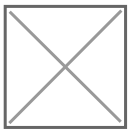
14 June 2010: National “ultrafast broadband” programme

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The Autorité de la concurrence releases to the public its 17 March 2010 opinion on the programme envisaged by the government.

Though favourable to the project, it is proposing adjustments and additional measures, notably in order to promote co-investment.



> Version française

The *Autorité de la concurrence* received a referral from by Christine Lagarde, Minister for the economy, industry and employment, and from Christian Estrosi, Minister for industry, to request an opinion on the national "ultrafast broadband" programme envisaged by the government. This programme is intended to facilitate the deployment of ultrafast broadband networks throughout the country. It will in part be financed by the national loan, in the amount of €2 billion, and calls for projects will be organised in three parts:

- “part A” is intended to stimulate private investment in profitable areas by allocating a label together with non-subsidy financial support;
- “part B” is intended to provide financial support to the local and regional administrations in the form of subsidies, for areas that are not profitable and as a supplement to part A;
- “part C” is intended to ensure the country’s “systematic” coverage subsequent to parts A and B.

The deployment of new generation networks is an essential challenge, and

the intervention of public authorities outside of very densely populated areas is legitimate

The deployment of new generation networks that allow ultrafast broadband access is a major challenge both for growth and employment, in terms of the development of the territory but also from a competitive viewpoint. Indeed, the deployment of a new optical fibre local loop could provide alternative operators with an opportunity to progressively extricate themselves from the incumbent operator's infrastructures. On an international level, France is not isolated in its desire to promote the best coverage of its territory with new generation networks, and the intervention of the public authorities is legitimate for three reasons: to ensure good linkage between the public intervention and private investment, to guarantee the "intensive" coverage of the service areas of the operators (i.e. the eventual connection to all homes and undertakings concerned) and, finally, to provide financial support for the deployment of optical fibre in areas that are not serviced by the market.

In view of the programme's non-constraining nature, its proper implementation is based on the balance between the incentives provided to the various actors so as to continue their deployments.

The linkage between the calls for projects for part A, intended for operators, and for part B, intended for local and regional administrations, may provide clarification as to the sharing of the roles between the actors and encourage the deployment of optical fibre, notably by the incumbent operator within profitable areas. In practice, in view of the programme's non-constraining nature, the Autorité de la concurrence offers the following observations, intended to strengthen the incentive for actors to continue with their deployments:

- **the commitment to "intensive" coverage that the operators will have to assume within the framework of part A is absolutely crucial**; the government may seek to clarify the coverage obligations of the operators such as to maximize the chances that these commitments will be fully implemented and not result in subsequent disputes;

- **the Autorité strongly recommends that ramp-up projects through modernization of the telephone network should be excluded from part B**; over and above the limits that these projects would entail on a competitive level, by encouraging the local and regional administrations to implement them, the State would discourage the incumbent operator from investing in FTTH; the programme's objective must remain the deployment of a new and lasting network;

- for the **proper linkage of the interventions of the local and regional administrations and of the operators, the government will have to see to the appropriate sequencing of the calls for projects for these two categories of actors**; dialogue between the local and regional administrations and the operators under the aegis of the sector regulator is more necessary than ever, if excessive dispersion of the local practices is to be avoided.

The *Autorité* has identified a certain number of competitive risks in the ultrafast broadband access market, resulting from the incumbent operator's greater capacity to deploy fibre and to use leverage by relying on the wholesale and retail markets

In profitable areas, pre-emption of the deployments by the incumbent operator could lead to a deterioration of the network access conditions for third party operators. The competitive intensity would be damaged relative to the benefits currently brought to the high speed market thanks to unbundling.

In unprofitable areas, the decisions that the incumbent operator will have to make regarding the conditions under which its retail branch will use optical fibre networks deployed by third parties will have decisive consequences on the profitability of these networks, and could therefore impact the outcome of the requests for proposals from the local and regional administrations within the framework of their public projects.

By accelerating the fibre deployment, the programme runs the risk of giving an advantage to the most advanced operator that is best set up to deploy it, namely

the incumbent operator. The national or local public authorities could, despite their best efforts, encourage the establishment of a fibre monopoly.

To limit these risks, the Autorité de la concurrence offers a certain number of observations regarding the programme's provisions...

- The financial aid must be available to all stakeholders in case of co-investments;

- The "landscape clause" envisaged by the programme, i.e. granting the label holder a kind of territorial exclusivity, is neither necessary nor legally feasible, and it does not correspond with the government's adopted general approach;

- The lots that will be determined for both the awarding of the label and the call for co-investments will have to be dimensioned with care, such as to not artificially increase the entry barriers, but while responding to the operational constraints of the deployment of the networks;

- Certain commitments that the government is seeking to obtain by means of the label would also appear to fall under the heading of sector regulation, thereby requiring good linkage with the ARCEP (French telecommunications and post regulator).

... and proposes additional measures notably intended to encourage co-investment

Regarding the profitable areas, the *Autorité de la concurrence* feels that the possibility, for alternative operators, to co-invest with the incumbent operator could limit the competitive risks, notably by providing the alternative operators with a "right to inspection" relative to the network architecture. To this end, the government's programme - and more specifically the benefits related to obtaining the label - do not appear to provide sufficient leverage. Consequently, the Autorité invites the ARCEP to use its ex ante regulatory jurisdiction in order to promote co-investment and, as relevant, to provide a framework for its

provisions.

Given the lack of history and the embryonic nature of the market, the Autorité de la concurrence recommends that a consultation clause should be included, for example after two years, in order to allow the market to indicate its intentions while maintaining the flexibility built into the arrangements.

> For more details in this regard, the entire text of opinion 10-A-07 of 17 March 2010 relative to the opinion requested by the Minister for the economy, industry and employment and by the Minister for industry relative to the national "ultrafast broadband" programme