Dear Mr Soriano

Subject: Commission Decision concerning:

Case FR/2017/2030: Wholesale local access provided at a fixed location

Case FR/2017/2031: Wholesale central access provided at a fixed location for mass-market products

Case FR/2017/2032: Wholesale high-quality access provided at a fixed location

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

1. Procedure

On 27 October 2017, the Commission registered a notification from the French national regulatory authority, Autorité de régulation des communications électroniques et des postes (ARCEP), concerning the markets for wholesale local and central access

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provided at a fixed location and wholesale high-quality access provided at a fixed location\textsuperscript{2} in France.

The first national public consultation\textsuperscript{3} ran from 9 February 2017 to 15 March 2017. A second national public consultation ran from 27 July 2017 to 22 September 2017.

On 8 November 2017, a request for information (RFI)\textsuperscript{4} was sent to ARCEP and a response was received on 14 November 2017. An additional RFI was sent to ARCEP on 15 November 2017 and a response was received on 16 November 2017.

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.

2. **DESCRIPTION OF THE DRAFT MEASURE**

2.1. **Background**

The fourth full review of the markets for wholesale network infrastructure access and wholesale broadband access in France was previously notified to and assessed by the Commission under cases FR/2014/1602-1603\textsuperscript{5}. The third full review of the markets for wholesale terminating segments of leased lines was notified to and assessed by the Commission under case FR/2014/1604\textsuperscript{6}.

2.1.1. *Wholesale (physical) network infrastructure access and wholesale broadband access*

On the retail broadband market ARCEP distinguished between the provision of broadband services and the provision of high speed broadband services.

ARCEP defined the **wholesale physical network infrastructure access market** as including fully unbundled and shared access to local copper loops and sub-loops, access to civil engineering infrastructure (including overhead cables and underground infrastructure), and passive access to fibre local loops provided at a concentration point by operators or by local authorities in the context of network sharing. Access delivered over cable networks, wireless or other alternative technologies, as well as active types of access (bitstream) were excluded. ARCEP considered the relevant wholesale physical network infrastructure access market to be national in scope.


\textsuperscript{3} In accordance with Article 6 of the Framework Directive.

\textsuperscript{4} In accordance with Article 5(2) of the Framework Directive.

\textsuperscript{5} C(2014) 4048 final.

\textsuperscript{6} C(2014) 4055 final.
ARCEP defined the **wholesale broadband access market** as including wholesale access for the provision of broadband and high speed broadband services provided at regional access points - over copper-based DSL infrastructures, fibre-based infrastructures (FTTx) and coaxial cable networks\(^7\), independently of the interfaces' technology. WBA provided at a single national point, leased lines and access delivered over alternative technologies (e.g. WIMAX, WiFi, satellite, power lines) and over passive fibre access offers were excluded from the market. ARCEP considered the relevant wholesale broadband access market to be national in scope\(^8\).

ARCEP designated Orange as the operator with significant market power (SMP) and imposed on it a full set of remedies with regard to copper lines on the two markets. However, no SMP obligations were proposed for Orange's fibre infrastructure (except for access to civil engineering infrastructures) and ARCEP discarded in particular the imposition of fibre unbundling and fibre bitstream in view of the symmetric regulation implemented in France in the context of the legislation on network sharing\(^9\).

The Commission invited ARCEP to closely monitor any change in the market structure which could affect the availability of adequate wholesale access offers and increase, in the case of greater concentration, the risk of market partitioning by co-investing operators. In addition, the Commission invited ARCEP to monitor market developments especially with respect to less densely populated areas in which in the absence of the cable operator's footprint and lacking a municipal FTTH network, it would not have been cost-efficient for operator to purchase passive fibre-based access offers at the concentration point.

### 2.1.2. Wholesale market for terminating segments of leased lines and wholesale markets for trunk segments of leased lines

In 2014 ARCEP defined the wholesale market for terminating segments of leased lines as including all active products fulfilling specific business requirements in terms of high quality data connectivity services (i.e. including guaranteed repair time), irrespective of transmission capacity, interface (traditional PDH/SDH or

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\(^7\) ARCEP indicated that Numericable was providing a bitstream service over its FttLA network enabling access seekers (e.g. Bouygues) to provide retail services substitutable in terms of prices and quality to DSL-based services.

\(^8\) 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.

\(^9\) In 2008, France adopted a law ("Loi de Modernisation de l'Economie", LME), which resulted in the addition of Article L. 34-8-3 to the French telecoms law ("Code des Postes et des Communications Electroniques", CPCE) which foresaw the obligation to share in-building fibre wiring. The legislation of network sharing was characterised by the organisation of co-investments schemes for rolling out FTTH networks in very densely populated areas (where only the in-house wiring is subject to co-financing) and in less densely populated areas (where a larger part of the terminating segment is subject to co-financing) in France. To that end, a very detailed symmetric access regulation has been put in place requesting the operator building the infrastructure to provide a wholesale passive access to the operators participating in the co-financing (ab initio or ex post) and as well individual line rental to the access seekers on an ad hoc basis. Furthermore, ARCEP adopted a series of Decisions and Recommendations to organise co-investments into FTTH networks, laid down the general terms and conditions for access to fibre lines, the location of the local connection point, and also specified the details of the access obligation applicable in and outside the "very densely populated areas".
alternative ATM/Ethernet) or underlying infrastructure (copper or fibre). ARCEP considered the relevant wholesale market for terminating segments of leased lines to be national in scope.

In the same notification ARCEP defined 15 individual markets for inter-territorial trunk segments of leased lines, each including all trunk segment services, irrespective of transmission capacity and interface. These markets encompass submarine cables, which are composed of two parts: a submarine element and a terrestrial complement.

On the market for wholesale terminating segments of leased lines, ARCEP designated Orange as the SMP operator and imposed on it a full set of remedies. However, ARCEP differentiated the price control remedy on a geographic basis. For copper access, ARCEP identified three areas: (i) an effectively competitive area not subject to any form of price control; (ii) a partially competitive area subject to a general prohibition of predatory prices (“non-eviction”); and (iii) a monopoly area subject to cost orientation. For dedicated fibre lines (FttO), ARCEP distinguished between two areas: (i) a competitive area free from price control; and (ii) a non-competitive area where ARCEP imposed a prohibition of predatory prices and a non-excessive price regime.

As regards the wholesale trunk segments of leased lines, Orange was found to have SMP and made subject to a full set of remedies on the segments Mainland France-French Guyane, French Guyane-Martinique and Mainland France-La Réunion, while GCN was found to have SMP and made subject to similar obligations on the Saint-Bathélemy segments.

The Commission commented on the geographic differentiation of remedies.

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10 The relevant market included, together with the traditional copper leased lines and dedicated fibre local loop (FttO or Fibre to the Office) accesses, DSL bitstream access with guaranteed repair time (of less than 4 hours), which in the previous market review (2010) had instead been included in the wholesale broadband access market.

11 Based on the three-criteria test carried out on these markets, ARCEP concluded that: (i) the segments Mayotte-Mainland France, Mayotte-Reunion were not to be subject to ex ante regulation; (ii) no ex ante regulation but mere price monitoring would apply on the segments Martinique-Guadeloupe, Martinique-Mainland France, Guadeloupe-Mainland France, Saint-Martin-Mainland France, Guadeloupe-Saint-Martin and Martinique-Saint Martin; and (iii) the routes Réunion-Mainland France, Saint-Barthélémy trunk segments, Guyane-Mainland France and Guyane-Martinique were to be susceptible to ex ante regulation.

12 ARCEP clarifies that FttO lines constitute the “BLOD” (“boucle locale optique dédiée”), which is used mainly to serve large businesses. In contrast, the “BLOM” (“boucle locale optique mutualisée”) corresponds to the FttH (including FttE or Fibre to the Enterprise) network deployed according to the French symmetric regulatory framework with a view to enabling access by operators other than the network operator.
2.2. Market definition

2.2.1. Wholesale local access provided at a fixed location

At retail level, ARCEP distinguishes the residential from the business segment. The latter is further distinguished between generic retail offers of high and very high speed for businesses and those which are business-specific.

ARCEP defines the market for wholesale local access provided at a fixed location as including (i) access to the copper local loop and sub-loop, with or without increased quality of service (QoS), through total or partial unbundling; (ii) access to civil engineering infrastructures for the purpose of fibre local loop roll-out; (iii) passive access to fibre local loops. ARCEP considers that access to cable, WiMAX or other alternative technologies\(^{13}\) are not included in the market. The use of the accessible galleries of combined sewer and access to civil engineering infrastructures of networks others than electronic communications networks are also excluded from the relevant market.

The relevant geographic market is national.

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

As in the previous market review, ARCEP distinguishes retail fixed offers for the mass-market from retail offers for specific business clients, which are not substitutable. However, ARCEP notes that certain businesses have needs comparable to those of the mass-market.

At wholesale level, ARCEP defines the market for wholesale central access provided at a fixed location for mass-market products as including broadband and high speed broadband services provided - at regional access points - over copper-based DSL infrastructures, fibre-based infrastructures (FTTx) and coaxial cable networks, independently of the interfaces' technology (IP, ATM, Ethernet). Access delivered over alternative technologies (e.g. WiMAX, WiFi, satellite, power lines) is excluded from the market.

The relevant geographic market is national.

2.2.3. Wholesale high-quality access provided at a fixed location

According to ARCEP, the corresponding retail market includes both high speed and very high speed offers specifically designed for business clients.

ARCEP defines the market for wholesale high-quality access provided at a fixed location as including active products fulfilling specific business requirements in terms of high-quality data connectivity services (i.e. including guaranteed repair time or GTR), irrespective of transmission capacity, interface (traditional PDH/SDH or alternative ATM/Ethernet) or underlying infrastructure (copper or fibre)\(^{14}\).

\(^{13}\)Terrestrial radio wave technologies such as WiMAX and Wi-Fi, satellite, power lines.

\(^{14}\)The relevant market comprises only the terminating segment, whose boundary with the trunk segment is defined by ARCEP in accordance to the topology of Orange’s legacy network.
The relevant geographic market is national.

ARCEP further proposes to deregulate the wholesale market for high-quality access to inter-territorial trunk segments. ARCEP bases this conclusion on the three criteria test, which it carried out for those segments that were still regulated in the last market review.\(^\text{15}\)

### 2.3. Finding of significant market power

#### 2.3.1. Wholesale local access provided at a fixed location

ARCEP proposes to designate Orange as the SMP operator in the market for wholesale local access provided at a fixed location based mainly on the following elements: (i) market shares, (ii) control of non-easily replicable infrastructure, and (iii) vertical integration.

On the wholesale local access market, Orange’s market share for both copper and fibre is over 90%, 99.99% on the copper segment and 48% on the fibre segment (excluding self-supply). Orange is the only operator that has a continuous and ubiquitous civil engineering network suitable for fibre roll out.

On the retail market for high and very high speed broadband access, Orange holds a market share of \(\boxed{\%}\), but has \(\boxed{60-65\%}\) of all FttH subscriptions (as of mid-2017).\(^\text{17}\)

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

ARCEP proposes to designate Orange as the SMP operator in the market for wholesale central access provided at a fixed location for mass-market products based mainly on the following elements: (i) market shares, (ii) size of the incumbent and control of non-easily replicable infrastructure, (iii) vertical integration, (iv) economies of scale, (v) absence of potential competition.

Orange's share in the market for high and very high speed bitstream amounts to 49% of total accesses. Orange's share of bitstream accesses supplied through its copper network amounted to \(\boxed{\%}\) in the first quarter of 2017. Central access offered by alternative operators represented 36% (of which only 3% fibre-based) of the...
subscriptions of high and very high speed\textsuperscript{18}. Cable-based bitstream offers amounted to\%.

2.3.3. *Wholesale high-quality access provided at a fixed location*

ARCEP proposes to designate Orange as the SMP operator in the market for wholesale high-quality access provided at a fixed location based mainly on the following elements: (i) market shares, (ii) size of the incumbent and control of non-easily replicable infrastructure, (iii) vertical integration, (iv) economies of scale, (v) barriers to switching.

ARCEP indicates that Orange’s wholesale market share as of mid-2016 was\% (\% on the copper segment and \% on the fibre segment)\textsuperscript{19}.

2.4. *Regulatory remedies*

2.4.1. *Wholesale local access provided at a fixed location*

(i) Access, migration and ancillary services

Orange is required to meet alternative operators’ reasonable requests and grant them unbundled access to copper loops\textsuperscript{20} and sub-loops\textsuperscript{21}, and access to its civil engineering infrastructure for the deployment of local fibre loops\textsuperscript{22}. In particular, with respect to the obligation to offer access to the copper local loop and sub-loop, ARCEP provides that Orange shall offer a series of services on the process of orders\textsuperscript{23}, repair of faults, reconfiguration of the local loop architecture, and migration services.

As to FTTH networks regulation, ARCEP does not intend to amend symmetric regulation\textsuperscript{24} which is destined to serve principally the residential segment of the

\textsuperscript{18} 74,000 FTTH accesses were sold in the market for wholesale central access by alternative operators. The main supplier was SIEA (Syndicat Intercommunal d'Energie et de E-communication de l'Ain).

\textsuperscript{19} On the retail business market, which comprises both high speed and very high speed copper-based and fibre-based offers, Orange holds a\% market share (as of mid-2016).

\textsuperscript{20} In particular, Orange's obligation concerns both total and partial local loop unbundling.

\textsuperscript{21} Orange shall offer access to the sub-loops with the possibility of bi- or mono-injection.

\textsuperscript{22} The obligation of access does not include areas in which Orange is not the infrastructure owner or administrator.

\textsuperscript{23} For instance, Orange provides SETIAR, a tool listing the number of existing copper pairs (active or inactive) by address, allowing alternative operators to know the concentration points serving the lines of a given address. In the case a line needs to be built and an intervention by a technician of Orange is requested, alternative operators can make an appointment through e-RdV, a tool allowing them to access Orange's technicians working schedule.

\textsuperscript{24} 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). ARCEP notes that co-investment has significantly increased since the last market analysis. In March 2017, there were 65\% of households in which several operators connected the concentration point to their optical distribution frame (ODF/NRO) (i.e. 5,400,000). Symmetric regulation includes the obligation to grant passive
retail broadband market. However, regarding the business segment of the retail market, given Orange's high market shares both at retail and wholesale level, ARCEP proposes to complement the symmetric regulation with two (asymmetric) additional access obligations imposed on Orange which serves principally the business segment of the underlying retail market.

In this respect, ARCEP notes that wholesale active offers allowing alternative operators to provide FTTH-based offers for the mass market barely exist. ARCEP considers that competition on the wholesale active market would be strengthened through passive offers with or without improved QoS. Therefore, Orange shall, firstly, make available offers of passive access to its FttH network with and without reinforced QoS based on which alternative operators can develop wholesale active offers specifically for the purpose of serving the retail business market25. These offers should allow alternative operators to serve clients for which Orange is the building operator by interconnecting at the first concentration point (point de mutualisation) or the more distant concentration point PRDM26. Second, Orange shall offer such access at technical and tariff conditions which allow stronger dynamics on the wholesale central access market with a view to serving business customers, and to ultimately have at least three infrastructure based suppliers of business connectivity in France. Finally, ARCEP proposes to impose on Orange to make available a resale access offer on its FTTH infrastructure that it commercialises at retail level for the business segment.

Orange is requested to provide a range of ancillary services to enable access seekers to use its copper and fibre local loop. To that end, ARCEP intends to confirm the obligation on Orange to maintain and improve the provisioning of its current commercial backhaul offer (LFO27) for providing a fibre link between two MDFs/ODFs and between an MDF/ODF and an alternative operator's point of presence (PoP)28.

(ii) Non-discrimination, technical replicability, transparency and quality of service access at the terminating segment of very high speed fibre networks at a concentration point. In high density areas, the concentration point is close to private property or even inside it; whereas in the rest of the territory (including low density zones within high density areas), the concentration point is located in an area including between 300 and 1,000 households.

25 ARCEP notes that the only available offers on fibre for the business segment concern a dedicated fibre terminating segment (FttO) mandated in market 4 which however entails significant costs and prevents operators from providing more affordable offers at retail level.

26 Orange indicated to ARCEP that it is able to provide such offer with a guarantee of repair of 10 working hours. ARCEP will assess within 12 months starting from when the offer is available if this option allows operators to meet the needs, in terms of QoS, of businesses that have now an SDSL connection.

27 Orange should apply non-excessive prices for this offer.

28 Moreover, ARCEP invites Orange to modify the technical details of its LFO offers, in particular by increasing the length of the fibre links ordered by alternative operators. In addition, Orange should maintain its offers for co-location of active equipment (or the possibility to connect its cables to the MDF/ODF of Orange in case an alternative operator opts for keeping its equipment close to the MDF/ODF).
Orange is requested to provide access seekers with a set of wholesale offers covering backhaul, co-location and unbundling services under non-discriminatory terms and conditions. ARCEP proposes to maintain on Orange the obligation to provide legacy copper-based wholesale inputs on an Equivalence of Output (EoO) basis. ARCEP proposes, however, to impose on Orange the obligation to ensure technical replicability of any new retail offers provided on its copper local loop or sub-loops and, at least, Orange « triple play » DSL offers. To that end, Orange is to provide a set of wholesale offers covering backhaul, co-location and unbundling services enabling the alternative operators and Orange to provide end users with TV services under equivalent operational conditions.

ARCEP proposes to oblige Orange to provide access to its civil engineering infrastructure on an Equivalence of Input (EoI) basis. Furthermore, given Orange's position on the fibre access segment, ARCEP consulted the sector on the possibility to reinforce for Orange the non-discrimination obligation. In the meantime, Orange presented to ARCEP a series of commitments seeking to address the concerns identified. Firstly, Orange adapted its existing contracts and proposed to other interested operators an offer based on its PON architectures in very dense areas based on the same technical and economic conditions. Secondly, Orange committed to put in place all the necessary measures to ensure the access to the concentration points in the buildings which alternative operators have identified as problematic in very dense areas. Thirdly, with particular respect to operational and technical processes relevant to the provision of passive access products, Orange committed, inter alia:

- a) to provide alternative operators with the same information on FttH eligibility as that used by Orange’s retail branch by 1 September 2018;
- b) to strengthen the quality checks carried out on FttH order processes, such that by 31 December 2018 validation conditions for each order are the same for alternative operators and for Orange’s retail branch (however, different internal and external order streams will continue to exist);
- c) to improve the quality of information provided to access seekers as regards FttH deployment schedules (Orange and alternative operators will continue to receive separate information streams);

The EoO allows ensuring that the access inputs as well as the operational and technical processes are provided to the access seekers in a comparable way as to Orange's own retail arm. ARCEP explains that Service Level Agreements (SLAs) and Service Level Guarantees (SLGs) are already routinely included in Orange’s wholesale offers. ARCEP further states that, in view of the rapid migration to FttH, an EoI obligation on copper local access would be disproportionate.

DSL triple-play (TV bundled with DSL access) offers represented more than two thirds of subscriptions in Q1 2017.

In terms of volume of MDF and delays.

ARCEP explains that this obligation has been imposed on Orange since 2008. Under this obligation, Orange is required to transmit to ARCEP the internal purchase contract between its wholesale and retail arm showing that the same command, process and engineering rules are used.

Orange committed to suppress rapidly the volume of buildings where blocked access persists before 30 June 2019.
(d) to ensure that alternative operators are increasingly aware of future developments in Orange’s information systems and after sales services.

On this basis, ARCEP considers that it is neither necessary nor proportionate to impose on Orange a specific (asymmetric) non-discrimination obligation on the FttH segment. ARCEP will publish a report on the implementation of Orange’s commitments by 1 September 2018. ARCEP reserves the possibility to intervene without delay to impose on Orange the relevant remedies if necessary.

Finally, Orange is subject to a transparency obligation including the publication of a Reference Unbundling Offer, a Reference Offer for access to the civil engineering infrastructure, as well as the terms and conditions of the LFO offer and of the wholesale offer of interconnection to the sub-loop in mono-injection. In addition, Orange shall publish data on its implementation of Key Performance Indicators (KPIs).35

(iii) Price regulation, cost accounting and accounting separation

ARCEP intends to impose on Orange an obligation to apply cost oriented prices for access to local copper loops and sub-loops, civil engineering infrastructure used for fibre local loops and ancillary services.36

In addition, a cost accounting and accounting separation obligations are proposed with respect to Orange’s copper and passive fibre wholesale offers.

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

(i) Access, migration and ancillary services

Orange is mandated to meet reasonable requests for access to its copper network. Orange shall keep the wholesale broadband offers currently in place (including naked DSL) and ensure that wholesale broadband access is available at different levels of the network (i.e. IP, ATM, and Ethernet). In addition, Orange shall ensure that the technical and economic conditions of its broadband offers allow alternative operators to propose, timely and at reasonable prices, non-linear TV broadcasting services in non-competitive areas. In such areas, Orange should

34 In the reply to the RFI ARCEP observes that the imposition of an EoI obligation would place a disproportionately heavy burden on Orange, as it would entail splitting Orange’s numerous databases and restructuring its FttH processes, in addition to a significant impact on human resources.

35 The list of KPIs concerning access to civil engineering infrastructure for the deployment of fibre networks will be specified and reinforced following consultation between ARCEP and the alternative operators that have signed an agreement on the access to civil engineering infrastructure.

36 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 of non-excessive prices.

37 Furthermore, Orange shall ensure an effective process of synchronisation of naked DSL supply and number portability within a maximum delay in order to facilitate for customers to switch operator.
continue offering mono- and bi-channel DSL offers. Orange shall also grant access to associated facilities, collocation, and provide the relevant information, as well as the appropriate migration procedures.

Regarding fibre-based bitstream, ARCEP considers 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 believes that an obligation to offer fibre-based bitstream could reduce the incentives for alternative operators to invest in local access, which is considered as the best solution to stimulate competition in the wholesale central access market. Moreover, ARCEP notes that SFR proposes a bitstream offer over its coaxial-based network (upgraded to Docsis 3.0), which is available to access seekers in a large footprint in urban and semi-urban areas.

(ii) Non-discrimination, technical replicability, transparency and quality of service

Similarly to the previous market review, Orange is required to provide wholesale central access to its copper network on an EoO basis and to demonstrate that its new retail offers (including bundles) provided over DSL can be technically replicated by the alternative operators based on regulated access products.

Furthermore, Orange must implement KPIs, and publish a Reference Offer for the provision of wholesale broadband access, SLAs and SLGs.

ARCEP proposes to reiterate the geographical segmentation of the obligations according to whether only one operator (non-competitive areas) or more operators (competitive areas) are able to offer wholesale bitstream products (based on LLU or on alternative infrastructures such as FTTx or cable). Unlike in the 2014 market analysis, the obligation of transparency of technical and economic conditions is limited to non-competitive areas, i.e. where Orange is the only operator able to offer wholesale central access products for the mass-market at national level (i.e. regional, district, intra-district level).

(iii) Price regulation, cost accounting and accounting separation

Orange is mandated to apply cost-oriented tariffs in non-competitive areas, whereas ARCEP considers it would not be proportionate to subject Orange’s offers to discriminatory tariffs in competitive areas.

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38 Mono-channel offers allow supplying internet only access, whereas bi-channel offers allow the supply of internet and voice over broadband bundled offers.

39 SFR’s footprint covers 8.9m households. In the context of the SFR/Numericable merger in October 2014, the cable operator committed to offer (i) bitstream and (ii) a white label offer. However, ARCEP notes that no alternative operator has purchased such offers. Such commitments are valid for a renewable period of five years.

40 In addition, ARCEP mandates Orange to ensure that when alternative operators request multiple wholesale regulated offers (as well as number portability), the supply of such offers is coordinated at a time agreed with the client of the alternative operator, and within a reasonable time without an excessive interruption of service (i.e. cumulatively less than 4 hours).

41 ARCEP notes that out of the 12,004 unbundled MDFs, there were 7,436 MDFs (86.2% of the population) where alternative operators proposed DSL central access offers based on LLU. The area in
to a cost-oriented price obligation in competitive areas. ARCEP explains that there is a sufficient constraint on Orange's access tariffs in competitive areas and as a result, it would intervene *ex post* only in case of predatory prices.

Finally, ARCEP intends to maintain cost accounting and accounting separation on Orange's wholesale offers.

### 2.4.3. Wholesale high-quality access provided at a fixed location

(i) Access, migration and ancillary services

Orange shall meet alternative operators' reasonable requests for access to its products and services on the wholesale high-quality access market. Orange is required to maintain its existing offers and the associated access and interconnection services. Orange is also mandated to offer certain complementary access services, such as in particular the provision of a range of bandwidths (above 100 Mbit/s) that is sufficient to enable alternative operators to technically and economically replicate Orange’s own retail offers.

Furthermore, Orange shall not be allowed to discontinue its existing wholesale offers (specifically those based on the PDH/SDH or ATM technology) unless: (a) Orange is able to propose alternative, innovative (Ethernet-based) products that alternative operators can use to build competitive retail offers; and (b) it is reasonable for an alternative operator, both from a technical and a financial perspective, to migrate to such new wholesale inputs.

Finally, ARCEP explains that, in view of the passive access remedies imposed on the wholesale local access market (in particular, Orange’s obligation to propose a passive access product with enhanced QoS), ARCEP deems it unnecessary to also mandate the provision of active offers over FttH. However, if Orange freely decided to commercialise high-quality active access products over FttH or FttE, such offers would be subject to the same asymmetric regulatory obligations that apply to dedicated (FttO) fibre, except for some differences concerning the price control remedy.

(ii) Non-discrimination, technical replicability, transparency and quality of service

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*which ARCEP imposed a cost-orientation obligation covered around 10,760 MDFs (13.8% of the population) in March 2017.*

*Orange currently proposes both copper-based and fibre-based wholesale offers using either a traditional or an alternative interface. At present all fibre-based business-specific offers are provided over dedicated fibre (FttO) only.*

*Orange is required to propose adequate migration services to enable alternative operators to rapidly migrate to modern Ethernet-based offers or to unbundled access, as appropriate. Moreover, if it opts to discontinue the provision of existing offers Orange is bound to observe specific periods of notice. Similar requirements are imposed with regard to the potential discontinuation of copper-based products and the migration process to fibre-based inputs.*

*In particular, ARCEP clarifies in the reply to the RFI that any FttH (including FttE) offers introduced by Orange would be price regulated on the entire territory (i.e. there would not be any deregulated area for such offers).*
ARCEP envisages imposing on Orange the obligation to provide all of its services in a non-discriminatory manner. Except for any new offers introduced by Orange over FttH or FttE, which would be subject to an EoI obligation, ARCEP proposes that all copper-based and fibre-based offers already included in Orange’s reference offer should be provided on an EoO basis. ARCEP further proposes a technical replicability test, with a view to ensuring that the wholesale products included in Orange’s reference offer enable alternative operators to replicate any new retail offers introduced by Orange.

Orange is also subject to a transparency obligation including the publication of a reference offer specifying the technical and price details of Orange’s wholesale high-quality access products. Moreover, ARCEP shall monitor the implementation and publication of information on SLGs, SLAs and KPIs by Orange.

(iii) Price regulation, cost accounting and accounting separation

In relation to services provided using a traditional interface (and the associated services), Orange shall continue to apply cost-oriented tariffs for copper-based access, whereas fibre-based access shall only be subject to a non-excessive price obligation.

As in the previous market review, as regards services provided using an alternative interface (and the associated services), ARCEP proposes to differentiate the price control remedy on a geographic basis as follows:

i. For copper-based services: (a) no price control in a first (competitive) area, where at least one alternative operator proposes business-specific bitstream with guaranteed repair times less than 4 hours and which have been unbundled for at least 7 years; (b) a general prohibition of predatory prices (“non-eviction”) in a second (partially competitive) area, where at least one alternative operator proposes business-specific bitstream with guaranteed repair times less than 4 hours, and which have been unbundled for less than 7 years; and (c) cost-oriented prices in a third (non-competitive) area, where Orange is the only operator proposing business-specific bitstream.

ii. For services provided over dedicated fibre (FttO): (a) no price control in a first (competitive) area; and (b) a prohibition of predatory prices and non-excessive prices in a second (non-competitive) area.

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45 ARCEP also specifies that Orange is required to offer to access seekers the same ranges of bandwidths that it proposes for its own corresponding retail offers, as well as physical and logical security services when these are proposed in relation to Orange’s own corresponding retail offers.

46 ARCEP explains in the notification that this obligation concerns Orange’s LPT 2 Mbit/s offers, which represent the only copper product offered nationwide with symmetric and guaranteed speed and GTR 10h (guarantee of repair within 10 hours).

47 Due to the ability of alternative operators to deploy their own fibre local loop, ARCEP considers that cost orientation would not be justified for LPT fibre offers.

48 As in the previous market review, ARCEP deregulates communes that cumulatively fulfil three criteria. ARCEP proposes to amend the first criterion, by decreasing from 50 to 20 sites per km² the minimum density of non-residential sites with more than 10 employees, with the expected result that the number of deregulated communes will increase. ARCEP does not propose any change to the
The perimeter of the above geographic areas and the respect of the corresponding price control obligations are reviewed annually by ARCEP.

ARCEP also specifies in the notification that offers provided over FttH/FttE using an alternative interface shall be subject to both a non-predatory and a non-excessive price obligation on the whole geographic market.

Finally, cost accounting and accounting separation obligations are proposed with respect to all services provided by Orange on the relevant market.

3. COMMENTS

The Commission has examined the notification and the additional information provided by the ARCEP and has the following comments:49

**Need to ensure appropriate fibre regulation with a view to stimulating competition on the retail market**

The Commission acknowledges the considerable progress of FttH deployment in France over the last regulatory period. In this respect, the Commission welcomes the increase of FttH eligible sites from 3.2 million in 2014 to 8.2 million as of March 2017 and the significant expansion of co-financing schemes, particularly in the less dense areas50. The evolution of network sharing (“mutualisation”) should likewise be recognised as a positive development51.

However, the Commission also notes that, compared to the situation at the time of the last market analysis, Orange has strengthened its position on the FttH segment and concentration on the market has gradually increased. In particular, Orange’s share of retail FttH subscriptions has risen from approx. 50% to 60-65%, which is reflective of, *inter alia*, Orange’s strong market position at wholesale level52. In addition, in France the share of households with a subscription to fast broadband (18%) remains below the EU average (37%)53.

Against this background, the Commission takes note of ARCEP’s proposal to strengthen the regulation of fibre access by introducing new asymmetric remedies,

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

50 In the less dense areas the co-financing rate has increased from 60% in 2014 to 90% in 2017, whereas the rate is nearly 100% in the high density areas.

51 As of 31 March 2017, 65% of FttH eligible sites (up from 53% in 2014) are subject to network sharing, such that at least two operators are able to commercialise a retail FttH product based on a passive access offer at a concentration point.

52 Orange is the infrastructure operator of 70% of fibre lines deployed to date and of 73% of active FttH lines.

such as passive wholesale local access products intended for the business segment of retail broadband markets, and EoI for any future wholesale high-quality products that Orange should decide to commercialise over FttH or FttE (in addition to its existing FttO products). On this basis, ARCEP believes that the combination of the symmetric framework, the regulation of access to the copper local loop and civil engineering infrastructure and the new asymmetric remedies for fibre is sufficient to ensure the continued deployment of FttH and the development of effective competition.

Nevertheless, the Commission notes that ARCEP does not intend to impose on Orange a specific non-discrimination obligation for passive access to its fibre network offered in the context of the symmetric regulation. ARCEP bases this conclusion, *inter alia*, on the voluntary commitments proposed by Orange to implement non-discriminatory operational and technical processes on the wholesale local access market. These commitments appear to differ from an EoI obligation, both in terms of material scope (in that they are largely based on the EoO principle) and lack of legal validity and enforceability, relative to either regulatory obligations or to binding contractual commitments to commercial partners / access seekers.

The Commission points out in this respect that, according to the Recommendation on consistent non-discrimination obligations and costing methodologies, EoI is the best way to achieve effective protection from discrimination as it ensures that access seekers are able to compete with the downstream business of the SMP operator using exactly the same set of regulated wholesale products, at the same conditions and using the same transactional processes. Moreover, even if providing regulated wholesale inputs on an EoI basis is likely to trigger higher compliance costs than less strict forms of non-discrimination obligation, requiring the SMP operator to provide NGA wholesale inputs on an EoI basis is likely to create sufficient net benefits, and thus be proportionate, given that the incremental costs of complying with EoI are lower in case of newly built systems.

In this respect, ARCEP states that an EoI-based obligation would be disproportionate but it fails to clearly show that the costs of implementing EoI would be greater than the expected benefits. Therefore, the Commission asks ARCEP to consider imposing in its final measure access to the fibre terminating segment based on an EoI basis, as regards in particular operational and technical processes, such as information systems, ordering, provisioning and after-sales services.

Should ARCEP still consider the imposition of EoI disproportionate, and in the absence of binding contractual commitments to this effect by Orange to its partners, ARCEP should at least consider making those commitments binding by imposing them as regulatory obligations on Orange, as they had an important impact on ARCEP’s analysis of the market. As such, the commitments would constitute

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regulatory obligations and should therefore be subject to a consultation both at national and EU level prior to adoption.\(^{55}\)

In any event, ARCEP should closely monitor the implementation of the commitments made by Orange and promptly intervene with its regulatory powers in the case it finds that Orange is not rigorously respecting its commitments or, in any case, that the latter are not sufficient to ensure that alternative operators are able to compete with Orange on an equal footing.

**Lack of fibre bitstream offers for the retail business segment**

ARCEP considers that the availability of adequate wholesale active offers would be desirable so as to enable operators to compete on the retail business segment without having to develop their own infrastructure, as passive offers on the mass market are not necessarily accessible for such operators, especially at local level. ARCEP also notes that vertically integrated operators lack the incentives to commercialise diversified wholesale offers.

Nevertheless, in order to stimulate competition on the wholesale central access market, ARCEP proposes to impose a new wholesale passive local access offer with and without improved QoS, which in ARCEP’s view should create the conditions for the development of a wholesale central access market for the purpose of serving business customers, with at least three national infrastructure operators. In this respect, ARCEP considers that if it was to impose fibre-based bitstream at national or regional level instead, this would not promote the development of sustainable competition in this market segment.

However, the Commission notes that it is within the discretion of Orange to adapt its current co-investment and line rental offers in such a way that operators intending to serve the business segment of the retail broadband market can operate in an economically viable manner. Based on the information currently available it is unclear whether a change in the tariff conditions can indeed have the desired effect. Should barriers to enter the wholesale central access market remain high despite the availability of new passive access offers and should operators not start offering diversified wholesale active offers as envisaged by ARCEP, the Commission reiterates its comment made in the previous market analysis inviting ARCEP to reconsider the imposition of fibre-based bitstream products at least in those areas where alternative access products are not economically viable.

Pursuant to Article 7(7) of the Framework Directive, [NRA] 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.

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55 Please see case IT/2009/988.

56 Obligation included in market 3a mentioned at page 8 of this decision.
Pursuant to Point 15 of Recommendation 2008/850/EC 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 Commission 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. You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

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

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