

Press release

## OPTICAL FIBRE AND CO-INVESTMENT

### The Paris Court of Appeal fully upholds the Arcep decision settling the dispute between Free and Orange over accessing shared FttH networks

21 October 2019

Through its Decision of 17 May 2018, in response to a request from Free, the Arcep body responsible for settling disputes ruled on a dispute that the operator was having with Orange over the conditions governing Free's access to Orange's FttH networks, in lower-density areas in France that are covered by private initiative.

On 26 September 2019, the Paris Court of Appeal upheld the Arcep decision whose legality Orange had challenged. Through the ruling of 30 January 2019, the judge delegated by the First President of the Paris Court of Appeal had already rejected Orange's request to stay the execution of the Arcep Decision.

Arcep's Decision made it possible, in particular, to specify the regulation's expectations with respect to the clarity that a co-investor such as Free should be given, over the duration of its FttH network access rights and any possible pricing changes, through the supply of information on aggregate costs. This decision supports the implementation of the co-financing scheme that underpins fibre regulation across the whole of France.

#### **Core issues of the dispute between Free and Orange: terms and conditions governing Free's access to Orange's shared FttH networks, which are co-financed by Free.**

In a context whereby operator Free began co-financing fibre-to-the-home (FttH) networks being deployed by Orange several years ago, in late 2017 Free filed a request with Arcep to settle a dispute with Orange over the conditions governing its access to the latter's FttH networks in lower-density areas that are covered by private initiative. Arcep ruled on three requests from Free:

- **Duration of the indefeasible rights of use (IRU):** Arcep concluded that the IRU granted for an initial period of 20 years, combined with the renewal conditions stipulated in the access agreement, did not make it possible to satisfy Free's need for clarity and transparency over the duration of the rights of use being granted by Orange. Arcep thus required that Orange grant Free – in its capacity of co-investor – access rights for a period of at least 40 years, thereby providing it with sufficient clarity on its investments.
- **Terms and conditions of FttH network access pricing:** Arcep concluded that, in light of its co-investor status in a substantial portion of those parts of France where the Government issued a call for investment letters of intent in 2010 (known as "zone AMII" in France), of the level of investment that Free has made to co-finance Orange's FttH network, and of the aggregate nature of the cost elements requested by Free, it was justified and reasonable for Free to obtain clear and detailed information on how Orange establishes FttH network access prices in lower-density areas covered by private initiative. Orange was required to offer Free an access agreement that includes, first, an explicit and transparent definition of the links between the main prices in the agreement and the co-financed network's costs and, second, the main capital expenditures and operating expenses for the network that Orange has deployed in "AMII" areas.
- **Use of excess fibres:** considering that Free's request was fair, Arcep concluded that Orange must allow Free to connect Free Mobile base stations using the excess fibres belonging to the FttH network deployed by Orange and co-financed by Free in lower-density areas covered by private initiative, within the limits of their availability and, if applicable, up to a certain cap. In its appeal, Orange did not contest this last point.

**The judgment of the Paris Court of Appeal validates the decision of the Arcep body responsible for settling disputes, legal proceedings and investigations (RDPI)**

In its ruling of 26 September 2019, the Court upheld Arcep's dispute settlement Decision, and rejected Orange's arguments in their entirety.

The Court confirmed Arcep's assessment whereby the contractual conditions governing the renewal of the access rights in question were "*not sufficiently detailed given the company Free's need for clarity over the actual duration of these rights,*" neither in their principle nor in their terms and conditions.

The Court also ruled that the contractual arrangements that the Arcep decision imposed on Orange, regarding transparency over the network access prices' underlying costs, and the definition of the links between these costs and these prices was "*tied directly to the offer's financial conditions, designed to guarantee their fairness*".

In addition, the Court concluded that the Decision did not violate business secrecy. The Court confirmed Arcep's analysis by pointing out that the information Orange is required to provide to Free, pursuant to the Decision, "*are highly aggregated in nature, as much in terms of geography as in terms of cost items*".

The Court thereby upholds the approach taken by Arcep's "RDPI" body which seeks to enable an operator that co-finances FttH networks to benefit from levels of clarity and transparency that are consistent with their investments and with the terms and conditions of the co-investment scheme.

#### **Associated documents:**

- [Paris Court of Appeal ruling of 26 September 2019](#)
- [Arcep Decision No. 2018-0569-RDPI of 17 May 2018 settling a dispute between the companies Free and Orange](#)
- [Press release on Arcep Decision No.2018-0569-RDPI, dated 21 June 2018](#)

#### **Arcep at a glance**

The Electronic Communications and Postal Regulatory Authority (ARCEP), a neutral and expert arbitrator with the status of independent administrative authority (IAA), is the architect and guardian of internet, fixed and mobile telecoms and postal networks in France.

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#### **Press liaison**

Anne-Lise Lucas

anne-lise.LUCAS@arcep.fr

Tel.: 01 40 47 71 37

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