

Guidelines regarding the legal framework applicable in France between 25 July 2003 and the adoption of the transposition texts for the “electronic communications” directives

The main EU directives regarding electronic communications were adopted on 2 March 2002 and officially published on 24 April 2002. Following that, the French government initiated the complex legislative process which would allow the transposition of these directives into French law.

Despite its efforts, and given the many constraints related to this process, it is now clear that the new legal framework for electronic communications will not be fully operational for several months.

However, the directives require that they be transposed by 24 July 2003 at the latest, and that corresponding national laws be applicable by Member States by 25 July 2003. Thus, a transition period will begin at this date, during which, in the absence of complete transposition measures, the current legal framework will have to be interpreted in light of the objectives of the directives.

Given the stakes, the Minister for Industry and the Autorité de régulation des télécommunications (ART) — the authorities responsible for regulating the telecommunications sector — wished to make public their joint analysis of the legal framework applicable during this period, in order to provide the legal security and visibility sector players need.

The purpose of these guidelines is to determine which framework will be applicable in the major areas of regulation during the period between 25 July 2003 and the adoption of the transposition texts. They are divided into three parts: the first identifies the status of this document; the second identifies the principles which will apply; and the third analyses the system applicable to the major areas of regulation during this period.

1. The status of these guidelines

Using these guidelines, the Minister for Industry and ART wish to clarify the conditions under which they will be required to apply the legal framework in force during the period between 25 July 2003 and the adoption of the draft law which is to transpose the EU directives regarding electronic communications.

However, these guidelines have no legal weight and do not modify current law in any way. Moreover, operators are required to respect the common law applicable to economic activities.

The adoption of these guidelines does not deprive the Minister for Industry or ART of their powers of discretion. They retain the right to depart from the defined course, either for reasons of general interest, or in order to take account of special circumstances. In both cases, they will make all efforts to clearly explain their reasons for doing so.

2. Principles

2.1. Jurisprudence

The main question regarding the period between 25 July and the adoption of the texts is whether the directives are directly applicable in the absence of transposition.

In this regard, the jurisprudence of the CoJEC allows constituents to invoke the clauses of an untransposed directive to their government, as long as they are clear, unconditional and sufficiently precise.

However, it is important to note that the CoJEC jurisprudence recognises only the direct vertical ascending effect of an untransposed directive (that is, for relations between constituents and the government) and not the direct horizontal effect, which is, in this case, issues affecting relations among operators or between operators and users.

Jurisprudence of the Conseil d'Etat (French supreme administrative Court) does not allow constituents to invoke the clauses of an untransposed directive to appeal an individual administrative decision. On the other hand, it does allow the questioning of laws and regulations which might be contrary to the objectives of a directive. It also permits one to invoke the non conformity of laws and regulations in support of action against individual acts resulting from them. Still, this does not imply that the very clauses of the directive must be applied directly.

Thus, the Minister of telecommunications and ART consider that the jurisprudence of both the CoJEC and the Council of State give cause to directly apply the directives as long as the clauses in question are clear, unconditional and sufficiently precise to be applied. And even when they are not, public authorities must not take any measures which would impede the implementation of the objectives of the directives, and are required to block those standards whose application might have this consequence.

2.2. The clauses of the directives

The directives identify several categories of transitory measures, which may be applied as of 25 July, before and after the adoption of transposition texts:

- Article 17 (§ 1 and 2) of the “authorisation” directive requires that existing authorisations be adapted to the new framework beginning 25 July 2003. However, existing authorisations may be extended to 24 April 2004 in cases where adaptation would restrict the rights or extend the obligations of operators.
- Article 17.3 of the “authorisation” directive allows Member States to temporarily preserve an obligation for network access which is linked to an existing authorisation, if the removal of this obligation would create excessive difficulties for the operators benefiting from access and if the operators are not able to negotiate new agreements under reasonable conditions. This extension must be requested from the Commission before 25 July 2003.

- Article 27 of the “framework” directive, article 7 of the “access” directive and article 16 of the “universal service” directive require that existing obligations be preserved in a number of areas, until the market analysis process has been completed:
 - Obligations for access and interconnection (including local loop unbundling)
 - Obligations for the control of retail fees
 - Obligations for the provision of a minimum set of leased lines
 - Obligations for carrier selection and pre-selection

3. The system applicable between 25 July 2003 and the adoption of transposition texts

3.1. Authorisations

As of 25 July 2003, the Minister for Industry and ART may no longer require operators to obtain an individual authorisation, since such an obligation is contrary to the objective of the “authorisation” directive. The same applies to those operators having submitted an authorisation request prior to 25 July, for which examination exceeds this date: in this case, even if the examination has been completed, no individual authorisation will be issued, which means that the operator will not be charged a set-up fee (cf. below).

However, this does not apply to those operators who have requested and been granted an authorisation prior to 25 July. CoJEC jurisprudence does not allow constituents to invoke the clauses of an untransposed directive prior to the transposition deadline.

Moreover, in order to provide the security operators require as regards the legal framework of their activities, ART will set up a preliminary declaration process for operators beginning 25 July. It will follow the spirit of the draft law on electronic communications and will be based on guidelines soon to be made public. These will provide a list of the information to be submitted, in accordance with the “authorisation” directive. This declaration will apply only to the operators of public networks and to the suppliers of public telephone services who have not yet been issued an individual authorisation in application of articles L. 33-1 and L. 34-1 of the Post and Telecommunications Code. ART will issue a receipt to operators having submitted this declaration, allowing them to exercise their rights (interconnection, rights of way, etc.) and informing them of their obligations (taxes, contribution to financing universal service, etc.)

During this period, the general obligations in force compatible with part A of the appendix of the “authorisation” directive will continue to be applied to operators, regardless of whether they have already received an individual authorisation or submitted their declaration after 25 July 2003.

As regards experimental networks, a reduced set of obligations will be kept, particularly as regards the application of taxes. To this end, in the guidelines to be published in the near future, ART will provide a list of the information which will be requested of operators for experiments.

3.2. Taxes

It is important to distinguish between the set-up fee and the management and control tax.

Since, under the “authorisation” directive, an individual authorisation will no longer be required to enter the market, the set-up fee will no longer be justified. Therefore, ART will no longer require payment of this tax.

Moreover, operators having requested an authorisation prior to 25 July and whose authorisation cannot be issued before this date will not be liable for the set-up fee, in that no individual authorisation was issued to them. According to the Post and Telecommunications Code and finance law, this fee results from the authorisation order issued by the Minister for Industry. When this order disappears, payment of this fee cannot be demanded.

The management and control tax will continue to be justified under the “authorisation” directive and must be paid.

3.3. Frequencies and numbering

Under the “authorisation” directive, frequency and numbering resources may be allocated using an individual authorisation and may be subject to a fee. Therefore, the application of texts in force is compatible with the objectives of the directive. Under this authorisation, the obligations stipulated in part B of the appendix of the directive for frequencies and part C for numbers may be imposed.

In this respect, operators having obtained frequencies following a call for applications have received specific obligations under the commitments they made during the procedure. These obligations will be maintained for the frequencies used, as permitted by appendix B of the “authorisation” directive.

3.4. The obligations of operators with significant market power for interconnection and access

Under the “access” directive, the applicable obligations in force before the application of this directive are preserved, until the National Regulatory Authority (NRA) has conducted the market analyses and taken appropriate decisions.

On this point, the direct application of the directives is not problematic because they are largely assimilated in the legislation in force. However, by virtue of the Post and Telecommunications Code in force, operators with significant market power must be designated annually. Consequently, given that these obligations are preserved, operators with significant market power must be designated in 2003 in order to apply the corresponding obligations to these operators for 2004.

Thus, the prolongation of existing obligations requires that new decisions be adopted, and in particular:

- The preliminary designation of operators with significant market power under the current system
- The approval of the 2004 interconnection catalogue under the current system

- The application of the price cap for the termination of fixed-to-mobile calls

The renewal of this process fully meets the objective of ensuring the continuity of the framework and of preventing any legal vacuum. Moreover, it was approved by all operators present at the interconnection committee meeting held on 24 April 2003.

In addition, the obligations regarding unbundling are preserved because, until the completion of the market analysis, the EU regulation of 18 December 2000 remains in force and France Telecom continues to be the notified operator under the terms of this regulation, as per article 27 of the “framework” directive.

3.5. Pricing approval

Pricing control is governed by article L. 36-7 (5°) of the Post and Telecommunications Code, by the specifications of France Telecom approved by decree 96-1225 dated 27 December 1996 under article L. 35-2 of the Post and Telecommunications Code and under article 8 of law no. 90-568 dated 2 July 1990,.

The transitory clauses under article 16 of the “universal service” directive allow the continuation of existing pricing control obligations. Therefore, the same reasoning is applied as for access and interconnection obligations: the direct application of the directives is to a large extent assimilated into the legislation in force.

Thus, the approval of universal service prices and the prices of services for which there is no competition on the market will be maintained after 25 July 2003.

3.6. The provision and financing of universal service

The “universal service” directive does not include any transitory measures regarding the provision and financing of universal service. Moreover, it allows a significant evolution to these conditions of provision and financing, although its clauses are not unconditional and are not sufficiently precise to be applied directly. Indeed, it gives Member States significant room to manoeuvre in determining the means of provision and financing.

Under these conditions, the directive cannot be applied directly in the absence of transposition texts. Therefore, the current clauses of the Post and Telecommunications Code remain in force.

3.7. Dispute settlement

A number of points need to be cleared up as regards dispute settlement by ART:

In terms of the procedure to be applied, under the Post and Telecommunications Code, ART is required to render its decision within three months, which may be extended to six months. However, article 20 of the “framework” directive sets a timetable of four months, which may be extended “under exceptional circumstances”. Thus, in order to respect the spirit of the directive, ART will have to apply the 4-month timetable stipulated by the directive wherever possible. In any case, it cannot extend this timetable beyond the six months set by the code.

As regards the legal framework of the decisions themselves, ART will have to deal with a dual jurisprudence:

- On the one hand, the CoJEC recognises only the direct vertical effect and not the direct horizontal effect of untransposed directives, which means that the law in force continues to apply in the settlement of a dispute between operators. Indeed, in settling a dispute, an operator cannot be imposed a new obligation with respect to those which are based in existing law, as long as this obligation has not been transposed.
- On the other hand, the Conseil d'Etat considers that national law, including that prior to a directive, must be interpreted by the courts in light of the objectives set by the directive.

Under these conditions, we must distinguish the system applicable to the admissibility of a case from that applicable to the content of the decision.

Thus, the admissibility of access or interconnection requests must be determined by ART, after 25 July, while taking into account the definition provided by the new directives for these concepts.

As concerns the content of its decisions, in ruling on a dispute, ART may not impose on an operator any obligation which has not been transposed, which is not required by the current legal framework and for which no basis can be found by interpreting this framework in the light of the objectives of the directives.

In any case, ART will be required to conduct a legal analysis on a case-by-case basis, given the specific nature of each dispute submitted to it.