
Press release

MARKET ANALYSIS

The Council of State rejects appeals of the Arcep Decision on the market for access to local passive solutions, aka Market “1” (unbundling)

Paris, 20 December 2024

Through its decision of 17 December 2024, the Council of State (*Conseil d'Etat*) has rejected the appeals filed by the firms Bouygues Telecom, Free SAS and SFR of the Arcep Decision¹ on the definition of the relevant market for wholesale local access provided at a fixed location, on the designation of an operator with significant power in this market (i.e. the SMP operator) and on the obligations imposed on that operator as a result. This Arcep Decision was adopted as part of the 7th round of fixed broadband and superfast broadband market analysis, covering the years 2024 to 2028.

Reminder: Arcep has imposed an obligation of cost-based pricing on Orange for wholesale local access solutions provided at a fixed location on copper access lines, which includes the copper local loop offer and the associated resources and services, since the first round of market analysis (2004-2007). For the 7th round of market analysis, Arcep identified three types of access:

- access for which cost-based pricing is maintained²;
- access for which there have been changes in competition conditions, and for which:
 - o either maintaining a cost supervision obligation for copper local loop access is no longer justified³;
 - o or maintaining an obligation of cost-based pricing is no longer justified but for which, given the observed level of competition, it appears relevant to impose an obligation not to charge excessive prices⁴. Orange proposed making a commitment to comply with a price cap for 2024 and 2025 in those municipalities where the obligation not to charge excessive prices is applied. Arcep accepted this commitment, and rendered it legally binding⁵.

The appeals filed by the operators pertained to the obligation not to charge excessive prices. The firm SFR also challenged the lawfulness of lifting the price supervision obligation.

The Council of State rejects the appeals lodged by the applicant companies, and confirms the lawfulness of the Arcep Decision

In particular, the Council of State concluded that an obligation not to charge excessive prices and the commitment from Orange that was made legally binding, “[...] *extrapolates the consequences of changes in the competition conditions in the market for wholesale access provided at a fixed location* [...]”. On this matter, it concluded in particular that the obligation not to charge excessive prices “*only applies in those municipalities where at least 95% of premises have been eligible to connect to the optical fibre infrastructure for at least nine months, which makes it possible for virtually every end user to switch from the legacy copper network to fibre*”. The Council of State also stressed that, “*the circumstance whereby the firm Orange is the only fibre infrastructure operator in a given area does not prevent other operators from competing with Orange in these areas, thanks to network sharing mechanisms, implemented in the form of passive access to fibre lines, in particular through cofinancing, as provided for by the regulatory framework*”.

The Council of State also concluded that Arcep did not misunderstand its obligation to bring changes to the regulatory framework in a predictable fashion, nor the principle of legal certainty, in particular given:

- the different public consultations held on the draft market analysis decision;
- the disputed Decision’s definition of the “*criteria used to determine the areas in which the obligation not to charge excessive pricing applies, as well as the conditions under which the firm Orange must give other operators sufficient advance notice of their application or amendment*”;
- price caps to which Orange committed for 2024-2025.

¹ Decision No. 2023-2802 of 14 December 2023

² Article 44 of Decision No. 2023-2802

³ Article 46 of Decision No. 2023-2802

⁴ Article 45 of Decision No. 2023-2802

⁵ Article 49 of Decision No. 2023-2802

Lastly, the Council of State dismissed criticisms of the decision to lift the price supervision obligation, having concluded that they were not “*detailed enough to assess their validity.*”

Arcep welcomes this decision from the Council of State.

Associated documents

- [Council of State decision](#)
- [Decision No. 2023-2802](#)

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, postal networks and press distribution in France.