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French Electronic Communications and Postal Regulatory Authority
Decision No. 2012-0366
of 29 March 2012
on the implementation of a process for gathering information on the technical and pricing terms governing data conveyance and interconnection

The Electronic Communications and Postal Regulatory Authority, ARCEP, hereinafter referred to as “the Authority”,

Pursuant to Directive No. 2002/21/EC of the European Parliament and Council, dated 7 March 2002, on the common regulatory framework for electronic communications networks and services (Framework Directive), amended by Directive 2009/140/EC of the European Parliament and Council of 25 November 2009¹;

Pursuant to Directive No. 2002/19/EC of the European Parliament and Council, dated 7 March 2002, on access to electronic communications networks and associated resources (Access Directive), amended by Directive 2009/140/EC of the European Parliament and Council of 25 November 2009;

Pursuant to Directive 2002/22/EC of the European Parliament and Council, dated 7 March 2002, on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), amended by Directive 2009/136/EC of the European Parliament and Council of 25 November 2009²;

Pursuant to the French Postal and electronic communications code (*Code des postes et des communications électroniques*) (hereinafter referred to as CPCE), notably its Articles L. 32-1, L. 32-4 and L. 36-8;

Pursuant to conclusions of Council of the European Union of 13 December 2011 on the open internet and net neutrality in Europe³;

Pursuant to the Authority’s proposals and recommendations on network and internet neutrality, published on 30 September 2010;

¹ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services

² Directive 2009/136/EC of the European Parliament and Council 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

³ 3134th Council meeting Transport, telecommunications and energy

Pursuant to the public consultation on plans to implement a campaign for gathering information on the technical and pricing terms governing data conveyance and interconnection, which ran from 23 December 2011 to 17 February 2012;

After the discussions held on 29 March 2012;

I. Applicable legal framework

By virtue of CPCE Article L. 32-1, the independent administrative authority responsible for regulating the sector has the task of ensuring:

“4) [...] The definition of terms governing access to public networks and the interconnection of these networks which guarantee all users’ ability to communicate freely and the equality of competition terms and conditions;

4b) That no discrimination exists, under analogous circumstances, in the relationship between the operators and providers of public online electronic communication services in traffic routing and access to these services; [...]

15) End users’ ability to access and distribute information, and to access the applications and services of their choice [...]”

CPCE Article L. 32-4, as amended by Order No. 2011-1012 of 24 August 2011 on electronic communications stipulates that:

“[...] the Electronic communications and postal regulatory authority can, in a manner proportionate to the requirements attached to the performance of [its] duties, and based on a reasoned decision:

1) Gather from legal entities or natural persons operating electronic communication networks or providing electronic communication services the information or documents needed to ensure that these undertakings are complying with the principles set out in Articles L. 32-1 and L. 32-3, and with the obligations imposed upon them by the present code or by the texts adopted for its enforcement;

2) Gather information and documents concerning the technical and pricing terms of traffic routing applied to their services from undertakings that provide online public communications services.

3) Conduct surveys of these undertakings.

[...] The Electronic communications and postal regulatory authority will ensure that the information gathered in application of this article is not divulged if it is protected by a matter of secrecy listed in Article 6 of Act No. 78-753 of 17 July 1978 concerning various measures for improving relations between the government and the public, and various administrative, social and fiscal provision.”

This order, issued to perform the transposition of Directive 2009/140/EC, extends the Authority’s power to conduct surveys and gather information from operators⁴ to providers of

⁴ As defined in Article L. 32, Para. 1: *“An operator refers to any physical person or corporate entity operating a publicly available electronic communications network or supplying an electronic communications service to the public.”*

public online communication services (hereinafter referred to as PPOCS)⁵ on the technical and pricing terms governing data conveyance.

Article 5 of the Framework Directive of 7 March 2002 as amended by Directive 2009/140/EC specifies that “*Member States shall ensure that undertakings providing electronic communications networks and services provide all the information, including financial information, necessary for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with, this Directive and the Specific Directives.*”

The Authority therefore has the power to gather information on the technical and pricing terms of data conveyance and interconnection from electronic communications operators and from PPOCS, in a manner proportionate to the performance of its duties, as detailed hereafter.

II. The Authority’s objectives

a. The implementation of a process for gathering information on the technical and pricing terms of data conveyance and interconnection falls within the scope of the work ARCEP is performing on internet and network neutrality.

As defined in CPCE Article L. 32, Para. 9, interconnection refers to the establishment, by operators, of a physical and logical link between their public communications networks. Data conveyance refers to the process of a PPOCS entrusting all or a portion of its data traffic to an operator. Although this latter may involve situations where there is no direct relationship between the PPOCS and the operator, for the purposes of this decision, the Authority will confine itself to gathering information pertaining to the direct relationships that can exist between these two types of undertakings.

Data conveyance and interconnection services are the foundation of the internet. Unlike electronic communication network operators’ other activities which are closely regulated at the national level, these services are based on partially unwritten schemes and agreements that are often not publicly available. As a result, current data conveyance and interconnection systems appear both disparate and complex.

Since 2010 ARCEP has worked on several projects, both qualitative and quantitative, in a bid to deepen its knowledge and understanding of these markets. This has included drafting an informal questionnaire on the technical and pricing terms of data conveyance and interconnection, which led to the first information gathering campaign in early 2011; a series of bilateral meetings with operators and PPOCS in mid-2011; participation in the BEREC⁶ working group on IP interconnection and in BEREC/OECD workshops since 2011; commissioning an outside report on the future outlook for data conveyance and interconnection markets (late 2011/early 2012); and production of a report to Parliament in the first half of 2012 that includes an analysis of the internet ecosystem and IP interconnection.

⁵ Article 1 of the Law of 21 June 2004 on confidence in the digital economy or LCEN (*Loi pour la confiance dans économie numérique*), defines online public communication services as follows: “*all transmissions, upon individual request, of digital data that does not constitute private correspondence, through an electronic communications process enabling the reciprocal exchange of information between the sender and the recipient*”

⁶ Body of European Regulators for Electronic Communications.

The Authority's aim in implementing the system of information gathering described in this decision, which concerns elements that are not publicly available, is to deepen its knowledge of these markets thanks to specific quantitative information. The Authority announced plans to engage in just such a process in its Proposal No. 8 on internet and network neutrality in September 2010⁷.

b. This information is vital to enabling ARCEP to perform the duties entrusted to it by Law

As the Authority stated in its proposals and recommendations on internet and network neutrality, published on 30 September 2010, "*It should be mentioned that data interconnection is within the Authority's regulatory purview, in the same way as voice service interconnection*". Agreements between operators on the technical and pricing terms of data conveyance and interconnection are covered by the provisions of CPCE Article L. 32, Para. 9.

However, based on earlier work performed by the Authority (see above), the situation in data conveyance and interconnection markets today does not appear to warrant the introduction of *ex ante* regulation at this stage – either in the form of a *symmetrical*⁸ or an *asymmetrical*⁹ decision.

Nevertheless, only detailed and regularly updated knowledge of these markets can enable the Authority to ensure their proper technical and economic operation over the long term.

In addition, when called upon to settle disputes in accordance with the powers assigned to it by CPCE Article L. 36-8, ARCEP may be required to specify the technical and pricing terms contained in data conveyance and interconnection agreements between two operators, or between an operator and a PPOCS. Under such circumstances, the Authority's competencies would not be limited to disputes between two undertakings located in France. The Authority may therefore be required to resolve a dispute between an operator which is not subject to an obligation to declare itself to ARCEP – in accordance with CPCE Article L. 33-1 – or a PPOCS that does not operate on French territory, on the one hand and, on the other, an operator that is subject to this obligation or a PPOCS operating on French territory, if the technical and pricing terms of the data conveyance and interconnection agreements between these two players have an impact on end users located in France¹⁰. The Authority therefore needs to have thorough prior knowledge of the current state of the market and of the players'

⁷ Excerpt from the 8th proposal: "*To eradicate the lack of clarity that currently exists in data interconnection markets, and to obtain information that will be useful to exercising its powers, the Authority will be adopting a decision on the periodical collection of information on these markets, before the end of Q1 2011. Based in part on this information, the Authority will later assess whether it is necessary to implement more prescriptive regulatory measures in these markets.*"

⁸ ARCEP has the power to impose prescriptive measures on all of the concerned operators' technical and financial terms of interconnection, in accordance with the terms of CPCE Articles L. 34-8, I and L. 36-6.

⁹ ARCEP could introduce regulation for interconnection services as part of a market analysis (CPCE Article L. 37-1 et seq.). Under the terms of such a decision, obligations could be imposed only on the operator(s) with significant power in the market(s) in question. It should nevertheless be stressed that IP interconnection services cannot be attached to any of the relevant markets identified in the European Commission recommendation on relevant markets of 17 December 2007.

¹⁰ Should the dispute involve an operator or a PPOCS from another European Union Member State, ARCEP may coordinate its efforts to resolve the dispute with the other competent national regulatory authorities, and will take utmost consideration of the opinion formulated by BEREC, in accordance with the provisions of Article 21 of the Framework Directive.

business practices to be able to exercise this power assigned to it by Law and by European directives.

In light of these objectives and its new responsibilities, ARCEP considers it justified to seek information on the terms of data conveyance and interconnection that are likely to have an impact in France, and this regardless of where the undertaking in question is established there. The only undertakings concerned are therefore natural persons or legal entities whose activity or business is likely to have a significant impact on end users located in France (*cf.* section III).

To compare and verify the accuracy of the collected information, the Authority intends to query the various parties involved in a data conveyance and interconnection relationship whenever it appears necessary to do so.

The Authority aims to guarantee the reasonable and proportionate nature of the information required of the natural persons or legal entities concerned which, while being specific, will be limited in terms of the frequency of the campaigns and the number of questions asked, according to the modalities defined in this document (*cf.* sections IV and V).

The Authority will be careful to provide a processing framework for that information that satisfies any need for trade secrecy, as it has managed to do for the other markets that it regulates (*cf.* section VI).

III. Natural persons and legal entities concerned by this information gathering process

The following concerns only natural persons or legal entities that own at least one autonomous system (AS¹¹) which is interconnected with at least two other AS.

For the purposes of the present decision, the Authority distinguishes two categories of undertaking:

- Category 1:
 - o electronic communications operators required to declare themselves to ARCEP, in accordance with CPCE Article L. 33-1;
- Category 2:
 - o electronic communications operators that do not belong to category 1 and which have an interconnection relationship with at least one electronic communications operator belonging to category 1;
 - o PPOCS that have a direct relationship with at least one electronic communications operator belonging to category 1, for the purposes of interconnection, and which have actively taken steps to have their services or content used or accessed by end users in France.

The elements that could be considered as active steps taken by a PPOCS to attract users located in France might include, for instance:

¹¹ An Autonomous System (AS) is a collection of IP networks controlled by a single entity, such as an ISP, a transit operator or a PPOCS.

- having one or several websites that have a top-level “.fr” domain name, or any other top-level domain name that corresponds to a French territory – such as “.re”, “.pm”, “.gf”, “.tf”, etc.;
- offering content in French;
- offering products and services that are shipped to or supplied in France, to a significant degree.
- being established on the French territory¹².

All of the persons and legal entities belonging to category 1 must complete the questionnaire found in the Appendix to this decision.

The Authority may, when it considers it necessary to verify or complete the information gathered from the undertakings belonging to category 1, gather from the undertakings belonging to category 2 all or a portion of the information listed in this questionnaire.

IV. Nature of the information gathered

a. Scope of the relationships considered

The requested information concerns the data conveyance and interconnection relationship established between the autonomous systems (AS) of undertakings required to respond to the questionnaire (see above) and other AS, whether managed by that undertaking or by a third-party.

This relationship is considered to exist – i.e. to have been established – once it has materialised through a physical and logical link with another autonomous system, regardless of whether or not a written agreement stipulating the modalities exists.

Respondents can confine their response to a set number of relevant data conveyance or interconnection relationships. For a given AS, therefore, only information concerning significant data conveyance or interconnection relationships is required, in other words those involving:

- the 20 main partners in terms of total data conveyance or interconnection capacity (all points combined);
- partners beyond the 20th who share a total capacity equal to or above 1 Gbit/s with the responding party’s own AS, and having AS marked “FR” or “EU”¹³ in the RIPE database¹⁴.

The undertakings belonging to category 2 from which ARCEP collects information will have the option of excluding from their responses all data conveyance or interconnection

¹² For instance, by having their headquarters or a subsidiary office or agency located on French territory.

¹³ For historic reasons, a number of AS operating primarily in France are marked “EU” in the RIPE database (see below).

¹⁴ RIPE database (Réseaux IP Européens): <ftp://ftp.ripe.net/pub/stats/ripenc/delegated-ripenc-latest> => To be filtered using “asn” for AS, and “ipv4 / ipv6” for IP addresses.

relationships that are not likely to have a significant impact on the supply of public online communication services to users located in France.

b. Content

For each relationship that falls under the scope of the questionnaire, respondents are asked to supply information on the characteristics of the relationship (contact information for the natural person or legal entity concerned, relationship start date, location of the points of interconnection/ internet exchange points, pricing terms, capacity, etc.), along with (incoming/outgoing) traffic statistics as detailed in the appendix to this decision.

c. Proportionate nature of the information gathering process

The Authority considers this information to be proportionate to its assigned duties in that it is vital, in light of the current state of the market, to tracking and measuring changes occurring in data conveyance and interconnection markets which are themselves likely to have an impact on end users located in France.

The accuracy of the information supplied is crucial to enabling the Authority to achieve a sufficient knowledge and understanding of these markets and their evolution. The Authority is nevertheless keen to limit the effort required of respondents by introducing a criterion regarding the relevance of the responses, detailed above (point IV/a), which was established after taking its discussions with stakeholders into consideration.

The objectives listed below, and particularly the ability to verify that the parties are behaving in a non-discriminatory fashion, requires the Authority – in accordance with its Proposal No. 8 of September 2010 – to seek not only technical but also price-related information from undertakings belonging to category 1 on a regular basis.

V. Frequency of the information gathering

Information gathering campaigns will be conducted on a biannual basis for undertakings belonging to category 1. This frequency will allow ARCEP to obtain a regularly updated view of the state of the market, but remains reasonable given the lack of malfunctions ascertained to date in the markets in question. Depending on the conclusions drawn from the first six or twelve months of observation, the Authority may:

- alter the frequency (increase or decrease) of the questionnaire;
- alter the level of detail (increase or decrease) of the questionnaire;
- expand periodical information gathering campaigns to all or a portion of undertakings belonging to category 2.

Undertakings belonging to category 1 will be given a two-month period at the end of each half-year to complete the questionnaire. The required elements must therefore reach the Authority by:

- 31 August for the survey covering the first half of the year (from 1 January to 30 June);
- 28 February of the following year for the survey covering the second half of the year (from 1 July to 31 December).

Responses to the first questionnaire can cover only the second quarter of 2012. They must reach the Authority by 31 August 2012 at the latest.

Should the Authority consider it necessary, information will occasionally be gathered from undertakings belonging to category 2. The requested elements must reach the Authority within two months of the request date.

VI. Use made of the gathered information

The information gathered by means of the questionnaire found in the appendix to this decision will be used by ARCEP to perform its duties, and in application of the legal framework cited in Sections I. and II. of this decision.

This information will be circulated in a controlled fashion within ARCEP. It will help to further ARCEP's knowledge of data conveyance and interconnection markets, and to spread this information, while being careful to respect trade secrets. In particular, it will enable the Authority to assess the existence or lack of competition in these markets over time.

This information could also be used or communicated in aggregate form, notably as part of opinions submitted to the Competition Authority, notifications to the European Commission, reports to Parliament or work performed on the subject at the European level. Moreover, in accordance with CPCE Article D. 295: *"The Electronic communications and postal regulatory authority will, upon receiving a reasoned request, provide the European Commission and national regulatory authorities in the other European Union Member States with information required by these authorities to perform their duties"* – in other words only those that fall under their respective purviews.

Lastly, as part of the work performed by BEREC on IP interconnection in the context of net neutrality, the Authority will work to encourage a harmonisation of possible future information gathering campaigns that may be organised by other European regulators. It would indeed be inefficient for the undertakings concerned by these additional processes to be required to provide multiple interlocutors with similar information in very different formats.

It is decided that:

Article 1 – Electronic communications operators that are required to declare themselves to ARCEP, in accordance with CPCE Article L. 33-1, which own at least one autonomous system interconnected with at least two other autonomous systems, will provide the Authority with information on the technical and pricing terms governing data conveyance and interconnection, in accordance with the questionnaire contained in the appendix to this decision.

Responses to this questionnaire must be produced on a biannual basis and reach the Authority within two months of the end of each six-month period, beginning in the first half of 2012.

By way of derogation from the preceding paragraph, responses to the first information gathering campaign can cover only the second quarter of 2012. They must reach the Authority by 31 August 2012 at the latest.

Article 2 – The Authority may, when it considers it necessary to verify or complete the information gathered from the undertakings belonging to category 1, request all or a portion of the information listed in the questionnaire found in the appendix to this decision from those undertakings that own at least one autonomous system interconnected with at least two other autonomous systems, which have a data conveyance or interconnection relationship with at least one electronic communications operator covered by Article 1 and which belong to one of the following categories:

- electronic communications operators not covered by Article 1;
- undertakings providing an online communication service to the public and which have actively taken steps to have their services or content used or accessed by end users in France.

The requested elements must reach the Authority within two months of the date of the request.

Article 3 – The Director General of ARCEP is responsible for the execution of the present decision which, with the exception of the appendix, will be published in the Official Journal of the French Republic, and in its entirety on the ARCEP website.

Paris, 29 March 2012

Jean-Ludovic SILICANI

Chairman of ARCEP