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(10TH REPORT)**

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INTRODUCTION

Previous Commission communications on the implementation of the EU framework for electronic communications (formerly telecommunications) have given extensive analysis in the form of a report backed by annexes containing more detailed regulatory and market data.

The Commission's latest communication, 'European Electronic Communications Regulation and Markets 2004', departs from that format in that it provides a very concise overview of major market developments over the past year and of the main horizontal regulatory issues arising. The more detailed analysis of the implementation of the framework in the individual Member States and market data is set out in this Commission Services' Working Document.

The document describes the transposition of the new regulatory framework in the Member States; the implementation in practice of nationally transposed measures; and developments in the broadband, mobile services, fixed voice, leased lines and interconnection market segments. It also contains an annex on the status of Article 7 proceedings, based on the experience of the team put in place in the two Directorates General, Information Society and Competition, to assess jointly draft measures notified by national regulatory authorities; an annex covering implementation in the Member States (country chapters), for the first time including all twenty five; and an annex containing detailed market data underpinning the Communication and Working Document.

The Working Document was prepared on the basis of missions carried out between June and September 2004 by desk officers from the Directorates General for the Information Society and for Competition, and analysis of the notifications and drafts received from Member States of national transposition measures. The market data were assembled by DG Information Society on the basis of information received from national regulatory authorities and of tariff data supplied by Teligen-HI Europe. All data were validated between the Commission services and experts from national regulatory authorities, directly and at a meeting held on 11 October 2004.

Unless otherwise stated, the regulatory situation described here is that at 1 October, and the market data cover the period up to and including 1 August 2004.

STATE OF TRANSPOSITION AND INFRINGEMENT PROCEEDINGS

At the end of October 2004, twenty Member States had completed the adoption of primary legislation to transpose the five Directives establishing the new regulatory framework¹. Those that had not were Belgium, the Czech Republic, Estonia, Greece and Luxembourg. However, substantive secondary legislation is still to be adopted in a number of Member States. In addition, twenty Member States have supplied complete information with regard to the Competition Directive.

	Framework 2002/21/EC	Access 2002/19/EC	Authori- sation 2002/20/EC	Universal Service 2002/22/EC	ePrivacy 2002/58/EC	Competi- tion 2002/77/EC
Belgium	☹	☹	☹	☹	☹	☹
Czech Rep.	☹	☹	☹	☑	☒	☹
Denmark	☑	☑	☑	☑	☑	☑
Germany	☑	☑	☑	☑	☑	☑
Estonia	☒	☒	☒	☒	☒	☒
Greece	☒	☒	☒	☒	☒	☒
Spain	☑	☑	☑	☑	☑	☑
France	☹	☹	☹	☹	☑	☑
Ireland	☑	☑	☑	☑	☑	☑
Italy	☑	☑	☑	☑	☑	☑
Cyprus	☑	☑	☑	☑	☑	☑
Latvia	☑	☑	☑	☑	☑	☑
Lithuania	☑	☑	☑	☑	☑	☑
Luxembourg	☒	☒	☒	☒	☒	☒
Hungary	☑	☑	☑	☑	☑	☑
Malta	☑	☑	☑	☑	☑	☑
Netherlands	☑	☑	☑	☑	☑	☑
Austria	☑	☑	☑	☑	☑	☑
Poland	☑	☑	☑	☑	☑	☑
Portugal	☑	☑	☑	☑	☑	☑
Slovenia	☑	☑	☑	☑	☑	☑
Slovakia	☑	☑	☑	☑	☑	☑
Finland	☑	☑	☑	☑	☑	☑
Sweden	☑	☑	☑	☑	☑	☑
United Kingdom	☑	☑	☑	☑	☑	☑

☑ = full transposition notified/complete information supplied ☹ = partial transposition notified/partial information supplied ☒ = no transposition notified/no substantial information supplied

¹ Framework, Access, Authorisation, Universal Service and ePrivacy Directive; see Recital 5 of the Framework Directive.

The above table indicates the state of transposition according to the notifications received from the Member States as of end November 2004 and, as regards the Competition Directive, whether information was supplied on primary legislation allowing the Commission to assess compliance with the Directive.

The Commission has already opened the final stage of infringement proceedings against those EU 15 Member States that have failed to notify measures for the new regulatory framework² and to supply complete information with regard to the Competition Directive, and proceedings have been pending before the Court of Justice against Belgium, Greece and Luxembourg since June 2004³. Infringement proceedings will be considered against those new Member States that have not notified transposition measures before the end of the year.

The Commission services are currently examining the *conformity* of national implementation measures with the EU Directives, and the first substantive infringement proceedings have been launched⁴. These concern the key issue of the role of the national regulatory authorities when carrying out market analysis, and in particular the remedies which should be available to them. Other issues are related to consumer interests.

The Commission will continue to monitor closely the full and effective implementation of the new regulatory framework and the Competition Directive as a priority, in order to contribute to the overall Lisbon goals⁵.

Any statement in this document in relation to the regulatory situation in a specific Member State is therefore without prejudice to the position taken by the Commission in the exercise of its powers under the Treaty.

² See most recently IP/04/510; all press releases on infringement proceedings related to the new regulatory framework are available at http://europa.eu.int/information_society/topics/ecom/all_about/implementation_enforcement/index_en.htm

³ Cases C-240/04 and C-376/04 (Belgium); C-236/04, C-349/04 and C-375/04 (Luxembourg), C-250/04, C-252/04 to C-254/04, C-299/04 and C-475/04 (Greece).

⁴ Publicly available information on infringement proceedings can be found at the following website http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_fr.htm#infractions.

⁵ Cf. 20th Annual Report on monitoring the application of Community law (2002), COM(2003) 669 of 21.11.2003.

REGULATORY FRAMEWORK

NATIONAL REGULATORY AUTHORITIES

The national regulatory authority has a fundamental role in ensuring a coherent application of the new regulatory framework as it is transposed in the national legal systems in the Member States. While monitoring the markets, the NRAs will be called upon to ensure a level playing field for all market players and stimulate investment, innovation and sustainable competitive development.

For this to work, decision-making procedures, either in the form of regulations or dispute resolutions, need to ensure regulatory predictability and effectiveness. They also need to be timely to reflect the dynamics of the electronic communications markets, while sanctions need to be proportionate to the objective to be achieved. As regards remedies, NRAs are expected to find the right balance between applying *ex ante* regulation and encouraging operators to invest in the sector and in particular in emerging technologies. In the context of the transposition and notification process, the Commission services are looking to the NRAs to be able to carry out fully the extended tasks they are required to undertake under the new framework.

However, certain issues have already arisen. There have been significant delays in conducting the market analysis and revising existing obligations. It also remains to be seen whether the requirement to provide for the independence of the NRA *vis-a-vis* operators is sufficiently ensured in all Member States. Further, the allocation of tasks has not always been clear in all Member States where powers are assigned to more than one organisation. In certain cases, national measures transposing the Directives provide for obligations to be imposed on ‘SMP’ operators (operators with significant market power) without taking into account the competitive and particular circumstances of a specific market, while in others the power of the NRA to impose obligations on the SMP operators is relatively limited. The Commission services are verifying the conformity of such arrangements with the new framework.

Independence and impartiality

The legal, functional and structural independence of NRAs from organisations providing electronic communications networks and services, especially where the state holds a stake in those organisations, continues to play a central role under the new regulatory framework.

Concerns expressed by market players in the past in this connection in Belgium appear now to have been overcome following the adoption of relevant legislative measures. In France, while structural separation has not been modified, the situation appears to have improved to the extent that the Ministry no longer controls retail tariffs. It remains to be seen whether further major concerns subsist in the EU 15 as regards the issue of independence.

It is also being examined whether further measures to improve the independence of the NRA and address concerns reported by the market players could be taken in some of the new Member States. In particular, in Cyprus, despite progress achieved, there may still be some room for improvement as on one hand the incumbent is not incorporated and has the status of a ‘semi-governmental body’ and on the other, the Ministry which co-ordinates the ownership

functions is also responsible for carrying out the tasks of frequency allocation and management. In Latvia, the Ministry responsible for policy and drafting of legislation still has ownership interests in an operator in the electronic communications sector.

As regards Slovenia, the Commission services are examining concerns from market players over a perceived conflict of interest and lack of independence resulting from the representation in the general shareholder's meeting of the State's holding in the incumbent fixed operator by the Ministry responsible for the supervision of the independent regulator, while in Slovakia it remains to be seen whether structural separation of regulatory and ownership functions has been achieved.

Allocation of tasks

In the interests of transparency and effective implementation, the Framework Directive stresses the need to ensure that where tasks are assigned to more than one authority the tasks are published in an easily accessible form and that consultation and co-operation takes place between the different bodies.

In the United Kingdom Ofcom, the successor of OFTEL, now exercises all of the regulatory functions previously assigned to five different bodies, including those relating to broadcasting. Positive developments are also reported in Italy, where a long-standing issue relating to the distribution of tasks between the independent regulator and the relevant Ministry has been clarified with the adoption of an agreement already notified to the Commission. In Spain, the responsibility for different elements of the regulatory framework is spread between five different bodies (including the government). In France, it is still unclear how the ART and the CSA (the regulator for the audiovisual sector) will co-ordinate their activities. In Lithuania it is reported by market players that there is some blurring of the responsibilities between the NRA and the Ministry where acts of the NRA require the Ministry's approval, while the ability of the Minister, even in theory, to annul NRA decisions could be problematic if applied in practice. In Poland, where regulatory functions are spread among three bodies (including the Ministry of Infrastructure responsible for defining relevant markets), some ambiguity has been noticed in the allocation of tasks regarding broadcasting between URTiP (the telecommunications NRA) and the National Broadcasting Council, while in Slovakia and the Czech Republic the division of tasks between the NRA and the national competition authority is somewhat unclear.

In Malta, the exact division of tasks between the NRA and the Competition Authority is not clear, as the NRA is also responsible for ensuring fair competition in the electronic communications sector.

The Commission services are examining each of the instances described above to determine their conformity with the regulatory framework.

In certain cases, the transposition measures introduce new provisions addressing long-standing concerns on the part of the market. This is for example the case for Spain and France, where the powers of the independent regulator have been extended to cover the possible regulation of retail tariffs in the context of the market analysis. The exercise by the same body of both wholesale and retail regulation, where appropriate, would allow it to tackle more efficiently certain issues such as price squeeze.

Powers of the NRA

The regulatory framework as a whole lists the powers that an NRA should have at its disposal in order to carry out its tasks. At the same time, in most cases it confers on the NRA the role of assessing the state of competition in a given market and determining, in the light of the conditions in that market at the time in question, what are the appropriate remedies to impose.

However, in a number of Member States the legislation transposing the framework may well limit this discretion conferred on the NRA, by pre-determining the outcome of the NRA's deliberations, by excluding some options which would otherwise have been available to the NRA or by placing additional conditions on the exercise of the NRA's powers which are not reflected in the EU framework.

In the Netherlands, the overall powers of OPTA have been both increased and better defined by the new Law, as a result of which appeals for lack of a legal basis or the power to intervene are expected to be avoided. However, concerns are reported by market players in that country and in Ireland concerning the actual freedom of the NRA to exercise its powers with discretion, as the Ministers in both Member States can issue policy directions to the NRA. Also, in a case where the Malta Communications Authority did not follow Ministerial policy directions it would be possible for its functions to be transferred to the Minister; so far, no such policy directions have been adopted and it is to be hoped that the issue is of a theoretical nature. In Portugal the new law appears to pre-define the remedies to be imposed on a finding of SMP in the leased lines markets, while in Finland the law appears not to allow for the imposition of all of the remedies available under the EU framework in the event of a finding of SMP. The Commission services are examining each of the instances described above to determine their conformity with the regulatory framework.

In Germany, the new Telecommunications Act appears to limit the NRA's discretion by predetermining certain types of remedies for access issues and by introducing criteria additional to the new framework such as historic market power and double dominance.

In Hungary the law seems to give to two ministries the power to issue decrees regulating broadcasting prices and the relations between fixed telephone networks and ISPs, without in either case the need for market analysis or a finding of SMP. In Poland, certain market players have expressed concerns that, in exercising its regulatory tasks, the NRA is less active than they would expect, while in Slovenia there is a concern on the part of new entrant market players, which the Commission services are examining, that there might be a lack of political will to regulate the market.

Length of decision-making proceedings

Delays have been reported by market players in certain Member States in the decision-making process of the NRA. This has been the case, for example, for Portugal and Poland. In Denmark and Germany, some delays have been reported in particular when the NRA acts on its own initiative. The Commission services are examining whether these reported delays represent a systemic problem.

Enforcement of decisions

Even if national law places at the disposal of the NRA all the powers envisaged by the EU framework, the exercise of those powers will have little effect on market conditions if there is not rigorous follow-up and enforcement of regulatory decisions after they have been made.

Limited exercise of enforcement powers by NRAs, which in certain cases refers to the enforcement of the decisions that the NRA itself has adopted, is considered as one of the major obstacles to the promotion of effective competition across the EU, and the Commission services are examining a number of reported instances. In particular, in Belgium, for example, it is reported that the powers to impose fines are not exercised in practice, while in Greece it is reported that the NRA does not always use its powers to enforce its own decisions and to impose heavier financial penalties. In Italy the level of the financial penalties envisaged by law for non-compliance is reported to be low, while delays in enforcement have also been experienced. In the Netherlands the Commission services are paying close attention to a reported lack of effective enforcement by the NRA of its own decisions in specific cases.

Resources

The need for NRAs to undertake the initial market reviews in addition to their ongoing work on supervision, dispute settlement and enforcement has clearly placed a severe burden on all regulators during this crucial period. The question of resources, in terms of expertise or staff numbers, is clearly an important element, and the Commission services are not yet convinced that they are fully available in particular in the case of Cyprus, Latvia, Lithuania, Luxembourg, Slovakia, Poland and Sweden. In Italy, an increase in human and financial resources would be welcome, following the reduction of the contribution by the State to the NRA's funds and the recent increase of its competences.

Consultation and transparency

Public consultation and transparency in the regulatory process is vital for the smooth functioning of the market. The Framework Directive accordingly places special emphasis on the need for information on the application of the framework to be made easily accessible to the public and requires NRAs to give interested parties the opportunity to comment on draft measures within a reasonable time.

The Commission services are scrutinising whether the consultation procedures in Articles 6 and 7 of the Framework Directive have been fully transposed in Latvia, and whether in Slovakia some consultations exclude certain interested parties such as consumers from the process, and whether the requirements of Article 7 are fully transposed in the case of draft measures under the Universal Service Directive. The Commission services are looking into concerns in Lithuania that the period allowed for consultation is too short to give interested parties a reasonable opportunity to comment. In Spain, concerns are reported for the first time regarding lack of transparency on the part of the CMT, in particular concerning the market reviews, and whether the new telecommunications law includes specific provisions governing the national consultation procedures. In Germany not all of the NRA's decisions are made publicly available on its website. In Greece, national legal requirements regarding publication of NRA decisions appear not to be fully applied in practice. In the Netherlands there was a reported lack of transparency as a result of the limited consultation of alternative operators following the negotiation of wholesale tariffs between the NRA and the fixed incumbent.

In certain Member States, the issue of confidentiality has been raised. In particular, in Belgium, although the NRA has been pro-active in taking measures to ensure a level playing field especially regarding cost accounting methodologies, it is reported that certain information that the new entrants consider essential to the proceedings has been withheld from the market on the grounds of confidentiality. Similar problems may well exist in Spain, where it is reported that information which some operators consider essential for the transparency of the decision making process is unavailable on grounds of confidentiality.

In Austria, the Administrative Court in a recent judgment partly relaxed the applicable rules on business secrecy. In accordance with the judgment, business data forming part of the reports used as evidence in NRA proceedings should not be deleted. This judgment could have an impact on the decision of market players to initiate proceedings before the NRA, as they might be concerned about their business data being revealed.

The Commission services are examining all of these concerns to determine whether the regulatory framework has been complied with.

Data gathering

The Framework Directive requires undertakings providing networks and services to make available all information necessary for NRAs to ensure conformity with the provisions of, or decisions made in accordance with, the directive and the specific directives.

Operators in a number of countries, in particular Belgium, Germany, Spain, France, Austria and the United Kingdom, have expressed concern at the volume of data they are required to submit in this context, and the frequency with which they are asked to submit it. Much of the information is for purposes other than market analysis, and appears to cover a wide range of subjects including business forecasts, detail of revenues, traffic volumes and patterns as well as information on the infrastructure used for each of the services concerned. The sheer detail required can represent a significant burden on operators.

In this regard it is important that NRAs take particular care to ensure that the information requested is proportionate to the performance of the task in hand, and that an undue burden should not be imposed on undertakings.

APPEALS AND DISPUTE RESOLUTION

Appeal mechanisms

In addition to its requirements for the Member States to ensure the existence of effective appeal mechanisms, the new framework also requires that the appeal bodies have the appropriate expertise available to them in order to carry out their functions. In the majority of the Member States, appeals against the NRA decisions are brought for before a court of either general or administrative jurisdiction. In a few Member States, different structures are in place. In particular, in the United Kingdom, appeals against Ofcom decisions are made to the Competition Appeal Tribunal, a specialist judicial body with jurisdiction over competition and regulatory cases, which assumed its responsibilities in April 2003.

In Denmark, appeals against NRA decisions are brought before the Telecommunications Complaints Board. The Board convenes only on request and only a few times per year. The

Commission services are examining the extent to which a rapid response to appeals may be ensured.

New structures have also been put in place in Belgium and Ireland. In Belgium, during 2003, the Act on Legal Remedies and Disputes Settlement introduced the right to appeal against the NRA's decisions before the Court of Appeals in Brussels, which can deliver a judgment on the merits of the case.

In Ireland, under the new electronic communications law, an Appeal Panel is set up only when an appeal against an NRA decision is received. The Commission services are examining whether the fact that the appeals panel is only established on an ad-hoc basis could have implications for its future effectiveness, for example, in terms of ensuring continuity of expertise and experience.

In Malta, under the new legislation the old Telecommunications Appeal Board should be replaced by the Communications Appeal Board which will consist of three members having relevant experience. The new Board will function as an *ad hoc* body being convened occasionally when an appeal is filed.

In Hungary, it would appear that any exercise of the powers of the Minister to adopt decrees imposing remedies independently of market analysis and SMP findings could only be appealed on constitutional grounds. The Commission services are examining this issue carefully.

In Poland, a large proportion of the decisions of the NRA has been overturned following an appeal against them, as a result of administrative and substantive deficiencies in the decisions. In Sweden, the Commission services are examining concerns regarding the right of appeal, since it appears that unless the decision is directly addressed to a certain party, the latter cannot appeal against it even if it is affected by it. In Hungary, it remains to be seen whether the practice of limiting the right of appeal to those who were parties to the particular procedure concerned would raise concerns in view of the wider rights of appeal for all affected parties provided for by the new regulatory framework.

Length of appeal procedures

It has to be considered whether in some Member States (Germany, France, Poland, Denmark, Sweden and Italy) the length of appeal procedures has undermined the effective application of the regulatory framework. Nevertheless, in Germany, a substantial improvement in the time required for delivery of a court judgment is expected following relevant provisions in the new Law which eliminate one instance of judicial review. Likewise, in the Netherlands, as of the adoption of the new Law, judicial review can be sought directly without the need to submit an appeal first with OPTA. Delays can also be caused by the practice of operators systematically appealing against decisions by the regulator (as has been seen in Belgium, Germany, the Netherlands, Portugal, Sweden and Greece), thereby reducing legal certainty until the final judgment is delivered.

Status of NRA decisions pending appeal

Implementation of measures needed to remedy lack of effective competition can also be seriously delayed by the systematic suspension of NRA decisions pending the outcome of an appeal. The new framework has sought to address this problem by providing that NRA decisions should stand pending appeal unless the appeal body decides otherwise.

The Commission services are examining whether this principle is transposed in Poland and Finland. A frequent suspension of decisions until the final judgment is delivered has been reported by market players in Lithuania. In Austria, appeals against decisions of the NRAs responsible for the regulation of the broadcasting infrastructure and rights of way appear to have the effect of suspending them. In France, appeals from decisions of the NRA and the national competition authority are heard by different courts (administrative and commercial respectively).

Dispute resolution

The ability of an NRA to resolve disputes brought to its attention by market players in a timely manner, to ensure the enforcement of the decisions it has reached and to impose appropriate sanctions are the main criteria for assessing the effectiveness of the NRA as the dispute resolution authority in the sector. The Framework Directive requires NRAs to resolve disputes in the shortest possible time frame and in any event within 4 months except in exceptional circumstances.

The length of time taken for resolving a dispute in Lithuania, Sweden, Slovenia and Poland, and the limited effectiveness of the NRA in resolving disputes in Italy and Slovenia, have been points of criticism by market players, while in the Netherlands improvements have been made to the law regarding the time limits for disputes to be handled. The Commission services are examining the extent to which in Germany the right to invoke a dispute resolution procedure with the NRA is limited to areas in which the NRA does not have to deal with the matter on an *ex officio* basis.

In Denmark market players appear to favour informal mediation on the part of the NRA to resolve contentious issues, rather than launching a formal complaint. In Belgium, the efficiency of the Competition Council, which since 2003 has become responsible for settling disputes between operators on a number of issues, has been questioned as regards dispute resolution.

NRAs are also empowered by the framework to intervene on their own initiative to ensure that the objectives of the new framework are met. However, in a number of Member States (including Luxembourg, Poland, Portugal and Slovenia) new entrants complain that the NRA is reluctant to intervene on its own initiative to address issues of horizontal importance to the market.

The Commission services are looking into the above-mentioned concerns on the part of market players.

Finally, an interesting initiative has been taken in the United Kingdom by the NRA, Ofcom, with the establishment of the post of “Telecoms Adjudicator” to help resolve problems relating to local loop unbundling.

MARKET REVIEW PROCESS

Timing of reviews

It is a pre-requisite for the effective implementation of the new regulatory framework that the initial process of market analysis and review of *ex ante* obligations be completed in a timely manner across the EU. For this reason the Framework Directive required NRAs to carry out their market analysis as soon as possible after the adoption of the Commission's Recommendation on relevant markets.

Partly as a result of delays in transposing the new framework and partly for other reasons, the market review process is still patchy across the EU, with draft measures having been notified to the Commission by only a minority of Member States. Furthermore, of those Member States only Austria, Portugal, Finland and the United Kingdom have notified the majority of the market analyses which will ultimately be required. A further description of the Commission's experience to date in handling notifications under Article 7 of the Framework Directive is provided in annex.

In some Member States, such as Italy, Hungary, Slovenia, Slovakia and Sweden, legal deadlines for completion of market analysis and choice of remedies have been included in national laws. However, this does not guarantee that the deadlines will be met, as evidenced by the situation in four of those countries, where the national deadline has already passed without completion of all market reviews (in Slovenia the deadline has not yet passed). In Sweden the status of existing prior obligations on the passing of the deadline is also an issue, because of the wording of the transitional provisions. In Slovenia the Commission services are examining the relevant provisions of national law to determine whether existing SMP obligations will remain in force only up to their stated date of expiry or until the completion of the market reviews, if later. In Estonia no deadline for starting or completing the market review procedures appears to be envisaged in the draft law, but it is proposed to include a date for the expiry of existing SMP designations and the obligations under the current law which flow from them.

In France, although the main transposition laws have now been adopted, further decrees establishing the legal conditions allowing for the market review process to be completed are still awaited.

Transposition issues relating to market reviews

Although the EU regulatory framework does not prescribe which particular authority within a Member State should carry out a particular task, in some cases the division of legal responsibility for different elements of the market analysis process at national level may call into question the achievement of the objectives of the framework. Where this occurs, careful monitoring by the Commission's services will be required. For example, in Poland and Austria national law appears to require that relevant markets be defined by ordinance and that the market analysis will then be conducted by another body. In Estonia, on the other hand, it is proposed that the relevant markets will be defined in the new law transposing the regulatory framework. However, the fact that different regulatory bodies or legal instances are responsible for market definition and for market analysis could give rise to limitations on the ability of the body responsible for market analysis to carry out its task as it deems appropriate. It also raises the question to what extent interested parties will have the right to appeal against

the definitions chosen, since the legal acts concerned are subject to more limited rights of appeal than normal decisions of the communications regulator.

The fact that regulatory responsibility for the broadcasting sector, including transmission services, is in the hands of the regional authorities in Belgium may have implications for the conduct of market analysis under the new framework, particularly as technological convergence breaks down the traditional distinctions between transmission platforms.

In Germany the timing and nature of certain obligations to be imposed on a finding of SMP appear to be prescribed by law rather than left to the discretion of the NRA.

The Commission services are monitoring developments in all of the above cases to determine their compliance with the regulatory framework.

Consultation with national competition authorities

Since the market analysis process is grounded firmly in the application of competition law principles, the Framework Directive requires Member States to ensure that the process is carried out, where appropriate, in consultation with national competition authorities.

In Germany the agreement of the national competition authority is required before the NRA can act, but the opinion of the competition authority is not always made public. In Estonia there appears to be no legal basis for the exchange of information between the NRA and the national competition authority, while in Lithuania and Poland there are apparently legal limitations on the ability of the national competition authority to share information with the regulator, on grounds of confidentiality. In Austria there seems to be no legal basis to guarantee co-operation between the two authorities, although it is likely to occur in practice. In the United Kingdom the regulator has parallel powers to apply competition law in the electronic communications field. In Hungary there is a duty of co-operation, but thus far little time appears to have been given to the NCA to provide its opinion, given the timing constraints imposed under the law on the completion of market analyses.

Careful monitoring will be required by the Commission services in the above instances.

NUMBERING RESOURCES

The availability of adequate supplies of numbers to meet demand is a key precondition for a competitive and growing electronic communications market. The Framework Directive therefore requires that the assignment of numbers and management of the national numbering plans be controlled by the NRAs, who must establish objective, transparent and non-discriminatory assigning procedures. The Directive also requires Member States to ensure that adequate numbers are provided for all publicly available electronic communications services.

In general the availability or management of numbering resources has not been identified as a major concern in the Member States in the reference period, although the Commission services are looking more closely at the situation in Latvia, where an insufficiency of numbering resources might be an issue.

One area which is likely to see significant growth in the future, and which will require numbering resources if it is to reach its full potential, is the provision of voice telephony over IP networks (“VoIP”). It is reported that the NRA in Luxembourg is freeing up numbering

blocks for use in IP telephony, and the regulators in Germany, Malta, Austria and the United Kingdom have undertaken public consultations on the rules that should apply to VoIP services. In Germany and the United Kingdom the NRA has also identified specific numbering ranges for VoIP services.

FREQUENCY MANAGEMENT

As with numbers, radio frequencies constitute an essential resource for the provision of electronic communications services, whether fixed or mobile, in a flexible and cost effective manner. For this reason the Framework Directive contains specific provisions requiring Member States to ensure the effective management of radio frequencies for electronic communications services in accordance with the objectives of the framework. They must also ensure that the allocation and assignment of frequencies by NRAs are based on objective, transparent, non-discriminatory and proportionate criteria.

In Spain a new body with NRA status was created by the new law transposing the EU regulatory framework, with specific responsibilities for the management of spectrum and charges for its use. In the United Kingdom the new, unified regulator for the electronic communications sector, Ofcom, has assumed the responsibilities for spectrum management which were previously in the hands of the Radiocommunications Agency. In Malta the regulator has also recently assumed responsibility for spectrum management.

A horizontal issue which has existed in a number of Member States over the last year (e.g. France, Czech Republic) has been how to deal with requests from holders of existing rights of use of spectrum for their rights to be adapted to enable them to use the frequencies concerned for the provision of different services or the same services with different technology.

This is an area which falls within the scope of the work currently being undertaken in the Radio Spectrum Policy Group (RSPG) in the context of its discussions on “Wireless Access Platforms for Electronic Communications Services”. Part of this work will be to assess how best to handle in the future the transition from the existing legacy of frequency rights towards a more flexible and technologically neutral approach to spectrum management which takes account of technological convergence and the need for legal certainty.

The issues involved are particularly acute in cases where the original rights of use were granted before the accession of the Member State concerned to the European Union, when the safeguards governing the assignment of frequencies contained in the EU regulatory framework did not apply.

The Framework Directive also allows for Member States to make provision in their national laws for the tradability of spectrum rights between undertakings, provided that this is done under the supervision and control of the NRAs. The Analysys report to the Commission on spectrum trading in May 2004⁶ identified Austria, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom as having made provision for spectrum trading in their new legislation. Enabling provisions relating to transfer of rights of use are also present in the laws of Denmark, Malta, Poland and Slovenia as well as in the draft law of

⁶ Study on conditions and options in introducing secondary trading of radio spectrum in the European Community, May 2004 (available at http://europa.eu.int/information_society/topics/radio_spectrum/useful_info/studies/secondtrad_study/index_en.htm)

the Czech Republic. However the precise scope of any ensuing trading rights may differ between Member States.

Further details of specific issues relating to the management of frequencies and the grant of rights of use are provided in the section on Authorisations below.

RIGHTS OF WAY, CO-LOCATION AND FACILITY SHARING

Where electronic communications providers need the permission of public authorities at national or local level to enable them to install their infrastructure on public or private land, it is important that their dealings with those authorities be conducted in a timely and even-handed way. The Framework Directive specifically requires Member States to ensure that competent authorities, when dealing with such requests, act on the basis of transparent and publicly available procedures, applied without discrimination and without delay. The Directive also requires NRAs to encourage the sharing of facilities and provides that they may make such sharing mandatory in specific types of cases.

Network operators have reported persistent problems across the EU as regards the granting of rights to install mobile masts and antennas, often due to health and environmental concerns. This might in a number of cases have delayed the roll-out of 3G mobile infrastructure, such as in Luxembourg, Sweden and Austria. In Belgium, Greece, Spain, Cyprus and Portugal variations in the approaches taken by different local authorities have been identified by operators as an additional burden. To help to overcome problems such as these within its territory, the NRA in Denmark has set up a publicly available database of all current and future locations of masts in the interests of transparency and to facilitate sharing.

In Ireland a potential issue arises from the fact that in some cases local authorities that have ownership interests in regional broadband networks are also responsible for the grant of rights of way.

In Poland the national law imposes obligations on all operators with regard to facility sharing and co-location, and the Commission services are examining whether this goes beyond the requirements in the Framework Directive.

In Belgium the compatibility with EC law of the system of taxes imposed by regional authorities on mobile pylons located on public land has been referred to the European Court of Justice. In Portugal the continued existence of a tax on the use of the public domain is a concern for operators. In the Netherlands proposals to impose charges on unused fixed infrastructure such as ducts have been criticised by the industry, while it has been alleged that in the United Kingdom local rates (taxes) on entrants could be proportionately higher than on the incumbent, as a consequence of different valuation methods applied.

AUTHORISATIONS

The purpose of the Authorisation Directive is to ensure the freedom to provide electronic communications networks and services subject only to the limited (and clearly identified) conditions laid down in the Directive. Its effective implementation in the Member States will reduce regulatory burdens on market entry and ensure a more consistent treatment of undertakings both as between Member States and as between converging technologies.

The Directive has not yet been fully transposed in Belgium, Czech Republic, Estonia, Greece and Luxembourg. In Ireland there is a specific situation, as the Authorisation Directive is apparently transposed, *inter alia*, by means of the Wireless Telegraphy Act of 1926 (as amended), dealing with apparatus authorisation rather than individual rights of use of radio frequencies. This approach appears to give rise to some inflexibility and its compliance with Community law remains to be examined. In the United Kingdom the situation is similar, as the United Kingdom legislation seems also to be based on authorisation of radio apparatus rather than the grant of rights of use of spectrum *per se*.

COMPETITION DIRECTIVE

The Competition Directive also includes similar provisions referring to the freedom to provide electronic communications networks and services. Belgium, Czech Republic, Estonia, Greece and Luxembourg have not provided the Commission with sufficient information allowing it to assess the compliance of their legislation with the provisions of the Directive. One of the main principles of that Directive is the prohibition on imposing or maintaining in force any exclusive or special rights for the establishment and/or the provision of electronic communications networks, or for the provision of publicly available electronic communications services. Member States must also not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services. In this regard, there are some concerns regarding the delays in allowing certain available PMR/PAMR frequencies to be used for wideband PAMR services.

FREEDOM TO PROVIDE NETWORKS AND SERVICES

Any restriction of freedom to provide electronic communications networks and services (whether legal or administrative) that unduly inhibits this freedom should be seen as calling into question the application of this principle. In Sweden conditions attached to broadcasting content licences seem to oblige broadcasters to buy transmission capacity from a national terrestrial network operator, creating a *de facto* exclusive right for this operator in the provision of transmission services. In Cyprus conditions attached to the mobile licences appear to give rise to a duopoly situation and prevent other undertakings from providing mobile services. The Commission services are looking into these issues.

GENERAL AUTHORISATIONS AND THE CONDITIONS ATTACHED

The Authorisation Directive requires that the provision of electronic communications networks and/or services may only be subject to general authorisation⁷, and Member States were therefore required to bring existing authorisations into line with the provisions of the Directive by the date of its application. For the broadcasting sector this implies particular attention on the part of Member State authorities where an individual licence (e.g. for cable operations or for terrestrial transmission/content providers) currently includes both an authorisation to provide an electronic communications network or service and an authorisation to provide broadcast content to the public.

General authorisations can be subject only to the conditions exhaustively enumerated in the annex to the Directive. The Italian legislation in place seems to lay down an additional condition under general authorisation concerning the duration of the right to provide electronic communications services and/or networks. In France, cable operators seem still to be covered by additional conditions imposed on them by local authorities (in contracts, drawn up prior to the entry into force of the new framework, enabling them to provide networks and/or services), and which have to be removed by negotiation. In Latvia, the primary legislation seems to include among conditions that may be attached to general authorisations also specific requirements for SMP undertakings. The Commission services are examining the conformity of such national provisions with the Authorisation Directive, in particular the requirement that such specific obligations be legally separate from rights and obligations under the general authorisation.

INDIVIDUAL RIGHTS OF USE FOR RADIO FREQUENCIES

Member States need to ensure that where possible, and in particular where the risk of harmful interference is negligible, they do not make the use of radio frequencies subject to the grant of individual rights of use but include the conditions for usage of such frequencies in the general authorisation. The Commission services are examining the correct transposition and/or application of this requirement in some Member States, including Ireland, Latvia and Poland. In those Member States the usage of any radio frequency for the provision of electronic communications services would in principle require the grant of an individual right of use⁸. This raises questions of the objective justification and proportionality of such an approach.

Procedure

Where it is necessary to grant individual rights of use, such rights should be granted through open, transparent and non-discriminatory procedures. It appears that this requirement is formally enshrined in the legislation of the Member States that have transposed. However, it is the actual application of these principles that may prove to be crucial for the future development of electronic communications markets in the European Union. The Latvian Ministry considers that no valid National Frequency Allocation Table currently exists in Latvia since the coming into force of the new law on 1 May 2004, and is currently applying the "ITU First Region Frequency Plan". Some doubts have been expressed by operators as to

⁷ This is without prejudice to the possible requirement for individual rights of use for underlying resources (i.e. frequencies, numbers and rights of way).

⁸ In the case of Ireland – a licence for apparatus using the frequency in question. In case of Latvia this conclusion is based on the law notified to the Commission as of 1 October 2004.

the transparency and objectivity of the frequency assignment procedures in Poland, at least with regard to recent assignment of frequency in the 800 MHz band, and Malta with regard to DTTV.

The non-discriminatory nature and proportionality of the frequency allocation and assignment procedures have been questioned by operators in some Member States. In Cyprus the conditions attached to the individual spectrum rights of use of the only two operators of mobile infrastructure (the second licence issued only in October 2003) seem to include a clause according to which no further individual right of use for the provision of 2G and/or 3G services will be granted for at least a 5 year period. In Malta the legal restriction on the number of mobile operators (two) was lifted only in September 2004. Moreover, Malta is planning to launch tendering procedures for the grant of individual rights of use for frequencies in the 3G band, where priority may possibly be given to current 2G licence holders. They are also considering to offer individual rights of use in the 3.5 GHz band (for FWA), but despite the technical possibilities only two licences are to be granted.. With regard to DTTV, it is being examined whether in at least two Member States (Italy and Malta) preference is given to current (analogue) broadcasters in the process of granting frequencies for the provision of digital broadcasting and what policy objectives are at play here. The Commission services are looking into this issue.

Efficient use of spectrum

It is also to be noted that Member States should not limit the number of rights of use to be granted except where it is necessary to ensure efficient use of radio frequencies. Measures and/or practices adopted by some Member States that result in non-use of certain frequencies (in general a highly valuable and scarce resource) and artificial scarcity thereof need to be verified against that principle, taking into account the overall objectives of the new regulatory framework.

Conditions attached

Individual rights of use of radio frequencies may be subject only to the conditions exhaustively listed in the annex to the Directive. Such conditions must be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.

A difficult issue arising from the spectrum assignment exercise in some Member States is the extent to which obligations equivalent to those which may be imposed on a finding of significant market power may be imposed as conditions attached to a right of use of frequencies, if they derive from commitments entered into by an applicant in a competitive tender. This will need to be judged on a case by case basis by reference to the principle of proportionality and against the overall objectives and structure of the regulatory framework.

In Lithuania, a condition attached to a spectrum right of use assigned to an undertaking precludes it from charging higher retail prices than the ones proposed during the tendering procedure. The Commission services are examining whether such a condition is objectively justified and proportionate.

ADMINISTRATIVE CHARGES AND FEES

Administrative charges imposed on undertakings should in total cover only the actual administrative costs of the national regulatory authorities incurred in managing the authorisation system and the granting of rights of use. The charges imposed need to be objectively justified, transparent and proportionate. For reasons of transparency, NRAs have to publish a yearly overview of their administrative costs and the charges collected and appropriate adjustments should be made, if necessary. In Sweden, it is not clear that any adjustments can be made to the system for administrative charges following the publication of such an overview.

In practical terms some Member States seem to maintain relatively high charges and their compliance with the principles mentioned above will need to be verified. Likewise there will need to be verification of the system of charges in France and Malta which are applied to all undertakings and take no (or little) account of their respective size and/or relative market power.

Fees for rights of use of numbers and frequencies and for rights to install facilities have to reflect the need to ensure optimal use of these resources. They must be objectively justified, transparent, non-discriminatory and proportionate in relation to the intended purpose and have to take into account the objectives of the new framework. It remains to be seen whether these requirements have been clearly transposed in Poland. The Commission services are also examining the level of annual fees imposed mainly on mobile operators for the use of frequencies and/or rights to install facilities in some Member States, which may raise some doubts as to whether these requirements are correctly applied.

It should be noted that it is not allowed to impose on electronic communications network operators and/or service providers, solely because they are such operators and/or service providers, financial charges other than and in addition to those allowed by the Directive. This principle can be derived from the ECJ's ruling in the *Albacom* and *Infostrada* cases⁹.

⁹ Judgement of 18 September 2003 in joined cases C-292/01 (Albacom SpA) and C-293/01 (Infostrada SpA) ECR [2003], I 9449. This ruling refers to the Licensing Directive 97/13/EC and although this Directive was repealed on 25 July 2003, it provides important guidelines for the interpretation of national measures similar to the contested charges, since the Authorisation Directive contains similar provisions in this respect.

ACCESS AND INTERCONNECTION

The Access and Interconnection Directive contains the principal body of rules that apply to the relations between providers of electronic communications networks and services at the wholesale level. The Directive provides both for the rules that are to apply to all market operators, irrespective of their size, and also for the rules which are to apply only to operators having significant market power. In both cases the provisions are underpinned by a core principle: regulation has to be limited to the minimum level necessary to achieve its objectives.

GENERAL PROVISIONS

As an example of the application of the above principle, the Directive provides that there should be no restrictions that prevent undertakings from negotiating access and interconnection with each other and that undertakings requesting access and interconnection do not need to be authorised to operate in the Member State concerned, if they do not provide services or operate a network in that country. It would need to be seen how far these requirements are met in the primary legislation in Latvia.

Article 4 (1) of the Directive provides for a general right and obligation for operators of public communications networks to negotiate interconnection for the purposes of providing publicly available electronic communications services. The legislation in Poland appears to extend the right and obligation to negotiate to access as well as interconnection. The Netherlands law seems to extend the right and obligation to negotiate also to providers of publicly available electronic communications services. The Commission services are examining the conformity of such transposition arrangements.

In order to ensure fair competition, particularly in the retail market, the Directive requires that undertakings which acquire information from another undertaking in the context of access or interconnection negotiations use that information solely for the purpose for which it was supplied and maintain its confidentiality. In some Member States the implementation and enforcement of these rules limiting information flow within undertakings will need thorough monitoring. In Hungary the NRA seems to have no information about the general fulfilment of this requirement and in Greece the level of win-back activity on the market raises questions as to the practical application of these rules. Win back and “save” activity has also been an issue addressed by the NRA in France and the United Kingdom, and both by the NRA and the NCA in Italy.

NRA POWERS TO IMPOSE OBLIGATIONS ON NON-SMP OPERATORS

The Directive (Article 5) requires that NRAs should have the power to take action where necessary to ensure adequate access and interconnection and interoperability of services, by imposing appropriate and proportionate obligations on undertakings even when they do not have SMP.

Further scrutiny will be needed as to whether the transposition measures adopted in Slovakia and Latvia ensure that the NRA has the complete set of powers and duties required under Article 5.

It needs to be highlighted that the power to impose access and interconnection related obligations on non-SMP operators has to be used with great care, as there is always a risk that excessive or unjustified use of the powers under Article 5 could undermine a key principle of the new framework – that competition related remedies should be based on the findings of a market analysis. The Commission is therefore following closely the development of NRA practice in the application of Article 5 of the Directive as part of the notification process under Article 7 of the Framework Directive.

IMPOSING REMEDIES ON UNDERTAKINGS HAVING SMP

The power of the NRAs to impose competition-related remedies is connected to the findings of the market analysis exercise. The addressee of these remedies can only be an operator having SMP. The Directive requires Member States to ensure that the NRAs are free to impose the appropriate regulatory obligations based on the findings of the market analysis. The obligations must be proportionate and justified in the light of the objectives laid down in the Framework Directive. As a consequence of these requirements NRAs have to have a degree of discretion when deciding what remedies are most suited to address the market failures identified in the analysis. They must also have the power to adapt the remedies listed in the Directive to the particular situation on the market. As far as the implementation of these principles is concerned, it is not enough that the NRA is provided with these powers; it also has to apply them in practice.

There are certain Member States which seem to limit the power of the NRA by restricting the necessary discretion by means of the application of criteria and conditions that are not present in the regulatory framework. This is the case in particular in Germany where the law introduced additional criteria – relating to the need for dominance on both the wholesale and the retail markets, and a historical market power position – as a condition for the imposition of *ex ante* wholesale price regulation for access services. This seems to go beyond the requirements set out in the Directive.

There are a number of Member States in which the discretionary power of the NRA appears to be limited by the application of legislative rules which prejudge the outcome of the market analysis. In some Member States the possibility for the NRA to impose certain remedies in particular markets is ruled out. This is the case in Finland as regards interconnection price regulation for fixed to mobile calls, where the Commission services are examining a proposed amendment of the relevant law which partially addresses the issue. In Germany the law rules out the possibility of mandating unbundled resale of access services until 1 July 2008, which needs to be further looked into.

In other Member States a remedy is determined by means of a legislative measure without the need for a market analysis to be conducted first. Hungary appears to have introduced empowerment provisions in its law as regards price regulation in the field of broadcasting, and revenue sharing obligations between fixed public communications network operators and internet service providers (ISP), both of which are not subject to the test of market analysis. So far only one of those decrees has been issued, which regulates the wholesale provision of terrestrial broadcasting transmission. In Slovakia the law itself appears to impose non-discrimination and transparency obligations in relation to interconnection on all operators providing public networks, irrespective of whether they have SMP or of the conclusions of a market analysis. The application of the requirements presented in this paragraph may also affect the rights of affected parties to appeal against the outcome of a market analysis

procedure, and the conformity of such transposition with the requirements of the Directive will need to be further scrutinised.

The Directive requires that NRAs have the powers to impose the remedies identified in it. In Finland the NRA seems to lack the power to ensure publication of the reference interconnection offer (RIO) and the reference unbundling offer (RUO). Furthermore it apparently has no power to impose changes to the RIO and to make internal transfer prices transparent. In Austria, due to the lack of notification of an older ordinance on interconnection, further examination will be needed whether it is ensured that the minimum necessary elements required by the Directive will be included in the RUO. The same applies to the issue whether the primary legislation in Latvia ensures that the NRA has the power to impose the obligation of transparency pursuant to the Directive. In Spain the new telecommunications law seems not to provide for all of the specific powers conferred on NRAs by the Directive to enable them to adopt appropriate wholesale remedies; these powers will however be provided for in implementing regulations not yet adopted. In Cyprus, where the incumbent lacks incorporation as a company, it remains to be seen whether the NRA will be able to implement remedies such as accounting separation and cost accounting effectively.

The Directive lays down that NRAs may impose access and interconnection-related remedies on SMP operators which are additional to those listed in the Directive, provided this is done in accordance with the special procedural requirements set out. The legislation in Finland, Latvia and Slovakia appears not to provide for such exceptional remedies.

RECIPROCITY AND PRICE REGULATION

The principle of reciprocity is being applied by a number of NRAs in different Member States (e.g. Austria, Germany, Spain, France, United Kingdom) as a basis for determining interconnection prices of operators by reference to the regulated prices of the incumbent. This approach emerged under the old regulatory framework. While reciprocity may be a valid regulatory approach under the new regulatory framework, an NRA has to ensure that any price regulation on the wholesale market is based on the findings of the relevant market analysis and applied only to operators with SMP. Furthermore, when imposing a pricing remedy using the reciprocity principle the NRA has to take into account the investments made by the operator and allow it a reasonable rate of return on capital employed. This principle implies that the operator has to be given an opportunity to demonstrate that reciprocal prices do not reflect its costs, allowing for a reasonable rate of return. For example, in Belgium the NRA considers that an alternative operator having invested heavily in network competition with the incumbent is entitled to charge higher termination rates reflecting its higher cost. In Spain the NRA has applied the reciprocity principle in the context of interconnection disputes between the fixed incumbent and alternative operators and implemented in parallel a capacity-based interconnection model. The NRA has recognised the downsides of applying the reciprocity principle and is currently revising its approach. Despite the generally applied reciprocity rule in Germany, the NRA lately accepted the non reciprocal interconnection charges of some regional operators. It follows that compliance with the principles of non-discrimination and proportionality of any price regulation applying reciprocity needs to be looked into on a case by case basis.

UNIVERSAL SERVICE

SCOPE OF UNIVERSAL SERVICE

The set of services that constitute universal service obligations must be made available at the quality specified to all end-users in the whole territory of the Member States at an affordable price. The correct delineation of the scope of universal service is of utmost importance, since only the net cost to designated undertakings arising from the provision of these obligations may be recovered through a sharing mechanism or from public funds.

The 9th Implementation report pointed to some of the key issues relating to the scope of universal service arising from the national transposition measures. For example, in Germany there is an ongoing issue concerning the legislation, which appears not to require explicitly that the connection to the public telephone network should permit functional internet access. In Ireland, the terminology used in the national transposition measure has given rise to discussions between the NRA and the fixed incumbent regarding the definition of functional internet access.

The Directive provides that as an element of universal service, at least one comprehensive directory and directory enquiry service (i.e. comprising both fixed and mobile subscribers) should be available to end users. The Commission services are examining concerns that have arisen in a number of Member States (e.g. Greece, Spain, France, Malta, Poland, Portugal, Slovenia) with the production of a universal directory. They appear to have stemmed in particular from the fact that alternative operators have either refused to provide their subscriber data to the designated undertaking or that the latter has not presented its competitors' data in a non-discriminatory manner in the directory. The presentation in the universal service directory of competing operators' directory enquiry numbers has also been an issue in the United Kingdom. In Italy, the issue relates rather to delays in putting in place the necessary regulations.

As the Commission prepares to launch a consultation on the review of the scope of universal service, as provided for in Article 15 of the Directive, Ofcom in the United Kingdom also intends to launch such a review at national level in late 2004.

DESIGNATION OF OPERATORS WITH UNIVERSAL SERVICE OBLIGATIONS

The Directive requires Member States to implement universal service in a way that is cost effective and minimises market distortion. No undertaking should *a priori* be excluded from being designated, and the designation mechanism may be used as a means of determining the net cost of universal service. Member States may avail themselves of the possibility to designate undertakings with universal service obligations through a tendering process.

New decisions on the designation of operators with universal service obligations will soon have to be taken in a number of Member States. In Austria, for example, the fixed incumbent has been designated with universal service obligations until the end of 2004, and the NRA will consider transferring some obligations to alternative operators. In Spain, the question will

become topical in 2005, and the new government has expressed its willingness to examine the possibility of co-financing any unfair burden associated with the provision of universal service. In Denmark, the fixed line incumbent has been designated as the universal service provider until 2007 and there is a discussion regarding the existing price cap regulation for call set-up charges (per minute charges are not regulated).

In contrast, in Portugal the fixed incumbent has been designated as the universal service provider until as long as 2025, apparently without any public consultation having been carried out. The Commission services are examining this and the instances outlined below to determine their conformity with the Universal Service Directive.

In Sweden there is currently no designated universal service provider as a result of the expiry of the legal provisions that designated the fixed incumbent as the universal service provider.

An issue of legislative technique which may also have tangible repercussions on the market arises in Finland, where universal service obligations appear to be imposed in the law on operators having significant market power.

In France, the law appears to exclude in practice most operators from the possibility of being designated. It creates the possibility for designating an operator for each service, but the operator must be able to supply that service on the whole of the national territory. The question arises whether this excludes all operators but one from eligibility to provide access at a fixed location and public pay telephones.

Meeting universal service obligations, and in particular the requirement to meet all reasonable requests for access to the public telephone network and to publicly available telephone services at a fixed location, proves more onerous in some of the new Member States than the EU15, due to the lower fixed telephone penetration rate in these countries.

Even though it is questionable whether mobile operators can be considered as being able to provide affordable functional internet access at this time, the Directive provides that no undertaking should *a priori* be excluded from being designated. Therefore any *a priori* limitation as to the contribution of mobile operators to universal service may well be contrary to the Directive and to the principle of technological neutrality in general. The Commission services are monitoring the situation in particular in Hungary, where the law defines universal service as one service comprising four different components, and thereby may make it impractical for some operators to participate in the designation procedure.

In that same country, according to the law the obligations placed on the designated undertakings appear to be determined in “universal service contracts” negotiated bilaterally between the operators concerned and the authorities. Up to 30 September 2004 only one had been concluded, and no contract had been published.

In Italy, no operator has been designated to provide directory enquiry services as referred to in Article 5 of the Directive, on the grounds that the market already provides for these services. However, the affordability of the services available on the market has been called into question by consumer organisations, in particular because the prices levied by the operator on which the obligation was previously placed have increased significantly.

CALCULATING AND FUNDING THE NET COST OF UNIVERSAL SERVICE

The net cost of universal service may be funded through a sharing mechanism (fund) or via public funds, where the costs arising from its provision constitute an unfair burden for the designated undertaking(s).

In the current Belgian law, there appear to be no references to the net cost giving rise to an unfair burden on the designated undertaking(s). Alternative operators consider that due to this omission an essential requirement for the activation of the universal service fund is omitted and expect that a relevant provision will be included in the new electronic communications law, which is still in draft form.

The Commissions services are examining the extent to which the new Slovenian law fails to refer to the existence of an unfair burden for the designated operator as the basic consideration for the authorities' decision as to whether a compensation mechanism should be set up.

Some Member States (e.g. Spain, France, the Netherlands) have availed themselves in their transposition measures of the possibility provided in the Directive to determine the net cost of universal service through the designation (tendering) procedure of the universal service provider. The draft Czech law also provides for this novel approach.

A universal service fund is operational in France and in Italy. In Italy, AGCOM estimated that the net cost of providing universal service incurred by the designated undertaking was € 37 million in 2002. This figure is disputed by market players, which overwhelmingly call for more transparency as to the criteria used by AGCOM in its cost calculations.

In the Czech Republic, the currently applicable law also appears to provide for an approach to the recovery of the losses arising from the provision of universal service that is based on contributions from operators in proportion to the level of their revenues. Not all of the operators have been willing to pay the contributions and a lawsuit has been launched by the fixed incumbent against the NRA for alleged failure to collect these contributions.

Following the ruling of the Court of Justice in December 2001 against the system of calculation of the net cost of the universal service in France, the French authorities revised this system comprehensively, and reduced the actual cost funded in previous years as well as the forecasts for following years. In this way, the definitive figure for 2001 fell from € 416 million to € 142 million. The estimated cost for 2002, which was considerably delayed by the need to bring secondary legislation into conformity with the Court ruling, is now set at € 297 million.

In Spain, the CMT set the net cost incurred by the designated undertaking at € 110 million for 2002 and, as in previous years, did not activate any funding mechanism on the grounds that the undertaking had not suffered any competitive disadvantage.

The designated operator in Portugal has also submitted its net cost estimates to the NRA, which appears nevertheless not to have validated them or to have come up with its own estimates.

In Belgium, the NRA's estimates of the net cost of universal service borne by the designated undertaking have been criticised by alternative operators and are currently being re-examined. While Belgium is a densely populated country, the net cost appears to be inflated by the high number of people benefiting from social tariffs. New entrants request further transparency in relation to the net costs and net benefits of the different components of universal service. Provisions in the draft law placing an obligation on all operators to offer social tariffs have created considerable concern among market players.

RETAIL PRICE REGULATION

The new framework builds on the 1998 liberalisation and open network provision directives that required Member States to remove all obstacles to tariff rebalancing before 1 January 1998 or to provide a detailed timetable for implementation of this requirement.

The relevant provision was not explicitly carried over into the new regulatory framework, because the latter was built on the premise that tariffs had been rebalanced by the above date or would be by the date of accession, in the case of the new Member States.

However, incumbent operators claim that the tariff rebalancing process has not been fully completed at least in Portugal and several new Member States (e.g. Cyprus, Latvia, Malta, Czech Republic, Slovenia, Slovakia).

The aim of the provision providing for the removal of obstacles to tariff rebalancing was to put an end to cross-subsidisation by the fixed incumbent, which has the potential to distort competition on the market in various ways and thereby to prevent market-led and competition-based reductions in end-user prices.

In the new framework obligations at the retail level should only be imposed on undertakings with SMP where the market analysis shows that the relevant retail market is not effectively competitive and obligations imposed at the wholesale level or the imposition of carrier selection and pre-selection do not result in the achievement of the objective of ensuring effective competition and the public interest.

It is for the market analysis to identify the main competition problems in Member States and to guide the NRA in the choice of the appropriate remedies. Without prejudice to the result of these analyses, in those new Member States where there is no effective competition in the fixed markets, where wholesale remedies (in particular local loop unbundling) are considered to be insufficient and where rebalancing has not yet been completed, rebalancing (by means of the cost orientation requirement) may be a necessary remedy for meeting the objectives of the regulatory framework.

Retail prices of the undertaking(s) designated as having universal service obligations should be set at an affordable level; however, such prices should not be predatory or otherwise distort competition, and the universal service provider should not derive a competitive advantage from its provision of universal service. Any losses incurred in the provision of universal service should be calculated and financed in accordance with Articles 12 and 13 of the Directive.

To the extent that prices of operators designated as having SMP in relevant retail markets are so low as to impede competition, NRAs in the Member States must be fully equipped to deal with the situations contemplated in Article 17 of the Directive (excessive and/or predatory prices, unreasonable bundling of services, undue preference to specific end users).

As competition on the market has increased, many national markets have seen fierce price competition among operators. In some countries, in particular in Spain and the Netherlands, there has been such a proliferation of discounts, promotions and price plans by the fixed incumbent that alternative operators have repeatedly drawn the NRA's attention to alleged price squeezing.

In Italy, in November 2004 the national competition authority sanctioned the fixed incumbent for abuse of a dominant position, arising from a series of offers targeting public administrations and private business users, and imposed fines totalling € 152 million. According to the authority's Decision¹⁰, the strategy of the incumbent was to explicitly exclude its competitors from the business end-users market for telecommunications services and thereby to maintain its historically dominant position both on the end-users market and the market for intermediate services for its competitors. It was based on offers of financial and technical conditions to customers that competitors could not replicate, and the use of contractual terms and conditions, such as exclusive clauses.

As fixed incumbent operators have come under increased competitive pressure from mobile operators, new entrant players report that the incumbents have responded by bundling services and products with a view to keeping existing customers and attracting new ones. Such practices are complained about by new entrants, for example in the Czech Republic, Germany and Slovenia. In Austria, the competition authority took decisive action on the bundling of products by the fixed incumbent. In Germany, on the contrary, the NRA appears to have approved a number of bundled tariffs of the incumbent.

In the United Kingdom, the incumbent fixed network operator appears to have responded to competition with key changes in its retail tariff structure, involving the migration of customers from its standard tariff to a tariff package which allows flat rate calls at off-peak times for an increased line rental fee. Alternative operators complained to Ofcom about the alleged anti-competitive effect of these changes; however, Ofcom concluded that the tariff package did not breach competition rules.

Among the various price plans offered by many fixed incumbents are schemes targeting users with a low level of consumption of telephone services. In some cases, such schemes are part of the universal service obligation imposed on a designated undertaking. In such cases it must, however, be ensured that the scheme is applied in a manner compatible with the Directive and, in particular, that market distortions are kept to a minimum and that the scheme is applied in a transparent, objective, non-discriminatory and proportionate way.

Some Member States, such as Denmark and the United Kingdom, have voluntary commercial low usage schemes in operation. Where such a scheme is operated by an undertaking which

¹⁰ AGCM "*Provvedimento*" n° 13752 – Case A351 – "*Comportamenti Abusivi di Telecom Italia*"

has been designated as having SMP for the purposes of Article 19 of the Directive (carrier selection and carrier pre-selection), the Commission service will examine them to ensure there are no anti-competitive commercial or technical restrictions which would impede access to those facilities.

Carrier selection (CS) and carrier pre-selection (CPS) have indeed been key drivers of competition in the telecommunications market under the 1998 regulatory framework. On average, in 2004, around 80% of all subscribers who have chosen an alternative operator use CS or CPS for conveying calls. CS/CPS penetration can be estimated at about 25% of all subscribers in the European Union for long-distance and international calls, and 13% for local calls.

Member States where CS/CPS has experienced most success are Sweden (38% of customers), Germany (36% of customers for long-distance and international calls) and Austria (30% of customers).

CS and CPS are now effectively implemented for all types of calls in the EU 15 and in a number of the new Member States. However, the Commission services are examining some of the problems still reported by new entrants. In Latvia, CS appears only to be available in some areas for international calls, whereas CPS appears not to be available at all. Full compliance with the requirements of the directive is not envisaged by the national authorities before 2006. In Poland, CS and CPS appear to be available only for those subscribers who are connected to digital exchanges and, in any case, not for local calls. In Slovakia, neither CS nor CPS appears to be available at present, but could be put in place following market analyses by the NRA.

COMPETITIVE PROVISION OF DIRECTORY SERVICES

With a view to enabling competition in the provision of directory and directory enquiry services, the Directive requires all service providers that assign telephone numbers to their subscribers to make relevant information available in a fair, cost-oriented and non-discriminatory manner¹¹. In some Member States, the Commission services are examining problems that are alleged to have arisen in this connection, in particular the requirement to provide relevant information on a cost-oriented basis.

In Italy, market entrants claim that there have been some delays with the allocation of the '12xy' numbers reserved for the competitive provision of directory enquiry services, which has reportedly created some market distortions.

In the United Kingdom, where competition in these services is probably most advanced, the introduction of new directory enquiry numbers for all providers in August 2003 has had a mixed reception, due to some quality of service concerns on the part of consumers.

¹¹ With regard to these requirements under the Voice Telephony Directive 98/10/EC, which was repealed on 25 July 2003, see ECJ's ruling in the *KPN* case C-109/03 of 25 November 2004.

CONSUMERS' AND USERS' ISSUES

Accessing the single European emergency number free of charge is possible in 23 Member States. Cyprus has not provided data for the Commission's questionnaire on the issue, but, according to information available to the Commission, this possibility exists. In Poland, access to '112' appears to be possible only through mobile networks.

Number portability is a facility that contributes significantly to consumer choice and competition. It should have been available for all numbers, fixed or mobile, since the entry into force of the Universal Service Directive. However, the Commission services are investigating the lack of availability of number portability in Latvia, Poland and Slovakia. In the Czech Republic, Estonia, Luxembourg and Slovenia, fixed number portability is offered but mobile number portability appears not to be. In Malta, fixed number portability is not available in practice as there is only one fixed operator with allocated numbers. In Poland, pre-paid customers appear to be excluded in the law from mobile number portability.

Fixed number portability is very successful in some Member States: Denmark, Belgium, the Netherlands (where it represents about 12% of the total number of lines) and Spain (which has, in absolute terms, the most ported numbers in the EU). In all these countries, the price of number portability is below the European average, currently standing at €19. In countries where the portability fee is significantly higher than the EU average, such as Ireland and Austria, the use of this facility appears to have slowed down.

Mobile number portability is particularly developed in Finland (20% of all subscribers), Denmark, Spain, the United Kingdom and Italy, while in Germany, where the fee is above €20 (compared to an EU average of €11), there has been limited take-up of this facility.

Information available from consumer organisations indicates that consumers mostly complain about a lack of transparency and legibility of operators' offers (in particular in the context of mobile number portability), bills and contract terms, as well as the prices of SMS, fixed-to-mobile calls, international roaming and internet access.

Operators in some countries (e.g. Denmark and Spain) consider that too heavy public service obligations are placed on them and/or that there is excessive protection of end users.

CONSUMER SATISFACTION SURVEYS

Two studies on consumers' satisfaction regarding services of general interest were conducted in 2003, the results of which were published in 2004¹².

In a qualitative study of December 2003¹³, fixed and mobile telecommunications services were generally well rated. Access to telephone services is perceived as easy, and the quality of

¹² The main results of these studies were integrated into the "Evaluation of the performance of network industries providing services of general interest – 2004 report", available at http://europa.eu.int/comm/internal_market/en/update/economicreform/docs/sec-2004-866_en.pdf

¹³ Qualitative study by OPTEM– European consumers and services of general interest in the EU-25 (December 2003)

service and of the information received is generally considered to be good. Contract terms and conditions are also generally considered as “fair” (equitable).

In only three Member States (Austria, Malta, United Kingdom) do consumers perceive the *price* of fixed telephony to be “fair”. In ten out of the EU15, the first stage of opening up of the fixed market to competition is considered by consumers as having contributed to lower prices without deterioration in quality. However the amount and even the very principle of the line rental charge is questioned by a majority of consumers. Consumers would also appreciate “real” competition in the local access market. In the new Member States, the impression that the prices of fixed telephone services have dropped is almost absent, except to a limited extent in Hungary and Poland.

As regards the mobile market, the benefits of competition to consumers are widely recognised, and any reservations expressed by consumers do not relate to the principle of competition, but to the limits and imperfections in the way it operates to bring about price reductions, including a lack of transparency and the difficulty in comparing prices.

These findings are also reflected in the results of the Eurobarometer surveys¹⁴, which however point to a single, but systematic difference between the EU15 and the new Member States as regards opinions of the quality of services of general interest. This is that consumers in the latter are less satisfied with the contract conditions, prices and in relative terms, with the service quality of their fixed and mobile telephone providers, than their counterparts in the EU15. Overall dissatisfaction with fixed telephone services is quite significant in the new Member States, in particular as regards prices and contracts. Mobile telephone services were rated better.

MUST CARRY

As mentioned in the 9th Implementation Report, most national measures transposing the new regulatory framework do not introduce must carry rules; they are most often embedded in other pieces of national legislation, such as the audio-visual laws. As a result of this, the Commission services gathered information from the Member States on the practical implementation of must carry through a questionnaire submitted in the Communications Committee.

This was done in a context where the compliance of existing and new national must-carry rules with the Directive has been called into question by market players in some Member States (e.g. Finland, Germany, the Netherlands, France), in particular in terms of their proportionality.

According to the Directive, must carry obligations should be imposed only where they are necessary to meet clearly defined general interest objectives. The general interest objectives invoked by the Member States are quite similar (pluralism, cultural diversity, freedom of

¹⁴ Eurobarometer - Consumers' opinions on services of general interest – Public opinion in the acceding and candidate countries (Fieldwork June –July 2003). The qualitative study and the Eurobarometer reports were commissioned by Directorate General for Health and Consumer Protection. They are available at: http://europa.eu.int/comm/consumers/cons_int/serv_gen/cons_satisf/index_en.htm

expression). The Commission services are examining the link between the must-carry obligations and the objectives, and the extent to which the discretionary powers of the authorities to grant must carry status are circumscribed in a manner that ensures that no arbitrary decisions are taken, in particular where the general interest objectives have been defined in broad terms.

PRIVACY AND ELECTRONIC COMMUNICATIONS

The 9th Implementation report identified some of the key issues arising from the Directive, such as traffic data (retention), location data, unsolicited communications and ‘cookies’. Due to the fact that during the preparatory process for this report only limited information has been shared with the Commission services on the implementation of this Directive, this section will focus mainly on three areas covered by the Directive, namely unsolicited communications, the retention of traffic data and cookies. These are also the topics which are most debated in the market and by national authorities, and which may have a significant impact on the consumer.

UNSOLICITED COMMUNICATIONS

Article 13(1) of the Directive requires Member States to prohibit the sending of unsolicited commercial communications by fax or e-mail or other electronic messaging systems such as SMS and MMS unless the prior consent of the subscriber has been obtained (opt-in system).

The only exception to this rule is in cases where contact details for sending e-mail or SMS messages (but not faxes) have been obtained in the context of a sale. Within this existing customer relationship the company who obtained the data may use them for the marketing of similar products or services as those it has already sold to the customer. Nevertheless, even then the company has to make clear from the first time of collecting the data that they may be used for direct marketing and should offer the right to object. Moreover, each subsequent marketing message should include an easy way for the customer to stop further messages.

The opt-in system is mandatory for any e-mail, SMS or fax addressed to natural persons for direct marketing. With regard to legal persons, Member States have to ensure that their legitimate interests are sufficiently protected.

For all categories of addressees, legal and natural persons, Article 13(4) of the Directive prohibits direct marketing messages by e-mail or SMS which conceal or disguise the identity of the sender and which do not include a valid address to which recipients can send a request to stop such messages. For voice telephony marketing calls, other than by automated machines, Member States may also choose between an opt-in or an opt-out approach.

The Czech Republic, Estonia, Greece and Luxembourg have not yet notified transposition measures for Article 13. In Latvia transposition of Article 13 is left to secondary legislation which had not been notified by 1 October 2004. The question of full or correct transposition needs to be further examined in some Member States including Austria, Slovakia and Poland, in particular with regard to Article 13, paragraph 2.

Regarding the protection of the interests of legal (as opposed to natural) persons, Spain, Denmark, Italy, Belgium, the Netherlands, Germany, Hungary, Poland, Czech Republic, Slovakia and Slovenia have chosen an opt-in system, while Portugal, France, United Kingdom, Austria, Ireland, Sweden and Finland, have chosen an opt-out model. In Cyprus this is left to secondary legislation which was not yet adopted on 1 October. The Commission services are examining whether in the Maltese and Lithuanian laws legal persons are sufficiently protected. As in Latvia transposition of Article 13 is left to secondary legislation which has not yet been notified, it remains open how legal persons are to be protected against

spam. The divergence in transposition of this provision is apparent and even though the Directive leaves it to the Member States to choose how to protect legal persons, practical problems for operators confronted with both natural and legal persons can arise. In addition the distinction between legal person and natural persons is not the same everywhere. In some cases small businesses, such as micro businesses, do not qualify as legal persons but as a natural persons. The Commission services will look into these divergences.

In January 2004 the Commission published a Communication on unsolicited commercial communications¹⁵. The Communication identified several actions to complement the legislative ‘ban on spam’, focusing on effective enforcement by Member States and public authorities, technical and self-regulatory solutions by industry, consumer awareness, and international cooperation. Examples include providing competent authorities with the required investigation and enforcement powers to trace and prosecute 'spammers', adapting marketing practices to the opt-in regime, and explaining to users how to avoid spam and what filtering and security can do for them. The Commission has indicated in this Communication that it would assess by the end of the year whether additional or corrective action was needed to combat spam. To help with this exercise, a consultation has been organised, including a public workshop on 15 November 2004.

The Working Party on the protection of individuals with regard to the processing of personal data (The “Article 29 Working Party”, set up by Directive 95/46/EC) provided an Opinion (5/2004¹⁶) on the issue of unsolicited communications for direct marketing purposes. This document provides useful indications on the interpretation by data protection authorities of various concepts used in Article 13(2) of the Directive.

On the issue of application of the provisions on spam, reference should also be made to national self regulation initiatives ongoing in some Member States that build on the provisions against spam. This is a welcome development.

For example, in the Netherlands there is since June 2004 a self regulatory code on direct marketing, on the basis of which the companies make it clear they will not be involved in distributing spam. Direct marketing associations and the employers’ association were involved in setting up this code, which also has the endorsement of the consumer association. In Germany the ‘anti spam task force’ has issued in September 2004 a White Paper that includes a “white listing” project called "certified senders alliance" which is promoting a joint venture between German internet service providers and the German direct marketing association.

TRAFFIC AND LOCATION DATA

Article 5(1) of the Directive requires that confidentiality be guaranteed not only for the content of communications but also for the related traffic data. Moreover, to actively pursue this, Article 6 of the Directive requires that service and network providers erase traffic data when they are no longer needed for the transmission of a communication. They may only process traffic data beyond this point if this is necessary for billing purposes.

¹⁵ http://europa.eu.int/information_society/topics/ecommerce/doc/useful_information/library/communication_reports/spam/spam_com_2004_28_en.pdf

¹⁶ http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2004/wp90_en.pdf

Traffic data may also be of interest for marketing or they may be the basis for value added services (traffic information, weather forecasts etc.) but usage for these purposes always requires the prior consent of the subscriber or user of the initial communications service.

Article 9 concerns location data other than traffic data. Location data can be used for the provision of services such as route guidance or tourist information. Precise location data can also be useful for emergency services. While mobile location-based services can be of great use to the public, it is also necessary to ensure there are appropriate data protection and privacy safeguards. Therefore, Article 9 requires that such location data may only be used with the consent of the subscriber. Moreover, it should remain possible for subscribers and users to temporarily block the tracing facility.

The Czech Republic, Estonia, Greece, Luxembourg and Belgium have not yet notified transposition measures. It is being examined whether in Latvia the rules for dealing with traffic data require further transposition. In Finland the law provides that with regard to the storage of traffic data there is an obligation to store for two years the information on the time of the processing, the duration of the processing and the person who processed the data. This is comparable to similar provisions in some Member States with regard to traffic data retention for law enforcement purposes, outlined below.

In January 2003, the Article 29 Working Party adopted an Opinion in which it says that it considers that it is reasonable that there is a “routine storage period for billing of maximum 3-6 months, with the exception of particular cases of disputes where the data may be processed for a longer period”. It also says that “only traffic data that are adequate, relevant and non-excessive for billing and interconnection purposes may be processed.”

DATA RETENTION FOR LAW ENFORCEMENT PURPOSES

Finally, there is a considerable increase of the interest in the use (and retention) of traffic data by law enforcement authorities. Article 15 of Directive 2002/58/EC provides that Member States can adopt legislative measures (restricting the scope of Articles 5, 6 and 9 of the Directive) for the retention of traffic data for a limited period when it is a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use.

Following the Declaration on combating terrorism of 25 March 2004, four Member States (France, Ireland, Sweden and the United Kingdom) tabled a proposal in April 2004 for a Council Framework Decision on Data Retention under Title VI of the Treaty on the European Union, which is being discussed in Council, with a view to adoption by June 2005. The draft Framework Decision speaks of a minimum 12 month general retention period with a maximum of 36 months.

On the basis of information received in the context of this implementation report it appears that the current trend in the EU is towards longer traffic data retention periods for law enforcement purposes than the currently existing periods. A few examples support such a trend. In Denmark for instance there is a draft for a new order on anti terrorism, which appears to include traffic data that are not logged today in Denmark as they are not needed for billing purposes, such as incoming calls, incoming mail and cell information for GPRS. The data is to be kept for one year. In Poland, for reasons referred to in Article 15, traffic data has

to be retained for twelve months. In Italy the legal retention period is 24 months which can be extended for another 24 months in cases of crimes against electronic systems and for reasons related to organised crime or terrorism.

Besides the need to maintain proportionality as between the length of retention periods, the intrusion on privacy and the actual need for the traffic data for law enforcement purposes, it is also necessary to keep in mind the costs to be borne by operators. The economic impact of traffic data retention periods increases as the retention period gets longer. In addition there has been an increase in the number of request from law enforcement authorities to retrieve certain data. In some Member States the respective costs borne by operators and service providers (such as investments in software, technologies and human resources) are not reimbursed; in others they are only partially reimbursed. These issues were debated in a consultation and at a public workshop on data retention practices for law enforcement purposes held on 21 September 2004, both organised by the Commission services in the light of the draft Framework Decision.

COOKIES

Article 5(3) governs the use of devices for storing or retrieving information, such as ‘cookies’. Users must be informed of the purposes of such devices and have the opportunity to refuse their use or installation on their terminal equipment. Even though this provision is supposed to have been applied since 31 October 2003, it has not been transposed yet in all the Member States (no transposition by Slovakia, Latvia, Greece, Belgium and Luxembourg). On top of that, normal use of the Internet does not appear to lead to any notifications of information on cookies or similar devices in accordance with the Directive. If so, this would indicate that the provision is generally not implemented in practice so that a thorough analysis of the situation in the Member States would be justified.

APPLICATION OF TRANSITIONAL MEASURES

Article 26 of the Framework Directive repeals the ONP legislation from the date of application of the new regulatory framework, i.e. 25 July 2003. Article 27 of the Framework Directive, however, requires Member States to maintain certain obligations under national law until such time as a determination is made in respect of those obligations by a national regulatory authority in accordance with the market analysis procedure established under Article 16 of the Framework Directive.

The rationale behind these provisions is that the legislator considered it necessary to provide for the continued application of certain specific obligations, in order to ensure legal certainty and to avoid a legal vacuum during the transitional period. Consequently, such obligations should initially be carried over into the new regulatory framework, but are subject to immediate review in the light of prevailing market conditions.

The obligations to be maintained are those for access and interconnection imposed under Articles 4 (Rights and obligations for interconnection), 6 (Non-discrimination and transparency), 7 (Principles for interconnection charges and cost accounting systems), 8 (Accounting separation and financial reports), 11 (Co-location and facility sharing), 12 (Numbering), and 14 (Publication of and access to information) of the Interconnection Directive, including obligations relating to carrier selection or pre-selection; obligations on special network access imposed under Article 16 of the Voice Telephony Directive and obligations relating to retail tariffs for the provision of access to and use of the public telephone network imposed under Article 17 of the same directive; and obligations concerning the provision of leased line transmission capacity, namely imposed under Articles 3 (Availability of information), 4 (Information on supply conditions), 6 (Access conditions, usage conditions and essential requirements), 7 (Provision of a minimum set of leased lines), 8 (Control by the national regulatory authority) and 10 (Tariffing principles and cost accounting) of the Leased Lines Directive. Finally, obligations under the Unbundling Regulation continue to apply until the relevant market analysis procedure under the new framework has been completed.

Obligations that fall outside the scope of Article 27 of the Framework Directive can be imposed only through an SMP determination made in accordance with the market analysis procedure under the new regulatory framework, by a measure taken under Article 5 of the Access Directive, or, alternatively, in exceptional circumstances, by a measure taken under Article 7(6) of the Framework Directive.

The starting conditions for the ten new Member States at the date of their accession (1 May 2004) are dealt with separately below. Consequently, the following overview relates only to the transitional regime as applied by the EU 15.

Continuity during the transitional period has proved to be particularly important in areas where regulatory intervention was needed to resolve issues which were indicated as still outstanding under the 1998 regulatory framework in previous reports. Although general concerns as to legal certainty have been expressed by market players, transitional arrangements were put in place in most of the EU 15 Member States. In practice, most NRAs continued to apply existing tariff regulation and cost accounting obligations, to carry out

interconnection dispute settlement procedures and to monitor and enforce the relevant SMP obligations imposed before the date of application of the new framework, e.g. on carrier pre-selection and unbundling. The Commission services are examining the apparent reluctance of the NRA of one Member State (Luxembourg) to intervene on regulatory issues during the transitional period and its preference instead to focus on tariff controls. Specific issues concerning the application of the transitional measures have arisen in other Member States, which will need to be further looked into.

The German NRA (RegTP) has stated that an obligation for an ex-ante approval of retail services which had been imposed in accordance with the old law will remain valid in the transitional period. In a recent (provisional) decision the relevant Administrative Court has, however, called into question this approach, limiting the scope of the transitional regime for tariff regulation to the tariff principles laid down in Article 17 of the Voice Telephony Directive.

OPTA, the Netherlands NRA, applies its own guidelines on costing models for the determination of cost-oriented interconnection tariffs in a different way from that followed in previous years pending the completion of the market analysis. In Portugal, ANACOM introduced a new “retail minus” pricing mechanism when approving the incumbent’s tariffs.

In Italy, the NRA (AGCOM) has prevented the incumbent from differentiating retail tariffs on the basis of different interconnection charges requested by the operator which terminates the call. The decision is still pending before the Italian court.

In Spain, the existing requirement for ex-ante approval of specific retail tariffs was transformed into a requirement only to notify the NRA of tariffs, without a market review.

In Ireland, the Minister issued a set of Policy Directions during the transitional period which concerned in particular national roaming obligations and single billing through wholesale line rental. However, in their final form these appear to allow the NRA to comply with the procedural requirements of the new framework.

In this context it is worth mentioning that the United Kingdom NRA (Ofcom) communicated to the Commission pursuant to Article 7(6) of the Framework Directive provisional measures with a view to maintaining obligations that fell outside the scope of Article 27 of the Framework Directive (i.e. obligations which were based on licence conditions and interconnection directions imposed under Article 9 of the Interconnection Directive).

In any event, it should be stressed that Article 27 of the Framework Directive is a strictly transitional regime and is not to be used by NRAs to bypass their obligations under the new regulatory framework, namely to carry out the market analysis. It might also be questioned whether the regulatory resources invested in “updating” pre-existing regulatory obligations do not in some way or another detract from the speedy implementation of the new framework. Review of the obligations maintained during the transitional period should therefore be given priority, in order to avoid over-regulation. This is to be taken into particular account in Member States that only transposed late, or where transposition has not even taken place at all yet. The same applies with respect to obligations that had not been imposed under national law before the date of application of the new framework (e.g. with regard to bitstream access or price regulation for call termination in individual mobile networks).

In some Member States the national law sets a deadline for completion of the market analysis. In one of the EU 15 Member States (Sweden), the national law, however, also stipulates that obligations under the old regulatory framework cease to exist after that date. The question arises as to whether this limitation of the scope of the transitional regime ensures its effective application, e.g. in the event of failure to complete determinations within the national deadline.

NEW MEMBER STATES - STARTING CONDITIONS AND THE TRANSITION TO THE NEW FRAMEWORK

The regulatory framework came into force in the New Member States on the date of their accession, 1 May 2004. Thus the framework applies to 25 Member States, and the Commission is examining the transposition and implementation in all Member States on an equal footing. However, the effective implementation of the new framework presents a particular challenge to the New Member States, where the legal, regulatory and market developments are, in many cases, at a very different stage to that obtaining in the EU15 when they came to implement the framework a year previously. The fact of acceding to the EU when the new regulatory framework was already in place also required substantial efforts from the New Member States but most of them proved able to take up this challenge.

The adoption of primary transposition measures had not been completed in two of the New Member States, the Czech Republic and Estonia, as of 1 October 2004. Malta and Poland were also quite late with transposition but, on the other hand, the other six New Member States transposed the framework before or very soon after the date of accession, which is a better rate of success than the EU15 in regard to their deadline in July 2003. The law in Latvia was originally adopted on a provisional basis, but the Commission is aware that a modified version was adopted definitively in late October 2004, which has not yet entered into force. Secondary legislation (quite significant, in some cases) will be required before transposition can be considered to be complete in the Czech Republic and Estonia (where there is no transposition, as yet), and the Commission is examining whether this is also the case in Cyprus, Latvia, Poland, Slovenia and Slovakia. As well as the problems of delay, a number of issues need to be examined in regard to the conformity of the transposition measures that have been adopted.

As well as the effective transposition of the *acquis*, the success of the transition of the New Member States to the EU regulatory framework was predicated on their implementing important aspects of the old framework some time prior to accession, as they committed themselves to do when enlargement negotiations were opened. This approach was designed to ensure that the basic “starting conditions” for liberalisation and harmonisation were in place as quickly as possible and, in particular, that the regulatory obligations on SMP operators from the old framework would be in force and could be maintained until the market analysis process has been completed. This would have allowed the application of the transitional measures under Art. 27 of the Framework Directive in the same way as for the EU 15. It was also aimed at ensuring the establishment of independent national regulatory bodies capable of ensuring the effective implementation of the framework upon accession.

However, some of the New Member States seem to have failed to implement fully prior to accession the “starting conditions” under the old framework, particularly those under the Access and Interconnection Directive which stood as a basis for imposing obligations on undertakings designated as having SMP in accordance with the criteria under the old framework, and this failing has been compounded by the delays that took place in transposing the new framework. The Commission services are looking into the application of some of the key transitional obligations on operators with SMP (over the 25% threshold as defined in the old Directives), relating notably to the apparent absence of adequate cost accounting and/or

tariff transparency (Cyprus, Lithuania, Poland, Slovakia, Slovenia) and/or of an interconnection reference offer, or one that adequately meets market needs (Cyprus, Lithuania, Poland, Slovakia, Slovenia) to ensure that interconnection is competitively available on non-discriminatory conditions.

The Commission services are also examining whether the cost accounting system applied in Malta ensures that the NRA is able to monitor compliance with the cost orientation obligation imposed on the incumbent in the market for fixed public telephony, given that the interconnection charges applied are among the highest among EU Member States. Latvia and Slovakia also have very high interconnection tariffs. In Slovakia also, due to the failure to impose key obligations of the old framework and lengthy decision-making, fixed to fixed interconnection is virtually non-existent – there is only one interconnection agreement concluded by the incumbent, with an operator which does not compete on the retail market. As well as examining such matters, the Commission services are looking at whether regulatory obligations have been incorrectly applied to operators, either because they do not have SMP in the markets identified under the old framework (Czech Republic, Slovenia) or because different markets have been identified (Malta). In particular, in the Czech Republic the current law requires accounting separation to be imposed on all operators, whether or not they have SMP.

The full implementation and enforcement of all these obligations is an essential pre-requisite for ensuring that an NRA can impose appropriate remedies on the basis of a market analysis exercise and effectively monitor compliance therewith.

Other important market opening rules were also not implemented prior to accession in some of the New Member States. Carrier selection and pre-selection was a key tool in the EU15 for enabling competition to develop in the first place, and its apparent absence in some New Member States (Latvia except for international calls; Slovakia) seriously undermines the development of competition. In some cases, the scope of CS/CPS was limited, either in terms of the markets to which it applies (Poland; as well as in Hungary where the problem has now been resolved), or simply because it was not defined as an SMP obligation (Slovakia). The Commission is examining whether fixed number portability has been implemented in some New Member States (Latvia, Poland, Slovakia).

Local Loop Unbundling is proving to be increasingly important for the development of competition and the roll-out of broadband services in the EU. However, in a number of New Member States the Commission is examining whether LLU has been implemented because there does not appear to be a Reference Unbundling Offer (Malta, Poland, Slovakia), or, where this exists, the conditions it establishes do not appear adequate to allow actual competition in local access through unbundling (Czech Republic, Lithuania, Slovenia).

There have also been some problems given the lack of designation of operators prior to accession as having SMP on particular markets identified under the old framework, especially the markets for interconnection. This means that some large mobile operators were not subjected to cost orientation or price control on their mobile termination rates (Lithuania, Poland).

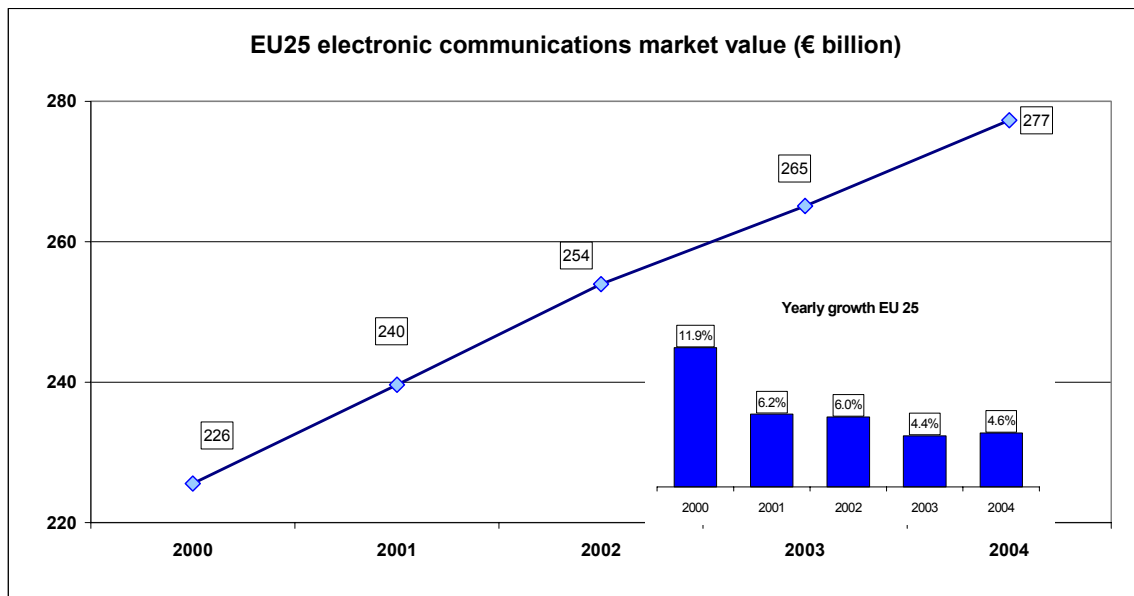
In a number of cases, therefore, there has been a failure to take the regulatory measures that were required to ensure that basic market opening rules were in place upon accession, including in markets where patently there are serious issues of market power. These cannot

now be addressed until the necessary legislative and administrative measures have been completed, and then the market analysis carried out, which shows just how urgent it is for New Member States to ensure that NRAs have the resources and the legal mandate to carry out the market analyses as soon as possible.

While not part of the “starting conditions”, the existence of an independent and properly resourced national regulatory authority is in fact a determining factor in the successful implementation of the framework. Accordingly, the Commission is monitoring closely the administrative capacity of the NRA in several New Member States (Latvia, Poland, Slovenia, Slovakia) and/or its independence (Cyprus). In some countries, the Commission is also examining whether there are limitations or constraints on the powers of the NRA to carry out its tasks (Slovenia, Latvia), particularly in relation to market analysis (Poland, where relevant markets are defined by law) and the imposition and enforcement of remedies.

MAIN MARKET DEVELOPMENTS¹⁷

The estimated value of the electronic communications services sector for the year 2004 is €277 billion¹⁸, which accounts for 43% of the overall ICT sector. The rate of growth for the sector appears to have stabilised and for 2004 is estimated at 4.6%¹⁹. However, at this level, it will outpace both growth in GDP, which (for the Eurozone) is estimated at 2.1%²⁰, and in the ICT sector, which is estimated to grow at 3% for 2004. The key drivers are mobile communications services and fixed data services, which show strong growth of 7% and 11.5% respectively²¹.



Source: EITO 2004 and Commission services

Underlying these general growth trends, fundamental shifts are taking place in the relative importance of the various components that make up the sector. Traditional fixed line telephony has declined in terms of value, as increasing competition, from new entrants and mobile communication services, forces prices and margins down. Fixed telephony revenues remain the cornerstone of the traditional operators' business, which have concentrated their efforts on reducing long term debt and operational costs. Fixed operators are focussed on stabilising domestic fixed revenues and developing innovative services, such as voice over internet protocol (VoIP) and fixed-mobile converged products. Broadband services revenues are offsetting the decline in fixed line voice revenues.

Broadband penetration has increased significantly, spurred by lower prices and intensifying access, but also infrastructure-based, competition, as new entrants start climbing the

¹⁷ The regulatory situation described here is generally that at 1 October 2004. Market data, unless otherwise indicated, cover the period up to and including 1 August 2004.

¹⁸ The communications services sector encompasses the following service segments as defined by EITO: Fixed voice telephone, Fixed data, Mobile telephone and CaTV.

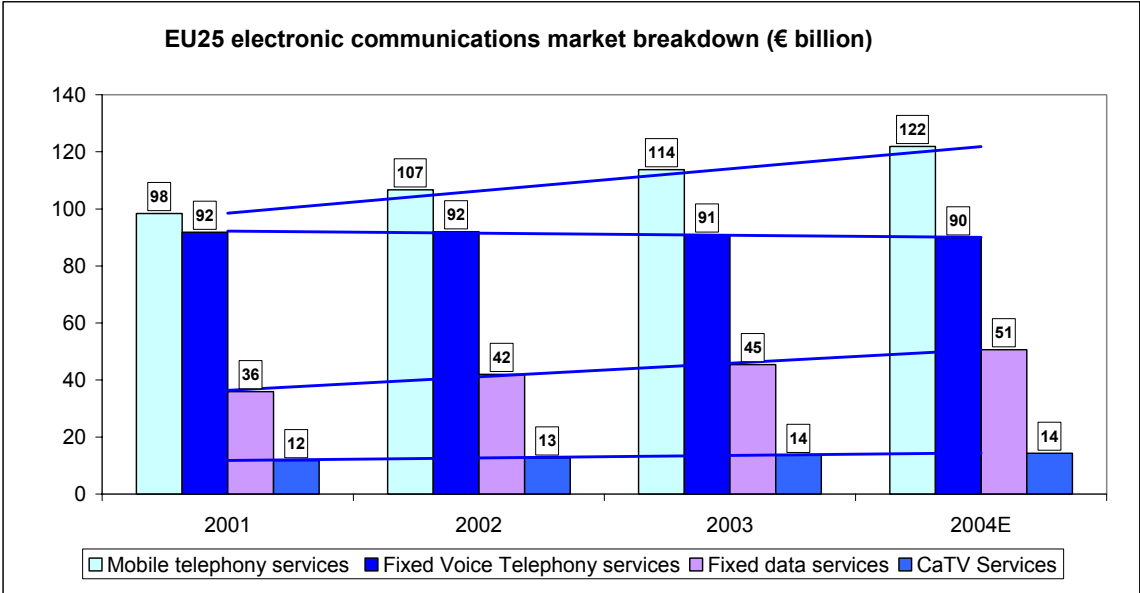
¹⁹ In nominal terms. Source: EC services based on estimates by EITO and IDATE

²⁰ Source: Commission. Eurozone GDP growth estimate for the year 2004

²¹ Source: EC services based on estimates by EITO.

investment ladder²². Mobile penetration continues to increase and, while voice services still dominate, there is evidence of growth in mobile data services. In some Member States, revenues from mobile services were higher than fixed-line revenues for the first time ever. 3G networks and services have been launched, at least on a limited commercial basis, in most Member States.

There seems to be a new sense of confidence leading to a renewed focus on growth. In the past four years, following the start of the downturn, and the impact of real competition, fixed operators concentrated on survival by cutting costs and reducing high long-term debt levels arising from acquisitions, capital investments in infrastructure and 3G licence fees. At the same time, they sought to resist the initial effects of competition. During this time, however, mobile telephony has continued growing and broadband has taken off. These two elements have fuelled the more positive outlook. Even if debt levels are still high in some cases, funds are now more readily available. New acquisitions, not only within the EU but also in other regions, buyouts of minority shareholders, including ISP subsidiaries, and further investment in mobile and fixed networks (in 3G networks, xDSL and conversion of the copper line networks into IP networks) can be observed.



Source: EITO 2004 and Commission services

MOBILE COMMUNICATIONS SERVICES

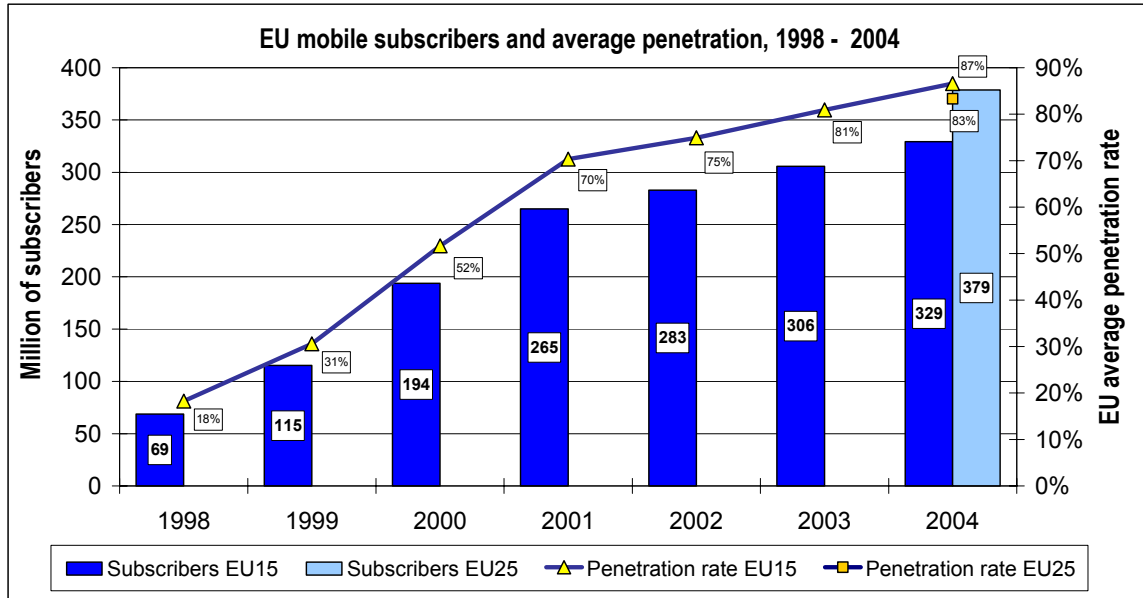
The mobile sector continues to grow strongly, achieving estimated 7%²³ growth in 2004. Revenues from mobile voice services exceed those of fixed voice services. However growth appears increasingly to be driven by value added services such as mobile data including SMS.

²² This term relates to a situation where a new entrant/alternative operator benefits initially from access products at different levels of the value chain in order to build customer base, and then progressively rolls out its own infrastructure towards the customer.

²³ Source: EITO 2004

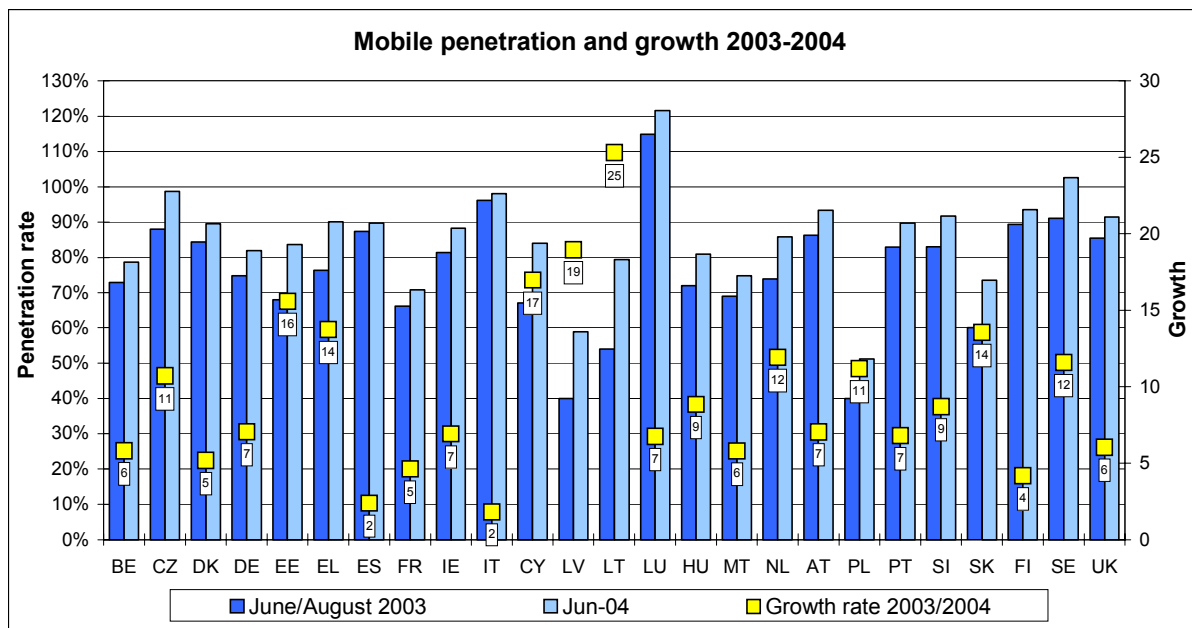
Penetration

The average EU25 penetration rate continues to grow and is now at 83%. The penetration rate for the EU15 has increased by 6 percentage points to 87%, the same rate of growth as last year. There are now more than 379 million mobile subscribers in the EU.



Source: Commission services based on NRA data and European Mobile Communications estimates

As the table below shows, growth has occurred in all Member States; however, the pace varies. The majority of EU15 Member States have experienced growth of between 5% and 8%. Four EU15 countries, namely Greece, Luxembourg, the Netherlands and Finland, experienced growth rates of 10% or more. In some of the new Member States growth was very high (25% in Lithuania, 19% in Latvia, 17% in Cyprus and 16% in Estonia). Growth was lower in the Member States where the penetration level was already very high. Mobile telephony penetration is higher than fixed penetration in many new Member States.



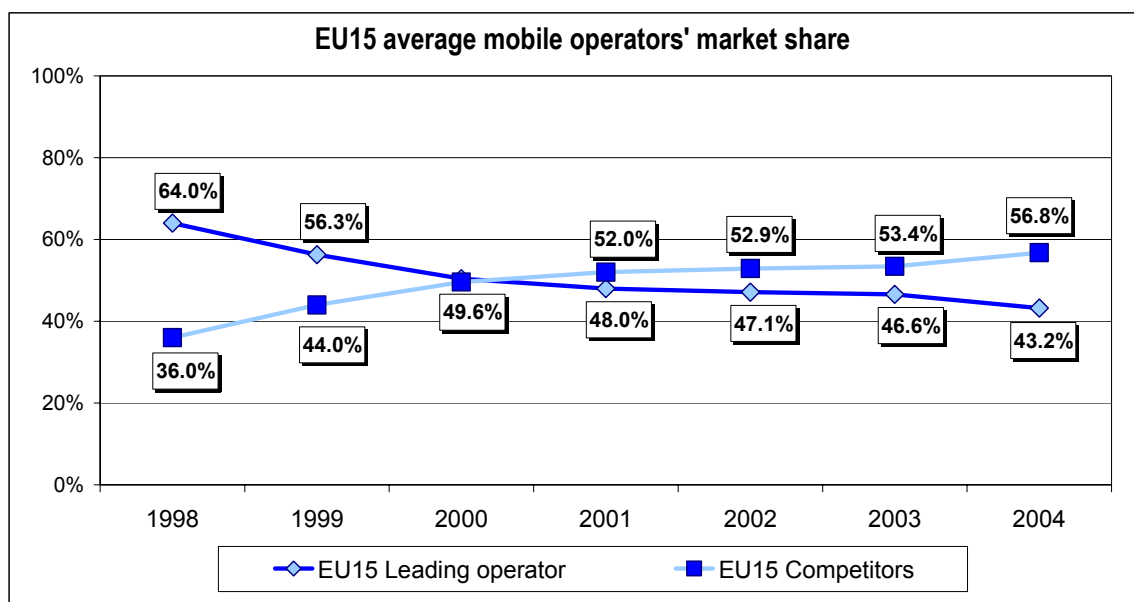
Source: Commission services based on NRA data and European Mobile Communications estimates

Drivers of growth

While future growth in the mobile sector in the EU will increasingly come from the deployment of advanced value-added services, voice services still account for the vast majority of revenues. As noted, the penetration rate for mobile services continues to grow at a healthy rate; however, it is clear that mobile operators will seek to add value through the deployment of content-rich data and by encouraging customers to move to higher value post-paid options. Data services appear to be growing, with indications²⁴ that these services now account for 13% to 22% of mobile operators' revenues. However, the majority of this revenue is derived from basic data services such as SMS, although more advanced services such as Multimedia Messaging Services (MMS) are having an impact. Enterprise solutions are likely to be the main drivers behind the growth of mobile data services but the extent of take-up remains uncertain. GPRS has been the main bearer technology and e-mail is likely to be the main application.²⁵

Market shares and new entrants

There are indications that competition in aspects of the mobile sector is intensifying. For example, the average market share of leading operators in each Member State has dropped from 46.58% last year to 43.2% this year. Although this trend had begun at the end of 2000, this year's reduction is greater than the reduction seen in the previous two years combined. There are 80 network operators in total in the EU, with three to four operational in most Member States. The number of competing players is significantly increased in some Member States by the presence of service providers such as MVNOs.



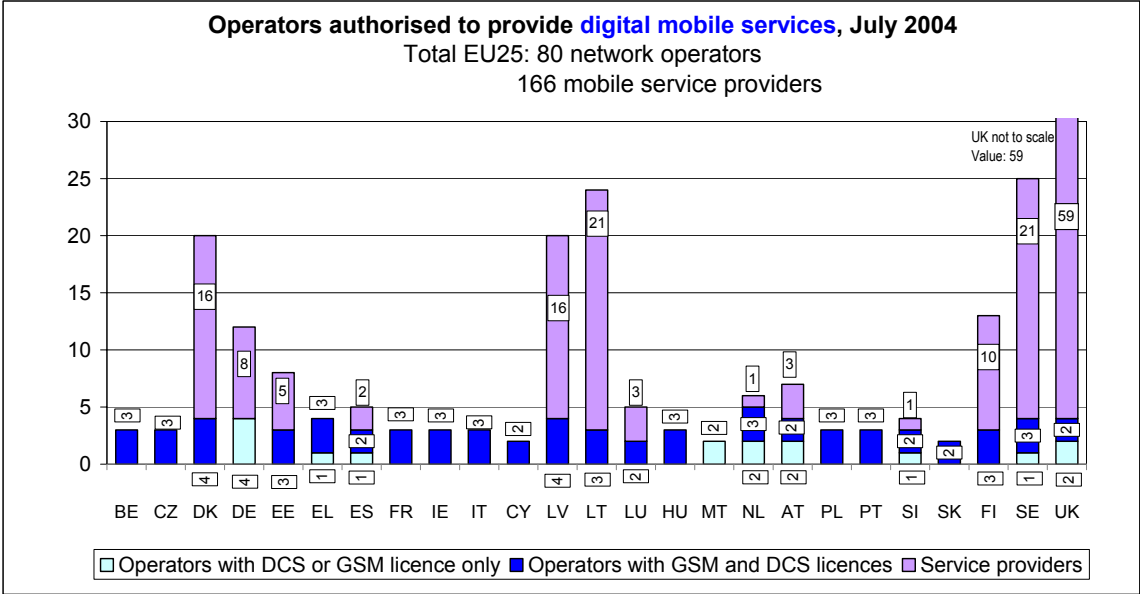
Source: Commission services based on NRA data and European Mobile Communications estimates

As the table below demonstrates, there is significant divergence between Member States when it comes to the number of mobile service providers operating in the market. There are no service providers in twelve Member States and competition there is consequently confined

²⁴ 3G Mobile, August 2004

²⁵ EITO 2004

to network operators. A further six Member States have a low number of service providers. However, there are six Member States, Denmark, Latvia, Lithuania, Finland, Sweden and the United Kingdom, that have at least ten service providers operating in the market. It is worth noting also that (with the exception of Latvia and Lithuania) these Member States have among the highest penetration rates for mobile services in the EU.



Source: Commission services based on NRA data

Wholesale pricing

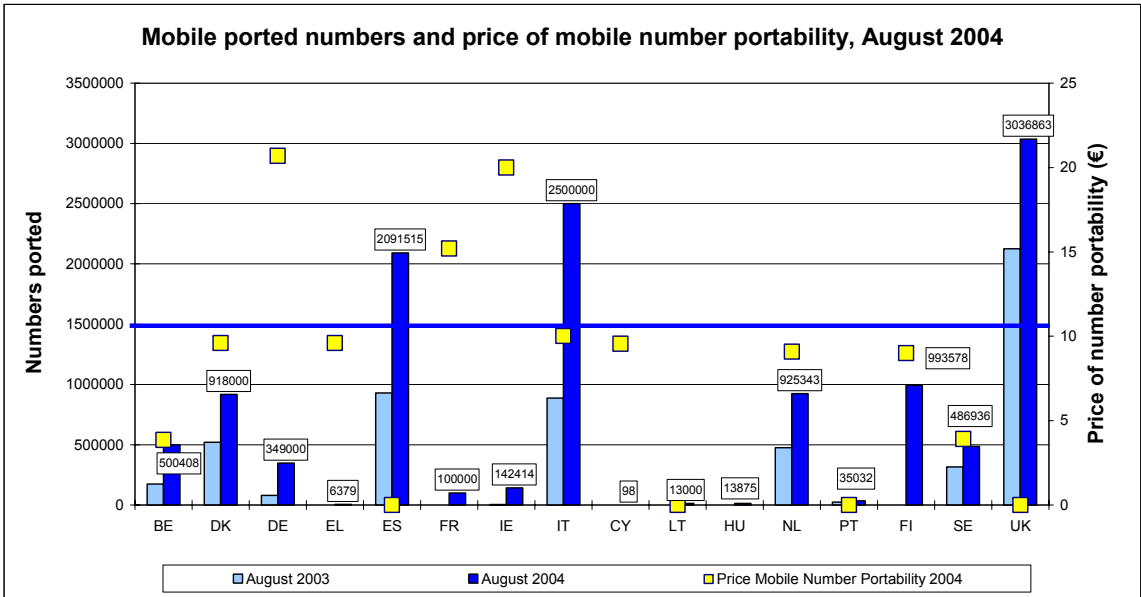
As the section below on interconnection shows, there has been a welcome reduction in mobile termination rates in many EU countries during the year, although further reductions could follow from intervention by NRAs. As for international roaming rates, concerns persist as to the high level of these charges. The European Commission is continuing its investigation under competition rules into wholesale international roaming tariffs charged between mobile network operators, and in July of this year issued its preliminary position on infringements of Article 82 of the Treaty with regard to a first market, the United Kingdom market for wholesale international roaming²⁶. Given its nature, this issue is likely to require a coordinated response and the European Regulators Group (ERG) has included international roaming in its 2004 and 2005 work programmes. The European Commission urges regulators to complete analyses of the markets for call termination on individual mobile networks and wholesale international roaming as quickly as possible.

Mobile number portability

Mobile number portability (MNP) allows subscribers to retain their number when they move from one operator to another. The number of ported numbers has increased significantly during the year, with dramatic increases occurring in some Member States, namely Belgium, Denmark, Germany, Spain, Ireland, Italy, the Netherlands, Finland, Sweden and the United

²⁶ Commission Press Release IP/04/994
 <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/994&format=HTML&aged=0&language=EN&guiLanguage=en>>

Kingdom. Overall, 12.1 million numbers have now been ported in the EU, representing 3.2% of mobile numbers. This is a 119% increase on the previous year which suggests that MNP is having a greater impact in the market.



Source: Commission services based on NRA data

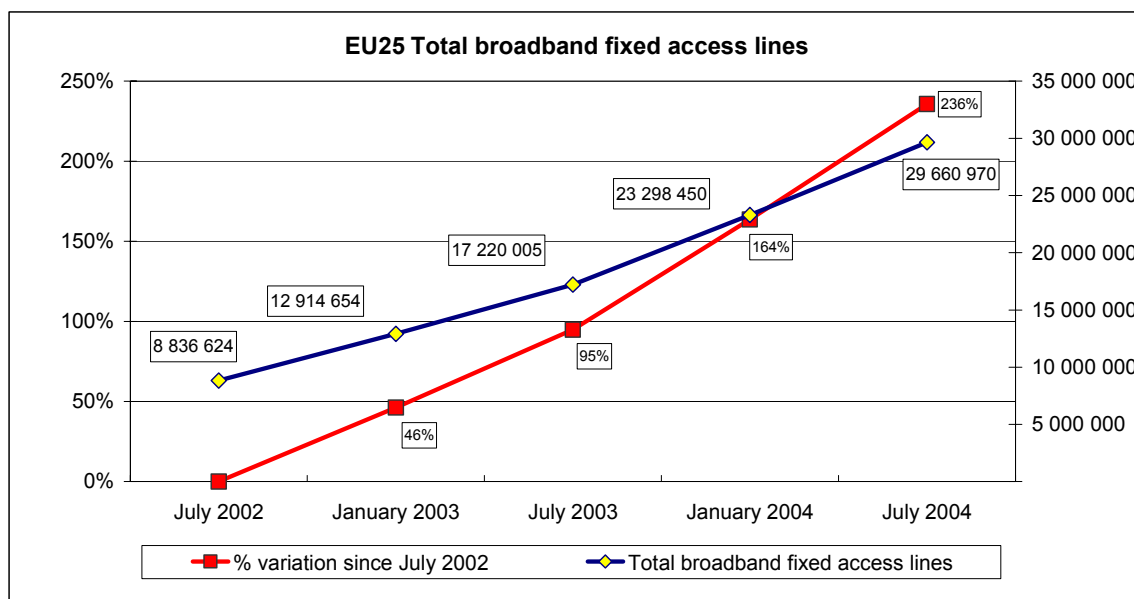
Launch of 3G services

The number of 3G launches has accelerated in 2004, with many operators offering trial and commercial services. Of the 75 existing 3G licences, 30 operators are offering commercial services, and 21 are in the trial or pre-commercial phase. It is estimated that there are around 2.6 million 3G subscribers in the EU and that, on average, there will be population coverage of at least 43% throughout the EU by the end of 2004. Take-up has been particularly strong in Italy and the United Kingdom.

BROADBAND

Broadband is the fastest growing market in the electronic communications services sector. This year has seen significant progress, with the total number of broadband access lines²⁷ growing by more than 72%. Deployment, as at 1 July 2004, was 29.6 million lines, which represents 6.5% of the EU population. The figure for the EU15 is 7.6%, which compares with 4.5% last year. Two years ago, the corresponding figure for the EU15 was 8.8 million lines. Overall, broadband and fixed data services revenues have grown by 11.5% for the year.

²⁷ Number includes fixed access lines only



Source: Commission services based on COCOM data. Figures for July 2002 to July 2003 refer to EU15 only.

This dynamism is not confined to growth in absolute terms, but is also evident in the increasing variety of innovative service offerings, and in the increasing capacity and speeds of transmission, that are now available. For example, providers of DSL services are beginning to offer VoIP in order to increase user spending. The major drivers include improved price/performance ratios, growing internet usage, growing availability, and increasing awareness. Broadband connections are increasingly likely to be used for applications other than high-speed access to the internet. Operators are gradually moving into offering voice and video services over broadband, while global carriers are incorporating DSL access into their remote connectivity portfolios²⁸.

Despite rapid growth, Europe still lags behind some other regions in terms of penetration levels (see below). However, some European countries, for example, Belgium, Denmark, Finland, the Netherlands and Sweden, compare very favourably with the best performing regions.

²⁸

Country	Broadband Penetration rate JULY 2004 (Lines/100 pop.)	Source
INDIA	0.02%	NRA
CHINA	1.3%	Compactnews
New EU MS	1.14%	COCOM
AUSTRALIA	5.5%	ACCC
EU25	6.5%	COCOM
EU15	7.6%	COCOM
US (January 04)	10%	Compactnews
JAPAN	13%	Ministry of Telecom, Japan
S. KOREA	44% of households	KAIST

The significant rise in broadband deployment appears to be driven largely by intensifying competitive pressure and also by the desire of fixed operators to offset eroding voice telephony revenues by seeking new opportunities for growth. However, an examination of the situation across Member States reveals a rather more diverse and complex picture. The following key observations, which are discussed in more detail in the following sections, can be made:

- The broadband penetration rate, measured as a percentage of population, varies significantly across Member States, ranging from 0.2% in Greece to 15.6% in Denmark.
- The rate of growth in broadband penetration over the year for the EU15 Member States is also diverse, ranging from 0.22 percentage points in Greece to 5.21 percentage points in Denmark. In general, the Member States with the highest penetration continue to have high rates of growth, widening the gap between them and the Member States with lowest penetration levels.
- There is diversity among Member States in the deployment of broadband technologies. Some Member States are characterised by significant deployment of alternative infrastructures such as cable and fibre, while in others, DSL is by far the primary technology.
- The nature and extent of competition varies considerably across Member States. In general, new entrants' share of the broadband market is increasing.
- Bitstream access is now the most common form of access for new entrants.
- The significant growth in Local Loop Unbundling (LLU) provides evidence that, in some Member States, new entrants are beginning to climb the investment ladder. Clearly,

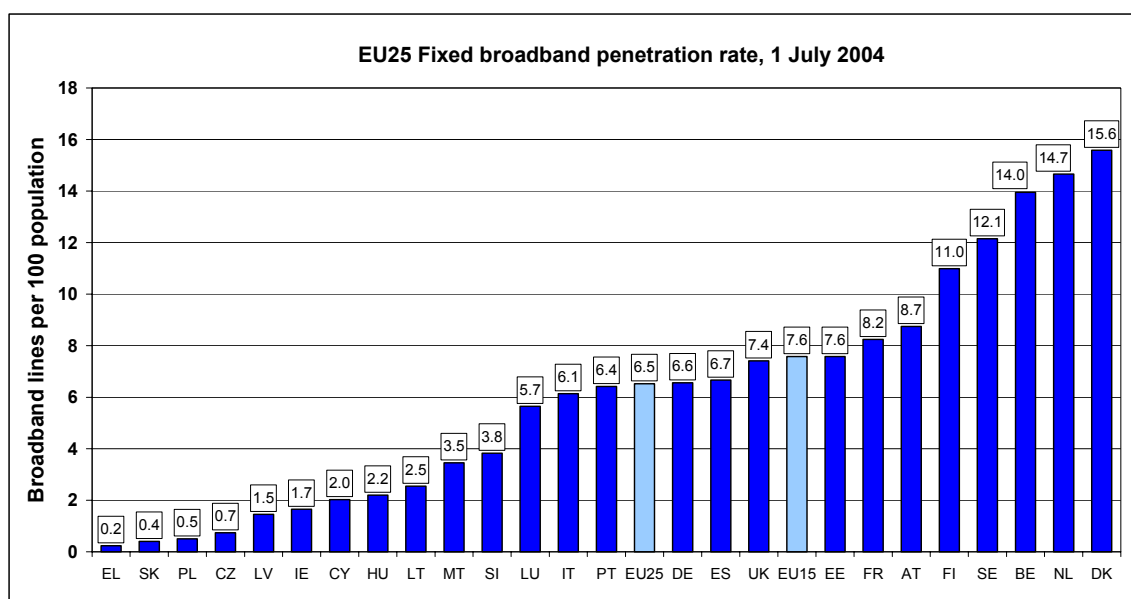
regulatory intervention in relation to price and non-price issues for LLU has been a key factor.

Broadband penetration and growth

Although most Member States have experienced growth in the rollout of broadband, the gap between them is widening. There are now five Member States where the penetration rate exceeds 10% (Belgium, Denmark, Finland, the Netherlands and Sweden), nine Member States with a penetration rate between 5% and 10%, and eleven Member States, where the penetration rate is below 5%.

Some Member States have performed particularly well. Denmark achieved an increase of 5.21 percentage points and has the highest penetration rate in the EU. Finland and the Netherlands have added more than five percentage points. Among the larger Member States, the progress in France is noteworthy where the rate has more than doubled, from 4.05% (below the EU average) to 8.24% at 1 July 2004. Italy has increased its rate significantly, although it is understood that many of the LLU lines in Italy are not yet used for broadband. Growth in the United Kingdom, Luxembourg, Denmark and Portugal has also been strong.

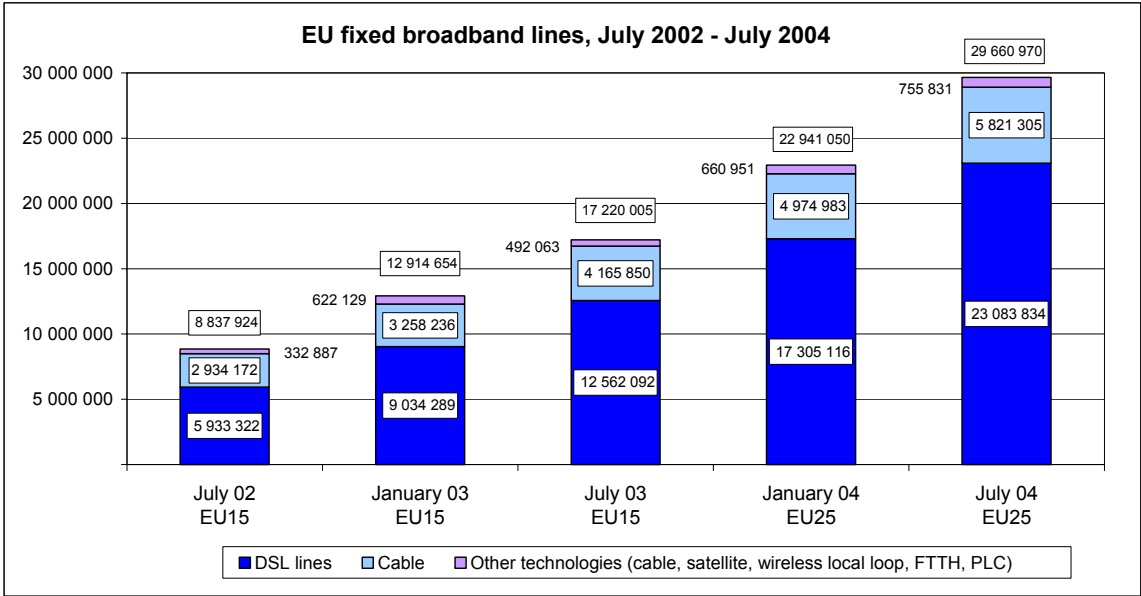
For the new Member States, it is worth mentioning the high penetration rate in Estonia, which is similar to the EU15 average at 7.58% of the population and clearly above the average penetration rate of the new Member States, which is 1.14%. Early liberalisation of the Estonian market and national policies to promote the deployment of internet (Tiger Leap programme), have resulted in lower prices for internet access and high internet penetration.



Source: Commission services based on COCOM data

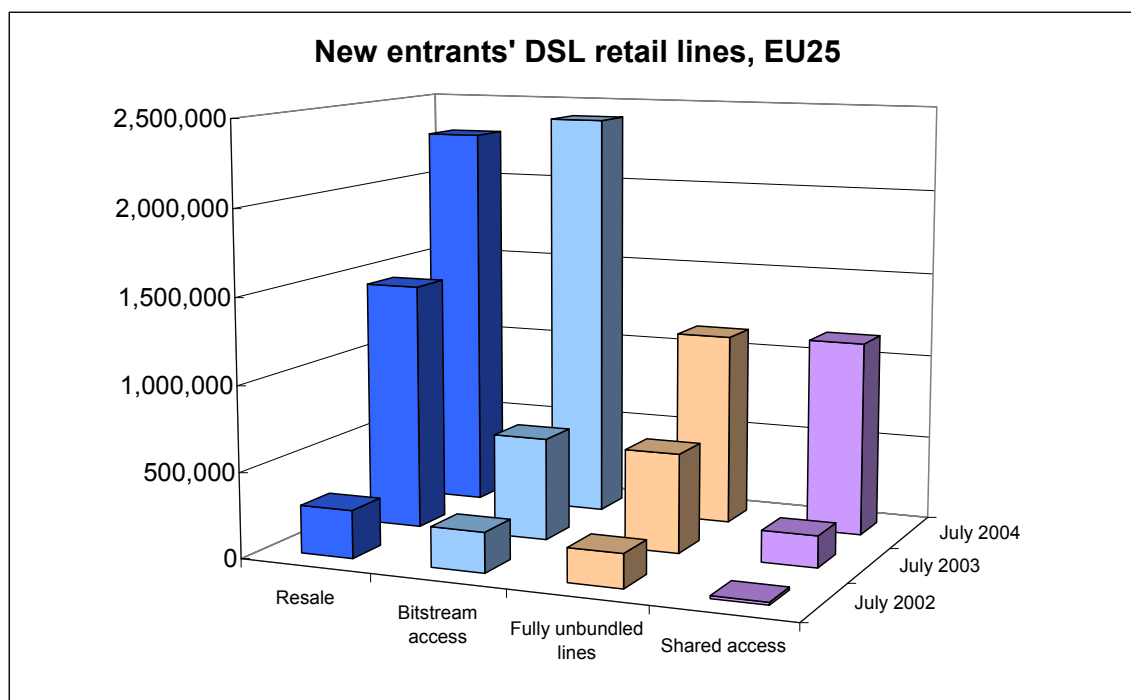
Broadband technologies

DSL technologies continue to account for an increasing share of the overall broadband market, and now stand at 77.7% of total broadband lines (EU25), up from 73% in 2003 (EU15), with cable modem access lines making up 19.6%, a drop of 4.6 percentage points on last year. Other technologies such as satellite, fibre and wireless local loop account for the balance of 2.7%, an increase on last year’s figure.



Source Commission services based on COCOM data

The table below shows the distribution of new entrants’ DSL lines by type of access. In July 2003, competition was based on service products, with resale lines and bitstream access accounting for 73% of new entrants’ DSL lines. A year later bitstream and resale lines still represent 67% of the new entrants’ DSL lines but the more rapid growth of fully unbundled and shared access lines over the year (197%) compared to growth for bitstream and resale (125%) suggests that competition is moving from service-based products to network-based competition.



Source: Commission services based on COCOM data

Bitstream

There was significant growth of 237% in wholesale bitstream access during the year, from 795 071 lines in July 2003 to 2 681 398 lines in July 2004. Wholesale bitstream products consist of the provision of transmission capacity by the incumbent in such a way as to allow new entrants to offer their own, value added DSL services, to their clients. Having overtaken pure resale, bitstream access is now the primary means of wholesale access used by new entrants to provide retail DSL services, and accounts for 34% of DSL services.

Local loop unbundling

A particularly noteworthy development is the significant increase of 110% in wholesale unbundled local loops in the EU15, from 1.8 million in July 2003 to more than 3.8 million in July 2004.²⁹ This increase comprises approximately one million fully unbundled lines and one million shared access lines. The number of shared access lines increased 510% from 191 500 to 1 168 828 lines, the biggest increases being in France and Sweden (shared access) and Italy, Germany, Austria and Finland (fully unbundled).

While shared access lines are used to provide broadband services at retail level, not all of the fully unbundled lines are used for broadband. For example, in the two Member States where the number of fully unbundled lines is highest, Germany and Italy, only 36% (Germany) and 42% (Italy) of the fully unbundled lines are used for the provision of retail broadband services. Nevertheless, the increase in the number of unbundled lines being used to supply broadband services at retail level is very significant.

²⁹ There are no data available in the NMS where LLU is offered

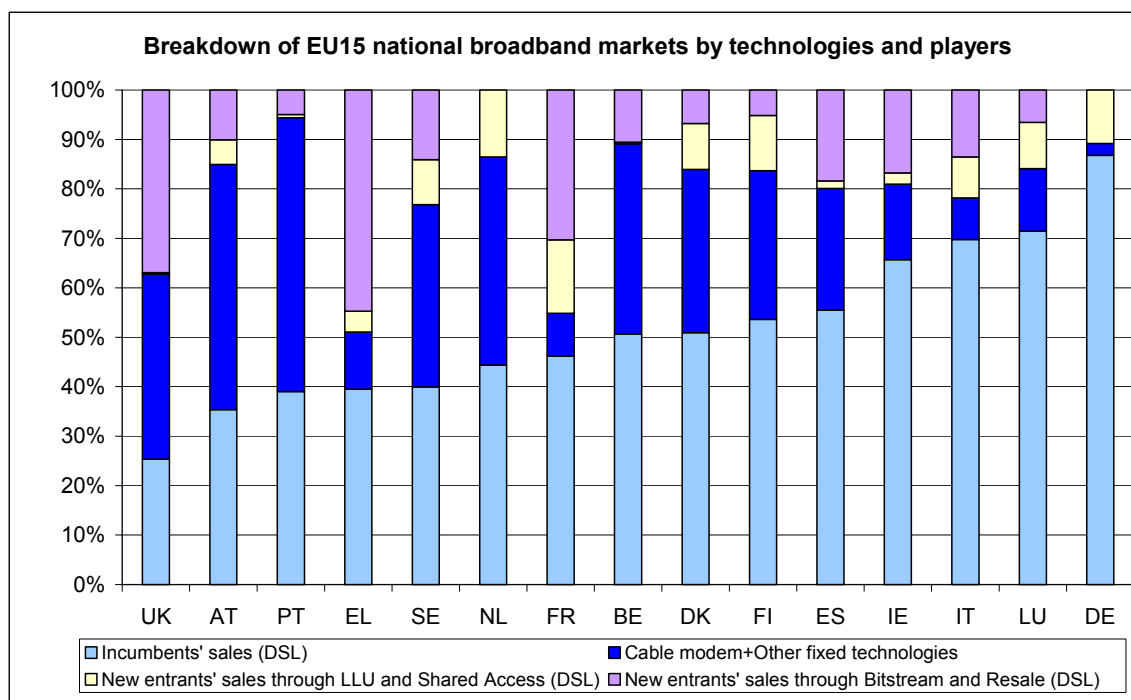
Prices for unbundled lines have decreased over the year, with the average (EU15) charge for a fully unbundled line (monthly rental plus the connection fee amortised over the year) falling from €17.20 to €16.70. A more significant drop was seen in relation to shared access, where the average EU15 price fell from €10.98 to €9.01, a drop of almost 18%. This comes on the back of a reduction of 28% the previous year. Significant reductions in the charge for shared access have taken place this year in Denmark, Germany and the United Kingdom.

The growth in LLU over the last year is encouraging, as it appears to indicate that new entrants are beginning to climb the investment ladder. Where alternative competing platforms are not viable, LLU provides the opportunity for infrastructure-based competition. However, until last year, the growth of LLU, particularly for broadband purposes, had been disappointing. A combination of complexity, in terms of product and process development, and dispute resolution, as well as unattractive wholesale prices, had halted progress. The improved performance this year is possibly a result of the more optimistic outlook and the fact that appropriate regulatory action has been taken in a number of Member States.

Competition in the broadband market

Competition in the broadband market intensified during the year, although at a slower pace than the year before. The new entrants' share of the broadband market at EU15 level has continued to rise and stood at 43.7% in July 2004, an increase of 2.4 percentage points on the previous year. The new entrants' share of the DSL market, a technology which, as stated, now accounts for 78% of the overall broadband sector, has also increased and is now at 30.6%, up 8 percentage points in the year.

The table below examines incumbent and new entrant market shares according to technologies in each of the Member States. It reveals different patterns of broadband competition at national level. For example, viable alternative platforms, such as fibre and upgraded cable TV networks exist in some Member States. This is the case in Austria, Belgium, Denmark, the Netherlands, Sweden and the United Kingdom. Most of these Member States are in the highest bracket in terms of penetration rates, suggesting that the pre-existence of alternative infrastructure competition has been a key factor in the rollout of broadband.



Source: Commission services based on COCOM data³⁰

Where viable alternative infrastructure does not exist, or is relatively scarce, competition largely depends on access to the incumbent's facilities. While penetration rates are generally lower in countries without competing alternative infrastructure platforms, there are strong indications in some Member States that access-based competition is growing as regulators intervene in the market to ensure open, non-discriminatory access for new entrants. New entrants have gained a strong foothold in the United Kingdom, largely based on resale, where the incumbent's market share is the lowest in the EU. Infrastructure competition is also strong there; however, LLU has yet to make a major impact although there are signs of increased activity in this segment of the market. In Germany, on the other hand, the incumbent's market share remains very high and alternative infrastructure competition is limited.

A good example is France, where the new entrants hold one of the highest shares of the DSL market, and consequently the overall broadband market. Broadband penetration has risen from 4.05% to 8.24% as at 1 July 2004, primarily driven by competition based on shared access and bitstream. France now has one of the lowest monthly rental prices in the EU for shared access and the French regulator (ART) has intervened strongly in relation to potential margin squeeze issues.

Clearly a variety of options are being used to drive the competitive rollout of broadband services, ranging from bitstream to LLU to alternative platforms. To some extent these options can complement one another. Where viable alternative infrastructure does not provide sufficient competition, regulators will need to apply appropriate remedies which may include rights of access through wholesale products, such as bitstream, making sure that potentially anti-competitive pricing practices, such as margin squeeze, are avoided.

³⁰ In Portugal the incumbent owns 73% of cable modem lines

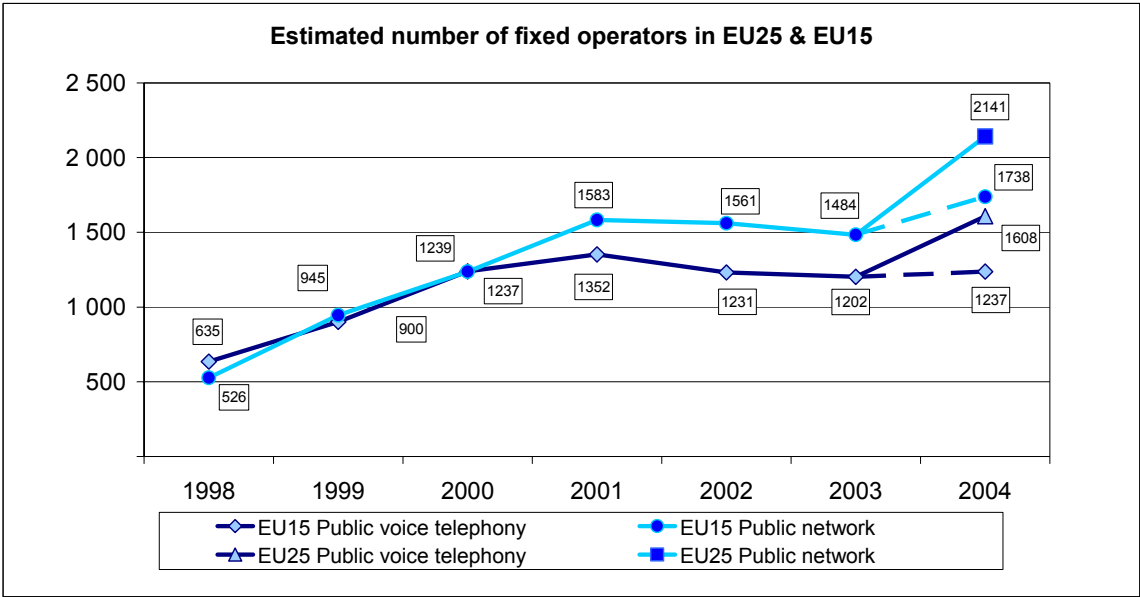
Following a competition investigation on the basis of Article 82 of the Treaty, Deutsche Telekom committed itself, vis-à-vis the European Commission, to terminating a presumed margin squeeze as regards broadband access by reducing its tariffs for shared access (line sharing) with effect from 1 April 2004.³¹ The Commission will actively monitor the development of competition in the sector and intervene where appropriate to ensure and protect competition.

FIXED VOICE SERVICES

Fixed voice telephony revenues have continued to decline slowly. Given the corresponding increase in mobile revenues and penetration, the decline in fixed revenues could, in part, be due to fixed-to-mobile substitution. However, there are indications that innovation, driven by intensifying levels of competition, both within the fixed segment and across mobile and fixed, including the arrival of new technologies such as voice over internet protocol and fixed-to-mobile convergence products, will possibly slow down the decline in fixed voice revenues over time.

Market share and new entrants

Despite this slow decline, there has, for the first time in a number of years, been an increase in the estimated number of players entering this market³². This reflects the more optimistic outlook for the fixed-line sector and will have an impact on the competitive landscape.



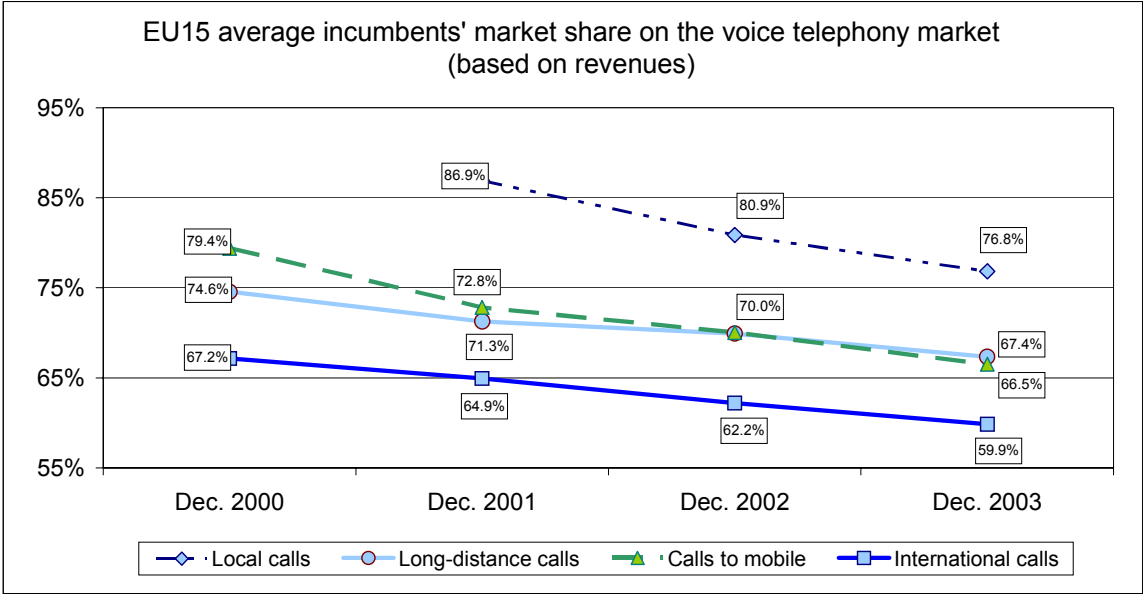
Source: Commission services based on NRA data

As the graph below shows, the decline in incumbent market share is continuing across all fixed segments. It is also clear that the rate of this decline remains steady and that incumbents continue to exercise a very strong hold on the local call segment. There is also a strong

³¹ Commission Press Release IP/04/281
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/281&format=HTML&aged=1&language=EN&guiLanguage=en>

³² As a result of the implementation of the new regulatory framework, it will become increasingly difficult to get precise figures on the number of authorised operators.

correlation between the timing of liberalisation of the market and incumbent market share. This is particularly evident for the new Member States, where the incumbent's share, again most notably in the local call segment, is over 90% in many cases.

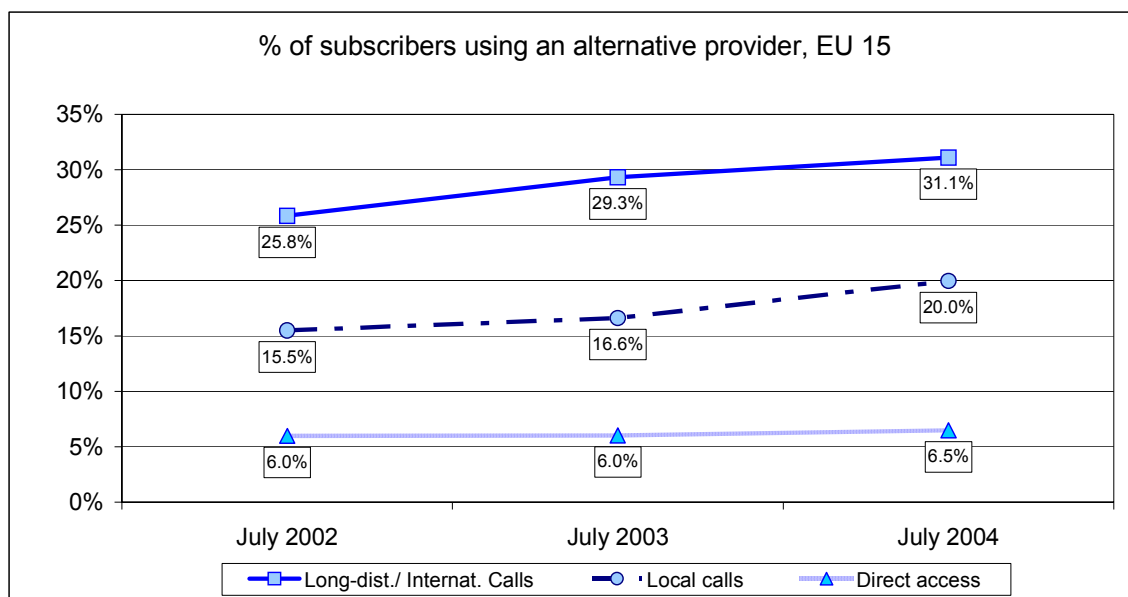


Source: Commission services based on NRA data

Competition in the fixed market is still largely service based, with new entrants providing services via indirect access methods such as carrier selection (CS) or carrier pre-selection (CPS). In fact only 6.47% of consumers are using direct access³³ to an operator other than the incumbent. Direct access competition is relatively strong however in Denmark (18%), Spain (11%) and the United Kingdom (16.9%).

The table below suggests that there has been an increase in subscribers opting for carrier pre-selection or carrier selection. 31% of subscribers now use an alternative operator for long distance or international calls. For local calls the figure is almost 20%.

³³ Services provided over proprietary infrastructure or over fully unbundled lines



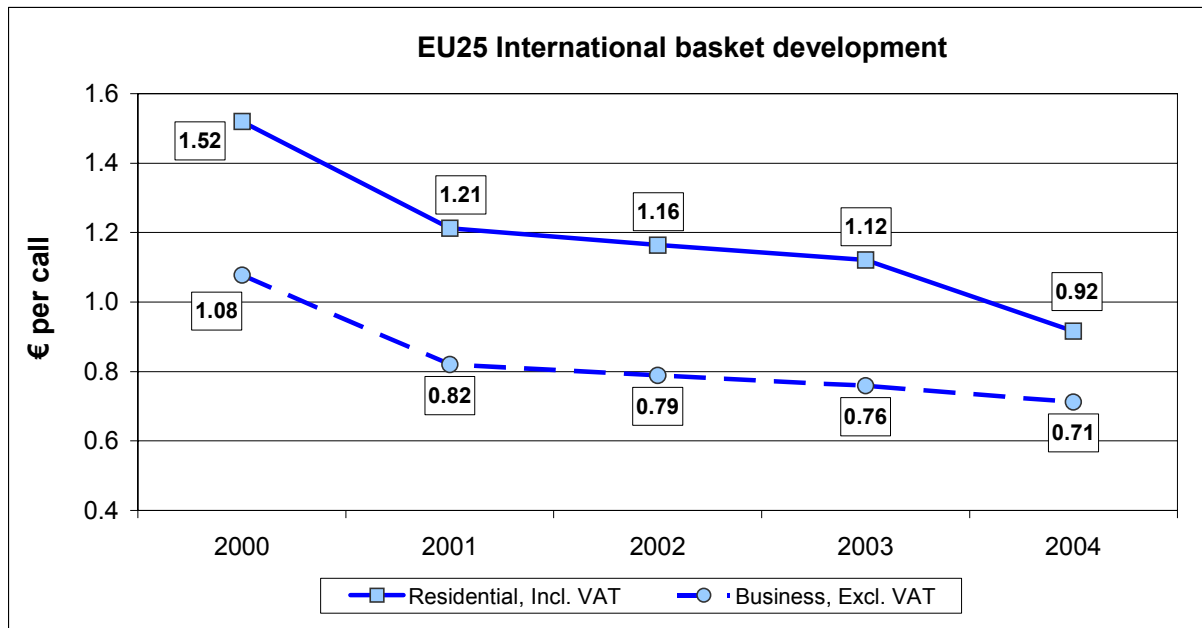
Source: Commission services based on NRA data

Pricing³⁴

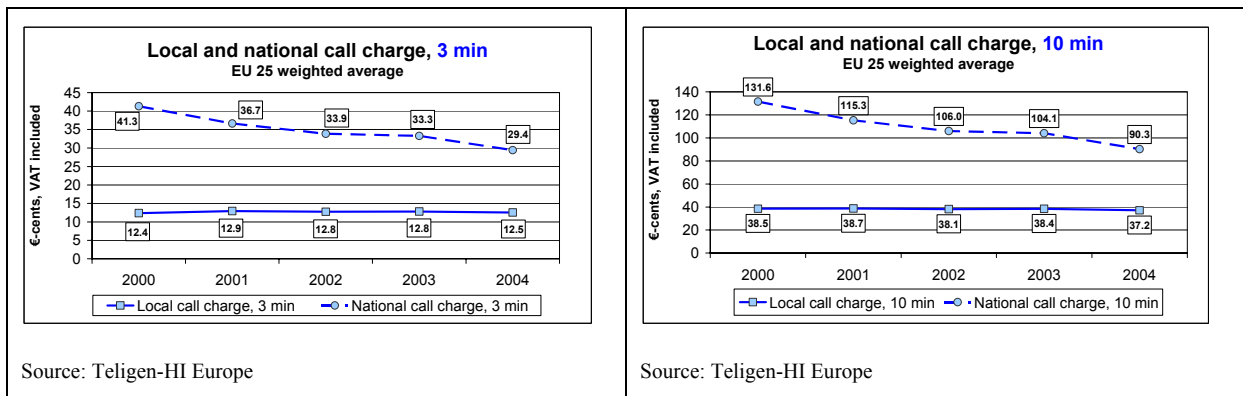
Although the major rate of decline seen in the early years of liberalisation has slowed, significant reductions have occurred in some segments during the year. In terms of assessing price changes, operators' list prices are becoming less relevant, as they increasingly offer more diverse and tailored pricing packages, such as bundled line rental and call charges, which are aimed at customer retention.

Different trends for local, national and international calls are evident. Reductions for national calls have been quite significant and, it appears, have even accelerated during this year. Average prices for a 3-minute national call have fallen by almost 12%. The average price for a similar 10-minute call has fallen by 13.5%. Prices for an international call for a residential user have fallen by 18%.

³⁴ Information on prices refers to the standard prices charged by the fixed incumbent operators of the EU25 Member States. However, standard prices charged by the incumbents are not necessarily the cheapest ones, as different price schemes are also made available and new entrants may offer cheaper prices.



Source: Teligen-HI Europe



Source: Teligen-HI Europe

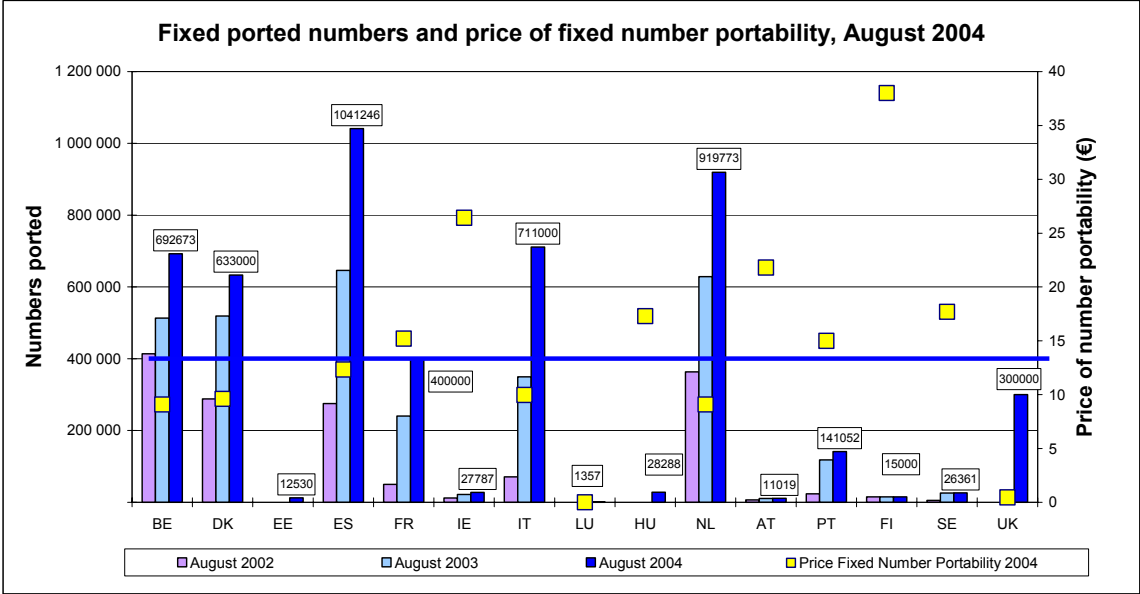
Source: Teligen-HI Europe

These trends suggest that there is an intensifying level of competition in the fixed market for national and international calls. The reductions are consistent with other developments identified in this document such as the overall declining value in fixed telephony revenues, the increasing number of subscribers opting for new entrants, declining incumbent market share and the increase in ported fixed telephone numbers (see below). However, it is also evident, as in previous years, that competition in the local calls market remains weak. However, of the general increase in the number of subscribers using a new entrant player, local calls saw the biggest growth. Also, the decline in incumbents' market shares is greatest for the local call segment. These gains for entrants are clearly based on indirect access service-based competition such as CPS and may also reflect regulatory intervention in relation to CPS.

Fixed number portability

Fixed number portability (FNP) enables subscribers to retain their number when they move from one operator to another. Although it was slow to take off, there has been a major increase in numbers ported during this year, suggesting a more competitive environment where customers are changing operator in greater numbers.

Almost 5 million numbers have now been ported in the EU. This is a 61% increase on the previous year. Spain, the Netherlands and Italy show the highest values in absolute terms.

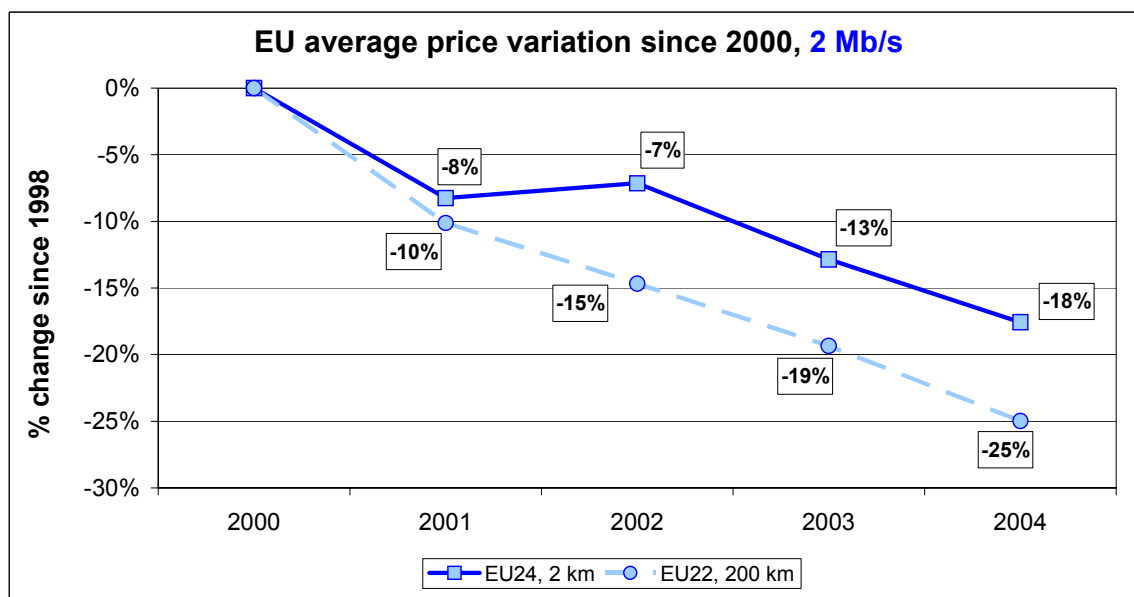


Source: Commission services based on NRA data

Leased lines

The downward trend in leased line prices³⁵ has continued in 2004 for all categories with the exception of 34 Mb/s 2km, for which prices have remained stable since 2000. The table below shows that 2Mb/s prices have continued to fall and, for 200 km leased lines, prices are 25% cheaper than in 2002.

³⁵ EU24: all EU Member States except Finland. EU22: all EU Member States except Finland, Luxembourg and Malta. Information on leased lines prices in the new Member States (with the exception of Malta) is available since 2000 only. Data for Malta refer to 2003 and 2004 only. All pricing information at EU level refers therefore to the EU24 weighted average for the years 2000, 2001 and 2002 and to the EU25 average since 2003.



Source: Teligen-HI Europe

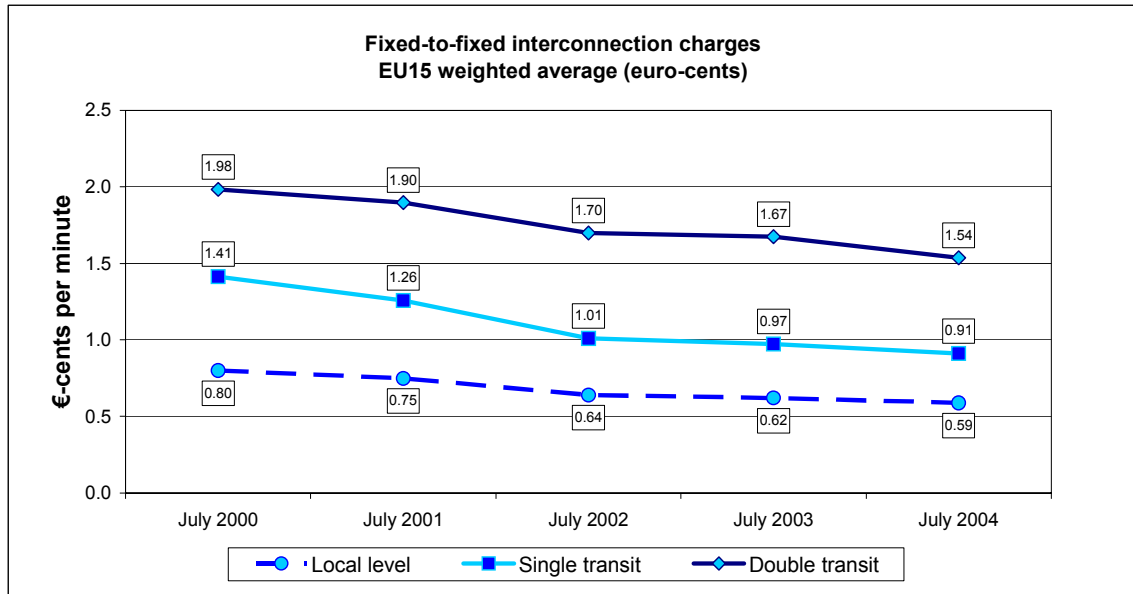
INTERCONNECTION

Fixed interconnection

In the fixed sector the downward trend in interconnection tariffs has continued. The table below shows slight reduction at all levels, and especially for double transit termination.

Among this generalised downward trend, the major changes since last year have occurred in the United Kingdom and Belgium for local level termination, Sweden, Germany and Belgium for single transit and Greece, Germany and Portugal for double transit call termination.

As with retail charges, there is a strong correlation between the levels of the charges and the timing of liberalisation of the market. Interconnection charges, for most of the new Member States, are significantly higher than those for the EU15 (74% higher for local level, 60% for single transit and 32% for double transit).

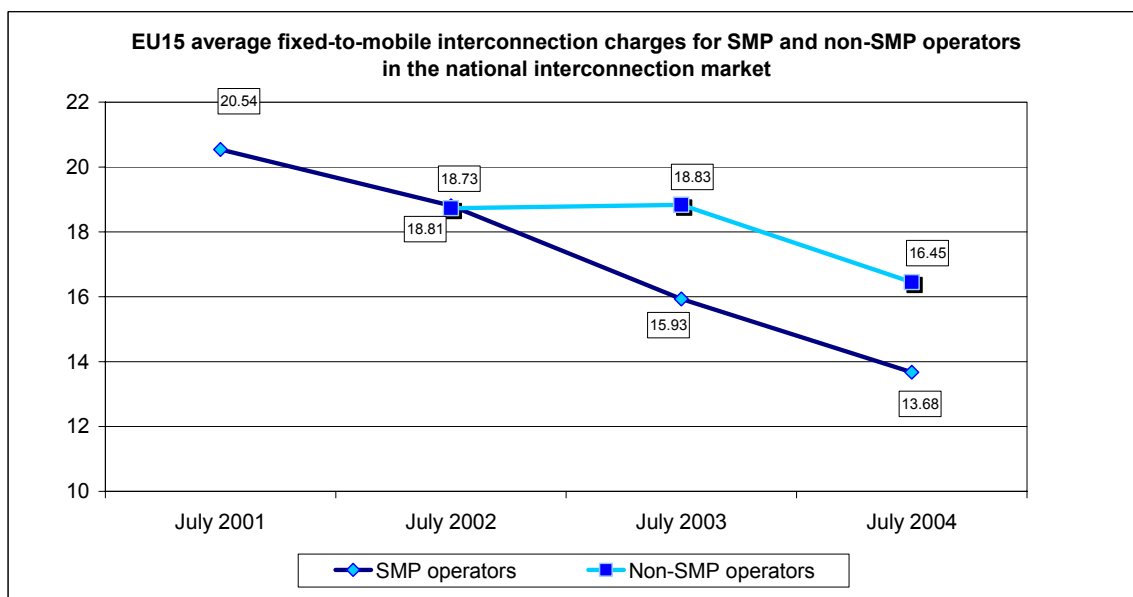


Source: Commission services based on NRA data

Mobile interconnection

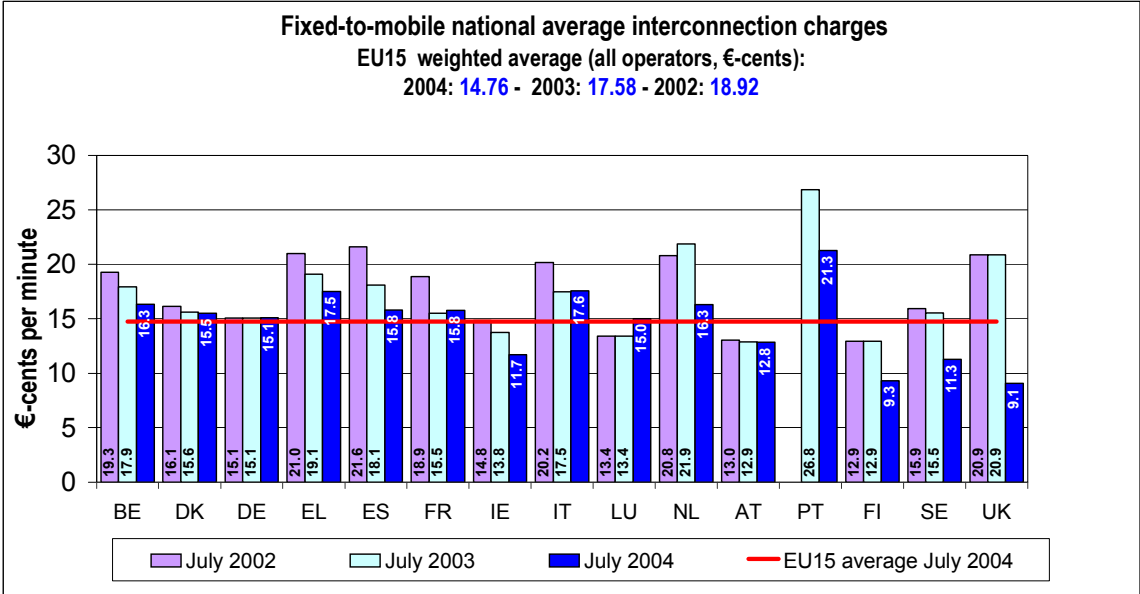
In the mobile sector, on the other hand, concerns have been expressed for some time that, in many cases, mobile call termination rates bear little relation to costs. In response to regulatory intervention there has been a welcome downward trend in these rates over the last year. Data for the EU15 show that the average fixed-to-mobile call termination rate for operators with SMP has fallen by 14% between July 2003 and July 2004.

The difference in charges between the SMP and non-SMP operators has arisen mostly as a result of regulatory intervention by NRAs to bring about cost-orientated charges for SMP operators. It should be noted that, even for non-SMP operators, interconnection charges have been sometimes set by the NRAs, for example as a result of intervention on the basis of a competition enquiry or setting a price ceiling to avoid excessive tariffs.



Source: Commission services based on NRA data

As the table below shows, significant reductions took place in many Member States, with the biggest being in the United Kingdom, with more than a 50% reduction. There have also been significant reductions in Finland, Sweden and the Netherlands. These charges are still eight times the equivalent rate (double transit) on the fixed network. Further reductions may follow from the market analysis procedures currently under way in Member States.



Source: Commission services based on NRA data

SUMMARY - CONSUMERS

The trends emerging from the market for 2004 suggest that the consumer continues to make significant gains from an increasingly competitive sector, although concerns remain as to the slow rate of progress in some areas, for example, competition in local fixed voice services. In general, prices continue to decline in the fixed sector and more players are now entering the market.

Given the later liberalisation of the markets, consumers in new Member States have not yet experienced the gains of the EU15. Competition is relatively under-developed in most of these countries. For many of the key indicators, such as pricing and broadband rollout, there are significant gaps between the old and the new Member States. A notable exception to this is for mobile phone penetration, where the rates are high, reflecting, perhaps the relatively under-developed penetration of fixed networks.

Prices for international and long-distance national calls in the EU25 have fallen by 40%³⁶ and 30% respectively since 2000. However, there has been a slight 1% increase in the price of short local calls. An increasing number of consumers, more than 31%, are opting to use new entrant operators for international and national calls, and the increase in ported fixed numbers signals that consumers are moving from one operator to another in greater numbers. Competition in the local call segment is relatively weak and prices appear to have stabilised here although, the number of consumers using an alternative operator for local calls increased

³⁶ Decrease since 2000 in the average price of an international call in all EU25 Member States except Malta, for which data are only available since 2003.

by 3.4% in the year. Regulatory intervention in relation to CPS is paying dividends in terms of increasing consumer choice. To date, however, these gains have not translated into significant price reductions at local level.

The consumer take-up of broadband services is one of the major developments in the year and indicates that the consumer is making use of the greater choice in terms of services and providers.

The declining market shares of leading mobile network operators, as well as the growing penetration and the increase in ported mobile numbers, suggest that the consumer is enjoying the benefits of an increasingly competitive environment. However, international roaming rates appear high. Further regulatory action on wholesale mobile call termination rates should lead to knock-on consumer benefits at the retail level. Over time, the launch of 3G services will stimulate further competition in the mobile sector and bring a new range of innovative data services to consumers.

COMMISSION STAFF WORKING PAPER

**EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION AND MARKETS 2004
(10TH REPORT)**

ANNEXES

ANNEX 1

ARTICLE 7 FRAMEWORK DIRECTIVE PROCEEDINGS

ARTICLE 7 FRAMEWORK DIRECTIVE PROCEEDINGS

This section of the report focuses on the main issues that the Commission has dealt with under the Article 7 procedures and the main regulatory trends observed, since July 2003.

INTRODUCTION

Notifications by national regulatory authorities of draft measures under the Article 7 procedures commenced in August 2003. By 27 October 2004, 103 notifications from 10 Member States (Austria, Greece, Finland, Hungary, Ireland, the Netherlands, Portugal, Slovakia, Sweden, the United Kingdom) had been received. Of these, 101 have been closed. The Commission has issued 57 “comments” or “no comments” letters, 3 “serious doubts” letters; considered 2 notifications to be “incomplete” and issued 3 veto decisions³⁷.

Ensuing Commission decisions (incompleteness, comments or veto) were issued with the main objective of harmonising the regulatory landscape for e-communications throughout the EU, i.e. providing guidance to NRAs in their market analyses whilst addressing policy and implementation issues in order to ensure a consistent approach based on EU competition law principles in all Member States. Experience to date shows that when adopting their final measures NRAs have, in most cases, taken utmost account of the comments issued in Commission decisions.

The Commission services have held 62 pre-notification meetings with NRAs from 15 Member States (including two of the new Member States: Hungary and Slovakia) in order to provide guidance on intended notifications. This practice has laid the foundations for a productive and solid cooperation between the Commission and the NRAs, and the latter have for the most part taken into account guidance provided by the Commission’s services.

The overall picture resulting from these proceedings is that regulation in line with competition law principles has become more focussed in addressing identified market failures, and has been rolled back in a number of cases. NRAs have generally tended not to deviate from the markets defined in the “Recommendation”³⁸. However, two markets in particular have been subject to a different approach: the wholesale broadband access market and the market for broadcasting transmission services.

Another trend is a tendency to impose the full set of remedies provided for in the new regulatory framework on undertakings with significant market power (“SMP”). In some cases, the NRAs have adopted an asymmetric approach to remedies, i.e. imposed different remedies on SMP undertakings in similar markets within their Member State.

Notifications received so far related to all but one (i.e. the wholesale national market for international roaming on public mobile networks – market 17) of the markets identified as susceptible to regulation in the Recommendation.

³⁷ Note that those letters/decisions can concern several notified draft measures.

³⁸ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 114, 8.05.2003, p. 45 (the “Recommendation”).

ISSUES RELATED TO THE ARTICLE 7 PROCESS

Parallel national and Community consultations

Several NRAs have conducted their national and Community consultations in parallel³⁹. In such cases it is difficult for the Commission to consider properly the comments of interested parties (e.g. industry, consumer associations and national competition authority) which are provided during the national consultation. These comments may affect the Commission's assessment of the compatibility of the draft measure with Community law and, if applicable, the appropriateness and proportionality of the proposed remedies. In addition, in the event that the national consultation results in significant changes to the original notification, the NRA risks having to re-notify the measures pursuant to Article 7 of the Framework Directive.

For these reasons, the Commission encourages NRAs to conduct sequential consultations at national and Community level.

Two-stage notifications

Some NRAs have split the market review into two stages – the first pertaining to the market definition and SMP assessment, the second to the remedies⁴⁰. The Commission invites such NRAs to notify the proposed remedies also within a short period.

The Commission continues to monitor whether all NRAs meet their notification requirements with regard to decisions in the context of access and interconnection disputes. The Commission therefore recalls that as a matter of principle all measures falling within the scope of Articles 15 or 16 of the Framework Directive, Articles 5 or 8 of the Access Directive or Article 16 of the Universal Service Directive are subject to Article 7 of the Framework Directive.

Notification ahead of transposition

In respect of a review of mobile call termination markets, an NRA defined the relevant market appropriate to national circumstances and carried out its market analysis prior to transposition of the EU regulatory framework into national law⁴¹.

The Commission considers that an NRA is entitled to do so on the basis that (i) the validity of its assessment is based on the assumption of correct transposition and (ii) the time period between the market reviews and the adoption of the final measure is kept as short as possible. Accordingly, where any material/substantial elements in the NRAs' analysis change as a result of incorrect transposition of the framework or delayed adoption of the final measure, the resulting measure should be re-notified as a draft measure under Article 7(3) of the Framework Directive.

³⁹ Cf. cases UK/2003/0019, 32-34, 35-39, 40, UK/2004/41, 45, 47, 65; AT/2004/0044, 63, 74, 90; IE/2004/0046; SE/2004/0048, 49, 50, 51, 52.

⁴⁰ Cf. cases IE/2004/0073, PT/2004/0053-0061, AT/2003/0018 (NB: the latter only covered market definition, no market analysis nor remedies)

⁴¹ Cf. case EL/2004/0078

Disapplication of national legislation

In a notification regarding mobile call termination (market 16), the NRA was faced with national legislation contravening the EU regulatory framework⁴². The Commission services will monitor closely the situation where the NRA's functions, powers and duties flowing from the EU regulatory framework are unduly and manifestly restricted due to conflicting national provisions, and may call on the NRA concerned to disregard the conflicting national provisions (on the basis of case law of the Court of Justice on the primacy of EC law). In addition, the Commission may envisage using its powers in accordance with Article 226 of the EC Treaty with respect to the conflicting provisions of national law (to the extent that infringement proceedings have not already been launched).

ISSUES RELATED TO MARKET DEFINITION

“Three criteria” test

The Commission underlines that in cases where the NRA identifies an additional market or excludes a market in relation to the “recommended” markets, the NRA concerned is expected to verify whether the three criteria are, or are not, met and to notify the Commission accordingly. This three criteria test should in general be prospective in nature and not rely on purely historic data. NRAs are expected to analyse all markets listed in the Recommendation⁴³.

It is considered that for the markets listed in the Recommendation, the three criteria test set out in recital 9 of that Recommendation - i.e. the presence of high and non-transitory barriers to entry, whether or not the structure of the market is moving towards effective competition (dynamic aspects), and whether the application of competition law alone would adequately address the market failure concerned - has already been applied by the Commission.

Wholesale broadband access (market 12)

To date, four NRAs have included broadband access via cable within the broadband access market⁴⁴. Two of them have considered that the indirect pricing constraint exercised by cable-based services at the retail level justifies their inclusion in the wholesale broadband access market⁴⁵, despite the absence of offers in the relevant market.

The Commission draws attention to the definition of wholesale broadband access in the Annex to the Recommendation, which covers both (PSTN) bitstream access and “wholesale access provided over other infrastructures, *if and when they offer facilities equivalent to bitstream access*”⁴⁶.

Therefore, regulators should examine carefully the technical, practical and economic feasibility for cable operators to offer facilities equivalent to bit-stream access and where this is so, provide evidence of an equivalent wholesale offering on the part of cable operators - if

⁴² Cf. case FI/2004/0031

⁴³ Cf. cases UK/2003/0004 and UK/2003/0005

⁴⁴ Cf. cases UK/2003/0032-34, FI/2002004/0062, SE/2004/0083, IE/2004/93

⁴⁵ Cf. cases UK/2003/0032-0034 and IE/2004/0093

⁴⁶ Italics added

the market is to include cable-based services. References to indirect constraints - for example, through substitutability at retail level - are in general to be considered at the level of the SMP assessment and not as part of the market definition.

Broadcasting transmission services (market 18)

So far, three NRAs have notified the market for television and radio broadcasting transmission services and all three split this market by platform⁴⁷. All three consider that cable transmission does not warrant *ex ante* regulation, mainly due to must-carry obligations and the limited negotiating power of cable operators. As to the transmission of broadcasting services via satellite, both the Austrian and Finnish NRAs excluded these from their market analysis since no such providers are subject to their jurisdiction. The Commission invites the NRAs to have regard to any future Commission decision on trans-national satellite broadcasting transmission services under Article 15(4) of the Framework Directive and to take this decision into account in their market analysis.

Voice call termination on individual mobile networks (market 16)

The seven NRAs which have so far notified these markets have designated all the terminating operators as having SMP⁴⁸. Indeed, according to the Recommendation, each individual mobile network constitutes a relevant market for voice call termination. This implies that each terminating operator is likely to be found to have SMP and thus to be regulated. In terms of remedies, some NRAs have applied asymmetric remedies⁴⁹. Sweden for example imposed lighter cost control obligations on newly established operators.

The Commission services recall that termination of voice calls on 3G networks is not as such to be considered as a novel service or newly emerging market, but rather a product that in principle should be part of the market for voice call termination on individual mobile networks.

ISSUES RELATED TO SMP ASSESSMENT

The Commission has so far used its veto powers three times: twice against draft measures notified by the Finnish regulator, Ficora, and once against a draft measure notified by the Austrian regulator, TKK.

The first veto decision concerned the markets for publicly available international telephone services provided at a fixed location for residential and non-residential customers in Finland. The Commission contested the methodology followed by the NRA in reaching the conclusion that there were no SMP operators in either of the markets (residential and non-residential). The Commission concluded that there was both a lack of evidence to support the finding of the absence of SMP and a lack of consideration of existing remedies. The Commission went on to recommend that the Ficora conduct a fresh market analysis looking into a number of indicators such as the evolution of market prices over time, the nature and intensity of barriers

⁴⁷ Cf. cases AT/2003/0018, IE/2004/0042 and FI/2004/0076

⁴⁸ Cf. cases FI/2003/0031, UK/2003/0040, SE/2004/0052, IE/2004/0073, EL/2004/0078, AT/2004/0099 and HU/2004/0101

⁴⁹ Cf. cases FI/2003/0031, UK/2003/0040, SE/2004/0052, EL/2004/0078

to entry and, in particular, whether a finding of lack of SMP in a defined retail market was due principally to existing regulatory obligations.

In the second veto decision, the Commission did not agree with the NRA's draft decision according to which the mobile operator with the highest market share in the relevant market had SMP in the market for access and call origination on public mobile telephone networks. The Commission came to the conclusion that the evidence provided by Ficora and the developments in the Finnish mobile market did not support the finding of SMP. In the view of the Commission, the recent developments at retail level and the ability of service providers to conclude wholesale agreements point towards sufficient competition in the Finnish market for mobile access.

In the third veto decision, the Commission challenged the proposal of the Austrian NRA to cease regulating wholesale transit services in the fixed public telephone network. In particular, the Commission did not agree with the NRA's approach to including operators which no longer demand transit services in the market definition. In the Commission's view this would have underestimated the incumbent operator's market power (and thus potential SMP), in particular vis-à-vis operators which cannot self-provide transit as long as they do not have a real commercial alternative. Further, insufficient consideration was given by the NRA to the possibilities that would be open to operators currently dependent on regulated transit services in the event regulation were lifted, and which have insufficient traffic volumes to justify further roll-out of their networks (lack of green-field approach). The Commission's veto decision does, however, provide for the re-examination of the market by the NRA.

ISSUES RELATED TO PROPOSED REMEDIES

Asymmetric/symmetric remedies

Four NRAs in several cases have imposed asymmetric obligations under the Access Directive⁵⁰. Indeed, obligations imposed under the Access Directive should be based on the nature of the problem identified, proportionate and justified.

In circumstances where it is likely that the market failure identified will be the same in all markets (for example 100% market share in termination markets, high barriers to entry and the economic non-viability of installing a competing local access infrastructure), and where an NRA intends to impose different remedies on different undertakings within similarly defined markets, such differential treatment should be adequately reasoned.

Remedies imposed outside the relevant market

Within its review of market 16, an NRA proposed to impose a non-discrimination obligation with respect to GSM gateways, which the Commission considered outside the scope of the relevant market⁵¹. The Commission is of the view that, in principle, the proposed obligations should pertain to a finding of dominance within the scope of the relevant product market.

⁵⁰ Cf. cases FI/2003/0020, FI/2003/0021, FI/2003/0022, FI/2003/0025, FI/2003/0028, FI/2003/0029, FI/2003/0030, FI/2003/0031, SE/2004/0050, SE/2004/0052, EL/2004/0078, PT/2004/0091 and PT/2004/0092.

⁵¹ Cf. case EL/2004/0078

However, in specific circumstances, NRAs may impose proportionate and justified obligations in an area outside, but closely related to, the relevant market under review, if such imposition constitutes (i) the most appropriate, proportionate and efficient means of remedying the lack of effective competition found on the relevant market, or alternatively (ii) an essential element without which the obligation(s) imposed on the relevant market would be ineffective.

Obligations imposed under Article 5(1) of the Access Directive

Two NRAs have used Article 5(1) of the Access Directive to impose obligations unconnected to a finding of SMP⁵²: the first was to impose under Article 5(1)(a) a general horizontal obligation to ensure end-to-end connectivity in the Netherlands; the second was to impose on a digital-platform-operator, under Article 5(1)(b), the provision of access to certain technical broadcasting services (beyond API's) as well as accounting separation, reporting obligations and the obligation to publish charges.

The Commission considers that NRAs must use Article 5(1) of the Access Directive with caution, taking into account the strict requirements for the application of this provision, namely that (i) access and interconnection and interoperability of services shall only be mandated where appropriate, (ii) NRAs must exercise their responsibility in a way that promotes efficiency and sustainable competition and gives the maximum benefit to end-users and (iii) conditions imposed shall be objective, transparent, proportionate and non-discriminatory.

SUMMARY

15 months after NRAs began to notify draft regulatory measures to the Commission, it is apparent that cooperation between NRAs and the Commission services responsible for the electronic communications consultation mechanism is working well. Since the market analysis under the new regulatory framework is based on EU competition law principles, cooperation between the NRAs and their respective NCAs is also very important. To date, the Commission is of the view that such cooperation could further improve, however.

As regards the markets which are to be analysed and notified by the NRAs pursuant to Article 7 of the Framework Directive, the Commission would like to reiterate that it operates on the assumption that the three criteria test is met for all markets listed in the Recommendation, but that deviations from the market definition in the Recommendation are possible when appropriately justified in the relevant notification, on the basis of the prevailing market structures in the country in question. When assessing such a notification, the Commission will take into account past notifications by other NRAs regarding similar markets.

As far as the SMP assessment is concerned, it is fair to say that the market shares identified by NRAs remain an important indicator for the finding or non-finding of SMP. However, the Commission would like to stress again that the existence of a dominant position cannot be established on the sole basis of large market shares.

⁵² Cf. cases NL/2003/0017 and UK/2003/0019

ANNEX 2

IMPLEMENTATION IN THE MEMBER STATES

BELGIUM

TRANSPOSITION

The new EU regulatory framework has not yet been transposed in Belgium. A draft law has been finalised and adopted by the Council of Ministers following a consultation procedure. This draft has been submitted to the Parliament. The Commission has already made a formal application to the Court of Justice asking it to condemn Belgium, at the end of the infringement proceeding started in October 2003, for failing to communicate the necessary transposition measures for the Directives.

This Report discusses therefore the overall progress in the telecommunications markets in Belgium with a particular emphasis on the implementation problems of the old regulatory framework. It seems, however, that some of these problems continue to exist under the new framework as the issue of the universal service fund activation which has created a number of concerns in the past. Given that the draft legislation could be modified during the Parliamentary process, this Report will not discuss in detail points of concern relating to the draft legislation which is submitted to the Parliament.

MARKET OVERVIEW

The fixed line incumbent retains its leadership in the local and long distance markets with its market share estimated in December 2003 at 81.1% (local calls market) and at 60.8% (market for international calls), based on retail revenues. A similar situation exists in the market for all local calls (including phone calls and calls to Internet) where the incumbent's market share is around 81.1%. The mobile penetration rate is estimated to be around 84%, an increase on last year, while the market share of the subsidiary of the incumbent fixed operator was 51%. The broadband penetration rate was estimated in July 2004 to be around 14%, which among the highest in the EU

NATIONAL REGULATORY AUTHORITY

Following the adoption of the BIPT Act in 2003, BIPT, the Belgian regulator, enjoys greater independence, however, concerns still remain and the industry would welcome further guarantees as to its independence. These concerns relate to a provision in the Act which gives the right to the Council of Ministers to suspend a decision of the BIPT on matters to be determined by a Royal Decree and when they consider such a decision to be illegal or contrary to the public interest. However, to date, no such decree has been adopted

It appears that, following the adoption of the new legislation, the respective broadcasting regulators for the Flemish and the French-speaking Communities, will be responsible for supervising the market for broadcasting services.

The draft electronic communications law which aims at transposing the new EU regulatory framework has raised concerns among the alternative operators as to whether the BIPT will be vested with sufficient powers to regulate the markets effectively. In particular, the issue as to whether BIPT would be granted sufficient powers to control retail prices of the incumbent, to

decide on the existence of an unfair burden for the provision of universal service and to define cost methodologies have been questioned.

It is reported that the BIPT does not have all of the powers necessary to enforce its decisions. However, under the BIPT Act, the Council may impose an administrative fine for a violation of the laws or any regulatory decision implementing the framework which can range between 0.5% and 5% of the last annual turnover in the relevant market, up to a maximum of € 12.5m. According to the alternative operators, it appears that the BIPT is reluctant to impose administrative fines and penalties on the incumbent operator as the BIPT, in practice, has never imposed any fines for non-compliance against the incumbent.

It is reported by market players that the resources of BIPT are limited and that this is causing delays in meeting its objectives. The problem is likely to be exacerbated in view of the new tasks required of the BIPT such as conducting market analysis under the new EU framework.

Since 2003 the Competition Council is responsible for settling disputes between operators in relation to interconnection, leased lines, special access, full unbundling and shared access. The operation of the Council has been criticised by the alternative operators as not being efficient and that appropriate procedures are not yet in place. In addition, there is speculation as to whether the Council is adequately resourced in terms of number of personnel and expertise in order to deal with these issues effectively.

The public consultations conducted by BIPT have been well received by the market while the Royal Decree with the “Rules of Order” (Règlement d’ordre intérieur) of BIPT still needs to be adopted. The Decree, which aims to increase transparency, will refer to procedural issues in the contacts between BIPT and third parties such as the timeframe for the communication of the BIPT’s Councils’ decisions and advices etc.

Appeal mechanism

In 2003, the Act on Legal Remedies and Disputes Settlement introduced the right to appeal against BIPT’s decisions before the Court of Appeals in Brussels which can deliver a judgement on the merits of the case. The alternative operators blame the incumbent for appealing almost every decision of BIPT challenging the legal certainty until a final judgement is delivered while the incumbent claims that all appeals made so far refer to issues of similar nature.

MAIN REGULATORY ISSUES

Universal service

The discussions on the establishment and activation of the universal service fund started already in 2002 at the request of the incumbent. In the same year, BIPT conducted a public consultation regarding the methodology for calculating the net cost of the provision of the universal service. A year later, BIPT communicated to the Minister of Telecommunications a recommendation on the total net cost of the universal service obligation (USO). This submission indicated that the cost was up to € 101m however, this figure was subsequently reduced, in March 2003, to € 91m. The alternative operators considered such cost to be the highest in Europe and it appears that the net cost calculated by them is lower than the one calculated by the incumbent. For the latter, the level of the cost is the result of the high number of beneficiaries for social tariffs and payphones in Belgium. The BIPT has re-examined the methodology

used for the calculation and a public consultation was launched on 19 September 2004. According to the latest estimate of the BIPT, the net cost is approximately € 46m.

The current legislation does not provide for the concept of an unfair burden. Alternative operators consider this to be an essential requirement for the activation of the universal service fund and expect that a relevant provision will be included in the new electronic communications law which is still in draft form. Further transparency is also requested by them in relation to the net costs and net benefits of the different components and the indirect and immaterial benefits of the provision of the USO by the incumbent. They also consider that the opportunity for other operators to be designated as universal service providers should be created through the establishment of appropriate procedures. The required transparency appears to be ensured, however, by the draft decision on the provisional net cost submitted recently to public consultation by the BIPT. The draft decision contains also an overview of the net cost or benefits of the components, including the impact of the immaterial benefits.

Market players have expressed concerns regarding the scope of the USO under the draft legislation. Specifically there is concern that the scope covers every operator for social tariffs, that there is no reference to the concept of the unfair burden, about the existence of possible discrimination in the calculation of the contribution for the incumbent and the alternative operators, and in relation to the selection procedure, where for two services (directory inquiry and directory services) it needs to be determined whether a selection procedure will be followed by the King through a Royal Decree. Under the current legislation, the possibility for alternative operators to provide universal service exists, but is subject to a condition of national coverage.

Local loop unbundling

Despite progress in relation to the relevant framework and the Reference Offer as a result of BIPT's involvement, the vast majority of DSL lines are still provided by the incumbent that maintains its leading position in the market.

The Commission is paying close attention to the implementation of co-location, the content of the Reference Offer and the Service Level Agreement. In relation to co-location, the incumbent offers options, physical co-location and co-mingling but difficulties are reported in their implementation, which is regarded as adding further costs to its provision. The BIPT has made several efforts to ensure the provision of an improved Service Level Agreement. However, the incumbent has appealed the relevant SLA decisions of the BIPT before the courts requesting their annulment. At present, there is a standard SLA which is being offered.

The prices of the provision of raw copper and shared pair were reduced. However, a significant price difference is reported between shared pairs with and without voice (where the user is provided a voice or other service). Given this pricing differential, it appears that alternative operators are not interested in requesting shared pair on a line where the end-user does not have voice subscription. They consider that this reinforces the dominance of the incumbent in the relevant market. It is reported that the difference is such that it is almost impossible for alternative operators to provide access to ADSL services independently from the incumbent (where the end-user has no fixed line subscription with the incumbent).

There is no cost accounting model specifically for the provision of LLU. At present, a "retail-minus" formula is being used with historic costs as a basis. The level of detail in this cost analysis is limited. As regards the incumbent's latest offer for basic retail PSTN access, aimed

at low end-users (including a monthly subscription at almost half the price of raw copper), the alternative operators appear to consider this formula as inappropriate.

The incumbent is currently preparing to provide services over VDSL. The alternative operators consider that such provision will render the provision of ADSL+2 technologies impossible as the usage of spectrum for such deployment will be limited because the frequencies envisaged by the incumbent for such use could interfere with other xDSL technologies.

The decisions to be taken by the NRA in this regard will be critical for the level of competition in the relevant markets.

Interconnection

An interconnection offer is normally finalised by the end of January of each year. The alternative operators consider the timing of the provision of the RIO as being too late to be informed of the new tariffs for their own budgetary planning purposes. They also consider that, if a level playing field is to be ensured, they need to receive the incumbent's interconnection offer before the latter launches new retail services.

Regarding carrier pre-selection, different conditions seem to exist between the activation and deactivation obligations imposed on the alternative operators. They consider that the use by the incumbent of a more simplified letter of authorisation for activation of preselection than the one used by them is inappropriate. They expect that both alternative operators and the incumbent should enjoy the same level of complexity/simplicity in these standard letters. This issue is currently under examination by the BIPT in the consultation process for the RIO 2005. The Federal Ombudsman for Telecommunications reports that there have been complaints brought to his attention by citizens who claim that carrier preselection service is either activated without permission or suspended without their authorisation. In particular, in the past nine months between January to September 2004, 228 complaints were submitted to the Ombudsman. It is also reported that the requirements of the authorisation letters are not always implemented.

The BIPT has achieved further progress and increased transparency in relation to cost-orientation, through the development of a new LRIC bottom-up cost model. However, due to delays (the development started in 2001) the process was finalised only in 2004 and a description of the cost model was finally published. However, the results of the reconciliation of the top-down model with the new bottom-up cost-models will be taken into account only in setting the tariffs for the RIO of 2005. Therefore, the tariffs for 2004 are based on the top-down model only.

Cost accounting

Alternative operators report that there is no information publicly available as to compliance by the incumbent with the accounting separation obligations. In 2004, the BIPT adopted a decision regarding the publication of separated accounts for the year 2000 to 2001. There is no confirmation of compliance from the regulator nor is there any information available as to the methodology used as well as the transfer charges.

For the accounting separation for 2002, the BIPT imposed additional requirements upon the incumbent and requested the disclosure of additional information, which the latter refused to

provide. Despite the threats of BIPT to initiate a formal dispute procedure, no action has been taken so far to enforce its decision.

Alternative operators have requested more concrete information regarding the cost accounting systems in order to verify compliance with cost orientation and cost accounting obligations. The request has not been fulfilled so far, on the grounds of the business confidentiality of the information. The available information is not always sufficient to enable the alternative operators to verify the incumbent's internal transfer charges.

Leased lines

In 2004, BIPT published its decision on cost orientation of the retail tariffs for the incumbent's leased lines for the year 2001. This followed the designation of the fixed incumbent as having SMP in the leased lines market in the same year. However, the fixed incumbent had already introduced new tariffs based on geographic zones for digital leased lines, the cost orientation of which, according to alternative operators, has not been analysed in depth. The analysis in particular did not refer to the discount scheme offered in the Global Contract and its adherence to the principle of cost-orientation.

In 2003, BIPT adopted a decision determining the tariffs for the migration of leased lines to the transport interconnect service. However, it is reported that the penalties under the Global Contract remain an open issue.

Tariffs for partial private circuits for 2004 were not approved on the basis of a cost model but on retail minus basis, complemented by a viability test. Alternative operators consider that this approach does not guarantee that the retail tariffs are based on the underlying cost elements.

Regarding the migration of retail leased lines to half links, while BIPT improves the conditions, discounts which have been granted in commercial agreements and to migration conditions (penalties and additional investments) remain stumbling blocks.

Mobile services

Network problems resulted in delayed launches of 3G services for all three 3G licensees while the first commercial 3G application was launched in May 2004. Prices for 3G services are similar to those for 2G services and network coverage was extended in June 2004 to six cities including Brussels. The 3G service includes provision of SMS via laptop, remote email access, remote internet access, monitoring data-usage etc.

Mobile termination rates are reported as a-symmetrical. A difference exists in the termination rates between the two SMP operators as well as between the first and the third operator. The fixed incumbent's mobile subsidiary claims that this situation has a negative impact on the competition in the mobile retail market. On the other hand, fixed operators continue to complain about the squeeze between fixed to mobile termination and the offers of mobile operators to large users.

A recent communication was issued by the BIPT allowing the use of GSM-Gateways in principle. Mobile operators consider that this communication leaves room for legal uncertainty. BIPT concedes in the communication that the use of GSM Gateways could, in certain circumstances, cause damage to the mobile networks.

Rights of way

Contradictory legal provisions on the (private) use of public land are reported as problematic for the alternative operators. While the federal legislation provides for the use of public land, free of charge, fees imposed by local authorities in the form of taxes on networks developed in their regions have created concerns for operators. In addition, the Flemish legislation requires the payment of a fee of € 1 for the use of regional routes per running meter of cable, both existing and new, with certain exemptions to apply (for example for the 52 000 km of cable belonging to one operator).

In addition, several local authorities are imposing taxes on mobile operators' antennae and pylons which could amount to € 2 450 per pylon, to be paid on a yearly basis.

ePrivacy - Data retention

The new Data Protection directive is not yet transposed in Belgium.

Under the Act on Computer Crime of 2000, data must be retained for law enforcement purposes for a minimum period of 12 months.

CZECH REPUBLIC

TRANSPOSITION

Legislation in order to transpose the new regulatory framework has not yet been adopted. The most recent version of the draft law was approved by the Czech Government on 1 September 2004. Currently, the draft is under discussion in Parliament, and it is intended to come into effect on 1 January 2005. Secondary legislation is being prepared simultaneously with the draft of the new primary law.

Although some issues arise in the draft law as regards transposition of the requirements of the new EU regulatory framework, the draft seems in general to demonstrate a high degree of legislative precision and it appears that substantial efforts are being invested in the current preparatory stage. Nonetheless, the Commission services are examining a number of issues which are referred to below.

Even though the new EU regulatory framework has not yet been transposed, in general the starting conditions appear to be in place, although areas for improvement exist which the Commission services are scrutinizing.

MARKET OVERVIEW

The fixed incumbent was originally formed as a state enterprise. The company became a joint stock company in January 1994. 51.1% of the company is owned by the National Property Fund of the Czech Republic. The company is a 100% shareholder of the biggest mobile operator in the Czech Republic, and has subsidiaries in Germany, Austria and Slovakia.

The fixed incumbent is designated as the SMP operator in the markets for public fixed telephone networks and services. It is also designated as having SMP in the provision of public telephony networks and services, in the provision of leased line services and in the provision of data transfer services.

Although the fixed line business has declined in recent years, mainly due to increasing mobile penetration, it has attempted to compensate by boosting its internet and other data services. The Czech Government is planning a sale of the state's shareholding in the fixed incumbent. Several options are currently being considered, including a direct sale to a strategic investor, a stock market floatation, or a combination of the two.

Information on the market share of the fixed incumbent in the voice segment is treated as confidential. Fixed line penetration stands at 34.4% of the population.

Licences in the mobile market have been granted for GSM, DCS and UMTS networks, and the mobile operator controlled by the fixed incumbent also operates an NMT network. Three operators are competing in the mobile market: by the end of June 2004 the operator controlled by the fixed incumbent had a 47% market share, while the market shares of the other two were 35% and 18% respectively. All three operators provide GPRS services, while the two biggest have also been granted 3G licences. The newest entrant did not participate in the auction for 3G licences; the launch of services is planned for the beginning of 2006.

Mobile penetration was approximately 99% as of June 2004. The two biggest mobile operators are designated as having SMP in the public mobile telephone networks and services market. The mobile operator controlled by the fixed incumbent is also designated as having SMP in provision of public telephony networks and services.

The fixed incumbent introduced broadband internet (ADSL) in March 2003. The ADSL market is mainly in the hands of the fixed incumbent operator. The number of incumbent's ADSL lines reached 30 000 in July 2004. At that time cable operators were providing broadband services to approximately 40 000 customers. In July 2004, without considering all new entrants' lines using WLL and other technologies, the market share of the fixed incumbent on the broadband market was 39.5% and broadband penetration was 0.74% of the population (i.e. the latter figure includes only DSL and cable modem lines - specific data were not available for other technologies such as leased lines).

THE NRA

The Czech Telecommunication Office (ČTÚ) was established in 1993 and on 1 July 2000 was transformed into an independent regulatory authority. It is financed from the State budget and has its own budget chapter.

Under the draft Law on Electronic Communications, ČTÚ is to be led by five Board members as a collective body presided over by the President of the Board. Under the draft law, members of the ČTÚ Board, including the President of the Board, may be dismissed by the Government on a proposal of the Minister of Informatics even in cases of "repeated less significant breach" of their duties.

It is open to question whether the current law provides sufficiently precise guidance with regard to the division of competences between ČTÚ and the Office for the Protection of Competition (the NCA in the Czech Republic). The new legislation will need to address this issue.

Some regulatory responsibilities belong also to the Ministry of Informatics (the Ministry), which is involved in preparation of the legal framework. During the reporting period the separation of regulatory and ownership functions in the electronic communications sector and the functional independence of the Ministry from matters relating to the State's ownership of the fixed incumbent operator was an issue, due to the representation of this Ministry on the board of one of the governing bodies of the fixed incumbent operator. However, this matter now appears to have been resolved.

The powers of the Ministry under the draft law are to be slightly increased. The Ministry is to obtain powers to define criteria for tenders in which radio frequencies are to be assigned and to define criteria for tenders in which universal service providers are to be designated.

MARKET ANALYSIS

ČTÚ has not yet publicly announced its plans regarding market analysis under the new framework, as in its view the market analysis process can start fully only after the new law is in place. ČTÚ has however started preparatory work based on elaboration of a methodology for the market analysis. The draft law requires ČTÚ to complete the market analysis within nine months after the new law comes into force and to review the SMP obligations imposed under the current law on telecommunications (based on the previous framework) within twelve months after the new law comes into force.

DISCRETIONARY AND ENFORCEMENT POWERS OF THE NRA

The requirement in the Access Directive that SMP obligations be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down by the Framework Directive is apparently not transposed in the draft law. The conditions that have to be fulfilled for wholesale price regulation to be imposed under the draft law appear to limit the regulator's discretion unduly. The draft law enables wholesale price regulation, subject to the condition that other SMP remedies, including even some retail level SMP remedies, would not be sufficient to solve the problem in the wholesale market. The imposition of such a strict conditionality on the imposition of wholesale price regulation could limit the flexibility of the regulator in cases where this type of remedy is needed. Based on this it might be questioned whether the power of the NRA to choose and impose SMP remedies as appropriate, in the event of finding an undertaking with SMP, is sufficiently clearly stipulated in the draft law. The Commission services will continue to monitor developments in this area closely.

With respect to the powers of the regulator to impose various types of obligations, including SMP obligations and universal service obligations, there are concerns on the part of market players as to the limited powers of the regulator in the area of enforcement of these obligations due to the fact that the draft law stipulates a maximum aggregate sanction that can be imposed on any undertaking in breach of its obligations by regulator.

STARTING CONDITIONS

The market was liberalised in January 2001 on the basis of the Law aiming to transpose the EU's 1998/2000 *acquis* in the telecommunications field. This law is still in force pending transposition of the new regulatory framework and, in general appears to meet the basic principles necessary for effective liberalisation of the market; however, a few issues of conformity remain.

The Commission services are examining whether the principle of cost orientation is correctly transposed in the current law. It is not automatically imposed on SMP operators and on them exclusively in accordance with the Interconnection Directive. Under the existing law there is also a requirement for accounting separation to be applicable to all service providers, not just those with SMP.

Interconnection is regulated by ČTÚ. The cost base applied to fixed operators is forward-looking, and interconnection charges for call termination in the fixed network are calculated using the LRAIC methodology. The cost base applied to mobile operators is historic, and interconnection charges are calculated using the FAC methodology for call termination in mobile networks. ČTÚ made a decision on reductions in interconnection charges for call termination in the fixed networks and mobile networks this year.

The fixed incumbent's RIO has been published. The fixed incumbent has concluded 22 interconnection agreements with new market entrants. The first RUO of the fixed incumbent was published in September 2003 and the first LLU agreement was signed in December 2003. Currently there are two operators who have concluded LLU agreements with the incumbent. It appears that in many cases new entrants prefer implementation of CPS rather than implementation of LLU. One of the possible reasons could be the price for LLU, which is not regulated; however, ČTÚ is currently preparing to introduce price regulation of LLU also. Currently the prices for LLU clearly exceed the EU average (€ 15.5 for monthly rental and € 317.4 for the connection as regards full unbundled loop; € 8.7 for monthly rental and € 324.1 for the connection as regards shared access).

Carrier selection was introduced in July 2002. Carrier pre-selection as well as number portability in the fixed network were introduced in January 2003.

MAIN REGULATORY ISSUES

Access and interconnection

Interconnection charges and the absence of fixed-fixed interconnection at local level are among the main sources of tensions between the incumbent and new entrants.

Under the draft of the new law the rule under which pricing for access and interconnection related to number portability is to be cost oriented is limited only to SMP operators.

In September 2004 all three mobile operators were fined by the NCA for concluding interconnection agreements that limited the contracting parties to direct interconnection of their networks only, and excluded the possibility of another operator interconnecting between these mobile operators. The total aggregate amount of all three fines imposed was CZK 44 million (€ 1.4 million).

The regulator has imposed an obligation on the incumbent to interconnect its network with alternative operators for the purpose of providing ADSL services, and has defined maximum prices for wholesale ADSL resale services. With respect to interconnection for dial-up access from the network of the incumbent to internet services provided by other market players, the regulator has imposed a minimum level of charges to be paid by the incumbent to the other market players for the provision of their element of the service, as the customers using dial-up access from the incumbent's network to internet services provided by other operators are billed by the incumbent.

Price regulation

The incumbent offers a large number of tariff plans, of which four are regulated, on the basis of a fully allocated historical cost methodology. Regulation is effected in the form of a price cap. Fixed tariffs are not yet reported by the regulator to be fully rebalanced.

The absence of regulation of certain facilities, e.g. the prices charged by the incumbent for LLU, is due to the fact that a dispute does not exist. The Commission services are examining whether, as it appears, in some cases ČTÚ has limited possibilities to apply regulation on its own initiative under the existing law. On the other hand, in cases where a dispute has arisen, e.g. related to mobile termination, subsequent price regulation has also been applied to those market players without SMP.

Price regulation, where applied, is based on principles of cost orientation. Price regulation as well as SMP designation is not carried out by virtue of individual administrative decisions, and appears therefore not capable of being appealed in ordinary administrative proceedings.

Leased lines

The prices of leased lines are not regulated. Prices for national leased lines (64kb/s and 2Mb/s) exceed the EU average if compared to these prices in those EU Member States for which these data are available (€ 2 577 per year for 64kb/s, 2 km circuits; € 8 149 per year for 64kb/s, 200 km circuits; € 13 660 per year for 2Mb/s, 2 km circuits and € 52 153 per year for 2Mb/s, 200 km circuits).

Universal service

The fixed incumbent operator provides all basic services generally required under the universal service obligations. The mechanism for recovery of loss arising from the provision of universal service is set by law. Under the law, the loss is to be financed by all operators in proportion to the level of their revenues. There are problems reported by market players in this area, as not all of the operators are willing to pay the contributions. The fixed incumbent sued ČTÚ at the end of 2003, claiming it had failed to collect these contributions. Under the existing law there is no process for determining whether the provision of universal service constitutes an unfair burden to the universal service provider, and compensation from other operators is automatic. The law provides for reimbursement of demonstrable loss to the universal service operator without the need for proof that there is an unfair burden. On the other hand the loss from provision of universal service is evaluated under current secondary legislation only for unprofitable services specified therein, i.e. mostly the losses caused by provision of services to disabled users and rental of special equipment for these users. The unprofitable services not specified in the secondary legislation are not included in the loss calculation and are considered as a fair burden for the provider of universal service (e.g. provision of public payphone services).

Tensions between the fixed incumbent and new market entrants are evident *inter alia* with respect to bundling of monthly line rentals with free minutes by the incumbent. The NCA has launched its first proceedings under the new EU competition rules by opening an investigation in this area. Similar tensions arise from the incumbent's recent offer of free calls during weekends, as no analogous offer by the incumbent exists at the wholesale level on the basis of which similar competitive services could be offered by new entrants.

Earlier this year the NCA fined the incumbent CZK 81.7 million (€ 2.6 million) for abuse of its dominant position on the market for provision of telephony services to business customers through fixed public telecommunications networks. The abuse consisted for example in the fact that customers were bound for a minimum volume of calls and they were also bound not to terminate the contract with the incumbent before a specified date.

Mobile number portability is not yet available and under the draft of the new law is intended to become available within six months after the new law comes into force.

Frequency management

The mobile operator controlled by the fixed incumbent has succeeded in gaining full authorisation to operate a high speed mobile data network in the 450 MHz band using the CDMA standard, effectively by means of a change in the permitted use of its existing frequencies in the 450 MHz band. This operator launched these services at the beginning of August 2004. In view of the factual background to this case, the issue arises as to whether the rights held in this frequency band constitute special or exclusive rights. ČTÚ has stated the view that the accompanying issues can be solved by imposition of an obligation on the mobile operator controlled by the fixed incumbent to provide wholesale access to its mobile data network. The Commission services are examining this issue attentively. However, to date no wholesale reference offer has yet been published.

ePrivacy

The law currently valid in the Czech Republic appears to transpose some elements of Article 13 of the ePrivacy Directive on unsolicited communications. However, no formal notification has been received so far and the Commission services are examining the exception to the opt-in principle with regard to unsolicited communications to see whether it is transposed correctly.

DENMARK

TRANSPOSITION

Denmark transposed the bulk of the new regulatory framework on time, its law coming into force on 25 July 2003.

MARKET OVERVIEW

For a country of its size and population, Denmark has quite a large number of operators (four mobile network operators and about a dozen fixed operators with national coverage). There are six major competing players. In total there are more than thirty operators effectively providing services. No notification is required upon entry, rights of way are granted to all providers of infrastructure and mast sharing is mandatory for providers of mobile services. Fixed line penetration is at 65.6%. Fixed network traffic has decreased and has been substituted by broadband connections and mobile network calls.

Also the market share and the volume of the fixed-line incumbent operator have gone down. Based on traffic volume the fixed line incumbent operator has a 62% market share of all fixed calls (including internet). The mobile penetration rate is well above average at 90-95% (depending on whether the definition is based on a 3 months or a 6 months activity period for pre-paid cards). The largest mobile operator has a 43% market share (based on subscriptions, including a 100% owned subsidiary), its main competitor 24%. Denmark is among the leading EU Member States in terms of broadband penetration (15.6% of the population in July 2004). 67% of these broadband access lines are DSL lines and 76% of these DSL lines belong to the fixed line incumbent operator. 96% of the Danish population is able to get a fast internet connection and from 1 October 2005 this will increase to 98%. Since 2000 the fixed-line incumbent operator has been very pro-active marketing its ADSL products and its market share has come down within about a year from 82.5% (July 2003) to 76%; new entrants have a customer base of over 135 000.

THE NRA

The NRA in Denmark, NITA, is a Government Agency under the auspices of the Ministry of Science, Technology and Innovation. It is independent from telecommunications operators and Danish legislation ensures that the Ministry cannot intervene in the Agency's handling of regulatory functions. The NITA adopts a consensus approach, attempting, whenever this is within its competence, to mediate between operators or to engage them in discussion in order to solve problems before they become disputes. Given the workload in general and the resources available there is a need to prioritise and this means it is not always possible for the NITA to act on their own initiative, even though it is the preference of the market players that the NITA deals with every issue brought to its attention before it becomes a dispute. However, the procedures for dispute resolution, and even mediation, are defined in the legislation and would normally result in a decision within a certain time frame, which is not by definition the case in those situations in which the NITA acts on its own initiative. The NITA encourages operators to follow this "legal" route of dispute resolution but market players in Denmark are reluctant to do so, as it may endanger their negotiation position with

the other party (in most cases the wholesale department of the fixed line incumbent operator). The downside of the 'mediation' approach is that the outcomes, based on consensus, may not always provide the clarity or precedent that those same market players also want. Greater clarity is, provided when the NITA is forced to use its powers under the dispute resolution procedure.

Appeal mechanisms - dispute resolutions

As indicated above, it is the normal practice for operators in Denmark to keep negotiating with the other party and not to jeopardise relationships by bringing disputes before the NITA. When disputes are brought before the NITA and, in some cases, appealed before the Telecommunications Complaints Board, there is generally respect in the market for the decisions, which are then implemented. The Telecommunications Complaints Board only convenes a few times a year, which doesn't appear to suggest a fast response to appeals. For instance the appeal of the fixed line incumbent operator on the LRAIC decision took one year and three months. However Board meetings are convened on request, so this could differ every year.

Despite comments from operators relating to the NITA not keeping the deadlines in dispute resolution procedures, it appears that, for 2003 at least (until September), out of a total of thirteen cases, only two were finalised with marginal delays.

With effect from 25 July 2003 a new telecommunications appeal board, funded by the industry, took over the handling of consumer complaints in the telecommunications sector; this is more transparent and simple for the consumer as, prior to that point, there were a number of different bodies to which they could address their complaints.

Cooperation NITA - NCA

Regarding the division of tasks between the NITA and the Danish Competition Authority (NCA), it appears that, even though operators claim that the division of tasks is not always clear, the division of tasks is clear in the legislation. Moreover, complaints or disputes filed with the wrong authority will be sent to the other one and, in cases where both authorities share competence, there is close cooperation. Both authorities published reports on competition in the telecommunications market around the same time. The NITA produced a telecommunications competition report in May 2003 at the Ministry's request. The NCA drafts an annual general competition report with a focus on different themes every year; in this report telecommunications was one of the topics of focus. The NITA report, which was drafted on the basis of input from the industry, identified (legal) barriers in the telecommunications market with the aim of removing these. The NCA report, which is non-binding, took a forward looking approach by looking at how to tackle some of the (regulatory) problems.

Even though the two authorities in general work well together, they don't agree on all topics as is apparent when reading their competition reports. There are different opinions regarding the length of the 'lock-in' period of customers to a mobile network operator. The NCA thinks that a twelve month period will encourage competition and technological progress, whereas the sector specific telecommunications legislation, which, according to NITA, intends to balance competition and consumer interests, foresees that exclusive binding contracts should only last for six months.

The same applies to the cost calculation for shared lines. The NCA seems to think that there is a problem of double costing, while, according to the NITA, an investigation it has carried out shows there is no such problem. These kinds of contradictory opinions create confusion and uncertainty in the market.

The NITA competition report - May 2003

The report concluded that there were a few, but no serious, legislative gaps and also that the telecommunications industry does not take sufficient advantage of the opportunities provided to them by the legislation, such as submitting cases to the NITA or requesting mediation. On the basis of the public consultation, and also the political discussion following the report, steps were taken to eliminate the issues/barriers raised.

For instance, new legislation was introduced on 1 April 2004 to clarify that ATM networks are covered by the national legislation already in force. Also, in order to prevent a first mover advantage for the incumbent operator when it introduces new services, a new legal provision introducing a higher penalty (based on competition law practices) for infringement of the transparency obligation in relation to the publication of information on new interconnection products, has been included. The alternative operators preferred a so-called “standstill” provision of 6 months to be imposed on the fixed line incumbent operator. This was, however, not considered by NITA to be proportionate vis-à-vis the fixed line incumbent operator.

Some non-legal initiatives also followed from this report, such as the introduction of a flexible system for change of customers between ADSL providers and the setting of targets for the measurement of the quality of telecommunications products. Moreover, the fixed line incumbent operator extended its ADSL coverage and ceased billing for ADSL tests and cancellation charges for non-availability of raw copper (since 1 January 2004).

Fewer barriers were listed in the report than the alternative operators had identified in the preparatory process. For example spectrum trading was not tackled immediately by the NITA (but will be addressed at a later stage) as well as the possibility of relaxing the terms and conditions for payments of frequencies. Internal cabling is another issue that was clarified in the summer of 2003, but with seemingly poor effect. The NITA has been working for a while on this issue, and four operators have asked the NITA for decisions regarding changes in their co-location agreements with the fixed line incumbent operator. A draft decision was sent for comments in September 2004. The NITA is also preparing to impose changes in the incumbent’s co-location reference offer.

The NCA Competition report - 2004

The report written by the NCA signals that, even though liberalisation has been generally successful (more providers, lower tariffs), almost all of the fixed line incumbent operator’s competitors are suffering losses and perhaps even major providers may leave the market. The report pointed to some weaknesses in the legal construction and reported on how to act in a more dynamic way in the future, by suggesting solutions. For instance the report indicates that the fixed to mobile termination tariffs are too high; in this way fixed line telephony consumers have been subsidizing the falling mobile telephony retail tariffs. The NCA suggests that the mobile termination tariffs should be lowered gradually in order to prevent the creation of obstructive competition between fixed and mobile telephony. Before the implementation of the new regulatory framework it was the task of the NCA to regulate mobile termination tariffs, if necessary according to competition law, due to the fact that none of the mobile

operators had a significant market power (of 25%) under the old regulatory framework. The NCA report was welcomed by the fixed line incumbent operator and the mobile operators in particular.

Market analysis

The NITA is in charge of the market analysis procedures and has, since 2003, invested much of its resources into this process. There is a close co-operation with the NCA, which will have the opportunity to give advice on draft decisions, and there is an extensive dialogue with, and involvement of, the operators. In this way specific competition law knowledge and market experience is included in the process. The market analysis procedure is currently ongoing. The procedure is that the NITA's preliminary conclusions on market analysis are subject to a seven-week national consultation. The NITA will then draft proposals for remedies to be imposed and finally the whole package of SMP analysis and remedies will be consulted nationally, with the European Commission and with the other EU NRAs. The NITA expects the first markets to be notified by the end of 2004.

With the NITA acting largely in line with the Recommendation, the fixed line incumbent operator fears that it will lead to more rather than less regulation as the tendency might be to expand telecommunications regulation to new areas and new players.

All operators are very pleased with the transparency of the NITA throughout the market analysis procedures but the alternative operators in particular are concerned about the timeframe of the implementation of the market analysis. With two rounds of national consultations (on finding of SMP and on remedies) they feel that actual implementation could be delayed considerably. Some delay in the timetable already occurred at an earlier stage when market players asked the NITA to change its original timetable, as they preferred that the NITA would use the data for all of 2003 in their analysis. Market players also wonder whether the Telecommunications Complaints Board is equipped to deal with appeals on market analysis decisions.

MAIN REGULATORY ISSUES

Access/Interconnection

Alternative operators believe that the NITA should focus more attention on new technologies/services; they claim it is difficult to introduce new products and that they have not always been able to roll out the products they want. Sometimes the products are not yet covered by existing legislation, and by the time they are covered, the alternative operators normally lag behind the fixed line incumbent operator. This issue should now be solved since a penalty has been introduced in relation to the transparency obligation for a new interconnection product.

The introduction of the LRAIC model in January 2003 resulted in an increase of the wholesale access price for full local loop unbundling in order to cover the actual level of costs. This increase will take place over a period of seven years. To the detriment of the fixed line incumbent operator, the reduction in the interconnection tariff (also as a consequence of the application of the LRAIC model) however, is not gradual and in fact did enter into force with immediate effect. Co-location prices are also set on the basis of the LRAIC model. The NITA's LRAIC decision was appealed by the fixed line incumbent operator, claiming that the

cost basis is misleading and the prices not correct. The decision was upheld in appeal. At the end of 2003, the NITA made a decision on interconnection tariffs for 2004, using the LRAIC method; the prices for switched interconnection have dropped by three to four percent. Denmark has the lowest interconnection tariffs in the EU (single and double transit).

Combining wholesale line rental with CPS

On the basis of the new telecommunications legislation, there is now the possibility to combine wholesale line rental with carrier pre-selection (CPS), which has an effect on the operator-customer relationship

Broadband

Full local loop unbundling is available in Denmark nation wide. Despite the fact that the price for full unbundling is among the lowest in the EU, the fact that an alternative operator now has a choice, namely between unbundling and the resale of the incumbent's bit-stream access service, does appear to have reduced the incentive for unbundling in general at the moment. LLU has been largely unsuccessful in promoting competition on PSTN subscriptions.

ADSL was introduced in 1999 in Denmark by an internet provider based on local loop unbundling. The fixed-line incumbent operator is the prevailing operator providing ADSL, but also falls under certain roll out obligations for ADSL. In September 2003 the national audit office analysed the processing by the relevant authorities of all complaints on competitive restrictive conduct in the ADSL market and assessed that the questions/complaints raised were generally handled promptly and carefully.

The fixed line incumbent operator's bit-stream access offer is only available in circumstances in which the end user has a PSTN subscription with the fixed-line incumbent operator. Unless consumers keep their PSTN subscription with the fixed-line incumbent operator in order to have a broadband connection, they will meet another pricing obligation due to the fact that no PSTN subscription contributes to the costs of the line. Where the broadband access is being provided by an alternative operator or ISP, the alternative operators have negotiated with the fixed-line incumbent operator, but the tariff offered is almost identical to the one offered by the incumbent to its own subscribers. This indirect bundling of the PSTN subscription with the bit-stream access product may lead to competitive problems when looking at the deployment of new services, such as VoIP. This issue will be analysed thoroughly by the NITA very soon.

There has been a large increase in the number of shared lines in Denmark (from over 10 000 in July 2003 to well over 28 000 a year later) despite the fact that alternative operators question the correctness of the price for a shared access line, which is currently exactly half the price of the fully unbundled line. According to them the tariff is not based on the actual incremental costs and this price makes it (unnecessarily) expensive for them to compete on raw copper. The situation regarding the bit stream access offer (see above) may have an effect on the increase in the number of shared lines.

There is also an increase in the number of alternative infrastructures (for fast internet) established by other 'operators', such as municipalities, housing associations or utility companies, even when there may already be a competitive infrastructure. By mid 2003 the estimated number of connections was 102 000 (of a total of nearly 913 000 connections).

Mobile termination

Fixed to mobile termination tariffs, which are just above the overall EU average, are claimed to be very high according to fixed operators and also according to consumer associations. Possible imposition of obligations following the market analysis procedure may change this. Currently regulation doesn't appear to give any incentive to lower the tariffs.

The issue of high mobile termination tariffs was the subject of a complaint against two mobile operators filed in 2002 and dealt with jointly by the NITA and the NCA. In December 2002 NITA decided that the approach taken by the two mobile operators to on-net and off-net offerings was not discriminatory. The NCA, after extensive investigation in April 2004, dismissed the parts of the complaint regarding excessive pricing and collusive behaviour but it did find that one of the two mobile operators had abused its dominance as there was an illegal margin squeeze between the wholesale and retail markets in 2003. The squeeze took place in connection with an end user product, parts of which were sold at retail prices below the wholesale tariffs. The NCA also found that this mobile operator used bonus systems which were both discriminatory and creating loyalty. The mobile operator appealed the decision and the appeal is still pending.

Traffic data retention

A draft order on anti-terrorism requires operators and service providers to keep traffic data and other data for one year. This involves also data which are not logged today and which are not needed for billing purposes, such as incoming calls, cell information for GPRS and incoming mail. Operators question the necessity and proportionality of such an obligation, which would also be difficult to implement. In June, operators sent a letter, including these and other comments, to the Ministry of Justice. It is expected that the legislation will not be finalised until there is clarity as to what will happen with the EU legislative proposal on the same topic, in order to be in line with that.

Universal service

The fixed line incumbent operator is appointed as the universal service provider until the end of 2007. The obligation covers PSTN, ISDN, a minimum set of leased lines, directory enquiry services and certain services provided for people with disabilities and there are –in some areas- regulated maximum prices for end-users. There is currently a price-cap regulation for call set-up charges (per minute charges are not regulated), subscription fee, conversion of PSTN to ISDN and vice versa, installation of the line, relocation and for calls to the directory enquiry service. The fixed line incumbent operator and (some of the) mobile operators say that this price control distorts price competition but the (alternative) fixed operators claim that a full lifting of these price controls would have a negative effect on their businesses.

With the objective of protecting user interests, a number of obligations have been placed on all operators. Some of these should be revised according to the alternative operators, as the costs of implementing some of these obligations, usually leading to changes in the billing and/or customer handling procedures, may not be proportionate to the number of customers using these services. Operators are calling for a careful cost/benefit analysis before obligations are imposed on them when new services are introduced in the future.

Masts - health issues

The building of 3G masts and antennae has resulted in an overheated debate about 18 months ago due to the health issues that have been raised in the media. The 3G operators have carried out an information campaign and, since 24 June 2004, the NITA has set up a database, which can be accessed by anyone, and that consists of all the (current and planned) locations of all masts. The present network roll-out status of one of the 3G operators does however indicate that the health debate has not led to a major setback in its building plans.

GERMANY

TRANSPOSITION

Germany appears to have transposed most of the new regulatory framework through a new Telecommunications Act (Telekommunikationsgesetz - TKG) which came into force only on 26 June 2004. Its structure resembles to some extent that of the old law, which, on the one hand, may facilitate its application. On the other hand, this could possibly create the impression that only minor changes have taken place. One article of the ePrivacy Directive has been transposed by the new Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb – UWG), which came into force on 8 July 2004. Furthermore, a catalogue of secondary legislation is envisaged by the Ministry in order to complete fully the transposition.

Market players expressed uncertainty as to which provisions apply in the transitional period. They were of the opinion that it should be clear which provisions of the new law are already applicable before the market analyses have been completed. The Framework Directive states that Member States shall maintain previous obligations referred to in the Access and Universal Service Directives until such time as a national regulatory authority has made a determination concerning these obligations.

In July 2004, RegTP decided⁵³ that an obligation under the old TKG to have retail tariffs approved should remain valid in the transitional period. This appeared to be in line with the Framework Directive. In its first preliminary ruling concerning the transitional period⁵⁴, the Cologne Administrative Court however was of the opinion that the obligation in the Framework Directive to maintain certain obligations would, as regards end-user tariffs, be restricted to certain tariff principles. It would not refer to the obligation to have tariffs approved. Following this decision it is likely that RegTP will no longer uphold obligations to have tariffs for retail services approved which were imposed under the old law. The conformity of such a regulatory approach with the Framework Directive will have to be verified.

MARKET OVERVIEW

The turnover of the telecommunications market in 2003 totalled approximately € 63.4 billion, which is an increase of 3% compared with the preceding year. In the same year, telecommunications companies invested more than € 5 billion in equipment and plant in Germany, of which about € 2 billion was in mobile communications. Regionally the new entrants were able to expand their market shares measured in terms of share of telephone lines to different extents in the past few years. In certain regions of Germany the national average of 5.7% relating to telephone lines was substantially exceeded. There are regions in which the competitors' share exceeds 20%⁵⁵.

⁵³ Decision of 14 July 2004 (BK 2c-04/12).

⁵⁴ Decision of 6 September 2004 (1 L 1832/04).

⁵⁵ The above mentioned data are taken from RegTP's annual report 2003.

On the basis of retail revenues and outgoing minutes of communications the leading position of the incumbent operator as regards public fixed voice telephony remains almost unchanged compared to the previous year. On the basis of retail revenues small decreases can be seen: from 95% to 90% for local calls, from 75% to 70% for national calls and from 59% to 57% for international calls whereas the share of calls to mobile remains unchanged at 68%. The incumbent's share of the market for local calls on the basis of outgoing minutes for communications has seen a significant drop from 92% in 2002 to 82% in 2003.

The total number of operators that are actually offering public voice telephony or public network services has risen considerably in the last year, but has not reached the level achieved in 2002. Up to the end of August 2004 there were 94 operators actually offering fixed public voice telephony. There are now 8 cable TV operators, instead of just one in 2003, which are actually offering voice telephony. As in the previous year, 40% of subscribers use a provider other than the incumbent operator for long distance and international calls, but only 11% do so for local calls. Only since April 2003 has it been possible for consumers to choose freely a provider for local calls via call by call. Since July 2003 pre-selection has been possible for local calls. In the latter cases the obligation existed under EU law since 1 January 2000.

There are 12 mobile players in the market, and four of these have their own mobile network. At the end of June 2004 there were 67.6 million mobile subscribers in the market. This corresponds to a penetration rate of about 82%, (omitting non-active prepaid accounts). The overall market share of the subsidiary of the incumbent fixed network operator was 40% in June 2004. The main competitor held a market share of 38%.

At the end of July 2004 more than 5.4 million broadband Internet access lines were in operation in Germany, of which 4.7 million were incumbent DSL accesses, about 586 000 DSL accesses of fixed line competitors and more than 129 000 broadband accesses via other means. This means that at this time the competitors had a broadband access share of about 13% compared with approximately 9% in July 2003. For DSL access lines, the incumbent had a 89% market share and competitors had 11%, which is up from 7% in July 2003.

THE NRA

The National Regulatory Authority, RegTP, is a higher federal authority under the remit of the Federal Ministry of Economics and Labour. Determinations are made by its Ruling Chambers. One Ruling Chamber with a specific field of responsibility is the Presidential Chamber, which is composed of the President of RegTP and its two vice-presidents.

RegTP is a subordinated authority of the Ministry of Economics and Labour. However, the decisions of its ruling chambers cannot be over-ruled by the Ministry, but only by a court. The fact that the members of the Presidential Chamber depend on political appointment and that they have annulable public service contracts, whereas the members of the other ruling chambers are lifetime officials, could give rise to concern, especially given that the Presidential Chamber is responsible for important issues such as market analyses. The Commission services will continue to scrutinize this issue.

The general regulatory policy of Germany is developed by the Ministry in close collaboration with the regulatory authority. To ensure a clear long-term regulatory policy and a strategic approach on the part of the NRA, Section 122 (2) of the TKG now requires RegTP to publish the fundamental legal and economic issues on which it will give an opinion during the year to

come. As far as transparency of RegTP's work is concerned, it is a cause for concern on the part of the market players that RegTP does not publish the comments it receives from the Competition Authority (Bundeskartellamt – BKartA) within regulatory procedures. Neither RegTP's Official Journal nor its regulatory decisions have been fully published on the Internet up to now. In the latter regard, RegTP has pointed to the necessity to safeguard business secrets and to a related decision by the German Constitutional Court which is expected soon. Notwithstanding that, RegTP is considering the publication of non-confidential versions of decisions and the publication of the Official Journal on the internet is apparently under preparation. Placed on the internet are the documents on market definition and market analysis, the submissions for approval of tariffs, and the regulatory decisions on access regulation.

Under the old regulatory framework, it was unclear whether the BKartA had the power to conduct proceedings in the electronic communications sector. The TKG now appears to confirm this explicitly.

As regards RegTP's powers to bring to an end abuses of dominant positions, TKG now appears to enable market players to initiate such proceedings. Given that it has often taken some time before RegTP opened proceedings under the old regulatory framework, this would appear to be an improvement.

Appeal mechanism and dispute resolution

Actions against RegTP determinations may be brought directly before the administrative courts. Following a decision of the two Chambers of Parliament it is planned, however, to allocate responsibility for actions against RegTP's determinations after a transitional period of five years to the civil courts. This would mean that such determinations would be handled within the same jurisdiction as competition law cases. The duration of appeal procedures before the German administrative courts has already given rise to concerns on the part of market players, as indicated in previous implementation reports.

The situation regarding appeals may improve given that, in the new law, one of the instances for appeal was removed both for preliminary and main proceedings. Whether this will significantly shorten the long appeal procedures remains to be seen.

Delays can be caused by the practice of some operators systematically appealing against RegTP's decisions challenging legal certainty until the time that the final judgment is delivered. Appeals against RegTP's decision have apparently no suspensory effect. If the addressee seeks preliminary legal protection, RegTP does not execute administrative decisions (e.g. interconnection orders) until the court has decided.

Section 133 (2) of the TKG aims at transposing the dispute settlement procedure pursuant to Article 20 of the Framework Directive. According to the reasoning for the law, however, this procedure is only applicable if the NRA is not required to take action on its own initiative. This could in practice lead to a reduction of the rights of market players which are laid down in the Framework Directive. Here, it will strongly depend on RegTP's practical application as to whether the conformity with the framework will be fully achieved, and the Commission services will monitor this closely.

MARKET ANALYSIS

According to RegTP there will be no separate decision on market definition. The starting point for RegTP's market analyses has been and will be the 18 markets in the Commission's recommendation, with the possible inclusion of some additional markets.

The way RegTP envisages applying the consultation procedures provided for in the TKG appears to be complex. According to RegTP's plans, national consultations will be run prior to the consultation of the Commission. There will be separate consultations for market definition /analysis and for remedies and the NRA justifies this possibly time-consuming way of proceeding by arguing that the Presidential Chamber is responsible for the decisions concerning market definition / analysis whereas the other ruling chambers decide on remedies. Only in exceptional cases and to save time does RegTP plan to take advantage of the possibility given by the TKG to run the respective consultations in parallel. Whether the fact that market analysis and the imposition of remedies are carried out by two different chambers of RegTP has any impact on the procedure or its results remains to be demonstrated in the future.

Concerning the sequence of market analyses, RegTP has started to analyse market 11 (wholesale unbundled access) first, followed by interconnection markets. RegTP argues that the sequence depends on the need to revise expiring obligations imposed under the old TKG as well as on volume-of-work considerations. In general, market players stated that RegTP's "sequential approach" was very time consuming and could lead to legal uncertainties.

Depending on the final sequence chosen by RegTP, the analysis of the important wholesale broadband access market may be delayed. In this context, it should be noted that, in 2003, the market share of the incumbent operator for retail broadband access in Germany was the highest in the EU 15. Irrespective of the fact that, up to 2003, the incumbent fixed telephone network operator applied a margin squeeze for access to its fixed telephony network⁵⁶ and that it presumably also applied a margin squeeze for broadband access until 2004⁵⁷, this lack of competition also derives from the fact that there has been no bitstream access in Germany.

RegTP will also have to decide whether the mobile markets will be analysed in a timely manner so that potential market distortions, probably impacting on the prices for fixed to mobile calls, are removed. It should be mentioned that, following a related regulatory decision before RegTP, agreements between the mobile network operators and the incumbent fixed network operator to reduce the mobile call termination fees have been announced. RegTP strongly welcomed these agreements and they can certainly be regarded as a step in the right direction.

RegTP has, however, already started to do some preparatory work concerning the markets mentioned above like, for example, the evaluation of questionnaires sent back by market players. It confirmed that it is envisaged to open the consultation concerning the analysis of the markets for voice call termination on individual mobile networks in the fourth quarter of 2004.

⁵⁶ See Commission decision of 21 May 2003 (Deutsche Telekom), OJ L 263 of 14.10.2003, p.9. This decision is currently before the ECJ after an appeal by Deutsche Telekom.

⁵⁷ See Commission press release of 1 March 2004, IP 04/281.

As regards VoIP, RegTP opened a public consultation on 21 April 2004, the aim of which was to contribute to creating a framework that will allow the opportunities and potential of VoIP to be grasped. Creating these framework conditions could also contribute to addressing problems with regard to the leveraging of market power. Earlier implementation reports had criticized the fact that RegTP did not prevent the incumbent fixed network operator from leveraging its quasi-monopolistic power in the provision of access to switched telephony services to the provision of access to broadband services. This was despite the fact that RegTP had found that some of the incumbent's retail ADSL services were offered below cost and that RegTP was aware that the incumbent did not offer its competitors corresponding wholesale products such as line sharing or bitstream access.

Pursuant to the new TKG, the decisions concerning market analysis will apparently be taken by RegTP after consultation with the BKartA.

MAIN REGULATORY ISSUES

Objectives of framework

It will have to be verified whether all objectives of Article 8 of the Framework Directive have been transposed into the new TKG. The specific protection of the interests of users with disabilities, for example, is only briefly mentioned in Section 42 (1) 2nd Sentence of the TKG, but may possibly be described in more detail by future secondary law. Furthermore Germany has not notified any legal acts apart from the TKG by which objectives of the Framework Directive could have been transposed.

It is noteworthy that Section 2 (2) no. 6 of the TKG establishes as an objective the promotion of telecommunications services in public institutions.

Duration of procedures

In the new TKG, there is a general time limit of four months within which RegTP must decide in proceedings regarding abuses of a dominant position. This appears to be an improvement compared to the old law in which for this kind of proceedings no time limit was applicable. Pursuant to the new TKG the standard period for taking a decision on ordering network access and interconnection is ten weeks, with the possibility of an extension to four months. However, special reasoning must be given for such extensions, which can have an inhibiting effect. *Ex ante* approval of rates must be decided within a period of ten weeks. With regard to *ex post* approval, the period within which a decision must be taken is between two weeks and two months.

In the past, RegTP has frequently tended to extend time limits, although prolongation should have constituted the exception. Hence the value added by the above modifications may need to be evidenced in practice.

Access-Interconnection

The new framework provides for independence of NRAs, with a broad scope of discretion. In contrast to this, the new TKG appears to limit RegTP's discretion by prescribing certain types of remedy for certain situations and by introducing criteria which are outside the framework (for example "double dominance", "historic market power"). By virtue of this, it is possible that consumer-sensitive markets such as wholesale broadband access or voice call termination

on individual mobile networks could be excluded from appropriate regulation. Furthermore, unbundled resale of access services may not be imposed before 1 July 2008. As already set out in the Ninth Implementation Report, the ability of NRAs to take proper account of other NRAs' or the Commission's comments in the Article 7 process is constrained where primary legislation predetermines the nature of the remedies which can be imposed. The Commission services will continue to examine this issue.

Pursuant to the new TKG, RegTP is responsible for access authorisation systems; in carrying out this function it must take broadcast interests into account. RegTP therefore claims to be responsible for regulation of Application Programming Interface (API) and Conditional Access Systems (CAS), notwithstanding the competences of the media institutes of the federal states ("Landesmedienanstalten"). API market opening is included in the TKG but not yet in the federal states' media laws (in which MHP seems to be the prescribed standard for APIs). However, representatives of RegTP and the Länder have already initiated first steps to collaborate in this area.

Doubts were recorded in previous implementation reports as to whether RegTP had adequately addressed the effects on competition of the incumbent fixed network operator's optional tariffs. It remains to be seen how this issue will be addressed under the new TKG. Now, there is a pattern of the incumbent offering more and more bundled tariffs which aim at raising the fees for access by reducing or even abolishing those for the connected minutes. This pattern was approved by RegTP at several occasions. Such bundling can make it very difficult for alternative providers to compete and will need further scrutiny as to its compliance with competition law.

Universal service

The 9th Implementation report pointed to some of the key issues relating to the scope of universal service arising from the national transposition measures. It appears, however, that the TKG does not require explicitly that the connection to the public telephone network permit functional Internet access.

It has already been stated that the new TKG appears to limit RegTP's regulatory discretion and powers. This is underlined by provisions dealing with regulation on the retail level. Whereas Article 17 of the Universal Service Directive prescribes that NRAs shall impose "appropriate regulatory obligations", the relevant transposing provision (Section 39 of the TKG) appears to restrict these obligations to tariff regulation. This is a cause of concern on the part of the market players and the Commission services will examine this closely.

Moreover, it seems questionable whether the principle of cost orientation, a potentially significant aspect of tariff regulation, has been comprehensively and distinctly transposed in relation to retail obligations. The TKG seems, however, to ensure that retail prices do not exceed the cost of efficient service provision.

It also has to be verified whether the principle of cost-orientation has been properly transposed as far as the provision of information for directory and directory enquiry services is concerned. This is an issue which has already been mentioned in a previous report and where apparently no improvement has been reached with the new law.

Must-carry is regulated in all 16 federal states ("Bundesländer"), and in some of these all analogue channels are specified for must-carry. It appears that in a few Bundesländer the

station that takes part in terrestrial digital TV provision (DVB-T) receives must-carry status for analogue provision via cable and that restrictions are regulated in laws and in cable allocation statutes of the Bundesländer. This legislation, however, has not yet been notified to the Commission. Some must carry rules have been called into question by some market players.

Authorisations

Section 144 (1) of the TKG introduces a telecommunications levy (“Telekommunikationsbeitrag”). This contribution is intended to finance RegTP for the fulfilment of certain identified tasks under the new law. The costs for carrying out these tasks are borne by the operators in proportion to their turnover. Similar contributions exist in the German financial area where banks contribute to funding the costs of the national banking supervisory body. The details of this contribution system are not yet clear; the final approach will however have to comply with Article 12 of the Authorisation Directive.

ePrivacy

The ‘anti spam task force’, which was initiated by almost all leading internet service providers, has issued in September 2004 a White Paper that includes a “white listing” project called “certified senders alliance” which is promoting a joint venture between German internet service providers and the German direct marketing association.

Broadband

The existence of margin squeezes in the German communications markets has already been an issue of concern in previous implementation reports. Following a competition investigation on the basis of Article 82 of the Treaty, Deutsche Telekom committed itself vis-à-vis the European Commission to bring to an end a presumed margin squeeze as regards broadband access by reducing its tariffs for shared access (line sharing) with effect from 1 April 2004.⁵⁸ The TKG now explicitly declares margin squeezes as being abusive. The practical impact of this provision however remains to be seen.

The unbundling of subscribers’ network connections has not yet been completed. In wide areas of Germany there appears to be still no consumer choice as regards the provision of fixed telephony access services. As stated above, the TKG nevertheless provides that the scope of a possible corresponding resale obligation should be limited until 30 June 2008, to cover only a resale of access services which is bundled with conveyance services.

⁵⁸ See Commission press release of 1 March 2004, IP 04/281.

ESTONIA

TRANSPOSITION

Estonia is one of the Member States that have not yet transposed the five Directives comprising the 2002 EU regulatory framework on electronic communications. Although the draft law on Electronic Communications passed its second parliamentary reading on 27 October 2004, it has yet to pass the third reading before its final adoption. The date envisaged for enforcement of the new law is now 1 January 2005. As regards secondary legislation, the adoption of 26 various ministerial or governmental regulations is envisaged on the basis of the draft law. The preparation of secondary legislation is said to be already in progress, but there is no information about when these measures will effectively enter into force. Until the adoption of the new law, the electronic communications sector is being regulated by the existing Telecommunications Act of 2000 and the numerous regulations issued under it, as well as the Cable Distribution Act and the Broadcasting Act.

MARKET OVERVIEW

The Estonian electronic communications market is small by EU standards, but yet one of the fastest developing markets in Estonia. As of 2003 the estimated value of the Estonian telecommunications market was about € 488 million⁵⁹. Mobile telephony dominates the market and there has been a rapid increase in the number of mobile subscribers associated with a decrease in subscribers to fixed telephony services within the last years. Currently, mobile penetration is 84% and fixed line penetration is 33%. Digitalisation of the fixed network has yet to be completed, reaching 82% as of June 2003⁶⁰. The Internet segment is very well developed, with a penetration rate of 46% of the population⁶¹ and about 16% of households. Broadband penetration is 7.6% of the population.

In general, there appears to be a satisfactory level of competition on the Estonian electronic communications market, with the significant exception of the ADSL market.

There are three major competing players on the fixed telephony market plus five smaller operators. All fixed operators except the fixed incumbent have entered the fixed telephony market after the opening of the telecommunications market in 2001. There are also a number of operators offering VoIP services.

On the mobile market there are also three major competing operators each of which has 2G and 3G licenses. In addition, six mobile service providers have also been registered, but none of them are actually providing services yet, although one of them is in testing phase. The interest in becoming a mobile service provider has increased recently in anticipation of the benefits created by introducing mobile number portability starting from 1 January 2005.

⁵⁹ Adjusted information collected by ENCB during the SMP designation process.

⁶⁰ IBM/4th report on Monitoring of^{EU} Candidate Countries (Telecommunications Services Sector).

⁶¹ Monitoring of TNS EMOR in the beginning of 2004.

For the year 2004 the fixed incumbent has SMP status on the telephone services market (87.32%), the leased line services market (73.22%) and the interconnection services market (43.78%), while the mobile incumbent has SMP on the mobile telephony services market (63.22%)⁶². In September 2004 the national regulatory authority announced its intention to assign SMP status again for the said companies also for 2005. In doing so it is proceeding from the existing Telecommunications Act and is not therefore applying the market analysis and consultation procedures in accordance with the 2002 regulatory framework, as it has no legal grounds to start proper market analysis before the new Act on Electronic Communications has been adopted. According to the draft law, no deadline for starting or completing of the market analysis seems to be established. However the draft seems to set forth that the decisions passed under the existing Telecommunications Act on designating SMP operators and the respective SMP obligations deriving from the said act will be valid until 31 December 2005. It should be also mentioned that Estonia is one of those Member States where the relevant markets are not going to be defined by the NRA. Namely, it is proposed that the relevant markets will be defined in the new law transposing the regulatory framework. This may raise issues of flexibility and adaptability in relation to any changes to the relevant Commission Recommendation.

THE NRA

The Estonian National Communications Board (the ENCB) – *Sideamet* – was established on 21 April 1998⁶³ as an independent regulator in order to ensure the existence of the necessary regulatory mechanisms by the time of opening the market for competition. According to its statutes, the ENCB is a governmental agency under the responsibility of the Ministry of Economic Affairs and Communications (the Ministry).

The ENCB reports to the Minister, who directs and coordinates its activities and performs official supervisory control over the ENCB. The costs of the ENCB are covered from the state budget, and the budget of the ENCB is approved by the Parliament and its implementation controlled by the Minister. The total number of ENCB employees as of 30 June 2004 was 123 and there are 22 further posts that are still vacant and waiting to be filled.

The ENCB is managed by the Director General who is nominated and released from employment by the Minister upon the proposal of the Chancellor. In order to guarantee the independence of the ENCB, its statutes provide that the Director General is competent to take decisions independently and individually in compliance with the law. In doing so the Director General may issue decrees (individual acts).

⁶² Press release of ENCB of 18 November 2003 (no. 1.3-1/03/36).

⁶³ The history of the ENCB dates back to 1991 (it was then called Inspection of Telecommunications). Since starting its operations on 1 August 1998 ENCB changed from being mainly technical regulator of radio frequencies and radio transmitting equipment into an independent economic regulator of the telecommunications market. As of 2002 ENCB is also responsible for regulation of postal sector.

Although the state still holds a minor shareholding of 27.23% in the holding company that owns 100% of shares in both the fixed and mobile incumbents, the ENCB and the Ministry of Economic Affairs and Communications are sufficiently independent in their regulatory activities, as the state's shares are administered by the Ministry of Finance. In spring 2004 the Government of Estonia and the majority shareholder of the holding company started negotiations over the possible buyout of the state's shares, but the negotiations were not successful.

The ENCB also cooperates with the National Competition Board, the National Consumer Protection Board and the National Tax and Customs Board on the basis of co-operation agreements. Although market surveillance information can be exchanged on the basis of the co-operation agreement with the Competition Board, in many cases co-operation is made difficult by the fact that there is no legal basis for exchanging confidential information.

In general the ENCB seems to have a positive image among stakeholders and seems to be sufficiently competent and efficient in regulating the market and most of its decisions have been also upheld by the courts.

STARTING CONDITIONS

The existing Telecommunications Act liberalized the Estonian telecommunications market as of January 2001 and its implementation has been largely in line with the old EU regulatory framework. Although the *acquis* on local loop unbundling and affordable universal service has not been fully transposed, in practice both of these elements are being applied. The existing law does not appear to explicitly provide for the right to affordable universal service, but there are certain measures in other legal acts that ensure the provision of financial support to consumers identified as having low incomes or consumers with disabilities. Terms and conditions for reference interconnection offer, non-discrimination and transparency obligations, cost-accounting and accounting separation obligations, as well as carrier selection, carrier pre-selection and fixed number portability, are all provided under the existing law and are also implemented in practice. In general there have not been any major problems in implementing the existing Telecommunications Act

MAIN REGULATORY ISSUES

Number portability

On the fixed telephony market an important milestone was the implementation of number portability as of 1 January 2004. In total, 12 530 fixed numbers have been ported so far. After the introduction of number portability the fixed incumbent has lost approximately 0.3% of its clients. Mobile number portability has not yet been implemented. According to the amendment of the existing Telecommunications Act adopted by the Estonian Parliament on 28 June 2004, mobile number portability should be available only as of 1 January 2005. In order to ensure this, a common routing database will be created both for fixed and mobile numbers, administered by an entity that has been selected through a public tender procedure. The successful bidder, announced on 4 October 2004, is a privately-owned Estonian information technology company independent from the electronic communication service providers.

Mobile services

Although the incumbent mobile operator opened a test 3G-network on 17 September 2003, no services have yet been launched. While the incumbent operator would be capable of creating its own 3G network, the two other operators holding 3G licenses would like to co-operate. Different network-sharing scenarios have been discussed under the existing legislative framework with the ENCB and the Ministry, but so far there seems to be no final result. It has to be mentioned that, according to the current conditions of their licences, each operator should create a 3G network within seven years of the issue of the licences in 2003. In the beginning of 2004, the ENCB announced a public tender for the fourth 3G licence, but the tender failed as no applications were received from interested parties.

Broadband

In the ADSL market there seems to be virtually no competition, and the market is dominated by the fixed incumbent (99.8%), which does not appear to provide bitstream access to any of the alternative operators. Besides the fixed incumbent, there are only some cable TV operators who are offering Internet over cable modem, limited to their respective areas of coverage. The ENCB has started to take steps to promote competition in the ADSL market, but so far no constructive progress seems to be achieved. In September 2003 the ENCB issued a request to the fixed incumbent demanding the latter to provide bitstream access to alternative operators, but the said request was appealed by the fixed incumbent on the grounds that it is not technically possible to fulfil it. The dispute is currently pending; however the request itself has become pointless at this stage, as it was issued with regard to the incumbent's PSTN network. Following the opening of proceedings, the fixed incumbent registered its DSL network as a data communications network, access to which is not covered by the ENCB's regulatory powers under the existing Telecommunications Act.

Access-Interconnection

After evaluating the interconnection charges of the fixed incumbent using a bottom-up LRAIC cost methodology, on 22 June 2004 the ENCB issued a request to the fixed incumbent regarding the calculation of the interconnection charges. It demanded a 20% decrease in local level and single transit interconnection (call termination and call origination) charges by 1 August 2004. The request was partially challenged, but finally a mutual agreement was reached. The basis for the agreement was that the ENCB came to the conclusion that the network model it used in calculations of interconnection charges was partially out of date⁶⁴ and the fixed incumbent concluded that several telephone network equipment prices that were used by it as input data for calculations had substantially decreased during the previous years. The new interconnection prices are expected to have a positive influence on retail prices. Compared to the interconnection service charges in force up to 1 August 2004, the new local and regional level interconnection service charges are approximately 15% lower in peak time and the new national level interconnection service charges are approximately 24% lower in peak time. The new interconnection service charges are applicable from October 2004.

⁶⁴ Currently it is being considered whether there is a necessity to change the existing governmental regulation on network model data.

The ENCB has also analysed the termination rates of all mobile network operators and found that all operators have unreasonably high profits. So far operators have voluntarily decreased prices, but in the ENCB's opinion these reductions have not been enough. On 9 March 2004 ENCB issued a request to the second largest mobile operator, which had the highest average call termination fee, demanding that the calculation of mobile network call termination charges be brought into compliance with the Telecommunications Act. This states that it is not permitted to set the weighted average cost of capital (WACC) above 18%. According to the calculations of the ENCB, the said mobile operator's call termination charge based on a reasonable rate of return should be approximately EEK 2.50 per minute compared to the EEK 3.06 per minute currently applied. The new call termination fee was to have been applied from 1 October, 2004, but the ENCB's decision has been appealed and the dispute is pending. The mobile incumbent and the third largest mobile operator have declared their willingness to restart negotiations on the reduction of call terminations charges, if the second largest mobile operator will lower its call termination fee.

GREECE

TRANSPOSITION

The transposition of the new regulatory framework has not yet taken place in Greece. Political changes have further delayed the process of adoption of the new Telecommunications Act, and it is estimated that the transposition measures will be finally in place by the end of 2004. While it appears that the new government intends to adopt a law transposing the new regulatory framework, no draft had been presented to the Commission at the time of drafting this Report. The Commission has already made a formal application to the Court of Justice asking it to condemn Greece, at the end of the infringement proceeding started in October 2003, for failure to communicate the necessary measures transposing the Directives.

The lack of transposition of the new framework has resulted in constraints on the power of the EETT, the national regulatory authority. The EETT has nevertheless taken the initiative to collect market data and conduct an analysis of the market for voice call termination on individual mobile networks. No remedies have been applied so far, since the EETT does not have the necessary legal powers to enforce them. The analysis was notified to the Commission and a decision was taken in this regard.

The fixed incumbent operator in Greece maintains its position as the only access network provider in the fixed market. As fixed network competition is now evolving, regulatory intervention continues to be very important in Greece. Consequently, the role of the EETT in monitoring the electronic communications markets will continue to be crucial, as it needs to be able to apply whatever remedies are needed to address regulatory bottlenecks. In view of the absence of a major cable operator in Greece, the only fixed network which has started competing with the incumbent is that of the national power enterprise. This network is currently under development but, despite its promising expansion, will still rely on the local loops of the incumbent.

Further efforts will be required to overcome regulatory constraints and facilitate the further development of fixed networks. Such constraints concern, *inter alia*, rights of way, access to the local loop, CPS conditions etc. The development of the mobile market is more satisfactory, as competition is quite well developed. Despite recent positive signs, broadband access is one of the major problems in the electronic communications markets in Greece.

MARKET OVERVIEW

As of December 2003, the fixed incumbent remains dominant on the fixed markets. In particular, its market share (based on retail revenues) was estimated at 90.7% in local calls (including calls to Internet), 84.2% in long distance calls and 75.8% in international calls. The situation is even more pronounced in the market of local calls to Internet only, where the incumbent's share was 99.5% while in the market for calls to mobile it stood at 84.5%. The biggest part of the overall value of the Greek telecommunications market comes from the mobile telephone services and is estimated at 47% while fixed voice services represent around 40% and fixed data services around 13%. Only 2% of subscribers are using an alternative operator for local voice telephony services while the figure is higher (around 12.8%) for long distance and international calls. As of the end of July 2004, only a few mobile numbers were

ported to another operator (around 6 379 numbers). The mobile penetration rate has reached 93% of the population while 9.9 million mobile subscribers were reported in May 2004. The market share of the subsidiary of the fixed incumbent is around 41%, the second largest around 31% and the third largest 27%. As of July 2004, the penetration rate for retail broadband access, taking account of the incumbent and new entrants' offerings, is the lowest among the 15 EU Member States. In July 2004 Greece's penetration level was 0.24%. The market share of the incumbent's ISP subsidiary of total DSL broadband lines is close to 46% while 96% of the total DSL broadband lines are provided through the incumbent's "ADSL Offer" (bitstream level).

THE NRA

The EETT exercises the main regulatory functions while the Ministry of Transport and Communications is responsible for the policy making and the drafting of legislation in Greece is the National Regulatory Authority in Greece. There is sufficient evidence that the overall performance of the EETT has been positive so far and the EETT has used its powers effectively.

The ability of the EETT to intervene in monitoring and regulating the markets has been restricted because of the lack of transposition. Therefore, important actions have been delayed, such as market analysis and the application of relevant remedies. Significant issues such as broadband access were not addressed for the same reason.

Alternative operators expect further actions to be taken to ensure the availability of co-location, to facilitate CPS procedures and facility sharing and to protect them from win-back tactics. There have been calls from the market for the EETT to play a stronger role in applying competition law and in particular in applying a price squeeze test in relation to the wholesale ADSL offer. In accordance with the Telecommunications Law 2867/2000, the EETT has the power to impose remedies based on the competition laws currently in effect. The efficiency of publication of EETT's decisions has been a point of criticism, suggesting that the requirements of the relevant national legislation are not fully implemented. On the other hand, decisions of the EETT are not always applied fully by the affected parties.

Contradictory opinions between different operators are reported regarding the exercise by the EETT of its right to impose financial penalties. On the one hand, it is reported by operators that, in certain cases, the EETT either does not impose financial penalties at all or the level of those finally imposed is so low that it does not affect the incumbent's behaviour, especially in those cases where its profits exceed the penalties imposed. On the other hand, the EETT claims to have imposed financial penalties totalling around € 1.7m in 11 cases during the year 2003. These penalties were imposed on a number of operators but mostly on the incumbent, for violations of SMP obligations and the telecommunications and competition laws. In 2004, penalties of lower amounts have been imposed, mainly against all mobile operators for violation of the obligation to provide a universal directory service.

Appeals and dispute resolution

Regarding appeals, it appears that there has been an increase in the number of appeals in 2003 and 2004. In particular during 2003, out of the 35 decisions of the EETT relating to the incumbent, 20 have already been appealed by the latter before the Council of State. Among

those decisions which have been appealed before the Administrative Courts of Greece, 10 relate to EETT decisions imposing financial penalties.

The dispute resolution procedures have functioned well so far. Nevertheless, it is reported that some room for improvement exists regarding the time limits for the delivery of the EETT's decisions and compliance with them by the affected parties. In most cases, operators report their problems to the EETT, asking for its intervention without filing a formal complaint. The EETT then mediates with a view to finding solutions while, if a violation of the relevant laws is identified, a hearing starts at the initiative of the EETT.

Market analysis

In July 2004, the Commission registered a notification by the EETT concerning the voice call termination on individual mobile networks. The notification was made ahead of transposition and therefore it could not be enforced against individuals until appropriate transposition of the EU framework has taken place. In case that any substantial elements of the notified market analysis are modified until the time of transposition of the framework, the EETT would need to re-notify the resulting measure. The Commission has commented among others on the obligation of non-discrimination in respect of GSM gateways, cost-orientation and accounting separation. In relation to the GSM gateways, the Commission considered that the obligation of non-discrimination is not intended to remedy an SMP finding in the product market covered by the notification but may pertain to a potential finding of dominance in another relevant market.

MAIN REGULATORY ISSUES

Interconnection

Termination charges for calls from fixed to mobile networks appear to be high. Alternative fixed operators complain that the mobile operators apply price squeeze tactics when charging on-net calls at prices much below interconnection charges. The EETT has adopted a decision in this regard determining that such practices are illegal and has issued recommendations to the mobile operator involved requiring it to desist from similar violations in the future. Such decisions are considered by the alternative operators to be insufficient, as they have no practical impact on the behaviour of the affected parties. Another inquiry is in progress by the EETT against a mobile operator for similar reasons.

Carrier pre-selection

In relation to the provision of carrier pre-selection, it is reported that the second fixed network operator has lost a number of subscribers during the past 18 months because of the anticompetitive win-back actions of the incumbent. While a complaint was filed with the EETT at the beginning of 2004, it seems that it has been hard to obtain sufficient evidence to establish that the incumbent has used customer data in an anti-competitive manner. No final decision has yet been reached by the EETT although interim measures were taken. Immediate regulatory intervention to facilitate customer activation and prevent anti-competitive win-back tactics is expected by alternative operators.

Mobile services

An Ombudsman's decision on the health aspects of installing antennae in residential areas, in particular at sites close to hospitals and schools, provoked intense debates on the environmental, social and economic aspects of such installations. As a result, local authorities sought to play a greater role in intervening in the process of authorising antennae.

The issue is even more important in view of the increased number of antennae required for the development of 3G networks. In addition, since the installation of antennae can be costly, co-location has been encouraged by the EETT. Mobile operators also expressed an increased interest in co-location. Nevertheless, the conclusion of cooperation agreements seems to have been delayed by considerations as to what constitutes the most appropriate site for co-location in relation to the frequency plans of each operator or how to share the advantages of acquiring a superior antenna location. Further involvement of the EETT in ensuring the successful conclusion of such agreements would be desirable, especially where the difference in the negotiating power of the operators does not ensure a level playing field.

Directory services

Despite a number of initiatives undertaken by the EETT, the universal directory service was not fully implemented in Greece under the old framework. It is reported that certain mobile operators refused to provide their subscribers' data to the incumbent who is designated as the universal service provider, while mobile operators claim that the non-provision of the service was the result of the failure of the EETT to specify important implementing terms and conditions.

In early spring 2004, EETT initiated proceedings against all operators concerned, in which it concluded that the four mobile operators were acting in violation of the national telecommunications legislation and imposed a fine on them. EETT has recently approved the format of the first issue of the Universal Directory which covers only a part of Greece and contains, in addition to the numbers of the incumbent a few numbers of two other fixed operators.

Number portability

Mobile number portability was only launched officially on 1 March 2004 and in practice on 1 April, with the application of the same tariffs and the same format (application of a 5 digit code) by the three biggest mobile operators. It is reported that an unusually high percentage of rejections of applications has been notified for allegedly incomplete or erroneous filing of the application (i.e. name, surname and identification number). In this regard, EETT started a hearing procedure against the four mobile operators in order to investigate whether the way that they provide the number portability service violates the current legislation. The proceeding is still in progress and mobile operators have reported that the rate of rejections is by now taking a downward trend.

Local loop unbundling

Slow uptake of local loop unbundling is still reported, with only 1 092 subscribers in mid 2004, as compared to 655 subscribers a year ago. Some increase in shared access is reported, with 160 subscribers in comparison with 5 subscribers a year ago. It is also reported that difficulties in obtaining access to the local loop of the incumbent are the result of either

limited information or delays of a technical nature, such as in implementing the necessary technical studies. In addition, it seems that the alternative operators have not developed a clear investment strategy.

The EETT has taken some initiatives in organising a number of meetings with the incumbent to discuss LLU problems. The incumbent was found in 2003 to have violated both the national LLU legislation and competition law. For this reason the EETT decided to impose administrative fines against the incumbent of € 150 000 for each of the two violations. Recently, in order to promote the development of broadband services in Greece, the EETT has organised working groups including the incumbent and alternative operators to facilitate the implementation of the provision of LLU.

The provision by the incumbent of co-location appears to be problematic for alternative operators. It is reported that neither physical co-location nor co-mingling are currently provided by the incumbent but only distant co-location. Different types of co-location are foreseen in the RUO but they are not fully implemented.

It is also reported by alternative operators that the incumbent does not accept alternative means of switching such as backhaul and certain wireless loops or fibre optics belonging to its competitors and that the timetables provided in the RUO are not fully respected.

Broadband

There was a high demand for ADSL services during the first year of their provision. Currently there are only 26 000 subscribers. Given that the new EU regulatory framework is not yet transposed, EETT's ability to intervene to impose *ex ante* measures in the market has been limited. Certain problems have been identified in the provision of the service, such as the quality of service and certain requirements imposed by the incumbent. The EETT took the initiative to organise working groups to improve the incumbent's ADSL offer and look for solutions to problems related to the provision of the service. A hearing was held by EETT to inquire about a possible violation of competition laws and in particular the bundling of the service with certain terminal equipment.

Pricing of the ADSL wholesale access is still reported to be problematic as current prices do not allow alternative operators to maintain a profit margin. A price squeeze test to be applied by EETT and a substantial reduction of the price of the wholesale offerings are expected by the market.

Although certain political initiatives were taken, such as relevant research and establishing the Greek Broadband Task Force in March 2002 to draft the national strategy for broadband, further actions are needed to boost the development of broadband services in Greece. Despite the substantial increase (more than double) of the number of subscribers within the past six months and the efforts made by the EETT, the figures representing the actual development of the broadband market are very disappointing.

Moreover in the light of the absence of an extensive cable network and until the development of a second network provider capable of providing competitive broadband services to the whole of the Greek territory, further action needs to be taken to meet the expectations of growth and competitiveness of the Greek economy and eliminate the digital divide between Greece and the rest of the EU.

Rights of way

A number of difficulties are reported in obtaining rights to install facilities on, over or under public property. It seems that the role of the EETT in granting such rights is limited, while other authorities, such as the City Planning and local authorities are involved in the process.

In accordance with the rules currently in force, the local authorities responsible for issuing the final approval for access enjoy certain discretion in handling relevant requests. A diversity of approaches applied by them in exercising such discretion has been reported. In particular, each municipality has the ability to apply its own rules for giving access to the public land which is under its responsibility and it seems that in certain cases inappropriate remedies were imposed. Appeals before the courts have been ineffective as often relevant decisions were modified and new appeals had to be launched.

The market expects that homogeneous rules and procedures, such as limits on the discretion of the local authorities, should apply to decisions on whether or not to grant approval. In accordance with the EU regulatory framework, the principles of transparency and non-discrimination need to be followed by competent authorities in attaching conditions to such rights. These will contribute to regulatory certainty and facilitate the development of competition. The Commission services are examining whether further legislative initiatives are necessary in this respect. It is reported that relevant provisions will be finally included in the new electronic communications legislation.

SPAIN

TRANSPOSITION

The institutional framework in Spain has undergone a series of changes in the reporting period. As a result of the formation of a new government following the March 2004 elections, responsibility for telecommunications has been placed with the Ministry of Industry, Tourism and Trade.

The first policy statements have been generally welcomed by the sector, and in June the new government formalised an agreement with the mobile operators to adapt the 3G roll-out conditions to the current market situation. However, the implementing regulations of the General Telecommunications Law of November 2003, which are necessary to transpose fully the new regulatory framework, have still not been adopted. As the necessary procedures are close to completion, it is expected that the relevant draft regulations will be adopted by the end of the year.

The Commission has identified a series of issues that merit consideration regarding the conformity of the new Spanish law with the common regulatory framework, in particular the absence of provisions governing the consultation at national level of interested parties on measures having a significant impact on the relevant market, the unavailability to the national regulatory authorities (NRAs) of all the wholesale remedies provided for by the Access Directive to address the absence of effective competition on the relevant markets and the absence of a definition of the remedies that the NRAs may impose on undertakings identified as having significant market power (SMP) in relevant retail markets and of the conditions governing the imposition, modification and withdrawal of such obligations. These issues are dealt with in the above-mentioned draft regulations.

The conformity with the common regulatory framework of the transitory provision of the new law, which establishes that no further cable TV licences will be granted before the end of 2009, also needs to be examined, if it concerns transmission services.

MARKET OVERVIEW

The period 2003-2004 has been characterised by a clear, but as yet timid recovery of the sector. Even though the main operators are making profits again, only the mobile sector recorded higher investments in 2003. Together with broadband, the mobile players are driving the growth in the sector: mobile services grew by 18% and broadband services by 88% (in terms of revenues) in 2003.

While competition in the mobile market has been dynamic, with the third operator gaining a 20% market share in 2003, in the fixed telephony market the incumbent has lost less market share than in previous years. Its share (by revenue) of the fixed telephony market is now 81%.

Mobile penetration has already reached 92%⁶⁵. However, the average per minute price of mobile calls did not decrease in 2003, with the notable exception of on-net calls. Mobile termination represents 62% of all interconnection revenue, which reflects the high mobile termination charges levied⁶⁶. As of July 2004 (the reference date for comparative market data in this Report), the termination charges levied by all three mobile operators designated as having SMP were above the EU-15 average for SMP operators.

On-net calls are 50-75% less expensive than off-net calls⁶⁷.

According to the Ministry, on 30 June 2004 there were some 2.6 million broadband connections in Spain (this figure has increased by 46% in just one year), 25% of which are provided to end users via cable modem (an increase of 35% in terms of customers), and the rest via ADSL (up 50%).

In 2003 the market share of the companies of the incumbent's group in the retail broadband market (all technologies) increased by five percentage points over 2002 (in terms of revenues).

The market share of the cable operators (the incumbent's main competitors) was 18% in 2003 in terms of revenues (this figure is eight percentage points lower than the market share in terms of customers due to the fact that the average revenue per client for cable offers is lower than is the case for ADSL offers⁶⁸).

Regarding ADSL alone, at that same date the incumbent's group had a 75% share of the retail market. In fact, it has very successfully positioned itself as the leader in this market (contrary to the dial-up internet access market where an alternative operator has been the major services provider).

THE NRA

While the new General Telecommunications Law designates a total of five NRAs, including the government itself, and is quite clear in assigning functions to each of them (with the CMT and the Ministry of Industry, Tourism and Trade vested with the key competences), the combination of the dispersal of these functions and references in the law to further implementing regulations on those authorities' tasks causes some unrest among operators.

However, in view of the various critical opinions expressed by market players regarding the retail price regulation applied thus far, the transfer of responsibility for retail tariff regulation (based on market definitions and analysis) to the CMT, pursuant to the new law, has been welcomed by all. While it is the Member States' prerogative to decide on the allocation of responsibilities as between public bodies, there are clear advantages in having wholesale and retail regulation under the same organisational umbrella. Retail (and wholesale) regulation should be proportionate and based on the nature of the problem identified. The new responsibility of the CMT for retail tariff regulation (alongside that for wholesale regulation) should enable it to deal more swiftly and effectively with problems such as price squeezing in

⁶⁵ Compared with a fixed penetration rate of 42%.

⁶⁶ CMT Annual Report 2003.

⁶⁷ CMT Annual Report 2003.

⁶⁸ The figures and data quoted in this paragraph are from the CMT's Annual Report 2003.

an environment that has been characterised by a proliferation of different types of discount and other price schemes, the majority of which have been introduced by the incumbent.

The CMT's regulatory activity has remained intense. Nonetheless, for the first time and in contrast with statements made in previous reporting periods, the market has expressed concern at a lack of transparency of the CMT, in particular regarding the market reviews (see "Market analysis" below).

While the CMT has recorded a series of successes and has pioneered regulation in certain areas (such as the implementation of capacity-based interconnection, and the incorporation of migration processes and prices in the reference unbundling offer), the more it has progressively broken new and more complex ground (cost accounting, mobile termination, price squeeze test), the more information which new entrants consider essential to the proceedings has been declared confidential.

MARKET ANALYSIS

In July 2004, the CMT issued a pre-consultation document defining and analysing four broadly defined retail markets⁶⁹. While this may have dispelled somewhat the concerns relating to the perceived lack of transparency of the CMT's regulatory policy, some confusion has arisen from the fact that both the market definitions and the market analysis methodology differ – in some respects quite significantly - from the Directives and Commission recommendation and guidelines.

This being said, the document clearly spelled out that neither the market definitions nor the analyses included therein corresponded to those referred to in the Framework Directive. The declared aim of the pre-consultation document was to check whether the CMT's views on competition problems in the above-mentioned markets were shared by the market players. Formal consultations are expected to be initiated in October 2004.

MAIN REGULATORY ISSUES

Access and interconnection - fixed market

The latest reference interconnection offer dates back to 10 July 2003. After a difficult start marked by many disputes and interim measures, capacity-based interconnection is booming and is expected to supersede metered interconnection in terms of traffic in 2004.

The CMT is currently revising the principle of reciprocity between the incumbent's and the new entrant's termination charges. In its latest annual report of July 2004, the CMT recognises that the imposition of the costs and efficiency standard of the incumbent on new entrants may constitute an obstacle to the provision of alternative networks, taking into consideration the different starting conditions faced by the new entrants in terms of coverage, number of clients and competitive framework.

⁶⁹ Access to the public telephone network at a fixed location, access to and traffic on data networks at a fixed location, access and traffic at a mobile location, traffic at a fixed location.

Regarding the charges for metered interconnection, the local level charges are slightly above the EU average. Single transit charges have come down close to the EU average, while double transit charges are among the most expensive in the EU.

In recent years, the prices of interconnection leased lines have come down, but remain well above the recommended ceiling and the EU average as concerns 2 Mbit/s lines. New entrants are satisfied with the service level agreement incorporated into the reference offer, but claim that it is not being executed or enforced.

The number of unbundled local loops, although still low (some 40 000 fully unbundled loops and some 2000 loops in shared use on 30 June 2004), has doubled over the last year (with a monthly growth rate of 20%) and is expected to increase significantly in the coming months. The monthly average total cost for leasing an entire or a shared local loop is among the least expensive in the EU. New entrants' interest in co-mingling and the take-off of shared access to the local loop are particularly noteworthy developments.

Broadband

In its annual report, the CMT notes that the discounts and promotions on the incumbent's retail ADSL prices (which were deregulated in November 2003 without any public market review process having been carried out) have not been carried over into its ADSL wholesale prices and have exerted pressure on new entrants' margins. Consequently, the latter have requested repeatedly the intervention of the CMT for margin squeeze concerns and some offers have been blocked on these grounds.

These developments and the fact that the incumbent has strengthened its position on the retail broadband market pose clear regulatory challenges, in particular from a prospective point of view.

In order to tackle this problem, in July 2004 the CMT devised a methodology (reportedly based on Community competition law and case law principles) to assess any price squeezes produced by discounts on the incumbent's retail ADSL products (with a view to preserving the existing retail minus). New entrants consider the CMT's cost assessments to be very conservative and point to a difference of several tens of percentage points between the latter and their own estimates.

In July 2004, the CMT revised the incumbent's reference unbundling offer (RUO) by incorporating the financial and technical conditions for migrating large groups of customers from shared access to fully bundled access, and from indirect access to fully unbundled access and shared access. As from March 2004 the RUO also sets the conditions for migration between different indirect access modes (e.g. IP bitstream to ATM bitstream). Alongside the detailed regulation applied to the bitstream product (GigADSL), the other wholesale ADSL products of the incumbent's group (the re-sale products ADSL IP and Megavía) are also subject to some regulatory conditions, albeit less strict than for GigADSL (publication, non-discrimination requirements, but no price regulation).

New entrants note that there is no wholesale SDSL product allowing to cater properly for the business market. Moreover, under GigADSL, full national coverage requires a presence at no less than 109 access points, while other wholesale products require less extensive network deployment.

New entrants have expressed concern about the recent proposal of the incumbent to double the speed rates of its retail ADSL offer without modifying the prices. This is however a welcome development in as far as users are concerned, given that the standard speed rates offered so far have been rather low in relation to the relatively high prices applicable. On 22 July 2004 the CMT issued a decision amending the incumbent's wholesale offer and establishing new prices on the basis of the retail minus methodology. For this measure to be a success, effective enforcement and execution of the CMT's decision will be essential.

The public authorities' support for the deployment of broadband as part of their national broadband strategy is another area where possible distortions of competition may occur, and there are concerns on the part of market players about public authorities' investments and procurement without open and transparent tenders. The CMT has issued guidelines to the public authorities in this respect, and this is clearly an area that will require a close follow-up in the future as the authorities implement their broadband strategies.

Mobile services

As mentioned above, the mobile sector has been driving growth and investment in the sector in 2003. The mobile market is very dynamic, as witnessed by high mobile number portability (with some 2.1 million ported mobile numbers on 1 July 2004) and the 20% market share gained by the third mobile operator, which was also designated as having significant market power in 2003.

The two main mobile operators were designated as having SMP in 2000. On 26 June 2003 the CMT issued a decision regarding the verification of the 2000 and 2001 cost accounts of these two operators and then initiated the proceedings aimed at determining the cost orientation of their termination charges.

In an interim measure regarding the incumbent's mobile arm that was adopted in October 2003, the CMT noted that there was "a big difference between the mobile operator's termination charges and the costs for those services that have been calculated for 2001". However, the relevant decisions introduced only a 7% reduction in the two main operators' charges, and a 12% reduction in the third operator's termination charges for traffic originated in fixed networks.

On 18 December 2003, the CMT added to its October's decision a new system of maximum average mobile termination prices; however, the application of this system did not result in any further decreases in the termination charges in real terms. At the same time, the CMT stated that the reductions effected in October 2003 had brought the termination charges to a cost oriented level. Yet in its decision, the CMT also noted that "it is observed that after the application of the interim measures of 2 October 2003, there remains a margin between the termination charge of the incumbent's mobile arm and the average price for providing the service as derived from the cost data audited by this Commission".

The fixed new entrants have expressed several grievances about the decision of 18 December 2003. They note that the new system of maximum average mobile termination charges is not transparent due to the fact that essential information used for calculating the charges has been declared confidential. They stress that the termination charges are not cost oriented due to the fact that for the first minute is charged as a whole. They also point to the fact that the operators' 2004 charges have been oriented to their 2001 costs.

The CMT is aware of the concerns of the sector and is contemplating a glide path allowing the sector to anticipate future developments, which is expected to bring more decreases to the mobile termination charges. As a consequence, further reductions of 12%, 10.5% and 15.5% were adopted in October 2004 that apply respectively to the main, second biggest and third mobile operators. Due to the regulatory framework in place, which requires charges to be oriented to audited costs, there is a clear need to speed up procedures to allow for the charges to be oriented to the costs of the latest auditing year (e.g. the termination charges applied in 2004 should be oriented to the 2003 audited costs).

In 2001, new entrants also brought a case of alleged price squeezing and discrimination by the mobile operators in the treatment of fixed-to-mobile and mobile-to-mobile calls, on the one hand, and on-net and off-net calls, on the other hand. The Competition Court is to provide its ruling on the investigation shortly.

Authorisations and rights of use of frequencies; rights of way

The new telecommunications law provides for an automatic adaptation of existing licences to a general authorisation regime and that any licence conditions contrary to this regime must be considered as not applicable.

In June 2004, the holders of a 3G mobile licence and the government concluded an agreement by which the licence conditions were adapted to prevailing market conditions. Two of the four licensees started offering 3G services in 2004 and can be considered as being in a “near commercial phase”. The third and fourth licensees are expected to launch their services in October 2004 and in 2005 respectively.

The Audiencia Nacional has still not ruled on the legality of the increase of the spectrum reservation charges effected in 2001. Generally speaking, as in a number of other Member States, the resolution through judicial proceedings of appeals lodged by operators against the most important and complex regulatory decisions has been protracted, and this can undermine the effectiveness of regulation.

The new telecommunications law provides for the creation of a new public body with the status of NRA within the meaning of the Directives, which is to manage radio frequencies and charges for the use of frequencies. The latter has not yet been established.

The new law also provides for the possibility of secondary trading of frequencies, but an implementing regulation is needed to set the conditions thereof. There is an interest on the part of the third mobile operator, which has a DCS 1800 and 3G licence, to have access to the GSM frequencies being vacated by the closing of the incumbent’s Moviline service. Contrary to its main competitors, it does not have any GSM 900 frequencies, which entail a number of restrictions not borne by its competitors.

A corollary to access to frequencies is the issue of obtaining rights of way, which has not improved substantively since recent reports despite the efforts by the central authorities to address the issue by means of new legislative provisions and cooperation with the regional and local authorities. A round table gathering these parties was organised in July 2004 to address the issue. Further tangible progress is needed and collective responsibility should be assumed in a situation where the operators have had to appeal regional and local authorities’ decisions before the courts, which have in most cases ruled in their favour.

Universal service, consumer issues, taxation

The incumbent has been designated as universal service provider until 2005. According to the CMT, the incumbent has incurred a net loss of € 110 million in providing universal service in 2002. As in previous years, the CMT ruled that it was not necessary to set up a universal service fund, since the incumbent has not suffered a competitive disadvantage from the provision of the relevant services.

The electronic communications sector as a whole has welcomed statements by representatives of the new government that public co-financing is being examined as another means to fund universal service. This would require an amendment to the new telecommunications law.

The authorities consider that the cost of universal service may rise in the years 2003 and 2004 as a result of the phasing out of the analogue rural mobile telephony system ('TRAC') and its replacement with technologies that permit functional internet access, as required by the Universal Service Directive. By now approximately 77% of the TRAC phones reportedly permit functional internet access, and pursuant to the law, 100% of the phones should allow for this facility by the end of 2004.

Regarding consumer issues operators complain about various public service obligations placed on them (emergency calls; traffic data retention, legal interception) and advocate self-regulation in the provision of adequate service quality.

Issues that have particularly caught users' and their associations' attention have been the prices of fixed-to-mobile calls, with the "indivisible first minute", and of broadband access in general.

Market players also voice concerns about the financial burden that they must bear as a combination of a series of different central and local taxes. They have to pay an administrative tax (0.15% of operators' revenue) the purpose of which is to finance the CMT's work. In this respect, the Authorisation Directive provides that any administrative charges on operators should in total only cover the administrative costs incurred by the benefiting authorities in performing their tasks. The Commission services are looking further at this issue.

In 2002, the system of local taxes (1.5% of the revenues earned in each local council district) on rights of way was modified with a view to aligning the regime applied to all operators with that historically applied to the incumbent. It does not concern mobile operators, however: the latter are subject to a new business tax formula (impuesto de actividades económicas) that is based on the number of users and of antennae in each municipal district. These changes have reportedly significantly increased the tax burden on the sector.

FRANCE

TRANSPOSITION

The positive developments in regard to competition in France over the past year, especially with regard to broadband, have been overshadowed by the fact that France was very late in adopting the laws required to transpose the new regulatory framework. While the key piece of legislation was finally adopted in July 2004, even now a significant amount of secondary measures is required to complete transposition. There does appear to be a common view among interested parties, however, that the new laws are a faithful transposition of the Directives.

The Commission has not yet reached a formal conclusion on the conformity of the measures adopted. The French authorities appear to be making considerable efforts to have the necessary secondary legislation adopted as soon as possible. A public consultation on a set of nine draft Decrees was launched on 1 September 2004 covering, amongst other things, universal service tariffs, directory services, rights of way, frequency management, and the rights and obligations of operators under the authorisation regime. Some of the issues addressed must be dealt with before the new framework can begin to be properly implemented. The most important are those establishing the necessary legal conditions for the national regulatory authority (ART) to proceed formally with the market analysis process and to impose the necessary obligations on operators with significant market power, as appropriate. The public consultation ended on 22 September, and the French authorities hope to have the Decrees adopted by the end of the year.

MARKET OVERVIEW

After remaining stable for over three years, the fixed line penetration rate has reduced by nearly 0.51% since last year, to 56.7% of the population or 33.83 million lines. The ART estimates that the fixed line incumbent had 80.7% of the local call market, including dial-up calls to internet, and 69% of the long distance and international calls markets in December 2003, a slight decrease on the year previously. While the market shares of the three principal new entrants on the fixed line market are not available individually, 22.4% of all subscribers used carrier selection or pre-selection, with a hard core of 13.7% subscribed to another operator through carrier pre-selection.

While the mobile market remains the most dynamic sector for growth in France, growth in mobile penetration slowed in the year to June 2003, in part because operators were shedding low margin customers and focusing on value-added customers, and then accelerated again in the third quarter of 2004, so that annual growth reached 6.8% in the year to 30 September 2004⁷⁰. Nevertheless, France still has one of the lowest mobile penetration rates in the EU (71%), and the third operator has not been able to break through an average market share ceiling of 17% and to compete on even terms with its two larger competitors, who control

⁷⁰ Source : ART – Mobile Observatory, 3rd Quarter 2004 - *Observatoire des mobiles du 3ème trimestre 2004* (<http://www.art-telecom.fr/>).

close to 83% of the market (48% for the incumbent's mobile subsidiary, 35% for the second GSM operator).

One of the most important developments in the French market has been the growth in the number of DSL connections, and notably the number of those lines that are in the hands of new entrants, with a penetration rate for broadband (8.3%) that is now just above the EU average. France has had considerable success in developing unbundling, and has the highest number of shared access lines in the EU (717 564). There are now 4.95 million broadband lines in France (of which 4.52 million are DSL lines), and the incumbent's market share for retail broadband lines has slipped to 48%. As regards DSL specifically, when including the number of resale lines that are supplied by the fixed line incumbent operator but sold on the retail market by other service providers, the incumbent now only has 50% of the retail DSL market (compared to 75.3% of the wholesale DSL market).

THE NRA

The *Autorité de Régulation des Télécommunications* (ART) is the independent regulator for the electronic communications sector in France, which already has a proven track record in the regulation of the sector. Under the recently adopted laws transposing the new EU regulatory framework, the ART has received responsibility for some of the few matters that were not already attributed to it, including in particular the regulation of retail tariffs, where appropriate under the new framework.

Despite the fact that the more recent developments in broadband can be attributed largely to a series of regulatory decisions by the ART, most notably in 2002, there continues to be a perception of a lack of regulatory independence in France. This is due in part to the fact that the Ministry in charge of electronic communications, which was responsible for approving retail tariffs under the old framework (a situation that remains in place until the relevant decrees have entered into force) and is still responsible for issuing rights of use for frequencies where it has been decided to have a restricted number of individual licences, is under the authority of the Ministry of Finances which is managing the State's shareholding in the incumbent. And while this situation is now changing, such a relationship was perceived to be very sensitive in the period when the State was seeking the best possible price for the sale of part of its shareholding, which was completed in early September 2004. Added to the fact that there was a challenge to the powers of the ART in regards to price regulation during parliamentary discussions on the new regulatory framework, it is hard to reassure market players that regulatory decisions are taken in an atmosphere that is conducive to independence and objectivity.

As referred to in previous Reports, there are still some concerns on the part of market players with the duration of procedures once a request for intervention has been made to the ART. While the maximum possible duration was shortened in mid-2003, the average length of time for a decision to issue has been approximately 4 months for 2003 and 2004, which is the maximum period permitted under the new framework.

Building on the relationship developed under the old framework, co-operation between the ART and the French competition authority (*Conseil de la Concurrence*) appears to be close and effective. As a recent example, the complementarity of the action of the two authorities was demonstrated when the *Conseil* issued a favourable opinion on a draft market analysis of

the ART for ex-ante regulation of a market while issuing at the same time a decision imposing ex-post sanctions on two operators for anticompetitive pricing practices in the same market.

Appeal mechanism

The duration of appeals against decisions of the ART is perceived by market players as a serious problem (as in the case of the appeal against the ART's decision on third-party billing, see below) where lengthy procedures can effectively freeze any developments in a given product or service. While ART decisions remain in force during any appeal process, unless a Court specifically agrees to a request for suspension, long-drawn out procedures can mean that the market does not develop, often to the benefit of the incumbent operator. With the entry into force of the new framework, and greater reliance on ART decisions such as in the case of market analyses and designations, the Commission intends to monitor closely whether any delays could militate against the effective regulation of the market.

Delays in decision-taking can have a knock-on effect on other services, but do not remove the obligation on the NRAs to take decisive action. This was the case in regard to third-party billing, for example, which was a key issue in determining the success of non-geographic number portability. In September 2004, at the instigation of the Commission, the European Court of Justice ruled that France was in breach of certain obligations under the old regulatory framework for its failure to ensure the availability of non-geographic number portability (and particularly for shared revenues services), which makes it clear that the national authorities have to take all the action necessary to ensure that a mandated service is effectively available.

MARKET ANALYSIS

Despite the delays in completing the transposition measures required to allow the formal market analysis procedure to be completed, the ART has carried out a significant amount of preparatory work, including a full data gathering exercise and the preparation of draft market analyses. As of 30 September 2004 it had completed three grouped consultations covering 12 of the markets referred to in the Commission's Recommendation, for the purposes of which it has provisionally identified a number of sub-markets.

The ART has also issued a questionnaire on a market for SMS messaging which, without prejudice to the market analysis that the ART will carry out subsequently, indicates *a priori* a willingness to examine the possibility that a separate market exists for SMS.

Some views have been expressed that the procedures for the collection of data (through detailed questionnaires) were quite burdensome, but there is an acceptance that the ART needs to have all the pertinent data at its disposal in order to ensure a thorough market analysis can be carried out. While the original deadline was quite short, given that it included the summer holiday period, the ART in reality accepted considerably longer delays in the provision of responses to the questionnaires by a number of operators, and engaged in a series of meetings and reminders in order to ensure that it had a satisfactory body of data available for the market analyses. . Another issue raised by operators was the relative lack of detail in the preliminary draft market analyses that have been published for consultation. However, as evidenced by the first formal draft market analysis decision, published recently, a considerably more detailed analysis is contained in the final draft market analysis which is published again for consultation of all interested parties.

MAIN REGULATORY ISSUES

Development of competition

The incumbent has been able to maintain and stabilise its dominant position in local voice telephony and local access, and other operators have concerns about the lack of regulatory intervention in relation to the incumbent's aggressive commercial and pricing strategy – particularly as the practice of the bundling of tariffs has developed. The re-integration of the incumbent's ISP subsidiary back into the incumbent's organisation, after a share buy-out, will require close monitoring by the Commission and the national authorities about transparency and competitive practices, given the market power that the incumbent can bring to bear on the retail market for voice telephony and Internet services, including broadband.

One specific issue in this regard is the incumbent's continuing domination of the local access market, despite advances in unbundling. Proposals for the incumbent to introduce wholesale rental of the subscriber line, did not come to a successful conclusion. And while there has been an agreement between the incumbent and another operator offering preselection so that the pre-selected operator could undertake third-party billing on behalf of the incumbent, alternative operators feel that they are unable to develop products and services to the end user until at least the market analysis is completed, other than by means of total unbundling, which does not appear to be competitively priced for alternative operators..

However, the most critical situation appears to be the incumbent's pricing strategy between retail (broadband) products and the equivalent bitstream and resale products offered to other operators. Following a period where the resale and bitstream tariffs of the incumbent appeared to be relatively balanced and to allow for the development of competition in DSL services, due to previous regulatory action by the ART, this balance now appears to have gone, and new entrants are complaining of a price squeeze. In December 2003, the ART agreed to a reduction in the retail charges and the resale ISP tariffs for DSL, but this has put huge pressure on the operators using the incumbent's bitstream product and those who were developing unbundling. Given the very positive effects of the ART's previous efforts to regulate these markets, where sufficient margin was allowed between the resale, bitstream and unbundling products, resulting in very significant growth in broadband lines and the market share of alternative operators, such a development must be considered as a step backwards.

Authorisations

While many aspects of the implementation of the new framework were delayed by the absence of transposition measures, the ART did move swiftly to apply an authorisation scheme from the date of application of the new framework in July 2003. However, one area of the authorisation system that the Commission is looking into as far as correct application of the new framework is concerned is that relating to cable operators, who are still subject to “conventions” or contracts, mostly with local authorities in whose catchment areas their networks were developed. These contracts were drawn up in a situation where the local authorities had extensive powers to determine if the operator could proceed and under what conditions. They set down a number of conditions and obligations and therefore constitute - at least in part - a set of conditions affecting the operators' right to provide electronic communications and services. As such they must be brought into line with the regulatory framework.

The transposition laws do contain a provision requiring these contracts to be brought into conformity. However, there will be a one year delay from publication of the decree giving effect to this provision (which has not yet taken place) before which the contracts are to be brought into line, to allow for negotiation with the local authorities.

Administrative charges

Another issue regarding the system of authorisations in France is the continuing high levels of administrative fee charged to certain categories of operators who declare themselves in accordance with the new system. Although there have been decreases in the level of charges in recent years, small operators, including those operating in a very restricted geographical area, find themselves having to pay charges that compare with those applied to national operators. It must be considered whether this acts as a disincentive to the development of small niche operators and those seeking to provide value-added services outside the major urban conglomerations.

Broadband

The very substantial growth in the broadband market in France, from a starting point two years ago where the number of such connections was much lower than the EU average, can be directly attributed by firm regulatory intervention by the ART. While new entrant operators still rely to a large extent on wholesale supply from the incumbent, there are now nearly 5 million [4 945 465] retail broadband lines in France. There has been a major growth in unbundled lines [760 769] and in the number of broadband lines supplied by new entrants. Two operators at least appear to have established a strong business case to use partial unbundling to provide high speed (DSL) services, as well as the development of triple-play products (voice, data/Internet and television).

The revised reference unbundling offer (RUO), published in December 2003, has not been the subject of any decision by the ART. There has been criticism that it does not contain a significant change to the tariffs for full unbundling which, in contrast to shared access, has met with little success in France, and where there is little appreciable difference between the monthly charge and the monthly retail subscription. Furthermore, it has been very difficult for alternative operators to develop their services to the business market, given this high cost of full unbundling, the cost of wholesale IP access, and the fact that the incumbent's virtual network service to business users is very competitively priced. Alternative operators have refused to sign agreements on the basis of the new RUO, particularly as it appears to restrict the services which they can offer to end users on the basis of an unbundled line, which the Commission services are looking into.

In December 2003, the ART did give a generally positive opinion to the reduction of the incumbent's resale offer for DSL services. Furthermore, to take account of the significant development of unbundling, the ART has allowed the incumbent to de-average its tariffs for wholesale broadband access between bundled and unbundled areas. The ART's objective was to allow for greater decreases in retail tariffs to the benefit of users in areas where competition was relatively strong, while not wanting to inhibit the development of unbundling. However, given that unbundling has been concentrated in urban areas there are very different cost considerations in the areas where unbundling has not developed, largely because of lower population density and greater technical problems because of the type of switches and the distance to customer premises. It is to be seen whether, as a result of these combined factors,

there is a danger that development of competition in DSL services in less densely populated areas could be inhibited.

The new transposition laws also included provisions allowing local authorities to set up their own broadband networks. In anticipation of this, in January 2004, the incumbent announced an initiative to collaborate with local authorities to accelerate and extend the deployment of broadband in the French regions. These initiatives responded to growing pressure from local authorities to improve broadband roll-out and ensure the development of the use of innovative services, particularly for public services, and also to the increasing number of initiatives by them to establish their own broadband networks. A number of agreements have been signed, but there have been considerable tensions around the strategy employed to convince local authorities to avail of the incumbent's services rather than construct their own networks, or to call on alternative providers, and the competition authority, at the request of ART, issued an opinion on the agreements stating that it had a number of reserves about the potential effects on competition and making recommendations for improvements.

Mobile services

The GSM licences of two of the three mobile operators in France expire in March 2006, and the French government was obliged under the terms of these licences to state clearly, two years in advance, the conditions that would apply for their renewal. Following considerable debate about the level of fees to be charged, the final decision was to charge an annual fee of € 25 million plus 1% of turnover. There were also some modifications made to the conditions attached to the licences, including coverage and access for handicapped, while in parallel considerable political pressure was brought to bear on the mobile operators to commit to reductions in the tariffs for SMS messages.

The issue of SMS charges was already sensitive because of formal complaints by the main consumers' organisation of abuse of a dominant position by the three mobile operators. This has led to an investigation by the consumer protection agency in association with a formal procedure before the competition authority. The competition authority is also investigating alleged concerted practices regarding the voice telephony charges of the mobile operators, in which minutes (or shorter periods) were indivisible for billing purposes. More recently, all three operators have introduced at least some tariff packages based on billing by the second.

As in a number of other EU states, the roll-out of 3G networks and services has experienced significant delays in France. However, two operators have now announced the commercial launch of services, albeit on a limited scale as they are restricted in geographical coverage and the products are designed exclusively for business customers.

Universal service

It has been suggested by operators that the process for designating universal service operators may breach the spirit, if not the letter, of the new framework. It does not appear to respect the obligation for a non-discriminatory designation mechanism, as it would exclude most operators in practice, given that only operators that are in a position to prove the service on a national basis are qualified to apply. It could also prolong the problems of universal service funding in France under the old framework, as the existing designated operator could have an undue influence on the costs to be reimbursed by other operators (by establishing the sum to be paid by the universal service fund on the basis of a call for tender in which there could be only one eligible bidder).

Another issue concerning universal service funding, is the risk that the obligation to contribute to funding will be applied retrospectively to authorised operators which did not previously have a licence and did not enjoy the full rights and obligations of the new framework until it was properly transposed in France (on the basis of turnover), for the year prior to the entry into force of the transposition measures.

The Commission will be looking into these issues.

Must-carry

The provisions established in the new law on electronic communications concerning must-carry are extensive and complex. In fact, while a number of obligations have been placed on broadcasting service providers and distributors, it is not clear if the obligations correspond to or are covered by the provision on must-carry in the new Universal Service Directive. The law creates an obligation on broadcasters to allow the transmission of the specified programmes or channels and an obligation on distributors to make them available to their customers. But it is not clear if these obligations apply to the operators of the networks along which these programmes or channels are transmitted. This obligation has been extended to include two extra (digital) channels that must be supplied even to customers who only take an analogue service.

These provisions create an obligation on collective cable systems and on broadcasters to provide a more extensive list of programmes in areas where a cable network is ensuring the supply of channels in a collective cable system. The Commission is examining how this dual must-provide and must-carry obligation takes account of the development of alternative individual means of connection, such as television over DSL and satellite.

IRELAND

TRANSPOSITION

Ireland has notified on time its measures to transpose all the Directives under the new regulatory framework, by means of primary legislation, the Communications Regulation Act 2002, and secondary legislation (a number of Statutory Instruments).

MARKET OVERVIEW

The Irish electronic communications market has continued to grow, and total revenues for fixed, mobile and broadcasting sectors increased by 3% since 2003 (although fixed revenues have decreased and mobile revenues have increased).

Mobile penetration remains high at 88% of the population. However, by October 2004 Ireland had a broadband penetration rate of 2.3%, which is below the EU average. The fixed penetration rate (incumbent's PSTN lines per 100 inhabitants) is 40.1%, which is slightly below the EU average. Digital TV continues to expand, and 32% of all households now subscribe to a digital service.

Internet penetration has steadily increased and currently 46% of subscribers with a fixed line are now connected to the Internet. The introduction of FRIACO (Flat Rate Internet Access Call Origination) has been successful, and the number of FRIACO subscribers has increased steadily since its launch in July 2003, and reached in excess of 81 924 by August 2004.

The launch of Mobile Number Portability in July 2003 has also been successful and most ports are completed within the targeted 2 hour timeframe. No charges are imposed on consumers with respect to either mobile or fixed porting. In the case of mobile porting, operators have agreed a charge, without regulatory intervention.

One roaming agreement has been completed and one is in the process of being negotiated. Roll-out of 3G is ongoing since the launch in 2003 and currently all operators have met their licence commitments. The two 3G operators which had specific demographic coverage obligations (33% demographic coverage by 1 May 2003 for one, and 33% demographic coverage by 31 March 2004 for the other, have both met these obligations.

Unlike in many other Member States, the fixed incumbent operator currently has no interests in the mobile market. The two biggest mobile operators held in May 2004 market shares of 54% and 40% respectively (in terms of number of subscribers).

The incumbent fixed operator held in December 2003 a market share of 95% of all local calls, 70% of long-distance calls, and 70% of international calls (in terms of retail revenue).

THE NRA

The notified National Regulatory Authority (NRA) for Ireland is the Commission for Communications Regulation (ComReg). The Commission consists of at least one and not more than three Commissioners (one of which is appointed the Chairperson, when there is

more than one Commissioner). There are currently only two Members of the Commission, following the expiration of the contract of another Member in June 2004.

The Communications Regulation Act, 2002, specifies that the Commissioners shall be appointed by the Minister in accordance with terms and conditions (including remuneration) set by her/him. Commissioners are appointed following a competition and selection procedure conducted by the Civil Service and Local Appointments Commission. A third commissioner is expected to be appointed following interviews in November 2004. This appointment will be on a full-time basis for a period of 4 years. A Commissioner can be re-appointed for one additional term.

The 2002 Act also provides that, when there is more than one Commissioner, the Minister shall appoint one of them to be the Chairperson of the Commission. The Chairperson has a casting vote in the Commission in the event of a tied vote. Unlike for Commissioners there is no set term for the office of the Chairperson but, since ComReg's establishment in December 2002, the Chairmanship has been rotated on an annual basis. The Minister sets the terms and conditions, including remuneration, of the Chairperson, with the consent of the Minister of Finance. To date, there has been no extra remuneration for the position of Chairperson. As a Commissioner, the Chairperson will have undergone a transparent selection procedure. However, there are potential concerns in relation to the appointment of the Chairperson, insofar as it appears that the criteria and terms of this process of appointment are not very transparent and the duration of the appointment is not set in advance.

Ministerial policy directions

Under Section 13 of the Communications Regulation Act 2002 the Minister may give such policy directions to ComReg as he or she considers appropriate, to be followed by ComReg in the exercise of its functions. ComReg shall comply with such Directions. Before giving a Direction, the Minister shall publish a draft of the proposed Direction for consultation, which thereafter will be given to ComReg with or without amendments.

In 2003 the Minister issued Directions, including a Direction on the introduction of FRIACO (Flat Rate Internet Access Call Origination). At the end of March 2004, following the publication of draft directions for consultation, the Minister issued a new set of Policy Directions on a number of issues, including national roaming and wholesale line rental (WLR).

As regards national roaming, the initial draft direction had suggested that ComReg would be instructed to introduce national roaming. ComReg commented upon this draft in the course of the consultation process and stressed, inter alia, the need to comply with the EC regulatory framework and the importance of the process of market reviews (including findings of SMP and determination of suitable remedies). The final Ministerial Direction clarified that, if ComReg with the agreement of the European Commission, designated any mobile operator as having SMP, individually or collectively, following the completion by ComReg of the mobile market review process required under the EC regulatory framework, ComReg should make use of its powers under existing legislation to examine mandating national roaming on existing GSM networks of SMP mobile network operators in favour of other mobile network and virtual network operators on fair commercial terms. The Direction stated further that the goal was that agreement would be reached between relevant parties, and that such agreement be implemented, commercially and technically, by the end of 2004. The Ministerial Direction was made at a time when ComReg was in the process of carrying out the relevant market

analysis, but before ComReg had made any findings of SMP or made any decisions on suitable remedies.

The Ministerial directions of 21 February 2003 referred to FRIACO, stating that ComReg should make use of its powers under the legislation as appropriate, to bring about agreements among market players in order to facilitate early introduction of retail dial-up internet access services charged at flat rates. ComReg was to report to the Minister on progress in relation to this matter within one month of the issue of this direction, and on a monthly basis thereafter until such time as retail services were introduced, making any recommendations it considered appropriate for further action. In relation to FRIACO, two operators had already formally requested the wholesale provision of FRIACO in 2002, and ComReg had convened a forum in November of that year when it was unsatisfied with progress towards implementation. ComReg formally mandated FRIACO in January 2003.

As regards wholesale line rental, the Ministerial Directions of 26 March 2004 stated that ComReg should ensure the introduction of a Wholesale Line Rental product for voice and data services by 31 March 2004 and ensure that the product be accessible, affordable and with sufficient margin for telecommunications operators to enable them to stimulate and drive competition in this market. It further stated that ComReg, as of 30 June 2004, would report monthly to the Minister on the commercial take-up of the WLR product and that a review would be undertaken by 24 September 2004 on the overall impact of the introduction of the WLR product on competition and line rental. If the progress envisaged was not evident at that stage, the Minister would direct ComReg to examine, subject to relevant requirements under European and national law; the removal of line rental from the present price cap and examine the setting of a specific rental cap no greater than CPI; or to take whatever other appropriate steps necessary to ensure its successful introduction. At the time of the Ministerial Policy Directions, the incumbent was already in the process of introducing single billing wholesale line rental, following a Direction from ComReg in July 2002 (under the previous regulatory framework) and this was introduced on 31 March 2004. This Direction mandated single billing through WLR as an extension to the carrier pre-selection (CPS) obligations, according to the old regulatory framework.

Although Ministerial Policy Directions may be a useful means for Ministers to specify overall policy, in the context of the new regulatory framework, regulatory intervention must be justified in accordance with the process of market review that is the cornerstone of that framework. In the national roaming case above, the final policy direction clarified that it was subject to EU law and, in the wholesale line rental case, the obligation had already been established under the previous regulatory framework. Notwithstanding this, the Commission services intend to monitor closely the use of Policy Directions in terms of allowing ComReg to carry out its tasks as foreseen by the regulatory framework.

Appeal mechanisms

The Regulations transposing the framework in Ireland provide for an appeal mechanism on an *ad hoc* basis, with an Appeals Panel being set up only when an appeal against a ComReg decision is received. It is to be seen whether the ad-hoc basis for the Appeals Panel could raise certain concerns, for example, in terms of ensuring continuity of expertise and experience. In August 2004, the first appeal under this appeal system was made by one new entrant 3G operator, seeking to challenge ComReg's designation of it as having SMP in the market for wholesale voice call termination on individual mobile networks. Following this, on 21 September the Minister appointed an Appeals Panel comprising four members, valid for

one year, from which three members can be drawn to hear each appeal of decisions made by ComReg, and constituted a specific panel to hear the abovementioned appeal. The Appeals Panel is independent in the performance of its functions and determines its own procedures. Stakeholders are waiting with interest to see how the appeals mechanism will work in practice.

Market analysis

As required under the EU framework, ComReg is in the process of carrying out a number of market analyses, and has completed four of them. The analyses completed are for the market for LLU (market 11), the broadcasting market (market 18), the market for wholesale mobile voice call termination (market 16), and the market for wholesale broadband access. National consultations have been completed for four other markets, and launched for seven other markets.

MAIN REGULATORY ISSUES

Broadband

As part of its Broadband Strategy, the Government, in partnership with the local authorities, is in the process of constructing regional broadband infrastructure (Metropolitan Area Networks). The current broadband rings, funded by the Government and local authorities, consist of duct and fibre laid around 26 large cities and towns. In the summer of 2004 the Government announced that a further 41 towns are to be part of the Regional Metropolitan Area Network programme and it is expected that the roll-out to these towns will be finalised within 12 months. The Government has also announced that the expansion to further towns is expected to be announced in the near future. In the summer of 2004 the Minister also announced that, following an open competitive process, the contract for managing, maintaining and operating the regional Metropolitan Broadband Networks had been awarded to a technology company. This company will operate as wholesaler of access to the metropolitan area networks (making broadband infrastructure available to authorised electronic communications operators). It will offer a full range of products, including ducting, sub-ducting, dark fibre, and co-location. The 15-year concession agreement provides for revenue sharing with the Government, and also for extension to additional metropolitan networks. The company has announced plans to be the provider of low-cost broadband infrastructure in the regions so as to enable service providers to offer services at competitive prices.

The fact that the Government is part-owner of the regional metropolitan networks, and benefits from the revenues of these networks and, at the same time, has legislative and regulatory functions for the electronic communications industry and even has the possibility of issuing binding policy Directions to the independent NRA, raises certain questions. It remains to be seen how the separation of regulatory and ownership functions, as required under EC law, will be ensured.

The local authorities are also partial owner of these regional networks. If these local authorities also were to have some regulatory functions, for example granting of rights of way, separation of ownership and regulatory functions will need to be ensured. Finally, the fixed incumbent and the responsible government department do not agree as to whether at least part of the broadband network duplicates the incumbent operator's current broadband

network. While alternative infrastructure competition can be healthy per se, there are potential issues when such infrastructure is partially state subsidised, for example possible cross-subsidisation.

The Commission services will be looking into these issues.

Authorisations

Ireland has notified the Wireless Telegraphy Act of 1926 as part of the transposition measures for the Authorisation Directive. This focuses on authorising “apparatus” rather than introducing a system of general authorisations and rights of use, as provided for in the Authorisation Directive. Ireland also notified a Statutory Instrument (the European Communities (Electronic Communications Network and Services) Regulation, 2003), which complements the 1926 Act. The Irish transposition, which focuses on “apparatus”, seems to create a heavy and inflexible system and affect the transposition of articles of the Authorisation Directive. Its compatibility with the Authorisation Directive will need to be examined. The Irish authorities are planning amendments to the 1926 Act, but there is currently no draft legislation and no planned adoption date.

Local loop unbundling

The number of unbundled lines in Ireland is low, and is currently at 1195 shared access lines and only 305 fully unbundled lines. Prices for local loop unbundling continue to be of concern, remaining at a high level since the 9th Implementation Report. Currently, as regards fully unbundled loops, Ireland’s prices for connection and monthly rental are above the EU average (connection fees are among the highest in the EU). Also the monthly average total cost per fully unbundled loop is well above the EU average, and even among the highest in the EU.

The situation is very similar as regards shared access, where both monthly rental and connection fees are above the EU average, and among the highest in the EU. Again, the monthly average total cost per shared access is above the EU average, and among the highest in the EU.

In May 2003 ComReg set a price of € 14.67 per month for LLU, but the relevant Direction was challenged by the incumbent by way of judicial review. In September 2003 the case was settled before going to court. ComReg proposed in a recent consultation document to lower the monthly rental for an unbundled loop from € 16.81 to € 14.65 per month from 1 December 2004, to be fixed in real terms until December 2007. This followed a detailed analysis of the costs of the access network using a bottom up model based on forward looking Long Run Incremental Costs and efficient operator principles. Notwithstanding the favourable margins available between retail and wholesale prices, many alternative operators are opposed to the proposed monthly rental charge, which they consider too high. The new proposed price would place the monthly rental for a local loop in Ireland as the second highest in the EU. One explanation put forward for this by the regulator is the unusual demographics that apply in Ireland where over 40% of the population live in rural areas, one of the highest proportions in the developed world. These rural dwellers also tend to be relatively widely dispersed. ComReg is also actively working with the industry to advance the take-up of full unbundling, has recently introduced a 50% reduction in survey costs and is actively looking at the other associated process costs. At least one additional operator has placed orders for the opening of

over 60 new exchanges, of which at least 30-40 will be opened in the next quarter and others are actively considering entering this area.

ComReg has also undertaken an own-initiative investigation regarding the wholesale charges for Site Surveys and site Offers associated with LLU.

The fixed incumbent's standard SLA (Service Level Agreement) for the provisioning and fault management of LLU services has been amended, following a review via an industry forum, and the revised SLA provides for, *inter alia*, improved delivery timeframes. In July 2004 ComReg designated the fixed incumbent as having SMP in the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services. ComReg imposed a number of obligations on the incumbent (transparency, non-discrimination, accounting separation, access to specific network facilities, price and cost-accounting obligations).

Universal service

The Commission services are looking at the manner in which the Irish legislation transposes the definition of universal service for its conformity with the EU legislation. Section 12 of the Communications Regulation Act, 2002, states, in relation to ComReg's tasks regarding the promotion of interests of users, that ComReg is responsible for: "ensuring that all users have access to *"a universal service"*. The Directive specifies that it is *"a universal service as specified in the Universal Service Directive"*. Irish legislation has also added an objective which does not exist in Community law: "encouraging access to the Internet at reasonable cost to the users". The Commission services will be looking closely into these issues.

ITALY

TRANSPOSITION

The new regulatory framework has been transposed by the *Codice delle Comunicazioni Elettroniche* which entered into force on 16 September 2003. The *Codice in materia di Protezione dei Dati Personali*, which transposes the e-privacy directive, entered into force on 1 January 2004. The Italian government has also recently notified to the Commission the new law on audiovisual markets (Gasparri Law n. 112/2004 of 3 May 2004) which transposes (*inter alia*) the framework for broadcasting transmission networks. The same law also mandates the Government to bring together the existing regulation into a Radio and Broadcasting Code (*Test unico della radiotelevisione*). The analysis of conformity of the aforementioned national provisions with the new regulatory framework is ongoing.

MARKET OVERVIEW

Despite modest growth in the Italian economy, the overall telecoms sector has performed well and has grown by 5.2% during 2003. One of the most important developments during 2003 was the fact that the mobile market has overtaken the fixed market in terms of revenues (16.7 compared to € 16 billion). In some cases this has taken the form of fixed to mobile substitution in terms of both number of connections and traffic volume.

In 2003, the incumbent's overall share of fixed voice telephony (in terms of traffic revenues) was 68%; 24.6% of the market was shared among three operators, with the remaining 7.5% among eight other operators. The incumbent's market share has remained more or less stable in comparison with 2002, with a slight increase for the long distance, international and calls to mobile markets (71.6%, 61.1% and 66.6%) and a decrease of 5.4% to 70%, for local calls (in particular for the Internet dial-up service). Regarding the fixed access market, AGCOM reports that it still shows strong monopoly characteristics.

The year 2003 has been characterised by a strong take-up in broadband connections: the penetration rate (excluding 3G connections) has more than doubled since July 2003 and it is now at 6.4%.

In July 2004, there were around 3 500 000 broadband lines, 92% of which use DSL technology, around 5% are fibre and 3.4% are satellite connections. As a consequence of one of the lowest monthly rentals in the EU (€ 8.3), and stringent regulation, the unbundling of the local loop (LLU) is providing an effective way for alternative operators to compete in the provision of broadband connections. The number of active unbundled local loop lines in July 2004 (697 530) was among the highest in the EU (and doubled since July 2003) and almost 30% of the new entrants' broadband retail connections are based on LLU. During the period July 2003-July 2004, the incumbent has increased its share in the overall retail broadband market (from 63.8% to 70.3%) and in the ADSL market (from 73% to 76.2%).

In October 2004 there were 1.6 million active 3G lines; if 3G connections are included, the incumbent's market share and the broadband penetration rate are, respectively, 55.9% and 7.8%.

As regards mobile communications, their rapid growth has been confirmed by the penetration rate that is currently above 100%. Mobile number portability has been successfully used by operators and at July 2004 there were 2.5 million mobile ported numbers (more than the double since July 2003). Furthermore, for the first time, the incumbent mobile subsidiary's market share (in terms of revenues) has decreased to less than 50%.

THE NRA

After some years of lack of clarity as to the distribution of tasks between the national regulatory authority (*Autorità per le Garanzie nelle Comunicazioni* – AGCOM) and the Ministry of Communications, a final agreement was notified to the Commission in July 2004 under Article 3 of the Framework Directive. In January 2004 a cooperation agreement between AGCOM and the national Competition Authority, concerning the general consultation mechanism, in particular with regard to market analysis and spectrum trading, was also signed.

There is a broadly positive consensus among market players concerning AGCOM's implementation of the regulatory framework so far. Furthermore, AGCOM has taken some important pro-competitive regulatory measures during the past two years, for example, the ex-ante replicability test for the incumbent's retail offer. Some concerns have been expressed by operators and consumer associations regarding slowness of the AGCOM decision-making process in some areas. The delay in the market analyses has created problems for operators, not only because of the consequent uncertainty about the new regulatory framework, but also because of the delay in defining some existing regulatory obligations not yet fully implemented (see following sections for more details).

AGCOM has been pro-active in many important areas as a result of the adoption of more stringent rules for non-discrimination on technical and economic wholesale offers. Nevertheless, due to lack of human and financial resources, the enforcement of national regulation in an effective and timely manner has been questioned by alternative operators, who are now less confident than in previous years.

Another issue which has been raised by a number of interested parties is the lack of effectiveness of the sanction system. AGCOM has the power, under administrative law and under the terms of its Statute, to impose penalties. However the long delays involved and the low level of monetary penalties (set by the Administrative legislation) make the whole sanction system ineffective in the opinion of many parties. It should be noted that, according to ordinary Law n. 689/81, operators are allowed to stop the sanction proceeding at an early stage by paying a reduced penalty. Alternative operators have expressed grievances as to lack of transparency during the monitoring process, in particular concerning the different stages of the process for individual cases.

As already stated, lack of human and financial resources is still a problem for both AGCOM and the Ministry of Communications (as far as its duties in the new regulatory framework are concerned). The situation for AGCOM will probably not be substantially improved with the arrival of new personnel in 2005, given the new competences assigned to it by two recently approved Italian laws on conflict of interest and on the audiovisual market. The situation has been exacerbated by the 12% reduction in the financial contribution from the State to AGCOM as decided by the General Budget Law for 2004. AGCOM is also currently

confronted with the ending of the mandates of the President and 8 Commissioners, in February 2005.

Market analysis

Market analyses are still being carried out. AGCOM has completed the analysis of seven markets⁷¹ and the remainder will be approved by AGCOM's Council by the end of November. Public consultation for market definitions, SMP identifications and remedies for all markets is expected by the end of the year and the final decisions are expected by spring 2005

The incumbent has challenged an AGCOM decision of July 2003 on retail tariffs, claiming that it constitutes a new remedy imposed without prior market analysis⁷². Article 5 of law 112/2004 seems to place obligations on all TV network operators aside from any that may be imposed as a result of market analysis.

National Competition Authority sanctions for abuse of a dominant position

From 2000 onwards, new entrants brought several cases before AGCOM concerning alleged anti-competitive practices by the incumbent, including price squeeze, arising from a series of commercial offers that targeted public institutions and business users.

On the basis of some of these complaints, AGCOM sanctioned the incumbent for several infringements and, in 2002, issued a more stringent regulation in order to prevent the incumbent from discriminating in favour of its commercial divisions⁷³. Nevertheless, in 2003 the main new entrants brought all the outstanding cases before the national competition authority (NCA). The NCA opened an investigation in July 2003 and, on 16 November 2004, sanctioned the incumbent for abuse of a dominant position.

According to the NCA's Decision⁷⁴, the investigation revealed a strategy aimed at excluding "its competitors from the business end-users market for telecommunications services and thereby to maintain its historically dominant position both on the end-users market and the market for intermediate services for its competitors"⁷⁵.

The NCA found that this strategy has been implemented by the incumbent from 2001 until the present through "the offering of financial and technical conditions to customers which the competitors could not replicate"⁷⁶ and through "the use of contractual terms and conditions,

⁷¹ They are: markets 3 and 5 (residential and non residential public fixed telephony services), market 11 (wholesale unbundled access), market 16 (mobile termination), markets 7 and 13 (retail and wholesale leased lines) and market 14 (wholesale trunk segment).

⁷² The measure prevents the incumbent from differentiating retail tariffs on the basis of different interconnection charges applied by the operator which terminates the call.

⁷³ "Delibera" n° 152/02/CONS

⁷⁴ "Provvedimento" n° 13752 – Case A351 – "Comportamenti Abusivi di Telecom Italia"

⁷⁵ NCA's press release of 19/11/2004 "The Competition Authority has fined Telecom Italia S.P.A. for abuse of a dominant position" (<http://www.agcm.it/eng/index.htm>).

⁷⁶ *ibid.* According to the Decision, this anticompetitive conduct includes, in particular, the offer made in the context of the 2002 call for tender launched by the State information services agency for the supply of telecommunications services to the public administration. "The framing of this bid was of particular

such as exclusive clauses (...) that (...) were considered abusive because of the effect they would have on excluding competitors”⁷⁷.

In its Decision, which the incumbent has announced publicly it will appeal against, the NCA has imposed an obligation on the incumbent to stop the anti-competitive practices identified, within 90 days of the notification of the Decision, and to pay fines totalling € 152 million.

Dispute resolution

Between April 2003 and April 2004, AGCOM has received 25 new cases of dispute resolution between operators. Among the 19 of these cases that it opened, mutual agreement between the parties was reached in four cases and, only in very few cases, have operators obtained a decision from AGCOM acting in its capacity as dispute settlement body. AGCOM has opened discussions with operators aimed at improving the dispute resolution process in light of the new regulatory framework.

MAIN REGULATORY ISSUES

Access-Interconnection

In February 2003 AGCOM set up a network caps mechanism for access and interconnection prices. This has speeded up the process for publication/approval and, for the first time, the 2004 reference offer (RO) for interconnection and access was published before the reference period (October 2003). In June 2004, the incumbent published an approved version of its reference offer (RIO and RUO), while claiming that for some services a price below current costs, has been imposed (namely the LLU and the billing services for non-geographic value added services). The RIO 2005 has already been published by the incumbent and provides for a significant reduction in the price of the services included in the network cap system.

The second operator, which (in 2002) was designated as having SMP in the market for dial-up Internet call termination, has not yet published its reference interconnection offer for this service.

With the aim of supporting investment by new operators in the access segment, in 2003, AGCOM reiterated the general ONP principle already applied in Italy, according to which new entrants are allowed to apply different interconnection charges for terminating calls on their networks to those applied by the incumbent. Up to now, not all new entrants have signed the new interconnection agreements with the incumbent. In response to a request by the incumbent, filed in July 2004, AGCOM opened a dispute resolution proceeding.

To reduce the likelihood of abuses and price-squeeze practices in ADSL offers, new retail offers may be launched by the incumbent only after AGCOM’s approval. A key condition is the existence of a wholesale offer that allows technical and economic replicability by competitors (following the *retail minus* principle). While AGCOM has successfully applied this mechanism several times during the past two years in the retail market, new entrants have

importance both in terms of the size of the tender, and because the financial terms and conditions offered to CONSIP that were below the cost of its competitors on the upstream markets”.

⁷⁷

NCA’s press release; see reference above

complained to AGCOM on several occasions about prices, provisioning and quality of the wholesale offers that would prevent them from competing with the incumbent on an equal footing in the business market.

One alternative operator has recently brought to the attention of the Italian Competition Authority, the incumbent's decision to eliminate the lower ADSL speed rate (256 Kbit/s) from the wholesale (and retail) offer. AGCOM has allowed the incumbent to launch its commercial offer after a period of 90 days in order to allow alternative operators to upgrade their networks. According to AGCOM the current regulatory framework does not provide for any obligation on minimum broadband capacity and the incumbent has complete freedom to decide the technical features of its retail broadband services.

Price for shared access has fallen significantly in 2003 (making it one of the lowest in EU); however, by July 2004, the demand for this access by alternative operators was still very low (only 158 wholesale lines).

New entrants have started only recently to show an interest in this service, however, the reference offer seems to include technical conditions that are not in line with the existing regulation. In July 2004 AGCOM set up a specific working group of operators and ISP's with the purpose of addressing problems with line sharing service provision and of evaluating measures for the introduction of voice over IP services. At the same time, AGCOM has also clarified the conditions to be applied in cases where the end user ceases its voice contract with the incumbent and maintains the shared access with the new entrants. This clarification from AGCOM was necessary in light of the request by the incumbent to charge the cost for a full unbundled line instead of the shared access cost.

Consumer associations have reported problems concerning the provision and quality of ADSL services, in particular as regards the connection speed. In August 2003, AGCOM issued general guidelines aimed at ensuring maximum transparency of contract clauses, technical parameters and quality of service (the identification of specific quality indicators for each service is still ongoing).

AGCOM has put a great deal of effort into the formulation of regulatory accounting policies. The incumbent's cost accounting system, for both historical and current cost methodologies, is verified by AGCOM. AGCOM also verifies the regulatory accounts for the two mobile SMP operators (rather exceptionally amongst EU Member States). Nevertheless, to date, AGCOM have still not published the compliance statement on the incumbent's costing and accounting separation model for 2001 (at historical costs).

Guidelines on the effective implementation of the current cost (CCA) methodology have been published and applied for the transport network. In the context of the analysis of the wholesale unbundled access market (market 11) AGCOM is in the process of evaluating and selecting the methodology to be applied to the access network. As a result of this, the price for local loop unbundling continues to be determined each year on the basis of both the incumbent's historical costs analysis and benchmarking considerations; the monthly rental has been confirmed for the year 2004 at € 8.3, the cheapest in the EU.

In August 2003, AGCOM established a new set of conditions for the incumbent's wholesale leased lines offer. Reductions were based on both the incumbent's cost analysis and EU benchmarking, with a view towards transition to a price-cap mechanism (after market analysis) in future. Improvements in the provisioning, timing and penalties have also been

introduced. Nevertheless, alternative operators have brought to AGCOM's attention that they are experiencing problems regarding the incumbent's adherence to the obligations set in the Service Level Agreement. In June 2004 (in conformity with AGCOM decision of 2003), a new provisioning and assurance system has been put in place by the incumbent, with the aim of solving such problems. This is now under evaluation by AGCOM.

Mobile services

As a result of the network cap system for mobile termination charges, which was set up in February 2003, AGCOM is progressing from a historical to a current cost system. The introduction of the network-cap has also *resulted in* reduced tariffs, *while a* further reduction totalling 10% are foreseen for 2004-2005. This has *yet* to be confirmed by the market analysis *that is* still ongoing. The fixed-to-mobile termination *tariffs* for the two SMP operators *are* currently higher than the EU15 average.

According to AGCOM, current Italian regulation covers both fixed-to-mobile and mobile-to-mobile termination charges for the two SMP operators. Nevertheless, these operators do not follow the same interpretation and mobile-to-mobile termination charges are *de facto* defined through commercial agreements and, in some cases, at a higher level than fixed-to-mobile.

The Ministry of Communications is currently verifying whether the coverage obligation (95% of the population resident in the regional capitals by 30 June 2004) has been satisfied by the licensed 3G operators. According to article 32 of the new *Codice delle Comunicazioni Elettroniche*, if the coverage obligation has not been complied with, the Ministry of Communications will start the procedure for infringements of the conditions applied to rights of use for radio frequencies.

One 3G licensed operator (that has never started any significant coverage activity) has indicated its intention to withdraw from the market and to transfer the right of use for radio frequencies.

Directories

AGCOM's Decision of June 2002, setting up the universal database for fixed and mobile customers, has not been implemented. In July 2004 the Italian Authority for Privacy issued a Decision on the prior consent model for existing customers. Mobile and fixed operators are finalizing the establishment of a database, which will connect each operator's numbering database, and the universal directories should be operational at the beginning of next year.

The decision on the introduction of a new code "12xy", envisaged for directory assistance services, has been only recently adopted and will be operational as of 1 July 2005. The short code "12" used by the incumbent, as well as the "internal" code 412 used by telecoms access operators (fixed and mobile, including the incumbent) for providing information exclusively to their customers⁷⁸, will be ceased on the same date. According to some operators, the delay in the full implementation of the national numbering plan has created a lack of transparency for consumers and a distortion in market competition.

⁷⁸ According to the national numbering plan, the code "4" is dedicated for giving info to the own subscribers about network facilities, prices, and similar, without any interoperability.

Since the entry into force of the *Codice* the directory enquiry service is no longer part of the universal service obligations in charge of the incumbent, due to the existence of different offers in the market. Since this provision was introduced, the price charged by the incumbent for the directory enquiry service through an operator has doubled. The use of the interactive voice recorded service facility (for which the price has remained stable) gives correct information only in 30% of the requests.

Data protection/data retention

The Italian Data Protection Code which transposes the e-privacy directive entered into force on 1 January 2004. The process of protecting final customers from unsolicited commercial advertising (spam) is still ongoing; it should be noted that this activity was regulated in Italy, even before the e-privacy directive, under the rule of “previous consensus”.

After a long debate, on 26 February 2004, the government introduced a law modifying the provisions in the personal data protection legislation for data retention for the purpose of crime detection. This has led to the introduction of a “minimum” data retention period of 24 months for telephone traffic, which can be extended for another 24 months in the case of crimes against electronic systems and for information related to organised crime or terrorism. This period of retention is one of the longest in Europe. Operators have complained about the fact that they have to bear heavy costs for data storage.

Premium rate services

In June 2004 the Ministry of Communication drafted a decree aimed at preventing fraudulent abuse of PRS. The decree foresees the same regulation of voice and data premium rate services delivered on all kinds of fixed and mobile networks (including cable, TV, satellite, etc.). A price limit for each service (€ 12.25) and the possibility for the users to block the services if a threshold is reached (€ 50 or € 100) have been introduced. Mobile operators claim that the new regulation could create a barrier to the development of new multimedia and 3G mobile services. A draft ministerial decree has been submitted to the European Commission for a preliminary evaluation; the analysis is still ongoing.

Carrier pre-selection

In August 2004, carrier pre-selection (CPS) represented almost 15% of the total number of lines, with an increase of 100% since last year.

Despite some AGCOM sanctions on the main telecom operators for unsolicited activations of carrier pre selection lines, in view of the great number of complaints to AGCOM the practice seems to be continuing, even if at a lower rate as in 2003.

The current level of CPS prices is well above the average for comparable EU countries. Italy is among the few EU countries that imposes a *surcharge* on this service. One operator has challenged AGCOM’s approval of the 2002 RIO before the Court on the grounds of incorrect application of the cost orientation principle. The RIO 2005, which was published in October 2004 by the incumbent, provides for a price reduction for the CPS activation fee of 19%. It is also understood that AGCOM is considering the elimination of the surcharge.

Consumer issues

Consumers' associations continue to denounce an alleged general lack of transparency in contracts and in commercial offers by operators. In a significant number of cases these contracts have been judged as fraudulent by the Civil Court. Since the beginning of 2003 there has been an average of 1 000 complaints per month. The vast majority of the complaints concern unsolicited activation/deactivation of CPS services and the subscription to new tariffs schemes and services (mainly ADSL) without an explicit consent from customers. Under the national regulation, an operator guilty of slamming has to rectify the situation within three days and meet the relevant expenses. Nevertheless, very often penalties are not applied and reimbursement not made because of the difficulty in defining which operator is responsible for the problem.

In December 2003, AGCOM set up a specific Consumers Complaints Unit with the task of simplifying the submission of complaints by customers and of encouraging operators to solve consumers problems, before activating the formal dispute resolution procedure (at September 2004 about 2500 complaints had been solved promptly by operators without any dispute).

Consumer associations also complain about the lack of transparency in mobile tariffs. As for the transparency of calls toward ported mobile numbers, a special free-of-charge-number (456) providing information on the name of the called mobile network was recently introduced although it seems not to be sufficient to solve the problem. In 2003, consumer associations brought a complaint to the national competition authority against mobile operators for price collusion in the SMS market (currently at € 0.15).

CYPRUS

TRANSPOSITION

Cyprus has adopted two primary laws in 2004 – the Law on Electronic Communications and the modification of the 2002 Law on Radiocommunications – to transpose the new regulatory framework (NRF) and it has also introduced four pieces of secondary legislation in the field of radiocommunications. All of these measures have been notified to the Commission. Cyprus, however, has not yet introduced the necessary secondary legislation for the Law on Electronic Communications. Although a large part of the secondary measures adopted on the basis of the 2002 Law on Telecommunications and Postal services remain valid until the entry into force of the new secondary legislation, on one hand these measures have not been notified to the Commission, and on the other they appear not to cover issues related to market analysis.

The Cypriot authorities focussed in the period prior to accession on the starting conditions, and there accordingly appears to be little practical experience of the implementation of the NRF at this stage. In addition, given the need for the regulators to finalise drafting of the remaining transposition measures and to finalise implementation of the starting conditions, they have been unable to devote a significant amount of time to the application of the NRF, including market analysis.

MARKET OVERVIEW

Competition appears very limited in the Cypriot electronic communications markets. New entrants in the fixed communications markets are mainly providing voice telephony services through carrier selection, pre-selection and via calling cards. They also aim to provide services for the purposes of accessing the internet through the public switched telecommunications network, but due to the current pricing system which markedly differentiates both on the wholesale and the retail level between voice calls and calls to ISPs⁷⁹, new entrants claim that there are obstacles for them to compete on this segment of the market.

Although interconnection rates – to the extent that the service is available – are mostly lower than EU average, the incumbent still has a 96% market share in the fixed local and national calls market and 97% as regards international calls⁸⁰. This is likely to be a consequence of the very low margin available between retail and wholesale prices and the lack of certain types of services offered as part of interconnection.

As far as the state of affairs on the broadband market is concerned, the incumbent possesses a 100% market share with a 2% of population penetration rate. The underlying technology used for broadband is almost exclusively DSL.

⁷⁹ The RIO of the incumbent defines different prices for voice calls and dial-up calls, setting a higher price for the latter. The incumbent's regulated retail prices are also different for voice calls and dial-up calls but here the latter is set on a lower level. As a result of the system the retail prices for dial up calls are lower than the respective wholesale prices.

⁸⁰ Data on market shares reflects the situation as of September 2004.

The second mobile operator could launch its operation only on 12 July 2004, as a consequence of the issuing of the second GSM licence at the end of 2003. The delay in opening the market for the second operator created a difficult situation for the newcomer as, by the time of its launch, the penetration rate in the mobile sector had reached 84% with, naturally, a 100% market share of the incumbent.

In these circumstances there currently seem to be few players on the electronic communications market capable of establishing a customer base sufficient to ensure sustainable competition on the market.

THE NRA

The tasks of the National Regulatory Authority (NRA) are divided between two regulatory bodies in Cyprus. The Ministry of Communications and Works (Ministry of C&W) is responsible for granting and monitoring the rights of use of frequencies. This Ministry has a separate department – the Department of Electronic Communications – dealing with the regulatory and policy issues regarding the sector. At the same time the Ministry of C&W coordinates the ownership rights in the 100% State-owned incumbent within the Council of Ministers. Although the regulatory tasks are carried out by the separate department within the Ministry of C&W, that the Commission services are examining the extent to which the latter has sufficient functional independence from the body responsible for the ownership functions.

The Office of the Commissioner of Electronic Communications and Postal Regulation (OCECPR) is responsible for all other regulatory matters and is empowered to issue regulations – subject to approval by the Council of Ministers – orders and decisions in relation to its tasks.

The status of the incumbent

The incumbent operator is not a corporate body but it is regarded as a ‘semi-governmental organisation’. Its budget and possible other business ventures are approved by the Council of Ministers and the House of Representatives. At the same time the two regulatory bodies – the Ministry of C&W and the OCECPR– are also dependent on those institutions.

Market analysis

The market analysis procedure has not yet started. As regards the rules on market analysis, the primary law appears not to ensure that the OCECPR would withdraw its draft decision if the European Commission has decided to veto a specific national measure. The law lays down that detailed rules for the procedure will need to be adopted by the OCECPR. These pieces of secondary legislation have not yet been adopted.

Starting conditions

The overall liberalisation of the Cypriot electronic communications market was governed by the 2002 Telecommunications and Postal Services Law, along with secondary legislation which was adopted in 2002-2003. This legislative framework opened the Cypriot electronic communications markets to competition and also established a separate regulator, which was responsible for applying the law in all sectors of the market, with the exception of issues relating to frequencies. This framework introduced the main legislative instruments of the

1998-2000 EU regulatory framework. The full implementation of those tools is ongoing and still forms the major part of the current regulatory work in Cyprus.

Both fixed and mobile number portability were implemented by the end of August 2004. However, so far no fixed numbers have been ported, as new entrants do not operate the necessary access infrastructure for providing this service.

There appears to be a serious delay with the implementation of a proper cost accounting system – i.e. a system which is implemented in accordance with the Interconnection Directive – for the incumbent, despite several attempts at drawing up the system. The current practice of the incumbent in this field is still not audited either by the NRA or an external body and therefore it still has not been approved by the regulator. According to the current project plan the audit should have been completed by the end of November 2004.

Further concerns can be identified as regards the implementation of other important provisions of the old framework – such as the adoption of the Reference Interconnection Offer (RIO) and Reference Unbundling Offer (RUO) of the incumbent. The level of prices and the structure of the conditions applied at the wholesale and at the retail level for voice and dial-up traffic, combined with the high market share of the incumbent, suggest that there is little or no margin – such as in the case of calls to internet – for retail service providers to operate in the market. The Competition Commission of Cyprus, which is currently investigating a possible price squeeze situation in the market, will have to decide whether it is more likely that this has come about as a result of regulatory decisions in relation to both wholesale and retail prices as opposed to anti-competitive behaviour on behalf of the incumbent operator. The interconnection regime outlined in the RIO provides for only two points of interconnection where single transit interconnection is available – one for the region of Nicosia and one for the Limassol area. In addition, there is no possibility yet to interconnect at a local level. The RIO does not ensure that the incumbent provides its pulses on top of the basic interconnection, making it difficult for entrants to sell their services e.g. to hotels – which are major customers in Cyprus – since their PBXs will not be able to bill their clients, as they do when subscribing to the voice telephony service of CYTA. According to information given by the OCECPR a review of the regime is under way. The Commission services are monitoring these issues carefully in regard to their conformity with the framework.

MAIN REGULATORY ISSUES

Secondary legislation

The Law on Electronic Communications empowers the OCECPR to issue any relevant secondary measure – regulation, order or a decision – which is needed for the proper exercise of the tasks assigned to it in law. There are a number of provisions in the law which already define the need to issue secondary measures in several fields: granting of individual rights of use for numbers; market analysis; universal service, in particular the financing of the service; access and interconnection; minimum elements of the RUO; consumer protection issues; dispute resolution; data gathering process; community consultation. The law also provides for a transitional provision which lays down that secondary legislation adopted on the basis of the previous law – intended to transpose the 1998-2000 regulatory framework – still applies until the secondary measures of the current law have been adopted. This fact, however, does not necessarily ensure that a number of instruments introduced in the NRF – for instance issues

related to market analysis and procedural requirements – are necessarily put in place. In the absence of the necessary secondary legislation the transposition of the NRF appears to be incomplete, and the Commission services will continue to follow this issue.

Leased lines

The country's geographical situation could potentially give rise to possible market failures in the provision of international leased lines. International connectivity can be regarded as a bottleneck facility as the capacity is limited on the basis of the established submarine cables. (Other connections – such as satellite – cannot provide the same features for voice services as submarine cables.) The vast majority of available international connectivity – international half circuits – appears to be either operated or rented under long term contracts by the incumbent. This could mean that the incumbent controls a large proportion of the available submarine cables, which are vital for any new entrant on the market. This situation presents serious obstacles to market entry and restricts the capacity for competition from those new entrants that have managed to enter the market. Both the OCECPR and the Competition Commission of Cyprus have intervened on this issue, among others by including landing stations in the RIO and a provision on backhaul, and by regulating the price of half circuits to popular destinations.

Mobile services

As stated above, Cyprus issued the second GSM licence in October 2003 with a due date for commencement of operation on 1 May 2004. However, owing to the continuing regulatory process, the new company was not able to start its operations until July 2004. This delay would seem to have favoured the incumbent.

Through last October's licensing process, a decision was made by the Ministry of C&W that the new entrant and the incumbent should be given the right to establish and operate 3G networks and offer relevant services within a period of 10 years from the date the GSM licences were issued. The conditions of the tender process have assured the two operators that there will not be a further granting of rights of use in this frequency band. According to the licences, this clause is to be evaluated in five years time or at the time when the new entrant gains 25% market share. This clause will need to be scrutinised by the Commission services for compliance with the Authorisation and the Competition Directives.

The Cypriot authorities are in the process of transforming these, and other, licences into general authorisations or rights of use for frequencies, in order to align them with the new framework.

Building permits

The lack of harmonisation in the field of acquisition of building permits is reported by new entrants to act as a disincentive to enter the market, particularly for mobile telephony. According to the current legal environment, the establishment of masts and placement of antennas requires permission from local authorities pursuant to the relevant town planning laws. The practice applied regarding this subject differs between local authorities and in many instances new entrants state that any person who wishes to establish any construction on a rooftop has to certify that all previous constructions were installed legally, which they regard as an entry barrier. Regarding the roll-out of fixed infrastructure, operators also need permits from local authorities and/or the utility companies. The procedures to obtain permits from

local authorities are not harmonized, this issue has been raised by the OCECPR with other Government bodies. The Commission services are examining the above issues, including any possible questions of discrimination arising from any differences of treatment between the incumbent and new entrants.

LATVIA

TRANSPOSITION

Latvia's new Electronic Communications Law (ECL) aiming to transpose the 2002 acquis was adopted by Regulations of the Cabinet of Ministers in April 2004 and came into force on 1 May of the same year. As of 1 October 2004 this law was still valid and legally binding. In that time it still remained to be adopted by the Latvian Parliament. A number of transposition issues arising from the ECL, which are set out below, remain to be verified by the Commission services. The ECL provides a deadline of the end of October 2004 for adoption of secondary legislation. Part of the secondary legislation still remains to be adopted. The Commission has been informed that the Latvian Parliament adopted the Electronic Communications Law on 28 October 2004 in a new version if compared to that adopted by Regulations of the Cabinet of Ministers in April 2004. This law however has not yet entered into force and the text is not referred to for the purposes of this report.

MARKET OVERVIEW

Differences in the market situation exist between the capital Riga and rural areas in Latvia. Fixed line penetration stands at 25.6% of the population in July 2004. As of December 2003 the fixed incumbent's market share in the national fixed telephony market was 98.1% on local calls, 99.6% on long-distance calls and 81.4% on international calls in terms of retail revenues. Market share of the fixed incumbent operator in the leased lines market dropped to 66% in terms of revenues at the beginning of 2004, as there are two other main competitors to the incumbent in this market. Fixed tariffs are not yet rebalanced and are regulated by means of a price cap.

The fixed incumbent operator was established in 1994. 51% of the company is State-owned, with 49% being held by a private consortium. The company provides voice and data services and is the designated universal service provider. The incumbent currently owns 23% of one of the mobile operators, in which the State also has a shareholding via the Ministry of Transport and Communications (the Ministry). Under the previous law, the fixed incumbent was designated as an SMP operator in the markets for fixed voice telephony services, leased lines services and interconnection services.

A dispute between the non-State shareholder of the fixed incumbent and the Latvian Government was settled this year. The terms of this settlement remain confidential. In this dispute the non-State shareholder of the fixed incumbent argued that a later date for liberalisation of the electronic communications sector had been promised by the Latvian Government at the stage of privatisation. The Latvian Government on the other hand argued that an earlier date had been promised by the non-State shareholder for modernisation of the incumbent's network. The non-State shareholder is currently considering increasing its shareholding in the fixed incumbent.

There are two mobile network operators with 2G and 3G licences and one service provider which provides pre-paid services through leased capacity on the network of the mobile operator in which the fixed incumbent has its shareholding. The mobile penetration rate stands at 62.7% as of September 2004. In terms of total number of customers, the mobile

network operator part-owned by the fixed incumbent has a 42% market share, with 51% belonging to the other mobile network operator and 7% to the service provider referred to above. Both mobile network operators were granted 3G licences in January 2003 with a deadline for launching services of 31 December 2004, ensuring 30% of the population will be covered by the end of 2005. Roll-out obligations require 45% of the population to be covered by the end of 2007. Both mobile network operators were designated under the previous law as having SMP in the national market for interconnection.

Internet services are not regulated. Fixed broadband penetration is approximately 1.5% of the population as of July 2004. Of these, DSL services account for 79% and from remaining 21% of broadband services provided by other means, 30% are provided by cable modem. DSL services became available to business users in 2000. In July 2004 the fixed incumbent's share of the broadband market was 80.9%.

THE NRA

The Public Utilities Commission (PUC) was established in 2001 as a unified regulatory body with oversight of the telecommunications, energy, railway and postal sectors. It is financed from regulatory fees paid by undertakings. Market players report problems related to lack of resources.

The Commission services are examining the extent to which the rules in the Framework Directive governing the provision of information from the NRA to the Commission as well as provision of information from the NRA to other NRAs in other Member States remains to be fully transposed in the law.

It remains to be seen whether separation of the regulatory and ownership functions of the State has been achieved, as the Ministry of Transport and Communications is a direct 5% shareholder in the mobile network operator in which the fixed incumbent also has its shareholding. The Ministry is also an indirect 23% shareholder in the same mobile operator, through a non-profit making company in which the Ministry has a 100% shareholding. This non-profit making company deals with broadcasting of radio and TV programmes and also provides radio communications services. The Ministry is responsible for the preparation of the legal framework which includes drafting primary law and submitting draft secondary legislation to the Government for approval. The Ministry also determines electronic communications industry development policy and represents the Republic of Latvia in international organizations.

Market analysis

PUC has not yet made publicly available its plans regarding market analysis under the new framework. It has stated that it sees some risks in a rapid transition to the new framework shortly after liberalisation. The current law appears neither to indicate a timeframe for carrying out market definition and analysis nor explicitly to transpose the requirement in the Framework Directive under which market analysis is to be carried out as soon as possible.

The Commission services are examining whether the ECL transposes the rules governing national consultation and consultation with the Commission and other NRAs as contained in the Framework Directive.

STARTING CONDITIONS

The market has been liberalised since January 2003 on the basis of the law transposing the 1998/2000 acquis, which was in force until the end of April 2004.

The fixed incumbent has published a reference interconnection offer. Currently 11 interconnection agreements have been concluded between the fixed incumbent and new entrants. SMP operators have an obligation to provide cost oriented interconnection charges using a fully distributed cost methodology adopted by PUC. LLU has been mandatory since 1 May 2004 on the basis of a decision by PUC and a reference unbundling offer is available. One LLU agreement is currently being negotiated with a new market entrant. Regulation in the area of leased lines is conducted by way of approval of conditions and prices offered by the incumbent.

Latvia has chosen a phased approach to the introduction of carrier selection and pre-selection and terms for their provision are included in the licence of the fixed incumbent. The deadline for full implementation of carrier selection is 1 January 2006, while the deadline for full implementation of carrier pre-selection is 1 July 2006.

Number portability for both fixed and mobile numbers is planned to become available by 1 December 2005.

The ECL does not explicitly state that previous SMP obligations will remain in force until market analysis and review of obligations under the new law are completed. The ECL confers an obligation on PUC to prepare all regulations, guidelines, procedures and methodologies provided for in the law by the end of October 2004. Until that date the regulations, guidelines, procedures and methodologies based on the previous law apply, as long as these do not contravene the new law. PUC claims, however, that obligations issued by it, with respect to fixed telephony, leased lines and interconnection, will remain in force. Similarly PUC claims that specific requirements under the previous law, including the obligation of cost orientation and obligations related to provision of LLU, will remain in force until completion of market analysis and imposition of new remedies based on the ECL.

MAIN REGULATORY ISSUES

Policy objectives and regulatory principles

The correct transposition of some policy objectives and regulatory principles in Article 8 of the Framework Directive is being looked into by the Commission. One of the examples in this respect appears to be the principle of addressing the needs of specific social groups, in particular disabled users.

Access and interconnection

Interconnection charges for call termination on the incumbent's fixed network clearly exceed EU average if compared to these charges in those EU Member States for which these data are available (€-cents 2.53 per minute on single transit and €-cents 5.93 per minute on double transit). The cost orientation of the fixed incumbent's interconnection charges remains to be examined by the NRA. Interconnection charges are among the main sources of tensions between the incumbent and new entrants.

The correct transposition of the rule in Article 3 of the Access Directive under which undertakings requesting access or interconnection do not need to be authorised in Latvia when requesting such access or interconnection (if they are not providing services and are not operating a network in Latvia), needs to be verified. The same applies for the powers of the NRA to impose obligations on non-SMP operators, as referred to in Article 5 of the Access Directive, and whether the law provides the possibility to the NRA in exceptional circumstances to impose other access or interconnection obligations than those listed in the Access Directive on operators with significant market power, with the approval of the Commission.

With regard to the imposition of SMP obligations, the principle that these obligations need to be based on the nature of the problem identified, proportionate and justified in the light of the regulatory objectives requires clarification. Whether the ECL makes sufficiently clear the discretion of the NRA to choose and impose SMP remedies as it considers appropriate, in the event of its finding that an undertaking has SMP, requires verification.

It remains unclear whether the obligation of transparency under Article 9 of the Access Directive, as one of the SMP remedies available to the NRA to be imposed at the wholesale level, has been fully transposed.

Frequency management

An issue of debate has arisen regarding the scope of the service licences issued in 2003 for the provision of public mobile services in the 450 MHz frequency band. These licences became available in Latvia after the mobile operator which is part owned by the fixed incumbent ceased to offer analogue mobile services (NMT 450) in that band. Two new market entrants therefore applied for and were granted authorisation to provide public mobile services in the band. The authorisations were formulated in a technologically neutral manner. However, due to an amendment to the frequency table by the Ministry in the first half of 2004, the use of the 450 MHz frequency band became limited to either NMT 450 or narrowband TETRA. Thus the use of other technologies in this band appears to be excluded. The Ministry has expressed the view that no valid frequency table has existed in Latvia since 1 May 2004, on the basis that the previous frequency table (which restricted the use of the 450 MHz band) was repealed by the new Electronic Communications Law and no new frequency table has yet been adopted. In the meantime the Ministry is currently applying the “ITU First Region Frequency Plan” which does not contain any limitation on the use of the 450 MHz band.

Numbering

During the first year of liberalisation approximately 10% of numbering resources were re-distributed and allocated to new market entrants. A potential shortage of numbering resources, particularly for the future development of mobile voice telephony services, has been identified by the Latvian regulator as a risk.

Universal service

The scope of universal service is defined by the regulator. Currently there appears to be no universal service funding scheme effectively in place. The correct transposition of several provisions of the Universal Service Directive requires verification by the Commission services. These include: the rules relating to the costing and financing of universal service obligations under Articles 12 and 13 of the Universal Service Directive. The principle that no undertaking should be *a priori* excluded from being designated as a universal service provider; the scope of the universal service, in particular with regard to provision of access at a fixed location, directory enquiry services and directories and public pay telephones, as well as special measures for disabled users; provisions applicable to carrier selection and pre-selection facilities; the conditions governing the imposition of SMP obligations at the retail level - that is the absence of effective competition and the insufficiency of wholesale remedies or carrier selection and pre-selection (Article 17 of the Universal Service Directive); the requirements relating to the implementation of appropriate cost accounting systems and the verification of compliance therewith, in the event of retail tariff regulation; rules applicable to transparency and publication of information, quality of service, integrity of the network, operator assistance and directory enquiry services and access by end-users from other Member States to non-geographic numbers; and Article 30 of the Universal Service Directive dealing with number portability.

Carrier pre-selection is not yet available and carrier selection is only available, to at least some end users, for international calls. Neither fixed nor mobile number portability have yet been implemented.

Authorisations

Under the ECL, PUC has until the end of January 2005 to adjust the rights and obligations deriving from licences which existed before the new law came into effect and which are not compliant with the new law.

The correct transposition of several provisions of the Authorisations Directive is being examined by the Commission. These include: the rule under which the use of radio frequencies does not necessarily have to be subject to the grant of individual rights of use; rules on the time limits for making decisions on rights of use of numbers and frequencies, as well as on the conditions which may be attached to these rights of use in accordance with the Annex to the Authorisation Directive; and the rules applicable to the amendment of rights of use.

Under the ECL, conditions which may be attached to general authorisations include special requirements for undertakings with SMP, which raise questions of conformity with the Authorisation Directive.

ePrivacy

Further clarification is needed with respect to the rules applicable to confidentiality of communications and unsolicited communications under the ePrivacy Directive. The full transposition of the rules applicable to traffic data in the ePrivacy Directive needs to be verified.

LITHUANIA

TRANSPOSITION

The Law on Electronic Communications transposing the 2002 EU regulatory framework on electronic communications came into force on 1 May 2004. In addition to the Law on Electronic Communications, certain provisions are transposed by the Law on Common Emergency Centre (transposes Art. 26 of the Universal Service Directive and Art. 10 (b) of the E-privacy directive) that came into force on 1 September 2004.

There are more than 50 pieces of secondary legislation related to the Law on Electronic Communications. Most of these are secondary acts that were already adopted on the basis of the previous Law on Telecommunications and that need only minor amendments. The majority of the secondary acts are adopted by the Communications Regulatory Authority of the Republic of Lithuania (the RRT). By the end of July 2004, the RRT had published several draft rules that were open for public comments. These concerned market analysis, public consultations, 3G licensing rules, terms of tender for setting up of a central data base for number portability and for introduction of LRAIC in fixed networks, procedures related to the imposition of economic sanctions on undertakings failing to comply with the requirements of the Law on Electronic Communications and secondary legislation. Regulations on market analysis procedures and public consultations, as well as procedures for imposing economic sanctions were approved by the director of RRT in September 2004.

As regards the newly adopted Law on Electronic Communications, this is currently under examination by the Commission services. Generally, market players seem to be positive about the final outcome but appear to be concerned about two issues, the very broad powers of RRT and the fact that, in some cases, the remedies that may be imposed by the RRT are not clearly defined, although they understand that such flexibility may stem from the new EU framework.

MARKET OVERVIEW

The Lithuanian telecommunications market has been expanding quite rapidly in recent years. In 2003 the electronic communications sector, in terms of revenues, was worth approximately € 580 million and is growing strongly. The sector is dominated by mobile telephony. At the end of June 2004 the fixed penetration rate was 24% and the mobile penetration rate was 79%.

As the fixed market is liberalised only as of 1 January 2003, the incumbent (the state's shareholding is only 5.93%; with SMP status in the public fixed telephony market, the national interconnection market and the leased lines) still holds approximately 97% of the market. By 1 July 2004 RRT had received 38 notifications from new entities about their intentions to start business in fixed market, but 21 actually have started their activities. It is interesting to note that the biggest mobile operator has also entered the fixed market in 2003 and acquired by the end of 2003 1.09% of the market in terms of originated minutes, while the rest of the new providers have 1.91%. By the end of June 2004 all new service providers held 3.3% of the fixed market in terms of originated minutes. The arrival of new entrants on the fixed market has already triggered positive changes. The fixed incumbent has lowered some

prices substantially (e.g. local calls off-peak time, national calls off-peak time, fixed-to-mobile calls peak time and off-peak time, international calls).

There are three major mobile operators in Lithuania, who all hold 2G licenses. However, by July 2004 RRT had received 27 notifications of intentions to start activities in the mobile sector. Currently four mobile virtual network operators (MVNO) actually operate in the mobile market using infrastructure of the second largest mobile operator. In terms of revenues they had a share of 1.13% of the market by the end of 2003. In the beginning of 2003, RRT designated the largest mobile operator as having SMP in public mobile telephony and national interconnection markets and the second largest mobile operator in the public mobile telephony market. Both of the mobile operators lodged appeals against such decisions to the administrative court. In August 2003 the Supreme Administrative Court repealed the RRT's decision with regard to the largest mobile operator and rejected the appeal of the second largest operator. This gave rise to the unusual situation where the largest mobile operator did not have SMP status, but the second largest one did. Based on the application submitted by the second largest operator, the Supreme Administrative Court decided to reopen proceedings in the above mentioned case and on 20 February 2004 issued a decision abolishing the decisions of RRT on the SMP obligations imposed on the second largest mobile operator under the Law on Telecommunications.

No 3G licences have been issued in Lithuania so far (except a non-commercial permit for the largest mobile operator to use UMTS frequencies for trial). In 2004, RRT published for public consultation a draft strategy on issuing 3G licences. This suggests issuing three licences, with some spectrum being set aside for the future. Operators have stated their opinion that the roll-out requirements are too stringent. They have also pointed out that there are suggestions that RRT would like to use retail prices as one of the criteria when awarding licences.

There are 70 Internet service providers in Lithuania. In 2003 the fixed incumbent had a share of 53% of the internet market in terms of revenues (50.1% as of 30 June 2004), the largest mobile operator – 10%, the second largest mobile operator - 8% and all other ISPs 29%. The largest share on the ADSL market is held by the fixed incumbent (93.4% of all DSL subscriptions). It should be noted that residential charges are still rather high which has led to a low residential internet access penetration rate (about 8 Internet subscribers per 100 inhabitants; 30% of the Lithuanian population made use of Internet access during the last half year), although recently the incumbent has offered rather substantial discounts (e.g. installation free of charge and discount on monthly charges) for those wishing to get ADSL access. At the same time it should be noted that cable TV companies have become more active in the broadband sector. The general number of broadband communications subscribers has increased by 135% within one year since July 2003. By July 2004 the broadband penetration rate was 2.6%.

It also appears that, in May 2004, the Ministry of Internal Affairs adopted a decision nominating a 100% state-owned company as the sole operator of the secure data transmission network used by state institutions, whereas such exclusive rights would cover data transmission services as well as telephony services, public key infrastructure, etc. No public tender procedures appear to be carried out before selecting this company.

In 2004, five new entrant companies, who mainly provide fixed and value added services or who are virtual mobile operators, formed an Association of Telecommunication Service Providers. This is a second association of telecommunication service providers besides the existing INFOBALT association. The representatives of the new association have pointed out that their biggest concerns are high mobile termination prices, reluctance of mobile network operators to negotiate interconnection agreements, and that there is no obligation to provide carrier selection for mobile services.

THE NRA

The RRT is an independent state institution that was established in May 2001. At the end of 2003, RRT had 135 employees (there are plans to increase this to 150 by the end of 2004 and to 160 by the end of 2005) and five regional offices. The current administrative capacity of RRT is regarded as relatively satisfactory, however some strengthening will facilitate the carrying out of the new tasks relating to market analysis procedures. The RRT seems to have an appropriate level of independence, both from market players (the shareholding of state enterprises is administered by the State Property Fund) and political influence. RRT is financed from the state budget and revenues from administrative charges paid by operators. In general, RRT is vested with appropriate powers to regulate electronic communication markets effectively. However, it should be noted that, in theory, legal acts adopted by RRT may be abolished by decision of the Government on the ground that they contradict the Lithuanian Constitution, laws, Governmental decrees and ordinances of the Prime Minister. This provision, established in the Law on the Government, is applicable, not only to the RRT's legal acts, but to those of all governmental institutions. On the other hand, to date there is no mechanism for implementation of such discretion by the Government which has never attempted to use it. Review of the legality of adopted legal acts is performed by administrative courts.

Concerning co-operation between the RRT and the National Competition Council, there seem to be some inconsistencies between the Law on Competition and the Law on Electronic Communications as regards exchange of confidential information between the RRT and the National Competition Council. The Law on Electronic Communications seems to authorise such exchange of information and the Law on Competition may be interpreted to prevent it with the exception of sharing such information with the EU Commission.

The attitude of market players towards RRT in general seems to be positive. RRT usually appears to consult widely with market players and seems to try to take into account submitted comments when adopting decisions. On the other hand, RRT is said to lack experience and administrative resources. In some cases, RRT is also said to set time limits that are too short for submission of comments and to be slow in resolving issues.

Appeal mechanism

The legal acts adopted by RRT or the non-adoption thereof may be appealed against in court, whereas, according to the law, filing of such an appeal generally does not suspend the implementation of the appealed legal act, except in cases where the court is entitled under the law to decide otherwise. However, in practice there have been problems that administrative courts quite often suspend implementation of RRT's decisions concerning various issues (e.g. designation of SMP and imposition of *ex ante* obligations) until the ruling on substance is given. When deciding to suspend RRT's decisions the court does not explore any possible

consequences of such suspension to the competitive environment and consumers, and there have been cases in which the court has even refused to take into account relevant practice of other EU Member States, or relevant provisions of the EU law. This approach, if continued, may cause problems in the future, although in its recent practice, the Supreme Administrative Court has started to refer to EU law and to substantiate its decisions.

Market analysis

RRT adopted rules on market analysis on 17 September 2004 after review of suggestions from market players and started market analysis on 30 September 2004. Priority markets for market analysis are fixed and mobile termination, transit, leased lines, access to local loops, access and call origination. First notifications to the EU Commission are expected in the first quarter of 2005.

STARTING CONDITIONS

The telecommunications market in Lithuania was fully liberalised as of 1 January 2003, when major amendments to the Law on Telecommunications of 1998, fully implementing the 1998/2000 EU regulatory framework, came into force. Prior to that date the incumbent had exclusive rights with regard to provision of public fixed telephone services and networks. All the tools necessary to ensure competition (i.e. sufficient powers of the national regulatory authority, number portability, carrier selection and pre-selection, local-loop unbundling, access and interconnection, possibility to impose SMP obligations on operators) were formally in place, however, provisions on number portability and carrier pre-selection came into force only as of 1 January 2004. At the same time, provisions on a reference offer for local loop unbundling came into force at the beginning of 2003, but did not appear to be fully implemented in practice. In some fields, the Law on Telecommunications went further than was required under the 1998/2000 framework and abolished the requirement to obtain an individual licence in order to engage in certain telecommunications activities. The introduction of such a system already proved to be very useful for eliminating the barriers to new players to enter the market, especially in the field of fixed and mobile telephony.

MAIN REGULATORY ISSUES

Access-Interconnection

The fixed incumbent published both a RIO and RUO in January and February 2003 respectively. RRT evaluated the RIO and indicated that interconnection prices were not cost-oriented and competitive, and requested provision of additional information. After the fixed incumbent failed to prove that interconnection prices were cost based, RRT established ceilings for the incumbent's interconnection prices on 20 November 2003. The incumbent did not appeal the said decision. Some operators have, however, indicated that the prices set by RRT do not seem to be competitive in the local market. RRT finished the review of the RUO in March 2003 and also ordered some amendments. The prices in the RUO are under the EU average, but are still regarded to be uncompetitive by the alternative operators and so far no local loops seem to be unbundled; however the fixed incumbent provides bit stream access (2249 lines, 17 operators as of 1 July 2004).

Carrier selection and pre-selection, number portability

Carrier selection is available as of 1 January 2003 and carrier pre-selection and number portability as of 1 January 2004. So far, 23 operators have received their access codes and 12 of these use access codes for provision of voice telephony services. Some alternative operators also have their own geographical numbers.

At the moment, mobile number portability is provided on a call forwarding basis and operators have pointed out that the regulations of RRT do not seem to be clear enough on how to implement the number portability in practice and that this has caused some disputes between the operators. As a consequence, some of the operators are not providing the full variety of services (e.g. SMS forwarding). In general, however, mobile number portability seems to work quite smoothly (as of 1 August 2004 there were 13 000 ported mobile numbers), although the smaller new entrant companies pointed out that number portability procedures sometimes take almost up to one month. As of 1 January 2005, mobile number portability should be provided on the basis of a central database established and managed by an entity independent from the operators. RRT has already started preparations for setting up the said database and has launched an open tender in order to select the administrator of the database.

Price caps

In December 2003 RRT awarded to a radio and TV company, a permit granting the right to use radio frequencies for the provision of fixed wireless access networks and services and establishing, amongst other things, an obligation for the company to observe retail price caps on a whole range of services (internet services, digital leased lines, public fixed telephony services, etc.). In August 2004 the Commission sent a letter to RRT pointing out that such retail pricing obligations could be regarded as contradictory to various principles of the regulatory framework (e.g. requirement to impose *ex ante* regulatory obligations on the basis of a market analysis and a finding of SMP; conditions that can be attached to a general authorisation) and inviting RRT's comments on the issue raised. In its letter of September 2004, RRT responded that the permit was granted on the basis of a public tender and the business plan, including the list of variety of services to be provided and the list of the retail prices of these services, was one of the significant criteria for rating the bids. The response further stated that, in RRT's opinion, such criteria are justified and reasonable, as the aim of the tender was to select a service provider who would use the limited resources for the highest overall benefit for society as a whole, incl. at the lowest possible consumer prices. No initial retail prices were included in the tender conditions and the prices proposed by service providers were evaluated during the tender process. The prices included in the permit can therefore be regarded as prices which the successful bidder committed to apply in the course of the tender proceedings and are applicable only to the services provided by using the frequencies granted by the permit. RRT is of the opinion that the permit issued is in compliance with the EU regulatory framework and that, if they were to amend the conditions of the permit, the other market players who participated or would have participated in the tender would be discriminated against. The Commission services are still looking into this issue.

LUXEMBOURG

TRANSPOSITION

Luxembourg has failed to transpose the new framework on electronic communications. The Commission has already made a formal application to the Court of Justice asking it to condemn Luxembourg, at the end of the infringement proceeding started in October 2003, for failing to communicate the necessary transposition measures for the Directives. The Luxembourg government did in fact propose draft legislation to the Luxembourg Parliament in July 2003, but as the formal consultations of various chambers and the Conseil d'Etat were only initiated at that time, the consultative process has meant that no discussion has taken place in parliament. The package of draft legislation consists of a main draft law on electronic communications, a draft law reorganising the NRA, the Institut Luxembourgeois de Régulation (ILR), and other measures on data protection and on spectrum management.

In May 2004, the Conseil d'Etat issued its opinion on the draft laws on electronic communications and on the ILR. This resulted in the government issuing amendments to its proposals on 30 June and 22 July, which in turn required further opinions of the Conseil d'Etat that were issued on 12 and 26 October respectively. The Luxembourg Parliament started its work on 19 October 2004; fifteen months after the government had submitted its drafts, by nominating "rapporteurs" for the proposals. The examination of the proposals in parliamentary committee is scheduled for early December 2004.

The draft law appears to follow closely the text of the Directives, and it must be noted that significant elements of the existing legislation, for example in relation to frequencies and numbers, will not require modification. However, the key elements of the new framework, particularly regarding the market analysis procedure and the powers of the NRA to impose the appropriate remedies, must await adoption of the draft transposition law and a certain number of secondary measures afterwards.

MARKET OVERVIEW

With mobile penetration growing by a further 6% in Luxembourg in 2003-2004, to reach 98% according to estimations by consultants, the mobile market is the biggest and most dynamic part of the electronic communications sector in Luxembourg. The mobile sector represents 61% of the total telecommunications market in terms of value, the second highest proportion in the EU25. There are just two GSM/DCS network operators, each of which also controls a service provider, the subsidiary of the incumbent controlling 49% of the retail market, the second operator controlling 36% while a third service provider has 15% of the market. On the fixed market, the incumbent operator, which is wholly-owned by the State, has 85% of the voice telephony market (local and national calls) by minutes, and 76% of international calls.

Despite the importance of high speed services to the business sector in Luxembourg, broadband penetration is still relatively low, and residential broadband has not developed significantly, in part due to the very high prices for high speed Internet access, and the lack of competitive bitstream or unbundling offers to other operators. The incumbent has 82% of the broadband market, including 73.5% of the DSL market, but this share has decreased from

83.7% year previously, and many of the retail lines operated by other operators are in fact resale lines based on the incumbent's network offering.

THE NRA

The "*Institut Luxembourgeois de Regulation*" is the NRA in Luxembourg possessing most of the responsibilities associated with regulation of the market, and this situation should be confirmed by the new draft laws transposing the new regulatory framework, once adopted.

The question of the staffing resources of the ILR has continued to be raised by operators. While once-off financial resources have been allocated for carrying out the first round of market analyses, the staff of the ILR itself is not increasing. This would require the allocation of civil service posts, but this in itself represents another problem as, in the specific job market of Luxembourg, the legal, economic or technical expertise may not be available nationally. A potentially serious problem is therefore created by the fact that, as the ILR is responsible for frequency management, employment in the ILR is considered to be of national interest and therefore only open to Luxembourg citizens.

A law has recently been adopted creating a new competition authority in Luxembourg. While this authority has yet to become operational, it is hoped that this will mark a more active and effective monitoring of competition law issues which have been lacking in the telecommunications and electronic communications sector. This is particularly important as the ILR has tended, under the old framework, to restrict its intervention to a very narrow role in regard to the regulation of tariffs on an individual basis. Operators are hoping that there will be close co-operation between the two authorities, and that the new competition authority will tackle issues of alleged price squeeze, and the practise of bundling of regulated and unregulated services in retail packages.

Because of the particularities of the Luxembourg market, as could be expected, the expertise contracted by the ILR to assist with the market analysis procedure, or for the cost accounting and cost separation issues (see below) often comes from external consultants from other EU countries. The incumbent has expressed the sentiment that the unique position of Luxembourg is not always taken into consideration, both in terms of its size as well as the presence of some international operators who may be able to exert market power on the basis of their position on other markets and their customer base. However, the fact that this expertise will be used in the context of a national market analysis carried out by the NRA should, in the view of the ILR, ensure that the specific market situation in Luxembourg will be taken fully into account.

Dispute resolution

In the period before the entry into force of the new transposition law, the ILR has appeared reluctant to intervene on regulatory issues, including in cases where its intervention is requested by an operator over an interconnection dispute. New entrants have raised a large number of issues with regard to the competitive behaviour of the incumbent in relation particularly to interconnection and unbundling, but very few of these issues have actually been addressed by the ILR. This situation is created by the apparent reluctance of new entrants to bring disputes formally before the ILR, either because they are unaware of the formal procedures required or because the ILR's attention has been focused on ensuring that regulated tariffs reflect cost, but not on the many issues of technical conditions and service level agreements which are needed to allow operators to offer services competitively on the

basis of those wholesale products. At the same time there is considerable doubt as to whether the ILR has the power, under the old law in force until transposition of the new framework, to intervene on its own initiative. Following one decision taken in 2002, only one dispute resolution decision was taken in 2003, where the ILR rejected the complaint of an operator concerning an interconnection agreement with the incumbent operator, on the basis that it concerned a commercial agreement on a non-regulated market (bitstream access) and that there was no breakdown in negotiations.

Market Analysis

In light of its own resources, the ILR has conducted a public call for tender for expert assistance in the conduct of the market analysis. The consultants will assist the ILR in the preparatory phase and collection of data, the analysis itself, and the preparation of the national and EU consultations. The consultants will also be on standby for technical assistance in cases where the ILR's decisions may be subject to appeal.

The contract also provides for the training and technology transfer to allow the ILR to develop the legal and economic expertise in-house so that it will be able to carry out the full market analysis procedure in-house over time.

The market analysis procedure cannot start formally until the transposition laws have been adopted and will take between six and nine months to complete. This situation is not satisfactory to any of the interested parties, given that the incumbent believes that it is put at a disadvantage by the fact that its SMP obligations carried over from the old framework cannot yet be reviewed, while other operators would appear to view the market analysis as an opportunity to impose some of the remedies required to tackle the incumbent's market position, particularly in regard to bitstream access and unbundling. Given the very restrictive approach adopted by the ILR in regard to obligations under the old regulatory framework, where it focused on tariff controls in relation to SMP obligations, there is certainly scope for a comprehensive review of what remedies may be necessary in each of the markets set out in the Recommendation.

MAIN REGULATORY ISSUES

Mobile services

While the mobile (2G) market has been a dynamic growth sector, the deployment of 3G has been seriously affected in Luxembourg by the growing legal obstacles to the erection of mobile antennae, and legal threats to existing ones. Growing opposition from individuals opposed to the deployment of such antennae has led to a series of court rulings which created jurisprudence regarding the construction of masts in the context of existing Luxembourg planning law. These rulings have led to a situation where GSM or 3G antennae cannot be constructed unless they were expressly identified in the development plan of the commune in which it is to be sited, and there is now huge pressure on local authorities not to insert them in these plans. Furthermore, the law must now be interpreted to restrict the erection of antennae to certain zones. Not only does this affect the development of 3G but existing GSM antennae are also under threat; the government has sought to clarify the situation by encouraging communes to include antennae in their plans, but so far to little avail.

In October 2004, one 3G licence holder (which was not present in the 2G market) formally returned its licence and stated that it was leaving the Luxembourg market. On the other hand, one 3G operator has launched its service commercially, covering 70% of the territory and 80% of the population. Unlike other MS where tests or commercial services have been launched, this service is for residential customers rather than business users.

The mobile penetration rate, at approximately 98%, is one of the highest in the EU. Some questions have been raised about the accuracy of such figures, as the total penetration rate is considerably higher than the Luxembourg population, but can be partly explained by the significant number of transfrontier workers that commute to Luxembourg from bordering Member States (over 100 000). Some of these transfrontier workers have taken mobile subscriptions in Luxembourg and the penetration rate reported above attempts to take account of this phenomenon. Nevertheless, it would appear that there is a need to establish a standard definition for counting active clients, as the two GSM operators apply no benchmark or rule in counting active subscriptions.

Mobile operators are on the point of introducing effective mobile number portability in November. The system for swapping numbers was designed by consultants on the basis of a call for tender from the ILR, which is being paid for by the operators themselves.

Access and Interconnection

There have been continuing problems with the conformity of Luxembourg's approach to cost-accounting and accounting separation in the incumbent. There are two cases taken by the Commission against Luxembourg that are currently before the Court of Justice concerning cost-accounting. The incumbent did not implement the guidelines of the ILR regarding cost-accounting. Despite the issuing of administrative sanctions, it has continued to fail to meet its responsibilities, and the Commission's infringement proceedings against Luxembourg relate to the fact that the authorities have not carried out the requisite verification of the incumbent's cost-accounting system.

The process for approval of the reference offer of the incumbent has not improved over the last two years. There is little transparency in the manner in which the RIO is drawn up or approved, and the ILR does not give explanations on the structure of the offer. It has informed some operators that it is not competent to examine issues such as a potential price squeeze between services in the RIO and retail tariffs of the incumbent. Furthermore, in a situation where the 2002 catalogue was only approved in September 2003, the draft 2003 RIO was only made available in April 2003 and only approved in December 2003, there is little value to new entrants in relation to business planning, and they cannot make appeals to the ILR about interconnection or access conditions while the RIO is still in draft form. The RIO 2004 had not been approved by the ILR as of 30 September 2004. These lacunae in what has been the basic tool for market opening in other Member States will hopefully be addressed in the market analysis.

Given the problems with obliging the incumbent to introduce accounting separation, the tariffs in the 2002 and 2003 RIOs have been checked against financial models developed by consultants on the ILR's behalf. This has at least allowed the ILR to identify if proposed tariffs fit within a certain margin. In the course of 2004 there have been signs of progress from the incumbent's auditors that the separate accounting system and cost model are close to finalisation, and the ILR hopes to be able to have a 2005 reference offer based on this new model. The first element of the work – the “separation des metiers – was presented to the ILR

in late September. The work on separating the business divisions within the telecommunications will not be ready before 2005.

As well as a new Reference Unbundling Offer (see below), the incumbent has developed, at the ILR's behest, a separate reference offer for co-location, which covers the practical delivery of interconnection as well as unbundling services. A formal consultation on this offer ended in September 2003, but the offer will probably not be finalised until end 2004.

Broadband

There is no effective bitstream product available in Luxembourg. The incumbent has stated that it is technically complicated and the ILR has confirmed that there is not a coherent ATM network that would allow a full bitstream product to be provided. The IP DSL product on offer to ISPs and other operators does not allow a differentiation from the retail offer of the incumbent and its subsidiaries, and is effectively a resale product. Nevertheless, there has been a 146% growth in retail broadband lines, albeit from a very low base, between July 2003 and July 2004, and new entrants retail market share has increased by over 10%.

In these circumstances there has been considerable pressure for unbundling to be effectively implemented, but the conditions established in the incumbent's reference unbundling offer (RUO) did not allow this to happen. A new draft offer was made available in the summer of 2004, but the price levels have stayed very close to those established four years ago, and the average monthly total cost for unbundling (full or shared access) is the second highest in the 21 Member States for which data is available. Given that in the same period the incumbent's retail DSL product has dropped by 60%, it is very difficult for other operators to establish a margin, and the tariffs are very high compared to the EU average. Nevertheless, two operators are trying to develop (full) unbundling in order to compete with the incumbent on the broadband internet access market, and to develop triple play products. The new reference offer has not been approved by the ILR.

The ILR is taking steps to allow the development of VoIP services. A consultation meeting was held with operators in mid-September 2004, and the ILR is freeing up [geographic] numbering blocks for use in IP telephony.

Data Protection

The Commission still has two infringement cases against Luxembourg under the old regulatory framework. While it is hoped that the new draft law will soon be adopted, and should overcome some of the problems encountered, the fact is that there has not been a proper system in place in Luxembourg for the specific protection of personal data in telecommunications [and no agency is specifically responsible for data protection in electronic communications].

Rights of way

As well as the developments referred to above concerning the erection of mobile antennae, there are continuing problems with the conditions for the granting of rights of use of the public domain in railways and motorways. More than one year after the European Court judgement of 12 June 2003, it appears that the Grand Duchy of Luxembourg is still failing to fulfil its obligations under the old Services Directive, by not clearly defining the authority in charge of granting rights of ways and not ensuring the absence of possible discrimination. The

complainant at the origin of the Commission's case against Luxembourg argued that the absence of such measures considerably delayed the development of its network.

HUNGARY

TRANSPOSITION

Hungary finalised the transposition of the 2002 regulatory framework by first adopting its Law on Electronic Communications in November 2003, and by adopting gradually the whole package of secondary legislation between then and the date of the country's accession to the European Union in May 2004. The law took effect on 1 January 2004 and all of the relevant secondary measures were introduced at the date of accession. Apart from the general objective of transposing the 2002 regulatory framework the legislator's aim was to achieve three goals through the adoption of these measures: i) to complete and implement fully the starting conditions before the date of accession and to maintain these conditions until the market reviews are finalised ii) to ensure that the process of market analysis starts as soon as possible; and iii) to re-structure the National Regulatory Authority, in order to prepare it for the workload placed upon it by those legislative measures.

MARKET OVERVIEW

Historically in Hungary there have been several operators with exclusive rights in the provision of public fixed telephony: one operator can therefore be regarded as the nationwide incumbent, alongside four other local telecommunications operators (LTOs) covering 20% of the country. All operators are privately owned; the State holds a 'golden share' in the nationwide incumbent. The five fixed incumbents had lost their exclusive rights by the end of 2002, but have held on to market power in their respective territories. The speed of full liberalisation from a legal perspective was not matched by such rapid effects in reality in the electronic communications market. On the basis of revenues the incumbent companies collectively have in 2004 99.9% market share as far as the local market is concerned, with 98.7% and 93.1% shares respectively on the national and international calls markets. Fixed line penetration is at 35.5% in 2004.

Despite several provisions already included in the 2001 Communications Law, initially there were no signs of a significant increase in internet penetration, in particular as regards broadband development. The trend seemed to have changed and broadband penetration reached 2.2% in 2004, but work remains to be done to reach the average EU level.

Towards the end of the 1990s mobile operators were playing an increasing role in shaping market trends, especially after the entry of the third digital mobile network operator at the end of 1999. The full liberalisation of the fixed telephony market took place half a year after mobile penetration had passed that of fixed telephony. In 2004 mobile penetration exceeded 80% and the third operator reached a market share (18%) which establishes it as a serious competitor of the second operator, which in turn has 34% market share. The leading operator, which is the affiliate of the incumbent, has 48% market share.

2004 has clearly brought more optimism to the whole market, which is characterised by market entry by a Europe-wide competitive service provider, consolidation on the ISP market, the introduction of the publicly available DVB-T service, and the Government's decision to issue a tender for 3G rights of use.

THE NRA

The Hungarian legislative framework places the National Communications Authority of Hungary (NCAH) as the central body of the regulatory system, allocating responsibility for market analysis and imposition of the necessary remedies on the undertakings having SMP. The Law on Electronic Communications provided for a serious re-structuring within the NRA, and the appointment of the Board – as a first step in this re-structuring – took place in a timely manner. The NCAH is not responsible for certain issues, for instance some of the regulatory tasks in relation to universal service. Despite the fact that the NCAH has been assigned responsibility to carry out the task of market analysis and impose remedies, the law grants power to two ministers – the Minister of IT and Communications and the Minister for Finance – to issue decrees regulating prices of the provision of wholesale terrestrial broadcasting transmission and regulating the relationship between the operators of fixed telephony networks and ISPs. According to the law, none of these pricing decrees would be preceded by a market analysis and their adoption would not require the finding that the addressed undertakings have SMP. The approach taken in the law is governed by the general system of price regulation applied in Hungary, which might need to be revisited in light of the requirements set out in the Access and Universal Service Directives concerning the imposition of remedies. Furthermore, it appears that none of these decrees could be appealed in accordance with Article 4 of the Framework Directive, as both can only be challenged in the Constitutional Court on the ground that they are unconstitutional. Until 30 September only the decree on prices for wholesale terrestrial broadcasting transmission services had been adopted and the two ministries had not issued any decree on revenue-sharing between the operators of fixed telephony networks and ISPs.

The Commission services are examining the issues raised in the above paragraph.

Appeal mechanism

In the course of appeal procedures the predecessor of the NCAH, the Communications Authority, took the view that its decisions concerning RIOs and RUOs under the old framework could only be appealed by the parties to the basic procedure – meaning, in these particular cases, the undertakings with SMP. This approach was accepted and taken over by the national courts. The possible continuation of this practice will need to be scrutinised for compliance with the Framework Directive.

Market analysis

Apart from the other strategic goals, the new Law on Electronic Communications also aims to establish an NRA which is competent to carry out an appropriate market review process as soon as possible. This aim was reflected in the law by i) giving the NRA effective data-gathering powers with sanctions for failure to provide the data; ii) creating an incentive for close co-operation with the NCA, in particular a requirement to conclude a co-operation agreement with it; iii) empowering the NRA to impose remedies with the necessary latitude, except in certain markets, in relation to price control; iv) imposing a deadline of 1 September 2004 for the first market analysis, covering all relevant markets, to be carried out. The time pressure caused by this deadline did not necessarily allow the NRA to benefit fully from the consultation with the NCA and market players.

On 2 September 2004 the NRA notified to the Commission the findings of its review of the market for mobile access and call origination (market 15) and subsequently on 23 September 2004 the market for wholesale voice call termination on mobile networks (market 16). The Commission has assessed both notifications and already expressed its comments on the notified draft measures.

STARTING CONDITIONS

The liberalisation of the Hungarian electronic communications market commenced in 1992 with the adoption of the Law on Telecommunications and continued as a gradual process over the following ten years. The Government adopted the Law on Communications in 2001, and this provided the cornerstone of the 1998-2000 regulatory framework. Exclusive rights in the field of fixed telephony were abolished in 2001-2002.

The Hungarian authorities implemented both fixed and mobile number portability in 2004. The introduction of the system in the fixed sector was delayed by one year despite the fact that, since 1 January 2003, there has been an obligation in the primary law on operators to provide the service. Incumbent operators had opposed the introduction, given that the details for the functioning of the system had not been determined in a relevant secondary decree.

There appears to have been also delay with implementing carrier selection and pre-selection in accordance with the Interconnection Directive. The primary law only extended the obligation for carrier selection and pre-selection to local calls with effect from 1 January 2004, but subscribers could still not benefit from the service because neither the adoption of the related secondary measure – it took effect on 24 April 2004 – nor the inclusion of the service in the RIOs had taken place. The service became available finally on 15 September 2004. The full functioning of carrier selection and pre-selection was also blocked by a practice introduced by the nationwide incumbent immediately after the date for full liberalisation. It provided the opportunity to use this service in one of its subscriber packages only and restricted access to it in the rest. It also reinforced the restrictive effect by making it extremely difficult to change between the different packages. Although this practice was heavily criticised by competitive operators, the NRA refused to intervene against it, arguing that it was legal according to the Hungarian law. The legislator realised the need to address this problem and consequently included a provision in the Law on Electronic Communications which clarified this as unlawful. However, this provision took effect only after an eight month delay on 1 September 2004. The Hungarian Competition Office (NCA) had initiated a procedure against this practice but the final decision of this authority came only after the abovementioned provision of the law had already taken effect.

By the end of August 2004, the NRA had adopted new, but transitional⁸¹, RIOs and RUOs of the SMP operators in the field of voice telephony. The NRA intended to reduce significantly the fees included in those reference offers. It also aimed to introduce a flat rate internet access call origination obligation (FRIACO) in the RIOs and a DSLAM level bitstream access offer in the RUOs. Both FRIACO and bitstream access were introduced in the Hungarian legal system by the Law on Electronic Communications and were part of the set of obligations that had to be maintained until the findings of the first market analysis take effect. In this context, it should be added that the nationwide incumbent has already been required by the NRA to

⁸¹ i.e. they are linked to the starting conditions and not to the market analysis.

offer a service which is similar to wholesale bitstream access. However, in its current form this offer does not necessarily comply with all demands of interested alternative operators, particularly owing to the fact that under its terms, the provision of voice services by the alternative operator is not allowed, and the possibility of changing the quality parameters is also restricted.

Following the adoption of the transitional RIOs and the RUOs it now seems that the NRA is much better positioned to achieve its aim as far as the reduction of prices is concerned, except in the case of one-off fees and the fees for leased line interconnection links in the RIO, since some of these charges have actually increased.

It remains to be seen whether the nationwide incumbent's leased lines RIO, as approved by the NRA, provides for a genuine regulated wholesale offering, covering the terminating segment half-circuit leased lines, and this issue will be scrutinised by the Commission services. The significance of this service was highlighted in the Commission's Recommendation on Leased Lines interconnection pricing in a liberalised telecommunications market.

In each case the NRA based its decision on benchmarking, as it did not accept the cost calculation prepared by the SMP operators. However, the particular effects of these decisions in the market remain to be seen.

MAIN REGULATORY ISSUES

Information flow as regards access and interconnection

The issue of prohibited information flow between the wholesale and retail operations of the nationwide incumbent is reported by new entrants, for instance in relation to leased lines disputes between competitive operators and the incumbent. The NRA, however, seems to have no information and hence has not taken any action to determine whether this requirement has been fulfilled by the relevant undertaking or not.

Mobile services

Under the old regulatory framework it was the responsibility of the NRA to determine the level of the mobile termination charges of those mobile operators having SMP in the national market for interconnection. In 2002 the NRA designated the first and second digital mobile operators as having SMP in this market. The second operator challenged this decision before the court and the appeal procedure is still pending. As the Metropolitan Court decided to suspend the enforcement of the decision – which was upheld also by the Supreme Court – the NRA had no possibility to impose the obligation of cost oriented termination charges on the second operator on the basis of the 2002 decision on SMP. The NRA then decided to carry out a new analysis in 2003 after which both the first and the second operators were deemed to have SMP and so had to adhere to a cost oriented termination charge. The NRA did not accept the cost calculations provided by the operators and instead based its decision on prices contained in an international benchmarking analysis. The NRA applied reductions to both operators' charges, but this had an asymmetric effect, given that the charges of the first operator had already been subject to regulation on a cost orientation basis.

Finally, after having carried out the market review procedure in September 2004 the NRA concluded, in its draft measure, that all three mobile network operators will be subject to the same regulatory remedies, including the obligation of cost orientation.

3G rights of use

The decision to issue rights of use for 3G mobile networks was taken by the Government this year and the tender for the provision of 3G services was issued on 1 September 2004. The Government aims to issue the rights of use before the end of the year. There are four blocks of 3G frequencies to be allocated, with the fourth of these being dedicated to a new entrant.

All four blocks are similar as far as technical conditions (including available spectrum etc.) are concerned. The three current 2G network operator companies are competing for the first three blocks, which have different characteristics as far as the payment, coverage and roll-out conditions are concerned. The fourth has even lighter conditions in these fields.

The NRA included a number of provisions aimed at encouraging the entry of a new operator. First, there are no coverage and roll-out conditions attached to the fourth block as opposed to the first three. Second, there is an option for the newcomer to acquire rights of use in the 900 and 1800 MHz spectrum, which would enable it to compete with the three incumbents also on the basis of 2G spectrum. Third, the tender for the first three blocks requires the incumbents to offer commitments in relation to the encouragement of market entry and promotion of competition. Although it is still not clear what will be the exact content of the offers, it can be expected that they would relate either to co-location or to national roaming.

Universal service

Hungary has taken a step forward with creating a new system for the operation of universal service in the Law on electronic communications, adopted in 2003. It appears that the legislative environment establishes a reasonable starting point for the Hungarian Government to overcome the most serious shortcomings of its previous system, but there will still be a need to take account of the risks identified below.

The new legislative environment introduced a system whereby undertakings providing universal service are designated by the Minister for IT and Communications, on the basis of applications. As no new candidate applied for the provision of universal services the Minister designated those undertakings which provided the service in the past. The conditions of the service are determined in the law, the set of Government and ministerial decrees and, ultimately, in the universal service contracts which have to be concluded between the operator concerned and the Minister. The rules of financing of any net cost of the universal service obligation of designated undertaking – including the maximum level of financing and the obligation of the designated operators to administer and prove their need for compensation – are set out by law and the relevant decrees. Further conditions for such compensation are settled in these contracts.

Although the universal service contracts have to be published in the Official Journal of the Ministry, it might be questionable whether this system meets the requirement of transparency, non-discrimination and least market distortion, as a number of important conditions – such as the need for a contribution – are to be settled in this contract, which is negotiated only between the ministry and the universal service operator concerned. (Up to 30 September 2004 no contracts had been published.) The possible lack of transparency may be further reinforced

by the fact that the list of factors for determining whether there is an unfair burden arising from the universal service obligation – which are listed in the decree – can be extended in the universal service contract, although it is stated in a decree that these additional factors cannot increase the amount of the required compensation. The practice adopted by the Ministry concerning the conclusion of the contracts so far may be appropriate to overcome the lack of clarity provided for in the legislative environment. Further, the risk of lack of transparency may be reduced by the fact that any compensation payment from the Universal Electronic Communications Fund has to be proposed by the director of the Fund and requires the approval of the Supervisory Board of the Fund. The majority of the Supervisory Board is composed of the biggest contributors to the Fund. The Fund publishes a yearly financial report and is supervised by the Hungarian State Audit Office. The Commission services are examining further the matters raised in this paragraph.

The Law on Electronic Communications defines the set of universal services as the four components taken together and not separately. This means that the law limits the ability of the Minister to designate different undertakings to provide different elements of universal service. The impact of this limitation is being examined in the light of the Universal Service Directive, along with the definition used in the law for the provision of access at a fixed location to the public telephone network.

The new system also changed the method for assessing the need for compensation. The basis for the new system is the calculation of net costs and the definition of any unfair burden. The compensation is based on a sharing mechanism between the undertakings concerned. The previous system based the calculation of the net revenue loss arising from the difference between the price of the reduced universal service subscriber package and the normal subscriber package multiplied by the number of subscribers subscribing for the reduced package.

According to the decree on the management of the sharing mechanism, only those universal service operators which applied to the body managing the sharing mechanism are entitled to any compensation. On the other hand, another decree on the calculation of the contributions to the sharing mechanism, and the assessment of the need for compensation, allows for the contribution obligation of the universal service operators to each other to be reduced if they do not themselves apply for compensation with regard to their own access and public payphone obligation. This possibility for off-setting may well create a system which is not transparent. The Commission will follow closely the practical implementation of these provisions of the law and the relevant secondary legislation.

MALTA

TRANSPOSITION

The new legislation (including subsidiary regulations), which aims to fully transpose the New Regulatory Framework of 2002, came into force on 14 September 2004. The primary legislation – the Electronic Communications (Regulation) Act – includes a transitional provision according to which “any directives, decisions or designations (...) made by the Authority under this Act as in force” on the date of coming into force of this Article “shall continue to be in force until revoked or amended by the Authority”. The Commission services are examining its compliance with Article 27 of the Framework Directive, which, in principle, refers only to those SMP obligations that were imposed in accordance with the old regulatory framework and does not mention other obligations that may have been imposed. In this respect, it is to be noted that some of the decisions of MCA, taken prior to accession to the EU might indeed be regarded as overregulation from the 1998 *acquis* perspective. The new law is currently being examined by the European Commission.

MARKET OVERVIEW

The electronic communications market in Malta is characterised by a limited number of operators. Despite the formal liberalisation of the fixed telephony market (completed by the end of 2002) the incumbent remains the sole provider of fixed services. As regards international telephony a number of ISPs providing VoIP services are competing with the incumbent and have gained a considerable market share⁸². There is a duopoly on the mobile telephony market with a subsidiary of an international company having 55% of the subscriber base of approximately 300 000, and a subsidiary of the incumbent serving the remaining 45%. Legally, the duopoly ceased to exist only when the new legislation transposing the NRF came into force (14 September 2004). There is only one cable operator (50% owned by a big international company) that provides nation-wide TV distribution services and Internet access (through its subsidiary).

The only really competitive market in Malta seems to be the provision of retail Internet services, with more than a dozen ISPs active on the market. They are providing the service on a purely resale basis, buying the wholesale product from the fixed incumbent’s subsidiary, as there seem to be no viable alternatives – for example the cable operator is not providing a wholesale product for Internet access.

Regarding international leased lines (particularly important in Malta, due its geographic situation), the market is also enjoying some benefits from infrastructure competition, with a second underwater data connection having been deployed. This has resulted in a significant drop in international IP bandwidth tariffs.

⁸² According to the report published by the MCA in April 2004 – “Telecommunications market review. October 2003 – March 2004” – “when minutes from March 2003 to March 2004 are aggregated, VOIP had a 35.7% of the international whilst {the fixed incumbent operator} had 36.6% of all international outgoing minutes”.

The penetration of fixed line telephony in Malta stands currently at 51.9 lines per 100 inhabitants and has remained constant. The mobile sector on the other hand has reported a notable growth in penetration and up to March 2004 the number of mobile subscribers grew by 6.1% on a year-on-year basis. Total revenues from mobile operations in 2003 grew by 21.4% in comparison to 2002⁸³, and a significant growth in mobile revenues has been observed since 2001, when the second mobile operator (the subsidiary of the incumbent) entered the market. The Internet market also experienced positive growth both in terms of Internet subscriptions and broadband connections. In fact more than 80 000 Internet subscriptions were reported at the end of March 2004⁸⁴. Mainly due to the competition at the retail level between service providers, broadband is taking up in Malta, with 13 738 broadband lines (as of 1 July 2004; out of which 2 312 are by means of cable modem) that amounts to 3.5% broadband penetration (in terms of population). It appears that recently a significant increase in the number of broadband lines has occurred as a result of the decision (in October 2004) of broadband providers to double the speeds of all ADSL and cable modem connections, free of charge.

THE NRA

The national regulatory authority – the Malta Communications Authority (MCA) – is a relatively young body, established in January 2001. With the coming into force of the new law, it has assumed all the responsibilities of the NRA under the new regulatory framework. While one of its responsibilities is also “to ensure fair competition in” the electronic communications sector, it is not clear what exactly the division of tasks is between the regulator and the competition authority and the Maltese authorities are about to issue an explanatory document in this regard.

MCA employs 41 people (12 of which have been recently transferred from the Wireless Telegraphy Department of the Ministry at the same time as the frequency management function was transferred to the MCA) and it is considered sufficient by market players in terms of manpower and quality. In general, there is confidence in the way MCA performs its tasks. However, some questions have been raised by market players as to its institutional independence from the Government, which owns a 60% share of the fixed incumbent operator. It seems that according to the provisions of the Malta Communications Authority Act, the Minister may in some cases give the MCA directions of a general character on the policy to be followed. The Authority would have to give effect as soon as possible to all such directions and in a case where it fails to comply with them its functions could be transferred to the Minister. In addition, it seems that the Minister may, after consultation with the Authority, make regulations in respect of any of the functions of the Authority. There is uncertainty as to the scope of the potential intervention by the Minister (which to date has not occurred), particularly when this is done by regulation. The possibility of regulatory functions being transferred to the Ministry in case the MCA failed to comply with policy directions needs to be monitored with regard to any implications for the MCA’s ability to operate independently and to exercise full discretionary powers.

⁸³ Idem.

⁸⁴ Idem.

Appeal mechanism

The Telecommunications Appeal Board consisted of three members, appointed by the Minister. Stakeholders are of the opinion that the appeal body lacks sufficient expertise and knowledge of the sector and there is room for improvement. Under the new law, the Communications Appeal Board will be created with a chairperson appointed by the Prime Minister and consisting of two other members selected by the chairman from a panel of persons with relevant experience established by the Prime Minister. Although the new body will remain an *ad hoc* one (convening only when an appeal has been filed), the new provisions are intended to ensure a better quality of appeal procedure in Malta.

Market analysis

The new law provides that the market analysis procedure shall be carried out as soon as possible after the relevant markets have been defined by the MCA. The regulator did not yet take any formal decision in this regard, nor has it published the sequence of the markets to be analysed. In October 2004 the MCA published a consultation document on the market review methodology. According to this document, the MCA plans to commence the market review process in November 2004 starting with fourteen of the markets identified by the Commission's Recommendation. Notification of the draft decisions to the European Commission are envisaged for June 2005 with regard to wholesale unbundled access and wholesale broadband access (markets 11 and 12), July 2005 with regard to mobile access and call origination, mobile voice call termination and wholesale national market for international roaming (markets 15, 16, and 17) and October 2005 with regard to retail level (markets 1-6) and fixed call origination, fixed call termination and transit services in the fixed public telephone network (markets 8-10) respectively. The revision of the remaining markets would follow in mid 2005 with the notifications expected by end 2005.

STARTING CONDITIONS

All operators (fixed, mobile and cable) have been found to have a dominant position on their respective markets (including markets that were not defined or addressed under the old framework) and remedies, prescribed by the law (mainly in accordance with the 1998 regulatory framework) have been imposed. A reference interconnection offer (RIO) was published by the fixed incumbent in January 2003, and a new offer is expected to be available in October 2004. The fixed incumbent is also obliged to publish a reference unbundling offer (RUO). It seems, however, that its publication has not taken place so far and a proposal was submitted to the NRA only recently (September 2004)⁸⁵.

In August 2003 the cable operator has been designated as having SMP ("Dominant Market Position" under the then applicable Maltese law) on a broadly defined "market" for telecommunications transport provision. As a result it has been obliged to provide open access to its cable network to third parties as from June 2004. The decision has not yet been effectively implemented.

⁸⁵ On 5 October 2004 the MCA has published it for public consultation that will run until 11 December 2004.

The fixed incumbent operator is legally required under the provisions of the Maltese law to provide for carrier selection and carrier pre-selection; however, the Commission services are examining whether these requirements have been effectively implemented so far. In May 2004 the MCA issued a decision detailing obligations imposed by the law on the incumbent (including the obligation to incorporate call origination charges in its RIO by June 2004). However, the latter has not so far complied with those obligations and has appealed the MCA decision claiming that CS and CPS should also be imposed on both mobile operators in Malta. Under current circumstances, as there is only one fixed operator, only mobile operators would be in a position to provide CS and CPS services and obtain carrier (pre-)selection prefixes, as ISPs (providing VoIP) are not considered to be providers of publicly available telephone services (PATS).

The Commission services are also examining the availability of number portability (NP) for subscribers in Malta. With regard to the telephony provided at a fixed location, this requirement cannot be practically implemented as long as the incumbent remains the sole provider of this service (as mentioned above, ISPs are not considered to be PATS providers, and in any case they have so far not been eligible to apply for numbers). Concerning number portability for subscribers of mobile services – required under the new law – there seems to be strong opposition from both mobile operators to its introduction. It is considered to be too costly to implement, and mobile operators in Malta do not see any practical benefits for end users. All parties agree, however, that this would facilitate an entry for a potential third operator.

Alternative operators appear not to have sufficient incentives to enter the Maltese market. It may be partly due to the size of the market, with a population of slightly less than 400 000; however, they are clearly regulatory issues that need to be dealt with in order to ensure competition on the electronic communications market in Malta, including correct implementation of the starting conditions. One of the remaining issues seems to be tariff rebalancing by the fixed incumbent operator. The possibility for operators to compete with the incumbent at local and/or national level has to be examined (due to the size of Malta there is no differentiation between local and long distance calls; moreover, the tariffs for local, single transit and national interconnection are the same in the current RIO of the incumbent). Call termination rates⁸⁶ seem to be extremely high and are in fact above the level of the retail tariff of the incumbent (€ 0.056 and € 0.025 per minute respectively). There is also the issue of the implementation of local loop unbundling (as mentioned above, it seems that no reference offer has been published so far). Here again, the issue of tariff rebalancing arises. It seems that bitstream access is not available. All these issues merit further examination.

⁸⁶ According to the current reference interconnection offer (and therefore believed to be cost oriented, however it is noteworthy that interconnection charges in Malta are very high above the EU average).

MAIN REGULATORY ISSUES

Administrative charges and fees

The level of administrative charges and fees for individual rights of use (including frequencies and numbers and rights of way) is under examination. Under the outgoing regime operators had to pay substantial amounts of money on a yearly basis – both fixed charges and a percentage (up to 4% in the case of the cable operator) of their gross revenue. According to the new law, public network operators and/or public service providers seem to be obliged to pay € 47 000 per annum, and in addition they seem to be obliged to pay up to 1.5% of their gross revenue. Mobile operators will also be obliged to pay fees for the use of frequencies in the amount of € 3 525 plus 2.5% of the total gross revenue. Every service provider will need to pay € 0.35 for each allocated number. In addition, in an innovation under the new regulations, undertakings authorised to provide nationwide fixed electronic communications networks will have to pay for the rights of way a fee of 0.4% of gross revenue and not less than € 282 600.

The law provides for a yearly overview of MCA's administrative costs and the charges collected, which has to be published and appropriate adjustments should be made, if a surplus of revenues over costs is identified. Moreover, the impact of the system of administrative charges and fees on small niche operators and service providers needs to be verified as part of the general monitoring of the compliance of the provisions in question with the requirements of the Authorisation Directive.

Frequency management

Under the new law, MCA has assumed the responsibilities for frequency management (frequency assignment in accordance with National Frequency Table established by the Minister). The manner in which those responsibilities will be executed remains to be seen and may prove to be crucial for the future development of electronic communications in Malta. The Commission has recently received a complaint, according to which there have been some deficiencies in transparency in the recent process of granting individual rights of use for frequencies (and rights of way) for the provision of digital terrestrial TV (DTTV) in Malta. The Commission services are currently examining this complaint.

The recently published (by the Ministry) consultation paper on the strategy for the implementation of 3G in Malta seems to suggest that the current mobile operators would be given priority in tendering for the respective frequencies (to be offered for a fixed amount of Lm 2.5 million to current mobile operators, whereas the same amount would be a minimum bid for the third licence). Another consultation paper concerning the strategy for introduction of fixed wireless access (in the 3.5 MHz band) states that “though technically it is possible to grant more than one licence, the idea is to grant only two spectrum bands for this technology, at least initially, especially given the limited size of the country and market.” Without prejudice to the outcome of the public consultation in the above mentioned cases, it may be questioned whether such an administrative limitation of the number of individual rights of use for frequencies to be granted is in line with the provisions of the regulatory framework. The Commission services will be looking into this issue.

Directory service

The Commission services are examining the extent to which the existing directory service available to end-users in Malta corresponds to the requirements of the EU framework (i.e. to cover both fixed and mobile subscribers).

e-Privacy

The Directive on privacy and electronic communications provides, among others, for a harmonised set of rules concerning unsolicited communications. Among other things, it requires Member States to ensure that the legitimate interests of legal persons are sufficiently protected. It is not clear from the Maltese law notified to the Commission that this requirement has been correctly transposed. The Commission services are looking into this issue.

THE NETHERLANDS

TRANSPOSITION

The national legislation transposing the new regulatory framework entered into force in the Netherlands on 19 May 2004, after a ten-month delay. In February 2004, through another legislative amendment, the national regulatory authority (*Onafhankelijke Post en Telecommunicatie Autoriteit*, “OPTA”) had already been given full powers to start the market analysis procedures.

MARKET OVERVIEW

Fixed penetration is at 48.2%. Based on retail revenues, the fixed line incumbent operator has a 76% share in the local call market, 61% in the long distance call market and 46% in the international call market. The total volume on the fixed network of the fixed-line incumbent operator is declining due to high penetration of mobile telephony and to growth of broadband internet. Currently the mobile penetration rate is just above EU average, at 84%. The leading mobile operator has a 36% market share (down 4% from last year), the second operator 24% (down from 26.7% last year) and the three other mobile operators share the remaining 40% of the mobile market. On 1 July 2004 the Netherlands was amongst the countries with the highest broadband penetration rate in the EU of 14.7 lines per 100 persons. It has over 2.5 million broadband lines. Fifty-eight percent of these lines use DSL technology and seventy-seven percent of these DSL lines are on offer via the fixed line incumbent operator. There is also a high number of ported fixed and mobile numbers. There are more than 150 undertakings registered with OPTA as a public network operator and/or a provider of public voice telephony. In general all of this implies that there is a relatively high level of competition which, in addition, is still developing.

THE NRA

In the light of the new regulatory framework OPTA’s powers had to be amended and strengthened to enable OPTA to perform its tasks under the new framework. The Ministry for Economic Affairs considers that the current strengthening of OPTA’s powers and responsibilities in the Telecommunications Act, needs to be better embedded in general policy goals and is in the process of drafting policy rules (“*beleidsregels*”), the intention of which is to give OPTA guidance on a number of issues. The Government says that the policy rules are aimed at increasing OPTA’s predictability and providing the necessary level of clarity in the market, which is important to enable market players take investment decisions. It is within the remit of the Ministry of Economic Affairs, which is also notified as a regulator, to issue such policy rules. There will be a national consultation on the draft policy rules. Another reason for the Ministry’s initiative to draft policy rules, relates to more general political discussions concerning the position of statutory independent authorities (“*ZBOs*” – “*zelfstandige bestuursorganen*”) such as OPTA. It appears that the Parliament and the Government wish to exercise greater influence over such independent bodies. In the Netherlands such independent authorities cannot be held directly accountable in Parliament, as may be the case in some other Member States; the Minister is ultimately held (politically) accountable.

Enforcement of decisions

Certain operators are of the view that, in the past, the fixed line incumbent operator has not always complied with decisions or kept the promises it made to OPTA, and this in turn has raised questions as to the use by OPTA of its powers and/or the adequate enforcement of its decisions in these situations. Operators fear that there will be inadequate enforcement of the wholesale tariff decision of 30 June 2004 (addressed below). OPTA says that it has a limited set of instruments to enforce financial obligations and it is of the opinion that Dutch civil law provides better and ample possibilities of enforcement of decisions with financial aspects. But, in order to achieve the enforcement of a financial obligation, a case has to be filed before the civil court and it is uncertain whether market players, who claim that OPTA has more powers to exercise enforcement than it currently uses, will want to do this.

Partly due to some of the cases described below, it is clear that alternative operators' confidence in OPTA has been shaken, although their criticism is not echoed by the consumer association ("*Consumentenbond*"). The same is true of the relations between the alternative operators and the Ministry of Economic Affairs, because even though alternative operators are positive about some aspects of the new law, such as the speeding up of legal procedures and the more effective enforcement tools for OPTA (i.e. fines up to 10% of turnover), they are critical on several issues. There also seems to have been some tension in the relationship between the Ministry and OPTA, but generally the relationship has improved considerably.

Dispute resolution and appeals

It is hoped that, with the new Telecommunications Act, and OPTA's increased and clarified powers, there will be less ground for appeal on the basis of lack of legal basis or on the basis of OPTA acting outside its remit on certain issues. Currently, the fixed line incumbent operator, in particular, appeals almost all decisions of OPTA. The new Telecommunications Act also includes shorter deadlines for dispute resolution, in line with the Directives. Parties are now able to go directly to court instead of appealing a decision of OPTA directly with OPTA in the first instance. Some important disputes have remained unresolved for too long, some even for a few years.

Market analysis

The start of the market analysis process was delayed substantively due to late implementation of the legislation giving OPTA the necessary data gathering powers. Furthermore, the Dutch Parliament voted for an amendment to the Telecommunications Act, which obliges OPTA to provide detailed reasoning for its regulatory decisions following the market analysis procedures. In practice this has led to extensive questionnaires in the data gathering process. Although it is in the interest of market players that OPTA provides a solid reasoning for its decisions, the questionnaires have been a considerable administrative burden for them and have led to more delays in the process. The latest timetable indicates that draft decisions for the mobile telephony markets will be taken in February 2005, the broadcasting market in March 2005 and the leased lines, broadband and fixed telephony markets in May/June 2005. The draft decisions will then be notified under Article 7 of the Framework Directive. It is expected that final decision will be taken in the second half of 2005, a year later than the original timetable.

MAIN REGULATORY ISSUES

Access-Interconnection

On 30 June 2004 OPTA adopted a decision on the wholesale tariffs of the fixed line incumbent operator (for interconnection and special access services and products, including LLU and interconnecting leased lines) for the period July 2004 - July 2005 (or until the market analyses have been performed, but until 1 January 2006 at the latest) and also retrospectively for the period 2003-2004. This decision is actually the result of bilateral negotiations between OPTA and the fixed line incumbent operator, which took place after OPTA invited the fixed line incumbent operator to propose cost oriented tariffs for the transitional period, for which it was to base itself on the cost models that OPTA approved for the period 2003-2004, the EDC-VI model, Embedded Direct Costs, for originating calls, and BULRIC-III, Bottom-Up Long Run Incremental Costs, for terminating calls). The negotiations led to several adaptations of the proposed tariffs and the fixed line incumbent operator agreed to withdraw some disputes and appeals, including the one it filed against the EDC-VI/BULRIC-III wholesale tariff decision of 2003. This appeal was initially filed against the fact that OPTA in July 2003 did not approve the cost models proposed by the fixed line incumbent operator and instead published the cost oriented tariffs that resulted from the EDC-VI and BULRIC-III cost models. Because of the uncertainty created by this appeal, market players were forced to make financial provisions, which was not in the interest of the market and the investment climate. The wholesale tariffs for the periods 2003-2004 and 2004-2005 have now been decided on the basis of these cost models. The tariffs for termination on the incumbent's network are the same for both periods and there is no decrease foreseen until the application of the new regulatory framework. The tariffs are above average for local calls (0.71, EU23 average is 0.61), just below average for single transit calls (0.90, EU25 average is 0.95) and well below average for double transit calls (1.15, EU25 average is 1.54). The 2004-2005 tariffs for interconnecting leased lines decreased on average with 10% and the LLU tariffs with 3-15%.

A number of alternative operators have greeted with great disappointment this bilateral approach to setting tariffs. The alternative operators were apparently not involved in the negotiations between OPTA and the fixed line incumbent operator; they were invited to an information meeting about the pending approval by OPTA of the tariffs only after the negotiations took place.

OPTA has discretion to determine cost orientation. Its aim was to create legal certainty for the market, as the appeal by the fixed-line incumbent operator against last year's decision is withdrawn. The wholesale tariff decision applies in the transitional period (2004-2005) until the market analysis process is finalised. OPTA states in its decision that in this period, while migrating to the new regulatory framework, OPTA will apply their own 2001 guidelines (on costing models) in a different way than they did in previous years. During this period the obligations regarding the principle of cost orientation for operators with significant market power under the old regulatory framework remain applicable. There is no justification for deviating from these provisions.

Article 4(1) of the Access Directive speaks of an obligation on operators of public communications networks to negotiate interconnection. The transposition of this provision by the Netherlands may raise concerns of possible overregulation. These concerns are not shared by the Ministry of Economic Affairs. The Commission services will be looking into this issue.

Bitstream access

In the past years, based on its powers under the old Telecommunications Act, OPTA has attempted to impose a bit-stream access obligation on the fixed-line incumbent operator. These attempts have been annulled in court as the obligation could not be derived from the relevant applicable legislation. Consequently there is no nationwide bit-stream access available for alternative operators who wish to provide broadband internet access to consumers. A number of operators have shown interest in such a product and take the view that the absence of a bit-stream offer in the Netherlands restricts competition in the residential broadband access market. In addition, the absence of a consumer bit-stream offer could impede the further take off of local loop unbundling in the Netherlands as alternative operators cannot use bit-stream as a basis for developing a customer base and generating a turn-over that can sustain (further) investments in the roll-out of alternative DSL networks on the basis of local loop unbundling. It is not yet clear whether bit-stream access will be regulated under the new framework; this is currently being investigated by OPTA in the applicable market analysis procedure of the new regulatory framework.

Fixed to mobile tariffs

In the Netherlands, mobile termination tariffs have been under investigation for a number of years. OPTA has attempted to lower mobile termination tariffs using dispute settlement procedures and based its decisions on the concept of ‘reasonable tariffs’ as was set out in its own policy guidelines. These attempts have been stranded in the courts. Furthermore, in 2002 and 2003 the NMA investigated the compliance of the mobile termination tariffs with Dutch competition law. In December 2003 the mobile operators came to an agreement on a mutual gradual decrease of mobile termination tariffs. As a consequence of this voluntary price decrease, the NMA stayed its investigation. Although the procedure has not been very transparent, the result of the agreement is that the uncertainty in the market has been removed and that the tariffs are going down by forty-five percent in the period between end of 2003 and end of 2005. OPTA will, in the meantime, analyse the mobile termination markets under the new regulatory framework, which could lead to further price regulation.

In view of the underlying costs, OPTA has also investigated the reasonableness of the fixed line incumbent mobile arm’s direct interconnection offer (enabling alternative operators to terminate traffic directly on its network without having to use the transit services of the incumbent). In a dispute settlement decision on 30 December 2003, OPTA held this direct interconnection offer to be unreasonable on a number of points and obliged the operator to put a modified offer in the market. This could also result in a decrease of the total costs of alternative operators for terminating traffic on that network.

Access to cable networks

Shortly after the entry into force of the amended telecommunications law (transposing the EU Directives), and on the basis of the new regulatory framework, the fixed line incumbent operator has requested cost oriented and non discriminatory access to the (local) network of the ten largest cable operators in the Netherlands, and requested co-location facilities, in order to offer broadcasting services to consumers and businesses. This is a very interesting initiative from a fixed incumbent operator in the current converging communications environment.

Fixed telephony discounts

The fixed line incumbent operator in the Netherlands wants to be able to offer more ‘packages’ than it is currently allowed by OPTA. OPTA is investigating whether, through the price setting of such packages, the incumbent fixed-line operator engages in a price squeeze. Alternative operators argue that they are repeatedly faced with such price squeezes due to discounts, promotions and price plans of the fixed-line incumbent operator.

Rights of way

In the old Telecommunications Act the obligation to allow the installation of cables in public or private land was restricted to cables that are actually used. This provision is still applicable under the new legal regime. In a recent proposal to amend the Telecommunications Act this obligation is extended to unused cables for a period of 4 years. Even though the industry is still concerned, the legislative proposal is made in conformity with the agreement reached on this matter between the relevant parties.

Broadband infrastructure roll-out

The Commission services will monitor the role played by local authorities in the area of the roll out of (broadband) networks, in particular the financial participation by local authorities in the roll out of fibre networks and its implications for the climate for infrastructure investment. Operators are concerned that the return on private investments could be undermined by the creation of competing public networks that may not pursue a market rate of return. The prospect of public intervention might also delay private initiatives for fear of investors missing out on subsidies. In such circumstances, the compatibility of the projects with State aid rules would have to be carefully assessed. The Dutch Government is in contact with the European Commission concerning planned broadband initiatives. Even though market players have a right to lay down their own infrastructure, the four largest cities in the Netherlands, the so-called “G4”, say in the Dutch Government’s “Broadband Paper” that the creation of several (access) connection networks is undesirable, as it would lead to loss of capital and unnecessary inconvenience for the public as a result of excavation works. They also want to investigate how continued investments in existing infrastructure can be avoided. On the other hand, public intervention might have pro-competitive effects when providing open-access infrastructure in areas that offer no prospect of competition in access networks and where the incumbent’s telephony network represents a bottleneck facility.

Free internet to schools

In March 2004 an appeal court ruled that the fixed line incumbent operator’s offer of free internet to schools does not lead to market distortion, overruling a lower court decision. The initial decision –not to allow the offer- was in conflict with a consultation performed by both the NMA and OPTA. OPTA indicated that any offer should be in conformity with the Telecommunications Act and the NMA was of the opinion that the initiative was not contrary to general competition rules and that cable-based access to internet and DSL are part of the same market, in which the fixed line incumbent operator is not dominant. Alternative fixed network operators indicate that the fixed line incumbent operator’s offer was based on regulated products (such as leased lines), which was the case in those areas where there had not been a roll-out of ADSL. These regulated products however are wholesale products whereas the fixed line incumbent operator’s offer is a retail offer, which is not regulated by OPTA.

Government's shareholding

The Government still has a 20% share and a golden share in the fixed line incumbent operator even though an ongoing Commission infringement proceeding is aimed at the removal of that golden share.

The Government has two different roles (shareholder and regulator) in regard to a company that has a licence to provide digital terrestrial television and radio (DVB-T) until January 2017. One of the company's shareholders is the fixed line incumbent operator (in which the Government has a 19.3% share) and this operator has expressed the wish to increase its share in the DVB-T company from the current 30% to 40% for which a decree will need to be amended. The NMA was consulted on the interest by the fixed line incumbent operator to increase its share and it concluded that, at least for the period until the end of 2007, there are no objections on competition grounds to increase the share of the fixed line incumbent operator. Alternative operators were not consulted and they subsequently objected to the NMA advice. Their fear is that the fixed line incumbent operator will strengthen its current position as a national provider of a broadband network. In its response to the critical remarks by alternative operators, the NMA confirmed its earlier position.

Migration of lines from one operator to another ("Telco-telco migration")

Regarding the so-called "telco-telco migration" the fixed line incumbent operator has complied with after an OPTA dispute resolution decision on 6 May 2004. This decision concerns the migration of unbundled lines (not the migration for other types of access services) and the decision focuses on a per line migration. The service level agreements are similar to those of a standard delivery. The tariff that the fixed line incumbent operator can charge is more or less similar to the connection/activation costs for an unbundled access line. The period in which a client was previously without a DSL connection has now been reduced from a few weeks to one day. The fixed line incumbent operator has not appealed this decision.

Must carry

In the Netherlands a "must carry" obligation, concerning fifteen television channels, is imposed on the cable operators. Seven of these are public broadcasting channels, which are clearly identified in the Media Act. The decision as to the commercial channels benefiting from must carry lies with the local programme councils, and the Commission services are examining whether the decision making procedures lack transparency. Article 31 of the Universal Service Directive states that the must carry obligations can only be imposed when they are necessary to meet clearly defined general interest objectives and that they must be proportionate and transparent. It is not clear whether the discretionary powers of the authorities to grant must carry status are circumscribed in a manner that ensures that no arbitrary decisions are taken. According to the Dutch Government the must carry obligations are transparent as the advice of the local programme councils is published. The Commission services will be looking into this issue.

ePrivacy -Traffic data

With regard to the fight against terrorism, there are legislative proposals relating to tapping and the retention of traffic data, other than the storage of traffic data for billing and interconnection payment purposes. Operators are mostly worried about the costs involved, especially as the number of requests for retrieval of (traffic) data has increased.

AUSTRIA

TRANSPOSITION

Austria appears to have transposed most of the new regulatory framework on electronic communications through the new Telecommunications Act (TKG) which came into force on 20 August 2003. This law encompasses all five relevant directives. Special provisions for the broadcasting sector have apparently been transposed by new legislation, which, however, has not yet been notified to the Commission.

The transition from the old to the new framework appears to have gone smoothly. SMP determinations and remedies imposed under the old framework are being maintained until completion of the market analysis.

In particular, the old interconnection regime is being maintained in practice to avoid an absence of regulation in this area during the transitional period. If market players cannot agree on interconnection, the Telekom-Control-Kommission (TKK) issues binding decisions substituting a civil law agreement between the parties and containing the relevant details for interconnection. For fixed to fixed, the general rule is that the principle of reciprocity applies to the relevant tariffs, except that alternative operators only have got a single tandem tariff for termination. In principle, both the alternative operators and the incumbent appear to be satisfied with this procedure.

As far as compensation for the costs of the provision of universal service in the past is concerned, a civil law agreement between the incumbent fixed network operator and its competitors was concluded in spring 2004 and will be in force within 31 December 2004.

MARKET OVERVIEW

In the past year the Austrian telecommunications market has been characterised by increasing volumes, growing sales in mobile and data communications and falling tariffs in the fixed and mobile network sectors. Net revenue increased by more than 5% from € 4.13 billion to € 4.34 billion with mobile communications accounting for 53.4% of the total. Due to increasing broadband penetration, broadband revenue rose from € 186 million in 2002 to € 279 million in 2003, an increase of just over 50%⁸⁷.

The incumbent fixed network operator continues to retain its leadership position in the market, with the rate of decline in its market share now slowing down. Though there is a decrease from 50% to 47% market share for local phone calls on the basis of retail revenues, its market share for all fixed phone calls, i.e. long distance, international, local calls and calls to mobile together, remains unchanged at 54%. On the basis of outgoing minutes the incumbent has retained a market share of 48%.

There are five major competing alternative operators in the fixed telephony market. The two biggest alternative operators hold 13% and 11% market share respectively on the basis of

⁸⁷ Data in this paragraph is taken from RTR's "Kommunikationsbericht 2003".

retail revenues. The others hold 5% to 3% each. 75% of the shares of the largest of these five alternative operators are held by public institutions. There are five mobile operators in the Austrian market. The market share of the mobile operator which is owned by the incumbent fixed network operator has decreased slightly in the past year and is now at about 42%. The market share of the second biggest operator has fallen from 29% to about 27%, whereas the third operator and the fourth gained a little by rising to 20% (19%) and 10% (8%) market share respectively. A fifth operator entered the Austrian mobile market in December 2003 and this had a market share of just over 1% in August 2004. End-user prices in mobile communications have fallen dramatically over the last few years and connections for less than 1 cent per minute have become common.

All mobile operators have so far met the coverage requirements for the roll-out of UMTS services. Coverage of 25% was achieved by all five operators by the end of 2003. 50% coverage is required by the end of 2005.

Approximately 19% of the Austrian households have broadband internet access. Operators providing broadband internet access via cable have a market share of 55%. The incumbent fixed telephone network operator has a market share of 42%.

At least six operators reported to the NRA the launch of voice over IP.

THE NRA

The Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR) was established by new legislation on 1 April 2001. It acts as the operational arm of the Austrian Communications Authority (KommAustria) and the TKK. The RTR is divided into two specialized sections (Broadcasting and Telecommunications) and is responsible for market definitions, operational tasks assigned to it under the Austrian Telecommunications Act, and operations for KommAustria.

The duties of the TKK are specified in the Telecommunications Act 2003. Among these there are determinations of significant market power in the relevant markets and the imposition of specific remedies, as well as the approval of general terms and conditions and tariffs. RTR provides expertise and handles all administrative matters on behalf of the TKK. TKK's members act independently. The presiding member is a judge. No regular legal recourse against its decision is possible. There is, however, the possibility to file a complaint with the Administrative and the Constitutional Courts.

KommAustria regulates the broadcasting sector. Its responsibilities are laid down in the Austrian Federal Act on the establishment of the Austrian Communications Authority and have been extended by the new Telecommunications Act in 2003. Its competences include inter alia the administration of the broadcasting frequency spectrum and the regulation of communications infrastructure for broadcasting and additional broadcasting services.

It is noteworthy that KommAustria is under the direct authority of the Federal Chancellery with just one official being responsible for its decisions. The public broadcasting infrastructure is owned by a foundation. Any concerns as to the division of interests of the regulator and the owner will therefore depend on the concrete organisational structure of this foundation and on how its representatives are nominated. The Commission services will continue to examine this issue.

The national consultation according to the new framework usually runs in parallel with the Community consultation under Article 7 of the Framework Directive. First experiences have shown that this approach might make it difficult for the Austrian NRA as well as other NRAs and the Commission to take properly into account the contributions of market players. The extent to which the national consultation is however taken into account in the NRA's final decision cannot be stated in general. RTR is aware of its duty to consider a second consultation after it has made significant modifications to its drafts following the first consultation.

The Austrian Administrative Court partly relaxed the privileges of business and professional secrecy in proceedings before the NRA in a judgement of 25 February 2004⁸⁸. The court ruled that where reports are adduced as evidence in proceedings before the NRA, no deletion of business data is permitted, since otherwise such reports would be tantamount to "secret" evidence. As a result of this decision market players may, in future, be reluctant to initiate proceedings before the NRA or may provide less data because of the risk of publication of relevant data. This may hamper the NRA in its tasks.

As regards the co-operation between the NRA and the National Competition Authority (NCA) under the old TKG, the NRA could approve tariffs without assessing their anti-competitiveness. The latter assessment fell under the competences of the NCA. Following a complaint by the NCA, the Cartel Court in Vienna obliged the incumbent fixed network operator by way of a judgement of 18 March 2004 to terminate an abuse of a dominant position committed by the application of certain of its bundled tariffs. These tariffs had been approved by the NRA on 21 July 2003, hence under the old TKG.

General regulatory policy for Austria is developed by the Ministry of Transport, Innovation and Technology in close collaboration with the regulatory authority. A clear long-term regulatory policy and far-sightedness is certainly positive, as it provides a perspective to the market players.

When ordinances have to be issued by the Ministry preparatory input is frequently provided by the regulatory authority.

APPEAL MECHANISM

Appeals against KommAustria's decisions have to be addressed to the Federal Communications Senate, an administrative body with court-like competences, and appear to have a suspensory effect in general as here, unlike in the telecommunications area, general administrative law (*Allgemeines Verwaltungsverfahrensgesetz – AVG*) applies (according to which appeals do have such effect).

MARKET ANALYSIS

Market definition is done by ordinance. KommAustria is responsible for the market definition and analysis and imposition of remedies in the broadcasting area, whereas RTR is in charge of

⁸⁸ Decision of the Verwaltungsgerichtshof of the Republic of Austria of 25 February 2004, ZI.2002/03/0273-7.

market definition in the telecommunications area. Finally, TKK is responsible for market analysis and the imposition of remedies for telecommunication markets.

Whereas Member States must ensure under the EU framework that market analysis is carried out, where appropriate, in collaboration with the national competition authorities, the Austrian TKG appears not to contain a specific legislative basis for such collaboration. The NRA has confirmed, however, that it does involve the competition authority at an early stage in relevant procedures.

Pursuant to the new TKG only those undertakings have the right to act as a party in the procedure of market analysis which are directly affected by this procedure.

Seventeen markets have been defined under the new framework, of which sixteen markets were defined at a first stage by way of an ordinance of RTR. Concerning the broadcasting market, which is defined by separate ordinance of KommAustria, Austria's definition deviates from that recommended by the Commission and has been notified on 19 January 2004. The wholesale broadband access market has neither been defined nor notified yet.

By 15 October 2004 seven consultations on market analysis had been concluded. Moreover, TKK has notified to the Commission under Article 7 of the Framework Directive eight draft measures concerning determination as to significant market power and the imposition or withdrawal of resulting obligations. The analyses completed concern the following relevant markets: 1) the retail market for the minimum set of leased lines (market 7, Commission's response: no comments); 2) the market for transit services in the fixed public telephone network (market 10, Commission's response: veto); 3) the wholesale unbundled access market (market 11, Commission's response: no comments); 4) markets for wholesale terminating and trunk segments of leased lines (markets 13 and 14, Commission's responses: comments); 5) the market for mobile access and call origination (market 15, Commission's response: comments); 6) the market for wholesale mobile voice call termination (market 16, Commission's response: comments); and 7) the broadcasting market (market 18, Commission's response: comments).

The fact that market definition and market analysis are carried out by two different bodies in the telecommunications sector, RTR on the one hand and TKK on the other, gives rise to concern on the part of the market players as to whether the flexibility of the NRA envisaged in the Framework Directive is fully ensured and the Commission services are examining this issue. If TKK comes to the conclusion that the market it analyses should have been defined in a different way than actually done by ordinance of the RTR, it appears not to be able to simply modify the market definition accordingly under national law.

The TKG appears to ensure that the NRA has the full range of remedies under the new regulatory framework at its disposal. It is apparently a matter for the NRA to decide in every case, which to impose. In order to ensure full transposition of the minimum list to be included in a RUO, Section 49 (2) of the TKG provides for the possibility to lay down the relevant details in an ordinance. Such an ordinance has not been issued yet. Pursuant to Austrian law the old interconnection ordinance would apparently still be applicable. Austria has, however, not notified this old ordinance as a measure to transpose the new framework, the significance of which is being considered by the Commission services.

MAIN REGULATORY ISSUES

Objectives of framework

Full transposition of all objectives of Article 8 of the Framework Directive has to be verified. For example, the law does not seem to contain any provisions relating to the special emphasis in the framework on the interests of handicapped people. Austria also has included additional objectives, which are not in the framework (e. g. in Section 1 (2) no. 1 of the TKG there is the objective included to promulgate Austrian industrial policy, “Standortqualität”).

Rights of way

Difficulties are reported by market players and may arise as far as rights of way are concerned. In general, the applicant may use his right of way after the highest telecommunications authority (Oberste Fernmeldebehörde, the Ministry) has decided that he has such a right at his disposal. In such a case the general administrative procedural law (AVG) would apply, which means that the appeal to the ministry has suspensory effect. It has to be seen whether this raises concerns with regard to the Framework Directive.

As already illustrated in the Eighth Implementation Report, there is serious concern on the part of operators about the constraints imposed by regional and local authorities on the roll-out of networks, since the procedures for obtaining rights of way seem to be complex, time-consuming and expensive. This could in particular have an impact on the roll-out of the 3G-network. Some local authorities are reported to ask market players to sign civil law contracts for the rights of way allegedly to by-pass existing limitations concerning administrative fees.

Universal service

The Austrian government has notified the Commission of the imposition of universal service obligations on the incumbent. This decision will be valid until the end of 2004. With a view to keeping the costs of the service as low as possible the Ministry for Transport, Innovation and Technology plans to consider transferring parts of the universal service obligations to alternative operators. A public consultation on this matter will probably be initiated.

New rules on must-carry have been passed by the Parliament and have apparently been broadly accepted by the relevant market players. According to these new provisions only the two nationwide public service broadcasters enjoy free of charge must-carry status. Upon request and for consideration the only nationwide private TV programme must also be carried. Furthermore local terrestrial programmes have to be carried upon request and for remuneration if further conditions (such as the broadcasting of “Austrian content”) are met. These new laws, have not yet, however, been notified to the Commission.

Mobile number portability, which is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment, was still not offered in Austria on 1 October 2004. However it is laid down in Section 23 of the TKG that operators of public telecommunications services must ensure that they offer their subscribers the possibility to change provider of telecommunications services and to keep at the same time their telephone number without any change in the specific use assigned to the relevant number range. As far as mobile number portability is concerned the Minister is empowered to determine the details of this obligation by ordinance. He has adopted such secondary legislation (“Nummerübertragungsverordnung”) in November 2003. Furthermore, RTR made a decision

seeking to resolve open questions between operators concerning the provision of mobile number portability in July 2004. According to this regulation fines will be applicable as of 16 October 2004, if mobile number portability is not offered by this date.⁸⁹

Itemised billing, the failure to introduce a sufficient level of detail of which led to a ruling of the European Court of Justice against Austria in September 2004⁹⁰, has apparently been offered by the incumbent since May 2004. It appears that itemised billing is provided upon request and free of charge, either in paper or in electronic form according to an ordinance issued by RTR which came into force on 1 May 2004.

ePrivacy

The new Telecommunications Act also covers the ePrivacy Directive. However, the transposition of Article 13 of the Directive, which deals inter alia with unsolicited e-mails (spam), limits the beneficiaries of this prohibition to “consumers” (“Verbraucher”). The Ministry has indicated that an amendment of the respective rule is already under discussion.

Mobile services

In the mobile market there has been extremely strong price competition particularly for end-user tariffs. For signing a one-year-contract for mobile telephony, an end-user regularly receives a handset and by one new entrant operator also a cash payment. On some mobile networks the price of a call can be less than €-cent 1 per minute. Here the NRA will have to decide whether it remains appropriate to continue to accept high mobile call termination fees in particular charged by new entrants or whether these fees might not have to be regarded as a subsidy which enables the market behaviour described above.

Local Loop Unbundling

After a lack of success in previous years, it appears that unbundling has now successfully taken off (reportedly 50 000 to 60 000 unbundled lines) and no further complaints have been reported as regards co-location issues.

⁸⁹ As from 16 October 2004 mobile number portability has been offered by all mobile operators.

⁹⁰ Judgement of the European Court of Justice Case C-411/02 of 14 September.

POLAND

TRANSPOSITION

The new Telecommunications Law aiming to transpose the new regulatory framework for electronic communications was published in August and came into force on 3 September 2004. A significant amount of secondary measures that are needed to ensure full transposition and effective application of the directives remains to be adopted, and the Ministry of Infrastructure (hereinafter the Ministry) is currently working on the drafts. Until the new executive ordinances are adopted, those issued under the Telecommunications Law of 2000 remain in force.

The Commission services are presently examining the conformity of the measures adopted, in particular in relation to provisions concerning the appeals mechanism, mobile number portability, the use of radio frequencies where the risk of harmful interference is negligible, facility sharing and co-location rules.

MARKET OVERVIEW

The incumbent fixed network operator - a publicly owned company⁹¹ – remains the dominant player with regard to fixed telephony and has between 82% and 90% of all call markets.⁹² Although there are about 80 licensed (under the old regime) fixed operators, they are mostly active on local markets. By the end of 2003, twenty seven service providers had a prefix assigned (for the purpose of carrier selection - CS - and carrier pre-selection - CPS); however, only a few of them are active on the long distance, international and fixed to mobile calls market (CS and CPS is not available in Poland for local calls – see below). The penetration rate of the fixed telephony network remains low and according to the NRA's report for 2003⁹³ it was 34% in terms of population by mid 2003. The number of fixed lines in Poland is still growing (albeit slowly) and the lines built and owned by new entrants represent about 10% of all PSTN lines⁹⁴.

There are three mobile network operators with similar market shares. The mobile penetration rate has recently reached 51%, but despite some reported growth in 2004 (slower than in previous years, however), it remains the lowest among EU 25. Next to the relatively low GDP per capita in Poland, this is partly due to the high retail prices for mobile services. None of more than a dozen licensed MVNOs managed to start their operations, as no mobile network operator was willing to sign appropriate agreements.

As regards cable infrastructure, Poland, with 4.5 million cable TV subscribers, is the third biggest market in the EU (after Germany and the Netherlands). There are more than 600 cable

⁹¹ The Polish state is still in a possession of 3.94% of the incumbent's shares. A big European operator is a strategic investor and has 47.5% stake in the incumbent's share holding.

⁹² On the basis of minutes of traffic, the incumbent has 89% of the market for local calls, 85% of international calls, 82% of long distance calls and 90% of the market for calls to mobile networks (competition on the market for calls to the mobile network has been only possible since October 2003).

⁹³ Raport roczny Prezesa URTiP, 2003 r.

⁹⁴ idem.

network operators and a penetration rate is approximately 54% (households passed). All major cable operators, besides the transmission of radio and TV signals, are also engaged in the provision of other electronic communications services (mainly Internet).⁹⁵

Broadband penetration in Poland is just 0.5% with only 192 307 DSL lines reported in July 2004⁹⁶. Approximately 6% of all DLS lines have been constructed and are owned by new entrants.

THE NRA

Under the new law three bodies have regulatory competences in the field of electronic communications in Poland, including the Ministry of Infrastructure, which is responsible for defining the relevant markets.

The Office of Telecommunications and Post Regulation (URTiP) is a relatively new institution, having been established on 1 April 2002 to replace the Office of Telecommunications Regulation (itself created in January 2001). The Office employs around 600 people, but a significant number of these deal with frequency management and less than 10% deal with regulatory matters. According to certain market players, URTiP is facing certain budgetary and staffing problems that make it harder for the regulator to carry out its tasks.

There is also a common perception among operators that UTRiP's performance, quality and effectiveness in the execution of its regulatory powers are in need of considerable improvement, and they have an obvious lack of confidence in the manner in which URTiP addresses its tasks, particularly in regard to the existing limitations on the market.

Concerning the networks used for radio and television broadcasting, as well as transmission services using those networks, regulatory competences and responsibilities are divided between two bodies. It is being examined whether there is a clear distribution of tasks between URTiP (the regulator for telecommunications) and the National Broadcasting Council (KRRiT – the regulator for TV and radio content matters as well as for some digital TV issues). KRRiT is responsible for the assignment of frequencies for the purpose of providing digital TV and for matters concerning conditional access systems, APIs and EPGs as well as “the multiplexing of digital signals”. It is not clear whether “the multiplexing of digital signals” would also include digital broadcasting transmission services.

Appeals and dispute resolution

The new law does not seem to fully transpose a provision of Article 4 of the Framework Directive, according to which, pending the outcome of an appeal, the decision of the NRA shall stand, unless the appeal body decides otherwise. In Poland an appeal would normally have a suspensive effect, unless the NRA decides otherwise on a case by case basis. The Commission services are looking into this issue.

⁹⁵ According to the report published by the National Broadcasting Council – Krajowa Rada Radiofonii i Telewizji – “Radio i Telewizja w Polsce: Raport o stanie rynku w chwili przystąpienia do Unii Europejskiej”, September 2004.

⁹⁶ Cable operators are also providing broadband services; however URTiP did not provide any data in this respect.

It is reported that, prior to accession, many disputes and proceedings took years before a decision was reached, exceeding by far the deadlines provided for by the law. In addition, a high percentage of decisions has been reversed by the courts on appeal (such court proceedings are also extremely lengthy in Poland) due to administrative and substantive deficiencies in the decisions. As well as the need to respect the procedural deadlines, the Commission services will monitor whether these cases represent ongoing issues and, if so, their implications for effective application of the new framework

Market analysis

It seems that the process of market definition and market analysis has been separated between two bodies. In effect, it appears that the Ministry (acting as a regulator in this respect) will define relevant markets (concerning product and geographical scope) in an ordinance, and only thereafter URTiP will analyse the pre-defined markets. It is to be seen whether this approach raises concerns as to how the NRA can properly exercise its discretionary powers in such circumstances and whether any serious difficulties in defining relevant markets appropriate to national circumstances in the context of constantly changing markets arise. Moreover, it seems that no effective appeal mechanism (as required by the Framework Directive) will be applicable to a ministerial ordinance defining relevant markets, which has to be seen as a regulatory decision. Although there would be a possibility for each individual concerned to refer the case to the Constitutional Court, the latter could only decide on the conformity of the ordinance with the Polish Constitution, depriving the market players of a right of appeal based on the substantive aspects. This procedure could only be launched after the regulator has issued a decision on the basis of that ordinance and the decision would have to be final (no other appeal possibilities under national law). The Commission services are looking into these issues.

The market analyses process has not yet started and the NRA is waiting for the Ministry to adopt and publish an ordinance defining relevant markets. The draft ordinance was recently published for a public consultation. While defining the relevant product markets, the Ministry is not planning to deviate from the Commission's Recommendation on relevant markets. With regard to the geographical scope of the markets, the Ministry is planning to define all markets (except for the call termination) as national. The authorities have widely consulted on questionnaires that are to be sent to operators, and a public tender has been published for a consultancy that will provide the NRA with expertise on the criteria to be used for analysing the competitiveness of the relevant markets. No formal decision regarding the sequence of the markets to be analysed has been taken.

STARTING CONDITIONS

The Polish market for electronic communications was formally liberalised with the introduction of competition into international calls in the beginning of 2003 (the market for local and long distance calls had been legally opened for competition a year earlier, although competition does not seem to have developed because of the failure to effectively implement CS and CPS for local calls). URTiP has issued several decisions designating SMP undertakings on all previously regulated markets (fixed telephony, leased lines services, mobile telephony and national market for interconnection in the public mobile telephone network). As regards the latter market, however, the appeal proceedings, launched by all three mobile operators (designated SMP) are on-going, and as a result of the fact that the decisions

in question do not contain an immediate effect clause, the appeals have had a suspensive effect (in accordance with administrative law). As a result, no obligations for transparency, cost orientation or cost accounting separation can be legally imposed on the mobile operators.

The cost orientation of the incumbent's charges for interconnection needs to be verified; the Commission services are examining whether the incumbent's cost accounting model has been verified and approved by the regulator so far.

The fixed network incumbent operator is legally required under the provisions of the Polish Law to provide for carrier selection (CS) and carrier pre-selection (CPS); however, there are several problems with their effective implementation. For technical reasons, CS and CPS are not available for a significant number of end users connected to analogue exchanges and full digitisation of the incumbent's network seems to be due only by the end of 2005 (the plan for modernisation of the network and its timing have been approved by URTiP). It seems that with regard to local calls, CS and CPS are not available at all. Both, the incumbent and URTiP claim that this is a result of an "open" numbering plan currently in place in Poland that will be changed to a "closed" one only by the end of 2005. It has been acknowledged that even with the open numbering plan, the introduction of CS and CPS for local calls is technically possible.

It is being examined whether number portability (NP) is available for subscribers in Poland. As regards fixed number portability, this was already required under the old Telecommunications Law. However, at the request of main fixed operators (including the incumbent), it would appear that URTiP has issued decisions suspending end users' right to port their numbers until the end of 2004 (and until the end of 2005 for the incumbent's end users connected to analogue exchanges).

MAIN REGULATORY ISSUES

Authorisations / rights of use

Transposition of the requirement that, where possible, in particular where the risk of harmful interference is negligible, the use of radio frequencies should not be subject to the grant of individual rights of use but the conditions for usage of such frequencies should be included in the general authorisation will be looked into by the Commission services. This needs to be examined in regard to the general objective of the new framework to ensure the efficient and effective management of radio frequencies, as well the objective justification and proportionality of such an approach.

Mobile number portability

Correct transposition of mobile number portability, i.e. the right of each subscriber for mobile services to retain their number(s) independently of the undertaking providing the service, will be looked into by the Commission services. Although it has been formally introduced into the Polish system with the adoption of the new law, the relevant provision of the Law seems to exclude pre-paid customers⁹⁷ of mobile services from its scope.

⁹⁷ Pre-paid customers constitute more than 50% of all mobile end users.

Access-interconnection

The fixed network incumbent operator has recently published a reference interconnection offer (RIO) for the first time. This marks the third attempt by the incumbent to have the RIO approved by the NRA, and on 5 March 2004 URTiP issued a favourable decision in this respect. It seems, however, that the decision was not based on the appropriate cost accounting calculation (as no cost accounting model has yet been approved) but on benchmarking (average cost levels of other European operators). The decision has been appealed to the courts by the alternative operators, and this procedure is on-going.

It is being verified whether reference offers for leased lines, bitstream and local loop unbundling remain to be published.

In the new law, a general obligation to negotiate access agreements seems to be imposed on all undertakings. The Commission services are examining the conformity of this measure with the relevant article of the new regulatory framework, which provides for an obligation for all undertakings to negotiate interconnection. It appears that, in case access negotiations fail, URTiP can (at the request of a party or at its own initiative) issue a binding decision resolving the dispute or establishing criteria for co-operation. The Polish law states that before issuing such a decision a consultation on a national level, as well as with other NRAs and the Commission, would need to be completed.

Facility sharing, co-location

The new law seems to impose an obligation on all public network operators with regard to facility sharing and co-location, if undertakings do not have access to viable alternatives or there is a lack of technical or economic reasonableness to duplicate the existing infrastructure. The Commission services are examining this obligation for conformity with the provisions of the Framework Directive, which allow the Member States to impose the sharing of facilities or property where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health, public security or to meet town and country planning objectives. The provisions in Poland are particularly important for cable operators in respect to sharing of ducts of the incumbent operator, but they also seem to apply to other infrastructure.

Single European emergency number

The Commission services are examining whether access to the single European emergency number (“112”) free of charge is ensured in Poland for fixed network subscribers, and whether access is only possible for mobile end users.

Directory and directory enquiry services

The Commission services are examining whether a comprehensive directory or directory enquiry service (i.e. comprising both fixed and mobile subscribers) is available to end-users in Poland. The existing directory appears to include only fixed networks’ subscribers.

ePrivacy

The Commission services are examining whether the provision of the Directive on privacy and electronic communications, whereby a company that obtained electronic contact details for sending e-mail or SMS messages from a customer in the context of a sale may use them for the marketing of similar products or services as those it has already sold to the customer, without an explicit consent of the latter, has been transposed. In Poland, all communications for the purpose of direct marketing require prior consent of the subscribers (both legal and natural persons).

Broadband

Broadband penetration in Poland is one of the lowest in EU 25. One of the reasons for that is limited competition in the broadband (access) market. It seems that the fixed incumbent operator does not provide a bitstream offer (although required under the Polish law) and local loop unbundling is not available in Poland.

On the other hand, as a result of a relatively low penetration of telephone lines in Poland, new entrants are investing in the development of telecommunications infrastructure, including the local loop.

With respect to broadband development in Poland, there also seems to be major potential in cable infrastructure. Some cable operators already provide broadband services.

Frequency management

The requirement for the efficient management of radio frequencies based on objective, transparent, non-discriminatory and proportionate procedures is formally transposed into Polish law. However, its effective application remains to be seen. There are concerns on the part of market players that, before Poland joined the EU, the prescribed procedures for radio frequency allocation and assignment were not fully observed. At least in one case, with regard to frequency assignment in 800 MHz band, operators have expressed doubts as to whether the procedure applied by URTiP was fully objective, transparent, non-discriminatory and proportionate.

URTiP has recently published plans, according to which up to two new operators may be granted frequency slots in the 1800 MHz band (for the provision of 2G services) and a fourth frequency assignment is foreseen for the provision of 3G services. With regard to the latter tender, no conditions relating to the roll-out obligations would be imposed. Both tendering procedures are to be finalised by May 2005. According to the plans, URTiP will decide on the frequency assignment taking account of the need to ensure a competitive environment for the electronic communications market in Poland (possibly favouring the operators not yet active on the Polish mobile market) as well as the proposed payment for the frequency reservation. The outcome of the tenders may prove vital for the development of the mobile communications market in Poland.

PORTUGAL

TRANSPOSITION

Portugal has transposed most of the European Union (EU) regulatory package on electronic communications through a Law (“Electronic Communications Law”) published on 10 February 2004. This law encompasses the Framework Directive, the Authorisations Directive, the Access Directive, the Universal Service Directive as well as the Radio Spectrum Decision. Concerning the e-Privacy Directive 2002/58/EC, Article 13 had already been transposed in national law through a Decree-Law of January 2004; the remainder of the Directive was transposed through Law n° 41/2004, published in the official gazette on 18 August 2004.

Following the appointment of the new government on 17 July 2004, electronic communications now fall under the responsibility of the Ministry of Public Works, Transport and Communications which supervises functional and budget issues, while the definition of guidance lines and the priority of actions are articulated together with the Ministry for the Presidency.

MARKET OVERVIEW

Since the full liberalisation of electronic communications in Portugal in 2000, competition has had a relatively limited impact on the market. The incumbent operator is still dominant in most markets: fixed telephony, mobile telephony, leased lines, narrowband and broadband Internet. It is worth noting that there is hardly any competition to the incumbent in the broadcasting transmission market (even if one alternative broadcasting network exists), and that the same group owns significant interests in content industries like broadcasting and published media.

The number of fixed telephone lines is about 4.3 million in Portugal (40% penetration) and has slightly decreased since 2001. The incumbent remains strongly dominant in this market, after three years of full liberalisation. Its share is still about 94% of all fixed lines, as well as 87% of fixed calls in terms of revenue. 9 operators are currently competing with the incumbent and their share is only around 21% for national calls and 23% for international calls (in volume). A specificity of the Portuguese market was that the incumbent did not own the national fixed telecommunications network but only the main cable TV network. However, in November 2002, the Portuguese Government sold the network to the incumbent for €365 million, without public consultation or public tender. As a consequence, the incumbent now controls both the fixed telecommunications network and the main cable network, which makes infrastructure competition very unlikely in the medium term.

The Portuguese market has also failed to attract the interest of large competitors (except one), who would have been able to make the high upfront investment necessary to compete with the incumbent. The high level of interconnection rates has probably deterred operators from entering the market.

Mobile penetration is very high in Portugal, standing at 90% of the population. The total turnover is €3.2 billion, higher than for fixed telephony, and is growing steadily. Three

operators are competing in the market. They have all launched UMTS services on a limited commercial basis.

In 2003 and 2004, the three mobile operators announced price rises for calls. Such a move may indicate that competition in the Portuguese mobile market is no longer as strong. Operators do not seem to be aggressively seeking to build market share and, as a result, market growth has slowed down in 2004.

Portugal has 667 550 broadband lines. The majority (55%) of these are provided through cable, and the remaining 45% mainly through ADSL. The incumbent's market share is about 89% of ADSL and 73%, via its cable subsidiary, of broadband cable lines.

THE NRA

The independence of the NRA, ANACOM, which had been subject to criticism from new entrants, is now clearly enshrined in the law. The law does not restrict the range of remedies that can be applied by the regulator. The amount of financial penalties that ANACOM may impose on operators has been increased. The law establishes an appeals mechanism through the courts for commercial law (in the case of breach proceedings) or the administrative courts. Appeals do not have the effect of suspending the NRA's decisions, except appeals against decisions taken by the NRA that, in breach proceedings, determine the application of fines or additional sanctions. The appeals procedure takes more than one year to be completed. The incumbent has repeatedly appealed a significant number of ANACOM's decisions in court, but still has to win a case, and has not yet been granted a suspension of challenged measures. Cooperation with the National Competition Authority (NCA) and the Commission is also addressed in the law; however, it seems that the cooperation with the NCA is still at an early stage.

It is also clearly stated in the law that the NRA has to take the Commission's Recommendations into account as far as implementation is concerned, and should inform the Commission if it does not follow the Recommendation. The NRA is responsible for spectrum management and explicit reference is made to the Spectrum Decision. Portugal modified its spectrum charging scheme as of 1 July 2004. This modification follows the new scheme, which was implemented in 2001, and is based both on the size of the frequency allocation and its use. It reduces by 7.5% the fees concerning the public land mobile service, and by 50% the fees applicable to the land digital sound broadcasting service in the VHF and UHF bands. Some adjustments are also included concerning fixed service using microwave links, both for private and public radio-communications.

New entrants are concerned, however, about practical implementation: they perceive ANACOM's decision-making as being slow and not sufficiently resolute, because it seeks to strike a consensus or middle line between the incumbent and the new entrants. The incumbent's view on ANACOM is that its decision-making is complaints-driven and poorly substantiated both in economic and technical terms. It noted that judicial reviews of ANACOM's decisions are not merit-based. ANACOM considers that the incumbent's replies to public consultations on draft decisions are not always well substantiated and lack good technical and economical foundations. The incumbent's main grievance with regard to the new law is that it allegedly pre-defines the obligations to be imposed on operators designated as having significant market power (SMP) in the leased lines markets.

MARKET ANALYSIS

In March 2004, ANACOM approved the draft measures concerning the relevant market definitions and SMP assessments for publicly available switched narrowband services provided at fixed locations (retail and wholesale services, excluding transit), i.e. markets 1 to 6 (retail fixed telephony) and 8 and 9 (call origination and termination on fixed networks) of the Commission Recommendation on relevant markets. They were then subject to a 30-day public consultation. In May 2004, these measures were submitted to the Commission and other NRAs of the EU, in line with Article 7(3) of the Framework Directive. The Commission had no comments on these draft measures, and, subsequently, ANACOM's board of directors adopted the measures on 8 July 2004.

On 22 July 2004, ANACOM notified the Commission of the draft remedies related to the retail markets for fixed telephony and to the wholesale markets for fixed call termination and origination. In this notification, ANACOM proposes in particular to impose on the incumbent the obligation to have a wholesale capacity based interconnection offer and the publication of a reference offer for wholesale line rental to its competitors on the narrowband fixed market, as well as accounting separation, cost-orientation or carrier selection/pre-selection.

MAIN REGULATORY ISSUES

Access and interconnection

The Reference Interconnection Offer (RIO) was revised in 2004. This revision led to a slight decrease in prices. It followed the introduction of co-mingling in the 2003 RIO, for the lack of which the incumbent had been fined. It includes now interconnect leased lines with capacity improved up to 155 Mbit/s, and connection at either the switch or at the end-users' premises. Prices are oriented towards prospective costs and are determined using a benchmark based on the EU average, rather than the cheapest EU Member States. New entrants would like to see wholesale line rental and capacity-based voice interconnection introduced quickly, but claim that the lengthy SMP designation process at ANACOM has led to unnecessary delays on this issue. They also complain regarding the lack of information on the incumbent's cost structures, albeit a description of the incumbent's accounting system is made publicly available by ANACOM. According to them, ANACOM's statements concerning compliance with the incumbent's cost accounting system do not contribute in any way to transparency.

Concerning carrier pre-selection (CPS), ANACOM imposed a 6-month standstill period on the incumbent, preventing it from trying to win back its customers who choose to pre-select their calls via another operator. ANACOM is currently re-evaluating the situation. Whereas new entrants welcome this measure, which they see as necessary to make any impact on the market, the incumbent finds it disproportionate and lodged a complaint in court. Nevertheless ANACOM has won the court case in which PTC had asked for a suspension of the decision.

New entrants regret the price increase on CPS as approved by the NRA in the RIO, whereas ANACOM claims that the CPS price defined in the RIO did not change since its introduction. New entrants also feel that the costs related to number portability are still too high, whereas, according to the incumbent, they do not cover its actual costs.

The incumbent is strongly dominant on its home retail broadband market, due to the fact that it has a very high share both on ADSL and cable. In the summer of 2002 the incumbent made

a wholesale ADSL offer available to ISPs. However, this wholesale offer admitted only two POI, impeding new entrants with their own infrastructure to use it in an efficient manner. In addition, the tariffs applied led to a negative gross margin for competing ISPs. Following a complaint by the ISPs in December 2002, ANACOM prohibited, in June 2003, some discounts that the incumbent applied in the wholesale offer, which benefited its own subsidiaries and caused a price squeeze. At the same time, ANACOM introduced a “retail minus” pricing mechanism (with a 40% nominal margin). Nevertheless, this retail minus does not apply to monthly fees charged on aggregated access (but only to the local access part). New entrants therefore claim that a price squeeze still remains. As a consequence, two of the most representative ISPs stopped recruiting new residential ADSL customers in January 2004 and one of them sold its client basis to the incumbent, who now holds a share of 86% for retail broadband DSL. ANACOM ordered in April 2004 an ATM interconnection offer with more access points (from 2 to 28) be made available to competing operators. However, ANACOM has not yet ensured that the incumbent makes a bitstream offer which would allow competitors a viable alternative to the wholesale product. In particular, the incumbent has not yet been mandated to allow competitors who invest in their own infrastructure to interconnect at local level.

ANACOM admitted that these interventions have not had a major impact on the market in terms of an increase of new entrants’ market share, but argued that this share might well have decreased, had those measures not been taken. It is also worth noting that the incumbent launched its broadband cable offer before a viable wholesale ADSL offer became available, effectively pre-empting part of the high speed Internet market.

Concerning local loop unbundling (LLU), the number of unbundled lines is still very low in Portugal. Despite several regulatory interventions, head-on prices (set up fees for eligibility of lines, testing, transfer of loops etc) remain rather high and set-up periods remain long, which does not encourage investment from new entrants. According to the incumbent, 41% of unbundled lines requested by the new entrants are not actually being used to provide services to the end-users.

Mobile termination rates are very high in Portugal. Following regulatory pressure, two mobile operators have agreed to reduce their prices. Under the old regulatory framework ANACOM did not designate any mobile operator as having SMP on the mobile interconnection market and therefore could not require those operators to have cost-oriented tariffs. However, with the SMP assessment currently under way in ANACOM under the new regulatory framework, termination prices will probably be reduced, as all mobile operators will have SMP on their mobile networks. As far as mobile gateways are concerned, ANACOM prohibited their use for commercial purposes in March 2004.

Leased lines were one of the main areas of concern of ANACOM in 2003. Following an intervention from the regulator in 2004, the incumbent had to change its discount scheme, and in particular the thresholds, which favoured its own subsidiaries. A new tariff structure was introduced, leading to an overall reduction in prices and to a non discriminatory tariff scheme. Overall, interconnection circuit prices decreased whereas local-end prices increased. New entrants welcome this regulatory intervention, but they also feel that they are discriminated against by the incumbent as far as leased lines delivery times are concerned. ANACOM had analysed data on delivery times and concluded that there was no evidence of discrimination. New entrants also think that the introduction of new performance indicators related to quality of service in Portugal should give a more accurate picture of the situation.

New entrants have, as was the case in previous implementation reports, complained about conditions of access to submarine cables. It seems that, in order to gain access to a submarine station, an operator needs to have capacity leased from a submarine cable which belongs to the incumbent, giving the incumbent a significant competitive advantage over its rivals in this market segment.

Authorisations

The Portuguese legislation establishes a general authorisation regime. Would-be operators are requested to send a summary of their intended activities to the NRA. The only exception arises when the use of numbers and frequencies, as scarce resources, is subject to allocation of individual rights of use by the NRA.

In the past, rights of way had been a cause of serious concern in Portugal. New entrants are satisfied with the wording of the national legislation, which they see as being in line with the Authorisations Directive. They are also concerned about the actual implementation, in particular at local level, as each local authority will levy its own charge. The question of the continuation of the public domain-use tax remains unanswered.

ANACOM has put forward a Decision containing a reference offer on duct sharing, which would be imposed on the incumbent as holder of the “concession” under which the incumbent operates. New entrants welcome this Decision. The incumbent has already expressed dissatisfaction concerning this reference offer and questions whether such an obligation may be placed on an SMP operator without market analysis and without regard to proportionality as well as other tests enshrined in the Directives. ANACOM points out that this obligation was imposed, according with the new law, on the incumbent, as holder of the concession and not as having SMP in a particular market.

Universal Service

The incumbent is currently the universal service provider and has been granted a concession for 30 years until 2025. No consultation was organised prior to the granting of the concession. The bidding mechanism provided for in the law will only apply after the end of the concession period of the incumbent, which will remain, until that date, the only provider of universal service. Competing operators do not contest this as such as long as, and on condition that, no universal service financing mechanism requiring a contribution from them is put in place.

In 2003, ANACOM ruled that the incumbent was not entitled to claim compensation for the costs resulting from the universal service provision before liberalisation took place in 2001. For the future, there is still a question as to whether or not the universal service fund provided for in the law, with possible contributions from market players, might be activated. This would undoubtedly raise objections by new entrants. In the meantime, the incumbent has sent its calculations of the universal service net costs until 2003 to ANACOM. The incumbent claims that an access deficit still exists, but that it cannot raise its monthly fee, as subscribers would then turn to the mobile operators instead.

In line with the Portuguese legislation, the universal service includes a standard contract, including applicable prices, for the basic telephone service. Any amendment to these prices must be notified to the NRA 15 days in advance and 30 days in advance to subscribers, which the incumbent thinks is excessive.

There have been several NRA rulings over the last two years, in accordance with the previous regulatory framework, concerning the absence of a comprehensive directory including both fixed and mobile numbers. The Commission services are examining the availability of the comprehensive directory under the new regulatory framework. Two mobile operators have refused to provide subscriber data to the central database, alleging previous cases of use by the incumbent of this data for commercial purposes. The latter has denied any such behavior. There is only one competing provider of directory services.

Only public service broadcasters enjoy, free of charge, must-carry status. This only represents two channels.

SLOVENIA

TRANSPOSITION

The new Electronic Communications Act (the ECA) transposing the five directives comprising the 2002 regulatory framework came into force on 1 May 2004. As regards secondary legislation, the ECA envisaged the adoption of various ministerial rules and regulations as well as regulatory acts by the national regulatory authority, no later than 6 months after the entry into force of the ECA. Thus, all relevant secondary acts should have been adopted by November 2004. According to the ECA, secondary legislation issued on the basis of the former Telecommunications Act remains valid until new secondary legislation has been issued and to the extent that it is not in contradiction with the provisions of the new law. By September 2004 almost half of the envisaged secondary acts were already adopted, some were in preparatory stages, but there were also several whose preparation had not yet started. According to the Ministry of Information Society, the absence of some of the envisaged secondary acts does not affect the implementation of the principles of the EU regulatory framework.

The Slovenian authorities have indicated that the ECA constitutes a full transposition of the new EU regulatory framework on electronic communications. Currently the text of the ECA is under the examination of the Commission services. So far there have been identified some issues requiring verification with regard to conformity with some of the principles of the regulatory framework. For example, the new law does not seem to refer to the existence of an unfair burden for the universal service provider as the basic consideration for the national regulatory authority upon deciding whether payment of compensation is needed. The relevant provisions of the new law also appear to leave some room for uncertainty as to whether existing SMP obligations will remain in force only up to their purported date of expiry or until the completion of the market reviews, if later.

In general, both the previous Telecommunications Act and ECA were regarded by market players as quite satisfactory, but the main concern in the opinion of the market players appeared to be the proper implementation of the law by the national regulatory authority.

MARKET OVERVIEW

The small size of the market seems to have implications on competition and regulation in the telecommunications sector in Slovenia but, nevertheless, since 2001 the sector has grown by about 8%⁹⁸. This has mainly been driven by the growth in the mobile segment, where penetration has increased from 84% as of September 2003 up to 95% as of May 2004. The fixed line penetration is 41.8% of inhabitants as of 30 June 2003. Internet penetration is 45%. Broadband penetration is 3.8% as of July 2004.

There seems to be virtually no competition as regards domestic fixed telephony services and very little competition in international fixed voice telephony services. More competition seems to exist in the market of international calls through VoIP telephony and there are 12

⁹⁸ IBM/4th Report on Monitoring of EU Candidate Countries (Telecommunication Services Sector).

alternative VoIP operators, including the fixed new entrants. The fixed incumbent is the largest, and for a long time was the only fixed operator in Slovenia (with SMP status in fixed public telephony services, the interconnection market and the leased lines market). The first interconnection agreement with an alternative provider of fixed telephony was reached only in June 2004, i.e. three years after the liberalisation of the market. There are also several other alternative fixed operators who have plans to start offering their services, but are said to be waiting for more favourable market conditions.

As regards mobile communications, the fixed incumbent's mobile arm still has 76% of mobile subscribers, and holds DCS, GSM, and 3G licences. Mobile telephony networks and services are also provided by two other operators, one of which has 21% of the subscribers and holds DCS and GSM licenses and the other 3% of the subscribers and holds only a DCS license. There is also one MVNO operating on the basis of the network of the fixed incumbent's mobile arm. Despite the exceptionally large retail market share of the fixed incumbent's mobile arm, the Slovenian national regulatory authority, the Post and Electronic Communications Agency (the APEK) has also designated the second largest mobile operator as having SMP status for the years of 2003 and 2004 basing its respective decisions on criteria other than the size of the market share, e.g. global connectivity, high market share of international roaming, good technological base and experience in provision of goods and services. This operator has challenged both of the decisions of the APEK in administrative court, arguing that by assigning them SMP status the APEK has violated its obligation to promote competition. The disputes are still pending.

No competition seems to exist yet in the 3G sector. In 2001 Slovenia initiated a process of granting up to three 3G licences but only one licence was granted, to the fixed incumbent's mobile arm, the only bidder, in part due to the high licence fee of about € 100 million. The deadline for launching 3G services was the end of 2003 and by March 2004 80 base stations had been set up, making 3G services accessible to 31% of the population. By March 2004 there were over 9000 subscribers to 3G services. APEK has launched a public consultation in order to take soundings on the issuance of two more 3G licenses.

The narrowband access market (dial-up PSTN-ISDN) appears to be well developed and competitive. There are 10 operators on the market. Alternative operators have a market share of 56% and the incumbent's subsidiary has 44%. In general broadband access (ADSL plus other technologies) also seems to be competitive. The incumbent's ISP subsidiary controls 67% of the broadband lines and the rest belongs to alternative ISPs, who are mainly cable operators of which there are 28 (approx. 30% of all broadband connections are via cable, approx. 8000 cable TV subscribers have broadband internet access). But there seems to be virtually no competition in ADSL. 99% of xDSL lines are controlled by the incumbent's ISP, which appears to have the advantage of using its mother company's leased access network. In some cases the number of users is up to five times higher than the number of lines.

As regards the leased line market, almost 100% of the leased lines infrastructure belongs to companies in which the state has a bigger or smaller shareholding. In addition to the fixed incumbent who has 75% of the leased lines market, leased lines are provided by three utilities companies in which the state has an interest in. There are also some cable TV companies which offer leased lines, but their market share is minimal.

THE NRA

The APEK was established in July 2001.⁹⁹ According to the ECA, the APEK must operate independently of natural persons and legal entities providing electronic communications networks and/or services, and must be impartial towards them. Starting from 1 January 2005 APEK, which currently employs 80 staff, shall be financed directly through revenues from the administrative fees stipulated by the ECA and other acts governing its area of operation. The director of the APEK is competent to issue both general and individual acts (incl. decisions) and to decide on individual matters within the competence of the APEK in accordance with the law governing general administrative procedures. Individual acts issued by the director shall be final unless otherwise stipulated under the ECA. The APEK itself has the right to conduct administrative enforcement of its decisions and may impose appropriate penalties and use other enforcement measures set forth by the law. Individual acts and decisions can be appealed to the administrative court. Only decisions of APEK inspectors are subject to appeal to the Ministry of Information Society, which is the Ministry with administrative responsibility for APEK. In some cases, APEK requires approval from the Government, for example for its plan of action, financial plan and annual activity and financial report, as well as the tariffs on the basis of which the operators are obliged to pay APEK the annual administrative fees and fees for the use of radio frequencies and numbers.

In September 2004 Slovenia's main alternative mobile, fixed and internet service providers stated that the main reason for adverse market conditions seems to be the lack of effective regulation, and moreover a lack of the necessary commitment to regulate the market. The state shareholding in the fixed incumbent appears to be seen as the main obstacle to liberalisation of the market, casting a shadow over the independence of the APEK in regulating the market. The government's shareholding (62.5%) in the incumbent operator is not administered by the Ministry of Information Society, which exercises supervisory control over the activities of APEK and is responsible for legislation. But the Government of Slovenia appears to have appointed two officials from that Ministry to represent the state at the shareholders' general meeting.

The activities and independence of APEK seem to be constantly under strong criticism. Although the ECA appears to bestow on APEK all the powers required to exercise appropriate market regulation, it is not perceived by operators to be using these efficiently and appears reluctant to resolve disputes or intervene *ex officio* in crucial issues with the result of a very few decisions taken or imposing market opening measures. According to APEK, a number of requests submitted by alternative operators, however, have been refused due to simple procedural errors or the reason that the respective issues were the subject of commercial negotiations.

The Commission services are examining whether the apparent failure to ensure the implementation of a workable and fairly priced interconnection offer, when viewed in the context of the lack of competition and the bundling of the incumbent's services with those of its subsidiaries, suggests that there are problems in relation to the lack of effective regulatory intervention.

⁹⁹ At that time it was called as Telecommunications and Broadcasting Agency. In June 2002 postal area was given into its responsibility and it became known as Telecommunications, Broadcasting and Post Agency. The current name was given this year after the adoption of the new Electronic Communications Act.

MARKET ANALYSIS

Based on the general Act concerning the definition of relevant markets that came into force on 17 July 2004, the APEK officially started the market analysis procedures by sending out questionnaires to market players relating to all 18 markets identified in the Commission Recommendation. The deadline for returning the completed questionnaires was 24 September 2004. In the beginning, priority will be given to the three mobile wholesale markets and the procedures relating to these markets are expected to be completed by the end of January 2005. The procedures relating to the rest of the markets are expected to be completed a couple of months later.

STARTING CONDITIONS

The Slovenian telecommunications sector was liberalised as of January 2001 on the basis of the Telecommunications Act of 1997. The implementation of the old EU regulatory framework started on the basis of the Telecommunications Act of 2001. Slovenia achieved a fair transposition of the 1998/2000 *acquis*. Although the most important principles of the regulatory framework were substantially transposed, there appeared to be certain missing elements that were to be regulated under the new law transposing the 2002 regulatory framework on electronic communications. Although the Telecommunications Act contained provisions on terms and conditions of a reference interconnection offer, non-discrimination and transparency obligations, cost-accounting and accounting separation obligations, as well as carrier selection, carrier pre-selection and fixed number portability, it remains to be seen whether they are effectively implemented in practice.

MAIN REGULATORY ISSUES

Access and interconnection

The incumbent published its first reference interconnection offer (RIO) in 2002, but was thereafter repeatedly requested by APEK to change and improve it. The current version of the RIO came finally into force in May 2004. Since then only two operators have signed an interconnection agreement with carrier selection and carrier pre-selection functionality and ISP operators have interconnection still on the basis of APEK's previous individual decisions setting forth the terms and conditions of interconnection. The incumbent's mobile arm did not have an obligation to publish a RIO at all under the previous Telecommunications Act and the existing mobile interconnection agreements are based on the previous Telecommunication Act. Prior to the enforcement of ECA, APEK, however, requested the fixed incumbent's mobile arm to issue a RIO and has already provided detailed comments on it. Local loop unbundling is possible since 1 January 2002 and a reference unbundling offer (RUO) was published by the incumbent in 2003. So far only its ISP subsidiary appears to have signed an agreement for shared access, but no lines seem to be unbundled by an alternative operator. Most alternative operators seem to be reluctant to sign any agreements based on the RIO or the RUO, which seems to suggest that the terms and conditions could be unfavourable and not adapted to the market needs. Co-location in some of the fixed incumbent's facilities also appears to be highly problematic. There are signs, on the other hand that, after a change of management early in 2004, the incumbent has tried to become more open and co-operative in questions regarding interconnection.

On-net/off-net differential

A problem that has been highlighted by operators is that the very low on-net tariffs of the incumbent's mobile subsidiary, together with an off-net price for the most commonly used tariff packages that is over 2.5 times greater, appear to be dissuading its subscribers from switching to other operators. When a subscriber moves to one of the other operators, most calls to other mobile subscribers are likely to be charged at higher termination rates, due to the sheer size of the customer base of the incumbent's mobile arm. However, the dissuasive effect of moving to another operator has appeared to be even more critical, despite their competitive tariffs, when the dominant operator's retail tariffs seem to penalize all of its subscribers who make a call to the smaller network. Despite complaints to the APEK and to the national competition authority, no regulatory decisions seem to have been taken on the potential impact of the large on-net/off-net differential on competitive conditions in mobile markets, both in regard to cost orientation but also in regard to the incumbent's position on the market.

Carrier selection and carrier pre-selection; number portability

Carrier selection (CS) and carrier pre-selection (CPS) for long-distance and international calls have been available since July 2002, and for local and national calls from May 2003. Number portability for fixed numbers also became available as of July 2002. In reality these services did not appear to be availed of by other operators, because of the tariffs and conditions, and there seemed to be virtually no competition on the fixed market. Mobile number portability is theoretically applicable on the basis of the ECA as of 1 May 2004, but the APEK is not planning to issue measures for its implementation before the end of 2004. It would also appear that mobile number portability cannot be implemented as long as the question of the very high on-net/off-net price differential on the incumbent's mobile network has not been solved. In addition, the incumbent's mobile arm appears to apply lengthy customer lock-in linked to subsidised handsets, and subscribers who would like to change operators seem to have to pay a prohibitive charge for terminating their contract. The customer lock-in issue is currently being analysed by the National Competition Protection Authority.

Prices

The APEK has been working on a LRAIC cost model to calculate costs of the provision of different services, but still mainly seems to rely on benchmarking for conducting price analysis. The fixed incumbent reduced its interconnection prices to the average EU price level after APEK requested them in July 2003 to offer cost-based prices for interconnection and reduce prices for all three connection levels (local, single and double transit). In February 2003 the APEK requested the incumbent to introduce two subscriber packages (simple and standard) and to increase retail prices, but this request appears not to have been implemented at the request of the government. As a result only the monthly subscription fee was raised. An additional price model was introduced in 2003 relating to the access network and ATM backbone network of the incumbent used for provision of xDSL services. The new model concerns leasing of access network and bitstream access, and is designed to reduce market entry barriers for new operators. The price model does not require a smaller new entrant operator to have very high minimum capacities for initial capacity leasing. Despite these efforts by the APEK, alternative market players still seem to be of the opinion that the existing wholesale and retail prices of the incumbent and its subsidiaries are not cost-oriented. Wholesale prices are said to be too high (e.g. leased line prices) and retail prices are said to be too low, even below the cost of providing the services and thus making it impossible, according to certain alternative operators, to establish a business case and to enter the market.

SLOVAKIA

TRANSPOSITION

The new Law on Electronic Communications, which aims to transpose the new EU regulatory framework, including the ePrivacy Directive, into national law, came into force on 1 January 2004, i.e. before the date of Slovakia's accession to the EU. This new law replaced the previously valid Law on Telecommunications, which aimed to transpose the previous regulatory framework that was based on the 1998/2000 *acquis*.

The Commission services are proceeding with their examination of the notified text, including conformity of the provisions relating to the powers of the regulator with respect to SMP regulation at retail level, number portability and consultations. These are referred to in more detail below.

MARKET OVERVIEW

There has been very little entry into the fixed line market, due in particular to the lack of effective measures to implement the law. Although the regulator has taken a number of positive initiatives this year, substantial space for improvement appears with regard to ensuring necessary conditions for effective liberalisation of the fixed market.

According to the regulator's market analysis, the fixed incumbent has 100% market share on the markets for fixed call origination and fixed call termination. Fixed line penetration stands at 22.3% of the population.

The fixed incumbent operator was originally formed as a state enterprise. In 1999 the company was transformed into a joint stock company. The company is the designated universal service provider and operates a fixed telecommunications network covering the territory of the Slovak Republic. Leased lines form an important part of the company's portfolio of services.

July 2000 was an important milestone in the development of the company, which was 100% state-owned until that date, as a strategic investor acquired a share of the company at that time. This strategic investor now has a 51% share of the company, while the Ministry of Transport, Post and Telecommunications (the Ministry) and the National Property Fund own 34% and 15% respectively. The company is currently a 51% shareholder in one of the two operators providing mobile services in Slovakia. The incumbent is to acquire the remaining 49% of this mobile operator shortly.

On the basis of the previous law which was in force until the end of 2003, the fixed incumbent has been designated with SMP on the market of public telephony services by means of public telecommunications networks and on the market for public telecommunications service using leased lines.

Mobile licences have been issued for 2G and 3G networks. The mobile operator controlled by the fixed incumbent also operates an NMT network. The two mobile operators have 56% and 44% market shares respectively as of June 2004. Both operators offer GPRS services, while the mobile operator controlled by the fixed incumbent also provides EDGE services. Both operators were also granted 3G licences and are obliged to launch 3G services by 1 April 2006. A third applicant participated in the beauty contest for 2G and 3G licences in 2002 and was awarded licences as a result. However, as this applicant failed to pay the licence fee, the regulator subsequently withdrew these licences.

Mobile penetration is approximately 74% as of June 2004. On the basis of the previous law in force until the end of 2003, both the established mobile operators were designated with SMP on the market for public telephony services provided by means of public mobile telecommunications networks.

Sales of broadband connections began in mid 2003. The number of ADSL lines was approximately 17 100 as of July 2004. A large number of internet users, especially residential households, still use dial-up access to internet. Due to the fact that alternative operators may provide competitive ADSL services to their customers only in those cases where these customers have a voice telephony or ISDN subscription from the fixed incumbent, the regulator made a decision in June 2004, to take effect four months later, prohibiting the fixed incumbent from bundling its ADSL services with its voice telephony and ISDN services. In August 2004 the Supreme Court decided on further postponement of the effectiveness of the regulator's decision, based on incumbent's proposal. As of July 2004 approximately 3 800 customers were using broadband services via cable. Only one of the Slovak cable operators provides broadband services. At that time the market share of fixed incumbent on broadband market was 46% and broadband penetration was 0.4% of the population.

THE NRA

The Telecommunications Office of the Slovak Republic (TÚSR) was established in 1993. It is financed from the State budget. Market players report that TÚSR does not have its own budget chapter, as it is included in that of the Ministry. TÚSR faces problems related to lack of human resources.

It is being examined whether the current law provides sufficiently clear guidance with regard to the division of competences between the TÚSR and the Antimonopoly Office of the Slovak Republic (the NCA in Slovakia). Cooperation between TÚSR and the Ministry appears to work well.

The Commission services are examining whether the full separation of regulatory and operational functions has been fully achieved, in the light of the fact that the Ministry controls part of the State's shareholding in the fixed incumbent operator and universal service provider in Slovakia as it controls 34% shareholding in the incumbent, while at the same time being empowered to adopt secondary legislation dealing with universal service and to propose a national policy for electronic communications to the government for approval. The Ministry has competence in the area of preparation of the legal framework. The Ministry is also competent to prepare the draft national frequency spectrum table and to submit it to the Government for approval.

Appeal mechanism

Under the current law decisions taken by TÚSR in the first instance are reviewed by the President of TÚSR in the second instance. Filing of an appeal against a decision taken by TÚSR in the first instance generally has suspensory effect. However, TÚSR's decisions can be subject to review by a court. Such a review does not in itself introduce suspensory effect of the decision being reviewed. Market players report that in practice this decision making process tends to be lengthy.

Market analysis

The regulator defined 18 relevant markets on the basis of the Commission's Recommendation in January 2004. The regulator was required under Slovak law to carry out an analysis of the defined markets by the end of June 2004. However it has made the results of its analysis publicly available only with respect to four relevant markets, which are wholesale markets 8 (call origination on the fixed telephone network), 9 (call termination on individual fixed telephone networks), 11 (wholesale unbundled access to metallic loops and sub-loops for provision of broadband and voice services) and 16 (voice call termination on individual mobile networks) in the Commission's Recommendation. Of those markets, the incumbent fixed operator was found to have SMP (with 100% market share) on markets 8, 9 and 11, while in the case of market number 16 both mobile operators were found to have SMP. One pre-notification meeting relating to Article 7 of the Framework Directive has taken place between the regulator and the Commission. The regulator intends to impose SMP remedies after the necessary consultation processes are complete. TÚSR has to date notified to the Commission under Article 7 of the Framework Directive three draft measures concerning determination as to significant market power and the imposition of resulting obligations in respect of the wholesale markets for call origination on the fixed telephone network, for call termination on individual fixed telephone networks and the market wholesale unbundled access (including shared access) to metallic loops and subloops for the purpose of providing broadband and voice services. The draft measures are under Commission's review.

The full transposition of the procedures under Article 7 of the Framework Directive needs to be verified. In particular it needs to be seen whether the specific provision of the law giving TÚSR the obligation to make the draft measure accessible to the Commission and to NRAs in other Member States obliges TÚSR to make accessible draft measures which fall within the scope of the Universal Service Directive.

The compatibility of the definition of the notion "consultation" in the law, which narrows the consultation mechanism only to undertakings, NRAs and the Commission, needs to be assessed for conformity with the Framework Directive, which refers in this context to "interested parties", which may cover also consumers, their associations, etc. Moreover, a subsequent provision of the law imposes an obligation on the NRA to consult only with undertakings.

STARTING CONDITIONS

The Slovak fixed voice market was formally liberalised in January 2003 by a previous law transposing the old, 1998/2000 regulatory framework for telecommunications, which remained in force until the end of 2003.

However, while that law provided for the licensing of competitive fixed network operators, it did not ensure all necessary conditions for effective liberalisation of the market. For example, it granted only what appear to be weak powers to the regulator to ensure interconnection between the incumbent and new entrants; there was no obligation to publish a reference interconnection offer (RIO); obligations related to local loop unbundling (LLU) including publication of a reference unbundling offer (RUO) were missing; and number portability was only required to be made available from 2005. Obligations for call by call carrier selection and pre-selection were applied as general obligations on all operators rather than as a condition of SMP status. Carrier selection and pre-selection were not implemented in practice under the previous law.

Attempts to improve that law by means of amendment failed. Because a substantial part of the 'starting conditions' for application of the new framework did not exist under the previous law, it has not been possible to maintain these conditions in place, as required by the new regulatory framework, pending completion of the market review process under the new framework.

The Commission services are examining whether the current law states explicitly that previous SMP obligations will be maintained until market analyses are completed. It remains to be seen whether the law makes it clear that a particular existing SMP obligation should only be removed when analysis of the equivalent market under the new framework has been completed.

MAIN REGULATORY ISSUES

Access and interconnection

Only one fixed to fixed interconnection agreement has so far been concluded by the incumbent, and in that case the undertaking concerned does not compete on the domestic fixed retail market. The fixed incumbent's reference interconnection offer was submitted to TÚSR in January 2003; however it has not yet been made publicly available as a complete document. The failure of negotiations on interconnection to date is generally attributed by new entrants to excessively onerous conditions demanded by the incumbent, e.g. unacceptable contractual penalties, high bank guarantees, unreasonable conditions for traffic forecasting, etc. Because of restrictions on access to the fixed incumbent's interconnection offer imposed on grounds of confidentiality, the document cannot be analysed objectively by third parties.

In June 2004 TÚSR made a decision on the technical and operational conditions for interconnection and the pricing methodology to be included in the incumbent's draft reference interconnection offer. This decision deals with interconnection between the network of the fixed incumbent and new market entrants. This decision did not come into force on its adoption because it was appealed. A second decision by TÚSR was made at the end of September 2004 as a result of the appeal. By virtue of this decision the fixed incumbent was required to make changes to its interconnection offer within 30 days. However, the

interconnection charges imposed by TÚSR are not based on a cost accounting methodology, but on a benchmarking exercise by reference to nine EU15 Member States, by excluding from consideration the three countries with the highest interconnection charges and the three with the lowest. Calculation of interconnection charges based on this decision also takes into account the ratio between fixed line penetration in these nine countries and fixed line penetration in Slovakia. As a basis for this benchmarking exercise, the decision refers to the Ninth and Sixth Implementation Reports of the Commission. Interconnection charges for call termination on incumbent's fixed network clearly exceed the EU average if compared to these charges in those EU Member States for which these data are available (2.87 €-cents per minute at local level; 3.72 €-cents per minute on single transit and 5.74 €-cents per minute on double transit).

TÚSR has also taken three decisions between July and September 2004 imposing an obligation to conclude interconnection agreements on the fixed incumbent and three new entrant operators. Of these three decisions, one was later rescinded by TÚSR and the other two have as of 1 October 2004 not yet become legally binding, as one has been appealed and the other was still open to appeal.

Due to the virtual absence of wholesale level fixed to fixed interconnection with the incumbent's network, one of the only ways in which alternative operators can compete in the fixed retail market is by offering voice services using the incumbent's network for dial-up access to the internet. However, even this solution faces problems in practice and creates tensions between the fixed incumbent and new entrants. The incumbent announced its intention to implement certain changes in its pricing for access to the internet in this respect, which the new entrants consider unjustified. In July 2004 TÚSR made a preliminary decision prohibiting the incumbent from implementing these changes and a final decision on this case is still awaited. In the same month TÚSR fined three alternative operators for providing voice services via an access code reserved under the current numbering plan for dial-up access to internet services. An appeal against this decision is still pending.

Negotiations on interconnection between new market entrants and mobile operators are proceeding without major problems, as both mobile operators have now concluded a number of interconnection agreements with new entrants.

It needs to be examined whether the powers of the NRA as stipulated by Article 5 of the Access Directive are transposed correctly, and whether the law provides the possibility for the NRA in exceptional circumstances to impose other access or interconnection obligations than those listed in the Access Directive on operators with significant market power. The Commission services are also examining the conformity of the law to the extent that it imposes directly on all undertakings providing public networks, obligations of transparency and non-discrimination in relation to interconnection.

LLU

It is being assessed whether local loop unbundling is in place and whether a RUO has been published.

WLL

In April 2004 TÚSR launched a tender for the assignment of frequencies in the 3.5 GHz frequency band for the establishment and operation of a wireless local access network. On 1 October 2004 TÚSR cancelled this tender, referring to a conflict between two applicable provisions in the Law on Electronic Communications dealing with fees for rights of use. There are two operators providing services in the 26 GHz frequency band.

Leased lines

The prices of leased lines are not regulated. Prices for national leased lines (64kb/s and 2Mb/s) clearly exceed the EU average if compared to these prices in those EU Member States for which these data are available (€ 5 084 per year for 64kb/s, 2 km circuits; € 13 160 per year for 64kb/s, 200 km circuits; € 22 371 per year for 2Mb/s, 2 km circuits and € 67 592 per year for 2Mb/s, 200 km circuits).

Universal service

The fixed incumbent operator is designated as a universal service provider and it provides all basic services covered by the universal service obligations. No universal service financing mechanism has been implemented in practice. Based on secondary legislation dealing with the universal service financing mechanism that came into force in mid September 2004, the universal service provider may apply for recovery of the net costs of provision of universal service.

Fixed tariffs have not yet been rebalanced, which means that monthly line rentals are offered below their actual cost. Regulation of retail tariffs is achieved by means of a price cap. The powers of TÚSR with respect to SMP regulation at retail level are significantly limited by the law. The scope of SMP regulation at retail level is narrowed in the law only to undertakings identified as having SMP on “public telephony service markets”.

The Commission services are examining whether carrier selection, carrier pre-selection, fixed number portability and mobile number portability have been implemented. Under the law the facility of number portability is made conditional on technical feasibility, the implications of which are also being examined.

The correct transposition of the right of subscribers to withdraw from their contracts upon at least one month’s notice of proposed modifications to contractual conditions needs to be verified. Under the law a subscriber has the right to withdraw from his contract on condition that the undertaking provides him one month’s prior notice on proposed modifications in the contractual conditions. The law does not however grant the subscriber the right to be given such prior notice.

Policy objectives and regulatory principles

The correct transposition of the policy objectives and regulatory principles set out in Article 8 of the Framework Directive needs to be verified.

ePrivacy

The correct transposition of the exception from the opt-in principle applicable to unsolicited communications and of the rules governing the use of networks to store information or to gain access to information stored in the terminal equipment of the user (cookies) also remains to be verified.

FINLAND

TRANSPOSITION

Finland transposed most of the new EC regulatory framework on time, by means of primary legislation (the Communications Market Act), and some secondary legislation, except as regards the e-Privacy Directive, which was transposed in the summer of 2004. The law transposing the e-Privacy Directive was adopted on 1 June 2004 and entered into force on 1 September 2004.

MARKET OVERVIEW

Finland's mobile penetration rate has been high for a number of years and is currently at 95% which is among the highest rates in the EU. The launch of mobile number portability in July 2003 was very successful and, as of August 2004, almost one million mobile numbers had been ported (993 578). A relatively large number (17) of service providers, including over 10 independent service providers, are now present in the market, and some MVNO (Mobile Virtual Network Operator) agreements have been concluded. It appears that two of these new entrants in particular have increased rapidly their market share as a result of the introduction of mobile number portability. It appears also that many service providers have introduced very low prices to attract customers (giving rise to allegations of price squeezes). Consequently, Finnish mobile end-user prices fell sharply in 2004. There have been some problems with billing, customer care etc, and the National Regulatory Authority (FICORA) and the Consumer Authority have intervened in order to ensure improvements.

Roll-out of 3G continues. One operator launched its 3G services commercially in October 2004 and another operator is expected to launch in November 2004. Finland has a high broadband penetration rate (11% of the population), which is among the highest in the EU, and well above the EU average. However, compared to the EU average, a high percentage of the total number of broadband retail lines is in the hands of incumbents (72%).

The Finnish fixed market remains segmented, with some fifty SMP operators, most of which are medium to small local telephone companies. The trend towards market consolidation, observed in the previous years, has further strengthened, with the organisation of the market around three main players (one of which consists, *inter alia*, of a number of local telephone companies). These three major actors have relatively equal shares of the total fixed market (25.9%, 31.4% and 36.1% of all fixed calls respectively, by retail revenue).

New entrants are encountering difficulties that are specifically related to the above-mentioned segmentation of the market (which obliges them, *inter alia*, to negotiate interconnection with numerous SMP operators) and to the fact that the local telecommunications markets remain firmly in the hands of local telephone companies. Not only do the latter control the local access infrastructure, but they also benefit from considerable "intangibles", such as, in many cases, a foothold of several decades in their activity area (in which they have played the role of a local utility), and the fact that, in the past, they were owned by their customers. Some ten local operators still offer price reductions to their shareholder-customers, even though the competition authorities have prohibited these reductions and fines have been imposed for non-

observance of the prohibition. These factors contribute to the intrinsically closed nature of the Finnish telecommunications market.

While the take-up of mobile number portability has been successful, there has been very little take-up of fixed number portability, with only 15 000 ported numbers, although it has been in place for much longer. This may be related to the fact that the technical solution chosen for fixed number portability is indirect routing, rather than, for example, a common database. This system will, however change in 2005, and the operators are obliged to use a common database by end of March 2005.

THE NRA

The notified National Regulatory Authority in Finland is FICORA (Finnish Communications Regulatory Authority). FICORA has been very active in carrying out market analyses, as required under the new regulatory framework, and was one of the first NRAs to notify their completed market analyses to the Commission. It is also one of the few Member States that has completed the vast majority of the market analyses required under the EC regulatory framework. A particular challenge has been the fact that there are so many SMP operators in Finland.

However, the new Communications Market Act restricts FICORA's power to impose certain regulatory obligations on operators that have been found by FICORA to have SMP on certain markets. One example of this concerns the mobile call termination market, which was notified to the Commission in November 2003. The Commission sent a "comments" letter on 18 December 2003, responding to the fact that FICORA considered itself unable to impose regulatory obligations on the market as a whole, even if SMP was found to cover the whole of the notified market. This was due to Section 43 of the Communications Market Act, which did not allow FICORA to impose regulatory obligations concerning cost-oriented interconnection charges on termination for calls from fixed to mobile networks. This arises because the charges for fixed to mobile interconnection in Finland are so-called "end-user charges" (even in cases where there is physical and logical interconnection). In spring 2004 the Finnish authorities proposed amendments to the Communications Market Act which partially addressed the issue of cost-oriented, fixed-to-mobile interconnection pricing. The proposed amendments also addressed Local Loop Unbundling (LLU) pricing and provided for the possibility for FICORA to set a maximum price for interconnection. The amendments are scheduled to be adopted before the end of 2004. Their compatibility with EC law will be examined after adoption.

FICORA also appears to lack the power to impose some other regulatory obligations provided for in the EC framework, such as the publication of a reference interconnection offer (including changes to the reference interconnection offer) and to require operators to be transparent regarding internal transfer prices. Section 18 of the Communications Market Act sets out an exhaustive list of regulatory obligations that FICORA can impose. However, this list does not explicitly contain all of the regulatory obligations provided for in the EC regulatory framework (Articles 9 to 13 of the Access Directive).

Appeal mechanisms

Currently, a FICORA decision does not automatically stand when appealed, and an explicit court order is required for a FICORA decision to stand if appealed to a court. It appears that

the current Finnish system, whereby a court order is required for a decision to stand, is enshrined in the Constitution. The Commission services are currently examining this in relation to its conformity with Article 4 of the Framework Directive.

An example of this process concerns FICORA's SMP designation in Market 16, which three mobile network operators appealed to the court. In this case the court decided that obligations imposed by FICORA on the two biggest players would stand pending the appeal as these operators already had obligations imposed under the old legislation. In contrast, the obligations imposed on the third complainant are not enforceable as no obligations had been applied before to this undertaking. It is worth noting that, despite the completion by FICORA of the great majority of initial market reviews, very few appeals have been made against the resulting decisions or choice of remedies. This has allowed the process of transition into the new regulatory environment to proceed quickly and has increased legal certainty.

Market analysis

Finland has been very active in carrying out the market analyses required under the framework, and was among the first countries to send in notifications. They are also among the most advanced Member States in that they have completed the vast majority of the required market analyses. So far 19 market analyses have been notified, covering all the markets in the Commission's Recommendation with the exception of the national market for international roaming. Of these notifications, the Commission did not comment on three. Comments were issued in 13 cases and in 3 cases the Commission requested FICORA to withdraw its draft measure.

On 20 February 2004, the Commission adopted a veto-decision requiring FICORA to withdraw its draft measures concerning markets for international telephone services, concluding that the draft measures lacked the evidence and the level of analysis needed for FICORA to arrive at its proposed conclusions, that is, that no operator had significant market power in the international calls markets. In addition, FICORA's assessment of the degree of market power of the undertakings in the markets did not take appropriately into account the existence of regulatory remedies and their impact on the perceived level of competition in the market. FICORA withdrew the draft measures on 26 February 2004.

On 5 October 2004, the Commission adopted another veto-decision requiring FICORA to withdraw its draft measure concerning the market for mobile access and call origination. The Commission considered that the recent developments in the Finnish retail mobile market and the fact that service providers have been able to conclude wholesale agreements, including MVNO agreements, on a commercial basis with all three nation-wide mobile network operators in the relevant market do not support FICORA's finding that the market was not effectively competitive.

MAIN REGULATORY ISSUES

Local loop unbundling

Current local loop prices in Finland, for both connection fees for a fully unbundled local loop and the monthly average total cost for a fully unbundled local loop, are above the EU average and, are, in fact, among the highest in the EU. As regards shared access the situation is similar, with Finland's prices for monthly rental and connection for shared access being

higher than the EU average, and, as regards the connection fees, among the highest in the EU. Also the monthly average total cost for shared access is above the EU average and among the highest in the EU. However, FICORA adopted decisions on LLU connection prices in September 2004, obliging five local operators to lower their connection prices.

There have also been some non-price related problems, such as long delivery times, for some operators. The proposed amendments to the Communications Market Act also contain provisions regarding local loop unbundling prices, and it remains to be seen what effect the amended Act, once it has entered into force, will have on current local loop prices.

Despite the high prices and non-price related problems, Finland has a relatively high total number of fully unbundled lines (96 600), and also has a relatively high number of shared access lines (31 600). Both the number of shared access and fully unbundled lines has risen since 2003, and in the case of shared access, it has risen significantly.

Universal service

It remains to be seen whether a significant number of Articles of the Universal Service Directive have a corresponding transposition measure in Finnish law. This seems to be partly due to the fact that the Finnish authorities considered that the EC requirements were complied with in practice and partly because Finland has no existing financing mechanism for Universal Service. According to the Finnish Communications Market Act, once an operator is found to have SMP, it is automatically also designated as a Universal Service Provider. The Universal Service Directive, however, sets out specific rules for the designation of a Universal Service Provider, and also provides that no operator should *a priori* be excluded (which means also that non SMP operators could theoretically be designated to provide part of the Universal Service). Since there is no true designation of Universal Service Providers, and Universal Service obligations flow directly from SMP status, many provisions of the Directive do not seem to be transposed at all. The Commission services are looking into these issues.

Must carry

Finnish legislation (Section 134 of the Communications Market Act) has certain provisions which appear to warrant further examination in relation to the Universal Service Directive. Further examination is required with regard to the requirement for technology neutrality, as well as to the requirement for the scope of must-carry obligations to be clearly defined and justified in terms of clearly identified public interest objectives.

Cable television network companies operating in Finland do not transmit programmes which fall under must-carry obligations without compensation, and collect a fee from all their customers to this effect.

ePrivacy - Data retention

The law intended to transpose the e-privacy Directive, which was adopted on 1 June 2004 (entering into force on 1 September 2004), sets strict and detailed requirements with regard to data protection. There is an obligation for operators to store, for two years, information relating to the processing of traffic data, including on the time and duration of the processing and the person who processed the data. Operators have complained about the fact that they have to bear additional costs for such data storage.

SWEDEN

TRANSPOSITION

Sweden transposed the vast majority of the EC regulatory framework on time, by means of new primary legislation and new secondary legislation, with only one provision of the e-Privacy Directive (Article 13 on “spam”) still outstanding at the time of the formal deadline in July 2003. Article 13 was transposed in the spring of 2004, when new primary legislation entered into force.

MARKET OVERVIEW

The fixed incumbent operator held a market share in terms of retail revenue of 54% of all fixed calls (including Internet dial-up traffic) in December 2003, as compared to 57% in December 2002. It held a market share (in terms of retail revenue) of 40% of the market for international calls in December 2003, i.e. a decrease of 4% compared to the previous year. The largest competitor has a strategy of consistently keeping its prices lower than the incumbent and its markets share amounted to the 14.5% of all fixed calls, including Internet dial-up traffic.

Fixed number portability was introduced on 1 July 1999 and mobile number portability on 1 September 2001. Despite the earlier introduction of fixed number portability its uptake has been much more limited than that for mobile number portability. Carrier pre-selection (CPS) was introduced in September 1999 and despite lack of decisive intervention by PTS, the NRA, in the initial stages of the reform, the uptake has subsequently been good. Judging from the formal consumer complaints of 2003, there are still some outstanding consumer problems related to CPS, inter alia customers having been signed up for another operator without their knowledge. Most of the consumers' complaints regard the Distance Contracts Act and the Marketing Act, which falls under the supervision of the Consumer Agency. PTS cooperates with this Agency and the CPS operators in an effort to diminish these problems.

Sweden has one of the highest mobile penetration rates in the EU (102% mobile subscriptions per 100 inhabitants in August 2004), and also has one of the highest broadband penetration rates in the EU (12.4%). The fixed penetration rate (incumbent's PSTN lines per 100 inhabitants) is the highest in the EU (61.5%).

PTS has, together with several authorities, been able to conclude that the Swedish mobile market is characterised by a structure that resembles an oligopoly, where mutual dependence prevails between the network-owning operators. In December 2003 the largest mobile operator held a relatively strong position in the mobile market with a 44% share of the mobile subscriptions, which represents a decrease in market share of 1% since the previous year. There are 21 MVNOs present in the mobile market but their combined market share is only 3.3% of the total number of mobile subscriptions.

THE NRA

The National Regulatory Authority (NRA) of Sweden, *Post- och Telestyrelsen (PTS)*, is a government agency under the Ministry of Industry, Employment and Communications (“Ministry of Industry”). The Ministry is also responsible for the State holding in the incumbent operator. The State holding in the incumbent has been reduced to approximately 46% of the capital, following *inter alia* a partial sale of shares in June 2000. The Ministry of Industry is not directly involved in the management of the incumbent. The Government appoints the Director General of PTS, for renewable six-year terms. The Swedish Constitution safeguards the autonomy and independence of all state authorities — including PTS — and prohibits any interference by Ministries in the day-to-day activities of the authorities. The Constitution stipulates that all government agencies must act impartially and objectively.

There are concerns on the part of operators as to whether PTS has been granted sufficient resources to deal with the market analysis process and at the same time carry out its other duties, such as market monitoring and dispute resolution, which is compounded by certain staffing problems.

Appeal mechanism and dispute resolution

Criticism has been raised by operators regarding the length of time it takes for PTS to solve disputes between market operators. Most interconnection disputes seem not to be resolved within the 4-month time-frame required under EC law.

The procedures laid down by The Administrative Procedures Act (SFS 1986:223) apply to the handling of matters by the administrative authorities. According to the Act the authority has an obligation to investigate the matter thoroughly. Furthermore, an applicant, appellant or other party is entitled to have access to the material that has been brought into the matter, provided that the matter concerns the exercise of public power in relation to someone. It seems that no matter may be determined without the applicant, the appellant or any other party having been informed about any information that has been brought into the matter by someone other than himself and having been given an opportunity to respond to it, provided that the matter concerns the exercise of public power in relation to someone. This duty to investigate and communicate often causes delays in handling the matters.

Furthermore, PTS considers that the 4-month time-limit starts to run when the request is complete and not when the request for dispute resolution is registered. This interpretation is based on the wording of the explanatory comments to the Act.

Although a decision of the NRA automatically stands until a court decides otherwise, the appeals process in Sweden is considered by many operators to be lengthy and complex. For example, decisions can be appealed to three levels/legal instances often involving a considerable amount of time at each instance. The fact that it may take a very long time before decisions of the NRA finally become effective increases legal uncertainty. Most of the decisions taken by PTS under the old regulatory framework have been appealed and the appellate courts have repeatedly taken a long time to decide on these cases. It has been alleged that courts do not always have the necessary expertise to deal with cases related to the application of EC law.

It appears that there are some doubts as to the right of third parties to appeal against a decision by the NRA not specifically addressed to them. This is decided by the national courts, but needs to be considered in the light of the right in Article 4 of the Framework Directive for parties “affected” by a decision to appeal against it.

There have already been a number of appeals of decisions which PTS has taken under the new EC regulatory framework. As regards the SMP decisions on call termination in mobile networks by PTS, five SMP operators have appealed and three of those have also requested that the court suspends the PTS decisions until final court decisions have been adopted. All of these suspension requests have been refused by the Administrative Court, which means that all regulatory obligations imposed by PTS apply, until such time as the court has made a final decision. One of the operators has also appealed against the refused suspension by the Administrative Court. The case will now be handled by the Administrative Court of Appeal.

Three operators appealed against the PTS decision regarding the fixed call termination market, and requested a suspension from the court, but the suspension request was refused by the court.

MARKET ANALYSIS

PTS is in the process of carrying out market analyses required under the new EC regulatory framework. PTS has completed market analyses and has taken final decisions regarding markets 7- 10 and market 16. All PTS decisions have been appealed by at least one of the interested parties. The market analyses for markets 11 and 12 have also been notified to the Commission, and PTS aims at taking the final decisions in autumn 2004.

However, a matter of major concern is the fact that Swedish law states that, if decisions on obligations under the new regulatory framework, following a market analysis, have not been made by 25 July 2004, the legal obligations imposed under the old regulatory framework cease to apply. This may mean that, for those markets where PTS has not completed market analyses and imposed new regulatory obligations, no obligations currently apply. The issue is currently under assessment by the Administrative Court and will also be looked into by the Commission services.

MAIN REGULATORY ISSUES

Local Loop Unbundling

The connection prices in Sweden for fully unbundled loops are among the highest in the EU, whereas the monthly rental price is around the EU average. The average total cost per month for fully unbundled local loops is among the highest in the EU. As regards shared access, the situation is similar, with the connection prices for shared access being among the highest in the EU and the monthly rental price for shared access being above the EU average. The average total cost per month per shared access is also among the highest in the EU.

In addition, there have been a number of non price-related problems, where PTS has taken action, e.g. concerning the access network. In May 2004, PTS formally ordered the incumbent not to discriminate against operators requesting access to the incumbent’s access network. These operators must be allowed to purchase equivalent products on conditions that are equivalent to those the incumbent offers to its own subsidiaries/retail arm. PTS has also

ordered the incumbent to provide interconnection to its access network, on request, at cost-oriented prices. Furthermore, in June 2004, PTS ordered the incumbent to provide to other operators complete information as to how many access lines are connected to a specific exchange and the length of these access lines, to resume delivery of LLU lines to other operators (after it had decided to cease such delivery temporarily) and to ensure that wholesale network access is provided in a non-discriminatory manner

Interconnection

PTS has decided to designate five mobile telephony operators as having SMP in the market for call termination for calls to mobile networks and imposed regulatory obligations on these operators. Obligations to apply cost-oriented interconnection charges were imposed on the three largest mobile operators. PTS has developed a cost accounting model to calculate cost oriented interconnection charges. On the basis of this model, PTS has set a recommended price level of maximum SEK 0.80 for 2004 for call termination in the mobile telephony networks of the three larger operators. A gradual transition to a cost-oriented price will take place over a period of four years. The Administrative Court has decided to reject requests for suspensions from the operators. However, two operators have appealed the decision of the Administrative Court to the Administrative Court of Appeal. PTS imposed “fair and reasonable prices” on the two remaining operators designated as having SMP. A fair and reasonable price should, according to PTS, be a price comparable with the cost-oriented price according to the LRIC-based price, i.e. no significant divergence from a cost-oriented price.

Universal service

There is currently no formally designated Universal Service Provider (USP) in Sweden, since the legal provisions according to which the incumbent was designated as USP have expired and no new provisions seem to have replaced them as yet. Sweden has chosen procurement as a possibility to finance Universal Service. Sweden does not seem to have transposed any other of the provisions regarding the creation of a Universal Service financing mechanism which means that there is currently no other financing mechanism than procurement in the case where the universal service obligation (USO) is considered to be an unfair burden to the USP. PTS has assessed that the USO has not constituted an unfair burden. The current situation may in some cases lack financial certainty and is being looked into by the Commission services.

Questions are raised in relation to article 18 of the Universal Service Directive which states that national regulatory authorities shall impose obligations regarding the provision of the minimum set of leased lines, and the conditions for such provision set out in Annex VII (non-discrimination, cost-orientation, transparency, supply conditions) on operators found to have SMP in the market for the provision of part or all of the minimum set of leased lines. However, it needs to be verified whether the Swedish legislation sets out an express obligation to provide a minimum set of leased lines. PTS has proposed amendments to the Swedish legislation in order for the obligations in Article 18 of the Universal Service Directive to be evident from the law itself and not only from the preparatory work to the law.

Must carry

Article 31 of the Universal Service Directive stipulates that Member States may impose reasonable must carry obligations for the transmission of specified radio and television broadcast channels and services. This possibility applies to undertakings, under the Member State's jurisdiction, which provide electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent.

In Sweden, the must-carry regime (as set out in the Swedish Broadcasting Act) applies to two public service broadcasters and one private broadcaster and requires that certain general conditions are met. Must-carry channels must be retransmitted without charge. The objective of the must-carry obligations seems to be that residents in houses connected to cable, who as a rule have no opportunity to install individual antennae, should not be deprived of access to the terrestrial TV programmes available free of charge for everyone else. Both the public service broadcasters and the private broadcaster that are granted must-carry rights are subject to licence terms requiring them *inter alia* to observe impartiality and factuality and to broadcast a varied supply of programmes, containing news and current affairs programmes. However, the Commission services are examining that the requirement that must-carry obligations should only be imposed where necessary to meet clearly defined general interest objectives is fulfilled.

Must carry obligations are under the supervision of the Swedish Radio- and Television Authority.

Broadcasting markets

The Swedish Parliament has decided that analogue terrestrial television should be phased out and finally closed down by January 2008. In Sweden there is only one provider of analogue terrestrial transmission services. This provider is state-owned. The current broadcasting licences, issued to three broadcasters (one private and two public), are valid until the end of 2005. According to the Swedish Government, it may be expected that these licences will be prolonged until January 2008. These licences require the broadcasters to purchase broadcasting transmission services for its analogue terrestrial broadcasts only from the single operator. The Electronic Communications Act does not require any amendments to these licences. In the summer of 2004 PTS tabled its preliminary proposals for decisions concerning market definition, designation of SMP operators and imposition of regulatory obligations concerning broadcasting transmission services. According to the preliminary PTS proposal, the single operator would be designated as an operator with SMP in the Swedish market for analogue terrestrial television broadcasting, and PTS would impose ex-ante regulation on this operator. However, due to the fact that the single operator still benefits from special and exclusive rights, PTS is considering refraining from imposing certain regulatory obligations that they otherwise would have wished to impose (notably access obligations). The fact that the licence conditions imposed on the broadcasters oblige them to buy broadcasting transmission services from the single operator pre-empts the effect of imposing certain ex-ante regulation. When it comes to digital terrestrial television broadcast the situation is the same.

Mobile services

Following a “beauty contest”, in December 2000, PTS granted four licences to provide network capacity for 3G mobile telecommunications services. The largest 2G operator was not granted a licence, and appealed the PTS decision to the Regional Court which upheld the decision of PTS. However, this operator subsequently entered the 3G market by forming a network-sharing consortium with one of the 3G licence holders, aiming at building a nationwide 3G network. These two companies also share the ownership of the joint 3G license holding company, although the 3G licence remains with the licence holder. There is also a second network-sharing consortium which originally consisted of one 2G operator and two 3G new entrant operators. Both network-sharing consortia have been found to be compatible with the Swedish competition rules by the Swedish Competition Authority.

In the autumn of 2002, one of the new entrant 3G operators in the second network sharing consortium decided that it would not avail itself of its 3G licence and has formally requested PTS to recall the licence. At the end of 2003 this operator, and the two operators in the first network sharing consortium, requested the permission of PTS to transfer its 3G licence to the first network-sharing consortium. In the spring of 2004, PTS refused the request due to competition concerns. Since the two operators in the first network-sharing consortium together accounted for nearly 80% of the total turnover for mobile telecommunications services, PTS considered that the transfer of the licence of the 3G new entrant operator would reinforce further the dominant position of the first network-sharing consortium.

Under the 3G licence terms, licensees were obliged to offer network capacity, in a limited geographical area, by 1 January 2002 at the latest. By 31 December 2003, licence holders had to provide a minimum network coverage comprising 8 860 000 inhabitants, which by the time was equivalent to 99.98% of the population. These conditions were the result of offers made by the successful licensees during the bidding process. The coverage requirements were later incorporated into the licence conditions by PTS. Licensees may conclude agreements on, *inter alia*, national roaming and network infrastructure-sharing in order to achieve the required coverage. However, licensees must ensure that at least 30% of the required population coverage is provided by own radio-infrastructure, as opposed to masts, sites etc, which can be shared to 100%.

Since then, all four licensees have formally requested PTS to allow a longer roll-out period. The licensees claimed that roll-out had proven more difficult than originally envisaged, partially due to problems in obtaining planning permissions for masts etc. from municipalities. All prolongation requests were refused by PTS and the original roll-out requirements therefore apply. All licensees, except the operator that has stated that it would not avail itself of its 3G licence, have launched their 3G services commercially.

After having monitored the roll-out, PTS considered, in January 2002, that all licensees fulfilled the roll-out requirements at that point in time. However, in March 2004 (when PTS monitored the roll-out again) PTS concluded that none of the licensees fulfilled the roll-out requirement of 99.98% of the population by 31 December 2003. At the time, the networks of the licensees covered 65-75% of the population. PTS subsequently informed the licensees formally that they have to comply with the licence conditions by 31 December 2004. If they do not fulfil the roll-out requirements by then, PTS has the right to, *inter alia*, impose a default fine. By the end of June 2004 the coverage was between 73.1% and 75.9%. Current coverage is between 75% and 80%.

PTS is planning to assign one new national mobile licence in the 450 MHz-band in the beginning of the year 2005, by means of an auction. The aim with this project is to establish a new, digital mobile telephony service in areas where such services currently are not available. Today, large parts of more sparsely populated areas in Sweden are only covered with the analogue NMT 450-system. There are, however, strong indications that NMT will be closed down in the near future. A proposal for regulations on the allocation is currently being circulated for consultation.

UNITED KINGDOM

TRANSPOSITION

The last year has been a very important one for regulation of the United Kingdom electronic communications markets, with the assumption by the new, converged regulator Ofcom of its statutory responsibilities for the telecommunications and media sectors and the completion of the great majority of the market reviews required for implementation of the new EU regulatory framework.

Transposition of the framework was substantially completed with the entry into force of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (transposing the e-Privacy Directive) on 11 December 2003. Since formally assuming its responsibilities on 29 December 2003, Ofcom has taken forward the work begun by its predecessor Oftel in carrying out the market analysis required by the new framework, and has now completed all but three of the market reviews corresponding to those in the Commission's Recommendation on relevant markets. Whether seen from a European or a domestic perspective, the overall perception by market players of regulatory developments over the reference period has been very positive. The United Kingdom completed transposition of the new framework into national law at a relatively early stage and it is well advanced in terms of the practical implementation of the framework following the market review exercise.

While some alternative operators have questioned Ofcom's decision to lift regulatory obligations in areas which fall outside defined relevant markets, and the incumbent fixed network operator for its part has questioned the time taken to remove such obligations, in general the transition between the old and the new frameworks, effected by means of Continuation Notices adopted under the Communications Act 2003, appears to have worked without major legal uncertainty. Where certain obligations falling outside the scope of Article 27 Framework Directive (Transitional measures) needed to be maintained until completion of the relevant market reviews, the national measures concerned were notified to the Commission under Article 7(6) of the Framework Directive. Ofcom announced on 9 September 2004 its proposals to lift all remaining continuing obligations, with a small number of exceptions related either to ongoing market analyses or to new obligations scheduled to come into force on a specified date.

MARKET OVERVIEW

These developments have taken place against a background of steady growth in the telecoms sector, in which the overall turnover of the telecoms industry grew by 6% to over € 75 billion in 2003¹⁰⁰. Despite the high levels of mobile penetration already achieved in the United Kingdom, much of this growth can be attributed to mobile telephony services, which have for the first time exceeded fixed voice services in terms of average household expenditure. Mobile penetration stood at 91% in June 2004. Although 3G mobile services have yet to develop into a mass market, with existing service offerings by four of the five network operators aimed primarily at business customers, high quality consumer handsets are likely to

¹⁰⁰ Ofcom Report: 'The Communications Market 2004 – Telecommunications' (August 2004).

become more widely available from the end of this year, and the new entrant 3G operator has already launched a wider range of services including pre-paid cards.

Fixed broadband services are also showing healthy growth, with Ofcom reporting around 50 000 new connections every week and overall retail revenues from broadband services more than doubling in the year to March 2004. Broadband penetration stood at 7.4 per 100 inhabitants on 1 July 2004 (just below the EU15 average). Latest figures from Ofcom¹⁰¹ indicate that there were over 5 million broadband lines operational at 30 September 2004.

However, the number of both fully unbundled and shared lines is still very low, at 7 466 and 5 949 respectively on 1 July 2004, and further development of the unbundling process is needed to make it an efficient industrialized process. Nevertheless, a number of recent regulatory and commercial developments give reason for optimism that this sector will see further growth in the coming months.

Penetration of the fixed incumbent's PSTN lines stood at 49.9 per 100 inhabitants at 1 July 2004, up 1% since the previous July. The incumbent held a 63.7% share of the fixed voice telephony market (all fixed calls including internet, in terms of revenue) at 31 March 2004, down 0.8% on the previous year. There has been significant growth in carrier pre-selection ("CPS"), with the total number of lines with this facility standing at 3.5 million at the end of June and growth now in the residential as well as the business market. Wholesale line rental ("WLR") has been less successful to date, with Ofcom reporting approximately half a million lines in operation (mainly for businesses) as at June 2004. Issues remain relating to the effectiveness of the processes needed to ensure the activation and transfer of lines to WLR in large numbers.

THE NRA

The legislation transposing the new regulatory framework in the United Kingdom, primarily the Communications Act 2003, has conferred on Ofcom the regulatory functions previously exercised by five different bodies and has in general terms given Ofcom full powers to ensure the implementation of the EU framework in the United Kingdom. No concerns have been expressed by the market as to any limitation on the powers of Ofcom to fulfil the duties of an NRA as required by the EU framework. The Commission services are examining whether the discretion accorded to Ofcom could be said to extend to areas in which the EU framework imposes mandatory requirements, and whether it is sufficient for it to be left to Ofcom's general duties to take account of Community law to ensure compliance.

The overall impression of Ofcom's performance in its first six months conveyed by stakeholders in the market was a positive one. This is not merely due to the fact that Ofcom could be said to have conducted prompt initial market reviews. There is also a perception that Ofcom has been concerned to look at issues afresh and to consider all options to achieve effective regulatory outcomes. Ofcom has shown imagination and creativity in its approach to persistent regulatory problems, for example by establishing the post of "Telecoms Adjudicator" to help resolve intractable problems relating to the processes for local loop unbundling. While there have been a number of top-level decisions designed to address the perceived regulatory bottlenecks in the United Kingdom market, much of the controversy

¹⁰¹ Ofcom Report: 'The Communications Market – October 2004 Quarterly Update'.

remains rooted in the issue of the detailed processes which apply to regulated products and facilities. In a number of areas, such as local loop unbundling and migration between wholesale products, the processes needed to ensure that rights conferred by SMP remedies can be exercised in a speedy, simple and “industrialised” manner remain to be fully developed by the market under the tutelage of Ofcom. In this area the market is looking for a continuing active involvement on the part of the regulator to ensure that the objective is achieved.

The DTI, as Ministry with oversight of the electronic communications sector, has effectively withdrawn from day to day involvement in regulation, with the possible exception of matters relating to data protection and e-privacy, for which it still has more active responsibility.

In the area of e-privacy, the day to day supervision of the market is carried out by the Information Commissioner. In this regard there is a perceived lack of powers on the part of the Information Commissioner (which he himself has identified) to enable him to enforce statutory obligations effectively and to act against offenders, particularly in the field of unsolicited communications and spam.

Market analysis

Ofcom has to date consulted on and notified to the Commission under Article 7 of the Framework Directive some 37 draft measures concerning determinations as to significant market power (“SMP”) in relevant markets and/or the imposition or removal of resulting obligations. The initial market analyses still to be completed and/or notified to the Commission are those related to markets 17 (wholesale national market for international roaming) and 18 (broadcasting transmission services). Ofcom has in a number of cases notified its finding as to SMP and the generic remedies and then further developed the details of the remedies by means of subsequent notifications.

National consultations on draft measures have on occasion run in parallel with the Community consultation under Article 7 of the Framework Directive. The Commission has commented in this regard that any material modification to the draft measure as a consequence of comments made by interested parties in the framework of the national consultation would require the draft measure to be re-notified under Article 7(3) of the Framework Directive.

In general the consultation process carried out by Ofcom, in which there was a high degree of transparency, has been well received by the market. However, the consultations inherent in the initial market review process have inevitably placed a heavy burden on the regulatory staff of the smaller operators, not least due to the voluminous nature of the documentation produced by Ofcom. There were also a large number of individual relevant markets defined by the regulator, due in particular to its decision to define the markets for fixed international telephone services on a route-by-route basis. Inevitably there has been criticism of the scope of the market review procedures from a variety of interested parties. For example some alternative operators have argued that additional relevant markets should have been defined and analysed (particularly as regards certain retail services) or that insufficient consideration was given to the leverage of dominance into related markets, while the fixed network incumbent has lamented the absence of more tightly defined geographical markets to reflect regional differences in supply and network infrastructure.

Appeal mechanism and dispute resolution

Appeals against Ofcom decisions are made to the Competition Appeal Tribunal, a specialist judicial body with jurisdiction over competition and regulatory cases, which assumed its responsibilities in April 2003. It is a matter of note that by 1 October 2004, despite completion by Ofcom of most of its initial market reviews, only one appeal had been made against the resulting decisions or choice of remedies. While a variety of factors may have persuaded operators not to appeal, including the need to maintain a positive working relationship with the regulator, this has allowed the process of transition into the new regulatory environment to proceed without undue delay or uncertainty.

As regards its powers of investigation and dispute resolution, it is worth noting that Ofcom has parallel powers under both competition law (Competition Act) and the regulatory framework (Communications Act). Although Ofcom's publicly stated policy is to use the Competition Act 'where appropriate', it is making significant efforts to ensure that the four month statutory deadline for dispute resolution under the Communications Act is met. It should be noted that the four month time period starts to run from the date of acceptance of the dispute by Ofcom rather than the date of the submission itself. However, Ofcom states that if a dispute is submitted containing all the information it requires, it will accept the dispute immediately. In practice, Ofcom has to date never declined to resolve a dispute under the Communications Act in preference for acting under the Competition Act.

Past experience has shown that Competition Act investigations can take significantly longer to reach a conclusion, particularly if the resulting decision is the subject of an appeal. One example, in which Ofcom has already exercised its powers under the Competition Act, is the investigation of an alleged price squeeze in the pricing of the incumbent's residential broadband services, concerning which Ofcom issued a statement of objections in August 2004, following a complaint which originally dated back to 2002. However, it should be noted that Ofcom has acted with dispatch in dealing with the case since it assumed its powers at the end of 2003. The willingness of Ofcom to act under its competition law powers has been hailed by some market players as offering enhanced prospects for redress and an increased deterrent.

MAIN REGULATORY ISSUES

Broadband

Although the level of local loop unbundling still remains very low, and prices for LLU and shared access were well above the EU average at 31 July 2004, a number of positive regulatory developments in recent months promise improvements in the environment for broadband services. These include in particular the appointment by Ofcom of the "Telecommunications Adjudicator" to resolve disputes relating to implementation of LLU, reductions in provisioning timescales and a series of further announced/proposed price reductions covering wholesale prices for LLU (to well below the EU average), the price of shared access and the price charged by the incumbent for migration between wholesale broadband products (IPstream and DataStream), as well as an increase in the margin for DataStream. These announcements have come in the context of the relevant market review exercises conducted by Ofcom.

Mobile services

The regulator found that the wholesale market for mobile access and call origination in the United Kingdom was effectively competitive, as no mobile operator had SMP in that market. The four established 2G operators hold roughly equal market shares in the retail market, and a significant number of service providers are also present on the market, despite some recent consolidation. At the wholesale level, Ofcom built on previous regulatory decisions by confirming controls on the charges for termination of calls on 2G mobile networks in June 2004, including requiring the operators of all four 2G networks not to exceed specified average termination charges over the applicable period (1 Sept 2004 – 31 March 2006). The fixed incumbent (which provides around 82% of fixed lines in the United Kingdom) has published revised retail prices to reflect these reductions from the beginning of September 2004. However, there is no clear indication that the reductions in mobile termination charges have been passed through to the customers of other mobile operators.

Developments at retail level

The incumbent fixed operator has taken a number of initiatives over the reference period to respond to the challenges of technological convergence and the increased competition in its core markets (for example from CPS and WLR). These include key changes in its retail tariff structure, involving the migration from 1 July 2004 of customers on its standard tariff to a tariff package which allows flat rate calls at off-peak times for an increased line rental fee. This gave rise to price squeeze allegations from its competitors, which were investigated by Ofcom under the Competition Act. Ofcom determined in July 2004 that the new retail price move did not give rise to a breach of the Act, in view of the incumbent's acceptance of an obligation to offer CPS at local level on terms allowing other operators to provide local call services on equivalent conditions and recent changes to its overhead charges.

The incumbent fixed operator also announced in May 2004 that it had concluded an agreement with a mobile network operator to offer combined fixed and mobile services using a single, dual-purpose handset. It claims that this type of service will offer customers the simplicity of a single bill and telephone number; this is likely to be a key area for development in the future.

Access-Interconnection

While improved processes for carrier pre-selection and WLR offer the prospect of significant further growth, they are also, perhaps as a consequence, subject to intense controversy regarding "save activity" and allegations of mis-selling.

A contentious area for market players has been the methodologies and assumptions to be used for determining the existence of a price squeeze in particular markets, due to the complexities of the process and the difficulty in achieving consistency of approach across markets. The stability of margins between retail and wholesale services is seen as a key pre-requisite for greater competition and investment in the sector.

The United Kingdom has used the term 'undue discrimination' when transposing the non-discrimination requirement under the new framework. The Commission services are examining whether the application of this concept by the United Kingdom authorities imposes a higher standard of proof than required by EU law, since it arguably involves the need to

show a material adverse effect on competition. Ofcom intends to publish guidelines on this issue for consultation.

Number translation services (“NTS”), which refers to a range of specially tariffed services involving calls to non-geographic numbers for purposes such as narrowband internet access and premium rate services, continue to be a bone of contention, with changes in the call termination fees paid by the incumbent fixed operator to other network operators giving rise to a number of complaints, for example those on which Ofcom made a determination in August 2004. This is a complex area which nevertheless represents a significant proportion of operators’ revenues in the United Kingdom and has been (and continues to be) addressed by Ofcom in a series of recent public consultations.

The indirect routing solution used in the United Kingdom for number portability poses difficulties in the event of the insolvency of the original operator and for certain 3G mobile services, such as video calls, when routed via 2G networks. Ofcom has engaged in a consultation process regarding its assessment of alternative solutions for United Kingdom number portability.

Convergence - VoIP

The incumbent fixed operator’s recent announcement of its plans for major investment in a new IP-based “21st Century Network (21CN)”, which will replace the PSTN, has given rise to conflicting concerns regarding on-going regulation. New entrants fear that hard-won regulatory obligations applicable to the historical fixed network may be rendered obsolete by the new technology. At the same time the new IP network is seen as offering an opportunity to incorporate genuinely non-discriminatory wholesale mechanisms into the system from the outset. The fixed incumbent, on the other hand, argues that existing regulation should not be transferred to the new network environment without proper justification and sees itself rather as entering the new IP environment on an equal footing with its competitors. This is likely to be a key area of focus for Ofcom in the coming months, as it deliberates on the conclusions of its strategic review of the sector (see below).

Ofcom has also been active in developing its approach to the new IP-based voice services which are likely to have an increasing impact on the market. It launched a consultation in September 2004 on the future regulatory treatment of new voice services, including “Voice over Broadband” services, including the requirements for network integrity, location information for emergency calls and consumer information. It also announced its plans for making numbering resources available to facilitate the introduction of voice over IP services.

Strategic review of the telecoms sector

In parallel with its work implementing the new EU regulatory framework, Ofcom has been conducting a wide-ranging strategic review of the telecoms sector, designed to answer a series of fundamental questions about how best to ensure sustainable competition and consumer benefits while encouraging investment in new technologies. The review is examining where in the telecommunications value chain competition is sustainable, given the fundamental underlying economics, and what regulatory options should be pursued to promote such sustainable competition. These options could include significant deregulation, or a re-examination of the structure of the industry. A third option is the pursuit of 'full functional equivalence' or as Ofcom terms it, 'real equality of access': i.e. the achievement of true non-discriminatory access to the essential inputs required by competitors, which would in turn

allow for significant deregulation elsewhere in the market. The majority in the industry currently favour the latter approach as preferable to re-examining the structure of the industry itself, though some consider that this should not be ruled out if equality of access is not achievable. The strategic review is due to be completed by Ofcom early in 2005.

Universal service

There is currently no universal service fund in operation, on the basis that the regulator did not consider that the universal service provider's obligations imposed an unfair burden on it. However, Ofcom is due to conduct a review of the universal service in the latter part of 2004. This review will cover issues such as how best to meet reasonable requests for connection at speeds that provide functional internet access and special tariff schemes for customers with low incomes or special social needs. The results of the review will need to be considered in the light of the requirements of the Universal Service Directive.

Spectrum management

In transposing the provisions of the new regulatory framework relating to rights of use of radio spectrum the United Kingdom has adapted, rather than replaced, the existing Wireless Telegraphy Act, which is based on the authorisation of radio apparatus rather than rights of use *per se*. This makes it more complicated to establish whether all the relevant requirements of the framework have been met. Ofcom has however been taking forward its thinking on spectrum management issues, conducting a number of consultations over the last year on the prospects for liberalisation of spectrum usage and spectrum trading.

It remains to be seen how the enabling provisions in the Communications Act dealing with Recognised Spectrum Access ("RSA") will be applied in practice. RSA is intended to offer safeguards for the use of spectrum for the reception of signals transmitted from outside United Kingdom territory.