

Press release

MOBILE NETWORK SHARING**The Administrative Court of Appeal of Paris rejects Bouygues Telecom's action for compensatory remedy due to the roaming agreement between Free Mobile and Orange**

Paris, 13 July 2023

Since its arrival in the French telecoms market, Free Mobile has employed a national roaming service on the Orange network, in both 2G and 3G, with peak speeds that have been decreasing steadily since 2016.

Believing that the roaming agreement signed on 2 March 2011 between Free Mobile and Orange was the source of anti-competitive effects, Bouygues Telecom submitted a claim for prior damages in the amount of 2.285 billion euros to the Prime Minister in December 2014, which the operator believed it had incurred due to Arcep's alleged failure to ensure regulation of this agreement between 2011 and 2015. After the implicit rejection of this request by the Prime Minister, on 8 April 2016 Bouygues Télécom filed an action for compensation with the Administrative Court of Paris. In a judgment dated 29 December 2020, the Administrative Court of Paris rejected this action. On 1 March 2021, Bouygues Télécom appealed this ruling.

In a judgement dated 29 June 2023, the Administrative Court of Appeal of Paris rejected the Bouygues Telecom appeal, thereby validating the actions that Arcep took to supervise the roaming services that Free Mobile employed on the Orange network between 2011 and 2015.

As a preliminary matter, the Court confirmed that, in this case, the governing liability regime is that of gross misconduct, *"having regard to the nature of the [...] powers assigned to Arcep, and to the interests at stake, of an economic nature [...]"*.

The Court ruled in this context that Arcep bears no fault that would constitute grounds for liability on the part of the Government.

First, the Court concluded that the Decision of 22 May 2014 whereby Arcep is alleged to have refused, *"on principle, to re-examine [...] the conditions governing access to the roaming services employed by Free Mobile [...] has no direct link to the damages pleaded by the appellant resulting, according to it, from the anti-competitive effects produced by the roaming agreement itself"*.

Second, the Court delivered a reminder that *"Arcep is not obliged to prove in its defence that the competitive effects of the agreement, from its conclusion in 2011 to 31 December 2015, were positive."* Moreover, the Court notes that *"investigation revealed that the terms and conditions of the agreement of 2 March 2011 were compatible with achieving the regulatory objectives ensured by Arcep,"* and that, *"Arcep monitored [Free Mobile's] compliance with its "non-roaming" obligations, [...] and concluded that [the operator] had met the target of 27% coverage as of 12 January 2012, of 75% as of 12 January 2015, and of 90% as of 12 January 2018, this latter target having even been exceeded by the firm Free Mobile since it was covering 93.4% of the population with its own 3G network as of that date"*. The Court also concluded that *"it was not proven that the pricing strategy proposed by the new operator Free Mobile had been enabled by the conclusion of the roaming agreement of 2 March 2011 and had been unfair in a way that required action from Arcep."*

The Court concluded that *“the firm Bouygues Télécom is not justified in claiming that Arcep engaged in gross misconduct in failing to fulfil its responsibilities resulting from the regulatory mandate assigned to it under the [...] Postal and Electronic Communications Code,”* with respect to network sharing agreements¹.

Lastly, the Court rejected Bouygues Télécom's invocation of the Government's strict liability due to an alleged breach of equality with regard to public burdens, having concluded that the firm, *“has not demonstrated a failure on the part of the Authority in carrying out its duties,”* nor *“any exorbitant burden likely to cause an abnormal situation to its detriment.”*

Arcep welcomes this judgement that upholds its analysis of the roaming agreement between Free Mobile and Orange from 2011 to 2015.

Associated documents:

- [Judgement of the Administrative Court of Appeal of Paris](#)
- [Judgement of the Administrative Court of Paris](#)

Arcep at a glance

The Regulatory Authority for Electronic Communications, Postal Affairs and Print Media Distribution (Arcep), a neutral and expert arbitrator with the status of independent administrative authority (IAA), is the architect and guardian of internet, fixed and mobile communications and postal networks in France.

¹ Since August 2015, Arcep has had the power to request that mobile operators amend their network sharing contracts when it appears necessary to achieving the regulatory objectives set forth in Article L. 32-1 of the Postal and Electronic Communications Code (CPCE). This power is provided for in CPCE Article L. 34-8-1-1, introduced by Act No. 2015-990 of 6 August 2015 on Growth, activity and equal economic opportunity.