PART 2

Legal and regulatory framework

The *Code des Postes et des Communications Électroniques* (CPCE), the French postal and electronic communications code, is the consolidation of laws and decrees which transpose Community electronic communications and postal directives.

The CPCE defines the rules which apply to postal and electronic communication operators and entrusts ARCEP with regulatory powers that are *ex ante* (market analyses in particular) and occasionally ex post (dispute settlement and sanction proceedings).

In some cases, its powers may complement those of other independent administrative authorities (IAAs) that have distinct missions, such as the *Conseil de la Concurrence* (the competition council) and the *Conseil Supérieur de l'Audiovisuel* (CSA, the council for broadcasting).

ARCEP in relation to other IAAs

Whereas the *Conseil de la Concurrence* safeguards competition and has the power to sanction illicit agreements and abuse of dominant position in a market[1], ARCEP's powers are limited strictly to the missions defined in the CPCE, the code that governs postal and electronic communications. ARCEP is charged with the mission of providing sectoral regulation upstream of specific markets (postal and electronic communications) to make them truly competitive and downstream to sanction non-compliance with CPCE rules or other rules adopted in application of the CPCE.

The roles of the two authorities are complementary because they operate in two different domains. Nevertheless, to avoid any risk of conflict legislators have provided for collaboration between the two authorities: the chairman of ARCEP refers abuses of dominant position to the *Conseil de la Concurrence* and more generally speaking, seeks the council's advice on all issues within the council's jurisdiction; similarly, the *Conseil de la Concurrence* informs ARCEP of all cases falling within ARCEP's jurisdiction[2].

For its own part, the CSA guarantees the freedom of all electronically transmitted audiovisual communications in the radio and television domain by ensuring that all content service providers comply with the laws and regulations in effect. It may also sanction radio stations or television channels that fail to comply with regulations. ARCEP may turn to the CSA for advice, particularly when Authority decisions stand to significantly affect radio and television broadcast services[3] or when the situation giving rise to a dispute could significantly restrict broadcast communication service offerings[4]. By the same token, CSA consults ARCEP in dispute settlement proceedings whenever the facts giving rise to the dispute have the potential to restrict electronic communication service offerings[5].

Beyond the legal and regulatory frameworks for electronic communications and audiovisual communication services, ARCEP and CSA representatives have created and maintain a liaison group for purposes of institutional cooperation.

1 Articles L.462-6, L.420-1 and L.420-2 of the commerce code.

2 CPCE Article L.36-10.

3 CPCE Article L.36-6.

4 CPCE Article L.36-8.

5 Article L.17-1 of Law No. 86-1067 as amended, concerning freedom of communication.

In 2005, new standards were adopted causing changes in the legal framework that governs how postal and electronic communication activities are regulated. Law No. 2005-516 of 20 May 2005, concerning the regulation of postal activities, marked a turning point in the Authority's activity (see Chapter 1) while new decrees concerning electronic communications clarified the legal framework for the telecommunications sector (see Chapter 2).

PART 2
CHAPTER I

2

Postal sector

A. Postal regulation law

B. Implementing decrees

C. Scope of the postal monopoly in 2006

D. Revision of postal directives

E. Universal Postal Union (UPU)

A. Postal regulation law

Law No. 2005-516 on the regulation of postal activities, dated 20 May 2005 and published in the 21 May 2005 edition of France's official register, the *Journal Officiel*, brought to an end the dispute proceedings initiated by the European Union over France's lack of independent postal sector regulation. Indeed, Article 22 of the 1997 Postal Directive requires that the national regulatory authority and the postal operator be functionally separate in Member States.

This regulatory law is of great importance because it fundamentally changes the context of postal activities and not merely the regulatory aspects themselves: in particular, it defines La Poste's mission with respect to regional development and puts an end to the lack of postal operator responsibility for lost or damaged postal items.

European texts

- European Parliament and Council Directive No. 97/67/EC of 15 December 1997 concerning common rules for developing internal postal markets in the Community and improving service quality. This Framework Directive establishes the principle of a universal postal service defined according to common rules.
- European Parliament and Council Directive No. 2002/39/EC of 10 June 2002 concerning the opening of Community postal services to competition. This text specifies the stages of postal sector liberalisation.

1. Fundamental restructuring of the sector

Postal market regulation consists of reconciling the existence and viability of universal service with the gradual introduction of competition into the market for correspondence items, with La Poste being responsible by law for universal postal service[6]. The minister of Posts and ARCEP are the regulators. Responsibilities are divided between the government and sectoral regulator as follows:

- The government drafts and implements postal regulations and negotiates international treaties. It also decides universal postal service quality objectives and - in conjunction with the Ministry of Finance - tariffs applicable for newspapers and periodicals[7].
- ARCEP's regulatory powers became effective on 1 November, the first day of the sixth month following enactment of the law[8]. Primarily, they involve:
  - awarding authorisations[9] and implementing associated rights and obligations[10];
  - overseeing La Poste's universal service mission and in particular its performance with respect to service quality[11];

CPCE Article L.2. 6

CPCE Article L.4. 7

Article 18 of Law No. 2005-516 of 20 May 2005 concerning the regulation of postal activities. 8

CPCE Article L.5-1. 9

CPCE Article L.5-2 1. 10

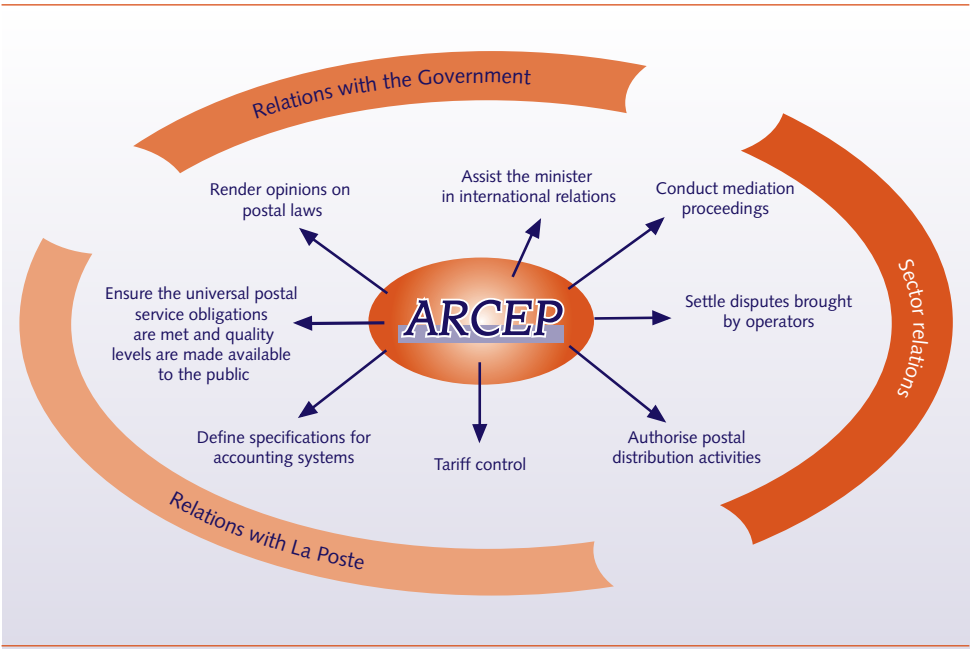
CPCE Article L.5-2 4. 11

- controlling universal service provider accounts and tariffs[12];
- settling disputes[13] .

12 CPCE Article L.5-2 6.

13 CPCE Article L.5-4.

2. ARCEP's missions and mandates



B. Implementing decrees

The regulatory law governing postal activities will not be fully operational until the implementing decrees have been promulgated. Existing texts are either obsolete (as in the case of the former PTT code, the regulatory part of which dates back to the era when La Poste was a PTT ministry directorate) or need to be revamped following the creation of ARCEP. This enormous regulatory task, launched in 2005, will be continued in 2006.

Primary implementing texts for the postal law

Decree concerning authorisations	Published 5 May 2006 in the JO (1)
Order concerning authorisations	
Dispute settlement decree	
Decree concerning sworn officers and agents	
Abrogation of the decree instituting a mediator for universal postal service	
Decree concerning the attributes of universal service	Formal consultations in the first quarter of 2006, , publication in the second quarter
Order concerning service quality objectives	
Decree concerning the authorisation of services for registered items in the legal services sector	Preparation in progress
Decree concerning access to private mailboxes	
Decree concerning postal operator responsibilities	Formal consultations concluded in in the third quarter
Other implementing decrees not directly related to postal regulation: • Decree concerning the postal bank (adopted), and • Decrees concerning the geographically uniform pricing fund (in formal consultations).	

Source : Ministry of Posts

(1) Decree No. 2006-507
Order dated 3 May 2006
ARCEP opinion No. 05-1008 dated 17 November 2006, concerning draft decrees

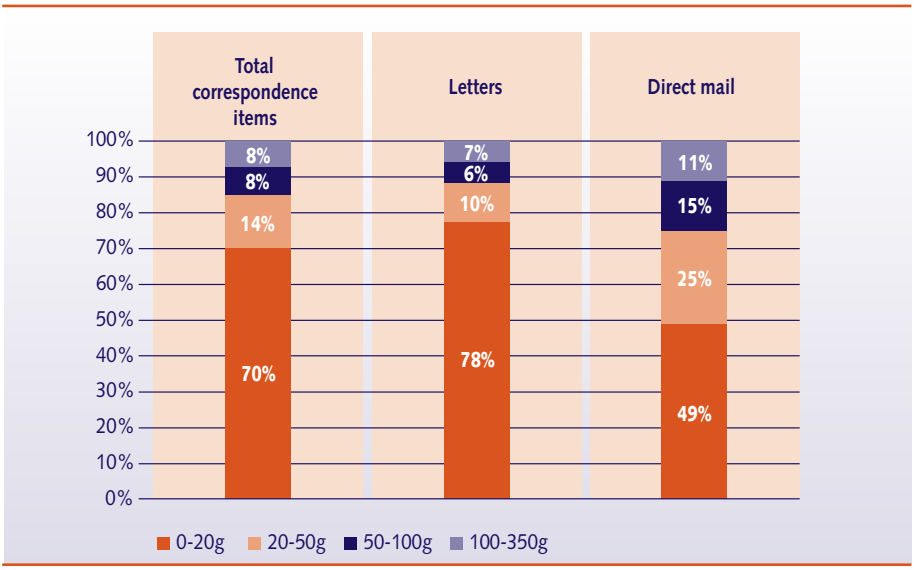
C. Scope of the postal monopoly in 2006

As in the other European Union countries, the scope of the postal monopoly has been brought back by law to the levels established in the 2002 postal directive for the period 2006-2009. Therefore, as from 1 January 2006, the postal monopoly covers correspondence items weighing less than 50g or valued at less than 2.5 times the base price (€1.325).

Reducing the scope of the reserved area from 100g to 50g will double the market volume open to competition (from 8% of all correspondence items to 16%). Thus the share of mail volume open to competition remains limited, but other types of items (newspapers and periodicals and packages in particular) are liberalised already.

According to a mail flow distribution study conducted for the European Commission by the consultancy CTCon, the share of the market open to competition before 2006 represented 8% of mail flows in 11 European countries, or more precisely 7% of letter flows and 11% of direct mail flows.

Mail flow analysis by weight for 11 European countries



Source : CTCon, 1998

D. Revision of postal directives

One of the possible outcomes of the European debate undertaken in 2006 is the full liberalisation of postal markets as from 1 January 2009. This would entail a major change for the 84% of mail still under monopoly. For this reason, the entire European postal services system is being re-examined including the scope of universal service obligations and the regulatory procedures necessary to create a single postal services market.

1. Timetable

The European Commission is expected to make known its proposed directive by the end of 2006. Between now and then it will issue a report evaluating current policy. The report will be based on the results of the public consultation (open from November 2005 to January 2006) and on two studies, now underway, on the status of postal market in each European country. Negotiations with the Council of Ministers are expected to take place under the 2007 German and Finnish presidencies. The European Parliament for its part has just published a report requesting that the Commission examine all possible options.

2. Liberalisation of European postal markets

	Prior to 2005	2006	2008 (conditional liberalisation envisaged)
Full liberalisation	Sweden	United Kingdom	Germany Netherlands
Liberalisation beyond the Directive	Spain (*), Italy		
Implementation of the Directive	France, Belgium		

(*) In this country, international outgoing mail is still under monopoly, as the Directive allows when justified.

Certain Member States have totally liberalised their markets (Sweden and - as of 1 January 2006 - the United Kingdom) or have planned conditional liberalisation (Germany and the Netherlands). Others are following the rules of the current directive (Belgium, France and Italy) or have *ad hoc* regimes (Spain has no monopolies except for national and international items). Two operators (the German and Dutch postal administrations) have publicly expressed their support for liberalisation and have demanded fundamental changes in the current rules requesting that the scope of universal service be reduced and that common competition law be applied. Still others are reserving judgment until they learn more about the balance of the Commission's proposals.

3. European institutions and their work

Organisation	Postal authorities	Role
European Union	The **Council of Ministers** of the European Union, usually in the "Industry, Energy, Electronic Communications" group	**To vote** on directives proposed by the Commission, as part of the co-decision procedure with the European Parliament
	Postal **Directive Committee**	Comprising Member States of the Union, it issues **opinions** on matters referred to it by the Commission
CEPT ***(conférence européenne des postes et Télécommunications),*** **the European Conference of Postal and Telecommunications Administrations**	**CERP** *Comité européen des régulateurs postaux,* the European Committee for Postal Regulation	Comprising European countries (currently 46), this is essentially a body for liaison and **consultation**
CEN ***(Comité européen de normalisation)*** **the European Committee for Standardization)**	**TC331** Technical committee charged with spearheading European postal standardisation efforts.	It is made up of European standards bodies (AFNOR in the case of France). It **drafts European standards and votes on them.** Some twenty postal standards have been published or are under study, relating particularly to service quality measures.

In advance of inter-governmental negotiations, the Commission periodically solicits the opinions of Member States sitting on the Postal Directive Committee. ARCEP participates at the request of the minister-delegate of industry. For its part, the Commission participates as an observer in the work of the ministries and that of the European regulators who meet under the auspices of CERP *(Comité Européen des Régulateurs Postaux),* which is the postal regulatory subcommittee of the European Conference of Postal and Telecommunications Administrations, CEPT *(Conférence Européen des Administrations des Postes et des Telecommunications).* CERP's work covers the regime for international mail, the accounting systems in force in the various countries, the universal service financing mechanisms provided for in Member State legislation, and postal statistics. ARCEP leads the postal statistics working group.

E. Universal Postal Union (UPU)

Founded in 1874, the Universal Postal Union (UPU) is an intergovernmental organisation that has been part of the United Nations system since 1948. Headquartered in Bern Switzerland, it currently has 190 member countries and its official language is French. Its permanent International Bureau acts as secretariat.

The mission of the UPU is to facilitate the operation of international mail by establishing a single postal territory worldwide: sending a letter should be possible from any departure point to any destination point. Common rules for international postal service are set forth in the Universal Postal Convention, which has the power of a treaty, and in its Regulations.

Within the UPU framework, world postal administrations determine the principles for establishing the "terminal dues" that destination postal administrations charge sending postal administrations to cover the cost of mail distribution.

Traditionally, the French delegation to the UPU comprises representatives of the minister of Posts, the minister of Foreign Affairs and La Poste. ARCEP participates at the request of the minister of Posts. ARCEP board member Joëlle Toledano leads a UPU working group on postal economics.

PART 2
CHAPTER II

2

Electronic communications sector

A. Legislative framework

B. Decree of 26 July 2005

C. Other regulatory measures adopted in 2005

Transposition of the Telecom Package directives of 2002 led to the adoption of new laws specifying the legal framework for electronic communications and fundamentally modifying the principal texts that had defined the French telecommunications landscape since 1990.

European texts

Electronic communications:

- DFramework Directive (OJEC, 24/04/02)
- Authorisation Directive (OJEC, 24/04/02)
- Access Directive (OJEC, 24/04/02)
- Universal Service Directive (OJEC, 24/04/02)
- Privacy and Electronic Communications Directive (OJEC, 12/07/02)
- Competition Directive (OJEC, 17/09/02)
- Radio Spectrum Decision, European Parliament and Council Decision No. 676/2002/EC, of 7 March 2002 (OJEC, 24/04/02)
- Commission Guidelines of 11 July 2002, concerning market analysis and the assessment of significant market power under the Community's regulatory framework for electronic communication networks and services (OJEC, 11/07/02).

Founding French texts from 1990 to 1996

- LLaw No. 90-568 of 2 July 1990 concerning the organisation of public postal and telecommunications services; created two new legal entities under public law, La Poste and France Telecom, legally and financially distinct from the State, each authorised as an "independent operator under public law" accountable to the minister.
- Law No. 90-1170 of 29 December 1990 regulating telecommunications; defined the various categories of networks and services, committed to liberalising several of them and specified the regulatory jurisdiction of the minister with respect to telecommunications.
- Law No. 96-299 of 10 April 1996 concerning information technology and services trials; permitted the award of the first experimental licences for telecommunications networks aimed at encouraging innovative initiatives of limited duration and limited geographic scope.
- Law No. 96-659 of 26 July 1996 known as the telecommunications regulatory law; transposed to national law European dispositions concerning the total opening of the telecommunications sector to competition effective 1 January 1998 and substantially modified the code governing posts and telecommunications by defining the legal framework for the new competitive regime. Three basic principles were established:

- Telecommunications activities are to take place freely.
- In a competitive environment, there is a need for a public telecommunications service, which has universal service as its main component.
- The regulatory function is independent of the operating function.
- la fonction de régulation est indépendante de la fonction d'exploitation.

A. Legislative framework

The new legal framework for telecommunications stems from the adoption of three fundamental laws.

First, Law No. 2003-1365 of 31 December 2003 concerning telecommunications public service obligations and France Telecom, transposed the Universal Service Directive.

Subsequently, Law No. 2004-575 of 21 June 2004 concerning confidence in the digital economy, transposed the Electronic Commerce Directive and clarified the notions of public online communications, public electronic communications, audiovisual communications and CSA responsibilities.

Finally, the electronic communications law No. 2004-669 of 9 July 2004 fundamentally altered the legislative framework that applies to electronic communications. One of the main changes was the principle of freedom to establish and operate public networks and provide the public with electronic communications; this replaced the operator licensing procedures that existed under former Article L.33-1 of the CPCE. Similarly, Article 133 II allowed obligations specific to dominant operators (under CPCE Articles L. 33-1 II and L.34-8 II-V) to be preserved until ARCEP exercises its authority under CPCE Articles L. 37-1 and L.37-2, which is to say until the market analysis process is concluded. Finally, Article 133 III governed the migration from the former frequency authorisation framework to the new one.

B. Decree of 26 July 2005

Implementation of the new framework was specified by a fundamental decree[14] issued 26 July 2005 concerning the conditions for establishing and operating networks, and for providing electronic communication services.

The main purpose of this decree, which revised CPCE Articles D.98 through D99-3, is to define the obligations of electronic communication operators. In addition, certain conditions were introduced concerning the procedure for declaring networks and services open to the public. Finally, certain provisions concern the conditions under which independent networks may be operated.

14 Decree No. 2005-862 of 26 July 2005 concerning the conditions for establishing and operating networks and for providing electronic communication services.

1. Operator obligations

1.1. General obligations

The 26 July 2005 decree establishes a series of obligations that when relevant, apply to public network operators and providers of public electronic communication services. Indeed, the first subparagraph of Article D.98-3 imposes on these operators various obligations set forth in Articles D.98-3 through D.98-13 concerning:

- conditions for network and service sustainability, quality and availability[15]. CPCE Article D.98-4. 15
- Communications security[16]. CPCE Article D.98-5 III. 16
- Rules covering standards and specifications for networks and services[17]. CPCE Article D.98-6. 17
- Prescriptions in the interest of public order, national defence, and public safety[18]. CPCE Article D.98-7. 18
- Rules affecting the routing and location of emergency calls[19]. CPCE Article D.98-8. 19
- The provision of quantified information[20] (financial, commercial, technical) about network operations and service delivery to ascertain whether an operator has significant power in markets recognised as relevant. This information is used also for purposes of collecting taxes and fees, determining operator contributions to finance universal service, and producing the comparative service quality and price assessments that ARCEP conducts in the interest of users. This information is provided to ARCEP on a predetermined schedule, and ARCEP has the authority to request further information. CPCE Article D.98-11. 20
- User information and user protection[21]. CPCE Article D.98-12. 21

1.2. Specific obligations

Decree No. 2005-862 of 26 July 2005 also catalogues specific obligations by type of operator.

1.2.1. For networks operators

The new Article D.98-10 establishes rules governing the conditions necessary to ensure service interoperability. These rules apply only to public network operators (under the third indent of Article D.98-3). In addition to ensuring interconnection conditions that guarantee service interoperability, the operator must comply with technical requirements ordered by ARCEP under the terms of Article L.36-6 for purposes of guaranteeing network and service interoperability.

1.2.2. For service providers

Certain rules[22] concerning communication privacy, neutrality and the handling of personal data apply only to providers of public electronic communication services (under the second indent of Article D.98-3). CPCE Article D.98-5 I and II. 22

Therefore operators must take the measures necessary to guarantee service neutrality and communications privacy with respect to the content of messages transmitted on their networks. Consequently, they must provide service without discriminating by type of message transmitted and they must take every precaution to ensure message integrity.

In addition, service providers must take appropriate steps to safeguard the security, integrity and confidentiality of the personal data they hold and process. Their use of personal data must comply with stated purposes.

Operators must also guarantee that every customer has free access to his or her personal information and the option to receive an itemised bill.

1.2.3. For providers of public telephony services

22 CPCE Article D.98-3 first indent.

The decree also sets forth certain obligations[22] concerning personal data which apply only to providers of public telephony services. Thus, these operators must offer their customers free blocking of their calling ID when calling other stations. Similarly, when these operators offer calling or connected line identification service they are required to inform subscribers and to allow the subscribers to whom calls are directed to interrupt or arrange for interruption of automatic call transfers free of charge via a simple method.

In their relations with international operators, telephony service providers must respond to all interconnection requests from authorised operators in countries that offer equivalent treatment. The decree emphasises that in the European Economic Area countries equivalent treatment is a right by law. In dealing with countries where such equivalence is not assured, operators must guarantee non-discrimination in their relations with potential competitors.

1.2.4. For all operators

The provisions of CPCE Article D.98-12 reinforce the general obligations concerning user information, which are set forth in the consumer code, *Le Code de la Consommation* (Articles L.111-1, L.121-18 and L.121-83). In the electronic communications sector, customer information must include in particular conditions relating to service quality, time to provision services, maintenance services, price offers, discount formulas and also methods of compensating and reimbursing the customer.

These various types of information must be accessible simultaneously at the operator's points of sale and via any telephonic or electronic medium at a reasonable price. By the same token, the text requires that users receive a copy of any contract they enter into with an operator.

The Authority has power of control over these matters and may request at any time that the operator provide the information made available to users as well as sample contract forms.

Finally, under this regulation, operators relying on third parties to commercialise their services remain subject to the obligations set forth in the code and remain accountable to subscribers for the services provided.

2. Network and service declarations

The new Articles D.98 through D.98-2 of the CPCE concerning the declaration procedures set forth in Article L.33-1 list the information that must be provided. They also specify the conditions that must be satisfied for ARCEP to issue a receipt containing the registration number that serves as the declarant's operator number.

3. Conditions for operating independent networks

Decree No. 2005-862 changed the conditions for operating independent networks in compliance with the new legislative framework. It is important above all to remember that when required for the sake of public order, public safety, or national defence[24], independent networks must comply with the instructions of legal authorities, police services and the armed forces. In this context, the minister of Electronic Communications and ARCEP may also impose obligations on independent network operators. Article D.99-1 states that when an independent network is connected to a public network, ARCEP may ask the operator at any time to demonstrate that appropriate measures are in place to prevent connections from being used for communications between parties other than those for whom the network was established. Additionally, independent network operators are required to take every precaution to maintain the integrity and security of the public networks to which their networks are connected[25].

CPCE Article D.99. 24

CPCE Article D.99-2. 25

C. Other regulatory measures adopted in 2005

1. Directories and directory information services

Decree No. 2005-606 of 27 May 2005 modified the part of the CPCE that regulates directories and directory enquiry services. Specifically, it requires that mobile subscriber directory listings have the subscribers' prior consent and that prepaid card customers also have the option to be listed in a directory[26]. Articles R.10-3 through R.10-8 specify conditions governing the compilation of directories and the relationships among operators and universal directory publishers (particularly as concerns the procedure for communicating subscriber lists).

CPCE Article R.10. 26

2. Spectrum

Decree No. 2005-400 of 27 April 2005 as provided for by CPCE Article L.42-1, specified the timescales for awarding frequency-use authorisations and for providing notification of the conditions governing authorisation

renewal. It also specified obligations on authorised entities to allow compliance with terms of use to be controlled. Therefore, unless there is special dispensation, no more than six weeks may elapse between the time ARCEP receives a complete request for frequencies and the time ARCEP notifies the applicant of its decision[27].

27 CPCE Article D.406-14

In addition, Decree No. 2005-422 of 4 May 2005 amended the 3 February 1993 decree on administrative fees for frequency assignment and management payable by entities holding authorisations awarded under CPCE Articles L.33-1 and L.33-2. For its part, Decree No. 2005-1168 of 13 October 2005, concerning the national frequency agency ANFr *(Agence Nationale des Fréquences)* and the funding of spectrum management, specified the amount and share of contributions from entities authorised to use frequencies. It also specified that when ANFr reallocates spectrum or issues instructions for this to be carried out (at the request of the administering agency or authority), it must establish the costs and expenses associated with reallocating the spectrum and that these are to be covered either by drawing from the spectrum reallocation fund on a case-by-case basis or by pre-financing from the fund[28].

28 CPCE Article R.20-44-6. .

3. Universal service

Decree No. 2005-75 of 31 January 2005 stated that the pricing of telephone communications services included in the universal service component may be subject to multiyear planning[29]. The decree specifies the procedure universal service operators are to follow in transmitting their tariff filings to the Authority as well as the timeframes the Authority is to observe in returning an opinion.

29 CPCE Article R.20-30-11.

It is worth noting that Decree No. 2004-1222 of 17 November 2004 concerning the implementation of Articles L.35 through 35-8 with respect to universal service, specifies public service and financing obligations for universal electronic communication service.

4. Rights of way

Decree No. 2005-1676 of 27 December 2005 relates to fees for non-roadway occupancy of the public domain, public roadway rights of way, and property easements as provided by CPCE Articles L.45-1, L.47 and L.48. The text is aimed mainly at establishing a cap on fees for private occupancy of the public domain.

5. Miscellaneous provisions

Decree No. 2005-399 of 27 April 2005 detailed the appointment and assignments of members of the *Commission Supérieure du Service Public des Postes et des Communications Électroniques* (CSSPPCE), the public service commission for posts and electronic communications. In addition,

in accordance with Article 5 of Framework Directive No. 2002/21/EC, the decree provides for a new CPCE Article D.295 governing the procedures for providing information to the European Commission and to competent authorities of other Member States and for publishing information relating to business secrets and other secrets protected by law.

Decree No. 2005-605 introduced amendments to CPCE Part II *(Conseil d'État decrees)*. In particular, it specifies:

- that the surveys mentioned in CPCE Article L.32-4 are to be conducted by employees or agents of the ministry responsible for electronic communications and of ARCEP who are empowered by the minister and duly sworn[30];
- that the CSA must return an opinion to ARCEP within six weeks when the matter is a dispute settlement the basis of which could significantly restrict the offer of audiovisual communication services[31];
- that the absence of any communication from ARCEP for a period exceeding six weeks from the date the Authority receives a complete request is the equivalent of a decision to deny when the matter concerns authorisation to use relevant frequencies under Article L.42-1[32];
- the amount of fees[33] payable by recipients of telephone numbers awarded under CPCE Article L.44.

CPCE Article R.9-1. 30

CPCE Article R.11-1. 31

CPCE Article R. 20-44-9. 32

CPCE Articles R.20-44-27 through R.20-44-33. 33

List of orders issued in 2005

- Order of 21 March 2005 and implementing CPCE Article R.20-11 concerning the placement on the market of radio equipment using frequency bands that are not harmonised throughout the European Community. Order of 3 March 2005 covering the designation of operators responsible for providing the universal service component.
- Order of 3 March 2005 concerning the universal directory and universal directory information services.
- Order of 3 March 2005 concerning the use of public payphones.

PART 2
CHAPTER III

2

European harmonisation

A. The works of COCOM

B. Work of the IRG and ERG

C. Review of the regulatory framework

B. The work of Cocom

The purpose of the Communications Committee (COCOM)[34] is to assist the European Commission, particularly in its role as secondary legislator. A classic instrument of comitology[35], COCOM enables Member States to give their opinions officially to the European Commission in areas relating either to COCOM's consultative capacity (Article 3 of the Council's Comity Decision of 28 June 1999[36]) or to its regulatory capacity (Article 5 of the same decision). It also encourages Member States and the Commission to exchange viewpoints on all matters that have been put on the agenda.

34 According to the provisions of Article 22 of the Framework Directive.

35 The European Parliament defines "comitology" as the procedures under which the Commission executes its implementing powers conferred to it by the legislative branch with the assistance of "comitology" committees consisting of representatives of Member States.

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 (in accordance with Article 7 of the Framework Directive) presents its intention to veto 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.

36 Decision No. 1999/468/EC.

In 2005, COCOM worked principally on several numbering and spectrum issues.

1. Numbering

1.1. The 116 prefix

COCOM's opinion was sought on the Commission's draft decision concerning numbers beginning with the 116 prefix[37]. This block of numbers is reserved for general-interest services. In Germany for example, the number 116 116 was set up to block bank cards. The decision aims to achieve pan-European number harmonisation so that a given number within the block might support a single service across all countries in the Union.

37 This subject is also studied by CEPT.

In response to the reactions of member countries, including France, several amendments were made to the draft. These amendments aimed mainly to clarify the objective of the draft decision, which is to reserve a block of numbers beginning with 116 so that numbers might be harmonised for harmonised pan-European services. The Member States also asked for clarification as to how these numbers will be awarded. Indeed, because these numbers constitute a scarce resource, they should be assigned under conditions that are objective, transparent and non-discriminatory. This requires that the conditions of award be unambiguous. To respond to these concerns, the Commission plans to publish a document containing guidelines for awarding these numbers following the final decision[38]. The annex containing the numbers will be amended as NRAs make awards.

38 The decision and complementary documents are expected to be adopted in 2006.

1.2. 112 implementation

Article 26 of the Universal Service Directive provides for the establishment of a single European emergency call number, 112. This article extends the provisions of the 29 July 1991 decision[39] that was abrogated by the Framework Directive. In June 2005, the Commission distributed a questionnaire aimed at determining the implementation status of the 112 number. As of March 2006, the final report had not yet been published but early indications were that all fixed and mobile telephone users across the Union would be able to connect to emergency services by dialling 112.

39 Decision 91/396/EEC of 29 July 1991, concerning the creation of a single emergency call number for Europe.

The Commission has insisted on the need for improving 112 access to reduce emergency service response and intervention time. For this reason, the Commission considers caller location as essential. To this end, it recommends a push system[40] (by which the caller's location is automatically transmitted to emergency services). However, although location may be desirable for certain Member States, full implementation could be difficult from a technical standpoint because operators have chosen different solutions for their networks.

40 As opposed to the pull system (whereby the emergency service has to seek location information from the operator).

To improve the use of 112, an *ad hoc* working group has been established. Its members represent the emergency services and the ministries responsible for electronic communications.

At the same time, the Commission asked the Member States to provide the public with more information about 112 because of concerns about a lack of awareness of the number. A *Eurobarometer* survey is to be published on this topic

1.3. Freephone numbers

The Commission has submitted several proposals to COCOM concerning freephone numbers in Europe:

- Free international numbers should be free to the caller for calls originating in Member States of the Union regardless of the network used (fixed or mobile).
- Free national numbers should be free to the caller for calls originating in the Member State involved regardless of the network used (fixed or mobile).
- Free national numbers should be accessible from another EU country via standard international numbering and at the normal cost for an international call.

These proposals highlight the problem of ensuring that calls to these numbers are indeed free particularly when the calls originate from a mobile network. The Member States have expressed reservations about these proposals, particularly as concerns responsibility for the cost of incoming calls from mobiles and abroad. In principle, the cost should be borne by the called party; however the cost of these calls may discourage businesses from using

this type of number as a means of being contacted. The Commission has nevertheless asked Member States to make this option available to businesses wishing to implement such solutions. Meanwhile, the technical and economic feasibility of these proposals is under discussion. This work should be concluded in 2006.

2. Spectrum

2.1. 2GHz MSS bands

The 2GHz[41] MSS frequency bands are reserved for broadband satellite communication services that have a terrestrial component. The Radio Spectrum Committee (RSCOM)[42] has mandated CEPT to harmonise the technical conditions for using these frequency bands. However the system characteristics and the terrestrial component in particular pose regulatory problems that have been submitted to COCOM via an *ad hoc* group of experts comprising members of RSCOM, CEPT, ETSI and the Commission.

41 The 1980-2010MHz and 2170-2200MHz bands.

42 The Radio Spectrum Committee (RSCOM) advises the Commission on frequency matters.

The regulatory difficulties are related in part to the terrestrial component of the system. This component constitutes a real advantage over currently deployed satellite electronic communication systems because it supports reception in urban areas (where satellite reception is problematic because of the "urban canyon" phenomenon). In cities satellite signals are retransmitted therefore by the terrestrial component, which operates like a 3G mobile network. Moreover, the terrestrial component can operate independently of the satellite. Indeed, when two users find themselves in the terrestrial component coverage area, communication does not have to take place via the satellite. It is useful therefore to clarify the conditions for authorising and using this terrestrial component, particularly with respect to other broadband mobile communication systems.

Moreover, the scarcity of resources in these bands (2x30MHz) allows only two operators to deploy pan-European service[43]. Authorisation conditions therefore need to be harmonised at the European level.

43 2x15MHz per operator.

These questions are being addressed in a joint study by COCOM and Commission experts and should be answered during the course of 2006.

2.2. From analogue to digital broadcasting

COCOM's opinion was solicited for the draft communication on accelerating the transition from analogue to digital broadcasting. In that document, which was adopted on 24 May 2005, the Commission defined its objectives, recommended that digital migration plans be coordinated and showed the advantages that could be obtained from the "digital dividend". Indeed, the migration to digital broadcasting will enable more efficient use of spectral resources because of the way the transmitted data is processed and compressed. Thus, some frequency bands will be able to be cleared and assigned to innovative services.

On its website, the Commission has published a list of national plans for phasing out analogue television. The COCOM05-51FINAL document summarises the contributions of the Member States. The various contributions reveal that most States are planning to phase out analogue broadcasting totally by 2010-2012. Similarly, most of the plans are for phased retirement, region by region.

3. Recommendation on accounting separation

COCOM was consulted for its opinion on the draft recommendation concerning accounting separation (2005/698/EC). The aim of the text, which was adopted on 19 September 2005, is to achieve consistent application of accounting methods at the European level as concerns obligations to which operators may be subject for purposes of market analysis. The recommendation suggests ways to implement cost accounting and accounting separation. The ERG (European Regulators Group) has adopted a common position that complements the recommendation and is in the form of guidelines for information reporting and publishing.

B. Work of the IRG and ERG

The IRG and ERG
(Independent Regulators Group and European Regulators Group)

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" of NRA heads provides members with a forum for sharing experiences and thereby handle competition problems that are similar from one country to another.

The IRG is open to the NRAs of all members of the European Union and the NRAs of Switzerland, Liechtenstein, Iceland and Norway[44]. Romania and Bulgaria participate as observers. Turkey's application to participate as an IRG observer was accepted in February 2005 and Croatia's was accepted in October 2005.

Several working groups have been established to support the group of NRA heads. They address topics related to fixed networks, mobile markets, the new framework, market data analysis, dominant operators, accounting and costs. Within the IRG, NRAs share their experience by means of benchmarks and questionnaires. Also, these groups draft common positions with the aim of harmonising regulation and sharing best regulatory practices in the Union. The documents produced and published by the IRG can be categorised as follows: PIBs[45] presenting

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

45 Principles of Implementation and Best practice

common principles, adopted by consensus, to be implemented in a given sector so that practices may be harmonised; reports describing a given situation and providing the basis for subsequent work; benchmarks for data comparison; consultation documents presenting regulators' positions and requesting sector input.

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 Member States of the European Union; the national authorities of countries that are not in the Union but are IRG members participate as observers. It has a permanent secretariat reporting to the Commission (DG Information Society), and advises the Commission by leveraging the experience and expertise of the NRAs. For example, the ERG lent its expertise to the Commission in preparing the supplementary texts of the regulatory package such as the recommendation on accounting separation (work begun in 2003 and completed in 2005). The ERG has no working groups of its own. Thus, the ERG and IRG work hand in hand. By way of illustration, the IRG and ERG have drafted their work programme jointly since 2004.

In 2005, the president of the IRG and the ERG was the Danish regulator, who was supported by two vice presidents (the Belgian regulator, who formerly held the presidency, and the British regulator, who will assume the presidency in 2006). The Italian regulator will be president of the IRG/ERG in 2006 and 2007.

1. Work completed in 2005

The IRG and ERG published the following documents on their web site[46] in 2005. The documents cover market analyses, review of the regulatory framework, international roaming, broadband, and regulatory accounting.

www.erg.eu.int and https://irgnet.icp.pt/index.asp 46

1.1. ERG documents

1.1.1. Guide to ERG/IRG activities

This document is a manual explaining the roles and operation of the IRG and ERG. It is worth noting that the ERG has editorial freedom. Its documents reflect the opinions and decisions of the NRAs that may differ from those of the Commission, even when the Commission participates in the work of the two groups.

1.1.2. Report on NRA experiences with market analysis

This document is the final version of the report on market analyses. It is aimed at providing input to the discussion on remedies as well as the review of the Relevant Markets Recommendation and more generally the review of the regulatory framework being adopted by the Commission. It contains analyses of only 5 of the 18 markets (10, 11, 12, 15 and 16).

For each of these markets, the comparative analysis reveals similarities and differences in how the market is defined, the principal issues associated with determining operator dominance and the obligations imposed by the various countries. The Commission's comments and vetoes regarding the various analyses are also included. Thus, these reports provide a first glimpse of the analyses that had been completed and those that were ongoing as of 1 September 2005.

1.1.3. Common position on remedies

This is an update of the 2004 common position on remedies. The main changes and additions have to do with clarification of the 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 where supply and demand conditions vary with geography. In addition, minor changes were made to reflect NRA experiences or texts drafted since the first version of the common position went to press.

Inset 1 of the document, which is only very slightly different from the prior version, recommends a flexible approach with regard to emerging markets. Indeed, 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. However, although the emerging market itself may not be regulated, the access markets should be if they allow dominant operators to act in such a way as to impede fair and effective competition in the emerging market.

Two important developments also were added:

- one on ways of pricing the various segments in the service value chain;
- another expanding on the notion of non-discrimination.

An updated text should be adopted in June 2006 following a public consultation conducted at the end of 2005.

1.1.4. International roaming

Roaming market analysis

A common position on market definitions and market analyses was drafted for the wholesale international roaming market. This document provides European regulators with guidelines for analysing Market 17. The document highlights the fact that other than under exceptional national circumstances, it is difficult for NRAs to define a simple dominant position in this market, just as it is difficult to define a joint dominant position from the current rulings of the European Court of Justice (see Order of the Court of First Instance of the European Court of Justice of 6 June 2002 in case T-342/99, Airtours plc v. Commission).

This being the case, European Commissioner for Information Society and Media Viviane Reding announced at the February 2006 ERG meeting in Paris that European regulation would be proposed to reduce international roaming prices. A call for comments was issued to gather feedback from market players. The ERG is preparing a common position on this topic (see below).

Transparency of retail international roaming tariffs

The purpose of this document is to improve consumers' understanding and ability to choose. The need for tariff transparency is set forth particularly in Article 21 of the Universal Service Directive and Article 8 of the Framework Directive.

It shows the status of NRA web sites that have been implemented to improve retail roaming tariff transparency in accordance with the decision of the November 2005 Plenary Meeting. Seven NRAs have already implemented sites that report pricing for 3- and 4-minute calls to various countries. Other NRAs have announced that they intend to do the same. Some NRAs will provide a link from their web site to the relevant page of the corresponding mobile or MVNO operator web site.

1.1.5. Portability: retail tariff transparency

The ERG has prepared a report on retail tariff transparency when implementing number portability. Indeed, in markets where numbers are ported, consumers must have the ability to obtain tariff information, particularly as relates to call termination.

This report was based on the results of a survey in which 22 countries responded to a questionnaire. ARCEP responded for France and had a role in writing the report. The report shows the status of number portability in Europe and analyses problems associated with tariff transparency.

The report places special emphasis on mobile number portability. It shows that there are significant disparities among countries. In 2004, the count of ported mobile numbers was in the millions in Spain (4.3 million), Italy (3.7 million), Finland (1.5 million) and the United Kingdom (1.2 million). With 250 000 ported mobile numbers, France ranks in the middle, but it has advanced significantly (109%) since 2003.

In a situation where numbers are ported, it is difficult for the consumer to know what pricing will be applied. Indeed, if tariffs are applied as a function of the number being called (number-oriented pricing), portability will have no impact on the consumer. On the other hand, if tariffs are applied as a function of the network being called (network-oriented pricing), the consumer will have difficulty telling which tariff will apply because that depends on the price charged for terminating a call on the called network.

The report also documents the various measures that member countries have implemented to address this need. First, it should be noted that most (14) of the countries have not implemented any specific measures to

provide consumers with information about how ported numbers are tariffed. The proposed measures consist of advising the caller of the call price by phone, SMS, Internet, or an announcement at the start of the call.

Finally, it should be noted that there is a strong correlation between tariff transparency and the technical solution selected for portability. If an operator can determine in real time that a called number is ported, it can apply the corresponding tariff and thus bill the customer thereby maintaining full transparency. In this case, the customer must be notified at the time of the call that the called number has been ported. Although technical solutions exist (such as a beep when the call is placed), they are costly to implement.

1.1.6. Competition in the broadband market

This benchmark[47] This benchmark allows a comparison of European wholesale prices as of 1 July 2005 (monthly fee plus service-access fee, price of full or partial unbundling, underlying costs, cost accounting methods) and retail prices (subscription fee for a conventional line and for an ADSL line).

The benchmark, which has been improved by including the retail subscription fee and bitstream retail pricing, is designed to help NRAs in their decision making.

47 This involves updating a benchmark. It should be noted that despite the disparate situations of the various countries, the differences among them are diminishing. Moreover, the use of current-cost accounting methods is spreading. The next update of the benchmark is planned for 1 July 2006 (it is updated annually).

1.1.7. Common position on the Framework Review

Following a call for comments launched by the Commission on 25 November 2005, the ERG adopted a common position on review of the regulatory framework (see below).

1.2. IRG documents

1.2.1. "Retail minus" methodology

This document provides NRAs with a set of eight implementation principles and best practices for applying "retail minus" to SMP operators. It gives NRAs guidelines for determining wholesale prices without necessarily applying cost accounting methods, particularly where such methods do not provide the most appropriate remedy for the market. This document was put to public consultation and was subsequently adopted in February 2006.

1.2.2. Current cost methodology

This document has been rewritten as an educational text, and is therefore detailed (containing a summary, glossary and calculation details, such as the calculation of current-cost depreciation added by ARCEP). It presents a methodology that is both top-down and bottom-up, with the latter being similar to the cost valuation method that ARCEP uses for copper pairs (economic CCA - current-cost accounting - together with an economic depreciation method).

2. Work programme for 2006

The 2006 work programme, prepared jointly by the IRG and ERG, was submitted to sector players for consultation. The main topics are the following:

- **Review of the regulatory framework**. This is the most important topic of the work programme.
- **NGN.** Two documents are planned – one on IP interconnection, the other on the regulation to be implemented for NGN (Next Generation Networks). The latter now provides for work concerning the economic regulation of VoIP at the request of ECTA (European Competitive Telecommunications Association).
- **Broadband:**
  - Complementarity of wireline access and wireless access as well as conditions for authorising WiMAX networks.
  - Update of the 2005 broadband competition status report.
- A report of consumer perspectives on the quality of broadband service delivery (speeds, billing accuracy) and bundled tariffs and offerings will also be prepared.
- **Transparency of retail roaming tariffs**. Work undertaken in 2005 will be continued in 2006. The project team will focus on the implementation aspects of proposals to improve roaming price transparency.
- **Status of mobile competition.** This is a second-priority topic that has been added (at ECTA's request).
- Following the announcement that roaming regulation would be drafted, the ERG formed a project team to respond to the call for comments. This document will also be an important element of the 2006 work programme.

The work programme will also deal with the following subjects: quality of consumer VoIP services and competition in mobile services. In addition, at the request of the Romanian regulator, a study will be conducted on the impact of universal service on competitive conditions in countries with low fixed-telephone service penetration.

OFCOM, which currently has the IRG/ERG presidency, has announced its intention to conduct a public workshop mid-year to discuss the status of work in progress with industry representatives.

C. Review of the regulatory framework

1. Methodology

1.1. A recurring exercise

Drafting and revising a regulatory framework may not be a regular exercise for the Member States of the European Union but it is a recurring one. Thanks to appropriate ex ante regulation for every stage of competition, European regulation has evolved steadily since the seminal Green Book of 1987 and has enabled the progressive emergence of competition in a sector that was originally largely monopolistic.

Three instruments permitted the initial opening of the electronic communications market:

- market liberalisation as provided for in the Commission directives based on Article 86 of the Treaty, which put an end to the incumbent monopolies;
- accompanying measures, which appear in harmonisation directives and in particular the 1990 Framework Directive instituting the principle of Open Network Provision (ONP) for a limited number of services;
- the preparation of rules (guidelines) for competition.

The Commission's 1995 Green Book led to total liberalisation of the sector and adapted the ONP Directive to a more competitive environment. This culminated in the 1996-98 regulatory package, which opened infrastructure and telephone service to competition.

In 1996, when the framework was reviewed as provided for in the directives themselves, changes in technology, the market and competition led the Commission to completely revise the regulatory framework in an effort to reconcile the principles of sectoral regulation and those of competition law. That effort in turn led to the preparation of the 2002 regulatory package (of six directives and one decision) which strengthened in particular the regulation of scarce resources and implemented competition regulation based essentially on market analyses (representing a break away from the rationale of ONP). It incorporated the convergence of telecommunications and the audiovisual sector (introducing the notion of electronic communications) and preserved, with some modifications, symmetrical regulation specific to the sector.

Thus, the review of the regulatory framework that is taking place today is by no means an exceptional event in the electronic communications sector. It was provided for in the 2002 directives. Moreover, the situation is quite different from that surrounding the review of the postal sector directive,

where the question of whether to totally open postal services to competition is still being debated.

1.2. A mandatory exercise

The European Commission has launched this process because it is bound to do so by certain texts:

- Each of the 2002 directives includes a review clause requiring the Commission to examine periodically the performance of the directive concerned and report accordingly to the European Parliament and Council, with the first report being due no later than three years from the implementation date, or 25 July 2006 (31 October 2006 for the Privacy Directive).
- The Relevant Markets Recommendation and Article 8 of the Competition Directive require the Commission to study whether updates are needed as of 30 June 2004 and 31 December 2004[48].

The texts therefore require that 2006 be designated as the year for review and that the Commission be in a position to give an account to the European Parliament and Council during the first half of 2006.

In any case, the review is not prompted by an observed regulatory deficiency in the current market. On the contrary, the results of the framework to date are positive even though the framework was only transposed into French law from a legislative standpoint in July 2004 and from a regulatory standpoint in 2005. Competition has developed as evidenced by the increased market share of alternative operators and the satisfactory levels of investment. The framework's flexibility and adaptability also allow NRAs to adapt their regulation to technological and economic changes in markets, all with the guarantee of a stable analytical framework.

The regulatory framework review covers the Framework, Access, Universal Service, Authorisation and Privacy directives, Competition Directive Article 8 on cable television networks, and the Relevant Markets Recommendation. The Relevant Markets Recommendation is solely the Commission's responsibility and unlike the directives, it is not adopted by the European Parliament and Council. Therefore the Relevant Markets Recommendation will be reviewed more quickly and will become effective in 2007 without needing to be transposed by each Member State. On the other hand, it will take at least another three years before the directives are adopted and then transposed to national law. However, the directives and the Relevant Markets Recommendation are closely linked and go hand in hand with the exercise of regulating electronic communications markets.

48 The re-examination of the latter two texts has been deferred given that the transposition in the European Union was not considered to be sufficiently advanced with respect to the planned dates.

Scope of the 2006 Review announced by the Commission[49]

European Parliament and Council	European Commission
Directives • Framework • Access • Universal Service • Authorisation • Privacy and Electronic Communications	• Competition Directive Article 8 on CATV networks • Relevant Markets Recommandation

49 *In its "Call for Input on the Forthcoming Review of the EU Regulatory Framework for Electronic Communications and Services Including Review of the Recommendation on Relevant Markets" of 25 November 2005, the Commission specified which texts would be re-examined in 2006.*

1.3. Respective responsibilities

The framework review, which comes four years after the seven texts were adopted at the European level and two-and-a-half years after they were theoretically implemented in each of the European Union Member States, most of which had a deadline of 25 July 2003, will allow for an evaluation of the impact and efficacy of these texts, particularly in terms of development of competition for the benefit of the consumer, innovation and growth.

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

Additionally, the Commission has launched a broader discussion[50] on spectrum management, which will be handled partly by this re-examination of the Framework and Authorisation directives.

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

Concerning the institutional process to be followed in modifying these texts, it is helpful, given that the texts differ in their legal nature, to distinguish between directives of the Parliament and Council and texts adopted by the European Commission.

With respect to the Competition Directive and the Relevant Markets Recommendation, the Commission has sole jurisdiction. Thus, the new recommendation should be published in December 2006 and become effective immediately.

As for Parliament and Council directives, the process is unlikely to conclude before 2010-2012. The texts are subject to a co-decision process[51] involving the following steps:

51 This description is a simplified outline of the procedure. See ECT Article 251.

- Directives are proposed by the Commission to the European Parliament and Council.
- The European Parliament and Council enter into debate with the participation of the Commission, to come to agreement on the text and adoption of new directives.
- Time allowed for the Member States to transpose and implement the directives assigned to them.

2. Consultation of NRAs

The Commission has launched a vast process to consult sector players and successfully conduct this framework review. NRAs have responded, presenting their views through the IRG/ERG[52]. This common approach is a "first" in the review of regulatory texts, because until now only independent contributions, primarily reflecting national concerns, had been presented[53]. Through this common response, regulatory authorities make the Commission aware of their views on the regulatory framework review process and their shared experience as regulators, thereby acting fully within the area of competence that falls to the ERG. For this occasion, a project team was established and all European regulators were mobilised to draft the ERG members' common response. ARCEP participated actively in the drafting activity, which was coordinated by Irish regulator ComReg.

In its response, the ERG followed the outline proposed by the Commission but underscored certain important points should the texts be modified. It emphasises that the current framework is basically satisfactory but suggests several ways in which it might be improved if amendments are made: the main points concern the market analysis process, access regulation, and the renewed importance of standardisation issues. The ERG has shown itself to be open yet cautious with respect to how radio frequencies are managed and how the Relevant Markets Recommendation is modified.

2.1. Evolution rather than revolution

The framework review should produce evolutionary rather than revolutionary change in the current framework. The 2002 regulatory framework now in force has indeed enabled undeniable progress toward competition, particularly in fixed telephony and broadband markets, where significant price drops have occurred. In addition, the current framework encourages investment; total investment in the European Union exceeds that of the United States and the Pacific region combined. The framework therefore appears to be particularly sound and a deregulatory trend is already evident in markets where regulators observe effective competition. Nevertheless, the regulatory authorities highlight certain points where the existing texts could be improved.

2.2. Key messages

Review of the regulatory framework should occur within the context of the Lisbon objectives[54]. It is essential that market players find predictability and clarity in the future framework. Finally, it would be helpful to commit to regulation that is more targeted and which over time will allow sectoral market regulation to be lifted once competition is effective.

Similarly, the review of the Relevant Markets Recommendation should concentrate on intervening in those market segments that are the least competitive (wholesale markets in particular).

52 The complete response is available at the following address: http://europa.eu.int/information_society/policy/ecomm/doc/info_centre/public_consult/review/comments/irgerg_call_for_input_final_pdf.pdf

53 The French authorities, led by the Directorate General of Enterprise (DGE) of the Ministry of Industry, likewise produced a contribution in which ARCEP particicipated.

54 Viviane Reding, European Commissioner for the DG Information Society, recalled the catalytic role of ICT in the Lisbon strategy in a talk given 3 June 2005. This talk is available at the following address: http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEE-CH/05/328&format=HTML&aged=1&language=FR&guiLanguage=fr

2.2.1. Market analyses

Improving the procedures for cooperation between NRAs and the Commission in light of Article 7 of the Framework Directive will lead to better harmonisation of practices where markets are evolving differently from country to country and will do so without compromising the stability of the regulatory environment.

Based on a *de minimis* rule (for small operators, such as those in Finland), certain market analyses could be exempted from the notification procedures and in cases of "super dominance" (where monopoly persists structurally, as in the case of call termination or unbundled local loop access) others could be subject to a less-burdensome notification procedure.

Also, there are questions about the effectiveness of the process as concerns harmonisation procedures and legal certainty in court appeals. The response moreover highlights the importance of retaining Article 7.6 of the Framework Directive relating to exceptional circumstances. Finally, for stronger and improved mutual understanding, the regulators would like the Commission to provide summaries and communicate information about the subjects covered in the market analyses.

In addition, the regulators are not in favour of the Commission having veto power over remedies. The NRAs' closer proximity to their markets guarantees that remedies appropriate to each national market context will be implemented in proportion to the situation.

2.2.2. Competition and access regulation

This topic is a key point of the framework review. Proposals are being formulated in three areas.

Promotion of efficient investment

It is important to encourage efficient investment and innovation. Moreover, the growing importance of NGNs must not be ignored.

However, the ERG is opposed to the 'regulatory holiday' that some operators claim would stimulate investment. Indeed, recreating a monopoly even if only temporarily, would negatively affect consumers and the entire economy.

In addition, the ERG recognises the importance of guaranteeing a return on investment proportional to the risks incurred. This could be ensured by clarifying the nature of access and interconnection agreements, the basis of tariff obligations, the rate of return on investments, and how the investment scale-effect concept is to be implemented.

Allow regulators to resolve competition problems associated with oligopolistic market structures

In oligopolistic market structures, which have a tendency to develop in the European Union, it is difficult to implement the concept of collective power in ex ante regulation when the concept is interpreted strictly in accordance with competition law jurisprudence. Consequently, the Commission must guarantee that regulators will have the possibility to intervene in

these oligopolistic markets with competition problems by expanding the interpretation of collective power and also by strengthening Article 5 of the Access Directive.

Clarify the powers of the NRAs with respect to remedies

The current framework is unclear about whether a regulator may impose obligations, such as accounting separation, where the need and justification are not limited to a single market and the competition problem affects multiple markets (coupling, convergence, integrated operators, tariff squeeze, etc.).

In addition, there appears to be a need to clarify the notion of non-discrimination in order to facilitate implementation of the principle of equal access to the networks of SMP operators.

In order to adapt to technological change and market evolution (particularly as concerns differences in the rate at which NGNs are being deployed and convergent offerings are emerging in the various countries), regulatory authorities require flexibility in defining markets and appropriate tools (for example new remedies such as duct access). They also ask that national characteristics be taken into account in the remedy application process while at the same time respecting common analytical principles.

Finally, the ERG considers that the leased line market should be subject to the usual market analysis process rather than being defined along with its obligations in the Universal Service Directive as is the case currently. It would be useful also to review the definition of the minimum set of leased lines, which at this stage does not comply with the principle of technological neutrality.

2.2.3. Standards and interoperability

Because standardisation plays a crucial role, Articles 17 and 18 of the Framework Directive must be preserved. Indeed, the evolution toward next generation networks (NGNs) is accompanied by unprecedented change in the core networks of incumbent operators. In time, this evolution will also affect core mobile networks. Standardisation, particularly at the European level, plays a key role in this transition. The list of standards should be dynamic, to follow the development of networks, services, and equipment. The ERG draws the Commission's attention to the matter of intellectual property rights, which are indispensable for the protection of standards.

2.2.4. Common approach to spectrum management

The electronic communications sector is facing growing demand for use of spectrum owing to technological development and fixed-mobile convergence. The implementation of European policies at the national level should not preclude the pan-European use of technologies and services. The ERG encourages the definition of a common approach to spectrum management.

Mechanisms for a secondary market for frequencies should allow both efficiency and flexibility. In addition, technical regulation remains necessary to avoid interference among radio networks and ensure that certain frequency bands are used efficiently.

2.2.5. Relevant Markets Recommendation

The Relevant Markets Recommendation has proven well suited to these markets; NRA-conducted studies based on this list have largely shown the existence of SMP operators and the need for *ex ante* regulation to deal with most of them. However, several types of improvement can be envisaged: certain market definitions have proven problematic (such as the definition of Market 18) and reducing the number of relevant markets would lighten the market analysis load. With respect to modifying this list, the ERG emphasises that any decision to remove a listed market should be based on the three criteria.

The Commission poses three questions in its call for comments:

- concerning the need to modify or remove a market from the list of relevant markets;
- concerning the need to add a market;
- concerning the three criteria for dominance (presence of high non-transitory barriers to entry, evolution toward effective competition, inability of competition law to remedy market failures on its own).

The ERG observes that the current definition of retail fixed markets has given rise to numerous decisions designating SMP operators and consequently regulators should preserve the option to regulate them if necessary. However, in these markets regulation can be relaxed once competition is effective. Finally, retail fixed markets could be merged.

In addition, the ERG highlights the challenges of migrating from the existing recommendation to the forthcoming new version. On the one hand, it hopes that the markets appearing on the new list will not have to be analysed again if they have already been declared competitive. On the other hand, if markets are removed under the new recommendation, it is also advisable to ensure a degree of legal certainty for NRAs that either did not finish their market analyses based on the first recommendation or are dealing with appeals against the analyses they have completed.

The ERG highlights the importance of the three criteria intended to provide regulators with flexibility to be able to adapt to national circumstances. However, it would like to see guidelines on the practical implementation of the three criteria drafted jointly by the European Commission and the NRAs under the aegis of the ERG in order to guarantee more consistency and harmonisation with respect to their interpretation.

In addition, the ERG states that the emerging-market concept has not demonstrated its usefulness either in the phase of defining relevant markets or choosing obligations. Therefore, it does not appear necessary to dwell on this concept any further.

ERG's position, which ARCEP fully supports, indicates to the Commission the directions that the NRAs consider desirable in reviewing the regulatory framework that will take effect towards 2010. This contribution is part of the preliminary phase of the regulatory process during which the Commission will also examine all contributions received and in particular the positions taken by market players and national authorities.

The next phase expected in the process is as follows: by mid-2006, the Commission will make known its analysis and will propose modifications to the texts; by year end, these initial proposals, which also will be put to a new public consultation, should lead to the adoption of a new recommendation and final proposed texts for discussion in the Parliament and Council.

3. ARCEP and the regulatory framework review

Given that the re-examination of the regulatory framework directly affects ARCEP's activity, the Authority has ensured that it will be in a position to actively participate in the process.

Consequently, an internal review structure has been set up involving the various departments of the Authority for purposes of studying issues associated with the review, producing an initial assessment of the current framework and formulating proposals that draw on the Authority's experience and appreciation of the new regulatory challenges.

The institutional organisation in which ARCEP is involved allows the Authority to contribute to this re-examination on various levels: on its own account but also at the national and European levels.

At the national level, the French authorities have contributed to the European Commission's public consultation. Thus, before proposing a draft contribution, the Directorate General for Enterprise (DGE) of the Ministry of Economy, Finance and Industry, met with sector players and the various ministers and authorities concerned. Once the text had been harmonised by the SGAE *(Secrétariat Général des Affaires Européennes),* the secretariat general for European affairs, it was transmitted to the permanent representative to the European Commission in Brussels.