

# 19 January 2012: Optical fibre roll-out

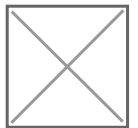
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**At the request of the Senate, the Autorité de la concurrence reminds public authorities of the competitive framework within which they can participate in the roll-out of very high speed broadband via "integrated projects".**

**It issues a number of recommendations to prevent the risk for public authorities of becoming victims of distorted competition within the context of their public tenders.**

**> [version française](#)**



Following referral by the Senate (Committee for the Economy, Sustainable Development and Town and Country Planning) regarding public authority activities within the sphere of optical fibre network roll-out ([see press release of 9 September 2011](#)), the Autorité de la concurrence has just issued its opinion, which it also explained to interested Senators during the public hearing of Bruno Lasserre, President of the Autorité, held by the Committee for the Economy, Sustainable Development and Town and Country Planning on 18 January 2011 ( [see video online at the Senate website](#)). It was also an opportunity to mention Messrs. Maurey and Leroy's Parliamentary bill regarding a local public service for very high speed broadband.

The Senate's request for an opinion falls within the scope of the Programme National Très Haut Débit (PNTHD - national very high speed broadband programme). The Autorité maintains its position as expressed in its opinion on this programme, launched by the government in 2009 (opinion [10-A-07](#)), which is now entering the operational phase. The AMII (invitation to demonstrate an investment interest) process has gathered together investment commitments from private operators, covering some 60% of the population. In addition, public

authorities were invited by the government to submit their public network projects to ensure coverage of their local areas.

The Autorité issued its response to the referral without commenting on the political choice implied within this context, namely that of the complementarity between public and private action. Furthermore, it has not suggested to construct or modify the competitive landscape through ex ante legislation, which falls within the remit of ARCEP (French telecommunications and posts regulator) regarding network roll-out, technical architecture and access conditions to such networks by third parties.

As an expert in competition law, the Autorité has analysed the European framework in this domain and, in order to provide an answer to the Senate's request, has verified that public authorities could act as a catalyst under certain conditions through integrated projects. Furthermore, it has highlighted the advantages of co-investment. As part of the objective to improve the effectiveness of public action, the Autorité once again draws attention to the two main competitive risks associated with the roll-out of very high speed broadband networks: firstly, the need to construct an incentivising framework, as it is not in the interest of the incumbent operator to roll-out a network that competes with the local copper loop, and, secondly, that of focusing attention specifically on tenders involving publicly-initiated networks within which integrated operators benefit from a special commercial and technical advantage.

The Autorité has therefore adopted a pragmatic approach, without establishing infrastructure competition as a principle, and without systematically favouring private projects.

### **Programme National Très Haut Débit (PNTHD - national very high speed broadband programme): maintain an incentive framework for private operators**

The Senate first of all asked the Autorité about the priority given by the PNTHD to operator roll-outs over public authority initiatives. In particular, the Senate sought the Autorité analysis regarding legal restraints resulting from the EU state aid regime concerning the possibility for local authorities to subsidize "integrated" projects that cover both profitable and unprofitable areas.

In its opinion, the Autorité de la concurrence notes that the legal framework<sup>1</sup> leaves plenty of room for initiatives by public authorities, notably via the principle of 'services of general economic' interest, but in compliance with strict conditions regarding the selection of the company responsible for providing the service and the terms of such a company's financial compensation. Within this context, the rationale of the PNTHD is based on a choice of appropriateness by the government, on which the Autorité de la concurrence has no jurisdiction.

The results of the AMII (invitation to demonstrate an investment interest) process suggest there is a certain appetite on the part of private operators for rolling out optical fibre networks. We should be very satisfied with these announcement , while ensuring that a framework is maintained which offers sufficient incentives and which effectively and manifestly ensures that declared intentions are met.

### **Publicly-initiated networks: protect local authorities against the significant risks of distorted competition during public tenders**

Local authorities have become major players in the electronic communications sector. Numerous public networks, launched on their own initiative thanks to the new powers they have held since 2004, today enable the residents and companies of these areas to benefit from competitive offers for high speed broadband Internet access.

With very high speed broadband and the roll-out of optical fibre networks, local authority intervention will continue. Numerous public initiatives will be launched over the next few years, often at local or regional level, as encouraged by the PNTHD (national very high speed broadband programme).

As already stressed by the Autorité de la concurrence (see opinions [09-A-57](#) and [10-A-07](#)), such public action is both completely legitimate and desirable, and integrated projects can take their rightful place within the framework of European state aid, whether it is a question of the guidelines issued on 30 September 2009 covering very high speed broadband or of the general framework of state aid, subject to certain conditions. Co-investment in particular offers very interesting avenues to justify projects on a case-by-case basis.

Nonetheless, the Autorité warns public authorities about the significant risks of distorted competition which may weigh down such public initiatives. To help forestall such risks, the Autorité issues a number of recommendations.

- Different operators are not on a level playing field

Two types of player make tender submissions to set up and operate public networks. Firstly there are the so-called pure players<sup>2</sup> who only serve the wholesale market, via access offers to public networks for which they are responsible and whose clients are Internet service providers (ISPs). Secondly, there are vertically-integrated operators such as Orange and SFR, who also carry out ISP activities and are therefore likely to use the public networks subject to tender in order to serve the retail market.

The Autorité de la concurrence notes that vertically-integrated operators benefit from significant advantages over the pure players which are likely to distort competition within the context of public initiatives. Firstly, a commercial advantage through the ability of an ISP to commit itself to becoming a client of the public network if it wins the tender to construct and operate the network. And secondly, a technical advantage, due to the fact that ISPs, as potential clients of public networks, insist on technical

specifications which, while not appearing to be illegitimate demands within themselves, in practice mean they are the sole candidate able to carry out the set-up and operation of the public network.

- Recommendations by the Autorité to limit the commercial and technical advantages of integrated operators (Orange and SFR)

Regarding the commercial advantage: the Autorité recommends that when integrated operators intend to make a submission to a public tender, they should also indicate the conditions under which they would be likely to use the public network as an ISP, irrespective of the identity the operator that will ultimately be designated to build the network, such that this information may be transmitted to all other candidates; providing this information could constitute an acceptance condition for the candidate's tender offer.

Regarding the technical advantage: if technical harmonisation work is deemed necessary to meet the requirements of the ISPs, it is vital that they fully participate and provide all the necessary information. The Autorité recommends that ARCEP (French telecommunications and posts regulator) ensure the smooth running of the harmonisation works and the full participation of all operators.

> [Full text of Opinion 12-A-02 of 17 January 2011 regarding a request for an opinion made by the Senate Committee for the Economy, Sustainable Development and Town and Country Planning concerning the framework of public authority participation in the roll-out of very high speed broadband networks.](#)

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*1 The opinion of the Autorité goes into some depth about the financing possibilities of very high speed broadband public networks and notably their compliance with European regulations on state aid.*

*2 These "pure players" are only active upstream within the context of network construction but do not develop Internet service provider activities downstream, for example Axione and Covage. They are generally subsidiaries of civil engineering groups.*