




Commitment decisions in network industries a French regulator's insight



Florence School of Regulation

24 September 2010

Workshop *10.10.2010 anni di Antitrust*

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1. Instances in which competition authorities make decisions accepting commitments by market players (scope)
 2. Potential areas of conflict between competition and sectoral regulatory authorities
 3. Some keys to successful cooperation between competition authorities and NRAs



1. Instances in which competition authorities make decisions accepting commitments by market players

- Commitment-related decisions are made by competition authorities, either by the European Commission (EC) or the French (national) Competition Authority (FCA).
- Competition authorities can negotiate/approve commitments, either in antitrust cases (abuse of dominant position/anticompetitive agreements) or in cases of a merger or acquisition (market concentration).
- The commitments made could be either structural or behavioural.
- Network industries are frequently regulated, especially telecommunications, post, energy, media, railways...



Commitments in cases of a merger or acquisition

- According to Article 430-5 of the French Commercial code: “The parties involved in the concentration [of the market] may commit themselves to taking measures aimed in particular at remedying, if applicable, the anti-competitive effects of this concentration”.
- Under the European Merger Regulation, the concerned parties could also make commitments with a view to rendering the concentration compatible with the rules governing the common market (Regulation 139/2004 of 20 January 2004).
- In 2007, in accordance with the EU Merger Regulation, the European Commission approved French mobile telephony operator SFR’s purchase of the Télé 2 France fixed telephony and Internet access businesses. When it was originally notified, the planned operation raised serious competition concerns in pay-TV markets in France, and the Commission launched an in-depth investigation. These concerns were resolved by taking into account commitments that guaranteed DSL operators equal treatment with the new entity regarding access to television content owned by the Vivendi group, of which SFR is a subsidiary.

Commitments in antitrust cases (abuse of dominant position/anticompetitive agreements)

- Commitment procedures overseen by competition authorities are a recent phenomenon for antitrust cases. European Competition Law introduced this procedure of submitting commitments to the European Commission through Regulation 1/2003 of 16 December 2002. Article 9 deals with competition concerns identified by the Commission where the undertaking(s) voluntarily offer commitments to address these concerns. This innovative decision empowers the Commission to make the commitments offered by undertakings binding and enforceable.
- In a recent report on the implementation of the Regulation 1/2003 (April 2009), the **European Commission** indicated that it had made **13 commitment decisions** to date.
- In French Law, a 2004 decree endowed the **French Competition Authority** with the power to make commitment decisions. In its annual report for 2009, the FCA indicated the success of this procedure: **30 decisions issued** as of the end of 2009.

Tableau 16 : Évolution du nombre de procédures d'engagements

	2003	2004	2005	2006	2007	2008	2009
Engagements*	0	0	6	6	8	7	3

* Nombre de procédures amorcées (mise en ligne d'un test de marché).



Frequent commitment decisions for antitrust cases in regulated sectors

Examples of commitment-related decisions made by the French Competition Authority in recent years in regulated network sectors include:

- **In the broadcasting wholesale market:** Decision No. 07-D-30 of 5 October 2007 concerning practices implemented by TDF in the terrestrial analogical broadcasting of TV services.
- **In telecommunications wholesale markets:**
 - Decision No. 08-D-21 of 7 October 2008 concerning practices implemented by France Telecom in the area of telephone connections on private property.
 - Decision No. 09-D-11 of 18 March 2009 concerning practices implemented by France Telecom in upstream Internet markets in the French overseas *départements*. Issues regarding the quality of the wholesale services offered to alternative operators.
- **In the mobile handset distribution market:** Decision No. 10-D-01 of 11 January 2010 concerning a vertical agreement between Apple and Orange for the distribution of iPhones.
- **In the energy (electricity) wholesale market:** Decision No. 07-D-43 of 10 December 2007 concerning practices implemented by *Electricité de France* (EDF): margin squeeze.

And even... to a degree

- **In the online advertising (Internet search engine) market:** Google has proposed commitments that address discriminatory concerns over the lack of objectivity and transparency of its search engine (ongoing).



The case of the iPhone

- This commitment procedure came after an initial interim measures procedure.
- The French Competition Authority (FCA) considered that **Orange's exclusive distribution deal for the iPhone was likely to further stifle competition in a sector that already suffers from a competition deficit**. In its decision, the FCA observed that **the exclusive rights granted by Apple to France's leading mobile operator extend over a very long period** (five years, although Apple is entitled to terminate the agreement after three), **and applied not only to iPhone models already on sale but also to those which may be released during the term of the deal**. In addition, the agreement was locked down by restrictions on the sale of "unlocked" iPhones.
- On 17 December 2008 (08-MC-01), the FCA issued interim measures that stated that iPhone products could no longer be marketed exclusively by Orange, or by any other operator wishing to create an offer with this device.
- At the end of 2009, **Apple and Orange proposed commitments that upheld the situation resulting from the application of the injunctions imposed as interim measures (no exclusive distribution rights for the iPhone in France for at least 3 years)**. After several months of negotiations over the details, the FCA accepted the commitments proposed by the parties, via Decision No. 10-D-01 of 12 January 2010, and closed the case.



The Mediaserv case (French overseas *départements*)

Decision No. 09-D-11 of 19 March 2009

- **France Telecom submitted commitments** to the French Competition Authority (FCA) designed **to improve the quality of the wholesale broadband services** provided to alternative operators **in France's overseas *départements*** (Caribbean Islands).
- The FCA had stated that France Telecom must implement the processes needed to resolve **quality issues** taking into account the distance between the overseas *départements* and mainland France. The FCA had concluded that **if the quality of services provided is poor, this can distort competition in the retail market at the expense of new entrants**. In particular, if alternative operators in France's overseas *départements* encounter difficulties in obtaining swift action from France Telecom to resolve technical problems that may occur on lines used by their customers, it would be detrimental to their image.
- To compensate for the disadvantages caused by the time difference, France Telecom has committed to maintaining a dedicated support unit for dealing with incidents involving telephony operators based in the Caribbean. France Télécom has also made the commitment to keep a representative from its specialist third party operator relations division in the Caribbean, and to appoint a new representative in Reunion.
- In addition, France Telecom will provide the competition authority with indicators that will allow the authority to verify that the quality of FT wholesale broadband offers is commensurate with that of its retail offers in France's overseas *départements*.


The Direct Energie Case (Electricity wholesale market)

Decision 07-D-43 of 10 December 2007

- **Alternative energy provider Direct Energie complained that EDF wholesale tariff conditions were such that it was unable to market viable commercial products to small businesses at competitive prices**, compared with those charged for the incumbent's "EDF Pro" solutions.
- Following the introduction of interim measures decided by the FCA, **EDF offered alternative suppliers a five-year contract with an optional 10-year extension for an annual volume of 10.5 TWh, representing total power of 1500 MW.**
- The FCA considered that "The quantity of electricity thus offered exceeds the free market's current consumption and would allow alternative suppliers to multiply by four their electricity sales volumes in the retail market. Access to this offer will be made via a bidding system for the 10-year option price. The total 15-year contract would guarantee alternative operators long-term foresight regarding the conditions of their supply in base-load electricity. This foresight is currently lacking from products available in the wholesale market.
Moreover, EDF committed to ensure that the price charged for supplies over the whole duration of the contract would not generate any margin squeeze with its own offers in the retail market. In this respect, the supply price is set at €36.8/MWh for the first year and will evolve according to market conditions.
This wholesale product will allow alternative suppliers to develop retail offers under conditions that will enable them to compete with EDF in the free market for small businesses and residential customers and to sell electricity at retail prices without incurring losses"



Three different cases butall of them important for the regulator


- In all three of these cases, the competition authority solicited the opinion of the sector's regulator. After that the competition authority had adopted its final decision, ARCEP published the opinions issued. However, although the opinion issued by the French Energy Regulatory Commission (CRE) in the Direct Energie affair is targeted explicitly in the competition authority's final decision, neither authority (CRE and FCA) has published it.
- The case concerning the distribution of the **iPhone** chiefly involves the mobile services retail market which is not regulated, but does raise major competition issues that are of interest to ARCEP as the sector's regulator.
- **The Mediaserv** affair directly concerns practices targeted by ARCEP regulation since it addresses the quality of the wholesale solutions marketed by the incumbent carrier which are regulated (as part of a market analysis)
- The **Direct Energie** case relates to wholesale energy prices. At the time, these prices were not subject to sector-specific regulation. This affair nevertheless concerned practices between vendors that had a fundamental influence on the organization of the electricity market in France.



2. Potential areas of conflict between competition authorities and the sectoral regulatory authority

- The examples cited above clearly show the potential for conflict (responsibilities and roles) between the CA and each sectoral regulatory authority.
- On the whole, all issues concerning the future organization of the regulated market, and the guarantee of effective competition over the long term are among the sectoral regulatory authority's responsibilities. This responsibility is particularly important when it concerns practices upstream in the "wholesale market". They have a direct influence on the market's overall design.
- Meanwhile, competition authorities investigate and monitor issues concerning past and ongoing anticompetitive practices.
- The purpose of commitments is to look ahead, to implement behavioural or structural commitments that will prevent competition problems down the road. Their aim is to shape the way that competition is organized on the market.

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- Commitments are of course initially proposed by the companies. However they come from "competition concerns" established by the competition authority (CA) which thus largely requested such commitments. Besides they are often negotiated, sometimes bitterly, with the CA.
 - Ultimately, when negotiating the measures to impose on the regulated entity, the CA finds itself, in both form and substance, in a role akin to that of the sector's regulator. As a matter of fact CA will solicit the regulator's opinion.
 - The potential risks are particularly significant when the commitments being discussed with the CA concern practices that affect the bottlenecks of essential facilities (discrimination, margin squeeze...), Bottlenecks are generally among sectoral regulators' main preoccupations. They are in their core area of responsibility. .
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- The risks of conflict are not more in danger of extinction that sectoral regulation is in danger of extinction.
 - Experience has taught us that sectoral regulation is not confined to simply opening a former monopolistic sector up to competition. In the telecom sector, for instance, asymmetrical regulation and the resulting restrictions imposed only on the former monopoly are gradually being lifted over time.
 - Regulation also becomes symmetrical and also concerns the old “new entrants” that have developed. Hence the expansion of the potential areas of conflict with the CA, not only over abuse of dominant position by the incumbent, but also over agreements between operators (esp. vertical ones).



Beyond *ex-ante* vs. *ex-post*: Police officer vs. educator

- In reality, if we take a step back, we can view the regulator as taking an educator's approach, while the competition authority has that of a police officer with a slightly rebellious teenager. The goal is to help the market progress in a healthy way (to a mature, adult stage).
- This dual approach (police officer/educator) offers a possible complementarity (and necessary cohesion) between the two institutions.
- This complementarity can help create a clearer understanding of the role played by each of the authorities in commitment procedures, and to identify the keys to successful cooperation in commitment issues.
- *This framework can apply to a country like France where there are two distinct authorities (competition and regulatory) with “complementary” powers.*



Part 3: Some keys to successful cooperation between competition authorities and NRA's

Going back to situation in France, three key observations:

1. It appears that while relationship between the FCA and the telecom regulator (ARCEP) is both fruitful and conflict-free, the situation in other sectors is somewhat more delicate.
2. The relationship between the FCA and ARCEP is structured by the Law (reciprocal opinions), and interaction over telecom-related matters is frequent (EU framework / market analysis).
3. A paradox?: The stronger is the regulator, the broader are its powers, the more the FCA appears to be heavily involved. The FCA is often solicited and is regularly, and very specifically, involved in the regulation of the telecom sector. Its involvement in regulated sectors such as energy, the media and the post appears to be more limited and more “cautious”.

The proposals that follow are based on current practices in the area of telecommunications. They add few changes with the current situation.



Involving the regulator in designing commitments ?

- The devil is often in the details, and competition authorities do not always have the experience and the specialised expertise needed to avoid the pitfalls in the details of drafting or implementing commitments. Input from the marketplace, notably through “market tests” and the procedure itself, are not always sufficient. Close collaboration with the sectoral regulatory authorities is a good practice. Especially when competition is weak....
- **Official opinion:** Article R. 463-9 of the French Commercial Code and Article L.36-10 of France’s Postal and electronic communications code state that, “**The competition authority** will communicate to Arcep all matters that fall under the latter’s purview, and **will solicit its opinion on the practices** in the electronic communications sector which it is responsible for regulating”.
- There can nonetheless be problems for accessing all of the information: the regulator may not be aware of all of the details on the case being processed by the FCA since it does not generally have access to the entire dossier.
- There are no specific provisions on the matter in EU Community Law.




Involving the regulator in designing commitments ?

- **Market test:** Whether the matter is before the European Commission or the FCA, the competition-related concerns that have been established and the proposals submitted by the concerned enterprise will undergo a “market test”, i.e. they are published and all interested parties can submit feedback (generally within a period of one month). The sectoral regulatory authorities (notably ARCEP and CRE) have already used this approach to establish their observations on the sufficiency or the details of certain commitments.
- **Hearings:** Article L.463-7, Para. 2 of the French Commercial Code stipulates that: “The Competition authority may call on any party that it believes capable of providing useful information”. In accordance with this provision, the FCA has always solicited the views of representatives of sectoral regulators (and notably ARCEP) during disputes that involve their sectors, and particularly during commitment procedures.
- Sectoral authorities could be asked to contribute to comparable hearings with the European Commission, although there is no specific provision to this effect.



Should the regulator be involved in monitoring compliance with commitments?

- Monitoring requires considerable resources: in theory, the regulator is the best equipped to monitor commitments (esp. behavioural ones, particularly when they affect wholesale markets): could the CA delegate this task to the sectoral regulatory authority?
- In France, commitments made to the FCA are monitored by the competition authority's legal department (see its 2009 Annual report, p.333). This legal department is comprised chiefly by magistrates on secondment and lawyers. Overseeing the implementation of commitments in certain sectors (and notably in network industries) can nevertheless require some advanced technical expertise. The role of sectoral regulatory authorities that have the expertise and are engaged in permanent monitoring of the markets could be expanded by monitoring compliance with these commitments.



The amount of interaction between the CA and sectoral regulators is also key to successful outcomes

- The close collaboration between authorities leads to more successful commitment procedures.
- The transposition of the European regulatory framework has structured regular institutional relations in the telecom sector.
- There are simultaneously informal exchanges : a steady flow of reciprocal information. In France, contact between the FCA and ARCEP is on at least a weekly basis. Also, it is not uncommon for staff members to move from one institution to the other.
- This array of formal and informal relations does not exist in the postal sector, and the “complementarity” is much less obvious. Disagreements between the two authorities in recent cases did not, however, concern commitment procedures.



Thank you!

