



II-2.11: The French Competition Authority recommends that the French Telecommunications Regulator consider a functional separation of France Telecom's activities

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MAIN INFORMATION

The *Autorité de la Concurrence* (French Competition Authority) issued a recommendation (n° 11-A-05) on March 8, 2011 in which it recommends that the *Autorité de régulation des communications électroniques et des postes* (ARCEP — French Telecommunications and Postal Regulatory Authority) proceed with studies envisaging the possible breakup of France Telecom into two separate functional entities, one managing monopoly activities (the network), and the other managing competitive activities (services).

CONTEXT AND SUMMARY

The *Autorité de la Concurrence* issued a recommendation (n° 11-A-05)[1] bearing on the third analysis of the wholesale market for high-speed and very-high-speed Internet service conducted by the *Autorité de régulation des communications électroniques et des postes* (ARCEP — French Telecommunications and Postal Regulatory Authority).

This recommendation begins by recalling the current state of regulation as it exists in France. Traditionally, telecommunications regulation in this sector has been focused on local-loop unbundling, meaning allowing any competitor to provide services using France Telecom's proprietary copper-wire network, as well as price regulation on the retail and wholesale markets.

On the wholesale market, “cost-oriented access pricing” has been imposed, meaning that France Telecom has to charge its competitors prices “close to its costs” for access to its network. On the retail market, “non-eviction” means that France Telecom has to charge prices significantly-enough higher than its competitors for broadband services in order to reduce viscosity and to promote competition, which, due to France Telecom's market dominant position, would not have been possible if it could compete based on price.

In its third cycle, the ARCEP judges that the market is sufficiently mature to

propose eliminating its “non-eviction” regulations, while maintaining cost-oriented pricing on the wholesale market, meaning that France Telecom could now compete based on price.

As concerns new-generation fiber optics networks that allow for the provision of very-high-speed Internet access, the ARCEP has decided to differentiate between urban and rural areas in its regulatory scheme. In urban areas, regulation will be *symmetrical*, meaning that the same obligations will be imposed on all service providers. However, in rural areas, the higher cost and lower profitability of the network means that the network is a natural monopoly that requires *asymmetrical regulation* in order to ensure that competitors can access the network in order so that a market can be built.

This parallel regulatory scheme has been approved by the European Commission’s ‘Next Generation Access Networks’ recommendation.[2]

However, the most striking part of the Competition Authority’s recommendation is that the ARCEP begin examining the possibility of imposing a “functional separation” within France Telecom between its monopoly activities (its network) and its competitive activities (service provision). This new tool was introduced by a European Directive of November 25, 2009.[3]

Indeed, there are three types of “separation” possible, as defined by the Competition Authority: the separation of property (meaning that the network used by France Telecom would belong to another company), legal separation (meaning the break-up of France Telecom into separate legal entities), and functional separation (meaning that two sets of accounts must be maintained, one for monopoly activities, and the other for competitive activities).

For now, only “functional separation”, or accounting separation, is being considered. This would allow the ARCEP to have more precise information about France Telecom’s monopoly activities, its pricing, costs, and commercial practices on the wholesale market. At the same time, this transparency would, according to the Competition Authority, allow the ARCEP to loosen its oversight over France Telecom’s monopoly activities: a clearer picture would enable ‘lighter touch’ regulation because presenting separate accounts would clearly show the ARCEP whether or not France Telecom has implemented ‘cost-oriented pricing’ on all of its monopoly activities.

[1] Available at <http://www.autoritedelaconurrence...>

[2] Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA). Available at <http://eur-lex.europa.eu/LexUriServ...>

[3] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, available at <http://eur-lex.europa.eu/LexUriServ...>

BRIEF COMMENTARY

The Autorité de la Concurrence's recommendation is interesting for a number of reasons. First and foremost, it appears that, although the recommendation states numerous times that Competition Authorities do not have the necessary tools to perform ex ante regulation, it also implies that the market is sufficiently mature (at least as concerns the retail market) for ex ante, sector-specific regulation of the wholesale market to suffice in providing the necessary market conditions for competition on the retail market. The progressive abandonment of asymmetrical regulation of the telecommunications sector in Europe bears witness to the extraordinary success of asymmetrical regulation in liberalizing the telecommunications sector over the last twenty years. However, it is also interesting to note that despite the true competition that exists for the provision of telecommunications services, the Competition Authority seems to recommend functional separation of France Telecom's monopoly and competitive activities. While it is indisputable that this would provide more transparency about France Telecom's pricing and costs, it is also true that true competition has flourished even in the absence of such measures. It is questionable whether such measures are necessary now, since competition has been durably established. It would seem indeed that the Competition Authority's recommendation intends to reduce sector-specific regulation to a minimum in order to cause all retail activities to fall under the scope of general competition law: this may be why the Competition Authority points out that functional separation would allow for lighter-touch regulation on the wholesale market. This would mean that the ARCEP would no longer have jurisdiction over the retail market, which would therefore fall uniquely under the purview of the Competition Authority, and would see its ex ante regulatory role reduced to minimal regulation of network access, through a simple verification of France Telecom's cost-oriented pricing obligations on the wholesale market. Since the possibility of functional separation was

introduced by a European Directive, it will be interesting to see what use and under what circumstances other member states make of this tool. In any case, this is a new chapter in the regulation of telecommunications, which is struggling to evolve as quickly as the new technological developments being introduced in this industry.