

Anti-competitive practice of price discrimination in the residential mobile telephony market

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The French Competition Authority (Autorité de la concurrence) has fined Orange and SFR €180 million for their anti-competitive practice of price differentiation (Decision n°12-D-24). TERA Consultants was appointed by Bouygues Telecom, the plaintiff, to conduct economic studies for the case. The complaint focused on on-net offers by Orange and SFR that allowed subscribers to make unlimited calls to three of their contacts who also are subscribers of the same operator. The Authority approved that this practice had damaging impacts on competition. TERA Consultants undertook economic analysis at several levels: definition of relevant markets, price calculation, measurement of price differentiation, measurement of the impacts of the price discrimination practice on the operators' subscribers and their habits and the impacts on competition and competitors.

The decision of the Authority to a large extent was based on this economic analysis. The reasoning can be divided into three stages:

1 - To reveal the existence of price discrimination practice

The defendants argued that in fact the existence of plans including both calls within their network (so-called on-net) and to competing networks (off-net) made it impossible to calculate differential rates for both call types, and the price for on-net and off-net calls cannot be distinguishable.

2 - To identify and measure the anticompetitive effects of the practice

The defendants believed that the relative stability of market shares of the three main operators over the period (2005-2008) was an indication sufficiently probative to challenge the existence of an anticompetitive foreclosure effect.

3 - To show that the practice was not justified despite its apparently positive effect for consumers

The defendants argued that the calling plans in question were in favour of the consumer. According to the defendants, on-net calls were cheaper than off-net calls. The lower prices available to consumers would also have enabled them to make more calls to their favourite contacts without changing their level of communication to others.

The existence of price differentiation

The Authority found that there was a differential treatment between on-net and off-net calls because the calling plans in question reserved unlimited calls to three on-net contacts only.

The identification of the effect of anti-competitive practices

The Authority based its reasoning on the 'club effect', which was artificially reinforced by unlimited on-net offers. Under these effects, the utility incurred to a subscriber of an operator increases with the number of customers already subscribed to this operator. Two types of effects can be distinguished:

- i. The 'club effect' that encourages relatives (family, friends) of the subscribers of an operator to subscribe to the same operator.
- ii. The 'statistical effect' that makes the operator with the highest number of subscribers more attractive.

The Authority stated that from a competitive point of view these network effects are likely:

- i. to reduce the market dynamics at the retail level,
- ii. to generate a loss of expected income to the plaintiff and
- iii. to increase the cost for smaller competitors who were forced to implement costly similar offers to avoid market eviction.

As a result, the only sustainable strategy for Bouygues Telecom was to propose a similarly unlimited offer on calls to subscribers of all operators (all-net). This new offer has led to a highly asymmetric flow of traffic since subscribers of Bouygues Telecom multiplied their off-net calls while on-net offers from Orange and SFR had the effect of retaining the calls by subscribers on their own respective network. Given the fact that the mobile termination rates regulated by ARCEP were greater than the underlying costs, the traffic imbalance resulted in a highly asymmetric interconnection charge in the market for call termination that ultimately increased the costs for Bouygues Telecom.

¹<http://www.autoritedelaconcurrence.fr/pdf/avis/12d24.pdf>

The Authority has for example assessed the impact of such practice on the consumer behaviour by studying the evolution of the average rate for on-net calls made respectively by Orange and SFR subscribers over the period between 2005-2008. The analysis shows a sharp increase starting in 2004, with the launch of the on-net offers, and a decrease after 2008, following the launch of the all-net offers. The on-net rates then return gradually to the same levels observed before the launch of on-net offers.

Figure 1 - Taux On-net Orange

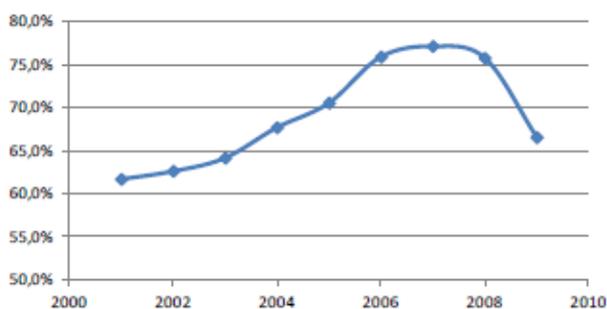
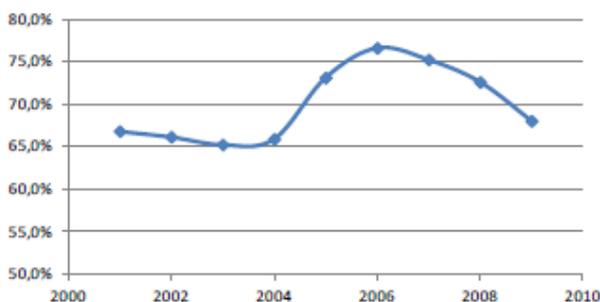


Figure 2 - Taux On-net SFR



Source : Autorité de la concurrence

The economic justification for price differentiation

The Authority rejected the argument by Orange and SFR that the price differentiation between on-net and off-net calls simply reflected a difference in the underlying costs of these two types of calls. In fact a calculation by the Authority showed that the price difference between on-net and off-net calls was always higher than the cost difference (§ 418).

As regards the positive effect of on-net offers on the consumer surplus, the Authority concluded that Bouygues Telecom's offers with unlimited calls to subscribers of all operators (all-net offers) have provided the same benefits to consumers without creating anticompetitive effects.

The Authority considered therefore that the practices in question had an anticompetitive effect of marginalising small operators, which was not compensated by efficiency gains to consumers.

The fines

In accordance with its standard practice of calculating the fines to be imposed, the Authority has taken into account:

- i. the seriousness of the infringements and the harm done to the economy
- ii. the aggravating circumstance of reiteration for France Telecom, because of six similar infringements of competition law committed over the last fifteen years
- iii. the mitigating circumstance that the progressive decline of call termination rates (regulated by ARCEP) would have favoured offers on-net

The Authority has consequently imposed a fine of €183 million in total, a significant penalty in France under articles L. 402-2 and 102 of TFEU (Treaty on the Functioning of the European Union). The Authority has further ordered the two operators to take measures to stop these infringements. The subscribers to unlimited on-net offers could then cancel their subscriptions at any time and without penalties.

This judicial order carries therefore significant pro-competitive effects by freeing up subscribers unduly tied to Orange and SFR.

Conclusion

Beyond the economic analyses' critical contribution to the decision, which is now the norm in such complex cases, the case on-net shows the technicality of the competition analysis in ex ante regulated sectors such as telecommunications. The competitive dynamics studied here are the results of the practices by Orange and SFR (unlimited on-net offers) within a specific regulatory framework. The assessment of the challenges of the case therefore requires a profound understanding of the regulatory issues in the sector as well as the competition law.

Finally, it should be noted that the decision entails interesting technical implications, in particularly regarding the margin squeeze test. However, since the decision is being challenged before the Paris Court of Appeal, it is still premature to draw jurisprudential conclusions.

Info-news TERA Consultants

Services of General Economic Interest (SGEI) and competition

TERA Consultants conducted a training session to the members of the General Economic and Financial Council (GEFIC) of the Ministry of Finance, through the implementation of compliance programs in the agencies where the State exercises its economic control. The purpose of the training was to explain the best pricing practices for competitive commercial services provided by actors who also provide a Service of General Economic Interest. A training on the most recent cases on relevant costs and fair prices is indeed essential for the judgments of the Court of Cassation, the highest court in the French judiciary, in the case of [Vendée sea crossings](#) and [the judgment of the European Court of Justice of 12 March 2012 in the case of Post Danmark](#).

Teaching materials of this training can be obtained by contacting info@tera.fr.

What are the prospects for the broadband digital development of France?

This symposium was organized on December 12, 2012 by FNCCR (a federation of local authorities). Prof. Laurent Benzoni, founder of TERA Consultants and Professor of Economics at Sorbonne University, was invited as an expert to speak at [the round-table](#) on issues relating to the public funding of broadband projects.

Merger control: a reconsideration of the structure index

Such is the title of the editorial number 4 of 2012 of the review 'Concurrence' (Competition) written by Prof. Laurent Benzoni and Dr. Julien Pellefigue, Partners at TERA Consultants. In this editorial, it is argued that, while the use of concentration indexes can still be relevant in the economic analysis of concentration opera-

tions, it is necessary to use the 'right' index and to go beyond the narrow framework of the Hirschman-Herfindahl index recommended by competition authorities. In this regard, the use of index Linda could be studied in the case of mergers and acquisitions in an oligopolistic market.

Internet neutrality and FTTH

Pierre-Yves Deboudé, Partner at TERA Consultants and expert in regulation and competition, was invited to give a two-day seminar in Rabat, Morocco in February 2013. The first seminar focused on the principles and challenges in regulating net neutrality, including the points of views from all stakeholders (NRAs, internet service providers, content providers, content delivery networks, consumers, etc.). The second seminar presents the regulatory issues such as pricing and access regimes for the deployment and development of fibre-optic network in Europe.

Very high speed networks: what role for local authorities?

Denis Basque, Partner at TERA Consultants and expert in regulatory cost modelling of FTTH networks, was consulted by the French Senate Committee in the context of assessing the law enforcement by local authorities in the deployment of digital networks.

Media and competition

Prof. Laurent Benzoni, founder of TERA Consultants and Professor of Economics at Sorbonne University, in association with Louis Vogel, Partner of the law firm Vogel & Vogel, and Laura Boulet, Director of public and legal affairs at the association of advertisers UDA, chaired the conference organized under the aegis of the Direction of Competition, Consumption and Fraud Control (DGCCRF) at the Ministry of Economy on Friday, April 12, 2013.

About TERA consultants

TERA Consultants is a leading economics consulting firm in France. Our competition practice employs a team of experienced economists who can apply the most advanced economic technics in terms of theories (industrial economics, game theory) and empirical evidence (econometrics, statistics, simulation methods), supported by legal analysis undertaken by law firms.

For almost 20 years, TERA has accumulated extensive experience in the field of abuse of market power, collusions, state aid and merger and acquisition. We have involved particularly in the case of iPhone exclusivity, a cartel between mobile network operators, State aid to France Telecom, or the merger between two premium television channels TPS / Canal Plus.