Regulating market competition

The market analysis process

I. A three-step process

Pursuant to the European Directives on electronic communications, the Act of 9 July 2004 effected deep-seated changes to the Post and Electronic Communications Code, notably with respect to the market analysis process. A Section 2, concerning operators with significant power in one of the electronic communications sector's markets, was introduced into the legislative section of the Code. This mechanism was specified through Decree n° 2004-1301 on SMP operators, dated 26 November 2004, then published on 30 November 2004, referred to hereafter as the "market analysis" Decree.

Pursuant to Articles L. 37-1 and L. 37-2 of the Post and Electronic Communications Code, ART is now responsible for:

- - defining the relevant markets for *ex-ante* regulation, following receipt of the Competition Council's opinion;
- - designating the operator(s) with significant market power in each of the markets, following receipt of the Competition Council's opinion;
- imposing, amending or, if appropriate, withdrawing these operators' obligations.

ART must also request the CSA's (broadcasting authority) opinion of its relevant market and SMP operator decisions when radio and television broadcasting are included in the market's scope. Both the Competition Council and the CSA have a period of six weeks to return their opinions to the Authority.[1]

ART must conduct its relevant market analysis by taking utmost account of the European Commission's Recommendation on relevant markets of 11 February 2003, and of the market analysis and SMP Guidelines of 11 July 2002[1]. These analyses must be part of a forward-looking approach.

1) JOJEC n° C 165, of 11 July 2002.

Furthermore, given that these decisions will have a major impact on the markets being examined, ART must consult the sector nation-wide to gather the views of the people involved. The minimum length of this public consultation has been set at one month by Article D. 304 of the Code.

ART must also define the length of these market analyses' validity. According to Article D. 301 of the Post and Electronic Communications Code, it cannot exceed three years. Nevertheless, when justified by the market's evolution, the Authority can elect to conduct a new market analysis before the deadline. Similarly, should the Commission alter its Recommendation on relevant markets, the Authority must conduct new analyses as soon as possible. It should also be noted that, in accordance with Article D. 303 of the Post and Electronic Communications Code, ART can amend SMP operators' obligations without having to redefine the relevant markets.

Lastly, in accordance with the provisions contained in Article L. 37-3 of the Post and Electronic Communications Code, ART must notify the Commission and the EU's other national regulatory authorities (NRA) on its draft decisions. These bodies have a minimum of one month to submit their comments, which ART must take under close consideration. Nevertheless, if the Commission feels that these draft decisions undermine the common market's development, or if it has concerns that the draft decisions made in the recommendation – on the definition of an unlisted market, or the designation of an SMP operator – are incompatible with community laws, it will have an additional two months to further its examination. At the end of this period, it can veto the adoption of the draft measures.

This process can nonetheless be eliminated, in accordance with Article L. 37-3 of the Code, under exceptional circumstances that require urgent measures to be taken to preserve competition and protect users' interests. In such a case, ART and the Minister in charge of electronic communications can adopt proportionate measures immediately, and which will be in effect for a maximum of 6 months only.

1) Defining the markets' scope, in terms of services and geography

The first stage involves defining the market's scope, both geographically and in terms of the services it encompasses. The entire process must be conducted in accordance with the principles of competition law.

ART must conduct analyses on at least each of the 18 markets identified in the European Commission's Recommendation. It can also define additional markets which were not listed by the Commission. In such a case, the Authority will be subject to stricter controls from the Commission, which has the power to veto its draft decision.

1.1. Supply and demand-side substitutability

For each of the market analyses, which are detailed in the following sections, and pursuant to the European Commission's Guidelines, ART undertook to analyse:

- Demand-side substitutability: two products are said to belong to the same market if they are sufficiently interchangeable for users, in terms of the use that is made of them, their features, tariffs, terms of distribution, the cost of switching from one product to another…

- Supply-side substitutability: supply-side substitutability is said to exist when an operator, which is not currently present in a given market, is likely to enter it rapidly, in response to a rise in the price of the products being sold in that market.

To establish the existence of supply or demand-side substitutability, ART has often applied the method known as the hypothetical monopolist test. This test involves studying the effect on demand of a small but lasting increase in the price of a service (e.g. 5% to 10%), in such a way as to determine whether there exist services that can be considered substitutable by the users to whom they are likely to be geared. The essential usefulness of this tool lies in its conceptual nature. Consequently, as underlined in the above-mentioned Guidelines, its implementation does not involve a systematic, in-depth econometric study.

The hypothetical monopoly test: a tool for defining a market's boundaries

The hypothetical monopoly test, or SSNIP *(Small but Significant Non-transitory Increase in Price)* consists of considering a "candidate" market, of applying the hypothesis of the existence of a monopolistic and unregulated enterprise in this market, and of examining whether this hypothetical monopoly could profitably increase its tariffs in this market. The goal is to observe whether or not, following a small but significant and non-transitory increase in the tariff (5% to 10%) – with all other elements remaining unchanged – consumers would be likely to turn to other substitutable products or to other geographic consumption areas. As long as substitution behaviour exists which removes the appeal of increasing tariffs, the substitutable products and additional geographical areas are incorporated into the definition of the candidate market. The process continues until the increase in tariffs becomes profitable for the hypothetical firm.

The Cellophane Fallacy

In addition to the complexity of its implementation, due to the multitude of data to be culled, this test has its limitations. The most common limitation is known as the "Cellophane Fallacy," which reveals the difficulty in applying the test when the prices being charged in the candidate market reflect the monopolistic structure. In other words, the test is more suitable if the prices in application are more competitive. If one considers a monopolistic company operating efficiently in a candidate market, then the price that it practices results from maximised profit, and is a monopolistic price. By definition, any other price would lead to lower profits. The hypothesis of increasing the price, even slightly, leads, on the one hand, to the company running counter to rational behaviour (or to a predatory strategy) and, on the other hand, to creating a bias in the relevant scope of the candidate market.

1.2. Defining a market's geographical scope

According to a consistent line of decisions in competition law, from a geographical standpoint, a relevant market is *"the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."*

According to the Commission Guidelines, two main criteria are used for defining a market's geographical scope:

- The area actually covered by a network;
- The existence of legal mechanisms (legislative and regulatory) that lead in practice to the distinction of this or that geographic zone or, on the contrary, to consider that the market's dimension is national.

In the market analyses launched by ART in 2004, it was revealed that France possesses certain singular features in this respect, compared to other European Union Member Sates, because of the large number of regions that make up its national territory. Each analysis therefore takes into account the fact that France is made up of the Metropolitan area, overseas *départements* (the Reunion, Guadeloupe, Martinique and Guyana), and the overseas territories of Mayotte and Saint-Pierre-et-Miquelon, where the Post and Electronic Communications Code applies. ART does not, however, have regulatory powers in the overseas territories.

This geographical dispersion of the French territory can therefore lead ART to define numerous geographical markets for a single product and service market. ART must also take into account the specific features of each of these regions in terms of competition analysis. These features emerge particularly when defining the national transit market, or the market for access and calls originating on public mobile phone networks.

Furthermore, because of their very nature, certain markets imply geographical divisions based on the operators' networks. Defining the relevant mobile call termination markets is a case in point, for which ART decided that each mobile network constitutes a relevant geographical market.

1.3. A market's relevance with respect to *ex-ante* regulation

Defining a relevant market with respect to *ex-ante* regulation must be undertaken with particular attention to the Commission's Recommendation and the Guidelines referred to above.

The Commission's Recommendation defines the three criteria which, when combined, make it possible to demonstrate the relevance of imposing *ex-ante* regulation on a market. For each market, this involves verifying:

- The existence of structural, legal or regulatory barriers to entry;
- A lack of dynamic competition;
- Competition law's inability to remedy the market's deficiencies single-handedly.

To the extent that the Commission analysed these three criteria when defining the markets listed in its Recommendation[2], national regulatory authorities (NRA) are not required to demonstrate the co-existence of these criteria when defining a market identical to the 18 markets listed. Under this hypothesis, their task is limited to providing a precise definition of the market in terms of products and geography[3].

This means that these three criteria need only be applied in a hypothetical situation whereby a national regulatory authority is defining a new market which is not covered by the Recommendation, or another market altogether.

Nevertheless, for all markets, Article L. 37-1 of Post and Electronic Communications Code specifies that ART must define the relevant markets, *"particularly with respect to obstacles to the development of effective competition."* In its market analysis process, the Authority therefore endeavours to demonstrate the existence of those obstacles that justify *ex-ante* regulation.

Barriers to entry

Entry barriers are factors that block or hamper enterprises seeking to enter a given market. They can result from a particular market structure (economies of scale, irretrievable fixed costs, product distinction), or from the behaviour of the undertakings already operating in that market. The government too can be the source of entry barriers (e.g. by imposing certain standards or by authorising technological patents).

2) p.12,13 on the reasoning behind the Commission's Recommendation on relevant markets

3) §36 of the Guidelines: "The main product and service markets whose characteristics may be such as to justify the imposition of ex ante regulatory obligations are identified in the Recommendation which the Commission is required to adopt pursuant to Article 15(1) of the Framework Directive, as well as any Decision on trans-national markets which the Commission decides to adopt pursuant to Article 15(4) of the Framework Directive Therefore, in practice the task of NRAs will normally be to define the geographical scope of the relevant market, although NRAs have the possibility under Article 15(3) of the Framework Directive to define markets other than those listed in the Recommendation in accordance with Article 7 of the Framework Directive (see below, Section 6)."

Market deficiencies

The "welfare economic theory" justifies the State's economic invention in cases where the market fails in its task of distributing available resources between the agents (i.e. the market's "game plan" is inefficient). Among these deficiencies is the case of "natural monopolies." This case emerges when, because of the size of the market for a certain good, production costs are lower if production is undertaken by a single company. The largest company in the market is therefore in a position to supplant its competitors and, if left to its own devices, the market's structure will tend towards a "natural" monopoly. Although this structure is one where production costs are kept to a minimum, it also leads the monopoly firm to use its market power to set the price level that maximises its profits. This price level corresponds to sub-optimal production compared to consumer demand. The role of the State, and of the regulator in particular, is therefore to substitute the market to avoid, on the one hand, the market from converging into a monopoly and, on the other hand, to hem in the power of the companies operating in that market.

2) Designation of SMP operators

After having defined a relevant market, ART must conduct a competitive analysis to determine whether or not there exists one or several SMP operators in this market.

Article L. 37-1 of Post and Electronic Communications Code specifies that: *: "an undertaking shall be deemed to have significant market power if either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. In this case, the operator may also be deemed to have significant influence over another market which is closely related to the first".*

Article D. 302 of the Code stresses the fact that when defining SMP operators, ART must take utmost account of the aforementioned European Commission Guidelines.

2.1. Individual dominance

With respect to determining individual SMP, the Guidelines specify that "According to established case-law, very large market shares - in excess of

50% -are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position"[4]. Nevertheless, an operator cannot be said to have SMP merely because it holds a large share of the market. This means that the player's position must also be examined with respect to qualitative market criteria, including[5]:

- the overall size of the company or undertaking;
- control of an infrastructure which is not easily duplicated;
- technological advantages or superiority;
- absence of or low countervailing buying power;
- privileged access to the capital markets and financial resources;
- diversification of products and/or services (e.g. bundled products or services);
- economies of scale;
- economies of scope;
- vertical integration;
- the existence of a highly developed distribution and sales network;
- lack of foreseeable competition;
- obstacles to expansion.

4) §75 of the Guidelines.

5) § 78 of the Guidelines.

In each of the market analyses that it began in 2004, ART therefore assessed the market share for each of the players operating in the market being analysed, followed by an assessment of the relevant qualitative criteria for this market.

In its documents on broadband markets which were submitted for public consultation, for instance, the Authority took into account the size of the undertaking, economies of scale, vertical integration and control over an infrastructure that was not easily duplicated. When analysing call termination markets for alternative fixed-line operators, among other things the Authority examined the presence of a countervailing buying power, such as France Telecom.

Economies of scale and scope

A company will generate economies of scale when it reduces its unit costs by increasing production (in other words, when average costs diminish as production rises). Those operations that generate high fixed costs (such as network industries) also generally have economies of scale segments. A company will generate economies of scope when it reduces its production costs by expanding its line of products and services (economies derive from using the same inputs to produce different outputs).

Price elasticity of demand

Elasticity of demand with respect to price measures the relative variation in demand for a good when its price changes. The greater the elasticity in absolute value, the higher demand's sensitivity to price. For instance: if demand increases by 20% when prices drop by 2%, then the demand/price elasticity is 10 (in absolute value).

2.2. Collective dominance

As concerns collective significant market power, Article D. 302 II of the Post and Electronic Communications Code specifies that it can be found to exist in cases where companies, *"operate in a market the structure of which is considered to be conducive to coordinated effect, even in the absence of structural or other links between them. Such a situation may occur in cases where the market satisfies a number of appropriate characteristics, in particular in terms of market concentration, transparency and other characteristics, mentioned below:*

- *mature market;*
- *stagnant or moderate growth of demand;*
- *low elasticity of demand;*
- *homogeneous products;*
- *similar cost structures;*
- *similar market shares;*
- *lack of technical innovation; mature technology;*
- *absence of excess capacity;*
- *high barriers to entry;*
- *lack of countervailing buying power;*
- *lack of foreseeable competition;*
- *various kinds of informal or other links between the undertakings concerned;*
- *retaliatory mechanisms;*
- *lack or reduced scope for price competition.*

This list is not exhaustive, and the characteristics listed are not to be taken cumulatively."

On 17 December 2004, ART published a public consultation on the market for access and call origination on public mobile networks. Upon completion of this analysis, it tabled the conclusion that Metropolitan France's three mobile networks enjoy collective dominance of this market.

Finally, as concerns determining an operator's SMP through leverage, Article D. 302 II also specifies that a market is deemed to be closely linked to another when *"the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking."*

3) Obligations that can be imposed on an SMP operator

After having defined a relevant market, and designated the operator(s) that have significant power in this market, ART must then impose obligations which are proportionate to the regulatory objectives set out in Article L. 32-1 II of the Post and Electronic Communications Code.

3.1. Obligations with respect to interconnection and access

As concerns interconnection and access, pursuant to Article L. 38 of the Post and Electronic Communications Code, SMP operators may be subject to one or several of the following obligations:

- Make public all information relating to interconnection and access, and notably the publication of detailed reference interconnection and access offers, providing technical and pricing details when subject to obligations of non-discrimination. ART has the power to modify this offer.
  This obligation is specified in Article D. 307 of the Post and Electronic Communications Code. ART can demand publication of data, notably accounting, technical and tariff-related, in addition to the transmission of interconnection and access agreements upon signature.
  Should the Authority demand publication of a reference offer, it can specify the list of minimum services to be included in this offer, and impose prior publication of all changes to the terms and technical and pricing conditions attached to the provision of their interconnection and access services, by a deadline set by the Authority.

- Provide interconnection and access services in a non-discriminatory fashion. To this end, and in accordance with Article D. 309, the operator must apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provide services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. Lastly, ART can demand justification of the technical and financial terms of the interconnection and access services that these operators supply to their own divisions, subsidiaries and partners.

- Comply with reasonable requests for access to network elements or the resources attached to them. Under this hypothesis, Article L. 38 V of the Code lists certain criteria that enable ART to ensure the proportionate nature of this obligation. Article D. 310 provides an open list of the obligations that can be imposed to this end (co-location, resale, unbundling), and specifies that it is incumbent on the Authority to define, where necessary, the terms for implementing these obligations, notably the time limits, to ensure their execution under fair and reasonable conditions.
  Moreover, it should be noted that unbundling is subject to a specific set of conditions. Article D. 308 of the Post and Electronic Communications Code stipulates that when an operator is obligated to comply with reasonable requests for access to the local loop, pursuant to Article D. 310, *"it will publish a technical and tariff offer for local loop access."* This Article also contains the minimal list of services that must be specified in this reference offer.

- Not charge excessive prices or apply a price squeeze in the market in question, including obligations for cost orientation of prices. Article D. 311 of the Post and Electronic Communications Code specifies that the burden of proof that prices are cost-oriented shall lie with the operator concerned. In accordance with this obligation, the Authority can therefore impose a multi-annual framework for these tariffs, or full justification of these tariffs, which it can demand be modified.
  Furthermore, for all tariff control obligations, the Authority can specify the cost recovery mechanisms, pricing methods and cost accounting systems. It can conduct European comparisons, and must ensure that the methods used promote economic efficiency, favour lasting competition, maximise the advantages for consumers, and ensure reasonable remuneration of the capital employed, in light of the risks involved.

- Undertake separate accounting for certain interconnection or access operations, or use accounting methods for the services and activities that enable verification of compliance with the obligations imposed under the present Article. Compliance with these terms is verified at the operator's expense, by an independent body designated by the Authority. This obligation is specified by Article D. 312 of the Post and Electronic Communications Code: the Authority can establish the specifications of the cost accounting system, along with the number, scope and degree of details to be supplied in the individualised accounts of an operator subject to an obligation of separate accounting, along with the cost evaluation methods and cost allocation rules. To this end, it must adhere to the principles of efficiency, non-discrimination and relevance. It must also determine the rate of return on the capital employed.

- If necessary, under exceptional circumstances, operators can be subject to any other obligation, following approval from the European Commission.

Lastly, this same Article L. 38 also stipulates that operators which are deemed to have significant power in the public fixed telephone connection market must provide all other operators with the interconnection and access services they require to allow their subscribers to pre-select their telephone services at a reasonable price, and connect to the pre-selected operator on a call-by-call basis by dialling a short prefix – the tariffs of this service being based on corresponding costs. Under Article D. 313 of the Code, the Authority has the power to define the interconnection and access services required, along with their terms and the deadline for their implementation.

3.2. Retail market obligations

Article L. 38-1 of the Post and Electronic Communications Code stipulates that when an operator is designated as having significant power in one of the electronic communications sector's retail markets, and that the obligations provided for under Article L. 38 do not make it possible to achieve the regulatory objectives stated in Article L. 32-1, one or several of the following obligations may be imposed:

- Provide retail services in a non-discriminatory fashion; no unfair bundling of these services.

- Not practice excessive prices or apply a price squeeze; practice cost-based tariffs, comply with the multi-annual framework defined by ART, communicate these tariffs to the Authority prior to their implementation, in cases where these tariffs are not controlled as part of a universal service mandate. In this last case, the Authority can oppose the implementation of a tariff through a decision supported by analyses, and economic analyses in particular, which substantiate its opposition.
  This provision is specified by Articles D. 314 and D. 315 of the Code. Operators required to practice cost-oriented tariffs must therefore be able to prove their compliance with this obligation.
  As to prior communication of their tariffs, they must be sent at least three weeks before their implementation, and must be accompanied by information that makes it possible to evaluate both the prices and the

elements of the corresponding offer. The Authority can oppose the implementation of these tariffs through a decision supported by analyses, and economic analyses in particular, which substantiate its opposition, within three weeks of the complete submission having been sent. When necessary, these analyses must take into account all of the obligations imposed on the operator, pursuant to Article L. 38-1.

- Employ accounting methods for the services and activities that enable verification of compliance with the obligations provided for in this Article. Compliance with these obligations will be verified by an independent body, at the operator's expense. The aforementioned provisions listed in Article D.312 will apply to implementation of this obligation.

These obligations must be proportionate to achieving the objectives of Article L. 32-1, and established with respect to the nature of the obstacles to the development of efficient competition identified by the market analysis.

Finally, it should be noted that these obligations do not apply to emerging markets, particularly those created by technological innovation, except in cases that threaten to undermine the objectives stated in Article L. 32-1 of the Code. In such cases the Authority can impose the obligations stipulated in Article L. 38-1 only after issuing a substantiated decision, indicating those objectives which are being undermined, on a case-by-case basis, and providing justification for imposing these obligations.

3.3. Leased lines

Pursuant to Article L. 38-2 of the Post and Electronic Communications Code, operators designated as having significant power in the market for the provision of all or part of the minimum set of leased lines, mentioned in Article 18 of the "universal service" Directive, must provide these links in accordance with the technical and tariff conditions defined by the "market analysis" Decree.

Articles D. 369 and subsequent of the Code specify that the Minister responsible for electronic communications determines the categories of leased lines provided by these operators, in accordance with the technical features harmonised within the European Economic Area. Furthermore, it is stipulated that these leased lines be supplied under objective, transparent and non-discriminatory conditions. Leased line tariffs must comply with the principle of cost-orientation, and be set according to transparent rules.

II. Market analyses milestones in 2004

Over the course of 2004, ART was able to complete the entire market analysis process for voice call termination on individual mobile networks. On 10 December 2004, it was thus in a position to adopt market definition decisions, designate the SMP operators, and to impose obligations on Metropolitan France's three mobile operators. The decisions concerning the overseas *départements* and the territories of Mayotte and Saint-Pierre-et-Miquelon were adopted on 1 February 2005.

ART also launched the formal public consultation process on the majority of the 18 relevant markets listed by the European Commission in its aforementioned Decision, namely:

- Fixed telephony markets (markets listed as 1 through 10 by the Commission); market 9 – Call termination on individual public telephone networks – is subject to distinct analysis;
- Access and call origination on public mobile telephone networks (market 15);
- The unbundling market (market 11);
- The bitstream market, or the regional wholesale broadband access market (market 12);
- The national wholesale broadband access market (new market).

ART also sent operators quantitative and qualitative questionnaires in 2004, prior to conducting its analyses on:

- The wholesale national market for international roaming on public mobile networks, in coordination with the European Union's national regulatory authorities (market 17);
- Broadcasting transmission services, to deliver broadcast content to end users (market 18);
- SMS call termination on individual mobile networks (new market).

Finally, with respect to leased lines, the Authority received the responses to the quantitative and qualitative questionnaires during the year, and sent out complementary questionnaires concerning the overseas territories in July 2004.

In conclusion, the new market analysis process is a complex undertaking that must be conducted in accordance with the principles of competition law, which has the merit of adapting the regulatory system to each competitive situation of the market analysed. It introduces a transparent and cooperative procedure on two fronts.

First, it requires consultation with the Competition Council, or the CSA (Broadcasting authority) when applicable, which makes it possible to reinforce the cooperative approach taken by the different bodies. Here, it is worth reiterating that Article 15.1 of the "framework" Directive makes clear that *"the markets to be defined by NRAs for the purpose of ex-ante regulation are without prejudice to those defined by NCAs and by the Commission in the exercise of their respective powers under competition law in specific cases."*

Second, it also requires the cooperation of the sector's players through their contribution to public consultations on each of ART's draft measures, but also because of the large volume of data that the Authority needs to obtain to be able to have a thorough understanding and clear view of the markets.

Market analyses in Europe

1. Notifications

1) Notification procedure for NRAs' draft measures

The market analysis process is divided into three phases: definition of the market and examination of its relevance for sector regulation, identification of the market's SMP undertakings and, when applicable, imposition of remedies. When an NRA intends to implement a measure to this end, it must first inform the Commission and the other national regulators. Article 7-3 of the "framework" Directive in fact stipulates that the measures taken by the NRAs as part of their market analyses must be notified to the Commission and to the other NRAs. ART must also hold a nation-wide consultation.

NRAs process these notifications by uploading their draft measures to the Commission's dedicated website (CIRCA[6]). The site can be viewed by the public, but there is also an area on the CIRCA site that can only be accessed by regulators, and an area accessible only to the Commission, to which confidential data can be uploaded. NRAs and the Commission then issue their comments within a month, or by the deadline set for the public consultation in cases where it exceeds one month.

When the Commission plans on vetoing a draft decision, it requests explanations from the regulator concerned by launching a Phase II. It sends the NRA a letter of "serious doubts," made public on the CIRCA website. This veto can be on the definition of relevant markets (if they differ unjustifiably from those listed in the "relevant markets" Recommendation) or on the designation of SMP operators. In addition, the Commission's remarks on the remedies must be taken into utmost account by the NRAs, except in cases where regulators impose obligations not outlined in the Directives, in which case the Commission has the power to veto. A Phase II procedure lasts two months, during which time the NRAs concerned are able to justify the validity of their analysis, and the other NRAs can submit their comments. The Commission's proposed veto is sent to the Communications Committee (COCOM) for consultative opinion, in the form of a formal vote. The Commission is not bound by the result of this vote. Once the two months have expired, and after having obtained COCOM's opinion, the Commission can demand that the NRA repeal the draft measure, if it deems the justifications for its implementation insufficient.

6) Communication and Information Resource Centre Administrator.

2) Notifications as of March 2005

By mid-March 2005, over 150 draft measures had been notified. All of the markets identified in the "*relevant markets*" Recommendation had been the subject of at least one notification, with the exception of market 17 (wholesale international roaming). Because of its inherent nature, this market is subject to joint analysis by all European countries, carried out as part of the European Regulators Group's (ERG) work programme.

Twelve NRAs have not yet notified their draft measures to the Commission (Belgium, Spain, Italy, Luxembourg, the Netherlands, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Malta and Poland). Even though they represent the majority in this category, new Member States do not represent an overwhelming percentage. Some of the EU-15 countries are also part of the group which has yet to notify the Commission.

On the flipside, certain Member States, including the UK and Finland, stand out for having notified their analyses on all of the markets, with the exception of the international roaming market (whose analysis is being conducted within the ERG), and four others have notified over 10 markets (Austria, Portugal, Sweden and Hungary).

2.1. Notification on new markets

Aside from the 18 relevant markets identified by the Commission, in the Annex to its "*relevant markets*" Recommendation, dated 11 February 2003, other markets too can be identified as being relevant when they meet the three cumulative criteria enumerated in this Recommendation:

- existence of high and non-transitory barriers to entry;
- market structure which does not tend towards effective competition within the relevant time frame;
- in cases where competition law alone cannot adequately address the market failure(s) concerned.

Several markets, qualified as being "new markets," were thus notified, while in other countries, new relevant markets have been identified but not yet notified. Among those that have been notified, there are some fifteen for the UK, two for Ireland and one for Portugal.

2.1.1. OFCOM's streamlined segmentation

The United Kingdom's national regulator, OFCOM, has finely segmented some of the markets listed in the Commission's Recommendation. Concerning retail fixed telephony markets, for instance, OFCOM has segmented international calls by route, and segmented access by type of connection, either analogue or digital. OFCOM has also created a category of wholesale flat rate Internet access offers, and of wholesale access markets, to impose a subscription resale obligation.

Although it approved these analyses, the Commission nevertheless noted the inherently cumbersome nature of such a segmentation, both from a regulatory standpoint and with respect to notification. Taking the Commission's remarks into account, OFCOM is undertaking broader identification of the markets. In the process, it will be distinguishing the obligations attached to distinct products within the same market.

2.1.2. ANACOM's analysis of shared cost or revenue services

Portugal's national regulator, ANACOM, notified a retail market for calls to non-geographical fixed numbers (shared cost and revenue services), which the Commission considers a segmentation of the fixed local and long distance calls market. As a remedy, ANACOM imposed a system of cost accounting and accounting separation, non-discrimination and upholding of numbering plan regulation (adequacy of calling numbers and tariffs for consumers). This last remedy constitutes a "new remedy" not provided for in the "access" Directive, and which the Commission has the power to veto. The Commission nevertheless approved both of these new measures.

2.1.3. ComReg's view of the leased line market

Ireland's national regulator, ComReg, notified two draft decisions to the Commission, which subsequently approved them both. The first concerns the retail international leased line market. In its analysis, ComReg demonstrated that there was no longer an SMP operator in this market, and thus repealed the existing obligations on the incumbent and formerly SMP operator. This corresponds to the need to analyse a market to be able to withdraw existing obligations. The Commission approved the analyses contained in this notification. The second concerns the retail national leased line market, which includes the minimum set of leased lines, and leased lines of over 2 Mbit/s, along with capacity services other than leased lines, per se, in other words, ATM VPN, IP VPN, Ethernet services and SDSL services, to the extent that they can be substituted for leased lines. ComReg ruled that there was no SMP operator for services of over 2 Mbit/s and so withdrew the obligations that were previously incumbent on the services provided by Eircom. The regulator nevertheless upheld the obligations attached to the minimum set of leased lines.

2.2. European Commission veto

For NRAs, notification of market analyses is an essential step – marking the completion of several months of work, when they receive the Commission's approval or, on the contrary, forcing a re-examination of their work when their draft decisions are vetoed. Since the start of the market analysis process, several draft measures have been repealed, of which four following a veto, and two to prevent the launch of Phase II (prior to a veto).

When the Commission has doubts about a draft measure notified by an NRA, it will request explanation by opening a Phase II with a public letter of *"serious doubts."* The NRA concerned then has two months to supply further details. This period also allows other NRAs to submit their own doubts to the Commission. Once this phase is completed, following a request for opinion to COCOM, the Commission can have the draft measure withdrawn if it deems the NRA's explanations insufficient, in other words, it can veto the draft decision. Up until now, all Phase IIs have led to a veto.

Of the four Commission vetoes registered in late March 2005, three involved decisions from the Finnish regulator, FICORA, of which two concerned markets 4 and 6 (retail international, residential and non-residential telephone service markets), and one related to market 15 (access and call origination on mobile networks). The Commission's fourth veto was directed at Austrian regulator TKK's analysis of market 10 (transit).

Several lessons can be drawn from these different decisions.[7]

First, it should be stated that it is difficult for a regulator to intervene in a veto procedure involving another NRA. The Commission's decision marks the end of a procedure that begins with a letter of serious doubt, which opens Phase II. During Phase II, other NRAs can submit their opinions but, in practice, this rarely occurs since they lack sufficient detail on the decision which was notified; NRAs publish their notifications in their native language, and are obliged to translate only a summary of them into English. Aware of this problem[7], ERG members have asked the Commission to have all notifications that are subjected to a Phase II translated fully into English. This proposal was implemented by the Commission for the procedure underway involving the German regulator, RegTP. In addition, in late 2004, the IRG (Independent Regulators Group) created an expert committee as part of the Phase II procedure, to undertake its own analysis, to be able to report to COCOM[8] members when examining the veto decision.

7) Addressed for the first time during the COCOM's extraordinary session on 28 September 2004, concerning the Phase II for FICORA's notified analysis of market 15.

8) For the most part, COCOM members are government (ministry) representatives, assisted by NRA members.

As concerned the FICORA's analysis of markets 4 and 6 (international, residential and non-residential retail telephone service markets), the Commission ruled that, in the absence of exceptional circumstances, a market share of over 50% was in itself a presumption of significant market power. The Commission also reproached FICORA for a lack of analysis of changing prices and, more generally, of data that would enable an assessment of SMP.

The Commission also vetoed Austrian regulator TKK's analysis of market 10. The Austrian regulator had deemed, on the one hand, that growth in the transit market was dropping sharply and, on the other, that Telekom Austria's transit offers could be easily duplicated by the competition. TKK thus concluded that there was no SMP operator in this market. The Commission, on the contrary, ruled that the offers could not be easily duplicated in the medium term, and that, in its qualitative analysis of the market, TKK should have taken into account Telekom Austria's very high level of consumption of its own offers.

On the flip side, the Commission also vetoed FICORA's decision on market 15 (access and call origination on mobile networks) which designated Telia Sonera as the SMP operator – the Commission stating that a 50% market share alone was not enough to prove a dominant position, particularly since the market had previously developed without regulation (significant presence of MVNOs and service providers in the marketplace).

It should be pointed out that the Commission's position is not dogmatic, but derives concretely from the actual state of the market. For example, the Commission approved Irish regulator ComReg's analysis of this same market 15 (access and call origination on mobile networks), which designated operators O2 and Vodafone as having collective SMP, while several NRAs (Austria, Hungary and the UK) had concluded a lack of collective dominance in their market, and the Commission accepted their analyses.

More generally, the Commission expects consistent analyses from the NRAs, based on reliable information that provides the most thorough view possible of the market being analysed. In the case of these four vetoes, the information supplied by the regulators varied a great deal during Phase II. The uncertainty created by this lack of reliable information gave the Commission all the more reason to impose a veto.

2.3. NRAs' withdrawal of draft measures

When the Commission disputes the analyses conducted by the NRAs, it launches a procedure known as Phase II. To avoid a possible Commission veto, pre-notification meetings are held, and constitute a privileged means of avoiding the launch of a Phase II by altering the NRAs' draft measures. This method does have its limitations, however, since it does not carry an absolute guarantee of avoiding a Commission veto. Similarly, some NRAs have withdrawn draft notifications of their own accord, no doubt to avoid the opening of a Phase II procedure.

II. Status of notifications on the 18 relevant markets

(situation on 14 March 2005)

Market 1 : Access to the public telephone network at a fixed location for residential customers
Austria: 10/11/2004 (AT/2004/0109 - adopted)
Finland: 21/11/2003 (FI/2003/0020 - adopted)
Hungary: 30/12/2004 (HU/2004/0130 - adopted)
Portugal: 25/05/2004 (PT/2004/0053 - adopted)
The UK: 26/08/03 (UK/2003/0007 to 0010 - adopted)
Sweden: 17/11/2004 (SE/2004/0112)

Market 2 : Access to the public telephone network for non-residential customers
Austria: 10/11/2004 (AT/2004/0110 - adopted)
Finland: 05/03/2004 (FI/2003/0021 - adopted)
Hungary: 30/12/2004 (HU/2004/0131 - adopted)
Portugal: 25/05/2004 (PT/2004/0054 - adopted)
The UK: 26/08/03 (UK/2003/0007 to 0010 - adopted)
Sweden: 17/11/2004 (SE/2004/0113)

Market 3 : Publicly available local and/or national telephone services for residential customers
Austria: 17/12/2004 (AT/2004/0127 - adopted)
Finland: 05/03/2004 (FI/2003/0022 - adopted)
Hungary: 30/12/2004 (HU/2005/0132 - adopted)
Portugal: 25/05/2004 (PT/2004/0055 - adopted)
The UK: 26/08/03 (UK/2003/0007 to 0010 - adopted)
Sweden: PTS elected to withdraw this draft measure on 08/03/2005 (SE/2005/0146)

Market 4 : Publicly available international telephone services for residential customers
Austria: 16/12/2004 (AT/2004/0125 - adopted)
Finland: Commission veto on 20/02/2004 (FI/2003/0024)
Hungary: 30/12/2004 (HU/2005/0133 - adopted)
Portugal: 25/05/2004 (PT/2004/0056 - adopted)
The UK: 26/08/03 (UK/2003/0007 to 0010 - adopted)
Sweden: PTS elected to withdraw this draft measure on 08/03/2005 (SE/2005/0147)

Market 5 : Publicly available local and/or national telephone services for non-residential customers
Austria: 17/12/2004 (AT/2004/0126 - adopted)
Finland: 05/03/2004 (FI/2003/0025 - adopted)
Hungary: 30/12/2004 (HU/2004/0134 - adopted)
Portugal: 25/05/2004 (PT/2004/0057 - adopted)
The UK: 26/08/03 (UK/2003/0007 to 0010 - adopted)
Sweden: PTS elected to withdraw this draft measure on 08/03/2005 (SE/2005/0148)

Market 6 : Publicly available international telephone services for non-residential customers
Austria: 16/12/2004 (AT/2004/0124 - adopted)
Finland: Commission veto on 20/02/2004 (FI/2003/0027)
Hungary: 30/12/2004 (HU/2005/135 - adopted)
Portugal: 25/05/2004 (PT/2004/0058 - adopted)
The UK: 26/08/03 (UK/2003/0007 to 0010 - adopted)
Sweden: PTS elected to withdraw this draft measure on 08/03/2005 (SE/2005/0149)

Market 7 : Minimum set of leased lines
Austria: 07/09/2004 (AT/2004/0097 - adopted)
Finland: 02/07/2004 (FI/2004/0079 - adopted)
Ireland: 17/01/2005 (IE/2005/0137)
The UK: 18/12/2003 (UK/2003/0035-36 - adopted)
Sweden: 10/05/2004 (SE/2004/0048 - adopted)

Market 8 : Call origination on public fixed networks
Germany: 15/02/2005 (DE/2004/0144)
Austria: 03/11/2004 (AT/2004/0105 - adopted)
Denmark: 04/02/2005 (DK/2005/0141)
Finland: 06/02/2004 (FI/2003/0028 - adopted)
Hungary: 01/03/2005 (HU/2005/0151)
Portugal: 25/05/2004 (PT/2004/0060 - adopted)
The UK: 26/08/2003 (UK/2003/0011 to 0016 - adopted)
Slovakia: 22/10/2004 (SK/2004/0103)
Sweden: 10/05/2004 (SE/2004/0049 - adopted)

Market 9 : Call termination on fixed networks
Germany: 15/02/2005 (DE/2005/0143)
Austria: 03/11/2004 (AT/2004/106 - adopted)
Finland: 06/02/2004 (FI/2003/0029 - adopted)
Hungary: 01/03/2005 (HU/2005/0152)
Portugal: 25/05/2004 (PT/2004/0061 - adopted)
The UK: 26/08/2003 (UK/2003/0003 - adopted)
Slovakia: 22/10/2004 (SK/2004/0102)
Sweden: 10/05/2004 (SE/2004/0050 - adopted)

Market 10 : Transit services in fixed public telephone networks
Germany: 15/02/2005 (DE/2005/0145)
Austria: Commission veto on 20/10/2004 (AT/2004/0090)
Finland: 11/06/2004 (FI/2004/0075 - adopted)
Hungary: 01/03/2005 (HU/2005/0153)
Portugal: 04/03/2005 (PT/2005/0154)
The UK: 26/08/2003 (UK/2003/0011 to 0016 - adopted)
Sweden: 10/05/2004 (SE/2004/0051 - adopted)

Market 11 : Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services
Germany: 01/12/2004 (DE/2004/0119 then DE/2005/0150)
Austria: 08/09/2004 (AT/2004/0098 - adopted)
Finland: 06/02/2004 (FI/2003/0030 - adopted)
Ireland: 16/04/2004 (IE/2004/0046 -adopted)
Portugal: 24/11/2004 (PT/2004/0117)
Slovakia: 05/11/2004 (SK/2004/0107)
Slovenia: 07/02/2005 (SL/2005/0142)
Sweden: 02/07/2004 (SE/2004/0084 - adopted)
The UK: 26/08/2004 (UK/2004/0094 - adopted)

Market 12 : Wholesale broadband access market
Finland: 26/05/2004 (FI/2004/0062 - adopted)
Ireland: 29/07/2004 (IE/2004/0093 - adopted)
Portugal: 24/11/2004 (PT/2004/0118)
Sweden: 02/07/2004 (SE/2004/0083 - adopted)
The UK: 17/12/2003 (UK/2003/0032-33-34 - adopted)

Market 13 : Wholesale terminating segments of leased lines
Austria: 08/09/2004 (AT/2004/0100 - adopted)
Finland: 02/07/2004 (FI/2004/0080 - adopted)
Ireland: 17/01/2005 (IE/2005/0139)
The UK: 18/12/2003 (UK/2003/0037-0038 - adopted)

Market 14 : Wholesale trunk segments of leased lines
Austria: 08/06/2004 (AT/2004/0074 - adopted)
Finland: 02/07/2004 (FI/2004/0081 - adopted)
Ireland: 17/01/2005 (IE/2005/0140)
The UK: 18/12/2003 (UK/2003/0039 - adopted)

Market 15 : Access and call origination on public mobile telephone networks
Austria: 26/05/2004 (AT/2004/0063 - adopted)
Finland: Commission veto on 05/10/2004 (FI/2004/0082)
Hungary: 02/09/2004 (HU/2004/0096); re-notification on 9/11/04 (HU/2004/0108 - adopted)
Ireland: 10/12/2004 (IE/2004/0121 - adopted)
The UK: 04/08/2003 (UK/2003/0001 - adopted on 03/10/2003)

Market 16 : Voice call termination on individual mobile networks
Austria: 08/09/2004 (AT/2004/0099 - adopted)
Finland: 06/02/2004 (FI/2003/0031 - adopted)
France: 02/11/2004 (FR/2004/0104 - adopted and FR/2004/0120 - adopted)
Greece: 01/07/2004 (EL/2004/0078)
Hungary: 22/09/2004 (HU/2004/0101 - adopted)
Ireland: 06/06/2004 (IE/2004/0073 - adopted)
Portugal: 23/12/2004 (PT/2004/0129 - adopted)
The UK: 19/12/2003 (UK/2003/0040 - adopted)
Slovakia: 14/01/2005 (SK/2005/0136)
Sweden: 10/05/2004 (SE/2004/0052 - adopted)

Market 17 : Wholesale national market for international roaming on public mobile networks
No notification

Market 18 : Broadcasting transmission services, to deliver broadcast content to end users
Austria: 14/11/2003 (AT/2003/0018 - adopted)
Finland: 15/06/2004 (FI/2004/0076 - adopted)
Ireland: 03/02/2004 (IE/2004/0042 - adopted)
The UK: OFCOM elected to withdraw this draft measure on 26/01/2005 (UK/2004/0111)

Analysis of the different markets

I. Relevant markets designated by the european commission

The European Commission's Recommendation, dated 11 February 2003, identifies the product and service markets which are likely to be subject to *ex-ante* regulation under the "framework" Directive[9]. The Commission defined seven retail markets and eleven wholesale markets.

9) European Commission Directive 2002/21/EC, concerning a common regulatory framework for communication networks and services.

1) Retail markets

- Access to the public telephone network at a fixed location for residential customers.
- Access to the public telephone network at a fixed location for non-residential customers.
- Publicly available local and/or national telephone services provided at a fixed location for residential customers.
- Publicly available international telephone services provided at a fixed location for residential customers.
- Publicly available local and/or national telephone services provided at a fixed location for non-residential customers.
- Publicly available international telephone services provided at a fixed location for non-residential customers.
- Minimum set of leased lines.

2) Wholesale markets

including three wholesale fixed telephony markets

- Call origination on the public telephone network provided at a fixed location. (Call origination is taken to include local call conveyance and delineated in such a way as to be consistent with the delineated boundaries for the markets for call transit and for call termination on the public telephone network provided at a fixed location.)
- Call termination on various individual public telephone networks provided at a fixed location. (Call termination is taken to include local call conveyance and delineated in such a way as to be consistent with the delineated boundaries for the markets for call origination and for call transit on the public telephone network provided at a fixed location.)
- Transit services in the fixed public telephone network. (Transit services are taken as being delineated in such a way as to be consistent with the delineated boundaries for the markets for call origination and for call termination on the public telephone network provided at a fixed location.)

Two wholesale broadband markets

- Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.
- Wholesale broadband access. (This market covers 'bitstream' access that permits the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bitstream access.)

Two wholesale leased line markets

- Wholesale terminating segments of leased lines.
- Wholesale trunk segments of leased lines.

Three mobile telephony markets

- Access and call origination on public mobile telephone networks,
- Voice call termination on individual mobile networks;
- The wholesale national market for international roaming on public mobile telephone networks.

And one wholesale broadcasting service market

- Broadcasting transmission services, to deliver broadcast content to end users.

II. Fixed telephony markets

1) Retail fixed telephony markets

The analysis of retail fixed telephony markets gave way to a public consultation (9 July to 9 September) for which ART submitted its initial analysis. The responses received, the summary of contributions and an amended version of the consultation document were made public on 21 December 2004. It was this amended version that was submitted to the Competition Council for opinion on 5 January 2005.

The Competition Council made its opinion public on 16 February 2005[10]. Since then, ART has continued the process which will ultimately lead to the adoption of a decision on market definition, designation of the SMP operator, and imposition of obligations on this operator, which will conclude the first analysis of retail and wholesale fixed telephony markets.

10) Opinion n° 05-A-05, dated 16 February 2005, concerning ART's request for opinion, pursuant to Article L. 37-1 of the Post and Electronic Communications Code, regarding its analysis of wholesale and retail fixed telephony markets.

1.1. Definitions

Fixed "narrowband" communication services provide access to analogue or digital channels whose bandwidth is equal to or over 64 kbit/s, enough for a telephone service, along with use of communication services supplied on those channels. Access services include the provision of connection to the fixed public telephone network. Communication services include voice calls and data transmissions, such as non-permanent narrowband connection to the Internet from a fixed terminal (commonly referred to as dial-up Internet access).

1.2. Market segmentation

The relevant markets, of which the list was published as part of the public consultation of July 2004, and submitted to the Competition Council for opinion in December 2004, were defined based on an analysis of supply and demand-side substitutability, and an analysis of objective features, prices and use of the services.

The market segmentation listed below is based on prior acknowledgement of a separation of narrowband access and broadband access, of narrowband access and leased lines, of fixed-line services and mobile services, and of residential and non-residential (i.e. business) markets.

The question of separation between broadband voice and narrowband voice services was raised by reactions to the consultation document published in July 2004. This is why, in its amended version, it was proposed to exclude Voice over Broadband (VoB) calls, which are part of the retail broadband access market, based on the acknowledgement that the relevant narrowband calls are contingent on use of a narrowband connection (or several connections for businesses). Through its opinion, the Competition Council contributed to debates on the subject, and expressed its wish to have VoB calls included in the relevant fixed telephony markets proposed by ART (§74 of the Competition Council's opinion), without undermining the fact that broadband access does not fall under the category of retail fixed telephony markets.

Segmentation of the relevant markets in geographical terms revealed the need to conduct an analysis of the national market, including Metropolitan France as well as the overseas *départements* and territories, with the exception of Saint-Pierre-et-Miquelon[11], which will be subject to later analysis.

11) Due to France Telecom's sub-contracting of all of its services to SPM Télécom.

ART submitted the following list of relevant retail fixed telephony markets to the Competition Council for opinion:

<table>
<tr><th>Relevant markets listed in the Recommendation</th><th>Proposed list of relevant retail fixed narrowband markets</th></tr>
<tr><td>Residential customer access (market n°1)</td><td>Residential customer access</td></tr>
<tr><td rowspan="3">Access for non-residential customers (market n°2)</td><td>Analogue access for non-residential customers</td></tr>
<tr><td>Basic digital access for non-residential customers</td></tr>
<tr><td>Primary digital access for non-residential customers</td></tr>
<tr><td rowspan="2">Local and/or national calls for residential customers (market n°3)</td><td>Local and long distance calls for residential customers</td></tr>
<tr><td>Calls to mobiles for residential customers</td></tr>
<tr><td rowspan="2">Local and/or national calls for non-residential customers (market n°5)</td><td>Local and long distance calls for non-residential customers</td></tr>
<tr><td>Calls to mobiles for non-residential customers</td></tr>
<tr><td>International calls for residential customers (market n°4)</td><td>International calls for residential customers</td></tr>
<tr><td>International calls for non-residential customers (market n°6)</td><td>International calls for non-residential customers</td></tr>
</table>

Source : ART

For the first analysis of retail fixed telephony markets, this list excluded calls to service providers and calls originating at public payphones which, it has been announced, will be analysed at a later date. In its opinion, the Competition Council concluded that there does exist a retail market for calls to service providers, of which it awaits ART's analysis (§75).

In concluding its opinion, the Competition Council stated that subdivisions of certain markets would not be necessary (§73). This is why ART is pursuing its analysis, and plans to group together non-residential access markets into a single market, and to group calls to mobiles with local and long distance calls (local and/or national calls).

1.3. Designation of an SMP operator

1.3.1. Access markets

Before analysing the criteria that make it possible to determine the existence of an operator having significant power in access markets, the size of these markets and the way they operate are examined.

	Turnover (K€ excl. VAT, on 31 Dec. 2003)	Number of lines (on 31 Dec. 2003)
Analogue and digital access for residential customers	3,499,179	23,076,792
Analogue access for non-residential customers	946,579	5,630,590
Basic digital access for non-residential customers	642,884	3,240,373
Primary digital access for non-residential customers	299,623	n.a.[12]

Source : ART

12) Because of the disparate nature of the data supplied by the different operators, the MoU data for primary access can only be estimated, and have been estimated at 1.4 million minutes.

It appears that the competition in these markets is still very limited, as revealed in the number of customers connected, and the geographic scope of the zones where alternative access offers are available. The following summary table lists all of the operators that provide access in France:

Residential customer access	Non-residential customer access		
	Analogue access	Basic digital access	Primary digital access
France Telecom	ADP Telecom	ADP Telecom	ADP Telecom
Suez Lyonnaise Telecom	France Telecom	Altitude Telecom	Altitude Telecom
UPC France		France Telecom	Belgacom Présence
			Cegetel
			Colt Telecommunications France
			Completel
			France Telecom
			9 Telecom
			MCI

Source : ART

Analysis of access markets is based not only on examination of market share, but also on the control that an operator may have over an infrastructure that is difficult to duplicate, and the presence of significant economies of scale and scope. Upon completion of this analysis, the Authority planned to conclude that France Telecom enjoyed significant power in all of the country's access markets.

1.3.2. Calling markets

The operational mode and size of the calling markets had been examined before examining the criteria used for determining the existence of an SMP operator[13].

14) The responses to the quantitative questionnaire sent to operators on 25 July 2003 were completed in 1Q 2004.

	Clientele	Turnover (K€, excl. VAT on 31 Dec. 2003	Volume (K minutes on 31 Dec. 2003
Local and long distance calls to subscribers at a fixed location	residential	2,406,516	57,402,256
	non-residential	1,403,815	31,750,108
Calls to mobiles	residential	1,357,657	5,856,621
	non-residential	1,330,266	5,312,047
International calls	residential	493,571	2,340,235
	non-residential	290,176	2,127,866

Source : ART

The incumbent carrier's three main competitors in calling markets are Cegetel, Tele2 and 9 Telecom. ADP Telecom, Colt, Completel, Free Telecom, Telecom Italia France, Tiscali France and UPC France are also positioned in these markets.

The market analysis revealed that France Telecom still has a well over 50% share. The forecasts made to ensure the prospective dimension of the analysis do not point to any foreseeable, significant change in these figures. Should France Telecom's markets shares decline more rapidly than expected, ART could undertake its next analysis of calling markets earlier than planned. Furthermore, the analysis focused on assessing SMP criteria such as control over infrastructures that were difficult to duplicate, existence of significant economies of scale and scope, vertical integration, the existence of a highly developed sales and distribution network, barriers to switching operators, and access markets' horizontal leverage over calling markets.

Observation of both current and forecast criteria led to the proposal that France Telecom has significant power in all of the retail calling markets in Metropolitan France.

1.4. Obligations that can be imposed

In July 2004, ART planned to impose the following obligations, pursuant to the Post and Electronic Communications Code's retail market provisions:

- *A priori* proscription of certain practices: discriminatory practices, unreasonable bundling, excessive prices, price squeezes in access and calling markets;
- Cost-oriented pricing in access markets;
- Prior communication of access and calling market tariffs to ART;
- Multi-annual tariff framework for calls to mobiles and local and long distance calls (the first in the form of a ceiling on retention charges when passing on decreases in call termination prices to retail tariffs charged for calls to mobiles; the second in the form of a price cap on baskets);
- Accounting separation and cost accounting: an obligation imposed across the board for all of France Telecom's broadband and narrowband services, both wholesale and retail.

2) Wholesale fixed telephony markets

2.1. Definitions

Wholesale fixed telephony markets allow operators to use traffic routing services purchased from other operators to market electronic communications services in retail markets.

Pursuant to the European Commission's Recommendation on relevant markets, the Authority has distinguished three types of wholesale markets:

- The call origination market, which involves call routing services supplied by the local loop operator (LLO) to other operators, and which allow the latter to provide electronic communications services to subscribers connected to the said LLO.
- The call termination market, which refers to the call routing services supplied by a local loop operator (LLO) to other operators, and which allow them, through their network's connection to this LLO's network, to establish telephone calls to subscribers connected to this LLO. Because of the direction of the thus routed calls, it is said that this LLO "terminates" the calls to its subscribers.
- The market for transit services in the fixed telephone network. In addition to wholesale provision of call origination and call termination, the traffic needs to be conveyed, or transited, to allow a call to be successfully completed. The conveyance of these calls, or transit interconnection, includes the transmission and/or switching and routing.

2.2. Market segmentation

An analysis of the degrees of substitutability led ART to limit the call origination market to the traffic routing services delivered from the first switching or routing equipment through which the calls transit.

In tandem with the call origination market, ART has limited the call termination market to the traffic routing services supplied between the last switching or routing equipment through which the call transits, and the destination subscriber.

In accordance with the European Commission's Recommendation, and pursuant to its analysis of degrees of substitutability, the Authority defined a call termination market for each local loop network. It therefore defined as many markets as there are fixed local loop operators.

In its analysis, published on 9 July 2004, the Authority first examined the call termination market on France Telecom's network. In early 2005, it published a complementary analysis on all call termination markets on alternative LLOs' networks.

As to transit services, ART defined the following zones: Metropolitan France and each overseas département and territory. To take into account the existence of these different zones, and the specific nature of the competition over the transit services that connect them, in each of the specific markets the Authority made the distinction between transit services provide by operators inside the same zone, and transit services provided between each pair of zones that make up the national territory. Services between distant overseas départements, between Guadeloupe and the Reunion, for instance, were not identified per se since they are substituted by services between Guadeloupe and Metropolitan France, and between Metropolitan France and the Reunion.

Analysis of the degrees of supply and demand-side substitutability also led the Authority to include, in each of these wholesale markets, traffic routing services corresponding to all of the retail calling markets listed below, whether person-to-person traffic routing, narrowband Internet traffic, or calls to service providers.

Finally, markets were defined for Metropolitan France, the overseas départements, and the overseas territory of Mayotte. A specific analysis of fixed telephony markets in the overseas territory of Saint-Pierre-et-Miquelon will be conducted at a later time.

Markets defined by the Commission	Markets defined by ART
Call origination on the public telephone network, from a fixed location	Call origination on the public telephone network, from a fixed location
Call termination on individual public telephone networks, from a fixed location	Call termination on all fixed local loop operators' networks (as many markets as there are local loop operators)
Transit services in the fixed public telephone network	Intra-national transit services; Transit services Metropolitan France – Martinique; Transit services Metropolitan France – Guadeloupe; Transit services Metropolitan France – Guyana; Transit services Metropolitan France – Reunion; Transit services Metropolitan France – Mayotte; Transit services Metropolitan France – Saint-Pierre-et-Miquelon; Transit services Guadeloupe – Martinique; Transit services Guadeloupe – Guyana; Transit services Guyana – Martinique; Transit services Reunion – Mayotte.

Source : ART

2.3. SMP operator designation

2.3.1. The call origination market

Competition in this market still appears to be very limited, as revealed in France Telecom's share of the local loop market, which has never fallen below 99% since the markets' deregulation. France Telecom provides call origination services on an infrastructure, i.e. the local loop, which is not easy to duplicate.

Added to this, France Telecom enjoys economies of scale and scope that far outweigh any that alternative operators could generate, because of its position in retail access markets (cf. below).

And, finally, France Telecom contends with very little countervailing buying power from third-party operators, these latter being obliged to buy their call origination services from the incumbent, without which they would be unable to market their services to the vast majority of users who are connected to France Telecom's network.

ART therefore designated France Telecom as being the SMP operator in this market.

2.3.2. The market for call termination on France Telecom's network

By the fact of having built it, France Telecom controls a 100% share of the market for termination services for calls to its network.

A telephone service that does not guarantee the ability to call France Telecom subscribers would of course not be economically viable. Because of this, the Authority concluded that no alternative operator is in a position to exercise countervailing buying power in such a way as to efficiently counter an increase in the price of France Telecom's call termination services, or force the incumbent to implement a decrease.

ART therefore designated France Telecom as being the SMP operator in this market as well.

2.3.3. The intra-national transit market

Despite a certain decline, France Telecom still had an over 55% share of the intra-operator service market in 2003.

Furthermore, given the volume of traffic being conveyed on its network, particularly in the service of its own customers, the operator enjoys economies of scale and scope that are superior to those generated by the market's most active alternative operators. Added to this, because of its position in the call origination and termination markets, France Telecom also has leverage that allows it to strengthen its position in the transit market.

As concerns transit services provided between two distinct networks, ART estimates that France Telecom holds a particularly central position, since it is the only carrier to be interconnected with all operators.

Lastly, some operators are incapable of exercising a countervailing power on the tariffs and terms that France Telecom would set in an unregulated situation. This particularly concerns operators of local loops in the nation's smaller zones, and which have no plans to build long distance infrastructures to ensure routing for the calls being made by their subscribers.

ART therefore concluded that France Telecom is also the SMP operator in this market.

2.3.4. Intra-zone transit markets

Due to the lack of available quantitative data, the Authority conducted primarily a qualitative analysis of the market for traffic routing services between two of the seven geographical zones[14] to which the Post and Electronic Communications Code applies.

14) Metropolitan (mainland) France, the 4 overseas *départements* (Guadeloupe, Martinique, Guyana and the Reunion), and the overseas territories of Mayotte and Saint-Pierre-et-Miquelon

Because of France Telecom's control over the main infrastructures that connect all of these zones, of the difficulty in duplicating these infrastructures, and of the leverage that France Telecom derives from its position in subjacent retail markets, and in both upstream and downstream wholesale markets (call origination and termination), the Authority concluded that France Telecom should be designated as the SMP operator in all of these markets.

2.4. Obligations that can be imposed

In July 2004, ART planned to impose the following obligations in wholesale markets, among those provided for by the Post and Electronic Communications Code:

- Obligation to meet reasonable demands for access, and to enable subscribers to access the services of any interconnected provider of publicly available telephone services;
- Obligation to meet specific demands for access to carrier selection/pre-selection, third-party billing, flat rate interconnection with the Internet, access to a wholesale telephone service;
- Obligation to provide access and interconnection in a non-discriminatory fashion;
- Obligation to provide access and interconnection in a transparent fashion. In particular the Authority proposed that France Telecom be obliged to publish quality of service indicators, to inform the Authority of the contractual terms of access and interconnection signed with third-party operators, and the publication of tariffs prior to their implementation.
- Obligation to publish an access and interconnection reference offer, detailing the technical and tariff conditions of call origination, transit and call termination services, access to interconnected and access sites, along with the technical and tariff conditions for the specific access services listed above;
- Obligation to set cost-oriented interconnection and access tariffs, with the exception of France Telecom's so-called double transit services;
- Obligation to keep separate accounts, and cost accounting obligation which, it should be recalled, is an obligation that applies to all of France Telecom's retail and wholesale activities, both narrowband and broadband.

III. Broadband markets

The European Commission designated two wholesale markets as relevant fixed network broadband markets: the unbundling market (Market 11 in the Commission's Recommendation), and the wholesale broadband access market (Market 12 in the Commission's Recommendation).

ART then undertook a broader examination of all broadband markets in order to identify the relevant markets for sector-specific regulation. It held public consultations in the summer of 2004 for each of the broadband markets, and submitted the resulting analyses to the Competition Council.

When the consultation process was complete, which was by necessity an in-depth process since it sets broadband's regulatory framework for the next three years, ART drafted its decisions on the markets' scope, on the SMP operator and its obligations, and notified them to the Commission.

After having taken into account the Commission's and other Member States' NRAs' eventual comments, and after having once again consulted with the sector, the Authority will adopt decisions which will be published in the Official Journal, thus completing the process of adopting the new regulatory framework.

1) Analysis of retail markets for broadband access

In France, the residential and business retail markets for broadband access are both highly competitive. In its review of retail markets which was undertaken as part of the public consultation, and submitted to the Competition Council on 5 October 2004, ART deduced that ex-ante regulation of retail markets would not be justified. It therefore proposed to withdraw tariff controls over France Telecom's "ADSL de ma Ligne" offer.

In its Opinion n° 05-A-03, dated 31 January 2005, the Competition Council also ruled that *"ex-ante regulation of retail markets was not required to guarantee competition."*

On the other hand, and in line with the spirit of the new framework, the Authority did commit to defining those measures that it deemed the most effective for upstream wholesale markets, to ensure the creation and maintenance of a healthy competition dynamic in retail markets. These wholesale markets are: local loop unbundling, bitstream access and national wholesale broadband access.

2) Local loop unbundling

The Authority launched an analysis of the local loop unbundling market in 2004. Following the preliminary data phase that involved gathering information and feedback from the sector, notably through qualitative and quantitative questionnaires, the Authority published a public consultation on the unbundling market, on 23 June 2004.

2.1. The public consultation of June 2004

This public consultation was devoted to defining the scope of the relevant wholesale unbundled access market, to determining whether or not one or several operators had significant power in this market, and to defining the obligations that would thus be incumbent on them.

The analysis of this market's scope, in terms of both products and geography, led the Authority to propose the exclusion of all access technologies other than the copper pair, e.g. cable and wireless access, and to consider that the market was a national one, except for the special case of Saint-Pierre-et-Miquelon. The market that it was proposed to define includes full and shared access to local copper loops and local copper sub-loops.

During this consultation, ART proposed that France Telecom, which owns virtually all of the country's copper pairs, be designated the SMP operator.

Here then, in accordance with the "framework" Directive and in line with the European regulation on unbundling of December 2000, the Authority proposed to impose several obligations on France Telecom, forming ex-ante regulation, geared to resolving the competition issues that were revealed in the market's analysis.

The regulatory mechanism that the Authority recommended in its public consultation follows through from the old framework. ART therefore planned on requiring France Telecom to comply with all reasonable demands for access to the local loop and related facilities. This obligation applies to the various forms of unbundling (full, partial, migration, etc.), and to co-location services for alternative operators' equipment in France Telecom exchanges.

The analysis also planned on requiring that France Telecom act in a transparent and non-discriminatory manner, which includes the publication of a reference offer and cost-oriented tariffs for unbundling and related resources/facilities (e.g. location, power, tie cable). A separate accounting obligation too was recommended.

2.2. Players' response and Competition Council's opinion

Twenty five players responded to the public consultation on broadband markets. After having taken all of these comments into account by amending its analysis, on 5 October 2004 ART requested the Competition Council's opinion on the "market scope and SMP" portions of the analysis, in accordance with Article L. 37-1 of the Post and Electronic Communications Code.

On the whole, the alternative carriers which responded to the public consultation agreed with the conclusions of the consultation, and particularly with the planned obligations. They were nevertheless virtually unanimous in their opinion that, first, the retail broadband market should be subject to *ex-ante* regulation and, second, that certain obligations should be more restricting. Operators' chief comments dealt with the quality of the prior information supplied by the incumbent carrier, and with the elements they needed to be able to replicate France Telecom's wholesale and retail offers (tariff conditions, technical conditions and QoS level).

For its part, France Telecom was of the opinion that ART did not sufficiently demonstrate the necessity and proportionality of the obligations it planned to impose. The incumbent also indicated that connection to unbundled distribution frames should be considered as a market unto itself, in other words, separate from the unbundling market. And, finally, it expressed its disagreement with the Authority's intention to change the unbundling pricing method.

In its Opinion of 31 January 2005[15], the Competition Council agreed with the Authority's conclusions concerning the unbundling market's scope, and the designation of the market's SMP operator.

15) Competition Council Opinion n°05-A-03, dated 31 January 2005.

2.3. Finalising the unbundling market's analysis

The next stage in the process will involve ART's notification of the European Commission and of the other Member States' regulators (NRAs) in spring 2005, on its draft decision for the wholesale unbundling market, taking into account the comments made by the players and by the Competition Council. The draft decisions will then be once again submitted for public consultation. After having taken into account the Commission's and the other NRAs' eventual comments, the Authority will adopt its final decisions, thus completing the market analysis process, and the effective implementation of the new regulatory framework for unbundling.

3) The wholesale bitstream market

The European Commission designated the wholesale bitstream market as being relevant for *ex-ante* regulation, leaving it up to the NRAs in each Member State to define the market's scope more precisely, in relation to the topology and specificities of the networks in each country.

In its analysis of market n° 12, ART defined this market as the wholesale bitstream or regional wholesale broadband access market. "Regional" is a generic term; in practice, connection can be at the regional level, inside a *département*, or between two *départements*. In the broadband value chain, this market is therefore situated between unbundling, upstream, and national offers, downstream.

The process adopted for analysing this market, both the methodology and the timetable, follows the one applied to the unbundling market, described above.

3.1. The public consultation of June 2004

Analysis of this market's scope, led to the segmentation of the bitstream market, distinguishing it from the unbundling market and the market for offers delivered at a national point of entry.

To the extent that there exist significant economies of scope between the different regional offers, this relevant market includes both the offers that are destined ultimately to residential customers, and the offers more tailored to the business clientele.

In a bid to remain technologically agnostic, the Authority held the view that all regional wholesale offers must be taken into account in this same market, regardless of the transport protocol being used. The offers delivered over IP and in ATM are therefore part of this market.

The designated geographical scope of this market is the same as the unbundling market's scope. This market therefore covers the entire national territory, with the exception of Saint-Pierre-et-Miquelon.

In 2004, the offers included in this definition, as proposed by France Telecom, were:

- *ADSL Connect ATM,*
- *Regional IP/ADSL,*
- *Turbo DSL,*
- *ATM and IP Bitstream*

An examination of the different players' share of this regional wholesale market led to the conclusion that France Telecom continues to enjoy considerable dominance. On 1 January 2005, France Telecom had a 95% share of the wholesale bitstream market – the remaining 5% controlled by its competitors corresponding to the access created through unbundling. France Telecom had a 100 % share of this market in January 2004 and a 98% share in July 2004.

Analytical forecasts did not provide any reason to believe that this situation would change significantly during the period covered by the analysis. Regional offers competing with the incumbent carrier's can in fact only be created through unbundling, so much so that, in non-unbundled zones, which concerns around 50% of the population, France Telecom was still the sole provider.

ART therefore proposed that France Telecom be designated the SMP operator in this market.

Following this analysis, ART felt it necessary to impose several obligations on France Telecom, notably the obligation to meet all reasonable demands for access to network elements and related facilities. In addition, the analysis planned to have France Telecom subject to obligations of non-discrimination, transparency and, particularly, the publication of a reference offer. It also provides for tariff control, based on the principle of cost-oriented tariffs for access and related services, a ban on price squeezes and, finally, an obligation to keep separate accounts.

These obligations that the Authority plans to impose on France Telecom will apply to each of the offers now designated as belonging to this market *(ADSL Connect ATM, regional IP/ADSL, Bitstream and Turbo DSL),* without prejudice to those that may be introduced in future.

Contrary to current practices, all of these offers will be regulated according to a single framework. The table below is a reminder of the regulatory framework that had been in force up until now.

Offer	Qualification	Regulatory method under the old framework	Regulatory method under the new framework
ADSL Connect ATM	Special access Article L. 34-8 IV of the PTC Article 16 of Directive 98/10/EC, dated 26 February 1998 L. 36-8 of the PTC L. 34-8 VI	*ADSL Connect ATM* tariffs must be cost-oriented and must be provided in a non-discriminatory fashion. ART has the power to settle disputes. The Authority can intervene immediately at any time, to define those areas that must be covered by a special access agreement, set the specific terms that such an agreement must fulfil, and impose a time limit for concluding negotiations.	Regulation of market 12
Turbo DSL	Service for which there is no competition L. 36-7-5°	Tariff approval system The Authority issues a public recommendation on tariff proposals, prior to their approval by the Ministers responsible for telecommunications and the economy.	
Regional IP/ADSL offer	Service for which there is no competition L. 36-7-5°	Tariff approval system The Authority issues a public recommendation on tariff proposals, prior to their approval by the Ministers responsible for telecommunications and the economy.	

Source : ART

3.2. Players' response and Competition Council opinion

As they did with ART's views on the unbundling market, alternative operators agreed with the Authority's analysis of this market, particularly with respect to the obligations to be put in place. These obligations will require France Telecom to make offers available to alternative carriers that will allow them to replicate the incumbent's, or the incumbent's subsidiaries', wholesale and retail offers, from both a pricing and technical standpoint.

Aside from the general comments outlined in the previous section on unbundling, France Telecom stated that it felt ART's interpretation of the non-discrimination principle was excessive.

In addition, the operator stated that it could not itself take advantage of the wholesale offers that it markets to its competitors. France Telecom underlined the fact that its approach had been upheld by the European Commission's ruling, which stated that an operator's own consumption of its services should not be taken into account when measuring its market share – only actual market transactions should be factored in. The Competition Council upheld the Authority's definition of the market, and its designation of France Telecom as the market's SMP operator.

As to method, the Competition Council specified several elements in its opinion concerning a market's relevance or irrelevance with respect to *ex-ante* regulation, and the assessment of a player's significant market power.

It stated that ART had demonstrated that the defined market was a relevant candidate for *ex ante* regulation since it presented the following characteristics: high barriers to entry, lack of foreseeable competition and competition law's inability to remedy these problems single-handedly. The Council felt that analysis of wholesale broadband markets proved the existence of these criteria.

For the Council, only those transactions taking place in the "open" market – excluding internal sales, in other words – should be taken into account when making a quantitative assessment of market power. It nevertheless stated that "[by taking into account only actual market transactions], *France Telecom's size, its vertical integration, its presence in all electronic communications markets, and particularly its ownership of the local copper loop, are all elements that put it in a position of strength, affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.*" In light of these elements, the Council concluded that France Telecom had significant power in these markets.

Taking this opinion into account, ART modified its analysis of France Telecom's SMP by measuring the operator's market share based only on sales that took place in the open market.

In its analysis, ART also applied criteria that were more qualitative in nature, such as the size of the undertaking, and its ownership of an infrastructure that was difficult to duplicate, the lack of foreseeable competition and, finally, its vertical integration and the economies of scale that this structure can generate.

3.3. Finalisation of the market's analysis

The next stage in the process will involve ART's notification of the European Commission and of the other Member States' regulators (NRAs) in spring 2005, on its draft decision for the wholesale unbundling market, taking into account the comments made by the players and by the Competition Council. The draft decisions will then be once again submitted for public consultation. After having taken into account the Commission's and the other NRAs' eventual comments, the Authority will adopt its final decisions, thus completing the market analysis process, and the effective implementation of the new regulatory framework governing the wholesale bitstream market.

4) Analysis of the national wholesale broadband access market

The national wholesale broadband access market, per se, is not among the relevant markets listed in the Commission's Recommendation. It nevertheless proved indispensable that ART undertake close analysis of the competition in this wholesale market, given the key role that it has played in recent years in shaping competition in wholesale markets, and given the existence of *ex-ante* regulation for these offers under the old regulatory framework, in the form of tariff approval.

4.1. The public consultation of June 2004

ART examined the three criteria that justified the designation of a relevant market not listed in the Commission's Recommendation, namely the existence of barriers to entering the market, the lack of dynamic competition and competition law's inability to remedy the situation.

The analysis conducted by the Authority led to the conclusion that national wholesale broadband access offers constituted a much-used relevant market, particularly by Internet service providers (ISPs) that do not have their own network, and by operators as a way of completing their broadband coverage. The IP/ADSL offer, as well as business offers delivered from a national point, such as TurboDSL, are included in this market. ART felt it necessary to maintain *ex ante* regulation in this market, albeit lightened compared to the existing framework. A public consultation on this topic was held from 23 June 2004 to 9 August 2004.

4.2. Players' responses and the timetable for 2005

The comments that the Authority received on its analysis were so wide-ranging that it felt it was necessary to hold a second consultation in October 2004. At the outcome of this consultation, and after having analysed the responses submitted by the players, the Authority submitted its analysis to the Competition Council, in accordance with Article L. 37-1 of the Post and Electronic Communications Code.

In its Opinion[16], the Competition Council approved ART's conclusions on the market's definition and on France Telecom's significant market power. Moreover, the Council underscored the major impact of Wanadoo's reintegration into France Telecom in the summer of 2004, and the need to *"determine the measures or mechanisms that could be imposed on a vertically-integrated operator, having a de facto monopoly over the local loop, to ensure operator equality through ex-ante regulation."* It concluded, as did ART, that the national wholesale DSL market was a relevant market in which France Telecom enjoyed significant market power. Furthermore, the Council felt that the 12-month time period that the Authority had set for re-examining this market was likely to undermine the overall coherence of the broadband market's regulatory mechanisms.

16) Competition Council Opinion n° 05-A-03, dated 31 January 2005, following ART's request pursuant to Article L. 37-1 of the Post and Electronic Communications Code.

In the summer of 2004, ART was therefore required to significantly alter the planned obligations set forth in the first public consultation. At the time, it had introduced France Telecom's obligation to formalise the technical and tariff conditions for internal sales, between the company's production divisions and residential broadband access sales divisions.

Because of the scale of the changes introduced following consultation with the sector and the Competition Council's opinion, ART submitted a new draft decision (concerning obligations imposed on France Telecom due to its position of SMP operator in the national wholesale broadband access market) for public consultation between 13 April 2005 and 13 May 2005, before notifying the Commission.

4.3. Finalisation of the market's analysis

Once this consultation is complete, ART will notify its decision to the European Commission, along with the "market scope and SMP operator" decision, which defines the market's scope and designates France Telecom as the SMP operator.

The next stage in the process will involve ART's notification of the European Commission and of the other Member States' regulators (NRAs) in spring 2005, on its draft decision for the wholesale unbundling market, taking into account the comments made by the players and by the Competition Council. The draft decisions will then be once again submitted for public consultation. After having taken into account the Commission's and the other NRAs' eventual comments, the Authority will adopt its final decisions, thus completing the market analysis process, and the effective implementation of the new regulatory framework governing the national wholesale broadband access market.

IV. Mobile telephony markets

1) The retail mobile telephony market

In its Recommendation, the European Commission did not identify the mobile telephony retail market as a relevant market for sector-specific regulation. ART does not plan on re-qualifying this market as being relevant, as defined under Article L. 37-1 of the Post and Electronic Communications Code. Analysis of the wholesale market for call origination and access nevertheless presupposes a close analysis of the state of competition in the retail mobile market, with intervention in the wholesale market being justified to remedy problems arising in the retail market.

1.1. A mature market

Over the past few years, the mobile telephony market has undergone remarkable growth. At the end of 2004, there were a total 44.6 million users (flat rate and pre-paid cards), generating a turnover of close to 20 billion euros, compared to a base of only 5.8 million mobile lines at the end of 1997. During this same period, the base of fixed lines has remained stable at around 34 million lines.

Initially voice-centric, mobile telephony has also given way to the parallel development of new services, headed by SMS (Short Message Service). More than 10 billion SMS were exchanged in 2004 over mobile networks in Metropolitan France, generating a turnover of over one billion euros – seven times more than in 2000. On the whole, new modes of communication (SMS, MMS, e-mail, videophony), and new services (SMS+, positioning, Internet access, mobile TV) all appear to have a bright future ahead of them.

Once confined to early adopters, technophiles and the business segment, mobile telephony is now a part of everyday life in France, its image shaped by the features that have marked the history of its development, by the different customer segments' consumption patterns and behaviours, and by the strategic, technological and commercial approach taken by each operator. Noteworthy among these characteristic features are the predominance of flat rate sales, distribution via physical networks and terminal subsidies.

The mobile telephony market is also marked by a high degree of offer segmentation. Price levels, tariff formats, the scope of services, available features, contract lifespans and the level of possible handset subsidies all vary depending on the target market: light/medium/heavy consumption; consumer/business/corporate market, etc.

In terms of tariffs, segmentation is between light and heavy consumers. The relatively low rate of penetration in France compared to the European average could be the direct result of the high per-minute tariffs that light users are charged. Similarly, the fact that heavy users are offered relatively low per-minute prices would appear to explain the high MoU levels amongst France's mobile phone subscribers.

It should also be pointed out that France's mobile offering is a rich one, compared to other European countries. Services like caller display, voice mail, three-party calling and usage statistics are often included in the offer, free of charge.

In the same vein, post-paid offers (and pre-paid offers as well up to 2002), include a terminal subsidy. This commercial practice initially contributed to the sector's growth by decreasing the short-term costs to consumers for accessing the service. It is now likely to encourage the spread of new services. Terminal subsidies can justify a counterpart minimal contractual commitment. Subscriber contracts with operators are generally 12 or 24 months long, in exchange for lower tariffs.

1.2. Relative decline in competition since 2000-2001

If, during the growth phase, these characteristic features contributed substantially to the French market's development, some may now be hampering the way it operates. Now that the base has reached maturity, for instance, the existence of 12 and 24-month contracts (combined with a three-month notice period for cancellation), is tending to create a disincentive for customers wanting to switch operators, given high churn out costs, and so hampering the competition dynamic.

Different elements point to the fact that, starting in 2000-2001, following the burst of the Internet bubble and the subsequent weakening of the financial state of mobile operators' parent companies, these operators began shifting gradually from a logic of new customer acquisition to a strategy focused more on increasing the value of existing customers and ARPU (average revenue per user), i.e. of increasing subscribers' monthly phone bill.

First, the three national operators' market share levelled off at around 48 % for Orange France, 35 % for SFR and 17 % for Bouygues Telecom (in terms of customer base). At the same time, the average customer acquisition and retention costs dropped by roughly 30 % between 2001 and 2004, which translated into less aggressive sales tactics. Similarly, the average churn rate for post-paid customers was cut in half between 2000 and 2004.

An examination of the growth of average per-minute or per-SMS revenues also shows considerable stability, after a period of sharp decline (for voice) up to the year 2000. This observation is corroborated by operators' analysis of their offers, which sought to steer an increase in usage by encouraging higher consumption (bonus minutes and high volume offers for on-net calls or calls to selected numbers, or at certain times of the day, and per-second billing in exchange for larger flat rates; introduction of SMS flat rates) or subscribing to a higher end offer (withdrawal of handset subsidies and decrease in the lifespan of cards for prepaid offers), leading to higher prices for the same consumption rate.

1.3. Market prospects

Consumers' appetite for new forms of communication and new mobile services are now the chief driving forces behind the sector's growth and technological development (EDGE, UMTS, DVB--H). Because of this, the market is expected to enjoy a revived momentum in the medium term.

In the short term, however, it appears that new players will need to enter the scene to trigger this revival. As part of its analysis of the wholesale mobile call origination and access market, ART plans to encourage the entry of mobile virtual network operators, or MVNOs, in other words operators that do not own a mobile network (cf. below).

Moreover, for technological innovations and the arrival of these new players to be truly beneficial, there needs to be greater market fluidity. In its Recommendation n° 05-0197, dated 22 March 2005, issued at the behest of the Minister-Delegate for Industry, the Authority stressed the need for intervention on the issues of contractual commitments and cancellation notice requirements imposed by mobile operators.

In December 2004, the Authority also drew up a timeline for the implementation of mobile number portability, which is one of the key elements in increasing the fluidity of market competition. This timeline makes it possible to identify the short-term adjustments that will be rolled out over the course of 2005 (removal of the ineligibility clause for outstanding accounts, reduced porting times, implementation of multi-line portage vouchers for companies and government agencies).The Authority has voiced its support for a medium-term "target solution" for portability, through a flexible, fast and simple process for customers wanting to keep their number, without operators' reinforcing their implicit customer loyalty mechanisms.

2) The wholesale mobile access and call origination market

2.1. Definitions

Access and call origination on public mobile telephone networks (market n° 15 in the Commission's Recommendation) encompasses all of the intermediary services that a network operator (host operator) can offer, to enable an operator that has not been awarded a frequency or wireless network authorisation (i.e. virtual operator, or MVNO) to operate in the retail market by offering its own mobile telephony services (access, voice calls, SMS and other narrowband services).

2.2. Analytical framework

After having launched a public consultation on 17 December 2004, ART consulted the Competition Council which recognised the relevance of its analysis (Opinion n° 05-A-09, dated 4 April 2005). Pursuant to the EU and national framework, a draft decision was notified to the European Commission on 14 April 2005 and submitted at the same time for public consultation.

In accordance with the spirit of the "telecoms package" Directives, ART plans on intervening in the wholesale market only to the extent that its ultimate goal is to remedy an unsatisfactory situation in the retail mobile telephony market. This is why the Authority's approach to the wholesale market and its recent developments is focused on the relative decline in competition observed since 2000-2001. The Authority did not, however, undertake a legal qualification of the retail market (in terms of relevant market and SMP), given that the Commission's Recommendation addresses only the wholesale market.

2.3. ART's analysis

With respect to operators' position in this market, ART's analysis led to the conclusion that, in Metropolitan France, the country's three network operators (Orange France, SFR and Bouygues Telecom) enjoyed collective dominance of the wholesale market. This situation has translated into all three operators behaving consistently in not offering existing and candidate MVNOs terms of access that would allow them to contribute significantly and in a lasting manner to the retail market's competitive landscape. This common line of action, which is tacitly admitted, allows the three network operators to maintain the low level of competition that has marked the retail market since 2000-2001.

For these network operators, and Orange France and SFR in particular, there is no long-term advantage in fully opening up the wholesale market, to the extent that it would have an adverse effect on their long-term margins. Individually, however, the signature of a wholesale agreement that allows an MVNO to gain a significant share of the retail market would lead to a swift rise in overall traffic levels (i.e. combined wholesale and retail) for the host operator, and an only moderate decline in margins, and so constitute a profitable operation. This is all the more pertinent given that a host operator adopting a first mover strategy in the wholesale market is likely to attract the most promising MVNOs. In the UK, for instance, where competition in the retail market is considered intense, it was T-Mobile, the number four and youngest network operator, which negotiated a wholesale agreement with Virgin Mobile.

The Authority pointed to the fact that France's wholesale market has undergone recent developments with the signature of seven MVNO agreements between June 2004 and April 2005.

As beneficial as these MVNO agreements may be, in absolute terms, for this long non-existent wholesale market, these recent developments do not fundamentally undermine the strategy adopted by the network operators. The positioning of existing MVNOs in particular, and the terms offered by their host operator are not enough to allow these players to have a significant impact in the retail market. In any event, even if an MVNO currently enjoyed satisfactory wholesale conditions, it would still remain just as dependent on its host operator – having not achieved critical mass in the retail market.

The regulator's intervention was thus deemed necessary, to oversee temporarily the market's opening up to competition, to ensure the long-term viability of the existing players and, eventually, to enable new players to enter the market. This type of intervention will probably no longer be required once the market is populated by MVNOs whose operations are developed to such a degree that maintaining, and even improving, contractual relations becomes a key part of host operators' strategies.

The lack of structural obstacles to the wholesale market's development and, conversely, the essentially contingent nature of current restrictions to the wholesale market's full opening, led ART to plan light and temporary intervention, in the form of a simple obligation for each network operator to meet reasonable demands for access coming from virtual operators. This obligation will be enough to open up the wholesale market, without having to resort to more prescriptive measures. The wholesale market's development will enable a revival of the retail market's competition dynamic, and the emergence of innovative offers born of fixed-mobile convergence.

Analysis of overseas markets led ART to impose on Orange Caraïbe an obligation to provide a wholesale national roaming service as part of its continuity of service mandate, thus allowing operators without full coverage of the Antilles-Guyana zone to offer their customers full service throughout this region.

2.4. The Irish example

When analysing the wholesale mobile access and call origination market, ART took a similar approach as the one taken by the Irish regulator, ComReg, which concluded that the country's two largest operators, Vodafone and O2, had collective market dominance – with a combined market share of 94%.

To determine this collective SMP, ComReg based its assessment on a selection of criteria, drawing on the European Commission's regulatory texts and on European Law, notably the high degree of market concentration, the two operators' tacit incentive to coordinate their activities, the operators' capacity to follow a common line of action and detect any deviation, the existence of reprisal mechanisms (should deviation occur) and, finally, the lack of foreseeable competition from other players. ComReg illustrated the way these criteria were examined using a selection of indicators on the market's past evolution, particularly in terms of retail price levels and changes, and profit margins.

ComReg thus identified a common line of action being practiced by these two operators, which involved coordination of their retail prices, and the refusal to offer third-party operators reasonable terms for the sale of wholesale access and call origination services. As to the proposed remedies, ComReg demanded that the two SMP operators meet all reasonable demands for access and adhere to the principle of non-discrimination. It is only if commercial negotiations break down between now and mid-2005 that these operators will find themselves subject to additional, complementary obligations, namely tariff control (cost-oriented tariffs), cost accounting and separate accounting.

3) The wholesale market for voice call termination on mobile networks

3.1. Definitions

Voice call termination is an interconnection service that all mobile operators offer to other operators, both fixed and mobile. This is the bottleneck through which all calls to the operator's customers must transit, both fixed-to-mobile and mobile-to-mobile.

3.2. First market analysis completed

ART has completed its analysis of the wholesale mobile voice call termination market. Voice call termination is an interconnection service that all mobile operators offer to other operators, both fixed and mobile. Each mobile operator therefore terminates calls to its own subscribers which originated on another operator's network (i.e. off-net calls).

The decisions adopted are the fruit of a lengthy process that began in mid-2003, and which led to an initial public consultation, launched in April 2004, and consultation with the Competition Council in June 2004. On 2 November 2004, ART notified the European Commission on its draft decisions concerning Metropolitan France, then on 8 December 2004 on those concerning the overseas territories. At the same time, a second public consultation was launched.

ART adopted four final decisions on Metropolitan France[17] on 9 December 2004, and eight decisions[18] on 1 February 2005, on the overseas départements.

At the outcome of this process, France found itself among the first of the 25 European Union countries to have completed their analysis of the mobile call termination market.

3.3. ART's analysis

Pursuant to the European Commission's Recommendation (market n°16), ART qualified the relevant wholesale voice call termination markets for each of the mobile operators' individual networks. In these markets, segmented geographically according to the licence allocation zones (Metropolitan France, Antilles-Guyana, Mayotte, the Reunion and Saint-Pierre-et-Miquelon), the Authority designated each mobile operator as having SMP in the market for call termination on its network.

17) ART Decision n° 04-936, dated 9 December 2004, on the definition of relevant markets for voice call termination on mobile networks in Metropolitan France.
ART Decisions n°04-937, n°04-938 and n°04-939, dated 9 December 2004, on the SMP of the undertakings Orange France, SFR France and Bouygues Telecom in the wholesale voice call termination market on their respective networks, and thus imposed obligations.

18) ART Decision n° 05-0111, dated 1 February 2005, on the definition of relevant markets for voice call termination on mobile networks in France's overseas territories.
ART Decisions n° 05-0112 through n° 05-0118, dated 1 February 2005, on the SMP of the undertakings Orange Caraïbe, SRR, Orange Réunion, Bouygues Telecom Caraïbe, Saint-Martin Mobile, Dauphin Télécom and SPM Télécom in the wholesale voice call termination market on their respective networks, and thus imposed obligations.

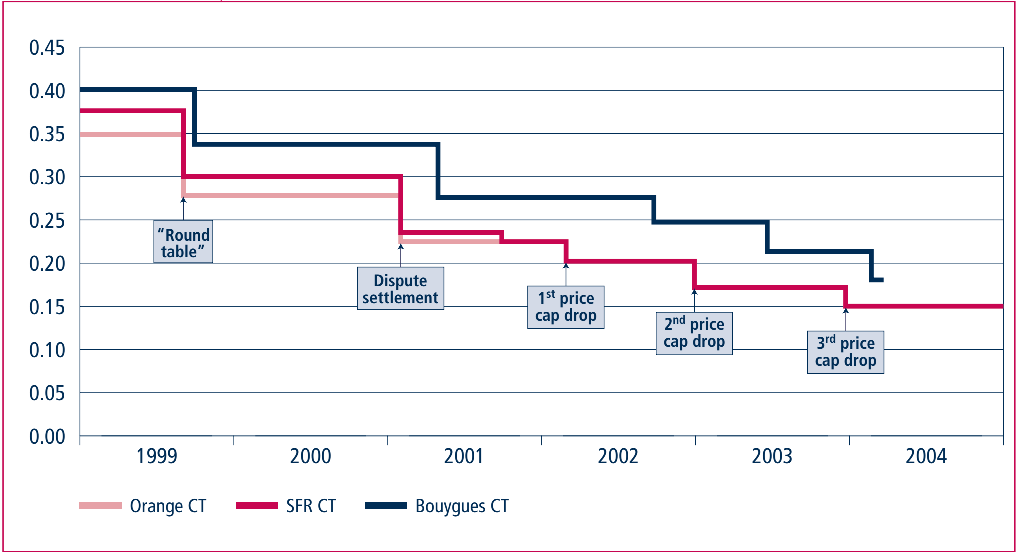
Upon completion of its analysis ART revealed that, except when using means such as fixed GSM gateways for by-passing termination equipment, no product can provide a substitute for voice call termination on a given mobile operator's network. This means that each operator controls a 100% share of its own voice call termination market, without any possibility of there being countervailing buying power.

To support this analysis, ART noted that, in the past, the leading mobile operators' call termination tariffs had remained high, compared to network costs. As concerns Bouygues Telecom in particular, which was not subject to regulation under the old framework, the Authority was able to observe that from 1999 to 2004, the operator's call termination tariffs were consistently more than 15% higher than those charged by Orange France and SFR – proof then of these two operators', and of France Telecom's, inability to exercise any countervailing buying power over Bouygues Telecom.

3.4. Operator obligations

Overall, the wholesale call termination tariffs on mobile networks translated into high retail prices for fixed-mobile calls, which led to imbalances and to inefficient value transfers between the fixed telephony and mobile telephony markets. As far back as 1999, this situation justified ART's intervention in the Metropolitan market. In 2001, this involved imposing on Orange France and SFR a roughly 37% decrease in their call termination charges over three years, which led to a wholesale tariff of 15 euro cents a minute, excluding VAT, in 2004.

Estimated change in the average price of call termination in Metropolitan France (euros/minute)



Source : ART

The analysis of wholesale voice call termination markets on mobile operators' networks is a continuation of ART's earlier actions. The Authority imposed on all three of Metropolitan France's mobile operators the obligation to publish a reference offer, along with tariff control obligations, with the goal of limiting the impact of these operators' significant market power. The price cap set by the Authority imposes on Orange France and SFR a ceiling on the average call termination tariff of 12.5 euro cents in 2005 and 9.5 euro cents in 2006. The ceiling for 2007 will be specified in 2006.

In France's overseas markets, mobile operators are subject to the same obligations as operators in the Metropolitan zone. In terms of tariff control, however, only the leading operators, SRR and Orange Caraïbe, are subject to a price cap which consists of a 20% decrease in their tariffs over three years. Smaller operators are subject only to the obligation of not charging excessive call termination tariffs.

4) The wholesale SMS termination market

4.1. Definitions

An SMS service includes SMS call origination on a mobile network and SMS call termination either on the same operator's network (i.e. on-net SMS), or on another operator's network (i.e. off-net SMS). SMS call termination also enables delivery of an SMS to a mobile network from a fixed-line network, an e-mail programme or a service platform, notably for SMS+.

4.2. ART's analysis

Considered an emerging market when the initial list of relevant markets was drawn up in the Commission's Recommendation in 2001/2002, and thus not subject to ex-ante regulation, the SMS market has since reached maturity.

Although still not listed as a relevant market in the Recommendation, ART nevertheless felt that the wholesale SMS call termination market operates in the same way as the voice call termination market. In particular, there was evidence of the three criteria required for a market to be subject to *ex-ante* regulation: existence of high and persistent barriers to entry, lack of foreseeable competition, competition law's inability to remedy the situation on its own.

ART thus began an analysis procedure for this new market by gathering qualitative and quantitative information, which is expected to allow it to subject its initial analysis to public consultation in the summer of 2005.

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5) The wholesale international roaming market

On 10 December 2004, the European Regulators Group (ERG), which is composed of the European Commission and the national regulatory authorities (NRAs) from the EU's 25 Member States, elected to launch a coordinated analysis of all of the Community's international roaming markets (i.e. the "roaming in" market). Acting in tandem with the other NRAs, ART sent Metropolitan France's three mobile operators the questionnaire that was drafted by the ERG.

The wholesale national market for international roaming on public mobile networks (market n° 17 in the Recommendation) corresponds in Metropolitan France to the wholesale services that Orange France, SFR and Bouygues Telecom sell to foreign operators to allow the latter to offer their customers the ability to send and receive calls when visiting Metropolitan France. Retail and subjacent wholesale roaming markets are therefore never located in the same country, which means that any international roaming issues are necessarily cross-border issues. The draft of a common position is scheduled for May 2005.

V. Leased line markets

1) Definitions

The retail leased line market corresponds to the capacity that operators sell to end customers (for interconnection of their corporate or public sector sites).

The wholesale leased line market in the terminal segment corresponds to the capacity that operators use to connect end customers primarily to their own network, and for offering them electronic communications services.

The wholesale trunk market corresponds to the generally very high-speed capacity used by operators between their larger network nodes, and combined with terminating segments to form the architecture for retail market capacity services.

2) Public consultation in 2005

ART continued its analysis of the market for leased lines and capacity services with alternative substitutable interfaces[19]; a public consultation is scheduled to take place in 2005.

19) Services with Ethernet or ATM interfaces, or data storage protocol interfaces such as SAN or ESCON.

In its market definition document, ART had indicated in 2003 that the definition of the retail market's scope contained in the European Commission's Recommendation seemed restrictive compared to the reality of the French market. The Commission had in fact confined this market only to leased lines subject to specific regulation in the "universal service" Directive – in other words, what are referred to as "minimum sets of leased lines" (analogue, 2- and 4-wire leased lines, and 64 kbit/s and 2 Mbit/s structured -1920 kbit/s- and unstructured -2048 kbit/s- digital leased lines, as defined in the list of EU standards, mentioned in Article 17 of the "framework" Directive). This first approach taken by the Authority, confirmed by substitutions of existing market services, could lead to the expansion of the retail market, which will be presented during the public consultation.

Moreover, like with all of the other markets, ART will favour strong regulatory measures for wholesale markets upstream from the retail market (wholesale terminating segment market, and wholesale trunk market), in a bid to eliminate the bottlenecks that currently exist in capacity markets, both on the whole network and on the access network.

VI. Broadcasting service markets

1) Definitions

A consequence of having taken into account the convergence of telecommunications and broadcasting networks, the 18th market identified by the European Commission is identified as the wholesale market for *"broadcasting transmission services, to deliver broadcast content to end users."* Up until then, this market had not been subject to sector-specific ex-ante regulation. It includes the networks and the related facilities that enable content broadcasting. The market being confined only to the networks, content is excluded from the scope of analysis.

2) Scope of broadcasting service markets

The European Commission's Recommendation on relevant markets specifies that the platforms included in market n° 18 are satellite, cable and the ADSL infrastructure, but first and foremost, analogue and digital terrestrial networks.

In particular, ART examined the state of competition for wholesale digital terrestrial TV (DTT) services, of which the Free-to-Air portion was launched on 31 March 2005.

The Commission ruled that, in theory, all of the networks used for broadcasting radio and television programmes belonged to the same market. It nevertheless left open the possibility for national regulatory authorities to segment into several markets

3) Public consultation in 2005

On 28 July 2004, ART published qualitative and quantitative questionnaires on this market. These surveys are aimed at all the players involved in the sector, namely broadcasters, service operators, multiplex service operators (broadcasting several service channels over a single frequency channel), satellite capacity resellers, commercial distributors and consumer associations. Distribution of these questionnaires followed a phase of informal hearings with the sector's players, which began in October 2003, and which provided the Authority with a preliminary view of the way that this specific market works, and of the issues at hand.

The responses to these questionnaires allowed ART to establish an initial diagnosis of the way that the audiovisual broadcasting service market operates.

In light of the existing obstacles to increasing effective competition, and of the market's ability to operate competitively, ART examined the need to implement ex ante mechanisms for the wholesale market, adapted and proportionate to the observed state of competition.

In accordance with the new regulatory framework, the Authority will begin a public consultation by mid-2005, focused on defining the relevant wholesale market for terrestrial TV programme broadcasting, on the designation of TDF as the SMP operator in this market, and on defining the appropriate obligations.