

# *Annual Report*

2002

*Summary*



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## *Editorial*

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2002 was a difficult year for the telecommunications sector, as was the preceding year. The operators, and by rebound the equipment manufacturers, continued to feel the impact of the drastic corrections in financial stocks (initiated by the bursting of the speculative bubble in the spring of 2000) in a general climate of slower economic growth. The effects of the abrupt downturn in the markets persisted, accelerating the phenomenon of concentration. Operators reduced investment by a little over one-third and have refocused on core businesses or pulled back into niche markets.

Over and above these temporary economic difficulties, competition continued to develop, as shown by the market share won by new players. This was notably thanks to the effective opening of the local call market with pre-selection, and the growing weight in household spending and corporate budgets of new services such as mobile and the Internet. Against this backdrop, ART focused on preserving already existing areas of competition and opening up new areas through recommendations and decisions based on continuous and intensive dialogue with the market players.

Another important development in 2002 was the introduction of local loop competition via unbundling. As in all the countries that have undertaken this process, the work is proving to be demanding and full of obstacles, and the progress made in France illustrates ART's determination to promote real, durable competition in this market segment.

ART's efforts and perseverance under the guidance of its Chairman Jean-Michel Hubert and members of the Board, and supported by the acknowledged expertise of the different departments, will be continued and developed over the coming years.

2003 will be a turning point in more than one respect.

First, in broadband: progress in unbundling the local loop – albeit still rather modest – is starting to bring ADSL into the scope of competition by going beyond simple resale of the incumbent operator's services. In addition, alternative operators can now collect and transport ADSL traffic for ISPs under acceptable economic conditions. The first WiFi access points in hot spots or rural

areas will gradually be put in place, offering itinerant users the possibility of broadband access when away from home and allowing towns not yet served by ADSL to emerge from their isolation. Consideration of network convergence should also give new impetus to broadband on cable and satellite networks.

Secondly, the ongoing changes in the legal framework should facilitate local authority involvement in telecommunications. These changes should provide a more solid foundation for their initiatives, both in terms of mobile network coverage and development of broadband as part of regional and digital development. ART will accompany this movement, by dialoguing with local authorities during the preparatory phase of their projects when requested, with a view to encouraging the methods of intervention most likely to lead to development of competition in the localities concerned, and establishing dynamic partnerships between local authorities and operators, in the spirit of the legal changes now being examined.

Finally, the statutory and regulatory framework is undergoing a comprehensive change to take into account progress made in competition and network convergence. The European directives, which are currently being transposed into French law, will modify ART's role and the tools it uses in its work. Based on the analysis initiated in the spring of 2003, ART's actions will become gradually more selective, but by the same token more effective in the areas in which it is involved.

Hence, this new framework will lead ART to look in even greater depth, in collaboration with market players, at the economic logic behind its actions, while remaining faithful to the operating principles that are the guarantee of its credibility and the legitimacy of its decisions. We are entering into an era of even closer dialogue concerning the nature of market operation and the most appropriate means to regulate these markets. This resulting shared knowledge will provide greater visibility in the long term.



Paul Champsaur

# Summary

## *I. The telecommunications services market and economic conditions*

### **A. 2002: a mixed year**

Without repeating the spectacular two-figure growth rates of previous years, the telecommunications services market nevertheless grew by 2.7% compared to 2001. Since 1998, when the fixed telephony market opened up to

competition, the end-user market has posted very sharp growth, rising from 24 billion euros to 34 billion euros, i.e. a growth rate of over 40% in these five years.

In 2002, the fall in revenues generated by fixed telephony (-2.7% compared to 2001 and -7.1% in five years) was easily offset by mobile and Internet revenues. In volume, these new services now easily represent a half of all minutes carried.

### **Change in revenues**

EUR million	1998	1999	2000	2001	2002	Growth 2002 (%)
Fixed telephony	14 931	15 063	14 631	14 373	13 986	-2.7%
Internet	162	344	731	1 119	1 136	+1.5%
Mobiles services	4 042	5 658	7 789	10 276	11 676	+13.6%
Total telephony (fixed and mobile)	19 136	21 065	23 151	25 768	26 798	+4%
Advanced services	1 370	1 648	1 842	1 810	1 882	+4%
Leased lines	1 449	1 469	2 011	2 328	2 433	+4.5%
Data transport	378	404	530	676	482	-28.7%
Directory services and other income	557	584	319	342	340	-0.6%
Terminals (sales and lease)	1 229	1 358	1 760	2 072	1 965	-5.2%
Hosting & call-centre management	N/a	10	20	43	45	+4.7%
All telecommunications services	23 957	26 537	29 633	33 039	33 945	+2.7%

### **Change in traffic (minutes)**

(millions of minutes)	1998	1999	2000	2001	2002	Growth 2002 (%)
Fixed telephony	124 898	124 029	121 950	118 480	111 445	-6%
Internet	4 976	12 617	28 901	52 446	66 109	+26%
Mobiles services	10 065	20 571	35 640	44 419	51 747	+16.5%

**1. Consequences of economic and financial difficulties**

Slower growth in the telecommunications sector in 2002 compared to previous years reflects the economic and financial difficulties which emerged at the end of 2000. These difficulties arose primarily as a result of the players investing heavily in the new information and communications technologies on the back of overly optimistic market forecasts. The speculative bubble burst after a loss of confidence in certain models, including the "new economy" model. Another negative factor in Europe was the pay-out of over 100 billion euros for UMTS licences, which exacerbated the effects of the slowdown in the financial markets by straining the balance sheets of numerous operators and hence drying up potential sources of financing. In 2002, this climate of mistrust was further aggravated by scandals emerging around certain listed companies, particularly in the USA. Hence, the financial markets have become more cautious not to say wary of telecommunications stocks, leading to a financing crisis in the sector.

This new economic situation has accelerated the movement of consolidation, which is a natural step in the gradual formation of a more stable and more balanced market structure and is the concrete sign of greater maturity. This overall process of sector adjustment was even more noticeable in that it began in mid-2001, when general economic conditions were slowing after a period of steady growth.

At the end of 2002, the French market consisted of 91 operators authorised to establish and operate a public fixed network (L 33-1) and/or supply public fixed-telephone services (L 34-1), versus 97 on 31 December 2001. 14 mobile operators were authorised to provide public telecommunications services in metropolitan France and in the overseas *départements* and territories.

Some fixed-telephony players have fallen back on niche markets, while others have adopted debt-cutting strategies which tend to curb both investment and headcount.

**Change in investment since 1998**

EUR million	1998	1999	2000	2001	2002	% change
Telecom operator investment	5 538	5 909	7 841	9 182	5 800	-37%

**Change in employment since 1998**

	1998	1999	2000	2001	2002	% change
Number of employees at 31 December 2002	155 992	155 297	154 522	151 191	146 200	-3.3%

NB: these figures are the results of an estimate based on partial data supplied by the operators and need to be fine-tuned. However, they do reflect general trends in the sector.



## 2. Competition at the service of users

Despite this return to a more realistic vision of the market, with the risk of exaggerated corrections, we should not lose sight of the beneficial effects of the opening up of the telecommunications sector to competition. Competition has resulted in the various demand components being served better and at lower prices and costs. This means higher levels of activity, more dynamic businesses and more innovation.

### a. Fixed telephony

Competition opened on 1 January 1998 for long distance and international calls, in 2001 for fixed to mobile calls, and was extended to local calls on 1 January 2002 with the elimination of the local sorting zone and the possibility for users to use pre-selection or call-by-call operator selection for routing calls within a given *département*. As of 31 December, almost 9 million subscribers had chosen another operator, of which around four million had opted for pre-selection, i.e. one million more than in 2001.

The market share won by the incumbent's rivals is proof of the vivacity of competition: 36% in volume for national and international long distance calls, and 20% in volume for local calls, according to France Telecom figures.

Flat-rate packages and bundled local/long distance offers have also emerged. In addition, we note continued reductions in the price of fixed to mobile calls, resulting from the ART decision in November 2001 to reduce fixed to mobile termination charges for calls to the networks of the two operators, Orange France and SFR, deemed to have significant market power in the mobile market.

The fixed telephony market is certainly not doomed to a gradual and inevitable decline.

New services are starting to develop, such as SMS transmission (short message service) so popular in mobiles, which are likely to bring in additional revenues for operators on top of voice-generated revenues. Furthermore, thanks to technological innovations, the copper pair still has substantial broadband potential.

### b. Mobile

The mobile market was liberalised in 1987 with two operators, France Telecom Mobiles and SFR, competing in the analogue radiotelephony market. They were awarded GSM licences in 1991 and in 1994, a licence was awarded to a third operator, Bouygues Telecom. Over the years, users showed their interest in this new means of communication; the national penetration rate rose to 64% at end 2002, although the growth rate has slowed over the last few months.

In five years, the mobile market has risen by 41.7% in value (by 14.5% in 2002), with volumes also rising very sharply (by over 400%), proof of the wholehearted adoption of this service by users. Hence, the penetration rate rose from 10% on 1 January 1998 to 64% on 31 December 2002. Between these two dates, i.e. by September 2001, the number of mobile lines finally exceeded the number of fixed lines.

Two major trends can be observed in the market in 2002. First, a fall, for all three operators, in the proportion of customers using pre-paid cards; this indicates a tendency for operators to eliminate "inactive" customers, which tends to raise ARPU (average revenues per user). Secondly, the changeover to per-second pricing (with the three operators using different methods) has slightly increased clarity and transparency in terms of the end user's invoice.

Following the change in financial conditions and extension of the term of 3G licences from

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1 Metropolitan France is divided into 95 *départements*. See glossary

15 to 20 years, ART launched a second call for applications at end 2001. The only candidate, Bouygues Telecom, obtained its UMTS licence on 3 December 2002, joining Orange France and SFR, which had been awarded licences to deploy a UMTS network in July 2001. Hence, the French market will be able to benefit from the presence of three third-generation mobile operators, providing a basis for genuine competition.

### c. Internet access

The number of paying internet users grew sharply, by 30%, in France in 2002. The number of switched-network Internet subscribers (narrowband) rose by 17% to almost 7.5 million. Since mid-2001, prices of narrowband service have stabilised with consolidation of the market around a small number of players and changes in the general economic model for Internet access. At the same time, the number of broadband subscribers has risen sharply. At end 2002, there were 1.7 million broadband service subscribers (cable or ADSL), representing a 2.5-fold increase in the user base in just one year. Growth was led primarily by ADSL, which had 1.4 million customers at end 2002. ART measures in favour of local loop unbundling in the spring and summer of 2002 should help stimulate competition in this sector, as can be seen from the first results reported at the end of the year and early 2003.

## B. The outlook

### 1. Conditions for a rebound

The telecommunications sector does not deserve the wariness with which investors approach it today. We can see at least three objective reasons for a recovery in investor confidence.

First, the pace of innovation has not slowed. The value chain is opening up to potential new players and new markets. Innovation, both

technical and commercial, continuously broadens choice at lower cost while at the same time bringing better services.

Secondly, users continue to show interest in new services. We only have to look at the success of SMS (short message service) on mobile phones, and, amongst young people particularly, of SMS+ (surcharge), to be convinced of this. The arrival on the market of new competitively priced terminals allowing colour display of images and photos will undoubtedly contribute to the take-off of MMS (multi-media message service).

Finally, stimulus packages including the e-Europe 2005 plan and, in France, the expansion of broadband access supported by national and local authorities as a way of narrowing the "digital divide", along with representations made by the public authorities to the European Commission in favour of stimulating the telecommunications sector and harmonising the policies implemented by member states, could give new impetus to the sector pending the arrival of new sources of growth, notably from UMTS. By ensuring that the necessary time is devoted to the technical aspects and that in the meantime, users are acquainted with the new, innovative multimedia services with attractive conditions, we can ensure that these different measures will indeed have the desired effect of stimulating the sector.

### 2. Issues facing the regulator

This new economic situation has encouraged concentration in the sector and emergence of players with European or even world reach. The attendant risk of this phenomenon is creation of virtual oligopolies and the regulator will increasingly be forced to tackle this aspect.

Likewise, technological changes, and notably the convergence between fixed and mobile telephony, the Internet and the audiovisual sector,

are opening up new market segments, and bringing about a new distribution of network and service functions. The internationalisation of service providers and the fact that many are installed outside national boundaries, calls for a European or even international approach to the issues raised. The regulator cannot confine its analysis to the domestic market without running the risk of leaving out a whole section of the market. Nevertheless, national regulatory authorities must remain attentive to the specific features of their own domestic markets and seek to uphold competition while continuing to encourage investment in new networks. This seeming contradiction actually illustrates the importance of the harmonisation/subsidiarity tandem, which is the base on which regulation will have to function effectively over the next few years.

## *II. Fixed and mobile broadband access*

Internet users are increasingly demanding broadband access as new services become available. This is evident from the success of services allowing music and films to be downloaded from the Internet, large file transfers and on-line gaming, for instance. Broadband access offers greater user comfort as well as real-time transmission capabilities.

Demand for data transmission is no longer confined to fixed telephony, since users increasingly demand mobility. To respond to market demand and pending roll-out of UMTS, manufacturers have developed an intermediary solution - so-called 2.5G. UMTS should allow users to access a wide range of new services, the most important of which is Internet access at a peak speed defined in the specifications of French 3G licence holders as 384 kbps downstream and 144 kbps upstream.

### **A. Accelerating the recent development of fixed-line broadband access**

#### ***1. The turning point: the summer of 2002***

The turning point for broadband Internet access came in the second half of 2002, with an acceleration in growth of the number of residential subscribers. In one year, the number of subscribers rose 2.5-fold, making the French market the fastest growing in Europe, with 1.7 million broadband Internet users (ADSL + cable). At end 2002, broadband access amounted to around 18% of all Internet access subscriptions.

The decisions made by ART on ADSL in April and July 2002 concerning copper pair unbundling (option 1), collection and transport (option 3) and France Telecom ADSL resale offers (option 5) had a very positive impact on the market: there could well be 3 million ADSL lines at end 2003 compared to 1.4 million at end 2002. These decisions helped create favourable conditions for the emergence of a more diversified offering and brought down prices, rendering the service more affordable for large residential Internet users.

#### ***2. Consolidating growth for the future***

ART's broadband access objective in the next few years is unchanged: it aims to ensure continued growth at the rate observed at the end of 2002 and early 2003 by providing the conditions for durable, strong growth in the market and strengthening competition. To achieve this, alternative operators must be able to use the incumbent operator's infrastructure and the technological access solutions need to be diversified to satisfy the different requirements, whether they are for users in densely populated urban environments (primarily ADSL and cable) or rural environments (WLL, WiFi or satellite primarily).

Another challenge is to create conditions encouraging geographical expansion of broadband access offerings at affordable prices to allow all users, even those living in isolated rural regions, to benefit from the competitive dynamism observed in 2002 in the more densely populated urban areas.

## **B. Priority issues in 2003**

### ***1. Unbundling and ADSL***

ART will focus particularly on ADSL, in both the retail and wholesale markets, for two reasons: first, it is the dominant broadband access technology, and secondly, strong market growth on a competitive basis implies that alternative operators can use the access network (copper pairs) owned by the incumbent operator, France Telecom, through local loop unbundling. Hence, ART has set itself three primary objectives for 2003, following on from the progress made on the reference offer in the first half of 2002, and reflected in the field by an encouraging start on actual implementation at the end of last year:

- The first objective is to improve operating conditions for unbundling and service quality in densely populated areas and encourage access migration from option 5 (access and collection of DSL traffic by France Telecom) to option 1 (unbundled local loop), and from option 3 (access and collection of DSL traffic by an alternative operator) to option 1. The recent sharp rise in the number of unbundled lines, which could accelerate over the next few months, implies that ART needs to pay very close attention to this point and, where necessary, undertake joint initiatives with France Telecom and the unbundling operators to resolve the inevitable operational difficulties generated by this type of process and improve its quality (notably in terms of error rates and leadtimes).

- The second objective is to expand the geographical coverage of ADSL to serve the greatest number of users in large towns and in less densely populated areas.

- The third is to give new impetus to resale offers by improving the economic terms of option 3 while paying particular attention to the risk of a price squeeze with option 5. ART's actions in this field will be reinforced by the new regulatory framework created by transposition of European directives. Wholesale supply of unbundled access (including shared access) to loops and sub-loops on copper pairs is in fact one of the eighteen relevant markets pre-defined by the European Commission in which ART can impose interconnection and access obligations on operators with significant market power.

### ***2. Other broadband access infrastructure***

#### **a. Cable**

Cable is the second means of large-scale broadband access. ART has always seen cable networks as a major alternative infrastructure for supply of telecommunications services. However, cable labours under three handicaps, the first of which is structural. The cable operators are still carrying unpaid debt from the Cable Plan initiated in 1982 and need to invest heavily to develop new services and upgrade old networks. Secondly, allocation of network operation licences led to a fragmentation of operating areas throughout the country, preventing economies of scale. And thirdly, regulatory constraints (maximum coverage set at 8 million customers, "must carry" obligations, etc.) have further exacerbated the difficulties of the sector.

Transposition of the new regulatory framework, which as ART has long advocated, calls for a common legal regime for all electronic

communications networks, is an opportunity to simplify the regulatory regime applicable to cable operators.

#### b. WiFi

In 2002, ART took steps to liberalise roll-out of wireless local area networks (WLAN), commonly called WiFi. After the agreement reached with the Ministry of Defence for the use of frequencies in the 2.4 GHz band, service providers and operators can install access points in hot spots without authorisation; in addition, power thresholds in 58 *départements* have been raised significantly.

ART's objective in 2003 is gradually to complete the list of *départements* in which thresholds have been raised as agreements are signed with the Ministry of Defence, so as to allow wider use of WiFi in both urban and rural environments. Furthermore, ART will encourage public network trials using this technology in the 2.4 GHz band for areas that are as yet poorly served in broadband access by existing networks.

#### c. Other infrastructure

Wireless local loop (WLL) technology is used to transport high-speed data and provides a means of Internet access for small and medium-sized businesses. In particular, it opens up the local loop to alternative operators. Difficult economic conditions in the telecommunications sector in 2002, the lack of maturity in the 3.5 GHz band and the cost of equipment in the 26 GHz band have all impeded WLL development. In the framework of their regional development policy and given changes in the legislative and regulatory environment, local authorities might find in WLL a good solution for bringing broadband to as-yet uncovered areas. WLL is also complementary to WiFi in some respects, notably for connection of access points.

Satellite is another means of opening up certain areas. The challenge, for 2003 and thereafter, is to develop and strengthen an economic model that will give private users access to a broadband offering under satisfactory tariff conditions (similar to ADSL). The CIADT<sup>1</sup> meeting held in December 2002 called for a study to develop this type of offering. Thanks to its expert knowledge of the market, ART can assist the public authorities in making the right choices.

ART also monitors other technologies with interest, such as FTTH (Fibre To The Home) and powerline carrier systems, even if as yet they play only a marginal role in terms of the number of broadband access subscriptions in France in 2003.

### C. Mobile broadband access

#### 1. ART's commitment to UMTS

Back in January 1998, ART was already aware of the vital importance of UMTS for promoting the information society and the telecommunications industry. By pressing for candidate selection using the "beauty contest" method and suggesting a reduction in the financial terms when presenting the results of the first call for candidates on 31 May 2001 (to bring them closer to those which it had recommended back in the first quarter of 2000), ART encouraged the emergence of factors allowing a third operator to apply for a licence. Hence, at the end of December 2002, Bouygues Telecom joined Orange France and SFR in 3G.

Another of ART's goals in this matter was to ensure the greatest possible visibility for market players, by clarifying the terms of infrastructure sharing for 3G operators. They will be obliged to inform ART of agreements signed so as to avoid any impediment to real competition. Indeed, ART has always manifested its

<sup>1</sup> CIADT: Interministerial Committee for Regional Development, see glossary

desire to make real 3G competition possible in respect of the potential of the French market. At the same time, it has called for a realistic and pragmatic approach, warning players against exaggerated optimism about the time frame for bringing services on line. This approach will continue to guide its actions and future decisions in favour of 3G development.

The timetables for commercial launch appearing in certain European countries show that the main technical hurdles are well on the way to being overcome. Hence, it is important that France does not lag behind so that users can soon benefit from the new services that will emerge.

## ***2. Mobile multimedia: the pace of development***

Very early on, ART officially declared that the timetables for launch of UMTS services were over-optimistic. In its "Viewpoint on UMTS" published in May 2001, ART wrote: "Today, everything suggests that a really viable market will only emerge at the end of 2003 or the beginning of 2004". Hence, the importance of the success of GPRS, which constitutes the essential stepping stone towards UMTS.

### **a. Pre-UMTS services on 2.5G**

GPRS is an essential link in the transition between 2G and 3G, since it allows users, business or private, to be acquainted with new services combining mobility and data transmission. GPRS offers much lower speeds than will be available with 3G, but they are still three to four times higher than GSM. Hence, the success of GPRS will govern that of UMTS, since the recent services launched on second-generation networks foreshadow those that will be available on the future UMTS networks.

### **b. Implementation delays**

The ambitious time frame imposed at EC level at the end of 1998 turned out to be incompat-

ible with the industrial cycle for UMTS, even if accelerated. In the case of GSM, it took eighteen years from identification of the first frequency bands on the European level to real take-off of the consumer market in 1997. UMTS will be no exception to this rule. The UMTS system was not even finalised on paper when the first licences were awarded in Europe during 2000.

The main reason for the delay in providing services with respect to the European timetable is the complexity of UMTS. From an industrial viewpoint, the first production cycle starts about two to two and a half years after adoption of the first standard (the first version of the specifications came out in January 2000). Production of terminals obeys the same industrial cycle as infrastructure, although with a lag of several months. The extremely wide range of services offered inevitably renders the preliminary phase before marketing of mobiles more complex. Hence, the network is ready before the terminals.

There are two other major reasons for the delay in implementing UMTS. First, use of W-CDMA (the European 3G standard) is a major break in continuity compared to the TDMA standard used in 2G (GSM). Secondly, the W-CDMA wireless interface (FDD mode) has a particularly complex protocol that requires very high processing power for the terminal to the detriment of the power that can be allocated to multimedia functions.

## ***3. Issues facing the regulator***

While the value-added services and terminals proposed in the market today are a factor of differentiation, they are also a source of segmentation of the market, with the risk of subscribers being "locked in" to a given operator. In addition, the access/service combination could bring about a centralisation of models along proprietary lines, where the operator controls the point of entry to the service by

means of a gateway and plays the role of exclusive access provider. In the longer term, this situation could exclude some technical intermediaries from the value chain and close off possibilities for competition between players providing access to any given network.

In addition, certain operators active in more than one country might be tempted to ensure interoperability and a certain transparency solely between their own networks, with the risk of fragmenting the UMTS market, contrary to what happened with GSM, from the outset, in the past.

Only an open and interoperable model will stimulate competition in the different market segments i.e. operators, service providers, manufacturers of infrastructure and terminals.

Hence, the regulator has an even more crucial role to play in defining economic models.

#### 4. UMTS outside France

Given the delay in developing the different UMTS infrastructure equipment and terminals compared to the timetable defined by the European Commission, the regulators and public authorities in the different countries have added corrective measures to the stated obligations of UMTS operators.

Hence, obligations to roll-out the networks and open commercial services have been eased in numerous countries. Likewise, different accompanying measures such as infrastructure pooling or licence term extensions have been taken to ease the constraints for operators. Finally, constraints on licence payment terms have also been eased in certain countries.

At end April 2003, very few European operators had actually launched commercial 3G services. They include Hutchison 3G in the UK and Italy, Monaco Telecom in the principality of Monaco and Mobilkom in Austria.

### III. Local authorities and regional development

#### A. Requirements

Telecommunications services are crucial for enhancing the attractiveness of our cities and regions. Local authorities are now fully aware of the importance of providing digital technologies to citizens, particularly as a way of fostering economic growth and development. Given this structural trend but also the specific economic difficulties facing traditional telecommunications operators today, forcing them, over the last few years, to take a more cautious and selective approach to investment, many local authorities have been looking closely at their capacity to establish and operate telecommunications networks. Some have already taken initiatives, notably in the field of broadband access.

Pursuant to the public mandate entrusted to it by the government following the CIADT meeting in Limoges in 2001, *the Caisse des Dépôts et Consignations*<sup>1</sup> listed some forty projects, sponsored by General Councils and inter-communal structures in 2001. The number of projects more than doubled in 2002.

Hence, local representatives have gone beyond acknowledging the need to act and have focused on the methods to be adopted. The work carried out by various organisations<sup>2</sup> generally converges on a single conclusion:

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1 See glossary.

2 "Briefing on mobile telephony and broadband Internet access ", Nicolas Forissier, UMP deputy for l'Indre, responsible for reporting on behalf of the delegation for durable regional development to the National Assembly (28/11/2002). "Information and communications technologies: an opportunity for the regions ", André Marcon, responsible for reporting to the Conseil Économique et Social (see glossary) (13/08/2001)

to avoid exacerbating the unequal development of digital technology and services throughout the country, public intervention in both offers and services is becoming a necessity.

ART is aware of the scale of investment required to provide widespread broadband access and improve mobile coverage, particularly in less densely populated areas. It has noted that the public authorities (and in many cases the local authorities) in Europe and in the USA are committed to regional development and use a variety of approaches. Other European countries also make better uses of European FEDER<sup>1</sup> funds for this purpose.

Hence, it favours allowing action by local authorities, who are often more closely aware of the requirements, not only in terms of public requirements but also those of local businesses and ordinary users, on condition that they act in partnership with telecommunications operators, with the utmost transparency and impartiality and in a way that allows better organisation of competition.

## **B. Changes in the legal framework**

### ***1. The Local Authority General Code***

To enable local authorities to take initiatives in a secure legal framework, the legislation must be amended, since the wording of article L.1511-6 of the Local Authority General Code, as interpreted by the *Conseil d'État*<sup>2</sup> after the government request for a recommendation, does not allow this if the request goes further than simple provision of so-called passive infrastructure. ART fulfilled its role of expert adviser in the interministerial discussions which resulted in presentation of an amendment to the draft legislation to ensure confidence in the digital economy (LEN). Indeed, ART clearly

expressed its position in favour of changes to the legal framework concerning action by local authorities in the field of telecommunications.

This amendment, adopted on first reading by the National Assembly on 25 February 2003, provides for abolition of article L1511-6, to be replaced by an article L1425-1, inserted in Book IV "Local public services", Section II "Provisions in respect of certain local public services".

Article L1511-6 authorised local authorities to assist private businesses in developing their activities, by taking financial responsibility for the most onerous network construction costs, primarily civil engineering costs. Article L.1425-1 allows recourse to clauses governing local public services and in this way provides a secure legal framework for local authority intervention. It also allows local authorities to use the public service outsourcing procedure to make their infrastructure available to authorised players, under transparent and impartial conditions.

The legislation also provides for modification of the authorised scope of local authority intervention.

Whereas before, according to the restrictive interpretation of the *Conseil d'État*<sup>2</sup>, local authorities were authorised to intervene solely on passive infrastructures, this new legislation will give them wider powers in respect of telecommunications networks.

In effect, the legislation provides that they may not only create but also, under certain conditions, operate telecommunications networks, thereby entering into the scope of activity described in Article L33-1 of the Posts and Telecommunications Code. However, it also provides for prior publication in order to

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<sup>1</sup> FEDER : (European Funds for Regional Development)

<sup>2</sup> See glossary.



identify the projects and requirements of operators, businesses and ordinary users, along with the infrastructure and players already active in the area in question.

A second stage of the draft legislation provides that local authorities may provide telecommunications services to the public where private initiatives are inadequate to satisfy the requirements of business or private users.

## **2. Use of FEDER<sup>1</sup> funds in the framework of Information and Communications Technology (ICT)**

One of the financial tools for developing broadband networks in France is use of European (FEDER<sup>1</sup>) funds. Through the CIADT<sup>1</sup>, the Government is currently holding talks with the European Commission with a view to adapting the framework for use of structural funds "to the new regional reality". These discussions should, notably, lead to modification of Article L1511-6 of the Local Authority General Code (CGCT).

On this point, the European Commission has announced publication of guidelines for use of FEDER<sup>1</sup> funds. The broader range of possibilities for funding telecommunications networks planned by local authorities should allow accelerated use of these funds on the national level and give new impetus to local initiatives, provided that they go ahead under conditions of transparency that are favourable to competition.

## **C. Scope**

In the CIADT<sup>1</sup> meeting held on 13 December 2002, the Government took some important steps.

### **1. 2G mobile telephony coverage**

Improving mobile network coverage is a major issue for regional development.

In the agreement signed with the ADF<sup>2</sup> in Rodez in 2001, ART provided local authorities with a tool for analysing coverage based on objective measurements of activity on the three operators' networks.

Local authorities keen to use this partnership in order to obtain reliable coverage data, were then able to use this data in their negotiations with operators carried out under the aegis of the regional *Préfectures*<sup>3</sup> in 2002. So far, some thirty agreements have been signed, while others are currently being validated.

At the CIADT<sup>1</sup> meetings on 9 July 2001 and 13 December 2002, the Government embarked on a programme aimed at extending mobile telephony coverage in France. This programme, which calls for roll-out of approximately 1250 sites covering more than 1600 district councils located in dead zones<sup>4</sup>, provides for financing of passive infrastructures by the public authorities, notably the towers on which the antennae are installed. The investment package of 88 million euros would be financed half by the Government and half by local authorities.

Leaving aside infrastructure sharing, ART worked to ensure that local roaming would also be taken into account as a means of facilitating full coverage. This solution, which concerns the three mobile operators, was chosen in the framework of legislation proposed by Senator Sido and adopted by the Senate in the autumn of 2002. It was inserted into similar clauses in the draft legislation to ensure confidence in the digital economy (LEN), adopted on first reading by the National Assembly on 26 January 2003.

<sup>1</sup> See glossary.

<sup>2</sup> Assembly of French Départements, see glossary.

<sup>3</sup> Administrative centre for a *département*, see glossary.

<sup>4</sup> i.e. areas not served by any of the three mobile operators.

A steering committee was set up under the guidance of the public authorities with a view to drawing up a list of dead zones and a hierarchical listing of the district councils to be covered. An agreement will shortly be signed by the Ministries concerned, ART, representatives' associations (AMF<sup>1</sup>, ADF<sup>2</sup>) and the three mobile operators. It will specify the areas to be covered by the plan of action, along with the accompanying technical and financial aspects.

## **2. Widening access to broadband**

The President of the Republic is committed to ensuring that all French district councils have broadband Internet access by 2007. The Prime Minister has set a target of 10 million broadband Internet users in this time frame. The CIADT<sup>2</sup> meeting held on 13 December 2002 quite rightly emphasized the importance of the "collective effort" required to meet this target.

## **D. The regulator's role**

### **1. In mobile coverage**

ART will deliver its recommendations on the breakdown between roaming areas and shared infrastructure areas as proposed in the operators' deployment plan, guided by a concern to preserve balanced competition in the mobile telephony market.

Furthermore, ART will monitor implementation of the roaming mechanism, notably the financial aspect. It will, in collaboration with the operators, define the calculation methods for determining the relevant revenues and costs to be taken into account, to ensure the financial neutrality essential in the context of public funding by subsidies.

### **2. In broadband access**

The draft legislation emphasizes the obvious point that local authorities setting up projects in compliance with the legal provisions must respect the obligations incumbent on telecommunications operators.

Hence, if the legislation is adopted as drafted, it should lead to emergence of a new category of player concerned by sector regulation, i.e. local authorities.

In view of the potential impact of local authority telecommunications projects on free and fair competition, ART may require prior notice of these projects, notably to ensure that tariffs charged for making infrastructure available to players in the sector (operators or service providers) do not distort competition.

Today, ART is placed at the heart of a new system, involving concerns ranging from public objectives in terms of regional development and narrowing the digital divide, on both the social and regional level, to objectives concerning the preservation and strengthening of competition, as a source of innovation and price reductions for users in these regions.

On this point, in 2002 ART successfully reinforced its capacity as expert in playing an advisory role upstream with respect to local authorities. It also increased its capacity to take the concerns of local authorities on board.

Upstream, ART, as an independent administrative authority, has deliberately positioned itself alongside the "Expert Groups" which the Government decided to set up at the CIADT<sup>1</sup> meeting held on 13 December 2002. ART's

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<sup>1</sup> AMF: Association of Mayors of France, see glossary

<sup>2</sup> See glossary

collaboration with ICT project heads from the SGAR<sup>2</sup>, and the strengthening of links and joint projects with Government organisations reflect its determination to contribute to the success of public policy goals in this field.

In 2002, local authorities sought ART's assistance and advice during the preliminary reflection phase before operational project implementation. Indeed, ART both seeks and strongly recommends this type of collaboration upstream of project implementation.

Another of ART's goals, particularly in respect of regional visits by members of the Board or staff from the different departments, is to seek a closer understanding of the real objectives underlying local policies, in order to fine-tune and adapt its regulatory activities to local conditions, albeit without departing from its duties under the Telecommunications Regulation Act.

Hence, ART emphasizes whenever necessary the need for local authorities, acting on the new powers conferred on them by the law, to respect the principles of partnership with operators. The time of the big multi-CUG (Closed User Group) projects appears to be over. The large urban centres that were the main drivers of these projects, now appear to be keen to take advantage of the new provisions to entrust management and roll-out to market players, or even to the new players with closer ties to the regions that are likely to emerge in 2003.

The Authority encourages these new forms of intervention by local authorities (in the framework of public-private partnership with sector players and notably operators), via public service outsourcing contracts, which may be subsidised for instance, or through leasing contracts.

A great deal of reflection on the concept of intervention by local authorities was carried out in 2002, at a time when market players were having increasing difficulty in mustering financial resources.

ART will continue to foster this trend in 2003, notably by developing new regulatory tools to encourage the intervention of local authorities in anticipating, accompanying and financing regional digital development projects.

## *IV. Continuing to adapt regulation to the new legal framework*

During 2002, the European Union established a new regulatory framework for the electronic communications sector, to be transposed by member states in 2003. The aim is to adapt the European legal framework to the new competitive environment and the development of network convergence, which leads to a clearer separation between network regulation and content regulation.

### **A. Transposition of "electronic communications" directives**

#### ***1. The new EC electronic communications framework***

##### **a. Presentation**

The EC regulatory framework for electronic communications consists of six directives and a decision.

Five directives known respectively as the "Framework", "Authorisations", "Access",

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<sup>1</sup> See glossary

<sup>2</sup> SGAR: General Secretariat for Regional Affairs, see glossary.

"Universal Service" and "Competition" directives, must be transposed into national legislation no later than 24 July 2003. The "Personal Data" directive must be transposed into national legislation no later than 31 October 2003.

A decision concerning a regulatory framework for radio spectrum policy in the European Community is applicable directly and hence does not have to be transposed.

This framework is completed by two administrative texts designed to guide the national regulatory authorities in carrying out their analysis of the markets:

- guidelines for analysis of the market and determination of SMP operators
- a recommendation concerning eighteen relevant product and service markets in the electronic communications sector, adopted by the European Commission on 11 February 2003.

## b. Principles of the new framework

The new European electronic communications framework is based on a certain number of principles:

- confirmation of the key role of regulation in guiding sector markets towards full competition and preparing for the transition to application of general competition law
- progress in establishing free and fair competition, which means adapting regulation to the diversity of competitive situations in the different markets (analysis of relevant markets, identification of operators with significant market power in these markets and choice of the right regulatory tools to be used depending on the situation of each market)
- transition to a regime of general authorisations, with the aim of facilitating overall

conditions of operation in the electronic communications sector

- consideration of the technological convergence implied in use of the term "electronic communications", which replaces and broadens the concept of "telecommunications". This means that the new system establishes a harmonised framework for all networks, independently of the content carried
- reinforcement of the Commission's role of harmonisation, more particularly in the field of market analysis and regulation.

## c. ART's activities in 2002

During 2002, ART focused on anticipating and laying the groundwork for these important changes. From January 2002, it embarked on a process of reflection on how to adapt regulation to the regulatory changes instituted by the new framework as well as to changes in the economic conditions under which it carries out its tasks. Its findings were published in a report on adaptation of regulation in July 2002<sup>1</sup>.

On 1 August 2002, The Minister responsible for Industry and the Minister for Culture and Communications launched a public consultation on changes to French legislation on electronic communications. This consultation complements and broadens the scope of an earlier public consultation launched in April 2002 by DIGITIP<sup>2</sup>.

ART provided a detailed response to the government's consultation, published on 9 October 2002 on its Internet site<sup>3</sup>. Its responses extend and supplement the proposals formulated in its report on adaptation of regulation. They are organised around several general themes:

- simplifying the regulatory framework
- providing appropriate competitive regulation
- consideration of technological convergence

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1 <http://www.art-telecom.fr/publications/adapt-regul.htm>.

2 DIGITIP : Directorate for Industry, Information Technologies and the Post.

3 <http://www.art-telecom.fr/communiqués/communiqués/2002/08-10-2002.htm>.

- adapting public service implementation procedures
- guaranteeing consumer protection.

## **2. Preparing for transposition**

### **a. Creating a task force for application of the EC framework**

At the beginning of September 2002, ART set up a task force under its Director General, with a brief to implement the new EC framework. Its job is to monitor the transposition process, coordinate the preparation of any contributions which ART may wish to make to this process, to be examined by the Board, and undertake a process of internal reflection concerning adaptation of its own organisation and working methods.

ART also undertook analyses of competition in three particular markets: narrowband Internet collection, interconnection and optical fibre infrastructure. The aim of these surveys was to gauge the scope and conditions of competition in these markets in the run-up to implementation of the new regulatory framework, which calls for general adoption of this approach on all markets.

### **b. The draft legislation on electronic communications**

Most of the responses emerging from the public consultation on changes in the French legislation on electronic communications were published on the DIGITIP<sup>1</sup> and the DDM<sup>2</sup> web-sites in December 2002.

The government then prepared draft legislation to ensure transposition of the EC directives

concerning electronic communications into French law .

Hence, on 1 April 2003, the Minister responsible for Industry and the Minister of Culture and Communications released a document containing the draft legislation<sup>1</sup>. For the most part, it consists of modifications to the Posts and Telecommunications Code and to the 30 September 1986 Act concerning freedom of communications.

At the same time, this document was submitted to ART, the CSA<sup>3</sup>, the Competition Authority and the CSSPPT<sup>4</sup>. It will then be submitted to the Conseil d'État<sup>5</sup> and adopted by the Council of Ministers by summer this year.

### **c. The Commission's recommendation on relevant markets**

On 12 February 2003, the European Commission published its recommendation on so-called relevant markets, i.e. according to the terms of the "Framework" directive of 7 March 2002, those markets likely to be concerned by ex ante regulation. Eighteen markets were identified.

In application of the new directives, ART took steps to enable it to carry out these analyses in the first half of 2003, in order to meet the obligations of the "Framework" directive, at least in relation to collection of information on the market. Note that definitive implementation of this "Framework" directive should go ahead on the basis of the legislative provisions to be examined by Parliament in the new few months.

This approach implies an even more in-depth understanding of the operation of telecom-

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1 <http://www.telecom.gouv.fr/telecom/index.htm>. DIGITIP : see glossary.

2 DDM : Directorate for the Development of Media.

3 CSA: French audiovisual authority, see glossary.

4 CSSPPT: Public service commission for posts and telecommunications, see glossary.

5 See glossary.

munications markets. It will require interaction with the Competition Authority and will include the following phases:

- a phase of quantitative and qualitative market surveys aimed, first, at assessing the position of operators on the markets and, secondly, understanding the way in which the markets operate and identifying, where applicable, any obstacles to effective competition. This first phase is scheduled for the first half of 2003
- a second phase in the form of a public consultation, which will summarise the main elements emerging from the first-phase surveys and submit the proposed measures for sector regulation for comment. This second phase should start during the second half of 2003.

To effectively start the process, ART invited the different players involved to a kick-off meeting on 6 March 2003, to present and start off the market analysis procedure which it had initiated. Some one hundred people participated in this meeting: representatives of operators, ISPs, their associations, consumer associations and legal and economic experts.

ART presented the Commission's recent recommendation on relevant markets, along with its own initial analysis concerning transposition of this recommendation into French law. The national authorities are responsible for defining the contours of these markets, i.e. defining the services included in the markets mentioned in this recommendation. ART invited comments on a document exploring this point and received more than fifteen different contributions. It is preparing to send market players questionnaires that will allow it to collect the necessary elements to analyse the situation of the different markets by the end of the summer of 2003.

### **3. ART'S recommendation on the draft legislation on electronic communications**

On 29 April 2003, ART delivered its recommendation on the draft legislation on electronic communications<sup>1</sup>, which, overall, faithfully reflects both the spirit and the letter of the directives, guaranteeing the effectiveness of the new legislative framework for electronic communications in France.

#### **a. Preliminary remarks**

ART is keen to propose changes likely to enhance further the efficacy of the new regulations and to ensure that it complies fully with the EC regulatory framework. It was keen to emphasize the importance of rapid adoption of the legislation, not only with respect to the transposition deadlines, but also in the interests of the market itself. Indeed, any delay in transposition would generate uncertainties for all the players involved, and would not be beneficial either for them or the French economy as a whole.

Furthermore, the draft legislation provides for a large number of implementing orders. Given the complexity of the questions dealt with and constraints associated with the standards hierarchy, ART agreed that it was not possible to transpose all the provisions of the directives into law. It suggested limiting any referral to regulatory provisions to the strict minimum, thereby reducing the number of implementing orders, here again with the aim of accelerating effective entry into force of the new framework.

#### **b. General remarks**

##### **• Concerning definitions**

ART considers that the draft legislation transposes the concept of "electronic commu-

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<sup>1</sup> Recommendation no. 03-552 of 29 April 2003.

nications' in accordance with the spirit of the directives, which replaces and broadens that of "telecommunications". Hence, electronic communications networks and services are defined in such a way as to permit harmonisation of the legal regime covering networks and make a clear distinction between electronic communications services and audiovisual content. However, it noted that conditional access systems were excluded from the field of access, in contradiction with the provisions of the "Access" directive.

Moreover, the draft legislation does not modify the definition of online public communications as it appears in the draft legislation to ensure confidence in the digital economy (LEN), adopted on first reading by the National Assembly on 26 February 2003, where it is defined as a sub-set of audiovisual communications. However, in order to dispel any ambiguity, the authors of the draft legislation decided to restrict the CSA's<sup>1</sup> regulatory scope to production and broadcasting of radio and television services, and audiovisual services using terrestrial microwave frequencies.

In the same spirit as its earlier recommendations and notably that concerning the draft legislation to ensure confidence in the digital economy (LEN), ART considers that it would have been preferable to make a distinction between online public communications and audiovisual communications to take better account of the specific characteristics of online communications services, which might in future constitute a separate (*sui generis*) category. At the very least, ART would like to see a definition of radio and television broadcasting services making it possible to precisely demarcate the scope of audiovisual regulation.

- **Concerning the authorisation regime**

The general authorisation system established by the draft legislation complies with the spirit of the directives. It provides notably that operators make a declaration to ART allowing it to identify the players that come under the scope of regulation and their activities. Conversely, ART recommended eliminating the paragraph concerning free installation of mobile phone jamming devices in theatres and proposed an alternative proposal that complies with European obligations in respect of competition and electronic communications activities.

In addition, ART has proposed a simplified definition of independent networks, with a view to harmonising the system of network fees paid for the use of the corresponding frequencies. It also emphasized that the concept of "closed user group" was not sufficiently precise to create clear boundaries for the independent network category.

Finally, ART proposes that the legislation provide a legal framework for field trials, to allow reworking of the obligations applied to such operations. In the spirit of the "Authorisations" directive, if called for establishment of a method for calculating fees as a proportion of operators' revenues.

- **Concerning allocation of frequency and numbering resources**

With respect to allocation and management of numbering resources, ART considers that the provisions of the draft legislation should be supplemented by explicitly integrating the point codes used for network addressing (signalling point codes) and other technical resources in the national numbering plan

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<sup>1</sup> See glossary.

managed by ART, as provided for in article 20 of the "Framework" directive.

On the question of frequency management, ART noted that the government had chosen to allow operators to transfer frequencies (previously allocated by ART) between themselves under the conditions that it had suggested.

ART also made various remarks concerning, notably, allocation of audiovisual transmission frequencies to technical operators rather than content publishers, or the possibility of revoking frequencies before expiry of a licence in the event of the frequency spectrum being reorganised, provided that sufficient notice is given. With respect to frequencies allocated after a call for applications, ART considers that there was no particular reason to modify the method used by the Minister to publish these conditions of allocation.

• **Concerning access and interconnection**

ART was pleased to note that most of the provisions contained in the directives have already been transposed. However, it considers that provision should be made for access and interconnect agreements to be submitted to it when requested, as is the case in the existing framework (for reasons of transparency and impartiality). Furthermore, it considers that the clause whereby SMP operators must submit agreements to ART should be upheld, for the same reasons.

ART notes that the obligations that may be imposed on SMP operators will be specified by decree, in order to complete the transposition of directives on this point. It insisted on the need for rapid adoption of this decree so as not to delay implementation of the new framework.

• **Concerning analysis and regulation of the markets**

The provisions of the draft legislation concerning market analysis and regulation comply generally with the spirit and the letter of the directives.

However, to ensure that transposition of the "Framework" directive is exhaustive, the draft legislation should be supplemented by two provisions. The first would exclude from the scope of the European Commission's veto any decisions relating to relevant markets previously identified in the Commission's recommendations. The second would consist of waiving the procedure whereby a national regulatory authority must notify the Commission and the other NRAs if it considers that it must take an emergency measure, under exceptional circumstances and for a limited period.

Furthermore, ART considers that defining the obligations of SMP operators in the leased line market by decree contradicts the spirit of the market analysis system. According to ART, the decree should define only a framework, allowing the Authority to identify these obligations more precisely where necessary.

Finally, the draft legislation provides that each year, ART must draw up a list of SMP operators in the markets it has defined. ART believes that repeating this procedure every year would be very cumbersome and difficult to implement. Hence, it has proposed an amendment whereby it would draw up a list of SMP operators at regular intervals and, in any case, after any amendment to the recommendation on relevant markets. This system could also allow the frequency of analyses to be modulated as a function of the markets and the speed at which they change.



- **Concerning tools of regulation**

ART notes that the draft legislation includes the improvements which it had formulated on the basis of its experience in the field of regulation, as well as the new provisions contained in the directives.

- **Tariff control**

The draft legislation gives responsibility for tariff control to ART, which tends to simplify the procedure and enhance its visibility. It provides for ART to approve or issue a public recommendation on tariffs for universal service and tariffs likely to be controlled following a market analysis.

Furthermore, following the market analyses, ART is responsible for determining which tariffs must be controlled and the way in which this is to be done (approval, recommendation, etc.), in accordance with the provisions of the directives. ART hopes that the implementing order provided for in article L.33-4 will not exclude the possibility of implementing tariff control in the form of a price cap.

- **Application of penalties**

ART notes that the draft legislation includes the provisions of the "Authorisation" directive, which provides that measures of conservation may be imposed in the event of serious infringement of the rules governing the sector. It also considers that decisions to apply penalties must be accompanied by the possibility of making application to the administrative judge to impose fines in the event of failure to comply.

- **Settlement of disputes**

ART notes the improvements made, in agreement with the "Framework" directive. It proposes explicitly widening these powers to allow institution of proceedings against operators in

any dispute opposing them to managers in the public domain, whether this means local authorities or private managers, notably for reasons of impartiality.

- **Expert opinion**

Finally, ART regrets that while the draft legislation allows it to call on expert advice in the settlement of disputes and penalty procedures, it does not make any particular provision for funding such recourse.

- **Concerning universal service for electronic communications**

ART notes the transposition of the clauses concerning provision and funding of universal service. In particular, it notes that the draft legislation adopts the principle of calculating operators' contributions to the universal service fund as a proportion of their revenues in the retail market, in agreement with the proposals it had formulated on several occasions. However, it would like to see an improvement in the wording of this provision to provide a clearer description of the revenues actually used as a basis for this calculation.

Moreover, given the sharp disagreements concerning the system for funding universal service, ART considers that the *Conseil d'État*<sup>1</sup> decree mentioned in article L. 35-3 should ease the constraints that currently encumber methods for assessing the cost of universal service.

- **Concerning consideration of convergence**

ART notes that the draft legislation provides for a harmonised framework for all electronic communications networks and that it places broadcasting of radio and television services on these networks within the scope of the 30 September 1986 Act and within the scope of content regulation.

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<sup>1</sup> See glossary

It considers that the wording of certain provisions of the draft legislation concerning broadcasting of these services does not comply with the goal of technological neutrality contained in the directives. At this stage, the draft legislation provides for different "must carry" obligations for satellite networks and the other electronic communications networks – a distinction that is not justified.

ART notes that the wording of articles concerning broadcasting of radio and television services does not comply with the goal of applying a common system to all to all players, whether operators in the meaning of article L. 33-1 of the Posts and Telecommunications Code, or distributors using frequencies allocated by the CSA<sup>1</sup>. In order to respect the principles of impartiality and technological neutrality, it would be advisable to adopt a more general formulation embracing all public electronic communications networks.

Finally, ART regrets that the method for regulating management of the passive infrastructure used by operators to build their networks is not clearly defined in the current state of the draft legislation. Given the importance of this market and the risk that some players might take unfair advantage of their dominant position, it would be advisable for the draft legislation to establish the principles and methods of this regulation.

- **Concerning transitional clauses**

The draft legislation indicates a number of provisions aimed at ensuring the transition between the current regime and the new framework. ART has stressed the important role of these provisions in ensuring continuity of the legal framework and avoiding uncertainties linked to the transition period.

It proposes adding to the existing provisions a certain number of measures which it deems essential to avoid any abrupt break in application of the legal framework. In particular, it proposes the following transitional provisions :

- provisions to maintain specific obligations for operators using frequencies (mobile and wireless local loop operators notably) until they have been transferred into the frequency allocation specifications
- clauses for control of France Telecom retail tariffs, to avoid any discontinuity in the legal framework and the practice of tariff control
- clauses to ensure that companies operating independent networks that become operators make a declaration to ART, in view of the change in definition of the concept of independent network
- clauses aimed at ensuring that agreements between cable operators and local authorities be brought into conformity with the new framework. This looks to be necessary to clarify the situation of cable and to avoid discouraging the investment required for renewed growth in this sector.

## **B. The impact of the law on the digital economy (LEN) on telecommunications**

### ***1. Purpose of the law on the digital economy (LEN)***

The main aim of the draft legislation on the digital economy (LEN), presented to the Council of Ministers on 15 January 2003 is to transpose the European directive on electronic commerce of 8 June 2000<sup>2</sup>. In particular, it amends the 30 September 1986 Act concerning freedom of communications, the 1 August 2000 Act amending the law on freedom of communications, and the Posts and Telecommunications Code.

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<sup>1</sup> See glossary

<sup>2</sup> Directive 2000/31/EC of the European Parliament and Council dated 8 June 2000, OJEC, L 178, 17 July 2000, p. 1.

The text, adopted on first reading by the National Assembly on 26 February 2003, follows on from the draft legislation on the information society (LSI). It is also the legislative translation of the "RESO 2007" programme initiated by the Prime Minister.

It is organised around four major themes: freedom of online communications, electronic commerce, security in the digital economy and methods for managing satellite systems. Some of the measures envisaged could substantially modify the overall legal framework for telecommunications.

The draft legislation revokes article L. 1511-6 of the Local Authority General Code (CGCT). Article 1a provides for it to be replaced by a new article L. 1425-1, which introduces into this code a chapter V entitled "Local telecommunications services and networks" supplementing section II of book IV of the CGCT. It gives local authorities and public institutions involved in local cooperation the power to establish and operate public telecommunications networks. However, these provisions do not apply to public audiovisual and telecommunications services available on networks established or operated within the scope of the 30 September 1986 Act.

## **2. ARTS recommendation on the law on the digital economy (LEN)**

ART issued recommendation no. 02-1090 on 3 December 2002 in response to a request for its opinion in November 2002, in which it formulated its observations on the draft legislation before it was read to the Council of Ministers.

As a preliminary, ART notes that the draft legislation substantially repeats the provisions of the draft legislation on the information society, on which the Authority had already issued recommendation no. 01-423 dated 2 May 2001.

### **• On definition of online public communications**

ART expressed reservations as to the definition of online public communications as a sub-category of audiovisual communications. It considers that this definition does not cover all the services provided by the means of communication constituted by the Internet, and might generate difficulties of application. In addition, given the mixed nature of some Internet services, ART considers it would be difficult to adopt a global definition, which would bring together very disparate situations. Hence, ART recommends establishing an exhaustive list of the online public communications services covered by audiovisual legislation.

### **• Concerning the regime of responsibility of technical service providers**

ART considers, notably, that the provisions of the draft legislation do not define a sufficiently precise legal framework for web hosters, since they maintain ambiguity as to the procedures whereby hosting service providers may refuse access to content. Likewise, the methods whereby the web hoster can gain knowledge of the illicit nature of an activity or information do not seem to be explained in a sufficiently clear manner.

### **• Concerning introduction of a legal framework for allocation of domain names**

ART considers that implementation of this legal framework is likely to reinforce the existing agencies. It emphasizes the need to guarantee the independence of these agencies and to organise the exercise of their mission via dialogue with other players in the field of information technologies and, most important, to associate ART with this work.

- Concerning regulation of electronic advertising

ART considers that the system of securing the prior consent of the user guarantees sufficient protection of consumers and individuals, a crucial point for development of the information society. Nevertheless, it points out that ambiguities in certain formulations in the draft legislation such as "similar or related goods and services" could give rise to difficulties of interpretation.

- Concerning satellite systems

ART considers that setting up an authorisation regime controlled by the ANFr<sup>1</sup> for satellite systems would have the effect of establishing a dual regulation mechanism, creating unnecessary complications and even legal disputes at the very time when the new EC directives aim to harmonise and simplify national regimes. It considers that the system envisaged is disproportionate to the goal sought. Hence, it believes that regulation of satellite systems, an essential component of the telecommunications sector, should be exercised by ART and the Minister responsible for Telecommunications under the same conditions as provided for the rest of the sector.

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<sup>1</sup> ANfr : National Frequency Agency, see glossary.

# Glossary of French terms

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- ADF:** assembly of French *départements* : representative body for local authorities to their interests and which do not fall under the jurisdiction of any other body.
- AMF:** association of Mayors of France Coordinates members' activities and provides assistance.
- ANFr:** National Frequency Agency Organisation for managing and planning the radio frequency spectrum.
- Caisse des dépôts et consignations:** the *Caisse des Dépôts* is a public financial institution created to provide secure management of private investment funds requiring special guarantees. These funds are used for social and economic investment programmes in the public interest.
- CIADT:** interministerial Committee for Regional Development. The theme of the CIADT meeting was : narrowing the "digital divide".
- Conseil d'État:** the Conseil d'Etat has an advisory role to the Government and the President of the French Republic. It examines draft laws and ordinances prior to them being submitted to the Council of Ministers. It is also the supreme administrative jurisdiction and rules on appeals brought by private individuals or legal entities against irregular administrative acts that have been considered as prejudicial
- Conseil Economique et Social :** The *Conseil Économique et Social* issues recommendations to the French authorities and also takes part in the legislative process on Acts to be submitted for approval by the French Parliament.
- CSA:** French audiovisual authority. An independent administrative authority to guarantee broadcasting freedom and oversee the quality of programmes.
- CSSPPT:** Public service commission for posts and telecommunications Monitors the balanced development of the public service. Legal advisor to executive power for posts and telecommunications sector.
- DDM:** Directorate for the Development of Media.
- Département :** Metropolitan France is divided into 95 *départements*.
- DIGITIP:** Directorate for Industry, Information Technologies and the Post. Related to the Ministry for Finance and Industry, it promotes competitive development of Industry in France.

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**FEDER** : European Funds for Regional Development. Its purpose is to offset regional inequalities and promote balanced development of European regions. Funds are granted to local players in the framework of development programmes established by the EU, the Member States and local authorities.

**Préfecture** : Administrative center for a *département*.

**SGAR** : General Secretariat for Regional Affairs. Coordinates public authority actions involving various local authorities.