



## **II-2.18: An operator was fined 5 million Euros by the French telecommunications regulator for failure to execute the injunction to contract it had previously issued.**

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To read the ARCEP decision, click [here](#).

### **MAIN INFORMATION**

The *Autorité de régulation des communications électroniques et des postes* (ARCEP — French telecommunications and postal regulator) issued an injunction on November 4, 2010, ordering Numéricâble to sign a contract with France Telecom according to the latter's new framework for accessing its telecommunications infrastructure for the installation of fiber optics. Failure to have complied within the imparted timeframe caused Numéricâble to be fined 5 million Euros by the ARCEP on December 20, 2011.

### **CONTEXT AND SUMMARY**

The *Autorité de régulation des communications électroniques et des postes* (ARCEP — French telecommunications and postal regulator) issued a decision on November 4, 2010, in order to settle the dispute between France Telecom and Numéricâble over their contract granting the former access to the latter's telecommunication infrastructure<sup>1</sup>. A group of contracts had granted Numéricâble access to the infrastructure owned and operated by France Telecom. France Telecom presented all operators having access to its infrastructure with an offer regarding access for the purpose of the implementation of fiber optics.

Numéricâble did not accept this offer, and tried to avail itself of the terms and conditions of the existing contracts, which were still in force. France Telecom appealed to the regulator in order to mediate the dispute, and won the case because on November 4, 2010, the regulatory agency ordered Numéricâble to accept the obligations laid out by France Telecom's offer on the grounds that it was necessary for all operators to follow the same conditions for access to the infrastructure.

Article 2 of the regulator's November 4, 2010 decision had stated that the parties were to comply by January 8, 2011, at the latest. Numéricâble had asked the Paris Court of Appeal to stay execution of the regulator's decision, but this was refused by a ruling on February 3, 2011, which stated that the contractual modifications imposed by the regulator did not irreversibly affect the situation of the operation.

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<sup>1</sup> [Déc. N°2010-1179](#) de l'ARCEP

The Court of Appeals was also asked to rule on the merits of the case, and on June 23, 2011<sup>2</sup>, it approved the regulator's decision on the grounds that the public interest with which the regulator has been entrusted is sufficient justification for its limitations on operators' contractual freedoms.

Numéricâble's appeal before France's Court of Cassation is pending.

Meanwhile, on January 7, 2011, France Télécom sent Numéricâble the text of the contractual amendments that it had to sign in order to bring the extant contracts into conformity with the regulator's demands. Numéricâble refused to sign the amendments on the grounds that "*la décision de l'ARCEP n'indique nullement qu'il serait question de signer des avenants.*"<sup>3</sup> The operator also mentioned other court cases or arbitrations in which France Telecom was sued for damages following unilateral modifications to the contracts in question. France Telecom replied with the affirmation that these cases did not modify the obligation of complying with the ARCEP's decision.

Following this, meetings were held in order to discuss the technical effects of the ARCEP's November 2010 decision, but within a few months it became apparent that Numéricâble would refuse to sign any amendments unless France Telecom indemnified it for the damages that Numéricâble claimed before the courts to have suffered. In any case, the regulator does not have the power to force an operator to sign a contract, and the mediation did not order Numéricâble to sign amendments; which is why Numéricâble refused to sign without receiving indemnification.

Furthermore, as regards the ARCEP itself, Numéricâble affirms that its refusal to comply is France Telecom's fault, because it did not give it the technical data necessary to do so. Meetings and exchanges of correspondence took place in order to find a compromise, but in vain.

But, the ARCEP considered that Numéricâble had willfully disobeyed its November 4, 2010 decision by opposing any modification of the contracts. The regulator believed that the two suits pending before the courts were not an obstacle to the execution of its decision, which was to be executed immediately. It furthermore stated that the 2010 decision unambiguously ordered the contracts to be modified, as confirmed by the Court of Appeals, and the modification of the contractual relationship went further than the modification of the technical parameters for accessing the infrastructure, which was the subject of the workshops that had taken place.

Therefore, Numéricâble failed to execute the decision.

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<sup>2</sup>FRISON-ROCHE, Marie-Anne, The French telecommunications regulator's decision to oblige a fiber optic network operator to obey the conditions set out by the civil engineering firm that owns the furrows the fiber passes through was approved by the Court of Appeal of Paris, *The Journal of Regulation*, 2011, [II-2.14](#).

<sup>3</sup> The ARCEP's decision did not mention that it was necessary to sign amendments.

The regulator believed this failure to be deliberate and unjustified. It reiterated that refusing to comply with an injunction issued by a competent authority is particularly serious. The decision, making a parallel with the practice of competition law, stated that the most serious possible attitude ought to be adopted because otherwise the regulator's power to issue injunctions would be stripped of any effectiveness.

During the hearings, Numéricâble accepted to sign the amendments in question. The regulator nonetheless refused to call off its hearings for failure to obey its injunction. Tardy compliance is a violation of the decision itself, which had included a deadline for compliance, and since the decision was a result of mediation, it was not necessary to send Numéricâble a preliminary injunction to comply. Article L.36-11 of the Code of Postal Services and Telecommunications states that:

*L'Autorité de régulation des communications électroniques et des postes peut (...)*

*2° Lorsqu'un exploitant de réseau ou un fournisseur de services ne se conforme pas dans les délais fixés à une décision prise en application de l'article L. 36-8, à la mise en demeure prévue au 1° du présent article ou aux obligations intermédiaires dont elle est assortie l'Autorité de régulation des communications électroniques et des postes peut prononcer à son encontre une des sanctions suivantes :*  
*(...)*

*b) Soit, si le manquement n'est pas constitutif d'une infraction pénale :*  
*-une sanction pécuniaire dont le montant est proportionné à la gravité du manquement et aux avantages qui en sont tirés, sans pouvoir excéder 3 % du chiffre d'affaires hors taxes du dernier exercice clos, taux porté à 5 % en cas de nouvelle violation de la même obligation. A défaut d'activité permettant de déterminer ce plafond, le montant de la sanction ne peut excéder 150 000 euros, porté à 375 000 euros en cas de nouvelle violation de la même obligation ; (...)<sup>4</sup>*

This article should be read keeping in mind that European legislation has stated that regulatory sanctions should be "dissuasive". This is why the regulator believes that the operator should be severely punished for its behavior. It therefore issued a fine for 5 million Euros.

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<sup>4</sup> The Regulatory Authority of Electronic Communications and the Postal Service can(...)

<sup>2°</sup> When a network operator or service provider does not comply within the deadlines contained in a decision taken in application of Article L.36-8 following the injunction issued in accordance with paragraph 1 of the present article, or with the intermediary obligations it contains, the ARCEP can issue one of the following punishments: (...)

b) Or, if the failure is not constitutive of a criminal infraction:

- a fine whose amount is proportionate to the gravity of the failure and the advantages that were drawn from it, without exceeding 3% of the before-tax turnover of the last reporting period, which can be increased to 5% in case of repeated failure. If it is impossible to determine this limit, the amount of the fine cannot be in excess of 150,000 Euros, increased to 375,000 Euros in case of repeated violation of the same obligation; (...)

## BRIEF COMMENTARY

It is possible to make two observations regarding this affair.

The first observation is on the relationship between regulation and contract, which is now becoming crucial. In a preliminary analysis of the November 4, 2010 decision and the June 23, 2011 ruling, it was possible to consider that the regulator was imposing identical or analogous conditions to those agreed to by the other operators granted access to the infrastructure. The principle remained that it was impossible for the regulator to obligate a party to enter into a contract.

Here, the regulator publicly affirms the contrary. It justifies this by citing the Court of Appeals' rulings of February 13, 2011 and June 23, 2011. If it is possible to affirm that contractual freedoms, expressed first and foremost in the negative—as are all freedoms—as the freedom not to enter into a contract, might be legitimately contradicted as concerns the natural monopolist (in this case, France Telecom as the infrastructure operator), it is harder to admit for the non-monopolist operator.

Indeed, denying the monopolist its constitutionally guaranteed contractual freedom can be justified by the fundamental right for other operators to access its network. A balance must be established between these two freedoms.

When Numericable's right not to enter into a contract is attacked, the justification is not the right of access: it is in order to ensure that all of France Telecom's contractual partners access its infrastructure under the same conditions. Is this sufficient? Is this equivalent to a fundamental freedom? Is this sufficiently powerful to contradict contractual freedoms guaranteed by the constitution?

The Court of Cassation will say.

Secondly, the Regulator insists upon the strategic necessity of making operators immediately obey its orders, even when these are *ex post* and not *ex ante* orders. Indeed, in order to obtain efficiency, operators must not play the game of introducing multiple law suits, which is always a possibility, or the game of interpretation: despite what the December 20, 2011 decision may say, the November 4, 2010 decision was not perfectly clear as to whether it obligated Numéricâble to sign a contract. Indeed, the operator must obey first and argue afterwards; the State and the tax authorities have long understood and applied this principle to taxpayers.

The decision is careful to cite jurisprudence of analogous severity against operators that refused to apply decision issued by the Competition Authority, such as the jurisprudence of the Paris Court of Appeals against France Telecom, which had repeatedly disobeyed injunctions issued by the Competition Council. The regulator thereby demonstrates its impartiality, pointing out that its severity could have also been directed at France Telecom.