchy: smaller operators, whether IAPs or ISSPs, stand to benefit from signing peering agreements as soon as they have grown large enough, thereby becoming Tier 2 operators. Further benefits are to be had when they have developed a large enough network to peer with a Tier 1 operator, thereby saving on transit costs. Similarly, Tier 2 players that have entered into agreements with a large enough number of partners can in turn develop a transit services business as a supplement to their core business as an IAP.

### **3. THE DATA INTERCONNECTION MARKET**

28. The quantity of data exchanged via the Internet has grown constantly in recent years. According to statistics released by ARCEP, citing a study by Cisco, the global market is expected to grow at an average annual rate in excess of 30% during the period 2010-2015,

driven partly by growth in the global online population, but primarily by the boom in bandwidth-intensive online video services. According to Cisco, the various forms of video traffic may together account for nearly 90% of all traffic by 2015.

29. However, this strong growth in traffic does not imply equivalent growth in transit expenditure, as the falling cost and higher performance of network equipment have significantly reduced transit costs, enabling IAP bills to remain relatively stable over the period.
30. [Confidential]
31. The position of transit operators in the market has shifted significantly in recent years, however. Originally, the cost of deploying a network and the economic weakness of ISSPs, which at the time were struggling to find a suitable business model, gave transit operators a central role, reflected in the significant share they received in the value derived from end users, i.e. ISSPs and subscribers.
32. Two phenomena have since played a role in shifting this balance, however. Firstly, the steadily growing weight of a few large ISSPs (notably Google, Amazon, EBay and MegaUpload) resulted in some of them interconnecting directly with IAPs, thereby acting as their own access providers, in order to enhance their quality of service while no longer being required to pay transit operators.
33. Furthermore, the growth of ISSPs, particularly among video streaming ones, has created for transit operators – specialised in this client group – a risk of severe structural imbalances between the flows to and from IAPs. Such imbalances are a potential source of significant tensions with IAPs, particularly as only part of the sharp fall in international transit costs has been reflected in lower access costs for Internet users. The relatively capillary nature of IAP backhaul networks prevents them from achieving the same economies of scale. Consequently, the growth in traffic has forced IAPs to steadily increase their infrastructure investment in order to handle the outgoing flows from ISSPs, on less favourable terms than for transit operators. As a result, certain IAPs have sought to increase the revenue derived from ISSPs, either directly or via their relations with their transit operator.

#### **4. THE PARTIES CONCERNED**

##### **a) The requesting parties: Cogent Communications France and Cogent Communications Inc.**

34. Cogent Communications Inc. is a US company with its headquarters in Washington, DC. It was founded in 1999 and is listed on the NASDAQ stock exchange. In 2010, the company reported sales of \$263 million (of which approximately 22% were generated in Europe). It is a Tier 1 (transit-free) international provider of Internet services and an active network operator in the wholesale market (and also in the retail market for a clientele of business customers, although this applies mainly in the United States). Cogent operates a long-distance optical fibre network covering much of North America and Europe, including transatlantic links. At international level, the optical fibre-based IP network operated by Cogent measures more than 82,000 km in length. The company provides its services in 30 different countries and is interconnected with almost 3,500 other networks and operators.
35. Cogent has multiple subsidiaries, all fully-owned, in the various countries in which it operates, including Cogent Communications France, a simplified joint-stock company with

a sole shareholder (*société par actions simplifiée à associé unique*) having share equity of €13,075,125. This subsidiary is a registered operator with a licence granted under the terms of Articles L.33.1 and L.34 of the French Electronic Communications Code (*CPCE – Code des Postes et Communications Electroniques*).

36. Its service offering includes IP transit services, point-to-point data transmission via Ethernet and physical hosting of equipment at its data centres. This service portfolio is aimed at two market segments: the wholesale market, including content and service providers as well as IAPs (the main business of which is providing Internet access); and the retail Internet access market, aimed primarily at businesses.
37. The leaders in the transit market are Level 3 and Global Crossing (which recently merged), each holding a market share of approximately 20%; Cogent is thought to be the third-largest player, with a market share of around 17%.

#### **b) The offending party: France Télécom**

38. France Télécom is a limited company (*société anonyme*) registered in France. Its registered office is located at 78, rue Olivier de Serres, 75015 Paris.
39. France Télécom operates in most markets relating to the electronic communication sector. In 2011, the company reported consolidated revenue of €45.3 billion (of which €22.5 billion in France). The France Télécom group has approximately 217 million customers around the world, when all services are taken into account. In France, France Télécom is the market leader in broadband internet access, via the Orange brand.
40. France Télécom operates in the interconnection market via two distinct networks:
  - Orange Internet (AS 3215) is the national network to which customers of the Orange IAP are connected. This network is interconnected via settlement-free peering with the other major French IAPs;
  - Open Transit (AS 5511) is the international network, interconnected with Orange Internet but also connected to a number of other international networks via peering agreements, generally on a settlement-free basis. Orange can be considered to be a transit-free operator since 2010. As Open Transit is merely a business offering, the corresponding revenue is not reported separately in the group's accounts.

#### **5. THE DISPUTE BETWEEN THE PARTIES**

41. The networks of Cogent and Open Transit are interconnected under the terms of settlement-free peering agreements. However, France Télécom only uses the interconnection with Cogent to connect Cogent and Open Transit customers, not to obtain worldwide connectivity.
42. The networks operated by Cogent (AS 174) and Open Transit (AS 5511) are interconnected via seven interconnection gateways, four of which are located in Europe and the remaining three in the United States. Total installed capacity was 66.5 Gbits/s as of April 2011. Cogent, considering this figure to be significantly too low, requested a total capacity of 130 Gbits/s in its referral. In the light of the subsequent closure of MegaUpload, which was responsible for a large proportion of the interconnections between Cogent and Open Transit, the current capacities appear to be adequate. According to

submissions made by France Télécom during the Board hearing, Cogent currently uses less than 40% of the capacity allocated to it.

43. Of this total capacity, only 2 Gbit/s are installed in France (specifically in Paris), resulting in frequent saturation in recent years, particularly at this gateway and also in London and Chicago. In the event of congestion at the Paris gateway, traffic is forced to take a longer route, for example via the interconnection point in Madrid. However, the more signals pass through multiple routers and different networks – and to a lesser extent, travel longer distances – the more this can adversely affect quality of service (increased latency, higher packet loss rates, etc.). This phenomenon is known as “*tromboning*”. Users may perceive the effects of tromboning as a lower quality of service, affecting the image of content suppliers among Internet users, who, in the absence of the full facts, may hold the ISSP responsible for this poor quality, and by extension, Cogent, thus prompting ISSPs to seek alternative partners if it is unable to provide the traffic quality that Internet users have come to expect. [Confidential].

### C. THE MARKETS CONCERNED

44. The following sections define the relevant market concerned by the dispute and describe the position of France Télécom in this market.

#### 1. The relevant market for direct or indirect access to Orange subscribers

45. The following sections describe the relevant market in terms of (a) its products, and in terms of (b) its geographical characteristics. In each part, the main observations arising out of the market test are given.

#### a) The relevant market in terms of products and services

##### *The market for specific access to Orange’s online customers*

46. The Internet connectivity market, which has emerged relatively recently, is an unregulated competitive market. Consequently, in the absence of specific regulations, the terms of interconnection agreements are the result of business negotiations between the players.
47. Concerning the market specifically concerned by this decision, Cogent defines it as the market for direct access to subscribers of the Orange IAP.
48. From the demand-side perspective (ISSPs, other IAPs and transit operators), it would indeed appear that the possibility of exchanging traffic with Internet users who have subscribed to Orange's Internet access services, but not with subscribers of other IAPs, denotes a specific requirement.
49. This specific requirement is not fulfilled by means of the peering agreements between Open Transit and its peers. While it is true that France Télécom provides access to Orange subscribers and to all Open Transit customers in such agreements, it benefits from reciprocal access, whereby the partner transit operator also provides access to the networks of its own customers. Similarly, “*universal*” transit offerings, which are intended for ISSPs and do not specifically target Orange subscribers, as explained above (point 16), address a different requirement.

50. The specific demand for access to Orange subscribers may be satisfied in two ways: either directly or indirectly.
51. Firstly, France Télécom has service offerings that provide direct connectivity with the domestic network of Orange (Orange Internet, AS 3215). The purpose of these offerings (referenced as “C3215” and “DCIO”) is essentially to exchange traffic with Orange customers in France.
52. Secondly, the international network (Open Transit, AS 5511) provides international connectivity services, in principle for the purpose of connecting customers (IAPs or ISSPs) to the whole Web. However, such universal connectivity offerings provided by transit operators may also, in certain cases, satisfy the demand for interconnection specific to Orange, when used in similar conditions to those applicable to offerings that provide interconnection with the 3215 domestic network. Although the contract terms governing transit offerings generally provide for global access to all networks, they may also be used exclusively for access to a particular network, and in such cases, the price agreed between the customer and the transit operator will reflect the predominant or exclusive use of certain routes. More rarely, this restriction to certain routes may be specified contractually (“truncated transit”).
53. Such offerings may emanate from the France Télécom group. For many partners requesting connectivity to Orange, particularly content and service providers, the offerings proposed by Open Transit on AS 5511 provide an alternative to direct access offerings on 3215 and in such cases are used only to access Orange (with access to the rest of the Web being provided by other transit operators).
54. Such offerings may also be provided by other transit operators. Since 2010, France Télécom is considered to operate a Tier 1 network and as such it needs to interconnect with all networks. Accordingly, the operator maintains peering interconnections with national and international networks. These mutual interconnections established by France Télécom via Open Transit enable its partners to provide end customers with offerings that satisfy any requirement for specific access to Orange subscribers.
55. For example, M6 has indicated that, for reliability reasons, it accesses Orange Internet users via two transit operators: Open Transit and Tata Telecom. To a certain extent, this dual provisioning also helps to optimize traffic flows by selecting the best route. The prices charged for the transit offerings of Open Transit and Tata Telecom are similar, and M6 uses almost the same capacities with each transit operator.
56. Although transit services have a universal vocation, this does not prevent certain transit offerings that are used – and sometimes negotiated to specifically or primarily reach the network of a particular IAP – from forming alternatives to direct access to that network. Several major customers of France Télécom's transit offerings address their specific need for access to Orange subscribers by arbitrating between an Open Transit contract and contracts with other transit operators. Such transit offerings, which are special inasmuch as they concern only the domestic network of Orange, might also be included in the specific market for access to Orange customers.
57. Although France Télécom has a technical monopoly for access to its network, as at some stage flows must pass through a physical interconnection, either directly with the Orange network (AS 3215) or indirectly with the Open Transit network (AS 5511), it does not have a commercial monopoly in this area. Other companies operating in the sector are in a position to provide commercial offerings that satisfy the specific requirement for access to Orange subscribers, as is the case for M6 with Tata Telecom.

58. As a result of the above, restricted transit offerings, whether provided by Open Transit or by its competitors, may be substitutable for France Télécom's direct access offerings, at least when they are negotiated and/or used to obtain specific access to Orange subscribers.

*Observations arising out of the market test*

59. Several observations relating to the definition of the market arose out of the market test.
60. According to the requesting party, indirect accesses – established via Open Transit alone or other transit operators, as well, that have peering relations with Open Transit (i.e. peers of Open Transit) – are not substitute solutions, as they are not in the same position in the value chain. In particular, Cogent claims that indirect accesses are made up of distinct transport segments.
61. Cogent has stated that it would be necessary to distinguish the various levels of access to the network, in accordance with the recommendations issued by the European Commission in relation to broadband access, wherein it is considered that unbundling and bitstream are two distinct relevant markets. As in the case in question, bitstream services not only contain unbundling services, but also provide a transmission service. Cogent stated that its request is a request for direct access to Orange customers and that it does not want or require a transmission service because it has its own transmission network.
62. The rationale, whereby a distinction should be drawn between direct and indirect offerings, in the same way that the bitstream and unbundling markets are distinct, cannot be accepted. There is no confusion between bitstream and unbundling services: in particular, bitstream providers are not able to offer subscriptions that include a broadband television service. The services offered are clearly different.
63. Considering the market for specific access to customers of Orange, the Autorité de la concurrence notes that such an access request may clearly be fulfilled by means of either a direct connection, or an indirect connection, via Open Transit. The latter point is illustrated by Cogent itself, which has only indirect accesses to Orange's Internet users. The example of M6 given in point 54 also illustrates the fact that indirect access to Orange customers may be provided in a perfectly substitutable manner by Open Transit or by a peer of Open Transit, such as Tata Telecom.
64. From a functional perspective, there may clearly be differences between the direct and indirect accesses to Orange's Internet users. If a stream carried from an ISSP located in France to Orange Internet users passes through an interconnection gateway located in another country (for example in the United States), latency times increase and quality decreases. This situation involving inefficient round trips is generally referred to as “*tromboning*”, as already mentioned in point 42. For certain applications, where latency is a differentiating factor (for example search engines), tromboning can be a disqualifying problem.
65. Nevertheless, although indirect services are potentially subject to a broad quality-of-service spectrum, it would appear that the differences in quality of service between the three modes of access considered in the market definition are in reality very small when only one third-party transit operator is used for an indirect access. These three modes indeed represent substitutable solutions for content providers seeking to specifically target Orange Internet users.
66. Regarding indirect access more specifically, Cogent stated that such access to the Orange network appeared to remain under the control of France Télécom, which would be able to determine which transit operators are authorised and to control traffic via its ratio policy.

67. Concerning the ability of France Télécom to decide, and therefore restrict, the number of competitors of Open Transit, the Autorité notes that international peering rules are such that in order to have access to all Internet routes, Open Transit must necessarily interconnect with a limited number of other Tier 1 transit operators. Peers of Open Transit as well as all their customers (whether IAPs, ISSPs or other transit operators with paid transit agreements) may use these interconnections, which France Télécom cannot refuse, to freely route flows to Orange customers and Internet users, subject to compliance with Open Transit's peering policy. By decreasing the number of peers with which Open Transit is interconnected, France Télécom would be isolating itself from entire sections of the Internet, which would not be in its interest, any more than it would be in the company's interest to refuse interconnections with non Tier 1 transit operators, as, by definition, such interconnections are paid for, generating revenue streams for the company.
68. Cogent considers, lastly, that the interconnection gateways to the domestic network of France Télécom (AS 3215) should be treated as essential infrastructure.
69. Our analysis reveals a seemingly unprecedented situation in which France Télécom effectively controls the physical interconnection with its network, but the peering agreements into which it is obliged to enter, in order to provide its customers with access to all parts of the Internet, entail a *de facto* loss of exclusive control over access to its subscribers. In such circumstances, comparisons with other markets (such as the broadband market, seaports, etc.) do not appear relevant, and, given that alternative means of accessing Orange subscribers exist, Cogent's suggestion that the domestic network should be defined as essential infrastructure cannot be accepted.
70. In conclusion, the market for service offerings providing direct or indirect access to French subscribers of the Orange IAP can be considered a relevant market, in terms of competition law.

#### **b) The geographical market**

71. Considering the geographical dimension of the market, access can in principle be provided anywhere on the planet. In reality, however, the tromboning effect described above greatly decreases the potential geographical size of the market. It is therefore probable that access offerings are only truly substitutable for Paris-based offerings within a geographical scope limited to France or possibly its immediate neighbours. The issue of its extension to immediately neighbouring countries may be left open however, since the conclusion regarding the market position of France Télécom would remain the same.

#### **2. The market position of France Télécom**

72. After examining the list of the main technical service providers (accounting for more than 80% of the traffic carried to Orange subscribers in 2011), it emerges that, of the aforementioned 80%, the amount of traffic processed by transit operators other than Open Transit represented less than half of the traffic routed to Orange. Conversely, more than half of the traffic bound for Orange was carried via a paid-for offering from the France Télécom group (3215 and 5511). In accordance with the guidelines arising out of jurisprudence in the area of market definitions, this calculation naturally does not include self-consumption.



73. Furthermore, the small proportion of competing offerings is not likely to increase freely, as competitors are subject to limitations on capacity. Any alternative offerings provided by transit operators are subject to the maximum interconnection capacities with France Télécom, as defined in their peering agreements. France Télécom controls the peering capacities and only opens or increases them if it is also in its own interest to do so. As a result, the provision of additional capacity may be subject to financial or technical conditions:
- Considering the financial perspective, France Télécom's peering policy (in common with those of most Tier 1 operators) defines a traffic ratio (the ratio between the traffic entering the Orange network and the outgoing traffic transmitted to the transit operator must not exceed a particular threshold), above which charges may be introduced. The purpose of this policy is to prevent congestion of the Orange network. As a result, a competing transit operator would not be able to respond to a request for connectivity to Orange from an ISSP with imbalanced traffic ratios (for example, video serving websites such as Netflix, MegaUpload or YouTube) unless it agreed to downgrade its ratio with respect to France Télécom, and where applicable, pay for traffic in excess of the agreed ratio;
  - Considering the technical perspective, France Télécom determines the location of the interconnection gateway. As already mentioned, having this location too far from Paris may be disqualifying for certain applications for which latency is a differentiating factor. Therefore, transit operating peers are unable to provide business offerings involving low-latency access to Orange unless they have adequate interconnection capacity in Paris or nearby countries. By granting interconnections in its own country and nearby countries parsimoniously, an integrated IAP is able to degrade the quality – in terms of latency – of any offerings from transit operator peers that provide access to its domestic national network.
74. This ability to control the capacity allocated to competitors derives from the vertically integrated nature of the international network and the national network of France Télécom. Unlike France Télécom, IAPs do not have international networks and are therefore obliged to use one or more transit operators to connect their customers to the Web. Consequently, they are able to control neither the traffic ratios, which exist only in peering agreements, nor the location of the interconnection. Although solutions do exist for limiting incoming traffic, for example by blocking a certain ratio of IP packets sent from content-serving sites considered by an IAP to be too imbalanced, justifying such a policy from a corporate image perspective (due to the warping of Internet “neutrality”) is harder than simply applying an industry standard peering policy.
75. In such conditions, France Télécom, which, as a Tier 1 operator, controls its traffic via peering, may possess significant market power.
76. Purchasers have a certain form of counter-power with regard to France Télécom. The temptation for an IAP such as Orange to charge a high price for access to its network is tempered by its need to interconnect with either the networks that host content providers or with the content providers themselves. Content providers (or their intermediaries) that are charged too high a fee may decide to limit their demand for interconnection capacity with the IAP, resulting in traffic congestion and lower connection quality for Internet users.
77. However, deterioration in the quality of connections to popular websites is liable to prompt certain subscribers to switch to a competing provider. It is precisely this mechanism that

MegaUpload, at the time a customer of Cogent, attempted to harness in the past, following a refusal by France Télécom to increase its interconnection capacity with Cogent free of charge: when Orange customers attempted to log on to the MegaUpload website, a popup window was displayed, denouncing Orange's behaviour and encouraging its customers to switch to SFR or Iliad.

78. In practice, however, several factors limit buyer-side counter-power. Firstly, no consensual performance indicators for measuring the quality of Internet connectivity and no accurate information regarding the source of network congestion currently exist. Secondly, the risk of customer defection is decreased by the fact that the IAP has a strong position in the retail market. In this respect, Orange is an attractive brand and France Télécom remains the leading operator in the domestic broadband retail market, with large market share in certain segments of the clientele, particularly in sparsely populated areas. Thirdly, Internet users are faced with barriers to changing to an alternative operator, mainly arising out of the inconvenience of losing their Internet access during the changeover to another provider.
79. Several remarks relating to this issue arose out of the market test. Cogent, inasmuch as it claims that indirect access offerings should not be included in the relevant market, considers that they cannot therefore mitigate the position enjoyed by Orange regarding access to its subscribers. Cogent takes the view that France Télécom has an “indisputable monopoly”, strengthened by Orange's position in the broadband retail market and by the vertical integration achieved by having the Orange IAP and Open Transit within the same company.
80. Contrary to the claim advanced by Cogent, this dominant position does not derive from a monopoly or the possession of essential infrastructure. As France Télécom does not have exclusive control over access to its subscribers, it cannot be considered to hold a monopoly.
81. Taking the above into consideration, France Télécom may hold a dominant position in the market for direct or indirect access to Orange subscribers.

#### **D. THE PRACTICES CONCERNED BY THE REFERRAL**

82. The case referred to the Autorité relates to a dispute between Orange and Cogent regarding their interconnection arrangements. Cogent, which counts the video serving website MegaUpload among its customers (at the time of the referral, 90 % of the traffic received from Cogent was from MegaUpload, according to France Télécom), wishes to carry traffic from its ISSP customers on Orange's network without paying for the provision of additional capacity. Orange, on the other hand, considers that Cogent does not comply with the ratios specified in its peering policy, and is refusing to increase the interconnection capacity allocated to Cogent free of charge.
83. Considering that the France Télécom group engages in practices potentially subject to Article L. 420-2 of the Commercial Code and Article 102 of the TFEU, Cogent has reported a number of practices, as described in the following sections.

## 1. Refusal of access to an essential facility and tied selling

84. Cogent reported, firstly, a refusal of access to Orange's domestic network (AS 3215), which it considers to be an essential facility, and secondly, the obligatory nature of an interconnection with the international network of France Télécom (AS 5511). According to Cogent, this forced interconnection with AS 5511 constitutes tied selling between the provision of access to Orange subscribers and transit services, which, according to Cogent, are “two distinct services that content/service providers and Internet transit operators should be able to purchase separately, including, where applicable, from separate operators”.
85. Submissions from Cogent confirm that immediately prior to the referral, Cogent had various peering links with Open Transit, with a combined capacity of almost 67Gbit/s, and that detailed discussions with Orange had been undertaken with a view to obtaining direct interconnections.
86. Concerning the practice of tied selling, France Télécom offers direct access services to AS 3215 that provide access to Orange subscribers and do not include transit services. Cogent and France Télécom have also held discussions relating to the feasibility of such an interconnection, as well as the related technical conditions and financial terms. In the light of the facts of the case, the terms and conditions proposed by France Télécom do not appear to be discriminatory compared with those of other operators.
87. These discussions prompted France Télécom (via its Operator division, DIVOP) to propose a paid offering to Cogent; this proposal was not accepted, however, as Cogent was seeking settlement-free interconnection within the framework of its peering agreement. The minutes of the hearing held on 28 June 2010, produced by Cogent, is clear on this issue: “FT requested confirmation from Cogent that the pricing proposal made today (excluding connection services) did not meet Cogent's expectations for the simple reason that the price was greater than zero, which Cogent confirmed, stating that its position on the issue remained unchanged since the start of negotiations”.
88. Cogent adds, in an answer given to the case officers, that “*for Cogent, the peering issue is not one relating to either AS 3215 or AS 5511; Cogent would agree to an interconnection with either of these purportedly separate networks, as long as the interconnection satisfied its capacity requirements and eliminated tromboning*”. It would therefore appear that access to AS 5511 is considered by Cogent itself to be an alternative to the AS 3215 access offering, at least if the interconnection gateway is located in France. It is not, therefore, direct access to the Orange AS 3215 system that Cogent considers to be an essential facility, but “*access to an interconnection with its subscribers*” (§191), regardless of whether such access is direct or indirect.
89. In the light of the case details, no evidence of potentially abusive tied selling was observed, inasmuch as France Télécom responded to Cogent's requests by offering it access to Orange customers, either indirectly via Open Transit, or else directly via an interconnection with Orange.
90. Concerning the alleged practice of refusing access to an essential facility, it would therefore appear that the dispute between Cogent and France Télécom relates not so much to the principle of access as to the matter of the price for additional capacity. In the light of the case details, no practices amounting to refusal of access to an essential facility were observed, as Cogent was simply refused a settlement-free increase in the capacity available under the terms of the peering agreement.

## **2. Fees for additional capacity under the terms of the peering agreement**

91. Cogent considers that paid direct access to AS 3215 is not an alternative, as the operator would lose its “Tier 1” status. The transit operator would therefore have no alternative to the peering offering of France Télécom, which would in effect be abusing its dominant position by refusing to increase settlement-free interconnection capacity.
92. The Autorité notes, however, that the concept of a Tier 1 operator does not necessarily imply that all services are totally free. Like any other transit operator, a Tier 1 operator must comply with the peering policies of its peers, which may provide for payments in the event that traffic ratios are exceeded. The definition of “Tier 1” is largely a matter of convention, and if “Tier 1” is defined as a network operator that does not purchase transit services, that does not prevent it from paying for certain interconnection capabilities within the framework of peering agreements. A peering relationship, even if partially paid-for, remains specific and distinct from the purchase of transit services, inasmuch as the operator in question continues to control its interconnection relationship with other networks.
93. In the opinion submitted to the Autorité de la concurrence in relation to this case, ARCEP notes that fees may be introduced in the event of dissymmetric “*interests or traffic*’ between an ISSP and an IAP. The European Commission has stressed that it is ‘not in principle unusual for (...) networks that provide high volumes of content to enter into transit (rather than peering) agreements with larger networks, and agree to pay the larger providers to carry their traffic’” (C(2010)1234).
94. While investigating the case, it emerged that several networks, considered to be Tier 1 networks, make or have previously made financial payments to peers because they have exceeded the ratios specified in peering policies.
95. Concerning Cogent more specifically, the case details reveal an atypical, particularly asymmetric traffic profile for this operator. Such a profile is liable to create additional costs for France Télécom, due to the need to size its network infrastructure to carry traffic from Cogent to its subscribers.
96. Consequently, demanding payment from Cogent in exchange for increasing its interconnection capacity does not appear in itself to be anticompetitive behaviour.

## **3. Discrimination against other transit operators**

97. The peering policy implemented by France Télécom provides for charging for capacity over and above a traffic ratio of 2.5 to 1 between the incoming traffic received by Open Transit and the outgoing traffic sent to the transit operator. This policy does not appear to be inconsistent with the practices of most large operators.
98. The request for increased capacity submitted by Cogent, which France Télécom declined to fulfil without payment, was made in a context of very imbalanced traffic ratios (up to 13 to 1 in December 2009), well above the limit of 2.5 to 1 defined in France Télécom's peering policy. Besides, it appears that France Télécom usually agrees to additional capacity requests when the ratio is lower than the 2.5 limit.
99. The practices described above do not therefore appear to be subject to Article L. 420-2 of the Commercial Code or Article 102 of the TFEU.

#### **4. Non-propagation of prefixes to peers**

100. Cogent claims that France Télécom stopped allowing prefixes to be sent by the peers of Cogent, and particularly by Verizon, its most recent transit operator since Verizon became a peer of France Télécom in 2010.
101. Sending prefixes between routers enables each router to generate an Internet routing table in order to orient traffic flows along the available routes so as order to reach any point in the Internet. If a third-party network that is interconnected with both France Télécom and Cogent fails to send France Télécom's prefixes to Cogent, Cogent's routers are unable to determine whether an available route to France Télécom via that third-party network exists.
102. The propagation of prefixes by peers of Open Transit would enable Cogent to access France Télécom's network free of charge (in accordance with peering agreements) via a third-party network with unsaturated links with Open Transit.
103. Non-propagation of prefixes is, however, a customary feature of peering agreements. This practice appears, furthermore, to contribute to cost-effectiveness because if prefixes were propagated, the third-party network would bear the cost of routing traffic with *a priori* no financial compensation. As ARCEP points out, “*the prefixes of Cogent and other Tier 1 operators are not propagated by their peers*”. As France Télécom's practice in this respect is “*widespread among the major Internet network players, it is not specific to France Télécom and does not appear to be specifically directed against Cogent*”.
104. Although the transit relationship that previously existed between France Télécom and Verizon enabled Verizon's peers to send traffic to France Télécom via Verizon's network, Verizon logically ceased to propagate France Télécom prefixes when this relationship changed to a peering one.
105. In the current state of the case, the practice reported by Cogent does not in itself appear to constitute abuse of a dominant position.

#### **5. Discrimination against Open Transit**

106. Cogent stresses that it receives payments from IAPs other than Orange. The operator considers that the peering relationship established with France Télécom enables the IAP Orange to pay nothing, giving it a major advantage over other IAPs that purchase transit services from Cogent. All the more, Cogent considers that it should have nothing to pay to France Télécom. It claims that France Télécom, in seeking to obtain payment from Cogent for interconnection capacity, is discriminating in favour of its own transit handling business, Open Transit.
107. In essence, Cogent is accusing France Télécom of not being its customer and of preferring to use its own international network. If other IAPs pay Cogent for transit services, it is because they have not chosen to develop their own international networks and therefore rely on the services of transit operators for their access to the global Internet. In this context, they have chosen to be customers of Cogent.
108. It is not, however, reasonable to reprimand France Télécom for choosing to develop a transit handling business and for making use of its own resources. The Autorité therefore rejects Cogent's claim that Orange's choice of Open Transit rather than Cogent as its transit operator constitutes a discriminatory practice.

## 6. Allocation of settlement-free peering capacity in Paris

109. Cogent stressed the very limited interconnection capacity allocated to it in Paris, and considers that such a limitation can represent a handicap inasmuch as congestion slows down traffic for its French customers, as flows must be routed via other, remote interconnections. As ARCEP stated in its opinion submitted to the Autorité de la concurrence, “*this tromboning effect extends the route travelled and may adversely affect the quality of the transit service provided by Cogent. Furthermore, this phenomenon may have a negative impact on its brand image in France, (...) potentially driving Cogent customers away*”.
110. For France Télécom, no rational economic logic exists that would prompt it to refuse to allocate additional capacity in Paris to a transit operator. All else being equal, routing traffic to French Internet users *a priori* costs less than routing it to New-York, for example, as it does not involve a transatlantic crossing.
111. The case details show that the interconnection between Cogent and France Télécom in France (in Paris) represents less than 5% of the total settlement-free capacity allocated to Cogent under the terms of the peering agreement. It would also appear that this level is lower than the allocations granted to comparable transit operators.
112. However, the case details do not include any evidence of a formal request for additional capacity in Paris from Cogent. In its observations submitted for the market test, Cogent referred to several written and verbal requests for additional capacity to Open Transit. In particular, the transit operator mentioned the existence of a letter dated 1 March 2010 and an email dated 6 April 2010. It also referred to an email exchange following the referral of the case, beginning on 26 January 2012.
113. Concerning the exchanges prior to the referral, although they effectively reflect a request for increased capacity, in no way do they constitute a specific request relating to Paris. On the contrary, the aforementioned exchanges are a request for interconnections at various locations in regional France<sup>2</sup>, to which France Télécom responded via its operator division (DIVOP). These discussions with DIVOP are addressed in points 86 *et seq.* of this Decision.
114. At the hearing of 28 October 2011, France Télécom referred to email exchanges between Cogent and Open Transit aimed at establishing that increased capacity in Paris was not the subject of a specific or significant request from Cogent. In an email dated 31 January 2011, Cogent, responding to a proposal from Open Transit to allocate additional capacity, asked Open Transit to state its preference between Paris, Lyon, Marseille, Nice, Vienna (Austria), Frankfurt, Hamburg, Munich, Milan, Rome, Amsterdam, Madrid, Stockholm, Geneva, Zurich and London. It seems unlikely that Cogent would have left such latitude to France Télécom if it was so specifically interested in obtaining additional interconnection capacity in Paris.
115. Cogent sent Open Transit a number of more specific requests for additional capacity, starting on 26 January 2012. Open Transit appears to have approved these in principle,

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<sup>2</sup> Email dated 6 April 2010 from Cogent to Open Transit: “*To date, the only interconnection points in France that you have offered us are in the Paris region. As you know, we are lucky enough to have a large network in France, and we are prepared to interconnect on a settlement-free peering basis with France Telecom's network in the 20 French cities (and surrounding areas) served by Cogent's network.*”

allowing for the re-balancing of traffic ratios arising out of the closing-down of the MegaUpload servers, and the increases should therefore be implemented without delay.

116. When asked during the Board hearing about progress on implementing additional Paris-based interconnection capacity between Cogent and Open Transit, the parties indicated that progress had been made. Although Cogent considers that discussions are taking too long, it appears that France Télécom has produced and submitted all the data requested by Cogent regarding the costs associated with the various possible interconnection solutions (including the use of a France Télécom link, the use of a Cogent link, or the re-use by Cogent of a link operated by a third party).
117. In the light of the foregoing, the practice of restricting capacity in Paris reported by Cogent does not appear to be subject to Article L. 420-2 of the Commercial Code and Article 102 of the TFEU.
118. It was therefore appropriate for the Case Officer to restrict his competition concerns to the potential margin squeeze practices alleged by Cogent. France Télécom responded by making a series of commitments to the Case Officer. These commitments led to a market test.

#### **E. IMPLEMENTATION OF THE COMMITMENT PROCEDURE**

119. The competition concerns submitted by the investigating team to France Télécom (1) led to proposed commitments on the part of the company (2). These commitments were followed up by a market test (3) and the observations arising from the test prompted France Télécom to suggest several changes (4) during the Board hearing.

##### **1. Competition concerns raised by the Case Officer**

120. According to Cogent, France Télécom offered ISSPs access to Orange subscribers at very low prices, creating a margin squeeze. Cogent claims that it would be unable to match such low prices – below the usual market level – as they were less than the cost of routing via a transatlantic link and below the wholesale price that France Télécom charged Cogent for access to its subscribers.
121. At this stage of the investigation, there appears to be only one example that illustrates the described situation: a contract between France Télécom and a content provider very popular with Internet users.
122. In this particular case, the price charged by France Télécom for access to Orange subscribers appears, *prima facie*, to be significantly lower than the normal market level. However, this observation must be considered in the light of several factors:
  - Contrary to the claims of Cogent, the service offered to the ISSP in question apparently concerns access to Orange's domestic network only, but not intercontinental transport. This price cannot therefore be compared with that of a transit service that includes international transport;
  - In order to compare the price offered to this ISSP with the wholesale price that France Télécom charges Cogent for access to Orange subscribers, one must take into account the total connection capacity available to Cogent from France

Télécom. Cogent already benefitted from significant settlement-free peering capacity (36.5 Gbit/s in 2010, and 75 Gbit/s in 2011) at the time when France Télécom offer it a paid service for direct access to network 3215. The price stated in this 3215 offering therefore related to the additional capacity only, without compromising the settlement-free service provided to Cogent for the capacity allocated under the peering agreement. In contrast, the connectivity services offered by France Télécom to ISSPs are paid-for from the first megabit of data exchanged;

- The price charged to the content provider referred to herein, appears to reflect a rather specific balance of power between it and Orange. Although Orange is undoubtedly a major IAP, it would appear that the services offered by the content provider in question are so popular with Internet users that Orange was not in a position to demand a price on a par with what it usually charges for access to its subscribers. Furthermore, if the ISSP had chosen to use Cogent to route its traffic to Orange, the status of the discussions between Orange and Cogent might have been different.

123. In the light of the aforementioned specificities and mitigating factors, it would be appropriate to assess whether the price charged by France Télécom to this content provider constitutes a margin squeeze between the upstream market level and the downstream level for access services to Orange subscribers. In practical terms, it would be necessary to identify whether the prices charged by France Télécom to this content provider are too low in comparison to those charged by competitors of Open Transit on the transit market. If this were the case, the economic space available to third-party transit operators would be too limited, exposing them to the risk of being driven out of the particular market for specific access to Orange subscribers.
124. The opaque nature of the relationship between Open Transit and Orange makes it difficult to monitor margin squeeze or even discriminatory practices. ARCEP also emphasises this point in its Opinion submitted to the Autorité de la concurrence in the context of this case: “the absence of formalised relations between Open Transit and Orange France complicates the task of analysing France Télécom offerings”.
125. Even France Télécom admitted that no financial exchanges between Orange and Open Transit are currently recorded in internal accounting processes. As Open Transit is simply a business offering of France Télécom, the relationship between the two business units is not governed by any particular memorandum of agreement.
126. The absence of formal records of exchanges between Orange and Open Transit complicates the task of monitoring margin squeezes, hence making such practices easier to implement. Such practices, which can potentially penalise or even exclude competing transit operators, may infringe the provisions of Article L. 420-2 of the Commercial Code.
127. In the event that such activities affect trade between Member States of the European Union, they may also be subject to Article 102 of the TFEU.

## **2. Commitments proposed by France Télécom**

128. On 27 March 2012, France Télécom offered to make certain commitments in response to the competition concerns expressed by the investigation services.
129. Commitment no. 1 – Formalisation of an internal memorandum of agreement



France Télécom agrees to formalise an internal memorandum of agreement between Orange and Open Transit, setting out the technical, operational and financial terms and conditions applicable to the provision of connectivity services in France for incoming traffic destined for its end customers.

In particular, France Télécom proposes to introduce a system to assign values to flows from Open Transit to Orange in the event that the ratio between incoming and outgoing traffic exceeds a certain threshold.

130. Commitment no. 2 – Monitoring of the internal memorandum of agreement

France Télécom commits to introducing a system to monitor the implementation of the internal memorandum of agreement between Open Transit and Orange arising out of Commitment no. 1.

A presentation of the internal memorandum of agreement shall be given to the investigation services after a period of one year.

### **3. Responses to the market test**

131. The commitments proposed by France Télécom were published on the Autorité de la concurrence website on 3 April 2012.

132. The market test, which ended on 3 May 2012, yielded a series of observations from Cogent, Verizon France, Neuronnexion, OVH and SFR, from the industry associations ASIC and Ilico, and from Mr Jérôme X..., an IP networks consultant.

133. In addition, the Cogent companies had access to the full file in the period preceding the Autorité de la concurrence Board hearing held on 28 June 2012.

### **4. New version of the commitments**

134. In the light of the observations arising out of the market test, France Télécom proposed several changes at the Board hearing. The new proposed commitments were subsequently confirmed by France Télécom in a letter dated 28 June 2012.

## **II. DISCUSSION**

### **A. ON THE APPLICATION OF EUROPEAN UNION LAW**

135. In its guidelines relating to the effect-on-trade concept in Articles 81 and 82 of the Treaty (OJEU 2004, C 101, p. 81), The European Commission states that Articles 81 and 82 of the EC Treaty, subsequently embodied as Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), apply to horizontal and vertical agreements and abusive practices by undertakings that may “*appreciably*” “*affect trade between Member States*”.

## **1. On the effect on trade between Member States**

136. Abuses of dominant positions in the territory of a single Member State may in certain cases affect trade with other Member States, as mentioned by the Commission in point 93 of its guidelines: “*Where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected*”.
137. In this case, the practices complained of cover the whole of France – which represents a substantial part of the EU market – and the companies liable to be adversely affected by the identified practices carry out their business activities throughout Europe, at the least. It is therefore presumed that trade between Member States is normally capable of being affected.

## **2. On the sensitivity of the effect on trade between Member States**

138. Concerning the sensitivity of the effect on trade between Member States, the Commission states, in point 96 of the aforementioned guidelines, that “*any abuse which makes it more difficult to enter the national market should therefore be considered to appreciably affect trade*”.
139. In this case, the examined practices are margin squeeze practices that may potentially drive competitors out of the identified relevant market or make entry by new competitors difficult or impossible. If proven, the examined practices may appreciably affect trade between Member States. The alleged practices may therefore be subject to Article 102 of the TFEU.

## **B. ON THE SUITABILITY OF THE COMMITMENT PROCEDURE**

140. Under the terms of Paragraph I of Article L. 464-2 of the Commercial Code, the Autorité de la concurrence may “*accept commitments from businesses or other organizations intended to allay its competition concerns relating to the prohibited practices described in Articles L. 420-1, L. 420-2 and L. 420-5*”.
141. Furthermore, Article 5 of Regulation 1/2003 of the Council, issued on 16 December 2002, relating to the implementation of the competition rules set forth in Articles [101] and [102 TFEU], states that the competition authorities of Member States are competent to “*accept commitments*”.
142. The Commercial Code and Regulation 1/2003 do not prohibit the use of commitment procedures for certain specific categories of behaviour liable to distort competition.
143. In its procedural notice on competition-related commitments, dated 2 March 2009, the Autorité de la concurrence indicated that it did not apply this procedure “*in cases where, all things considered, the effect on economic public order demands the imposition of financial penalties, which, in principle, notably excludes particularly serious conspiracies such as cartels and certain abuses of dominant positions that have already caused significant damage to the economy*” (point 11).
144. In this case, the alleged practices, liable to restrict the competitive functioning of the market, are margin squeeze practices. France Télécom is alleged to have offered content

providers access to Orange subscribers at very low prices, creating a margin squeeze. Cogent claimed that it would be unable to match such prices – below the usual market level – because they were lower than the cost of transmission via a transatlantic link and lower than the wholesale price that France Télécom charged Cogent for access to its subscribers.

145. However, the investigation revealed only a single example liable to illustrate such a margin squeeze, involving a low price offered to an ISSP by France Télécom. In that example, which is described in points 118 *et seq.*, it would appear that the price charged was simply attributable to the balance of power between the two companies, rather than characteristic of an anticompetitive effect. The example did, however, highlight the lack of transparency between Open Transit and Orange, prompting the Autorité to express competition concerns.
146. It is merely incumbent upon the Autorité, in the context of this decision, to verify that the commitments proposed by France Télécom are necessary and sufficient to allay the competition concerns identified in the preliminary assessment report.
147. Furthermore, concerning the case referred by Cogent, it must be emphasised that the Autorité is entitled, as it is its duty to preserve economic public order, to make decisions in relation to commitments, not in order to satisfy requests by requesting parties but to put an end to competition-distorting situations. The Paris Court of Appeal notes that the purpose of the commitment procedure is “*not to satisfy the requesting party, whose demands may extend beyond what is strictly necessary in order to settle competition concerns, but simply to have those concerns addressed appropriately by the public authority*” (6 October 2009, Canal 9 SAS).
148. Accordingly, the use of a commitment procedure is particularly appropriate in this case.
149. The proportionality of the proposed commitments must be assessed. The analysis took the following aspects into consideration.

### **C. ON THE CONSEQUENCES FOR THE OVERALL FUNCTIONING OF THE INTERNET IF THE AUTORITÉ APPROVED THE COMMITMENTS**

150. In general terms, Cogent considers that a decision by the Autorité de la concurrence validating the commitments of France Télécom would have serious consequences for technical intermediaries (such as transit operators) and content providers alike. According to Cogent, such a decision would also appreciably affect the functioning of the Internet; the operator mentions a collapse of routing mechanisms, increased costs for ISSPs, loss of competition between transit and paid peering, discrimination in favour of “on net” IAPs, a restriction on the choice of websites visited by consumers and, lastly, merging in the ISSP sector.
151. Similarly, ASIC, while acknowledging that the commitment procedure applies to the case in point only, is nevertheless concerned about the message it might send to the sector, considering that accepting the commitments would result in unreserved approval of the principle of paid IP terminations on French access networks.
152. Verizon France, a competitor of France Télécom in the Internet connectivity market, considers that the market is a dynamic, competitive market that does not require any regulation.

153. The Autorité de la concurrence intervenes in the functioning of a market exclusively within its competence, which is limited to practices potentially subject to Articles L. 420-1 and L. 420-2 of the Commercial Code and Articles 101 and 102 of the Treaty on the Functioning of the European Union.
154. Following a preliminary assessment, only the margin squeeze practice reported by Cogent emerged as a competition concern.
155. In contrast, the change in the network financing framework, which is prompting certain IAPs to seek alternative revenue streams to those obtained from Internet users, does not appear, in the context of this case, to be subject to legal characterization, in particular under the terms of Article L. 420-2 of the Commercial Code or Article 102 of TFEU.

**D. ON THE ASSESSMENT OF THE COMMITMENTS PROPOSED BY FRANCE  
TÉLÉCOM**

**1. On the 1<sup>st</sup> Commitment: formalisation of an internal memorandum of agreement**

156. Through this commitment, France Télécom agrees to formalise an internal memorandum of agreement between Orange and Open Transit, describing the technical, operational and financial terms and conditions applicable to the provision of connectivity services.
157. In particular, France Télécom proposes to introduce a solution to assign values to flows from Open Transit to Orange in the event that the ratio between incoming and outgoing traffic exceeds a certain threshold.

**a) On the claim that the proposed measures infringe sector regulations**

158. Cogent considers, in general terms, that the commitments proposed by France Télécom would validate a practice infringing industry regulations, by authorising “*Orange to refuse direct interconnections at a cost-oriented price*”.
159. However, it appears that in response to requests from Cogent, Orange offered it direct connectivity to its domestic network (AS 3215); Cogent rejected this proposal on the grounds that the proposed price was not zero (point 86).

**b) On the claim that the proposed measures are inappropriate and insufficient**

160. According to Cogent, the commitments proposed by France Télécom are legally unacceptable under competition law, as they would concern only one of the practices reported by Cogent. Furthermore, the transit operator considers that Commitment no. 1 is not relevant, credible and verifiable, and does not adequately address the margin squeeze issue inasmuch as it does not provide a mechanism for monitoring cost levels.
161. SFR, for its part, considers that the commitments proposed by France Télécom are necessary but still insufficient. According to SFR, France Télécom should guarantee to offer third parties technical and financial terms and conditions that are not discriminatory with respect to those in the internal memorandum of agreement. Cogent has also stated that Open Transit should commit to a non-discriminatory peering policy.

162. Cogent, in an economic study submitted along with its observations, considered that implementing a formalised memorandum of agreement is not a sufficient remedy, and that the transit operator and IAP businesses of France Télécom should be separated, or at the very least, “*a formalized interconnection agreement between Open Transit and Orange should be introduced*”.
163. Concerning the issue of flow values raised by Cogent, and the cost level monitoring that it claims is necessary, it should be noted that the competition concerns related neither to the level of internal sale prices, nor to the possibility that they may be too low or too high. The concerns focus on a risk of margin squeeze and discrimination between the transit business of France Télécom and competing transit operators. In such circumstances, all that counts is the comparison between the prices charged internally and those charged externally. In this respect, the identified risks can be adequately addressed by formalising an internal memorandum of agreement.
164. Concerning the requests of Cogent and SFR for France Télécom to also make a non-discrimination commitment, the Autorité would be required, if the issue were referred to it, to assess the memorandum of agreement and the financial terms and conditions applied by Open Transit, and to issue a decision regarding the existence or otherwise of a discriminatory practice and whether such a practice was anticompetitive.
165. Lastly, the Autorité considers that the introduction of an internal memorandum of agreement establishes a formal framework for the relationship between Open Transit and Orange. At this stage, this commitment constitutes a proportionate response to the stated competition concerns with no need to require the IAP and transit operator businesses to be structurally separated.

**c) On the nature of the relations between Open Transit and Orange within the framework of the memorandum of agreement**

166. In his comments, Mr. X... (in common with Neuronnexion and the Ilico organisation) states that France Télécom's commitments appear inappropriate inasmuch as the AS5511 and AS3215 networks are interconnected in a transit relationship but not a mutual peering relationship.
167. This observation raises an important issue concerning the nature of the relations between Open Transit and Orange within the framework of the memorandum of agreement.
168. The ability to obtain indirect access to Orange subscribers via peers of Open Transit is crucial as this maintains competitive pressure on France Télécom. In the event that France Télécom were to treat this relationship as “peering”, and as a corollary to that status, cease to propagate Orange prefixes via Open Transit, France Télécom would be in a position to prevent indirect access to its Internet users via transit operators having a peering relationship with Open Transit.
169. Accordingly, France Télécom was asked, during the Board hearing, to provide additional details concerning this specific issue.
170. France Télécom responded by stating that the memorandum of agreement would not change the fact that Orange's Internet user customers are accessible via transit operators in peering relations with Open Transit. Returning to the example of M6, France Télécom explained that it will still be possible to access Orange's Internet users via Tata Telecom.
171. As specified in the commitments, the internal memorandum of agreement provides for Orange's prefixes to be communicated to customers of Open Transit (indirect access via

Open Transit) but also to peers of Open Transit and their customers (indirect access via peers of Open Transit).

172. Ultimately, the memorandum of agreement will bring necessary transparency to the relations between Orange and Open Transit, without altering the ability of content providers to access Orange's Internet user customers in the three manners described above, i.e. directly via Orange (1), indirectly via Open Transit only (2) or indirectly via a peer of Open Transit (3). In particular, inasmuch as it is not a peering agreement, the memorandum of agreement will not enable France Télécom to eliminate the third method of access and will not therefore enable it to gain commercial monopoly.
173. To avoid any confusion with a peering agreement in the strict sense of the term, France Télécom was questioned at the Board hearing regarding the possibility to eliminate, from its commitments, the reference to traffic symmetry ratios; such ratios indeed seem to be a key aspect of peering relations. France Télécom agreed not to include any references to symmetry ratios in its commitments, or to include the sale price.
174. In the light of the foregoing, Commitment no. 1, which is relevant, credible and substantial, adequately addresses the competition concerns, which related to the risk of occurrence of margin squeeze practices or discrimination between the transit businesses of France Télécom and its competitors. The extent to which its implementation is verifiable is analysed in the context of the second commitment.

## **2. On the 2<sup>nd</sup> Commitment: monitoring of the internal memorandum of agreement**

175. Through its second commitment, France Télécom agreed to give a presentation on the manner in which it had formalised and implemented the internal memorandum of agreement to the investigation services of the Autorité, one year after the decision to accept the commitments.
176. SFR considers that the period of one year before the memorandum of agreement is presented to the Autorité is too long, as it would be possible to implement the memorandum of agreement sooner. SFR also considers that the memorandum of agreement should be submitted to the Autorité each year for a period of five years.
177. OVH noted that the commitments proposed by France Télécom are vague and not very restrictive, and also considers that the period of one year before the presentation of the memorandum of agreement and implementation thereof is too long.
178. The Autorité de la concurrence effectively considers that the period of one year in which to give a presentation to the investigation services is too long, and expressed its wish that the memorandum of agreement be implemented rapidly.
179. France Télécom indicated during the Board hearing that it agreed to modify its second commitment in such a way that the internal memorandum of agreement would be submitted to the Autorité within three months after the decision to accept the commitments.
180. Similarly, the Autorité considers that the one-year monitoring period proposed by France Télécom is too short. However, considering the fast-moving nature of the sector, a five-year monitoring period appears inappropriate in this case. During the Board hearing, the investigation services therefore recommended extending the commitment monitoring period to two years, to which France Télécom agreed.

181. Lastly, during the Board hearing, the Autorité expressed the wish that France Télécom submit its internal memorandum of agreement to ARCEP, concurring with the request made by ARCEP in the course of its participation.
182. France Télécom explained that the commitments made were not intended to create any obligations other than to the Autorité de la concurrence. France Télécom nevertheless stated that it understood the request and would send the internal memorandum of agreement to ARCEP. The Autorité duly noted this.

**E. FINAL COMMITMENTS UNDERTAKEN BY FRANCE TÉLÉCOM**

183. These commitments, confirmed by France Télécom in a letter dated 28 June 2012, are laid out as follows:

Commitment no. 1: Formalisation of an internal memorandum of agreement between Open Transit (OTI) and Orange (RBCI)

France Télécom commits to implementing an internal memorandum of agreement describing the technical, operational and financial conditions applicable to the supply of connectivity services in France for the incoming and outgoing traffic of its end customers, between:

- the business unit responsible for Internet connectivity for traffic entering the IP backhaul and backbone network (*Réseau Backbone et de Collecte IP* – hereinafter “RBCI”), having the reference AS 3215;
- and the business unit in charge of sales for Open Transit Internet (hereinafter “OTI”), having the network reference AS 5511.

The traffic concerned is traffic from OTI that enters the RBCI network from the IP networks and/or end customers of OTI, bound for the national IP networks and/or end customers of RBCI.

France Télécom commits to including, in the internal memorandum of agreement, the procedure for reception by RBCI of traffic released by OTI via all input devices in the RBCI AS, and subsequent routing to the end customer.

The procedure between OTI and RBCI shall be established in accordance with the following principles:

i) Technical principles

France Télécom commits to including the following in the internal memorandum of agreement:

- The procedure whereby OTI delivers traffic to each of the regional zones of RBCI in mainland France;
- The obligation upon OTI to refrain from retaining routes or traffic, and any impairment of the quality of service perceived by Orange customers in France, whether intentionally or through negligence;
- The defrayal, by each party, of the costs associated with jointly approved architecture changes, within the scope of their IP network.

ii) Value allocation principles

- France Télécom commits to introducing a value allocation system between OTI and RBCI, for all traffic entering RBCI.
- The method for measuring transfer rates in the context of the memorandum of agreement shall be based on the 95<sup>th</sup> percentile of the series of mean hourly transfer rates ranked in ascending order.
- After an observation period of one year, the aforementioned value allocation may be revised by the parties at a Steering Committee meeting, subject to mutual agreement. It may subsequently be revised annually in the same manner.



*Commitment no. 2 - Verification of the implementation of the memorandum of agreement by the investigation services of the Autorité de la concurrence.*

France Télécom agrees to submit the internal memorandum of agreement between OTI and RBCI to the Autorité de la concurrence within three months of the decision of the Autorité de la concurrence accepting the commitments.

France Télécom also agrees to give a presentation covering the formalisation and implementation of the internal memorandum of agreement between OTI and RBCI to the investigation services, one year after the decision to accept the commitments.

Lastly, France Télécom agrees to notify the Autorité de la concurrence of any changes to the internal memorandum of agreement between OTI and RBCI that may occur during the period of two years following the decision of the Autorité de la concurrence accepting the commitments.

184. In the light of the foregoing:

- the first commitment, consisting in the formalisation of an internal memorandum of agreement between Open Transit and Orange, shall remain in force indefinitely;
- in the context of the second commitment, France Télécom shall submit the internal memorandum of agreement to the Autorité de la concurrence within three months of publication of this decision. A presentation covering the formalisation and implementation of the memorandum of agreement shall be given to the investigation services after one year, and France Télécom shall notify the Autorité de la concurrence of any changes made to the memorandum of agreement for a period of two years.

### **III. CONCLUSION**

185. The Autorité de la concurrence considers that the final version of the commitments proposed by France Télécom addresses its competition concerns and is credible and verifiable. As such, the appropriate action is to accept France Télécom's commitments, render them mandatory and close the procedure.

## DECISION

**Article 1:** The Autorité de la concurrence accepts the commitments undertaken by France Télécom, as integral part of the Decision. These commitments are made mandatory as of the notification date of the Decision.

**Article 2:** The procedure, registered under number 11/0035F, is closed.

Deliberation on the verbal report of Mr Sylvain Moll, Case Officer, and the intervention of Mrs Virginie Beaumeunier, General Rapporteur, by Mrs Elisabeth Flüry-Hérard, Vice-President, Chair, Mrs Pierrette Pinot, Messrs. Emmanuel Combe, Jean-Bertrand Drummen et Pierre Godé, members.

The Hearing Officer,  
Caroline Orsel-Sébès

The Vice-President,  
Elisabeth Flüry-Hérard

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