The Autorité de la concurrence has issued an opinion to Arcep as part of the cycle of analysis of the fixed broadband and superfast broadband wholesale markets

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Background

Arcep requested the opinion of the *Autorité de la concurrence* on five draft decisions adopted by Arcep as part of the sixth cycle for analysis of the fixed broadband and superfast broadband wholesale markets for the 2020/2023 period. The markets 3a, 3b et 4[1] have been identified by the European Commission as likely to be subject to *ex ante* regulation by the sector regulators of the European Union Members States, while Arcep identifies a separate civil engineering market, which it also proposes to regulate. Arcep is also proposing a draft decision specifying the terms and conditions for access to superfast broadband fiber optic networks.

The *Autorité* welcomes the work carried out by Arcep in drafting this coherent regulatory framework that comes at an especially key time for the markets analysed, with a view to the many changes expected.

In its opinion, the Autorité insisted, in particular, on the distinction, which may be justified in the future, between fixed broadband and superfast broadband. The Autorité has also raised the importance of the work on the closure by Orange of its copper network, to switch to the FttH network. The Autorité stresses that particular attention will have to be paid to the timetable and the technical, operational, commercial and financial conditions of this changeover, which raises considerable competitive challenges.

[1] Market “3a” concerns the wholesale supply of local access at a specific location; market "3b" concerns the wholesale supply of central access in a determined position; market “4” concerns the wholesale supply of high-quality access at a fixed location.

Referral by Arcep

Arcep’s request for an opinion relates to the identification of markets of products and services for which *ex ante* intervention is necessary to develop competition, and the designation of operators considered “powerful” on the relevant markets.

Arcep’s request for opinion also concerns a draft decision specifying the procedures for accessing the fibre-optic superfast broadband networks, applicable to all operators of fibre-optic superfast broadband networks known as “FttH” networks (Fiber to the Home).

Markets that include broadband and superfast broadband services, on which Orange exerts a significant influence

The *Autorité* supports maintaining a single market for broadband and superfast broadband services, as proposed by Arcep, for both the general and “business” segments, as it previously did in its opinion of 2017 (see press release of 9 May 2017).

The *Autorité* primarily drew on the fact that there are no services or applications widely popular with users that are only available with superfast broadband connection. On the “business” market, the *Autorité* has observed that physical connection hardware, or even the access speed proposed, are less critical for most businesses than the proposed service quality.

However, the current competitive dynamics driven by superfast broadband and the potential emergence of services exclusively available on superfast broadband could challenge this delimitation during the coming cycle.

Furthermore, for the first time, Arcep has chosen to introduce a separate analysis of the market of wholesale civil engineering physical infrastructure for the deployment of fibre-optic networks, and furthermore, to extend analysis to available civil engineering offers for the deployment of gathering networks, in addition to available civil engineering offers for the deployment of optical local loops.

The *Autorité* welcomes Arcep's choice to conduct a separate analysis of these two categories of offers, and shares its conclusions, particularly with regard to the importance of civil engineering infrastructure which will guarantee and support future deployments of fibre-optic networks.

The *Autorité* agrees with the designation of Orange as the only operator capable of exerting significant influence on all of the markets subject asymmetric regulation.

The effectiveness of the obligations imposed on Orange in the civil engineering market

Regarding the main changes to the regulation, the *Autorité* is in favour of Arcep's proposal for the civil engineering access market to require Orange to commit to a reasonable maximum duration of works when complying with reasonable requests from third-party civil engineering renovation operators. Nevertheless, the *Autorité* considers that a system specifying the procedures for identifying what constitutes a reasonable duration would be required to render this measure fully effective. Moreover, in a context where third-party operators are able to intervene autonomously for civil engineering renovation, the *Autorité* underlines, on the one hand, the need for Orange to manage operations in the

same way, whether for its own purposes or on the request of third-party operators and, on the other hand, the importance of the choice of third-party operators to intervene autonomously is not only guided by potential inertia on the part of Orange. The *Autorité* also underlines the importance that the operational and financial procedures defined by Arcep in its draft decision guarantee non-discriminatory treatment by Orange of any requests submitted.

Objective and precise rules for switch-off of the Orange copper network

With regard to means of supporting switch-off of the Orange copper network, which will spread from 2023 to 2030, the *Autorité* carefully examined, in particular, the issue of switchover from the copper network to the FttH network, and consequences associated with dismantling of the copper network by Orange, both for this operator and for the other operators that will be impacted.

This impact will have a financial dimension (changes to "unbundling invoice" paid by operators to Orange for their subscribers connected to the copper network), and thus a technical, commercial and operational dimension, associated with the different components linked to switch-off of the copper network for the subscribers affected (e.g. planning necessary work or anticipating switchover of subscribers from copper to fibre, etc.).

The *Autorité* considers that it is of the utmost importance for rules to be defined in the most objective and precise manner possible, and sufficiently in advance for operators to get organised. In particular, the *Autorité* approves Arcep's proposal to only allow "quick" switch-off of the copper network (with a notice period of two months for general offers and six months for specific business offers) in areas where commercial operators of nationwide scope (OCEN) are present on the FttH networks.

Moreover, the *Autorité* would like to reiterate the importance of taking into account the specifics of the business market in order to define precise switch-off criteria. The *Autorité* invites Arcep, while awaiting a concrete switch-off

programme from Orange, to conduct an in-depth analysis of the economic incentives linked to the unbundling fee and any potential changes to said fee, and the scheduling of the switch-off of copper lines, in order to guarantee that the measures taken do not unduly put certain operators at an advantage or disadvantage, and do not weaken the current competitive dynamics.

The *Autorité* welcomes the fact that a planned exit from the copper network is already clearly fixed by Orange, when operators are committed to significant investments for the deployment of FttH. The *Autorité* also welcomes the outlines defined by Arcep for the operational switchover process from copper to FttH.

Quality of service: an essential parameter for competitive dynamics

Concerning the issue of service quality, the *Autorité de la concurrence* takes note of the introduction of an obligation for Orange to comply with quantitative service quality thresholds for general copper (unbundling and activities) and FttH offers with enhanced service quality, and for the copper and fibre high-quality access offers for businesses. This obligation supplements pre-existing obligations to provide contractual service quality commitments with a penalties mechanism and to publish quality indicators.

Moreover, the *Autorité* welcomes the introduction of a service quality obligations mechanism (quantitative thresholds, contractual commitments with penalties and publication of indicators) applicable to all infrastructure operators proposing FttH offers on the shared optical local loop (the "SOLL", i.e. the network deployed from the concentration point (where applicable, from the shared remote connection point up to the subscribers' home), including when these offers contain an enhanced service quality option.

The *Autorité* considers it necessary that these service quality obligations, which especially meet the needs of business customers, also leave operators the ability to distinguish themselves on the retail market.

Measures to strengthen the competitive dynamic in the business market

On the business market, the *Autorité* is in favour both of imposing an obligation on all infrastructure operators to provide wholesale offers with two levels of enhanced service quality on the SOLL, and of implementing a pricing reproducibility test to ensure that alternative operators are capable of reproducing Orange retail offers on the basis of these wholesale offers activated on the dedicated optical local loop (DOLL) in dedicated fibre-optic zone 2 (ZF2). The *Autorité* considers that these offers must allow alternative operators to meet the needs of multiple businesses and thereby propose offers of a quality similar to offers developed on the DOLL with significantly lower barriers to entry. The *Autorité* supports these measures that seek to boost the business market while inviting Arcep to closely monitor the effective implementation of this test.

Strengthening the measures applicable to operators who have deployed FttH fiber optic networks, in particular in non-discrimination terms

The *Autorité* supports Arcep's choice of requiring that the operators having deployed FttH networks, implement "shared tools" to provide access to any operator requesting it, including their potential downstream branch at the point of mutualisation. This mechanism is indeed consistent with the notion of input equivalence[1] advocated by the European Commission to implement the obligation of non-discrimination on superfast broadband fiber optic networks[2].

The *Autorité* also supports Arcep's choice of an obligation applicable to all infrastructure operators, with respect to the control they exert over their network downstream of the concentration point, as the *Autorité* had suggested in its opinion of 2017.

However, the *Autorité* notes that Arcep intends, exceptionally and if certain conditions are met, to give some infrastructure operators the possibility of simply

implementing equal treatment between all operators. On this point, the *Autorité* invites Arcep to strictly assess this derogation as such an obligation is less likely to generate advantages in terms of non-discrimination as the equivalence of inputs.

Moreover, the *Autorité* approves the measures applicable to all infrastructure operators that have deployed FttH networks which aim to ensure the availability of fibre in lower-density areas, in addition to the new accounting obligations imposed by Arcep on these operators.

New recommendations aimed at specifying the obligations in force

The *Autorité* notes the Arcep's draft recommending to operators to implement a deferral mechanism for market launch of fibre-optic lines for all concentration points for which the date of delivery of the necessary services for commercial operators in not compatible with the scheduled date of market launch. In this respect, the *Autorité* invites Arcep to ensure that the commercial operators are capable of marketing their offers on equal footing with an integrated infrastructure operator. The Autorité observes that the proposed measure could be considered a direct adaptation of the non-discrimination principle as written in Article L. 34-8-3 of the French code of postal and electronic communications (*Code des postes et communications électroniques*), and therefore invites Arcep to ensure that there is no ambiguity in the way in which the draft recommendation and the existing obligations are articulated, so that the proposed mechanism does not lead to a less restrictive regime than that envisaged by current obligations.

Arcep has finally the intention to recommend that all infrastructure operators that have established or operated concentration points inside buildings in very high-density areas apply the solutions implemented by Orange during the previous cycle in order to guarantee effective access to inside concentration points under non-discriminatory conditions. The *Autorité* takes note of this project and reiterates, as in its opinion of 2017, that all infrastructure operators

are responsible for guaranteeing effective access to the concentration points it deploys, under non-discriminatory conditions. The ***Autorité*** invites Arcep to ensure that there is no ambiguity in the way in which the draft recommendation relates to existing obligations, so that the proposed mechanism does not lead to a less restrictive regime than that provided for by the current obligations.

[1] Provision of services and information to internal and third-party access seekers under the same conditions, including with regard to price and quality of service levels, schedules, systems and processes used and level of reliability and performance.

[2] European Commission recommendation n ° 2013/466 / EU of 11 September 2013 on non-discrimination obligations and consistent costing methods to promote competition and encourage investment in broadband.

OPINION 20-A-07 OF 15 SEPTEMBER 2020

regarding a request for an opinion from ARCEP on the sixth cycle of analysis of the fixed broadband and superfast broadband wholesale markets and on the draft decision specifying the terms of access to superfast broadband optical fiber electronic communications lines

See full text of the opinion

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