



EUROPEAN COMMISSION

Brussels, 4.12.2020
C(2020) 8807 final

Autorité de régulation des
communications électroniques, des
postes et de la distribution de la
presse (ARCEP)

14, rue Gerty Archimède
75012 Paris
France

M. Sébastien Soriano
Président

Subject: Cases FR/2020/2284: Wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-markets products in France – Detail of remedies

Commission Comments pursuant to Article 7(3) of Directive 2002/21/EC

Dear Mr Soriano,

1. PROCEDURE

On 6 November 2020, the Commission registered a notification from the French national regulatory authority (NRA), Autorité de régulation des communications électroniques, des postes et de la distribution de la presse (ARCEP)¹, concerning the French markets for wholesale local access (WLA) provided at a fixed location and wholesale central access (WCA) provided at a fixed location for mass market products².

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33), as amended.

² Corresponding respectively to markets 3a and 3b in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive (2014 Recommendation on Relevant Markets) (OJ L 295, 11.10.2014, p. 79).

The national consultation³ ran from 11 September 2020 to 12 October 2020.

The Commission sent a request for information⁴ (RFI) to ARCEP on 17 November 2020, and received a reply on 20 November 2020.

Under Article 7(3) of the Framework Directive, NRAs, the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The last market review for wholesale local access and central access provided at a fixed location were notified to and assessed by the Commission respectively under cases FR/2020/2278 and FR/2020/2279⁵. Regulated prices for the respective services were previously notified to and assessed by the Commission under case FR/2017/2046⁶.

2.1.1. Wholesale local access provided at a fixed location

ARCEP defined the relevant product market as including access to the copper local loop and sub-loop and passive access to fibre local loops. After a detailed geographic analysis, the relevant market was defined as national.

ARCEP designated Orange as the operator with significant market power (SMP) and imposed on it a full set of remedies for its copper network, including the provision of access to the copper local loop and sub-loop and to its civil engineering infrastructure. On the FTTH network, ARCEP complemented the symmetric regulation⁷ with three (asymmetric) additional access obligations imposed on Orange, which serve principally the business segment of the underlying retail market⁸. Orange was required to provide access seekers with a set of wholesale offers covering backhaul, co-location and unbundling services under non-

³ In accordance with Article 6 of the Framework Directive.

⁴ In accordance with Article 5(2) of the Framework Directive.

⁵ C(2020) 8531 final.

⁶ C(2017) 8891 final.

⁷ According to the symmetric regulation, building operators must offer passive access at transparent and non-discriminatory conditions, reasonable prices, and in the respect of the principle of objectivity, relevance and efficiency (including the publication of a reference offer).

⁸ Orange shall make available offers of passive access to its FTTH network with and without enhanced quality of service (QoS) at technical and tariff conditions such as to allow alternative operators to develop wholesale active offers specifically for the purpose of serving the retail business market. In addition, Orange shall make available a resale access offer on its FTTH infrastructure that it commercialises at retail level for the business segment. Orange shall also provide a drop cable to connect on demand business premises to its fibre network in very dense areas.

discriminatory terms and conditions⁹. In particular cost orientation was applied to access to local copper loops and sub-loops and ancillary services¹⁰.

The Commission commented on the need to precise the obligation relative to the connection of business premises in very dense areas.

2.1.2. Wholesale central access provided at a fixed location for mass-market products

ARCEP included in the relevant product market wholesale access for the provision of broadband and high speed broadband services provided - at regional access points - over copper, fibre and coaxial cable networks, independently of the interfaces' technology. ARCEP performed a geographic analysis and found that differences in competitive conditions justified defining two separate markets: very dense areas, representing 3% of market 3b, and the rest of the national territory. Moreover, ARCEP found that competitive conditions varied on the market "rest of the territory" depending on the number of network operators which were in the position to offer LLU-based bitstream¹¹.

ARCEP designated Orange as the operator with SMP, and imposed on it (i) the provision of bitstream access over its copper network (but not over fibre¹²); (ii) non-discrimination; (iii) cost accounting and accounting separation; and, for those areas where Orange is the only wholesale supplier of DSL, (iv) cost-orientation; and (v) transparency.

The Commission commented that ARCEP should consider using a broader range of criteria regarding the geographic analysis of the market, in particular when setting differentiated remedies.

⁹ ARCEP proposed to maintain on Orange the obligation to provide legacy copper-based wholesale inputs on an Equivalence of Output (EoO) basis. On the fibre access segment, the non-discrimination obligation was reinforced by Orange's voluntary commitments to implement non-discriminatory operational and technical processes largely based on the EoO principle.

¹⁰ Wholesale offers concerning FTTH are covered by the symmetric regulation framework (i.e. the building operators should apply reasonable prices); whereas the LFO is subject to an obligation to apply non-excessive prices.

¹¹ ARCEP identified a geographic area where only one operator was able to provide a bitstream offer and a second geographic area where several operators were able to provide such a product. ARCEP stressed that precise and stable boundaries between the two areas could not be distinguished since the number of unbundled MDFs may substantially change in the timeframe of the market analysis.

¹² ARCEP considered that it would not be justified or proportionate to oblige Orange to offer wholesale central access based on the fibre terminating segment, given the combination of symmetric regulation, Orange's obligations concerning access to its civil engineering infrastructure and the new obligations concerning fibre passive access for the provision of business-specific offers. In that respect, ARCEP considered that an obligation to offer fibre-based bitstream could reduce the incentives for alternative operators to invest in local access, which is considered to be the best solution to stimulate competition in the wholesale central access market.

2.2. Regulatory remedies

In the notified draft measure, ARCEP proposes to set price caps for the entire regulatory period 2021-2023 for a number of wholesale services related to local loop and sub-loop unbundling as well as central access provided at a fixed location for mass-market products¹³. ARCEP formerly used a top-down methodology resulting from Orange's regulatory accounts (TD-RA) based on "current economic costs". However, in the context of the technological transition and migration from copper to fibre, the TD-RA model now estimates costs per line significantly above current set maximum rates¹⁴, as the fixed-costs are to be supported by a diminishing number of lines (as customers migrate from copper to fibre). With the view of maintaining price-stability and of sending an appropriate "build or buy" signal, ARCEP has decided to change its approach and to fully rely on a bottom-up cost model (BU LRIC+) that was already developed in 2017¹⁵. This model is based on the costs of deploying an FTTH network, in accordance with the French symmetrical framework¹⁶. Such an approach is in line with the Commission's recommendation on non-discrimination and costing methodology (NDCM)¹⁷.

ARCEP considers that the proposed tariffs are in line with the prices currently applied by other Member States that are most comparable to France¹⁸.

The prices set by ARCEP will apply as of 1 January 2021 until 31 December 2023.

2.2.1. Wholesale local access provided at a fixed location for mass-market products

ARCEP proposes to set price caps for the copper full unbundling monthly fee, which represents the main part of the revenues linked to the copper local loop, but also for

¹³ The other services relating to local loop unbundling and subject to the cost-orientation obligation, such as for example collocation at Orange's MDFs, are not concerned by the present decision. The corresponding tariffs will therefore continue to be set by Orange on an annual basis.

¹⁴ The model results in prices of respectively [] €, [] € and [] € for the years 2021, 2022 and 2023, compared to 9.51 € in 2020.

¹⁵ At that time, the BU LRIC+ approach gave similar results as the TD-RA methodology. ARCEP however considered that more experience was needed to ensure the robustness of the bottom-up approach before relying on this model alone. Compared to this 2017 BU LRIC+ model, ARCEP has introduced a load factor of the network (85%) and has extended the coverage of the network to the whole territory, given that private investment increasingly covers also rural areas.

¹⁶ In particular, only the hypothetical operator builds the terminating segment between the PM and the final consumer. The model is however adjusted to reflect the specificities of the copper network:

- The hypothetical operator is the only one deploying the fibre network also on the segment between the MOF and the *Point de mutualisation* (PM).
- There is no co-financing, the network construction is entirely supported by the hypothetical operator alone.
- Active equipment at the edge of the fibre loop (in particular the Optical Network Termination – ONT – and the Optical Line Termination – OLT) are not included in the model.

¹⁷ In particular paragraphs 30-32 of the NDCM Recommendation.

¹⁸ Germany, the UK, Italy and Spain.

the services closely related, namely the installation fee¹⁹, the contract termination fee and the aftersales service (SAV+) charges.

Regarding partial unbundling and activated DSL access with telephone subscription, ARCEP considers that these products are of low economic importance²⁰ and that there are high uncertainties on their specific costs derived from the TD-RA model. ARCEP therefore considers that a change in the price caps would not be justified.

Based on above, ARCEP comes up with a price band for monthly fees of copper unbundling of [8.12-10.90€] and derives from this band the following price caps for 2021, 2022 and 2023.

		2018	2019	2020	2021	2022	2023
Full unbundling	Monthly fee net of all taxes ²¹	8.17 €	8.21 €	8.23 €	8.20 €	8.20 €	8.20 €
	Monthly fee including IFER ²²	9.31 €	9.41 €	9.51 €	9.65 €	9.65€	9.65€
	Installation fee	50 €	50 €	50 €	70 €	70€	70 €
	Contract termination fee	5 €	5 €	5 €	5 €	5 €	5 €
	SAV+ ²³	105 €	105 €	105 €	105 €	105 €	105 €
Partial unbundling	Monthly fee	1.77 €	1.77 €	1.77 €	1.77 €	1.77 €	1.77 €
	Installation fee	66 €	66 €	66 €	66 €	66 €	66 €
	Contract termination fee	35 €	35 €	35 €	35 €	35 €	35 €
	SAV+	105 €	105 €	105 €	105 €	105 €	105 €

Table 1: Price caps for market 3a (years 2018-2020 included for comparison)

ARCEP explains that the relatively stable results from years 2021-2023 observed in table 1, when compared to the previous years, is a combination of decreasing WACC

¹⁹ *Frais de mise en service - FAS*

²⁰ These are two-end of life products and have a low and quickly decreasing number of customers: there were less than 290 000 partial unbundling accesses (550 000 in 2017) and less than 7 000 active access with telephone subscription (60 000 in 2017) in regulated areas by 31 December 2019. This trend generates high uncertainties on the specific costs of these services derived from the TD RA model.

²¹ All fees exclude VAT.

²² The IFER ("*imposition forfaitaire annuelle sur les entreprises de réseaux*") is an annual tax introduced in France in 2013 as a partial replacement of the professional tax. The annual IFER values for 2018, 2019 and 2020 are €12.90/pair, €13.38/pair and €14.09/pair, respectively (Art. 1599 quarter B of the "code general des impôts" as modified by the decree 2017-698 of 2 May 2017). In order to incorporate the IFER into the LLU monthly fee, ARCEP increases it by 3% (Art. 1641 of the "code general des impôts") and divides it by 12 to obtain the monthly increase, which is then adjusted through an annual re-evaluation coefficient (Art.112 of law n° 2010-1627 29 December 2010).

²³ "*Service après-vente*" (after-sales service).

(4.8%²⁴ compared to 7.6% in the previous decision) and increasing costs (excluding WACC) resulting from the BU-LRIC+ model.

ARCEP signals in its draft measure that Orange intends to start by the second quarter of 2021 to notify the commercial switch-off²⁵ of some copper loops, using the “rapid” procedure foreseen in the regulatory decision setting out the obligations for markets 3a and 3b²⁶. For other areas, where commercial closure would follow the “regular” procedure²⁷, Orange has not announced its intentions. ARCEP considers that its costing methodology should promote economic efficiency and thus avoiding the need to operate two networks in parallel. To that end, the measure currently notified by ARCEP includes a review clause in order to possibly raise maximum copper prices before 2023 in case Orange comes up with a detailed copper switch-off plan, depending on the guaranties that Orange would provide concerning migration conditions.

2.2.2. *Wholesale central access provided at a fixed location for mass-market products*

The tariffs concerned by the proposed measure in market 3b relate to a number of wholesale services for the provision of broadband and high speed broadband services provided over copper-based DSL infrastructures.

That offer breaks down into two main components: (a) access, which may be provided over a line that may or may not have a subscription to the public switched telephone network (PSTN) service (provided by Orange) and may be single channel (“*mono VC*”) or dual channel (“*bi VC*”); and (b) distribution²⁸. Similarly to the previous 2017 decision, the present draft measure only concerns the access component. According to ARCEP, the uncertainty as to the evolution of speeds (“*débits*”) (and therefore of the unit costs) of the delivery component is too high. As such, the tariffs for the delivery component will be set annually by Orange, under the control of ARCEP²⁹.

ARCEP does not consider it appropriate to modify the current price caps of the DSL access with telephone subscription. As for access prices, ARCEP proposes to set the following price caps for years 2021-2023:

²⁴ As notified to and assessed by the Commission under case FR/2020/2269, C(2020) 7023 final.

²⁵ Which refers to the situation where Orange stops selling new access on its copper loop.

²⁶ These market reviews, recently assessed under cases FR/2020/2278-2279, foresee that if the 4 main commercial operators are present on the FttH network at the level of the PM, then Orange might proceed to the commercial closure of the corresponding copper lines with a 2-month notification period for residential products and a 6-month notification period for business products.

²⁷ In areas where conditions for rapid commercial closures are not met, Orange may only proceed to the commercial closure under several conditions and with an 18 or 36-month notification period for residential products and a 36-month notification period for business products.

²⁸ *Composante de collecte*.

²⁹ Orange shall transmit its costs to ARCEP on demand and justify any changes of prices on the basis of these costs. ARCEP will have the possibility to rectify Orange’s proposed prices.

		2018	2019	2020	2021	2022	2023
DSL access without telephone subscription	Installation fee	61 €	61 €	61 €	70€	70€	70€
	Monthly fee single channel	13.19 €	13.30 €	13.41 €	13.13 €	13.37 €	13.53 €
	Monthly fee dual channel	13.29 €	13.40 €	13.51 €	13.23 €	13.47 €	13.63 €
	SAV+	135 €	135 €	135 €	135 €	135 €	135 €
DSL access with telephone subscription	Installation fee	56 €	56 €	56 €	56 €	56 €	56 €
	Monthly fee single channel	4.79 €	4.79 €	4.79 €	4.79 €	4.79 €	4.79 €
	Monthly fee dual channel	4.89 €	4.89 €	4.89 €	4.89 €	4.89 €	4.89 €
	SAV+	135 €	135 €	135 €	135 €	135 €	135 €

Table 2: Price caps for market 3b (access, prices for 2018-2020 included for comparison)

3. COMMENTS

The Commission has examined the notification and the additional information provided by ARCEP and has the following comment:³⁰

Price setting for unbundled copper local loop

The Commission welcomes ARCEP's approach of deriving the price cap for the copper network from the bottom-up modelling of an FttH network, in line with the NDCM Recommendation. However, the Commission observes that the new cost model estimates a price band for copper-based LLU appreciably above those calculated previously (increase of around 16%). This increase of costs is counterbalanced by new, lower WACC (decreased to 4.8% from 7.6%) and ultimately result in stable prices. While the direct comparison of model results (between the previous and the current model) is impossible due to changed modelling approached, the Commission invites ARCEP to verify whether the significantly increased modelled costs (i.e. regardless of WACC) are indeed reflecting the actual cost of deploying the relevant infrastructure.

The Commission also notes that ARCEP already now foresees the possibility to increase the price cap of the unbundling monthly fee, before the end of the period of validity of this decision, if Orange comes up with a detailed plan for the switch-off of its copper network. ARCEP explains that such a price increase would be used as an incentive for Orange to promote economic efficiency by avoiding the need to operate two parallel networks.

To this extent, the Commission recalls that prices shall reflect costs and WACC shall reflect the costs of capital. In its notified draft decision ARCEP argues and explains how the estimated costs have increased just enough to offset the decreasing WACC. In that regard, in view of ARCEP's intentions to amend the notified price caps, the Commission reminds ARCEP that any potential price-change (before the end of the period for which the prices are set, i.e. for 2021-2023 and in general) shall be subject

³⁰ In accordance with Article 7(3) of the Framework Directive.

to a notification to the Commission and shall be justified by a fully-fledged analysis of underlying costs and of the impact of such change on competitive conditions.

Pursuant to Article 7(7) of the Framework Directive, ARCEP may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC³¹ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission³² within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.³³ You should give reasons for any such request.

Yours sincerely,

For the Commission
Roberto Viola
Director-General

³¹ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

³² Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

³³ The Commission may inform the public of the result of its assessment before the end of this three-day period.