

Access to networks  
through competition law:  
*Autorité de la concurrence's* experience

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- **What competition law can do?**
  - **Mandate access**
  - **Control tariffs**
  - **Control the absence of discrimination**
  
- Where *ex ante* regulation can be needed?

# Mandate access to the network

- In principle, firms can choose their partners, clients and suppliers
  - obligation to supply can deter firms from investing
- But refusal to supply can infringe competition law and access to the network can be mandated
  - The Commission has set out three criteria to consider a refusal of supply from a dominant firm as an enforcement priority:
    - » *the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;*
    - » *the refusal is likely to lead to the elimination of effective competition on the downstream market, and;*
    - » *the refusal is likely to lead to consumer harm.*
  - Refusal of supply can also take the form of an anticompetitive agreement
- **The *Autorité de la concurrence* has imposed obligations to France Télécom in order to foster competition on the broadband market:**
  - to supply a « regional bitstream » wholesale offer (00-MC-01)
  - to grant access to a database giving technical details about the copper loop (02-MC-03)
  - to adapt unbundling rules to allow alt. operators to provide TV over ADSL (04-MC-01)

# Control tariffs

- Excessive pricing
  - Wholesale prices, far above costs, leading to market failure
    - Telecom sector in France (09-D-24): wholesale price set by FT to get capacity on a submarine cable essential to serve the broadband market on the island of La Réunion
- Margin squeeze
  - Unconsistency between wholesale and retail prices
    - Energy sector in France (07-MC-04) :
      - » wholesale price set by EDF for based-load electricity
      - » retail price for SMEs on the free market
- Retail price discrimination
  - Price differentiation, unjustified by costs differences, and distorting competition
    - Telecom sector in France (09-D-36): Orange Caraïbe (FT group) set *on net / off net* price differentiation far above termination rates differences, strengthening « club effects »
- Unjustified wholesale price agreement
  - Recent decision in the banking sector (10-D-28):
    - Banks agreed to charge interbank unjustified fees during the transition towards a new digital system for processing checks
    - Fees have been past, at least partially, to bank's clients, either directly by increasing checks remittance costs, or indirectly by increasing the price of other banking services

# Control the absence of discrimination

- SNCF / Expedia (commitment decision 09-D-06)
  - SNCF and Expedia had a common subsidiary: the online agency [www.voyages-sncf.com](http://www.voyages-sncf.com); SNCF granted preferential facilities to its subsidiary
  - SNCF committed to grant to alt. travel agencies the technical conditions needed to enable them to market certain promotional offers properly (last minute offers or high-speed intercity services at discount rates), or use the “print ticket” feature.
- Google vs. Navx (interim decision 10-MC-01)
  - At the stage of investigations, Google appeared « likely to » get a dominant position on the market of online advertising on search engines
    - see also FTC’s « Double Click » merger decision
  - Refusal of supply didn’t seem anticompetitive in itself: in principle, Google is free to set its « content policy » for its online advertising service « AdWords »
  - But implementation of this policy turned out to be:
    - » Opaque: Navx hasn’t been put in situation to understand the rules to respect
    - » Discriminatory: Navx was treated more roughly than TomTom or Garmin
  - Leading to competition harm on the downstream market and justifying interim measures

- What competition law can do?
- **Where *ex ante* regulation be can needed?**
  - **The limits of an *ex post* only approach**
  - **Bottlenecks and transition paths can justify *ex ante* regulation**

# The limits of an *ex post* only approach

- Where structural market failures are found...
  - Natural monopoly
  - Externalities
  - Public goods
  - Informational failures
- ...*ex post* competition law may be insufficient
  - Need for quick and frequent interventions
  - Need for operational expertise (technical processes to deliver access, accountability controls, etc.)
  - Need for *ex ante* rules, clarifying the playing field
  - Need for structural measures: accounting, functional or patrimonial separation

# Bottlenecks and transition paths can justify *ex ante* regulation

- Bottleneck:
  - Transport sector in France (10-A-04): a consistent approach is needed to set wholesale fees related to transport infrastructures (railways, airports, etc.)
- Transition path:
  - Pay TV sector in France (09-A-42): regulation is needed to set wholesale prices allowing the distribution of TV channels without exclusive deals
- A sector where *ex ante* regulation is particularly needed : the roll out of fibre networks (opinions 08-A-06, 08-A-09, 09-A-47, 10-A-07)
  - Bottlenecks:
    - Ducts inherited from the former monopoly
    - In-building wiring
  - Transition path:
    - Right incentives must be given to operators for rolling out the fibre local loop, without leading to a decline of competition
- NB: A good dialogue between authorities in charge of *ex ante* and *ex post* regulation ensures an efficient and proportionate action on the market