The Autorité de la concurrence issues its opinion to ARCEP on its draft decision to deregulate the market for wholesale central access provided at a fixed location for the mass market (“market 3b”)

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Background

The French electronic communications, postal and print media distribution regulator (*Autorité de régulation des communications électroniques, des postes et de la distribution de la presse* – ARCEP) asked the *Autorité de la concurrence* for an opinion on its draft decision to deregulate the market for wholesale central access provided at a fixed location for the mass market. Like Opinion 23-A-14 of 5 October 2023, this opinion is part of the seventh cycle of analysis of the fixed broadband and superfast broadband wholesale markets for the five-year period to end-2028. As a reminder, these opinions come at a pivotal time, since this seventh cycle is marked in particular by the implementation of Orange’s plan to close the copper network.

In this opinion, which deals solely with market 3b (“bitstream” activated wholesale offers), the *Autorité* – while reiterating the importance of maintaining service-based competition within the market – supports ARCEP’s approach, in terms of both the definition of relevant markets and the reasons for deregulation. However, the *Autorité* invites ARCEP to monitor market developments closely, given the challenges posed by operators’ migration from copper to fibre.

The *Autorité* approves ARCEP's approach in terms of the material and geographic definition of relevant markets

- **Material definition of relevant markets**

As for the previous cycles of regulation of the fixed broadband and superfast broadband wholesale markets, the *Autorité* considers that, as proposed by ARCEP, it is possible to accept the existence of substitutability between broadband and superfast broadband offers.

However, the *Autorité* reiterates the observations made in Opinion 23-A-14 on the imperfect nature of this substitutability, with operators encountering certain obstacles in migrating all their customers to fibre. Consequently, the *Autorité* invites ARCEP to monitor any developments that might confirm or invalidate this conclusion, in particular in the context of the large-scale closure of the copper local loop network, and to draw any necessary conclusions.

- **Geographic definition of relevant markets**

With regard to the geographic definition of markets, the *Autorité* supports ARCEP's approach of defining a nationwide market, with the exception of very densely populated areas, and without distinguishing between private-initiative areas (AMII) and public-initiative areas, both of which are driven by a dynamic of convergence.

The *Autorité* considers ARCEP's plan to deregulate market 3b ("bitstream" activated wholesale offers)[1] justified

- **The *Autorité* supports ARCEP's analysis that the three-criteria test that could justify regulation of market 3b is not met**

Following the three-criteria analysis provided for in Article D. 301 of the French Postal and Electronic Communications Code (*Code des postes et communications électroniques*), and specified in Commission Recommendation (EU) 2020/2245 of 18 December 2020, ARCEP concludes that market 3b does not currently meet the first two criteria and that continued regulation of the market is therefore no longer justified.

In its opinion, the *Autorité* notes that analysis of the first two criteria – namely the absence of barriers to market entry and the evolution of the market towards a situation of effective competition – justifies regulatory measures being lifted. However, the *Autorité* highlights the importance of ensuring that independent operators, which often specialise in the business market, have access to wholesale offers, in particular in the fibre segment of the market, as their presence helps to stimulate competition in the market.

In addition, the *Autorité* notes that, contrary to ARCEP's analysis, several players have stressed that the effects of Orange's image and sales force on end customers are significant, leading to a reduction or stagnation in their order volumes, even though the number of potential customers has increased due to the gradual closure of the copper network.

While these factors could temper ARCEP's analysis and justify particular attention being paid to the evolution of the competitive situation in the fibre market during the analysis cycle, they do not call into question the finding that the market is evolving towards a situation of effective competition.

- **The need to preserve service-based competition**

As the *Autorité* recalled in Opinion 23-A-14 of 5 October 2023, service-based competition is crucial in the fixed electronic communications sector, since it has provided a useful means for third-party operators to drive competition in the market and climb the investment ladder. On the latter point, the *Autorité* recalled in the aforementioned opinion that wholesale offers in market 3b allow for the minimal and gradual presence of new competitors on the investment ladder, thanks to service-based competition.

Deregulating market 3b is therefore likely to make it more difficult for new operators to enter the market, by no longer guaranteeing the existence of these regulated offers. It is also likely to affect independent operators specialising in the business market, which – unlike their vertically integrated competitors – have no option but to use other operators' wholesale offers to build their retail offers. In addition, deregulating wholesale offers in market 3b is likely to be detrimental to those operators that, although not dependent on this type of offer for the bulk of their business, occasionally use it to respond to calls for tender whose specifications require the use of activated offers without enhanced quality, sometimes based on the copper network.

In this opinion, the *Autorité* states that it will pay close attention to contractual developments after deregulation of the market, particularly as regards wholesale prices.

[1] Bitstream access refers to a situation in which the operator that owns the network installs a high-speed or ultra-high-speed access link at the customer's premises and then makes this access link available to third parties, to enable them to provide high-speed or ultra-high-speed services to customers. In addition to local loop access, the operator provides transmission services to its customers and routes traffic to a "higher" (or "central access") level in the network hierarchy, where bitstream customers have a point of presence.

distribution de la presse – ARCEP) for an opinion on the analysis of the market for wholesale central access provided at a fixed location for the mass market

See the full text of the opinion (in French)

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