Part 4

Electronic communications

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CHAPTER 1

Legal framework

A. National framework

1. Background

In France, most of the regulatory provisions that govern the telecommunications sector are specified in the French code governing electronic communications and postal markets, 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 and stems from the adoption of three laws:

- the Law of 31 December 2003[1] transposing the "Universal Service" Directive;
- the Law of 21 June 2004[2] concerning confidence in the digital economy which, in particular, authorises local authorities to become telecom operators[3];
- the Law of 9 July 2004[4], 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 2008, two laws which affect electronic communications were adopted:

- Law no. 2008-3 of 3 January 2008 for the development of competition for the benefit of consumers, referred to as the "Chatel Act";
- Law no. 2008-776 of 4 August 2008 on modernising the economy, referred to as "LME".

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.

European directives

- Directive 2002/21/EC of 7 March 2002 concerning a common regulatory framework for electronic communications networks and services, ECOJ 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, ECOJ 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, ECOJ of 24 April 2002 ("Universal Service" Directive);
- Directive 2002/20/EC of 7 March 2002 concerning authorisation of electronic communications networks and services, ECOJ 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, ECOJ 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, ECOJ of 17 September 2002 ("Competition" Directive);

2. Provisions adopted in 2008

2.1 The "Chatel Act"

Adopted on 3 January 2008 and brought into force on 1 June 2008, the "Chatel Act"[5] reinforces the consumer code, with the particular goal of providing a better framework for contractual relations between electronic communications service providers and their customers.

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

The measures contained in the "Chatel Act" are aimed at all fixed, mobile and Internet service providers. They apply to consumers and businesses outside the electronic communications sector (in other words members of the liberal professions or associations whose core business is not electronic communications).

◆ Setting service contract cancellation times and fees

The consumer code now stipulates that execution of the cancellation notice required of a consumer for an electronic communications service cannot exceed 10 days from receipt of the cancellation request, unless the consumer expressly requests otherwise[6]. This new provision brings the timeline associated with all cancellation notices in line with the timeline for number retention, which also carries a 10-day maximum.

6 - Article L. 121-84-2 of the consumer code.

The "Chatel Act" also stipulates that the service provider can only bill the consumer for the actual costs incurred in carrying out the cancellation.

◆ Reinstatement of oversight for minimum contract lengths

If the consumer's contract carries a set minimum duration, their invoices must indicate this and specify the time remaining on the contract or, if applicable, indicate that the contractual period has elapsed[7].

7 - Article L. 121-84-3 of the consumer code.

Moreover, the minimum contract length cannot exceed 24 months[8]. The consumer may also cancel their subscription at the end of the twelfth month in exchange for the payment of an amount equal to less than a quarter of the outstanding balance due on the remaining length of the contract.

8 - *Article L. 121-84-6 of the consumer code.*

◆ **Free waiting time on operator hotlines**

Consumers cannot be billed for the time spent on hold when calling operators' after-sales or technical support services, or any other hotline[9]. No amount can be billed before the consumer has been connected with a member of the hotline staff who will actually handle the consumer's request.

9 - *Article L. 121-84-5 of the consumer code.*

◆ **Oversight of calls to telephone directory services**

The price of calls to telephone directory services are subject to supervision: without affecting the tariff associated with providing directory services, the cost of the call cannot exceed the regular price of a national call[10].

10 - *Article L. 121-84-9 of the consumer code.*

◆ **Return of security deposits and calling credits**

Security deposits and other amounts that consumers paid up front must be returned by the operator within 10 days of the return of the equipment on which the deposit was made, or payment of the final invoice[11].

11 - *Article L. 121-84-1 of the consumer code.*

The "Chatel Act" and the CPCE

The "Chatel Act" has also brought changes to the postal and electronic communications code, CPCE (*Code des postes et des communications électroniques*). A new Article[12] stipulates that the Authority must identify certain numbers in the national numbering plan that can be called for free from all networks[13].

The "Chatel Act" also brings changes to the terms contained in the CPCE[14] for designating the universal service operator(s). These changes allow for the provision of the universal service by one or several operators no longer at the national level but on a sub-national geographical scale. In addition, this new law[15] opens the way for establishing new terms for licensing fees for the 2.1 GHz band, giving the government the ability to set new provisions concerning the amount and terms of this fee, following a parliamentary debate[16].

12 - *Article L. 34-8-2, reiterated in Decision no. 08-0512 of 6 May 2008 amending Decision no. 05-1085 of 15 December 2005 setting the use of the categories of numbers in the national numbering plan.*

13 - *ARCEP Decision no. 08-0512 of 6 May 2008.*

14 - *Articles L. 35-2 and L. 35-3 of the CPCE.*

15 - *Article 22 of Law no. 2008-3 of 3 January 2008.*

16 - *Cf. Part 1, Chapter 1, B.*

2.2 Law on modernising the economy (LME)

2.2.1 Secure legal framework for deploying fibre in buildings

The LME aims to facilitate the process of installing optical fibre in housing units, while maintaining the rights of property owners and fair competition practices[17]. To encourage ultra-fast broadband optical fibre network rollouts in buildings, the new legislative framework is built around four main areas of focus:

◆ instilling an ability to access fibre (amendment of Article 1 of Law no. 66457 of 2 July 1966 concerning the installation of broadcast reception antennae);

17 - *Law no. 2008-776 of 23 July 2008, JO of 5 August 2008.*

- the principle of sharing between the operators of optical fibre networks deployed in buildings (new CPCE Article L. 34-8-3);
- mandatory contractual guidelines governing relations between property owners (or managers) and operators (new CPCE Article L. 33-6);
- pre-equipment of greenfield buildings (amendment of Article L. 111-5-1 of the building and housing code).

The combination of the first measure aimed at facilitating operators' access to buildings, and the principle of network sharing between operators is the key element in this provision.

The right to fibre

It will become mandatory to outfit new buildings with optical fibre, starting in 2010 for buildings with over 25 units, and in 2011 for all others[18]. In existing buildings, installation of optical fibre by operators is facilitated by the fact that, from now on, any proposal from an operator to install fibre in the common areas of a building to connect it to a telecommunications network, must by law be included on the agenda for the next general assembly of the property's owners or management board. The decision to accept the operator's proposal is by a majority vote of the property co-owners present or represented at the meeting[19].

A building owner cannot oppose a resident's right to be connected to an ultra-fast broadband network, unless they have a "*serious and legitimate*" reason. Among the reasons considered serious and legitimate is the fact that the building is already connected to an ultra-fast optical fibre network (in which case the landlord can demand that the connection be installed using the existing installation). Another serious and legitimate reason is the property owner's decision to install fibre himself within six months of receiving the tenant's or occupant's request in good faith.

Including proposals to equip a building with fibre on the agenda of property management board assemblies provides a guarantee that the property owners can control the quality of the requests to perform installations, which are entirely at the operator's expense. An agreement between the property owners (or property management board) and the operator installing the optical fibre sets the terms for the installation, and for the maintenance and replacement of the lines[20]. The work that the Authority performed for over a year in tandem with the players concerned led to the production of a sample agreement.

Obligation to share the last drop of optical fibre networks

To limit the amount of work and the disruptions caused, and to guarantee competition inside buildings, the law stipulates that operators must share the last drop of optical fibre networks. An operator that has already installed fibre in a building must grant requests from competing operators to share its infrastructure. This should result in a swifter and more economical migration to optical fibre, require less work and cause fewer disruptions.

The new CPCE Article L. 34-8-3 requires that any party which has installed or is operating an optical fibre network inside a building must grant all reasonable access requests from other operators. This access must be provided under transparent and non-discriminatory conditions, and enable connection to the network under "reasonable" economic, technical and access conditions. An agreement sets the

18 - *Article L. 111-5-1 of the new building code.*

19 - *Article 24-2 of Law no. 65-557 of 10 July 1965 setting the status of the co-ownership of existing buildings.*

20 - *Conseil d'Etat Decree no. 2009-54 of 15 January 2009 setting the terms of application for CPCE Article L. 33-6 which specifies the contractual clauses, notably monitoring and acceptance of the work performed, the terms for accessing the common areas in the building, management of the installation and the system for delivering information between the operator, the property owner or co-owner management board, and other operators.*

technical and financial terms governing access between the parties concerned. Any refusal to grant access must be substantiated. The Law assigns ARCEP the power to settle any dispute and to stipulate the technical and pricing terms for this access through a decision which is subject to the minister's approval.

2.2.2 Other provisions in the law

In addition to a system that aims to encourage sharing of the last drop of optical fibre networks, the Law on modernising the economy contains several provisions that concern electronic communications.

◆ Changes to ARCEP's responsibilities

Within two years of the adoption of the Law, ARCEP must publish a report on the status of ultra-fast broadband rollouts, which must also contain proposals for encouraging ultra high-speed network rollouts in rural zones[21].

CPCE Article L. 36-11 was amended to allow ARCEP to impose more proportionate penalties in cases where parties licensed to use scarce resources (notably spectrum) fail to meet their coverage obligations (possibility of combining official notice with a system of interim stages granted to the licence-holder for meeting its obligations; partial rescinding of a licence, either in scope or duration; financial penalties that take account of the population or area not covered by the licence-holder)[22].

◆ More power for local authorities

Infrastructure managers and telecom operators must provide local authorities, their economic interest groups and the State with information, free of charge, on the location and deployment status of the infrastructure and networks installed in their region. An implementing decree specifies the methods for enacting this obligation, particularly as concerns regulation governing public safety and national security[23].

Authorities in charge of organising the distribution of water and electricity may install ducts for enabling fibre deployments when doing work for themselves. An agreement will be signed with the competent local authority, in accordance with Article L.1425-1 of the local and regional collectivity code, CGCT (*code général des collectivités territoriales*) in the region in question to avoid any conflict of powers[24].

Further provisions have been added to the system to be used by municipalities and their economic interest groups for implementing the principle of shared use of public civil engineering infrastructure for cable networks, as provided for by the Law of 5 March 2007[25]. The local authorities concerned can organise this system of sharing by issuing a simple decision. Should the cable operator refuse, the local authority has the full power to take control of this infrastructure, in exchange for limited compensation, after having served official notice in accordance with the terms of adversary procedure. ARCEP can be called upon to settle differences concerning the technical and pricing terms for implementing this system of shared use[26].

On 22 December 2008, ARCEP submitted a report to Parliament and the government which contained the initial assessment of local authority involvement, pursuant to Article L.1425-1 of the CGCT[27].

21 - *LME Article 109.*

22 - *LME Article 112.*

23 - *LME Article 109.*

24 - *LME Article 109.*

25 - *Law no. 2007-309 of 5 March 2007 on modernising audiovisual broadcasting and television of the future, JO of 7 March 2007.*

26 - *LME Article 113.*

27 - *Available on the ARCEP website: http://www.arcep.fr/uploads/tx_gspublication/rapport-bilan-rip-221208.pdf.*

◆ Completing mobile coverage

2G operators must publish an annual list of the zones that were covered over the course of the year, and inform ARCEP of their coverage plans for the coming year. In the 12 months following the adoption of the LME, ARCEP must establish an overall assessment of coverage – and in particular the outlook for eliminating those areas that are not yet covered by all operators[28].

28 - LME Article 109.

Operators must also provide a social tariff offer, whose terms are set through an agreement with the State[29].

29 - LME Article 111.

30 - LME Article 119.

In accordance with the LME[30], following public consultation[31] ARCEP must determine the extent to which 3G mobile network installations in Metropolitan France are being shared, and particularly the coverage threshold beyond which this sharing has been implemented.

31 - Available on the ARCEP website: http://www.arcep.fr/uploads/tx_gspublication/consult-partg-infra-3g-091208.pdf.

◆ Unbundling the local sub-loop

SMP operators in the local sub-loop market must provide an offer for accessing this segment of the network at a reasonable price. The technical and pricing terms must contain the provisions needed to enable subscribers to benefit from broadband and ultra-fast broadband services[32].

32 - Article 110 of the Law on modernising the economy.

◆ Spectrum auctions

The law now explicitly provides for the possibility of employing an auction procedure for allocating spectrum resources as part of a call for candidates, in other words in situations where a scarcity of frequencies exists[33].

33 - Article 114 of the Law on modernising the economy.

◆ Oversight of the use of surcharged numbers surtaxes

The law includes a ban on the use of surcharged numbers by company call centres in situations where the purpose of the call centre is to process calls from consumers seeking to obtain the proper execution of their contract or to file a complaint – and this for all sectors of activity.

3. Regulatory provisions adopted in 2008 and 2009

In 2008 and in early 2009, ten decrees concerning the telecommunications sector were adopted.

Access to emergency calls for the hard of hearing	Decree no. 2008-346 of 14 April 2008 concerning the reception and routing of emergency calls from people with hearing impairments.
Procedure before the Court of cassation	Decree no. 2008-484 of 22 May 2008 (Article 22) concerning the procedure before the Court of cassation.
Licensing fees	Decree no. 2008-565 of 2 July 2008 amending Decree no. 2007-1532 of 24 October concerning spectrum licensing fees due from the holders of spectrum licences that were issued by the ARCEP.
Universal service	Decree no. 2008-792 of 20 August 2008 concerning universal service.
Routing calls to "112"	Decree no. 2009-41 of 12 January 2009 concerning the measures to be taken by operators for routing calls to the number 112, and amending the code governing postal and electronic communications markets in France, CPCE.
Regional coverage	Decree no. 2009-166 of 12 February 2009 concerning the publication of information on the status of national coverage by electronic communications services. Decree no. 2009-167 of 12 February 2009 concerning the communication of information to the State and to local authorities on the infrastructure and networks deployed in their region.
Optical fibre	Decree no. 2009-52 of 15 January 2009 concerning the installation of ultra high-speed optical fibre electronic communication lines in new buildings. Decree no. 2009-53 of 15 January 2009 concerning the right to access ultra-fast broadband, taken in application of paragraph II of Article 1 of the Law no. 66-457 of 2 July 1966 concerning the installation of broadcast reception antennae. Decree no. 2009-54 of 15 January 2009 concerning the agreement between an operator and a property owner for the installation, management, maintenance and replacement of ultra high-speed optical fibre lines in a building.

3.1 Routing calls to "112"

Reminder of the provisions

Article 26 of Directive 2002/22/EC of 7 March 2002 ("Universal service" Directive) stipulates that "*aside from any other national emergency number specified by national regulatory authorities, Member States will ensure that all end users of telephone services that are available to the public, including the users of public payphones, are able to call emergency services for free by dialling "112", the unique European emergency number*". Articles L. 33-1 and D. 98-8 of the code governing electronic communications and postal operations, CPCE, transposed into French law the rules concerning the free routing of emergency calls, and notably those going to the number "112".

Article 1 of the Decree of 12 January 2009[34] added three new paragraphs to Article D. 98-8 of the French postal and electronic communications code. Mobile telephony operators are no longer required to route calls to "112" if the operator's customer identification is not considered active by the customer's operator at the time of the call.

In addition, to allow mobile customers to reach "112" when their operator's network is down, the operator whose network is experiencing a malfunction can request that other operators route its calls to "112" for as long as the service malfunction lasts, even though the calling parties are not their customers.

And, finally mobile operators are required to inform the minister and the Authority of their implementation of CPCE Article D. 98-8, and the minister has the power to give mobile operators instructions with which they must comply.

3.2 Regional coverage

3.2.1 Allowing local authorities to stimulate competition

The Decree of 12 February 2009[35] brings added clarification to the provisions contained in CPCE[36] Article L. 33-7, allowing local authorities to facilitate operator entry into the geographic area for which they are responsible, and to coordinate their own network projects with electronic communication operators' rollouts as closely as possible.

To achieve this, the Decree adds an Article D. 98-6-3 to the CPCE[37], which:

- stipulates that requests made by the State in the performance of its duties in the areas of public safety and national security are not covered by the provisions contained in this Article;
- requires that the information mentioned in CPCE Article L. 33-7 be transmitted by the managers of electronic communications infrastructure – in other words all parties that own infrastructure which hosts passive electronic communications network equipment, as defined by paragraph III of CPCE Article D. 98-6-3, and declared operators in accordance with Article L. 33-1 – on demand and free of charge, to the State, to local authorities and their economic interest groups;

34 - *Decree no. 2009-41 concerning the measures operators must take for routing calls to the number 112, JO of 14 January 2009.*

35 - *Decree no. 2009-167 of 12 February 2009 concerning the communication of information to the State and to local authorities on the infrastructure and networks deployed in their area, JO of 14 February 2009.*

36 - *Article 109 of the Law on modernising the economy lays down a principle of providing local authorities with access to information on the infrastructure and networks deployed in their region. To do so, the above-mentioned article inserted an Article L. 33-7 in the CPCE, whose terms of application are stipulated by decree, in accordance with the aforementioned article.*

37 - *Article 1 of the Decree.*

- specifies the electronic communications network infrastructure and the passive electronic communications equipment for which requests for information can be made;
- stipulates the terms applying to the communication of the transmitted data (confidentiality).

The Decree came into effect on 31 March 2009[38]. Article 2 nevertheless states that "*the sixth paragraph of Section V of Article D. 98-6-3 of the postal and electronic communications code will enter into effect on 1 July 2009, as it pertains to the information referred to in paragraph 2 of Section III, and on 1 July 2011 as it pertains to the information referred to in paragraph 1 of Section III. Prior to this date, the information will be provided in the best condition available to the operator or electronic communications infrastructure manager, with respect to the objective stated in the paragraph in question*".

3.2.2 Publication of coverage information

Another Decree, dated 12 February 2009[39], adds an Article D. 98-6-2 to the CPCE that pertains to the rules governing the publication of information on national coverage levels for electronic communications services.

The provision that will be put into effect will need to be specified by a decision from ARCEP, made in accordance with CPCE Article L. 36-6.

3.3 Optical fibre

3.3.1 Drafting sample agreements between property owners and operators

A Decree from the *Conseil d'Etat*, dated 15 January 2009[40], adds Articles R. 9-2 to R. 9-4 to the postal and electronic communications code, CPCE, which define the central principles and the minimum content that agreements between property owners and operators must adhere to and contain. These are not actual clauses that must be complied with, but rather provisions that the agreements must satisfy.

This provides a foundation for drawing up more detailed agreements, which can be based on a more comprehensive sample contract.

3.3.2 Guaranteeing the right to fibre access

A Decree dated 15 January 2009[41] specifies the terms for implementing Article 109 of the Law on modernising the economy[42], and especially the methods by which a tenant or resident can exercise their right to be connected to an ultra-fast broadband network[43]. This Decree also provides more detail on the terms of a property owner's refusal to provide this requested access to or replacement with ultra high-speed, optical fibre electronic communications lines, for the serious and legitimate reasons identified in paragraphs 2 and 3 of Section II of Article 1 of the amended Law of 2 July 1966.

3.3.3 Providing for the installation of fibre in new builds

A last Decree[44] sets the terms for installing ultra high-speed, optical fibre electronic communications lines in newly constructed buildings, notably to enable several operators to connect to it.

38 *- Specified by Article 3 of the Decree.*

39 *- Decree no. 2009-166 of 12 February 2009 concerning the publication of information on national coverage levels for electronic communication services, JO of 14 February 2009.*

40 *- Decree no. 2009-54 of 15 January 2009, JO of 16 January 2009, concerning the agreement between the operator and the property owner for the installation, management, maintenance and replacement of ultra high-speed optical fibre lines in a building, made in accordance with Article 109 (V) of the Law on modernising the economy of 4 August 2008.*

41 *- Decree no. 2009-53 of 15 January 2009 concerning the right to ultra-fast broadband access, taken in accordance with para. II of Article 1 of Law no. 66-457 of 2 July 1966 concerning the installation of broadcast reception antennae, JO of 16 January 2009.*

42 *- Article 109 of the Law on modernising the economy amended Article 1 of Law no. 66-457 of 2 July 1966 concerning the installation of broadcast reception antennae by creating a "right to ultra-fast broadband access", which benefits the residents of residential or mixed use property.*

43 *- Article 1 of the Decree.*

44 *- Decree no. 2009-52 of 15 January 2009 concerning the installation of ultra high-speed optical fibre electronic communication lines in new buildings, JO of 16 January 2009.*

This decree sets the terms of application for the provisions contained in the building and housing code[45], which stipulate that greenfield projects which contain several housing units or business premises must be equipped with the necessary ultra high-speed, optical fibre electronic communications lines such that a public ultra high-speed, optical fibre electronic communications network can be supplied to each of the housing units or business premises.

4. Order concerning fees

Changes brought by the Order of 2 July 2008[46] satisfied the expectations that the Authority had expressed on the matter of the fees due from fixed and mobile satellite services, as the initial text created several extreme cases for these services which, in some instances, would have led to some licence-holders owing particularly low or particularly high spectrum access or spectrum management fees.

45 - According to the provisions in paragraph 2 of Article L. 111-5-1, in its formulation derived from Article 109 (VII) of the Law on modernising the economy of 4 August 2008.

46 - The Order dated 2 July 2008 amended the Order of 24 October 2007 concerning the application of Decree no. 2007-1532 of 24 October 2007 on the spectrum licensing feeds due from the holders of spectrum licences issued by ARCEP, which was itself amended by Decree no. 2008-565 of 2 July 2008, JO of 4 July 2008.

B. Review of the European framework

The process

The telecommunications sector is governed by the European directives adopted in 2002. The Commission undertook a review of the regulatory framework and 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. 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. Once adopted, the new directives will then be transposed into national legislation in the 27 European Union Member States.

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 experts from the sector. It took part in the work dedicated to reviewing the framework.

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.

The principal changes introduced by the Commission were the following:

- 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. Work of the European Parliament

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; most of the harmonisation measures for spectrum management were maintained; 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. Work of the European Council

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 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. It 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, while the United Kingdom and Sweden regretted the lack of ambition in the spectrum policy, as well as 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 in view of a second reading in Parliament, planned for April 2009, and by the Council in June 2009.

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.

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 performed by the European Commission on international roaming

Reminder

International roaming consists of giving consumers the ability to continue to use their mobile phone when travelling abroad.

Having noted that the high price charged for these services had resulted in a structural lack of competition, and because of the impossibility of having national regulatory authorities intervene effectively in what are by nature international markets, in June 2007 the European Union adopted a regulation[47] that imposed an automatic substantial decrease in the price of mobile calls made or received while roaming in Europe.

Pursuant to this regulation, operators are required to offer their customers a "Eurotariff" service which, for a French consumer in a roaming situation inside Europe, has a ceiling of € 0.59 including VAT per minute, starting on 30 August 2007, then lowered once again to € 0.55 a minute on 30 August 2008. The ceiling price, including VAT, for received calls was set at € 0.29 a minute the first

47 - EC Regulation no. 717/2007 concerning roaming on public mobile telephone networks inside the Community, ECOJ of 29 June 2007.

year, then brought down to € 0.26 a minute as of 30 August 2008[48]. These decreases in retail market prices are made possible by similar regulation on underlying wholesale tariffs, billed between operators in the different EU Member States[49], which are expected to continue to drop steadily over the coming years, in accordance with the regulation.

This new text also reinforces the obligations imposed on operators which must now inform their customers of roaming tariffs within the European Union. By virtue of the regulation, operators are required to send customers a text message informing them of the three main prices of roaming calls – i.e. the price of an inbound call, the price of a local call in the country where they are travelling and the price of a call to France – upon their arrival in another European Union Member State. Operators are also required, upon request by the customer and for free, to provide more detailed information on calling rates to other destinations (via mobile voice mail or text message), and on the price of SMS, MMS and mobile data services.

48 - The Eurotariff concerns only calls originating in or going to a European Union country. Prices excluding VAT are € 0.49 and € 0.46 per minute for outbound calls and € 0.24 and € 0.22 per minute for incoming calls.

49 - Maximum wholesale tariffs set at € 0.30 euro a minute starting on 30 August 2007, down to € 0.28 a minute as of 30 August 2008.

Drawing on elements provided by national regulatory authorities, among other things, on 29 September 2008 the Commission submitted a proposed regulation[50] prolonging and expanding the initial regulation, following its analysis of market development, in accordance with Article 11 of the regulation.

50 - Proposal of 23 September 2008 of the European Parliament and Council regulation amending the EC regulation no. 717/2007 concerning roaming on public mobile telephone networks inside the Community, and Directive 2002/21/EC concerning the common regulatory framework for electronic communications networks and services. http://ec.europa.eu/information_society/activities/roaming/docs/regulation/reg_fr.pdf.

Because of an observed lack of competition in roaming voice call markets, the Commission proposed that the existing regulation be prolonged, along with an annual decrease of € 0.03, excluding VAT, in both wholesale and retail market tariffs – to be applied starting on 1 July 2009 and until 2013. The wholesale tariff will decrease from € 0.28 to € 0.17 by 2013, the price of outbound calls will go from € 0.46 to € 0.34 and the price of inbound calls from € 0.19 to € 0.10.

On the matter of voice calls, the Commission also proposed a limit on the use of tiered billing which is not beneficial to consumers, by specifying that the volumes employed when calculating ceiling tariffs must be by the second, starting with the first second. In the case of calls made while roaming, a first indivisible period of 30 seconds will be tolerated, to allow operators to recover possible set connection costs, and to give them the ability to differentiate themselves if they so desire by employing a lower tier, but also to take account of the diversity of situations across European Union Member States.

The initial regulation did not provide for regulation of SMS tariffs and data roaming solutions, but imposed the implementation of price monitoring for these services. Based on available data, the Commission noted a broad stability in both wholesale and retail prices for SMS, which would appear to indicate that the state of competition in the roaming SMS market is similar to the earlier situation with voice calls. On the other hand, mobile data prices have decreased in recent times, by an average 28% in the wholesale market and by 30% in the retail market in France (not including group rates) between Q3 2007 and Q3 2008.

In light of these elements, the European Commission proposed that the regulation be extended to SMS, based on a similar system to the Eurotariff, namely a "euro-SMS" whose price would be based on a regulated wholesale tariff of € 0.04, and a retail tariff with a ceiling of €0.11. It should be pointed out that this would mean a very sharp drop in the retail price of a text message, as the average price in France for a roaming SMS was € 0.24 as of Q3 2008.

The data roaming market is still too nascent for retail tariff regulation to be legitimate. Moreover, recent developments indicate a trend towards decreasing prices. Nevertheless, factoring in the possible difficulties that some operators have in obtaining reasonable wholesale tariffs, the European Commission does want to implement a system of safeguards for wholesale tariffs that consists of applying an average maximum price of one euro per megabyte, designed as being a tariff that would prevent distortions in the state of competition between independent operators and operators which are part of large corporations or pan-European alliances.

This tariff does indeed appear capable of fulfilling this role as it corresponds approximately to the average tariff observed in the latest quarterly figures available.

Alongside this wholesale market regulation, the Commission wanted to improve pricing transparency and to battle against the excessive invoices that some consumers found themselves faced with when travelling abroad.

To achieve this, in addition to an obligation for increased information on pricing, delivered via SMS when customers enter another European Union country, the Commission proposed that operators be required to provide their customers, free of charge, with a mechanism that would allow them to automatically set a cap on their roaming data spending, along with an alert for when they had nearly reached that limit. Such a system, which consumers could deactivate, would allow users to control their spending on roaming services.

The Commission proposal is currently being examined by the European Parliament and Council, and is expected to be adopted in the first half of 2009.

2. Work of the European Regulators Group and the Independent Regulators Group (ERG-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 Norway[51]. Turkey's application to the IRG was accepted in February 2005, Croatia's was accepted in October 2005 and 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

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

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. 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.

2.1 ERG publications in 2008

The work performed by the ERG in 2008 resulted in the publication of several documents[52].

52 - All documents published by the ERG can be viewed online at: http://www.erg.eu.int/documents/docs/index_en.htm.

2.1.1 Common positions

With the goal of achieving greater market harmonisation, three common positions were adopted in 2008: on the symmetry of mobile and fixed call termination, on wholesale leased lines and on the geographical aspects of market analyses.

The ERG also adopted a report, which was coordinated by ARCEP, on best practices for the implementation of unbundling and bitstream: operational (quality of service), functional (migration) and economic (system for billing access to the local loop) aspects.

A common statement on the regulatory principles of IP interconnection/NGN core was also adopted. The document is structured into three parts:

- a description of the networks (separation of transport/service, number of points of interconnection…);
- interoperability/interconnection/quality of service and pricing;
- pricing principles, which includes a section on bill-and-keep for call termination, regardless of the type of network.

2.1.2 Reports

Headed up by the Spanish NRA, a methodology for monitoring broadband retail prices was devised. In 2008, two recurring reports on mobile call termination were published, and a report on regulatory accounting practices was adopted.

The reduction in the number of markets listed in the EU Relevant markets Recommendation of 2007 is expected to make testing of the three criteria more frequent in the second round of market analysis. This is why the ERG decided to publish guidelines on this subject.

In addition, groups of experts met in 2008 following the European Commission's launch of phase II proceedings (serious doubts on the market analyses) concerning:

- the transit market on the PSTN in Poland;
- the market for the terminating segments of leased lines on Poland's trunk circuit network;
- the wholesale broadband access market in Slovenia.

2.1.3 Opinions

The ERG is regularly called upon by the Commission to provide its expertise when drafting Community texts pertaining to electronic communications. In 2008, the ERG published its responses to the public consultation on call termination, on new generation networks, on the recommendation contained in Article 7 and on international roaming.

2.2 Work programme for 2009[53]

2009 will be a year of transition, from both a regulatory and technological standpoint. The priority areas of focus will the review of the regulatory framework and developments in new generation networks (NGN). As in previous years, the work programme will be structured into three parts: review of the framework, new market challenges and harmonisation. The work performed in 2008 with the RSPG (*Radio Spectrum Policy Group*) on the topic of spectrum will continue, and the ERG will also devote efforts to enterprise market offerings. ARCEP is heading up the "SMP operator" group, as well as working group devoted to call termination.

3. Work performed by other European bodies

3.1 COCOM

The purpose of the Communications Committee (COCOM)[54] is to assist the European Commission, particularly in its role as secondary legislator. A classic instrument of comitology[55], COCOM enables Member States to give their opinions officially to the European Commission – in areas relating either to COCOM's consultative capacity[56] or to its regulatory capacity[57] – and to exchange viewpoints on all matters that have been put on the agenda.

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 veto[58] draft national market analysis measures and where national regulatory authorities (NRAs) have the opportunity to respond.

ARCEP ensures that the French authorities are represented at COCOM alongside the Ministry for the Economy, Industry and Employment Directorate General for Competitiveness, Industry and Services (DGCIS).

The work programme in 2008 followed through on the work performed in previous years, with three main areas of focus: the review process for the regulatory framework, achieving greater harmonisation of practices, and innovation (particularly new generation networks).

53 - The ERG work programme can be viewed online at: http://www.erg.eu.int/workprog/index_en.htm.

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

55 - 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.

56 - Cf. Article 3 of the Council's Decision no. 1999/468/EC of 28 June 1999 ("Comitology" Decision), amended by Decision no. 2006/512/EC.

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

58 - Cf. Article 7 of the Framework Directive.

3.1.1 COCOM draft recommendations

◆ Draft recommendation on call termination

The Commission submitted a draft recommendation to COCOM which seeks to achieve harmonised regulatory methods for mobile and fixed call termination tariffs. It states that the differences in the methods used to set call termination tariffs in the different EU countries, and in the fixed and mobile sectors, constituted major obstacles to achieving a single European electronic communications market.

The European Commission established principles for determining which cost elements were to be taken into account by national electronic communications regulatory authorities when setting call termination tariffs. In the same vein, it implemented an LRIC (long-run incremental cost) calculation method and symmetrical call termination tariffs (fixed-to-fixed and mobile-to-mobile) which must be brought down to equal the costs calculated for an efficient operator. Any differences with the unique efficient cost level are only justified if they prove to be objective cost differences that are beyond the control of operators. The Commission submitted this proposal to public consultation and received 70 responses, which can be viewed on the Commission website[59].

59 - http://ec.europa.eu.

Although most Member States share the Commission's objectives, they did express reservations – particularly on the prescriptive nature of the recommendation and the fact that the timetable for its implementation (by the end of 2011) is too short. During the vote on the COCOM opinion, these concerns translated into five votes for (including the French vote), 10 abstentions and 12 votes against.

Following the COCOM vote and the period of examination by the European Parliament, the Commission announced its intention to publish the recommendation.

◆ Draft recommendation on new generation access networks (NGA)

On the matter of NGA, the Commission prepared a draft recommendation that allows NRAs to oblige SMP operators to provide access to their ducts, to enable their competitors to deploy their own optical fibre in them, but also to impose an obligation to provide physical access that goes beyond this access to ducts (i.e. access to dark fibre) when no ducts are available or when the population density is too low to ensure the viability of a commercial model.

The Commission ultimately withdrew this proposal from the COCOM agenda in February 2009, to avoid causing confusion with the discussions on this topic that were already underway in the European Parliament and Council as part of the framework review process.

◆ Draft recommendation on mobile communications onboard aircraft

In early 2008, the Commission submitted a draft recommendation to COCOM for opinion on authorising mobile communication services onboard aircraft (MCA) inside the European Union.

This draft recommendation, produced at the same time as the Commission decision concerning the technical conditions for MCA[60], aims to coordinate national licensing procedures and terms. The recommendation was published on 7 April 2008 after receiving a favourable opinion from COCOM.

60 - European Commission Decision 2008/294/EC, OJEU of 10 April 2008.

3.1.2 Procedure for awarding 2 GHz MSS licences

On 14 February 2007, the European Commission published a decision[61] whose purpose was to have Member States designate and make available the 1980-2010 MHz and 2170-2200 MHz frequency band for systems providing mobile satellite services. After having received the opinion of the COCOM, on 7 August 2008 the European Commission launched a call for submissions aimed at selecting the candidate operators for these services. Four candidates came forward: Solaris, Inmarsat, Terrestar and ICO[62] and were declared eligible by the Commission in December. The final selection of the candidates is expected to take place in the second half of 2009.

In addition to these specific points, the COCOM also ensured the application of decisions and recommendations that were made earlier on (116 XYZ and 112 numbers) and on recurring subjects (broadband statistics…).

3.2 The Radiospectrum Committee (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 the Committee's discretion. The chairman of RSCOM is a Commission representative.

The RSCOM rules of operation are set by Commission decision[63]. The Committee advises the Commission and provides assistance with consultative and regulatory procedures.

Work performed in 2008 focused primarily on:

- harmonisation of the terms of use for radio spectrum[64];
- harmonisation of the frequency band[65].

3.3 The Radio Spectrum Policy Group (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*".

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.

61 - *Decision 2007/98/EC of 14 February 2007 concerning the harmonised use of radio spectrum in the 2 GHz band, for the deployment of mobile satellite systems, OJEU of 15 February 2007.*

62 - *At the COCOM meeting of 15 October the Commission pointed out that ICO Services had lodged a complaint against the Parliament and Council with the TPICE (case no. T-441/08).*

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

64 - *Decision 2008/294/EC of 7 April 2008 on the harmonisation of the terms of use of the radio spectrum for the operation of mobile communication services onboard aircraft, and Decision 2008/432/EC of 23 May 2008 concerning the harmonised use of radio spectrum for short range devices.*

65 - *Decision 2008/411/EC of 21 May 2008, OJEU of 4 June 2008, on harmonisation of the 3400-3800 MHz frequency band for the provision of terrestrial electronic communication systems, Decision 2008/477/EC of 13 June 2008, OJEU of 24 June 2008 on harmonisation of the 2500-2 690 MHz frequency band for the provision of terrestrial electronic communication systems, Decision 2008/671/EC of 5 August 2008 on harmonisation of the 5875-5905 MHz frequency bands for the use of intelligent transportation systems and Decision 2008/673/EC of 13 August 2008 on harmonisation of the 169.4-169.8125 MHz frequency bands, OJEC of 15 August 2008.*

The RSPG adopted three opinions in 2008:

- one concerning the European approach to the collective use of spectrum;
- a second on best practices for spectrum use by the public sector;
- and, third, an opinion on streamlining the regulatory environment for the use of spectrum.

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

The new 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. These notifications are issued on a dedicated Commission website (CIRCA[66]) which can be accessed by the public but which has an area whose access is restricted to regulatory authorities. At the end of November 2008, more than 800 notifications had been transmitted to the Commission.

66 - *"Communication and Information Resource Centre Administrator" (http://forum.europa.eu.int/Public/irc/infso/ecctf/library).*

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.

On 15 October 2008, the Commission published a new recommendation concerning the notifications, timelines and consultations provided for in Article 7 of the Framework Directive. According to the Commission, the aim of this amended recommendation[67] is to streamline the notification process. As a result, a shortened notification form was introduced for certain categories of draft measure. Although the shortened form does facilitate the writing of draft measures and their examination by the Commission, it does nothing to lessen the preliminary work that needs to be performed by NRAs, namely market analysis.

67 - *This text replaces Recommendation 2003/561/EC of 23 July 2003.*

2008 brought with it a number of changes to European NRAs' decisions, in both form (with the new notification procedure) and content (new list of relevant markets, notification of geographical markets).

4.1 The "Relevant markets" Recommendation of November 2007

In accordance with the principles of competition laws and of the Framework Directive, the European Commission recommendation on relevant markets, which replaces the previous recommendation of 2003, lists the electronic communications sector product and services markets that are likely to be subject to ex ante regulation.

Although it was adopted in November 2007, the new recommendation did not produce any concrete effects until 2008 when the first notifications that refer to it explicitly appeared. The markets that were eliminated from the current recommendation are still subject to notification when all three criteria (see below) are met.

Attached to the directive is an explanatory memorandum describing the principles that a national regulatory authority must apply when analysing 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.

Although it aims to harmonise the scope of regulation in the Member States, the recommendation does not prejudge the possible relevance of a market at the national level. 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.

The list of markets in the recommendation is much shorter than the previous one. Most retail markets (former Markets 3 to 7) have been removed, as have the two "intermediate" wholesale markets, namely transit and wholesale trunk segments of leased lines (former Markets 10 and 14), access and call origination on public mobile telephone networks (former Market 15) and broadcasting transmission services (former Market 18).

Despite the virtual consensus among NRAs on the lack of competition in Markets 15 and 18, the Commission removed them from the list.

It also comes as no surprise that international roaming (former Market 17) no longer appears on the list, in light of the European regulation of June 2006.

New list of markets in the recommendation

1. access to the public telephone network at a fixed location for residential and non-residential customers (combination of 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 unbundled access to physical network infrastructure (including full unbundling and shared access) for the purpose of providing broadband and/or voice services at a fixed location (former Market 11 expanded);
5. wholesale broadband, or bitstream, access (former Market 12);
6. wholesale terminating segments of leased lines (former Market 13);
7. voice call termination on individual mobile networks (former Market 16).

4.2 Summary of market analyses performed in 2008

At the end of December 2008, the Commission had recorded more than 800 notifications since the start of the market analysis process in 2003, of which over 100 in 2008. The Commission opened phase II proceedings on five of the cases it received in 2008, none of which ended in a formal veto by the Commission, as four of the notifications were voluntarily withdrawn by the NRA before a veto was possible, while the fifth was modified in such a way as to eliminate the Commission's serious doubts (c.f. Section 4.3 on Market 5 in Spain).

The CRC[68], which was the only NRA not to have a notified a single market by the end of 2008, remedied the situation in early 2009 by notifying its first analysis of fixed (Markets 2 and 3: fixed calling origination and departure) and mobile (Market 7, mobile call termination) markets.

68 - Bulgarian competition authority.

While some NRAs (Romania, Bulgaria) are beginning the notification of their first round of market analysis, others are already on their third round for certain markets (Austria, Finland, the Netherlands, Hungary). Most NRAs are situated between the two – i.e. currently engaged in their second round of market analysis.

Aside from this factual information, two types of notification stood out among the market analyses performed in 2008: first, the emergence of analyses of geographic markets and, second, notifications concerning call termination.

4.3 Geographic markets

One of the major developments in market analyses in 2008 was the emergence of the geographical segmentation of relevant markets. Whereas NRAs notified only their national markets[69] during the first round of market analysis, some have begun to submit analyses that include either a geographical segmentation of the relevant market or a geographical differentiation of the remedies applied.

69 - Aside from the special cases of countries where there were local monopolies in some markets, such as the Hull area in the UK, as well as in Finland and Hungary.

This trend could increase as the impact of the remedies applied as a result of the first round of market analysis is starting to manifest. Aware of this likely development, the ERG's "SMP"[70] group adopted a common position aimed at examining the competition conditions in the markets which led NRAs to perform geographically differentiated analysis in certain cases. This topic also made its way into debates over the review of the EU regulatory framework, via proposals from the European Parliament[71], which were taken up in part by the Council and the Commission.

70 - Group responsible for primarily economic analysis of SMP operators, chaired ARCEP.

71 - Cf. SI presentation to the Board, 22/07/2008.

4.3.1 Geographic segmentation of wholesale broadband access markets in the United Kingdom

- In November 2007, Ofcom notified the Commission of its second analysis of the wholesale broadband market[72], which identified three types of market:

72 - Case no. UK/2007/0733; the first analysis of this market was notified in 2003.

- market no. 1: exchanges where BT is the only operator;
- market no. 2: exchanges where there are two or three operators *and* exchanges where there are four or more operators but where the exchange serves less than 10 000 homes and businesses;
- market no. 3: exchanges where there are four or more operators *and* where the exchange serves 10 000 or more homes and businesses.

Ofcom designated BT as the SMP operator in markets 1 (99% market share in terms of volume) and 2 (78% market share). On the other hand there is no SMP operator in market 3 where BT (45%) and Virgin Media (30%) dominate the other operators that share control of the remaining 25%.

The following remedies were imposed on BT in markets 1 and 2: provide access (on reasonable request), not discriminate unduly, publish a reference offer, notify terms and conditions, publish technical information, accounting separation and an obligation to be transparent with respect quality of service.

In market 3, where conditions were deemed competitive, Ofcom proposed lifting BT's obligations, after a one-year notice period.

In addition, BT assured the sector players and Ofcom that it would lower its ceiling tariffs for wholesale bitstream offers across the UK, and this up to the end of 2010. BT also made commitments on the stability of unbundling rates (no targeted decreases below a certain level in certain geographical areas).

These commitments from BT echo some of the concerns that can arise when making the transition from a regulated situation to a situation that is deemed competitive. One of these concerns is that the incumbent carrier could take advantage of the situation to regain market share by putting pressure on prices. Here, BT's commitments, along with the one-year notice period, will allow for a smoother transition from a regulated to a competitive market.

In its comments on this analysis, the Commission underscored a trend that had emerged in the second round of analyses of wholesale broadband access markets: alternative operators are investing more and more in their networks to be able to take advantage of unbundling in the incumbent carrier's local loop. As a result, in certain areas, some parallel infrastructure whose purpose is to deliver broadband services is changing the balance of competition.

- **The Commission also gave some indications on the way in which NRAs should approach geographic markets**

The Commission expressed the view that the number of operators present in a given area is not a significant enough criterion for defining a geographic market. Other elements such as the operators' market share and changes to the balance of power are equally important. Also to be taken into account are prices (wholesale price vs. retail price, price charged by the incumbent carrier vs. alternative operators' rates, etc.), the features of the offer (difference between the offer marketed by the incumbent and those marketed by the competition) and demand. It is thus all of these criteria combined that make it possible to conclude the existence of a geographic market.

In any event, because of its flexibility, the current framework enabled NRAs to perform this type of analysis.

4.3.2 Geographical segmentation of remedies in the Austrian wholesale broadband market

73 - "Rundfunk und Telekom Regulierungs GmbH (RTR-GmbH)" - Austria's telecommunications regulator

In February 2008, RTR[73] notified its analysis of the wholesale broadband access market in Austria. As with Ofcom, this is the regulator's second notification. Here again, the state of competition changed considerably as a result of the remedies imposed following the first round of analysis. But, unlike Ofcom, RTR concluded that the market remained a national one since Telekom Austria applies the same pricing policy nationwide. Developments in the market nevertheless led RTR to undertake a geographical segmentation of remedies to take account of the varying degrees of competitive intensity.

RTR identified two different zones:

- Zone 1: Exchanges that satisfy all of the following criteria:
  - 3 or more major operators present;
  - more than 2 500 households served;
  - Telekom Austria's market share below 50%.
- Zone 2: all other exchanges.

Current obligations (provide access, price controls, non discrimination, cost accounting, etc.) are upheld in zone 2 while in zone 1 all obligations have been lifted, except for accounting separation which is maintained in both zones.

Several factors led RTR to undertake geographically differentiated remedies:

- population density likely to sustain a new entrant in a given exchange;
- actual or planned entry onto a given exchange;
- the different operators' local market share.

These indicators allowed RTR to measure the different levels of competitiveness by geographical zone. As a result, Telekom Austria (TA) does not have the same incentives to provide broadband access in the different zones. This incentive is greater when there are several operators present. Telekom Austria nevertheless continues to charge end users the same prices nationwide: i.e. in terms of the offer, there is only one market. This is why it is only by differentiating the remedies that the RTR proposes to take account of the disparate levels of market competition. The Commission recognises that the geographical differentiation of the remedies can be a suitable solution in cases where different degrees of competition can be observed, but which are not intense enough to justify dividing the market up geographically.

4.3.3 Geographical segmentation of remedies in the Spanish broadband access market

74 - "Comisión del Mercado de las Telecomunicaciones" – Spain's telecommunications regulator.

- Analysis by the CMT[74]

On 13 October 2008, the CMT notified a draft decision on Markets 4 and 5 of the new recommendation, namely: wholesale access to network infrastructure and bitstream, respectively.

As concerns Market 5, i.e. the bitstream market, CMT considered it a national market and designated Telefónica as having SMP in this market, but proposed geographically differentiated remedies.

Two zones were identified: zone 1 where competition was at its liveliest and zone 2 where competition was weaker – a distinction based on an analysis of the "indirect constraints" the alternative operators cause Telefónica. CMT concluded that these constraints are more or less severe depending on the zone. The remedies proposed by the Spanish regulator have been scaled back for zone 1 (grant reasonable requests for access to solutions up to 30 Mbps, non excessive prices, accounting separation, *ex ante* communication of retail prices and the obligation to be transparent).

In addition to the obligations imposed in zone 1, the SMP operator in zone 2 is also required to submit to tariff supervision, to publish a reference offer and not to discriminate unduly. In all cases, offers running at over 30 Mbps are exempt from regulation.

◆ **Launch of phase II procedure by the Commission**

The Commission decided to open up a phase II procedure in light of the serious doubts raised by the CMT notification, and pertaining to:

- the exclusion from the market of solutions running at over 30 Mbps;
- the CMT analysis of the indirect restrictions caused by alternative operators;
- geographical differentiation of the remedies.

It is interesting to see the Commission's position on the geographical differentiation of the remedies in this phase II procedure. Under the current framework, the Commission can impose a veto only on the definition of the market and on the analysis of market power – and only comment on the remedies. The introduction of geographical remedies created concerns that some NRAs could be tempted to avoid a Commission veto by defining a national market (open to a veto) while proposing a geographical differentiation of the remedies (not open to a veto). This would make it possible to deregulate certain markets without the Commission being able to control it. Here, the Commission exercises control over the remedies but only through economic analysis leading to a geographical differentiation of the remedies. The Commission thus responds to concerns over uncontrolled deregulation through the application of geographical remedies.

In this instance, the CMT justifies the geographical differentiation of the remedies by the differences in the state of competition in zones 1 and 2 (indirect constraints caused by alternative operators). According to the Commission, however, this difference in competition is not entirely certain. In particular, the Commission expressed doubts about the extent of the constraints that alternative operators (including cable operators) created for Telefónica, depending on the zone.

As a result, the Commission requested proof that would justify the need to differentiate the remedies according to zone, and gave a list of the elements that could serve as proof:

- different commercial strategies employed by operators depending on the zone;
- lower retail prices in zone 1 (the most competitive zone);
- difference in the service offerings in the zones;
- decreased market share for Telefónica in both the wholesale and retail market in zone 1;

- elements of distinction between the two zones remaining unchanged;
- proof of an overall trend towards effective competition in zone 1.

These elements requested by the Commission are not new, as it had already listed them and underscored their significance as elements of proof of geographically differentiated competition in the Austrian case (c.f. Section 4.2 above).

In its remarks on the Austrian case, the Commission had also indicted that the geographical differentiation of remedies could be adapted in situations where different states of competition could be observed but which were not important enough to justify a geographical differentiation. Here, the Commission had serious doubts about the differences in the state of competition cited by CMT to support its analysis.

Another possible justification for the geographical differentiation of remedies would be cases where a premature lifting of ex ante regulation could hold negative consequences for the development of the competitive process, which is not the case here.

Through the launch of a phase II procedure, the Commission completes a "doctrine" on the elements that can justify the existence of a geographically distinct market and or/remedies.

With the threat of a Commission veto, the CMT submitted an amended analysis in early December which responds to the serious doubts raised by the Commission, in that it:

- withdraws the exclusion of services running at speeds exceeding 30 Mbps;
- recognises the weakness of the constraints caused by alternative operators (particularly cable operators);
- withdraws the geographical differentiation of the remedies.

On the matter of remedies, CMT decided to apply the remedies initially planned for the less competitive zone 2 to the entire country, but continues to exempt services delivering access speeds of more than 30 Mbps from all regulation. The remedies are as follows: grant all reasonable requests for access up to 30 Mbps, non excessive prices, accounting separation, ex ante communication of retail prices, transparency, price controls, publication of reference offers and an obligation not to discriminate unduly.

The Commission withdrew its serious doubts in a Decision dated 26 December 2008 in light of the changes made by CMT. The Commission nevertheless regrets that the remedies remain limited to services running at up to 30 Mbps, despite their inclusion in the market. According to CMT, the remedies in this segment would be disproportionate since demand for this type of product is expected to remain very limited over the next two years[75] and the standard speed at the end of the period of analysis is expected to be between 15 and 20 Mbps. In response, the Commission issued a reminder in its remarks of the offers recently rolled out by Telefónica, running at 30 Mbps and by cable operator ONO at 50Mbps and 100 Mbps, which would tend to confirm a trend towards marketing services delivering speeds of more than 30 Mbps in the time period covered by this analysis. When attending the Forum in Davos, Commissioner Reding explicitly stated that this lack of remedies for services running at over 30 Mbps in fact constituted a regulatory holiday that she considered unjustified. She therefore underscored the shortcomings of the law that prevented

75 - *Period covered by the analysis.*

the Commission from opposing such a measure, and argued for the introduction of a veto on remedies in the future framework.

4.4 Call termination

Fixed and mobile call termination, or CT (Markets 3 and 7 of the new recommendation) have been very much at the forefront of discussions on electronic communications in Europe, partly because of debates over the draft recommendation on call termination. Here, notifications concerning call termination help provide a snapshot of the state of these markets across Europe. In addition, the Commission regularly employed its remarks to express its position on the need to lower call termination rates, and this in a harmonised fashion.

4.4.1 Fixed call termination market (Market 3) in Italy

AGCOM[76] submitted its analysis of fixed call termination (Market 3) to the Commission in May[77]. This analysis follows through on two previous analyses:

- case IT/2006/0384 which had concluded that Telecom Italia and 11 alternative operators enjoyed SMP;
- case IT/2008/0753 that proposed a cost model and glide path towards cost-oriented pricing for alternative operators.

76 - *"Autorità per le garanzie nelle comunicazioni (Agcom)" – Italy's telecommunications regulator.*

77 - *IT/2008/0777.*

At the outcome of its analysis, AGCOM proposed imposing measures on the alternative operators that enjoyed SMP according to their infrastructure and investments. This meant that, in addition to their obligations to grant access, to be non-discriminatory and transparent, certain operators were subject to price control obligations, namely a glide path towards cost-oriented pricing.

The AGCOM proposal of requiring operators to follow a glide path to cost-oriented pricing creates a dual asymmetry during the initial period (up to 2010):

- 1st asymmetry: between alternative operators depending on the infrastructure employed, as call termination rates over bitstream are lower than CT rates on the local loop (copper and other);
- 2nd asymmetry: between alternative operators and Telecom Italia.

Starting on July 2010, AGCOM will create symmetry between all operators (including Telecom Italia) with a call termination tariff set at 5.7 €-cents/min.

In its remarks, the Commission expressed its doubts over the approach taken by AGCOM to imposing lower call termination rates for calls terminating on bitstream, compared to those terminating on a local loop network (unbundling) or direct access calls. The goal for AGCOM is to encourage operators to invest in unbundling and in alternative access networks.

The Commission nevertheless pointed out, as it has done on several occasions, that call termination rates should be symmetrical and oriented towards the costs incurred by an efficient operator. AGCOM, on the other hand, had opted for a bottom-up cost model with long-run average incremental costs, depending on the type of technology employed.

In conclusion, the Commission requested that AGCOM review its analysis as soon as a common approach was adopted at the European level (work being done by the ERG and draft recommendation on call termination).

4.4.2 Mobile call termination (Market 7)

◆ In Italy

Italian regulator AGCOM notified the Commission of its analysis of Market 7[78] defined as wholesale call termination services supplied by operators on their network, regardless of whether the calls originate on a fixed or mobile network. All traffic is taken into account, including on-net traffic, except for calls to geographic numbers[79].

AGCOM designated all mobile network operators (Telecom Italia, Vodafone, Wind and H3G) as having SMP, and imposed on them a requirement to be transparent, non-discriminatory, grant access, along with accounting and price control obligations.

On the matter of price control, AGCOM decided to impose a glide path to cost-oriented pricing, running from 2009 to 2011, as depicted in the table below:

	2009	2010	2011
TI and Vodafone	7.7 €-cents/min	6.6 €-cents/min	5.9 €-cents/min
Wind	8.7 €-cents/min	7.2 €-cents/min	5.9 €-cents/min
H3G	11 €-cents/min	9 €-cents/min	7 €-cents/min

At the end of the glide path, there will still be an asymmetry of 1.1 €-cents in H3G's favour.

AGCOM employed long-run incremental costs based on historical costs to determine mobile operators' call termination rates. It justified the predominant use of historic costs citing the fact that, because mobile network assets have a limited lifespan, current costs are close to historic costs.

Furthermore, AGCOM justifies the asymmetries between operators with elements such as market entry date and the technology used (difference between operators that use the 1 800 MHz band and those that operate on the 900 MHz band).

In its comments, the Commission underscored the importance it attaches to the use of an incremental cost model with the current costs of an efficient operator, and not historical costs. It also stressed the fact that using historical costs as the basis for calculations meant call termination rates that were still relatively high at the end of the glide path in 2011, compared to other European Union member countries. The Commission thus invited AGCOM to review its cost calculation methodology.

On the matter of the asymmetry, the Commission noted that when costs are based on those of an efficient operator, they must naturally be symmetrical. Any case of asymmetry that exists must be justified by objective cost differences, and must be limited to a transitional period.

In light of the comments received from the Commission, AGCOM elected to amend its draft measures – bringing changes to the following elements in the amended draft measures sent to the Commission:

- ◆ adoption in 2010 of a cost model that complies with the Commission's draft recommendation on call termination;
- ◆ implementation of mobile call termination symmetry around 2012;
- ◆ price decrease planned for 2011: to 5.3 €-cents for Telecom Italia, Vodafone and Wind (instead of 5.9 €-cents as initially planned) and to 6.3 €-cents (instead of 7 €-cents) for H3G;

78 - *IT/2008/0802.*

79 - *Particular case of fixed-mobile convergence offers addressed by AGCOM in its analysis of fixed call termination (Market 3). Although terminating on geographic numbers, the calls concerned by these offers are routed over the mobile network (e.g. the "Vodafone Casa" offer and Telecom Italia's "Maxxi TIM Casa" offer) but with a fixed CT rate.*

- implementation of a fully symmetrical price of and 4.5 €-cents in 2012;
- review in 2012 of the tariffs to be applied in 2011-2012, based on an LRIC[80] model, in accordance with the draft recommendation on call termination.

80 - Long-run incremental cost .

- In Spain

Market 7 in Spain differs from the French market in one interesting respect, namely the presence of full MVNOs[81]. In France, mobile virtual operators cannot bill for call termination.

81 - Mobile virtual operators that enjoy considerable technical and commercial autonomy from their host operators.

As a result, there are far more SMP operators in the Spanish call termination market than in France. They can be classified into three groups:

- group 1: the three largest mobile network operators: Telefónica, Vodafone, Orange;
- group 2: Xfera (the fourth largest MNO);
- group 3: MVNOs (Euskaltel, ONO, R Cable, E-Plus, Jazztel…).

Operators in group 1 are subject to the following obligations: grant access, cost accounting, price control with cost-oriented pricing, accounting separation and non-discrimination.

Xfera, meanwhile, is required to grant access, charge reasonable prices and not discriminate unduly.

Group 3 operators are also required to grant access, submit to price controls and not discriminate unduly.

As concerns the operators in group 1, CMT plans on proposing a new glide path in 2009, which should maintain the symmetry achieved in April 2008. This glide path should use the fully-allocated current cost method.

As to Xfera and the country's MVNOs, CMT concluded that cost-oriented pricing would be an excessive measure to impose on these operators.

The Commission regrets that CMT did not establish a glide path starting in 2008 that would help decrease the call termination rates charged by the leading operators, which the Commission deems too high (€11.73 €-cents/min since April 2008). Moreover, it invites CMT to eliminate the asymmetries between group 1 and Xfera as quickly as possible by using the costs of an efficient operator as its benchmark. The Commission underscored the fact that allowing too large a gap between Xfera and the leading mobile operators to continue could reduce any incentive that Xfera has to invest in becoming more efficient.

On the matter of the cost accounting model, the Commission expressed strong concerns about the use of allocated costs, and requested that CMT employ the long-run incremental cost method based on the costs of an efficient operator for its next glide path, which will be notified in 2009.

- In Germany

BNetzA[82] notified its second analysis of the mobile call termination market in October 2008, in which it identified two types of SMP operator:

- mobile network operators: T-Mobile, Vodafone, E-Plus and O2;
- MVNOs: Vistream and Ring.

82 - "Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA)" – the German telecommunications regulator.

BNetzA imposed a set of remedies on mobile network operators: interconnection based on objective criteria, collocation and access. On the other hand, call termination rates are not set based on a predetermined model, but rather proposed by mobile operators and subject to the prior approval of BNetzA.

As to MVNOs, BNetzA explained that the analysis was not yet complete and that the Commission would be notified of the remedies at a later date.

The Commission regretted the lack of information on remedies applied to MVNOs, and the absence of a model for setting mobile operators' call termination rates. In its remarks, the Commission cast doubt on the compliance of BnetzA practices with the regulatory framework, due to the lack of notification on remedies – the reason for which it plans on launching infringement proceedings against the German regulator. The Commission reiterated once again the need for a common approach to mobile call termination rates in Europe.

The different notifications analysed here reveal the need to harmonise the methods used to calculate call termination rates. Although all Member States continue to work towards decreasing CT prices, some continue to employ calculation methods which, on the contrary, serve to maintain the gaps between the Member States. It was precisely this contradiction that the Commission pointed out at the latest COCOM meeting in December 2008, at which the draft text was presented.