Interview with **Jean-Michel HUBERT**
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Regulation and Market Efficiency

Over the last decade, there have been moves to encourage the extension of the area governed mainly by market influences to include activities hitherto subject to monopolistic and administrative management influences. This applies particularly in the case of telecommunications services. "Natural monopoly" arguments have quickly crumbled in a context dominated by the potential for a difficult-to-plan diversification of new services likely to be offered to consumers and by the spread of communication technologies and information processing throughout the sphere of economic and social activities.

Nevertheless, several paradoxes appear at first sight that call for delving deeper into the question of the efficiency of the market in this sector. Here, we consider three, each of which can constitute a starting point for examining the efficacy of the regulatory system and its rules.

Clearly identified many years ago, the first of these lies in the concomitance of accelerated liberalisation of telecommunications and the drawing up of a range of particularly complex legislation and administrative decisions. It is not so much the development of an intricate regulatory framework that is in question but its specificity and confrontation with the general set of rules governing market activities. Moreover, networking of the economy tends to break up traditional activity frontiers (sectors and branches) by introducing new intermediary influences in the supply-demand relationship with the result, for example, that it has become increasingly difficult to identify relevant markets for the purpose of judging the risk of abuse of dominant position.

The second is also the object of frequent intervention and is born out of the confrontation of an immaterial economy characterised by insignificant marginal costs and indicators emphasising the digital divide between those with access to new services and those who are denied entry to these gates to the Information Society.

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Although dependent on the first two mentioned, the third paradox appears to be of a more cyclical nature. It is directly bound up with the excessive enthusiasm of the market for Internet and telecoms securities that was demonstrated prior to the serious crisis currently hitting most players in this sector. The paradox exists in that it is just when the fruits of the bubbling period of innovation in recent years (mobile Internet, broadband access) are being harvested that investment is lacking. Although actually few in number, there are those who lose no time in interpreting the situation as the failure of the very principle of liberalisation, while others think in terms of imposing stricter regulation on dominant operators with a view to improving margins for new entrants. Finally, there are those who regard the situation as an opportunity for creating a new balance that strengthens the part played by the public powers by mobilising their investment capacity or lessening the constraints that weigh down on dominant operators. This latter point of sensitivity is finding strong expression in the USA in the proposals (cf. M. Tauzin's project) for calling the Telecom Act of 1996 into question: with a view to achieving greater efficiency, and realising the difficulty experienced by new entrants in maintaining investment in the new broadband access networks in a lasting manner, it is being proposed to abolish most of the rules that curbed the hegemony of regional operators. In Europe, the chaos accompanying the allocation of UMTS licences, and the proliferation of withdrawals by investors selected for the award of wireless local loop licences or DSL services justify further questioning of the notion of "industrial responsibility" on the part of the rule-maker, or indeed the regulator.

The efficiency of the market rapidly gives rise to the difficult question of the entry of efficient operators and, in the end, of effective regulation.

Yves GASSOT

Yves GASSOT: This issue is devoted to the evolution of market mechanisms under the influence of information and communication technologies. How do you address the apparant paradox of supposedly increasing market efficiency, applied only recently to telecommunications networks and services, and the extensiveness and complexity of the regulatory system that characterises the sector?

Jean-Michel HUBERT: Undoubtedly, the paradiox exists, but there is absolutely no contradiction. One often confuses liberalisation with deregulation, but these are two distinctly different matters. A process of liberalisation generally comprises two phases: the first, which occurs on the opening of a market, consists in implementing regulatory instruments that are sufficiently effective to oblige the former monopoly to open up its market to new entrants. This is what we refer to asymmetric regulation. It is not until the second phase, when lasting competition is being practised, that these restrictive rules can be eased.

The present complexity of the regulatory framework and regulation of the sector is bound up with the conjunction of several phenomena:

- We are dealing with a sector where the use of networks is a prerequisite. The network belonging to the incumbent operator is of decisive importance in allowing competition to take place. Hence the complexity of rules governing access to the network and interconnection, which have to take account of each player's respective situation and impose more severe obligations on those enjoying a privileged position.

- The telecommunications sector is made up of several markets – fixed long distance, local loop, mobiles, Internet access, etc. – which find themselves in widely differing situations. For example, they are not all based on the same business model, the numbers of players involved are not always comparable, nor have they reached the same level of maturity. The superpositioning of these different markets forces the regulator to adopt different approaches and to apply different rules. I should add that the technical progress that is playing a part in altering the frontiers between these market also tends to increase this complexity.

- Today, at least in some of these markets, we are at the end of the first phase of liberalisation. A relaxation in certain areas is assuredly necessary. This is, in fact, one of the chief objectives of the review of Community directives currently being adopted. The new European framework will then simplify regulation, for example by replacing individual licences with a system of general authorizations. It will also provide regulators with new

tools for adapting the rules applying to suit the physiognomy of each individual market.

So, overall, we are well on the road towards simplification of the system. The paradox here is that this simplification involves complex legal and technical discussions that are mainly of interest to the specialists but the results of which have a very concrete impact on the future of the market. Pedagogy and simplification are undoubtedly called for in presenting these issues.

As to the efficiency of the market, it does not seem to my mind to be affected by this complexity, judging by the results achieved in France over the past four years: two-digit growth, a constant fall in prices and diversification of offerings and pricing options. These are obviously the results that competition is expected to bring about, and I do not believe that efficiency is necessarily synonymous with simplicity.

At a time of globalisation of markets, including the services sector, how do you judge what is bound up with reprehensible protectionism and what is legitimate when examining the specificity of national telecommunications regulatory frameworks? To what extent are the commitments negotiated within the WTO being adhered to and can they be considered satisfactory? In these conditions, does the Community framework for telecommunications regulation still display a specific nature?

WTO conditions apply generally to all trade in products and services. But in telecommunications there are various specific features: the use of rare resources, the need for worldwide standards, heavy investments, demands for interoperability, security, protection of private life, protection of the content carried, etc. There is thus an unquestionable need for specific regulation, both at world level and on a national scale, to complement the general rules of competition.

It should also be stressed that, in the telecommunications sector, globalisation is primarily concerned with improving the circulation of information and communication between people over the networks. When it comes to markets, what can now be observed over and above a large world market is the forming of several regional markets, with North America and Europe being the biggest in terms of value.

In this context, national frameworks remain. I first wish to recall the fact that they are the result of a given historical and political situation. On the economic, institutional and political plane, the future of Europe will be what is made of it by the fifteen Member States and all those destined to join the European Union sooner or later.

Let me make a few remarks concerning national peculiarities: it is true that there are still differences in the legislation applying in the countries of Europe. Generally, they are subsidiary in nature, and the successive reports issued by the Commission have shown that, taken as a whole, the main arrangements contained in the directives have been transposed by the Member States, so much so that it can be said that the whole of Europe employs the same legislation. This means that the European market already exists and the least that can be said is that its doors are open to other continents, as can be seen from the operator typologies that we draw up regularly. Unfortunately, the opposite does not always apply.

In this respect, the WTO basic telecommunications agreement signed in February 1997 and in force since February 1998 is not a worldwide liberalisation agreement, for not all countries have undertaken the same commitments. Like the USA and Japan, Europe was among the regions that agreed to open up their markets in 1998 and it can well be said to have implemented the principles to which it subscribed.

Given these conditions, it seems to me that the European telecommunications framework is the most effective instrument for liberalising a market and its scope appears altogether adapted to cope with the issues involved in the global development of the sector. There are no doubt improvements to be made in order to achieve better harmonisation of the rules, and this is one of the aims expressed in the review of the directives.

But globalisation is also reflected in inequality among countries, as can be seen in recent changes in the system of settlement rates. This system of international interconnection is based on a sharing of revenue between the initiating and the recipient operator in the case of an international call. The problem is that the developing countries have suffered a heavy reduction in their payments in recent years, which has deprived them of an essential source of revenue. On this subject, I would like to praise the efforts of the ITU, which has issued a number of recommendations aimed at maintaining the fair character of the international interconnection system both for telephone calls and for Internet connections. These moves, which are

destined to promote a dialogue between players with sometimes diverging interests, are taking a positive turn and are helping in the fight against the digital divide.

In its capacity of regulatory authority, ART is largely dependent on a pre-existent legislative and regulatory framework. How do you view the French legislative framework of 1996 and, more generally, the Community principles applying to the liberalisation of telecommunications as defined in the early 1990s? What are the market innovations and phenomena that had been poorly anticipated? Do you observe wide differences in the relationships in the various countries between the regulatory authorities, the government and Parliament?

ART has several times had occasion to point out that the regulatory framework established by the 1996 Act is satisfactory in that it has made for proper opening up of the telecommunications sector to competition.

All the essential moves for this process were in fact rapidly initiated and it was possible to implement regulation in the best conditions a year ahead the starting date of full liberalisation.

The amendment proposals formulated by ART, notably in its annual report, were directed more towards methods of applying the law or the interpretation difficulties arising out of the technicality and novel nature of the legislation than towards questions of principle. The main basic difficulty still to be observed is bound up with the approval of France Télécom's retail charges. This is a matter involving ART, which is charged with issuing a public opinion on the tariff proposals drawn up by France Télécom, and the government, whose task is to approve these proposals. Control is exercised in two cases: for services coming under the heading of universal service and those provided under a de facto monopoly. It is thus aimed at ensuring, on the one hand, that the pricing practices of France Télécom comply with the rules of competition and, on the other, that the prices charged for services bound up with universal service are truly affordable.

The Authority is in favour of adapting this mechanism to achieve simplification, clarification of responsibilities and a fully controlled means of coping with the wide variety of changes occurring in the various segments of the market.

In this context, given that the level of competition still differs according to the market segment in question, any adaptation of the regulation implemented will have to be aimed at preventing the monopoly operator or dominant operator from being able to assume pre-emptive rights to certain emerging markets in a discriminatory fashion. For example, the introduction of today's regulatory tools has not made it possible to position all players on the same starting line at the same time to allow them to take their place under the same conditions in the ADSL market, or at least to allow them to take this path alongside the incumbent operator.

By definition, technological progress is always ahead of the law; it is the task of legislation to take account of technical progress and to anticipate it as far as possible. European regulation in this respect appears fairly well adapted to recent technological developments, thanks to its active concern with technological neutrality. The chief difficulty that has confronted European law is the absence of arrangements made in the directives for unbundling. This example, however, is more to the honour of Community legislation which, by adopting the regulation of 18 December 2000, proved its ability to adapt itself rapidly and effectively in the face of an issue of this nature. I would add that although the current review of the directives is aimed at a adapting the texts to suit the increase in competition and the technological convergence of networks, the principles that we are now introducing retain a very strong presence.

In the various countries, there is of course a difference in the relations between institutions, Parliament, the government and the regulatory authority. This comes from historical situations and naturally differing cultures. In this respect, I have noted that there are no two regulators in Europe that have either the same structure or the same fields of competence. This is all explained by the fact that regulation is either more strongly or more weakly anchored in the institutional tradition in each country. And if all the Member States of the European Union were to apply similar Community legislation, the transposition conditions or everyday practices in the national market could throw up variations of a by no means abnormal nature, as long as they were not bound up with essentials.

Nevertheless, the Commission and the regulators themselves are working towards the highest degree of harmonisation possible. The Commission, which has this as one of its principal roles, is acting by regularly publishing detailed reports on the implementation of the Community legislative framework and, when necessary, by conducting surveys or settling disputes. As to the regulators, who are assembled within

the Independent Regulators Group (IRG), they are seeking spontaneously to give a maximum of coherence to the answers they supply on a day-to-day basis to the difficulties encountered in their respective countries. This voluntary initiative constitutes an effective complement to the more formal action of the Commission. It can be found especially in the matter of unbundling.

Telecommunications is frequently described as the new marketplace in that its networks and services constitute the nervous system governing the exchange function in all activity sectors. To what extent is telecommunications regulation being forced increasingly to go beyond its framework proper and to involve itself with other sector-based rights and regulations or with common business and competition law?

When I look at the question of possible changes in telecommunications regulation in France, four lines of thought come to mind:

- To take account of the growth of competition, ART will be obliged to modify and differentiate its action according to the level of maturity of each market segment. In this respect, there will be increasingly frequent meeting points with common and competition law. We are already working closely with the Competition authority on numerous questions, but the growth in competition will heighten the influence of competition law on our decisions. This must also be brought to apply to the current review of Community directives.

- The convergence of network technologies, another decisive aspect of the review, will lead to change in telecommunications regulation as the frontier between networks and content will gradually take over from the traditional audiovisual/telecoms separation.

- Europe-scale regulation represents a further strong incentive for adaptation on the part of the regulator. Together with regulators from countries within the European economic area, we have set up an informal body for dialogue and action. To my mind, this independent regulators group (IRG) can effectively open the road towards European regulation. I have no doubt that it will assume increasing importance over the coming years.

- Among the tasks of the regulator, and in pace with the spread of competition, economic and social issues are gradually taking pride of place; they are becoming priorities alongside the technical and legal action that constitutes our daily work. It has thus become essential to give thought to

innovation, geographical coverage, training, employment and the digital divide in making our decisions.

All these changes are leading ART to make increasingly frequent incursions into the legal, economic and technical spheres that lie outside its proper field of competence. This has become a necessity, since ART, which lives in a world of movement, cannot ignore the proliferation of changes taking place; similarly it has a duty to understand them to preserve the relevance of its decisions and to anticipate changes in the regulation.

Naturally, none of these lines of thought could make me envisage the disappearance of telecommunications regulation to the profit of any one of them. On the contrary, they demonstrate that the action undertaken by ART, because it is right at the centre of these concerns, is vital to the development and modernisation of our economy.

At the time of a merger – now in abundance in the telecoms sector – and an examination of the risk of abuse of dominant position, the players involved often claim that it is no longer appropriate to consider national markets as relevant markets. What is your opinion? Is there any real difference of doctrine on the two sides of the Atlantic in examining these mergers?

It is true that in recent years the telecommunications sector has seen a number of alliances or mergers on a European or even worldwide scale. The European Commission, which is the competent authority in the area of mergers and abuse of dominant position in the territory covered by the Union, has thus been called upon to take a stand.

Here it should be emphasised that the Commission's analysis has been directed jointly at both national and European competition issues. In the case of Vodafone's takeover of Mannesmann, for example, the Commission gave the go-ahead on condition that the German operator sell off Orange so as to avoid too heavy a concentration in the UK mobiles market.

This shows that the European view, which is now indispensable in understanding current changes in the telecoms market, cannot cut itself off from an analysis of national markets – an analysis that in certain respects remains wholly relevant, given the differences that are still to be found in the organisation of these markets.

Whatever the case, these subject files do not lie within the main action areas of the regulators, even though they may bear some association.

In 1996, while fully recognising the fundamental role of the market, the legislator wished to ensure the widest possible access to the telephone service through regulation of universal service. How do you judge the situation at a time when France is toiling to having the methods of application accepted by Community bodies? In these circumstances how can one imagine extending the universal service notion to new services such as Internet access and mobile telephony?

I would firstly point out that the definition and content of universal service fall within the realm of the public authorities, both nationally and at Community level. The question is currently being discussed within the framework of the review of directives.

If we now talk about the system for funding universal service, I note that despite the difficulties you mention and which cast no doubt over the actual principle of this funding, the mechanism has been operating satisfactorily in France for five years. And I am happy to see that it was finally possible last year to implement the arrangements relating to social charges.

It must be admitted that access to fixed services in our country no longer represents any major difficulty. France now enjoys one of the world's best meshed networks. The equipment rate is also very high, and the same applies to the rest of the European Union.

The future issue concerning universal service is thus to be found elsewhere. When it comes to voice transfer services, the concern being expressed by the population in general and by elected representatives in certain regions over mobile coverage shows that expectations are currently directed mainly towards mobility. Access to high-speed data services over the entire country is another priority area. The notion of universal service may one day then have a role to play in reducing the digital divide, for technologies where the equipment rate remains inadequate and unevenly shared among users. But extending the notion to new services presupposes a delicate choice between the role of the public service and that of competition. The point of balance is not necessarily the same in all countries, which does not facilitate decision-making on a European scale.

I should like to add that unless the question of funding the services included is addressed at the same time, the debate on the evolution of universal service will remain somewhat theoretical. In regard to this matter, there would be no way of dissociating the laying down of principles from the means to be provided for allowing them to take concrete form.

We should remember, however, that it is not always necessary to make a principle of this nature into law to be able to act, and that there are different tools that can be employed to meet this demand for universal access to services within the Information Society. In France, for instance, the introduction of priorities defined by the government this summer concerning nationwide coverage by mobile networks and high-speed access have already found concrete expression.

Beyond poor anticipation of the «excessive exuberance» of the telecommunications market over the past twelve months, the methods of allocating UMTS licences revealed a high degree of heterogeneity in the procedures adopted in Europe and too rigid a timetable because of impatience on the part of equipment suppliers. How do you regard this brief analysis?

To my mind, it gives rise to three complementary thoughts:

Firstly, a question: while there was general agreement in Europe on the principle of a co-ordinated introduction of UMTS and on the aim of repeating the GSM success, how did we manage to achieve such disparity in the methods and such a degree of inefficiency in the implementation of this objective? It seems that one of the chief lessons to be learnt from this experience is the need for greater harmonisation and co-ordination between the countries of Europe. For instance, a harmonised European licence would have been an effective instrument in a case such as this.

Secondly, a single subject: the consumer. The liberalisation process is based on the belief that competition is not an end in itself. It has to work in favour of the consumer. It follows that if the market is to become a reality, the consumer has to understand and accept the offer he is being made; he must recognise the service provided as the right answer to his needs.

The reason for the success of GSM lies in the fact that the consumer understood what was being offered: diversity by means of mobility and the credibility of the price options announced. In the case of UMTS, on the other hand, one has the feeling that the consumer has been forgotten and that the

budget imperatives of the Member States have overridden any analysis of the conditions for building up an effective demand.

Lastly, an observation: failure to take account of the time dimension. The highly ambitious timetable drawn up by the European Union in late 1998 for the introduction of UMTS did not give sufficient consideration to the pace of maturing of the market, to its technological preparation and to the creation of a sound demand. It is true that the players involved, both manufacturers and operators, also made a very ambitious assessment of the short-term opportunities offered by this technology. It was seen early this year that there is no deciding the start-up of a market and that several more years are needed before a proper offering can emerge.

Taking into account these three elements – harmonisation, the consumer and the time dimension is in my opinion a prerequisite for the success of an ambitious and effective public policy in this sector.

The serious crisis currently affecting the telecommunications sector allows certain people to put forward recommendations, if not for a reinstatement of the monopoly, then for a readjustment that provides more room for public investment (particularly by local authorities) and a form of regulation imposing less restraint on incumbent operators (especially in regard to unbundling in Europe and access to long-distance services in the USA). This is particularly true in the area of broadband networks and access services where the collapse of certain new entrants and the debt burden of others give rise to the fear of an overcautious deployment of broadband in the country. To what extent is there convergence between the pragmatism on which these orientations claim to be based and the principles lying behind your activity?

It is just to overcome the limits of the monopoly that Europe has opted for the introduction of competition into the sector. This has already produced the desired effect in certain segments: price reductions, incentives for innovation, etc. Based on Community directives and national law, competition now constitutes the framework and in some way the backbone for the development of information technologies in France.

But the process involved is long and difficult, especially for access networks and the corresponding services. For example, several complementary technologies are currently being deployed to allow the general introduction of high-speed access throughout the country. ART is

making every effort to establish and maintain conditions for lasting competition in relation to this deployment. It is still too early to judge the results, but our objective remains the practice of significant, effective competition among players, whose number will depend on the economy of each of the market segments concerned.

The complementariness of technologies is the factor that will enable the general implementation of high speed services across the country. With this in view, my belief is that it is primarily up to operators, and thus the market, to deploy telecommunications networks to ensure full nationwide coverage. I would even go so far as to say that this is their prime responsibility.

However, not all the problems have been resolved, as demonstrated by the moves adopted during summer 2001 by the government, which launched an action programme bringing together the market, the State and local authorities to promote nationwide coverage by mobile and broadband networks.

Given the time required for building up the market; one must go further to prevent the establishment of a two-speed Information Society. This, in itself, justifies the need for public intervention to complement the work of players in the market, so as to facilitate access by a maximum of users to IT. It is not a question of replacing competition by public action but of supplementing and accompanying it. This is the sense I give to the moves defined by the government.

I would add that although local authorities obviously have a role to play in realising these objectives, their intervention is by no means expected to be of lasting duration, but in the spirit of the law must be aimed at promoting competition by means of targeted investment to the benefit of regional development. But the coherence demanded by the establishment of a national network cannot depend solely on the total of local measures and initiatives and it will not be possible to look on the local authorities as the main source of funding nationwide coverage by telecommunications networks.

Current difficulties and the role assumed by ART in the development of the sector would naturally tend to exhort the «industrial responsibility of the regulator» (the title of a seminar organised by IDATE in the early 1990s). There have been many critical remarks directed at the choices made on completion

of the process of allocation of WLL licences in France. What are the requirements and the risks involved in an assessment of an «effective entry» by a new entrant into the market? Is there not a tendency in Europe to assess the contribution of a player to the development of «lasting competition» in the light of the investments he plans to make?

I would like to revert for a moment to the criticism you mention in connection with wireless local loop licences. Overall, the telecommunications sector is a highly capitalistic one that calls for investments. I wish to point out that one of the main selection criteria for the wireless local loop was the capability of stimulating competition, together with heavy demands, notably in regard to nationwide coverage and thus investment; our examination of applications led us to choose those who were most capable of fulfilling the requirements and who could justify their claims. I must explain that this ability to justify their commitments was a specific selection criterion. There was no question of just taking them at their word but of having an objective evaluation of their ability to finance their undertakings.

But the market has since experienced a reversal of the situation that no-one had been able to foresee. It is obvious that the financial situation of all players, not simply those who hold a wireless local loop licence, has changed. It is always easy, *a posteriori*, to throw the baby out with the bath water; but I do not recall hearing voices raised against our choices at the time they made. In any case, I take full responsibility for them and I can assure you that France is one of the few countries where the wireless local loop is being deployed effectively At this moment, services have been launched in some twenty cities in metropolitan France.

Speaking more generally about entry conditions for players in this market, the law requires ART in their examination of licence applications to assess the financial strength of operators in relation to their undertakings, regardless of the size of the planned investment. More than 130 operators have so far been admitted into the market.

Moreover, in 1996 the French legislator was all in favour of promoting investment, a wish that found expression more in the spirit of the matter than in the letter of the law. This caused thought to be given to the business model/s of relevance in the telecommunications sector and to examine possible changes in these models. In this context, I am convinced that competition should be practised not only in services but also in the infrastructure sector, for in a network economy the one who possesses the «essential» infrastructure, to use a term employed in competition law, is

endowed with a decisive influence on the market. This is why the deployment of wireless local loops along with unbundling represents a major issue for ART.

It is quite normal that the regulator should assume part of the «industrial responsibility» you mention, in that his decisions have an impact on market growth. But his job is not to impose economic and technological choices on players, even though he has to establish a dialogue to facilitate the making of these choices, to make them known and see that they are implemented in conformity with the rules of the game.

We work in a risk-filled sector: financial risk as in all trading activity, but also technological risks, since the encounter between technique and market is not always a matter of course. The law states that «telecommunications activities are to be exercised freely». This means that anyone can choose to exercise them or not to do so, notably if they consider the affair too risky. I must repeat that the role of the regulator is not to shape the market but to allow it to develop.