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Part

Electronic communications

Electronic communications

4

Part

1.	Legal framework	127
	A. National framework	127
	B. Review of the European Framework	135
	C. European harmonisation	143
2.	Electronic communications markets	155
	A. Market figures and status	155
	B. The different market segments	167
	C. Consumption and usage in France	200
	D. European benchmarks	209
3.	Regulation of electronic communications market competition	219
	A. Market analysis in France in 2007	219
	B. Broadband markets	223
	C. Mobiles	234
	D. Fixed telephony	245
	E. The enterprise market: capacity services	249
	F. Wholesale market for audiovisual broadcasting services	250
	G. Implementation of accounting separation	252
4.	Spectrum resource regulation	263
	A. Spectrum management	263
	B. Numbering	283
5.	Consumers	287
	A. Taking consumer interests into account	287
	B. Monitoring quality of service	296
	C. International roaming	303
	D. Number portability	305
	E. Universal service	313
	F. Universal directory	325
	G. Value-added and "118" services	330

6.	Regional development	335
	A. State of national coverage	335
	B. Local authority actions	341
7.	Telecommunications in the overseas territories	345
	A. Market round-up	345
	B. 3G in overseas markets	347
	C. Decrease in mobile call termination tariffs	349
	D. Roaming between Metropolitan France and the overseas territories	350
	E. Mobile number portability in Reunion and Mayotte	352
	F. Universal service price cap specific to overseas markets	352
	G. Undersea cables	353
	H. The new numbering plan in Mayotte	354
8.	ARCEP's international responsibilities	355
	A. International Telecommunication Union (ITU)	355
	B. Organisation for Economic Cooperation and Development (OECD)	358
	C. Cooperation with Francophone countries: Fratel	359
	D. Study missions and meetings	360

CHAPTER 1

National framework

A. National framework

1. Reminder

In France, all of the regulatory provisions that govern the telecommunications sector are specified in the code governing France's electronic communications and postal operations, CPCE (*Code des postes et des communications électroniques*).

The CPCE, which formalises the national legal framework, was created by the transposition of European Telecom Package Directives of 2002 into French national law, which stems from the adoption of three laws:

- ◆ the Law of 31 December 2003¹ transposing the “Universal Service” Directive;
- ◆ the Law of 21 June 2004² concerning confidence in the digital economy which, in particular, authorises local authorities to become telecom operators³;
- ◆ the Law of 9 July 2004⁴ which fundamentally altered the legislative framework that applies to electronic communications, one of the main changes being the implementation of a new system of declaration for operators.

The legal framework is enhanced on a regular basis by laws, decrees, etc. to take into account regulatory or technological changes in the sector, or to respond to specific issues, such as roaming.

In 2007 two laws which affect electronic communications were adopted:

- ◆ the Law of 5 March 2007⁵ which assigns ARCEP the responsibility of producing a public report on the progress being made in achieving compliance in the agreements signed between local authorities or their interest groups for the establishment and operation of cable networks, as well as the power to mediate issues encountered in these efforts to achieve compliance;

1 - Law No. 2003-1365 of 31 December 2003 concerning the public service obligations of telecommunications and France Telecom, JO of 1 January 2004.

2 - Law No. 2004-575 of 21 June 2004 concerning confidence in the digital economy, JO of 22 June 2004.

3 - Cf. Article L.1425-1 of the local authorities general code, introduced by the law on the digital economy (LEN) of 21 June 2004.

4 - Law No. 2004-669 of 9 July 2004 concerning electronic communications and audiovisual communication services, JO of 10 July 2004.

5 - Law No. 2007-309 of 5 March 2007 concerning modernisation of audiovisual broadcasting and television of the future, JO of 7 March 2007.

6 - Law No. 2007-1774
of 17 December 2007
enacting several amended
provisions of EU economic
and financial laws,
JO of 18 December 2007.

7 - EC Regulation
No. 717/2007 concerning
roaming on public mobile
telephone networks inside
the Community,
ECJ of 29 June 2007.

8 - Law No. 2008-3
of 3 January 2008
concerning the development
of competition for
consumers' benefit,
JO of 4 January 2008.

9 - Cf. Part 4, Chapter 5, B.

- ◆ the Law of 17 December 2007⁶ for the application of the European Regulation of 27 June 2007 on international mobile roaming within the Community⁷.

More recently, the Law of 3 January 2008 for the development of competition for consumers' benefit⁸ (referred to as the "Chatel" Act) set down several measures whose goal is to provide a better framework for contractual relations between electronic communications service providers and their customers⁹.

European directives

- ◆ Directive 2002/21/EC of 7 March 2002 concerning a common regulatory framework for electronic communications networks and services, ECJ of 24 April 2002 ("Framework" Directive);
- ◆ Directive 2002/19/EC of 7 March 2002 concerning access to and interconnection of electronic communications networks and their associated resources, ECJ of 24 April 2002 ("Access" Directive);
- ◆ Directive 2002/22/EC of 7 March 2002 concerning universal service and users' rights with respect to electronic communication networks and services, ECJ of 24 April 2002 ("Universal Service" Directive);
- ◆ Directive 2002/20/EC of 7 March 2002 concerning authorisation of electronic communications networks and services, ECJ of 24 April 2002 ("Authorisation" Directive);
- ◆ Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, ECJ of 31 July 2002 ("Privacy" Directive);
- ◆ Directive 2002/77/EC of 16 September 2002 concerning competition in the markets for electronic communications networks and services, ECJ of 17 September 2002 ("Competition" Directive);

2. Provisions adopted in 2007

2.1 New internal regulation

The Authority amended its internal regulations to take account of the new provisions introduced by the Law of 5 March 2007¹⁰.

The Law of 5 March 2007 is aimed at achieving compliance in the agreements signed between local authorities or their interest groups for the establishment and operation of cable networks with the provisions of Article L.33-1 of the code governing France's electronic communications and postal operations, CPCE.

The legislator hereby enacted its desire to allow the parties involved to be able to appeal to ARCEP to mediate issues encountered in these efforts to achieve compliance.

The Authority's internal regulations were thus amended in July 2007 to define the rules to be applied to this act of mediation. When ARCEP is called upon to mediate, the procedure implemented stipulates that the Board of Directors will appoint a mediator from among its members. He or she can hear from the interested parties and from any other parties whose views he/she deems relevant. He/she will then draft a recommendation that is given to the parties which, in turn, can respond with their own

10 - Law No. 2007-309
of 5 March 2007 concerning
modernisation of audiovisual
broadcasting and television
of the future,
JO of 7 March 2007.

remarks. Once the procedure is complete, the statement of agreement or of disagreement with the draft recommendation, amended if so agreed upon by the parties, is signed by the mediator and the parties.

The goal of this newfound ability to mediate, provided for by law, is to encourage discussion between the players that have accepted the principle of a common approach. It is not, however, meant to replace actions brought before the courts which are the only bodies with the power to legally qualify an agreement, and to rule on the consequences.

2.2 Implementing decrees adopted in 2007

In 2007, five implementing decrees concerning the telecommunications sector were adopted.

Internet domain name management and assignment	Decree No. 2007-162 of 6 February 2007 concerning the assignment and management of Internet domain names, JO of 8 February 2007.
Final net cost of the universal telecommunications service from 1997 to 2000	Decree No. 2007-563 of 16 April 2007 concerning the methods for assessing, remunerating for and sharing the final net cost of the universal telecommunications service for the years 1997, 1998, 1999 and 2000, JO of 18 April 2007.
Cryptology	Decree No. 2007-663 of 2 May 2007 concerning cryptology methods and services, JO of 4 May 2007.
Electronic communication interception tariffs	Decree No. 2007-1519 of 22 October 2007 concerning tariffs applied to the interception of electronic communications, JO of 25 October 2007.
Spectrum and fees	- Decree No. 2007-1531 of 24 October 2007 enacting a fee for covering the costs established by the State for managing radio frequencies, JO of 27 October 2007. - Decree No. 2007-1532 of 24 October 2007 concerning the fees due from the holders of frequency licences awarded by ARCEP for the use of radio frequencies, JO of 27 October 2007.

2.3 Terms and methods for awarding a fourth 3G licence

The call for candidates for the award of the fourth 3G licence was issued by the Minister responsible for Industry on 8 March 2007, following the Authority's adoption of a decision¹¹ containing its proposals to the minister on the terms and methods for awarding a fourth 3G licence in Metropolitan France¹².

This call for candidates was similar to the procedures employed in 2000 and 2001 for the award of the first three 3G licences. It included provisions that would benefit the fourth mobile operator with respect to the reuse for 3G telephony of frequencies that are currently used by 2G for national 2G roaming and cell-site sharing.

By the application deadline, i.e. 31 July 2007, only one company, Free Mobile (a wholly-owned Iliad group subsidiary), had submitted a dossier.

To be selected, all candidates were required to satisfy the selection criteria stipulated in the call for candidates, notably the stated specifications and the ability to pay the fixed portion of the licensing fees, "amounting to 619,209,795.27 to be paid on 30 September of the year the licence is issued, or upon delivery of said licence should it occur later than 30 September"¹³.

11 - ARCEP Decision No. 07-0177 of 20 February 2007.

12 - For further details on the award of the fourth 3G licence, see Part 1, Chapter 1, C and Part 4, Chapter 1, A.

13 - Cf. amended Article 36 of the Finance Act for 2001.

14 - ARCEP Decision
No. 07-0862
of 9 October 2007.

15 - Cf. Article 22 of Law No.
2008-3 of 3 January 2008
concerning the development
of competition for
consumers' benefit,
JO of 4 January 2008.

16 - Cf. amended Article 36
of the Finance Act for 2001.

17 - European Commission
Decision 2007/116/EC
of 15 February 2007.

18 - ARCEP Decision
No. 07-0179 of 20 February
2007 amending ARCEP
Decision No. 05-1085
of 15 December 2005
defining the use of categories
of numbers in the national
numbering plan.

19 - ARCEP Decision
No. 07-0180 of 20 February
2007, approved by the
minister on 2 March 2007,
JO of 20 March 2007.

20 - Cf. ART Decision
No. 02-1179
of 19 December 2002.

It was the Authority's view that, under the financial terms currently stipulated by the Finance Act, the candidacy of the firm Free Mobile, as presented in its application dossier, did not satisfy the selection criteria and, as such, could only be rejected¹⁴.

The Law of 3 January 2008 on the development of competition for consumers' benefit (referred to as the "Chatel" Act)¹⁵, provides for the establishment of new financial terms for the future award of the fourth UMTS licence.

By virtue of this law, the article concerning the terms of settlement for the 3G licensing fees stipulated in the Finance Act for 2001¹⁶ will be repealed once the regulatory authority has set the amount and the payment methods of the new mobile licensing fee. In addition, it requires the government to hold a parliamentary debate prior to any implementation of this article.

2.4 Creation of a new emergency number: 116 000

In its Decision¹⁷ of 15 February 2007, the European Commission stipulates that: *"the numbering range beginning with '116' shall be reserved in national numbering plans for harmonised numbers for harmonised services of social value"* and that a harmonised service of social value is a *"service meeting a common description to be accessed by individuals via a freephone number"*.

The annex of this decision reserved the number 116 000 for a hotline for missing children.

In preparation for the introduction of this new number, the Authority took the necessary measures for having 116 000 included in the list of emergency numbers.

As a result, it adopted two decisions :

- ◆ the Decision¹⁸ of 20 February 2007 opening up the range of numbers with the format 116 XYZ as the numbers reserved for pan-European freephone numbers of social value;
- ◆ the Decision¹⁹ of 20 February 2007 adding 116 000 to the list²⁰ of numbers to be routed free of charge by telecommunications operators. This decision was approved by order of the Minister responsible for telecommunications, on 2 March 2007.

2.5 Making subscriber lists available for the universal directory

In tandem with the affected players (operators and universal directory publishers), ARCEP held discussions to determine the methods to be employed for making subscriber and user lists available. The issues and delays encountered in compiling the universal directory nevertheless continued in 2006, which led the Authority to adopt a decision with regulatory consequences – in accordance with its powers, and which is subject to the approval of the Minister responsible for telecommunications – in an effort to bring elements of clarification and legal security to the sector, for the benefit of consumers.

As a result, after lengthy discussions²¹, ARCEP adopted a decision²² in November 2006, approved by the minister in March 2007, which specifies the terms for providing subscriber and user lists for the purpose of publishing a universal directory or for providing universal directory assistance services²³.

2.6 Regulatory framework for value-added services

In the past, the value-added services market (VAS)²⁴ has been left to develop outside a specific legal or regulatory framework. The incumbent carrier's offer had a *de facto* influence on the shape of this complex market comprised of numerous and diverse players (fixed and mobile local loop operators, transit operators and collectors, content providers and VAS providers, etc.) which, over time, has encountered a variety of issues:

- ◆ growing consumer dissatisfaction, particularly in terms of their understanding of how the market works, the clarity of the tariffs being charged and the code of ethics applied to the content available via VAS numbers, and of the use of these services;
- ◆ the lack of a specific obligation to route calls to all VAS numbers, giving rise to contractual issues between the market players;
- ◆ billing and collection issues between these same players.

Based on these concerns, which were brought to light during discussions with all interested parties²⁵, ARCEP submitted a decision for approval to the Minister responsible for electronic communications, specifying the common rules for the accessibility of numbers in the numbering plan assigned to VAS²⁶.

In its substance, the regulatory framework enacted by this decision is based on two obligations :

- ◆ an obligation of VAS number accessibility imposed on operators present at either end of the value chain (i.e. originating operators and VAS number operators), which will need to comply with *reasonable* requests for access to numbers under objective, transparent and non-discriminatory conditions, without prejudice to the right to discontinue or suspend in case of fraud or failure to adhere to the code of professional ethics;
- ◆ an obligation for originating operators to meet reasonable requests for repayment of part of the amount invoiced to subscribers under objective and non-discriminatory conditions.

Should a disagreement occur over an access agreement concerning VAS numbers, the players concerned can appeal to the Authority to settle the dispute.

The minister approved the ARCEP decision in an Order dated 24 April 2007. Because all of the players are subject to these new obligations, this is a symmetrical regulatory decision, independent of any market power considerations that may apply to certain players.

21 - Following the work performed in February 2005 and June 2006 by the working group comprised of sector players, ARCEP conducted a public consultation on its draft decision on 7 July 2006. To ensure transparency, the Authority consulted not only advisory committees, CCR and CCRSCE, but also the French national commission on computing and freedom, CNIL and the General Directorate for Enterprises, DGE in October 2006.

22 - Decision No. 06-0639 of 30 November 2006, approved by the minister 8 March 2007, JO of 24 March 2007.

23 - Cf. Part 4, Chapter 6, G. for more details.

24 - Cf. Part 4, Chapter 5, F. for further details on ARCEP actions.

25 - Notably a dual public consultation on 23 November 2006 and on 9 March 2007.

26 - Pursuant to CPCE Article L.36-6 and Articles L.34-8 III and D. 9-11, by virtue of which ARCEP can impose obligations on operators that control access to end users, in order to ensure access to services on other networks and service interoperability.

3. Operators' rights and obligations

3.1 Rights from which operators benefit

Being an operator confers a legal status that gives these enterprises certain prerogatives with respect to both other operators and the regulatory authority.

The rights that operators enjoy include:

- ◆ **right to interconnection:** operators of networks open to the public grant the interconnection requests made by other operators of networks open to the public to enable them to provide electronic communication services to the public²⁷. Any refusal to do so must be for a specific reason.
- ◆ **right to use spectrum:** all operators can use the frequencies managed by ARCEP, whether they require an individual licence (GSM, UMTS, WiMAX, etc.) or whether subject to simple prior declaration, under certain technical and regulatory conditions (2.4 GHz and 5 GHz bands). Operators also have the possibility of trading or making available to other users some of the frequencies for which they are licensed.
- ◆ **right to use numbers:** through an authorisation decision, the Authority assigns to operators that file a request, prefixes and numbers, blocks of numbers, and codes for routing electronic communications which are not part of the Internet addressing system.
- ◆ **right to request that ARCEP settle a dispute:** having the status of electronic communications operator gives an enterprise the right to submit a case to ARCEP so that the regulator may rule on certain disputes between public network operators or electronic communication service providers.
- ◆ **right to submit a request to ARCEP to open a disciplinary procedure:** upon request from an operator, ARCEP has the power to discipline network operators or communication service providers which have not complied with the legislative and regulatory provisions that govern operations, or with the decisions made to ensure implementation.
- ◆ **rights of way on the public domain and rights of passage on private property:** public network operators are given rights of way on public roadways to install and operate their networks. On non-roadway portions of the public domain, operators need to obtain access agreements. Operators of networks open to the public also enjoy rights of passage on private property²⁸.
- ◆ **preservation of technical data for billing and network security purposes:** data will be preserved such that it satisfies the principle of protecting electronic communication network and service users' right to privacy²⁹. Only technical data may be preserved; the contents of correspondence and viewed information is excluded.
- ◆ **guarantee of the confidentiality of the data that operators transmit to ARCEP:** the data that operators transmit to ARCEP cannot be divulged to a third-party, except in the few explicitly enumerated cases (ability to view access and interconnection agreements, in accordance with the terms of CPCE Article D. 99-6) and, in all circumstances, in strict compliance with business secrecy.

27 - CPCE Article L. 34-8 II

28 - CPCE Article L. 45-1

29 - In accordance with the provisions of the Law of 6 January 1978 concerning computing, files and freedoms.

- ◆ **right to appeal:** all of ARCEP's decisions can be appealed before the relevant judge, provided all the conditions of a relevant appeal are met.

Summary table of electronic communications operators' recognised rights

The articles mentioned are those contained in the code governing France's electronic communications and postal operations (CPCE).

Operators of electronic communications networks open to the public	Electronic communication service providers
Interconnection (Article L. 34-8)	N/A
Spectrum licences (Article L. 42-1 and s.)	N/A
Authorisation for use of numbering resources (Article L. 44)	Authorisation for use of numbering resources (article L. 44)
Rights of way (Articles L. 45-1, L. 47 and L. 48)	N/A
Referral to ARCEP for dispute settlement (Article L. 36-8)	Referral to ARCEP for dispute settlement (Article L. 36-8)
Referral to ARCEP on penalty procedures (Article L. 36-11)	Referral to ARCEP on penalty procedures (Article L. 36-11)
Guarantee of the confidentiality of information transmitted to ARCEP (Articles L. 131 and L. 132)	Guarantee of the confidentiality of information transmitted to ARCEP (Articles L. 131 and L. 132)
Preservation of technical data for billing and network security purposes (Articles L. 34-1 I, III, and Article R. 10-14)	Preservation of technical data for billing and network security purposes (Articles L. 34-1 I, III, and Article R. 10-14)
Right to appeal	Right to appeal

3.2 Operators' chief obligations

In exchange for enjoying certain rights, operators are subject to both financial and technical obligations.

3.2.1 Pecuniary obligations

Operators are subject to three categories of financial obligations:

- ◆ **payment of an administrative tax:** the sum of the administrative tax depends on the operator's turnover³⁰. Operators whose annual revenues are below one million euros are exempt from taxes.

30 - See below.

The following table lists the annual amount of the tax to be paid, according to an operator's financial situation.

Case description	Annual tax	Remarks
Turnover below €1 million	0 €	Proof to be supplied
Turnover between €1 million and €2 million	[Turnover divided by 50] minus 20 000 €	Proof to be supplied
Operators performing trial operations, as described in CPCE Article L. 33-1 (for a maximum three years)	0 €	ARCEP validates the experimental nature of the activity
Adjustment of sums indicated above		
Operators mentioned on one of the lists provided for by Para. 8 of CPCE Article L. 36-7 and whose turnover exceeds €800 M.	Amount multiplied by four	Operators designated as having SMP in an electronic communications market (CPCE Articles L. 37-1 and following)
Opérateurs dont l'activité est limitée aux départements d'outre-mer ou couvre au plus un département métropolitain	Amount divided in two	

* N.B.: before taxes turnover generated by electronic communications activities mentioned in CPCE Article L. 33-1...

- ◆ **payment of taxes and licensing fees in exchange for the use of scarce resources:** operators which have been assigned numbering resources must pay a tax, while spectrum licence holders are subject to a licensing fee.

N.B.: ARCEP collects all of these taxes and fees before depositing them, in their entirety, into the State's general budget

- ◆ **contribution to the universal service fund:** the amount that operators must contribute to the universal service fund is based on a prorata share of their turnover³¹. Operators whose turnover is below €5 million are exempt from this contribution³². The *Caisse des dépôts et consignations* (Deposit and consignment office) is responsible for the accounting and financial management of the fund.

31 - Cf. CPCE Article L.35-3.

32 - Cf. CPCE Article R.20-39 (2).

3.2.2 Technical obligations

The code governing electronic communications and postal operations, CPCE, includes a list of the obligations to which operators are subject. Based on this common set of rules, the regulatory framework is then adapted and completed depending on whether the entity in question is an operator supplying a telephone service or one supplying electronic communications services to the public.

Under this framework, an enterprise that operates a network and provides services can be subject to both the obligations that apply to networks open to the public and to the legal regime governing electronic communications services.

In the same vein, if the entity supplies a telephone service to the public, it must comply with the obligations to which electronic communications and telephone service provision activities are subject.

Breakdown of operators' chief obligations, by type of activity

The articles mentioned are those contained in the CPCE

Obligations to which all operators are subject

- Article D. 98-4: Permanence, quality and availability of networks and services
- Article D. 98-5 III: Security of communications
- Article D. 98-6: Network and service standards and specifications
- Article D. 98-7: Prescriptions for reasons of public order, national defence and public safety
- Article D. 98-8: Emergency call routing and localisation
- Article D. 98-11: Controlled by ARCEP
- Article D. 98-12: Consumer protection and information
- Articles L. 34-1, L. 34-1-1, R.10-12 and following.: Preservation and transmission of traffic data, as measures for pursuing penal infractions and the fight against terrorism
- Article L. 44: Numbering, portability

B. Review of the European Framework

1. New recommendation on relevant markets

The current Framework Directive³³ includes the provision for regular re-examination by the Commission of the relevant market recommendation that it has adopted. Following the public consultation it launched in summer 2006, on planned amendments to its earlier recommendation of 11 February 2003, the Commission consulted with national regulatory authorities (NRA) and national competition authorities (NCA) on a second draft amendment on 12 September 2007. A new recommendation was ultimately adopted on 13 November 2007, coming into effect on 17 December 2007³⁴.

33 - Directive 2002/21/EC
concerning a common
regulatory framework for
electronic communication
networks and services.

34 - Recommendation
2007/879/EC
of 17 December 2007,
ECQJ of
28 December 2007.

1.1 Goal of the recommendation

In accordance with the principles of competition laws and of the Framework Directive, the European Commission recommendation on relevant markets lists the electronic communications sector product and services markets that are likely to be subject to ex ante regulation.

Attached to the directive is an explanatory memorandum describing the principles that a national regulatory authority must apply to analyse the markets, whether listed or not. It specifies that, to be regulated, a market must satisfy all three of the following criteria:

- ◆ the presence of barriers to market entry and to the development of competition;
- ◆ lack of prospects for a shift towards effective competition;
- ◆ the inefficiency of existing competition laws.

An NRA is thus required to analyse all of the markets listed but not to regulate them, should they not meet these three criteria or if no single operator is deemed to have significant power in these markets. With the Commission's approval, a national regulator may, however, decide to regulate a market that is not included in the list if it satisfies these three criteria – one example in France being the SMS call termination market.

1.2 The new list

Of the 18 markets listed in the Recommendation of 2003, seven continue to be relevant for analysis by national NRAs in view of potential *ex-ante* regulation:

- 1 - Access to the public telephone network at a fixed location for residential and non-residential customers (combines former Markets 1 and 2);
- 2 - Call origination on the public telephone network provided at a fixed location (former Market 8);
- 3 - Call termination on individual public telephone networks provided at a fixed location. (former Market 9);
- 4 - Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location for the purpose of providing broadband and/or voice services. (former Market 11, extended);
- 5 - Wholesale broadband access, or bitstream (former Market 12);
- 6 - Wholesale terminating segments of leased lines (former Market 13);
- 7 - Voice call termination on individual mobile networks (former Market 16).

The recommendation of 17 December 2007 has been largely relaxed. It no longer contains international roaming³⁵ (former Market 17), due to the regulation adopted by the European Commission in June 2006. It has also taken into account the development of competition in retail markets (removal of former Markets 3 to 7) and in the transit market and wholesale trunk segments of leased lines (former Markets 10 and 14). Also removed from the list are access and call origination on public mobile telephone networks (former Market 15) and broadcasting transmission services (former Market 18).

35 - Cf. Part 4, Chapter 5, D.

From the recommendation of 2003 to the recommendation of 2007

Markets listed in the recommendation of 11 February 2003		Markets listed in the recommendation of 17 December 2007
1 - Access to the public telephone network at a fixed location for residential customers. 2 - Access to the public telephone network at a fixed location for non-residential customers.	=>	1 - Access to the public telephone network at a fixed location for residential and non- residential customers
3. - Publicly available local and/or national telephone services provided at a fixed location for residential customers. 4. - Publicly available international telephone services provided at a fixed location for residential customers. 5. - Publicly available local and/or national telephone services provided at a fixed location for non-residential customers. 6. - Publicly available international telephone services provided at a fixed location for non-residential customers. 7. - The minimum set of leased lines.	=>	Removed
8. - Call origination on the public telephone network provided at a fixed location.	=>	2 - Call origination on the public telephone network provided at a fixed location.
9. - Call termination on individual public telephone networks provided at a fixed location.	=>	3 - Call termination on individual public telephone networks provided at a fixed location.
10 - Transit services in the fixed public telephone network.	=>	Removed
11 - Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.	=>	4 - Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location for the purpose of providing broadband and/or voice services.
12 - Wholesale broadband access.	=>	5 - Wholesale broadband access, or bitstream
13 - Wholesale terminating segments of leased lines.	=>	6 - Wholesale terminating segments of leased lines.
14 - Wholesale trunk segments of leased lines. 15 - Access and call origination on public mobile telephone networks.	=>	Removed
16 - Voice call termination on individual mobile networks.	=>	7 - Voice call termination on individual mobile networks.
17 - The wholesale national market for international roaming on public mobile networks. 18 - Broadcasting transmission services, to deliver broadcast content to end-users.	=>	Removed

1.3 Duct regulation authorised

The new text authorises the regulation of civil engineering ducts. In the memorandum that accompanies the recommendation, the Commission expresses the view that technological developments have created the need to include all physical infrastructure required to deliver fixed telecommunications services to end users in the market for wholesale access to physical network infrastructure that comprises the local loop. This includes civil engineering infrastructure, and so the ducts.

2. Proposed Commission directives

The process

The telecommunications sector is governed by the European directives adopted in 2002. The Commission has undertaken a review of the regulatory framework. After broad consultation with the affected sector players, the Commission published its proposals for new regulatory texts on 13 November 2007, then submitted them to the European Council and Parliament, which votes on whether or not to adopt them. Adoption of these texts is based on the principle of equality between the European Union Council and the European Parliament, such that neither body can adopt legislation without the consent of the other. The new directives will be adopted in 2010 at the latest, and will then be transposed into national legislation in the 27 European Union Member States.

The official European Commission proposals for the overhaul of the Telecom Package are contained in three documents :

- ◆ new regulation establishing a European Electronic Communications Market Authority (EECMA);
- ◆ a proposed directive amending the Framework, Authorisation and Access Directives;
- ◆ a proposed directive amending the directives concerning universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) and the directive concerning personal data and privacy issues.

Unlike the previous review of the regulatory framework, which was performed in 2002, none of the consultations conducted by the Commission gave an indication that a major overhaul was likely. The Commission had in fact consistently stated that the current framework was satisfactory and that only minor changes were needed, along with a reinforcement of its spectrum policy, i.e. in the area of spectrum management. A number of amendments were nevertheless proposed on 13 November 2007 that would considerably alter the European regulatory framework, in terms of both the institutional balance of market analyses and the issue of spectrum management.

2.1 Major institutional changes, including the creation of a European regulator (EECMA)

The Commission proposes strengthening the independence of national regulatory authorities (NRA) and extending acceptance of NRA decisions to other areas

(symmetrical and asymmetrical regulation, network security and integrity, consumer protection...).

The major institutional change concerns the proposal to alter the balance of power between the Commission and national regulators, giving the Commission greater power over NRAs' market analysis and in the area of spectrum management. As concerns market analysis, the Commission would, for instance, have veto power over the remedies imposed on SMP operators (and not only over market definitions and the designation of SMP operators, as is currently the case), in addition to having the power to alter these remedies. As concerns spectrum, the Commission would use its powers to impose harmonised spectrum management in the different European Union countries³⁶.

36 - See below.

To achieve this change under the regulatory system, the Commission proposes the creation of a "European regulator" – the European Electronic Communications Market Authority (EECMA) – whose chief function would be to provide assistance by examining market analyses as well as spectrum, numbering and network security issues. The European Network and Information Security Agency (ENISA) would be incorporated into the EECMA.

Composed of 134 people (including ENISA staff) and allocated a provisional annual budget of 28 million from the third year onwards (10 for the first year), the EECMA would replace all cooperation between NRAs and between NRAs and the Commission, which currently occurs primarily within the European Regulators Group (ERG). In terms of structure, the EECMA would be organised into an Executive Board (six Commission representatives and six Member State representatives), a board of regulators, a chairman, a chief network security officer, a permanent stakeholders' group and a board of appeal.

2.2 Change in the market analysis procedure, under the EECMA

The Commission proposes that changes be made to the market analysis procedure, to endow the EECMA with a more central role, taking over from NRAs and the Commission³⁷.

37 - Cf. new Articles 7 and 16 of the Framework Directive described in the diagram..

The new market analysis procedure proposed by the Commission is as follows:

Draft measure

1 month

Submitted to the Commission, the EECMA and NRAs (notification by the NRA). Comments from the Commission and other NRAs only in the case of serious doubts.

In instances where the Commission expresses serious doubts

2 months

Adoption of the draft measure is suspended for two months. During that time, the Commission can request that the NRA withdraw its draft measure, while taking better account of the opinion of the EECMA.

In the case of a request from the Commission for the withdrawal or amendment of a measure

3 months

The NRA must amend or withdraw its decision within three months. In the case of an amendment, the NRA must conduct a public consultation.

If the Commission rules that the NRA is not complying with its request, it can impose a specific remedy

Timetable set ahead of time

EECMA opinion required.

New notification of draft measure to the Commission by NRA

The first stage of the procedure – which involves the NRA preparing draft measures and notifying them to the Commission and the other NRAs – remains the same, except for the simultaneous notification of the EECMA and its possible intervention. The Commission still has a month to analyse the dossier and, if necessary, to communicate its serious doubts, and a further two months to request the draft measures be withdrawn or amended. The current right to veto relevant market definitions and the designation of SMP operators, should also apply to these remedies.

In the case of a veto, the Commission provides a maximum three months for the NRA to withdraw or amend its market analysis, which imposes a mandatory re-examination of the market and the establishment of new measures in a transparent fashion, hence a period of consultation with the sector and the national competition authority which cannot be abridged.

At the end of these three months, or if the new analysis is deemed unsatisfactory, the Commission can impose a specific remedy on the NRA, by soliciting the opinion of the EECMA. In the same vein, should the work performed by the NRA be found to be lacking, the Commission can request that the EECMA prepare a draft analysis of the market in question and demand that the NRA designate one or several operators as having SMP, and impose obligations on them. The NRA must submit this draft measure to public consultation.

And, lastly, the Commission stipulates a maximum period of validity of two years for market analyses, starting from notification of draft analysis (compared to the current period of three years, starting with definitive adoption of the analysis), which has the advantage of ensuring that the players will be heard and ensuring the legal security of the decisions.

Moreover, at the request of the Commission, the EECMA would perform trans-national market analysis and would submit an opinion on whether to impose, maintain, alter or lift obligations. Taking this opinion into consideration, the Commission would then make the decision of whether to designate one or several operators as having SMP, and impose obligations on them. Under the current framework, it is the NRAs which are in charge of trans-national market analysis, as defined by the Commission³⁸.

38 - The Commission has yet to identify any trans-national market; the procedure has thus never been implemented.

2.3 New remedies for competition issues

The provisions aimed at setting remedies for market competition problems are described in the Access Directive. The two main novelties identified in this directive concern functional separation (Article 13) and the regulation of passive infrastructure (Article 12).

The Commission proposes making a new regulatory remedy available to NRAs: the power to impose functional separation on vertically integrated enterprises, requiring them to create a separate business unit for their wholesale network access operations. This business unit must market wholesale products and services not only to all of its clients, i.e. competitors, but also to its own parent company's divisions and subsidiaries, under the same terms with respect to pricing, services and operational processes.

In the case where an NRA wants to impose functional separation, a detailed request must be submitted to the Commission which will decide whether or not to allow the measure to be taken. If the request is accepted, the NRA must perform a coordinated analysis of the different markets tied to the access network.

In addition, the directive opens up the possibility of recognising voluntary separation of an SMP operator which, if applicable, must inform the NRA of its intentions. Here, the NRA can impose obligations concerning access to the thus separated entity.

Despite the request made by the ERG, the proposal does not, however, provide for an expansion of the provisions pertaining to non-discrimination. The ERG holds the view that the conditions defined as justifying the application of functional separation are not necessarily such that they require the imposition of so intrusive a regulatory mechanism as functional separation, which is a remedy that should only be imposed as a last recourse, in cases of a persistent distortion in the state of market competition.

Lastly, NRAs are given the power to impose an obligation to share passive infrastructure (such as ducts, towers, antennae, etc.) on the owners of the infrastructure, under transparent, objective and proportionate conditions. In the Member States, the competent public authorities (local authorities) can also impose an obligation to share resources or landed property for reasons of environmental protection, health or public safety.

2.4 Strengthened consumer protection

In its draft amendment of the Universal Service Directive, the Commission provides for increased NRA powers in the area of consumer protection. One example is the introduction of new provisions aimed at more comprehensive information on contractual terms, particularly on emergency calls and accessing content. It also seeks to improve the clarity of tariff schedules and consumers' ability to choose their offer and to switch operators. Article 30 of the Universal Service Directive provides for a maximum one-day number porting process. The Commission also plans on the future possibility of number portability between fixed and mobile networks.

Measures have also been planned for facilitating disabled persons' access to universal service-based offers. Special tariffs are also planned for low-income persons and those with special social needs. And, finally, the Commission wants to enable consumer access to all legal content and, to this end, to expand the regulatory objectives and scope of application of dispute settlements.

2.5 More flexible spectrum management

The Commission's proposals concerning the radio spectrum are aimed chiefly at ensuring greater flexibility in how it is managed and in facilitating market players' access to it. Among its proposals, the introduction of a general and harmonised system of licence-exempt spectrum is a major new feature. A system of general authorisation would become the default system for spectrum management. This means that individual licences would be the exception, justified only by cases where there are serious risks of harmful interference or for achieving an objective that is in the general public interest.

Also included in the Commission's proposals is mandatory enforcement of technological neutrality, which is already included in Article 8 of the existing Framework Directive. Technological neutrality is thus becoming a general rule by default, imposed on all Member States in the management of spectrum. Exceptions, which are covered by the texts, are nevertheless factored in, and could be harmonised by the Commission.

39 - *Wireless Access Policy for Electronic Communications Services, or WAPECS is "a framework for the provision of electronic communications services within a set of frequency bands to be identified and agreed between European Union Member States in which a range of electronic communications networks and electronic communications services may be offered on a technology and service neutral basis, provided that certain technical requirements to avoid interference are met, to ensure the effective and efficient use of the spectrum, and the authorisation conditions do not distort competition".*

As it had already announced back in 2005 (through a series of communiqués and the start of work on WAPECS³⁹), the Commission then suggested an additional rule to be applied to spectrum management, namely full and mandatory service neutrality, which is truly a regulatory novelty.

This rule, included only in Article 9 of the Framework Directive, thus concerns only wireless networks and services. The objectives are not clearly defined: does the goal of service neutrality refer to voice and data streams, or in the broader sense used by the ITU whereby these services correspond to categories of radiocommunication networks such as satellite, microwave links, mobile networks, TV networks, etc.?

Lastly, the Commission is seeking to reinforce and harmonise the implementation of secondary frequency markets in Europe by making spectrum trading implementation mandatory in certain bands that have been harmonised at the Community level. Spectrum trading is optional under the current directives.

3. European Regulators Group (ERG) position on the creation of the EECMA

The national regulatory authorities that make up the ERG hold the collective opinion that the EECMA is not a suitable response to the bid to harmonise telecommunications regulation in Europe.

Convergence with common competition law is the founding principle of the regulatory framework that has governed telecommunications since 2003, having as its long-term objective the removal of sector-specific regulation. It seems particularly inopportune, when reviewing the current framework, to abandon this goal of convergence and to send out contradictory signals by prolonging sector-specific regulation with the creation of a dedicated European regulator. Rather, the review of the Community framework should work to prove that asymmetrical *ex ante* regulation of the telecommunications sector remains a temporary regime, and capitalise on the success of the regulation applied in a number of markets to promote best practices.

The ERG shares the Commission's view that work needs to be done to improve the harmonisation of regulation in Europe. But this harmonisation requires the Commission to make only a few decisions on major issues (mobile call termination, fibre regulation, etc.), and to monitor their implementation in the field which **only NRAs are capable of achieving**.

This planned regulation, however, aims to make the EECMA "*serve as the exclusive forum for cooperation between national regulatory authorities in the exercise of the full range of their responsibilities under the regulatory framework*"⁴⁰. As a result, the Commission's proposal would abolish NRA efforts to strengthen their cooperation (with each other and with the European Commission) via the ERG.

This creates a major risk of inefficiencies due to the loss of the expertise of the working groups comprised of NRA representatives. Furthermore, the EECMA would constitute an entity that is removed from the realities of regulation and lacking a true understanding of the sector, particularly of national specificities.

40 - "Whereas" (14) of the draft regulation on the creation of the EECMA.

If it were to be enacted, a shift in the balance of regulatory power in favour of the Commission, particularly by extending the Commission's powers in the area of remedies⁴¹, needs to be offset by efficient supervision at the State level by national regulators.

41 - *Obligations imposed by NRAs on SMP operators.*

This conclusion led the ERG to search for an alternative solution that was in line with spirit of the Directives of 2002 (progressive replacement of sector-specific regulation with common competition law), whose new Telecom Package would constitute only an extension and not a reversal of stance.

To enable harmonised telecommunications regulation through greater cooperation between NRAs and collaboration with the Commission, inspiration can be found in the regulator committees that exist in other sectors, of which several have proven very effective. One example is the work performed by the European Competition Network (ECN) for the implementation of Articles 81 and 82 of the European Community Treaty (agreement and abuse of dominant position), supported by a network of national competition authorities (NCA)⁴².

42 - *Committee created by Council Ruling 2003/1/EC of 16 December 2002 Network created by joint Declaration of the Council and Commission, adopted at the same time as the ruling.*

The alternative proposal made by regulatory authorities aims to respond to the sector's preoccupations, in other words the consistent application of a framework and achieving harmonised regulation. In addition to ensuring greater independence for NRAs than would be the case under the EECMA, it would also ensure that the principles of subsidiarity and proportionality are upheld.

C. European harmonisation

All of the Authority's powers, and so its operations, are governed by a European regulatory framework, which explains the strong international and in particular the Community aspect of all of the work that ARCEP performs.

In accordance with French law, ARCEP provides French authorities with assistance on international issues, in addition to exercising its own powers when dealing directly with fellow NRAs and with the European Commission.

The regulatory framework requires ARCEP to notify a number of its decisions (market analyses, definition of obligations imposed on SMP operators) to the European Commission. In addition to the formal procedure, this requires ARCEP to maintain regular relations with the Directorates-General, "Information Society" and "Competition" which are responsible for these issues.

1. Work of the European Regulators Group (ERG) and the Independent Regulators Group (IRG)

The ERG

Cooperation between national regulatory authorities (NRA) began back in 1997 within the Independent Regulators Group (IRG), which was created at the initiative of several NRAs, including ARCEP's predecessor, ART. This informal "club" provides members with a forum for sharing experiences, and its members now include all European Union countries and the NRAs of Switzerland, Liechtenstein, Iceland and Norway⁴³. Turkey's application to the IRG was accepted in February 2005, Croatia's was accepted in October 2005 and

43 - *Switzerland, Iceland, Norway, and Liechtenstein are members of the EFTA, the European Free Trade Association. The latter three have joined the European Economic Area.*

Macedonia's in January 2007, in other words at the same time they became European Union candidate countries.

Since 1997, the IRG has produced best practices guidelines, which are not obligatory, but which are rather a means of enabling the harmonised implementation of regulation across Europe. It was in July 2002 that the common work performed by the NRAs was formalised by the European Regulators Group (ERG), created by the Commission to provide a forum for discussing the concrete application of the new regulatory framework. The ERG was born of the IRG and, as a result, their functions overlap to a degree. The ERG is composed of the NRAs of European Union Member States while the NRAs of countries which are not official EU Member States but IRG members are admitted as observers.

The ERG advises the Commission, providing it with the experience and expertise of the member NRAs. It expresses common NRA positions which, in many cases, are formulated by the joint ERG-IRG working groups. But it is the ERG which acts as the NRAs' official voice before the European Commission. To give an example: the ERG submitted to the Commission its opinion on the preparation of the secondary texts contained in the regulatory package, including the recommendation on accounting separation (on which work began in 2003 and was completed in 2005). More recently, the ERG issued an opinion on the Commission's proposals for the review of the regulatory framework, and has published common positions on the symmetry of fixed and mobile call termination tariffs, and on VoIP.

1.1 IRG/ERG publications in 2007

44 - The documents published by the ERG are available online at: www.erg.eu.int/documents/docs/index_en.htm.

The work performed by the ERG in 2007 resulted in the publication of several documents⁴⁴.

1.1.1 Common positions

The ERG thus published three common positions, following public consultation, concerning:

- ◆ the symmetry of fixed and mobile call termination (CT) tariffs, the goal being to achieve cost-oriented pricing as a remedy for mobile call termination and the convergence of fixed/mobile call termination. This document will serve as the touchstone for the two ERG groups⁴⁵ that drafted it when they issue their opinion on the Commission's draft recommendation, which covers the issue of the symmetry/asymmetry of fixed CT and mobile CT, costs and the network elements to be taken into account when calculating fixed and mobile CT costs (convergence);
- ◆ Voice over IP, an issue which arose following a report⁴⁶ published in 2006 which revealed the lack of harmonisation in the rules pertaining to VoIP. The recommendations contained in this common position concern primarily numbering and obligations with respect to number portability, the obligation to route emergency calls and consumer information;
- ◆ wholesale leased line markets. It proposes best practices for the remedies imposed on leased line wholesale markets.

45 - The "Fixed market" and "Mobile market" groups (the latter is chaired by ARCEP).

46 - ERG report on "VoIP consumer aspects" (ERG(06)39), published in 2006.

In addition to common positions on bitstream and unbundling adopted in 2006, the ERG published a more detailed report in April 2008 on best practices to be applied to unbundling and bitstream, along with the results of the public consultations. The team responsible for this project is headed by ARCEP. The report analyses the different regulatory models that exist, in terms of quality of service, migration, reference and tariff offers and, from there, establishes the best practices for ERG members.

1.1.2 Reports

The ERG publishes reports on specific issues a regular basis, such as the report on accounting (*Regulatory accounting in practice*) which outlines the different approaches regulators take to accounting, based on an array of data such as the accounting system, the method used for supervising prices and audit procedures.

The ERG also publishes reports on the results of public consultations conducted on planned common positions. The issues addressed in 2007 were fixed and mobile call termination and the wholesale leased line market.

1.1.3 Guidelines

ERG guidelines are of equal import in terms of harmonising regulatory practices. The international roaming guidelines, published in January 2008, provide an additional point of reference for NRAs' intervention in this market.

1.1.4 Opinions

The ERG is regularly called upon by the Commission to provide its expertise when drafting Community texts pertaining to telecommunications. The ERG has thus published opinions on the regulatory principles of accessing new generation networks and on functional separation. It should be pointed out that the ERG drafted an opinion on functional separation on its own initiative, and not at the Commission's request, the goal being to make public NRAs' understanding of the notion and application of functional separation. The ERG supports the existence of this new obligation as one of the remedies available to NRAs, but believes it should only be employed as a last recourse.

The ERG has also published an opinion on the relevant market recommendations.

1.2 Work programme for 2008

The work programme in 2008 will follow through on the work performed in 2007⁴⁷. It concerns the review of the regulatory framework, harmonisation of NRAs' regulatory practices and innovation.

1.2.1 Review of the regulatory framework

The ERG plans to share its expertise, as needed, with the European Parliament and Council throughout the joint decision-making process for the directives currently being reviewed. The revised market analysis process, the introduction of functional separation and the Commission power of veto on remedies are all topics on which the ERG will voice its opinion. The ERG will also take an interest in the Commission's views on universal service, if the timetable for its publication in the second half of 2008 is met.

And, finally, the recommendation on relevant markets came into effect in late 2007 (soft legislation). With this in mind, the ERG plans on implementing harmonisation

⁴⁷ - The ERG work programme is available online at: http://www.erg.eu.int/work-prog/index_en.htm.

of the recommendation, which involves the application of the “three criteria test”, a joint position on new SMP (significant market power) guidelines, and any other issue that may arise as a result.

1.2.2 Harmonisation and the single market

Following through on the work performed in 2007, the ERG will continue to develop common positions on the remedies to market competition problems. It is also expected to strengthen its monitoring of regulatory authorities' compliance with common positions. The goals for 2008 include the implementation of monitoring of common positions on WLA/WBA (wholesale unbundling market and wholesale bitstream market), which were published in 2007, and to develop common positions on relevant regulation models. The common position on relevant costs for mobile call termination will come to complete the position on the symmetry/asymmetry of fixed and mobile call termination tariffs (adopted by the ERG in early 2008), to contribute to the Commission's draft recommendation on the subject. Lastly, discussions will also get underway in 2008 on improving the convergence of wholesale fixed and mobile call termination tariffs.

The ERG will continue to establish benchmarks based on quantitative data pertaining to existing mobile CT, SMS CT and broadband markets.

Finally, since the European Commission's adoption of the roaming regulation⁴⁸, the ERG has been coordinating the regular collection of data and monitoring of NRA practices, to be forwarded to the Commission for use in the production of its biannual reports.

1.2.3 Regulatory challenges created by innovation

The ERG will also be continuing work performed in 2007 on the topic of convergence (headed by Spanish regulator, CMT). Similarly, concrete expression will be given in early 2008 to the work begun in 2007 on Voice over IP. The ERG also published an opinion on the principles of access to new generation networks (NGN) in October 2007. More in-depth examination devoted to NGN network cores and IP interconnection will be performed in 2008.

The ERG work programme is also focused on developing communication channels with other regulatory institutions, in the same spirit as the ERG-MEDA regulators meeting in October 2007 and the ERG-RSPG meeting in February 2008.

In 2008, ARCEP will chair the groups devoted to mobile call termination and to SMP operators.

2. Work performed by other European bodies

2.1 COCOM

The purpose of the Communications Committee (COCOM)⁴⁹ is to assist the European Commission, particularly in its role as secondary legislator.

A classic instrument of comitology⁵⁰, COCOM enables Member States to give their opinions officially to the European Commission – in areas relating either to COCOM's consultative capacity⁵¹ or to its regulatory capacity⁵² – and to exchange viewpoints on all matters that have been put on the agenda.

48 - EC Regulation
No. 717/2007 concerning
roaming on public mobile
telephone networks inside
the Community,
ECJ of 29 June 2007.

49 - According to the
provisions of Article 22 of the
Framework Directive.

50 - The European
Parliament defines
“comitology” as the process
by which the Commission,
assisted by a committee of
experts drawn from the
Member States, adopts the
measures necessary for
the implementation
of legislative acts.

51 - Cf. Article 3 of the
Council's Decision
No. 1999/468/EC of 28
June 1999
(“Comitology” Decision).

52 - Cf. Article 5 of the
Council's Decision No.
1999/468/EC
of 28 June 1999.

The instances in which COCOM intervenes in a consultative or regulatory capacity are determined by the Electronic Communications Directives. COCOM is also where the European Commission presents its intention to veto⁵³ draft national market analysis measures and where national regulatory authorities (NRAs) have the opportunity to respond.

53 - Cf. Article 7 of the Framework Directive.

ARCEP ensures that the French authorities are represented at COCOM alongside the Ministry of Industry Directorate General for Enterprise.

A great deal of COCOM's efforts in 2007 were devoted to spectrum and numbering issues.

On the issue of spectrum, COCOM issued a favourable opinion following its examination of the draft recommendation on mobile services onboard aircraft. The goal of this recommendation is to coordinate national licensing terms and procedures for the use of radio spectrum for mobile communication services onboard aircraft (referred to as MCA services) to enable their introduction within the EU, and to prevent the harmful interference created by MCA services on transnational flights.

Also under discussion at COCOM, particularly within the "Authorisations" sub-group, was the selection and licensing procedure used for mobile satellite services (MSS). Ongoing debates in the European Parliament and Council are expected to result in an agreement after the first reading, some time in the second half of 2008.

The Committee has also adopted the draft recommendation on WAPECS⁵⁴. This recommendation marks a step towards more flexible use of the radio spectrum: it identifies the frequency bands in which Member States can encourage licence-exempt spectrum usage.

54 - Wireless access policy for electronic communications.

On the issue of numbering, COCOM contributed to monitoring the application of a decision dated February 2007 aimed at harmonising the use of 116 numbers (for value-added services of social value). Here, it issued a questionnaire to the Member States to obtain information on the implementation of 116 numbers.

As concerns larger issues, COCOM issued a favourable opinion on the DVB-H standard in the list of standards included in Article 17 of the Framework Directive. This list contains a series of standards whose goal is to encourage the harmonised provision of electronic communication networks and services.

COCOM also monitors changes in the wholesale price of international roaming, following the application of the Commission regulation on the matter⁵⁵.

55 - Cf. Part 4, Chapter 5, D.

2.2 RSCOM

The Radiospectrum Committee (RSCOM) was created in March 2002. Its role is to assist the Commission in achieving the objectives set out in Article 1 of the Decision (see above). The Commission thus submits appropriate technical measures of application to RSCOM in view of harmonising spectrum management and ensuring spectrum availability. RSCOM is also consulted on the definition, draft and application of Community radio spectrum policies.

Each Member State is represented at RSCOM by a delegation composed at their discretion. The chairman of RSCOM is a Commission representative.

56 - Council Decision
1999/468/EC on the rules
of comitology.

The RSCOM rules of operation are set by Commission decision⁵⁶. The Committee advises the Commission and provides assistance with consultative and regulatory procedures.

Work performed in 2007 focused primarily on:

- ◆ mobile communications onboard aircraft (European draft decision);
- ◆ short-range devices (required update of Decision 2006/771/EC);
- ◆ wireless broadband access in the 3400 – 3800 MHz frequency band (European draft decision);
- ◆ intelligent transport systems (European draft decision);
- ◆ the European recommendation on flexible spectrum use (WAPECS) and the verification of candidate frequencies to be used to implement this concept.

2.3 RSPG

The Radio Spectrum Policy Group, or RSPG, was formed by a Commission Decision dated 26 July 2002. The Group assists and advises the Commission on spectrum policy, policy coordination and “on harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market”.

It is composed of high-level experts from Member States and from the Commission, with representatives of the European Conference of Postal and Telecommunications Administrations (CEPT), the European Telecommunications Standards Institute (ETSI), European Economic Area (EEA) Member States, candidate countries and members of the European Parliament admitted as observers. The RSPG can be seen as the equivalent of the ERG in the area of spectrum.

RSPG adopts consensual opinions at the request of the Commission or on its own initiative (advisory opinion). If consensus cannot be reached, the decision is submitted to a majority vote, with each member having one vote. It should be mentioned that neither the Commission nor the observers have a voice. The Commission is not obliged to adopt RSPG decisions.

The work performed by the RSPG in 2007 was focused on:

- ◆ the digital dividend;
- ◆ the World Radiocommunications Conference 2007 (WRC 2007)⁵⁷;
- ◆ licence-exempt spectrum;
- ◆ spectrum regulation;
- ◆ spectrum for government use;
- ◆ the review of the regulatory framework.

57 - Cf. Part 4,
Chapter 4, A.

The digital dividend and the WRC'07 in particular were the subject of a formal RSPG opinion.

3. European Conference of Postal and Telecommunications Administrations (CEPT)

The European Conference of Postal and Telecommunications Administrations (CEPT) has 48 member countries, of which 27 are from the European Union. The role of the CEPT is to strengthen relations between Member States and to stimulate the momentum of Europe's postal and telecommunications markets. It is made up of two committees: the ECC (European Communications Committee) and CERP (European Committee for Postal Regulation). Its decisions do not constitute regulation.

The ECC is assisted by the ERO (European Radiocommunications Office) which organises and coordinates the work performed by the ECC. Experts from Member States meet within working groups or project teams.

The European Commission advises CEPT but has no voting rights. The relationship between the two bodies is defined by the Memorandum of Understanding signed in January 2004. In accordance with this MoU, the Commission mandates CEPT to perform work aimed at harmonising use of the radio spectrum in Europe.

Based on the work performed by CEPT, the Commission can adopt a regulation that will apply to the entire European Community, provided RSCOM issues a favourable opinion.

On the issue of telecommunications, and of spectrum in particular, the ECC has focused much of its efforts on the WAPECS wireless access policy. As mandated by the European Commission, it has published a report on the frequency bands to be identified, and which the Commission took into account in its recommendations on WAPECS.

As concerns numbering, CEPT essentially addressed the issue of "116" numbers and worked to maintain the European Telephony Numbering Space (ETNS) using the "3883" code.

In 2007, the ECC adopted a text that reiterates the February 2007 Commission decision on the matter. The ECC decision was adopted with the annex as it appeared in the Commission decision, in other words with the "116 000" number included. This annex will be updated on a regular basis to take account of the new 116 numbers that have been identified.

4. Principal decisions made by national regulatory authorities in the European Union

Notification procedure

Article 7-3 of the Framework Directive stipulates that the measures taken by NRAs as part of their market analyses must be notified to the European Commission and to the other national regulatory authorities. At the start of February 2008, more than 750 notifications had been transmitted to the Commission.

Once an NRA has formally notified its decision, the other national regulators and the Commission have one month to submit their remarks (unless the national public consultation conducted by the notifying NRA lasts longer). This one-

month period can be extended by an additional two months if a phase II procedure is launched (prior to a veto).

Pursuant to Article 7-4 of the Framework Directive, the Commission can veto an NRA's identification of relevant markets or its designation of SMP operators. When a notification gives rise to doubts, the Commission will launch a phase II procedure lasting two months, by issuing a "serious doubts" letter. This period allows the affected NRA to provide additional details on its decision, and for the other NRAs to submit their remarks on the Commission's doubts. Once this phase is complete, the Commission can request that the NRA withdraw its draft measures if it deems its explanations insufficient, or will withdraw its "serious doubts" if the NRA has justified its position or amended its draft measures.

4.1 Commission report on market analyses

On 12 July 2007, the European Commission published a report on market analyses. This is the second such report.

The fact that the first cycle of market analyses is virtually complete makes it possible to gain a certain perspective on the analyses, and to draw useful conclusions on the analysed markets.

4.1.1 The need for a more harmonised regulatory environment

The markets in many European Member States are now served by several operators. According to the Commission, having a similar service offering across Europe requires relatively similar wholesale services to be on offer. It nevertheless states that not only are the remedies imposed by certain NRAs ineffectual but inconsistent as well, even in markets where conditions are similar.

As a result, the Commission suggests guaranteeing efficient regulation and consistent regulation across Member States through the application of additional measures. This rather ambiguous statement appears to be aimed at justifying a Commission veto on remedies. Through its proposed measures, the Commission is hoping to do away with the lack of harmonisation between the 27 Member States, even though ERG efforts in this direction have made real strides.

4.1.2 Definition of markets and of significant market power

The Commission applauds the consistency across Europe in the definition and analysis of significant market power (SMP), the only elements over which it has veto power.

On the issue of market definition, the veto⁵⁸ procedure has made it possible to guarantee consistent market definitions, even in markets that have integrated new technologies (VDSL⁵⁹). The Commission has reiterated the position expressed concerning the German case (regarding VDSL) by stating that simply upgrading an existing service with a new technical process does not in itself constitute a new market.

To determine whether there are SMP operators in this market, the Commission states that, except under extraordinary circumstances, very high market share (of over 50%) constitutes proof of the existence of a dominant position, which is central to determining whether an operator enjoys significant market power.

58 - Cf. Article 7 of the Framework Directive.

59 - The Commission launched a phase II investigation which required BnetzA to amend its draft measure that sought to exclude DT's VDSL services from Market 12. This issue has not yet been resolved as the German government voted in a law that allows this exclusion, as a result of which the Commission has launched proceedings for failure to meet an obligation.

4.1.3 Remedies

The Commission is far more critical of remedies. It states that there is “less consistency across the EU with regard to remedies than has been achieved in market definition and SMP analysis”. More specifically, the Commission regrets the differences in remedies which cannot be explained by different market conditions, in addition to which the choice of remedies is not always the most effective.

In fixed retail markets

According to the Commission, in retail access markets, some NRAs (Germany, Czech Republic) have not imposed cost accounting or accounting separation obligations (or have not set the details).

The lack of such remedies prevents effective tariff regulation for the associated wholesale market products, such as subscription resale and unbundling, and thus makes it difficult to ensure that non-discrimination obligations are being satisfied. The Commission also states that differences in the application of subscription resale between Member States cannot be justified by different market conditions.

And, finally, it notes that, to remedy a lack of effective competition in retail markets, it is preferable to work on achieving effective regulation of wholesale markets (subscription resale, unbundling).

In fixed and mobile call termination markets

The Commission has concluded that problems continue to exist in call termination (CT) markets, despite the price decreases that resulted from measures taken by NRAs.

It notes sizeable disparities between Member States in the average price of mobile CT. These disparities can be explained by differences in cost, but also by differences in the methods used to set prices. The Commission also points to disparities in the timetable set for convergence with the cost levels for an efficient operator.

As to asymmetries in the regulation of mobile CT, it is the Commission's view that it could prevent smaller operators that benefit from it from increasing their market share. It thus recommends that all asymmetries in CT tariffs, which are not based on objective cost differences, be eliminated within a reasonable timeframe.

To reduce CT costs, the Commission invites Member States to work within the ERG on defining a cost calculation method and on improving symmetry.

In broadband wholesale markets (bitstream and unbundling)

The wholesale offers in these two markets allow new entrants to provide increasingly innovative services as they move up the ladder of investment (triple play bundles), as a result of which some operators have managed to deploy their own infrastructure (generally in densely-populated zones).

Given the importance of these markets, the Commission regrets the tardy implementation of remedies in certain cases. One example comes from Germany which notified remedies concerning bitstream a year after notifying its definition of the market and of SMP. In the same vein, the Commission regrets that, in several instances, regulators did not specify, or were not specific enough concerning the network level at which bitstream access must be offered.

Lastly, the Commission has underscored the importance of access networks in cases where the local loop has been upgraded: alternative operators need to be able to

access SMP operators' networks at a level that allows them to stay competitive. It also suggests performing joint analysis of unbundling and bitstream markets in future, to ensure a consistent approach.

4.1.4 State of competition in analysed markets

In its report, the Commission has taken account of changes in the state of competition to review the Relevant Market Recommendation⁶⁰.

60 - See above.

In retail markets

According to the Commission, retail calling markets are tending to become increasingly competitive. This trend is characterised by decreasing prices and an increase in new entrants' market share. The trend is expected to be confirmed in the coming years thanks, in particular, to the increased ubiquity of broadband and voice over broadband.

The report stresses the idea that effective regulation of wholesale markets is enough to guarantee effective competition in retail markets.

In wholesale markets

The situation in wholesale markets varies to some degree. Most of them have been declared uncompetitive, with the few exceptions including:

- ◆ Market 15 (mobile call origination) which was declared competitive in most Member States during the first cycle of analysis. This could change during the second round of analysis if the state of competition in this market has deteriorated since the first analysis was performed;
- ◆ the transit services and wholesale trunk segments of leased lines markets have been declared competitive in some Member States where alternative operators have managed to roll out a network that allows them to market a rival offer to the one supplied by the incumbent carrier.

The broadcasting transmission services market is a rather special case. It is regulated by all Member States except Cyprus, but the majority of NRAs have imposed only partial regulation on it. Given the technical developments that have taken place in this market, the Commission does seem to be anticipating that the digital switchover will spur a trend of increased competition.

4.2 Summary of the main market analyses in the European Union

The code that governs postal and electronic communications markets in France, CPCE⁶¹, stipulates that:

Every year, before 30 June, the regulatory authority responsible for electronic communications and postal affairs must draft a report that gives an account of its work and the application of the legislative and regulatory provisions concerning electronic communications and postal activities. This report will contain an analysis of the principal decisions made by regulatory authorities responsible for electronic communications and postal affairs in European Union Member States during the year gone by, in order to allow a comparison of the different forms of control being exercised and their effect on the markets.

61 - Cf. CPCE Article L.135, amended by Law No. 2005-516 of 20 May 2005 concerning the regulation of postal activities.

The complete list of NRA notifications made as part of their market analyses can be found in the annex of this report.

4.2.1 The mobile call termination market in Belgium (Market 16)

In July 2007, the Belgian regulator, IBPT, notified the Commission on draft measures concerning Market 16, i.e. mobile call termination. These draft measures are aimed at lessening asymmetries in the call termination tariffs charged by the country's two largest mobile operators (Belgacom and Mobistar) while maintaining those found in the tariffs charged by the number three operator, Base. IBPT justified its decision by citing a difference in costs that was due to the configuration of the Base network (which uses the 1800 MHz frequency band).

The Commission referred to this case when calling on NRAs to work together within the ERG to develop a common European approach to reducing disparities in mobile call termination tariffs in the different Member States.

Upon completion of its work, the ERG published a common position on the symmetry of mobile call termination tariffs⁶².

62 - See above.

4.2.2 The broadband access market in Malta (Market 12)

Upon completion of its analysis of the broadband access market, the Maltese regulator MCA notified the European Commission of draft measures that sought to include cable in the relevant market and to designate the country's two operators as having joint SMP. The Commission expressed "serious doubts" regarding joint SMP by launching a veto procedure, and expressed certain reservations on the inclusion of cable in the market.

MCA solicited the ERG Article 7 Expert Group for its opinion on the matter. The group's counter-expertise concluded that MCA had not proven joint SMP, albeit recognising the existence of competition issues in the market in question.

In light of the Commission plans to veto, and the mitigated findings of the expert group, MCA decided to withdraw its analysis.

4.2.3 Market for mobile call origination to non-geographic numbers in Italy (Market 15)

In early 2007, the Italian regulator, AGCOM, notified Market 15 bis, i.e. mobile call origination to non-geographic numbers, for which it identified four operators as enjoying significant market power. The Commission expressed "serious doubts" regarding the market definition and the situation of joint SMP.

The Commission expressed the view that AGCOM had not managed to prove the existence of a specific market for mobile calls to non-geographic numbers, in addition to which it stated that, even if the existence of such a market were proven, there was no proof that the market passed the three criteria test⁶³.

63 - See above.

Having been unable to provide the supporting elements requested by the Commission during the phase II veto procedure, AGCOM withdrew its analysis.

4.2.4 Retail market for fixed access to the PSTN in Poland (Markets 1 and 2)

This is the second notification of these markets issued by Polish regulator UKE in less than a year – the previous one having been withdrawn in early January 2007 following the Commission's veto ruling. This second notification was also subject to a veto procedure, as UKE had included broadband-related services in this market (network maintenance services).

In light of the “serious doubts” expressed by the Commission, the UKE withdrew a portion of its notification – excluding the broadband-related elements from the market.

4.2.5 Geographic markets

64 - Case UK/2007/0733
notified on
15 November 2007.

In November 2007, British regulator Ofcom notified its analysis of the wholesale broadband access market⁶⁴. In it, Ofcom identifies four sub-markets. With this new definition of the market, Ofcom had sought to take account of changes in the state of competition in the wholesale market for broadband access in the UK. The Commission took advantage of the unprecedented nature of this notification to issue its view of geographic markets, indicating that the number of operators in a given zone was not a significant enough factor to warrant identification of a geographic market. These remarks are all the more pertinent in view of the fact this type of notification is becoming increasingly common.

Notification by the Austrian regulator, RTR, of the wholesale market for broadband access further confirms this. Unlike Ofcom, however, RTR identified a national market while making geographical distinctions in its remedies. The Austrian regulator had lifted certain remedies imposed as a result of the first cycle of market analysis in those zones where competitive pressure was deemed more intense. While accepting the RTR analysis, the Commission nevertheless underscored the importance of monitoring changes in the state of competition at the national scale.