Legal and regulatory framework 3

Postal sector

A. National legislative framework

The scope of regulation covers postal service activities involving the clearance, sorting, routing and delivery of postal items as part of regular rounds. It does not cover the delivery of unaddressed advertising, urban courier services and express transport – sectors that are open to competition and therefore come under competition law.

La Poste's banking activities and its regional development mission do not come within the purview of postal regulation.

1. Background

The Law of 20 May 2005[1] modernised the rules applicable to postal activities, making them compatible with the European legal framework. In particular, it addresses:

- the organisation of the postal operations market;
- the establishment of regulation of this market with the creation of ARCEP: the legislator entrusted the former ART with the mission of supervising the opening and correct operation of the postal market as well as the financing and safeguarding of the universal service;
- the recasting of the legal framework of La Poste's financial services with the creation of the *Banque postale* (which is excluded from postal regulation);
- the regional development mission assigned to the company La Poste and the financing thereof.

As well as modernising legislation on postal operations, the Law on regulation of postal activities also reorganised the legal and statutory provisions governing the postal sector, dividing them into two main texts:

1 - Law No 2005-516 of 20 May 2005 on regulation of postal activities, JO (Official Journal) of 21 May 2005.

- the French postal and electronic communications code, CPCE (***Code des postes et des communications électroniques,***), which groups the rules applicable to **postal services in general** and to the universal postal service in particular. It is this text that lays down the provisions on regulation[2], particularly the role of ARCEP[3].
- **the 1990 Law on La Poste**[4] which sets out the operating rules for the **company La Poste** (and does not therefore have a direct bearing on ARCEP's work).

In 2006, this framework was supplemented by new implementing decrees.

2 - Chapter II of the CPCE.

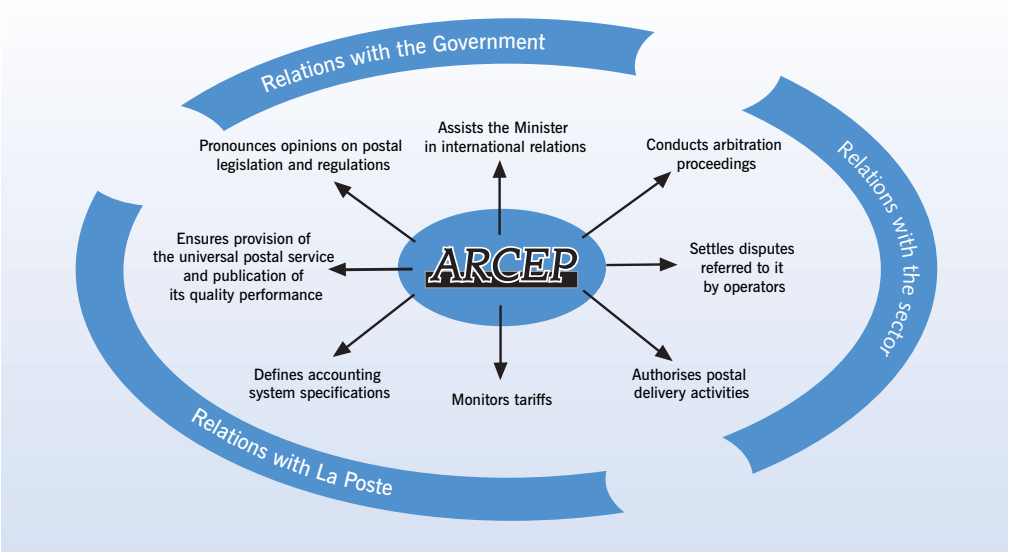
3 - Cf. article L.5-2 of the CPCE.

4 - Law No 90-568 of 2 July 1990 concerning the organisation of the postal public service in France and France Telecom, JO of 8 July 1990.

2. Regulator's missions

The Law on regulation of postal activities conferred on ARCEP the mission of supervising the opening and correct operation of the postal market:

- by issuing authorisations to exercise a postal activity;
- by issuing opinions that are subsequently published concerning tariffs and universal service quality targets;
- by approving tariffs for the reserved area.



3. Implementing texts adopted in 2006

In 2006, numerous implementing texts were published, including a decree and an order specifying the conditions under which ARCEP may grant authorisations to companies providing correspondence-item services, plus a decree and several orders on the universal postal service.

Main implementing texts for postal legislation

Decree on regulation of postal activities covering: • authorisations • the settlement of disputes • accreditation of investigating agents • repeal of the decree instituting a universal postal service ombudsman	Decree No 2006-507 of 3 May 2006 on regulation of postal activities and amending the CPCE published in the JO of 5 May 2006
Decree on the characteristics of the universal service and the corresponding implementing orders: • Order on quality of service targets • Order on the definition of bulk items • Order on literature for the blind	Decree No 2007-29 of 5 January 2007 on the universal postal service and La Poste's rights and obligations and amending the CPCE published in the JO No 6 of 7 January2007
Decree on postal operator liability	Decree No 2006-1020 of 11 August 2006 in implementation of articles L. 7 and L. 8 of the CPCE concerning the liability system applicable to postal service providers, published in the JO of 17 August 2006

B. Revision of the Postal Directives

In October 2006, the European Commission submitted a proposal for a directive confirming 1 January 2009 as the date for total liberalisation of postal markets.

1. Review of European postal policy

a. Principles

Following the publication in 1992 of a Green Paper on postal services, the European institutions committed to the gradual introduction of a single European market for postal services. In 1997, a Framework Directive[5] was published, establishing the principle of a universal postal service defined according to common rules and of independent regulation of the sector.

As the Directive text was not very detailed, regulatory procedures were not harmonised at European level. It nevertheless specifies some basic tools and principles:

- tariffs geared to costs;
- transparent accounting designed to ensure there is no illegal cross-subsidisation;

5 - *Directive No 97/67/EC of 15 December 1997 of the European Parliament and of the Council concerning common rules for the development of the internal market of Community postal services and the improvement of quality of service.*

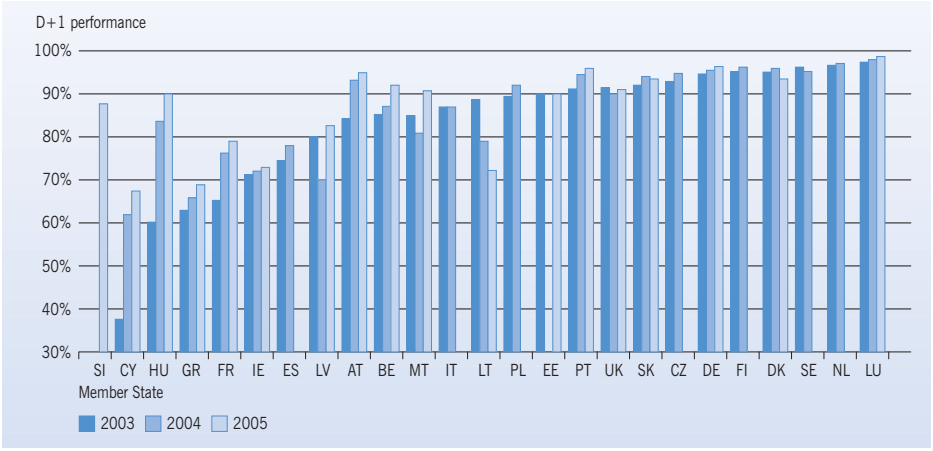
- non-discrimination as regards tariffs applicable to bulk items;
- the enactment of rights and obligations for competitors in the form of licensing or declaration systems.

b. Results

The Commission regularly assesses postal progress in Europe. The reports and studies conducted since then highlight significant developments: on average, quality is improving and postal operators are increasing their margins.

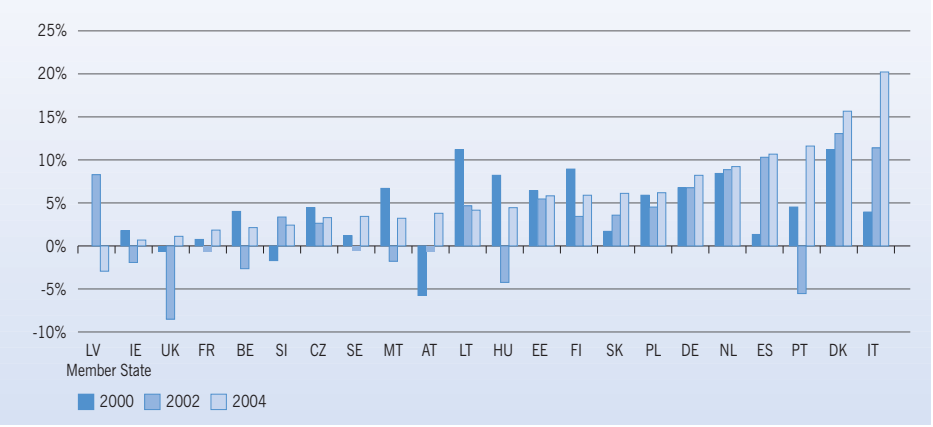
6 - Here, performance is measured as the percentage of letters delivered one day after posting (D+1).

Postal operator performance in terms of mail delivery in D+1[6]



Source: Main developments in the postal sector (2004-2006), WIK Consult GmbH, May 2006.

Postal operators' profit margins in 2000, 2002 and 2004



Source: Main developments in the postal sector (2004-2006), WIK Consult GmbH, May 2006.

2. The European Commission is proposing a new directive

a. Situation in Europe

Insofar as the 1997 Postal Directive[7] left Member States considerable room for manoeuvre, the European scene is far from uniform.

7 - See above.

While the majority of European Union Member States (Belgium, France, Germany, and Italy) implemented their national legal systems in accordance with the rules provided for in the Directive – for instance, transposition of the principles of universal service, phased opening of markets[8] – other countries adopted special measures:

8 - The 1997 Directive provides for gradual widening of the competitive area, which corresponded to items of correspondence weighing at least 350 grams from 1997, 100 grams from 2003, and 50 grams from 2006.

- advanced liberalisation in certain Member States:

  - some countries extended liberalisation to direct marketing items, including those below the weight limits set in the Directive[9] (Netherlands, Spain);

  - others have already completely opened the postal market to competition (Sweden in 1993, the United Kingdom in 2006) or announced their intention to do so before 2009 (Germany and Netherlands, in 2008);

- special systems in some Member States:

  - some countries have managed to retain international items as part of the monopoly because for them, such items represent a significant percentage of their total traffic (Italy, Luxembourg, Spain);

  - Spain allows competition in urban areas and retains a monopoly on interurban flows;

  - Finland has opened its entire market but imposes stringent admission conditions on the competition (service in a very restricted geographical area, admission fee).

9 - See above.

b. The Commission's observations

The European Commission found that liberalisation has not called the fundamentals of the universal service into question in countries where it was introduced ahead of schedule. This was the case in Sweden in particular, where the 1993 liberalisation resulted in a stable situation in which Posten, the incumbent operator, retains a large share of the market and is in a sound economic position. The competition holds a limited share of the market (8 to 9%) but provides Posten with an incentive to improve its efficiency.

To evaluate the impact of opening postal markets in Member States, the European Commission published a study[10], commissioned from PricewaterhouseCoopers (PWC). Based on the assumption that operators and Member States adapt their behaviour to the new market context, the study concluded that liberalisation was possible without specific funding mechanisms in the majority of European countries, particularly if:

- postal traffic volumes are high;

10 - "The impact on universal service of the full market accomplishment of the postal internal market in 2009", Pricewaterhouse-Coopers, May 2006, available on the Internet: ec.europa.eu/internal_market/post/studies_en.htm

- it is possible to apply non-uniform prices[11] for bulk mail, thus enabling the universal service operator to withstand the cream-skimming strategies adopted by the competition[12];
- the operator in charge of the universal service restructures, adapts its tools and operates in social conditions similar to those of its competitors.

11 - Applying non-uniform prices entails putting in place a system of tariffs that vary depending on the mail's destination and the routing problems involved.

12 - Strategy adopted by postal operators of concentrating their activity in densely populated areas which are a priori the most profitable, at the expense of sparsely populated areas, which are left for the operator in charge of the universal service.

The example of France

The study conducted by PWC showed that in France, the impact on the market of opening the postal sector to competition would be fairly limited. The country is well prepared as regards the quality of its framework regulations and in view of certain favourable aspects of its market. In contrast, there is inadequate preparation with regard to the universal service provider, and to the compatibility between the scope of the universal service and total opening to competition. The study therefore suggested specific accompanying measures.

c. A new directive

In this context, the European Commission proposed a new directive based on the following key points:

- total market liberalisation from 1 January 2009;
- compatibility between liberalisation and the requirement to maintain a daily, nationwide service;
- organisation of the financing of universal service obligations by Member States if it transpires that funding mechanisms are needed; the text does not explicitly organise specific intervention measures but merely lists them; they will have to satisfy the requirements applicable to government aid;
- maintaining the universal service principles as defined at present;
- the directive remains a framework text which sets out principles but leaves Member States considerable leeway when it comes to defining the exact content of the universal service and implementing specific regulation procedures. Thus, national approaches may differ considerably from the market liberalisation model. For instance, the decision about granting access to the networks of incumbent national operators is left to the individual countries.

The electronic communications sector

A. Reminder of the national legal framework

The legal framework that governs telecommunications stems from the adoption of three laws:

- the Law of 31 December 2003[13] transposing the "Universal Service" Directive;
- the Law of 21 June 2004[14] concerning confidence in the digital economy, which, in particular, authorises local authorities to become telecom operators[15];
- the Law of 9 July 2004[16], which fundamentally altered the legislative framework, that applies to electronic communications, one of the main changes being the implementation of a new system of declaration for operators[17].

Furthermore, in 2006 two laws and one order, which will affect electronic communications, were adopted:

- the Law of 23 January 2006[18] which extends the obligation to produce and maintain traffic data, and containing provisions concerning the data themselves and those in charge of preserving them (notably ISPs and hosting companies).

13 *- Law No 2003-1365 of 31 December 2003 concerning the public service obligations of telecommunications and France Telecom, JO of 1 January 2004.*

14 *- Law No 2004-575 of 21 June 2004 concerning confidence in the digital economy, JO of 22 June 2004.*

15 *- Cf. Article L.1425-1 of the local authorities general code, introduced by the law on the digital economy (LEN) of 21 June 2004.*

16 *- Law No 2004-669 of 9 July 2004 concerning electronic communications and audiovisual communication services, JO of 10 July 2004.*

17 *- Cf. Part 10, Chapter 1, A.*

18 *- Law No 2006-64 of 23 January 2006, concerning the fight against terrorism and containing diverse provisions relating to security and border control, JO of 24 January 2006.*

- the amending finance Law of 2006[19] which specifies the methods for calculating taxes due from the allocation of numbering resources covered by the CPCE, and which brings changes to spectrum licensing fees.
- the Order of 21 April 2006[20] specified in the CPCE that the frequencies available in France constitute a private form of occupation of the State's public domain.

B. Regulatory provisions adopted in 2006

1. Implementing decrees in 2006

Spectrum licensing fees	Decree n° 2006-13 of 5 January 2006[21]
Frequencies and health	Decree n° 2006-61 of 18 January 2006[22]
Number portability [23]	Decree n° 2006-82 of 27 January 2006[24]
Electronic communication terminal equipment	Decree n° 2006-207 of 20 February 2006[25]
Mobile operator obligations[26]	Decree n° 2006-268 of 7 March 2006[27]
Protection of privacy	Decree n° 2006-358 of 24 March 2006[28]
Satellite frequency assignment	Decrees n° 2006-1015 of 11 August 2006[29]
Spectrum trading[30]	Decrees n° 2006-1016 of 11 August 2006[31]
Electromagnetic compatibility of electrical and electronic equipment	Decree No 2006-1278 of 18 October 2006[32]
Fight against terrorism	Decree No 2006-1651 of 22 December 2006[33]

19 - Law No 2006-1771 of 30 December 2006: amending Finance Law for 2006, JO of 31 December 2006.

20 - Order No 2006-460 of 21 April 2006, concerning the legislative portion of the general code on corporate ownership of public property, JO of 22 April 2006.

21 - Decree No 2006-13 of 5 January 2006 modifying the Decree of 3 February 1993 concerning the fees that licence-holders must pay for gaining access to and managing radio spectrum, pursuant to Articles L. 42- 1 and L. 42- 2 of the CPCE (French postal and electronic communications code), JO of 6 January 2006.

22 - Decree No 2006-61 of 18 January 2006, concerning quality criteria imposed on entities mentioned in CPCE Article L.34-9-1, and amending the Code, JO of 20 January 2006.

23 - See inset.

24 - Decree No 2006-82 of 27 January 2006, concerning number portability, pursuant to CPCE Article L.44, JO of 28 January 2006.

25 - Decree No 2006-207 of 20 February 2006, concerning compliance assessment and the terms for installing and using electronic communications terminal equipment and wireless equipment, and amending the CPCE, JO of 23 January 2006.

26 - Cf. Part 8, Chapter I, C.

27 - Decree No 2006-268 of 7 March 2006, concerning the terms for establishing and operating networks and supplying wireless mobile services, JO of 9 March 2006.

28 - Decree No 2006-358 of 24 March 2006, concerning the preservation of electronic communications data, JO of 26 March 2006.

29 - Decree No 2006-1015 of 11 August 2006, concerning the assignment of frequencies to satellite systems and amending the CPCE, JO of 12 August 2006.

30 - See inset

31 - Decree No 2006-1016 of 11 August 2006, concerning spectrum licence trading, JO of 12 August 2006.

32 - Decree No 2006-1278 of 18 October 2006, concerning the electromagnetic compatibility of electrical and electronic equipment, JO of 20 October 2006.

33 - Decree No 2006-1651 of 22 December 2006, made for application of Part I, Article 6 of Law No 2006-64 of 23 January 2006, concerning the fight against terrorism, and containing diverse provisions relating to security and border control, JO of 23 December 2006.

2. Spectrum trading

The ability for operators to trade frequency licences was introduced into the CPCE[34] by the Law of 9 July 2004[35], thus enabling the creation of a secondary frequency market[36]. The general terms of this trade were defined by a decree published[37] in the *Journal Officiel* of 12 August 2006.

Trading can involve all or part of a licence:

- **full sale:** the spectrum licence-holder sells all of its rights and obligations (notably fee payments) to a third-party for the entire remaining period of the licence;
- **partial sale:** the spectrum licence-holder sells only a portion of the rights and obligations contained in its licence. This transfer of rights and obligations may concern a set geographical zone, particular frequencies, or a portion of the licence's lifespan. The partial sale concerns only licences for which there are no specifications with respect to the location of site installations.

A third option involves the licence-holder making frequencies available for a third party to operate. Contrary to a sale, in this case the licence-holder remains entirely responsible for meeting the obligations attached to the frequency licence. As with a sale, a frequency can be made fully or only partially available to the third-party.

Furthermore, in a legal studied carried out on behalf of ARCEP in January 2007[38], senior member of the Council of State, Christine Maugüé, specified the procedure for local authorities wanting to be involved in the secondary frequency market.

NB: Details on the procedures for trading spectrum or making it available to third-parties, along with a list of tradable frequencies, are available on ARCEP's websit[39].

The first spectrum licence trade occurred on 11 January 2007, with the Alsace Region transferring a geographical portion of its WiMAX licence – issued by ARCEP in July 2006 – to the Haut-Rhin *département*.

3. Number portability

Number portability (or number retention) allows customers to switch fixed or mobile telecom operators, while keeping the same phone number[40]. The CPCE includes the provision that public telephone service subscribers (fixed or mobile) who so request can keep their numbers[41], and specifies that:

- subscribers can request number portability from a single provider, namely their new operator of choice ("one-stop" process).

34 - *Article L.42-3 of the CPCE.*

35 - *Law No 2004-669 of 9 July 2004, concerning electronic communications and audiovisual communication services, JO of 10 July 2004.*

36 - *Cf. Part 8, Chapter 1, A, 2.*

37 - *Decree No 2006-1016 of 11 August 2006, concerning spectrum licence trading, JO of 12 August 2006.*

38 - *Report on the legal procedures for trading and making wireless local loop frequency licences available to third-parties, January 2007, available on ARCEP's website: http://www.arcep.fr/uploads/tx_gspublication/etd-march-second-frqc-janv07.pdf.*

39 - *Cf. http://www.arcep.fr/index.php?id=7108.*

40 - *Cf. Part 6, Chapter 5.*

41 - *CPCE Article L.44.*

- the time limits for porting and cancellation will be a maximum 10 days (except on special request from the customer);

The method of application for legal provisions concerning number portability was set by a decree on 27 January 2006[42]. Among other things, this decree:

- lists the operators concerned by number portability requests;
- specifies the impact of a number's portage on the cancellation of a contract between customers making the request and their operator;
- confirms the time limits for implementation (maximum 10 days).

42 - Decree No 2006-82 of 27 January 2006, concerning number portability, pursuant to CPCE Article L.44, JO of 28 January 2006.

It also provides for a decision from ARCEP[43] which will specify the method of application of these provisions, notably in terms of:

- informing subscribers;
- quality of service obligations with respect to portage and the maximum length of service interruptions;
- the time limits for the exchange of information between operators required to process subscriber requests.

43 - Only the decision specifying the method of application for mobile number portability in Metropolitan France (ARCEP Decision No 06-0381 of 30 March 2006) has been published.

Lastly, it sets the timetable for implementing the number portability process.

Mobile telephony			Fixed telephony (geographic and non-geographic numbers)
Metropolitan France	Guadeloupe, Guyana, Martinique	Reunion, Mayotte, Saint-Pierre-and-Miquelon	Metropolitan France and overseas territories
1 January 2007 N.B. : this date was changed to 21 May 2007 by the Minister- delegate of Industry[44]	1 April 2006	1 July 2007	1 April 2007

4. Frequency assignments for satellite systems

The Decree of 11 August 2006[45] specifies the procedure enabling the transfer of rights concerning frequency assignments, acquired by ANFr from the International Telecommunications Union (ITU)[46], to an entity operating a satellite electronic communications system.

It provides notably that during an investigation into requests for satellite frequency authorisations, the National Frequency Agency (ANFr) will consult with ARCEP, which allocates the frequencies in question, to obtain its opinion.

This opinion will not, however, be prejudicial to ARCEP's later issuance of a spectrum licence in the French territory.

44 - Press Release from the Minister-delegate of Industry: http://www.industrie.gouv.fr/portail/ministre/comm.php?comm_id=7241.

45 - Decree No 2006-1015 of 11 August 2006, concerning frequency assignments to satellite systems and amending the CPCE, JO of 12 August 2006.

46 - Cf. Part 10, Chapter 3, A.

European harmonisation of electronic communications

ARCEP takes an active role in the work being performed to harmonise the European Regulatory Framework, notably through debates and the contributions it makes to the various bodies (committees, working groups) involved in the European Commission's decision-making process.

A. The work of COCOM

The purpose of the Communications Committee (COCOM)[47] is to assist the European Commission, particularly in its role as secondary legislator.

A classic instrument of comitology[48], COCOM enables Member States to give their opinions officially to the European Commission – in areas relating either to COCOM's consultative capacity[49] or to its regulatory capacity[50] – and to exchange viewpoints on all matters that have been put on the agenda.

The instances in which COCOM intervenes in a consultative or regulatory capacity are determined by the Electronic Communications Directives. COCOM is also where the European Commission presents its intention to veto[51] draft national market analysis measures and where national regulatory authorities (NRAs) have the opportunity to respond.

ARCEP ensures that the French authorities are represented at COCOM alongside the Ministry of Industry Directorate General for Enterprise.

A great deal of COCOM's efforts in 2006 were devoted to spectrum and numbering issues.

47 *- According to the provisions of Article 22 of the Framework Directive.*

48 *- The European Parliament defines "comitology" as the process by which the Commission, assisted by a committee of experts drawn from the Member States, adopts the measures necessary for the implementation of legislative acts.*

49 *- Cf. Article 3 of the Council's Decision No 1999/468/EC of 28 June 1999 ("Comitology" Decision).*

50 *- Cf. Article 5 of the Council's Decision No 1999/468/EC of 28 June 1999.*

51 *- Cf. Article 7 of the Framework Directive.*

1. The 116 prefix

Following a favourable recommendation from COCOM on 20 December 2006, the Commission issued a decision[52] in early 2007 aimed at harmonising the rules for allocating numbers beginning with the 116 prefix (destined for services of "social value").

52 - *Decision 2007/116//EC concerning "116" of 15 February 2007, EC Official Journal of 17 February 2007.*

COCOM had in fact been called on by the Commission to render a draft decision on the issue, as part of the regulatory procedure. The goal was to achieve harmonisation of 116 numbers across Europe so that a given number in that range would be assigned to the same service in all EU countries.

Article 1 of this Decision states that: *"The numbering range beginning with '116' shall be reserved in national numbering plans for harmonised numbers, for harmonised services of social value."* Only one number would not be subject to such an assignment: 116 112, to avoid confusion with the 112 emergency number.

Reserved 116 numbers are listed in the Decision's annex: only those numbers reserved at the European level are likely to be assigned at the national level. When first published, the list contained one number: 116 000, for emergency hotlines for missing children – which is due to be gradually put into service across Europe in the second half of 2007. In France, it was added to the list of emergency numbers that operators are required[53] to route free of charge.

53 - *Order of 2 March 2007 ratifying ARCEP's Decision No 07-0180, JO of 20 March 2007.*

Another number that could be added to the annex in 2007 is "116 116", which is already used in Germany for blocking bank cards. A public consultation will be launched in the first half of 2007 in all Member States to identify the services interested in this number, and to incorporate them, if need be, into the list of eligible numbers.

2. Allocation of 2GHz MSS frequencies

In February 2007, the Commission adopted a decision[54] concerning use of the 2GHz[55] MSS[56] frequencies.

54 - *Decision 2007/98/EC of 14 February 2007 concerning use of the 2GHz for mobile satellite services with a complementary ground component.*

The 2GHz MSS frequency bands are reserved for broadband satellite communication services that have a complementary ground component. The Radio Spectrum Committee (RSCOM) has mandated CEPT to harmonise the technical conditions for using these frequency bands. The system characteristics and in particular the ground component and the pan-European scope pose regulatory problems that have been submitted to COCOM via an *ad hoc* group of experts comprising members of RSCOM, CEPT, ETSI and the European Commission.

55 - *The 1980-2010MHz and 2170-2200MHz bands.*

56 - *Mobile Satellite Services.*

The regulatory difficulties result in part from the system's ground component. This component constitutes a real advantage over currently deployed satellite electronic communication systems as it supports reception in urban areas (where satellite reception is problematic because of the "urban canyon" phenomenon). In cities, satellite signals are therefore retransmitted by the ground component, which can also operate independently of the satellite. When two users find themselves in the ground component coverage area communication does not, in fact, have to take place via the satellite. It is therefore useful to clarify the conditions for authorising and using this ground component, particularly with respect to other broadband mobile communication systems.

Moreover, the scarcity of resources in these bands (2x30MHz) allows only a limited number of operators to deploy a pan-European service. Authorisation conditions thus need to be harmonised at the European level.

In 2006, the *ad-hoc* 2GHz MSS group worked on a procedure enabling:

- coordinated selection at the European level of the candidates which will be allocated resources in this band;
- harmonisation of the conditions for using this band in the different EU countries.

The group's work is expected to be completed with the launch in Q1 2007 of a public consultation for which a draft was presented to COCOM on 7 February 2007. This consultation should provide an opportunity to present the selected options (mechanism for the selection and authorisation process), to solicit the sector reaction and proceed with an initial assessment of the scarcity of the resource, in light of the potentially declared candidates for it.

B. Work of the European Regulators Group (ERG) and the Independent Regulators Group (IRG)

IRG/ERG

Since 1997, NRAs have cooperated informally through the Independent Regulators Group (IRG), which was created at the initiative of several NRAs, including ARCEP. This informal "club" provides members with a forum for sharing experiences.

The IRG is open to the NRAs of all members of the European Union and the NRAs of Switzerland, Liechtenstein, Iceland and Norway[57]. Turkey's application to participate as an IRG observer was accepted in February 2005, Croatia's was accepted in October 2005 and Macedonia's in January 2007.

Since 29 July 2002, the common work of the NRAs has been formalised through the European Regulators Group (ERG), which was created by a Commission decision so that the practical aspects of implementing the new regulatory framework could be discussed. The ERG comprises European Union Member States; the national authorities of countries that are not in the Union but are IRG members participate as observers.

The ERG advises the Commission by leveraging the experience and expertise of the NRAs. To give an example: the ERG lent its expertise to the Commission in preparing the supplementary texts of the regulatory package, including the Recommendation on accounting separation (work begun in 2003 and completed in 2005). The ERG has no working groups of its own; the ERG and IRG thus work hand in hand.

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

The IRG and ERG have drafted their work programme jointly since 2004, for instance. Reports and joint positions are drafted with the goal of achieving harmonisation and the sharing of regulatory best practices across the EU. The documents drafted by the regulators group are submitted to public consultation to obtain input from the sector's players. Public hearings on important issues have also been held since 2006.

A new organisation was set up in 2007: project teams were formed to address issues on the work programme for the year, while working groups that existed previously will now only exist in a virtual fashion, to enable the exchange of information.

NRAs also share their experience through questionnaires which make it possible to create benchmarks of regulatory methods, prices, costs, etc.

In 2006, the British regulator was the chairman of the IRG and ERG, seconded by two vice-chairmen (the Danish regulator who had been the previous chairman, and the Italian regulator who will become chairman in 2007). The Hungarian regulator will take over the chairmanship in 2008.

1. Work completed in 2006

a. Work of the European Regulators Group (ERG)

(a) Review of "Remedies" documents

In 2006, the ERG updated the common position on possible remedies to competition issues. The main changes involved incorporating the following: scale-of-investment theory, factors influencing the selection of cost and price models and the possibility of imposing differing remedies, either on separate dominant operators in similar markets (such as call termination) or on a single operator in a single market as a function of geography or varying supply and demand conditions. Other more minor changes were also made to reflect NRAs' experiences or texts drafted since the first version of the common position was published in 2004.

Principles laid out in the ERG's "Remedies" document

In emerging markets

The document recommends a flexible approach with regard to emerging markets. By definition these markets are characterised by uncertain demand, which is in turn associated with risk because of the uncertainty. It also points out that not every investment or new service will necessarily lead to a market being considered emergent, and that not all new services necessarily constitute an emerging market. However, although the emerging market itself may not be regulated, the access markets should be if they allow SMP operators to act in such a way as to impede fair and effective competition in the emerging market.

On the scale of investments

The document emphasises the need to:

- make access services available to operators in a logical order (starting with services requiring the least investment from alternative operators, enabling them to "climb the ladder");
- keep several rungs of the ladder to enable broad national coverage, and enable new operators to enter the market;
- ensure coherent pricing on the different rungs of the ladder to prevent price squeezes;
- monitor the processes of moving from one rung to another in such a way as to prevent disconnecting customers.

On asymmetrical regulation

The document specifies that regulation can be asymmetrical (i.e. differentiated) in several cases:

- in mobile termination markets: depending on external conditions (e.g. differences in spectrum allocation), which may justify a glide path to cost-oriented pricing, but which must be only temporary;
- in fixed call termination markets, where market development conditions which may lead to significant and lasting different termination conditions, the situation of smaller operators must be taken into account;
- where there are geographical differences, remedies can be asymmetrical without leading to a multiplication of relevant geographical market definitions;
- where there are differences in supply and demand in different segments of the same market (taking countervailing buyer power into account).

In 2007, two ERG project teams will work on fixed and mobile call termination. In several market analyses (including the one on mobile call termination in France) the Commission reiterated that asymmetrical regulation must be justified, and should not be a long-term solution.

On discrimination in non-price issues

The goal of this section is to achieve a clearer definition of the notion of discrimination within the regulatory framework for electronic communications. An obligation for SMP operators to treat all parties identically when supplying external and internal offers did not correspond to the notion of "non-discrimination" currently included in the Access Directive; the publication of internal reference offers could, however, be imposed. NRAs could also publish guidelines on what constitutes unfair competition practices, and they must be sure to impose obligations in such a way that non-compliance is as easy as possible to prove. Finally, the obligations must provide an incentive for SMP operators to respect them (in addition to administrative sanctions, penalties could be included in the agreements).

(b) Report on regulatory accounting systems

The report on regulatory accounting systems[58] outlines the different approaches that NRAs take to accounting, and reveals several trends:

- the increasingly widespread use of current cost accounting (CCA) for mobile call termination;
- the preference for CCA is confirmed for the fixed call termination market;
- more extensive use of Long Run Average Incremental Cost (LRIC/LRAIC) methodologies based on CCA in the mobile termination market;
- Fully Distributed Cost (FDC) and LRIC/LRAIC costing methodologies continue to dominate the fixed call termination market.

From a more general perspective, the report reveals a trend towards harmonisation of accounting practices. There will be a follow-up to the report in 2007, devoted to assessing the evolution of regulators' accounting practices.

58 - Updated version of the report published in 2005.

(c) Report on broadband market competition

The report on broadband market competition[59] was opened up to consultation based on input from 23 NRAs. It confirms that the "ladder of investment" theory described by Martin Cave[60] is operating effectively. The report does not, however, draw any strong conclusions from the analysis of the collected data, which shows a correlation between the high level of competition development and high broadband penetration levels.

This report was accompanied by case studies on 15 countries.

It is due to be updated in 2008, to assess the efficiency of the regulation put into practice in 2007.

59 - Idem.

60 - Martin Cave is a Professor of Economics and the Director of the Warwick Business School's Centre for Management Under Regulation.

(d) Report on IP interconnection

The goal of this document, which is based on input from NRAs and several industry associations[61], is to provide an inventory of the state of IP interconnection in Europe, and to assess how technological evolution towards NGN could affect regulation. The report also analyses the effects that this evolution could have on the different types of interconnection. It seeks to pinpoint a few guiding principles for regulating IP interconnection and NGN interoperability.

The report speaks of the possible need to adapt current regulation (addition or modification of relevant markets), and underscores the fact that a transitional period will be a particularly delicate time from a regulatory standpoint, as several interconnection regimes may be operating concurrently. The document concludes that the development of NGN will require NRAs to preserve interoperability and quality of service on the networks.

A great many NRAs feel that it is still too early to speak of an IP interconnection problem. Only Iceland, Italy, the Netherlands and Germany stand out for having to contend with swift migration on IP networks.

61 - ECCA, ECTA, ETNO, ETP, GSM-E and Euro-ISPA. The sector has expressed varying viewpoints, depending on whether they are coming from alternative or incumbent telcos. Alternative operators (ECCA, ECTA…) have expressed concerns over the technical and commercial terms for interconnection offered to them. They also have concerns over the resurgence of bottlenecks due, for instance, to the interconnection standards that will be implemented by incumbent carriers. Meanwhile, incumbent telcos point to the need for a market-based interconnection model (ETNO, GSM-E) and a broadening of the debate over [PSTN-NGN] and [NGN-NGN] interconnection.

(e) European benchmark of mobile call termination tariffs

Benchmarks are updated twice a year – providing a snapshot of mobile call termination tariffs in Europe.

According to the latest available benchmark, from 1 July 2006[62], tariffs continue to drop in most Member States, or remain unchanged. The most marked decreases are found in Austria, Greece, Portugal and Sweden. Tariffs in France are within the European average, in terms of absolute value.

(f) The ERG's response to the Commission's Review of the EU Regulatory Framework

The ERG drafted a response to the public consultation launched by the European Commission in summer 2006, as part of the EU Regulatory Framework's review process. Details on the ERG's response are included in the section of the annual report devoted to the re-examination of the Regulatory Framework[63].

(g) Report on retail tariff transparency and international roaming

NRAs agreed to provide information on international roaming tariffs on their own websites, in a bid to improve tariff transparency. The report is also devoted to the legal and technical feasibility of "push"[64] and "pull"[65] SMS solutions.

ARCEP does not intend to publish the tariffs itself, nor to calculate average prices, as it would be too cumbersome to manage and would contain too many risks of error, and so be the source of possible disputes with the operators themselves or with consumers. ARCEP does, however, provide a link to mobile operators' and mobile virtual operators' (MVNO)[66] websites.

The ERG also instigated a proposal for European regulation on international roaming tariffs[67].

b. Work of the Independent Regulators' Group (IRG)

(a) "Retail minus" recommendations

The recommendations (or PIBs[68]) on retail minus, drafted in 2005 and published in 2006[69], provide NRAs with guidelines for determining wholesale prices in cases where cost accounting methods are not used. The goal of the document is not to discuss the relevance of using the method depending on competition conditions and regulatory objectives (issues which are addressed in the "Remedies" document), but rather to provide NRAs with a set of principles (eight PIBs) for applying retail minus to SMP operators. ARCEP has not used this method in its decisions.

62 - *Document available on the IRG's website: http://irgis.icp.pt/admin/attachs/467.pdf.*

63 - *See the next Chapter, Paragraph C.*

64 - *Advertisers send a text message containing specific information (advert, invitation, etc.) to customers, as part of a subscription, for instance.*

65 - *Customers send a text message to obtain information (isolated request).*

66 - *On the FAQ page, under "Operators in France": http://www.arcep.fr/index.php?id=6&no_cache=1.*

67 - *Cf. Part 7, Chapter 4, C..*

68 - *Principles of implementation and best practices.*

69 - *Published on the IRG's website: http://irgis.anacom.pt.*

70 - *Idem.*

(b) Current cost recommendations

Published in early 2006[70], these recommendations aim to provide NRAs with a methodology enabling the use of current costs when regulating the electronic communications sector.

The initial draft recommendations which included only a top-down approach were altered during the drafting process to incorporate bottom-up model hypotheses, which provide more complete coverage of existing situations, notably hybrid ones, across Europe.

The document is educational in nature, and therefore detailed: containing a summary, glossary and calculation details.

The added bottom-up hypothesis (expansion of the scope of recommendations) is similar to the cost valuation method that ARCEP uses for copper pairs (economic CCA, together with an economic depreciation method).

(c) Recommendations on weighted average cost of capital (WACC)

Published on IRG's website in February 2007, following a public consultation, this document suggests PIBs based on the weighted average cost of capital. It provides NRAs with guidelines for cost of capital estimates through analysis of a series of methods and problems encountered.

When an NRA imposes cost recovery and price control measures on operators, it needs to take their investments into account and allow for a fair return on investment.

Setting the rate of return must strike a balance between the need to facilitate alternative operators' access while not creating disincentives for regulated operators to continue making investments. If there is no one perfect method, weighted average cost of capital is still widely-used by operators and constitutes a method that can be embraced by both the financial world and telecommunications industry players.

2. Work programme 2007

The work programme for 2007 is more structured than in previous years, and devoted to three areas in particular:

- review of the EU Regulatory Framework;
- harmonisation of regulatory practices;
- the impact of technical innovation on regulation.

The ERG will continue to act as an advisor on future legislation, until it is finalised by the European Parliament and Council (directives, recommendations on relevant markets, roaming regulation). Particular attention will be given to the Universal Service Directive in 2007.

Following criticisms from market players in particular, priority is being given to harmonising NRA practices. The common position on remedies will be completed by more concrete recommendations, PIBs, "toolboxes" for regulators on specifically identified issues such as broadband access, unbundling, VoIP, fixed and mobile call termination, regulatory compatibility systems, transparency and consumer information.

The development of next generation networks (NGN) alters traditional fixed networks, a fact which will naturally influence regulation – so work on the principles of NGN regulation will continue in particular as concerns access. And, finally, the question of convergence between media and electronic communication services – particularly its impact on the dividing lines between electronic communications and broadcasting – will be examined.

The work programme was submitted to public consultation, and the market players expressed their views on the programme at a public hearing on 8 November 2006.

Player positions expressed at the public workshop on 7 November 2006

The concerns expressed by the market players (notably ECTA[71]; incumbent carriers were virtually silent on the matter) addressed the following:

- Ethernet leased lines (access issues, price squeezes);
- harmonisation: the players called on the ERG to monitor the effective implementation of harmonisation;
- fixed call termination regulation (symmetry/asymmetry of remedies);
- notion of reasonable costs;
- existence of different regulatory accounting systems (retail minus/cost plus) across Europe, which lead to price squeezes;
- bitstream access and unbundling: they must be addressed as they constitute rungs on the same ladder of investment;
- reinforcement of *ex-ante* remedies, to achieve greater efficiency;
- the question of dividing lines between access to content and access to infrastructures where convergence is concerned;
- harmonisation of market analysis procedures in the different countries across Europe;
- transparency of next generation networks (NGN) is important to alternative operators (network access issues which have an impact on investments). ECTA has requested a specific point on NGN to be included in the work programme. The alternative operators also want the ERG to examine VDSL access and FTTH (Fibre To The Home) issues.

In terms of organisation, ECTA wants a strengthened independent secretariat to monitor regulatory practices and to report on NRA activities and the state of the market. It proposes that the "monitoring" portion be outsourced to an independent body.

The decision was made in 2006 to create a more efficient secretariat, which would second the Chairman. This new secretariat is due to be in place by the second half of 2007.

71 - *European Competitive Telecommunications Association: i.e. an association of Europe's alternative operators.*

Review of the EU Regulatory Framework

A mandatory exercise

In 2006, the European Commission began the process of reviewing the EU Regulatory Framework – a mandatory exercise, in fact, provided for by the texts themselves:

- the 2002 directives[72] all contain an article providing for their future review, stating that the Commission must periodically examine how said directive is working and submit a report to the European Parliament and Council: the first report within a maximum three years from the date of application, in other words 25 July 2006.
- the "Relevant Markets" Recommendation and the "Competition" Directive[73] require the Commission to examine whether changes need to be made to them as of 30 June 2004 and 31 December 2004[74], respectively.

According to the texts, the Commission should have been capable of submitting a report to the European Parliament and Council in the first half of 2006 but, given the delays in implementing the Framework in most Member States, the required Review took place several months later than planned.

72 - *See below.*

73 - *Cf. Article 8 of the "Competition" Directive.*

74 - *The initial review of these last two texts was postponed as their tran sposition across the EU was far from complete when the scheduled deadline came.*

A. Reminder of the current framework

The "Telecom Package" texts, which have been in effect since 2002, can be broken down by author:

European Parliament and Council

Adoption on 7 March 2002 of:

- Directive 2002/21/EC concerning a common regulatory framework for electronic communications networks and services ("Framework" Directive);
- Directive 2002/19/EC concerning access to and interconnection of electronic communications networks and their associated resources ("Access" Directive);
- Directive 2002/22/EC concerning universal service and users' rights with respect to electronic communication networks and services ("Universal Service" Directive);
- Directive 2002/20/EC concerning authorisation of electronic communications networks and services ("Authorisation" Directive);
- Decision No676/2002/EC concerning a regulatory framework for radio spectrum policy in the European Community.

Adoption on 12 July 2002 of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ("Privacy" Directive).

European Commission

- Guidelines 2002/C 165/03 of 11 July 2002 on market analysis and assessment of significant market power, under the Community regulatory framework for electronic communications networks and services;
- Directive 2002/77/EC of 16 September 2002 concerning competition in the markets for electronic communications networks and services ("Competition" Directive);
- Recommendation C(2003)497 of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible to ex-ante regulation, in accordance with the "Framework" Directive ("Relevant Markets" Directive);
- Final Recommendation C(2003)2647 of 23 July 2003 on notifications, time limits and consultations, pursuant to Article 7 of the "Framework" Directive;
- Final recommendation C(2005) 103/1 of 21 January 2005 and 29 March 2005 on provision of leased lines in the EU;
- Recommendation 2005/698/EC of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications.

B. Review: scope and timetable

1. Scope

European Parliament and Council
Directives: • Framework • Access • Universal Service • Authorisation • Privacy and Electronic Communications

European Commission
• Article 8 of the "Competition Directive", regarding cable networks • The "Relevant markets" Recommendation

The goal of the Review is to assess the impact and efficiency of these seven texts, notably in terms of the development of competition beneficial to consumers and of innovation and growth, four years after their adoption at the European level, and two and a half years after their theoretical application in all European Union Member States.

The Commission has also launched a broader discussion[75] on spectrum management.

However, since transposition of the directives was delayed, the regulatory framework was actually implemented less than two years ago in many Member States, which could make the Commission's task of rendering an account far from easy.

75 - *See the Parliament and Council Communication of 14 September 2005, "A market-based approach to spectrum management in the European Union".*

2. Timetable

The process began with the European Commission's launch of the first call for input, on 25 November 2005, inviting all interested parties to express their views on any of the texts cited above. The Commission then held an open workshop on 24 January 2006 to hear the views of the interested parties.

A public consultation on the Commission's proposed changes was launched in late June 2006. A summary of this public consultation is due to be submitted by the Commission, along with its draft proposals, by mid-2007.

What institutional procedure will be followed to enact changes to the above listed texts?

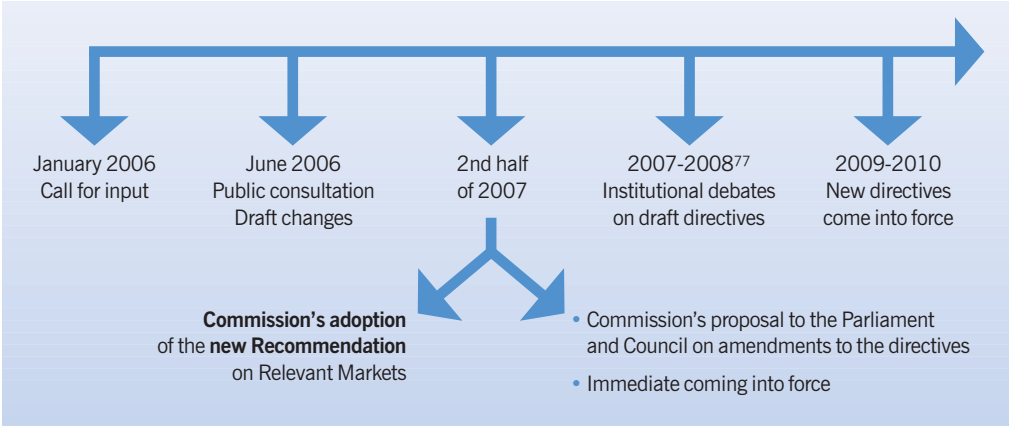
The Commission is the only body competent to alter the "Competition" Directive and the "Relevant Markets" Recommendation. The new recommendation could thus be published in the second half of 2007, coming into immediate effect.

As to the Parliament and Council directives, the review process is not expected to be completed until 2010-2012. These texts are subject to a joint decision[76] procedure that involves the following stages:

1. proposal of directives or amendments to existing directives, submitted by the Commission to the European Parliament and Council;
2. debates between the European Parliament and Council, with the Commission's involvement, to reach a consensus on the text, followed by the adoption of the new directives;
3. deadline for transposing the directives imparted to Member States;
4. directives come into effect in the Member States.

76 - This description is a very summary view of the procedure, cf. Article 251 TCE

To summarise:



77 - The proposed dates are estimates.

C. French authorities' and the ERG's contributions to the Commission's public consultation

The public consultation instigated by European Commission in summer 2006 concerning the review of the "Electronic Communications" Directives of 2002, and the review of the "Relevant Markets" Recommendation, elicited input from both French authorities (interested ministries and independent administrative authorities, coordinated by SGAE[78]) and the European Regulators Group[79]. ARCEP was involved in drafting two of these position papers, but made no contribution on its own.

78 - The Secretariat-General of European Affairs.

79 - See above.

The position of European NRAs and French authorities are relatively similar on most of the Commission's proposals concerning the directives. As to the Relevant Markets Recommendation, the French authorities nonetheless take a firmer stance than the ERG on the removal of retail markets from the list of markets susceptible to regulation. Both contributors are in favour of keeping the current Markets 15 (mobile access/call origination) and 18 (broadcasting) in the list.

1. Proposed changes to the regulatory framework

The following is not an exhaustive list of the different contributions[80].

a. Generalities

Both the French authorities and the ERG called on the Commission to adopt a more forward-looking vision of the electronic communications sector's evolution.

Input from France underscored the need for further debate on the impact of new players and networks (media/electronic communications convergence, NGN), on managing the transition to market deregulation as competition increases, and of ultra-broadband rollouts.

The ERG also stressed how important it is for regulators to be able to manage the transition towards deregulation, particularly the capacity to address issues of non-discrimination effectively (e.g. it is in favour of adding functional separation to the list of remedies that can be applied upon completion of a market analysis).

Both contributors stated that it is crucial to take account of issues arising from the development of oligopolistic markets, which run the risk of becoming increasingly frequent in a world characterised by convergence (media/telecom, fixed/mobile…), to the extent that the current framework does not necessarily make it possible to act effectively when competition problems arise.

To achieve these last two objectives, the ERG proposes that the Commission broaden the current scope of Article 5 of the "Access" Directive.

b. Spectrum

The French authorities and the ERG support the Commission's desire to increase the flexibility of spectrum management, and the goal of harmonising the terms of authorisation for pan-European services.

As to the principles of technological neutrality and service neutrality, France insists on the need to take account of general principles such as interoperability, plurality of information and cultural diversity, along with measures for protecting against interference and jamming. The restrictions imposed by ITU and the Radiocommunications Regulation also need to be considered.

It is the French authorities' view that service neutrality needs to be seen as an objective to be achieved, and not as a general rule. They have also expressed reservations about the Commission's desire to limit harmonisation of uses in certain frequency bands, and to implement a system of general authorisation as a general principle.

As concerns secondary frequency markets, France has requested further information from the Commission on the transfer of rights and obligations attached to the original licences, particularly for frequencies assigned to broadcasting, and on protection against dangers of spectrum pre-emption and hoarding.

Finally, it has expressed the desire to see the European Commission draw up a true strategic vision for spectrum at the European level, in collaboration with Member States and the other international bodies concerned (ITU[81], CEPT[82]).

80 - *For more details, see the complete text of the contributions, available on the European Commission's website: http://europa.eu.int/information_society/policy/ecomm/tomorrow/index_en.htm.*

81 - *Cf. Part 10, Chapter 3, A.*

82 - *Cf. Part 10, Chapter 3, B.*

Because not all of the ERG's members are responsible for spectrum planning and management, the group's input on the matter is more limited. In particular, the ERG supports a more economical approach to spectrum management.

c. Streamlining the market analysis mechanism

The French authorities and the ERG agree on market analysis in several respects, notably:

- the Commission's proposal to become less involved in the matter, whereas NRAs and operators' level of involvement would, in principle, stay the same;
- setting a strict deadline for performing market analyses following publication of a new "Relevant Markets" Recommendation is not realistic. The French authorities nevertheless indicate that the Commission could plan on a deadline for performing market analyses that would be nine months from receipt of the relevant information from operators;
- the Commission's request for a right to veto on obligations is not justified; on the other hand, both contributions underscored the need to strengthen the ERG's role as a promoter of European regulatory harmonisation;
- the decision to launch a review of adopted market analyses should be taken by NRAs and not by operators;
- the directives themselves need to provide for NRA power to gather information on unregulated markets and, if necessary, to impose remedies in markets related to regulated markets.

The ERG and French authorities' views nevertheless differ on several points of procedure:

- the ERG is opposed to the Commission's adoption of regulation on market analysis procedures, whereas the French authorities are in favour of it;
- the ERG is opposed to setting a deadline for re-notification following a Commission veto, whereas the French authorities are not opposed to the measure, albeit expressing the view that the deadline should be more flexible than the six months proposed by the Commission.

Lastly, the ERG and French authorities share two other concerns:

- the repeal of European regulation on unbundling, proposed by the Commission. Should this regulation be repealed, their view is that principles would need to be added to the "Access" Directive, stating that effective regulation of unbundling is crucial to the development of competition in general, and of broadband market competition in particular;
- the legal regimen applicable to carrier selection. The input from both parties invites the Commission to submit this obligation to the general competition law that governs market analyses, and to rescind currently applied specificities, notably its automatic aspect.

The ERG also recommends that the Commission review current SMP Guidelines, notably as concerns the notion of joint SMP.

d. Strengthening the internal market

French authorities and the ERG share the same opinion on the different types of measures that the Commission is planning in its bid to reinforce the creation of an internal market:

- increasing NRAs' powers to impose sanctions to enable them to adopt more dissuasive sanctions;
- support for the Commission's proposal to embody provisions in the directives aimed at defining the conditions under which national courts may grant the suspension of market analyses adopted by the NRAs. The ERG and French authorities nonetheless point out that the Commission must ensure that its proposals do not diminish the criteria allowing suspensions in Member States where they are already defined;
- opposition to the Commission's proposal to extend its veto powers to decisions made in accordance with Article 5 of the "Access" Directive (symmetrical regulation of operators controlling access to final users);
- the creation of an institutional framework enabling harmonisation of authorisation mechanisms for pan-European services. The ERG would nevertheless like to obtain further clarification from the Commission on the notion of "services of pan-European interest".

e. Consumer protection and universal service

The French authorities and the ERG join the Commission in stressing the importance of providing consumers with clear and transparent information on tariffs. They also support the Commission's desire to make greater efforts to accommodate disabled users.

Moreover, as the Commission has announced the publication of a Green Paper on universal service in 2007, contributors have proposed to address all of the issues relating to that subject at the same time.

2. Proposals for changing Relevant Market Recommendations

a. Procedural aspects

There is widespread agreement in the input from France and European regulators on the procedural aspects addressed in the paper on the Recommendation's purpose – expressing concerns about issues involved in the transition between the two recommendations (notably the effect of publication of the new recommendation on the validity of existing market analysis decisions).

They also request clarification on how operators' production for internal purposes will be taken into account when defining the markets and determining SMP.

Furthermore, France and the ERG call on the Commission to undertake more in-depth examination of the impact of bundled offers (TV-telecom, fixed/mobile/broadband) on market definitions.

Lastly, they request that a provision be made to allow regulators to gather information on unregulated markets, and to impose remedies on markets related to those where an SMP operator exists.

b. List of markets

As concerns the markets to be listed in the future recommendation, France and the ERG again took a relatively similar stance, with one exception. In particular, they request that the Commission keep Markets 15 (mobile access/call origination) and 18 (broadcasting) in the list, and support the proposal to include text-messaging termination.

They nevertheless diverge on retail communications markets. The improvement in France of wholesale market regulation, along with the growing use of VoIP services, have helped stimulate competition in telephone calling markets. As a result, ARCEP has already begun the process of deregulating residential retail calling markets. Under these conditions, French authorities are not opposed to removing retail markets from the list of relevant markets. The state of competition may, however, be less healthy at the European level (these markets do not yet exist in a number of countries, and need to be monitored for the medium or long term, particularly in the newer Member States where regulation is more recent). The ERG thus requests that the Commission continue to include these markets in the list.

Principal market analysis decisions made by European Union NRAs

The French postal and electronic communications code (CPCE)[83] provides that:

"The Authority for the regulation of electronic and postal communications shall draw up a public report on the performance of its functions and the application of the legislative and regulatory provisions concerning electronic communications and postal activities before 30 June of each year. It will provide an analysis of the principal decisions taken by the electronic communications and postal regulatory authorities in the European Community Member States during the previous year with a view to establishing a comparison of the different types of control being exercised and their impact on the markets."

The complete list of the market analysis notifications submitted by NRAs is included in the annex to this report.

83 - Cf. CPCE Article L.135, amended by Law No 2005-516 of 20 May 2005 concerning the regulation of postal activities.

A. Cases of notified joint SMP in the mobile access and call origination market

On 30 January 2006, the Commission endorsed Spanish regulator CMT's analysis which sought to declare three Spanish mobile operators (Telefonica, Vodafone and Amena[84]) as having joint SMP in Market 15 (mobile access and call origination).

In its analysis, CMT expressed the view that, to maintain their profit levels, the mobile operators had a common interest in preventing mobile virtual network operators (MVNO) from entering the Spanish market.

84 - France Telecom subsidiary.

The Commission explained that the situation in Spain was a special one to the extent that mobile operators' retail prices were high, and well above the European average – a fact which justified its approval of the Spanish NRA's notification. The absence of MVNOs from the market appeared to have been a decisive factor in this case.

This notification was the second instance of the Commission's acceptance of a market analysis that sought to demonstrate joint SMP. In 2004 the Irish regulator, ComReg, had also notified Vodafone and O2 as having joint SMP in its market. But the decision was never put into place as an appeal was filed with the national court and the decision subsequently overturned (for another reason). It is unlikely that ComReg will reiterate its notification of joint SMP in Market 15 since the market structure has evolved since then with the arrival of Meteor[85] (taken over by incumbent landline carrier, Eircom) and 3 (3G operator and a Hutchison subsidiary).

85 - *Meteor currently reports a base of 750,000 customers (16% market share), compared to only 340,000 at the end of 2004.*

Following the Commission's approval of the notification, Vodafone filed an appeal with the European Court of First Instance, reproving the Commission for not having vetoed the CMT's draft measures, and this for the following reasons:

- the Commission should have expressed "serious doubts" about the CMT's analysis of Market 15 (joint SMP);
- the Commission's decision is inconsistent with other decisions (Commission's opposition of other analyses tending to demonstrate joint SMP);
- the Commission's decision is tainted by irregularities.

The European Court of First Instance's ruling will be a very important one, as it will give legal value to a decision that upholds NRAs' market analyses. As it stands, the Commission holds the view that only vetoed decisions can be appealed.

In 2006, the Maltese regulator, MCA, notified the Commission on another case of joint SMP in Market 15. In its remarks, via which it upheld MCA's analysis, the Commission indicated which factors it deemed essential for proving joint SMP: sufficiently large revenues in the retail market to provide an incentive for mobile operators to collectively refuse wholesale market access to a third-party operator. It was the Commission's view that such was the case in Malta, where very high retail tariffs led to equally high profit levels for the two mobile operators in place, namely Vodafone (51.5% share of subscribers) and MobIsle (48.5%).

The cases cited above reveal the importance that the Commission gives to price levels as an incentive for preventing access to mobile operators' networks. This position is not extended to other markets[86].

86 - *See below.*

B. Market 17: International Roaming

Despite the European Commission's announcement of forthcoming regulation on international roaming, ten or so NRAs notified this market in 2006. To date, no NRA has submitted an analysis calling for regulation of the market.

The absence of regulation does not, however, mean that the international roaming market is without competition issues. Most of the NRAs that notified the Commission on this market remarked on the high prices being charged, but without being capable of proving joint SMP due, most notably, to the restrictive interpretation of *Airtours*[87] jurisprudence.

In its remarks, the Commission points out that the problem of high prices is addressed by the international roaming regulation which is being drafted.

87 - *Cf. European Court of First Instance ruling, Airtours v Commission, Case T-342/99.*

C. Remedies in fixed and mobile call termination markets (Markets 9 and 16)

The issue of asymmetrical termination tariffs imposed as remedies in these market, according to the size of the operators, was addressed several times by the Commission over the course of 2006.

In April 2006, AGCOM (Italy) notified the Commission of its analysis of Market 9 (fixed call termination). In it, AGCOM identified Telecom Italia and 11 alternative operators as being dominant in the market[88]. Price control obligations for the 11 operators were nevertheless differentiated from those imposed on the incumbent carrier: they were authorised to charge higher tariffs than Telecom Italia for a four-year period (up to 2009) – the goal being to achieve a symmetry by the end of this period, thanks to a gradual decrease in their call termination tariffs.

88 - *In this market, regardless of size, each operator has a monopoly over its call termination.*

Despite having upheld AGCOM's analysis, in its remarks the Commission underscored the need for the Italian NRA to specify the four-year glide path (gradual tariff decrease to cost-oriented pricing) in its final decision, and to develop a cost model for calculating alternative operators' call termination tariffs. The Commission acknowledges that alternative operators cannot enjoy the same economies of scale as the incumbent (a fact which is reflected in their costs), but holds the view that they need to be encouraged to become more efficient over time (by increasing market share if necessary).

The same question was raised concerning the mobile call termination market (Market 16), with Belgian NRA IBPT's notification. Because of their monopoly over their own call termination, the country's three mobile operators – Belgacom Mobile (48% of subscribers), Mobistar (34%) and Base (18%) – were declared as having SMP.

Taking the differences in costs of these three operators into account, IBPT decide to apply asymmetrical remedies. To do so, the regulator proposed that a Long Run Average Incremental Cost (LRIC/LRAIC) model be implemented, using a top-down approach[89]. According to the Commission, this method of calculation runs the risk of prolonging the asymmetry beyond the period of analysis which is why, in its analysis, it issued a reminder that symmetry remains the rule. The Commission also pointed out that, although asymmetry can be justified in certain exceptional cases, in needs to disappear after sufficient time has been given to enable the alternative operator to

89 - *Each operator's audited historical costs are taken into account when setting their CT tariff.*

become efficient. Moreover, in the Commission's view, maintaining asymmetry acts as a disincentive for alternative operators to work on increasing their market share.

Basing its ruling on examples, the Commission requested that the European Regulators Group[90] work on developing a cost model for efficient operators. The results of this work (on the ERG's work programme for 2007) should enable NRAs to get a better grasp on alternative operators' costs when calculating their call termination, and thus make it easier to transition gradually to symmetrical obligations on call termination price controls.

90 *- See above.*