The Autorité de la concurrence issues its opinion to Arcep as part of the procedure for analysing the fixed broadband and superfast broadband wholesale markets

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Background

Arcep has asked the *Autorité de la concurrence* for its opinion on three draft decisions as part of the seventh cycle for analysis of the fixed broadband and superfast broadband wholesale markets for the 2024-2028 period. Its request for an opinion concerned, on the one hand, the definition of product and service markets for which ex-ante intervention is necessary, and, on the other hand, the designation of the operator considered as "exercising a decisive influence" on these different markets.

The opinion issued by the *Autorité* comes at a pivotal time, as this seventh cycle will see the implementation of the copper network closure plan proposed by Orange. By the end of this plan, in 2030, all subscribers should have migrated to fibre optic networks, which are now the reference networks. The general framework of the new cycle is also different from the old one. For the first time, Arcep is proposing to extend the period from three to five years, despite the persistence of several uncertainties likely to affect regulated markets. Furthermore, at this stage, Arcep has decided to reduce the number of relevant markets it intends to regulate, by excluding from its analysis the market for mass-activated wholesale offers (known as "3b") [1], which has been regulated since the sector opened up to competition.

In its opinion, the *Autorité* validated Arcep's approach to market definition. It welcomes the measures proposed to ensure the access to the civil engineering infrastructures, which is of key importance and is structuring for the sector, and those aimed at facilitating the migration to fibre. It calls on Arcep to be particularly vigilant for the good implementation of the plan to close Orange's copper network and the accompanying measures, as well as regarding the evolution of market 3b. The *Autorité* particularly calls on Arcep to ensure that the easing of the quality of service framework linked to the commercial closure of the copper network, and perhaps even more so the unbundling pricing framework, do not create imbalances in the market.

Migration to fibre should help boost competition in the business market. The Autorité calls on Arcep to ensure that operators have access to comprehensive eligibility information and are able to offer effective services with conditions at least similar to those that currently exist on the copper network.

The *Autorité* approves Arcep's approach to market definition, including the separate definition of the market for wholesale access to physical civil engineering infrastructures

As in its Opinion 20-A-07 on the previous cycle 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, in both the generalist and business segments. However, the *Autorité* qualifies the perfect nature of this substitutability, particularly in view of the difficulty of migrating a significant proportion of customers to fibre.

With regard to product markets, the *Autorité* approves the separate definition of a wholesale market for access to physical civil engineering infrastructures, given the structural nature of this access to guarantee the continued roll-out of fibre optic networks and ensure their reliability over time.

Lastly, for all these markets, the *Autorité* agrees with the national definition proposed by Arcep, and with the demonstration leading to the designation of Orange as the only operator exercising significant influence.

Regulatory changes proposed by Arcep

The Autorité welcomes Arcep's proposals concerning the civil engineering access market

The *Autorité* stresses that access to civil engineering infrastructure is of vital and structural importance to the sector at a time when the roll-out of fibre optic networks, considered the reference networks for the coming decades, is being continued and completed.

Access to these infrastructures must first and foremost guarantee and control the roll-out of the fibre networks still needed to provide the most comprehensive coverage possible, as the speed of implementation of the plan to close Orange's copper network may depend on it. During the investigation, operators indicated that difficulties with final connections are likely to delay the completion of their latest roll-outs. To alleviate these difficulties, Arcep is proposing a number of changes, welcomed by the *Autorité*, that will increase Orange's obligations in this area.

Access to civil engineering infrastructures must also guarantee and organise this access over the long term. The players heard for this investigation confirmed that preventive maintenance, curative maintenance and, more generally, the renovation of these infrastructures are essential issues. Here too, the *Autorité* notes a range of regulatory measures taken by Arcep that seem to address these difficulties, in particular those that increase Orange's information and transparency obligations towards third-party operators.

The Autorité invites Arcep to be vigilant regarding the implementation of Orange's plan to close its copper network

With regard to Orange's plan to close its copper network, the *Autorité* notes that it represents a major challenge for the upcoming regulatory cycle, given the large-scale closures it envisages. The *Autorité* also notes that, while full commercial closure is scheduled to take place during the cycle, in 2026, technical closure will occur over a longer period, until 2030.

During its interviews, the *Autorité* found that many players in the sector criticised the opaque nature of its implementation. In this respect, the *Autorité* reiterates that the imperatives of transparency and predictability are essential to the implementation of Orange's copper network closure plan and must not create too much room for manoeuvre or interpretation, to the detriment of competitive conditions in the closure areas concerned. The *Autorité* therefore invites Arcep to ensure that this plan is properly implemented and to intervene when the choices made or the criteria applied by Orange do not guarantee the conditions for competitive dynamics during the transition to superfast networks.

In addition, the *Autorité* notes that Arcep's proposals to ease certain conditions for closing the copper network, such as the criterion linked to the availability of an alternative infrastructure or the availability of an alternative offer, must be carefully considered when they are implemented (impact on the percentage of copper lines that will last over time, absence of difficulties in using alternative superfast technologies, real availability of offers adapted to users' needs, etc.). It also notes that the competitive scenarios mentioned in its Opinion 20-A-07 , in particular the risk of Orange building up a financial income, seem to have been confirmed since it published the plan to close its network. Indeed, the lack of hindsight regarding the competitive dynamics that will accompany the closure of the copper network, the uncertainties over the percentage of copper lines that will remain active over time (the number of customers reluctant to change may be as high as 15-20%), and the uncertainties over the actual time that will elapse between the commercial closure and the technical closure of the network, all seem likely to affect the incentives of operators and their customers, in particular the decision regarding migration to fibre. Consequently, for the next regulatory cycle industry players are very concerned about the continued reduction in the quality-of-service framework for the mass market, linked to the commercial closure of the copper network, and perhaps even more so about the reduction in the tariff framework for unbundling. The *Autorité* calls on Arcep to remain vigilant regarding these reductions, to ensure that they do not create imbalances in the market.

The Autorité encourages the measures proposed by Arcep to support customer migration to fibre

While the *Autorité's* hearings revealed that some subscribers do not seem to be migrating to fibre until forced to do so, it notes that continued roll-out to make all premises eligible is essential if all customers are to migrate when the time comes. To this end, it stresses the need for the files on the eligibility of premises for fibre optic networks to be exhaustive.

In addition, the *Autorité* is in favour of Arcep's proposals for operators to terminate access to Orange's local loop free of charge where they have no other choice but to do so, and for Orange to reimburse overpayments where it has benefited from a waiver of pricing control for a longer period than initially planned, due to the absence of a technical closure of the copper network. In the *Autorité's* view, these measures do not appear to impose any additional costs on operators in connection with the closure of the copper network, which should encourage migration to the fibre optic network.

The Autorité calls on Arcep to be vigilant in opening up the business market to competition in the next cycle

As in previous market analysis cycles, the business market remains a market with little competition. The *Autorité* finds, however, that the fibre migration period offers an unprecedented opportunity to boost competition, as a significant number of companies are considering a change of operator during this period.

In its opinion, the *Autorité* identifies two major avenues for promoting this potential migration dynamic. First, the aim is to strengthen business eligibility by ensuring that all business premises are accurately and exhaustively listed and identified in the fibre optic network eligibility files. Lastly, companies need to be able to subscribe to effective offers that provide fibre services at least equivalent to those offered by copper.

The *Autorité* therefore calls on Arcep to be particularly vigilant on these issues, so that all operators can continue to roll out and connect their networks and can then offer their commercial services with similar conditions.

[1] Market 3b comprises wholesale central access offers at a fixed location, aimed at the mass market or general public. It covers offers delivered at a sub-national level, whether based on copper DSL, coaxial cable or optical fibre, and whether delivered in IP (Internet protocol) or Ethernet.

OPINION 23-A-14 OF 5 OCTOBER 2023

on a request for an opinion from the French Electronic Communications, Postal and Print Media Distribution Regulatory Authority (Autorité de régulation des communications électroniques, des postes et de la distribution de la presse) on the seventh cycle for analysis of the fixed broadband and superfast broadband wholesale markets.

See full text of the opinion (in French)

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