

Part 1

Highlights of 2008

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CHAPTER 1

Main areas of focus in 2008

Part 1

A. The digital dividend

Real progress was made on this issue, which has been a major area of focus for the electronic communications sector, on 22 December 2008 with the Prime Minister's order assigning the 790-862 MHz sub-band to ultra high-speed mobile services¹. This decision is the culmination of work begun back in 2007 in which ARCEP had been heavily involved, with contributions such as the report on assessing the value of the digital dividend, produced by the firms Analysys and Hogan & Hartson in May 2008².

1. Decisive matter for electronic communications

Mobile communication services are poised to follow the same path as fixed services, in other words a stepped-up transition to high-speed and ultra high-speed solutions. Mobile access is expected to become a natural extension of fixed Internet offers, providing consumers, and especially business users, with continuous and ubiquitous personal access to Internet services over a wide array of devices, when away from home or work – offering the same ease of use and the same vast selection of applications as a high-performance wireline connection. This trend can already be observed in the marketplace, through the rise in the bitrates and traffic on UMTS and subsequent networks, and through the introduction of handsets tailored to mobile Internet usage.

The way is already being paved for the systems that will replace UMTS (3G) standard solutions at the start of the next decade – and for LTE³ (4G) systems in particular. The harmonised assignment of the 2.6 GHz high frequency band for this purpose is already underway in Europe. For ultra high-speed networks to be deployed nationwide, new low frequencies need to be assigned as well, in other words frequencies below 1 GHz for which the physical radio propagation properties

¹ - Order of 22 December 2008 approving the national scheme for switching off analogue broadcasting and making the transition to digital, JO of 23 December 2008.

² - Available in the Appendix and on the ARCEP website: www.arcep.fr

³ - LTE stands for Long-Term Evolution (see Glossary).

are suited to achieving broad coverage. The 900 MHz band, used for GSM coverage and which will allow expanded UMTS coverage, cannot meet this requirement as it is much too narrow for ultra high-speed technologies.

Without additional low frequencies, mobile services could have found themselves faced with a severe lack of spectrum, and a new digital divide could have formed between densely populated areas, where ultra high-speed mobile will be available thanks to the 2.6 GHz high frequency band, and the rest of the country.

The Law stipulates that the analogue broadcasting signal will be switched off by 30 November 2011 at the latest, to be replaced by a digital signal which consumes six times less spectrum. This switch-off will therefore free up a substantial quantity of frequencies below 1 GHz. The Law also stipulates that the majority of this newly available spectrum will be assigned to audiovisual services, to enable the deployment of new solutions such as high definition (HDTV) and personal mobile TV. It does, however, also provide for the possibility of assigning a portion of these frequencies to electronic communications.

This opportunity, to be correlated with the need for low frequencies to deliver ultra high-speed mobile services in the next decade, is an economic and societal issue that will shape the market in the coming years.

2. Harmonisation of the 790-862 MHz sub-band for mobile services

2.1 At the global level

At the global level, the International Telecommunication Union's (ITU) World Radiocommunication Conference in 2007 (WRC-07) in Geneva identified the 790-862 MHz sub-band for ultra high-speed mobile services.

This sub-band is relatively narrow compared to those identified for other regions of the world (America, Asia) and compared to the needs that had been expressed – notably in France through the public consultation held by ARCEP (estimated requirement for a sub-band with a width of 100 to 150 MHz).

2.2 At the European level

At the European level, the Radio Spectrum Committee, or RSCoM (a committee composed of European Commission and Member State representatives responsible for making founding, Community-level decisions concerning spectrum) mandated the European Conference of Postal and Telecommunications Administrations, CEPT, to perform technical harmonisation studies with a view to assigning this sub-band to ultra high-speed mobile. The first stage of this work was completed in early 2008, with the publication of three reports that underscored the possibility of having ultra high-speed mobile and broadcasting cohabitate in adjacent bands. The second stage, which is currently underway, is focused on establishing a more precise description of the configuration of the sub-band for ultra high-speed mobile and ancillary applications, such as wireless microphones, that could also benefit from access to these frequencies. This stage will be completed by mid-2009.

2.3 At the national level

The decision to assign the 790-862 MHz sub-band to ultra high-speed mobile was announced by the government on 20 October 2008 when unveiling the “*France numérique 2012*” (Digital France 2012) plan. This was followed soon thereafter by an updated national frequency allocation table: ARCEP becomes the sole entity responsible for allocating the sub-band as of 1 December 2011, and the assignment of the 790-830 MHz and 830-862 MHz segments to broadcasting and the Ministry of Defence, respectively, will end on that date. Moreover, French broadcasting authority, CSA, is requested not to use this spectrum in the sub-band when planning for digital TV after the analogue switch-off. Exceptions to this last point, which could prove necessary for coordinating spectrum use with neighbouring countries, will only be allowed by the government on a temporary basis.

3. Allocation of digital dividend spectrum as a complement to 2.6 GHz frequencies is a major area of focus for 2009

On 12 January 2009, the Prime Minister announced that the procedure for allocating the 790-862 MHz and 2500-2690 MHz (referred to as the 2.6 GHz band) frequency bands would begin before the end of the year, to enable the development of ultra high-speed mobile services. With this in mind, and in accordance with a request from the Prime Minister, ARCEP launched a public consultation on this subject on 5 March 2009.

B. 3G spectrum allocation procedure

1. Background

France differs from most other countries in that a quarter of the 2.1 GHz-band spectrum, which is available for deploying third generation (3G) mobile networks and reserved for a new entrant up to now, has never been allocated.

Three calls for candidates for the award of 3G (UMTS standard) licences have been issued since 2000:

- ◆ the first on 18 August 2000 for the award of four licences: Orange and SFR submitted an application, and both were awarded a 3G licence;
- ◆ after the government revised the financial terms for being awarded a 3G licence (applied retroactively to Orange and SFR), a second call for candidates was launched on 29 December 2001 to award the two remaining licences: Bouygues Telecom was the only candidate to respond. It was awarded one licence, which means that the fourth licence remains available to this day;
- ◆ following the interest expressed by the sector's players during a public consultation launched by ARCEP on 5 October 2006, a third call for submissions was issued on 8 March 2007: the sole applicant (Free Mobile) did not satisfy the selection criteria, and its submission was rejected by the Authority on 9 October 2007. Free Mobile had requested a schedule of staggered payments for the fixed portion of the licensing fee, which runs counter to the law;

4 - <http://www.arcep.fr/fileadmin/reprise/dossiers/umts/modal-orient-umts-900-fev08.pdf>

◆ moreover, on 5 July 2007, ARCEP published guidelines for the reuse of the 900 MHz bands for 3G⁴. These guidelines state that 2G-3G operators that so desire could reuse the 900 MHz frequency band for 3G systems starting in 2008. These guidelines also stipulate that a possible 3G new entrant with a licence to the 2.1 GHz band would have access to a UMTS carrier (5 MHz) in the 900 MHz band.

2. New developments in 2008

The Law of 3 January 2008 on the development of competition for the benefit of consumers (also known as the “Chatel Act”) stipulates that the article concerning the terms governing payment of the 3G licensing fee contained in the Finance Act for 2001, which impose the payment of a fee of €619 million the year the licence is issued, will be abrogated once the amount and terms of payment of the new licensing fee are established by regulation, following a parliamentary debate⁵.

5 - Article 22 of Law no. 2008-3 of 3 January 2008 for the development of competition for the consumers' benefit, JO of 4 January 2008.

On 30 April 2008, the government noted the fruitless nature of the call for submissions in 2007 and, on 19 May 2008, requested that ARCEP launch a public consultation on the allocation of the remaining frequencies in the 2.1 GHz band.

6 - A summary of the consultation, published on 22 September 2008, is available on the ARCEP website: www.arcep.fr

Launched by ARCEP on 13 June 2008⁶, this public consultation received a number of responses, with several respondents expressing an interest in gaining access to the spectrum that was still available. It also proved instructive on the issues at hand and the possible allocation procedures to be used, and notably on the relevance of continuing to set aside spectrum for a potential new entrant⁷.

7 - There has always been at least one licence for a new entrant in the offering since the first call for submissions, which was launched back in 2000, as the initial plan was for a total of four 3G licences to be awarded, even though only three mobile operators had spectrum licences.

Based on these elements, the Authority reported that it could rapidly launch a new call for submissions for licences to the 2.1 GHz band, as soon as the government had established the financial terms and conditions, following a parliamentary debate as provided for by the law.

On 12 January 2009, the Prime Minister indicated that a call for submissions would be based on dividing the remaining spectrum into three blocks of 2 x 5 MHz, one of which would be set aside for a new entrant.

Following the parliamentary debate that took place in the National Assembly on 5 February 2009 and discussions in the Senate on 11 February 2009, the government announced the new financial terms for the 5 MHz duplex set aside for a new entrant: a set fee of €209 million.

Based on these elements, in early March 2009 the Authority proposed to the Minister responsible for electronic communications that a new call for candidates be launched for the allocation of the remaining 2.1 GHz frequencies in Metropolitan France.

3. An allocation procedure in two successive stages

As with previous calls for applicants, the first round sets aside a block of spectrum for a new entrant. This means that only those candidates that do not yet have a licence to the 2.1 GHz band in Metropolitan France can compete for the 5 MHz duplex in that band. The eventual new entrant will be awarded a 20-year licence to this spectrum, in exchange for a set fee of €209 million and a variable annual fee equal to 1% of the revenue generated by the use of these frequencies.

The second phase will involve the allocation of the 2.1 GHz frequencies that are still available once the first phase has been completed. Depending on the results of the first phase (i.e. whether or not the first block of frequencies has been allocated), the second phase could involve the allocation of two or three blocks of spectrum.

The second phase will not begin until the first phase is complete, thus allowing the candidates to know exactly how many blocks are available. This phase will be open to all candidates, regardless of whether or not they already hold a 3G spectrum licence in Metropolitan France.

The selection criteria for the entire procedure are similar to those applied during previous calls for UMTS candidates, with applicants able to go beyond the minimum criteria by making additional commitments, notably with respect to coverage, the coherence and feasibility of the project, their financial capacity, openness to MVNOs, etc. The selection criteria pertaining to candidates' willingness to host MVNOs was stipulated to take account of the work performed by the Authority and the Competition Authority in 2008⁸.

⁸ - See Part 4, Chapter 4, D.3.

C. Fibre rollouts

All of the leading French operators (France Telecom, Free, SFR, Numericable) are deploying ultra fast broadband networks, starting in the most densely populated cities. As of 31 December 2008, more than 3 million households were located in buildings in the vicinity of a fibre installation, and around 20% of them lived in a building equipped with fibre.

This momentum, which is capitalising on the success of broadband, which is itself sustained by unbundling, appears to be unique in Europe at this stage. In most other countries, ultra-fast broadband is being deployed on the initiative of the incumbent carrier or the leading cable company and, in some cases, municipalities.

The economic equation of ultra-fast broadband remains a complicated one, however. Rollout costs are still high outside the most densely populated areas, in particular due to the civil engineering work (which accounts for between 50% and 80% of the costs of a rollout) that needs to be done in the case of reconstruction, and the need to install fibre in buildings and homes.

2008 saw the implementation of a regulatory framework whose goal was to enable as many operators as possible to deploy fibre, first by providing access to civil engineering infrastructure and, second, by sharing the last network drop, notably the portion located on private property.

1. Access to France Telecom civil engineering infrastructure

Having access to existing civil engineering infrastructure alters the economic equation of a rollout considerably. In its market analysis decision for the broadband and ultra-fast broadband markets, issued on 24 July 2008⁹, the Authority therefore implemented regulation for accessing France Telecom ducts, which it inherited from the former public monopoly.

The multilateral efforts begun in autumn 2007 under the aegis of ARCEP allowed alternative operators to test the offer for accessing France Telecom ducts, in order to establish operational processes and engineering rules.

⁹ - ARCEP Decisions no. 08-0835 and no. 08-0836 of 24 July 2008.

The reference offer, which France Telecom published on 15 September 2008, makes it possible to expect that the leading operators will undertake large-scale rollouts. Work is underway to develop the engineering rules and to firm up the economic aspects of the offer.

2. Sharing the last drop of optical fibre networks

Aimed at preventing local monopolies from forming in each building, a system for sharing the last drop of the network involves having the first operator that installs optical fibre in the building provide other operators with access to its installation to allow them to serve the building's residents.

Throughout 2008, the Authority worked on examining the technical and economic issues surrounding infrastructure sharing to be able to establish a framework that would encourage several operators to invest in deploying fibre local loops, and help create a state of lasting competition.

ARCEP launched a public consultation on deploying and sharing the last drop of FTTH networks on 22 May 2008. It addressed the role of the building operator, contractual relations between operators and property co-owners, and the topic of where the shared access point should be located.

10 - Law no. 200-776 of
4 August 2008, JO of
5 August 2008.

The Law on modernising the economy of 4 August 2008¹⁰ instilled a balance between the rights and obligations of operators deploying ultra high-speed networks, and established the principle of network sharing to guarantee the existence of a competitive ultra fast-broadband market without requiring multiple parties to perform installations on the private property. Fibre rollouts were thus facilitated for operators and made mandatory for property developers in new builds. The building operator is single-handedly responsible for deploying fibre in the building, and must comply with an obligation to share its installation, allowing competing operators to provide the building's residents with ultra-fast broadband services under non-discriminatory conditions. The Law entrusts ARCEP with the task of setting the technical and pricing terms of infrastructure sharing.

As to the implementation of these provisions, in the early stages the Authority favoured solutions established by the players themselves, based on recommendations made public in October 2008. It encouraged the signature of sharing agreements that included all operators, so that they might all begin their optical fibre rollouts. The goal was to test the different technical solutions on a large enough scale to be able to draw certain conclusions, albeit without being prejudicial to later developments.

As concerns the location of the shared access point, the Authority noted at the time that local circumstances have a considerable effect on the economics of optical fibre network deployments, and could lead to disparate regulation in different parts of the country. On the whole, however, because installing fibre inside buildings constitutes a major cost item, it would not be economically reasonable, and even impossible in practice given the scarcity of solutions for bringing cable into buildings, to have as many installations as there are operators. The Authority stated that having the shared access point at the entrance to the

building would thus not be viable, except in the special case of large buildings in very densely populated areas. In all other cases, the location of the shared access point will depend on the population density and the type of housing.

In the absence of an overall agreement that includes all of the operators, the Secretary of State in charge of the development of the digital economy brought together the main operators involved in optical fibre rollouts in France (France Telecom, SFR, Free, Numericable, and two PSD operators, Sequalum and Axione) to form a steering committee whose first meeting was held on 16 December 2008. The operators made three commitments at this meeting:

- ◆ *“First, to take part in one or both of the trials [i.e. single fibre and/or multi-fibre].*
- ◆ *Second, to sit on the steering committee, convened on this day and whose technical supervision will be entrusted to ARCEP, which will assess and standardise the technical terms by 31 March 2009. The first meeting of the technical committee will be on 18 December.*
- ◆ *Third, in the case where one of these models is eventually selected, this will not affect rollouts performed to date using a different model.”*

Following this meeting, operators performed a series of trials and assessments, under the aegis of ARCEP. A briefing on this work was held on 7 April 2009.

3. Local authority involvement

Because the economic equation of fibre rollouts is such a difficult one, local authorities will have a role to play in helping achieve nationwide coverage and a state of healthy competition. The experience they have gained in enabling broadband rollouts offers proof that their involvement has a significant impact on the availability of competitive and innovative services in the regions, provided their efforts create incentives for private investment.

In May 2008, the Authority published guidelines on local authority involvement in ultra-fast broadband rollouts¹¹. The document lists the various paths of intervention open to local authorities: as the managers of public property, by providing access to civil engineering infrastructure and by deploying a public-initiative network.

From a more general perspective, local authorities can also stimulate the introduction of faster services on fixed and mobile networks in their region, for instance by extending the regional deployment of optical fibre collection networks which has been taking place over the past four years.

¹¹ - Guidelines on FTTH ultra-fast broadband rollouts (“Points de repères sur le déploiement du très haut débit”), available on the ARCEP website: www.arcep.fr.

D. Mobile call termination

1. Background

Any operator marketing a telephone service must allow its customers to reach any mobile number in France. To do so, operators must purchase a “call termination” service from each mobile operator under conditions which, in the

absence of regulation, are decided unilaterally by the operator providing the service. Mobile voice call termination thus constitutes a structural bottleneck.

The resulting market power that this gives to operators led the Authority – as part of its second round of analysis of relevant mobile call termination markets for 2008 to 2010 – to impose on all three French mobile operators a system of supervision of the wholesale tariffs they could charge for these call termination services during those three years.

This system is implemented in two different ways:

- ◆ for the three mobile operators in Metropolitan France (Orange France, SFR and Bouygues Telecom) and the two main mobile operators in overseas markets (SRR and Orange Caraïbe), the obligation to charge cost-oriented prices for their call termination service, combined with accounting obligations;
- ◆ all the other operators affected by this analysis are obligated to charge non-excessive prices.

- 12 - ARCEP Decision** no. 07-0810 of 4 October 2007. As a result, in its Decision of 4 October 2007¹² ARCEP set the ceiling tariffs for mobile voice call termination for the three mobile operators in Metropolitan France, for the period running from 1 January 2008 to 30 June 2009. In the same vein, in a Decision dated 16 October 2007¹³, it set the ceiling tariffs that apply to the two main mobile operators in overseas markets (SRR and Orange Caraïbe) and established guidelines for what constitutes non-excessive prices for the other operators, for the period running from 1 January 2008 to 31 December 2009. What remained, then, was to define the tariff framework applicable to French mobile operators up to the end of the market analysis cycle, i.e. 31 December 2010.
- 13 - ARCEP Decision** no. 07-0811 of 16 October 2007.

The Authority had wanted to divide the cycle into two periods to allow for progress made in achieving harmonised principles governing call termination at the European level. These efforts continued on through 2008 with the adoption of a common position by the European Regulators Group and work by the Commission on a draft recommendation regulating fixed and mobile call termination, which was adopted on 7 May 2009. The Authority thus extended its work on mobile call termination in 2008¹⁴.

- 14 - See Part 4,** Chapter 4, D.

2. Gradual shift to incremental costs

- 15 - ARCEP Decision** no. 08-1176 of 2 December 2008. On 2 December 2008¹⁵, ARCEP set the tariff framework for the three mobile operators in Metropolitan France, for the period running from 1 July 2009 to 31 December 2010.

In accordance with this framework, and in light of the current state of market development – i.e. the maturity of cellular networks, convergence and growing competition with the fixed network, strong development of high-volume offers (flat rates and unlimited offers), marked trend towards distinguishing mobile calling rates based on the destination network (on-net calls that transit over a

single network vs. off-net calls that transit over two distinct networks) – the Authority enacted a shift in cost bases so that the resulting economic signal for the markets was better adapted and more efficient.

In particular, it is the Authority's view that the optimal level for call termination prices in the medium term is one that reflects incremental costs, in other words the additional costs incurred by an operator to terminate off-net calls on its network, compared to a situation where it did not provide this call termination service. As a result, the tariff structure of the offers should better reflect the industry's cost structure in a way that is beneficial to consumers, and which enables the development of fair and healthy competition between mobile operators, and between mobile and fixed operators. This development should stimulate innovation, for instance by encouraging the development of high-volume offers for calls to all networks (and not just on-net calls) and of fixed-mobile convergence solutions – hence lifting restrictions on consumption.

Because of the fundamental influence that voice call termination tariffs have on the sector, and the constraints involved in modifying retail offers, it was decided that a transitional period would be needed to give the market time to adapt. Operators thus expressed the view that too swift a change in wholesale prices could destabilise the market in a counter-productive way, by creating opportunities to circumvent the process, for instance, or by upsetting the balance of certain offers. As a result, ARCEP decided that although incremental costs constitute a suitable method for calculating relevant costs, that cost level should be reached gradually over the course of several years. This transitional period justified allowing Bouygues Telecom to charge different tariffs from the two other operators, due to a combination of an imbalance in off-net traffic between Bouygues Telecom and its competitors and the gap between call termination tariffs and underlying costs.

It was under these circumstances that the Authority pursued its policy of a gradual and pragmatic decrease in mobile call termination prices, by imposing a decrease in tariffs:

- ◆ starting on 1 July 2009, from 6.5 to 4.5 €-cents a minute for Orange France and SFR and from 8.5 to 6 €-cents a minute for Bouygues Telecom;
- ◆ starting on 1 July 2010, the tariff decreases from 4.5 to 3 €-cents a minute for Orange France and SFR and from 6 to 4 €-cents a minute for Bouygues Telecom.

These prices are to be compared with the corresponding cost estimates for an efficient operator which, in 2008, were between 1 and 2 €-cents when using the incremental cost method, and between 2.4 and 2.9 €-cents when using the full cost method that was employed previously.

3. Development of a specific technical-economic model for overseas markets

To increase its knowledge of mobile operators' cost structures in the overseas *départements* (DOM), and especially the specific features of the overseas markets, in 2008 the Authority developed a technical-economic cost model for an efficient

16 - Law No. 2005-516 of 20 May 2005 on regulation of postal activities.

17 - ARCEP Decision No. 06-0576 of 1 June 2006 on the characteristics of the multi-year tariff framework for the universal postal service.

18 - The figure adopted for changes in expenditure is based on two calculations which produce the same result. The first is derived from La Poste's forecasts concerning the universal service scope, the second on an ARCEP simulation of the changes in the public establishment's 2004 expenditure. Both calculations arrived at the same result, pointing to an average annual increase of 1.65% for 2006-2008 (in terms of full costs).

19 - Volume development was based on letter volumes. La Poste expects these volumes to fall 0.65% per year. This traffic trend is explained by the emergence of new, paperless communication methods which have replaced postal items, and by rationalization measures on the part of large mailers. However, at present, there is no way of assessing the scale, or even the direction, of short-term fluctuations with any reasonable degree of accuracy. ARCEP therefore prefers to use a historic approach and has chosen the moving average of developments for 2003-2005, i.e. an assumed average decrease in business volume of 0.35% per year for the three years covered by the multi-year framework.

mobile operator operating in the Reunion-Mayotte zone and for an efficient mobile operator operating in the Antilles-Guyana zone. These two models are based on the model developed in 2007 for Metropolitan France. They will be finalised in early 2009 and will help shed additional light on the cost levels found in the regulatory accounts that the two incumbent carriers in the overseas markets are required to submit. They will also help in estimating the costs of the other mobile operators that do not enjoy the same economies of scale. ARCEP will issue a decision in 2009 setting the tariff framework that will apply to operators in the overseas markets for the period running from 1 January to 31 December 2010.

E. The multi-year tariff framework of the universal postal service

The multi-year tariff framework (or price cap) is a contract between the regulator (ARCEP) and the regulated company (La Poste). It controls tariff changes for all or part of the products in the regulated sector (the postal service), so as to keep the company's profit margins stable through its own productivity efforts over a specific period (three years).

In the case in point, the tariff framework concerns price changes for postal products that come under the universal service.

In France, the law¹⁶ designates La Poste as the universal service provider and assigns regulation of universal postal service tariffs to ARCEP.

1. The 2006 to 2008 price cap

The price cap system is much more appropriate for the way a public enterprise works than "case-by-case" approval of its tariffs. First, it enables La Poste to make budget forecasts based on the room for tariff manoeuvre granted to it, while knowing from the outset the limits that must not be exceeded. Next, it allows La Poste to adopt a tariff strategy: by complying with the margins set by the price cap, the company can alter its tariffs so as to build a coherent structure that sends appropriate economic signals because it reflects costs.

In 2006, ARCEP capped postal tariff increases for the period from 1 January 2006 to 31 December 2008 at 2.1% per year¹⁷ based on the following: Consumer Price Index movement was evaluated at 1.8% per year, La Poste's expenditure at 1.65% per year¹⁸, and the decrease in postal volume at 0.35% per year¹⁹.

Bearing in mind the short-term inflexibility of expenditure, it appeared essential to ensure the volume-related risk is fairly divided between the operator and users. Consequently, an adjustment mechanism provides for relaxation of the price cap should volumes fall further than the trend estimated for a given year, to allow La Poste to adjust its revenue. On the other hand, if the trend observed is more favourable, the price cap has to be tightened to ensure the automatic efficiency gain is passed on to the consumer.

2. The multi-year framework for 2009 to 2011

In 2008, ARCEP and La Poste defined the characteristics of the future tariff framework for the period 2009 to 2011 which retains the principles of the previous system.

It is based on assumed inflation of 2% per year, and an estimated decline in volume of 1.3% per year. The latter point emerged as a key factor in tariff movements, especially in the light of the traffic downturn experienced in other European countries. To this was added an assumed increase in La Poste's expenditure of 0.9% per year, which means that the latter has to keep control of its expenditure.

Adjustment of the tariff ceiling in terms of volume was retained, with the same correcting factor as hitherto; the possibility of correcting sizeable differences between forecast and actual inflation (if the difference is greater than 25%) was introduced.

On this basis, the framework allows an overall average annual increase of 2.3% for products over the period in question.

A "sub-stipulation" citing average annual growth of 2% is applied to single-piece machine-franked items because ARCEP has observed that the successive increases for single-piece products, which are mainly used by SME customers, automatically increased margins on them.

F. Creation of a "consumer" committee

Since its creation, the Authority has held meetings with consumer associations on specific topics, generally tied to a particular current issue. These occasional meetings have revealed the participants' reciprocal interest in discussing subjects related to regulation.

To develop and formalise these meetings, ARCEP proposed the creation of a structure for working on and debating consumer-related issues that fall under the Authority's purview: the Consumer committee.

This committee is made up of representatives of consumer associations and public institutions: the National consumer institute, INC (*Institut national de consommation*), the General directorate for fair trade, consumer affairs and fraud control, DGCCRF (*Direction générale de la concurrence, de la consommation et de la répression des fraudes*) and the Directorate general for competitiveness, industry and services, DGCIS (*Direction générale de la compétitivité, de l'industrie et des services*). Operators may be invited to attend, depending on the topic being discussed.

The Consumer committee aims to improve the flow of information between participants within a permanent structure, to identify problems whose resolution would be simplified by consulting with the parties concerned. It can also allow associations to call on the Authority to explain its decisions and how the markets work. The committee met for the first time on 17 December 2007.

The Consumer committee meets once a year in a plenary session to assess the work performed thus far and to set the directions for the working programme for the coming year. Last year, the plenary session was held on 9 June 2008.

Work is also done by groups and sub-groups that meet on a regular basis throughout the year. Five technical meetings were held in 2008:

- ◆ in February 2008, on the topic of ultra-fast broadband (optical fibre sharing, future legislation);
- ◆ in March 2008, on topics related to the postal sector (quality of service, access to mailboxes in buildings equipped with a Vigik system, sending small items at the letter tariff);
- ◆ in May 2008, on telecommunications related issues such as the quality of access offers and fixed and mobile call termination;
- ◆ in September 2008, on La Poste's general terms of sale and on the universal postal service;
- ◆ in October 2008, on topics concerning optical fibre rollouts (sample agreement for property co-owners) and the quality of access offers.

The committee met on two occasions during the first quarter of 2009:

- ◆ on 25 March 2009, to discuss the issues surrounding fixed and mobile number portability;
- ◆ on 3 April 2009 to discuss postal issues such as sending small items at the letter tariff and La Poste's general terms of sale.

CHAPTER 2

Changes to the European regulatory framework

Part 1

A. The electronic communications sector

2008 and the first half of 2009 were devoted to negotiations over the revised European regulatory framework, a process with which ARCEP was closely involved through the Ministry responsible for electronic communications, particularly during the period when France assumed the presidency of the European Union (July-December 2008). ARCEP was also called upon by Members of the European Parliament and the sector's lobbyists, and contributed to the efforts devoted to reviewing the framework as a member of an ERG working group.

The electronic communications sector is governed by the European directives adopted in 2002. In accordance with the stipulations contained in these directives, the Commission engaged in the process of reviewing the regulatory framework. After broad consultation with the sector players concerned, the Commission published its proposals for new regulatory texts on 13 November 2007, then submitted them to the European Council and Parliament. Adoption of these texts is based on the principle of equality (joint decision-making) between the European Union Council and the European Parliament, such that neither body can adopt legislation without the consent of the other. Moreover, in cases (veto) where the Commission disagrees with the text adopted by the Parliament and proposed by the Council, the Council must vote unanimously on the text for it to be adopted.

1. Commission proposals

The European Commission gathered its official proposals for revisions to the “Telecoms package” into three documents: new regulation creating a European Electronic Communications Market Authority (EECMA) and two proposed directives amending the “Framework”, “Authorisation” and “Access” Directives on the one hand, and the “Universal service and rights of the users of electronic communications networks” and “Personal data and protection of privacy” Directives on the other.

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. 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.

20 - Further details on these proposals can be found in ARCEP's annual report for 2007, in Part 4, Chapter 1, B.2.

The principal changes introduced by the Commission were the following²⁰:

- ◆ the creation of a European Electronic Communications Market Authority, EECMA (which would absorb the ENISA);
- ◆ increased independence for NRAs;
- ◆ expansion of the Commission's power of veto on remedies;
- ◆ increased flexibility in spectrum management, additional harmonisation power for the Commission, involvement of the EECMA;
- ◆ increased consumer protection and information;
- ◆ introduction of functional separation.

The Commission's proposals were not very well received by either the Parliament or the Council, particularly on the matters of institutional balances and the creation of a European agency, and on the matter of spectrum management.

2. European Parliament positions

The vote following the first reading in Parliament on 24 September 2008 therefore led to substantial changes to the Commission's proposal:

- ◆ modification of the European agency plans, notably in terms of governance (management of this entity is left up to the NRAs and no longer to a Board composed of European Commission and Member State representatives), in terms of powers (a certain number of tasks are no longer listed and the merger with the ENISA is quashed) and in terms of size (reduced from 130 to around 30 people);
- ◆ modification of the proposed increased power of veto on remedies: a process of joint regulation between the Commission and the European entity, in which the latter plays a significant role, was proposed;

- ◆ modification of the provisions concerning spectrum neutrality, in order to make them feasible given the physical restrictions tied to the frequencies; preservation of most of the harmonisation measures for spectrum management; encouragement to engage in strategic planning for the spectrum;
- ◆ introduction of new issues associated with new generation access networks (NGA): encouragement to perform analyses of geographical markets, take account of investments for new networks in the form of risk sharing, increased promotion of facilities-based competition and stable regulation over time;
- ◆ inclusion of several content-related issues, for greater transparency in the information provided to consumers, notably traffic management policies and illegal practices with respect to network use.

3. European Council positions

Member States proved even more reluctant than the Parliament to endow the Commission with even greater powers to impose harmonisation, whether in the area of spectrum management or regulatory practices. They also rebuffed any changes to the balance of power between institutions, rejecting even more strongly than the Parliament the proposal of a European agency with full legal status in the Community, to guarantee the European Regulators Group's (ERG) independence from the Commission. They did nevertheless seek to increase cooperation between the ERG and the Commission.

The Council of Ministers of 27 November 2008 obtained a political agreement, formalised in a common position on 16 February 2009, based on the following provisions:

- ◆ as concerns the European entity, the establishment of a two-tier structure: on the one hand, a group of regulators acting in an advisory capacity to European institutions, with a scope of influence that is clearly restricted to directives governing the electronic communications sector. This group is recognised in the directives and is supported, on the other hand, by a small secretariat whose legal status remains to be defined;
- ◆ opposition to the Commission veto on remedies, amended to an opinion (following the opinion of a European body); any departure from this opinion in an NRA's final decision must be justified;
- ◆ on the matter of spectrum: changes to the provisions concerning spectrum neutrality very similar to those proposed by Parliament, but a rejection of most of the spectrum management harmonisation measures; incorporation of a portion of the institutional plans proposed by the Parliament;
- ◆ exceptional and highly controlled use of functional separation (solution similar to the one proposed by Parliament);

- ◆ integration of a portion of the amendments proposed by the Parliament concerning NGA and content, but much more cautious (rejection of proposal on risk sharing in particular).

This political agreement was arrived at with some difficulty, given:

- ◆ the disparate views held by the Member States:
 - with Germany, Spain and the Netherlands voicing particularly strong opposition to any increased power of harmonisation being given to the Commission;
 - the United Kingdom and Sweden regretted the lack of ambition in the spectrum policy;
- ◆ and the power of veto for the European Commission which remained very attached to the main proposals it made in 2007 (single agency, veto, spectrum...).

Despite the Commission veto, the Council managed to reach a consensus, with three Member States having abstained (the UK, Sweden and the Netherlands).

Meanwhile, the ERG examined the proposals and issued two statements: during the plenary sessions in Dublin on 17 October 2008 and in Berlin on 5 March 2009.

4. Second reading

Discussions continued in the “trialogue” between the Parliament, Council and Commission.

The debates consisted chiefly of working to reach consensus among the institutions on the following main issues:

- ◆ greater leeway given to the Commission by the Council in the area of achieving harmonised spectrum use and in regulatory practices (notably remedies);
- ◆ more formal incorporation of the “secretariat” portion of the entity in the Community environment, while maintaining its small size and control by NRAs;
- ◆ achieve the right balance between encouraging investments and consumer protection.

The European Parliament ratified the proposals at the second reading on 7 May 2009.

B. The postal sector

1. The new Postal Directive set 2011 as the date for total market liberalisation

The 2002 Directive provided for total liberalisation of the market from 1 January 2009, subject to confirmation of this date by the European authorities, following a prospective study by the Commission.

In October 2006, the European Commission proposed a new Directive, setting 1 January 2009 as the target date for full market opening. However, this date proved controversial, and the compromise arrived at by the members of the

European Parliament finally postponed the deadline until 1 January 2011, leaving some Member States the option of a further two years' grace. Moreover, from 31 December 2010, Member States that have fully opened their markets may refuse to grant authorisations to operators which still hold a monopoly in their country of origin (temporary reciprocity clause).

This new text also gives Member States the option of implementing offset mechanisms when universal service obligations constitute an unfair burden for the provider. A new Annex deals with the principles for calculating the net cost of the universal service and with offset methods.

2. The new European provisions

2.1 On the universal service

The text is couched in general terms, as were the previous Directives, which left it up to each State to define the specific contours of a minimum range of services comprising postal items, parcels, registered and insured items.

The definition of quality of service standards and post-office accessibility rules also remain a national prerogative, while quality standards for intra-European mail are laid down by the European Commission.

The new Postal Directive leaves it to the discretion of States to spread the obligation over one or several operators, and even to subdivide it by region or service component, and does not expressly exclude any universal service funding mechanism.

2.2 On competition

The option of making the provision of postal services subject to declaration or authorisation systems remains, with the clarification that these systems must not represent an obstacle to market entry. In particular, the Directive prohibits *ex ante* restrictions on the number of service providers.

Like the 2005 French Postal Law, the Directive sets out the principle that a certain number of installations or information held by the universal service provider must be made accessible to its competitors, namely:

- ◆ P.O. boxes in post offices;
- ◆ private letter boxes;
- ◆ item redirection services;
- ◆ the postcode reference system.

On these points, the Directive takes on board the national provisions that already exist in the domestic legislation of several European countries.

2.3 On financing the universal service

Full market liberalisation is based on the findings of a prospective study conducted by the European Commission. This study was based on work by PricewaterhouseCoopers and involved the economist Paul Kleindorfer. It concludes that the basic objective of providing a quality universal service on a long-term basis can be achieved without retaining a reserved area.

The Directive permits the use of external funding resources under certain conditions:

- ◆ if universal service provision represents a net cost for the operator responsible for providing it;
- ◆ if this cost represents an unfair financial burden.

Under these conditions, an offset fund may be set up:

- ◆ based on objective, verifiable principles, particularly as regards the calculation of contributions;
- ◆ under the control of the national authority;
- ◆ taking account of the advantages derived from being the universal service provider.

An appendix details the method for calculating the net cost of universal service obligations which must take account of the right to make a reasonable profit and of measures to encourage economic efficiency.

Part 1

CHAPTER 3

Main economic indicators for the market in 2008

A. Electronic communications markets

Operators' retail market revenue totalled €44.2 billion in 2008.

Mobile telephony

Market development

- | | |
|-----------------------|--|
| ◆ In terms of value | €18.6 billion (+ 5.6%) |
| ◆ In terms of volume | 101.8 billion minutes (+ 2.3%) |
| ◆ Number of customers | 58 million customers (+ 4.8%) |
| ◆ Penetration rate | 91.3 % (compared to 87.6 % at the end of 2007) |

Trends

- | | |
|----------------------------|--------------------------|
| ◆ Average customer invoice | €27.3, excl. VAT (-0.3%) |
|----------------------------|--------------------------|

Internet

Market development

◆ Turnover (broadband and narrowband)	€5.4 billion (+ 16.9%)
◆ Number of customers	18.7 million (+ 8.3%)
of which	
broadband subscriptions	17.7 million (+ 12.3%)
narrowband subscriptions	1 million (-34.3%)

Trends

◆ Number of unbundled lines	6.3 million (+ 20.9%)
of which	
shared access lines	1.4 million (- 13.6%)
fully unbundled lines	4.9 million (+ 36.2%)

Fixed telephony

Market development

◆ In terms of value	€10.6 billion (- 3.7%)
◆ In terms of volume	108.6 billion minutes (+2.4%)

Trends

◆ number of subscriptions	
to a telephone service	40.7 million (+ 2.5%)
of which	
analogue and digital line subscriptions*	26.3 million (- 8.5%)
VoIP subscriptions (over a broadband connection)	14.4 million (+ 31.6%)

* Essentially France Telecom

Source : ARCEP.

B. The correspondence market

Market development

◆ In terms of value	€8.4 billion (+ 1.9%)
◆ In terms of volume	16.2 billion items (- 2.8%)

Exports

◆ In terms of value	€424 million (- 3.2%)
◆ In terms of volume	430 million items (- 9.1%)

Source : ARCEP.