

Press release

OPTICAL FIBRE

In settling a dispute filed by Free, Arcep details the rules governing access to the networks operated by SFR FTTH under a fibre co-financing scheme between these two operators

Paris, 4 January 2021

Reminder of the governing principles of FttH regulation, introduced more than ten years ago

The main national operators in France elected to deploy a new Fibre to the Home (FttH) local loop infrastructure, to keep pace with the demand for ever increasing connection speeds. Back in 2008, the legislator adopted the principle of sharing the last drop of FttH networks, to free up investment and enable efficient deployment, and entrusted Arcep with the task of establishing the rules that would govern this scheme.

As a result, operators wanting to sell superfast broadband services have physical access to the last drop of the networks deployed by infrastructure operators. In particular, the regulation introduced by Arcep stipulates that commercial operators can help finance any FttH network deployed by infrastructure operators who, in exchange, will grant them long-term rights of use.

For the record, and independent of the dispute being addressed here, on 17 December Arcep announced a complete update of its fixed market regulation system which, in particular, seeks to shore up the above-mentioned principles.

Regarding the request filed by Free

Free has been involved in co-financing FttH networks for several years, and wants to co-finance those deployed by SFR FTTH, a subsidiary of Altice SFR FTTH that took over the FttH infrastructure operator business that had previously been run by SFR, in lower density areas covered by private and public initiative.

It was in this context that, in July 2020, Free appealed to the Arcep body responsible for settling disputes, legal proceedings and investigations (RDPI), requesting that it settle its dispute with SFR FTTH over the terms and conditions governing its access to the latter's FttH networks in lower density areas covered by private initiative. More specifically, Free requested that Arcep rule on:

- Its ability to keep the rights of use that SFR FTTH has granted to Free in exchange for its co-financing, should there be a change in the network's ownership or in SFR FTTH's capital structure, and on the compensation to which Free would be entitled should it lose its rights of use;
- Supervision of SFR FTTH's ability to implement price changes unilaterally, in those areas covered by calls for investment letters of intent ("AMII areas" in French):
 - o By confining SFR FTTH's power to the ability to apply the indexing set forth in the contract, and provided that its recurring fee not exceed the average recurring fees observed in "AMII areas";
 - o By stipulating that any further changes require the signature of a contractual amendment, following good faith negotiations;
- Revision of *ab initio* co-financing rates in "AMII areas", so that they not exceed €513.60/line for the non-recurring charges, and €5.12/line/month for the recurring charge, in exchange for assuming a 20% share of financing.

To rule on the requests filed by Free, Arcep's RDPI body referred in particular to the regulatory framework's underlying principles, notably the lasting nature of the rights of use, the principles of transparency and predictability, and reasonable nature of the access prices. The Authority also based its decision on Arcep's shared optical local loop cost and pricing models, which have been submitted repeatedly to public consultation.

1/ Requests regarding the lasting nature of the rights of use

Arcep concluded that having sufficient clarity on the actual duration of the rights of use is key to ensuring long-term predictability, and is integral to guaranteeing FttH network co-financers long-term access. The Authority thus concluded that the SFR FTTH contract does not provide sufficient predictability and transparency guarantees on to whether Free would keep its rights of use should there be a change in network ownership or in the company's capital structure, and that Free's request was therefore justified.

As a result, Arcep has required SFR FTTH to submit a draft amended contract to Free regarding those parts of the country where SFR subsidiary, SFMD, operates, whose stipulations include:

- Should there be a full or partial change in the network's ownership, SFR FTTH must guarantee that Free continue to enjoy its rights of use and the essential access conditions associated with these rights, in exchange for its co-financing;
- A mechanism designed to ensure that Free is properly compensated if all or a portion of its rights of use, and the essential access conditions associated with these rights, are terminated following a transfer of these FttH lines by SFR FTTH;
- That the section of the contract regarding the ability to cancel the co-financed lines following a change in SFR FTTH's shareholder structure be clarified, and stipulate that the terms and conditions permitting this cancellation be based on a failure to provide sufficient financial guarantees as, incidentally, is stipulated in another article of the access agreement.

2/ Request to supervise SFR FTTH's ability to implement price changes unilaterally

Arcep concluded that the particular status of FttH network co-financer implies being afforded adequate predictability and transparency, notably with regard to recurring costs, as well as the clarity needed to assess the reasonable nature of any planned price changes. In this particular case, Arcep concluded that a legal mechanism requiring SFR FTTH to submit a contractual amendment for any price changes that exceed a certain threshold would constitute justified and proportionate supervision of the infrastructure operator's power to modify its access prices. Arcep did not, however, agree to the threshold that Free requested.

Arcep thus is thus requiring that SFR FTTH submit a draft amended contract to Free regarding "AMII areas" in those parts of the country where SFR subsidiary, SFMD, operates – supplementing the articles pertaining to prices changes with a mechanism designed to ensure that, beyond the threshold to be defined by the contract, any price change will require a contractual amendment that has been negotiated in good faith by the parties.

3/ Request regarding SFR FTTH pricing

The regulatory framework governing fibre stipulates that access prices must be reasonable, and satisfy the imperatives of non-discrimination, objectivity, relevance and efficiency, in addition to being based on costs.

Free substantiated its request to revise the prices that apply in "AMII areas" in those parts of the country where SFR subsidiary, SFMD, operates – as set forth in the SFR FTTH contract – with the latter's cost and price setting models, set against the models already published by Arcep. SFR FTTH did not provide any specific elements that would have made it possible to assess its costs. In light of the elements that both parties supplied to the investigation and, as a result of its own assessments, Arcep concluded that Free's price-related requests were justified and proportionate.

Arcep has thus demanded that SFR FTTH adjust its prices in "AMII areas" in those parts of the country where SFR subsidiary, SFMD, operates, 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 Authority also concluded that there is no clear indication that the pricing that Free requested for "AMII areas" is incompatible with performing rollouts in those areas covered by calls for expressions of interest in local initiatives ("AMEL areas"). Arcep therefore underscored that the injunction requiring SFR FTTH to adjust its pricing in "AMII areas", as per Free's request, in no way requires SFR FTTH to charge different prices in "AMEL areas".

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The complete decision will be published in the coming weeks, subject to trade secrets protected by law.

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 telecoms and postal networks in France.

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