EUROPEAN COMMISSION

Brussels, 28.11.2014
C(2014) 9270 final

Autorité de Régulation des Communications électroniques et des Postes (ARCEP)

7, square Max Hymans
F-75730 Paris-Cedex 15
France

For the attention of:
Mr Jean-Ludovic Silicani
President

Fax: + 33 1 40 47 72 02

Dear Mr Silicani,

Subject: Commission decision concerning:

- Case FR/2014/1668: Wholesale call termination on individual public telephone networks at a fixed location
Article 7(3) of Directive 2002/21/EC: No Comments

- Case FR/2014/1669: Wholesale voice call termination on individual mobile networks
Article 7(3) of Directive 2002/21/EC: No Comments

- Case FR/2014/1670: Wholesale SMS termination on individual mobile networks
Opening of Phase II investigation pursuant to Art.7 of Directive 2002/21/EC[1] as amended by Directive 2009/140/EC

I. PROCEDURE

On 28 October 2014, the Commission registered a notification from the French national regulatory authority, Autorité de Régulation des Communications Electroniques et des Postes (ARCEP), concerning the wholesale markets for (i) call termination on individual public telephone networks provided at a fixed location, (ii) voice call termination on individual mobile networks[2], and (iii) for SMS termination[3] in Metropolitan France and oversea territories.

---

[1] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33.

[2] Corresponding respectively to markets 1 and 2 in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament

Two national consultations[4] were held: from 28 May to 28 June 2013, and from 12 September to 10 October 2014, respectively.

On 6 November 2014, a request for information (RFI)[5] was sent to ARCEP and a response was received on 12 November 2014. An additional request was sent to ARCEP on 13 November and a response was received on 17 November 2014.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRA), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on the notified draft measures to the NRA concerned.

Pursuant to Article 7(4)(a) and (b) of the Framework Directive, the Commission may notify the NRA concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The third review of the wholesale markets for call termination on individual public telephone networks provided at a fixed location was notified to and assessed by the Commission under case FR/2011/1236[6]. ARCEP notified a Bottom-up Long Run Incremental Cost (BU-LRIC) model, in line with the Termination Rates recommendation[7], resulting in a price-cap of 0.08 €c/minute applicable to all SMP operators as of January 2013. The Commission welcomed the obligation imposed on FT to provide IP interconnection at a reduced number of interconnection points and invited ARCEP to specify clear migration rules in order to encourage timely migration towards IP interconnection.

The third review of the wholesale markets for voice call termination on individual mobile networks in mainland France and overseas territories was notified to and assessed by the Commission under case FR/2010/1128[8]. The Commission commented on the need for ARCEP to achieve symmetry of mobile termination rates (MTRs) both in mainland France and to the largest extent possible in the oversea territories.

Mobile termination markets in mainland France were further notified to and assessed by the Commission under cases FR/2011/1200[9] and FR/2012/1304[10]. In case FR/2011/1200,

---

and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

3 Market not listed in the Recommendation on Relevant Markets.

4 In accordance with Article 6 of the Framework Directive.

5 In accordance with Article 5(2) of the Framework Directive.

6 C(2011) 5148

7 Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L124, p. 67 (the "Termination Rates Recommendation").

8 C(2010)7138; C(2010)7398

9 C(2011) 2977

10 C(2012) 5302

ARCEP reviewed its BU-LRIC cost model, and set a three-year glide path resulting in a price-cap of 0.8 €c/minute to be achieved by 1 January 2013 by Orange France, SFR and Bouygues Telecom. The Commission had no comments. In case FR/2012/1304, ARCEP proposed to designate Free Mobile, Lycamobile and Oméa Télécom as having SMP on their respective termination markets. The Commission opened a Phase II investigation under Article 7a of the Framework Directive. Following ARCEP's proposed amendment (i) to shorten the period of asymmetry (initially foreseen until the end of 2013) to 30 June 2013 (thus aligning MTRs for these operators with the 0.8 €c/minute price-cap applicable to other operators as of 1 July 2013), and (ii) to regulate (safe exceptional circumstances) any full MVNO entering the market as of 1 July 2013 on the basis of symmetrical MTRs, the Commission lifted its reservations pursuant to Article 7a of the Framework Directive.

Mobile termination markets in the overseas territories were further notified and assessed under case FR/2012/1370[11], concerning the update of the cost model of a generic efficient operator in the French overseas territories. MTRs were set for 2013 at a maximum level of 1 €c/minute applicable as of 1 January 2013 for all SMP operators except for Dauphin Telecom and UTS Caraïbe, for whom the 1 €c/minute price cap was applicable only as of 1 July 2013. The Commission asked ARCEP to reconsider the delayed implementation of cost-efficient MTRs for these two operators, in line with the Termination Rates Recommendation.

The second review of the wholesale markets for SMS termination services of mobile network operators (MNOs) in metropolitan France[12] and the first review of markets for those services in the French overseas areas were notified to and assessed by the Commission under case number FR/2010/1094[13]. ARCEP defined a separate market for SMS termination services on each of the mobile networks. The proposed market definitions covered the provision of SMS termination provided for other mobile and fixed network operators, internet access providers and so called "aggregators" of SMS (for the termination of SMS push services).[14] Since the SMS termination market was not covered by the 2007 Recommendation on relevant markets[15], ARCEP carried out the 3 criteria test and concluded that the test in question is met for all markets concerned. ARCEP proposed to designate all MNOs with SMP and to impose on them the full set of obligations. Moreover, ARCEP proposed to make the obligation to provide termination at regulated prices subject to a reciprocity clause, i.e. only operators offering the same tariff could claim the regulated tariff. The Commission invited ARCEP to closely monitor the delivery of content onto mobile devices which might according the

11 C(2012) 8380.

12 The first review of the SMS termination market for mainland France dates back to 2006 (case FR/2006/0413/D 204005).

13 C(2010) 5067; C(2010) 5276

14 SMS Push services are used by banks, distribution firms, music or games editors and other content providers who wish to send content SMS, such as weather information, confirmation of ordering and publicity provided by SMS to mobile end-users. At retail level these editors of services ("éditeurs de service") buy SMS Push services directly from MNOs or use aggregators ("aggrégateurs") to convey these SMS messages to the MNOs' customers. At wholesale level MNOs offer distinct SMS Push termination services to aggregators or other MNOs.

15 Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p. 65.

Commission lead ARCEP to no longer include SMS Push services in the relevant SMS termination market and to consider removing regulation. Concerning the non-conformity of the proposed reciprocity clause with the EU law, the Commission invited ARCEP not to impose the proposed reciprocity clause in the final measure.

II.2. Market definition

II.2.1. Wholesale fixed and mobile call termination

ARCEP defines each of the (fixed, mobile and SMS) termination markets as the provision by an operator of interconnection for the purpose of terminating (fixed and/or mobile) calls or SMS to its subscribers. ARCEP defines a separate termination market per operator[16]**.** The geographic scope of each of the defined (both voice call and SMS) termination markets corresponds to the geographic network coverage of each operator active on the French mainland and overseas territories and outermost regions[17].

ARCEP confirms in the response to the RFI that market definitions for, respectively, fixed and voice call termination as well as SMS termination remain unchanged as compared to the previous market analyses.

II.2.2. Wholesale SMS termination on individual mobile networks

The market definition cover the SMS termination provided by each mobile operator to other mobile network operators, fixed network operators, internet access providers and to the so called "aggregators" of SMS (for the termination of SMS Push services).

ARCEP keeps including in the relevant market both the wholesale termination services for SMS Push services and the wholesale termination services for interpersonal SMS[18].

ARCEP does not consider, at this stage, that SMS can be substituted by other messaging services, including MMS and instant messages or e-mails sent via *peer-to-peer* internet applications allowing the communication between subscribers using the same applications and a terminal device connected to the internet (like iMessage on Apple iPhone, Whatsapp messages on compatible devices, etc.). In this respect, ARCEP points to the fact that contrary to other EU countries (where SMS volumes are either low or strongly decreasing) and despite smartphone penetration and development of instant messaging, SMS usage in France remains high and continues progressing[19].

---

[16] I.e. a fixed voice call termination market for each fixed operator as well as separate markets for mobile voice call and SMS termination for each mobile operator.

[17] Overseas departments of Réunion, Mayotte, Martinique, Guadeloupe, Guyane and local authorities of Saint-Martin, Saint-Barthélemy and Saint-Pierre-et –Miquelon.

[18] ARCEP confirms its position that the two types of SMS termination services belong to different retail markets. As already explained by ARCEP in the context of the previous market analysis, the provision of content SMS belongs to a broader retail market for the provision of online services. Online services are provided over different media, e.g. SMS, e-mails, applications on Smartphone. ARCEP considers there is only partial substitution of SMS by other media since SMS corresponds to a specific demand for an instant, personal, reliable and urgent communication. ARCEP had explained at the time that, even though technical modalities to deliver interpersonal SMS and termination services for SMS Push services differ since wholesale termination services for SMS Push services encompass additional features, both services are bought for the same purpose (to terminate the SMS on an operator's network in order to deliver the SMS message to the end user), and face the same competitive constraints.

[19] In France 252 SMS are sent per user per month. Interpersonal (M2M) SMS services have increased by 285% between the second quarter 2009 and the second quarter of 2014. Push SMS services have increased by 55% between 2010 and 2013, i.e. from 1079 million to 1668 million.

While ARCEP considers that substitutability between SMS and the above mentioned messaging services may become possible at some point in time, it is of the view that the level of substitutability will not be sufficient in the timeframe of this review. ARCEP considers it more probable that such substitutability first occurs with respect to interpersonal SMS as compared to Push SMS for whom ARCEP considers substitutability will be more difficult since they are the only available means for a service-providers to reach the end-user.

II.3. Three criteria test

ARCEP carries out the three criteria test[20] with respect to all termination markets under consideration (i.e. SMS but also fixed and mobile voice call termination), and concludes they warrant ex-ante regulation.

In particular, with respect to the SMS termination market, ARCEP explains that because of a structural monopoly of mobile operators on their respective networks, the first criterion (high barries to entry) and the second criterion (no tendency towards effective competition) are met. Regarding the fulfillment of the second criterion, ARCEP does not identify at retail level substitues for SMS termination services able to exercise competitive pressure on the relevant market during the relevant regulatory period. In this respect, ARCEP reiterates in the response to the RFI its arguments why the substitutability of SMS by new messaging services would remain partial, i.e., the limited penetration of the mobile Internet, the need to have a compatible terminal (e.g. smartphone), to pay an additional fee for having access to the mobile internet, to have sufficient coverage and speed (or access to e.g. WiFi), and the absence of interoperability between the different instant messaging applications. ARCEP thus stresses the universality of the SMS services and concludes that these messaging services are rather complements than substitutes for SMS.

ARCEP highlights that 57% of smartphone users download applications. The average use of instant messaging is lower in France as compared to other EU countries (ES, DE, UK). The difference is particularly pronounced with respect to the young generation where it would be legitimate to expect first signs of change in usage patterns. ARCEP notes that the only country where the usage rate is lower is Poland, where SMS termination rates are also regulated. ARCEP sustains that these instant messaging services are not susceptible to exercise sufficient competitive pressure, considering the continuing increase in SMS usage. ARCEP pointed out that the smartphone penetration is 53% in the second quarter of 2014 and that 51% of total users are active users of mobile data.

The French Competition Authority, while endorsing ARCEP's analysis for the period until end 2016, notes that the substitution dynamics would be of a nature to lead, in the future, to effective competition[21]. ARCEP considers in this respect that while strong competitive pressure at retail level could in some circumstance justify lifting regulation at wholesale level, it is not straightforward that competitive constraints from the retail

[20] The test consists in analysing the presence of the following elements: (i) high barriers to entry, (ii) no tendency towards effective competition, and (iii) insufficiency of competition alone to address the identified market failures.

[21] ARCEP's analysis covers the period end 2014 – end 2017, while the Competition Authority (in its opinion on regulation until the end of 2016) has suggested the deregulation of the SMS termination market, if appropriate, already within the 2014-2016 period. In ARCEP's view, competitive conditions for 2017 do not differ from those for the period 2014 – 2016. ARCEP maintains that potential substitution dynamics at retail level from other messaging services would not be effective before the end of this regulatory period.

level lead to effective competition at wholesale level and that given the structural monopoly of termination markets, absent regulation, a situation of non-effective competition may lead to prices above the competitive level.

Finally, ARCEP considers that competition law alone is insufficient to address market failures, and has to be complemented with ex-ante regulation.

ARCEP explains that the risk of price-related competitive distortions is more limited now and that the main objective of maintaining regulation is to preserve competitive dynamics achieved so far. The benefit would be double: to ensure stability of wholesale prices, which also affects retail offers, and to ensure symmetry of prices between regulated operators and operators who have not been regulated so far. ARCEP explains that the proposal to maintain regulation (including the price cap) was supported by all operators. In this respect, ARCEP points to the possible risk of price increase and potential impact on operators. ARCEP maintains that given that traffic is not strictly symmetrical, an increase of SMS termination rates towards the EU average (2.5 eurocents/SMS) would produce a financial impact on operators of around 2 billion euros (around 15% of the mobile market turnover). Given these figures, even slight traffic asymmetries would, according to ARCEP, heavily impact operators who would in return be more hesitant to launch innovative offers, thus obstructing users' ability to develop new usages. ARCEP also stresses that aligning SMS termination rates in mainland France and overseas territories has permitted to include SMS traffic with these territories in the unlimited offers, which is not the case for SMS traffic exchanged with other EU countries, which according to ARCEP is due to the heterogeneity of SMS prices creating an economic risk.

II.4. Finding of significant market power

ARCEP's SMP findings are based on the assessment of the following criteria: market shares, barriers to entry and countervailing bying power (both at retail and wholesale level). All fixed operators are proposed to be designated with SMP on their respective termination markets for fixed voice call termination and all mobile operators on their respective markets for mobile voice call and SMS termination.

With regards to the SMS termination markets, ARCEP points out *inter alia* that the countervailing buying power exerted indirectly by the the calling operator's subscribers is limited and not credible.

The operators who have entered the market after the previous market decison was issued and who are not regulated so far, are also found to have SMP. ARCEP explains that when these operators entered the market in 2012 none of them was charging rates symmetrical to those of the regulated operators. Indeed, ARCEP explains that new entrants have used their SMP by charging mainly in 2012 higher SMS termination rates as compared to regulated level. Currently SMS termination rates are bilaterally symmerical and have stabilised: at the 1 eurocent price-cap in the SMS transactions among historical operators and between a historical operator and non-regulated operator, and in transactions among non-regulated operators at sometimes higher (e.g. […] eurocents/SMS) but symmerical levels.

As to the fact that these operators have not yet been regulated since their entry in the market, ARCEP explains that given the high workload related to a market analysis and the fact that the review of the full market analysis was already foreseen, ARCEP has found it more proportionate to analyse these four operators under the present market review. ARCEP believes that it is the announcement of the forthcoming symmetrical regulation which has permitted to both stop asymmetrical rates applicable by new operators, and to avoid a raise of prices between the expiry of the previous regulatory decisions and now.

II.5. Regulatory remedies

The obligations of access, transparency, non-discrimination and price control will be imposed on all SMP operators active on the territories covered by the present analysis[22].

In addition, the obligations of cost-accounting and accounting separation will be imposed on Orange on the (fixed and mobile) voice and SMS termination markets as well as on the five other big mobile operators[23].

Further specifications of the proposed obligations are provided below for each of the termination markets under consideration.

II.5.1. Wholesale call termination on individual public telephone networks provided at a fixed location

Regarding the transition to IP, ARCEP proposes that IP interconnection becomes the norm. Thus, as of 1 July 2015[24], a request to interconnect at IP level will be considered as a reasonable access request. In this respect the fixed operators will be obliged under the proposed transparency obligation to give prior notice when amending technical and financial terms of interconnection offers[25]. The draft measure also specifies the obligations with respect to Orange (who has both a NGN and a PSTN network). Orange should meet all requests for interconnection at IP level (at the NGN points of interconnection (PRN)) within 18 months following the adoption of this draft decision. This implies that Orange will have to provide termination at regulated tariffs for calls to all its numbers (both TDM and IP)[26]. As to TDM-TDM interconnection, it will continue occurring at regulated tariffs as far as this kind of interconnection will be technically feasible.

In continuity with the currently applicable price control, FTRs will be based on a pure BU-LRIC model and will result in the following pure BU-LRIC price-caps:

Timeframe	FTRs (in €c/min)
Until 31/12/2014	0.08
2015	0.079
2016	0.078

22 Regarding Saint-Pierre-et-Miquelon, which was already subjcet to a differentiated treatment during the previous market analysis, ARCEP proposes to make SMP operators subject to a cost-orientation obligation based on incremental costs. ARCEP does not, however, exclude the imposition of price-caps in the future if deemed necessary.

23 SFR, Bouygues Telecom, Free Mobile, SRR and Orange Caraïbe.

24 The draft measure also specifies that this date could, if necessary, be adjusted for overseas territories to reflect local specificities.

25 I.e. 12 months for amending financial terms of a termination offer based on TDM, and for a change in the network architecture implying commercial closure; 24 months for a change leading to a technical closure.

26 In order to promote the migration to full IP, ARCEP envisages extending the obligation currently imposed on Orange to provide termination at regulated tariffs (applicable so far only to IP-IP interconnection at NGN POIs (Points de raccordement (PRN)) and to TDM-TDM interconnection), to traffic towards all its numbers (i.e. TDM and IP) when interconnection is requested at NGN POIs.

2017	0.077

II.5.2. Wholesale voice call termination on individual mobile networks

MTRs will be based on a pure BU-LRIC model and will result in the following pure BU-LRIC price-caps[27]:

Timeframe	**MTRs** (in €c/min)
Until 31/12/2014	0.8
2015	0.78
2016	0.76
2017	0.74

II.2.3. Wholesale SMS termination on individual mobile networks

ARCEP proposes a differentiation of the price control remedy between interpersonal and Push SMS termination services. The 1 eurocent/min price-cap[28] will be maintained with respect to operators providing interpersonal SMS termination services (and imposed on those who were not regulated so far). ARCEP explains that while its cost model calculates a decreasing cost for SMS termination over time, ARCEP considers the maintainance of the price-cap as a first lightening of the price control obligation. The operators providing SMS termination services to non-mobile operators (i.e. Push SMS) will be required to charge non-excessive prices[29]. ARCEP explains with regards to the differentiation that while both types of SMS services were previously cost-oriented, the price-cap of 1 eurocent/SMS was not applicable to Push SMS. ARCEP clarifies that the charge for Push SMS was 3 eurocents due to the more complex technical service.

The price control obligations explained above are applicable to the termination of fixed calls, mobile calls and SMS originated within the European Economic Area (EEA). As regards the termination of (fixed and mobile) voice calls and SMS originated outside the EEA, SMP operators would be allowed (for the sake of achieving symmetrical tariffs) to condition the application of regulated tariffs depending either on the level of termination rates practiced by the other operator or on the regulatory framework applicable in this respect. Thus, ARCEP proposes that SMP operators are allowed to charge higher tariffs (than the regulated cost-oriented price-caps defined above) for terminating a call originated outside the EEA. These higher rates should not exceed the termination rates charged in return by the non-EEA operators.

---

[27] The relevant price-cap in Guadeloupe, Guyane, Martinique, Mayotte, Reunion, Saint-Martin and Saint-Barthélémy will be (until the end of the 2014) 1 €c/min since this is the price-cap currently applicable in these territories. This reasoning is also applicable to the FTRs tebal above. ARCEP explains in this respect that the objective of the proposed price control for MTRs is to align the tariffs in metropolitan France and Oversea territories, which is already the case for FTRs and SMS termination rates.

[28] Imposed in the previous market decision on the basis of *coût complet* (FDC model in the Commission's Art.7 decision.

[29] ARCEP will pay attention to four criteria: (i) whether mobile operators' offers correspond to the needs of SMS Push purchasers, (ii) the absence of tariff differentiation, (iii) tariff evolution, i.e. a tariff above the level of the 3 eurocents/SMS charged by the three historical mobile operators, and (iv) 6 months prior notice for any price change.

ARCEP explains that since the EU Regulatory Framework is not applicable to operators active outside the EEA, these operators may charge termination rates which are significantly higher compared to those charged by a European operator. ARCEP also refers to the French Competition Authority's request to look for a solution allowing European operators to benefit from balanced competition conditions in their transactions with non-European counterparts (though entering bilateral negotiations resulting in e.g. reciprocity conditions).

III. ASSESSMENT

Following the examination of the notification and the additional information provided by ARCEP, the Commission considers that the draft measure concerning the wholesale market for SMS termination on individual public telephone networks in France falls within the scope of Article 7(4)(a) and 7(4)(b) of the Framework Directive.

Article 7(4)(a) gives the possibility to the Commission to express its serious doubts as to the compatibility of a draft measure with EU law when it concerns the definition of a market differing from those defined in the Recommendation on relevant markets in accordance with Article 15(1). The latter recommendation identifies those markets the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the specific directives (i.e. defining a market for the purpose of ex-ante regulation). The Commission has serious doubts as to the compatibility of ARCEP's draft measure with EU law in particular Articles 15(3) and 16(4) of the Framework Directive.

ARCEP’s draft measures concern markets that are not included in the list of markets identified as susceptible to ex ante regulation in the Annex to the Recommendation on relevant markets. The draft measure would affect trade between Member States because of the cross-border aspect which SMS termination in France may have in transactions with other EU operators. The Commission considers that ARCEP has not provided sufficient evidence to support its findings that the SMS termination markets in France have been defined/analysed in accordance with competition law principles for the purpose of ex-ante regulation, in compliance with Articles 15(3) and Article 16(4) of the Framework Directive.

If mobile operators were subject to regulation for the provision of SMS termination services where this would not be justified on the basis of a proper definition of the market in accordance with Article 15(3) of the Framework Directive, this may distort competition for the provision of such services and prevent end-users from deriving maximum benefit from the market, thus being non-compliant with the principles provided in Article 8 (2) a) and b) of the Framework Directive.

The Commission, therefore, expresses serious doubts as to the compatibility of the draft measures with EU law for the following principal reasons:

Need to analyse competitive constraints on a forward looking basis

The SMS call termination market has never been listed in the Recommendation on Relevant Markets as a market susceptible to ex ante regulation. NRAs may, however, decide to regulate this market, taking into account the national circumstances, by taking utmost account of the Recommendation on Relevant Markets, which provides for a three criteria test to be followed when defining such a market. They could do so only if this would be justified on a forward-looking basis. It such a case, the NRA should in particular consider implications of the substitutability of SMS with emails and instant messaging, which are more and more available due to an increase in smartphone and broadband penetration.

ARCEP concludes that the three criteria test is met and that therefore the SMS termination market in France is susceptible to ex-ante regulation.

However, the Commission considers that, when defining the relevant market in a forward looking perspective, ARCEP has not been appropriately addressing the tendency towards effective competitive, by taking into account the impact of possible competitive constraints that could be exerted at retail level by alternative instant messaging services sent via peer-to-peer internet applications.

In this respect, the Commission already in its previous Article 7 decision[30] has noted that the development of mobile devices for the delivery of content may lead ARCEP to no longer include Push SMS services in the relevant market and to consider removing regulation.

With reference to all SMS services (including interpersonal and Push SMS), the Commission stresses that the take-up of mobile terminal equipment (which allows receiving content by means of e.g. email delivered on Smart Phones) together with the further spread of smartphones are likely to change competitive conditions and constrain the provision of SMS termination services in the very near future. In fact, SMS termination rates are not subject to *ex ante* regulation in 25 Member States where NRAs did not bring a case under Article 7 of the Framework Directive of ineffective competition in the markets concerned.

The Commission observes that the remarkable increase in smartphone penetration in France (from 16% at the end of 2009 to 53% in 2014) is likely to continue in the next three years (although perhaps more moderately), probably accompanied by an increased usage of instant messaging as alternatives to SMS.

In this respect, the Commission notes that ARCEP has not properly considered possible constraints deriving from instant messaging services sent via peer-to-peer internet applications. Also, ARCEP does not assess in detail the future evolution of instant messaging in France (i.e. potential growth or decline) as compared to SMS services.

Further to that, the Commission takes the view that ARCEP does not sufficiently consider a modified Greenfield scenario when analysing the substitution dynamics and resulting need for regulation, i.e. does not analyse the market independently of the impact of regulation on the relevant market.

In this regard, the Commission considers that the high SMS usage and low penetration of alternative messaging services, which ARCEP argues to be a French specificity, could be the result of regulation of the SMS termination market and the resulting low SMS (retail) prices. ARCEP's reasoning could therefore be circular and prevent alternative messaging means from developing and exercising competitive constraints on SMS termination. The Commission therefore fears that ARCEP's approach could lead to persistent overregulation impeding structural market developments, which would have taken place absent regulation in the market, and therefore does not meet the regulatory objectives as expressed in Article 8 (2) b) of the Framework Directive.

30 See case FR/2010/1094, C(2010) 5067; C(2010) 5276.

Potentially broader market for SMS termination in France

The Commission notes that ARCEP has not carried out a SSNIP test permitting to assess whether in case of small but significant non-transitory increase in SMS prices (part of) customers would switch to instant messaging services. The analysis of such switching towards instant messaging at the retail level under the Greenfield approach is limited to the SMP section dealing with indirect countervailing buyer power (section 3.4.1.) which is mainly based on previous market analysis conclusions. Also, the draft measure does not seem to assess in detail the evolution of (i.e. potential growth or decline) of instant messaging in France to see what the trend is as compared to SMS termination services. In this respect, ARCEP has not properly considered possible constraints deriving from instant messaging services sent via peer-to-peer internet applications, which could point towards a broader definition of the market which would include also other services than SMS termination.

As stated above, ARCEP further argues that messaging as an alternative to SMS might become a full substitute for interpersonal (mobile-to-mobile) SMS services within a shorter time period compared to Push SMS services. The Commission regrets that while ARCEP's argumentation appears to imply differing market dynamics for interpersonal and Push SMS services, this has not been sufficiently analysed by ARCEP.

Given the lack of robust analysis of competitive constraints arising from instant messaging services, the different technical characteristics of Push SMS (as compared to interpersonal SMS) as well as the proposed differentiation of price remedies at wholesale level, the Commission is not convinced that the provided evidence is sufficient to conclude on boundaries of the wholesale market for SMS termination as proposed by ARCEP.

Based on the evidence currently available the Commission therefore expresses serious doubts that ARCEP has correctly delineated the market for SMS termination services in France, in compliance with Article 15(3) of the Framework Directive.

SMP assessment

Since the evidence provided so far does not permit to conclude on the exact market delineation, this also impacts on the reliability of the SMP assessment. A potentially broader market, including for example instant messaging services, would have impacted the SMP assessment and possibly lead to a different SMP finding or no finding of SMP. Moreover, even if instant messaging services were rightly excluded from the market definition, ARCEP should have thoroughly assessed constraints coming from these services at the stage of the SMP analysis.

In this respect and as to the impact on competition, ARCEP explains in the response to the RFI that lifting regulation from the market would lead to higher SMS termination rates. The Commission would like to note that in other Member States where SMS termination is not regulated there does not seem to be a risk of abusive pricing. The risk of excessive pricing in France may be overestimated in France especially given the low level of SMS termination rates by EU comparison (1 eurocent/SMS versus 2.5 eurocent/SMS). The Commission does not dispose of evidence of whether the "what if competition" price would be closer to the EU average or to the regulated price-cap in France.

As to the potential impact on end-users, ARCEP states in response to the RFI that a deregulated market would result inter alia in a decrease of SMS volumes and in a development of alternative messaging services. This in ARCEP's view would lower social welfare since even the penetration of these alternative messaging services would have been higher absent regulation, a substantial part of mobile users would have not been able to access those services because smartphone penetration is of 53% and only 57% of smartphone users are downloading applications. The Commission cannot agree with this assessment of end-user welfare for several reasons. First, we consider that to claim lower benefits for end-users, ARCEP should have carried out a more detailed cost/benefit analysis in order to show that the disadvantage of decreasing SMS volumes does outweigh the benefit of having greater choice in terms of messaging services, especially given that some of them are free for end-users. While recognising that acquiring a smartphone for the purposes of using an alternative to SMS application represents an additional cost for consumers such a cost is normally decreasing with smartphone penetration.

The Commission therefore raises serious doubts that the proposed regulatory approach complies with Article 16 (4) of the Framework Directive and that it maximises end-user benefit in accordance with Article 8 (2) a) of the same Directive.

Conclusions

For the above reasons the Commission has serious doubts as to whether the market definition and the market analysis proposed by ARCEP meet the requirements laid down in Article 15(3) and Article 16(4) of the Framework Directive and accordingly whether ARCEP meets the objectives to in Article 8 (2) a) and b) of the Framework Directive. These serious doubts stem from the lack of sufficient evidence supporting ARCEP findings.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take vis-à-vis other notified draft measures.

The Commission points out that, in accordance with Article 7 of the Framework Directive, the draft measures on the markets for SMS call termination on individual mobile networks in France shall not be adopted for a further two months period.

Pursuant to Article 7(7) of the Framework Directive, ARCEP may adopt the draft measures concerning the wholesale markets for call termination on individual public telephone networks at a fixed location and for voice call termination on individual mobile networks in France and, where it does so, shall communicate it to the Commission.

Pursuant to Recommend 17 of Recommendation 2008/850/EC, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within five working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours sincerely,
For the Commission
Andrus ANSIP
Vice-President

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION