
Press release

OPTICAL FIBRE

Rules governing access to XpFibre networks: The Paris Court of Appeal confirms two Arcep dispute settlement decisions

Paris, 11 May 2023

In a judgement dated 20 April 2023, the Paris Court of Appeal confirmed the Arcep dispute settlement decision regarding the pricing terms and conditions governing Bouygues Telecom's access to shared fibre-to-the-home (FttH) networks operated by SFR FTTH (renamed XpFibre).

Having been seized by Bouygues Telecom to settle a dispute it was having regarding the pricing terms and conditions governing access to the optical fibre lines operated by SFR FTTH (renamed XpFibre) outside of very high-density areas, in those parts of the country where SFR subsidiary, SFMD, operates¹, the Arcep Executive Board body responsible for settling disputes, legal proceedings and investigations (RDPI) issued a Decision on 5 November 2020², requiring SFR FTTH to submit to Bouygues Telecom an amendment to their agreement on FttH line access in SFMD areas, reinstating as of 1 February 2020, the co-financing rates in effect prior to that date, and whereby the price of passive line rental will not exceed €13.20 excl. VAT/month/line starting from 3 January 2020.

SFR FTTH appealed that Decision to the Paris Court of Appeal. In a judgement published on 20 April 2023, the Court upheld the Arcep Decision:

- The Court rejects the claim by SFR FTTH which challenged the **impartiality of the "RDPI" body and its Chair** over the course of the dispute settlement procedure.
- **Regarding the rescinding of the price increases from the different rules governing access to the SFR FTTH fibre network, due to come into effect on 1 February 2020:** the "RDPI" body had, in particular, concluded that the elements provided by SFR FTTH did not make it possible to justify an increase in its co-financing rates, nor to assess the reality of the alleged additional costs. Regarding the regulatory framework and the need for commercial operators to enjoy access rules that guarantee lasting access to optical fibre networks, the price increase introduced by SFR FTTH was regarded as neither justified nor reasonable. The Paris Court of Appeal affirmed the reasoning of the "RDPI" body – stating, notably, that SFR FTTH: *"refused to provide the requested data on its costs [...]"*. The Court concluded that the operator could not invoke the confidential nature of said data as it had been permitted to present them in a manner *"sufficiently aggregated"* to be able to share. It underscores the fact that, *"if the principles of objectivity and transparency do not imply an obligation for the [infrastructure operator] to justify all of its costs in detail to the commercial operator, it does nonetheless imply that, when a price change occurs, the [infrastructure operator] will inform the [commercial operators] using its network of the objective elements that justify those price changes"*.
- **Regarding the decrease in the monthly line rental fee set by SFR FTTH:** the "RDPI" body had concluded that, in accordance with the regulatory framework, and particularly the scale of investment

¹ These "SFMD" areas correspond to those locations where SFR FTTH acts as an infrastructure operator:

- Municipalities covered by SFR's pre-existing deployments in those parts of the country where the Government has issued a call for investment letters of intent – called "zones AMII" in French (those municipalities that Orange handed over to SFR under a redivision agreement concerning these "zones AMII" signed in 2018 are therefore not concerned by this dispute);

Those areas covered by the commitments that SFR made as part of calls for expressions of local interest (AMEL in French).

² [Arcep press release of 18 November 2020](#) and [Arcep Decision No. 2020-1168-RDPI of 5 November 2020](#)

principle, the infrastructure operator must offer several access schemes (co-financing and rental) with a coherent difference in price between the two, to protect co-financing incentives while keeping prices under control to enable renting commercial operators to enter the market. The reasonable nature of the passive line rental fee was therefore assessed based on the difference between the price of co-financing and rental solutions. The “RDPI” body concluded that the (disputed) passive access line rental fee of €16.40 excl. VAT/month/line was unreasonable, and that the upper limit of the price range requested by Bouygues Telecom, namely €13.20 excl. VAT/month/line, was reasonable. On this point as well, the Court affirmed the “RDPI” body’s reasoning and points out that *“The Authority rightly concluded that the rental price had to be assessed with regard to co-financing rates, to verify that the gap between the two reflects the scale of investment principle, and based on the reasonable nature of the rental price”*. It also upheld the use of the pricing model that Arcep published in 2015³ to settle the dispute.

In a second judgement published on 20 April 2023, the Paris Court of Appeal confirmed the Arcep dispute settlement decision on the conditions governing operator Free’s access to SFR FTTH fibre networks in lower density areas covered by private initiative

Also seized by Free to settle a dispute regarding the conditions governing its access to SFR FTTH optical fibre networks in “SFMD” areas (pricing requests pertain solely to the portions of “SFMD” areas covered by calls for investment letters of intent (“AMII areas” in French)), the “RDPI” body issued a Decision on 17 December 2020. SFR FTTH appealed this Decision to the Paris Court of Appeal. In a judgement published on 20 April 2023, the Court upheld the Arcep Decision:

- The Court also rejected the claim by SFR FTTH which challenged, once again in this case, the **impartiality of the RDPI” body and its Chair**.
- **Regarding requests for lasting rights of use:** the “RDPI” body had concluded that the SFR FTTH contract did not provide sufficient predictability and transparency guarantees on whether Free would keep its rights of use should there be a change in network ownership or in the company’s capital structure, and therefore required SFR FTTH to submit a draft amended contract to Free, whose stipulations include a guarantee of continued rights of use and of essential access conditions being maintained, along with a mechanism to ensure that Free be properly compensated if all or a portion of its rights of use, and the essential access conditions associated with these rights, are lost or terminated. On this point, the Court validates the “RDPI” body’s reasoning, concluding notably that the *“insertion of a compensation clause contributes to [...] the safeguarding of rights of use, and provides the co-financing operator with guarantees on the conditions governing its access to the network deployed in exchange for its co-financing to enable it to earn a return on its investment”*.
- **Regarding the request for supervision of SFR FTTH’s ability to change its prices unilaterally:** for the “RDPI” body, Free’s particular status of co-financer implies that it would have adequate predictability and transparency, as well as the clarity it needs to be able to assess the reasonable nature of any planned price changes. It had therefore imposed an obligation on SFR FTTH to offer Free a contractual mechanism, for the area covered by the dispute settlement, whereby, beyond a threshold set by the contract, the planned price change will be the subject of an amendment negotiated in good faith by both parties. On this point, the Paris Court of Appeal once again upheld the “RDPI” body’s reasoning, concluding that it *“correctly applied the principles of transparency and objectivity, by virtue of which the rates charged by the [infrastructure operator] must be justifiable based on clear and binding cost elements and any change in price justified by objective elements”*.
- **Regarding the request pertaining to SFR FTTH prices:** in accordance with the regulatory framework, concerning the elements produced by the parties during the investigation and, in light of its own assessments, the “RDPI” body had required SFR FTTH to adjust its prices in the “AMII” section of “SFMD” areas to align them with the prices requested by Free, i.e. *ab initio* co-financing rates that not exceed €513.60/line and a monthly fee per line that does not exceed €5.12, in exchange for Free assuming a 20% share of financing. The Paris Court of Appeal affirmed the “RDPI” body Decision in its entirety. Here, it upholds the use of Arcep’s shared optical local loop cost and pricing models for settling disputes – models which had been subject multiple times to public consultation, and once

³ In 2015 Arcep published pricing guidelines for less densely populated areas which included a model and an explanatory document: https://www.arcep.fr/uploads/tx_gspublication/modele_PRDM-PTO.xlsx; https://www.arcep.fr/uploads/tx_gspublication/doc-model-tarif-acces-ftth-oct2015.pdf

again notes that SFR FTTH abstained from providing an account of “*even aggregated*” rollout costs to justify the reasonable nature of its prices.

Associated documents:

[Judgement of the Paris Court of Appeal – Arcep dispute settlement regarding the pricing conditions governing Bouygues Telecom’s access to shared fibre-to-the-home networks operated by SFR FTTH](#)

[Judgement of the Paris Court of Appeal – dispute settlement regarding the conditions governing Free’s access to SFR FTTH optical fibre networks in lower density areas covered by private initiative](#)

Arcep at a glance

The Regulatory Authority for Electronic Communications, Postal Affairs and Print Media Distribution (Arcep), a neutral and expert arbitrator with the status of independent administrative authority (IAA), is the architect and guardian of internet, fixed and mobile communications and postal networks in France.