The new legal framework

The legal landscape in France

I. Gradual evolution of legislation

Making the transition from a monopoly to an effectively competitive regime requires steady and gradual adaptation of the legal framework governing the economic sector involved, before ordinary competition laws can be applied to it.

In 1990, Europe's desire to develop a large interior telecommunications market led French public authorities to alter the status of the telecommunications operator. The Ministry of Post and Telecommunications' General Telecommunications Division (DGT) was transformed into a public industrial and commercial establishment (EPIC), which then took on the name France Telecom. Parallel to this, the Act dated 29 December 1990 instituted new rules for deploying networks, providing services and marketing telecommunications terminals.

The legal landscape was reviewed once again in 1996, in view of transposing a number of European directives into French national law. Two new acts were adopted, the first of which transformed the public operator, France Telecom, into a public limited company; the second prepared for the sector's full deregulation on 1 January 1998, and identified the task of State regulator to be assigned to an independent institution, namely the Telecommunications Regulatory Authority (ART).

In 2004, a third stage began with the publication of three acts: the Act on telecommunications public service obligations and France Telecom[1], the Act on confidence in the digital economy[2] and the Act on electronic communications and audiovisual communication services[3].

These three acts transpose the European Directive of 8 June 2000 ("e-commerce"), the four Directives of 7 March 2002 ("framework, authorisation, access and universal service"), the Directive of 12 July 2002 ("personal data") and that of 16 September 2002 ("competition") into French national law.

Since the four "framework, authorisation, access and universal service" Directives should have been transposed into national law by 24 July 2003, at the latest, a temporary measure was implemented. So it was that, on 17 July 2003, the Ministry of Industry and ART published guidelines for the players on the regulations in force in the main areas of competition, during the transitional period from 25 July 2003 until the new laws came into force. To limit the uncertainties during this period of transition, and to provide operators with the required security in terms of the legal framework governing their operations, precisions were given on the rules applying to authorisations, taxes, frequencies, numbering, SMP operator obligations, universal service and dispute settlement.

1) Act n° 2003-1365 dated 31 December 2003 on telecommunications public service obligations and France Telecom (OJ of 1 January 2004).

2) Act n° 2004-575 dated 21 June 2004 on confidence in the digital economy (OJ of 22 June 2004).

3) Act n° 2004-669 dated 9 July 2004 on electronic communications and audiovisual communication services (OJ of 10 July 2004).

Finally, the practical terms of the temporary authorisation system were published by ART on 16 September 2003, in a document on the practical conditions attached to the general authorisation system and the allocation of numbering and frequency resources.

Coming in line with European texts, the new legal framework that was adopted profoundly altered the Post and Telecommunications Code, which became the Post and Electronic Communications Code (CPCE). Among other things, it took into account the convergence between telecoms, computing and audiovisual by simplifying authorisation procedures, and introducing a more technologically agnostic approach, in addition to defining the principles and procedures for evaluating the competitive reality in the different markets. ART was thereby assigned the task of analysing each of the 18 relevant markets, predefined by the European Commission, using the competition law methodology, pursuant to the Competition Council recommendation, and under the aegis of the European Commission.

II. The Act of 31 December 2003 on telecommunications public service obligations and France Telecom

The Act on telecommunications public service obligations and France Telecom was adopted on second reading by the Senate on 16 December 2003, without modification compared to the version adopted on second reading by the National Assembly on 5 December 2003. It was then published in the Official Journal on 1 January 2004. In accordance with its mandate, ART had issued a recommendation on the draft bill on 22 July 2003[4].

4) Recommendation n° 03-904 dated 22 July 2003.

This Act reaffirmed the great importance that the legislator attaches to the public telecommunications service. It transposes the "universal service" Directive, and reorganises the definition of universal service, which is thus comprised of three components[5]:

5) Art. L. 35-1 of the Post and Electronic Communications Code (CPCE).

- provision of a high-quality telephone service to all at an affordable price. This component includes "functional access to the Internet" and "free conveyance of emergency calls";
- provision of a universal directory enquiry and subscriber directory service, in printed and electronic form;
- provision of public payphones on the public thoroughfare.

Parliament also provided for certain measures to be implemented to meet disabled persons' specific needs.

Provision of universal service components is now open to competition, and the incumbent carrier is no longer the legally designated operator in charge of universal service. A call for candidates procedure was therefore put into place concerning technical and tariff conditions and, if necessary, the net cost of providing services[6], with the proviso that universal service must be provided throughout the national territory. All operators can therefore apply to be a provider of one of the universal service components.

6) Art L. 35-2 of the Post and Electronic Communications Code.

Another major change, the Act altered the way that universal service was to be funded[7]. First, all operators must now contribute to the fund, and not only operators authorised under the old Articles L. 33-1 and L. 34-1 of the Post and Telecommunications Code. Second, operators now contribute to the net cost of universal service, prorated based on the turnover generated by electronic communications services (excluding revenues generated by interconnection and access services that are the subject of agreements, and other services carried out or billed on behalf of third-party operators), and no longer based on traffic volume. And, finally, operators whose revenues are below the sum fixed by decree are exempt from contributing.

7) Art. L. 35-3.-II of the Post and Electronic Communications Code.

This same Act provides that all changes concerning contributors, the method used for calculating contributions and exemption are applicable as of the final assessment of the cost of universal service for 2002.

Finally, ART is responsible for calculating each operator's share of universal service funding obligations. The method used is specified by Decree n° 2004-1222, dated 17 November 2004 (see below). The previous procedure, whereby payments were defined by the Minister, pursuant to a recommendation from ART, is therefore repealed.

III. Act of 21 June 2004 on confidence in the digital economy

Adopted on 13 May 2004 by joint committee, the French Act on confidence in the digital economy (LCEN) was published in the Official Journal of 22 June 2004, after examination by the Constitutional Council. The draft bill had been passed on first reading by the National Assembly on 26 February 2003, then by

the Senate on 25 June 2003. ART had issued a consultative recommendation on this text on 3 December 2002[8].

8) Recommendation n° 02-1090 dated 3 December 2002.

This Act, whose main objective was to transpose the "e-commerce" Directive, addresses most notably:

- public online communication. The Act clarifies the notion of public online communication, public communication by electronic channel, audiovisual communication and the responsibilities of the Broadcasting Council (CSA). Public communication via electronic channel is thereby divided into two branches: audiovisual communication, on the one hand, comprised chiefly of radio and television on all platforms, and public online communication, on the other. The CSA is responsible for guaranteeing the freedom of audiovisual communication for all electronic communication processes on radio and TV; radio and television services broadcast over the Internet fall under the Broadcasting Council's authority;
- the responsibilities of technical service providers, hosting companies and operators, with respect to online communication services;
- the organisation of domain name management;
- the definition of and legal framework for e-commerce (online advertising, spam, i.e. unsolicited advertising/canvassing over electronic channels, electronic contracts, consumer protection, deregulation of cryptology);
- the framework for satellite system frequency allocation (statement guaranteed by the National Frequency Agency (ANFr) to the International Telecommunications Union (ITU).

In addition, the Act on confidence in the digital economy requires that voice call telephony operators make an offer available to consumers for calls in Metropolitan France billed on a per-second basis, starting from the first second, excluding the possibly applicable fixed connection cost. Consumers who have opted for a pre-paid payment method are billed by the second, from the first second of the call. Upon request, these users can switch to any other billing mode offered by the operator.

Furthermore, this Act also provides that, each year, the government must determine the list of social services that provide users with special toll-free calling numbers that can be dialled from fixed or mobile phones. The Authority must set aside a block of special numbers for this purpose. Following public consultation, the Authority must also oversee the billing principles established between operators and the providers of the services attached to these toll-free numbers.

Finally, the Act on confidence in the digital economy introduces a major change in local authorities' responsibilities in the area of telecommunications. The new Article L. 1425.1 of the Local Authority General Code (CGCT), which repeals Article L. 1511-6, authorises local authorities to establish telecommunications networks in their region, and to provide services under certain conditions, and contingent on a proven lack of private initiatives.

Also included are provisions for second-generation mobile telephony operators' coverage of the national territory, through local roaming and sharing of the passive infrastructures created by local authorities.

ART's responsibilities are therefore expanded, since it is now called upon to:

- receive declarations from local authorities wishing to become operators;
- if necessary, specify the technical and financial terms of local roaming, in accordance with Article L. 36-6 of the Code;
- rule on disputes, in accordance with Article L. 36-8 of the Code, concerning the conclusion and execution of local roaming agreements;
- rule on disputes, in accordance with Article L. 36-8 of the Code, concerning the technical and tariff conditions for running a business of electronic communications operator, or the establishment, provision or sharing of electronic communications networks and infrastructures, as stated in Article L. 1425-1 of the Local Authority General Code (CGCT).

IV. The Act of 9 July 2004 on electronic communications and audiovisual communication services

The Act on electronic communications and audiovisual communication services was officially passed by the Senate and the National Assembly on 3 June 2004, after an urgent procedure was invoked and examination by a joint commission. It was reviewed by the Constitutional Council and then published in the Official Journal on 10 July 2004. The National Assembly and the Senate had passed the bill on its first and only reading, on 12 February 2004 and 15 April 2004, respectively. Made public by the Minister-Delegate for Industry and the Minister of Culture and Communication on 1 April 2003, the draft bill of the electronic communications Act became a bill after being passed by the Council of Ministers

on 31 July 2003. ART had issued a recommendation on the electronic communications bill on 29 April 2003[9].

9) Recommendation n° 03-552 dated 29 April 2003.

This Act is the outcome of widespread reforms to the regulations governing telecommunications operations, begun across Europe in 1999. From a legislative standpoint, it marks the end of the transposition into French law of the six EU Directives adopted over the course of 2002, and commonly grouped together under the name: "telecoms package."

1) The Act's principal provisions

1.1. Freedom to deploy networks and provide electronic communications services.

Electronic communications network operators and service providers are no longer governed by the system of individual licences awarded by the Minister, pursuant to the Authority's recommendation, but must declare themselves to ART[10]. This freedom extends to the deployment of internal networks open to the public and/or their operation (such as the ones deployed in hotels). In the same vein, independent networks, insofar as they escape the notion of networks open to the public, are not subject to a system of administrative declaration. All, however, remain subject to certain obligations, and must adhere to certain rules whose terms of application are set by decree.

10) Art. L 33-1 of the Post and Electronic Communications Code (CPCE).

1.2. Identical legal regulations for all electronic communications networks

The Act defines an electronic communications network as *"all transport or broadcasting installations or combined installations and, when applicable, all other means for ensuring the transport of electronic communications, notably switching and routing"*[11]. In the continuing drive to promote technological neutrality, cable networks are no longer subject to a specific set of regulations, and all cable, satellite and wired networks are considered as electronic communications networks, in accordance with the "framework" Directive which specifies that *"the convergence of the telecommunications, media and information technologies sectors implies that all transmission networks and related services are subject to the same legal framework."*

11) Art. L.32 2° of the Post and Electronic Communications Code.

1.3. Scare resource management

The Act of 9 July 2004 upholds ART's responsibilities in the allocation of scarce resources, namely numbers and frequencies.

In cases of particular scarcity of available frequency resources, it also gives ART the possibility of organising a call for candidates[12] whose terms of allocation are defined by the Minister responsible for electronic communications, upon the

12) Art. L. 42-2 of the Post and Electronic Communications Code.

Authority's suggestion. The selection criteria can relate to the terms for use of the frequencies, and now to the authorisation fees that the candidates agree to pay, thus introducing a new auction procedure. Finally, the Act upholds the possibility provided for in the "authorisation" Directive of creating a secondary market for frequency usage authorisations, thereby overturning the principle that forbade the resale of government authorisations. The Minister responsible for electronic communications defines which frequency bands this can apply to.

1.4. Market regulation

The new provision endows the regulator with new means of intervention that will help foster the development of fair and effective competition in the electronic communications sector's different markets. The market analysis procedure set by law[13] is composed of three phases. ART must first determine the scope of the relevant markets being subject to its analysis, by taking utmost account of the Commission's recommendation of 11 February 2003 and of the Commission's guidelines dated 11 July 2002. The regulator must then designate the operator(s) having significant market power. Finally, ART defines the obligations incumbent on SMP operators, which must be justified and proportionate under the regulation objectives laid down in Article L. 32-1 II of the Post and Electronic Communications Code.

13) Art. L. 37-1 and subsequent of the Post and Electronic Communications Code.

1.5. ART's means of intervention

ART's authority in settling disputes has been expanded to the extent that the list contained in Article L. 36-8 of the Post and Electronic Communications Code is no longer a closed one. In addition, the Authority can now call upon experts and conduct technical, economic and legal consultations as part of its investigation. It can also request an opinion from the Broadcasting Council (CSA) when the issues involved in the dispute are likely to considerably diminish the audiovisual communication service offer. The regulator now has the capacity to refuse the disclosure of exhibits that would threaten trade secrets. Lastly, it must coordinate its actions with those of the regulators of other Member States in cases where one of the parties involved operates in another Member State, and where the dispute has been filed with that country's regulator.

As to ART's power to impose sanctions , the Act[14] upholds its authority in this area, and specifies that it is now the responsibility of ART's General Director to issue enforcement notices to operators to adhere to the provisions of the Code, and notices of the decisions taken for its application. The scope of the applicable sanctions is specified: the Authority can impose financial penalties, or the withdrawal or reduction of the right to deploy a network or provide an electronic

14) Art. L. 36-11 of the Post and Electronic Communications Code.

communications service, but it can also suspend, reduce or revoke a numbering or frequency resource allocation or assignment decision. ART can adopt conservatory measures, without prior notice in cases of serious and immediate violation of the Code's provisions, or decisions made concerning its application. Lastly, it is also provided that ART may apply to the presiding Judge of the Conseil d'Etat's legal section to rule in cases that are likely to entail serious consequences for an operator or for the market, such that the responsible individuals be ordered to comply with applicable rules and decisions, and to remove the effects of the violations. The judge thus has the power to take all conservatory measures immediately and to issue a writ of execution.

The Authority's power to gather information and power of enquiry have been specified under the new framework. ART must be able to obtain the information required for verifying compliance with the obligations defined in Article L. 33-1, and for conducting market analyses. Based on a fair decision, and in a manner proportionate with the need to fulfil its mandates[15], it also has the power to gather information to ensure compliance with the principles defined in Articles L. 32-1 and L. 32-3 of the Post and Electronic Communications Code, and with the obligations imposed by the Code or by decisions made concerning its application. Under these same conditions, when conducting an enquiry its authorised agents have the right to gain access to companies' business locales and to obtain any document.

15) Art. L. 32-4 of the Post and Electronic Communications Code.

Finally, it should be pointed out that in cases where the Authority sees fit to adopt measures that will have a considerable impact on the market, it must make the planned measures public within a reasonable timeframe prior to their adoption, and consult with the parties concerned. The results of these consultations must be made public, except in the case of secrets protected by law.

2) Temporary provisions of the "Electronic communications" Act

On 17 July 2003, the Minister in charge of telecommunications and ART had published the guidelines on the legal framework that would be applicable between 25 July 2003 and the adoption of the "Electronic communications" Directives' transposition texts, to ensure the legal security and visibility required by the players.

The "Electronic communications" Act marked the end of the first transitional period, and created a second one. Articles 133 and subsequent of the "Electronic communications" Act in fact structure the transition from the old legal framework to the new legal framework.

2.1. Operator authorisations procedure

The "Electronic communications" Act alters the authorisations system and, most notably, marks a shift from a system of prior authorisations to one of declaration of the deployment and operation of networks open to the public, and of provision of electronic communications services to the public.

Article 133 I of the "Electronic communications" Act specifies that those who held authorisations to conduct operations covered by the new Article L. 33-1 of the Post and Electronic Communications Code when this Act came into force, are deemed to have satisfied the declaration obligation.

Furthermore, Article 136 specifies that all authorisation requests submitted prior to the publication of the "Electronic communications" Act and relating to equipment or a service, now requiring only a declaration, will be deemed a declaration.

Lastly, for those conducting operations covered by the new Article L. 33-1 of the Post and Electronic Communications Code when the "Electronic communications" Act came into effect, will have six months to comply with the declaration terms defined in this Article. This six-month period ended in January 2005.

2.2. Radio frequency authorisations

Article 133 III shapes the transition from the old to the new framework for frequency authorisations. It is therefore stipulated that frequency usage authorisations that were valid when the "Electronic communications" Act was published remain valid up until their original expiry date or, if earlier, up until expiry of the authorisation to deploy and operate an electronic communications network delivered under the Post and Telecommunications Code.

Furthermore, this Article stipulates that operators holding an authorisation delivered under Article L. 33-1 of the Post and Electronic Communications Code on the date of publication of the "Electronic communications" Act, remain subject to the obligations laid out in the specifications attached to its authorisation order, which are governed by the terms of use enumerated in p. II of Article L. 42-1 of the Post and Electronic Communications Code, until such time as a new decision on assignment of the frequency used has been taken.

Operators therefore remain subject to the terms of use of the frequency or frequency band as stipulated in Article L. 42-1 II of the Code, namely:

- the nature and properties of the equipment, installations, networks or services which can use the frequency or frequency band, as well as the terms relating to permanence, quality, availability and, when applicable, the deployment timetable and zone of coverage;

- the duration of the authorisation, the minimum delay for notification of the terms for renewal of the authorisation and the reasons for denying renewal;
- authorisation fees;
- the technical conditions necessary to avoid harmful interference, and to limit the public's exposure to electromagnetic fields;
- obligations defined by international agreements;
- the authorisation-holder's commitments agreed to in the call for candidates.

2.3. Specific obligations for SMP operators

Article 133 II of the "Electronic communications" Act specifies that the obligations imposed on operators upon publication of the Act pursuant to Articles L. 33-1 II and L. 34-8 II through V of the Post and Telecommunications Code, in its wording at the time, remain applicable until exercise by the Authority of the powers assigned to it by Articles L. 37-1 and L. 37-2 of the Post and Electronic Communications Code, in other words, up until the end of the market analysis process.

This Article therefore requires that the operators in question uphold the following obligations:

- legal separation of certain activities (L. 33-1 II);
- publication of a technical and tariff interconnection offer, having received prior approval by ART (L. 34-8 II);
- separate accounting and independent auditing (L.34-8 II);
- cost-oriented interconnection tariffs (L. 34-8 III);
- interconnection supplied under objective, transparent and non-discriminatory conditions (L. 34-8 IV);
- access and special access (L. 34-8 IV);
- pre-selection and selection on a call-by-call basis (L. 34-8 V).

The obligations imposed on SMP operators under the old framework therefore remain in effect until ART has completed the market analysis process on each of these obligations. It was through this process that the Authority was able to approve France Telecom's interconnection catalogue (ART Decision n°04-1000, dated 23 November 2004), which came into force on 1 January 2005.

Furthermore, Article 133 IV of the "Electronic communications" Act stipulates that tariff control obligations imposed on France Telecom, under p. 5 of Article L. 36-7 of the Post and Telecommunications Code, defined prior to the publication of this same Act and the specifications attached to the Decree of 27 December 1996, also remain in effect until:

- completion of the market analysis process in cases involving tariffs for services for which there exists no competition in the market;
- publication of the decree on universal service tariff control in cases involving universal service tariffs.

It is for these reasons that France Telecom's tariffs remain subject to the traditional approval procedure (i.e. recommendation from ART, approval by the Minister responsible for electronic communications) for the tariffs set for services for which there is no real competition, until the Authority completes the process of analysing each of the markets concerned. The transitional period will therefore gradually come to an end as the analyses of the markets in question are completed.

As to universal service tariffs, the Authority has had full power to exercise tariff control over these services since publication of Decree n° 2005-75 of 31 January 2005, on universal service tariff control.

2.4. Transitional provisions for cable network agreements

Article 134 of the "Electronic communications" Act specifies that the agreements signed with regions or their cooperatives for the deployment and operation of cable networks, in application when Article L. 33-1 of the Post and Electronic Communications Code came into force, as well as the attached specifications, must be made to comply with the terms of this Article within one year's time, starting from the publication of the implementation decree of this same Article – publication which has not yet taken place.

V. Regulatory texts published in 2004

1) Implementation Decree for the Act of 31 December 2003[16]

Pursuant to the Act of 31 December 2003, Decree n° 2004-1222, dated 17 November 2004, concerning public service obligations and universal electronic communications service funding, and modifying the Post and Electronic Communications Code, was published. ART had issued a recommendation[16] on the draft of this Decree in June.

16) Recommendation n°04-563 dated 29 June 2004.

The Decree comprises three categories of provisions: those concerning the definition of universal service components, those concerning the procedure for

designating operators in charge of universal service components and, third, those concerning the methods for calculating the cost of universal service and each operator's contribution to that cost.

The new Articles R. 20-30 through R. 20-30-11 of the Post and Electronic Communications Code, introduced by this Decree, describe the services that must be provided by each of the components defined by Article L. 35-1 of the Code, as well as those imposed with respect to component 4, concerning disabled persons (Article R. 20-30-4). These services must be provided throughout Metropolitan France, in the overseas territories and in the regions of Mayotte and Saint Pierre et Miquelon.

Article R. 20-30-12 specifies those elements that must be contained in all calls for candidates launched by the Minister, namely the minimal obligations incumbent on an operator responsible for one of the components, the information that must be supplied by the candidate including, when applicable, the net cost of supplying the component, selection criteria and the duration of the devolution, which cannot exceed five years.

In addition, this Decree modifies the Articles of the Code relating to the methods used for calculating the cost of universal service (Articles R. 20-31 to R. 20-41). Noteworthy among these changes are:

- eradication of the "unprofitable subscribers in unprofitable zones" component from the cost of geographical equalisation (Article R. 20-33);
- modification of the size of the zones;
- eradication of the closed list of indirect proceeds that can be taken into account. This therefore leads the Authority to consider taking into account revenues generated by all of the services provided by France Telecom (Article R. 20-33);
- the rate of return on capital must be set by the Authority (Article R. 20-37);
- taking into account the provision of services to disabled persons (Article R. 20-38);
- specification of the relevant turnover for calculating operators' contributions (Article R. 20-39);
- setting the annual turnover exemption threshold at 5 million euros when calculating operators' contributions (Article R. 20-39);
- possible excessive charges tied to provision of the universal service component must be assessed by the Authority (Article R. 20-39).

Finally, it provides for repeal of the specifications incumbent on France Telecom approved by Decree n°96-1225, dated 27 December 1996.

2) Implementation Decrees of the "Electronic communications" Act

The "Electronic communications" Act provides for the adoption of a considerable number of decrees.

The decrees planned by the Conseil d'Etat concern:

- universal service tariff control;
- the universal service directory;
- the secondary frequency market;
- rights of way;
- diverse procedures (powers, dispute settlement…).

The individual decrees relate to:

- the declaration procedure and the obligations attached to the status of operator;
- market analyses (market definition, designation of SMP operators and obligations);
- the authorisation and frequency renewal procedure;
- public exposure to electromagnetic fields;
- the National frequencies agency (ANFr) and the Spectrum refarming fund commission (CFRS);
- various provisions (tidying up the Articles relating to sanctions and advisory committees).

In September 2004, the Ministry of Economy, Finance and Industry launched a public consultation on the following draft decrees:

- universal service tariff control;
- the universal service directory;
- diverse procedures (powers, dispute settlement…);
- rights of way;
- the declaration procedure and the obligations attached to the status of operator;
- market analyses (market definition, designation of SMP operators and obligations);
- the authorisation and frequency renewal procedure;
- National frequencies agency (ANFr) and the Spectrum refarming fund commission (CFRS);
- various provisions (tidying up the Articles relating to sanctions and advisory committees).

It was specified that the decrees relating to frequency resale and to electromagnetic fields would be defined subsequently.

One of these decrees was published in 2004. Decree n° 2004-1301, dated 26 November 2004, concerning the provisions applicable to SMP operators in an electronic communications sector market, in accordance with Articles L. 37-1 to L. 38-3 of the Post and Electronic Communications Code was published on 30 November 2004. ART had issued a recommendation[17] on this draft decree. This marked the completion of the transposition of the market analysis process, and thus enabled the Authority to adopt its first decisions in December 2004. These provisions are specified in the "Market analysis" section of this Report.

17) Recommendation n°04-1024 dated 25 November 2004

Harmonisation of practices around Europe

In addition to harmonising regulation and regulatory methods through legislative channels, with the transposition of the Directives of 2002 into the European Union Member States' national law, 2004 was also marked by the furthering of certain efforts to harmonise European regulatory practices. This work was conducted under the aegis of two bodies, first within the Communications Committee (COCOM) and, second, within the European Regulators Group (ERG) and the Independent Regulators Group (IRG).

I. Work performed by COCOM

The Communications Committee (COCOM)[18] was created in March 2002 by European directive, with the goal of assisting the European Commission, particularly in its role as secondary legislator. ART ensures representation of French authorities within COCOM, alongside the Ministry of Industry's Directorate General for Enterprise (DGE, formerly Digitip).

The longstanding instrument of comitology[19], COCOM on the one hand enables Member States to submit their official recommendations to the European Commission, both in areas that fall under its advisory responsibilities (Article 3 of the Council's "comitology" Decision dated 28 June 1999[20]) and in areas involving its regulatory powers (Article 5 of the same Decision) and, on the other hand, to allow them to debate issues that are on the agenda.

The cases for which COCOM has advisory or regulatory powers are determined by the directives of the new electronic communications framework. It is also within COCOM that the European Commission presents its draft vetoes (in accordance with Article 7 of the "framework" Directive) of a national market analysis project, and to which national regulatory authorities (NRA) can respond. COCOM issues an advisory opinion on this draft veto, by which the Commission is not bound.

The two principal texts adopted by COCOM in 2004 and early 2005 are two recommendations: one on interconnection leased lines and the other on powerline carrier systems (PLC).

1) Interconnection leased lines[21]

This recommendation addressed the technical and tariff conditions of interconnection leased line offers (called partial leased lines in France) for SMP

18) According to the provisions of Article 22 of the "framework" Directive.

19) Comitology can be defined as the body of rules and procedures applicable to committees in charge of assisting the European Commission in its execution of community legislation.

20) N° 1999/468/EC.

21) This recommendation received a favourable recommendation from COCOM, via written procedure completed on 28 January 2005, and published in the OJEC of 29 March 2005, C(2005)951.

operators in the leased line markets (referred to as "notified")[22]. This in fact constitutes a revision to the previous recommendation of 1998 on the same issue, to adapt to the new situation. In 1998, this type of interconnection offer was virtually non-existent, and comparisons were made based on the technical architecture and tariffs charged for leased lines offered by incumbent carriers in the retail market. These lines were largely used by new entrant operators to connect their customers' sites.

Nowadays, most of Europe's incumbent carriers market this type of interconnection offer to their competitors. To ensure that the comparisons were relevant, much effort was put into designing a methodology that would enable precise definitions of the offer segments to be compared.

The recommended prices are in line with the third best monthly tariffs being applied in the Member States, and this for each category of leased line, based on circuit length tiers ranging from 2 to 50 kilometres (monthly fee, including 1/24th of the service access fee (SAF), supposing that an interconnection leased line (LL) is leased for two years). As a security measure, a comparison of SAFs was also conducted, to establish a benchmark for LL leasing lasting less than two years. The recommended tariffs for SAFs (one-time connection fee) correspond to the average of all SAFs charged in Member States, excluding the three highest and the three lowest. France Telecom's tariffs are still well in excess of the recommended price (roughly twice as high), except for its connection fees (SAFs).

Capacity	Maximum 2 km circuit €/month	Maximum 5 km circuit €/month	Maximum 15 km circuit €/month	Maximum 50 km circuit €/month	One-time connection fee -FAS- €
64 kbit/s	61	78	82	99	542
2 Mbit/s	186	248	333	539	1,112
34 Mbit/s	892	963	1,597	2,539	2,831
155 Mbit/s	1,206	1,332	1,991	4,144	3,144

As with all recommendations, when a Member State's notified (SMP) operator's tariffs are above the set ceiling, particularly after imposition of obligations devolving from market analysis, the NRAs must justify these tariffs to the Commission, notably with respect to costs.

22) From now on, this designation will be made following an analysis of the retail and wholesale leased line markets.

2) Recommendation on powerline carrier systems (PLC)

In June 2003, COCOM agreed in principle to adopt a recommendation on powerline carrier systems (PLC), in other words the supply of electronic communications services over electrical power lines, in a bid to foster the emergence of broadband services over this alternative local loop.

The main problem involved in providing this type of service is the radiation that the networks give off, and which is likely to interfere with the wireless systems authorised in the frequency bands in question. The technical work has been entrusted to ETSI and to CENELEC, two European standardisation bodies.

Faced with the inability to set a radiation level that is acceptable to all Member States (the level of wireless systems' sensitivity to radiation depends in large part on the configuration of national electrical networks, and particularly on whether or not they are underground networks), the Commission focused on making a more political than technical recommendation, supporting the principle of conflict resolution after the fact for cases of interference between PLC and wireless systems.

This recommendation upholds the principle of technologically agnostic favoured by the new regulatory framework. It does not create a specific regulatory mechanism for the services provided on this type of network, notably with respect to their compliance with RTT&E Directives, and concerning electromagnetic compatibility.

This recommendation, which received a favourable recommendation from COCOM through written procedure, completed on 17 February 2005, is scheduled to soon be published in the OJEC.

Adoption of this recommendation gives operators a stable legal framework, and one which is likely to encourage the deployment of this type of solution, which provides an alternative to the local copper loop. In France, four players have already begun trial operations on PLC services.

II. Work performed by the IRG/ERG

Cooperation between national regulatory authorities (NRA) began informally back in 1997, with the Independent Regulators Group (IRG), whose creation had been initiated by several regulators, including ART. This "club" provides a forum for exchanging viewpoints, with the goal of taking a coordinated approach to handling similar competition problems that exist in the different countries.

The IRG is composed of NRAs from all European Union Member States, along with NRAs from Switzerland, Liechtenstein, Iceland and Norway[23]. The 10 new Member States had been taking part in IRG meeting as observers since November 2002, until their full integration into the European Union, on 1 May 2004. Romania and Bulgaria have been attending IRG/ERG meetings as observers since 2004. Turkey's observer status in the IRG was accepted in early 2005.

Working groups have been created to support the club of NRA heads. The issues addressed relate to fixed networks, mobile markets, transposition of the new framework, market data analyses, SMP operators, accounting and costs. NRAs share their experience through benchmarks and questionnaires within the IRG. Joint positions are also reached within these working groups, with the goal of harmonising and sharing regulatory best practices inside the Union. The IRG draws up and publishes a range of documents. PIBs *(principles of implementation and best practice)* present the joint principles adopted by consensus and applied in a given sector in a bid to harmonise practices. The reports describe a given situation, and so act as the basis of future work. Benchmarks provide data comparisons, and advisory documents present the regulators' position, and query the sector.

Since 29 July 2002, the joint work performed by NRAs has been formalised through the creation of the European Regulators Group (ERG), an organisation devoted to discussion of the concrete application of the new regulatory framework. The ERG is made up of the European Union's Member States. NRAs from countries outside the Union, but which are members of the IRG take part as observers. It has a permanent secretariat that works alongside the Commission (DG Information Society), and advises the Commission by drawing on the NRAs' experience and expertise. For example: the ERG provided the Commission with its expertise by preparing the subordinate texts for the regulatory package, including the recommendation for separate accounting (work begun in 2003 and ending in 2005). Furthermore, the ERG does not have its own working groups. Because of this, the ERG and IRG work in tandem. A case in point: the work programme has been defined jointly by the two bodies since 2004.

In 2004, the chairman of the IRG and the ERG was the Belgian regulator, seconded by two vice-chairmen (the Dutch regulator, who was the former chairman, and the Danish regulator, who will become chairman in 2005).

23) Switzerland, Iceland, Norway and Liechtenstein are members of EFTA, the European Free Trade Association. The last three have entered into the Agreement on the European Economic Area (EEA).

1) Areas of work in 2004

ART has been actively involved in the joint projects, alongside its European counterparts, with the goal of harmonising regulators' practices, and sharing its experience with other members of the IRG/ERG. The IRG/ERG's work is carried out in a transparent fashion, with respect to the sector, thanks to public consultations on issues such as remedies for competition problems or the definition of the work programme for 2004 and 2005.

The IRG/ERG work programme for 2004, which was defined after consulting with the market's players in order to take their priorities into account, was initially comprised of three main areas of work: mobile call termination tariffs, international roaming and broadband access. Regulatory issues relating to Voice over IP services also became a primary area of concern for NRAs over the course of 2004.

1.1. Finalisation of the remedies document

2004 marked the completion of the common document on the approach to appropriate remedies for competition issues in the new regulatory framework – a benchmark market analysis document for NRAs. This work, which began in late 2002, focused on analysis of *ex-ante* obligations imposed on SMP operators, with respect to competition problems that had been encountered. This document is available on the ERG's website[24].

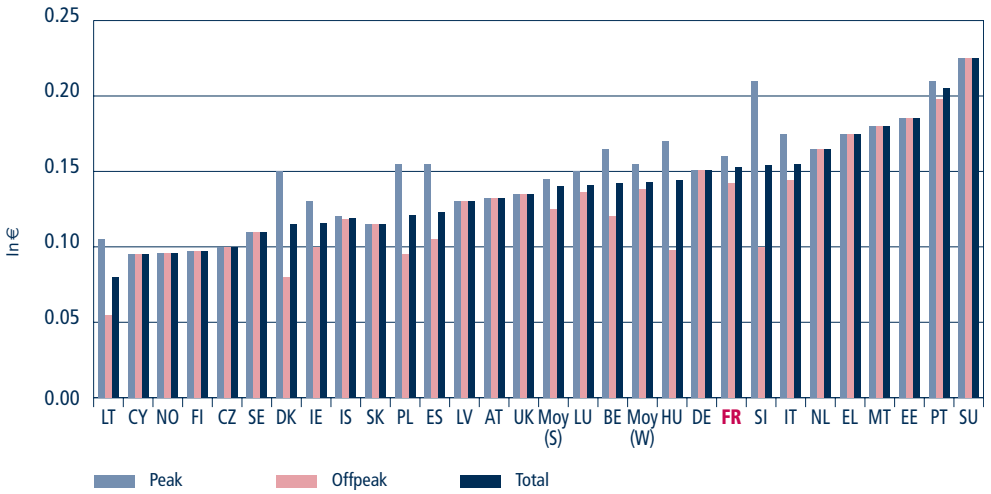
24) http://www.erg.eu.int/

1.2. Mobile call termination

The specific market that is mobile call termination (each operator being in a position to enjoy significant power in the wholesale voice call termination market on its network) was the focus of an effort to reach a consensus on regulation of mobile call termination tariffs, incorporated into the more general document called "common position on regulatory remedies," referred to earlier.

Furthermore, to obtain a "snapshot" of the state of mobile call termination tariffs around Europe, a European benchmark (covering 25 countries) of MT tariffs on 1 July 2004 was published on the IRG's website. An update, providing the prices being charged on 1 January 2005, will be made available during the first half of 2005. The benchmark takes into account the price of a 3-minute call, factoring in the real breakdown of peak and off-peak hours (75%/25% for France), or a 50/50 breakdown if the real one is not available.

Average mobile call termination tariffs around Europe: a disparate landscape



Tariffs on 1 July 2004
Source: IRG

To move gradually towards harmonised call termination tariffs, a glide path (multi-annual tariff management) was set by the NRAs in 2004, based on indicators that went beyond just the average tariffs being charged in each country. This method serves as a minimal point of reference for NRAs which do not regulate the MT market in a cost-oriented manner. It therefore allows them to enjoy solid European support for reducing the mobile call termination tariffs being charged by their national operators.

The tariff selected by the NRAs, based on average per-minute revenues per country, will be the fourth lowest tariff as of 1 January 2005 (2003 figures), and is to be applied within three years' time. This means that on 1 January 2008, the tariffs in all Member States must be equal or below this tariff. This tariff is expected to be set at 11.91 euro cents a minute. As a reminder, in France this tariff must be 12.50 euro cents for Orange and SFR in 2005 and 9.50 euro cents in 2006.

1.3. Broadband access

A common position on broadband access was finalised in early 2004, incorporating the results from public consultations on remedies. A document on broadband access via cable was drawn up as well. It analyses the state of competition, and the ensuing remedies in cases were cable access is part of the wholesale offers available in the broadband market. It should be noted that, as part of the recommendation on relevant markets, cable can be included in the bitstream market, "*if and when [other infrastructures] offer facilities equivalent*

to bitstream access." This analysis was conducted following requests from certain NRAs, including the Dutch regulator, in view of cable operators' considerable prominence in this country. Portions of this document will be incorporated into the common position on broadband access, in early 2005.

1.4. International roaming

Major preparatory work was done in 2004 on the issue of international roaming. Documents on the subject will be finalised in 2005. One of the features of this market is the fact that wholesale tariffs being charged in any given Member State have an impact on consumers in other Member States. Joint analysis is therefore key to ensuring the coordinated action of the largest possible number of Member States. To achieve this, in 2004 the ERG drafted a series of documents on the international roaming wholesale market. These documents focus on defining the national international roaming market, and on the notion of collective SMP with respect to international roaming. Furthermore, the NRAs sent questionnaires (qualitative and quantitative) on the wholesale and retail markets to their national mobile operators. The analysis will continue into 2005, based on the feedback to these queries. This subject is also part of the ERG's work programme for 2005 (see below). The goal of this common work is therefore to ensure that the same steps are taken with respect to the wholesale market by all regulators, to avoid having any national operator disadvantaged for the benefit of consumers in other countries.

1.5. Voice over IP

The ERG issued a joint statement on VoIP in February 2005. The document addresses portability and emergency call routing. It underlines the particular attention given by regulators to the emergence of IP telephony services, and sets out the goal of promoting the development of this type of service through appropriate regulation.

The common goal for European countries is in fact to create a regulatory and competitive environment that encourages the emergence of new technologies – as revealed in recent debates on new generation networks *(NGN)*[25]. The ERG is assisting in VoIP's progress by building a stable and predictable regulatory environment.

25) Next Generation Networks

The state of electronic communications markets can vary substantially from one country to the next. In some countries, number portability can be perceived as an entry barrier for new entrants, so the idea of exempting an emerging market like VoIP from number portability obligations could be considered a solution to this problem. In other Member States, however, portability is viewed as an opportunity for new entrants to gain a new share of the market. Here,

rather than being a barrier, portability becomes a positive factor for both new entrants and for the emergence of new technologies. Far from constituting an insurmountable problem, these differences in fact provide countries with a chance to exchange their views on the matter.

This difference in national situations needs to be taken into account when drawing up regulations for VoIP, which implies a step-by-step process. In accordance with the new regulatory framework, the first stage involves managing VoIP services on a case-by-case basis, depending on the entry barriers that exist in each country. Parallel to this action, within the ERG, NRAs will take part in debates on the competition aspect of VoIP – competition which is growing daily. To this end, the ERG's work programme for 2005 includes drafting a report which will be published in 2Q 2005. A common position is planned for release by the end of the year.

This work will make it possible to gradually reach the objective of creating a regulatory environment that favours innovation, investment and competition.

2) The IRG/ERG's work programme for 2005

The IRG/ERG's work programme for 2005 is characterised by a smaller number of documents to produce and publish, and by a more rigorous organisation that better distinguishes the project teams' permanent working groups, which are dissolved once their task has been completed. The programme's revision mid-year, which is a novelty compared to 2004, is expected to allow NRAs to focus more on current and timely issues, and thus be more reactive.

This work programme is defined based on a process of both internal and external consultation. The sector's players were able to take part in its definition through a public consultation and a public workshop. Other topics too have been incorporated into the work programme, at the request of the European Commission.

2.1. Priority issues

Broadband and VoIP are two issues that are of the utmost importance for NRAs because of the diversity of the players and services made possible by broadband. Debates will focus in particular on the competitive aspects of VoIP, and on interconnection issues.

Market analyses is another priority area for NRAs. Whereas the first analyses had been notified in 2003 and 2004, it now appears necessary to take stock of the experience which has been acquired since then.

In the same vein, Member States will be able to draw on their experience with regulation when reviewing the common approach to remedies. It is not likely to constitute a complete overhaul of the initial approach to remedies, but rather a series of modifications and additions to incorporate based on past experience.

Call termination on mobile networks is also part of the ERG's work programme for 2005. The "Mobile markets" working group will continue its benchmark of tariff conditions to be able to provide a snapshot of the MT tariffs being charged around Europe. The mobile call termination glide path will also be brought up to date.

International roaming too will be another topic addressed by a project team, whose work will lead to two common positions (on defining the national international roaming market, and on the notion of collective SMP), along with a report on the three phases of market analysis. It is in the interest of European States to work together on this issue, as illustrated by the joint questionnaire which was sent simultaneously to all Member States in December 2004. ART is one of the 10 volunteer countries whose work will form) the basis of the project team's assignment.

2.2. Opinions requested by the Commission

Three years after the publication of the "telecoms package," based on European directives, some of the elements of the framework need to be reviewed. The Commission has therefore requested an opinion from the ERG on the "relevant markets"[26] recommendation, as well as an opinion on reviewing the scope of universal service as defined in Article 15 of the "universal service" Directive.

26) Commission recommendation dated 11 February 2003 concerning relevant product and services markets in the electronic communications sector which are likely to be subject to ex-ante regulation, in accordance with the "framework" Directive.