



Autorité de régulation des communications électroniques et des postes (ARCEP)
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Réponse de Skype Communications sarl à la consultation ARCEP: “Consultation publique sur l’attribution d’autorisations dans les bandes 800 MHz et 2,6 GHz pour les services mobiles à très haut débit”.

La réponse de Skype est formulée en langue anglaise. Une traduction vers le Français pourra être réalisée sur simple demande.

Skype Communications sarl (hereafter ‘Skype’ www.skype.com) is a Luxembourg-based provider of peer-to-peer software applications which enable Skype users to communicate with other Skype users, and enabling, optionally and where possible, certain forms of communication with the subscribers of electronic communications networks and services.

Please find hereby Skype’s brief response to ARCEP’s consultation document.

A. General Remarks

Skype welcomes the opportunity to comment on ARCEP’s very comprehensive consultation document, and in particular on the points raised by ARCEP with regard to future evolution of mobile services, competitive dynamics going forward (at wholesale and retail level), national roaming, openness and neutrality.

The promise of a ubiquitous open mobile very high speed Internet represents an unprecedented opportunity, which stirs up the entrepreneurial spirit. Skype, on behalf of its users, believes that this entrepreneurship lies in the hands of a community of technologists, developers and users, including the network operators, whilst not being the exclusive preserve of the network operators. This community is ready to deliver an explosion of mobile innovations if ARCEP and other authorities set their policy correctly. These innovations will spur new forms of usage and generate traffic, which will clearly be in the interest of the future network operators, as well as in the interests of French citizens, public administrations and businesses.

In our view, the best course for ARCEP is to adopt 800 MHz and 2.6 GHz spectrum allocation rules and licence conditions that balance the interests of network operators and users, including innovative software developers such as Skype. Such a policy will maximize the overall citizen and socio-economic welfare. To that end, Skype appreciates ARCEP’s consideration of Internet access as a key mandatory service to

be provided by future licensees, as well as proposals on national roaming/MVNO access, and ARCEP's preparedness to consider the merits of openness and neutrality.

The presence of multiple network operators (inter-modal competition) increases, at least in theory, the possibility that competition will spur network operators to innovate with new business models. Skype supports initiatives to increase competition at the network operator level in particular. Currently, the French mobile market is dominated by three large GSM/UMTS operators, all of whom have mixed incentives regarding tariff levels, wholesale access, and mobile Internet. This is exemplified by the fact that the Conseil de la Concurrence has sanctioned collusive behaviour (2005) and has concluded that there were insufficient competition dynamics (2008) and has, alongside the Government and ARCEP, called for increased MVNO access. The licensing of a fourth mobile network operator is also on the agenda. It is also exemplified by the fact that, currently, the contractual terms and conditions of all 3 major French mobile network operators explicitly restrict users from utilising VoIP and P2P applications. There is a considerable risk that these circumstances will not materially change after 800 MHz and 2.6 GHz spectrum is allocated, and that restrictive behaviour will continue to occur, to the detriment of French citizens, public administrations and businesses.

ARCEP's goal for very high speed mobile (including the 800 MHz and 2.6 GHz allocation rules and licence conditions) should therefore be to foster a greater intensity of competition, delivering meaningful choice for consumers. Greater intensity of competition is needed at the network operator level, but should also be fostered by setting terms of wholesale access (national roaming and MVNO conditions) and at the retail services level (mandating, through the licensing conditions, Internet access as a service and applying QoS conditions/supervision), in order to prevent restrictive practices that harm user interests and would limit the wider socio-economic benefits that could otherwise be derived.

B. Observations relating to specific aspects/questions of the ARCEP consultation document

B.1. Questions 1 and 2

At page 8 of the consultation document (in the context of Q.1), ARCEP states the following:

« Les services de communications mobiles s'apprêtent à suivre la même évolution que celle des services fixes, c'est-à-dire une transition accélérée vers l'accès à haut et très haut débit. L'accès mobile devrait s'inscrire dans le prolongement des offres internet fixe à haut et très haut débit, pour assurer au consommateur – particulier ou professionnel – la continuité et l'ubiquité de l'accès personnel aux services Internet, sur une grande diversité de terminaux, en dehors de son domicile ou de son entreprise. Ces services devront être disponibles partout et à tout moment avec le même confort d'utilisation et la même richesse d'usages que les accès filaires performants. » ... « Cette tendance peut dès à présent être observée sur le marché, à travers la croissance des débits et du trafic de l'UMTS et ses évolutions HSPA, la mise en place de premières offres illimitées, ainsi que l'introduction de terminaux adaptés à l'internet mobile. ».

ARCEP presents this as a likely tendency, and provides evidence supporting the tendency it has identified. Skype would wish this to be true, but we must observe that the so-called 'offres illimitées' (alongside ALL other offers) are, as a matter of fact, severely limited, since ALL French mobile network operators apply contractual prohibitions on the utilisation of VoIP and P2P applications, and certain forms of utilisation are otherwise impeded. Therefore, Skype would like to appeal to ARCEP to ensure that the tendency it describes does not remain a theoretical possibility, but becomes actual reality. Absent intervention, and on the basis of the 800 MHz and 2.6 GHz spectrum allocation scenarios being considered, there is a very real risk that the tendency described by ARCEP will NOT become reality.

With regard to Section 1.2 (in the context of Q.2): « *Les apports du très haut débit mobile sur les plans économique, culturel et sociétal* », Skype wishes explicitly to endorse ARCEP's vision and description. We would add that the OECD has found that ICT contribution to growth represented 0.5% of GDP over a 10-year period, and that "innovation without requiring prior permission" (e.g. in the computer industry, in consumer electronics, on the Internet, etc.) is a recognised key driver of such growth. Innovation without requiring prior permission enabled by ubiquitous, open, very high speed mobile Internet is very likely to lead to a new wave of development and usage, in the interests of French citizens, public administrations and businesses. We therefore urge ARCEP to ensure, through the 800 MHz and 2.6 GHz spectrum allocation rules and licence conditions, that this prospect can be achieved also in the mobile communications environment.

B.2. Questions 3 and 4 (and selected points on 800 MHz/2.6 GHz principles).

As is stated in our general remarks above, Skype believes that fostering stronger competition at the network operator level is important, given deficiencies in market dynamics observed to-date. Enabling entry of new network operators increases the possibility that these will adopt new business models, and that this in turn will spur existing operators into revising restrictive practices.

Making available hitherto unavailable spectrum is clearly a key instrument to achieve this. However, we have concerns, especially as regards the 800 MHz band, and also as regards some scenarios (including 800 MHz + 2.6 GHz combination scenarios) that ARCEP's proposals may not lead to significant changes compared to the market structure that exists today at the network operator level. Indeed, there is even a risk that competition at that level could be reduced. In such circumstances, there is a considerable risk that restrictive behaviour will continue to occur, to the detriment of French citizens, public administrations and businesses.

Therefore, Skype would advocate that ARCEP give serious consideration to an approach that leads to the maximum possible intermodal competition and diversity (in the near term and the longer term). We would suggest that the following elements are key in this respect: (i) enabling new entry on the basis of 5 MHz blocks of spectrum which can be aggregated, (ii) with possibilities for requalification (incl. from FDD to TDD), (iii) a fully technology-neutral approach including allowing adaptation to future new technologies, (iv) permission of negotiation of border conditions between network operators, (v) no minimum spectrum blocks, (vi) spectrum trading on fair terms, (vii), the possibility of development of niche markets, etc. In addition, (viii) the

application and enforcement of a global spectrum cap per network operator/group, and maintaining such a spectrum cap for the entire duration for which the 800 MHz and 2.6 GHz spectrum is made available, is also a very important principle to promote competition at all points in time and avoid reduction of competition.

An additional potential remedy is to make available further spectrum, for example selected spectrum below 790 MHz, so as to enable further market entry at network operator level. Skype would therefore advocate that the French authorities consider, as a matter of priority, whether further spectrum can be made available for such purposes.

With regard to the overseas départements and collectivités, we can see no justification for any delay in enabling their citizens, administrations and businesses to benefit from ubiquitous open very high speed mobile Internet.

B.3. Questions 43, 44, 52

We are thankful that ARCEP is consulting (Q. 43) on the nature of very high speed mobile services/coverage, and the explicit reference to mandating mobile Internet speed/QoS in this context (Q. 44).

Skype considers it absolutely essential that Internet access must be included in the list of 'standardised' services characterising the definition of a very high speed mobile network, and this must be part of the licence conditions for the 800 MHz and 2.6 GHz band (and in fact should also be adopted for the already allocated bands). It is likely that mobile networks operating in the 800 MHz and 2.6 GHz bands providing very high speed Internet access will be an absolute necessity for nearly all individuals (in both personal and professional contexts). In addition, at least for a proportion of users (in geographic and in socio-economic terms) very high speed mobile is likely to substitute, wholly or in part, the use of fixed networks (partial substitution is already evident in countries such as Austria, Hungary, Portugal, the UK and other countries on the basis of current HSPA networks). Therefore the definition should ensure that users of these mobile networks can benefit from Internet access that is open, and with quality that is suitable to enable fully functional very high speed broadband Internet access, taking into account the requirements expressed by users to make use of, and distribute, content, applications and services on the Internet.

We note in this context that the Conseil Constitutionnel (2009) has confirmed that users' Internet access is explicitly a component of citizens' fundamental freedom of communication, freedom to speak, write and print.

With regard to geographic/population coverage (Q. 52), Skype is strongly of the opinion that the benefits from ubiquitous very high speed mobile Internet are so great (for citizens, administrations, businesses) and that this is so essential for socio-economic development, that a mandate (in the licensing conditions) to achieve quasi-ubiquity is essential. In this regard, it should be taken into account that very high speed mobile Internet is not only relevant for interpersonal communications, but that there are many self-evident and very desirable person-machine interaction possibilities, machine-to-machine applications, including for example in 'smart grid' electricity to reduce waste and preserve the environment, vehicle traffic management and safety etc. On existing

mobile networks, it has been seen that when these applications are custom-developed, using custom protocols, etc. development is slow and features are limited, but when the Internet is used, development is fast, innovation is great, and take-up is far greater.

B.4. Questions 61, 62, 63, 72, 75, 76

Radio Access Network sharing and other forms of joint investment/resource sharing (Q. 61) are an important topic, deserving continual attention, because they represent a two-edged sword. Sharing can both increase and decrease competition; it can lead to a market with more entities that have the freedom to define their own services, but it can also lead to collusive behaviour, spectrum pooling leading to underutilisation of a scarce resource against overall welfare, and to the limitation of possible business models. We believe that certain undesirable forms can easily be identified ex-ante, and that indications could be given by competition and regulatory authorities on what would certainly not be acceptable, and at the same time have regulatory and competition authorities exercise a scrutiny role on any tangible proposals. Therefore, we would advocate that, as a minimum, a requirement of notification of envisaged sharing arrangements should be imposed.

We welcome the fact that ARCEP appears to recognise that there are risks of status-quo or even deterioration of competition at the network operator level (Q.72) and that ARCEP is seriously considering an obligation on 800 MHz licensees to provide national roaming (Q. 62). Indeed, this appears to be inevitable in many of the scenarios put forward by ARCEP. Change is needed, in order to avoid a continuation of the present situation, or a deterioration. A key question is not only who should be the subject of the obligation, but also who should be entitled to benefit from national roaming. Skype is of the opinion, and this opinion is informed by the risk that the number of network operators may not increase to a sufficient extent to ensure a real change from today's circumstances (see also B.2, paragraph 2 above), that the right to benefit from 800 MHz national roaming should not be restricted to 2.6 GHz licensees, but should be open to all, in order to promote competition, and to achieve a far more competitive situation than we observe today at wholesale level (restrictive MVNO access conditions) and retail level (contractual restrictions on VoIP and P2P). We also believe that mandating 800 MHz national roaming and MVNO access should not have a major impact on investment/costs, and would likely be beneficial to the operator providing such roaming. Value of spectrum should not be ARCEP's main concern; achieving socio-economic benefit in general (not only strictly within the telecoms sector; the main value of ICT innovation is achieved outside the ICT sector) should be the main goal, and this goal is best achieved by vibrant competition at the network operator level, augmented (given the likely low number of network operators) by national roaming and by other obligations (discussed below).

National roaming and MVNO access (in the context of Q. 76) can also be important to support worthwhile diversification of offers and worthwhile niche positioning (e.g. operators can be focused on particular vertical industry markets, can provide a particular service to regional or local public authorities, be specialised in machine-to-machine, etc. but still need nation-wide, and indeed, EU-wide reach for their customers on an occasional but non core-basis). Finally, it seems clear - and the French authorities, including ARCEP, the Conseil de la Concurrence and the Government have recognised - that the MVNO access situation is not satisfactory, i.e.

that the access clause in the SFR UMTS licence, and the arrangements made after ARCEP withdrew its draft analysis of Market 15 of the 2003 Recommendation on Relevant Markets, have not produced the desired competitive dynamics, and hence a more prescriptive approach is needed to stimulate diversification of offers and head-to-head competition.

B.5. Question 77

Over the past two decades, the Internet has been a relentless source of individual and industrial creativity, a massive breeding ground for innovation and for the development of entirely new business concepts and models, to the delight and benefit of European citizens and European businesses, and facilitating the delivery of key public services by European government authorities at all levels.

The remarkable success of the Internet is largely attributable to its open and non-hierarchical nature, and especially to the fact that there are no gatekeepers deciding on which content, applications and services can be accessed, used and distributed by its users. It is an undeniable fact that network operators have historically supported this openness, in their own commercial interest.

Many mobile network operators, however, including ALL three French GSM/UMTS operators, have decided to adopt contractual clauses preventing users from using VoIP and P2P applications, and certain forms of utilisation are otherwise impeded.

If (very high speed mobile) network providers are put in a position of determining the success or failure, extra costs, terms and conditions etc. of content, applications and services on the Internet, this would mean that individual developers and small businesses would be discouraged from coming up with new content, software and applications, and from releasing, as Skype has done, revolutionary applications. This would undoubtedly have a brutally chilling effect on the most vibrant source of innovation of the past two decades, and would prevent French users, including individuals, businesses and administrations from the immense opportunities that lie ahead with fully functional open very high speed mobile Internet, as users and as producers.

Access to Internet content, applications and services, as confirmed by the Conseil Constitutionnel, is an explicit part of the fundamental rights of citizens to hold opinions and to receive and impart information and ideas without interference and regardless of frontiers. Additionally, unrestricted Internet access to content, applications and services is also a necessity for the preservation of the effectiveness of European and French policies designed to combat social exclusion, promote education, training, employment, etc..

On the basis of the above, including today's factual circumstances, and the comments made above, including the concerns we have expressed that the ARCEP proposals on 800 MHz and 2.6 GHz spectrum may not materially alter the existing market structure at network operator level, Skype strongly advocates that explicit regulatory intervention is needed (i.e. explicit conditions in the licences of very high speed mobile network operators) to ensure that users enjoy unrestricted access to the Internet.

Skype is also concerned that the liberalisation of terminal equipment, which was achieved in the European Union at the end of the 1980s, and is enshrined in Directive 1999/5/EC (the right to connect any non-interfering terminal equipment) is substantially at risk from the policies being adopted in recent years by access network operators, notably by means of particular integrated access devices, which have limited external connectivity, or devices which are associated with restrictive terms and conditions, for example on the right to utilise certain types of software. Hence, there is a need to reaffirm, in the licences of very high speed mobile network operators, the right of users to connect any device that does not harm the network.

B.6. Question 83

As had been indicated above, Skype believes that the conditions under which 800 MHz and 2.6 GHz spectrum are likely to be made available in France (and in the rest of Europe) suggest that there will be ongoing risks that competitive dynamics at network operator level will not be sufficient to maximise socio-economic welfare. On the basis of the current factual situation (at wholesale level: restrictive MVNO conditions; at retail level: contractual prohibition of use of VoIP and P2P) and the likelihood that the market structure at network operator level may not materially evolve, specific regulatory interventions are justified.

The interventions should take the form of: (i) doing the utmost to promote competition at network operator level, including by making available more spectrum, delivering meaningful consumer choice, (ii) imposing national roaming obligations and MVNO access on 800 MHz licensees, from which any interested party would be entitled to benefit, and (iii) requiring, through the licences of very high speed mobile network operators, the provision of Internet access as one of the 'standard services', and mandating that this is provided with quality that is suitable to enable fully functional very high speed broadband Internet access, taking into account the requirements expressed by users to make use of, and distribute, content, applications and services on the Internet.

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Should you require any additional information with regard to the contents of this response, please do not hesitate to contact us.

Yours faithfully,



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