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Autorité de Régulation des
Communications Electroniques et
des Postes (ARCEP)

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France

For the attention of:
Mr. Jean-Ludovic Silicani
President

Fax: +33 1 40 47 72 02

Dear Mr. Silicani,

Subject: Commission Decision concerning case FR/2012/1354: Wholesale market for digital terrestrial television broadcasting services

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

I. PROCEDURE

On 12 July 2012, the Commission registered a notification from the French national regulatory authority, Autorité de Régulation des Communications Electroniques et des Postes (ARCEP)¹, concerning the wholesale market for digital terrestrial television broadcasting services in France².

A national consultation³ has been carried out first from 7 February to 7 March 2012 and then from 27 April to 25 May 2012.

On 23 July 2012, a request for information⁴ was sent to ARCEP and a response was

¹ 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 by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 18 in Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with 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 114, 8.5.2003, p. 45.

³ In accordance with Article 6 of the Framework Directive.

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

received on 26 July 2012.

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

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The first and the second review of this market were assessed by the Commission respectively under case FR/2006/0335 and case FR/2009/0914. ARCEP considered that there were two distinct markets for terrestrial television broadcasting transmission services: a wholesale downstream market⁵ and a wholesale upstream market for broadcasting services offered to other broadcasting service providers.⁶

ARCEP found that the national upstream market for digital terrestrial broadcasting transmission services (DTT) was fulfilling the three criteria test and designated TéléDiffusion de France (TDF) as having significant market power (SMP) on this market.⁷ ARCEP differentiated between TDF's replicable and non-replicable sites⁸ and for all the sites imposed a set of remedies on TDF including access, non discrimination, accounting separation, cost accounting, transparency and price control obligations. Strict cost-orientation was only imposed for the non-replicable sites.

In its comments letter the Commission considered that ARCEP's proposal to reserve the right to extend or shorten the list of non-replicable TDF sites may lead to legal uncertainty and therefore invited ARCEP to establish in its final measure at which interval(s) the established list will be subject to revision. Furthermore, the Commission invited ARCEP to further analyse the actual ease of replicability of all TDF sites not listed as non-replicable, and to closely monitor competitive developments on the market so as to assess whether the proposed regulatory obligations imposed on TDF for all these sites remain justified and proportionate.

II.2. Market definition

Similarly to its previous market analysis, ARCEP identifies a wholesale upstream market

⁵ Corresponding to the market on which the broadcasters provide their broadcast offers to the editors or to multiplex operators. A multiplex is a group of channels that use the same radio frequency. Each multiplex is managed by a multiplex operator, commonly referred to as a multiplex. ARCEP explained that this market, besides falling under the audiovisual and electronic communications legislation enforced by the *Conseil Supérieur de l'Audiovisuel* (CSA) was evolving towards effective competition and no ex ante regulation was imposed.

⁶ Corresponding to the market on which access is granted to a new entrant broadcaster to the infrastructure of the incumbent broadcaster. ARCEP considered that, in the context of broadcasting services, the retail market corresponds to the TV offers delivered by editors and distributors to the public.

⁷ See FR/2009/0914. ARCEP focuses its analysis on the wholesale upstream market for providing DTT broadcasting services. DTT is a means of digitally broadcasting a multiplex of free and pay channels *via* radio waves.

⁸ The two selection criteria drawn-up by ARCEP to identify non-replicable sites are: (i) maximum attachment height on the mast of the antenna used to broadcast at least one digital terrestrial TV multiplex \geq 50 meters, and/or (ii) the site manifestly presents difficult access conditions or is situated on an exceptional location.

for digital terrestrial television broadcasting⁹ comprising two services: the hosting of broadcasting equipments on a site¹⁰ and a more complete broadcasting transmission service¹¹.

Similarly to its previous market analysis, ARCEP excludes from the market broadcasting transmission services for digital radio, analogue FM radio and personal mobile TV.¹²

ARCEP also excludes satellite, cable, ADSL and fibre platforms from the relevant product market. ARCEP explains that although those alternative platforms are increasingly used, most viewers are still accessing TV through the terrestrial platform.¹³ ARCEP points out that cable TV can be subscribed only by around 38% of the population and that even if the coverage of xDSL platforms has grown substantially the use of this platform to access TV content remains limited and the economic model for broadcasting TV channels on this platform remains uncertain¹⁴. Satellite faces also usage restrictions.¹⁵

ARCEP emphasises as well other specific features of the broadcasting markets in France which explain the exclusion of alternative platform from the relevant market and the distinctiveness of the DTT platform. The countervailing buying power of TV channels in the downstream market is very limited given, in particular, that a channel applying for a DTT broadcast license must commit to cover at least 95% of the French population¹⁶. Moreover, the choice of each TV channel to choose another broadcasting platform is limited due to their grouping into multiplexes, which organize the broadcasting of common frequencies on a national scale.¹⁷

Similarly to its previous notification, ARCEP considers the geographical scope of the market as national, i.e. including the overseas territories.¹⁸

⁹ Like in its previous market analysis, the downstream market does not meet the three criteria test.

¹⁰ I.e. essentially corresponding to the access to a pylon and collocation of equipments.

¹¹ I.e. essentially corresponding to the use of the broadcasting infrastructure including the antenna (*DiffHF-TNT*).

¹² Analogue terrestrial television broadcasting services have been all phased out in France by 30 November 2011 and are therefore not subject to the substitutability analysis.

¹³ In Q1 2011, 64.5% of the households equipped with a TV set were using DTT and the share of the terrestrial broadcasting platform in the actual consumption of television in France remains very high (in Q2 2012, almost 50% in terms of time of the population's TV consumption).

¹⁴ In Q1 2012, the share of the ADSL platform in the actual consumption of television in France accounts only for 23.2%. Television by ADSL is available only to households served by relatively short copper pairs. Fibre-to-the-home (FTTH) roll-out is still in its infancy (only 4.7% of the population covered so far). ARCEP explains in its reply to the RFI that the lack of substitutability between DTT and xDSL/FTTH networks should be assessed in the context of the on-going debate on net neutrality (e.g. TV channels may be increasingly asked to cover the ISP's network costs in order to be broadcast over this platform).

¹⁵ Satellite has a penetration rate of less than 25% of the households and faces multiple constraints related to urban and building ownership rules. Moreover, accessing television services by satellite requires end-users to invest in extra equipment.

¹⁶ Editors of terrestrial TV services and multiplexes are bound by this obligation as requested under the French law 86-1067.

¹⁷ There are six metropolitan DTT multiplexes (R1, R2, R3, R4, R5 and R6) and one overseas multiplex (ROM1). Two new metropolitan multiplexes (R7 and R8) are still to be deployed.

¹⁸ I.e. Metropolitan France, Martinique, Guadeloupe, French Guyana, La Réunion, Saint-Pierre-et-

II.3. The three criteria test

As the broadcasting transmission services market has been removed from the Recommendation on relevant markets¹⁹, ARCEP applies the three criteria test on the markets it has defined and concludes that the upstream wholesale access market is susceptible to *ex ante* regulation.

With regard to the first criterion, ARCEP finds that the high and non-transitory entry barriers that were identified in the previous market analyses are still in place. Despite the increase in number of TDF's sites replicated during the last cycle, a very high proportion of sites remain non-replicable due to, *inter alia*, the existence of economic and natural constraints, as well as urbanisation, public health and environmental requirements and pre-orientation of antennas to TDF sites.²⁰ Furthermore, the possibility to develop alternative sites is severely restricted by the fact that new entrants must install their sites very closely to the existing TDF sites that they are replicating.²¹

Also, according to ARCEP, the high barriers to entry will not be overcome in the timeframe of the market review because of three additional factors. First, the broadcasting contracts are now in a phase of renewals and therefore the actors who have their facilities already in place tend to be favoured.²² Also, multiplexes seek to have the forthcoming calls for tenders launched per aggregated geographic areas, which would make bidding conditions even more difficult for new entrants. Finally, the rather short calendar for the deployments of new multiplexes R7 and R8 could greatly limit the possibility for alternative operators to replicate TDF's sites.

With regard to the second criterion, even if alternative operators have achieved some deployments during the past cycle, competition remains limited. The entrants' aggregated market share amounts only to 13.6% in terms of competition based on alternative infrastructures and to 25.6% in terms of competition based on services provided.²³ Alternative operators' deployments have not yet led to the establishment of

Miquelon, Mayotte, Saint-Barthélemy, and Saint-Martin. Although the technical, legal and supply and demand characteristics of the market are the same as in Mainland France, ARCEP explains that certain differences can be observed in terms of DTT penetration rate in the overseas territories.

¹⁹ Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

²⁰ DTT coverage in France is ensured through two sets of broadcasting infrastructure: the 134 most important sites in the metropolitan territory, named "principal network" allow covering close to 85% of the population, whereas the smaller sites of the "secondary network" (almost 1500 in metropolitan France) are used to cover 12% of the population. Three alternative operators (Itas Tim, Onecast and Towercast) have entered the market and started to replicate sites. However, only 11 sites of the principal network and 298 sites of the secondary network have been replicated to date.

²¹ In order to foster adoption of DTT by end-users and the switch-over from analogue to digital transmission, the CSA has established coverage specifications, which aim at reproducing the previous analogue footprint – built upon TDF's historical network.

²² DTT broadcasting contracts are granted (usually for five years) after a call for tender. These tenders are held by each multiplex (managing one frequency) for each site. This process is handled on a rolling basis, therefore regularly opening and closing "windows of opportunities" for the broadcasting operators.

²³ 63.9 % of the frequencies used by the historical multiplexes on the principal network, and 75.4% on the complementary network remain broadcast by TDF, which has won 74.2 % of all the calls for tenders.

infrastructures that are large enough to become a strong alternative to TDF's network.²⁴ Furthermore, alternative platforms do not represent a credible alternative to DTT yet.²⁵

With regard to the insufficiency of competition law (third criterion), ARCEP explains, *inter alia*, that these calls for tenders are taking place over a too short period of time, which, in the event of anti-competitive practices by the dominant operator, is not compatible with the timeframe of the investigation needed by the competition authority.

II.4. Finding of significant market power

ARCEP intends to continue designating TDF as having SMP in the relevant market. The main criteria considered by ARCEP when reaching its conclusion on SMP include: market shares²⁶, control of a non-replicable or difficult to duplicate infrastructure, size and vertical integration, and economies of scale and scope.

II.5. Regulatory remedies

ARCEP proposes to impose on TDF the following obligations: (i) access to its network elements and associated facilities²⁷, (ii) non-discrimination; (iii) transparency, including the publication of a reference offer²⁸, the provision of all technical details necessary for alternative operators to respond competitively to calls for tenders for multiplexes, and details of the periodic changes of the pricing and technical conditions of the offers, (iv) cost accounting and accounting separation; (v) and price control.

As for the price control remedy, ARCEP continues differentiating between replicable and non-replicable sites²⁹ and has developed a bottom up cost model³⁰. ARCEP proposes to continue imposing cost-orientated prices for access to TDF's non-replicable sites. For the replicable sites, ARCEP proposes to prohibit, on the one hand, excessive tariffs and eviction tariffs for the not yet replicated sites (in order both to foster investment by alternative operators and avoid exclusionary pricing), and, on the other hand, eviction tariffs for the sites already replicated by alternative operators.

²⁴ Even if alternative operators have started to deploy their infrastructures, more than 94% of frequencies used by the multiplexes on the principal network and more than 85% on the secondary are transmitted from TDF's sites.

²⁵ See II.2 above.

²⁶ See footnotes 22 and 23 above.

²⁷ Including, *inter alia*, access and collocation on TDF's masts, within TDF's buildings and outdoors, and broadcasting via TDF antennas (*DiffHF-TNT*).

²⁸ TDF does not have the obligation to publish a reference offer for the overseas territories.

²⁹ ARCEP proposes to slightly modify the two lists and will further amend them in the course of this cycle if needed.

³⁰ In the reply to the RFI, ARCEP explains that the costs of an actual network will be taken into account for setting access price to the non-replicable sites while the costs of an optimized or efficient network (used to provide several services, i.e. DTT broadcasting, radio broadcasting, bundle of services) will be used for setting access tariffs to the replicable sites (make or buy signals). In the proposed measure, ARCEP does not determine the final value of the tariffs to be imposed on the SMP operator and the final value of the parameters to determine the cost of capital, which, according to ARCEP, has been the subject of a national consultation running in parallel with the current review of the draft measure by the Commission. The Commission has therefore not scrutinized these elements as a part of the current review.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the ARCEP and has the following comments:³¹

Regulation of the overseas territories

ARCEP considers the geographical market as national in scope, i.e. including mainland France and the overseas territories. However, as agreed by ARCEP, the competitive conditions are very different in overseas territories where DTT is not the main platform used for accessing TV channels (satellite has a very strong presence). Given those circumstances, ARCEP should fully take into account the intensity of platform competition when imposing adequate remedies in the overseas territories. In particular, it cannot, a priori, be excluded that TV channels and editors can, in some specific geographic areas, switch to another platform than DTT and consequently their countervailing buying power is also strong (taking also into account the must-carry obligation).

The Commission asks ARCEP to re-analyse more in-depth, in its final measure, the competitive conditions in the overseas territories and to re-assess the proposed remedies (in particular the need for cost-orientation).

Strengthening the criteria for identifying replicable and non-replicable sites

ARCEP explains that at least over the next review cycle DTT will remain an essential and unavoidable platform for TV channels. The Commission is of the view that this situation may be perpetuated by the specific technological and legal environment in France –in particular the coverage obligation and the call for tender requirements– which impact on the development of platform competition.

In fact, the prospect for infrastructure competition (i.e. replication of sites) seems rather weak at the moment (currently of the 134 sites of the principal network covering 85% of the population, 83 are considered non-replicable by ARCEP). Since ARCEP has devised remedies to foster competition at least at those sites considered replicable, the development of infrastructure competition will also depend on whether the distinction between replicable and non-replicable sites is sufficiently accurate.

In this respect the Commission observes that the number of sites considered as non-replicable has increased compared to the previous market review while several non-replicable sites have effectively been replicated. It would therefore appear that the replicability assessment, which rests on only two criteria,³² is not sufficiently precise and does not take fully into account the economics of providing the broadcasting transmission service at each respective site.

Consequently, ARCEP's approach with regard to selecting replicable and non-replicable sites does not appear to provide the necessary regulatory certainty to foster infrastructure investments.

Against this background, the Commission believes that, in order to ensure the development of a competitive market, regulation should be based on a case by case assessment of replication at each site taking into account not only the physical aspects but also the economics of replication (e.g. expected gains from

³¹ In accordance with Article 7(3) of the Framework Directive.

³² Cf. footnote n. 8 above.

renewals of multiplex contracts and from the provision of a bundle of services at a site, over the market review period). Therefore, before imposing remedies, the Commission calls on ARCEP to use additional criteria in its assessment of replication (on a site by site basis or for groups of sites characterized by the same conditions) in order to strengthen its current assumptions.

Pursuant to Article 7(7) of the Framework Directive, ARCEP shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; 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/EC³³ 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 Commission³⁴ 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.³⁵ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

³³ 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.

³⁴ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

³⁵ The Commission may inform the public of the result of its assessment before the end of this three-day period.