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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL,
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SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION AND
MARKETS 2005 (11TH REPORT)**

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EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION AND MARKETS 2005 (11TH REPORT)

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INTRODUCTION

The Commission's Communication 'European electronic communications regulation and markets 2005' provides an overview of market, regulatory and consumer developments in the sector over the year. It identifies the main issues regarding implementation of the framework that still require attention and, where appropriate, provides pointers as to 'best practice' in the Member States.

There is a statutory requirement to review the framework in 2006, and the Communication also provides indications of those aspects of the framework which, although implemented, could benefit in the forthcoming review from a re-examination of their effectiveness. It complements recent Communications on spectrum policy and market reviews¹.

A more detailed analysis of electronic communications services markets, the regulatory environment and the consumer interest, together with the customary overview of the situation of the sector in the individual Member States ('country chapters') and detailed market data, on which the Communication is based, are set out in this Commission staff working document.

The working document was prepared on the basis of missions carried out in the Member States by staff of the Directorates General for Information Society and Media and for Competition, and analysis of the notifications of national transposition and implementing measures received from Member States.

The market data were assembled by DG Information Society on the basis of information received from national regulatory authorities, of tariff data supplied by Telenor HI-Europe, and of data on capital investment supplied by ETNO, ECTA and ECCA. All market data were validated between the Commission services and experts from the national regulatory authorities, on a bilateral basis and at a meeting at the Commission premises in November 2005. Country chapters were sent to the authorities in the Member States for comment, but are the final responsibility of the Commission's services.

The regulatory situation described here is that at 1 December 2005. Market data, unless otherwise indicated, cover the period up to 1 September 2005 (1 October 2005 in the case of broadband data).

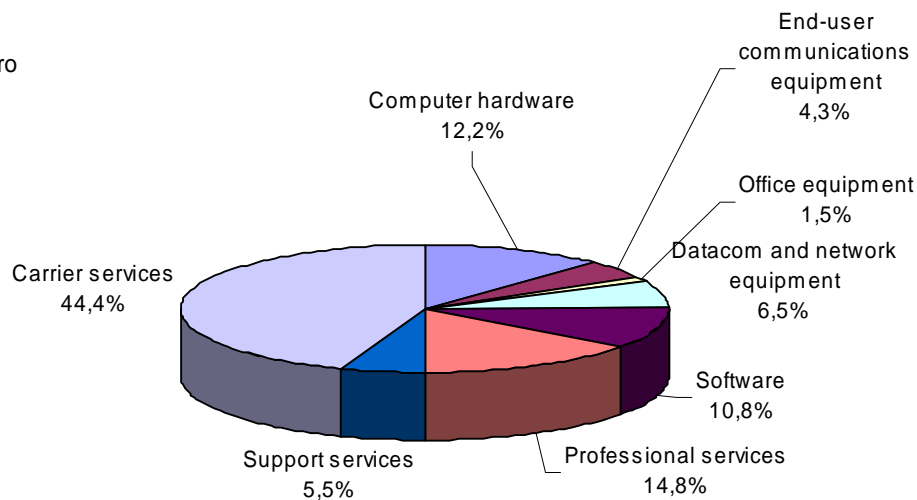
¹ COM(2005) 400, COM(2005) 411 and COM(2005) 461 ; COM(2006) 28

THE MARKET CONTEXT

The telecommunications sector is moving through a transitional phase driven by competition and technological change. On the one hand, overall revenues from traditional services have either declined or growth has slowed as markets mature. On the other hand, competitive forces and technological changes are opening new opportunities for growth based on convergence between high speed broadband networks, audiovisual media and electronic devices. With these opportunities come new challenges as players face the prospect of enhanced competition from new players and platforms. Already it is clear that operators are investing to meet these challenges and be winners in this converged environment. These developments derive from a regulatory framework which has opened markets to competition and delivered significant consumer benefits, innovation and investment.

In terms of the wider economic perspective the telecoms sector continues to represent the largest segment by far of the overall ICT sector accounting for 44.4% of the total value which is up from 43% last year. This year the ICT sector is worth €614 billion with telecommunications accounting for €273 billion. Overall growth in revenue terms in the sector continues to be strong and again has outpaced general GDP growth for the EU which was 1.5%. ICT represents just over 5% of the EU GDP. ICTs drive about 40% of productivity growth and one quarter of overall growth in Europe. The contribution of the telecoms sector to Europe's growth, jobs and prosperity is therefore crucial. This is recognised in the re-invigorated Lisbon strategy and more particularly in the Commission's i2010 strategy, which seeks to foster growth and jobs in the information, communication and media industries.

Total value:
614 Billion Euro



Industry trends

Based on recent results, it appears that, **from a financial perspective, the situation is recovering from previous years even if market sentiment reflects a degree of uncertainty as to the nature of future business models.** Nevertheless the situation now represents an advance following the crisis at the end of the 1990s, where operators were heavily burdened by high debt levels brought about by major investments in infrastructure and internet portals.

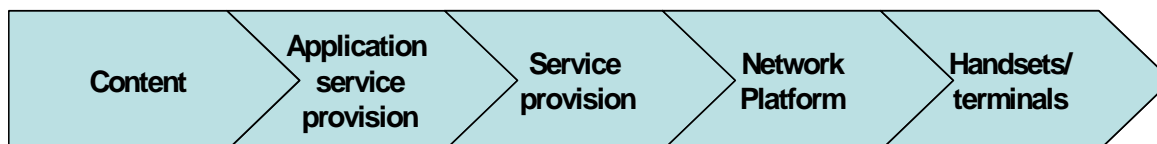
During the last few years all major operators have implemented cost-cutting policies that have now begun to produce results. Disposal of non-core assets, lower depreciation and falling interest charges as a result of lower debt levels, have all helped to increase profits. **Despite the continuing fall in voice revenues, strong growth in mobile subscriber numbers and new income generated by broadband lines have made it possible for operators to build reserves.** In contrast to the approach taken during the years of the internet boom, operators are embarking on acquisitions while at the same time remaining cautious about debt levels. These operators are looking for growth by acquisition. Cash is available and market investors seem ready to support investment even if it is not yet completely clear what model of integrated services will attract consumers.

There is also a **trend towards consolidation**, with the emergence of large operators with activities in different countries and with interest in diverse sectors. Examples include the incumbents in Germany, France and Spain which have acquired or are in the process of acquiring their internet subsidiary companies to exploit growth in broadband more effectively. Some observers have cast doubt on the wisdom of operators focusing on fixed or mobile networks only, or on those operators not offering a complete range of services. It is significant that the biggest operators have recorded larger profits for the year to mid-2005 than for the same period in 2004. Smaller national operators are more susceptible to falling prices and fierce competition.

For the mobile sector, results for the first and second quarters indicate that, with a few exceptions, most operators managed to increase their profits on 2004. Besides the above mentioned cost cutting policies, the number of mobile subscribers has continued to grow, in some cases at a higher rate than in 2004. At the same time mobile traffic has increased, including content and data transmission, with generally higher revenue per user. In most cases growth has been driven by revenues from European and international markets.

Convergence

This industry has always been defined by rapid technological and market change. However, the pace is increasing as the lines between content, services, applications and networks become increasingly blurred. Competition is driving market players to invest in new technologies in order to reduce costs and position themselves to be the winners in a new converged environment. It is not so much about new services but about new ways to integrate and provide existing services and content that so far have been provided through different, separate infrastructures.



Traditionally most providers of telecommunication services were network providers. Liberalisation and competition led to the opening of markets and a new communications value chain was created.

Voice telephony, the traditional telecoms service remains a very important element but is now just one part of the wider value chain which is being brought about by convergence. Broadband take-up, coupled with technological advancements such as Voice over IP (VoIP) or Voice over broadband (VoB) have made such convergence a possibility.

Content owners are investing in network platforms and even voice telephony. They are repositioning themselves in the new value chain. The strategies of the major operators in this field vary. Some have acquired networks as a way of reaching new customers. Others are seeking alliances with network operators and the synergies are leading to new service offerings for consumers.

Meanwhile, global players which are in the content business, or further down the line (in application service provision) have managed to gather a critical mass of users. They are now adding the ability to make VoIP calls, instant messaging or music downloads to their suite of services. Incumbents are reacting and are offering triple play and even quadruple play services. These traditional operators are seeking to maximise the potential of their customer base by offering services such as VoIP, broadband and also content through IPTV.

These developments are leading to investments but also to uncertainty as to who the new leaders in the industry will be.

Regulatory objectives – competition, investment and consumer benefits

From the perspective of the main objectives, the regulatory framework on electronic communications is achieving positive results. As shown in the market section, competition is intensifying in most sectors and the consumer is seeing the consequential benefits in terms of price, choice and more innovative services. Equally, the data show that market entrants are investing more in infrastructure, thus boding well for the sustainability of competition. Competition from new platforms, such as wireless, is beginning to emerge although still at a very early stage. At the same time there are markets which remain persistent bottlenecks, for example local access. International roaming is another area where greater progress is needed.

These trends and other market developments are explored in more detail in the section on Regulatory and Market Developments.

Investment

In 2005, aggregate investment – measured in terms of capital expenditure - rose to more than € 45 billion, representing an increase of 6% over 2004². It was the third consecutive year of increased year-over-year investment levels since 2003. The steady nature of this overall

² Data are taken from Infonetics Research, ECTA, ETNO, ECCA, OECD and European Commission sources.

increase suggests that the investment cycle has improved and that the sector is considered a more attractive growth opportunity because of its broader structural characteristics. Moreover renewed emphasis on investment was accompanied by rising capital market valuations of the sector over time³.

Capital expenditure of incumbent operators is still predominant and reaches approximately 15% of their revenues. This ratio is significantly higher for alternative operators (it is also rising faster), and for the cable and mobile sectors generally.

A further interesting development in 2005 was the accelerated inflow of capital from other sources into the sector. Private equity groups launched a successful leveraged buy-out deal of the Danish incumbent and new wave entrants such as internet companies sought to gain entry into the voice telephony sector via VoIP services.

The uptake in investment can partly be explained by cyclical factors. All major operators during the past years have pursued cost-cutting policies that now result in tangible cash flow benefits and improved financial health. The structural reasons arguably are even more important, however.

First, there is the emergence of new technologies - competition for triple-play product offerings⁴ creates the need for enhanced and upgraded broadband infrastructure.

Second, the growing commoditisation of certain market segments - mobile penetration rates are reaching saturation levels and traditional fixed markets are shrinking – forces operators to protect their current profitability levels by realizing economies of scale and higher operative efficiencies.

Third, appropriate regulatory action has had a variety of beneficial effects. The framework enhances regulatory certainty in which the present value of individual investment decisions can be better estimated. It provides a range of flexible instruments from which regulatory bodies can make a selection commensurate with their national economic circumstances. Furthermore, wherever access price obligations are imposed, NRAs are able to account for the risk of specific investment projects by adjusting the applicable weighted average costs of capital (WACC) rate. Thus, if it can be argued that today's investments into local access network infrastructure call for higher risk premiums than were traditionally granted by regulators, the framework is able to accommodate this. In addition, while there is some evidence that genuine platform-based competition might be rather more conducive to investment than simple service-based competition, it is important to realize that in economic circumstances where platform-based competition has yet to emerge, the framework's concept of the investment ladder is still useful. Clearly, unbundling obligations can promote investment and has succeeded, for instance, in France. Finally, and perhaps most importantly, it is clear that the framework is attaining its objective of creating more competition that results in static benefits from lower prices and costs as well as in dynamic gains from investment in innovation such as the mobile sector.

³ The benchmark Dow Jones EURO STOXX (SM) Telecommunications (SXKE) – encompassing mainly incumbent operators - rose from 321.73 on 1 Jan 2003 to 417.11 on 1 Dec 2005 (approximately 30%). Sector performance in 2005 alone was more disappointing, though.

⁴ Television, voice telephony and internet access delivered through one conduit.

REGULATORY AND MARKET DEVELOPMENTS

FIXED VOICE SERVICES

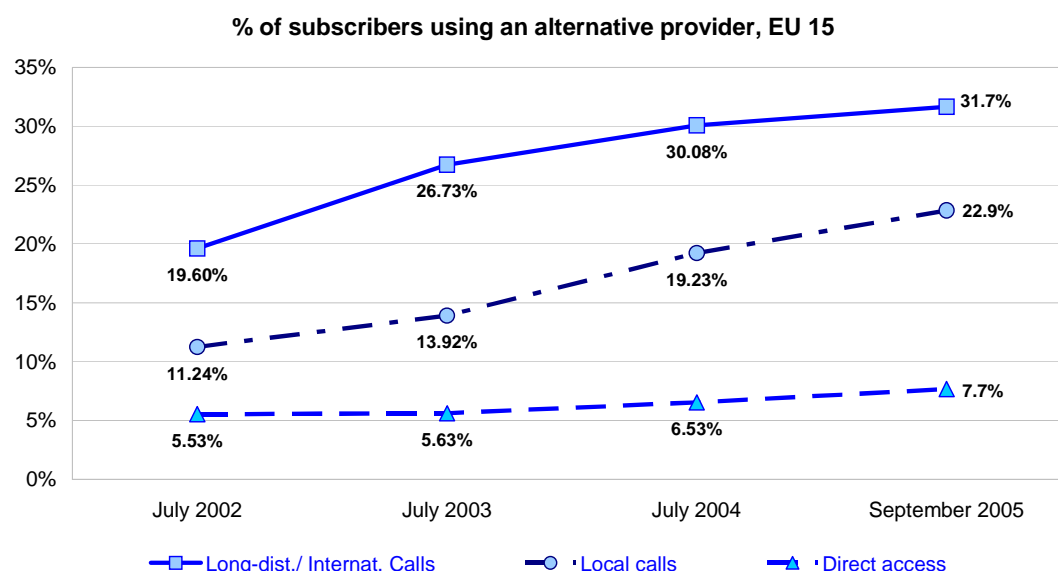
Key trends

- The overall value of the fixed voice sector in the EU is €85.8 billion. This sector remains the major source of income for fixed operators despite falling in value due to price competition and other factors.
- Competition in the fixed voice market has intensified over the year with prices for local, national and international calls continuing to fall.
- There is a growing number of players entering the market, the number of fixed ported numbers has increased and incumbent operators are continuing to lose market share.
- Faced with intensifying competition and the challenge of finding new growth opportunities, players are investing in new markets and technologies such as broadband and Next Generation Networks (NGNs), with growth by acquisition being a significant feature of the market in 2005.
- Technology change is having an impact as VoIP becomes more widespread.
- Intensifying competition is leading incumbent operators to deploy defensive strategies aimed at protecting their voice revenue streams. These include aggressive win-back campaigns and bundled pricing strategies. The latter include the increased use of packages such as line rental plus calls (although these packages are sometimes challenged by NRAs), as well as price structures aimed at keeping or winning back high-value corporate customers.
- There is also a trend towards consolidation, with the emergence of large operators with activities in different countries and with interest in diverse sectors. Some examples are the fixed incumbents in Germany, France and Spain that have completed or are about to complete the acquisition of their internet subsidiary companies to exploit more effectively growth in broadband.

The pattern of competition

Competition in the fixed voice market is still largely based on indirect access wholesale products such as carrier pre-selection (CPS) and carrier selection (CS). These services allow customers to use the services of an alternative operator for calls while still using the access line provided by the incumbent operator. As such, these wholesale products have been key to the successful development of retail competition in the fixed voice market. It is surprising that some Member States have been slow to introduce CPS/CS given that it has proved to be such an effective tool for the promotion of retail competition in other countries.

Following strong early growth, the percentage of subscribers using alternative providers has begun to slow down. This may be explained in part at least by the fact that incumbent operators have mounted aggressive win-back campaigns which are proving effective.

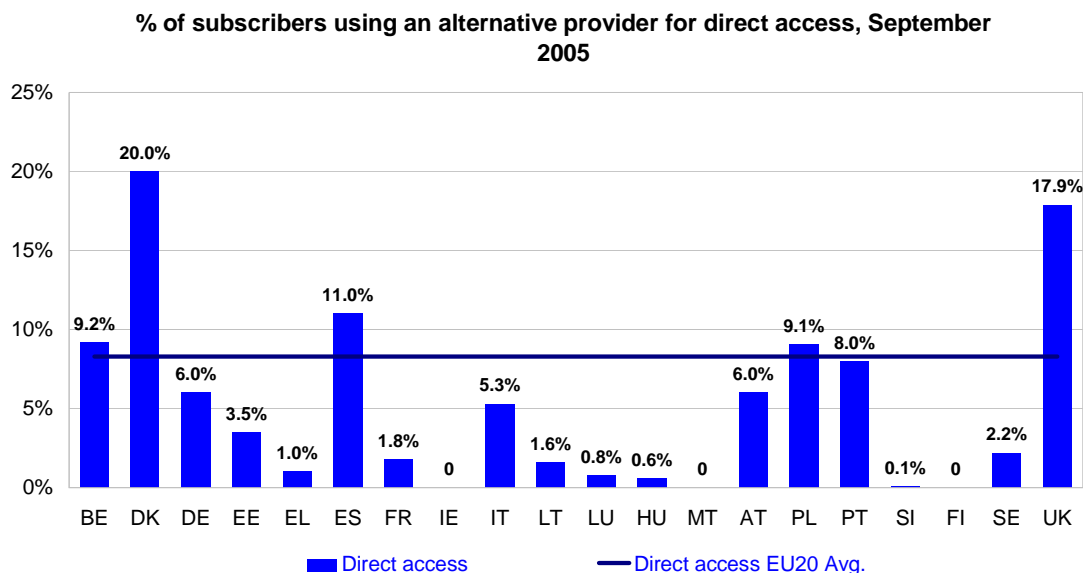


Another factor, however, is that the market is increasingly moving towards provision of integrated bundled products e.g. triple play⁵. Operators providing voice services alone by means of CPS or CS, may find it increasingly difficult to compete in a world where voice becomes a low-cost element of a triple play package. Some Member States have also introduced wholesale line rental as an enhancement to the CPS product. This enables the new entrant to provide the customer with a single bill covering rental and calls. These products are still in the early stages of development but could provide a boost to competition over time.

Direct access competition is still relatively weak in Europe. Only 8.3% of subscribers (for EU 20) are using direct access from a new entrant player. In this case direct access means that the alternative operator provides the voice services over a line forming part of its own network to the customer. This could be a cable line, an unbundled line or some other means of access as wireless. The fact that only 8.3% of subscribers use direct access reflects the incumbent players' continuing dominance of the local access market.

As the following graph shows, the relatively high percentage of subscribers using alternative operators for direct access in countries such as Denmark and the United Kingdom is based on access by cable. In some countries, direct access is based on unbundled local loops. It is interesting to note that the percentage of subscribers using alternative operators for direct access is high in countries with low interconnection rates e.g. Denmark and the United Kingdom. This suggests that low rates are not having an adverse effect on infrastructure rollout.

⁵ Telephony, internet access and TV



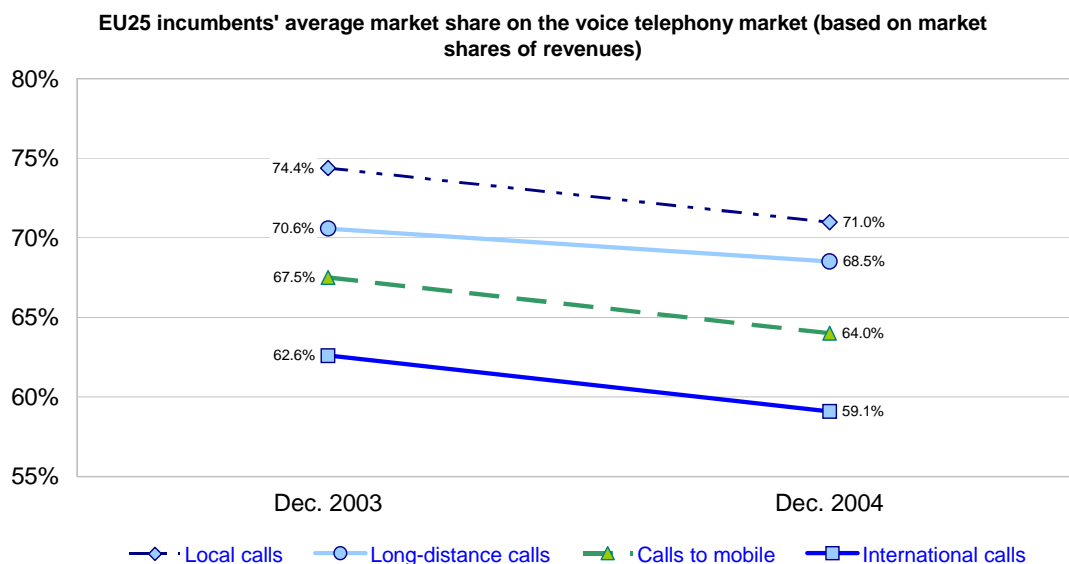
The future prospects for direct access competition seem to depend on a number of factors including, for example, the further development of cable networks as competing platforms. However, this will only have an impact in countries where existing cable penetration is high.

Also for many countries, LLU seems to hold out the best prospects for increased infrastructure competition. As margins decline, voice services alone will not provide sufficient opportunity for growth. Operators will need to move increasingly to richer services such as broadband and integrated packages (triple play). Voice will remain important but only as part of a suite of services. New entrants will have to be in a position to compete with incumbents. The growing demand for broadband and integrated packages will incentivise operators to invest in order to add consumer value.

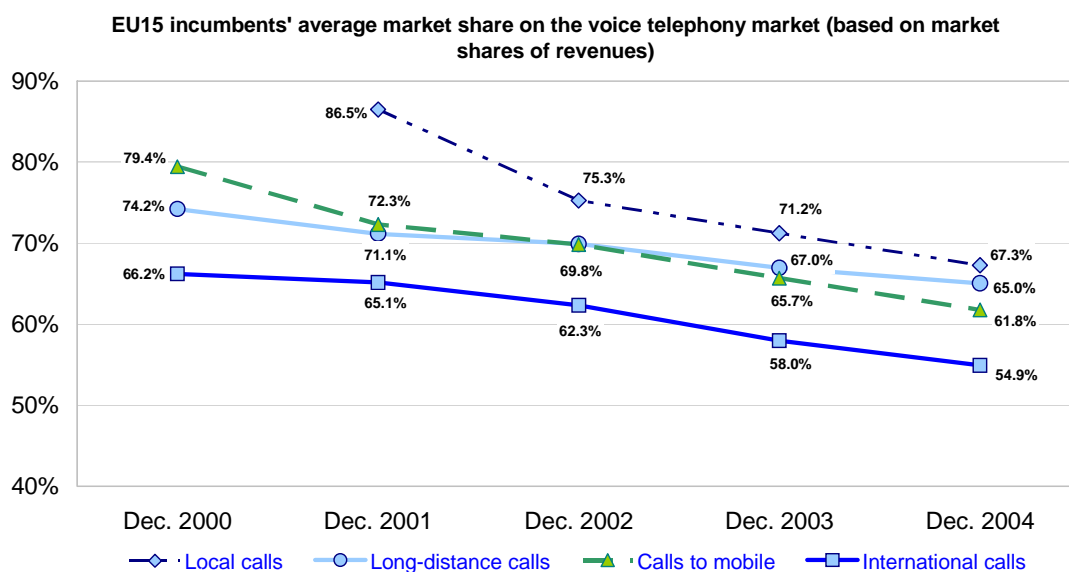
Finally, demand for broadband stimulates the development of alternative platforms e.g. wireless, mobile, fibre etc. particularly in some Member States, although the impact is still limited. The rollout of alternative access platforms is discussed in more detail in the section on broadband.

Market share

Incumbent players' share of the fixed voice market continues to decline across all call categories. The rate of this decline seems to be steady with a drop of around 4 percentage points for each type of call (local, long distance, international, fixed to mobile) during 2004.

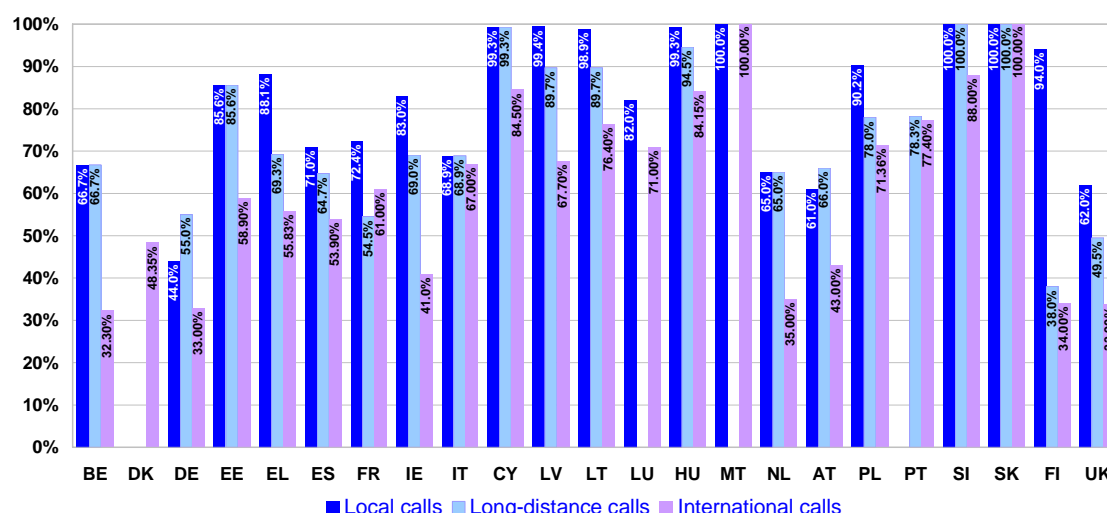


The figures for EU 15 show a steady decline in incumbent market share over the four years from 2001 to 2004. Although there is a significant difference in market share between international calls and local calls, the rate of decline is comparable. However, incumbent operators dominate the local access market suggesting that, as we have seen, competition in the voice market is dependent upon regulated access products such as carrier pre-selection.



An examination of incumbent players' market shares in individual Member States reveals a very diverse pattern.

Incumbents' market share in the national telephony market
(Minutes of traffic-Dec. 2004)



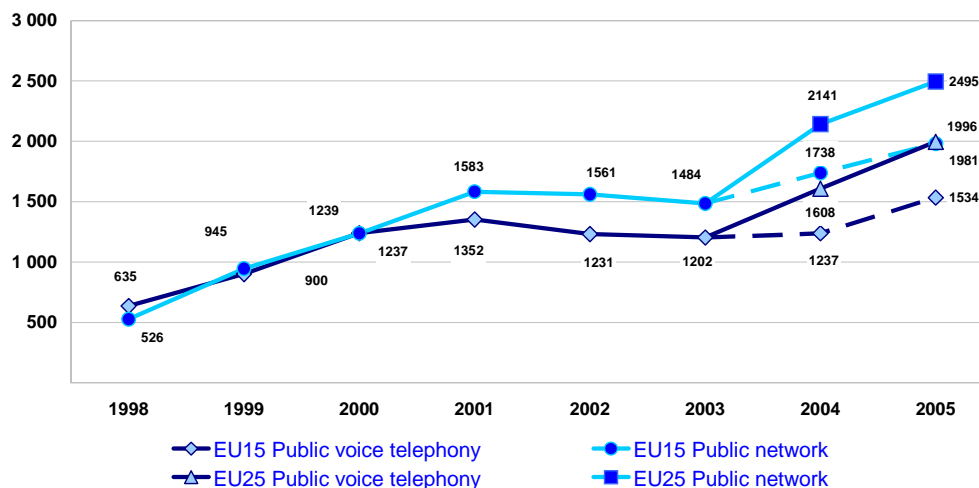
New entrants have made the biggest inroads into incumbent market share in Germany, Austria (for local and international), the Netherlands (international), Finland (for long distance and international) and UK (for all categories). Incumbents' market shares remains very high in Cyprus, Latvia, Lithuania, Malta, Slovenia and Slovakia.

Carrier selection (CS) and pre-selection (CPS) is now available in all Member States with the exception of Slovakia (where CPS is unavailable, CS was introduced in June 2005). However, in a number of countries (Malta, Hungary, Portugal) new entrants complain that the interconnection costs associated with CPS are currently hindering the effectiveness of the service. Given their importance to retail competition in the fixed voice sector it is essential that viable fit-for-purpose CPS and CS products are made available to new entrants.

New players

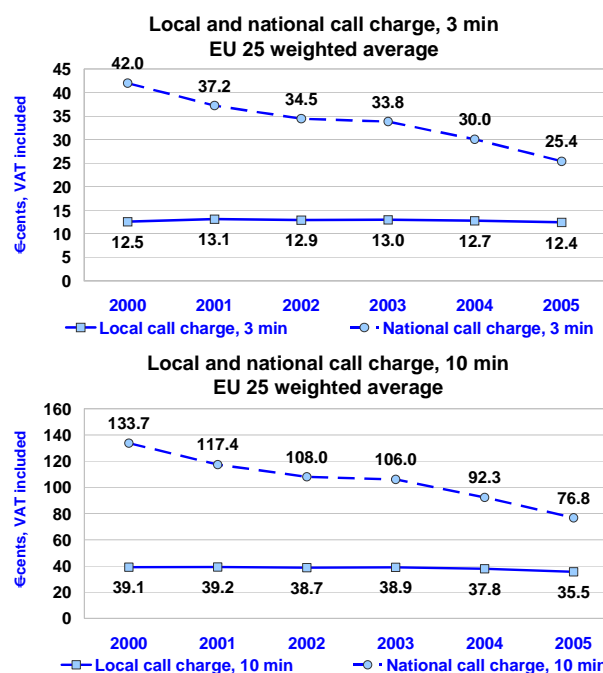
A notable development is the significant increase in the number of players entering the market. The graph below shows that this number had declined slightly between mid-2001 and mid-2003. Since then there has been a significant increase, even allowing for that brought about by the new Member States. The number of public network operators has increased by 36% and the number of public voice telephony providers by 68% in the EU 15. These increases are on a par with the numbers of players entering the market in the late 1990s following liberalisation.

Estimated number of fixed operators in EU25 & EU15



Pricing

As the charts below show, there were significant reductions in prices⁶ for both 3 minute (15.3%) and 10 minute (17%) national calls during the year. Since 2000 the EU weighted average charge of a 3 minute call has fallen by 65% and the cost of a 10 minute call by 74%.



Although progress has been slower for local calls this year saw a 6% reduction in the price of a 10 minute local call. For international calls there was no movement in the nominal price although it is likely that many operators are offering special offers which are not reflected in list price reductions.

⁶

Based on incumbents' standard list price

Revenues

Overall revenues for the fixed voice sector have continued to decline and are now estimated at €85.8 billion. Voice revenue still accounts for the major part of total operator revenues and consequently is vital for the funding of investment in new technologies and services. The decline seems to be due to a number of factors. However, the main cause seems to be falling prices reflecting more intense competition. There are other factors at play. For example the growth of broadband is resulting in a reduction in dial-up internet traffic which has an impact on fixed voice revenues.

VoIP

VoIP services are now available in most Member States, although precise data as to usage is not readily available. As network operators move towards an IP environment it is possible that all voice calls could be termed as 'IP' in the future. There are a number of different types of VoIP services available at the retail level:

- Voice over broadband ("VoB") managed by the broadband access provider
- VoB managed by an independent voice service provider
- VoIP as a "personal voice application"

Even though it appears that VoIP has not yet had a dramatic effect on traditional fixed voice revenues, its emergence is highly significant for all market operators, not least through the entry of formidable new players as providers of voice services. Incumbent players are responding with VoIP products of their own or with bundled packages which include voice services. The impact of VoIP will grow over the coming years. For now, NRAs are facing the issue of how these services are to be treated from a regulatory point of view. This is discussed in the regulatory section below.

Regulatory issues

The prospects for competition in the fixed voice market are mixed. A number of NRAs (Finland, Sweden, Austria, Germany and the Netherlands) have found that the market for international voice calls for residential users is competitive. Similarly Finland, Denmark, Sweden, Germany and the Netherlands have notified the same market for non-residential users as being competitive. Consequently these NRAs have removed retail level obligations in these markets.

For local calls, the average incumbent market share is still around 70% in the EU indicating that the prospects for competition in the local/national calls market remain low in many Member States. Incumbent market share in the local call market is below 60% in only three Member States (Austria, Germany and the United Kingdom). Incumbent market share is above 70% for local calls in 14 countries.

It would seem that continued remedies at wholesale level, or at retail access level, such as CPS and CS are, for the time being, indispensable to ongoing competition for fixed voice services. Many NRAs have also imposed wholesale line rental obligations which enable new entrants to provide 'seamless' single billing services to their customers. Mostly these obligations are imposed where dominance has been found in the access markets.

NRAs therefore face the twin challenge of continuing to support competition at retail level for fixed voice services while at the same time continuing to encourage the rollout of infrastructure. Market dynamics, such as the move to integrated packages, suggest that the business case for investment in infrastructure is more compelling than ever. Despite the growing success of competition at retail level for voice services many NRAs face ongoing problems. For example, many Member States report problems with incumbent win-back campaigns and alleged anti-competitive price bundling. In some countries (Malta, Hungary, Portugal) new entrants complain that the interconnection costs associated with CPS are currently hindering the development of the service.

So far, only four countries (France, the Netherlands, Sweden, and Germany) have included any kind of VoIP in the calls markets. Denmark has specifically excluded VoIP services due to lack of substitutability. Sweden and France have not imposed any regulation. In the Netherlands, the Dutch NRA, OPTA, proposed to have a more formalised monitoring system than ARCEP, the French NRA to monitor VoB services offered by KPN. The proposed regulation is relatively light consisting of the application of a price floor test. This means that KPN's retail VoB offers (bundle of VoB and other broadband services) must make up for the total costs (so called 'bundle test').

In the future it may be that as the nature of retail competition shifts to a larger bundle of products, operators will choose to price and promote the bundle in a manner that allows them to take losses on some elements and make their profits on other elements. In the case of such a shift, it is the ability to compete on the overall bundle which is important - not the individual components. For NRAs to concentrate on the individual components (cg voice) could be to deny consumers important competitive benefits. This may also mean that in such markets, traditional voice service providers who choose not to provide a wider range of products will have to change their business plans or leave the market. These developments reinforce the need for close monitoring of the market by the NRAs.

WHOLESALE VOICE TELEPHONY PRICING – INTERCONNECTION

Key trends

- As the analysis of retail competition in the fixed market suggests, an effective interconnection regime is essential to the development of competition. In general, fixed network interconnection charges continue to fall albeit at a slower pace than in earlier years. This level progress reflects the fact that the approach to regulation of fixed interconnection has developed over time with most Member States now having LRIC cost accounting systems in place.
- The cost of interconnection depends on the point in the network where it occurs. For example at the local level the new entrant interconnects at the incumbent's local switch, that is, farthest down the network. This is the lowest cost. Single transit covers a number of local switches, for example, a region. Double transit is the highest level in the network and consequently is the most expensive as more of the incumbent's network elements are being used.
- While the overall EU trend is downwards, for the majority of countries there has been very little change in rates. This is unsurprising given that the approach to regulation of fixed interconnection is well developed in most MS with limited scope for major reductions in most cases. On the other hand it is surprising that there has been no more progress in some Member States where interconnection rates remain relatively very high.
- There have been significant reductions in some countries with charges for double transit seeing the biggest reductions overall. At the lower end of the scale, following the imposition of remedies this year, the United Kingdom has seen very significant reductions bringing it to the lowest level in Europe for two out of three charges. At the other end of the scale, Malta and Slovakia have seen reductions but still have a long way to go before they reach average EU levels. Latvia has introduced very significant reductions bringing the rates for single and double transit to below the EU average.
- Other countries to make progress this year include Estonia, Greece, Ireland, Italy and Sweden. Overall there are many countries where there was no movement at all this year. There is also a very wide disparity between rates. For example the highest rate in the EU for double transit is 2.8 Euro cents in Malta. The lowest is the UK with a rate of 0.25 Euro cents.

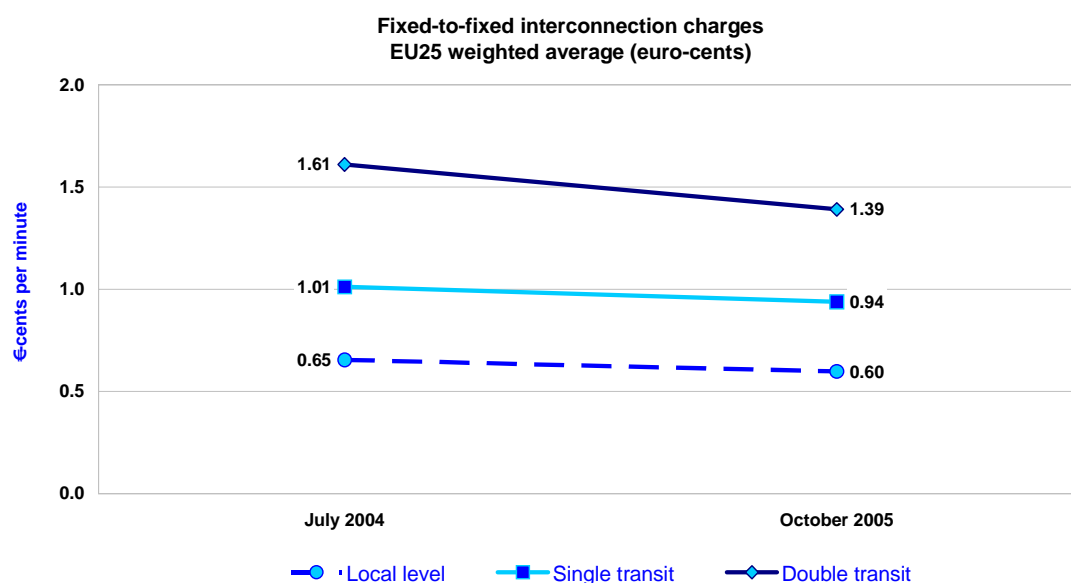
Regulatory issues

There are three relevant markets relating to fixed interconnection in the Commission's Recommendation on Relevant Markets. These are the market for call origination on the public telephone network provided at a fixed location; call termination at individual public telephone networks provided at a fixed location and transit services in the fixed public telephone network.

Based on the notifications received under the Article 7 process it is clear that the first two of these wholesale markets have shown few signs of sustainable competition. However, remedies applied at this level enable effective competition to develop at retail level. Regulators have been able to reflect differences in the size of operators by imposing lighter remedies on smaller ones (i.e. by applying “asymmetric” remedies). For the market for call access and origination all 12 notifications so far have found dominance in this market and generally the full range of remedies have been applied including price control and cost accounting. For the call termination market, again, all NRAs have found dominance in their respective markets. In this case the NRAs have generally adopted an ‘asymmetric’ approach by not applying, for example, price control or accounting separation obligations in many cases.

For the transit market, eight out of eleven notifications included SMP and one was vetoed.

It is clear that the imposition of remedies under the 2002 Regulatory Framework *inter alia* lead to positive results in some Member States such as in the United Kingdom and in Cyprus where the publication of RIO had resulted in lower interconnection charges. Where such obligations have not been imposed with regard to the three relevant markets as for example in Slovenia, new entrants note technical difficulties and relatively high level of interconnection charges.



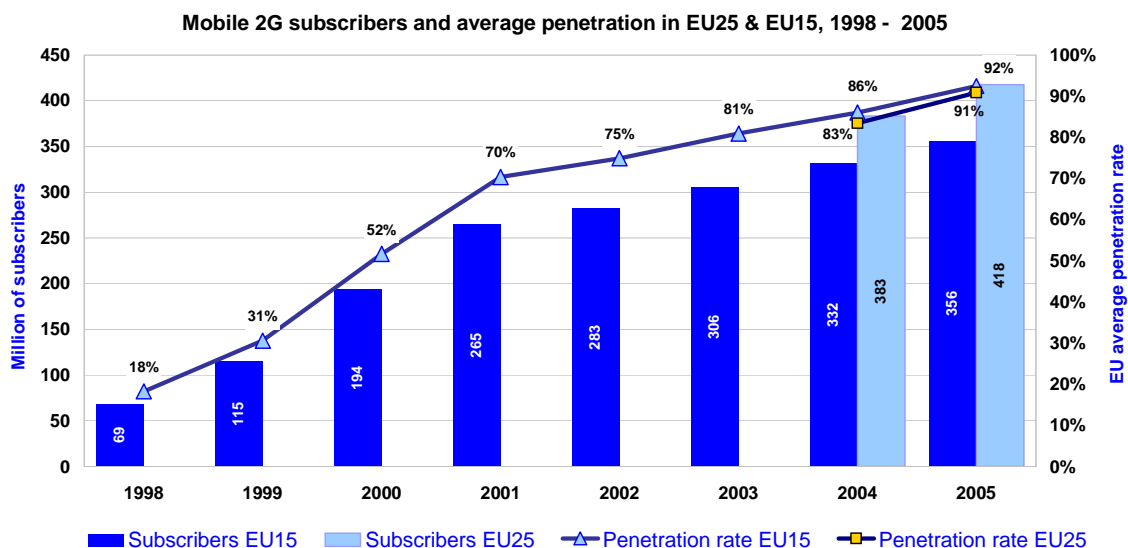
THE MOBILE MARKET

Key Trends

- Mobile phone penetration levels grew at a faster rate than 2004. 426 million people now have mobile phones representing 92.8% of the population of the EU 25. Penetration exceeded 100% in eight Member States. Growth in penetration for the EU 15 was relatively slower, which is not unexpected for a maturing market.
- Overall revenues continued to increase, albeit at a slower pace as the market begins to show signs of maturity.
- Competition aided by regulatory tools, such as mobile number portability, is leading to significant consumer benefits. There are more operators and a significant increase in the number of MVNOs in the market.
- As in the fixed market, operators are offering more value added services to increase average revenue per user (ARPU). Growth in the mobile market will be driven by value added services such as mobile data with laptop cards which are emerging as the most significant mobile data revenue stream since the introduction of SMS.
- 3G became a commercial reality in 2005 although voice seems to be the main driver so far. 3G subscribers are now close to 15 million more than double last year's figure.
- The first signs of network consolidation in Member States such as Denmark, Austria and the Netherlands are evident. No significant consolidation among service providers has yet taken place.
- There has also been further downward pressure on mobile termination rates through regulatory intervention in many Member States.
- Despite the many consumer benefits of mobile telephony concerns persist as to the level and lack of transparency of international roaming charges.
- These key trends are discussed in more detail below.

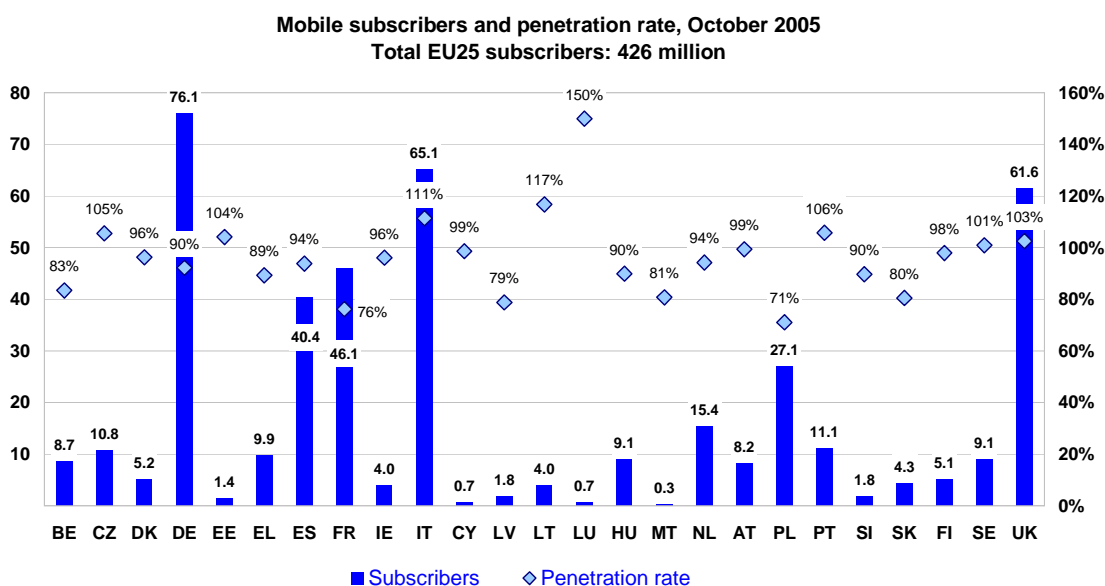
Mobile penetration

The average EU 25 penetration rate continues to grow and has now reached 92.8 per cent. Growth is higher than for the previous year but this is mainly attributed to faster growth in the new Member States. Growth was also evident in the EU 15 but at a slower pace than that for previous years which is to be expected in a market which is showing signs of maturity. The total number of subscribers in the EU has now reached 426 million.



The figure for 2005 is overestimated since it includes 3G subscribers in a number of countries where the split 2G/3G is not available
BE, CZ, DK, EL, ES, NL, UK: July 2005

A number of Member States have surpassed the 100 per cent penetration mark for the first time. In effect, there are now eight Member States in all that have penetration levels higher than 100 per cent and three of these are from new Member States reflecting the relative importance of mobile.⁷



3G subscribers are included

BE, CZ, DK, EL, ES, NL, UK: July 2005

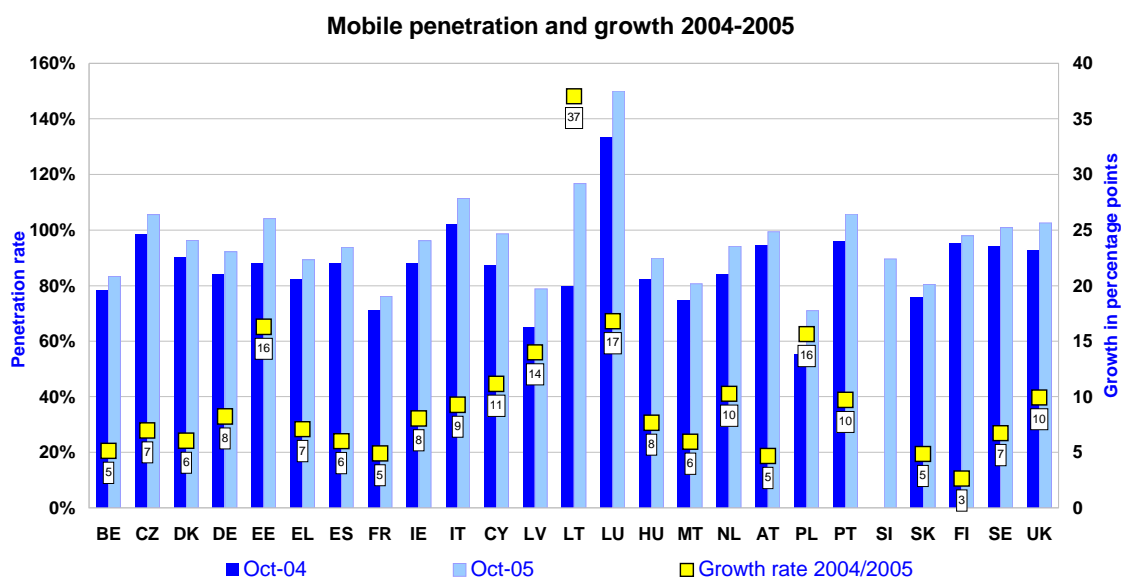
Luxembourg: The penetration rate has been calculated on the basis of the national population only, without including trans-national commuters.

Sweden: The definition of pre-paid active subscribers has changed resulting in a 20% reduction compared to previous years.

⁷

Italy, Luxembourg, Portugal, Sweden, United Kingdom, Czech Republic, Estonia and Lithuania. The last three are new Member States.

In Lithuania growth stood at 37 percentage points. Poland also registered very strong growth at 16 percentage points together with Estonia, Latvia and Cyprus. In the EU 15 Member States Luxembourg had a growth of 17 percentage points, followed by the Netherlands, Portugal and the UK with growth of 10 percentage points in penetration.



3G subscribers are included

BE, CZ, DK, EL, ES, NL, UK: July 2004-July 2005

Luxembourg: The penetration rate has been calculated on the basis of the national population only, without including trans-national commuters.

Sweden: The figure for 2004 has been adjusted to enable comparison with 2005.

In this context, a penetration rate in excess of 100 per cent is purely notional: some customers switch from a business to a private mobile number; others have SIM cards for data, while some seek to optimize their spending by availing themselves of beneficial on-net tariffs. However, it still is a very strong indicator of the importance of mobile telephony in Europe's economy.

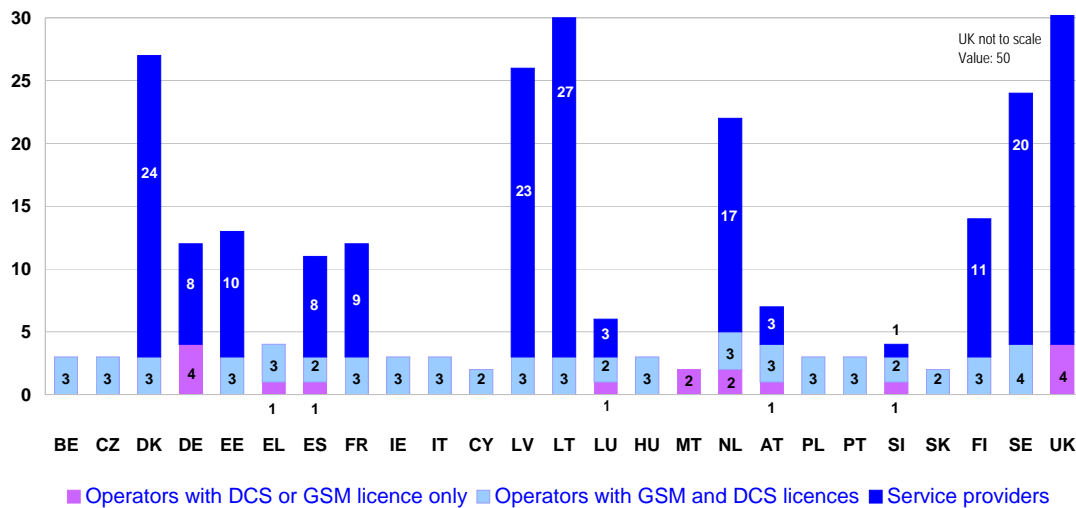
Market players

The GSM networks continue to dominate the market with 79 network operators in total in the EU offering 2G services, with three to four operational in most Member States. These are then complemented by 214 mobile service providers (MVNOs) which exist in the majority of Member States. **There has been a considerable growth in the number of service providers from 166 the previous year.** In general, penetration tends to be higher in Member States where there are a high number of service providers though there are some exceptions.

The number of service providers in the UK (which is by far the highest) remains at 50. But there have been significant increases in the number of service providers in Denmark, Estonia, France, Latvia and Lithuania. The fact that there are nine new service providers in France could lead to increased competition and higher penetration levels. In effect, France's competition authority imposed its largest ever fine on the three mobile networks for colluding to deter competition and stabilize the market from 1997 to 2003.

Operators authorised to provide 2G mobile services, September 2005

Total EU25: 79 network operators, 214 mobile service providers



NL: 1 MVNO + 16 resellers

EE: Only 4 MVNOs are active

LT: Only 4 service providers are active

FI: Operators in the Aland Islands are not included

3G

The number of 3G operators offering commercial services in the EU has increased from 51 to 58 out of the 79 UMTS licences that have been granted. The number of 3G operators granted a licence ranges from five in Austria to none in Lithuania.

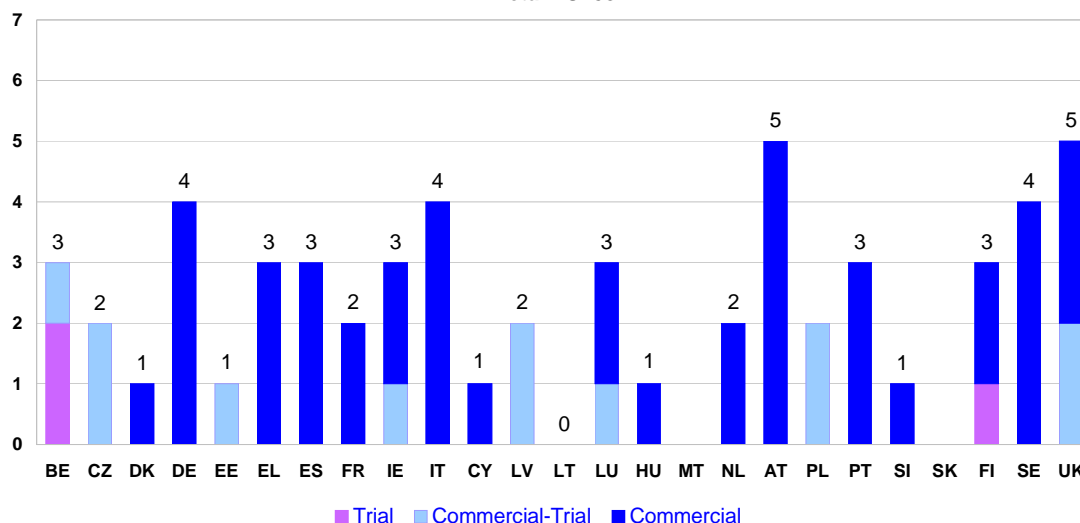
By the end of September 2005, there were around 15 million subscribers in the EU using 3G services. The largest 3G operator in Italy had an estimated 4.5 million subscribers. In the more advanced markets like Italy and the United Kingdom it is estimated that 30 per cent of mobile phones sold in the final quarter of 2005 will be 3G.⁸

Cheaper and smaller handsets for 3G will become available on the market in 2006 and these are expected to be significant drivers of 3G take-up. These operators are increasingly offering 3G packages with bundles of voice minutes to entice users to migrate, as well as attract users from the fixed line.

⁸

Informa Telecoms and Media.

3G operators offering commercial services, September 2005
Total EU: 58



DK: In November 2005 a second operator launched commercial services. At least two service providers have launched commercial services using this operator's network

EE: Commercial operations started on 22 October 2005

FR: In November 2005 a third operator launched commercial services

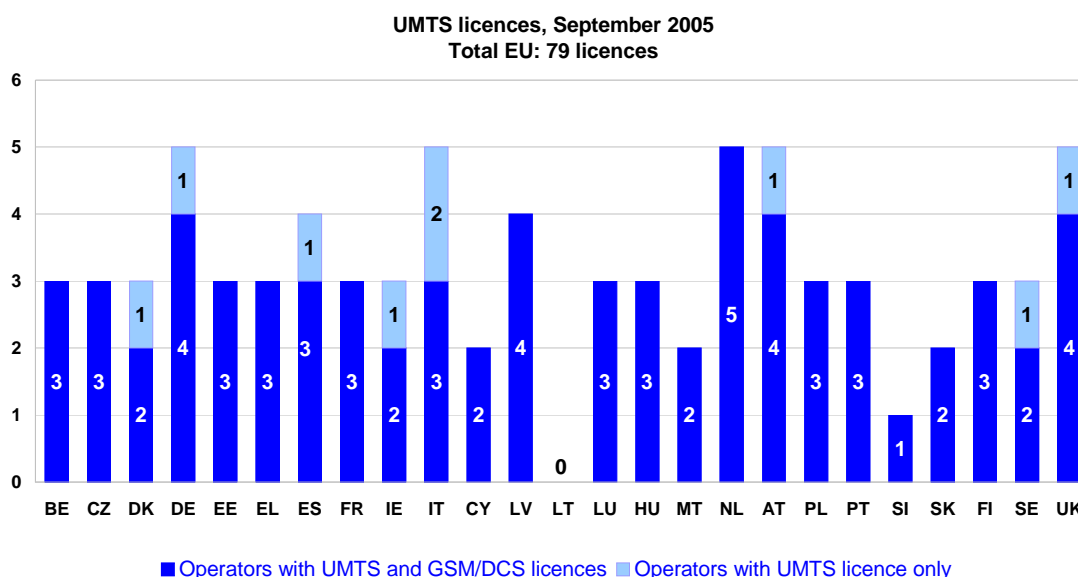
FI: Operators in the Aland Islands are not included

LT: Licence for trials in 2004. There were no 3G operators in 2005. The tender for 3G licences was announced on 17 November 2005.

The new services being offered by 3G operators include high speed internet access, information services such as football match highlights, news, video messaging or conversations, games and music downloads.

At present there are three Member States where 3G networks are not yet available⁹ though this is set to change in 2006 as the networks are rolled out. In Austria, UK, Italy, Sweden and Germany several 3G networks have already been established and are offering commercial services.

⁹ Lithuania, Malta and Slovakia



LV: Including one CDMA licence

LT: Licence for trials in 2004. There were no 3G operators in 2005. The tender for 3G licences was announced on 17 November 2005.

FI: Figures do not include local operators

SE: 1 UMTS license is held by "Svenska UMTS Licens AB", a company fully owned by "Svenska UMTS-nat AB", shared 50 per cent each by Tele2 and Telia.

Competition in the mobile sector

There are a number of factors that suggest an increased degree of competition in the mobile market including:

- The number of active players is increasing as 3G services are launched and a large number of new MVNOs entered the market.
- Leading operators' market shares continue to decline.
- There are signs of downward pressure on prices.
- The availability of mobile number portability is also having an impact.

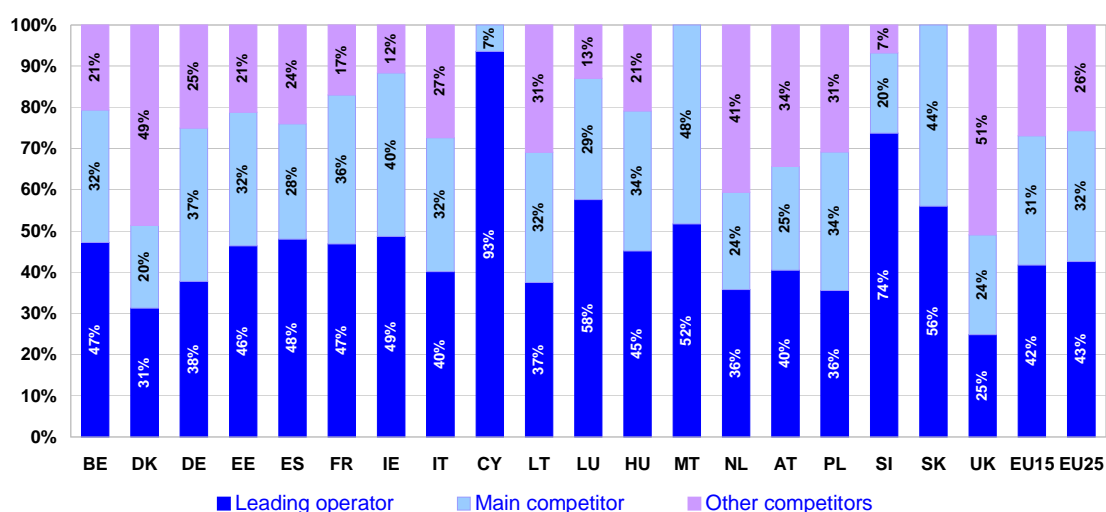
These factors are resulting in subscribers being able to get more value for money if they are on the right tariff plan.

Market structure

Continuing a trend evident since 2000, the average market share of leading operators in nearly all Member States has continued to drop as the main competitors and other operators including MVNOs increase their market shares. The biggest decrease in market shares was observed in Ireland (a drop of seven per cent) followed by drops of five per cent in Belgium, Greece, Italy, Cyprus and Portugal.

However, the leading operators in Austria, Belgium, Cyprus, Estonia, France, Hungary, Ireland, Italy, Lithuania, Malta, Slovenia and Spain still have a market share of 40 per cent or higher.

Digital mobile market share based on customers, October 2005
(GSM 900/DCS 1800)



Data on market shares in CZ, EL, LV, PT, FI and SE are confidential

There are a growing number of MVNOs entering the market. In most Member States this is happening on the basis of commercial agreements with network operators. At the same time there continues to be a significant divergence between Member States when it comes to the number of mobile service providers operating in the market. For example, despite the growth in the overall number of service providers, there are still none in 11 Member States. However, the number of Member States which have 10 or more service providers has increased from six last year to eight this year. In most cases, the penetration levels of the Member States' with the largest number of service providers is high and in four cases exceeds 100 per cent.

Pricing

There is pressure on prices and a general view that mobile operators are increasingly marketing more differentiated offers. But there are still areas of concern. Prices for international roaming and data services remain high and subscribers who are not aware of different tariff plans could end up paying much higher prices.

Prices of mobile operators continue to vary significantly between Member States for low users, medium users and the heavy mobile users as the following table indicates:

Baskets ¹⁰	Highest price	Lowest price
low usage basket	€37.8 (UK)	€5.5 (Lithuania)
medium usage basket	€58.1 (Netherlands)	€12.7 (Cyprus)
high usage basket	€103.9 (Portugal)	€20 (Cyprus)

¹⁰ The analysis of national mobile services is based on the OECD baskets for digital mobile services. Figures in the table reflect the price of one of the two most prominent operators in each country, based on available subscriber numbers. See the market data annex for further details.

Prices have in general gone down in the majority of cases while they have remained the same for around 30 per cent of the operators. The percentage of operators that have higher tariffs for the same services within the baskets is 18 per cent. This might not necessarily mean that the price of mobile telephony has gone up but that, for example, the price of an SMS is now higher or the call set-up charge is higher.

In some instances, there were significant reductions in the prices within the baskets. This was observed in particular for operators in Belgium, Luxembourg, Finland, the Netherlands, Poland, Portugal, and Sweden in the low and medium usage baskets. Significant increases were noted for two particular cases in Portugal and the United Kingdom.

The number of tariff packages for consumers is increasing. The distinction between on-net and off-net tariffs still remains, especially since operators continue to distinguish between tariffs for the free minutes in bundles (where no distinction is made) and minutes over and above the agreed bundle (where the price for on-net and off-net calls is different).

Competition is in general producing benefits to consumers but price transparency by operators remains a key issue. Tariffs are not always transparent for consumers and in some cases consumers do not know whether a call set-up charge applies or whether billing is carried out per minute or per second.

Revenue sources

The main component of revenues for mobile communications is still voice telephony even though basic data services such as SMS continue to show signs of growth.

The market is reporting a growing demand for non-SMS data services. Research indicates that around 50% of mobile handsets are already capable of multi-media services and usage of internet browsing and email on mobile phone has increased.

There was slight growth in the number of outgoing calls but mobile network operators are reporting lower increases in revenue than the actual minutes meaning that consumers are in general paying less for more minutes of telephony. This is also attributed to a decrease in mobile termination rates which is being mandated by NRAs in their market reviews. Mobile termination rates account for around 22 per cent of their turnover and are therefore considered as an important part of their revenue.

We are also observing further signs of mobile substitution (when subscribers drop their fixed line and just retain their mobile line). In UK, for example, the fixed operator launched a service called Fusion which is a mobile service with fixed rates while a subscriber is at home. In Portugal, a mobile operator has offered a fixed/mobile service to subscribers at rates which are competitive to those of the incumbent. Calls have to be made from three pre-determined locations and which are hence considered as the 'fixed location'.

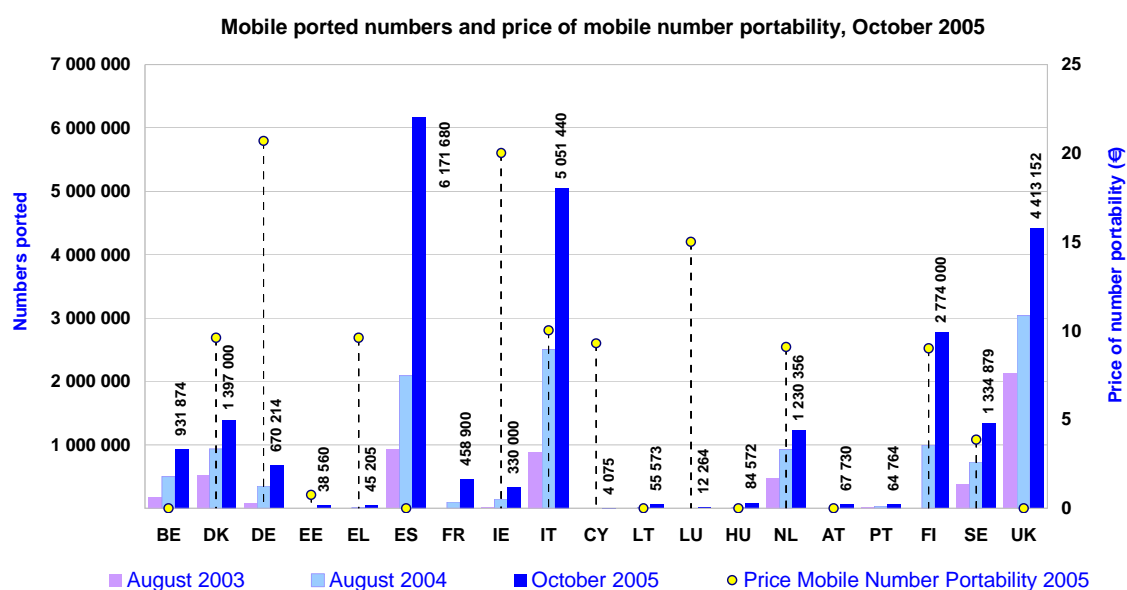
Post-paid contracts with bundled minutes and calls still account for the largest portion of mobile operators' revenue but the main growth is increasingly tied to value-added data services. In this regard, the initial signs of convergence and the emergence of alliances between mobile operators and content providers can be seen and this may also lead to increased take-up for value-added services. Laptop cards are emerging as the most significant mobile data revenue stream since the introduction of SMS. In some European countries, it is

estimated that revenue from such data cards accounts for two per cent of mobile revenues for some operators.

There have not been any noticeable shifts of customers from pre-paid to post-paid tariff plans although there are significant differences between Member States. Italian subscribers for example continue to prefer pre-paid services to the extent that there are 58.1 million pre-paid customers compared to just 6.1 million post-paid customers. On the other hand, in countries such as Finland and Denmark, there are significantly more post-paid customers than pre-paid. Spain has seen a gradual shift from pre-paid to post paid over the past years. In general, although there may be a slight increase in the percentage of post-paid contracts, there are very few Member States which have seen a shift from one form of payment method to the other.

Mobile number portability

Mobile number portability (MNP) as mandated by the Universal Service Directive allows subscribers to retain their number when they move from one operator to another. **The number of ported numbers has doubled during the year with considerable increases in some Member States.** In total Spain, Italy and the UK have 63 per cent of the total ported numbers in the EU. Overall, 24.3 million numbers have been ported representing 5.8% of mobile numbers. This is clearly indicative of the impact that this regulatory tool is having in the market.



The above table indicates the number of ported numbers over a three year period. In total, Spain had 6 171 680 numbers ported followed by Italy with 5 051 440 and the United Kingdom with 4 413 152 in October 2005.

The above table also reflects the percentage growth. Comparing the figures to the total number of subscribers, in Finland 55 per cent of subscribers are using ported numbers. Denmark has 26.86% subscribers with ported numbers though this figure includes numbers that may have been ported more than once. In Spain 15.3% of subscribers have ported numbers while other Member States with a higher than normal percentage of mobile number portability include Belgium, Ireland, Italy, the Netherlands, Sweden and UK.

While consumers can retain their number, consumer organisations have noted that subscribers are also using number portability as a negotiating tool to get a better deal from their existing operator.

MNP has not been successful in all countries. Less than 1 per cent numbers were ported in Austria, Germany, France, Portugal and Greece. Equally in the new Member States the figure for ported numbers is very low. Seven Member States from the EU have not yet introduced mobile number portability, these being Czech Republic, Malta, Latvia, Lithuania, Poland, Slovakia and Slovenia.

The fact that mobile number portability has not been introduced in these Member States makes it more difficult for new operators to gain foothold in the market.

Mobile regulation

Regulation of the broader mobile market is applied at wholesale level only, there being no retail markets identified in the Commission Recommendation. The pattern of regulation is summarized below.

Access and call origination on public mobile telephone networks

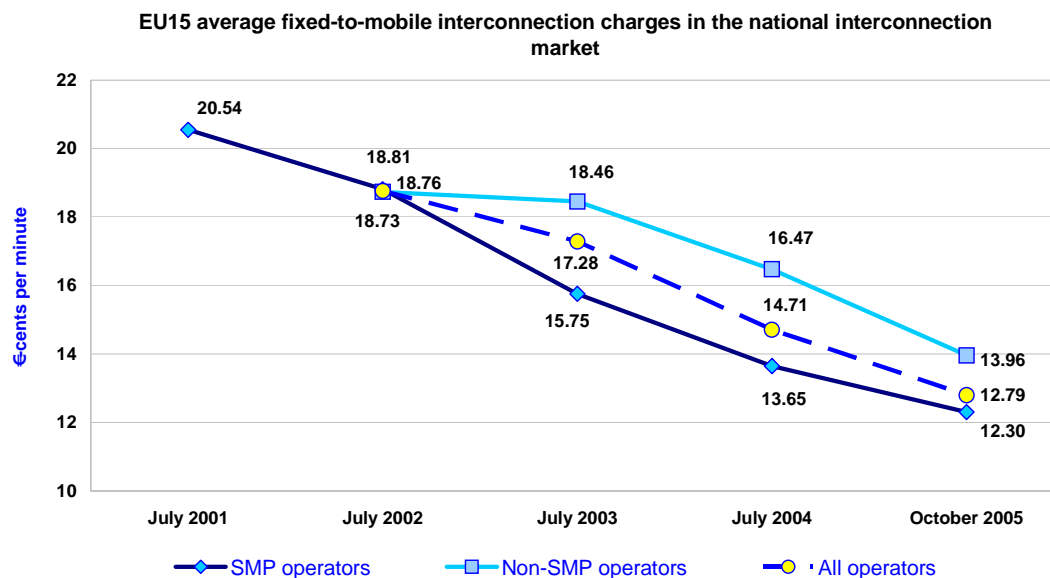
Among the NRAs that have assessed and notified the market on access and call origination on public mobile telephone networks, only Ireland and Slovenia have determined that operators have Significant Market Power.

The NRAs in Austria, Denmark, Finland, Sweden, the United Kingdom, Hungary, Italy and the Netherlands have found the market to be competitive. The Irish NRA, ComReg, found joint dominance in this market and proposed to impose remedies of non-discrimination, accounting separation, access obligation and price control and cost accounting. However, in December 2005 ComReg annulled its decision which is consequently not enforced. The Slovenian NRA also found one operator to have dominance and imposed remedies.

Mobile termination rates

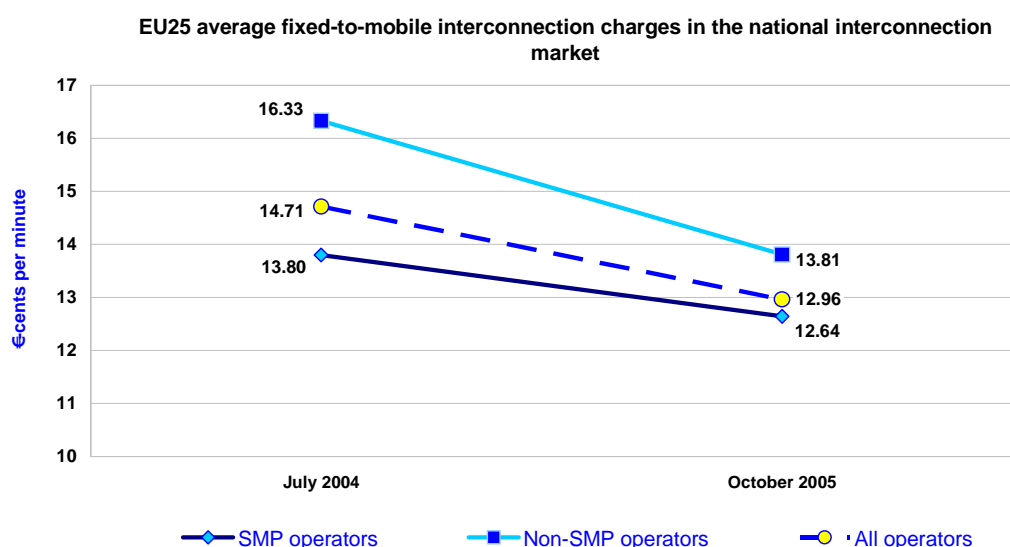
In contrast to access and call origination, this is not the case with the market for voice call termination of individual mobile networks. This market relates to the charges which mobile operators levy on other operators for calling one of the mobile operators' own subscribers i.e. the mobile operators terminates the call.

Prices have continued to go down as can be seen in the table below.



In general, regulatory intervention in the EU 15 has seen the price of fixed to mobile termination fall from €0.20,5 per minute to €0.12.79 from July 2001 to October 2005 or a decrease of almost 38%.

Some NRAs allowed the reductions in MTRs to follow a glide path i.e. reductions to cost orientation are gradual. They have also imposed obligations such as accounting separation and the principle of non-discrimination. However, there have been cases in Member States where retail prices did not decrease by the same amount as the wholesale prices. In Italy, in view of a delay in the analysis of this market, the NRA decided to require a reduction in MTRs of 25% for the two SMP operators and almost 40% for the non-SMP operator. However, this did not result in significant decreases in retail prices for consumers. It is therefore still difficult to assess whether declining wholesale prices are being passed on to consumers in full.



On average, the mobile termination rates for SMP operators have gone down from €-cents 13,80 to €-cents 12,64 per minute while the decrease for non-SMP operators has been more significant though it still remains higher at €-cents 13,81 as can be seen in the figure above.

The Cypriot operator has a very low MTR but this is due to the particular circumstances within this market. There are significant differences between the cheapest Mobile Termination Rates in Finland at €-cents 6,80 per minute and in Slovenia - €-cents 21,84 (for a non-SMP operator). Operators which have SMP in general have lower MTRs and this is attributed to regulation. There are 12 operators within five EU Member States where MTRs are below €-cents 10 per minute.¹¹

However, compared to fixed interconnection rates, mobile termination rates still remain very high. The fixed-to-fixed interconnection charges now stands at €-cents 1,39 per minute which is 11% of the price for fixed-to-mobile termination.

International roaming

The prices for international roaming are high despite initiatives last year to increase transparency of tariffs, including the launch of a consumer website by the European Commission.

There have however been encouraging signals from operators who have launched a number of tariff packages aimed at simplifying roaming tariffs thus making them more transparent and easier to comprehend.

When launching these tariff packages, operators are mainly targeting their heavy users since they are the ones who might switch to new technologies to reap cost savings. New mobile handsets to be launched shortly will be equipped to make VoIP calls from Wifi hotspots. This may put significant pressure on mobile operators to react by decreasing their prices.

Pressure on international roaming tariffs is set to come from further transparency measures, increased competition within the market as well as from new technologies.

NRAs are still in the process of analysing the market 17 relating to the wholesale national market for international roaming on public mobile networks.

¹¹ Operators in Cyprus, Finland, UK, Sweden and Latvia

BROADBAND

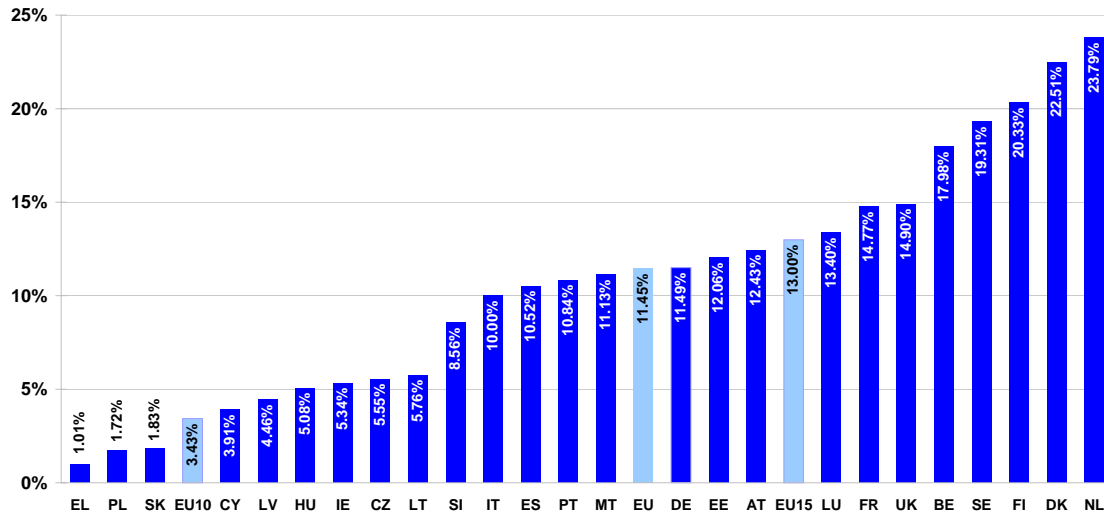
Key trends

- Broadband continues to grow rapidly and the penetration rate has reached **11.5% of the EU population (almost 53 million lines)**, up from 7.3% last year.
- However, the **gap between EU Member States has increased** as a result of uneven broadband growth across the EU.
- Broadband is rapidly replacing dial-up. In some EU Member States **dial-up access already accounts for less than half** of total fixed Internet access.
- Although still lagging behind, broadband take-up is growing faster in the EU than other regions such as South Korea and the US.
- Competition is driving increased broadband penetration. **New entrants now have 49.8%** of the market up from 44.3% last year.
- **DSL** has moved further ahead as the leading technology, followed by cable.
- **Local Loop Unbundling (LLU) has become the main access option** for alternative ADSL providers.
- Consumers are benefiting from **lower prices, higher speeds** and a variety of broadband offers due to increasing competition in the broadband market.
- **New services are expected to boost broadband demand** and contribute to the current migration from dial-up to broadband.
- **Effective regulation** is crucial to broadband rollout. NRAs play a key role not only through price regulation but also by enforcing the implementation of wholesale remedies.

Penetration

There has been a further significant increase in broadband take-up with the number of fixed broadband access lines exceeding 50 million as of 1 October 2005. This equates to an average number of broadband lines added per day during 2005 of 52 565 compared to 38 477 new broadband lines per day during the previous year. As a result the broadband penetration rate has shifted from 7.3% for the EU average in October 2004 to 11.5% EU average in October 2005, while EU15 average has increased from 8.4% to 13%.

EU Broadband penetration rate, 1 October 2005

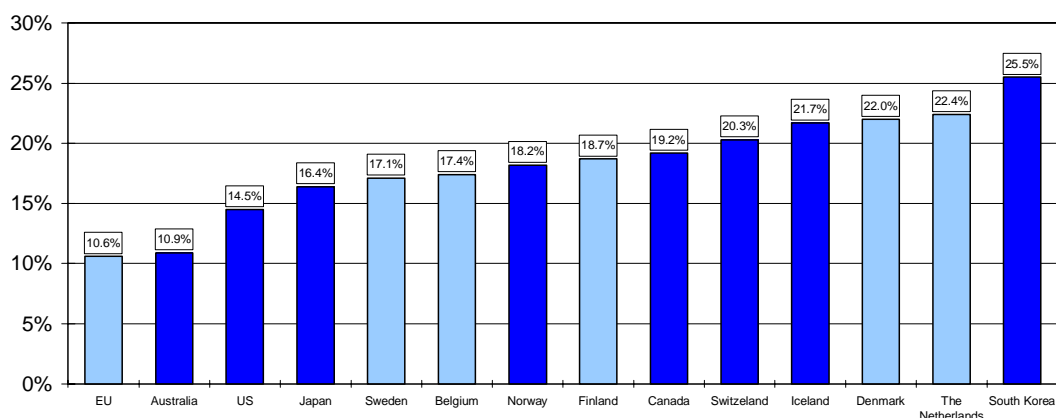


Growth has been uneven across EU Member States and the gap between the highest and the lowest has increased from 16.1 percentage points in October 2004 to 22.8 percentage points in October 2005. The same five Member States (the Netherlands, Denmark, Finland, Sweden and Belgium) still have the highest penetration rates. Among the new Member States, Estonia continues to perform well and Malta has seen a significant increase in penetration rate.

International Comparison

The EU still lags behind some other regions in terms of penetration rates, but growth rates indicate that Europe can close the gap with other countries, such as South Korea, where growth has slowed down indicating that it may be approaching saturation level. Again this year, countries like the Netherlands, Denmark, Finland, Belgium and Sweden are among the best-performing countries in the world in terms of broadband take-up.

International broadband penetration rate, June-July 2005



Country	Broadband Population Penetration Rate (June/July 2005)	Annual Increase in Penetration Rate (% points)	Source
South Korea	25.5%	1.26	OECD, June 2005
The Netherlands	22.4%	7.8	COCOM, July 2005
Denmark	22.0%	4.9	COCOM, July 2005
Iceland	21.7%	6.41	OECD, June 2005
Switzerland	20.3%	5.86	OECD, June 2005
Canada	19.2%	2.65	OECD, June 2005
Finland	18.7%	7.74	COCOM, July 2005
Norway	18.2%	6.89	OECD, June 2005
Belgium	17.4%	3.5	COCOM, July 2005
Sweden	17.1%	4.49	COCOM, July 2005
Japan	16.4%	3.73	OECD, June 2005
US	14.5%	3.48	OECD, June 2005
EU15	12.0%	4.4	COCOM, July 2005
Australia	10.9%	5.68	OECD, June 2005
EU	10.6%	4.1	COCOM, July 2005
EU10	3.1%	1.8	COCOM, July 2005

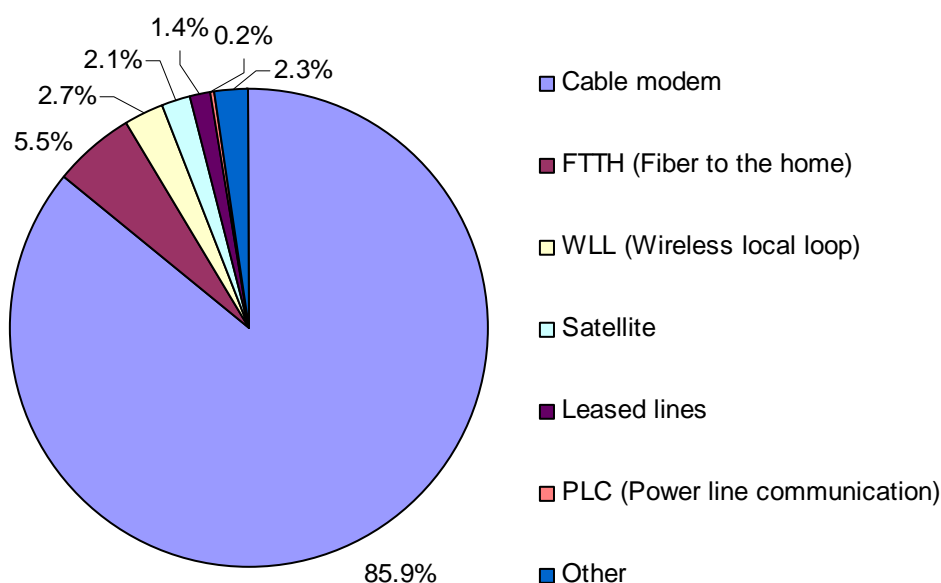
Broadband technology trends

DSL has increased its importance as the main technology at the expense of cable and other technologies. The DSL share of fixed broadband lines is 80.4% compared to 16.8% of lines provided by cable and 2.8% by other technologies (Fibre to the Home (FTTH), satellite, wireless local loop (WLL), leased lines, PLC etc). DSL lines grew by 61.5% from October 2004 compared to a more modest 39.2% increase in cable modem subscriptions.

However, although still at a low level of penetration, operators are investing in other non-DSL technologies especially FTTH and WLL. FTTH is the third most used technology in the EU and represents a relatively high proportion of retail lines especially in Sweden but also in Estonia and Lithuania.

In some Member States such as Lithuania, Ireland and Latvia, alternative operators are using WLL as an additional platform for broadband access. Use of WLL may increase in the future in a number of countries, such as Poland, Slovakia, and Malta, where WLL licences have recently been tendered. There are other alternative platforms such as satellite and PLC, which increase the range of options for providing broadband even if they represent only 0.45% of total broadband lines at present.

Non-DSL access lines



Even though there have been improvements, the EU still lags behind other regions when it comes to broadband speed. New DSL technologies such as ADSL2+ and VDSL¹² have started to be adopted following network upgrading in some Member States allowing access speeds of more than 25Mbps. Together with broadband take-up, increasing transmission speed is crucial to foster the introduction of new services.

Other wireless access technologies, like WiMAX, are being trialled and operators have started to develop commercial networks. WiMAX could be particularly interesting as a means of providing broadband services in remote or sparsely populated areas.

In some countries metro Ethernet, also called “apartment LAN” is becoming increasingly prevalent. This solution is used mainly in large apartment blocks where individual homes are connected by Ethernet cables to a shared dedicated switch which has a broadband link, which may be provided by different broadband technologies (mainly fibre, but also DSL, cable, WLL). It is popular in a number of countries including Finland, Sweden, Estonia and Latvia, and is also commonly used in Russia and South Korea.

There is a trend towards double (internet and telephony) or triple play offers (internet, telephony and audiovisual) on different broadband platforms. This in turn is leading to the introduction of new converged devices which enable access to mobile-Bluetooth or mobile-WiFi services for example depending on the location of the consumer.

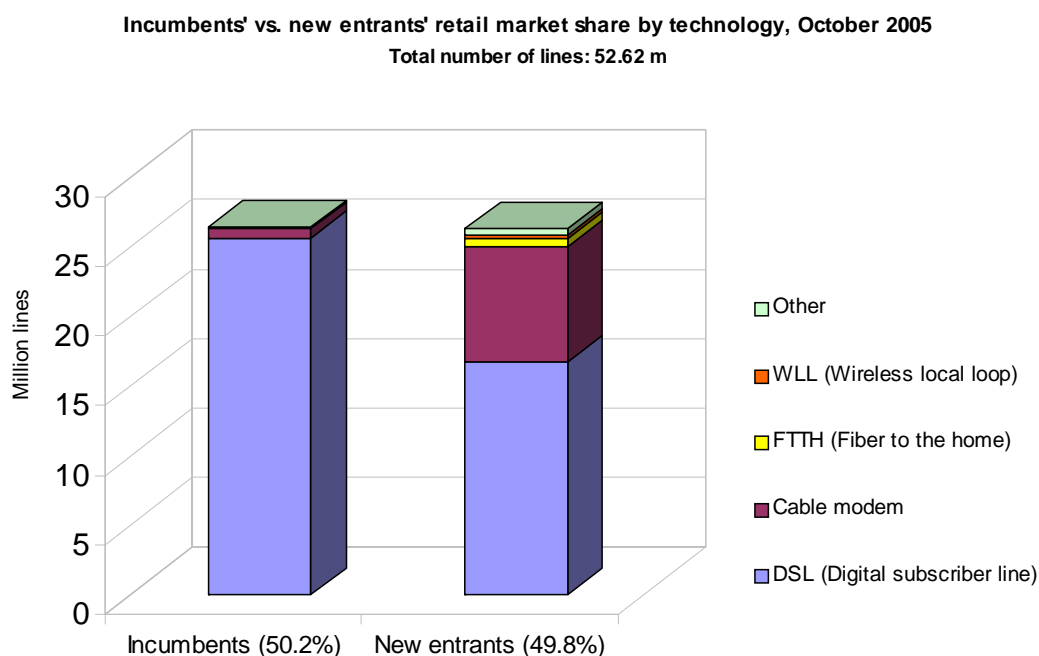
¹² ADSL2+ (G.992.5 ITU-T standard approved in 2003) and VDSL (G.993.1 ITU-T standard approved in 2004) are DSL standards that enable higher speeds.

The level of competition in the market also has an effect on transmission speeds, as well as on price differentiation. In general baseline speeds are increasing. In some countries alternative operators are offering higher speeds using LLU or alternative platforms although with a more limited geographical reach.

Competition and regulation

The pattern of regulation in all notified markets so far is that NRAs have determined that the relevant markets are not effectively competitive and they have generally imposed access obligations including bitstream and LLU¹³. Nearly half of the Member States have not yet reviewed these markets, even if a number of them have remedies in place during the transitional period. Specific regulatory and competition developments are discussed below.

The incumbents' broadband market share has steadily declined reaching 50.2-% from 55.7% last year for the EU, together with a fall in their share of the DSL market to 60.5% as of 1 October 2005. The situation regarding market share differs from country to country ranging from 25% incumbent market share in the UK to 100% in Cyprus.



While there are many factors that contribute to broadband rollout and take-up, competition is one of the most important. Countries with the highest broadband take-up (above 15% - Denmark, Netherlands, Finland, Sweden, Belgium) all have high roll-out of cable but they often also have well developed access regimes such as for LLU or bitstream access. Recent mergers and acquisitions in the cable segment may increase broadband infrastructure competition in some countries.

¹³ As of 31 December 2005, the Commission has assessed 14 notifications of market 11 (wholesale unbundled access) and 13 notifications of market 12 (wholesale broadband access) of the Recommendation on the relevant markets.

In other Member States, competition based on competing infrastructure is less developed but there are some notable successes where a combination of competing infrastructure and effective regulation have resulted in relatively high broadband penetration.

For example, in France, where DSL lines represent 94% of the broadband market, competition has intensified based on a significant growth in usage of wholesale access to the incumbent's network. As a result, the incumbent's market share has decreased to 44.7% and broadband penetration rate has reached 14.8% in October 2005. In the UK, competition is based both on the cable alternative platform with 27.7% of the overall broadband lines, and on the resale incumbent's product (38.4%) even if this wholesale option only permits the replication of the incumbent's DSL product.

Wholesale access to the incumbents' networks

There has been a significant shift in the pattern of access to incumbents' networks over the year. **New entrants are gradually shifting from resale and bitstream access towards local loop unbundling in the provision of broadband services.** The trend towards integration (such as triple play) as well as the ability to provide even greater differentiation is making unbundling a more attractive option for new entrants.

Local loop unbundling (fully unbundled lines and share access) is now the main wholesale access for new entrants, followed by bitstream. Resale continues growing mainly by the increase in countries like Germany where this access product was recently included, and the UK where more than half of the DSL lines are based on this option. Lines controlled by new entrants now represent 9.4% of the fixed incumbents' PSTN main lines compared to 5% last year.

Perhaps the most striking feature is that **shared access lines have tripled over the year.** Many operators may have a preference for shared access partly because the unbundling process is much easier and because they can provide VoIP as an alternative to switched voice. There are a number of Member States where the use of shared access has been a catalyst for broadband growth. This is the case for the **UK, France and Denmark**, where the number of shared access lines has increased dramatically following the reduction of unbundling fees by the NRAs showing that decisive regulatory action can yield positive results.

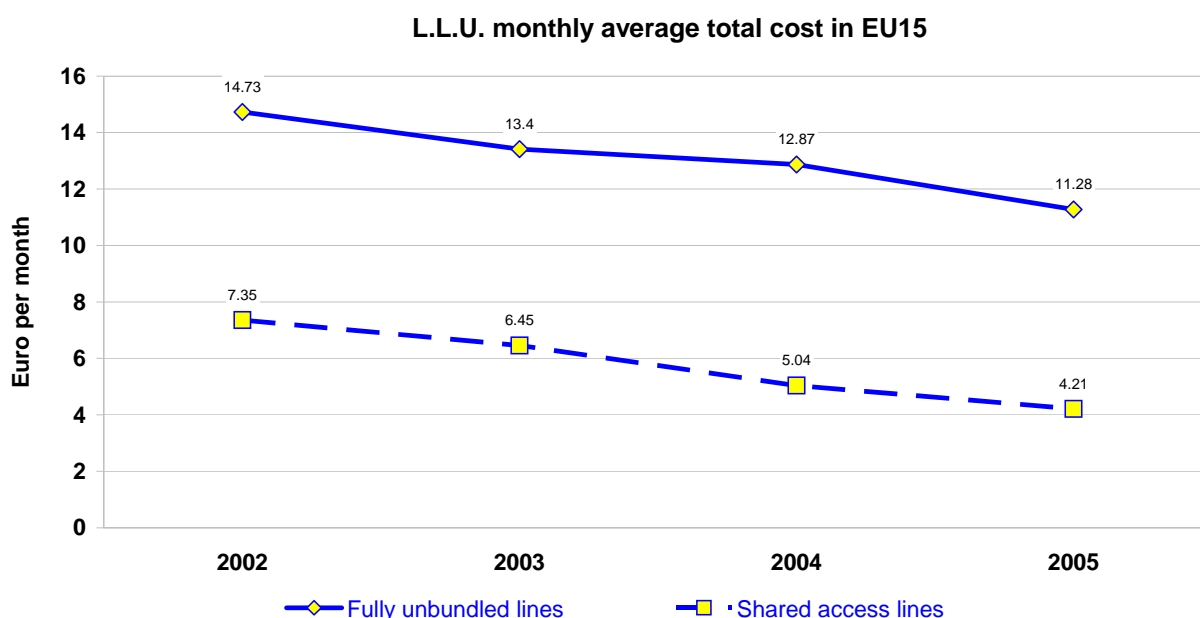
On the other hand in many of the new Member States, where the incumbent retains a relatively large share of the overall broadband market, the access regimes are less developed and new entrants are mainly providing broadband services through alternative platforms.

Some Member States are either considering or implementing a Naked DSL offer¹⁴. The Belgian NRA approved a Naked DSL offer in December 2004, which has been challenged by the incumbent. In Italy, the incumbent submitted a naked DSL proposal to the NRA in July 2005. In both cases the prices are much higher than normal bitstream offers. In France, the incumbent is also considering this type of offer. In Denmark, the NRA mandated naked DSL in July 2005, while this measure is not yet implemented. Even if this wholesale option is an interesting complement to LLU in certain cases, costing issues may limit benefit to consumers.

¹⁴ DSL broadband access provided without requiring PSTN voice service over the same copper wire.

LLU Pricing

There is a clear downward trend in price levels for both full unbundled and shared access lines, although there is still an uneven picture across the EU. There is also a trend towards homogenization of monthly rental tariffs for fully unbundled lines, after significant price reductions in some countries have brought prices closer to EU average.



There is a strong relationship between LLU pricing and the strategies adopted by alternative operators. For example, in Italy the monthly average total cost¹⁵ per fully unbundled line is the lowest in the EU and there are 1 163 195 fully unbundled lines in comparison with 110 975 shared access lines. In contrast in the Netherlands, which has the lowest monthly average total cost per shared access line, the figure for shared access at 588 247 is much higher than the number of full unbundled loops at 68 880.

The UK, Germany and Finland, countries where the regulators have been especially active in reducing tariffs, have undergone significant penetration boost.

Although there are other factors that determine new entrant strategies, attractiveness of tariffs is one of the main drivers. In line with this, all fourteen regulators that have notified market 11 of the EC Recommendation (wholesale unbundled access) have imposed some kind of price control and cost accounting obligation. In addition, regarding market 12 (wholesale broadband access), 11 out of the 13 regulators which notified this market have imposed price control and cost accounting obligation, mainly using retail-minus formulas¹⁶.

¹⁵ Total average monthly cost is calculated on the basis of the price of the monthly rental plus 1/36 of the connection fee, which is amortised over 3 years.

¹⁶ Germany has not yet notified remedies.

Implementation of remedies

The non-effective implementation of the remedies or other barriers will limit the development of competition in the market. The problems encountered in this area are very different, from pricing to delivery conditions. In Ireland, for example, the quality of the PSTN network in certain areas is limited; whereas in other Member States, such as Sweden, NRAs' decisions are suspended on the Courts hampering the efficiency of the regulatory process.

In many Member States, LLU has enabled alternative competitors to offer higher transmission speeds, even if the coverage is more limited than the incumbents'. However the lack of RUO definition or an incorrect implementation may delay LLU take-up.

Some NRAs have taken measures to improve the unbundling process regarding costs, supply times and possible penalties to be imposed on the SMP operator. In the majority of the countries alternative operators have raised some concern regarding lack of co-operation by the incumbent.

The evidence suggests that the availability of fit-for-purpose access products, appropriately priced, play a key role in stimulating broadband rollout many countries. The latest figures for example, suggest the LLU is growing considerably and is now the principle basis for competing broadband access. At the same time there are still a significant number of countries where not all wholesale access products are available or implemented. For example, many of the EU10 countries have only resale or bitstream and are only now implementing LLU agreements.

Pricing and non-price implementation issues are crucial factors in determining the strategies adopted by alternative operators and the penetration of broadband.

Broadband and competitiveness

Broadband is considered crucial to European competitiveness. In this context, the European Commission has been particularly active in promoting broadband developments. The EC adopted an initiative supporting the Lisbon 2010 goals, i2010, where broadband take-up is considered an important factor for the emerging digital economy and competitiveness. In addition, during 2005 the EC has issued a decision on Radio Local Area Networks (RLAN, commonly known as Wi-Fi), recommendations on Power Line Communications (PLC, broadband provision via electric power supply lines), and on price ceilings and delivery times for leased lines. In a Communication in May, the EC considered that so far only a small minority has a broadband connection and therefore it should not be subject to universal service obligations.

During 2005 the EC issued recommendations¹⁷ on price ceilings and delivery times for leased lines provided by SMP operators, which are very important measures in order to foster competition at wholesale level. However, the use of SDSL (symmetrical DSL) as a substitute for leased lines is increasing as SDSL is becoming more widely available at lower prices.

¹⁷ Commission Recommendation of 21 January 2005 (2005/57/EC) and Commission Recommendation of 29 March 2005 (2005/268/EC) on the provision of leased lines in the EU.

CONSUMER ISSUES

A key objective of the regulatory framework is to promote competition so that users derive the maximum benefit in terms of price, choice and quality of services. Equally, where competition has not developed, the framework seeks to ensure that the consumer is protected by, for example, ensuring access to universal services.

During 2005 increasingly competitive markets have yielded greater consumer benefits in terms of lower prices, greater choice of innovative services. These gains represent a continuation of advances made as competition has been rolled out. For example, since 2000 the EU weighted average charge of a 3 minute call has fallen by 65% and the cost of a 10 minute call by 74%. Prices for traditional services continue to fall, for example, the average price of a national call in Europe fell by a further 17% during 2005.

Almost 93% of European consumers now have a mobile phone, 47% are connected to the internet and 11.5% are now availing of high speed broadband access. As broadband prices fall more than 53,000 broadband lines were taken up every day in Europe during 2005. Intensifying competition and advancing technological change mean that the consumer has never had more options for availing of both traditional and new services. The rollout of 3G services, for example, has begun to take off in earnest offering consumers the possibility to access advanced data services while on the move. Now with 15 million subscribers, 3G is growing rapidly and is likely to see much higher penetration over the coming year as new attractive services are rolled out.

There are areas where the consumer gains described above have been slower to develop. International roaming charges for example are still high and, as the Commission and national regulators have pointed out, lack transparency. It was for that reason that the Commission launched its roaming website during 2005 with the aim of increasing transparency and consequently bringing more competitive pressure to bear. It is hoped that this initiative, which will be updated early in 2006, combined with the efforts of the national regulatory authorities will produce results. The Commission is watching developments closely and will consider options for the most efficient and timely pan-European action.

MONITORING AND ENFORCEMENT

Enforcing full and effective implementation of the new regulatory framework in electronic communications is essential for the sector's contribution to the overall Lisbon goals. Thus the Commission, performing its function as “guardian of Community legislation”, has formally opened more than 100 infringement proceedings under Article 226 of the Treaty since the date of application of the new regulatory framework. These concern all but two Member States (Denmark and Ireland). The Commission welcomes the continuing support from the European Parliament for its enforcement role.¹⁸

From the outset, the Commission took a rigorous approach to those Member States that failed to notify transposition measures in good time. Following a first round of enforcement action, which led to judgments of the Court of Justice against four Member States (Belgium, Greece, France and Luxembourg)¹⁹, all but one Member State had completed the transposition of the new regulatory framework within two years after its date of application. In the case of Greece, the Commission's services regret that no transposition took place in 2005. On the other hand, the Commission's services welcome the fact that all new Member States have completed transposition in a relatively short time after accession.

Consequently, the focus of enforcement has shifted from transposition issues to ensuring full compliance and application in all 25 Member States. In particular, the Commission services undertook to screen the national legislation notified so as to scrutinise its compliance with the framework, and in particular examined the major concerns expressed in the annex to the 2004 Report. As a result, the Commission has opened more than fifty infringement proceedings on grounds of incorrect implementation, concerning twenty-three Member States, and in most of these cases a reasoned opinion has been sent to the Member States concerned. These proceedings focus on the transitional regime, the independence and powers of the NRA, delays in reviewing the relevant markets, the designation of universal service provider and consumer issues such as number portability, directory services, the single European emergency number 112 and protection against spam. Other issues addressed are the absence of a RUO in the new Member States, the national consultation procedure, cooperation with the NCA in case of market review and the suspensory effect of appeals against decisions of the NRA. Finally, the Commission acted where the scope of SMP obligations was extended to non-SMP operators.

Although compliance has now been assessed to a large extent, the Commission will remain vigilant so as to ensure that measures relating to national markets do not jeopardise the completion of the single market in electronic communications, and will continue to open formal infringement proceedings where necessary.

¹⁸ Most recently see the European Parliament's Resolution on European electronic communications regulation and markets 2004 (2005/2052(INI) of 1 December 2005, based on the Toia Report of 14 October 2005 (A6-0305/2005).

¹⁹ See cases C-240/04 (10/3/2005) and C-376/04 (28/4/2005) for Belgium, C-250/04, C-252/04, C-253/04 and C-254/04 (15/12/2005) for Greece, C-31/05 (14/7/2005) for France, and C-236/04 (10/3/2005) and C-375/04 (28/4/2005) for Luxembourg.

In order to stress the importance of full compliance with the framework as well as for the sake of transparency for all stakeholders, the Commission decided to issue press releases at each stage of the procedure. These are available at the implementation and enforcement website of the Information Society and Media Directorate General²⁰ together with overview tables for all cases, which are regularly updated.

The enforcement action undertaken has already produced positive results. A RUO now exists in all 25 Member States and the 112 emergency number is accessible throughout Europe. In some cases national legislation has been amended relatively quickly in order to resolve transposition concerns, as was the case for spam regulation in Malta and Austria.

In line with the Commission Communication on better monitoring of the application of Community law²¹, the Commission services have also focussed on preventing formal infringement proceedings by providing general guidance on transposition requirements *inter alia* via the Communications Committee, as well as technical assistance, in particular to the new Member States.

²⁰ http://europa.eu.int/information_society/policy/ecom/implementation_enforcement/index_en.htm

²¹ COM(2002) 725, of 11 December 2002.

REGULATORY ENVIRONMENT

TRANSPPOSITION, STRUCTURES, PROCESSES

Experience since liberalisation of the telecommunications markets at EU level in 1998, and of the implementation of the regulatory framework supporting it, shows that progress towards sustainable competition and consumer benefits takes place in several phases. These phases (which follow logically from each other but can overlap in time) can be described as follows:

- The first phase is the transposition into national law of the requirements of the directives making up the EU framework.
- A second phase consists in the implementation by the national regulatory authorities (NRAs) of the detailed rules by which those requirements are given practical effect (in particular through the process of market analysis and the imposition of remedies provided by the EU framework).
- As the regulated products and services become established, a third phase can be identified in which NRAs look at the relationship between those products and services, to ensure that operators and their customers can migrate between them as competition and market forces direct.
- Finally, but equally important in the long term, a fourth key phase should occur in which NRAs (together with policy makers at EU and national level) identify and prepare for the regulatory challenges presented by changes in technology and demand. In this way they can ensure that the legal structures in place remain appropriate to the changing market conditions.

An overview of the state of the markets and implementation across the EU shows that this process is well established, but that individual Member States are at different stages along the road to achieving their common objectives.

Transposing the EU requirements into national laws

Transposition of the 2002 framework has now been substantially achieved across the EU25, with the exception of Greece, which has still not adopted transposition measures. In view of the importance of timely transposition, the Commission had taken legal proceedings against those Member States who were most behind in transposing. This resulted in judgments of the Court of Justice against Belgium, France, Luxembourg and Greece. Belgium and Luxembourg both notified their transposition measures to the Commission in June 2005, while France notified their final secondary measures in September 2005.

In some Member States (such as Belgium, Estonia, France, Latvia and Poland) secondary legislation is still needed to give full effect to the framework. The Commission will continue to maintain pressure on the Member States concerned to fill these legislative gaps as soon as possible.

Implementation by the NRAs

The second phase in the regulatory process identified above is largely represented by the market analysis and review of existing obligations which all NRAs were required to carry out by the Framework Directive. This process is described in more detail in the section on NRA's Decision Making below.

Establishing the key regulatory structures conducive to competitive markets

A comparison between the levels of growth and competition in the main segments of the communication markets across the EU25 (fixed voice, broadband and mobile) on the one hand and the regulatory structures put in place by the NRAs on the other, shows that the two are related.

In particular, a range of key regulatory products and services can be identified which provide the stepping stones towards growth and consumer benefits. These are in broad terms:

- fixed and mobile number portability,
- obligations for cost oriented interconnection,
- carrier selection and pre-selection, wholesale line rental,
- bitstream access, shared access to the local loop and full local loop unbundling.

Each of these regulatory outcomes is either mandated by the EU framework or a recognised means of addressing a lack of effective competition in the relevant markets. Only when effective competition is shown to have developed in the relevant markets in which these remedies have been applied, can the SMP obligations giving effect to them be relaxed or withdrawn.

Those Member States which have not yet succeeded in putting in place these key regulatory building blocks are unlikely to be able to ensure the full benefits of competition and quality of service which the regulatory framework is designed to bring about.

Number portability

It is worth noting in this regard that number portability (both fixed and mobile) is now operational in most Member States. However it is not yet fully implemented in the Czech Republic, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. There are also problems linked with the mechanisms in place to ensure the operational effectiveness of portability in relation to local loop unbundling in Ireland.

Interconnection regimes

An interconnection regime designed to allow non-discriminatory access to the incumbent fixed operator's network on cost-oriented terms is also well established in most Member States, although the development of accounting systems which can verify this cost-orientation (in both fixed and mobile networks) is an ongoing task of the NRAs. However, regulatory action has not yet ensured the conditions for effective interconnection in Estonia, Lithuania, Malta, Poland, Slovakia and Slovenia. As regards cost-oriented interconnection, cost

accounting systems for the fixed SMP operator have not yet been fully implemented in Luxembourg, Malta²², Poland and Slovakia. The Court of Justice recently condemned Luxembourg for its failure to ensure the independent certification of accounting under the old regulatory framework.

Carrier selection and pre-selection

Carrier selection and pre-selection is now available in all Member States with the exception of Slovakia (where carrier selection is implemented, but carrier pre-selection is expected to become available only in 2006), although in a number of other countries (Malta, Hungary, Portugal, Poland²³, and Slovenia) new entrants complain that the associated interconnection costs or other technical impediments are currently hindering the development of the service.

Wholesale line rental

Wholesale line rental is operational to date in Denmark, Ireland, the United Kingdom and Sweden. It is due to become operational in France from April 2006. It has also been notified to the Commission as a new remedy in Italy (in areas where there is no local loop unbundling) and is due to become available soon. There is legal provision for wholesale line rental in Austria, but only on economic terms that have so far limited its use. The NRA can mandate wholesale line rental in Germany, but until 2008 this can only be done as part of a bundle of connection services.

LLU and bitstream

For broadband services, bitstream access has not been regulated in the Czech Republic, Germany, Estonia, Greece, Luxembourg, Latvia, Malta, Poland, and Slovakia and the relevant regulation has been suspended by the appeal courts in Sweden.

The Commission is examining the extent to which local loop unbundling has been effectively implemented in Estonia, Lithuania, Latvia, Cyprus, Malta, Slovakia, Poland and Slovenia.

Cost orientation

As indicated above, one of the key tools without which competitors cannot access markets is the remedy of cost-orientation. In a number of Member States NRAs have been deepening and refining the methodologies by which SMP operators with cost-orientation obligations maintain their accounts. For example in the United Kingdom Ofcom has introduced changes to the regulatory accounting requirements applicable to the fixed incumbent operator, and has also published two major policy documents clarifying Ofcom's assessment of the fixed incumbent's cost of capital and the cost of its local copper network. Ofcom's findings are informing its ongoing decision making on remedies, and are a useful contribution to transparency and legal certainty both for the SMP operator itself and for third parties.

²² In an attempt to ensure cost orientation of fixed interconnection tariffs the Malta Communications Authority published a proposed statement of decision on 28 November 2005, proposing to reduce the average call termination rate of the fixed incumbent by 33% as from 1 January 2006. This is based on the results of the bottom-up cost model recently built by the MCA.

²³ Carrier selection and carrier pre-selection are not available for local calls in analogue switches in Poland – although they were due to be replaced by digital switches by the end of 2005.

France has also developed a valuation of the incumbent's copper local loop and cost accounting methodologies for full LLU, as part of its market review exercise. Other Member States where work has been undertaken to develop a more systematic approach to cost accounting include the Netherlands, with a planned move to the embedded direct cost model, Italy (where the NRA verified cost accounting for both fixed and mobile SMP operators) and Malta, where there has been significant progress on the development of a bottom up cost model for fixed interconnection.

Sweden was among the first to develop a LRIC accounting methodology for mobile operators with SMP cost-orientation obligations. On the other hand cost accounting systems and methodologies are still undeveloped or lack transparency in a number of Member States, and this is a key area where commitment from NRAs is essential. In commenting on the notification from the Spanish NRA of its review of the broadcasting transmission market, the Commission noted the absence of cost orientation requirements on the operator found to have SMP.

Similarly, tariff rebalancing still remains an issue in a number of the new Member States (the Czech Republic, Latvia, Malta and Slovakia).

Addressing the relationship between regulated products

Once the key regulatory remedies are in place at national level, regulators should seek to ensure that there are no unnecessary barriers to the migration of end-users between regulated products.

This involves re-evaluating the comparative pricing of the different regulated wholesale products to ensure that there is an incentive for alternative operators to invest in building out their networks as close as possible to the end-user, while at the same time not leaving them stranded with a product which becomes commercially untenable.

It also involves focussing on the practical processes by which customers can be migrated from one regulated product to another with the minimum of disruption to the end-user. In this regard regulators need to ensure that the obligations are implemented in such a way that they do not discriminate as between competing operators and the dominant operator's own retail business.

For example the regulator in Spain has addressed migration issues between different access products and, in particular, taken measures to facilitate the porting of numbers in conjunction with local loop unbundling. In Italy the migration process is also strictly regulated, although some problems remain with regard to migration to shared access for the incumbent's customers.

Part of this process can also involve the lifting of regulatory obligations where competition has become effective.

Taking a pro-active approach to future regulatory challenges

One of the prime objectives of the EU framework is that it should be capable of adapting to changes in the market, such as technological developments, changes in consumer demand and increased competition. One of the prime mechanisms to achieve this objective is of course the market review process, which is intended to be conducted on a periodic basis that reflects the rhythm of change in the relevant markets.

The legal framework itself needs to be kept under review to ensure that existing rules do not impede the development of new products and services. Voice over IP is an example of where some regulators, in conjunction with discussion at European level, have addressed such development.

Guidelines on the regulatory treatment of VoIP services have been issued or are under discussion in quite a number of Member States, including Belgium, Germany, Ireland, Spain, Italy, Luxembourg, Austria, Finland and the United Kingdom. In some cases, numbering plans have been adapted to ensure that these services can develop without undue legal constraints, such as by making geographic numbers, as well as dedicated numbering ranges, available for VoIP services (e.g. in Luxembourg and the United Kingdom).

The demand for converged services which cross the traditional divide between fixed and mobile networks has also resulted in the NRAs in Denmark and the United Kingdom exploring the possibilities for introducing fixed to mobile number portability.

At the same time as ensuring that there are no unnecessary legal constraints on new services, NRAs have the equally important task of ensuring that existing regulation is not circumvented through the introduction of new technological solutions that were not previously envisaged. Fixed network operators across the EU are investing or planning to invest in next generation networks which are likely in due course to replace the traditional PSTN networks. Unless regulators establish well in advance the approach they will take to the regulation of those NGNs and communicate their thinking to the market in good time, the resulting legal uncertainty may have a dampening effect on investment by incumbents and new entrants alike.

Transparency

Underpinning all these different phases in the implementation process is the need for transparency on the part of the national authorities, both for end-users and market players, so that they can make informed decisions. In this regard, the principle enshrined in the framework that public consultation should occur at national level on all important regulatory decisions seems to be well established across the Community. However, in a number of countries (such as Lithuania and the Netherlands) market players have expressed concern about a lack of transparency as to how comments made during national consultation have been taken into account.

The Commission considers that the websites operated by the NRAs are a key tool for promoting transparency in the regulatory environment and consumer awareness. This applies in particular to the public consultation process required by the EU framework, according to which there should be a single access point for all national consultations. However, an NRA's website can provide much more than merely access to consultations. It can act as a guide to the consumer, offering comparative information about pricing and marketing practices; it can

also provide easy access to information about the legal framework and obligations currently in force.

One example of the benefits of a well-designed website can be seen in that provided by Portugal's regulator, Anacom. Another is the website provided by the Irish regulator, ComReg, which includes price comparisons for mobile users, which is thought to have had a beneficial effect on prices.

Reflecting convergence in regulatory structures

With the advent of converged broadband services combining telephony, internet access, broadcasting and other audio-visual elements in a single offer, the traditional separation that has existed in many Member States between the regulatory structures applicable to the telecoms and audio-visual worlds becomes less and less logical. While most Member States have established converged regulators with competence across the electronic communications sector, others have maintained separate regulatory bodies. This can create complexity and uncertainty in the regulatory process, particularly where competences overlap or where different agencies are responsible for the regulation of broadcasting markets, for example with regard to reviews of the broadcasting transmission market.

A particular example of this is Belgium, where the language communities share competence with the federal state as regards broadcasting, including the transmission of broadcasting content over electronic communications networks. The issues of competence have been ruled on by the national courts, and the failure to implement a workable *modus operandi* between the competent authorities, essential to enable the relevant market reviews to proceed, has led to legal uncertainty and delay. The issue of separate regulatory competences for broadcasting transmission also arises in e.g. Austria and Poland. In Spain there is provision for five different regulatory authorities, which creates a degree of complexity for market players.

Ensuring non-discrimination when dominant operators bundle products to meet demand for converged services

As convergence becomes a reality and operators who are dominant in the relevant markets increasingly seek to retain or acquire their customers by offering packages of products serving all their communication needs (often involving discounted or free calls), it becomes increasingly important that the regulatory structures in place enable alternative operators to compete on an equal footing. This means ensuring that regulated wholesale access products ensure genuine non-discrimination between alternative operators and the dominant operator's own retail business.

NRAs' Independence

The concept of a national regulatory authority whose independence from commercial interests in the sector is assured is now well established across the EU. However, some issues remain in relation to the separation of ownership and regulatory functions in Belgium (two ministries in charge of telecommunications, of which one is also in charge of public undertakings including the incumbent), Cyprus, Slovakia, Slovenia and Hungary.

It is equally important that the impartiality and objectivity of the day to day decision making of the regulator be beyond doubt, without suspicion of undue political influence being applied to shape its decisions. This is at least an open question in Poland (where the NRA has recently

been reconstituted by the government), in Malta (where there is provision for the Minister to transfer competences back from the NRA), in Slovakia (where the NRA is still financed from the budget chapter of the Ministry) and in Slovenia (where the Director's appointment has been on a temporary basis for nearly a year). The Commission is considering these issues in the light of the requirements of the regulatory framework.

NRAs' Powers

Some concerns remain as to limitations placed by law on the full range of powers and discretions which the framework envisages for national regulators and which the Commission is examining.

For example infringement proceedings are open with regard to legal limitations on the power of the NRA to impose remedies in certain markets in Germany and Finland and as a result of the fact that in Estonia an amendment to primary legislation is required if the NRA is to define markets which differ from those in the Commission's recommendation. The possibility in Ireland, Malta and the Netherlands for the Ministry to issue directions as to the exercise of NRAs' powers is also an issue which the Commission services are keeping under review.

In addition, the Commission services are examining a possible limitation on the power of the NRA in Denmark to set the terms of an access agreement where the parties do not agree (at least until completion of the relevant market review); and a lack of data collection powers in Poland.

In Belgium the law establishing the statute of the IBPT provides a possibility for the implementation of some of its decisions to be suspended by decision of the Council of Ministers (when they are contrary to law or the general interest).

Any amendment to the German electronic communications law which may be made to reflect the agreement reached between the governing parties after the recent general election, which would seem to imply that new markets created as a result of investment in broadband networks "shall be exempt from regulatory intervention for a specified period of time", will be examined carefully by the Commission's services to establish whether the powers of the NRA are constrained in a manner contrary to the EU framework.

Enforcement

However, the most common concern across the EU about the powers of the NRAs seems to relate to perceived limitations on their power to enforce their decisions. This was often due to legal limits on the level of fines that can be imposed or are ultimately paid (e.g. in the Czech Republic, Ireland, Greece, Estonia, Italy), as well as the frequency of legal challenge and the length of appeal procedures (for which see further below). The Irish NRA must seek a court ruling for even the low level of fines allowed to be imposed. In some countries operators have simply refused to comply with decisions of the regulator, with as yet no clear prospect of enforcement action. In Greece the payment of all fines imposed by the NRA has been suspended on appeal, and no appeals have yet been resolved.

It is therefore important for Member States to ensure that the financial penalties that can be imposed by NRAs for non-compliance with their rulings are set at a level that reflects the nature of the breach and can act as a genuine deterrent. Equally, while always safeguarding the operators concerned against unjustified or disproportionate enforcement action, the

administrative procedures for the imposition of penalties must be such that their purpose is not frustrated by legal challenge.

NRAs' Decision making (Market analysis and other)

Market analysis and review of obligations

The process of market analysis and review of obligations is now well under way and has resulted in a significant volume of notifications to the Commission under Article 7 of the Framework Directive²⁴. Finland was the first and (at the end of November 2005) the only Member State to have notified the results of its reviews of all 18 of the relevant markets contained in the Commission's Recommendation²⁵.

However, a number of other Member States (France, Ireland, the Netherlands, Austria, Portugal, Slovenia, Sweden, the United Kingdom, Germany, Hungary and Denmark) have completed the large majority of their initial market reviews. On the other hand, a significant number of NRAs have completed only a part of the market reviews required and no notifications had been received by the Commission from Belgium, the Czech Republic, Estonia, Cyprus, Latvia, Luxembourg and Poland by 15 November 2005.

In some cases this has been attributed to the delays in transposing the framework into national law. In others it can be at least in part attributed to a lack of resources on the part of the NRA, be it in terms of the requisite expertise or staffing resources. For example the move of the Spanish NRA from Madrid to Barcelona has resulted in the loss of half of its staff. The NRA in some Member States has sought to overcome these problems by drawing on the expertise of outside consultants to help them conduct the market analysis. Once the first round of market analysis and review of regulatory obligations has been completed, the NRAs' tasks should become easier, both as a result of the experience gained and the procedures put in place.

The Commission considers that timely completion of the initial market review process is essential if the objectives of the framework are to be met, and therefore launched infringement proceedings in October 2005 against those Member States in which the NRA had not made any notifications to the Commission in this regard by that time.

In a number of Member States the length of time that has elapsed since entry into force of the 2002 framework without completion of the market reviews has resulted in legal uncertainty and even legal vacuums, as transitional provisions put in place to ensure continuity between the regulatory situation before and after implementation of the 2002 framework have either lapsed (Sweden, Slovenia and Estonia, the latter at the end of December 2005) or become of increasingly uncertain application.

²⁴ See separate Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Market Reviews under the EU Regulatory Framework – Consolidating the internal market for electronic communications, COM(2006)28, of 6 February 2006

²⁵ Commission's 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, 8.5.2003, p. 45

Timing concerns relating to the conduct of market review exercises may not just relate to delays in starting the process, but also to the length of time that can occur between the start of an individual market review (for example by the launch of data collection) and its completion. In extreme cases the length of the process could call into question the continuing validity of the data on which the NRA's conclusions are based. For example in Poland the data collection exercise was finalised in principle in mid 2005, although SMP decisions with regard to a number of markets are not expected before the end of 2006. In France, the regulator withdrew its notification to the Commission of its analysis of the market for access and call origination on public mobile telephone networks, as a result of the development of the commercial activities of mobile virtual network operators which took place since the launch of that review.

Another factor which can contribute to the length of the market review process is the division of the process into separate stages, each of which may be subject to separate consultation and appeal procedures. This occurs not only where separate bodies define the relevant markets and then analyse them (such as in Poland, Austria and Finland), but also where the same body carries out discrete exercises in defining the market, assessing the effectiveness of competition within it, and then finally determining the remedies that are appropriate where dominance has been found.

General obligations on operators

The framework provides (in Article 5 of the Access Directive) that NRAs should be empowered to take action where necessary to ensure and encourage adequate access, interconnection and interoperability of services, by imposing appropriate and proportionate obligations on undertakings even in the absence of operators with SMP. The European Commission already expressed the view in the 10th Report that that this 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.. However, over the last year NRAs' recourse to this power to impose obligations on all operators has been limited.

Nevertheless, some transposition and application cases relating to Article 5 have arisen. An infringement proceeding was launched against the Slovak Republic as its national legislation does not empower the NRA to impose remedies on undertakings without SMP, except where a dispute between undertakings has arisen. The Commission has also opened an infringement proceeding concerning lack of transposition of Article 5 of the Access Directive in Poland.

Further scrutiny of the transposition measures in Latvia will be necessary to verify whether the NRA has the powers and duties required by Article 5 of the Access Directive. The Commission's services are also examining the situation in Slovenia, where there is a legal obligation on all operators of public communications networks to negotiate access agreements, in addition to the obligation to negotiate interconnection.

Urgent measures

The Framework Directive contains a mechanism²⁶ which in exceptional circumstances allows NRAs to adopt provisional measures if they are proportionate and there is an urgent need to act in order to safeguard competition and protect the interests of users. This has been used by only a small number of Member States so far (Germany, Italy, Hungary, Spain and the United Kingdom).

The Commission would like to ensure that provisional measures are not taken simply in order to avoid the obligations on NRAs related to market analysis (including consultation of interested parties). Indeed, the Commission has stressed that the taking of provisional measures should only occur in exceptional circumstances. Urgency caused simply by delays in the performance of an NRA's own tasks in accordance with normal procedural safeguards would not in itself be a sufficient justification.

Appeals

The success of a regulatory system is not only defined in terms of the efficiency and timeliness of intervention by the national regulatory authorities themselves. Indeed the effectiveness of an NRA's decision can only be judged once it has taken effect and been complied with, and this is often dependent on the legal process of appeal and enforcement that comes after the decision has been made.

Of course, any regulatory framework at EU level must respect the different legal and administrative traditions in the Member States. Nevertheless, perceived weaknesses in the appeal systems in a large majority of Member States are a key factor tending to undermine the effective application of the regulatory framework across the EU.

A fundamental issue relates to the length of appeal procedures, which has been noted as a factor in Belgium, Estonia, Spain, Germany, Slovakia, Portugal, Ireland, Malta, Poland, Finland, Luxembourg, France, Hungary, Greece, the Czech Republic, Sweden and the United Kingdom. Even when not combined with delays in earlier stages of the implementation process, such as transposition or market reviews, the effect of protracted appeals can prevent the benefits of an effective regulatory framework feeding through to consumers for years. In some cases, even once the appeal body has issued its judgment on the appeal, it may simply refer the case back to the NRA, whose revised decision may in turn be appealed by the same or a different interested party.

In addition, in a significant number of Member States appeals against the NRA's decisions, particularly (but not only) by the fixed incumbent operator, tend to be systematic. This reflects the reality that an operator with the resources to maintain legal actions across a wide front has an interest in postponing wherever possible the application of obligations whose cost far outweighs the cost of litigation. The practice of systematic appeals has been seen particularly in Belgium, Greece, Estonia, Italy, Cyprus, Hungary, the Netherlands, Poland, Slovakia and Sweden.

²⁶ See Article 7(6) of the Framework Directive

Under the EU framework an NRA's decision should not be suspended pending the outcome of an appeal, unless decided otherwise by the appeal body²⁷. Austria has announced its intention to amend its legislation to remove the suspensory effect of an appeal against a decision of the regulator, following the launch of a proceeding by the Commission. Poland has also announced its intention to amend its legislation to the same effect. In Belgium legal actions against the NRA before the Court of Appeal of Brussels have suspensory effect when directed against a decision imposing a fine or ordering suspension of commercial activity. In a number of Member States (Sweden, Denmark, Lithuania and Finland) the appeal body has been seen to suspend decisions (in accordance with national practice) on a regular basis, in some cases (such as Sweden) without any reasoned decision explaining why. The systematic suspension of appeals can also add to delay and legal uncertainty.

Even where a regulatory decision (e.g. following a market review) is not formally suspended pending its appeal, the ongoing process of implementing its obligations and refining its terms may still be hampered by the existence of the appeal, since the legal uncertainty surrounding the obligations concerned will inevitably sap the willingness of interested parties to invest in their application. The development of regulated products or services can thus be frozen by the appeal process in any event.

Another issue which has been raised in a number of Member States is the fact that an appeal against an NRA's decision on the merits of the case often involves detailed consideration of questions of fact which can be extremely complex in both economic and technical terms. Appeal bodies which have a general, non-specialised remit may find it difficult to handle this work-load, particularly if confronted with systematic and frequent appeals. In some Member States there are limitations on the power of appeal bodies to consider the merits of a case, for example in Malta or (in the case of Ministerial ordinances defining relevant markets) Poland.

In some Member States smaller undertakings indicate that the cost of appeal procedures (in terms of both finances and staff) can be a heavy burden and may act as a deterrent.

The EU Framework requires that any person who is "affected by a decision of a national regulatory authority" has a right of appeal. However, in Sweden the right to appeal against a decision such as imposition of SMP remedies seems to be limited to the undertakings to which the decision is addressed. The Commission's services are examining whether such limitations satisfy the requirements of the EU framework. The question whether parties other than the addressee of an NRA decision have the right to appeal against it has also been referred for a preliminary ruling to the European Court of Justice by the Austrian administrative court.

Dispute resolution

Similar issues to those affecting appeal mechanisms also arise in relation to the dispute resolution mechanisms administered by the NRAs. In particular, there is a common concern in a number of Member States that dispute resolution procedures can take a long time. Although the EU framework provides a time limit of four months within which, except in exceptional circumstances, NRAs should resolve disputes with a binding decision, the lengthiness of dispute resolution processes in Estonia, Italy, Austria, Poland and Sweden has been the subject of comment. It is reported that in Finland some operators are choosing not to refer

²⁷ See Article 4 of the Framework Directive

matters to the NRA or competition authority, due to the perception that action would not be timely in the context of the subject matter of the dispute. In France the NRA has been concentrating on completing its market analyses under the new framework, and therefore appears to be less willing to intervene in disputes relating to obligations under the old framework. In Italy there is a perceived lack of effectiveness in the dispute resolution process, leading some operators to prefer to refer matters to the courts.

In some countries there is also a perception among operators that the NRA is reluctant to pursue formal dispute resolution procedures, preferring to encourage voluntary agreement between the parties. This is no doubt due, at least in part, to the burden on resources that these procedures represent and the complexity of individual disputes, and NRAs may see individual complaints as drawing scarce resources away from other regulatory activity of a more generally applicable nature. If NRAs have resources and internal structures which permit staff to be dedicated to dispute resolution, this may help develop the necessary expertise and mitigate the problems of conflicting priorities.

Spectrum management

The EU regulatory framework recognises the essential role of radio frequencies as a facilitator of electronic communications services. It therefore calls on the NRAs to encourage their efficient use and ensure their effective management and requires procedures for their assignment to comply with the principles of objectivity, transparency, non-discrimination and proportionality. It also recognises that the ability for market players to transfer radio frequencies between them can be an effective means of increasing efficient use of spectrum and meeting market demand.

Indeed, reform of spectrum management has been highlighted by the Commission as one of the strategic issues in the i2010 initiative launched in June 2005. In the Communication “A Forward-looking radio spectrum policy for the European Union - Second annual report”²⁸, the Commission presented its strategy for achieving more efficient spectrum management. A strong EU dimension is required in this area, since successful wireless products are increasingly predicated on large volumes and widespread consumer adoption, which imply common rules across Europe. An optimal mix of spectrum management models must be developed in a coordinated manner in Europe, taking into account underlying EU policies and regulatory principles

The Commission’s recent Communication on “A market-based approach to spectrum management in the European Union”²⁹, setting a framework for a dynamic and responsive use of spectrum, has specifically proposed a market-based model allowing more freedom to market players to decide how spectrum should be used, and lowering the barriers for access to spectrum rights by making possible the trading of the rights as one of the cornerstones of any reform of spectrum management.

The principles in favour of a more flexible approach have also received endorsement from the Member States acting within the Radio Spectrum Policy Group, when in November 2005 it adopted its Opinion on Wireless Access Policy for Electronic Communications Services

²⁸ COM(2005) 411

²⁹ COM(2005) 400

(WAPECS), which called for action across Europe to allow more flexible use of spectrum for mobile, broadcasting, fixed wireless and other electronic communications services.

Up to now, twelve Member States have adopted legal provisions in their national law to enable spectrum trading. The matter is also being consulted on in Spain. However for the time being spectrum trading has not become a common practice in any of the Member States, as illustrated by a number of non-exhaustive examples. In Austria assignees of radio frequencies can pass them on to third parties after receiving the authorisation from the NRA and there has been one case of such frequency trading so far. While tradability has been introduced in a number of spectrum bands in the United Kingdom, the actual exercise of trading rights has up to now been limited. A form of spectrum trading has also occurred in Poland in a limited number of cases.

As regards implementation of the radio spectrum harmonisation decisions adopted by the Commission³⁰ (three decisions concerning 79 GHz and 24 GHz automotive short-range radars and 5 GHz Radio Local Area Networks), the Commission services note that only approximately half of the Member States have thus far signalled complete implementation of all three decisions.

Rights of way and facility sharing

The EU framework requires public authorities to act on the basis of transparent, non-discriminatory and timely procedures, which should be open to the public, when deciding whether to grant electronic communication undertakings the right to install facilities. Where public authorities retain ownership or control of electronic communications networks or services providers, then those functions should be appropriately separated from the functions relating to granting the rights of way. This is particularly important given the trend towards local and regional authorities' participation in the rollout of broadband infrastructure in a number of Member States.

Furthermore, effective mechanisms should be in place in order to allow electronic communication undertakings to appeal to an independent body against decisions of authorities concerning rights of way. With respect to the imposition of fees for the right to install facilities, these should be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose.

Electronic communications undertakings and NRAs in 2005 reported a number of difficulties with regard to the implementation of these principles in the Member States. Non-transparent rules governing the granting of rights of way have been a persistent concern and these are presently being examined by the Commission services.

Issues relating to discrimination between operators have been raised in Cyprus (uneven treatment of the incumbent and alternative operators in the case of removal of masts) and

³⁰ Commission Decision 2004/545/EC on the harmonisation of radio spectrum in the 79 GHz range for the use of automotive short-range radar equipment in the Community, OJ L 241, 13/07/2004, p. 66; Commission Decision 2005/50/EC on the harmonisation of the 24 GHz range radio spectrum band for the time-limited use by automotive short-range radar equipment in the Community, OJ L 021, 25/01/2005, p. 15; and Commission Decision 2005/513/EC on the Harmonised use of radio spectrum in the 5 GHz frequency band for the implementation of Wireless Access Systems including Radio Local Area Networks (WAS/RLANs), OJ L 187, 19/07/2005, p. 22

Greece (preferential effects for the incumbent of an old law on public utility works). The transparency of procedures and criteria, and/or the timeliness of public authorities' decisions on the granting of rights of way have been reported to be a problem in Cyprus, Greece, Ireland, Italy and Spain.

Concerns of operators with regard to the structural separation between functions relating to granting rights of way and activities associated with ownership of local networks have been noted in the case of Ireland. In Spain, public authorities, who are simultaneously responsible for granting rights of way, are increasingly involved in the rollout of broadband networks (such as WiFi and fibre).

Transparency of fees, which should ensure the optimal use of scarce resources, has been reported as an issue in France (with the absence of the secondary legislation); and Portugal (local authorities are able to levy their own charges, once rights have been granted). The proportionality of fees charged for rights of way has been reported to be a concern in Greece (annual fees for radiation controls of masts and base stations); Italy (the level of charges imposed by authorities in the case of railways, highways and non-metropolitan public roads); and Malta (electronic communication operators pay high fees for installation and use of equipment over or under public roads, whereas public utilities companies are not required to pay fees for similar kinds of activity).

A legal base for the installation of mobile masts and antennae is lacking in Luxembourg, so that no permits can be issued, while existing permits have been ruled to be in breach of planning laws. In Greece a similar difficulty, exacerbated by a decision of the Council of State, has been noted: mobile operators have been unable to obtain new licences for masts and base stations and several existing facilities have been ruled to be illegal. An analogous situation is reported in some regions of Spain, where no new masts had been put up during the last few years, since a number of antennae were ruled to be illegal.

Although the rules governing rights of way are often of general application and not limited to the activities of electronic communications companies alone, the diversity of rules across Member States can lead to an administrative and financial burden on operators.. This burden has been diminished where action has been taken to simplify rules and procedures and to apply them consistently across a Member State.

One example of a national approach to the issue, is the United Kingdom, where operators can benefit from streamlined procedures if the infrastructure concerned meets certain pre-defined criteria. Also, operators have signed up to a voluntary code of practice governing local consultation on the siting of masts.

ISSUES RELATING TO THE TAXATION OF ELECTRONIC COMMUNICATIONS INFRASTRUCTURE

In the course of the last year questions relating to the imposition of taxes or charges on electronic communications infrastructure have arisen in a number of contexts. Operators are clearly concerned over the potential for a proliferation of financial burdens imposed on them as a consequence of their operation of an electronic communications network. This relates in particular to the taxation of mobile masts and antennas, but the issue can arise also in relation to any type of physical infrastructure.

In this regard the judgment of the Court of Justice of 8 September 2005 in joined cases Mobistar SA v Commune de Fléron (C-544/03) and Belgacom Mobile SA v Commune de Schaerbeek (C-545/03) has helped throw some light on the legal context for such taxes.

The Commission is carefully monitoring all cases where taxes on electronic communications infrastructure could potentially increase the burden on operators in a disproportionate manner. The Commission noted the withdrawal of a proposal by the Parliament of the Federal State of Lower Austria to promote the sharing of facilities for mobile communications by introducing a tax on those facilities, a measure which its services were in the process of investigating. Following critical reaction to the proposal both from market players and government bodies, the mobile network operators and the regional government agreed to an increased sharing of facilities and the government of Lower Austria announced the withdrawal of the law.

Other instances of national measures imposing a fiscal burden on operators by reference to the networks or services operated by them include the Maltese Budget Measures Implementation Act, 2005 introducing an excise duty that seems to be imposed on the charges levied by mobile operators from their services (the 3% excise duty is added to net charges for telephony services, raising the final prices to be paid by consumers) and the Spanish local business tax calculated in relation to mobile operators on the basis of the number of service users and the number of antennas.

CONCLUSIONS ON REGULATORY ENVIRONMENT

NRAs bear the major responsibility for ensuring that the objectives enshrined in the EU framework for electronic communications are met. The fundamental tasks of NRAs in this regard (reflected in Article 8 of the Framework Directive) are:

- to ensure and promote competition as a driver of increased choice and quality of service for consumers;
- to contribute to the development of the internal market and remove obstacles to the free movement of electronic communications services across the EU, and
- to promote the interest of citizens, in particular by ensuring the availability of an affordable universal service of a minimum specified quality and a high level of protection to consumers and other users of electronic communications.

The framework provides the tools to ensure that regulation is applied consistently across Europe and that competitive conditions are only constrained by *ex ante* regulation in markets where competition is not effective.

The regulatory structures and processes envisaged by the framework are being progressively put in place across the European Union and are providing the backdrop for increased competition, lower prices and greater choice and quality for end-users. However, while the European regulatory landscape is lit by common objectives and a common purpose, it finds itself at different stages of development in different Member States.

The task of Governments, NRAs and the bodies responsible for policy development at European level is to ensure that those national markets that lag behind are able to catch up with the leaders, and that regulation in all Member States continues to adapt to take account of changes in technology and consumer demand.

THE CONSUMER INTEREST

INTRODUCTION

The interests of consumers of electronic communications services, in particular in the shape of greater choice, lower prices and higher quality, lie at the heart of the EU framework. This is reflected both in the overall objectives which regulators are required to pursue (set out in the Framework Directive) and in the detailed range of end-user rights and corresponding operator duties which are enshrined in the Universal Service Directive and the e-Privacy Directive. These include the services which are required to be provided under the concept of ‘universal service’ and the other consumer safeguards set out in those Directives.

The Commission published in 2005 a Eurobarometer survey of consumer satisfaction in 2004 with services of general interest, including fixed and mobile telephony.³¹

UNIVERSAL SERVICE

Scope

Member States must ensure that a minimum set of services, defined at EU level, are made available to all end-users in their territory, irrespective of geographical location and at an affordable price, the level of which is left to the Member States to decide.

There are currently four services within that minimum set. These are (i) provision of access at a fixed location upon request, to enable users to make and receive local, national and long distance calls, fax communications, and to enable them to have functional internet access; (ii) the provision of at least one comprehensive directory and at least one comprehensive directory enquiry service comprising the numbers of all fixed and mobile subscribers who so wish; (iii) the availability of public pay phones over the whole territory; and (iv) putting measures in place which ensure that the disabled have access to the same services at an affordable price.

Designation

If the basic set of services currently within the scope of universal service referred to above is not being provided under normal commercial conditions at an affordable price, Member States may choose to designate one or more undertakings to provide them in all or parts of the national territory. The Member States may also designate different undertakings to provide different elements of the universal service. In doing so, they must ensure that the designation mechanism is efficient, objective, transparent and non-discriminatory and that no undertaking is *a priori* excluded from the process. The mechanism is thus left to the discretion of the Member States. In the majority of cases the details are either enshrined in national law or in each call for tender.

³¹

http://europa.eu.int/comm/consumers/cons_int/serv_gen/cons_satisf/eb219_report.pdf

Current designations

Some Member States have designated universal service providers under the new framework with short periods for review whilst in the majority of cases the incumbent is providing the universal service on a transitional basis.

The Commission services are considering whether the procedures applied have been transparent and non-discriminatory and that no *a priori* exclusion has ensued in several Member States, notably the Netherlands, where the fixed incumbent has been designated as the provider of the complete set of universal service obligations under a transitional regime, but without applying the procedure prescribed under national law; Cyprus, where the application of geographical and population coverage criteria could limit the choice of provider; Poland where the tender specifies that the designated undertaking(s) are obliged to provide all components of the universal service; Austria, where an 'expert opinion' was taken into account which came to the conclusion that directories and directory enquiry services could be provided by an alternative operator on a national basis, but only the incumbent could provide the other elements on a national basis.

The Commission is also looking into the manner in which the national legislation transposes the designation mechanism, particularly Lithuania, where the criterion for designation is that the undertaking selected must have significant market power, but as new secondary legislation is due to be adopted, it remains to be seen what, if any criteria will form part of the new procedure; Belgium, where it appears that only undertakings able to provide each service in all of the national territory can be designated, but yet again secondary legislation is due to be adopted.

French law limits the possibility of being designated to undertakings able to provide each service in all of the national territory. On the other hand, Hungarian legislation provides that only operators able to supply all four components of the universal service can participate in the call for tender. In Finland, an automatic designation of the operator with significant market power or highest market share in the fixed telephony access market has elicited concerns regarding the exclusion of other operators. In Portugal the incumbent was designated as the universal service operator until 2025 under a concession agreement. No tender was held, raising questions as to the transparency of the procedure and the fact that all other operators were excluded from the process. The Commission is currently addressing all the issues referred to in this paragraph by way of infringement proceedings.

Future designations

A number of Member States have not yet designated a universal service provider under the current framework. For example in Slovakia a call for tender was launched in August 2005 and it is expected that the universal service provider(s) will be designated in the course of 2006. In Estonia, the transitional regime lasts until the end of 2006. In Spain, a public consultation was launched at the end of 2005 with a view to identifying possible operators interested in providing the service from 2008 onwards. In Poland a tender has been launched in September 2005 and it is expected that the universal service provider(s) will be designated in the first quarter of 2006.

New designations will soon take place in some other Member States, as the current designations are limited in time. In Ireland, a public consultation will be launched in the first quarter of 2006 as the current designation ends in July of the same year.

Other approaches

Some Member States have decided not to designate a universal service operator on the basis that provision of the service is ensured by normal market conditions. This is the case in Luxembourg and in Germany. Others have taken one or more of the elements out of the set of universal service obligations. For example, Italy does not impose the obligation to provide a directory and a directory enquiry service on a specific undertaking as it considers that there are different services on offer in terms of availability, quality and at an affordable price. Sweden has recently designated the fixed incumbent as the universal service operator only for the ‘access at a fixed location’ element.

Despite the fact that each Member State is moving at its own pace regarding the timing of future designations, the Commission services note that for the moment all Member States have conferred the obligation to provide the universal service on their fixed incumbents and in this way could be indirectly strengthening their position on the market. Furthermore in most of these cases it has been deemed that there is no unfair burden as the incumbent reaps the intangible benefits. The Universal Service Directive, however, allows Member States to designate several undertakings to cover the national territory. This leaves the door open for Member States to designate several smaller regional operators to provide this service or parts of this service, if they so wish.

Financing

Ensuring universal service may involve the provision of some services to some end-users at prices that depart from normal market conditions. However, compensating designated undertakings in such circumstances need not result in any distortion of competition, provided that they are compensated for the specific net cost involved and that the net cost burden is recovered in a competitively neutral way.

If the NRA considers that the provision of the universal service represents an unfair burden on the universal service provider, the net cost must be calculated. This involves calculating the difference between the net cost for a designated undertaking of operating with the universal service obligation and operating without the universal service obligation. The costs and revenues, including the intangible benefits, must be taken into account³². The universal service provider must provide the NRA with its accounts which should then be verified.

Once the net cost is established, the Member States can fund the universal service either by using public funds (the general governmental budget) or via a sector-specific fund into which other providers of electronic communications networks and services contribute. It is worth noting that the sector-specific fund should only compensate for the obligations on the universal service provider which are specified in the Directive. Member States are free to impose other public service obligations but they must then finance them from the government’s budget. It is left to Member States to decide if all operators must contribute into this fund or only if operators with revenues above a set limit should do so.

³² Case C-146/00 Commission v France [2001] ECR I-9767

In the Commission's recent Communication on the revision of the Universal Service³³, the Commission questioned the appropriateness of this funding mechanism and invited industry to comment whether funding from general taxation would be preferable in the future.

In many countries, the legislation provides for compensation, but in the majority of cases no compensation has been paid because the provision of the universal service is not found to represent an unfair burden on the designated undertakings. In other countries, a decision concerning the financing of the universal service is taken during the tendering procedure. Thus one of the criteria of the tender is the ability to provide the service at the lowest possible cost and in this way avoid the set-up of a funding mechanism which could hinder competition.

The Commission services are examining the extent to which Belgium has failed to require, in its transposing legislation, that an unfair burden be proven before a funding mechanism comes into operation.

The Lithuanian law provides for a presumption that there is no unfair burden if the designated undertaking has a market share of at least 80%.

The Hungarian legislation has introduced a new method for assessing the need for compensation, taking into account any unfair burden. The designated operators consider that the method used is too complicated and regret the lack of guidance from the NRA. Concerns have also been raised by the market players in Austria, as the value of intangible benefits is difficult to establish.

As far as the Commission is aware, no designated universal service provider currently receives compensation from public funds. Only the designated undertakings in France and Italy receive compensation, but this is from a fund to which providers of electronic communications networks and services contribute. In both of these countries, it is the incumbent that provides the universal service. Consequently a transfer of funds from the alternative operators to the incumbent takes place.

DIRECTORIES AND DIRECTORY ENQUIRY SERVICES

Telephone users want to have ready access to a directory and a directory enquiry service which covers all subscribers (including fixed and mobile) who have not chosen to keep their numbers private. Given the growing number of subscribers who are choosing only to own a mobile phone, it is increasingly likely that mobile subscribers will want the option to have their mobile numbers included in a directory database. The exceptionally high listing of mobile numbers in the Scandinavian countries demonstrates that the inclusion of mobile numbers has become a normal part of how people can reach each other. Furthermore this could also be a result of the fact that individual privacy is highly respected in these countries and that there is no widespread abuse of consumer privacy or unwanted commercial contact.

³³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "On the Review of the Scope of the Universal Service in accordance with Article 15 of Directive 2002/22/EC" of 24 May 2005 (COM(2005)203).

The EU framework includes an obligation on operators to inform customers of their right to include all their details in a directory. Mobile subscribers must therefore be offered the opportunity to opt-in to a directory. Therefore and as a follow-up to its statements in the 10th Implementation Report on this issue, the Commission launched infringement proceedings against the Czech Republic, Greece, France, Cyprus, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia and the United Kingdom for failing to ensure the provision of at least one comprehensive directory and/or at least one comprehensive directory enquiry service including the numbers of all fixed and mobile subscribers who have not chosen to exclude their numbers. In the meantime the situation was remedied in Lithuania and the Commission was able to close the case.

A liberalised service

In a large number of Member States, the 118xx³⁴ number range has been introduced for directory enquiry services with several undertakings currently providing this service in each Member State.

However, in Greece and in Cyprus fears have been expressed that competition may be restricted by the fact that, in the transitional period in which both old and new numbers are in operation, the old directory enquiry service number only informs users of the incumbent's new number.

Another issue arises in Greece, whereby the regulator follows a dual opt-out/opt-in system (opt-out required for subscribers' inclusion in the universal service directory, opt-in required for inclusion in a commercial directory) which is not required by the regulatory framework but seems to be the result of current Greek data protection legislation. A dual opt-in/opt-out system may raise questions of discrimination in favour of the designated undertaking.

In Italy, the removal of this service from the universal service obligation in September 2003 led to the doubling of prices, while the complete liberalisation of this sector in October 2005 has not yet produced a significant decrease in prices. This has led to questions as to whether the services concerned remain affordable, in line with the requirements of the EU framework.

One of the main points of contention is the high price competing providers are requested to pay in order to obtain the comprehensive database. According to the judgment of the Court of Justice in the *KPN* case³⁵, the costs that an operator can charge for access to the data in the database must be cost-oriented and reflect the cost of making the data available. In Germany, a court has ruled that the incumbent has to pay back a considerable sum of money to one of its competitors who had paid an excessive sum for this data. The Spanish NRA has found a creative solution to the problem: the NRA, as opposed to the designated undertaking, controls the database and gives access to the database for free to any operator seeking it.

³⁴ The directory enquiry service access code 118, has been introduced by a CEPT/ECTRA Recommendation of 1997 (ECTRA/REC/(97)01).

³⁵ Case C-109/03 *KPN Telecom BV v OPTA* [2004] ECR 00000

EMERGENCY SERVICES

The ability for anyone in the EU to call the emergency services by using the same emergency number regardless of where he or she may be in the Union is one of the key safeguards provided by the framework. The single European emergency number, 112, can now be called free of charge from any telephone, fixed or mobile, in the EU. As a follow-up to the 10th Implementation Report, the Commission had started an infringement proceeding against Poland in March 2005 because fixed telephones were not able to dial 112 there. The situation was remedied in September 2005 and the Commission was able to close the case.

Denmark and the Netherlands have chosen to make 112 their sole emergency number.

An increasing number of Member States are also taking steps to upgrade the organisation of their emergency systems, with a view to providing a better service to those who call 112 in an emergency situation. The most common action is the creation of centralised Public Safety Answering Points or PSAPs, able to deal with virtually all emergency situations, whether they fall under the remit of the police, the fire brigade or an ambulance service. Finland has set up such centres and now boasts an impressive response time: it takes a maximum of 90 seconds between the reception of an emergency call and the dispatching of help. The Commission services believe that the establishment of PSAPs is a positive step towards improving the efficiency of emergency authorities' responses to phone calls. Valuable time can be gained through a single entry point for all emergency calls, which may in turn save lives.

The Commission services note the progress made as far as handling emergency calls in foreign languages is concerned, in the context of the ever-growing number of travellers in the EU. Possible solutions range from training emergency operators in foreign languages to relying on interpreters via a conference call mechanism. The Czech Republic has implemented an ingenious system, whereby an emergency operator is able to transfer a call to another centre which can assist in the language of the caller.

Operators are obliged to provide caller location information to emergency services, if this is technically feasible. In order to guide the Member States in the implementation of this requirement, the Commission issued a Recommendation³⁶ in 2003. In that document, the Commission stated that “public telephone network operators should, initiated by the network, forward (push) to public safety answering points the best information available as to the location of the caller, to the extent technically feasible. For the intermediate period (...), it is acceptable that operators make available location information on request only (pull).” The Commission services further stated in March 2005³⁷ that, from then on, they would regard the provision of caller location as technically feasible, at least under a “pull” mode, since it is available in a majority of Member States. The Commission services therefore expect that all Member States should be able to ensure that such information is made available to emergency services within a short timeframe. The Spanish regions have set up very advanced systems to locate calls from fixed and mobile phones, improving dramatically the quality of their

³⁶ Commission Recommendation on the processing of caller location information in electronic communication networks for the purpose of location-enhanced emergency call services, C(2003)2657, 25 July 2003

³⁷ Working document of the Commission services COCOM05-07, “Implementation of the single European emergency number 112: follow-up”, 18 March 2005.

emergency response. According to information available to the Commission services, caller location information is not available in the following countries: Greece (for mobile phones), Italy (for mobile phones), Cyprus (for mobile phones), Latvia (not before 2007 for all phones), Lithuania (for mobile phones), Luxembourg (for mobile phones), Hungary (for all phones), the Netherlands (for mobile phones only in 2007), Portugal (for mobile phones) and Slovakia (for all phones). The Commission services are examining whether this raises questions in the context of the implementation of the Directive.

In addition, the Universal Service Directive places the onus on the Member States to inform the citizens about the existence and use of 112. All forms of advertising used for this purpose (advertising campaigns, but also listing 112 in telephone directories and public payphones) should not only refer to 112 as one of the existing national emergency numbers, but also to the possibility for the citizens of the Member State to dial this number when travelling to other countries in the EU. Latvia launched a television programme dedicated to 112, and, as a result, the Latvian population's knowledge of 112 increased dramatically. Calls to 112 represent on average around 25% of all calls to emergency services in the EU 25, but this falls to 7.5% in the UK and 10% in Hungary. Therefore the Commission services believe that the European citizens' knowledge of 112 can be improved in the vast majority of EU countries.

Overall, the Commission is pleased to note that all end-users are now able to call 112 free of charge in the EU. Nevertheless, there is still some room for improvement. Member States are invited to explore ways of increasing the efficiency of their call centres, in particular by making use of caller location information from both fixed and mobile phones. Member States are further invited to step up their efforts in promoting citizens' awareness of 112.

NUMBER PORTABILITY

The ability of subscribers to retain their number when changing provider has had a very positive impact on competition for both the fixed and mobile markets. Spain has the highest number of fixed (1.71 million) and mobile (6.17 million) ported numbers in the EU, probably linked to the low prices for Fixed Number Portability (FNP) (€12) and Mobile Number Portability (MNP) (free of charge). FNP has played a key role in the development of direct access in Spain (11% of all subscribers as opposed to EU average of 7.8%), either via cable modem or via local loop unbundling. The growing success of MNP has exerted competitive pressure on all three mobile operators, which have responded by increasing handset subsidies and reducing on-net call prices.

However, there are still problems of availability in the following countries, against which the Commission has started infringement proceedings: the Czech Republic (MNP required to be available from 15 January 2006); Latvia (FNP and MNP expected to be available from 1 December 2005); Lithuania (fully operational MNP expected to be available from February 2006); Malta (FNP and MNP expected to be effectively available at the end of March 2006); Poland (FNP and MNP expected to be effectively available from January 2006); Slovenia (MNP expected to be available from 1 January 2006 and FNP expected to be available from 1 July 2006); Slovakia (FNP and MNP expected to be available from March 2006).

In addition, new entrants have reported specific problems concerning MNP in Greece (not functioning effectively), France (complex procedures) and Austria (pricing). In all three cases, the NRAs are currently taking action, which will hopefully have positive results on the wide-spread use of MNP.

In two countries (Denmark and the United Kingdom), the national authorities are considering whether to extend number portability to allow subscribers to retain their numbers also when they switch between fixed and mobile operators, in order to facilitate the development of new, converged services that can be provided over both fixed and mobile networks.

Number portability has had a considerable impact on the market (24.5 million mobile numbers have been retained until 2005). Its effect has been two-fold: not only does it help in enhancing competition, but it also is an instrument which facilitates consumer choice.

SINGLE MARKET NUMBERING ISSUES

The Commission services are concerned about difficulties that have arisen concerning the ability of end-users to access non-geographic numbers (for instance freephone or shared cost numbers, where the called party pays all or part of the total cost of the call) across borders.

Access to non-geographic numbers can help to ensure that the single market becomes a reality for the millions of European citizens who travel, live or work in other countries of the Union. Facilitating this movement contributes to economic and social development in the Member States and to the attainment of a true Single Market. So far, it appears that very few such numbers can actually be called from another EU country. This is particularly worrying as non-geographic numbers at national level are increasingly being advertised and used in order to contact government services, financial organisations and public utilities. The Commission service are also concerned that subscribers of Voice over IP services who have been allocated non-geographic numbers may not receive calls from other EU countries.

There does not seem to be any significant technical barrier to ensuring that non-geographic numbers can be accessed across borders, with one exception: Ireland would have to change the Dublin area code to enable cross-border access to other European freephone numbers. From an economic point of view, there is no reason why operators would not be able to agree on a revenue-sharing mechanism for a vast majority of non-geographic numbers. In this case, the normal charge made to the consumers should cover the costs of both parties.

The Commission services expect NRAs to intervene proactively in the coming months so as to ensure that this important issue is resolved and that calling such numbers from all Member States becomes a reality for European consumers in the context of achieving a true Single Market.

E-PRIVACY

The protection of personal data in general terms has been governed in the EU since the entry into force of the Data Protection Directive in 1995³⁸. The e-Privacy Directive of 2002 (hereafter the Directive)³⁹ specifies and complements the general Data Protection Directive. It provides for basic obligations to ensure the security and confidentiality of communications over EU electronic networks, including internet and mobile services. It also gives consumers and citizens a set of tools to protect their privacy and personal data. All Member States have established independent supervisory authorities overseeing the implementation of national laws transposing the Data Protection Directive. In some cases, these authorities also have the role of national regulatory authority for issues addressed by the e-Privacy Directive, according to which the Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by the Data Protection Directive (“the Article 29 Working Party”) shall also carry out the tasks laid down in that Directive with regard to the protection of fundamental rights and freedoms and legitimate interests in the electronic communications sector.

By the end of 2005, all Member States had notified transposing measures for the Directive except Greece, which for that reason has been taken to court by the Commission. The two main issues in 2005 in the area of privacy and electronic communications have been unsolicited communications and traffic data retention. The focus of the Commission’s infringement procedures against Member States in the privacy area has been on unsolicited communications, the grounds for which are detailed below. Progress during the year to prepare legislation on a European level regarding the mandatory retention of traffic data has warranted some examination in this chapter of the current state of implementation of such rules in the Member States.

Unsolicited communications (‘spam’)

The Directive requires Member States to implement measures to protect natural and legal persons against unsolicited communications, generally referred to as “spam”. Notably, Member States are required 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 (an “opt-in” system).

Divergences in the protection of the interests of legal persons in the transposition of the Directive’s provisions on spam – allowing for less strict rules than for natural persons – remain a potential practical concern for operators confronted with both categories of persons, especially since the distinctions between the two categories differ between Member States. The Commission services are examining these divergences.

At the end of 2005, the Commission had ongoing infringement procedures for incorrect or incomplete transposition of the Directive’s provisions on spam against three Member States. The Commission considers that Czech legislation does not correctly transpose the principle concerning direct marketing towards own customers. It also considers that Slovakia’s notified

³⁸ Directive 95/46/EC

³⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

legislation does not appear to transpose the same principle. While the Commission has been notified of a draft bill for Latvia's transposition of the Directive's provisions on spam, it is concerned that the transposition might still be incomplete.

The Commission indicated in its Communication on unsolicited commercial communications⁴⁰ that it would assess by the end of 2004 whether additional or corrective action was needed to combat spam. Since then, much effort has been made to fight spam. The user awareness level has increased, more and better technical solutions are available on the market, and spammers are being prosecuted also in those third countries which are the most important sources of spam. Self regulation initiatives in some Member States, building on the provisions against spam, are a welcome addition to the rules in the Directive. The informal Contact Network of Spam Authorities (CNSA) set up by the Commission meets regularly to exchange best practices and cooperate on enforcement across borders. The CNSA has recently adopted a voluntary cooperation procedure to facilitate cross-border handling of spam complaints. While the fight against spam has had effects, the threat is evolving. Spam is increasingly sophisticated, fraudulent (such as "phishing"), and more than before a vehicle for activities based on programmes like spyware⁴¹ and viruses (see below).

Additionally, the Commission is promoting a series of international cooperation initiatives against spam, including the OECD Task Force on Spam, where the Commission holds a vice-chair position, and in the International Telecommunication Union. The CNSA is liaising with enforcement agencies grouped in the London Action Plan, which gathers enforcement authorities from third countries such as the United States and Japan as well as industry.

Cookies and spyware

According to the Directive, users must be informed of the purposes of devices for storing or retrieving information such as 'cookies'⁴² and spyware (often spread via spam), and have the opportunity to refuse their use or installation on the users' terminal equipment.

Issues with the transposition of the Directive's provisions on cookies and spyware remain for Slovakia. Moreover, significant uncertainties remain as regards the practical implementation in Member States of the Directive's rules on cookies and spyware, and the enforcement of the implementing legislation. The Commission services are investigating this issue further.

In February 2005, the Framework Decision on Attacks against Information Systems was adopted, dealing *inter alia* with spam and spyware-related activities covered by the Directive. According to the Decision, spyware-related activities are to be punished with criminal penalties of up to 5 years imprisonment. In July 2005, the CNSA held a workshop dedicated to spam and spyware. The Commission is currently working on a Communication addressing these issues, to be adopted in 2006.

⁴⁰ http://europa.eu.int/information_society/topics/ecommerce/doc/useful_information/library/communication_reports/spam/spam_com_2004_28_en.pdf

⁴¹ According to the PTS report Spyware and closely related phenomena programs that, without the knowledge of the user, are installed or executed on the user's computer and which in various ways gather or disseminate personal information about the user.

⁴² Message given by a web server to a web browser, storing the message in a text file which is sent back to the server each time the browser requests a page from the server, with the main purpose of identifying the user in order to prepare the web page as appropriate.

Traffic and location data

Location data other than traffic data can be used for the provision of services such as emergency services, route guidance and commercial information. The Directive requires that such location data may only be used with the consent of the subscriber and that it should be possible for subscribers to temporarily block the tracing function. In Germany, not all details concerning the protection of such data appear to be transposed. The Commission has launched an infringement proceeding in this regard.

In November 2005, the Article 29 Working Party adopted an opinion on the use of location data with a view to providing value-added services. The opinion provides guidance on general conditions governing the use of location data with a view to providing value-added services including how to inform and receive consent, as well as specific conditions for implementing certain location services in the light of their purpose such as location of minors and employees.⁴³

Data retention for law enforcement purposes

The Directive limits the processing and storage of traffic data relating to subscribers by public communications networks or publicly available electronic communications services. In the wake of recent hostile acts targeting civilians, Member States have called for increased storage and use of traffic data for law enforcement purposes. Member States can adopt legislative measures extending the scope of traffic data retention in order to safeguard national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use, provided this is done in accordance with the general principles of Community law.⁴⁴

The proposal tabled by four Member States in April 2004 for a (“third pillar”⁴⁵) Council Framework Decision on Data Retention was considered by the Commission to be affecting Community law⁴⁶ and as such having the wrong legal base. The draft was also rejected by the Parliament in September 2005. On 21 September 2005 the Commission proposed a (“first pillar”) Directive for the prevention and prosecution of serious crimes such as organised crime and terrorism, notably amending the e-Privacy Directive.

According to information made available to the Commission services, the majority of Member States have not adopted data retention measures for law enforcement purposes. The maximum time for the retention of data in legislation notified to the Commission by Member States varies between three months and four years. In 2004, there was a trend in the EU towards longer traffic data retention periods for law enforcement purposes. A year later, it appeared that while some Member States already had legislation in place concerning the retention of traffic data for law enforcement purposes, many Member States were still considering such measures but were waiting for a Council agreement on an EU instrument.

⁴³ Also in relation to the general Data Protection Directive 95/46/EC

⁴⁴ Including notably principles referred to in Article 6(1) and (2) of the Treaty.

⁴⁵ Under Title VI of the Treaty on the European Union

⁴⁶ Article 47 of the Treaty of the European Union

The proposed new data retention requirements in Denmark – part of a draft order on anti-terrorism – were put on ice until there would be clarity about a proposal on EU level. In the United Kingdom, the legislative provision for data retention in the Anti-terrorism, Crime and Security Act provides for operators to enter into voluntary agreements with the government. In the absence of such agreements, the Home Secretary may impose a mandatory data retention period. However, no such period has so far been imposed. Italian regulation provides for one of the longest data retention periods in the EU – 24 months for telephone traffic which can be extended to another 24 months in the case of investigations of organised crimes or terrorism. The new anti-terrorism Law of July 2005 obliges operators to store all existing traffic data until 31 December 2007 and to identify all internet users at all times.

On 14 December 2005, the Parliament introduced amendments to the Commission's Directive. The amendments correspond to the position taken by the Council, and have been accepted by the Commission. The draft Directive could therefore be adopted in early 2006. According to the agreed draft, traffic data is to be retained for periods of not less than 6 months and for a maximum of two years from the date of the communication. European industry has expressed concerns including that the costs to be borne by the operators will be disproportionate in relation to the aims of the legislator.

DIGITAL TERRESTRIAL TV

The deployment of digital terrestrial television (DTT) services as well as household penetration varies considerably across the EU⁴⁷. Some Member States (i.e. Finland, Germany, Italy, Netherlands, Sweden and UK) have had commercial provision of DTT services in place for a few years, some have launched DTT recently (i.e. Belgium⁴⁸, Czech Republic, France, Malta and Spain⁴⁹), while others are considering introducing DTT shortly. However, a few Member States still do not have a definitive switch-over strategy setting out the details of the move from analogue to digital terrestrial broadcasting.

The Commission has recently published a Communication on accelerating the transition from analogue to digital broadcasting⁵⁰ and suggested the beginning of 2012 as a recommended date for analogue switch-off. Switchover is accelerating in the EU and two Member States have recently brought forward the deadlines for analogue switch-off. Overall, ten Member States have set a switch-off date of 2010 or earlier. For ten others the deadline is 2012. In Poland 2014 has been proposed but an earlier date may be possible depending on the market situation. It appears that four Member States have not yet committed to a switch-off date. In view of the diversity of Member States' approaches and progress to date, it remains to be seen if this date can be kept to in all cases.

⁴⁷ At the moment of writing of this report, DTT services were commercially available in Belgium (since 2004, penetration - 0.23%) Czech Republic (since Oct 2005, penetration - no data available), Finland (since 1999, penetration - 33.1%), France (since March 2005, penetration - 2.6%), Germany (since Nov 2002, penetration - 6.4%), Italy (since Dec 2003, penetration - 14.5%), Malta (since June 2005, penetration - no data available), Netherlands (since 2003, penetration - 2.16%), Spain (since 2000, penetration - after collapse of the pay TV provider in 2002 - is negligible), Sweden (since 1999, penetration - 10.7%) and UK (since 2000, penetration - 23.3%). Data on penetration after Datexis, as of September 2005.

⁴⁸ In Flanders

⁴⁹ It is indeed a re-launch after the failure of the previous pay-TV channel in 2002.

⁵⁰ COM(2005) 204 final

In order to encourage the transition to digital terrestrial TV, Member States have taken a number of initiatives to assist the development of the market. This in turn may raise concerns with regard to potential state aid. While recognising that digital switch-over may be delayed if left entirely to market forces and that public intervention can be beneficial, it is to be remembered that in accordance with Community law any state support must be based on objective criteria, address specific issues where the market does not provide solutions, be limited to the minimum necessary and avoid distorting competition unduly, particularly as between different delivery platforms. For example, the Commission has recently ruled subsidies for DTT in Berlin-Brandenburg to be illegal, as they did not meet the above-mentioned requirements and in particular favoured the terrestrial network over competing TV platforms, disregarding the principle of technological neutrality⁵¹.

In establishing the new digital environment for terrestrial TV, it appears that in virtually all Member States some kind of preferential treatment is given to the public service broadcasters (PSBs). This normally takes the form of reserved capacity for PSB, so that once they start broadcasting in digital format they can be sure that their content will be transmitted over DTT networks. Public service broadcasters can have a guaranteed listing on a multiplex operated by another party or, as has already taken place in several Member States including the Czech Republic, Finland, Germany, Italy⁵², Spain, Sweden and the UK, public service broadcasters were granted the frequency for a whole multiplex which (depending on the technology used and additional services provided) can encompass up to 6-8 channels⁵³. It appears that at least four Member States (Germany, Italy⁵⁴, Spain and the UK) decided to reserve radio frequencies for the assignment of at least one multiplex to current commercial broadcasters⁵⁵. The Commission services are examining what policy objectives are at stake and whether the preferential treatment of some broadcasters is proportionate to the objectives pursued.

It is worth recalling that when assigning frequencies for any purpose, including for the transmission of broadcasting content, Member States have to follow prescribed procedures and that individual rights of use of radio frequencies must be granted through open, transparent and non-discriminatory procedures, in accordance with the Authorisation Directive. It is the Commission services' understanding that this Directive allows Member States to apply specific criteria and procedural requirements when assigning radio frequencies to broadcast content providers. Arguably this means that as a result of these specific criteria and procedures the mechanism for granting such rights may not be fully 'open, transparent and non-discriminatory'. However, this can only apply to specific criteria and procedures adopted with a view to pursuing general interest objectives and in conformity with Community law. This implies that principles of non-discrimination and proportionality should apply, even in cases where a genuine general interest objective is present.

⁵¹ See press release IP/05/1394 for more details:
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1394&format=HTML&aged=0&language=EN&guiLanguage=en>

⁵² In Italy, due to the lack of available radio frequencies, all current broadcasters were given the right to purchase radio frequencies for the purpose of digital broadcasting from other players active on the analogue market. New entrants do not have this right.

⁵³ Using the currently most popular compression standard – MPEG2. MPEG4 standard allows for doubling the efficiency of compression.

⁵⁴ See footnote no 52.

⁵⁵ Poland is considering granting one multiplex to be jointly operated by two main commercial broadcasters. In Malta three frequency channels are reserved for assignment to current broadcasters.

Based on the generally applicable proportionality principle, it therefore needs to be stressed that the process of granting frequencies to broadcasters should be as open, transparent and non-discriminatory as possible while meeting the general interest objective pursued. Any divergence from those principles has to be weighed against the identified general interest objective(s) and needs to be proportionate.

The Commission is in favour of ensuring a sufficient level of harmonisation of approaches to the spectrum dividend within the EU to be able, in particular, to satisfy future demand for pan-European services, as outlined in the Communication “EU spectrum policy priorities for the digital switchover in the context of the upcoming ITU Regional Radiocommunication Conference 2006 (RRC-06)”.⁵⁶

Recognising that digital broadcasting provides consumer benefits in terms of better quality, more choice and enhanced services, the Commission services will continue monitoring the way in which the additional spectrum resources from the digital switchover are reused so as to ensure that the society and the economy at national and European levels can benefit.

MUST CARRY

The EU framework provides⁵⁷ that Member States may in certain circumstances impose reasonable must-carry obligations on network operators under their jurisdiction. If introduced (or maintained), these obligations should apply to specified radio and television broadcast channels and may be imposed only where necessary to meet clearly defined general interest objectives. Moreover, such obligations must be transparent and proportionate i.e. not exceed what is strictly necessary to achieve the clearly defined general interest objective(s). Must carry obligations should also be periodically reviewed.

As mentioned in previous Reports, most national measures notified to the Commission as transposing the new regulatory framework do not include must-carry provisions as they are usually covered by the broadcasting laws of the Member States. In most cases these provisions remain to be notified. According to the information available to the Commission services only five Member States do not have a must carry regime in place (Cyprus, Greece, Latvia, Luxembourg and UK⁵⁸). As regards those who do, the Commission services are examining their conformity with Community law.

The Commission is examining whether a number of Member States have failed to set out a clear justification for the imposition of must carry obligations is provided for. Others invoke arguably imprecise general interest objectives of freedom of expression and/or information, media pluralism and cultural diversity. It would appear that such broad concepts do not meet the requirements of *clearly defined* general interest objectives.

In addition it appears that at least in some Member States or parts thereof (in case of federal states) the broadcast channels that are eligible for must carry status are not sufficiently specified and/or no maximum number of such channels is defined.

⁵⁶ COM(2005) 461

⁵⁷ Article 31 of the Universal Service Directive

⁵⁸ In the UK enabling provisions exist in the Communications Act; however a commercial agreement has been reached and there has therefore been no need to impose must carry obligations.

Where there is a potential lack of clearly defined general interest objectives or a lack of clear specification of must carry channels, it remains to be verified to what extent the national legislation allows the proportionality of the must carry obligations to be assessed.

The Commission would recall Member States' obligation to subject their must carry regimes to periodical review.

OUT-OF-COURT DISPUTE RESOLUTION

As consumer choice increases in the context of a competitive environment, the views of consumers should be taken into account when dealing with end-users' rights. The protection afforded to the consumers must also be sufficiently effective so as to protect them from the various practices that undertakings may carry out e.g. spamming. Many problems that consumers face can often be resolved amicably and at a relatively low cost by contacting the undertaking directly.

However if direct contact fails and so as to enable consumers to take advantage of the benefits that ensue from the EU framework, Member States must put in place an effective mechanism which is capable of dealing with disputes between consumers on the one hand, and undertakings providing publicly available communications services, on the other. The mechanism should be relatively inexpensive to use and disputes should be settled promptly.

The advantage of this mechanism is that it offers more flexibility than going to court and could potentially better meet the needs of both consumers and professionals. Compared to going to court these schemes should be cheaper, quicker and more informal which means they could potentially be an attractive means for consumers seeking redress.

An example of best practice can be seen in Denmark, in which a Consumer Complaints Board, financed by the industry, has been effectively operating for three years. In Spain, a new office within the Ministry has been set up to deal with such issues. Complaints can also be introduced via a website.

In Poland, consumer arbitration courts were set-up as a quicker and more efficient way of solving disputes. They have however not yet started operating, so it is too soon to draw any conclusions on how effective they are in practice, especially since the cost could act as a deterrent. In Italy, this task is undertaken either by regional public entities or Chambers of Commerce, if the regional entities have not yet been established by the local authorities. However, these two types of bodies function in a different manner, most notably because the former provides a free of charge service, whilst the latter requires payment. Thus the requirement of an inexpensive procedure can be called into question as regards the Chambers of Commerce. Furthermore, increased co-ordination between all these bodies could result in greater coherence between the different approaches.

Moreover, in France, the Competition, Consumers and Fraud Directorate General (DGCCRF) deals with consumer complaints. The Commission is investigating whether the powers of this body, insofar as they apply to electronic communications, fulfil the requirements of the Universal Service Directive. In addition, a voluntary-based mechanism was put in place by operators to deal with such disputes after the exhaustion of the operators' internal complaints procedures.

As can be seen, these out-of-court mechanisms have been developed differently across the European Union. Some are the fruit of public initiatives whilst others spring from private initiatives. Precisely because of this diversity, the status of the decisions adopted by these bodies differs greatly. Some are mere recommendations, others are binding only on the undertaking whilst others are binding on both parties.

ARRANGEMENTS IN PLACE FOR PEOPLE WITH SPECIAL SOCIAL NEEDS

Access for people with disabilities

One of the Commission's policy priorities as part of the i2010 initiative⁵⁹ involves the promotion of an inclusive European information society which would close the gap between the different sectors of society. As electronic communications services become more widely used, the benefits should be felt by an increasing proportion of the population. Services should be made more accessible, in all parts of the EU. This is an economic, social, ethical as well as a political necessity.

One of the sectors of society targeted by the i2010 initiative are people with disabilities who constitute about 15% of the European working population⁶⁰. This is a significant proportion of the population, making it imperative for products and services to become even more accessible to those end-users. As action is encouraged rather than mandated Member States have chosen to put in place measures, either pursuant to the regulatory framework or pursuant to national social policy, in order to accommodate specific needs and to ensure that people with special social needs enjoy the same rights as other end-users.

In most Member States public payphones have wheel-chair access. However, in some Member States payphones are not equipped for use by blind and deaf users.

The Italian NRA has provided a lead by setting general principles that fixed operators are encouraged to follow so as to assist disabled access to basic services. These measures consist, for example, in giving priority to the users with disabilities in relation to new connections, reducing repair times and ensuring appropriate customer assistance. The Irish regulator has created a specialised website listing the measures the incumbent has put in place for users that are hearing impaired (e.g. amplifier phones, visual alert phones), for users that are hearing and/or speech impaired (e.g. a text relay service and rebates on such phones as it takes longer to make a call on them), for users with limited dexterity or mobility (e.g. hands free phones) and for users with restricted vision (e.g. Braille billing, special directory enquiries).

Special tariff options

Designated undertakings may also be required to provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available telephone service. This enables Member States

⁵⁹ Communication from the Commission to the Council, European Parliament, the European Economic and Social Committee and the Committee of the Regions on i2010 – A European Information Society for growth and employment, 1 June 2005, COM(2005)229 final.

⁶⁰ Commission Recommendation of 21 January 2005 (2005/57/EC) and Commission Recommendation of 29 March 2005 (2005/268/EC) on the provision of leased lines in the EU.

to ensure that the benefits of competition and greater choice can be felt in all parts of society and can also offer the necessary support to these consumers. Lasting improvements to the situation and participation of people with special social needs through an inclusive European society that is open and accessible for everybody is therefore a core objective of the framework.

However concern has been raised that people entitled to these tariff packages are not necessarily aware of their existence.

In Cyprus, there are two schemes, targeted on the one hand at individuals with low income and, on the other, at individuals with special social needs (e.g. disabled, blind or deaf users). Users are entitled to services at a reduced cost. Furthermore these users are also entitled to use carrier selection or carrier pre-selection on their lines if they so wish. In some countries carrier selection or pre-selection is not available on these lines.

In the United Kingdom, pursuant to Ofcom's review of the universal service obligation, it is proposed that the current low usage schemes will be replaced by a low income scheme. In Spain only the retired and those receiving social benefits are entitled to the special tariff plan for low-income users. It is worth noting that in Austria the State finances special tariff schemes available from fixed and mobile operators, whereby users receive one hour of free local or national calls as well as a free subscription. In Hungary, the Ministry has set up a fund which allows certified low income subscribers to obtain a lump sum which goes towards their monthly telephone bills. In Belgium, all operators will have to offer social tariffs to eligible customers and will also have to contribute to a fund which will pay for the cost of these tariffs.

Overall, there have been positive developments which enable users with disabilities to access affordable telephone services e.g. accessibility of public pay phones for wheel-chair users, hard-of-hearing (by using amplification systems) and sight impaired (by installing a keyboard with a raised dot 5). Nevertheless, more can be done to ensure that users with disabilities have equivalent access to emergency services, that enquiry services across Europe can be accessed through relay services and that directories are available throughout Europe in Braille.

ANNEX 1

IMPLEMENTATION IN THE MEMBER STATES

BELGIUM

INTRODUCTION

Belgium was very late in transposing the regulatory framework, and there are continuing fundamental problems with its effective implementation because of the failure to resolve institutional issues linked to the joint competences of the federal government and the language communities. This situation appears to have undermined the market analysis process - by the end of 2005 Belgium had still not notified any draft market analysis decisions - and it is not clear when the NRAs will be able to proceed with the analysis of any of the markets which touch on broadcast transmission services or the transport of media content.

Despite these problems, the Belgian market is continuing to develop, particularly in the broadband segment, with increasing competition between operators in the mobile, fixed voice and broadband markets. Belgium has one of the highest broadband penetration rates in the EU, helped by the prevalence of cable network connections, and there is competition on service content as well as price. While the mobile sector is growing, the success of number portability and increasing price competition reflects the level of competition in the retail market. There is a risk that, if the institutional problems regarding implementation of the framework are not quickly resolved, these positive market trends will be undermined by legal insecurity and economic fragmentation.

Finally, new entrants are very concerned about the estimation of the net cost of the universal service and the possibility that a funding mechanism will become operational without a calculation having been made of whether the net cost represents an unfair burden on the universal provider. At the same time, all operators have had to conform with the requirement in the new law to provide social tariffs to all eligible customers, and also to contribute to a funding mechanism for this purpose.

The institutional issues regarding the role and co-operation between NRAs, as well as other issues arising from the adoption of the new Act, will be examined by the Commission as to their conformity with the regulatory framework.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Belgium finally notified on 24 June 2005 the primary legislation adopted to transpose the regulatory framework, the Act of 13 June 2005 [in force on 30 June], just under two years after the date by which the Directives were supposed to be applied. While transposition of the regulatory framework is considered by the Belgian authorities as complete, a number of decrees may need to be adopted in order to complete technical and implementation measures. Furthermore, the measures required to complete transposition in the language communities have yet to be notified to the Commission. This is significant as the communities have shared competence with the federal state in the domain of electronic communications, particularly in regard to broadcasting as well as

the transmission of media content over electronic communications networks (such as TV over the Internet).

In its ruling of 14 July 2004 the Belgian *Cour d'Arbitrage / Arbitragehof* (a constitutional court charged with settling disputes between the different entities of the federal state) annulled one article of the Act of 17 January 2003 regarding the statute of the regulator of the Belgian post and telecommunications sectors. It stated that the language communities and the federal Government had to establish a co-operation agreement by 31 December 2005 at the latest in regard to joint competences regarding electronic communications (broadcasting matters). After that date the federal NRA would not be able to apply directly the powers given to it under the repealed article, namely in relation to the completion of market analyses for broadcast transmission services, and maybe also for other markets. In essence, decisions about networks and specific markets for which the communities are jointly competent could only be taken after consultations and joint agreement between federal and regional NRAs.

The various (federal and community) governments finalised a draft cooperation agreement on 20 April 2005 - which has to be signed by all the entities concerned following ratification by their respective assemblies. It appears that the Flemish government has failed to ratify the agreement and appears to have linked its agreement with progress on another matter. However, the *Cour d'Arbitrage / Arbitragehof* applied the same approach to the Flemish law on radio and television broadcasting when it handed down, on 13 July 2005 an almost identical ruling with regard to a section of the Flemish Community law of 7 May 2004 dealing with electronic communication networks, provision of cable networks and broadcast transmission services within the relevant areas of joint competence.

On 20 July 2005, the Belgian government amended the annulled article of the Law, in order to ensure that it conformed with the provisions of the Court ruling and to prepare for the enactment of a co-operation agreement. As a consequence there is now a clear obligation on the language communities as much as the federal authorities to adopt a co-operation agreement and put a co-operation procedure into operation. The “conference” of regulators will have to settle disputes between the federal and community level about any decision to take with respect to networks and markets in the area of their joint competences, and only after this has been done can the federal NRA take the decision concerned. The lateness of transposition coupled with continued delays in implementation in the language communities, means that Belgium is already seriously behind in the market analysis process, and there appears to be a real danger of further delays in regard to certain markets.

The NRA

The *Institut belge des services postaux et des télécommunications / Belgisch Instituut voor postdiensten en telecommunicatie* (IBPT/BIPT) appears to have the necessary powers and authority to perform its tasks, with the notable qualification that the failure of the Belgian government to resolve the issue of its relationship with the authorities of the language communities, as referred to above, appears to have weakened its authority and inhibited the completion of market analyses.

Independence

IBPT/BIPT is an independent organ which is not controlled by a minister, which instead has political responsibility vis-à-vis the Belgian Parliament. The Institute issues two reports per year, prepares the draft acts related to electronic communications on request of the relevant ministers, and almost all acts are signed jointly by the two federal ministers in charge of electronic communications.

As to the independence of the Institute, there remain some pending issues. According to article 15(1) of the Act of 17 January 2003, the implementation of some decisions of IBPT/BIPT can be suspended by decision of the council of ministers but the decree establishing this list of decisions (in case of infringements of the law or general interest) has not yet been adopted. On the other hand, some uncertainty has arisen again with respect to the structural independence of the NRA. Recent developments in the attribution of competences between ministers in the federal government have led to a situation in which one of the leading minister's portfolio includes the supervision of public enterprises, including the fixed incumbent, as well as some responsibilities for electronic communications. This is being looked at by the Commission services, especially because the federal government still owns a majority stake in this operator.

The Commission services will also closely monitor how these competences will be applied in practise in regard to the market analysis process described above.

Powers and objectives

While IBPT/BIPT's powers appear to be well defined, its scope for action appears to be curtailed by the situation described above. The Court decision referred to means that IBPT/BIPT was formally prevented from taking action in matters which concern also broadcasting transmission services until the co-operation agreement has come into effect. Thus Belgium, having failed to transpose the framework for so long, has quickly reverted to a position where it is unable to ensure its full implementation.

Decision making

The unresolved legal and organisational issues surrounding the joint competences of regulators in markets dealing with content transmission services has clearly delayed and undermined the conduct of the market analyses. On 25 October 2005 IBPT/BIPT opened public consultations on draft analyses for the retail markets for access to the fixed network, as well as the wholesale markets for unbundled access to the local loop and for wholesale broadband access. After these consultations, and following any necessary changes, IBPT/BIPT was to consult the national competition authority. As regards the wholesale markets for broadband and LLU, all interested parties agreed that these are likely to be the subject of co-operation with the regulatory authorities of the language communities.

The co-operation agreement is to work on the basis that each of the competent authorities should notify the others of draft market decisions (or, in fact, any decisions having an impact on their competence including, for example, the outcome of a dispute resolution procedure). The other regulators would have a short period in which to respond if they wish to initiate the co-operation process, whereupon a conference of regulators is

convened and all the authorities whose competence is affected have to agree on the draft measure. If there is no consensus, the matter is referred to the political level where ministers of the respective governments will have to agree.

This mechanism raises a series of questions about how the principles of the regulatory framework will be complied with. Moreover this has to be considered in conjunction with the risks of regulatory decisions being perceived to be undermined by the lack of structural separation between state shareholding and regulatory functions, when the federal government still owns a majority shareholding in the fixed incumbent and the regions have stakes in some of the regional cable network operators. The requirement prevailing in Belgium to seek agreement at ministerial level in certain specific circumstances could make it more difficult to ensure that market analysis decisions are based on and justified by the findings of an economic and competition law analysis. The Commission services are looking into this matter.

Appeals

As reported last year, a law adopted in 2003 introduced the right to appeal against IBPT/BIPT's decisions before the Court of Appeal in Brussels, which can deliver a judgement on the merits of the case. While there have been fewer regulatory decisions in 2005 because of the freeze in regulatory activity, operators and IBPT/BIPT continue to criticise the length of time taken to deal with appeals. Up until the end of November 2005, five decisions had been annulled and in each case the Court refused to alter them.

Rights of way and facility sharing

In a preliminary ruling of 8 September 2005, the European Court of Justice gave its opinion to the Belgian courts on two cases in which Belgian mobile operators have challenged the practice of some municipalities to levy taxes on pylons, masts and transmission antennas for GSM. While it does not constitute a final decision in the cases, which was to be given by the relevant Belgian Court, the ECJ stated that such taxes, if applied to all mobile operators, do not constitute a breach of the internal market principle of the freedom to provide services. It recognised that a tax measure restricting that freedom may constitute a prohibited measure, thus confirming its previous case law. But the Court clarified that this would apply only to measures that have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, that is by affecting in a discriminatory way operators from other Member States.

The Court pointed out that the taxes applied without distinction to all owners of mobile telephone installations within the commune in question, and that foreign operators were not, either in fact or in law, more heavily affected by those measures than national operators. The ECJ also stated that such taxes are not covered by the provision of the former EU competition Directive prohibiting restrictions on the construction or use of mobile infrastructure, except where these tax measures favour, directly or indirectly, operators which have had special or exclusive rights to the detriment of new operators and they significantly affect competition. This is a question which must be determined by the Belgian courts in each specific case.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection

Relatively few problems have been reported in regard to access and interconnection in the fixed market. The reference interconnection offer (BRIO) set the interconnection rates for local and single transit calls slightly higher than the EU average, and the national interconnection rates are below the EU average.

Competition/Market situation

The incumbent operator has 67% of the local and national calls markets by minutes of traffic and 73% by revenues. The incumbent's market share is reduced to 63% (by revenues) when the international calls and Internet dial-up markets are included.

Leased lines

The pricing for interconnection leased lines presents a number of problems in the Belgian market, as it is considerably above the EU averages, particularly in terms of the one-off connection fees. According to the NRA, price comparisons between Belgium and other countries can however be difficult due to different methodologies (for example, in the assessment of distances). New entrants have continued to complain about the service and migration conditions associated with the development of interconnection leased lines, but these complaints are common to all the operations requiring service level agreements in Belgium. The SLA for interconnection leased lines is equivalent to the one for retail leased lines. The incumbent is also subject to a reporting obligation, to verify that installation and repair times are non-discriminatory between retail and wholesale leased lines.

The infrastructures of the new entrants are also, up to now, not sufficiently developed to compete on the leased lines market: the length of the segment to connect end-users to their infrastructure is often longer than the length of the retail line end-to-end. The leased lines market is too low to justify such an investment; however the ongoing extension for broadband market (access to incumbent location) can serve also to reduce the length of the terminal segment.

Broadband Markets

Penetration

Belgium has one of the highest broadband penetration rates in the EU (18% of the population).

Competition/Market situation

While the incumbent telecom operator has 78% of the retail DSL market, this represents a market share of 48% of the retail broadband market including cable, due to the ubiquity of cable networks and their substantial share of the Belgian broadband market.

Local loop unbundling

The high level of customisation possible with bitstream access products offered by the incumbent allows operators to establish a service sufficiently differentiated from the incumbent's retail offer, and allows them to await the necessary market share in a geographical location before investing in unbundling. However, according to alternative operators, the difference in prices between full unbundled access and shared access is such that economically it is not sufficiently interesting for them to provide ADSL services on the basis of full unbundling, which is far less attractive for them than the shared pair or the bitstream access model.

Bitstream access / resale

The dedicated bitstream offer of the incumbent has allowed new entrants to take 22% of all retail DSL connections. Relatively few retail broadband lines are supplied by new entrants using unbundling. In reality two thirds of these lines use the BROBA II Bitstream access offer that enables the new entrant to define his own service at ATM level giving a result very close to the service that he can define on his own network. It has enabled three operators to develop and grow their own client base for broadband Internet access and to obtain sufficient market share to invest in unbundling. One third of the lines use the IP wholesale offer that is a replication of the incumbent's retail offer but requires less expertise to operate.

Mobile Markets

Penetration

The mobile penetration rate in Belgium was at 86% in October 2005, which is below the average for the EU15 Member States, and the rate of growth appears to be slowing down. However, there are some signs that the reporting of active subscriptions is more accurate in Belgium than in some other EU Member States.

Competition/Market situation

The fixed incumbent's mobile subsidiary (which owns three quarter of the shares) has 47% of mobile subscribers, followed by 32% for the second operator and 21% for the third. There appears to have been a significant change in the market shares as the process of mobile number portability became firmly established, and the third operator in particular has benefited from net gains especially at the expense of the largest operator.

Technologies (2G/3G)

All three operators have both GSM and 3G licences, and one of them appears to be offering 3G services on a commercial basis. The other operators are offering enhanced 2G services (EDGE).

Mobile regulation

Until now the mobile interconnection market has been characterised by asymmetric rates between the three operators, with a significant mark-up between the largest (ex-incumbent) operator and the third operator. This reflects the fact that two of the operators

were subject to regulatory obligations on the national interconnection market under the old regulatory framework. In the context of the preparations for the market analysis, the largest operator has stated his view strongly that termination prices should be based on those of an efficient operator, and that there should be reciprocity in cost other than for specific costs that are beyond the control of the operator.

Tariff Issues

In the summer of 2005, the fixed incumbent introduced a tariff package based on free off-peak calls and a fixed fee for each call in peak time (whatever the duration of the call). This followed a tariff package from the previous year that contained a reduced fixed line subscription with higher call charges that was aimed at low volume users but was principally addressed to users who were large Internet users and who may have been tempted to avail of the broadband without voice telephony (“naked DSL”) offer that was being developed by other operators on the basis of the incumbent’s mandated bitstream offer.

New entrants have claimed that both offers contained elements of price squeeze and, particularly in the case of the more recent offer (Happy Time), that the incumbent was not fulfilling its obligation to orient its prices towards cost. They have been particularly critical of the role played by the NRA, which examined both packages but did not intervene, and the competition authority is now examining these allegations of price squeeze on the basis of a complaint. The NRA found that in some circumstances (calls to some fixed operators with high interconnect rates), the Happy Time package was not cost oriented and imposed the obligation on Belgacom to modify it (IBPT/BIPT’s decision of 17 October 2005).

Market and Technological Developments

In the autumn of 2005, the fixed incumbent launched a TV over IP product on its ADSL platform, having experienced difficulties in exploiting its investment in VDSL technology. This commercial development was a response to the growth of broadband internet over the cable networks and the bundling with voice products.

THE CONSUMER INTEREST

Retail price trends

In all market sectors (fixed, mobile, broadband access) there have been a number of innovative pricing developments to the benefit of consumers. The mobile market has been particularly active, as mobile operators seek to benefit (or protect themselves) from the growth in ported numbers, and as the market seems to have reached maturity in terms of penetration.

Tariff transparency

These same mobile tariffs, and to a lesser extent the development of ‘bundled’ packages in the fixed market, are nevertheless criticised for their relative lack of transparency, particularly when different products are bundled together (monthly rental and calls; mobile calls at different times of the day and SMS; etc.)

Universal Service

The fixed incumbent continues to hold the designation as universal provider until secondary legislation is introduced to implement the provisions of the framework in this regard, but also until the process for a new designation is triggered by the authorities. The Commission is looking into the manner in which the Belgian legislation implements the designation mechanism.

Under the new Act all operators will have to offer social tariffs to customers who are eligible. To that effect, a decree is in preparation to create a data base (within the NRA) of all the customers who meet the conditions (in order to avoid abuses or double counting). However, it does not appear that this work will overcome the concerns of most operators about the functioning of this system, and particularly the fact that apart from offering social tariffs they will have to contribute to a fund to pay their part in the cost of all social tariffs in proportion to their market share. For new entrants this represents a “pay and play” system which is a disincentive to service innovation and contradicts the existence of a separate process for universal service provision.

Belgium has failed to include in its transposition legislation an explicit mechanism for determining whether the universal service provision, where a net cost has been certified, is an unfair burden on the designated operator. The Commission services are looking into this matter. Therefore, while no funding has been requested or triggered so far, a number of entrants are very concerned about the possibility of this happening. As detailed in the 10th Report, the NRA’s calculations for the net cost for 2003 were strongly criticised as being inaccurate and overgenerous to the incumbent, and there is considerable uncertainty and concern among new entrants as to whether funding payments will be requested from 2006 onwards on the basis of a similar costing methodology.

Emergency services (112)

The “112” number was available in the Belgian network as soon as it was introduced at European level. Belgium has been criticised for the organisation of access to and information about the European emergency number, “112”. As the emergency call centres are staffed by the authorities, calls are treated in the national languages. There are difficulties in the handling of calls, particularly in relation to the language factor when dealing with calls from non residents, and the Commission services are considering the level of information to the public about the service.

Number Portability

As noted above, mobile and fixed number portability is working well in Belgium and is clearly having a positive benefit for users both directly - because of the facility and speed with which numbers can be ported - and indirectly because of the effect on competition and pricing between operators.

(On 1 July 2005 approximately 850,000 fixed numbers and about 830,000 mobile numbers had been ported.)

Must Carry

Because of the complex regional and linguistic structure of the country, there exist relatively onerous obligations on operators to carry public channels as part of their television offering. This is particularly the case in the Brussels capital and its periphery, where cable operators have to service both language communities, and where there are overlapping competences between language community and federal governments. The Commission services are examining whether these must carry obligations comply with the regulatory framework.

CZECH REPUBLIC

INTRODUCTION

Regulatory developments in the Czech Republic have been dominated over the last year by the adoption of the new law to transpose the regulatory framework. The one-year delay in transposition appears not only to have had consequences at the formal level, but has had a negative impact on the market review process and in particular on the imposition of regulatory remedies. Where these were needed for the establishment of effective competition in the relevant markets there has certainly been a corresponding negative impact for the consumer.

One of the biggest challenges faced by the regulator in the period from May 2005 until the end of January 2006 was its task of carrying out the market analysis within a relatively tight nine months deadline.

The series of price regulation decisions taken by the regulator shortly before the new law came into force was of relevance for the market, in that for example local access price regulation was introduced for the first time. However even though the new prices have brought improvements, they still appear relatively high if compared to the situation in other EU countries. This might possibly be among the reasons why on the DSL services market substantial progress in terms of competition has not been achieved. Improvements are still required to enable new entrants to enter that market on fair terms.

In the fixed market, successful privatisation of the State's 51 % shareholding in the incumbent was also among the major events last year.

Bundling of line rentals with free minutes by the incumbent has been abolished, and this is expected to bring enhanced competition on retail fixed voice markets.

Mobile sector continues to be successful in terms of the mobile penetration rate. Mobile players have begun 3G rollout, as well as preparations for the implementation of mobile number portability.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The Law on Electronic Communications, intended to transpose the EU regulatory framework, was adopted on 22 February 2005 and has been in force since 1 May 2005. It thus became effective exactly one year after the accession of the Czech Republic to the EU. Secondary legislation relevant for the transposition appears to be in place.

The NRA

Based on the new Law, the Czech Telecommunications Office ("ČTÚ") is headed by a five-man board, chaired by its President. Even though one member of the Board remains to be appointed, the Board as such can currently work and take decisions.

From April 2005 ČTÚ became competent also in the area of posts. ČTÚ in general appears to meet the criteria of an independent regulatory authority. It is financed from the State budget and has its own budget chapter. At the same time the State is not reported to have shareholdings in any of the market players.

The ČTÚ's enforcement powers appear to be limited, as the Law stipulates a maximum aggregate sanction approximately equal to € 340 000 that can be imposed by the regulator on any undertaking in breach of its obligations. This limitation relates also to SMP and universal service obligations. Given the short space of time the new Law has been in place, the practical impact of these limited powers, if any, will be seen once the regulatory obligations have all been imposed by the ČTÚ.

The powers of the Ministry under the new Law cover the area of electronic communications policy and monitoring of its implementation as well as international relations in this field. The Ministry also represents the Czech Republic in European Union bodies. Powers to define criteria for tenders in which radio frequencies are to be assigned and criteria for tenders in which universal service providers are to be designated, which were intended to go to the Ministry at the time when the new Law was under preparation, were in the end allocated to the ČTÚ.

Decision making

The regulator has already started the market analysis process; however, it has not yet adopted any measures based on that process. Currently, no draft measures, except as regards the definition of relevant markets, have been consulted on either at national level or referred to the Commission pursuant to the procedures under Article 7 of the Framework Directive. The Commission has opened an infringement proceeding in this regard. The new law requires ČTÚ to complete the market analysis by 1 February 2006 and to review the SMP obligations imposed under the previous law (which was based on the previous framework) by 1 May 2006. One pre-notification meeting relating to Article 7 of the Framework Directive has taken place between ČTÚ and the Commission services.

Appeals

The legal framework as laid down by the new Law for dealing with appeals appears to be rather complex. This does not however appear to work in a negative way, as the appeal mechanism takes into consideration the importance and nature of the issue being decided.

In general, first instance decisions are taken by a department of ČTÚ competent to deal with the matter covered. These decisions are reviewed by the President of the ČTÚ Board in the second instance. They may then be challenged before a court.

Decisions in the area of frequency management and decisions by which disputes between undertakings are to be resolved are taken in the first instance by the President of the ČTÚ Board. These decisions are reviewed in the second instance by the ČTÚ Board excluding the President. They may then be challenged before a court.

Decisions in ‘sensitive’ areas such as price regulation, designation of the universal service provider and findings of SMP with imposition of SMP remedies are taken by the ČTÚ Board and may be reviewed by a court.

While the decisions are being reviewed by a court, they stand unless the court decides otherwise. The Commission’s services are examining whether the decision-making process, where a court is the appeal body pursuant to the Framework Directive, is not over-lengthy in some cases.

Spectrum management

Spectrum trading is possible under the new Law. During the reporting period there was no demand from market players to acquire spectrum in this way.

Authorisations

The Authorisation Directive requires notification of an operator’s intention to commence the provision of networks or services via a simple declaration to the NRA and the submission of the minimal information which is required to allow the NRA to keep a register or list of operators. Under the Directive this information should be limited to what is necessary for the identification of the operator. The Commission services are examining compliance with the Authorisation Directive of the requirement in the Czech Republic that excerpts from criminal records and documentation proving that the subject concerned is not in arrears with the payment of taxes and certain other payments be provided in this context. On the other hand this issue does not appear to hinder market entry directly or competition in terms of its effectiveness.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

A major event in 2005 was that the 51.1 % shareholding in the fixed incumbent operator owned by the Czech National Property Fund were acquired by the Spanish fixed incumbent operator after the latter won a government tender in April 2005. The acquisition price was €2.7 billion. As of September 2005, the shareholding of the new majority shareholder reached 69.4 % after it acquired shares from various minority shareholders.

To date 22 interconnection agreements have been concluded between the fixed incumbent and the new market entrants. Interconnection is regulated by ČTÚ. Interconnection charges for call termination in the fixed network are calculated using the LRAIC methodology. The cost base applied to fixed operators is forward-looking. In April 2005 a new price decision by ČTÚ came into force setting the price for call termination on fixed networks and decreasing the termination charges on single transit by 5%. Termination charges on double transit have been decreased by approximately 20 % and 21 % on peak and off-peak respectively. Fixed-fixed interconnection for voice services is still not implemented at local level.

With respect to interconnection for dial-up access from the network of the incumbent to internet services provided by other market players, the termination model is used. The

principle is that the incumbent pays 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. The minimum price to be paid by the incumbent to the alternative operators is regulated and was substantially decreased in 2005 which was a source of major tension on the fixed market, as retail prices charged by the incumbent are not reported to have changed. This decision by the regulator, which appears to have radically changed the wholesale regime in the area of dial-up access to internet, has been heavily criticized by alternative operators and appears to be a source of uncertainty for consumers as regards future market developments in the area of dial-up access to internet. In this context pressure from the new entrants for implementation and subsequent price regulation of flat rate internet access call origination (FRIACO) is evident.

Information on the market share of the fixed incumbent in the voice segment is treated as confidential. Fixed line penetration is decreasing and now stands at 31.8% of the population, while in 2004 this figure was 34.4%. The incumbent's fixed line business appears to be slowly declining. This development may be explained by the continued take-up in the mobile sector which has been visible during recent years.

Carrier selection and carrier pre-selection have been implemented from July 2002 and January 2003 respectively. They are available for national and international calls, for calls to non-geographic numbers and also for dial-up access to internet on the whole territory of the Czech Republic. The operation of these facilities has not been the subject of major complaints on the side of consumers.

Prices of leased lines remain unregulated. . These factors do not appear to contribute to competitiveness in the fixed market. Retail prices for 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 (€ 2 771 per year for 64kb/s, 2 km circuits; € 8 761 per year for 64kb/s, 200 km circuits; € 14 685 per year for 2Mb/s, 2 km circuits and € 56 068 per year for 2Mb/s, 200 km circuits).

Broadband Markets

The Czech authorities state that there are approximately 180 000 new entrants' WLL broadband access lines. The number of new entrants' WLL broadband access lines would therefore account for as much as an approximately 32 % share on the Czech broadband market. On this basis broadband penetration of the population would therefore appear at the level of 6 %, and market share of the fixed incumbent on broadband market would thus appear at the level of 40%. The number of new entrants' WLL broadband access lines would therefore account for as much as approximately 66% of the total number of the new entrants' WLL broadband access lines in the whole EU-25, while in the same time the population of the Czech Republic accounts approximately only for 2% of the total EU-25 population. Based on these facts it seems that the figures on the number of new entrants' WLL broadband access lines would appear to need further scrutiny.

During the reporting period, the number of DSL lines grew rapidly. Whereas in July 2004 there were approximately 36 000 lines, in October 2005 this number was approximately 252 000. The DSL market is mainly in the hands of the fixed incumbent operator, as the market share of the fixed incumbent on the DSL market is approximately

88 %. The fixed incumbent was operating approximately 221 000 DSL lines in October 2005. Even though the regulator has defined the interconnection regime between the incumbent and new entrants for the purpose of providing DSL services with stipulated maximum prices for wholesale DSL resale services, this regulated interconnection regime is not implemented and wholesale relations between the incumbent and new entrants are based on an unregulated access regime offered by the incumbent to these operators. Bitstream internet access has not been implemented and is not expected to be in place in the near future. Alternative operators are providing resale of DSL services and they also provide DSL services using LLU. DSL services are offered by the incumbent at the retail level as a bundled service with fixed voice services. It would thus appear that space for improvement exists in the area the establishment of effective competition in the DSL market.

The fixed incumbent was fined € 345 000 by the NCA in March 2005 for concluding unlawful price agreements related to sale of ADSL modems.

Currently, cable operators provide approximately 120 000 broadband lines, which accounts for a 21% share of the Czech broadband market.

Direct local access has been implemented since December 2003. Currently, four LLU agreements have been concluded with the fixed incumbent. The NRA introduced price regulation in the area of local access in 2005 by virtue of which the price of monthly rental was lowered from € 16.6 to € 13.6 and the price for the connection was lowered from € 339.1 to € 156 as regards fully unbundled loops. The price for the connection as regards fully unbundled loop thus still appears to be relatively high, as it is almost triple the EU average. The new price regulation also lowered the price of the monthly rental from € 9.3 to € 5.3 and the price for the connection was lowered from € 346.2 to € 159 as regards shared access. The price for the connection as regards shared access thus also appears to be relatively high, as it is also almost triple the EU average. Prices for co-location are not regulated. It thus appears that even though prices for local access were substantially decreased by the NRA, their current level still needs further scrutiny, as cost orientation of prices for local access is among the main drivers for the establishment of effective competition on the DSL market.

WLL is provided by three operators country-wide in 26 GHz and in the region of Prague in 28 GHz. In 3.5 GHz two operators provide services on a country-wide basis.

Mobile Markets

Mobile penetration in the Czech Republic is high, at 105 %. Three operators, one of them 100% owned by the fixed incumbent, are competing on the mobile market. Their market shares are treated as confidential. All three operators offer GPRS and EDGE services.

The third entrant in the Czech mobile market was awarded frequency for the provision of 3G services last year for € 68.5 million. The third entrant in the Czech mobile market is required to launch 3G services from January 2008. The obligation of the other two mobile operators to launch 3G services has been shifted from the beginning of 2006 to the beginning of 2007. However, one of the two mobile operators already launched 3G services in the area of the capital city from October 2005, while the other mobile operator launched 3G services in the area of two major cities from December 2005.

In February 2005 ČTÚ made a decision setting the price for call origination on mobile networks which is to be paid to mobile network operators for enabling call origination on their mobile networks by interconnected providers of virtual calling cards services. This facility, which might enhance competition on mobile call origination markets, has however not been implemented in practice.

In April 2005 a new decision by ČTÚ came into force, setting the price for call termination on mobile networks and decreasing the termination charges by approximately 2.5%. Interconnection charges for call termination in mobile networks are calculated using the FAC methodology. The cost base applied to mobile operators is historic.

Tariff Issues

The bundling of line rental with free minutes by the fixed incumbent, which was previously a major source of tension between new entrants and the incumbent, was abolished in April 2005. In the same month the regulator cut by a small margin the monthly line rental and also per minute call charges. These NRA decisions are expected to be supportive in terms of the establishment of fair competition on retail fixed voice market. In November 2005 the chairman of the NCA confirmed a first-instance decision according to which the previous bundling of line rental with free minutes by the fixed incumbent constituted an abuse of dominant position. A fine of € 7 million was imposed on the incumbent.

The incumbent offers a large number of tariff plans, of which two are regulated, on the basis of a fully allocated historical cost methodology. One of these two regulated tariff plans is a 'low usage' type tariff plan for which carrier selection, carrier pre-selection and DSL services are not offered. Regulation is imposed in the framework of universal service regulation and is effected in the form of a price cap. It is expected that in future, regulation at retail level will be carried out as part of universal service and in the framework of the market review process. The NRA has however admitted the possibility that regulation of voice services might be abolished in 2006. Such a move could result in higher charges for monthly line rentals and lower per minute call charges. In the view of the regulator, rebalancing of fixed tariffs was not achieved in 2004, meaning that monthly line rentals were offered below their actual costs. The question whether rebalancing was achieved in 2005 still remains to be reviewed by the regulator.

There is a clear pressure from alternative operators for a review to be carried out to find out whether or not current prices for local access if compared to prices for DSL services offered by the incumbent at retail level introduce a margin squeeze.

Market and Technological Developments

The fixed incumbent received a licence in August 2005 from the Czech Broadcasting Council to launch an internet TV service. The incumbent plans to start broadcasting in 2006 to compete with local cable TV channels, which provide services to approximately 800 000 households.

One of major alternative operators came up with a wholesale VoIP service offering in August 2005. Other internet services providers thus appear to have the possibility of

offering voice services to their customers independently of the fixed incumbent. This operator came up with a retail offer of unlimited VoIP telephony for a fixed monthly fee in October 2005.

One of the major alternative operators launched the operation of ADSL2+ network via LLU in October 2005.

The mobile operator owned by the incumbent announced in July 2005 that it had 50 000 customers for its wireless broadband internet services using the CDMA standard. This mobile operator launched the service in August 2004. One other mobile market player launched high-speed internet using 3G technology in October 2005.

THE CONSUMER INTEREST

Universal Service

The universal service provider, under the new law, has not yet been designated. Currently, the universal service is provided by the fixed incumbent operator based on transition provisions referring to the scope of the universal service under the previous law. The new law requires the NRA to carry out the universal service designation by the end of January 2006.

A comprehensive printed directory or a directory enquiry service covering all fixed and mobile subscribers is not yet available, as the subscribers of mobile services are not included. The Commission has addressed the issue via infringement proceedings launched in 2005.

A problem appears to have arisen at national level as regards universal service funding. Due to a legal error before the accession of the Czech Republic to the EU, based on which operators were required to make their contributions on another basis than on the basis of administrative proceedings, the ability of the NRA to enforce the payment of contributions from the market players appears to be blocked.

Non-geographic numbers

Non-geographic numbers appear to be accessible for calls made from abroad, with the exception of some non-geographic numbers in mobile networks. This is a positive development which accords with work done in the Communications Committee in this field.

Data Protection

The ePrivacy Directive admits an exception from the opt-in principle in cases where electronic contact details are obtained from customers in the context of a sale. In such a case the same person may use these electronic contact details for direct marketing of its own similar products provided that customers are given the opportunity to object in an easy manner to such use of these contact details. The Czech legislation notified to the Commission appears to contain an incorrect exception from the opt-in principle. It allows processing of the data even in the case that these were acquired from a public directory. It further allows processing of data other than for marketing of such natural or legal

person's own similar products or services and it also provides that refusal by a customer to such data processing be effected only in written form. The Commission has addressed the issue via infringement proceedings launched in 2005.

International roaming

International roaming charges remain unregulated. As the market review process is not finished, the wholesale national market for international roaming on public mobile networks has also not yet been analyzed.

Disabled users

The incumbent operates public payphones with wheel-chair access. Payphones are not equipped for use by blind or deaf users.

Emergency services (112)

The single European emergency call number '112' is implemented. Caller location is made available for calls from fixed and mobile networks.

Number portability

Fixed number portability has been implemented since January 2003. The Commission's services have not been provided with comparable data on the quantity of numbers ported. Mobile number portability still remains to be implemented and is expected to be in place by mid January 2006. The Commission is addressing the lack of mobile number portability via infringement proceedings.

A dispute between one of the mobile operators and the NRA relating to implementation of one of the conditions included in a measure on number portability issued by ČTÚ was resolved by the Czech Supreme Administrative Court in September 2005. The issue was whether those mobile customers who have concluded a contract with their mobile operator for a defined time period may port their mobile numbers before the defined period expires. The court ruled that such mobile customers may port their numbers from their mobile operator only after the expiry of their contract with the mobile operator from whom they wish to have their numbers ported.

Digital TV

Czech public service TV launched digital terrestrial TV broadcasting in the area of the capital city in October 2005.

ČTÚ has granted frequency rights to three operators to start building their networks and providing services. One of them launched regular digital TV transmission in the area of the capital city in October 2005. Three programs of public service and one program of a commercial broadcaster are distributed through the network of that operator.

The government expects the switch-over from analogue TV broadcasting to digital TV broadcasting is to be finalized between 2010 and 2012.

Must-carry

It remains to be examined by the Commission's services whether the Law on Electronic Communications transposes correctly Article 31 of the Universal Service Directive. The Commission's services are also examining whether the rule under which 'must-carry' obligations are to be imposed only where they are necessary to meet clearly defined general interest objectives, are proportionate and transparent and are subject to periodic review are transposed correctly. A new law relevant in the area of 'must carry' is currently being prepared. Must-carry obligations have not yet been imposed under the new Law.

Out-of-court dispute resolution

Out-of-court resolution of disputes involving consumers relate, in the vast majority of cases, to billing for services. Other disputes concern issues related to quality of service. There have also been disputes where the fact whether a contract between an operator and a customer had been terminated validly is disputed.

DENMARK

EXECUTIVE SUMMARY

Most of the market analyses required by the new regulatory framework have undergone Commission consultation. The delay of these analyses has nevertheless been a matter of concern amongst operators, as legal uncertainty remains as long as the relevant administrative decisions are not final. Denmark still has the lowest fixed telephony interconnection tariffs in the EU. It is also the EU leader in household broadband penetration. The total average cost for fully unbundled local loops are among the lowest in the EU. While the number of wholesale xDSL/bitstream lines is still increasing, the biggest increase is seen in shared access lines. In the meantime, electricity network operators plan to provide fibre to the home to at least one third of all households. Denmark has enjoyed mobile telephony price wars. According to a preliminary assessment of the national regulatory authority, the wholesale mobile access and call origination market was effectively competitive in 2005. The migration from fixed to mobile services accelerated. The overall trend for consolidation in the sector increased. Operators tended to offer more bundled services in efforts to tie customers to their own companies. Terrestrial digital television will be available in 2006, and analogue terrestrial shutdown is scheduled for October 2009.

REGULATORY ENVIRONMENT

The NRA

The Danish national regulatory authority is *IT- og Telestyrelsen* (NITA), a government agency under the Ministry of Science, Technology and Innovation (“the Ministry”).

Powers

A major concern among alternative fixed operators is that in some cases NITA does not have the power to set terms and conditions of an access agreement where the operators concerned cannot agree, in effect rendering any access obligation toothless. The limitation is a consequence of a provision in the old legislation, and should be removed as an effect of the decisions on regulatory remedies to be taken according to the new legislation. However, the old legislation will continue to apply in markets where such decisions have not yet been adopted by NITA, or if NITA has adopted a decision and it is appealed. As long as the appeal instance, the Telecommunications Complaint Board, has not taken a decision on the substance of the case, the old legislation will remain in force.

A bill according to which NITA’s market decisions will enter into force immediately and also giving NITA the powers to set terms and conditions for access and interconnection agreements, was expected to be adopted by Parliament before the end of 2005.

There has been a continued discussion regarding the division of tasks between the national regulatory authority and the competition authority. A number of cases taken up by the competition authority related to interconnection issues. Operators often submit

complains to the competition authority in order to obtain a binding assessment of the compatibility with competition law of a particular interconnection agreement. The competition authority is required to make binding statements concerning regulated prices for services which fall under the universal service obligation (USO), e.g. the provision of leased lines to end users. Furthermore, the competition authority has for instance undertaken investigations into a possible margin squeeze in the broadband subscriptions market. Upon request from NITA, the competition authority has also investigated possible anti-competitive pricing for the joint utilisation of masts in an industry-wide agreement. There is good cooperation between the NRA and the NCA in identifying the right regulatory remedies.

Decision making

Operators regard the market analysis process as transparent but burdensome and resource-consuming. The fact that these analyses have been delayed has been a matter of concern amongst operators. While the outcomes of the draft analyses that have been made public do not generally seem to have been surprising to industry, a significant legal uncertainty remains as long as the relevant administrative decisions – taken by either NITA or the Telecommunications Complaint Board – are not final, pending appeals. The incumbent is concerned that the delay in the market analysis process will make the market data on which analyses are based out-of-date when the final administrative decisions are adopted. The existing market analyses are based on market data from 2001-2003.

Appeals

The transitional provisions in the Act on Competitive Conditions and Consumers Interests in the Telecommunications Market stipulate that obligations imposed on operators with significant market power according to the old legislation remain applicable until there is a “final administrative decision” according to the new legislation. It appears that this provision has the effect of automatically suspending decisions taken by NITA in the first round of market analysis, if these decisions are appealed. Even if this arrangement is transitional, the Commission is examining whether these transitional arrangements could be contrary to Article 4.1 of the Framework Directive. In appeal cases where the national regulatory authority has addressed a competition problem which can only be adequately remedied on the basis of the new Act, the competition problem remains for an undetermined period of time while the decision is being assessed by the Telecommunications Complaint Board.

As stated above, a bill according to which NITA’s market decisions will enter into force immediately was expected to be adopted by Parliament before the end of 2005.

The Telecommunications Complaint Board has made efforts to prepare for the expected increased workload in view of the national regulatory authority’s upcoming market analysis decisions. According to an executive order, cases before the board should normally be settled within three months. However, experience from other Member States seems to indicate that decisions based on the first round of market analysis are likely to be appealed, and that the consequent accumulation of cases – together with the fact that some issues are new – contributes to the long duration of the appeal process.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Denmark still has one of the lowest fixed-line telephony interconnection tariffs in the EU for both single and double transit. As a consequence of the wholesale line rental reform, in place for some time, 19% of end-users used an alternative provider for their fixed telephony subscription at the end of June 2005, compared to 18% at the end of June 2004. NITA has concluded that the retail markets for fixed international voice calls are effectively competitive and intends to withdraw previous obligations from these markets. The national fixed voice calls markets, however, are still deemed to lack effective competition *inter alia* due to the high market shares of the incumbent. The incumbent's market share for fixed calls by traffic volume was 61% in 2004 as compared to 63% one year earlier.

Broadband Markets

Denmark is the joint EU leader in broadband penetration. There were 22 broadband connections per 100 inhabitants at the end of September 2005. Broadband services are widely available but are on average not among the cheapest in the EU. The incumbent's market share of retail broadband connections at the end of September 2005 was 60% as compared to 59% at the end of June 2004.

Both the wholesale connection price and the monthly rental price for fully unbundled local loops in Denmark remain among the lowest in the EU. As regards shared access, the connection price is among the lowest in the EU, while the monthly rental price is above average. The Danish average price for shared access is close to the EU average.

According to the October 2005 figures, the number of wholesale xDSL/bitstream lines is still increasing, but it is LLU sales that have shown the most significant increase. Alternative operators in Denmark seem to be investing in infrastructure in a way that is in line with the objectives of the regulatory framework for electronic communications. However, the continued development depends much on the future level of the regulated wholesale price. NITA is undertaking a review of the pricing methodology for full and shared access. The transition period for the fixed network from a regulatory cost accounting model based on historical cost to a model based on LRAIC⁶¹ has been extended from seven to eight years. As regards shared access, NITA is examining the correct attribution of access line maintenance costs to the PSTN and the xDSL components. Currently, the regulated shared access price is based on a 50/50 attribution of that cost.

As regards NITA's lack of power to set terms and conditions of an access agreement where the operators concerned cannot agree,⁶² there is in particular concern about the situation with internal cabling, an important element of fixed network competition where one alternative operator needs access to the SMP operator's local exchange in order to interconnect with a second alternative operator. There is a risk that legal uncertainty and

⁶¹ Long Run Average Incremental Cost, a methodology focusing on hypothetical current acquisition costs.

⁶² See above.

potential harm to fixed network competition could prevail for a longer period of time, as a consequence of the frequent suspension of appealed decisions on regulatory remedies in the first round of market analysis conducted according to the new regulatory framework.⁶³ However, NITA considers that its final decisions in the markets for call origination on the fixed network and for wholesale broadband access resolve the competition problems regarding co-location and internal cabling.

NITA has taken action in a number of non price-related matters concerning access to network such as discriminatory behaviour and the provision of information. Favouring the consensus approach, NITA has successfully mediated *inter alia* in a case on co-location assistance, where an alternative operator's staff needed access to the incumbent's exchanges. In addition, the competition authority has an ongoing case in the Danish appeals tribunal regarding alleged abuse of a dominant position by the incumbent by means of bundling co-location with transmission.

A group of electricity network operators including the largest operators have drawn up plans to provide fibre to the home to public institutions, business users and households within their respective power supply areas. These operators intend to target 500,000 potential customers (homes passed) by the end of 2007 and around 1.2 million customers by 2015. Each local operator is responsible for the roll-out of its own network, and will decide on what terms – commercial or otherwise – access will be provided to households. The Danish competition authority has produced a report which *inter alia* finds that investments in fibre networks are undertaken in accordance with the rules on accounting separation in the Electricity Distribution Act. In the case at hand, these rules will ensure that the electricity network operators will not cross-subsidise the fibre network operations.

Mobile Markets

As in other countries, Denmark has experienced a slow-down in the growth of mobile penetration – at 96 percent at the end of 2005 – as the market has become more saturated. As a consequence of strong mobile call price competition, the migration from fixed to mobile has increased. The number of fixed subscriptions has decreased and calls from mobile phones have increased. At the end of 2005, there were four mobile network operators and one MVNO in the Danish market.

At the end of June 2005, the mobile subsidiary of the fixed network incumbent had a 31 percent share of the market based on the number of subscribers, representing a further decrease in market share from 33 percent a year earlier, despite the fact that the incumbent acquired a competitor with a mobile market share of 10 percent in 2004. Denmark has some of the lowest mobile retail prices in the EU. As a consequence of the development, NITA has preliminarily concluded that the mobile access and call origination is effectively competitive and the obligations currently imposed on two operators with (previous) significant market power should be withdrawn.

Four 3G licences were initially awarded by auction in 2001. As a consequence of a merger between two operators already holding licences, one of these four licenses was

⁶³ See above.

returned to NITA in January 2005. The Danish 3G licence conditions require the construction of networks covering 30 percent of the population by the end of 2004 and 80 percent by the end of 2008. All operators have complied with the first requirement. Two of the licence holders currently offer commercial 3G services. An auction was held in December 2005 for the re-allocation of the returned 3G licence.

While the 3G-l licence conditions prohibit logical network sharing, mast sharing upon request is mandatory by law and in general the 3G operators have been able to agree on mast sharing without major problems. The earlier debate on health issues connected to new 3G masts has basically subsided.

In October 2005 there were 28 operators authorised to provide mobile services, of which 24 were service providers. Excess capacity and mandatory access to mobile networks for service providers (in place since 2000) have paved the way for service providers primarily in niche segments of the market. While the combined market share of mobile service providers is small, the re-allocation of the fourth 3G-l licence may provide scope for strengthened presence of such operators.

Mobile operators have expressed concerns regarding the benchmarking model chosen by the national regulatory authority for regulating the mobile termination fees. There is doubt generally as regards the relevance of comparison with the chosen reference countries – Sweden, Finland and Norway – and in particular that the end result would not sufficiently reflect the costs of the regulated operators in Denmark.

Fixed wireless access has so far had limited uptake in Denmark. There has been concern among operators that the annual fees paid for the allocation of fixed wireless spectrum licences, levied by NITA, are high in relation to their economic value. The fees for the fixed wireless access licences were set at a point in time when market demand projections for such services were significantly higher – in Denmark and elsewhere - than what currently holds true. NITA has stated that the spectrum fees are proportionate (bearing in mind that each licence restricts NITA's ability to issue new licences). The spectrum fee is proportionate to the licensed bandwidth, i.e. the more bandwidth the licensee has access to the higher is the spectrum fee. There is an ongoing review of the incumbent's need of the spectrum allocated to it specifically for WiMAX, following concerns that this spectrum is not being used. According to NITA, the interest for providing WiMAX services is increasing in Denmark.

There is an ongoing ministerial project assessing the future allocation of spectrum rights. The issues covered include the prospect of a liberalised spectrum environment with spectrum trading and more freedom for licence holders to determine the use of the spectrum allocated to them.

Market and Technological Developments

In 2005, the already ongoing consolidation trend accelerated in Denmark. Larger international operators are purchasing smaller operators. The Danish markets for electronic communications now mainly consist of four large Nordic operators and their subsidiaries. The two major cable TV operators are owned by the two largest telecom operators. An increasing trend is also the packaging of services and various price schemes, in efforts to retain customers.

The migration from fixed to mobile voice services – where consumers cancel their fixed-line subscriptions in favour of only relying on their mobile phones – accelerated considerably in 2005 *inter alia* as a consequence of mobile telephony price wars. The fact that the fixed-line incumbent's wholesale bitstream access offer currently requires that the end user has a PSTN-subscription negatively affects migration. However, the NRA has demanded that the incumbent's bitstream access product should also be available as a stand-alone product (naked DSL).

Operators are concerned that Denmark does not currently provide an environment favourable to investments in telecommunications. The maturity of the Danish electronic communications markets in combination with the availability of telecommunications investment opportunities in less developed markets in other countries are two factors likely to discourage further investments in Denmark. A large part of planned or ongoing investments in electronic communications infrastructure can be attributed to the roll-out of 3G-networks. However, the electricity network operators' plans to connect households with fibre⁶⁴ would constitute major investments in fixed networks in Denmark.

THE CONSUMER INTEREST

Universal Service

NITA has regulated the retail call set-up charges of the SMP operator in the fixed calls markets. The current obligation is based on provisions in the Danish Act, according to which set-up charges are imposed on the basis of the Universal Service Directive. However, new regulation which will abolish all price regulation of USO services, including call set-up charges, was expected to enter into force on 1 January 2006.

Out of court dispute resolution

A consumer complaints board, financed by the industry, is in its third year of operation. The board handles issues such as double billing when changing operators and the redirection of calls without the user's consent. The latter issue, usually involving "modem hijacking", has been partially resolved since the operators -after being approached by NITA- blocked communications with a handful of very small island states to which the bulk of hijacked modem calls were redirected. Communication with these states now requires special activation by the subscriber.

Number portability

NITA has conducted a feasibility study on full number portability, enabling the porting of numbers between fixed and mobile phones. As a result, it has proposed that the legal requirement currently in the Danish law on full number portability should be abolished. Subsequently, the Ministry of Science, Technology and Innovation sent a legislative proposal regarding among other things the abolition of full number portability in public consultations. A bill on the abolition of the legal requirement on full number portability was expected to be adopted by the Parliament before the end of 2005.

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See Broadband above.

Digital TV

Terrestrial digital television will be available during 2006, when the three public-service TV channels will start broadcasting on the first nationwide digital terrestrial transmission network. Denmark's public service broadcasting companies will run the first digital terrestrial network, which initially will broadcast without encryption. Decisions regarding the establishment of further transmission networks are pending. Analogue terrestrial shutdown is scheduled for October 2009.

Must carry

Cable-TV operators in Denmark are currently subject to must-carry obligations including the retransmission of the programmes of the state broadcaster (public service radio and television channels), the public service programming of another nationwide channel and one local TV channel per area.

Privacy

The proposed requirements on operators to retain traffic data and other data for one year have been put on hold until there is clarity about a legislative proposal at EU level. The data which operators would be obliged to keep include *inter alia* incoming calls, mobile cell information and incoming e-mails. Operators, concerned about expected implementation costs, have questioned the proportionality of what they perceive as too far-going measures.

GERMANY

INTRODUCTION

In nearly all the fixed line markets the market position of the incumbent fixed network operator remains strong. In the mobile market, significant retail price reductions have taken place, with new operators providing only basic services entering the market. In the broadband market, the incumbent fixed line operator's market share has fallen, especially due to resale-based offers by its competitors.

The main regulatory issues are linked to market analyses, one of which was vetoed by the Commission. Analyses of important markets, such as the wholesale broadband market and the mobile markets, have been delayed, but the NRA has now started to notify some of them. The NRA's first draft of its analysis of the wholesale broadband access market was modified following a serious doubts letter by the Commission as it had excluded the analysis of the market based on the new VDSL infrastructure. In a modification to the draft, the NRA appears to have taken account of these doubts.

Twelve market analyses have been received so far. Decisions on remedies are notified separately to the Commission and their adoption is therefore further delayed.

Consumers have benefited from the market development over the past year, mainly through falling prices for some mobile and broadband products. More resolute and timely action on the part of the NRA in areas such as mobile termination and bitstream access, however, could possibly have led to even greater benefits.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Germany has transposed most of the new regulatory framework through a new Telecommunications Law (Telekommunikationsgesetz - TKG) which came into force on 26 June 2004. 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. Must-carry provisions have been transposed by legislation by the Federal States. There are three open infringement proceedings against Germany, two of them concerning limitations on the NRA's discretionary powers, and the third relating to transposition of the ePrivacy Directive.

The NRA

On 13 July 2005 RegTP, the regulatory authority for telecommunications and post, was subsumed into the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, BNetzA). BNetzA is a higher federal authority falling under the scope of activity of the Federal Ministry of Economics and Technology, and has its headquarters in Bonn.

The Federal Network Agency's decisions in the fields of telecommunications 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 BNetzA and its two vice-presidents. The members of the Presidential Chamber are political appointees and have annulable public service contracts, whereas the members of the other ruling chambers are lifetime officials. The Presidential Chamber is responsible for important issues such as market definitions and analyses.

Impartiality

Although the principle of NRA impartiality does not explicitly follow from the wording of the Telecommunications Law, it appears in principle to be guaranteed in Germany, as the NRA is bound by constitutional requirements such as the rule of law principle (“Rechtsstaatsprinzip”) and general provisions of administrative law, guaranteeing the impartiality of authorities and their officials.

Transparency

As far as the transparency of the work of the NRA is concerned there are also general administrative rules in force which pertain to the NRA as they do to any other administrative authority. These are laid down in the Administrative Procedure Act. They regulate in a general way how administrative procedures should be carried out in Germany. One provision deals, for example, with the obligation to hear participants, before an administrative act affecting their rights may be executed.

Furthermore, the Telecommunications Law itself lays down a procedure following which decisions have to be made by the ruling chambers. The ruling chambers are court-like bodies and they follow rules which are similar to those applicable to the courts. It thus appears that sufficient transparency is guaranteed for the parties concerned as well as for third parties.

Resources and expertise

Market players are very concerned about the effects of the creation of a broader field of responsibility for the NRA, due to the addition of the electricity, gas and railway sectors. Experienced members of the ruling chambers in the telecoms area are said to have moved to the new sectors within BNetzA. Market players are afraid that the NRA will therefore lose expertise and experience in the surveillances of the telecoms sector. The NRA and the Ministry have confirmed that some experienced officials of the telecoms sector have taken over responsibilities in the electricity and gas sectors. They have also confirmed that for the telecoms sector there will be no recruitment of new external staff due to budgetary constraints. Due to this, BNetzA runs the risk of losing valuable expertise and skills in its telecoms sector.

Appeals

The new Telecommunications Act has eliminated one instance in the court hierarchy and left only one instance to decide on the facts of a case. Whereas market players are not ready yet to conclude that this change has really led to an acceleration of the appeal mechanism, BNetzA considers that this amendment and the establishment of an additional chamber dealing with telecoms law within the Administrative Court of Cologne have led to a clear acceleration of the appeal mechanism.

According to the Court, at present there are approximately 250 proceedings related to telecommunications law pending before the Court. About 70 of these proceedings deal with legal questions related to tariffs and charges pursuant to the TKG.

Contrary to the NRA, the Court applies a narrow interpretation of the provision of the TKG regulating the transitional period. The Court is of the opinion that obligations imposed by means of an administrative act under the old framework remain applicable only in exceptional circumstances. The Commission services are currently investigating whether this is in compliance with the regulatory framework.

Spectrum management

Frequencies are assigned by administrative act either *ex officio* (general assignments published in the Federal Network Agency's Official Gazette) or upon application (individual assignments). The TKG enables the Federal Network Agency to tender or auction frequencies in special cases where demand outstrips the number of frequencies available for a particular application.

Decision making

The way BNetzA applies the consultation procedures provided for in the TKG appears to be complex. There are separate consultations for market definition/analysis and for remedies. However, according to the TKG the consultations may be run in parallel. The NRA also notifies the decision on market definition / analysis separately from the decision on the imposition of remedies.

The duration of the market analysis procedure and the imposition of remedies are amongst the aspects that are most heavily criticised by market players. The NRA was reported to be eager to start the collection of data for relevant markets and the first consultations on market analyses; there were, however, frequent reports of inaction related to important markets such as mobile markets or the market for wholesale broadband, and loss of certainty by market players was a possible consequence. Germany has notified the analyses of 12 markets so far, covering retail fixed markets, wholesale fixed markets, the market for wholesale unbundled access to metallic loops, and the wholesale broadband and one mobile market. For four markets a notification of the imposed remedies has taken place: for the wholesale fixed markets and for the market for wholesale unbundled access to metallic loops and sub-loops for the purpose of providing broadband and voice services.

As far as the notification of the remedy imposed on the market for wholesale unbundled access to metallic loops is concerned, new entrants were critical when in the course of this proceeding the NRA lifted existing regulation concerning certain optical fibre lines. Market players are concerned that this decision could already be seen in the context of the incumbent operator's recent announcement to consider investing € 3 billion in optical fibre lines in Germany and its claim for a regulatory holiday with regard to this investment. However, BNetzA had published the final decision on the market for wholesale unbundled access to metallic loop on 22 April 2005, whereas the incumbent fixed line operator publicly announced the planned investment in optical fibre lines only on 1 September 2005. Nevertheless, BNetzA's first notification of the analysis of the market for wholesale broadband access excluded the analysis of the market based on this

new VDSL infrastructure for an indefinite time. In a modification to the draft, BNetzA appears to have taken account of doubts expressed by the Commission services.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection generally

Doubts were recorded in the previous implementation report as to whether the TKG limits the NRA's discretion by laying down fixed remedies for certain situations and by introducing criteria which are outside the framework (for example "double dominance" and "historic market power"). By virtue of this, it could be possible for consumer-sensitive markets such as wholesale broadband access or voice call termination on individual mobile networks to be excluded from appropriate regulation. These doubts persist and an infringement proceeding has been initiated.

Competition/Market situation

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 significant with the exception of publicly available international telephone services provided at a fixed location. However, further decreases in the market shares can be seen with regard to all types of call. On the basis of retail revenues, the following decreases can be noted: from 89% to 75% for local calls, from 69% to 64% for national calls and from 47% to less than 40% for international calls, while the share of calls to mobile has fallen from 66% to 61%. The incumbent's share of the market for local calls on the basis of outgoing minutes has seen a significant drop, from 82% in 2003 to 67% in 2004.

The total number of operators that are actually offering public fixed line voice telephony or public network services has risen only slightly since the last report. Up to the end of October 2005 there were 112 operators actually offering fixed public voice telephony services (up from 94 in 2004). There are now 10 cable TV operators (up from 8 in 2004) which are offering voice telephony. Seventeen percent of subscribers continuously use a provider other than the incumbent operator for local calls, up from 11% in 2004. Direct access from customers to operators other than the incumbent fixed line operator is increasing only slowly: 6% of subscribers have direct access to a provider other than the incumbent operator, up from 4% in 2004. These figures show a slow positive development, but they also underline in general the remaining strong position of the incumbent fixed line operator.

Relevant market analyses and regulatory decisions

The Commission vetoed one decision concerning parts of Germany's analysis of the market for call termination on individual public telephone networks provided at a fixed location, where Germany had been of the opinion that, apart from the incumbent fixed network operator, no operator had SMP. After the veto decision, Germany changed its draft to take into account the Commission's comments and informed the Commission accordingly.

CPS

C(P)S is broadly accepted and the fact that the incumbent fixed line operator also collects the charges for call-by-call connections made through its competitors makes it very easy for customers to use carrier selection. In most cases a previous registration with the alternative operator is not necessary.

To ensure the proper functioning of retail fixed markets 1 – 6, BNetzA has published and notified an urgent measure pursuant to the Framework Directive maintaining and imposing necessary regulatory measures, in particular carrier (pre-)selection obligations. The Commission has not opposed this way of proceeding.

Broadband Markets

Competition/market situation

On 1 October 2005, a total of about 9.5 million broadband Internet access lines were in operation in Germany. The penetration rate is 11.5% (up from 6.6%). Ninety-seven percent of fixed broadband retail lines were DSL lines. Cable continues to be used mainly for television, but the cable network operators have slowly begun to offer broadband internet services.

The incumbent fixed line operators' share in the market for fixed broadband retail lines is 65%. The incumbent fixed line operator's share in the DSL retail lines market has decreased significantly, from 83% in 2004 to 67% in October 2005. The increasing market share of its competitors, however, is to a considerable extent based on resale products of the incumbent. According to BNetzA, however, the majority of the increase is based on access to the unbundled local loop (reportedly 63% of all retail DSL lines offered by competitors).

Relevant market analyses and regulatory decisions

BNetzA had not taken into account the announced investment in the optical fibre when first analysing the market for wholesale broadband access. In a modification to the draft, BNetzA appears to have taken account of doubts expressed by the Commission services.

Local loop unbundling

In 2004 there was an increase of about 44% in the rental of unbundled local loops from the incumbent fixed line operator to competitors⁶⁵. The NRA lowered the monthly charge for the unbundled local loop from € 11.80 to € 10.65.

Bitstream access

As of December 2005, there is still no bitstream access offer by the incumbent in Germany, a deficiency already been referred to in the last implementation report. BNetzA has been waiting for a voluntary offer by the incumbent fixed network operator, which has not been presented so far. BNetzA has analysed the market, but only when it

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decides on the imposition of remedies will market players enjoy the necessary security to invest in this market and offer modern and state-of-the-art products to the German consumers which go beyond mere resale.

Resale

Since mid 2004, competitors have had at their disposal, apart from offering access via their own DSL lines, a resale offer covering the incumbent fixed network operator's DSL lines. Resale led to a considerable growth of broadband access in Germany referred to above.

Thirty-six per cent of DSL lines offered by competitors are based on resale.

Since the entry into force of the new TKG, the NRA has had the power to require the SMP undertaking to provide a resale offer to its competitors. However, pursuant to a transitional provision inserted in the TKG, the scope of a possible resale obligation should be limited until 30 June 2008, to cover only resale of access services bundled with conveyance services. The NRA has not imposed a resale obligation for broadband access lines in Germany so far. The fixed line incumbent's resale offer is based on a voluntary commercial basis.

Mobile Markets

Competition/market situation

Mobile penetration is at 90% (omitting non-active pre-paid cards) in October 2005 (up from 82%), and there are 76 million subscribers. There are twelve mobile players in the market, and four of these have their own mobile network. The overall market share of the subsidiary of the incumbent fixed network operator was 38% (down from 40%) in October 2005. The main competitor held a market share of 37 % (down from 38%).

Relevant market analyses and regulatory decisions

The NRA started the analysis of two mobile markets, but has only been able to finalise that for the market for voice call termination on individual mobile networks by October 2005. Furthermore, the decision on which remedies to impose will presumably still take several months. Due to this general delay, potential market distortions, probably impacting on prices for fixed to mobile calls, may persist.

Up to now, in principle, mobile markets have not been regulated in Germany. The four network operators have applied a slow decrease of termination fees, which was welcomed by the NRA. The NRA has carried out the market analysis designating all four as SMP operators, but it has not yet notified the intended remedies.

Market and Technological Developments

As regards VoIP, BNetzA has adapted the definitions and analyses of certain fixed retail markets to include VoIP after consulting the market players and the Federal Cartel Office. As far as numbering for VoIP is concerned, the NRA has reserved the range of 032 numbers. However, the NRA has also decided to allow geographical numbers for VoIP on condition that the person/entity applying for the geographical number has a

residence in the area the geographical number is reserved for. The NRA's "light touch" approach is likely to support the further deployment of this technology.

THE CONSUMER INTEREST

Retail price trends

In the fixed network, operators provide various special offers such as a reduction of the connection fee or the granting of fixed sums of credit. Furthermore, end user equipment (modems etc.) for new ISDN or DSL subscribers are offered free. Flat rate tariffs for data conveyance via DSL subscriptions are continuously going down. The trend towards paying a higher monthly fee for lower prices for calling minutes has continued. Nowadays some tariffs plans allow unlimited national calls to fixed network numbers for less than € 20 per month.

Mobile operators offer inclusive tariffs to cover a certain number of minutes for calls per month. Some tariffs make it possible to call free of charge at certain times, e.g. at weekends. New low-cost mobile service providers entered the market in 2005 offering a minimum service but an easy tariff system with just one price for calls in all national mobile and fixed line networks. As a consequence, tariffs have fallen remarkably. Flat rates are also available, allowing the customer unlimited calls to the network of the network operator and to fixed lines.

Some of the mobile offers aim at attracting, in particular, fixed line customers, indicating the possibility of future substitution of fixed by mobile.

Universal Service

It has already been stated in the previous implementation report that the new TKG appears to limit the NRA's regulatory discretion and powers. In this context, reference has also already been made to provisions dealing with regulation at the retail level. These causes of concern on the part of the market players and the Commission services persist. The Commission has initiated an infringement proceeding in this regard.

Data Protection

Due to some inaccuracies and deficiencies in the German law in transposing certain provisions of the ePrivacy Directive, the Commission has initiated an infringement proceeding against Germany.

Emergency services (112)

Whereas there is broad awareness of 112 as the national emergency call number, there is little awareness with respect to its applicability abroad. The Ministry in charge, the Ministry for the Interior, appears to have done little to advertise 112 as a Europe-wide number for emergency calls. In addition, it remains to be examined how far this service can effectively be used in Germany using other languages apart from German. The requirement to make caller location available is dealt with in the TKG regardless if the emergency call originates in a fixed or mobile network. For the time being, the location can be determined as follows: in cases of fixed networks on the basis of the calling

number by means of an online request to BNetzA; in cases of mobile networks the providers provide the Cell-ID of the radio cell where the emergency call is originated. The Commission services are currently examining the issue of “112” in Germany.

Directories

In August 2005 BNetzA published a decision, which took full account of the ruling by the ECJ in case C-109/03 “KPN”⁶⁶ according to which only restricted costs can be claimed for the provision of subscriber data to alternative telephone directory or enquiry service providers. Due to this, a court ruled that the incumbent has to pay back, to one of its competitors, a considerable sum. The incumbent has appealed this court decision.

Must-carry

Must-carry is regulated in all sixteen 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. Some must-carry rules have been called into question by market players, and the Commission services are investigating whether the legislation of the sixteen Bundesländer actually takes into account the conditions to allow must-carry as laid down in the Universal Service Directive.

⁶⁶ ECJ rep. 2004 I p. 11273.

ESTONIA

INTRODUCTION

The Estonian electronic communications market has again proven to be a frontrunner in terms of retail market developments and growth, despite a number of regulatory problems. Operators clearly have incentives to provide services and a large number of authorised operators are active in the market. However, fixed penetration remains low and there are indications that the level of infrastructure investment also remains low, so that the provision of wholesale services remains rather basic and most operators can be categorised as resellers. Nevertheless, broadband penetration increased considerably to 12% and was the highest amongst new Member States. Mobile telephony remained the key market in 2005 and, as well as a significant increase in penetration in the 2G market, the largest operator launched the first commercial 3G service in Estonia in October 2005. There does appear to be considerable potential in both fixed and mobile markets which, once properly exploited, and given the right mix of stimulation of investment and appropriate regulation should be able to introduce more balanced competition and bring about increased long term benefits to consumers.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Estonia transposed the regulatory framework by means of the Electronic Communications Act (the ECA), which entered into force on 1 January 2005. Following adoption of the ECA, the Government and various Ministries adopted 21 out of 37 secondary acts envisaged by the Law. Several secondary acts based on the old Telecommunications Act remain in force until the adoption of new ones or until the adoption of market analysis decisions on the basis of the ECA. However, the Commission is examining some of these transitional provisions, as well as the case of bitstream access where the existing obligations imposed on the incumbent seem to be defined narrowly, leaving the operator a wide margin of discretion on how to interpret its commitments. Other laws, intended to complement the ECA and transpose the regulatory framework, were notified to the Commission only during the process of drafting of this report. Currently the text of the ECA is under examination by the Commission services. The Commission has already launched infringement proceedings for the failure of Estonia to transpose the Directives correctly, namely in the case of SMP obligations that will expire by the end of 2005, irrespective of results based on market reviews and in the case of market definitions.

The NRA

Powers and objectives

A majority of the market players consider the Estonian National Communications Board (ENCB) to be an impartial regulatory authority, able to carry out its tasks in a transparent and objective manner. However, alternative operators perceive ENCB to lack the powers

to enforce fully appropriate obligations on the incumbent, in an environment in which its decisions are regularly challenged in court. The ENCB's powers in this regard appear to be limited, since the biggest fine that the regulator can impose on an operator for non compliance with its obligations is limited to € 3 000.

A key limitation on the ability of ENCB to regulate the market in 2005 was the difficulty to update or enforce the SMP obligations that were in place under the transitional regime, and which expired anyway at the end of 2005. Operators tended to challenge any extension of the scope of transitional SMP obligations, based on the lack of precision with which they had originally been formulated. The Ministry of Economic Affairs and Communications appears to have been allocated some regulatory tasks normally attributed to an NRA under the regulatory framework, notably those related to the accounting methodology to be used when applying obligations of accounting separation.

Decision making

According to ENCB, the process of market analysis is being carried out in two stages. The first phase, including analyses of call termination on individual public telephone networks provided at a fixed location, wholesale broadband access and voice call termination on individual mobile networks began in April 2005; however no notifications had been made by mid December to the Commission in that respect. The second phase, which was to begin in early 2006, is intended to complete the list of market analyses to be notified to the Commission services. Domestic consultations were to be run ahead of consultations of the Commission services. As ENCB had not concluded any market analysis and no notifications were made, the Commission launched infringements in October 2005 against Estonia in that respect.

Appeals

The ENCB seems to have a number of difficulties with enforcement of its decisions, mostly owing to the lax definitions originating from the old Telecommunications Law. The lack of legal certainty about these obligations gives strong legal grounds to the addressees of decisions to appeal the measures, should they choose to do so. There are currently five appeals preventing ENCB from enforcing SMP obligations to help the current telecommunications market to function more effectively. Two cases relate to interconnection, one case to the SMP designation and related remedies, one case to broadband access and one to alleged price squeeze. There has been, however, a recent court ruling related to the price squeeze, where the fixed incumbent operator's request to annul ENCB's decision was rejected and the incumbent was ordered to comply with the regulator's decision without delay. In general, an obligation for execution of ENCB's decision is not automatically blocked if an operator submits an appeal to the court. A special procedure is required to do so. There has been one case, concerning DSL obligations on the fixed incumbent, in which the implementation of requirements was suspended.

Dispute resolution

With regard to dispute settlement, the broad opinion of operators is that the procedures brought before the authorities are in general cumbersome and lengthy. Currently, there is a dispute about interconnection prices, involving one of the alternative mobile operators. The case is still pending, since the ruling of the administrative court has not yet taken effect as the term for appeal has not expired.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection

Interconnection prices have decreased significantly over the last year; however, the charges for call termination on the incumbent's fixed network still remain above the EU-25 average. In addition, market operators seem to charge set-up costs. The question of whether the incumbent operator may charge lower termination rates to retail arm (self-supply) than it does to other market operators has been raised by those operators.

Competition/Market situation

There is no infrastructure competition in the fixed telephony market. The market has an estimated value of some € 104 million excluding VoIP services and some € 108 million including VoIP operators. There are 17 operators providing fixed voice telephony services and 9 resellers of services. Market penetration did not show any signs of growth and thus continues to be low at 33%. The market share of the incumbent operator measured in minutes of traffic remains high, around 84%. Most competition is, in contrast to other smaller markets, in the national calls segment, however more competition is still expected to be developed on the international market. The fixed incumbent had SMP status for telephony services, leased lines services and interconnection services market in 2005, at the end of which the obligations expired.

Leased lines

The share of the incumbent operator on the market of leased lines is 75%, 1.2 percentage points down from 2003. There are at present 19 leased lines service providers. In the absence of market analyses, cable operators experience problems in obtaining access to the fixed incumbent's backbone.

Broadband Markets

Penetration

The growth of the broadband market was very high compared to the year before (currently topping the EU-10 table, with a penetration rate of 12%).

Competition/Market situation

There are currently 66 operators providing purely broadband services, eight providing both broadband and narrowband and only four providing purely narrowband services. Only nine service providers have direct international internet access and only ten operators have more than 1 000 end-users. As bitstream access appears to be impossible for alternative operators and since it appears to be very difficult to gain shared access, relatively high barriers to entry prevent alternative fixed operators and ISPs from providing (higher) value added services, i.e. following the investment cycle from pure resale to LLU. The absence of SMP obligations under the transitional regime and the lack of consistently structured and logically applied wholesale services (from pure resale to LLU) create the situation where the incumbent operator could find itself in the position of capitalising on further technological developments, such as VDSL, and thus creating barriers to entry. Strong competition is present only in the urban areas, where local cable operators compete with the incumbent in the provision of internet services. Optimistically, further competition could be expected in rural areas if the incumbent provides access to their broadband wholesale facilities and services on a full scale basis. Besides, the incumbent operator has been promoting a special LAN service for apartment buildings, where more customers share one connection at an average price that is lower than the wholesale price for local loop. A LAN offer is not available to competitors. Moreover, in the cable market, the fixed incumbent operator started challenging the competition with its cable broadband offer. There are no cable operators currently providing wholesale internet services. The fixed incumbent operator controls around 53% of the broadband market (85,622 connections) and has 98% market share in the DSL segment, whereas two cable operators (one with 45% of the national coverage) provide access to 35% of customers.

Technologies

The technology mainly used to provide broadband is ADSL, while one can observe the growing presence of other access platforms, as for example optical fibres and WLL networks, which represent roughly 17% of the market.

Local loop unbundling

Since the incumbent had no obligation until now to provide bitstream access to other operators, the provision of broadband relies on the unbundled local loop. The Commission services are currently examining whether the available unbundling offer, published by the fixed incumbent, is consistent with the principles and scope of the EU Regulation on Unbundling. According to the information provided by the NRA, two of the minimum and obligatory elements are missing. The unbundling of the local loop, which is available to the alternative operators, does not appear to offer a viable business case, in light of the incumbent's retail prices. This applies to both fully unbundled and shared access. In the case of shared access, alternative operators are obliged to order a special technical facility called "shared access possibility" for every main distribution frame, thus increasing their wholesale cost. The price for shared access with the "shared access possibility" is at almost the same level as the price of full unbundling and prevents the development of value added services. Currently, none of the alternative operators are

using shared access and there are four providers of services based on a fully unbundled local loop. Volume discounts are available only to the incumbent's own retail services.

Bitstream access

The SMP obligations based on the old Telecommunications Law do not appear to oblige the incumbent to provide access to the ATM network, meaning that an effective bitstream offer is unavailable to other operators. The difficulty for other operators to gain access to the ATM network has allowed the incumbent to consolidate its market position on the broadband market and to generate extra revenues. It is understood that this issue will be examined by ENCB as part of the market analysis process.

Mobile Markets

Penetration

Mobile telephony penetration rose by 20 percentage points since the publication of the last annual report, where the figure stood at 84%. Roughly half a million users are pre-paid subscribers, whereas 0.9 million users are post-paid subscribers.

Competition/Market situation

Competition between operators providing networks and services is far more balanced than in the case of the fixed market. There are three operators providing mobile telephony services over their own network and four mobile virtual network operators (MVNOs). There are currently four MVNOs offering services on the network of the alternative operator. The mobile branch of the company that also owns the incumbent has a market share of 46%, whereas the closest competitor controls 32% of the market.

Technologies (2G/3G)

The market leader in the 2G mobile segment was the first operator to have also launched a commercial 3G service covering the capital Tallinn. However progress is slow as regards a further rollout of its network and those of the two alternative operators.

Mobile regulation

Despite some recent interventions in the period from January to July 2005 by ENCB, which resulted in a decrease of rates (justified on the basis of weighted average cost of capital) by 15% on average, the termination segment of the mobile market (where there are no designated SMP operators) continues to represent an ongoing concern for fixed operators who terminate their calls on mobile networks. It appears that mobile operators have no cost-based obligations regarding termination on the mobile segment as opposed to the termination obligations imposed on fixed operators. Mobile termination rates are 24 to 33% higher than European weighted average termination rates. The NRA had been developing a model to calculate costs of call termination; however, as the process was rather cumbersome, in the short term ENCB intends to rely on a benchmarking methodology, in order to conduct cost analysis in the process of the forthcoming market analysis.

Tariff Issues

Bundling

The fixed incumbent operator successfully bundles its ADSL and telephone service offers for residential customers. The price for a standard 512Kbps download speed in the bundled offer appears to leave little extra margin for alternative operators, if compared with an offer based on LLU. Several complaints have been addressed to the Consumer Protection Board in that respect, reporting that the incumbent had been bundling services which the consumers did not require.

Margin/price squeeze issues

Shared direct access is reported to be held back for the reason of a potential price squeeze. The Commission services are looking into this matter.

THE CONSUMER INTEREST

Retail price trends

Towards the end of 2004 a joint “mobile-fixed” service package was introduced on the market by the fixed incumbent in cooperation with its mobile counterpart. The package is offering favourable tariffs for calls from fixed to mobile network. Although this service targets fixed users, it is marketed by the mobile arm, who is not an operator with a SMP status on the fixed market. As the offer significantly undercuts the average retail prices, ENCB requested information regarding cost configuration of the above service, to no avail, as the mobile operator refused to cooperate.

Moreover, in October 2005 the fixed incumbent operator started offering to its Home Package customers a round-the-clock opportunity to make calls on the incumbent’s fixed telephony network free of charge starting from the 10th minute of the call. Less than the usual rate is charged for these calls up until 10th minute (the price of a national 10 minute call is in general the second lowest in the EU and still decreasing since 2004). The facility does not extend to the calls made to the numbers of the Internet dial-up centres, service numbers applying special charges, public payphones numbers and to calls made via carrier selection. Average monthly expenditure of both residential and business users is the second lowest across the EU-25 and amounts to € 24.2 per month (VAT included) and € 53.5 per month (excluding VAT) respectively. One can also notice that the average price for an international call decreased from 2004 to 2005 by € 0.14 to € 0.68 (VAT included) in the case of residential users and by € 0.08 to € 0.46 (VAT excluded) in the case of business users.

The national competition authority (the NCA) has taken action against the pricing policy of certain cable operators when moving into new geographical areas, by imposing on them obligations to increase their retail tariffs. This intervention covers only those geographical areas where the existing competition had been threatened by this pricing strategy.

Universal Service

The obligation to provide universal service (US) on the basis of the Telecommunications Act prior to the entry into force of the ECA remains valid under the conditions applicable before the entry into force of the ECA until an operator, with the obligation to provide universal service is appointed according to the ECA. This transitional status shall, however, not be maintained any longer than 31 December 2006. Currently, there is one operator with an obligation to provide universal service. No problems have been reported by the NRA with regard to provision of US. US providers have presently no legal obligation to provide directory enquiry services and comprehensive directories to end-users. In practice, more than just two operators provide such services.

Number Portability

Nearly 7 000 numbers per month have been ported in 2005 on average, with 80% of these being mobile numbers and some 20% fixed numbers. Market operators have responded rather positively towards the introduction of number portability, but there is criticism relating to the management and pricing policy of ported numbers.

Digital TV

Estonia has not taken any official step in the direction of digital switchover. A strategy document, drafted by a working group of interested parties led by the Ministry of Economic Affairs and Communications, was made available to the government of Estonia in June 2004. It intends to establish a switch-off within 2 years following the penetration rate of digital receivers on terrestrial broadcasting reaches certain value (probably 75% of the population), but in any case not later than 2015.

Must Carry

The Estonian Broadcasting Act establishes the legal provisions for ensuring must carry obligation. Only one undertaking that is responsible for operation of nationwide transmission and distribution networks is concerned with the obligation, whereas only public broadcasters (national TV and radio) benefit from that obligation. The remuneration for must carry obligation is based on commercial negotiations, whereas the Estonian Competition Board has been attributed powers to resolve conflicts arising in that context.

GREECE

INTRODUCTION

Greece finally transposed four of the five Directives (not including Directive 58/2002) on 17 January 2006. The Greek electronic communications market has suffered from the lack of transposition of the regulatory framework in 2005, as regulation under the old framework has been considered by various market players to be partly excessive and partly insufficient. The Court of Justice condemned Greece in December 2005 for its failure to transpose the framework.

The fixed incumbent operator has maintained its position as the only access network provider in the fixed market. There has been some progress towards more competition in the retail market, primarily as a result of CPS services provided by alternative operators. The development of the mobile market is more satisfactory, as competition is quite well developed, although procedures concerning masts, base stations and rights of way in general have to be clarified and simplified. Despite recent positive signs and some ambitious projects supported by the Greek government, broadband access is one of the major problems in the electronic communications markets in Greece. Some serious problems remain in the directories market.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The transposition law was adopted on 17 January 2006. Transposition seems not to include Directive 2002/58/EC, for which a law is being prepared separately by the Ministry of Justice, and some broadcasting issues, which will be dealt with in a separate law. Secondary legislation (presidential decrees and ministerial decisions) implementing the law is likely to take a few more months after adoption of the law.

The very long delay in transposition has had some serious consequences for the Greek electronic communications sector and has been deplored by the NRA and all operators. Old regulatory obligations and procedures remained in place, while the NRA was unable to fully carry out its tasks of market analysis and establish appropriate remedies or review existing remedies in most markets. This was felt in particular in the area of broadband, where Greece remains at the bottom of EU Member States. Moreover, serious legislative or regulatory weaknesses identified in the 10th Implementation Report have remained throughout 2005 and have seriously hampered the growth of the electronic communications market in a smooth regulatory environment. These include the lack of an effective appeals mechanism, non-transparent and cumbersome rights-of-way procedures and ongoing disputes with regard to health and environmental aspects of masts and base stations. The new law seems to have provisions addressing these problems and their effectiveness will be tested as the law is applied.

The NRA

Independence

This has been a somewhat difficult year for EETT. On the one hand, the lack of transposition restricted its regulatory possibilities and, on the other, the end-of-term of its board, in May 2005, resulted in some regulatory uncertainty until the new board came into office in August 2005. Decisions are taken by the board acting as college under one President and two Vice-Presidents. As of this year, these are selected by the Council of Ministers (i.e. the government) following a Parliament committee hearing. At the time of drafting of this report, EETT employed 157 qualified staff, which will be further increased in order to accommodate the tasks assigned to EETT under the new Law. EETT have also used the services of external consultants for a number of tasks such as the audit of the incumbent's cost accounting system, the analysis of relevant markets envisaged in the new regulatory framework, etc.

Powers and objectives

As far as operators' expectations towards EETT are concerned, the incumbent has expressed a strong wish for a more stable pricing methodology for interconnection and leased lines that would facilitate investment and business planning. Alternative operators have called for stronger EETT enforcement powers in the form of heavier fines, more proactive action and an appeals system that would not de facto jeopardize EETT's decisions. All operators would welcome quicker EETT decisions resulting from hearings and public consultations. Although, as a result of the new EETT board taking office, some 2005 hearings have had to be repeated, EETT points out that there is no pending complaint submitted before 2005. Some operators have criticised EETT for not adequately responding to their letters or complaints.

Decision making

EETT has undertaken a number of market analyses. It has concluded its work on market 16 (wholesale mobile call termination), reviewing its 2004 notification after receiving the Commission comments in August 2004. The Commission gave a generally positive reaction in June 2005, in the understanding that the final measures resulting from this notification would not be formally adopted and enforced against individuals until appropriate transposition had taken place. At the time of drafting of this report, EETT has also concluded national consultations for the definition, market analysis and proposed remedies for market 11 (unbundled access to the local loop) while the relevant consultation for market 12 is also in progress. Pre-notification meetings have been arranged for markets 11 and 15. Additionally, the national consultations for the market definition of markets 8 (fixed call origination), 9 (fixed call termination) and 10 (fixed transit services) have been concluded.

EETT has been encountering problems with markets 13 and 14 because the incumbent has been providing incomplete data and markets 1-6 because the incumbent could not distinguish between residential and business retail customers.

Appeals and out of courts dispute resolution

All operators have serious concerns with the apparent inadequacy of the existing appeals mechanism. Appeals against NRA decisions have to be made to the highest administrative court, the Council of State, able to hear appeals on procedural, not substantive grounds. Administrative court injunctions against NRA decisions were possible only for irreparable damage. It seems that the Council of State has taken no decision yet on any of the appeals made to it, primarily by the incumbent, and this has created considerable legal and market uncertainty. The administrative court of First Instance decides on matters related to faults of administrative procedure of collection of fines, imposed by EETT. Within the framework of that procedure, the court may incidentally decide on EETT's Decision based on which the fine has been imposed and may suspend the payment of the fine as an interim measure, in case of irreparable, moral or economical damage and so far seems to have blocked all fines imposed by EETT until the relevant appeal is decided by the Council of State. The new law provides that the administrative court of Appeal will be able to decide on the merits of the case under strict deadlines.

The dispute resolution procedures have functioned well so far, although they have mostly not taken the form of mediation between disputing parties but rather operators' requests to EETT for injunctions or interim measures related to C(P)S win-back or slamming practices, claims of debts from alternative operators to the incumbent and vice versa and related switch-off threats or complaints regarding number portability. For some of these matters, final decisions will have to be taken by the courts, which seem to be taking too long and not to have appropriate expertise. For matters brought before EETT, affected parties are called to a Hearing, before a Hearing Committee, prior to the issuing of the Decision by EETT.

Rights of way and facility sharing

The situation regarding rights of way has deteriorated in the reporting period, in the absence of a transposition law, in particular in the case of mobile masts and base stations. As from spring 2005 there has been a complete blockage of any authorisation to install base stations or masts for mobile or fixed wireless communications. This was the result of a decision taken in March by the Council of State, which considered a specific mast as illegally installed, primarily for procedural grounds, but also made reference to an alleged lack of substantive conditions (specific rules to address proximity to schools or hospitals). A number of local authorities have since brought base stations and masts down and no new authorisations have been given. The new Greek law provides that base stations and masts located near hospitals and schools will have to observe more strict radiation standards, while radiation controls of all masts and base stations will be increased (operators will be charged for this purpose € 200 per mast annually).

A large number of procedures and licenses seem to be required, involving many different public authorities (municipality, town planning, military, environment, archaeology, NRA). Under the new law, special procedures will be adopted by Ministerial decision and the relevant rates will be fixed by the NRA. In some cases, thanks to an old law concerning public utilities, the incumbent seems to encounter fewer obstacles in rolling

out or upgrading its network, often done in the context of digging projects involving a number of public utilities (transport, telecom, electricity and natural gas power, water).

Spectrum management

In 2005 EETT deployed fully the national spectrum management and monitoring system (NSMMS) covering areas of Athens and Thessaloniki with fixed and mobile stations and the rest of the country with mobile stations. EETT used this in 2005 for the technical analysis and licensing of frequency assignment applications as well as for monitoring different bands of the spectrum. Results were positive since both the time intervals needed to assign frequencies and resolve interference complaints have been reduced.

Wi-Fi / Wi-Max

In the spectrum band of 2400 – 2483.5 MHz, installation and operation of W-LAN for own use is licence-exempt. An individual licence is required in Greece for the provision of services to third parties encompassing the operation of hot-spots. The provision of Fixed Wireless Access Services (connection of end users with fixed public network) in this spectrum band is currently not permissible.

The spectrum bands of 5150-5250 MHz, 5250-5350 MHz, 5470-5725 MHz and 17.1 – 17.3 GHz allow the licence-exempt interior use of HIPERLAN systems, while their exterior use needs authorisation of EETT, after approval by the Ministry of Defence.

EETT has proposed the issuance of a Ministerial Decree defining the spectrum bands 2400 – 2483.5 MHz, 5150-5250 MHz, 5250-5350 MHz, and 5470-5725 MHz as spectrum bands for the development of Wireless Access System, including WAS/RLAN, irrespective of system architecture.

Operators who were awarded licences in the 3.5 GHz band, through an auction procedure in 2000, are preparing to deploy Wi-Max technology networks. Moreover there is interest for one remaining licence in this band for similar use. EETT has launched a competitive procedure.

REGULATORY AND MARKET DEVELOPMENTS

Fixed markets

Competition/Market situation

In September 2005 there were 24 authorised public fixed voice telephony operators of which 13 were commercially offering fixed voice telephony services over a leased or own network. These include the incumbent but do not include operators acting as resellers or suppliers of prepaid services. Although the incumbent is still strong in the fixed calls market, there has been some significant progress towards more competition, reflected in the fact that the incumbent's retail revenues market share fell from 85% in December 2003 to 76% in December 2004, while there were three additional operators, which, together with the incumbent, accounted for 90% of the market. In particular, the

incumbent's market share was estimated at 82.1% in local calls (including calls to Internet), 74.6% in long distance calls and 68.6% in international calls.

The situation in the market of local calls to Internet only remained particularly one-sided, with the incumbent having more than 99.5% of call-minutes to Internet. This was partly due to the artificially low prices for dial-up narrowband access, which in turn have had an impact on the very slow uptake of broadband.

The incumbent failed to provide on time the data for its annual cost audit by EETT. EETT had to set provisional prices for services until the audit would be concluded, with one year delay, and this has maintained a continuous price uncertainty in the market.

Access/Interconnection

Interconnection charges for call termination on the incumbent's fixed network have fallen from 0.69 €-cents in July 2004 to 0.57 €-cents in October 2005, just over the EU average. Alternative operators have stressed that the incumbent has been using old contracts, sometimes not following the most recent RIO of 2003. The incumbent, on the other hand, has been asking for letters of bank guarantee, which have been challenged by some operators. Moreover the incumbent was making interconnection with alternative operators own infrastructure, via Fixed Wireless Access, very difficult, refusing the installation of alternative operators' equipment on-top of the incumbent's building. The same applies for installing alternative operators' fibre networks inside the incumbent's premises. EETT has intervened repeatedly regarding co-location issues, which it considers of paramount importance for competition in a number of markets. However, the incumbent has not complied yet, stating instead that it was prepared to sign co-location agreements but this required careful arbitrage and common planning that would avoid discrimination of some operators, given the limited number of "prime" locations.

Carrier Pre-Selection

Twelve (12) alternative operators have been offering their services through carrier pre-selection. EETT has taken an asymmetrical decision, aimed at preventing incumbent's win-back practices, asking that any subscriber wanting to move away from the incumbent would only do it via the new alternative operator of his choice and any move from an alternative operator back to the incumbent would also be requested through the alternative operator and not directly to the incumbent. The incumbent appealed to the courts and simply refused to follow this decision. In practice the decision seems to have enabled slamming practices of alternative operators without significantly restricting the incumbent's win-back practices. EETT warned the incumbent with imposition of a fine of 150 € per subscriber subjected to CPS deactivation or denial of CPS activation in breach of regulations. The matter was being reviewed when this report was being drafted.

Leased lines

From an EU benchmarking perspective, leased line charges have been low for low-capacity and high for high-capacity circuits. This is partly to be explained by EETT's regulatory limitations under the old framework. Monthly rental for 64 kbits/s and 2 Mbits/s circuits was well below average, while it was well above average for 34 Mbits/s and 155 Mbits/s.

As regards leased-line price-setting, there was ongoing dispute involving the incumbent, EETT and alternative operators. The incumbent seems to have failed to prove cost-orientation of tariffs for leased lines by not being able or willing to provide to EETT all requested data on time. EETT has had to establish provisional prices based on the incomplete data made available by the incumbent.

The incumbent has made a formal complaint to the Commission against the NRA decision of December 2003, regarding the imposition of these provisional wholesale and retail tariffs for leased lines. The incumbent further complained about the mandated reduction of wholesale tariffs by a further 4% (on price-squeeze grounds). In the incumbent's view, these were new obligations imposed without a market analysis and thus in breach of the regulatory framework. In the Commission's view, the cost-orientation obligation imposed under the old framework had to be maintained until a market analysis took place. The cost accounting methodology was a matter for the NRA and for domestic appeals mechanisms. The incumbent considers that EETT decisions have been favouring old at the expense of new technologies. Low leased-line prices were likely to result in a manifold increase in demand and considerable incumbent investment in outdated PSTN technology, with no guarantee that alternative operators will take up, use and pay for these lines. EETT maintains that this is due to the incumbent's costing system and its inability to comply with its cost-orientation obligation.

Alternative operators complained that the incumbent delayed almost one year to start invoicing them with the provisional wholesale prices set by EETT in 2003 and 2004 and some of them claimed that the incumbent has not fully complied with EETT's decisions. Some alternative operators did not consider to be bound by and did not pay the provisional prices for leased lines. The incumbent's attempts to cut them off its network were in most cases blocked by EETT, who asked the alternative operators to immediately pay (or provide a bank guarantee) for the non-disputed debts and to refer any disputed amounts to the courts.

EETT has fined the incumbent €2 million for failing to keep fixed time schedules for delivery and repair, refusing to provide partial circuits and not meeting obligations foreseen in EETT-approved leased-lines contract.

Broadband markets

Penetration

As of October 2005, the penetration rate for retail broadband access remains the lowest among the 15 EU Member States, although it has grown to around 1% from 0.24% in July 2004. Total broadband lines have risen from 25 931 to 112 258. 98.3% of these were DSL lines. The market share of the incumbent's ISP subsidiary was 74%.

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.

LLU

Slow uptake of local loop unbundling is still reported, with only 3 883 fully unbundled lines in mid 2005, as compared to 1 092 a year ago. Some increase in shared access is reported, with 1 530 subscribers in comparison with 160 subscribers a year ago. There remain difficulties in obtaining access to the local loop of the incumbent because of either limited information or delays of a technical nature. LLU growth has still been very slow, despite the high quality of available copper. One natural co-location site was already in place when this report was drafted. The incumbent indicated that four more would be established by the end of 2005, while there were around 150 distant co-location cases. These figures were questioned by EETT.

The main problems are not the prices charged for access, but difficulties with co-location and provision of ancillary services, including the lack of a SLA. The incumbent was found to have violated both the LLU regulatory framework and the competition law (delays in delivery of local loops, delays or refusal as regards co-location, anti-competitive behaviour as regards ADSL provisioning). For this reason, EETT decided to impose administrative fines against the incumbent of € 500 000 for the former and € 1 million for the latter violation. In order to promote the development of broadband services in Greece, EETT has organised working groups including the incumbent and alternative operators to facilitate the implementation of the provision of LLU.

Bitstream access

Regarding bitstream access, the incumbent provides wholesale broadband access and transmission services from the end-user's premises to the national points of DSL traffic concentrators (BBRAS) over the incumbent's backbone and access network (the so-called "ARYS" service), as well as ATM backhaul transmission from the BBRAS to the competing operator's/ISP's network point of presence (the so-called "OKSYA" service). Competing operators/ISPs are obliged by the incumbent to acquire the "OKSYA" service to be in a position to provide retail access services (i.e., the incumbent will not supply ARYS services and allow competing operators/ISPs to provide their own backhaul services). Competing operators/ISPs must therefore enter into ARYS contracts for carriage up to each individual BBRAS. It should be also noted that several complaints have been made by alternative operators regarding the quality of the relevant services offered by the incumbent and for the low margin between the wholesale and retail prices for the DSL access.

Broadband rollout

An ambitious project to extend broadband access to Greece's more remote regions is underway, co-funded by the EU Regional Fund.

Moreover, to facilitate cheap ADSL Internet access to all higher education students and enhance broadband penetration, the government has recently launched the DIODOS project, in which the high-capacity GRNET educational network will provide Internet connectivity at no cost. This will be open to all ISPs and network operators that will want to offer this service at prices expected to be around 50% below current retail prices.

Mobile markets

Penetration

The mobile penetration rate was 90% of the population while 9.9 million mobile subscribers were reported in June 2005. 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%. Mobile operators consider that the high growth rate of previous years in the sector could no longer be maintained since the penetration rate had reached maturity and prices were coming down as a result of competition and regulation.

Competition/Market situation

There have been four mobile operators through most of 2005, the smallest of which was bought by one of the larger ones in October 2005. The market share of the three biggest mobile network operators ranged between 25% and 38%. Average interconnection fixed-to-mobile termination charges fell from 17.52 €-cents in July 2004 to 15.01 €-cents in October 2005, 3.06 €-cents over the EU average.

Technologies

The commercial offering of 3G services started in 2004 and the licensed operators already report over 80 000 3G subscribers. Licence conditions require 25% population coverage by end 2003 and 50% population coverage by end 2006. 3G operators report varying coverage, which in all cases satisfies licensing requirements.

Mobile regulation

All four operators were found to have SMP status in market 16 (mobile call termination). By far the most important obstacle faced by mobile operators has been the blockage of all new licences for masts and base stations, described in the section on rights of way. The problems with the FCT Gateways persisted: networks were locally overcharged, investment in new infrastructures was discouraged, consumers did not really profit since gateway operators charged retail prices almost as high as the fixed incumbent, access to emergency numbers was not possible and law enforcement requests could not be met. Mobile operators considered that administrative fees paid to the NRA (0.5% of their gross revenue annually) were excessive.

THE CONSUMER INTEREST

Universal service

In the absence of transposition, the incumbent has remained the USO provider, as determined under the old framework. No steps for the designation of a USO provider under the new law had been taken when this report was being drafted.

Directory services

Despite a number of initiatives undertaken by EETT, the universal directory service is still not fully implemented. In this connection, formal infringement proceedings are in progress against Greece. According to information provided by EETT, mobile operators have provided their subscribers' data to the incumbent for the purpose of the US directory and while an enquiry service is already available, the directory itself should be available soon. The dual opt-out/opt-in system (opt-out required for subscribers' inclusion in the USO directory, opt-in required for inclusion in a commercial directory) followed by EETT is not required by the regulatory framework but seems to be the result of current Greek data protection legislation. EETT started a dispute resolution procedure between mobile operators and the incumbent in order for the former to obtain access to the USO database in order to offer their own comprehensive directory services. It seems that the draft law prepared by the Ministry of Justice in transposition of Directive 2002/58/EC provided for opt-in for all directories. A dual opt-in/opt-out system may raise questions of discrimination in favour of the US operator. A general opt-in system would seriously affect the directories market. Moreover, the opt-in solution could probably not be applied retroactively to the US directory already prepared by the incumbent and this would raise discrimination questions. It seems that Greece is following a more restrictive approach than other Member States in which directory services is no longer a USO as a result of effective competition in that market. Moreover a competition issue is raised by the fact that the old directory services number is still used via a recorded announcement to divert calls exclusively to the new directory services number of the incumbent. The Commission has received complaints and is looking into these matters.

Number Portability

Considerable progress has been made with regard to number portability. The number of fixed numbers ported (24 307) was satisfactory given the incumbent's almost monopoly position in the fixed market. Regarding mobile number portability, problems were caused by the complicated procedures requested by the three big mobile operators, which resulted in a large number of procedural rejections. EETT did a hearing on this matter, which revealed infringements of the telecommunications and competition rules, imposed a fine of € 500 000 on each of the three operators and forced them to simplify their procedures. EETT also launched an awareness campaign in December 2004. It seems that these actions have had an effect and the number of mobile numbers ported has substantially risen in 2005 (from 6 379 in August 2004 to 45 205 in October 2005). However, EETT maintains that there are still obstacles persisting regarding mobile number portability which need to be addressed by mobile operators.

Broadband access

Despite aggressive marketing campaigns, there seem to be long delays with retail ADSL access to consumers. There have been consumer experiences of longer than six weeks delays by the incumbent's ISP.

Digital TV

There were 215 000 digital TV subscribers in June 2005. Digital switchover is expected to take place after 2010.

Emergency services (112)

The 112 emergency number is operated and offered in Greece in Greek, English and French, under the responsibility of the General Secretariat for Public Protection. Caller Line Identification (CLI) is currently not available for mobile calls. The implementation of the recommendation on CLI processing in electronic communication networks for the purpose of location-enhanced emergency call services is in the process of examination by competent authorities. Operators have raised the cost of the implementation of the recommendation as one of the main barriers for its application.

Must carry

According to the draft new law, “must carry” obligations for the transmission of specified radio and television broadcast channels and services can be imposed by Ministerial decision.

Data protection

In the absence of a law transposing Directive 2002/58/EC, the law which had transposed Directive 97/66 EC is still in place. Apparently this Directive will be transposed through a law currently prepared by the Ministry of Justice, however there does not seem a clear timetable for its adoption. The Commission will take all necessary steps to speed up transposition.

SPAIN

INTRODUCTION

Spain has adopted the remaining secondary legislation necessary to transpose the EU regulatory framework. However, the review of the level of competition in the relevant markets has been slow and the first market analyses were notified to the European Commission only in late September 2005. The full outcome of the market analyses is still to be seen, and the uncertainty arising from this delay has inevitably had its effect on the sector.

While the provision for five different national regulatory authorities (NRAs) creates a degree of complexity, regulators have been able to promote competition through a number of regulatory measures in fields such as capacity-based interconnection for voice and internet access or bulk migrations of customers from indirect access to local loop unbundling (LLU). The market indicates that there is still some room for improvement in the correct and timely implementation of the conditions defined in the Reference Unbundled Offer (RUO), currently under revision. The NRAs have also played an important role in drafting codes of good conduct and as a mediator, for example in the Commission dealing with problems in obtaining rights of way, or the coordination body for ensuring fixed number portability.

Broadband and mobile communications are the most dynamic segments in the Spanish market for electronic communications. Mobile operators have focused on increasing their customer base, and mobile number portability has been a successful competition tool; however, mobile operators still encounter serious problems in obtaining rights of way for network deployment. There has been a considerable increase in broadband penetration. In a first step towards infrastructure competition, alternative operators are increasingly investing in LLU, with differentiated offers appearing on the broadband market.

Consumers have benefited from a growing diversity of offers; there is a clear trend in the market towards bundled products. Competition has increased consumer choice and consumers are able to change provider according to their needs, as it is shown by the number portability figures.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Over the last year, Spain has adopted two major pieces of secondary legislation implementing the General Telecommunications Law of November 2003, which was necessary to transpose the EU regulatory framework. The *Regulation on electronic communications markets, access to the networks and numbering* adopted in December 2004, provides the Telecommunications Market Commission (CMT) with the remedies specified in the Access and Universal Service Directives at wholesale and retail level to be imposed on significant market power (SMP) undertakings. It also establishes the

access and interconnection regime, and the competences of the CMT and the Ministry of Industry, Tourism and Commerce with regard to numbering.

The CMT has appealed to the Supreme Court for the repeal of a number of articles of this regulation which, according to the CMT claims, seem to transfer some of the numbering competences previously held by it to the Ministry.

The second *Regulation on conditions for the provision of electronic communication services, universal service and users' protection* adopted in April 2005 specifies the rights and obligations of operators, the general authorisation procedure, the universal service obligation and a number of provisions under the e-Privacy Directive. The current universal service designation has been extended until 31 December 2007. Operators have expressed their concern regarding the number and financing of users' rights and public service obligations imposed on them. However, this regulation recognises a number of important rights for telecommunication users as foreseen in the Universal Service Directive.

While Spain has adopted secondary legislation necessary to transpose the EU regulatory framework, there are a number of legislative acts which are due to be adopted soon, such as the Regulation on Radio Spectrum Management, the Quality Order and a new Regulation on Telecommunication Taxes. The Ministry launched a public consultation on spectrum trading, which is provided for under the Spanish law but needs secondary regulation to specify the conditions.

The NRA

The Spanish government formally decided on 30 December 2004 to move the CMT to Barcelona. The CMT has completed its move by the end of 2005, as required by the relevant Royal Decree. The regulator has lost some of the valuable expertise acquired, since around half of the staff has not moved to the new location. This may have contributed to delays in the implementation of the revised regulatory framework, given that only three markets identified in the Commission Recommendation have been notified. Operators complain about the resulting legal uncertainty and possible impact on the performance of the CMT.

Powers and objectives

The division of regulatory functions between different NRAs persists, even if the main competences are divided between only two of them. The Radio Communications State Agency, the NRA intended to manage radio frequencies, is unlikely to be established in the short-term.

Decision making

After the pre-consultation processes carried out by the CMT during 2004 on markets not defined in accordance with the Commission Recommendation, the regulator launched the first national consultation in July 2005. At the end of September 2005, the CMT notified to the European Commission markets 9, 16 and 18 of the Recommendation, launching in parallel national consultations. More recently 14 markets have been submitted to national

consultation procedure in a period of two months and the regulator has confirmed its intention to finish the market analysis process during the first trimester of 2006.

Even though maintenance of SMP obligations during the transitional regime was assured under the General Telecommunications Law, market players have expressed concerns regarding their current uncertainty about the final results of the market review process, which affects the planning of their investment and business strategies, and the difficulty of having to deal with many national consultations simultaneously, which may have an effect on operators' capacity to analyse them properly. Operators state that a timetable of national consultations would have helped the sector to prepare itself in advance.

Appeals

As the resolution of appeals and disputes by the Courts takes at least two to three years, market players point out that it is essential to have timely CMT resolutions in order not to adversely affect the functioning of the sector in a rapidly changing environment.

Administrative charges

As in previous years, CMT's operational costs are lower than the amount collected through the administrative tax, which as provided by the Authorisation Directive is intended to cover only administrative costs. Under the General Telecommunications Law, the surplus was envisaged to finance the not yet established Radio Communication State Agency. The recently adopted 2006 budget has adjusted the above-mentioned administrative tax from 0.15% to 0.125% of the operators' gross revenues. The Commission services are looking further at this issue. Operators fear that the surplus generated will not revert to the telecommunications sector, and at the same time that new draft legislation and administrative bodies could increase the excessive financial burden imposed on the sector.

REGULATORY AND MARKET DEVELOPMENTS

The electronic communication sector in Spain has grown by 8.2%⁶⁷, continuing the recovery initiated the previous year, and the operators' financial situation has improved accordingly.

The telecommunications market has seen a number of mergers and acquisitions, as the consolidation of the two main cable companies and the acquisition of the third mobile company by an enterprise already present in the fixed and broadband markets. Meanwhile, the incumbent has entered new markets through two main acquisitions in other European countries and investments outside Europe.

⁶⁷ CMT Annual Report 2004

Fixed Markets

Competition/Market situation

This is a very mature market where fixed traffic continues to decrease, partly due to the shift from narrowband to broadband access and the more extensive use of mobile communications. CMT introduced verbal ordering verified by a third party for preselection; nevertheless, this mechanism has seen erratic and slow growth during last year. Even though the figure for fixed ported numbers has increased significantly, the incumbent's market share on the fixed retail market in terms of revenues has slightly diminished (79% December 2004)⁶⁸. This can be explained by the incumbent's aggressive bundled offers and its reluctance to comply with LLU obligations, as mentioned in the section below.

Access/Interconnection

Since the start of the liberalisation process, the incumbent has gradually lost market share on the wholesale fixed interconnection market, with a corresponding increase on the part of operators with their own infrastructure. More than half of fixed interconnection is capacity-based⁶⁹, three years after the regulator introduced this innovative model. Since the end of 2004, many operators have been able to launch bundled offers, including voice as an additional service to broadband access, using LLU and capacity-based interconnection.

Leased lines

The incumbent's wholesale leased lines market share in terms of revenue has gradually decreased (67% December 2004⁷⁰), while its main competitor has increased market share. After the modification of the reference interconnection offer (RIO) in November 2005, leased line prices have decreased between 10% and 33%, however they are still above the EU recommended ceiling. On the one hand alternative operators criticised the CMT for not being transparent concerning the setting of new prices under the RIO, whilst on the other hand the regulator has invoked business confidentiality reasons.

Transitional measures

Due to the delay in the market analysis process, the price cap system which regulates the incumbent's fixed retail nominal prices has been extended for another year. For the first time the Ministry of Economy decided in late December 2005 not to modify both the monthly fee and the traffic tariffs. The sector has repeatedly criticised the use made by the government of the price cap system for inflation control purposes. The Spanish authorities have pointed out that this has not been the case for the last two years and that effective price reductions have traditionally been much more significant than the ones stemming from price cap downward pressure.

⁶⁸ CMT Annual Report 2004

⁶⁹ Idem

⁷⁰ Idem

Broadband Markets

The broadband market has been the most dynamic segment over the last year. The number of broadband retail lines exceeded 4.5 million by October 2005, nevertheless broadband penetration (10.5%) is below the EU average (11.5%). Due to considerable investments in broadband infrastructure, the alternative operators' broadband retail market share has grown to 37.7% in terms of revenues⁷¹. However, the incumbent has lost less market share in terms of revenue than in terms of lines.

Since Q4 of 2004, the incumbent and the new entrants have launched a large variety of promotions in order to attract new clients. Alternative operators have started to offer differentiated products, in particular voice and broadband bundled offers, and higher speeds. The effect may be jeopardised by the incumbent's triple play offer approved by the CMT, which competes with existing triple play offers made by cable operators. Between July and October 2005 the incumbent operator has doubled for the second time the speed of its ADSL connections maintaining existing prices, after the necessary modification of the RUO to adapt the wholesale offer. Although some ADSL providers requested the maintenance of the lowest speeds, the new basic speed is now 1Mbps.

The regulator adopted in 2004 important measures in this segment, such as regulation of migration from indirect access, LLU price reductions and the new bitstream retail minus price formula. As a result, the number of unbundled local loops significantly increased during 2005, but still remains relatively low in relation to the incumbent's activated PSTN lines (2.31%). New entrants have focused on shared access and, since April 2005, the number of shared access lines has exceeded the number of fully unbundled lines, while bitstream access continues to be the main means of access after cable for alternative operators.

During 2005, prices of full unbundled and shared access loops have not been modified. Taking into account charges for connection and monthly rental fees, the cost per full unbundled loop is around the EU average, while the cost per shared access loop continues to be among the lowest in the EU.

The main concern from new entrants against the incumbent is the incorrect implementation of the RUO, which obstructs new services from alternative operators and may be one of the reasons for the slow take-up of unbundling. The CMT has already resolved some of the numerous complaints from alternative operators regarding the non-fulfilment of delivery times and other RUO conditions, and has imposed penalties on the incumbent; however, extensive follow-up of the implementation for the RUO is urgently requested by the sector.

The CMT has rejected claims by the incumbent that it cannot handle simultaneously an excessive number of LLU requests from alternative operators and that no penalties should therefore be imposed on it. In its resolution of 27 October 2005, the regulator has indicated that a lack of resources does not have the same impact on the incumbent's group of companies as it does on its competitors, and has admitted that the number of pending petitions has delayed LLU take-up. On the other hand, the CMT has authorised

⁷¹ CMT Annual Report 2004

the incumbent's ADSL2+ offer without an equivalent bitstream product in the RUO where competitors are present using LLU.

After the increase in the number of public administrations rolling out broadband networks, the CMT published in January 2005 a code of good practice to provide guidance on market activity without distorting competition. Alternative operators are concerned about the incumbent's group obtaining an overwhelming majority of the public procurement tenders awarded, and consider tender conditions generally to be unfair.

Mobile Markets

The Spanish mobile market continues growing in terms of traffic and revenue, and represents the major part of the investment effort in the sector⁷². Mobile penetration in Spain (94%) is above the EU average. The three operators currently on the market have focused in retaining customers and attracting new ones using mobile number portability, on-net call discounts and mobile subsidies.

The incumbent's subsidiary's retail revenue market share has declined by 2.7 percentage points (54.3% December 2004), while the second operator's one has increased by 1.8 (27.3% December 2004), and the third operator's one increased by 0.8 (18.3% December 2004)⁷³. Due to strong marketing campaigns, the number of subscription customers has reached the number of pre-paid customers.

Technologies (2G/3G)

Even though the three mobile operators on the market have launched commercial UMTS services during 2004, the numbers of clients and revenues are still low. The fourth UMTS licence holder has not yet entered the market, but may launch operations before mid 2006. Mobile operators argue that the non-existence of mobile virtual network operator (MVNO) agreements in Spain, even though this possibility has been provided for in the legislation on commercial agreement basis since 2002, is due to the current obligation of non-discrimination.

Rights of way

The roll-out of radio-communications infrastructure urgently needs to be facilitated, as mobile operators, and to a certain extent cable operators, still encounter serious difficulties in obtaining rights of way from local administrations. A set of recommendations, a 6.5 month reference procedure and a code of good practice are the first results of the cooperation, promoted by the Ministry, between administrations and operators. Even though some progress has been achieved, this has yet to produce significant improvements as far as roll-out of networks is concerned.

⁷² CMT Annual Report 2004

⁷³ Idem

Mobile regulation (origination/termination)

The CMT has cut mobile termination charges for the fourth consecutive year as it moves gradually towards cost orientation. However, some operators have not passed the reductions on to consumers. As mentioned in the previous implementation report, the methodology is considered not to be transparent by some market players and consumers' associations. The Commission has commented on CMT's proposed measures for deregulating mobile to mobile termination.

Spectrum assignment

Three additional GSM 900 frequency bands were allocated in June to the first and third mobile operators; the latter had borne a number of restrictions in the past when compared to its competitors due to the fact that it had a DCS 1800 and UMTS licence but no GSM 900 licence. Both mobile operators have committed to a total of € 833 million in investments for a two-year period partly in order to improve coverage conditions in the main transport lines, as well as in rural and strategic areas, in accordance with the options established in the tender.

Tariff Issues

Bundling

There is a trend in the market towards bundled offers and other flat rates for voice services. Since the end of 2004, many operators have been able to launch double play offers, including voice as an additional service to broadband access, using LLU and capacity-based interconnection.

During this year the incumbent operator was allowed the launch of its first triple play (voice, internet and TV services) offer, previously provided only by cable operators. Some market players have expressed their concern regarding the replicability of this offer, although an alternative operator has informed the CMT of its intention to provide audiovisual services, and others are expected to follow this step.

Market and Technological Developments

In February 2005, after a public consultation, the CMT adopted a light regulatory approach towards VoIP services. In August the Ministry allocated both a non geographic numbering range and a geographic numbering range with nomadic restrictions, which operators could request from the CMT the following month. Operators are required to direct emergency calls according to the users' addresses. It is expected that new commercial offers of VoIP services will be launched shortly.

THE CONSUMER INTEREST

The *Regulation on conditions for the provision of electronic communication services, universal service and users' protection* adopted in April 2005 reinforces users' rights such as conditions for cancelling contracts, information to be included in contracts, compensation for poor quality, and operators' complaint services.

At the same time, a new office within the Ministry has been established to deal with users' complaints and provide information on users' rights. Complaints can be introduced from the web site, and an arbitration process can be requested before the administrative process is taken up.

Consumers have benefited from a variety of double and triple play offers and from the doubling for the second time by the incumbent of ADSL speeds while maintaining existing prices, followed by similar moves on the part of the new entrants.

After the incumbent's subsidiary mobile operator decided to change its tariff scheme, consumers' associations restarted a campaign against "round-up" billing practices made by the three mobile operators. The Ministry criticised mobile tariffs as being untransparent. After much controversy, mobile operators have presented new tariff plans which increase the variety of options and in certain cases include per-second billing tariffs from the first second, with corresponding benefits for the consumer. In parallel, the Ministry of Health and Consumers has prepared a draft Law, which is aimed at prohibiting round-up practices in a number of sectors of the economy but which is strongly rejected by telecommunications market players.

Universal Service

The current universal service designation of the incumbent has been extended until 31 December 2007 by Royal Decree. The Ministry has launched a public consultation in late December 2005 to identify possible operators interested in providing this service. The national legislation opts for funding by operators in the market as foreseen in the Universal Service Directive; however the universal service fund has not yet been activated as the unfair burden condition has not yet been fulfilled.

Regulated prices for telephone directory enquiry services under the universal service obligation, together with narrowband access services, have been liberalised.

Number portability

According to data as at October 2005, Spain has the highest number of both fixed (1 710 651) and mobile (6 171 680) ported numbers in the EU. CMT has introduced regulation of fixed number portability in ULL processes. Mobile number portability, which is free for the consumer, has been extensively used as a competition tool to attract customers.

Digital TV

In July 2005, the Government approved a number of measures in order to re-launch Digital Terrestrial Television (DTT), moving the deadline for regional and national switch-over to 2010 (the local switch-over deadline is 2008). The short deadline for the start of national DTT broadcasting and the high coverage requirements have introduced tough infrastructure constraints on competitors to the incumbent operator on the broadcasting transmission services' market.

In September 2005 following an access dispute by a new entrant, the CMT adopted provisional measures under article 7.6 of the Framework Directive granting access to the incumbent's network. After these measures were contested by both the incumbent and the new entrant, the CMT has reviewed the technical conditions but not the pricing conditions of the interim measures, which, according to the new entrant, may prevent it from entering the market. The Commission's services are examining this issue.

Radio frequencies for national digital transmissions have temporarily been assigned through public tender and mostly by an automatic procedure after certain DTT promotion commitments to the public service broadcaster and existing analogical and digital broadcasters.

FRANCE

INTRODUCTION

Considerable progress has been made in France since the 10th Report concerning transposition, finally completed, and market analyses, although an effort is required to conclude the latter as soon as possible. The French NRA is actively working to improve competition and benefits to users, but in some cases it would appear that stricter use is required by the NRA of its powers to force compliance by operators with their obligations, in order to guarantee the full respect of the regulatory framework objectives.

French users can take advantage of one of the most dynamic and competitive broadband markets in Europe, which has high penetration rates and attractive prices. Improvements in wholesale access have been made, for example through the publication of a revised reference unbundling offer. The widening of the margin between the monthly fee for full unbundled access and the retail subscription fee as well as the publication by the incumbent of the reference offer for wholesale line rental, when fully achieved, should allow alternative operators to develop their retail offers and to increase consumer choice. On the other hand, there were no significant changes in the mobile market and the NRA is monitoring access to this market by new entrants by virtue of a number of MVNO-type agreements signed during the year.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

France was very late in adopting the necessary measures for transposing the new regulatory framework. Although the primary law had been adopted in July 2004, the absence of the necessary secondary legislation eventually led, in July 2005, to a judgement by the European Court of Justice condemning France for failure to fulfil its obligations concerning the Authorisation, Access and Framework Directives. The delay in transposition delayed the introduction of targeted regulation for the development of the market to the benefit of consumers, and it prolonged the period of uncertainty for operators.

Nevertheless, France completed notification of all the secondary measures it considers necessary for achieving transposition in September 2005. Beyond this, a set of draft Decrees not considered as transposition measures by France, but considered as essential by market players in order to give full effect to the regulatory framework, had still not been adopted in late 2005, including a Decree on rights of way. The Commission services' analysis of the conformity of these transposition measures with the NRF is ongoing.

The NRA

The French NRA for electronic communications was renamed ARCEP (*Autorité de Régulation des Communications électroniques et des Postes*) to take account of its new responsibilities for postal matters. The board of ARCEP was also expanded from five to seven members to take account of these additional responsibilities.

There were still concerns being expressed about ARCEP's use of its powers: some market players criticised what they saw as an apparent stagnation, since not all the market analyses had been published. ARCEP appeared not to be paying attention to ensuring that obligations based on the old framework were still effectively applied, for example in relation to delivery times and quality of service. Furthermore, when designating SMP (significant market power) and defining appropriate remedies under the market analysis procedure, ARCEP has referred in some cases to a subsequent implementing decision before which the remedy cannot become effective. This leads to legal uncertainty and further delay in regulation (e.g. accounting separation, which will have to wait more than a year to be implemented, or the method of valuation of the copper local loop). However, ARCEP has maintained other obligations based on the old legal framework until the new remedies are ready to be implemented, so there is no legal or regulatory vacuum.

In July 2005, France published the last of the secondary measures⁷⁴ required to complete transposition, which contained, amongst other things, obligations to be imposed on operators in order to allow for proper controls by ARCEP, mainly detailing the form and content of information that ARCEP can call for. This measure will contribute to improving the effectiveness of ARCEP's interventions and to overcoming problems such as, for example, ARCEP's apparent inability in some cases to get sufficiently detailed information, for example in relation to the incumbent's cost allocation.

In September 2004 the State sold 10.85% of its shareholding in the incumbent, whereupon for the first time its shareholding dropped below 50%, and it sold more in June 2005 to bring its share to 34.9% of the incumbent's capital. The other shares belong to employees (3.1%) and stock market investors (61%), although the State also has shareholdings in a number of these institutional investors. While the State was still the largest shareholder, management of this shareholding was the responsibility of the *Agence des participations de l'Etat*, which is attached to the Treasury.

In the matter of dispute resolution by ARCEP, the period of time required for a conclusion to be reached complies since mid-2004 with the maximum period provided for in the Directive. However, ARCEP has naturally been concentrating on completing the market analyses and proposing appropriate remedies under the NRF, and therefore appears to be less willing to intervene on its own initiative in disputes relating to obligations under the old framework. This may also act as a disincentive to request's for dispute resolution from market players. As a result, it appears that some important issues of current regulation are more likely to be dealt with by the competition authority, the *Conseil de la Concurrence*.

⁷⁴ Decree n° 2005-862 of 26 July 2005

Co-operation between ARCEP and the *Conseil de la Concurrence* appears to be effective and mutually beneficial. The opinion of the competition authority is taken into account by ARCEP and has led ARCEP to modify and improve its position regarding some of its market analyses before public consultation and final decision. On a reciprocal basis, the opinion of the NRA is sought by the *Conseil* on competition cases relating to the electronic communications sector.

Concerning the French audiovisual authority (*Conseil Supérieur de l'Audiovisuel- CSA*), the division of tasks between it and ARCEP appears to be well defined and understood, as ARCEP deals with the transmission market and CSA deals with the (television and radio) broadcasting and content market as well as the management of spectrum allocated to broadcasting. The draft analysis of the broadcast transmission market, which should give a further indication of the approach of the two regulators, was submitted by ARCEP to the CSA in October 2005.

Decision making

ARCEP has speeded up the analysis of the markets contained in the Commission's Recommendation and a significant number of them have already been notified to the Commission. As of 15 November 2005, ARCEP had notified 12 markets and one sub-market to the Commission, and had withdrawn another one. The markets that had not been notified by the end of November 2005 included leased lines, international roaming and broadcasting transmission services, but ARCEP was making efforts to complete the process as soon as possible.

Appeals

Market players still had serious concerns about the duration of appeal procedures against ARCEP's decisions. This is an issue, already noted in past years, that has not been resolved with the implementation of the new framework, as the judicial mechanisms surrounding ARCEP decisions have not changed, although some steps seem to have been taken by judicial authorities in order to reduce this duration. This situation has a negative impact on market development and may make operators more prudent as far as investment in the development of networks and services is concerned. Appeals do not suspend ARCEP decisions unless a specific request of suspension is granted by the Court. However, compared to other Member States, this has not been the norm in recent times in France.

Spectrum management

An Order was published in September 2005 to bring the national frequency table and spectrum allocations into line with the radio spectrum harmonisation Decisions adopted by the Commission. An ARCEP decision to complete this Order concerning the 5.4-5.7GHz band, was foreseen for adoption before the end of 2005. In the 450-470 MHz frequencies, which were the object of complaints in the past, a public consultation was launched concerning the introduction of broadband mobile radio networks ("PMR/PAMR"). The result showed no interest from operators to open PAMR broadband networks, although there is continued interest for PMR narrowband networks.

Administrative charges

Administrative charges linked to operators' general authorisations have continuously dropped in the past years and they are currently below the administrative costs of ARCEP and the other agencies concerned. Nevertheless, administrative charges in France are still some of the highest in Europe. This is especially difficult for small operators developing their activities in restricted geographical areas, as they have to pay proportionately higher charges compared to other operators with national coverage. The administrative charge for an operator offering services in 2 *départements* is the same as for an operator present in all *départements*. The result is a disincentive to the development of small operators, including those developing network services in areas that may otherwise not be the first concern of national operators.

The obligation for NRAs to publish a yearly overview of their administrative costs and of the charges collected from operators is not currently being fulfilled by France.

Rights of way and facility sharing

The secondary legislation concerning rights of way was still pending in November 2005. The absence of this regulatory measure has an economic impact for market operators, as the transposition law refers to a Decree setting the maximum fees that can be imposed for the use of the public domain. Furthermore, there is an important legal gap, as the old measures establishing these maximum fees were abolished in 2003.

Authorisations

In the past, cable operators concluded different types of contracts with local authorities in order to deploy in their local areas. Most of these were delegations of public service with exclusivity clauses. As was already mentioned in the 10th Report, the contract conditions and obligations applying to operators had to be brought into line with the new regulatory framework. The French law stipulates that contract conditions must be modified, where necessary, within one year following the publication of a Decree concerning the authorisation requirements. Nevertheless, this secondary measure was the last one to be adopted and it was not accompanied by any guidelines to assist the negotiations between cable operators and local authorities to give rise to a coherent result in full compliance with the framework. While it defines the obligations of all operators, the Decree does not contain any indication of eventual sanctions to be applied in case one party prevents the conventions to be adapted as required.

Negotiations are currently been dealt with on a case by case basis ⁷⁵ and the Government has not taken any measure to treat them horizontally. Therefore there are doubts about the coherence and compliance of the final result with the regulatory framework regarding the adaptation of cable operator's authorisation conditions.

Besides this, French law now allows local authorities effectively to become telecommunications network operators, as long as there is a proven lack of initiative in their respective areas. Most of the projects underway are focused on broadband development. Cable operators active in the relevant areas have in some cases attacked the

⁷⁵ There are currently 1000 contracts signed in France.

use of public funding, as having an impact on fair market competition. In one case, an appeal has been lodged with the Court of First Instance against the Commission's decision to the effect that the funding did not constitute state aid in the sense of the EU Treaty.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

The fixed markets are still evolving in France, mainly due to the development of DSL, which has almost halted the decline, although France did see a further slight decrease in the number of PSTN lines: There were 33.4 million PSTN lines in France in October 2005. The merger between Cegetel and Neuf Telecom (Neuf Cegetel) in 2005 created the largest alternative operator in the market, which could have an impact on the wholesale market situation.

The incumbent is still very strong in the fixed voice market, with a 71.5% market share (by revenues) as of 1st January 2005, which represents a slight decrease from 2004 (74.2% as of 1st January 2004). Most alternative operators use carrier pre-selection (67% of active operators) while 33% use carrier selection for providing their voice services. The extension of VoIP, representing around 7% of voice traffic in the 2nd semester of 2005, has also introduced changes on this market.

When it came to the analysis of this market, voice over broadband (VoB) was included in the market by ARCEP, although no ex-ante regulation was planned. Voice over Internet Protocol (VoIP) was not included in the market analysis, as ARCEP considered that these are not substitutable services. VoIP should also be seen to have an impact on the broadband market as well.

Benefits for consumers in the fixed voice market are increasing thanks to the unlimited offers (packages) from operators and this may continue as a result of the improved conditions for fully unbundled lines as well as the incumbent's new offer for wholesale line rental. Both measures could bring benefits to users as well, as it will allow simpler and more transparent relations with their operator of choice in cases of carrier pre-selection and / or shared use unbundling, and therefore to have exclusive commercial relations with the alternative operator, which is also of benefit to the alternative operators. Alternative operators will be then in a position to offer a complete retail package of fixed telephony services, including subscription, associated services and communications. Alternative offers will be launched on April 2006. ARCEP included this reference offer as one of the remedies imposed on the incumbent in the fixed market.

Broadband Markets

The broadband market has been exceptionally successful in France and it continues its strong progression, with a penetration rate of 15% in October 2005. France was the EU country with the second highest number of broadband lines, 8.9 million lines (as of October 2005), 94% of which were DSL lines. The main reason for this spectacular growth is the development of unbundling, with a rhythm of 500 000 additional unbundled lines per quarter in 2005 (ARCEP data). France is the leading European country in the number of unbundled lines, 2.51 million in October 2005, of which 360

788 were fully unbundled. The growth in full unbundling is remarkable, and there has been a significant catching up with shared access, but the number of fully unbundled lines is still below the average for the EU15.

The incumbent's share of the broadband market decreased, being of 45% of the total retail market and 47.6 % of the DSL market in October 2005, which shows the continued importance of the incumbent's resale and wholesale broadband (bitstream) products.

The full reintegration of the incumbent's Internet subsidiary, becoming once again a brand of the incumbent, may have an impact on the competitive situation. ARCEP has recognised the need to be vigilant in regard to transparency and internal transfer pricing ("self-supply" of broadband access), and has identified a relevant market of wholesale national broadband access, and has imposed remedies to regulate this market for one year in order to allow controls on the internal provision of wholesale services to the retail service arm of the incumbent operator.

The market analysis decisions on broadband have contributed to improving competition on this market. ARCEP has made important improvements in order to avoid price squeeze between bitstream and unbundling, although there are still problems regarding the necessary economic margin between the unbundling rates.

Local authorities have contributed to unbundling by using their capacity to become network operators and creating public initiative networks. An important number of new sites opened to unbundling in the third quarter of 2005 were linked to public initiatives. Attention has to be paid to the evaluation of the "absence of initiative" concept, which is the trigger that allows local authorities to act as operators, but the French authorities do require that ARCEP is informed and the procedures can be triggered only when a public tender has failed to attract any suppliers. The level of public financing is another issue that may have an impact on the market and on competition.

Mobile Markets

The mobile market in France had an annual growth rate of 5%, with 46.1 million mobile subscribers in October 2005, which represents an increase of 3 million over the previous year. Nevertheless, the mobile penetration rate in France in October 2005 was 76.12%, which is still well below the average penetration rate for the EU (91 %).

Compared to previous years, the once dynamic French mobile market shows signs of stagnation. Prices have remained stable for the last few years and the three operators' market shares have not changed significantly, two of them having 83% of the market (the incumbent's mobile subsidiary 47% and the second mobile operator, 36%), while the third player did not succeed to break through its 17% market share. In December 2005, the competition authority (*Conseil de la Concurrence*) condemned the three mobile operators for sharing confidential information and dividing up the market and for concerted practices. Another procedure is still open concerning alleged abuse of a dominant position by the two larger operators.

Furthermore, access to this market by new entrants through MVNO⁷⁶ agreements is still difficult, and the NRA is trying to promote competition by supporting such agreements. But a significant number of new contracts were concluded by the mobile network operators between the autumn of 2004 and mid-2005. The MVNO share of the market was 108 000 in September 2005.

In the course of its analysis of the market for wholesale access and call origination on mobile networks (market 15), ARCEP decided to withdraw its draft decision and to monitor the mobile market in order to establish the impact of the MVNO agreements on competition. The deadline provided by ARCEP for a new market analysis was end of 2006. One of the questions that arose was the extent to which the service providers had full MVNO status, that is whether they were able to control access to their clients and determine for themselves the package of services to which the customer subscribed.

Furthermore, ARCEP identified a sub-market on market 16, related to SMS messaging. A public consultation regarding an eventual wholesale SMS market was held in late 2005.

Tariff Issues

While retail broadband rates in France are one of the lowest in Europe, alternative operators still complain about the lack of economic space between the incumbent's reference unbundling offer and its telephony retail subscriptions. ARCEP has recognized that an adequate margin between full unbundling and retail tariffs, which will allow alternative operators to invest in local loop unbundling, will only be ensured in 2006 or even 2007. In the meantime, the incumbent benefits the additional revenues coming from the increase of the line rental while alternative operators cannot replicate offers to consumers based on unbundling.

Alternative operators claim the same situation appears between the wholesale rental line and retail prices in areas that are not unbundled. The incumbent's reference offer concerning wholesale rental lines would not, in the view of alternative operators, allow enough economic margin for them to replicate the incumbent's retail offers.

Market and Technological Developments

The incumbent has announced an integration strategy to be developed in the next few years. This integration is both economic and commercial. Its starting point was the full reintegration of the incumbent's Internet subsidiary and its transformation into a brand. The second step is based on the integration of the mobile subsidiary to become its international brand and to support all services provided by the incumbent. This development could have an impact on a number of markets.

The merger of the alternative operators Cegetel and Neuf Telecom (Neuf Cegetel), the two major alternative fixed operators, created a major alternative operator in the French fixed market. Both undertakings already offered ADSL services to their clients. The evolution of this merger and its impact on the relevant markets will also be a key issue over the coming year.

⁷⁶ Mobile virtual network operators

Wimax licences are already available in France. One undertaking is already operating in the 3.5GHz frequency, under licenses covering the whole of metropolitan France and several overseas departments. Additional authorisation procedures have already been launched. Triple play offers combining Internet, voice and data, have become standard offers from most operators.

The three mobile operators have UMTS as well as GSM licences. The incumbent and the first alternative operator already offer 3G commercial services (September 2005). The third operator has given preference to the 2.5G EDGE technology.

THE CONSUMER INTEREST

Retail price trends

Retail rates on broadband are among the lowest in Europe. As referred to above, while ARCEP has already taken measures in order to limit the risks arising from lack of transparency in the broadband national access market, it appears that controls should be necessary in all steps of the chain value, as direct accesses to 99.9% of users is still in the hands of the incumbent. Concerning retail pricing in the fixed market, the unlimited call offers contributed to remove differences between local and national rates and to decrease call prices to the benefit of the consumers. Convergent offers are now offered by several operators and competition in this issue is benefiting the retail pricing decrease.

Universal service

French law limits the possibility of being designated as a “universal service provider” to undertakings that are able to cover all of the national territory. Although Member States can choose to designate one or more undertakings providing universal service in part or all of the given national territory, nevertheless the NRF states that no undertaking should *a priori* be excluded from designation by the mechanism put in place. Moreover, the restrictive designation process could exclude undertakings that are potentially more cost-effective, and therefore the French financing mechanism could not respect the principle of least market distortion and non-discrimination as enshrined in the universal service directive. An infringement procedure on the transposition of the EU rules related to the designation of “universal service” provider is currently opened.

Directory services and enquiry directory services

France has failed for over seven years to produce a universal service directory or directory enquiry service. As of 15 November 2005, comprehensive directory services and enquiry directory services were still not available in France. This situation already existed under the old regulatory framework, despite the fact that legislative measures had been put in place. Steps have been taken to bring the situation into conformity: a new Decree was published and the NRA has agreed with the operators the conditions to provide the subscribers’ information in order to make available the services. Nevertheless, the Commission decided to open an infringement procedure against France for failing to ensure the provision of these services to consumers.

Emergency services (112)

France has recently taken secondary measures⁷⁷ in order to further develop the obligation for operators to carry free-of-charge all calls addressed to emergency services and the obligation for operators to transmit caller location information when their equipments allow to. These provisions will improve the functioning of this service, which already exists in France.

Number portability

Portability of mobile numbers exists but its implementation has not being successful. The delay for portability and for contract cancellation is too long, from 1 to 2.5 months, compared with other EU countries. The use of indirect routing of calls is also a problem that needs to be resolved. A new article was introduced in the French law recently in order to reduce the portability and cancellation deadlines to 10 days. At the same time, ARCEP negotiated with operators the introduction of a new one-stop-shop system together with direct routing. Nevertheless, this is overshadowed by the long delay foreseen, as the implementation of the new system is planned for 2007. Despite the lack of dynamism in the French mobile market, ARCEP considers this delay to be reasonable in light of the complexity of the system.

Portability of non-geographic numbers, particularly the shared revenues services, was the subject of a decision of the European Court of Justice in 2004, which ruled that France had failed to ensure the portability of these numbers'. At present, portability of non-geographic numbers is in place, although the economic case for shared revenues services is unclear. Nevertheless, ARCEP intends to review its special numbers and third-party billing regulations in order to improve this service.

Digital TV

Digital terrestrial television was launched in March 2005, population coverage of 50% was reached in September 2005. 65% coverage is the target for June 2006 and the final objective is 85% in spring 2007. Full coverage is not foreseen in the Law, although a working group was established to study possibilities for covering the last 15% of population. The initial target date for analogue switch-off is 5 years after the launch of DTT, but this is to be re-assessed later taking account of digital television accessibility and the penetration of equipment in households. The audiovisual regulator, *Conseil Supérieur de l'Audiovisuel (CSA)*, decided upon the distribution of channels between free-to-air and paid TV through a call for tenders. Free channels were launched in March 2005 and paid channels were developing between 1 September 2005 and 1 March 2006. Public service broadcasters have capacity reserved as well as some local or regional services. Implementation of TNT is going well and the forecast for decoder sales was one million by the end of 2005.

⁷⁷

Decree n°2005-862 of 26 July 2005

Must-carry

The obligations in the French law concerning TV channels basically affect public channels, local channels, digital television, free channels and collective reception systems. The 2004 French law reduced the scope of the must carry obligation and extended some of the precedent cable operators' obligations to other network operators, defined as distributors, and imposed other obligations on broadcasters, creating a mixed group of different kind of obligations "must carry", "must deliver" obligations. "Must carry" obligations apply to the network operators and, at the same time, may affect certain broadcasters. In this regard, there should be taken into account the existing dual effect when the obligation is applied to operators like cable, as they are not only services distributors, offering TV packages to the public, but also network operators, carrying the signal and responsible for the transmission of channels. The French law creates "must carry" obligations on cable, satellite and ADSL operators concerning public free-to-air channels (both analogue but also digital in some cases): Cable and ADSL operators have an obligation to carry local channels as well. In both last cases they cannot ask for payment. Another obligation applies for private free-to-air channels, where operators have to respond to broadcasters' demands to accede to their distribution terminals in a fair and non discriminatory manner. Finally, there is an obligation on broadcasters with regard to collective reception systems, as broadcasters cannot refuse to have their programmes distributed in collective buildings where cable is the only network able to carry the TV signal to users.

Some questions could arise concerning the inequality of treatment between operators, as cable operators have more obligations than the others. The Commission services are examining the question.

Out of court dispute resolution

The availability of an out-of-court dispute resolution procedure is crucial for consumers to fully benefit from freedom of choice and competition in the market. At this point, it appears that it is not ARCEP, but the general directorate for Competition, Consumers and Fraud (DGCCRF) that is dealing with consumers' complaints and trying to settle disputes with telecom operators as required in the universal service Directive. Nevertheless, the Commission is investigating whether the powers of this Ministry, insofar as they apply to electronic communications, fulfil the requirements of the Directive that need to be transposed into national law.

At the same time, at the suggestion of the government, a voluntary-based mechanism (*médiateur*) was put in place by operators to deal with disputes with users, to be used after operators' internal procedures (e.g. a complaints department) had been exhausted, but until now it appears that this has had a very limited impact on the resolution of consumer complaints. Decisions of the médiateur are not compulsory whereas the effectiveness of out-of-court dispute resolution has to be ensured by Member States.

IRELAND

INTRODUCTION

Thanks to the pro-active approach of the Irish national regulatory authority, the first round of market analyses has been completed comparatively early, and a range of other important regulatory initiatives can also be observed (such as reduced fees for rights of use, licence-exempt schemes applicable to wireless access solutions and a website which allows consumers to compare mobile phone charges across all operators⁷⁸).

However it appears that a number of structural obstacles stand in the way of the further promotion of competition, especially in the fixed and broadband markets, in light of the NRA's limited enforcement powers, and the manner in which the appeals procedures have been functioning so far. Attention needs to be paid to whether these issues have contributed to the lack of a functioning local loop unbundling (LLU) product that would help to improve Ireland's poor broadband performance. A coherent and future-oriented legal framework for spectrum management as well as consistent procedures for granting rights of way would also merit further attention from the Irish authorities.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Ireland had already notified its measures to transpose all the Directives under the new regulatory framework, chiefly by means of secondary legislation in 2003 (a number of Statutory Instruments), as well as the Communications Regulation Act (2002) concerning ComReg (the Commission for Communications Regulation – the notified national regulatory authority (NRA) for Ireland).

After a thorough analysis of all these legislative measures, the Commission services identified and communicated to the Irish authorities (principally the Department of Communications, Marine and Natural Resources – “the Department”) questions about a number of potential transposition issues. The Commission services are continuing their detailed analysis.

The NRA

Independence

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. 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.

⁷⁸

<http://www.callcosts.ie>

As explained in the 10th Implementation Report, in 2003 the Minister issued 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).

The Department of Communications, Marine and Natural Resources has confirmed that no new policy directions have been adopted and none are currently planned.

Powers and objectives

ComReg has no powers to impose fines, but it can apply to the courts for an order obliging an operator to comply with its obligations. The maximum fine that can be imposed directly by a court against an operator amounts to only € 3 000 (i.e. no turnover fines are possible), and this can only be imposed in limited situations defined in law (e.g. excluding infringement of SMP obligations). Non-compliance with a court order to comply, on the other hand, could lead to substantial penalties. Further primary legislation is under preparation by the Department, which apparently will, if adopted, provide for robust enforcement powers for ComReg.

Decision making

A review of all markets “recommended” by the Commission except for market 17 (wholesale mobile international roaming) has been completed in Ireland, a fact that is highly appreciated by the market players.

Some market players complained on the one hand of excessive reporting obligations being imposed on them in the process of market analysis (e.g. data relating back to the year 1999 had to be presented; customer’s consent had to be obtained when presenting data on top 10 customers), and on the other hand they complained that sometimes findings of market analyses appeared to be based on old data. A number of market players also expressed the view that much greater detail of the analysis needed to be made public in the course of consultations, particularly in the section devoted to regulatory measures and their impact.

Responding to these critical observations, ComReg stressed (a) that the regulatory burden on market players partly results from the requirements of the EU regulatory framework as well as the fact that the markets have been analysed for the first time; and (b) that it does perform and consult on a careful impact analysis of proposed SMP obligations (as illustrated for example by the consultation concerning accounting separation and cost accounting).

Appeals

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 also possible for the Minister to refer appeals to an existing appeals panel that has already been established).

Certain observations can be made on the operation of the new appeals procedure. Mindful of the need to ensure due process, it appears that the members of the Appeals

Panels have taken a cautious and detailed approach to the cases referred to them, with proceedings substantially exceeding the four month target set for them. Furthermore, the procedural rights and obligations of the parties, as well as other aspects of procedure (e.g. the weight to be given to expert advice) have not been clearly established as yet and this, together with the time taken, can give rise to considerable cost in terms of legal fees for the parties involved. On the question of delays, one of the explanations suggested by the Department of Communications, Marine and Natural Resources is that panellists do not serve on a full-time basis.

Dispute resolution

ComReg has required service providers to adopt codes of practice for dispute resolution outlining the procedures for a consumer to make a complaint along with the escalation points. ComReg will only intervene where such procedures have been exhausted. Where such intervention is required, ComReg can resolve the dispute where the issue involves a breach of a regulatory obligation; in other cases, ComReg acts as an arbitrator between the parties.

It remains to be seen whether the out-of-court dispute settlement system described above is in practice sufficiently accessible, transparent and simple for the consumers.

Spectrum management

Ireland has notified the Wireless Telegraphy Act of 1926 as part of the transposition measures for the Authorisation Directive, but indicated informally at the time (July 23003) that they intended to review this legislation in due course. This focuses on authorising “apparatus” rather than introducing a system of general authorisations and rights of use, as provided for in the Authorisation Directive. Apart from general inflexibility, this authorisation mechanism would appear to have a number of specific regulatory defects.

Firstly, the system of fees charged in connection with issuing licences under the Wireless Telegraphy Act, 1926 does not seem to be entirely coherent. For instance, sometimes the applicable charges are calculated on the basis of equipment used, and sometimes – on the basis of the allocated radio frequencies. Furthermore, the market players claim that the system resulting from the Wireless Telegraphy Act causes a lot of extra administrative work (e.g. updating “licensed” stamps on various pieces of equipment). Proposals for a revised and more coherent fee structure are currently being addressed by ComReg through a public consultation.

Secondly, as long as licences are issued for possession of “apparatus” rather than for use of allocated radio frequencies, it will be difficult (although legally possible) to enable licensed undertakings operating in Ireland to transfer rights to use radio frequencies to other undertakings (an option laid down by Article 10 of the Framework Directive).

Finally the Commission services are concerned about the overall time frame of the promised review of the Wireless Telegraphy Act, 1926. According to the information presented on the internet site of the Department of Communications, Marine and Natural Resources the review began already in 2001. However, the first draft of the new Radiocommunications Bill is not yet available, and the precise schedule of further

legislative actions is not clear at all. According to the market players, the review of the Act is not getting the required political priority.

Within the current legal framework for spectrum management, it should be noted that ComReg initiated a licence-exempt scheme for the 5.8GHz band to facilitate early roll-out of fixed wireless access services and is in the process of implementing special schemes to facilitate fixed services, including broadband FWA, as well as wideband digital mobile data services.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Competition/Market situation

There was considerable growth in the provision of voice telephony using Carrier Pre-selection (CPS) and Wholesale Line Rental (WLR) in 2005. According to the data of December 2004, the fixed incumbent's market share of fixed calls (by retail revenues) amounted to approx. 79%. According to the data of September 2005, 19% of subscribers used an alternative provider for voice telephony services.

WLR

According to the information provided by ComReg, over 150 000 PSTN and 10 000 ISDN customers are availing of this product either as new subscribers or moved over from CPS. Currently 40% of the indirect market is through WLR with the remaining 60% on the more mature CPS product. Some market players cite complicated processes (especially the single billing procedures) as a remaining barrier to this product and are calling for a margin from the retail subscription in excess of the current 10%.

Broadband Markets

In October 2005 broadband penetration reached approx. 6% (which is still significantly below averages for both the EU 25 and the EU 15), compared to approx. 2.5% in October 2004. According to the data of October 2005, the fixed incumbent's market share of fixed broadband retail lines is approx. 63%, and its market share of DSL retail lines is approx. 76% (the shares have remained relatively stable since 2003). It is notable that DSL lines constitute only approx. 3.5% of the fixed incumbent's PSTN main lines. According to the data of October 2005, DSL is the prevailing broadband provision technology (approx. 76%). ComReg's recent initiatives to promote wireless broadband data services include permitting licence-exempt public wireless access services, licensing a range of frequencies for fixed wireless access services and licensing a range of frequencies for wideband digital mobile data services.

The development of broadband in Ireland remains an issue of concern to representatives of users of electronic communication services. In their view, the network of the fixed incumbent suffers from underinvestment, with the result of a high percentage of broadband-enabled line failures (the direct technical causes of such failures include the long distances from exchanges and use of "carrier lines" in rural areas).

The fixed incumbent, on the other hand, has drawn attention to a number of positive developments, including broadband roll-out to 90% of the lines (complete roll-out planned for March 2006) as well as the new “amber programme” due to which the rate of line failures will be reduced to 10%.

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). Although regarded as a positive development in general by alternative operators, in the opinion of representatives of users of electronic communication services, for the time being Metropolitan Area Networks are having little effect on the market due to the absence of the necessary complementary infrastructure and services. Some market players claim that the Government is too concentrated on Metropolitan Area Networks and does not pay sufficient attention to other possibilities, e.g. the promotion of wireless access, which is especially important to Irish coastal and rural areas (many of them still depend on dial-up). The fixed incumbent has also expressed concerns about the MANs, particularly in regard to the apparent absence of market failure that would justify state funding, given that the areas where the MANs are being built are generally already serviced by the incumbent’s fibre backbone, as well as the question of the transparency of the conditions applicable to the beneficiary of the funding.

From the regulatory point of view, the main potential concerns include the effective structural separation of the function responsible for granting rights to install facilities on, over or under public or private property from activities associated with ownership of Metropolitan Area Networks in Irish municipalities. It is important that there is no discrimination benefiting, directly or indirectly, entities involved in operation of Metropolitan Area Networks and prejudicing operators of competing networks in the process of granting rights to install facilities on, over or under public or private property.

Local loop unbundling

According to the data of October 2005, the price for connection to a fully unbundled local loop was more than halved if compared to August 2004, and is now around the EU 25 average, whereas the price for monthly rental of fully unbundled local loop as well as the monthly average total cost remain one of the highest in the EU 25. The same trends apply to the shared access. According to the data provided by ComReg, at the end of June 2005 there were nearly 2 300 local loops either fully unbundled or shared.

On 18 January 2005 ComReg issued directions to the fixed incumbent concerning local loop unbundling (a requirement to respond to industry requests for improvements to LLU processes and product range); on 15 February 2005 ComReg issued an enforcement order to oblige the incumbent to comply with the LLU directions. However, further development of the product was effectively suspended due to the fixed incumbent’s appeal against these decisions. By virtue of the judgement 2005 No.152 JR the High Court ruled that the enforcement order denies the fixed incumbent its right of appeal and is therefore unlawful. On 14 September 2005 ComReg, based on the court judgement, withdrew the above mentioned LLU directions. On 24 October 2005 the fixed incumbent circulated its response to the requirements from the alternative operators for local loop unbundling, which was evaluated by ComReg as unsatisfactory.

The problems that the alternative operators would like to be solved as a matter of priority include integration of the number portability into the LLU process so that they can be ordered and provided simultaneously (currently users wishing to move to LLU and to retain their numbers have to face significant out-of-service periods), migration from other wholesale services (such as WLR, Bitstream) to LLU (currently these other wholesale services must be removed from the line before the LLU order can be processed with the resulting out-of-service periods of up to eight weeks) and an LLU ordering system/process which would cater for LLU volume processing.

The fixed incumbent maintains that the EU regulatory framework does not warrant the requested further development of LLU, that it is a complicated and time / resources consuming process, that it would actually result in over-subsidising service provision by the alternative operators in profitable urban areas, that the return paths should be simultaneously introduced for users wishing to switch back to the fixed incumbent as well as that the LLU – number portability linkage problem was raised only in January 2005.

ComReg's position on LLU is that the technical feasibility of advanced LLU is proven by the fact that the fixed incumbent actually gave shared access to one of the market players for a month. However ComReg has confirmed that the related number portability issue emerged only recently as part of the move towards voice LLU (traditional LLU concerned only data).

Bitstream access

For the time being the fixed incumbent's wholesale bitstream product is the main platform for the alternative operators to provide their broadband services. However according to the alternative operators, the efficiency and cost of the product is not satisfactory (e.g. insufficient access to supporting systems is provided). According to the data of October 2005, there were 36 610 wholesale bitstream access broadband lines in Ireland.

Following analysis of market 11 "wholesale unbundled access (including shared access) to metallic loops and sub loops", ComReg has designated the fixed incumbent as having SMP and has imposed the following remedies: access, non-discrimination, transparency, accounting separation, price control and cost orientation, cost accounting.

Mobile Markets

According to the data of October 2005, the penetration rate in Ireland reached 96%, compared to approx. 88% in September 2004 (the majority of subscribers fall into the prepaid segment). The market share of the mobile subsidiary of the fixed incumbent is approx. 12%. Otherwise there are two important players in the market (with market shares exceeding 40%). From the business users' perspective, effective competition in mobile communications would appear largely to be still absent (e.g. companies in many cases get the same prices from just two operators in their mobile services tenders). According to the data provided by ComReg, mobile data revenues account for 22% of mobile industry revenues – one of the highest levels in the EU 25.

Three 3G licences have been issued in Ireland so far, and three operators already offer 3G services on a commercial basis. As result of a recent competition a licence has been offered to a fourth operator.

Mobile regulation

Following analysis of market 15 “wholesale access and call origination on public mobile telephone networks”, ComReg has designated each of the two biggest mobile network operators as having, jointly with the other, SMP and has imposed the following remedies: an obligation to provide network access on foot of a reasonable request by an access seeker; an obligation of non-discrimination; an obligation of price control to be implemented by way of cost orientation; an obligation to prepare separated accounts; and an obligation to implement appropriate cost accounting systems. However apparently this has not led to any MVNO agreements yet. The finding of joint SMP was the subject of appeal, which was upheld, and in December 2005 ComReg decided to withdraw its measure and undertake a new market analysis.

Tariff Issues

Margin/price squeeze issues

Some market players questioned application by ComReg of a consistent price squeeze test when monitoring the fixed incumbent’s tariffs, however according to ComReg it has never permitted retail tariffs which are not in accordance with the relevant legislation.

Market and Technological Developments

In the context of ComReg’s broad strategies, some market players were concerned about ComReg’s negative comments on NGNs (next generation networks), i.e. the view that they will provide opportunity for dominant operators to extend their market power.

However generally ComReg appears to fully appreciate the potential benefits of a move to NGNs, including advanced electronic communications services to consumers, more efficient platforms to network operators, lower network operational costs and higher margins. In the context of further analysis by industry and by ComReg itself ComReg plans to ensure that potential future bottlenecks will be identified and addressed.

In 2004 ComReg took initial regulatory steps to allow development of VoIP services, in particular through the introduction of a new non-geographic number range based on the access code 076. To date ComReg has allocated both 076 numbers and existing geographic numbers for VoIP use to some 20 operators and a number of services have been launched and other testing projects are ongoing. To further facilitate the launch of VoIP services based on 076, ComReg issued a set of directions to the fixed incumbent in March 2005 to ensure the timely conclusion of interconnection agreements and the opening up of 076 numbers on its network.

In addition, ComReg issued a guidelines document for VoIP service providers on the treatment of consumers in July 2005. ComReg has also committed to conduct a review of the regulatory framework for VoIP after 12 months of operation.

THE CONSUMER INTEREST

Tariff transparency

On 10 November 2005 ComReg launched a website which allows consumers to compare mobile phone charges across all operators. The website has been developed in cooperation with the operators themselves. Furthermore, representatives of users of electronic communication services have already observed the resulting reduction in the charges.

Universal Service

In September 2005, ComReg laid down detailed requirements concerning requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location as well as functional internet access.

In the opinion of representatives of users of electronic communication services, long waiting periods for telephone line installation is a frequently occurring problem in the context of the current house building boom in Ireland. Another point of criticism is ComReg's definition of functional internet access at 28.8 kbit/s, because this would be only a target and not a mandatory standard ("reasonable endeavours" terminology is used), and the target is too low to allow good quality VoIP services.

According to ComReg, introduction of the 28.8 kbit/s guideline was never made with the intention to ensure that end-users achieve the capability to subscribe to VoIP services. The purpose was to seek to ensure that the small minority of Irish users, whose connections had been achieving data speeds below 28.8 kbit/s, would be able to receive an internet connection capable of a speed that could be described as "Dial-up-standard" (as opposed to an even slower connection, that may be continuously 'dropped' by the ISP due to line capabilities). In ComReg's opinion, the definition of functional internet access at 28.8 kbit/s represents a balanced compromise. ComReg has not made it a mandatory standard in order to avoid diversion of investment from broadband.

On the issue of long waiting periods for line installation the fixed incumbent has noted difficulties in getting planning permissions (electronic communications operators do not fall into the concept of "essential providers") as well as the construction of a large number of detached (single) houses requiring individual cabling.

Data Protection

Representatives of users of electronic communication services were concerned about several aspects of the way the Statutory Office of the Data Protection Commissioner is dealing with spam, in particular – the burden imposed on the complainant (duty to give oral evidence in court), non-use of fining initiation powers and delays (giving an example where a letter to an operator was sent only six months after submission of a complaint).

As the Office has explained (a) the guidance on making a complaint was recently changed, and giving oral evidence in court is no longer a prerequisite for initiation of spam related investigations; (b) the rare imposition of fines is mostly due to the lack of sufficient evidence; (c) instances of delays may occasionally occur, but the problem should be solved as a result of the recent increase in staff.

Emergency services (112)

It would appear that the provision of adequate information to citizens about the existence and use of the single European emergency call number “112” could be an issue in Ireland. The Commission services are looking into this matter.

Number Portability

According to the data of October 2005, a total of 50 826 fixed numbers and 330 000 mobile numbers were ported in Ireland. The consumer friendly process which facilitates customers in porting their number in approximately two hours and which provides no direct retail charges is seen as a key driver of number portability. However the prices for the inter-operator handling charges for fixed and mobile portability have remained amongst the highest in the EU 25.

Must Carry

According to the Irish Broadcasting Act, transmission companies must, if requested by a broadcasting content provider, enter into contractual arrangements for transmission of the relevant broadcasting content. Furthermore, holders of licences authorising the re-transmission of broadcasting content by means of a cable system or a MMD system, if requested by a broadcasting content provider, must re-transmit all free-to-air services provided for the time being by such broadcasting content provider. Finally, the Broadcasting Commission of Ireland may require holders of licences authorising the transmission of broadcasting content by means of a cable system or a MMD system to transmit the broadcasting content supplied under the local community content contracts in case the suppliers of the content request such transmission. According to information provided by ComReg, four television channels currently enjoy the must carry status.

The Commission is examining whether the Irish must carry regime is aimed at clearly defined general interest objectives, whether the must carry channels are sufficiently specified as well as whether the relevant obligations meet the requirements of transparency, proportionality and periodic review.

ITALY

INTRODUCTION

The growth in the Italian telecommunication market in 2005 has been mainly driven by broadband and mobile communications (with the second highest penetration rate of the EU, 111% and a leading position as for the UMTS take up). Pro-competitive measures taken by the national regulatory authority on prices, wholesale access and local loop unbundling (LLU) have enabled Italy to almost close the gap with the EU average broadband penetration rate, with 5.8 million broadband lines at 1 October 2005. Italy has the second highest number of unbundled lines in the EU.

The persistent lack of resources (for both the national regulatory authority (NRA) and the Ministry of Communication), the increase of the NRA's tasks and the renewal of its board in March 2005 (including the President), has somewhat affected the ability to implement timely and effectively some regulatory tasks. Nevertheless, several important new regulatory measures have been taken, like the notification of nine market analyses, the opening of the directory enquiry services market, the price decrease in interconnection charges for call termination on mobile networks, and the migration procedures for shared access.

REGULATORY ENVIRONMENT

Legal framework, including transposition

The Commission opened an infringement proceeding against Italy in March 2005 for incorrect transposition of Art. 13 of the Access Directive, since the Italian legislation appears to include supplementary elements to be taken into account by the NRA in calculating the costs of interconnection charges. An explanatory circular, which gives an interpretation of the contested provision that is in line with the Access Directive, was published by the Ministry of Communication on 11 July 2005.

In addition to the transposition laws referred to in the 10th Report, the recently approved *Testo Unico della Radiotelevisione* (Decree Law 177 of 31.07.2005) includes all regulation on radio and broadcasting, including Law n. 112/2004 of 3 May 2004 that transposes (*inter alia*) the framework related to TV transmission networks and the digital TV switchover.

Law 112/04 on the audiovisual sector appears to impose some non discrimination obligations on all existing audiovisual network operators, in the absence of the results of the analysis of the broadcast transmission services market. The creation of new terrestrial digital broadcasting networks is made possible through the acquisition of frequencies, a possibility that is only available to existing analogue TV operators. Law 112/04 refers to the respect of EU principles in the allocation of spectrum but not to any procedure for obtaining a digital dividend as a result of the switch-over process.

The NRA

In February 2005, the mandate of the former eight Commissioners and the President of the Italian national regulatory authority (*Autorità per le Garanzie nelle Comunicazioni*, AGCOM) expired. The new AGCOM Board took office only on 16 May 2005.

Resources

Human and financial resources are still a challenge for both AGCOM and the regulatory department of the Ministry of Communications (the Ministry), in particular if compared to Member States of similar size. The situation for AGCOM should be improved with the arrival of 48 new employees by early 2006; the remaining vacant posts (to bring the total up to 335 employees) are expected to be filled during 2006.

The General Budget Law for 2005 has reduced the financial contribution from the State to AGCOM by € 1.5 million; in July 2005, the Economy and Finance Ministry increased the annual operators' contribution for 2005 to 0.65% of the annual turnover. The operators' contribution for the year 2004 (around € 5 million), temporarily allocated to the Ministry of Economics Affairs, has not yet been transferred to AGCOM.

The draft Budget Law for 2006, proposes to abolish state funding as from 2007. The Commission services will monitor AGCOM's ability to carry out its tasks.

Decision making

While there is a substantial positive consensus concerning the implementation of the regulatory framework so far, operators and consumers criticise AGCOM and the Ministry for slowness of the decision-making process in some important areas, like market analysis, regulatory cost accounting, consumers' protection against frauds and non-requested services. Together with a "light" sanctioning system (see below), this is perceived in some quarters as hindering the development of more competition.

The situation can be partially explained by the general lack of human resources, the increase of AGCOM's tasks (namely in the audiovisual sector) and, for the year 2005, the late renewal of AGCOM's Board.

Alternative operators and consumers consider that there is lack of information in response to their complaints (to both AGCOM and the Ministry). On this point, AGCOM has undertaken to increase the transparency of the complaint proceedings, and to implement a "tracing system" for complaints.

The first market notifications came to the Commission only at the end of September 2005, despite the fact that the first draft measures had been opened to public consultation between November and December 2004. By 1 December 2005, Italy had notified to the Commission nine markets. The whole notification process is expected to be concluded by spring 2006.

Dispute resolution

The current out-of court dispute resolution mechanism is not perceived as a useful and efficient way of resolving disputes by alternative operators. Alternative operators would like AGCOM to assume a faster, more active approach, and they are increasingly turning to the civil courts.

Monitoring and sanctioning process

The efficiency of the enforcement of regulatory obligations has been put in question by alternative operators and consumers' associations. AGCOM's President has included efficient enforcement among the priorities of his mandate. In order to increase the speed of enforcement, an internal AGCOM re-organisation has been recently approved and should be fully effective by February 2006.

AGCOM is currently delaying the conclusion of some important sanction proceedings against the incumbent, while examining the possibility of applying the new stronger sanctioning regime laid down in the *Codice*. The lack of effectiveness of the sanction system is perceived as a problem by most actors in the market, including AGCOM.

According to Law n. 689 of 24 November 1981, operators have the possibility to put an end to the sanction proceeding at an early stage, by paying a reduced penalty. Between May 2004 and September 2005 the amount of fines effectively paid by operators sanctioned by AGCOM has been 1/10 of the penalties originally fixed. AGCOM intends to ask the government and the parliament formally for a revision of such legislation, to bring it in line with what is applied by the national competition authority.

Spectrum management

In March 2004, the allocation of the last portion of free 900MHz spectrum was opened to public consultation by AGCOM with the aim of allocating this spectrum to existing GSM operators and/or of granting a new fourth mobile GSM/DCS licence. The final decision is still pending due to the need to ensure consistent approaches between UMTS and 2G spectrum allocation.

In fact, 3G operators without GSM licences claim that the assignment of additional frequencies, given so far to GSM operators without any up-front fee, breaches the principle of non discrimination. The Administrative court of first instance has recently rejected some appeals against two Ministry and AGCOM decisions on these issues.

After having verified that one UMTS operator has never started any coverage activity, the Ministry has started the procedure for infringements of the conditions applied to rights of use for radio frequencies, according to Art. 32 of the *Codice*. The Ministry has requested the operator to sell its frequencies, failing which the right of use of such frequencies will be withdrawn.

Rights of way

Alternative operators have expressed concerns about the lack of transparent and harmonised procedures of rights of way on railways, highways and non-metropolitan public roads⁷⁹. While for the highways the procedure provided for by the *Codice* seems time consuming and not effectively working, for rights of way on railways and non-metropolitan public roads there appears to be a lack of clear identification of procedures and level of charges. The Commission services are examining the issue.

Privacy-Data retention

Italian regulation provides for one of the longest data retention periods in the EU (24 months for telephone traffic which can be extended to another 24 months in the case of organised crimes or terrorism). Furthermore, a proposal to store internet traffic data for 6 months is currently under discussion in parliament.

The new anti-terrorism Law of July 2005 obliges operators to store all existing traffic data until 31 December 2007 (including also unsuccessful outgoing calls) and to identify all internet customers (both fixed and mobile). Telecoms operators and Internet Service Providers are concerned about the storage costs of such data and about the investment costs necessary for the provision of the new draft list of services that judicial authorities can request for purposes of judicial proceedings.

Directory services

Since 2004, AGCOM has put great effort in completing the opening to competition of the directory enquiry services that became effective as of 1 October 2005. A series of strict rules regulating the opening of the market has been set and during the past months AGCOM has promptly intervened on several occasions against operators that did not comply with them (some operators have also been sanctioned for non compliance with the neutrality of message requirement). While several operators/service providers are currently competing in the market, strict compliance with the regulation still needs to be assured, in particular as regards interconnection charges applied by the incumbent.

On 5 October 2005, AGCOM opened an investigation on the competitive situation of the market and on the commercial conditions applied by operators and service providers, with regard to possible impacts of wholesale origination charges, both from fixed and mobile networks, on retail prices. This should give impulse for a price reduction of the directory enquiry services.

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Highways are managed by private entities, while railways and non-metropolitan roads are managed by private enterprises controlled by the State.

REGULATORY AND MARKET DEVELOPMENTS

Fixed markets

Competition/Market situation

There are currently thirty five operators significantly active in the fixed market, four of which cover 90% of the market in terms of retail revenues. The competitive situation in the fixed market has not seen significant changes since last year. In December 2004 the incumbent's overall share in the fixed voice telephony market (in terms of retail revenues) was 65.9% (-1.2% compared to December 2003).

On 11 May 2005 the Administrative Court of First Instance (TAR) partially upheld (namely, as far as the section referring to business offers is concerned) the incumbent's appeal against the decision of the National Competition Authority (NCA) imposing a fine of € 152 million for abuse of a dominant position⁸⁰. The court's decision, which left to the NCA the duty to redefine the fines, has in turn been appealed by the NCA.

Access/interconnection

During the antitrust proceeding A351, the incumbent voluntarily committed to some pro-competitive obligations, including one to anticipate the reductions in interconnection prices originally foreseen for 2006. This has resulted in significant average (peak and off-peak) reductions in interconnection charges. Concerning the peak charges, particularly significant is the decrease for local interconnection charges that are now lower than the EU15 average. Peak single transit is also slightly below the EU15 average, while peak double transit, which is marginal, is above average.

The last statement of compliance with the cost accounting system verified by AGCOM refers to 2001 for both the incumbent and the two largest mobile operators (despite the fact that the incumbent has already communicated to AGCOM its regulatory accounting figures up to the year 2004). The delay of the proceeding has been partly caused by the complexity of the analysis (historical and current costs for the incumbent's costs) and by the very strict criteria for selecting the independent auditor, who had not yet been appointed when this report was drafted. The matter is being examined by the Commission services.

There is disagreement between AGCOM and the incumbent as regards third party billing. The incumbent claims that AGCOM has set the cost in the RIO 2005 at a value that is significantly lower than the price derived from the regulatory accounts for 2003 (transmitted to AGCOM, but still to be verified). According to AGCOM, this value, in line with the European benchmark, has been assessed reflecting a standard level of efficiency in the provision of the service.

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The investigation showed that during the period 2001- 2004 the incumbent implemented an exclusionary strategy against its competitors aimed at preserving its dominant position in the business and end users market for telecommunication services.

The incumbent maintains that the interconnection termination charges should be set according to the principle of reciprocity or – in cases of non reciprocity – that the difference should be charged on the retail price (currently forbidden by AGCOM Decision 289/03).

Carrier Pre-Selection

The surcharge for single minute of carrier pre-selection is no longer applied and the one-off activation charge (€ 5.46 per line) decreased by 18% during last year.

Wholesale Line Rental

AGCOM has notified to the Commission that it intends to introduce a wholesale line rental obligation in areas where local loop unbundling is not provided by the incumbent.

Broadband markets

Penetration

One of the most important developments in the Italian market since October 2004 has been the impressive growth of fixed broadband retail connections (+50%, almost all using DSL technology), due to strong competition between operators that has brought a significant price decrease. In October 2005 there were 5.8 million fixed broadband lines with a penetration rate (10%), below the EU average (11.45%).

Competition/Market situation

The incumbent has slightly decreased its strong position on the broadband market. In terms of access, in October 2005 it had 73% market share in the DSL retail market (-5% than in October 2004) and 70% in the overall fixed retail broadband market (-2.8% than in October 2004). The incumbent's market share remains significantly higher than the EU average.

Local loop unbundling

The incumbent has implemented a series of favourable technical and economic conditions for local loop unbundling (LLU), some of them valid until December 2006, other until 2010.

Full unbundling of the local loop represents a realistic possibility for alternative operators to compete in the broadband market. In October 2005, Italy had the second highest number of fully unbundled lines in the EU (around 1.16 million), with an increase of 53.7% since October 2004. This result has been achieved through effective regulation and the fact that the incumbent has charged the lowest monthly price in the EU, following the commitments made during the antitrust proceeding in January 2005. The monthly price currently applied by the incumbent (€ 7.5) is almost 10% lower than the price approved in the RUO 2005.

However, AGCOM's Supervision and Control Department has announced during a public hearing in October 2005 that for the periods 2004 and 2005 the incumbent had failed to correctly disclose the relevant information on its primary and secondary

network, in terms of correctness/completeness of information (in particular regarding the local loop and the fibre optic) and the timing of the update.

According to AGCOM, the incumbent has not implemented yet a seamless migration procedure allowing its ADSL customers to switch to the ADSL service provided by alternative operators making use of shared access as required by AGCOM. In September 2005, the incumbent has appealed the relevant decisions before the Administrative Court of First Instance.

During the last year, alternative operators started to extensively use shared access thanks to the favourable regulatory and price environment. In October 2005 there were around 110 000 active lines (compared to only 927 in October 2004).

AGCOM has decided that in case of termination of the telephony service contract with the incumbent by a customer, for whom the service of shared access is activated, the alternative operator continues to pay only the price for shared access. AGCOM further clarified that alternative operators should pay the price for full ULL only if the customer's termination of the voice contract with the incumbent takes place at the same time as the new activation of the shared access. AGCOM stated that such obligation is a transitional measure that will be reviewed in the light of further developments of shared access. The Commission services are looking into this issue.

Bitstream access

In order to complete the current incumbent's wholesale broadband access offer, AGCOM is going to introduce an obligation of access to the incumbent's local DSL switches ("DSLAM"), for those exchange sites which currently are not open to unbundled services. AGCOM has notified to the Commission that it intends to change the pricing system from retail-minus to cost orientation.

In July 2005 the incumbent submitted to AGCOM an offer for "naked" wholesale ADSL service (where there is no accompanying voice telephony subscription), proposing a price that is the double of the wholesale ("non-naked") ADSL (previously charged at the same price). The offer is currently being assessed by AGCOM that, in the meantime, has required the incumbent to apply the non-naked ADSL price while continuing to allow wholesale naked ADSL.

Alternative operators claim that the incumbent deactivates the access line as soon as the customer ceases its voice contract, irrespective of the existence of a wholesale ADSL service (the line is then re-activated after a checking with the alternative operators), with a lack of service suffered by customers.

Broadband tariffs

Last summer AGCOM decided to grant an "experimental" authorisation for four months for the incumbent's new retail offer, at a price significantly lower than the current one. While alternative operators have complained about the difficulty of matching such a retail offer, several offers at prices significantly lower than before are currently available on the market. The incumbent's offer has been recently approved by AGCOM, subject to a 30% mark-down for the corresponding wholesale offer.

Margin/price squeeze issues

From the entry into force of the new remedies in relation to the broadband access market, the verification of the alternative operators' ability to compete with the incumbent's offers in the retail market, so far undertaken by ex-ante analysis, will be carried out only ex-post (the incumbent has to notify to AGCOM its retail offers at the time of their commercialisation). Alternative operators underline the risk of pre-emption of the market by the incumbent through non replicable offers and the urgency to improve AGCOM's capability to promptly apply dissuasive sanctions.

Mobile Markets

Penetration

In October 2005, Italy had the third highest mobile penetration rate in Europe (111%) with a total of 65 million subscribers (+10% since October 2004). Almost 85% of subscribers use pre-paid cards. The increase in the number of subscribers has been mainly driven by the new UMTS entrant without GSM network, whose customers (4.7 million in October 2005) have almost tripled since October 2004. AGCOM has estimated that in October 2005 the total number of UMTS subscribers in Italy was more than 7 million, one of the two largest European markets.

Competition/market situation

Competition in the mobile market during the reference period (October 2004-October 2005) was characterised by the strong take up of the new UMTS operator that has increased its market share in terms of subscribers from 2.8% to 7.35%⁸¹. Over the same period, the market share of the incumbent's mobile subsidiary has decreased from 44.3% to 40.16%.

MVNO

Current regulation on mobile access market states that mobile network operators can negotiate agreements for provision of wholesale capacity to enhanced service providers⁸² (ESP) on a commercial basis and in line with the principle of transparency and non-discrimination. Furthermore, the operators have the possibility to ask AGCOM to resolve possible disputes. For the mobile virtual network operators (MVNO) current regulation does not fix specific obligations and operators can reach agreement on a commercial basis and in line with the competition rules.

Following a complaint introduced by some fixed operators, in February 2005 the national competition authority opened an investigation concerning the three main mobile network operators for a possible abuse of a dominant position and for an anticompetitive agreement concerning the wholesale access market, the termination market and the retail market.

⁸¹ Source Mobile Communications, September 2005.

⁸² ESPs are mobile service providers which do not own SIM cards and numbers, but provides mobile services via a commercial agreement with a mobile operator and commercialize services under its own brand.

Mobile regulation

In July 2005, AGCOM adopted an urgent measure using art. 7(6) of the Framework Directive due to the delay in the analysis of market 16 and to apparent serious competitive problems associated with the excessive level of mobile termination wholesale tariffs.

The mobile termination tariff decrease for the three GSM operators (on average 25% for the two former SMP operators and almost 40% for the non SMP operator) has positioned the average tariff almost 3% below the EU average⁸³. AGCOM has also confirmed the non discrimination between fixed-to-mobile and mobile-to-mobile off-net termination charges.

On December 2005 the Commission has cleared the final measures for market 16 notified by AGCOM.

AGCOM has recently opened a public consultation on the SIM-lock practices, extensively applied by one 3G operator, currently varying between 12 and 24 months.

THE CONSUMER INTEREST

The new AGCOM board has put consumer protection among the first priorities of its mandate and last September the first of periodical meetings with consumers associations was held.

Universal service

Since the entry into force of the *Codice* (September 2003) the directory enquiry service is no longer part of the universal service obligation of the incumbent, due to the existence of different offers in the market in terms of quality and affordable price.

The *Codice* provides also for a possibility to review such decision on the basis of the periodical check by the Ministry of the market conditions (in cooperation with concerned operators). Although the price of the service provided by the incumbent has doubled since 2003, it appears that, so far, none of the six-month period checks has been carried out. The complete liberalisation of the directory services market since 1 October 2005 does not seem, at this stage, to give commercial incentives for a decrease in prices, although some operators have recently started to provide flat rate prices. The issue is currently being examined by the Commission services.

Emergency services (112)

The 112 emergency service is currently active in Italy from both fixed and mobile phone. Nevertheless, caller location is possible only for fixed calls and the integrated Public Safety Answering Point (PSAP) has not yet been implemented. Concerns remain also regarding the compliance with the Universal Service directive requirements in terms of

⁸³ Mobile termination charges for former SMP operators are 4.9% below the EU average, while for non-SMP operator is 4% higher.

language capabilities of the services and citizens' awareness of the possibility to call 112 abroad. Encouraging steps are about to be taken by the Italian authorities, in particular concerning the establishment of an integrated first level PSAP linking all competent administrations and providing several additional services, including map representation from both fixed and mobile calls.

Number portability

Italy is the country with the second highest rate of mobile numbers ported (double the EU average). Since its launch (in 2002) and until the end of September 2005, some 5 million customers have changed operator using mobile number portability, of which 2.5 million only during the past year. The successful entry of the new 3G operator in the market has created a long waiting list for numbers to be ported (up to 45 days) and, according to AGCOM, at the moment there are around 50 000 numbers waiting to be ported. Following an AGCOM initiative, mobile operators have recently agreed to an increase, from mid-October 2005, of the ported numbers per day (per operator), from 5 000 to 7 500.

Consumer associations continue to ask for a national regulation that would oblige operators to transfer the residual credit of the pre-paid cards (that represent 90% of the market).

Digital TV

The switch over to digital TV is progressing well in Italy. In December 2005 the Ministry estimates that around 3 700 000 digital terrestrial TV decoders had been sold. In April 2005, the Ministry, audiovisual operators and two regions – Sardegna and Valle d'Aosta – signed an agreement for a pilot project with the aim of completing the digitalisation of the two regions for July 2006. The switch-off date at national level has recently been postponed to December 2008.

Satellite operators have denounced a perceived discrimination between technologies regarding the accessibility of public funds for the purchase of digital decoders. The Commission has recently launched a state aids investigation on this issue.

Consumers' complaints and out of court dispute resolution

The incumbent and a few alternative operators have put in place a conciliation procedure for the solution of disputes with end users.

AGCOM receives an average of 1000 complaints per month; a significant part of them are solved at an early stage without the opening of a formal dispute.

AGCOM has established a compulsory mechanism to have disputes settled out of court, within a time limit of 30 days, by regional public entities (Co.re.com) or, if they are not yet functioning, by other entities, usually the Chambers of Commerce. Nevertheless, only 13 out of 20 Co.re.com have been already activated by the regional authorities, with the consequence that free-of-charge out of court dispute resolution is available to only 70% of the Italian population, while Chambers of Commerce require, on average, a payment of € 50.

While AGCOM considers that the new Co.re.com system is a useful tool for dispute resolution (so far 58% of more than 1000 decisions have been in favour of the consumers), they also underline the necessity to improve the harmonisation of approaches between the different regional Co.re.com. Consumer associations propose the setting up of an on-line system for dispute resolution.

Premium rate services and activation of non-requested services

Consumer associations have denounced the persistently impressive number of cases of fraudulent use of premium rate services (PRS) through internet auto-diallers, with important profits for the operators concerned: according to AGCOM's data, between January and August 2003, the turnover of the three operators sanctioned in 2004 was more than € 200 million.

Since 2003, AGCOM's *ad-hoc* interventions to stop the inappropriate use of specific PRS numbers have only partially solved the problem, since fraudulent diallers usually shift to different numbers. AGCOM has also opened an investigation on the issue (still on-going). During the year 2005, the Ministry has deactivated almost 100 PRS numbers (attributed to around 20 network operators) for incorrect use. While the current monitoring activity seems to be limited to only two specific numbering codes (899 and 166), a revision of the national numbering plan is welcomed to better clarify the PRS services that can be provided within each category of numbers.

The *Regolamento sui servizi a valore aggiunto* (the first draft of which was issued in June 2004), that would regulate the matter, still needs to be approved by the Ministry. Consumer associations underline the fact that such services should be provided under a specific contract and billed separately from basic voice telephony contract/billing. In 2004 and 2005 AGCOM has sanctioned one operator for non-requested carrier pre-selection activations during 2002. The number of such cases, in particular concerning ADSL, continues to remain particularly high, despite a significant decrease since 2004.

CYPRUS

INTRODUCTION

2005 has been the first full year, since accession, of regulation on the Cyprus electronic communications markets. The Commission can therefore draw more concrete conclusions on the state of competition and regulation on these markets.

New entrants in the fixed communications markets are providing voice telephony services mainly through carrier selection and pre-selection as well as services for the purposes of accessing the internet through public switched telecommunications networks. The second mobile operator, since the start of its operations in the second half of 2004, is mostly providing services in the pre-paid market sector but is finding it increasingly onerous to obtain the various permits for erecting masts which in turn would enable it to increase its national coverage. Moreover, there is no national broadband strategy yet in place, which is reflected in the relatively low uptake of broadband in Cyprus (roughly 4%)⁸⁴, mostly using DSL.

Despite a significant amount of regulatory activity over the past year, products such as bitstream access and wholesale line rental, which could enhance competition on the market, have not yet been introduced. Nevertheless, the market analysis procedure is currently under way, but the protracted delays, both in the initiation of this procedure and its continuation vis-à-vis the remaining markets, have not been beneficial to the state of competition on the Cyprus electronic communications markets.

Overall, competition still appears to be very limited in the Cypriot electronic communications market, possibly partly due to both retail and wholesale pricing issues in the fixed and mobile markets. Furthermore, concern has been raised about the absence of political will to create a market environment that can introduce and consequently sustain effective competition.

REGULATORY ENVIRONMENT

Legal framework, including transposition

Cyprus has adopted the remaining secondary legislation necessary to transpose the EU regulatory framework, and has also notified these measures to the Commission.

The NRA

The legislation transposing the regulatory framework in Cyprus has conferred regulatory tasks on the Department of Electronic Communications (DEC) of the Ministry of Communications and Works, the Minister of Communications and Works, the Office of the Commissioner for Electronic Communications and Postal Regulation (OCECPR) and the Council of Ministers. However, the Minister of Communications & Works

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Data on penetration reflects the situation as of October 2005

coordinates the ownership rights of the 100% state-owned incumbent within the Council of Ministers as well as retaining some regulatory functions. This raises questions concerning the independence of the regulatory bodies which has already been addressed in an infringement proceeding in October 2005.

The DEC and the OCECPR were both set up in 2002. The slow start to the market analysis procedures seems to indicate that the OCECPR is under-staffed. The DEC seems to be similarly under-staffed, and this appears to have an impact on the initiation of procedures for the authorisation of specific spectrum bands. Nevertheless, the overall impression of the OCECPR's and the DEC's performance, as conveyed by stakeholders in the market, is of effectively-functioning bodies.

In the area of e-privacy, the day to day supervision of the market is carried out by the Office of the Commissioner for Personal Data Protection, which seems to have established a productive working relationship with the OCECPR, most notably in relation to the latter's investigation on accepted practices in advertising services to customers.

The status of the incumbent

The incumbent, a vertically-integrated operator, started operations in 1960. It is a semi-governmental organisation. This status coupled with the incumbent's financial strength, have made it extremely difficult for new entrants to compete successfully. The incumbent has a 97% share of the fixed national calls, a 91% share in the fixed international calls (in terms of revenue) and 93.5% of the total number of mobile subscribers⁸⁵.

Discussions are currently under way about a change in the legal framework governing the incumbent, with proposals aimed at giving it more autonomy. While ownership will remain with the Government, it may become permissible for dividends to be paid, which in turn should encourage the incumbent to make a significant profit and accordingly to adjust its behaviour to that of a player subject to the normal constraints of business. The Commission services will be closely following developments in this area so as to ensure conformity with the regulatory framework, especially in relation to the interplay between ownership and regulatory functions of the Minister of Communications and Works and the Council of Ministers.

Appeals

Appeals against the DEC's and the OCECPR's decisions are made to the Supreme Court, which is not a specialised body with jurisdiction in regulatory affairs. This has led to concerns about the effectiveness of the appeals procedure. Furthermore, the alternative operators blame the incumbent for systematically appealing almost every regulatory decision, thus bringing legal certainty into question until a final judgement is delivered, even though the NRAs' decisions stand pending the outcome of the appeal.

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Data on market situation reflects the situation as of June 2005 according to OCECPR

Spectrum management

Fixed Wireless Access networks and services do not yet operate in Cyprus. According to the DEC, during the course of 2006, a contest will be held so as to authorise their use. Given the appropriate conditions, it is expected that this kind of network and or/service could help increase the uptake of broadband in Cyprus, especially in remote areas.

Network rollout

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, as well as a building licence. The practice applied regarding the town planning licence differs between local authorities. Furthermore, the fact that any person who wishes to establish any construction on a rooftop has to certify that all previous constructions were installed legally is regarded as an entry barrier. If the construction is less than 6 metres high, then no prior authorisation is needed. As this process is not harmonised, differences of treatment occur and this continues to act as a disincentive for new entrants, especially mobile operators, to enter the market.

Regarding the rollout 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 harmonised. Furthermore, most sites in rural areas are Government-owned, and accordingly approval for construction can be a lengthy process (roughly one year) which has to be both approved by the relevant Ministry/ies to which the land belongs as well as by the Council of Ministers.

According to information given by the DEC, a review of both these regimes is under way so as to make the procedures more efficient, fair and transparent and to avoid unnecessary bureaucratic processes. The Commission services are monitoring these issues and their developments carefully in order to ascertain if there is any discriminatory treatment between the incumbent and new entrants.

In order to try to change public perceptions, the DEC is looking into creating a website so as to address existing concerns related to exposure to electromagnetic fields.

Authorisations

All radio licences (issued by the DEC) and electronic communications licences (issued by the OCECPR) have been converted from individual rights of use to general authorisations in order to bring them into line with the new regulatory framework. Nevertheless, the special conditions inserted in the licence of one of the mobile operators will need to be evaluated so as to ensure that they do not go beyond what is enumerated in the restrictive list annexed to the Authorisation Directive.

Decision making

The OCECPR will analyse the 18 markets in the Commission's recommendation and has secured the services of a consultancy to assist them with this process. Some views were expressed that the procedures for the collection of data (through very detailed questionnaires) were quite burdensome for the smaller operators. However, there is an

acceptance that the OCECPR needs to have all pertinent data at its disposal in order to ensure that a meticulous market analysis can be carried out.

The cooperation with the Commission for the Protection of Competition seems to have worked efficiently and effectively, with constructive comments from the latter. The public consultation on the first four markets (markets 11, 12, 15 and 16), started in mid-October with a deadline for comments set at mid-November 2005 whilst notification to the European Commission took place in January 2006.

The second stage of the market analysis, which consists of the remaining markets, started in October 2005 with the end envisaged for June 2006. Alternative operators (the majority of which operate in the fixed sector) have expressed concern that markets which are extremely important for the fostering of effective competition in Cyprus have not been looked at in the first phase, most notably markets 1-6.

REGULATORY AND MARKET DEVELOPMENTS

The regulatory obligations imposed on the incumbent form part of the transitional measures according to the starting conditions. The incumbent was designated as having SMP in fixed and mobile networks, fixed and mobile voice and leased lines. The remedies in place include accounting separation, cost-orientation, an obligation to issue a RIO and RUO, and a retail price cap on fixed retail services such as PSTN connection, PSTN line rental and calls. According to the OCECPR, as a result of an audit of the incumbent's costing system, cost-oriented prices, for wholesale and selected retail services, are in place.

Fixed markets

The incumbent, three years after liberalisation, still has a 97% share of the fixed national calls and 91% of the fixed international calls (in terms of revenue). These figures have remained more or less stationary over the past year. This is likely to be a consequence of the existing low retail prices offered by the incumbent and alternative operators describe it as a considerable barrier to entry for them, making it difficult to create a critical mass given the prevailing market conditions.

In order to rebalance the retail tariffs following the audit of the incumbent's costing system, and thereafter the decision taken by the OCECPR, the incumbent significantly increased its line rental fees, in the past year whilst rates for all calls, markets in which the incumbent is facing competition, have dramatically decreased. The interplay of the two has reportedly had a negative impact on the alternative operators providing carrier select and pre-select services.

The one-off and monthly rental charges for 2 and 34 Mbit/s leased part circuits used for interconnection have been benchmarked at the third lowest of all Member States by the OCECPR in the absence of sufficient information about the actual costs in the incumbent's costing system.

The RIO 2005, published on 8 April 2005, received a cautious welcome by the new entrants as it significantly decreased the charges for interconnection and for backhaul services, especially in relation to the submarine landing stations which can be considered

a bottleneck. Even though there are an increasing number of interconnection points at local and regional exchanges, the incumbent does not yet offer technical facilities for local interconnection, which prohibits the alternative operators from fully exploiting this service. A further point of contention is the high bank guarantees requested. Furthermore, the new RIO should enable new entrants to bill their clients in the same way as the incumbent, but the incumbent still needs to find a technical solution to ensure the availability of this service. Some new entrants would like to see the introduction of wholesale line rental as soon as possible, but claim that the lengthy SMP designation process has led to unnecessary and detrimental delays.

There has been an improved process for carrier pre-selection but as a consequence there have been allegations that the incumbent has launched allegedly anti-competitive win-back campaigns for all the customers that move to an alternative operator. This issue is being examined by the regulator.

Broadband markets

The market analysis procedure is in progress in Cyprus, with questionnaires sent to the operators for the first batch of markets, amongst which are markets 11 and 12 (broadband).

At present, the incumbent is the sole provider of broadband services, with a 4% population penetration rate. Two contracts have been signed under the RUO 2005 for unbundled access to the local loop (collocation at the local exchanges and sub-loop level) but there are delays in the implementation of the process as envisaged in the RUO, so the new entrants have not yet been able to start offering their broadband services. This delay would seem to favour the incumbent. The Commission services will monitor how this evolves in the coming months.

The Commission launched an infringement proceeding against Cyprus for the failure to notify any draft measures pursuant to the market analysis procedure before October 2005. The lack of remedies, such as wholesale broadband access, seems to indicate that these delays are in particular detrimental to competition in the retail broadband market.

Mobile markets

Markets 15 and 16 (access and origination and termination on mobile networks) are also included in the first batch of market analyses. The incumbent's regulatory obligations (pricing) on the retail mobile market were abolished by the OCECPR due to the fact that no mobile retail market is defined in the Commission Recommendation. The OCECPR may consider analysing this market if the remedies imposed on the SMP player as a result of the market analyses of markets 15 and 16 do not yield any concrete results.

The second mobile operator, since the start of its operations on 12 July 2004, has only acquired 6.5% of the total number of subscribers, mostly in the pre-paid sector. This is probably due to the low margin between the incumbent's retail prices and the national roaming prices the latter offers to the second mobile operator. This issue, as well as a possible abuse of the incumbent's dominant position, is currently being examined by the Commission for the Protection of Competition (CPC). The interim order issued by the latter in July 2005 requiring the incumbent to bring its prices back to the pre-April 2005

level has, however, not been complied with by the incumbent. Due to a procedural loop-hole in the national law, by which there is no possibility of enforcement of interim decisions, as envisaged by Regulation 1/2003, the CPC's interim decision could not be enforced.

One of the conditions in the second mobile operator's licence was to have 50% geographic coverage by the end of 2005, a goal which has already been achieved, thus decreasing its need for national roaming and consequently its dependence on the incumbent's network. By the end of 2007 it must achieve 75% geographic coverage, an objective that may be difficult to reach, given that the procedures for obtaining the necessary permits for the rollout of the network are becoming increasingly onerous. On the other hand, the incumbent was not always required to apply for such permits when rolling out its network. However, following court orders or decisions by the Government, several masts or building sites in different districts, all belonging to the second operator, have been taken down. This could constitute discrimination and the Commission services are for this reason examining the matter.

Unlike the first mobile operator, the second mobile operator is already providing 3G services.

Tariff issues

One of the obligations placed on the incumbent under the starting conditions was that of cost orientation of wholesale and retail prices. The incumbent's costing system, which is based on FDC for retail services and LRIC for wholesale services, concerning the actual results of 2003 and the budgeted forecasts for 2004, was audited by consultants for the OCECPR in 2004 with final approval from the OCECPR in 2005. The audit for 2004 is currently under way.

Alternative operators have requested more concrete information regarding the cost accounting systems to be divulged to them so that they can verify compliance with cost orientation and cost accounting obligations. The request has so far not been fulfilled and business confidentiality has been invoked.

THE CONSUMER INTEREST

Universal service

The incumbent has been designated as the universal service operator, for three years, for all elements and for the whole territory with no funding mechanism yet in operation for this purpose. This designation is envisaged to end in 2008.

The Commission services are looking into the manner in which the Cypriot secondary legislation applies the designation mechanism for its conformity with EU legislation. More precisely this concerns the fact that a designated operator must have a geographical coverage of at least 85% of the total territory of the Republic of Cyprus and population coverage of at least 70% of the Republic of Cyprus.

The liberalisation of the directory enquiry sector has taken place, following lengthy negotiations on the procedures for data exchange and the corresponding financial

payment. There are currently two providers of this service, with several more wishing to enter this market. However, the data provided to the alternative operators in return for remuneration does not seem to be, at first sight, in conformity with the *KPN* judgement⁸⁶. This is an issue which the OCECPR is currently investigating. Fears of precluding competition on the market have been expressed due to the fact that at present, the old directory enquiry service number only informs users of the incumbent's new directory enquiry service number.

Directories and directory enquiry services do not include the numbers of all fixed and mobile subscribers of all operators. The Commission has expressed its concerns in this matter as this is a consumer benefit, enshrined in the Universal Service Directive.

The OCECPR has introduced two schemes targeted, on the one hand for individuals with low income, and on the other to individuals with special social needs (e.g. disabled, blind or deaf users). Potential subscribers to these lines need to provide the incumbent with certificates from the relevant governmental bodies. They are then entitled to services at a reduced cost. Furthermore these users are also entitled to use carrier selection or carrier pre-selection on their lines if they so wish.

Number portability

Fixed (within the same geographical zone) and mobile number portability have been available in Cyprus since the end of 2004. This has naturally been a useful tool for the second mobile operator, which has had to churn customers from the incumbent, as the penetration of this market is relatively high at 98%.

Emergency services (112)

22% of emergency calls are to 112, whilst 78% of calls are to 199, the national emergency number. A committee has been set up to look at the more efficient use of languages, at increasing awareness, at developing the way calls are handled and ensuring that caller location information is readily available. Caller location information is currently available when the call is made from a fixed line but is not available when the call is made from a mobile phone. The Commission services are looking into this matter.

Digital switchover

A committee is expected to advise the government on policies, procedures and the timeframes for the introduction of digital terrestrial television in Cyprus. Two analogue channels have at the moment been reserved for this purpose but it is expected as time goes on that more will be released and consequently made available. 2012 as the date for analogue switch-off does however seem to raise concerns and Cyprus has not committed to a switch-off date yet.

⁸⁶

Case C-109/03 *KPN Telecom BV v OPTA* of 25 November 2004

LATVIA

INTRODUCTION

The last year was the first in which the new Latvian Electronic Communications Law, substantially transposing the EU regulatory framework, was in force. It was also a year that saw timely progress towards more competition in some areas, for instance with the licence award to, and subsequent market entry of, a third GSM/UMTS mobile network operator based on CDMA technology.

Broadband take-up grew dynamically in the period under review, and overall penetration moved up significantly from 1.5% to 4% (October 2005) of the population. For this figure, Latvia compares favourably to the average penetration rate of its peer group of the ten new Member States. As yet there are virtually no fully unbundled lines, but there is some infrastructure-based competition from broadband technologies other than DSL. The large and profitable market for fixed voice services is still characterised by high levels of concentration.

The most urgent need for the NRA – the Public Utilities Commission – at the end of 2005 was to commence the market review procedure that lies at the heart of the framework as soon as possible. The Public Utilities Commission, now in its fourth year of operation as a multi-sector regulator, has been adding strongly to its already committed staff. This augurs well, perhaps, for how the regulator will deal with the heavy burden of upcoming notifications when it now finally addresses the question of market analyses according to Article 7 of the Framework Directive.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The Latvian Electronic Communications Law was notified to the Commission on 23 November 2004. On 12 May 2005 further amendments to the law were published and subsequently notified, and the EU regulatory framework was thereby substantially transposed into national legislation. Reviewing the process of transposition since mid-2004, several market players lamented the fact that there were an excessive number of amendments and changes to the law, adding an unnecessary dimension of uncertainty to the legal environment. The NRA and the Ministry of Transport are currently in the process of drafting the approximately 45 remaining acts of secondary legislation and by-laws, expected to be adopted in early 2006.

The NRA

The Electronic Communications Law confers on the Public Utilities Commission – a multi-sector regulatory authority originally set up in June 2001 – the regulatory functions the framework demands.

The NRA's internal organization has been strengthened in the last year, with the Electronic Communications and Post Department now employing 24 staff.

The Public Utilities Commission remains however much smaller than the regulators in other countries of a similar size, and its budget may not be sufficient yet to cover the expenses inevitably incurred when relying on external expertise in such fields as the development of sophisticated cost and interconnection pricing methodologies.

The decision-making process is said to be generally transparent and properly designed to involve market players in the course of regular consultations. It remains to be seen how this process will evolve once market notifications and draft measures will have to be dealt with. Negative comments were made as regards the absence of specialized decision-making chambers within the NRA. Instead, the legislator has opted for one single, politically appointed, board of five commissioners responsible for decisions concerning all public utility industries within the regulatory remit of the NRA.

Parties may appeal the NRA's decisions to the administrative court system. It falls into three circuits of appeal, namely district, regional and the Supreme Court. The latter may only consider points of law. The experience of the courts is limited – they were established in February 2004 and have only dealt with a small number of cases involving the NRA so far.

The most urgent task facing the NRA is to consult on, and then notify to the Commission, draft measures concerning determinations of SMP in relevant markets as a pre-condition for the imposition of remedies. On 31 May 2005, a methodological framework for the market analysis procedure was approved by the Public Utilities Commission's board, and it is now for the NRA to expedite the consultation process.

Market players have voiced criticism of the role played by the Competition Council in the electronic communications sector; it remains to be seen whether the Competition Council will play a constructive consultative role in the imminent market review process.

Spectrum Management

In another area, spectrum management has been an enduring source of unease among market players, as the precise competences relating to frequency allocation between the Latvian government and the NRA are difficult to understand. In principle, a national frequency plan was adopted in April 2004. The NRA in turn is responsible for allocation on the basis of the plan, but the procedure is rendered much more complex, for example, through the involvement of a special inspection unit for technical authorisations placed outside the control of the regulator. With the governmental decision on Radiofrequency Bands with Limited Usage Rights in force since 23 August 2005, it is to be hoped that this situation will change, particularly with regard to the important 400/450 and 800/900 MHz as well as the 3.5/3.6 GHz bands.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

The market for fixed voice telephony is growing slowly and, in terms of overall revenues, is smaller than the market for mobile telephony. However, it is strongly cash-generative, and it also remains a virtual monopoly. The incumbent is still able to capture nearly the entire market segment.

The fixed incumbent is one of the five biggest companies in the country with approximately 3000 employees and € 200 million in revenues projected for 2005. The government of the Republic of Latvia (via its privatization agency) owns 51% of the shares. While in the past privatization of this stake had been mooted, concrete steps have yet to materialise. In the meantime, the incumbent has completed a process of internal reorganisation, with separate business lines being created for network management and maintenance on the one hand, and for services on the other.

The Public Utilities Commission has mandated the availability of CPS for local calls as per 1 September 2005. Though the impact of this measure remains to be assessed, mandating CS/CPS for international calls in the past has resulted in greater choice for consumers, and in the incumbent's market share decreasing to a level of approximately 70% (though still well above the EU average of 55% for this market).

The Public Utilities Commission has made considerable efforts to bring fixed termination charges down to EU levels for both single and double transit. This has been a decision fraught with political tension, because a large number of calls terminated on the incumbent's fixed network are coming from international locations. While the decision is subject to appeal in the administrative courts, rates have in the meantime been reduced to less than 65% and 40% of their previous levels (to approximately € 0.0115).

The incumbent has announced investment of more than € 40 million in the coming year to upgrade its network with a view to introducing internet television - a first step towards a proper triple-play product matching similar offerings by cable competitors.

Price-cap obligations for retail prices are in place. However, no comprehensive rate-rebalancing of the incumbent's tariffs has been accomplished to date.

Broadband Markets

The reference period has seen dynamic growth in retail broadband access, with penetration moving up significantly from 1.5% to 4% (October 2005) of the overall population. This compares favourably with the performance of other new Member States. The fixed incumbent has a 57% share of all broadband lines (in terms of revenues the figure is more likely to be over 80%); however, its share of xDSL lines is 98%.

This is a remarkable level (and likely cannot be attributed to superior retail offerings on the part of the fixed incumbent - at more than € 70 per month the 2-Mbit retail product is priced fairly high), and mostly due to the lack of competition at the wholesale access level. There are no fully unbundled local loops at all, and the typical wholesale access offer made under the LLU decision of May 2004 usually amounts to no more than a simple resale agreement in which both the brand and the retail price of the service are

still controlled by the fixed incumbent. Potential alternative providers interested in gaining access have cited the exorbitant installation charges levied by the incumbent, in addition to the rental prices for copper as such, as a major commercial impediment.

Cable companies and wireless fixed companies possess 43% of total broadband lines and thus constitute meaningful infrastructure-based competition in some parts of the country (their market share in terms of revenues is lower). Even accounting for issues of productive efficiency in a small economy, however, appropriate regulation of the DSL wholesale access market with a view to introducing some service-based competition would seem to hold much potential for consumer welfare. The NRA has signalled that in the upcoming market review process, the markets for unbundled access to loops and wholesale broadband access would likely be included in the first batch of notifications.

Accelerating the process of market analysis seems even more urgent as in the period under review the fixed incumbent has completed an acquisition – effective since 1 November 2005 – of a strong potential competitor for broadband and DSL offerings. The acquired company has attracted a strong customer base across all three Baltic States, and operates as a successful IT services and infrastructure provider.

Mobile Markets

There has been strong growth in the Latvian markets for mobile services, with overall penetration going up from 63% of the population in September 2004 to 78% in October 2005. Arguably the most significant development in the mobile markets has been the largely well-managed entry of a third mobile network operator. A third GSM and UMTS-licence was issued to this operator on 29 June 2005. The Tender Commission, chaired by the Ministry of Transport and involving a representative from the Public Utilities Commission, was much lauded for its role in ultimately ensuring transparency and efficiency of the tendering process.

The new entrant challenges the prevailing duopoly of the two providers licensed in the past, which has created a market structure in which the two players have a customer base of approximately 900,000 each, and revenues of € 215 million and € 115 million respectively. While the duopoly has resulted in considerable network investment, and today ensures coverage of approximately 90% of both population and territory of a predominantly rural country, it has also produced retail price levels well above those prevailing in neighbouring states. New entry can be regarded as positive, because at planned investment levels of more than € 72 million over the next years it should be conducive to price rivalry and may lead to increased consumer welfare.

Observers noted problems in connection with the national numbering plan and the scheduled transition from a 7-digit to an 8-digit numbering system (about to enter into effect on 1 May 2006), necessary for the operation of the third mobile provider. The unclear division of competences between the government, which is responsible for establishing the national numbering plan, and the NRA, which is responsible for allocating numbers on the basis of it, has resulted in artificial scarcity of numbering resources that threatens competition. A provisional government decision has allocated some 100000 numbers to the third entrant in the meantime.

Technologically, the two largest providers are obliged by their licence conditions to offer UMTS services to 30% of the population living in the greater Riga region by the end of 2005; commercial considerations suggest that a proper roll-out will in all probability follow in the course of the coming year.

Moreover, at the end of 2005, the country's eleven largest cities – corresponding to approximately 85% of the population – were offered services by a player using CDMA technology over the 450 MHz band.

The Public Utilities Commission has for some time paid a significant amount of attention to the regulation of fixed-to-mobile termination rates. The current average of € 0.089 is below EU average. Action has been taken to bring these rates further down (as well as to establish a uniform mobile interconnection price structure with no differences among operators), but the decision is currently being appealed in the administrative courts.

THE CONSUMER INTEREST

Neither fixed nor mobile number portability was available until November 2005. It was confirmed by the Latvian authorities however that preparations for effective service introduction were under way with a view to the launch-date of 1 December 2005. At the end of 2005, however, serious concerns persisted as to the fees charged to consumers for this important service, and the European Commission will closely monitor the situation in order to ensure effective implementation. Not only an economic tool for reducing switching costs and intensifying competition, number portability also is a major consumer benefit in terms of convenience assured by the framework.

Though no universal service fund is in operation, the Ministry of Transport is currently in the process of drafting secondary legislation with regard to the modalities of its introduction. The resulting by-laws will be updated in the light of the requirements of the Universal Service Directive.

The Public Utilities Commission is in the process of completing a consultation paper on the introduction of directories and directory enquiry services, with implementation scheduled a later date. It is incumbent on Member States to ensure timely implementation in line with the framework and as such the European Commission is monitoring the issue with concern.

Finally, charges for international mobile roaming services remain high for both major networks. It is to be hoped that increasing competition on the mobile market will result in more innovative and ultimately lower offerings to consumers for this vital service.

LITHUANIA

INTRODUCTION

In Lithuania competition between fixed operators seems to be lagging in comparison to the level of competition between mobile operators. In addition, the large number of “mobile only” users indicates the presence of a considerable degree of fixed-mobile substitution. The broadband market is developing positively and is shared between a number of fixed and wireless platforms, despite the prominent role of the fixed incumbent in the DSL technology segment.

From the regulatory point of view, market analysis, further development of the fixed incumbent’s wholesale products, as well as strengthening the protection of consumer interests seem to be the priority areas for further attention and/or corrective action on the part of the Lithuanian authorities.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The Law on Electronic Communications transposing the 2002 EU regulatory framework for 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 that came into force on 1 September 2004.

Apart from the above mentioned primary legislation, both in 2004 and 2005 the national regulatory authority – the Communications Regulatory Authority (RRT) was adopting and amending a wide range of secondary legislative acts, including for example new general conditions of carrying out electronic communications activities, new rights of use auction rules, new rules on installation and use of electronic communications infrastructure, new market analysis regulations.

After a thorough analysis of all these legislative acts, the Commission services identified and communicated to RRT questions about a number of potential transposition issues. Following discussion of these issues with RRT as well as RRT’s comprehensive written explanations, certain issues remain – they are summarised in the corresponding sections below.

The NRA

In 2005 the administrative capacity of RRT was further strengthened: RRT’s staff reached the target number of 160 with most recent admissions taking place in legal and economic fields. RRT’s organisational and financial independence seems to be well established and not subject to noticeable challenges on the part of other state institutions. Market players’ attitudes towards RRT were generally positive and appear to gradually be improving further, as a result of the NRA’s growing expertise and its emerging strategic direction.

Decision making

RRT has taken steps to strengthen positive interaction with several other authorities active in the field of electronic communications. As regards cooperation with the Competition Council, under the Law on Electronic Communications RRT has the general right but not the obligation to consult it. However in practice the Competition Council is usually consulted, and informal contacts between the two institutions are frequent. Furthermore, a RRT – Competition Council cooperation agreement has already been drafted. Concerning RRT's co-operation with other institutions, an agreement with the Radio and Television Commission (broadcasting content regulator) is under preparation.

Several market players appreciated improved timing of RRT's consultation procedures. On the other hand, several small service providers noted that sometimes the burden of regulation is too heavy (e.g. one person must be employed only to deal with regulatory issues), that RRT has so far not fully enforced several important milestones, such as mobile SMPs, number portability and competition in fixed markets, and that RRT has abstained from imposing substantial disciplining fines. A number of market players indicated that proper feedback is still not always part of RRT's consultation procedures, which has a negative effect in terms of clarity and stability of the regulatory situation.

In some cases, alternative operators have argued that RRT has failed to ensure that its decisions are sufficiently explicit to guarantee that the incumbent cannot subsequently use technical requirements to hold up implementation or to make the access product uneconomic, particularly in regard to access and collocation.

Responding to some of these negative comments, RRT noted that its approach towards market players is quite pro-active, e.g. it often carries out informal consultations and each year organises a 2-day seminar targeted at small market players, as well as that RRT has self-imposed a procedure whereby it answers to market players' comments, but this is done in important cases only, and not necessarily all arguments are disclosed due to the litigation threat.

An obligation to give an appropriate period of notice to parties affected, contained in Art. 16(3) of the Framework Directive, is transposed by Art. 17(7) of the Law on Electronic Communications as the RRT's right to prolong validity of obligations for up to 28 days after publication of the cancellation decision. Depending on the circumstances, the strict 28-days limit may give rise to disproportionate adjustment burden on market players benefiting from the obligations to be withdrawn. The Commission services are looking into this matter.

Concerning market analysis, RRT has prioritised wholesale markets to be analysed first, the currently planned time for finishing these analyses being the first half of 2006. However progress so far has been rather slow: only the results of analysis of market 16 "voice call termination on individual mobile networks", market 9 "call termination on individual public telephone networks provided at a fixed location", market 12 "wholesale broadband access" and market 10 "transit services in the fixed public telephone network" had been notified to the EU Commission at the time of drafting of this report.

Several market players were disappointed with RRT's decision to start market analyses with a mobile rather than a fixed market, considering that, in their view, the competitive situation in the fixed electronic communications markets is less favourable than in the mobile markets.

Appeals

It would appear that Lithuanian courts continue a practice of routinely suspending validity of RRT's decisions, as it has been recently demonstrated by rulings in cases concerning market 16 "voice call termination on individual mobile networks".

Dispute resolution

As regards disputes between undertakings providing electronic communication networks and/or services, Art. 28(1) of the Law on Electronic Communications makes the RRT dispute settlement procedure the mandatory pre-court dispute settlement mechanism rather than an alternative to court procedures. The Commission services are looking into this issue. New entrants have suggested that RRT seeks to have agreements between operators rather than proceed with dispute resolution, which they feel can be criticised when the tendency to find compromise positions takes away from the NRA's task of imposing market opening remedies when these are required.

Spectrum management

All the three mobile operators are concerned about the unclear selection criteria (e.g. technical solutions for network lay-out, quality and variety of services) contained in the UMTS tender conditions. However, according to RRT, this is due to the nature of a beauty contest. Furthermore, in the course of the relevant public consultation the beauty contest was indicated as the preferred granting rights of use option by the operators themselves.

One of the mobile operators drew attention to its 3.5 GHz data transmission licence issued only for the period of one year (with an extension for one further year under negotiations), contrasting with 10-year licences of the same type issued for competitors. RRT explained the difference by different timing of the licence assignment procedures.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection

Interconnection with the network of the fixed incumbent would appear to be a difficult exercise creating obstacles to development of competition in fixed electronic communications markets. In one instance interconnection negotiations lasted for approximately 13 months. The incumbent's interconnection rates (too high, according to new entrants, even after a recent reduction; according to the data of October 2005, they are the highest in the EU 25) and the technical conditions for interconnection were cited as the main problems.

While the fixed incumbent tried to dismiss these claims (e.g. noting its compliance with approved price caps, occasional technical incompetence on the part of other market players and numerous interconnection negotiations going on at the same time), RRT admitted that the incumbent's network might be too expensive, noted its intention to look at the problems in the context of market analyses, but at the same time regretted that the issues are not brought up in the form of formal complaints.

At the beginning of summer 2006, the fixed incumbent will finish implementation of TD-LRIC (Top Down Long Run Incremental Costs) cost accounting model. Then RRT will apparently reconcile it with the BU-LRIC (Bottom Up Long Run Incremental Costs) that is already calculated in order to implement HY-LRIC (Hybrid Long Run Incremental Costs). Until now a historical cost model (ABC) has been used.

Competition/Market situation

Lithuanian fixed electronic communications markets have developed the following general characteristic features: (a) fixed to mobile substitution is relatively more important, e.g. has the effect of keeping fixed telephony prices at a low level; (b) foreign investments come mainly from Scandinavian countries, and powerful new entrants are hardly expected (for the time being these are rather small local companies focusing on international calls and VoIP).

According to the data provided by RRT, the most notable recent developments include increase in revenues of alternative providers by 31.6% during the second quarter of 2005 (comparing with the first quarter) as well as increase of alternative providers' traffic by 8.7% (comparing with the first quarter of 2005). However, these increases have remained to a large extent limited to the international calls segment.

According to the data of December 2004, the fixed incumbent's market share of fixed calls (by revenues) amounted to approx. 93% (a fall by approx. 4% if compared to 2003).

CPS

Concerning carrier selection and carrier pre-selection, the single billing feature is apparently not available yet. Furthermore, some market players drew attention to occasional CS / CPS failure (some calls are "lost", and the user is invoiced for them both by the fixed incumbent and by a CS / CPS provider), although the fixed incumbent stated that this is definitely not a frequent problem.

Broadband Markets

During 2005 the number of broadband providers has grown by approx. 32%, whereas in October 2005 broadband penetration reached approx. 6% (compared to approx. 3% in October 2004).

According to the data provided by RRT, approximately 41% of broadband subscribers use a DSL technology, approx. 22% - LAN, approx. 23% - cable, approx. 8% - a wireless solution. According to the data of October 2005, the fixed incumbent's market share of fixed broadband retail lines is approx. 42%, and the market share of DSL retail lines is approx. 97% (the shares have remained relatively stable since 2004).

Local loop unbundling

According to the data of October 2005, the monthly average total cost of fully unbundled local loop is the second lowest in the EU 25, and the monthly average total cost of shared access is close to the EU 25 average.

Nevertheless many market players criticised the fixed incumbent's local loop unbundling product, because feasibility to use it is substantially reduced by the incumbent's detailed technical compatibility examination lasting from two to six months. As a result local loop unbundling is still not functioning in Lithuania.

Bitstream access

In contrast to LLU a number of market players were quite positive about the fixed incumbent's bitstream access product, mentioning in particular such technical features as the possibility to vary quality parameters and to connect at IP level). However its pricing, in relation to corresponding incumbent's retail tariffs, appears to be an issue. A complaint is pending at the Competition Council precisely on the pricing aspects of the incumbent's bitstream access product. According to the data of October 2005, there were 2 685 wholesale bitstream access broadband lines in Lithuania. In its notification to the Commission of the results of analysis of market 12 "wholesale broadband access" RRT has envisaged imposition on the SMP operator of the cost accounting obligation.

Mobile Markets

The ever-increasing penetration is characteristic to Lithuanian mobile markets. It exceeded 100% in the middle of 2005 (counting active subscribers) and currently (October 2005) stands at approx. 117% (compared to approx. 80% in October 2004). According to the data of October 2005, the market shares of the three mobile operators (by subscribers) were approx. 37%, 32% and 31%.

The beauty contest for the three UMTS licences was announced on 17 November 2005. For the time being one operator is conducting 3G service trials.

Mobile regulation

Concerning access to mobile networks, a mobile virtual network operator pointed to insecurity of the present situation where such access is granted only by one (out of three) mobile operator as well as deteriorating business conditions which are linked to ratio between this operator's wholesale and retail prices. RRT intends to investigate more deeply these issues in the context of market analyses.

As regards interconnection, there is an apparent uncertainty in the market surrounding regulatory treatment of termination of third parties' traffic (e.g. resulting from the use of mobile gateways). RRT plans to solve the issue by virtue of the cost accounting obligation imposed on the SMP operators as a result of the market 16 "voice call termination on individual mobile networks" analysis.

Market and Technological Developments

VoIP services are not extensively developed at this stage in Lithuania, but are attracting considerable interest: 15 service providers have submitted appropriate notifications with launch of VoIP being considered by the fixed incumbent too.

An alternative operator has recently started operating a wireless broadband mobile access network and providing wholesale data transfer services.

THE CONSUMER INTEREST

Universal Service

The main element of the universal service provider designation mechanism currently put in place in Lithuania is that an undertaking possessing significant market power on a relevant market must provide the complete set of the universal service. Other undertakings get a possibility to become universal service providers only in case the RRT's investigation demonstrates that the complete set of the universal service is not provided in the whole territory of the Republic of Lithuania or in case the SMP undertaking requests compensation. The Commission services are looking into this issue.

In 2005 the Commission launched infringement proceedings against Lithuania, because contrary to the Universal Service Directive and the national legislation, there was no comprehensive directory comprising all subscribers, fixed and mobile, available in Lithuania. Furthermore, the directory enquiry service could not provide numbers of subscribers of one of the three mobile network operators. Following satisfactory explanation and/or resolution of the above mentioned issues the proceedings have been terminated.

According to Lithuanian legal acts, the Government of Lithuania rather than RRT has a real power to determine geographical coverage, number of public pay phones as well as not to impose public pay phones related obligations at all. The Commission services are looking into this issue.

The fixed incumbent criticised the current funding mechanism as impossible to be implemented in practice, since it contains a presumption of absence of unfair burden on the provider in case its market share exceeds 80%. It was also concerned about definition of functional internet access at 33.6 kbit/s in the new draft Universal Service Regulations, because the speed may not be available on certain of its access platforms.

Data Protection

Art. 61 of the Law on Electronic Communications provides that legal persons shall enjoy only those e-privacy related rights, which concern directories of subscribers and unsolicited communications. The Commission services are looking into this issue.

Emergency services (112)

It would appear that, in case of mobile subscribers, provision of the caller location information is not available yet. Furthermore, it is not clear whether officials responsible for answering and handling emergency calls in all cases possess the necessary linguistic skills. The Commission is looking into these issues.

Number Portability

According to the data of October 2005, 55 573 mobile numbers and only 232 fixed numbers were ported in Lithuania.

At the time of drafting of this report, the RRT's recent number portability central database tender was over with a winner selected, however many market players were unhappy with the outcome either because it deviated from their respective proposals or because of the potentially not cost-based price of the central database services (calculated as 1 LTL per allocated number per year). On the other hand, RRT stressed that in any way this was the lowest price offered in the tender, furthermore the consumer will not have to pay anything.

One of the features of the temporary direct call forwarding solution that is still used as a substitute for fully operational number portability in Lithuania is that SMS (short message service) and MMS (multimedia message service) messages are not forwarded and cannot reach the ported mobile number of a subscriber. The Commission services are looking into this issue.

Digital TV

A pilot digital TV project covering the capital Vilnius plus 30 kilometres around it has been launched in Lithuania with apparently positive results. As regards widespread commercial use of digital TV, the necessary legislation has been put in place, two digital terrestrial broadcasting licences were awarded in 2005. Actual roll-out of digital TV transmission networks should start in 2006 with the start of switch-off process scheduled in 2012.

The alternative operators were concerned by the fact that one of the two digital terrestrial broadcasting network operator licences was recently awarded to the fixed incumbent. They see this as the incumbent's move to strengthen its domination, especially in competition against cable operators. However the incumbent itself views obtaining a digital TV licence as part of search for alternative revenue in the context of declining income from fixed voice telephony.

Must Carry

According to the Law on Electronic Communications, transmission providers must transmit, in accordance with the procedure and conditions set out in licences and agreements concluded with broadcasters and/or re-broadcasters, a minimum number of radio and/or television programmes set by the RRT. A number of provisions potentially creating must carry obligations are contained in the Law on Provision of Information to the Public and other Lithuanian legal acts.

The Commission services are examining whether the Lithuanian must carry regime is aimed at clearly defined general interest objectives, whether the must carry channels are sufficiently specified as well as whether the relevant obligations meet the requirements of transparency, proportionality and periodic review.

LUXEMBOURG

INTRODUCTION

The mobile market continues to be stronger than the broadband market, with continued growth and high penetration and the arrival of a third operator. The fixed market is characterised by decreasing revenues and call minutes. Luxembourg has significantly improved in terms of broadband penetration from its very poor position three years ago to a situation where it is now at the EU15 average of 12%. Both the fixed telephony and broadband markets are characterised by a very high market share of the incumbent.

Luxembourg has only recently armed itself with the regulatory mechanisms created by the EU framework, as it was extremely late in transposing the regulatory framework, during which time the NRA has not been able to proceed with market analyses. Furthermore, this delay has compounded certain regulatory weaknesses from the old framework, such as the persistent failure to ensure proper cost accounting and separation of the incumbent. There is also a lack of wholesale broadband access products that would have allowed more rapid development of the broadband market.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

After a lengthy delay, the package of laws to transpose the NRF entered into force in Luxembourg on 1 July 2005, two years after the Directives on electronic communications were supposed to be applied. This followed the condemnation of Luxembourg by the Court of Justice, in March 2005, for its failure to ensure timely transposition. The law appears to reflect the Directives, but it is a minimalist transposition that contains few non-normative provisions, and the Commission services continue to examine the conformity of the transposition measures with the EU Directives.

The NRA

One of the laws adopted was the law concerning the organisation of the Luxembourg NRA, the *Institut Luxembourgeois de Régulation* (ILR), but this had little effect on the continuity of the functioning of the NRA in practice. But while there has been continuity in the institutional situation, which allowed for preparations to be made for implementation of the market analysis process, the delay in transposing the law dealing with the substance of the framework, the Law on Electronic Communications and Services, has led to serious delays in the market analysis as it was only on adoption of the law that the ILR had the necessary power and mandate to complete the market analysis. The Commission has already addressed infringement proceedings against Luxembourg for its failure to initiate the process.

Powers and objectives

The ILR is fully independent, the only criticisms expressed by operators being that they need greater staffing resources in order to meet the demands of the NRF. However, as reported in the 10th Report, the ILR has engaged consultants on a long term contract to assist in the market analysis process but also to transfer skills and know-how to the ILR in order to develop in-house skills for carrying out market analysis in the future.

The new entrants continue to criticise the apparent inability of the ILR to enforce its own decisions, or at least to impose meaningful sanctions that would punish operators for prolonged failure to conform with ILR decisions. The ILR has not until now had the possibility to impose fines in practice, as a separate state agency should have been nominated in law to collect any fines for failure to conform. The most obvious example has been the lengthy delays in implementing a series of decisions on the auditing of cost accounting, and in the provision of cost data and accounting separation from the incumbent.

Decision making

In preparing for the market analyses, the ILR identified four “clusters” of markets around which it has organised its work: access, mobile, fixed telephony and leased lines markets. The ILR intends to close each national consultation before launching the formal notification to the Commission and other NRAs (so there will be no parallel consultation, to allow better account to be taken of input from the national consultation). However, there have been delays in the original timetable, which already took account of the delay in transposing the new framework. The first group of draft market analyses, on the mobile markets, was published for public consultation on 25 October 2005, and were notified to the Commission in December. The ILR subsequently withdrew the notification on call access and origination.

Outside of the market analysis procedure, and in part due perhaps to the resource implications, the ILR has not been very active in dealing with ongoing difficulties experienced by operators, particularly in the broadband access market. Nevertheless the ILR has been active in regard to interconnection rates, and it is clearly in the interest of the market that the market analysis procedure be the focus of the NRA’s efforts.

New entrants have also suggested that the ILR needs to improve the transparency of its decisions, not just in the market analysis area but all decisions regarding interconnection, dispute resolution etc. In fact, the ILR systematically publishes its decisions on its website, but is now taking steps to implement a system of automatic notification by e-mail of the fact that decisions of interest (in the electronic communications domain) have been published.

Appeals

The appeals mechanism in Luxembourg appears to conform with the requirements of the EU framework, but it is clear that there are lengthy delays in the resolution of cases once referred to the Court. In fact a number of cases, relating to NRA decisions under the old framework and dating back several years, remain to be ruled on.

Dispute resolution

As the new framework was only applied in Luxembourg in July 2005, and as the ILR has been concentrating its resources on the market analysis process, there was a continued lack of enthusiasm from both the ILR and operators to engage in dispute resolution under in relation to interconnection and access issues, despite difficulties for example in the technical and tariff conditions relating to collocation.

Rights of way and facility sharing

There continues to be a legal vacuum in regard to permits for the construction or placement of mobile masts and antennae, as explained in the 10th Report. While some operators appear to be placing transmitters in certain circumstances, there is no legal basis for these developments nor even for the existing antennae that were constructed in good faith prior to a court ruling that stated that the relevant permits were in breach of planning laws. This creates great legal uncertainty and provides a very poor basis for investment in mobile networks. Neither the ILR nor operators are in a position to remedy the situation, and decisive intervention by the government is required.

In addition, although Title VIII of the new Luxembourg law on electronic communications contains a section on rights of way, acknowledging that all notified operators of electronic communications networks enjoy rights of way on the public domain of the State and of the municipalities, the Règlement Grand-Ducal setting out the procedure to make use of these rights has not yet been issued. The Commission considers that as long as the Règlement has not entered into force and put an end to the current lack of transparent and non-discriminatory procedures for exercising rights of way, Luxembourg has not fully complied with the judgment of European Court of Justice of 12 June 2003, regarding the failure to implement the non-discrimination principle relating to rights of way, which was at the time required by EU Directive 91/388/EEC (Article 4d). Market players have for example reported that in Luxembourg, there is currently no set timeframe for the delivery of works permits.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection

The ILR has been working to catch up on the significant delays that have marked the approval each year of the incumbent's reference interconnection offer, mandated under the old framework and maintained under the transitional provisions of the new framework. In early March 2005, the ILR gave its final approval to the interconnection prices for 2004. On 1 August 2005, the ILR approved the interconnection offer for 2005. Both of these reference offers had been subject to a number of modifications prior to final approval, sometimes at the request of the ILR, and operators have effectively been operating without the certainty of what charges will be applied, and the risk existed that a retrospective adjustment may be necessary.

However, on 26 October 2005, the ILR published for consultation the 2006 reference interconnection offer, and there is some hope that it will be approved much earlier in the year of its application and will thus give greater certainty to operators.

Competition/Market situation

The incumbent has 82% of the national telephony market, and 79% of the calls to Internet market, giving an aggregate share of 82% of the national fixed market in Luxembourg. This compares to a market share of 71% in international voice telephony. In the interconnection market, the restrictive approach taken by the ILR under the old framework means that there is no bitstream product available to other operators.

Accounting separation / cost-accounting

The ILR's decision on the incumbent's 2004 reference offer also contained a reminder to the incumbent that it had to make publicly available a description of its cost-accounting system in a level of detail sufficient to show the main cost headings as well as the rules being applied in deciding the allocation of costs linked to interconnection.

The issue of this cost allocation is part of a long and difficult saga in Luxembourg concerning the implementation of accounting separation and cost accounting obligations imposed on the incumbent under the 1998 framework, already explained in previous Commission reports and which have still not been fully resolved. In December 2005, the Court of Justice condemned Luxembourg for its failure to assure the independent verification and certification of the incumbent's regulatory accounting under the old framework. Furthermore, on procedural issues surrounding the case, the Court confirmed that the Commission was justified in pursuing the case despite the fact that the failures dated back to 1999, because the new framework required the maintenance of the same cost accounting obligations under the transitional measures.

The failure until 2005 to ensure accounting separation of the different businesses of the incumbent (which is also active in the postal and financial services' sectors) and the proven lack of independently certified cost accounting in accordance with the SMP obligations of the 1998 regulatory framework, has lent credence to the claims by new entrants that interconnection tariffs have not been cost oriented, and has made it more difficult to ensure that costs are properly allocated.

In early 2005, the incumbent confirmed that its accounting separation was in place, but there does not yet appear to be separation in the cost accounting between operational divisions of the incumbent's telecoms division. However, the incumbent states that a full LRIC cost accounting system is in place, one which can also be tested against the data flowing from the accounting separation. The accounts for 2003 are the first to have been certified (in 2005) as corresponding to the requirements of account separation, and the incumbent hopes to speed up the process by which accounts are certified and accurate cost data fed into the accost accounting system to comply with cost orientation obligations.

CPS

New entrants have maintained their criticism of the method for identifying customers who apply for carrier pre-selection, as the requirement to provide their customer number with the incumbent (and not their telephone number) makes the 'one-stop shop' approach generally ineffective. The incumbent points out that this method was agreed by new entrants upon introduction of CPS, and is a necessary control to ensure that the person requesting CPS is in fact entitled to do so.

Leased lines

Prices for leased lines services are low in Luxembourg, with obvious benefits for the business market. The prices for high capacity lines, however, while still at or below the EU average, are still proportionately more expensive than lower capacity lines which could indicate some problems for large businesses and high capacity users. The system of rebates/discounts offered by the incumbent on the basis of volume is still considered to be a barrier to developing competition, not only in the leased lines market itself, but also in the provision of other services by alternative operators.

Broadband Markets

Luxembourg has achieved a broadband penetration rate of 14% in 2005. The incumbent operator has 76% of the fixed broadband retail market (by number of lines). DSL represents an increasing part 89% of the fixed broadband market, at the expense of cable networks. The incumbent has 84% of the retail DSL market, the rest of which is taken up by one large and a few smaller operators who use an IP resale product from the incumbent, and their market share has actually fallen back from 2004.

There are just over 3 000 unbundled lines in Luxembourg, most of them fully unbundled lines in the business sector. There have been repeated complaints that the prices and particularly the collocation costs for shared access make it uneconomical for other operators to avail of this type of access to compete on the broadband market with the incumbent. However, in February 2005, the ILR agreed some reductions with the incumbent with regard to collocation costs, but these were deemed insufficient by new entrants to stimulate real growth in the number of unbundled lines.

The incumbent is investing in the connection of its street cabinets to local exchanges by optical fibre, which means that the ILR will have to take this development into account when analysing and possibly proposing regulation for the LLU market and the bitstream market. Any delay in tackling these market issues will be particularly significant in view of the fact that Luxembourg is lagging behind other EU countries in the level of competition in broadband access.

There is no bitstream access in Luxembourg, although a resale product for ISPs bears this name. The incumbent does not have a comprehensive ATM network, so IP interconnection with limited functionality is all that is available to operators wishing to compete in the broadband access market.

The reduction in the unbundling tariffs for operators were matched by the incumbent with reductions in its retail broadband offers, with obvious benefits for consumers in the short term. However, this has meant that other operators are continuing to complain of a lack of margin that would allow them to develop their own products and services in the broadband market.

Mobile Markets

The mobile penetration rate is still the highest in the EU. On paper, Luxembourg has a theoretical penetration rate of 150%, due in part to the number of transfrontier workers holding SIM cards and the number of users with two or more SIM cards for professional and private use, but also because of the lack of uniformity or guidance in the counting of inactive subscriptions.

Competition/Market situation

Apart from the apparently saturated market in terms of penetration, there are low retail prices for consumers and the successful launch of portability in January 2005. The two larger operators together have a market share of 93%. In October 2005, market shares were the following: the incumbent's mobile operations accounted for 58% of mobile subscribers - including the two service providers under its control - the second operator had 30% and the recent new entrant had 12%. At the end of 2004, the incumbent operator had 53% in minutes and 67% in terms of revenue; the second operator had 40% of the market in minutes and 26% in terms of revenue, while the third operator had 7% in minutes and 6% in revenue ILR figures.

Having entered the market in 2004 on the basis of a roaming agreement with the incumbent, the third mobile operator in Luxembourg has been steadily expanding its own DCS 1800 network. This now covers 75% of the population, and the geographical area in which the third operator still relies on national roaming is steadily decreasing, with the objective of full coverage by end 2006.

Technologies (2G/3G)

Notwithstanding this network development, the legal situation continues regarding the authorisation of mobile masts and antennae, referred to above and explained in the 10th Report. This causes delays in the development of 3G services in Luxembourg. Apart from the legal vacuum created, the situation also has the potential to undermine the investment plans of operators and to create potential discrimination, as the state of deployment of operators' networks is at different stages, and there are commercial pressures to develop 3G services.

Voice/data services

While all three operators are offering 3G services, these are not well developed in Luxembourg although one operator is offering the data service package branded by an international mobile operator. The slow development of 3G is due in part to the restrictions on the roll-out of mobile networks due to the uncertainty regarding construction permits.

Mobile regulation

The first draft make analyses published by the ILR for consultation and then submitted to the Commission related to the mobile markets – call access and origination and call termination respectively – but the ILR subsequently withdrew its draft on the access and origination market. The incumbent mobile operator announced that it was terminating its roaming agreement with the small third mobile operator, which attained a population coverage of over 70% in 2005.

Tariff Issues

Bundling

Under the old regulatory regime, which still applies until market analyses have been completed, the ILR had very little power to intervene on the retail market, a situation that was compounded by the absence until late 2004 of a competition authority in the country.

In the course of 2005, the incumbent presented a new bundled tariff package, which covers fixed voice, mobile and broadband Internet access. This is particularly significant in Luxembourg because of the integration of the incumbent operator and the postal incumbent, so that as well as the obvious marketing synergies, the incumbent is also able to support its offer through economies of scale and a marketing / sales network that includes, for example, use of all post offices. Despite accounting separation between the telecommunications and other divisions, there are still complaints from other operators that the incumbent is not respecting accounting separation between services (e.g. where the network department deals with the fixed and mobile infrastructure, or where the same advertisement campaign is used for products of different branches).

Margin/price squeeze issues

The incumbent's practice of giving substantial discounts to loyal and high volume customers has meant that in effect a two-tier pricing system applies, in voice telephony as well as in the leased lines market. New entrants argue that the discount system causes a price squeeze that effectively excludes them from some sectors, and they point to the bundling of services using discounts applied across the board and not just to the service for which it was "earned". The incumbent points to the fact that the discount, now capped at 18%, represents true economies represented by the higher volumes and the lower churn associated with such customers.

Market and Technological Developments

The incumbent operator has continued to press for due account to be taken of the particularities of the small Luxembourg market, both in the assessment of the market power of operators with small market share but who have economies of scale and impetus from their position in neighbouring markets, but also in the application of remedies under the new regulatory framework.

In late 2004, the ILR adopted a decision establishing the geographic numbering ranges that can be attributed for use in VoIP telephony and innovative services, which will help to facilitate new and alternative services to classic PSTN telephony.

THE CONSUMER INTEREST

Retail price trends

Luxembourg has maintained its position as one of the EU Member States with low voice telephony prices, for both fixed and mobile, and a very competitive international telephony market. Residential and business users in Luxembourg enjoy one of the lowest average expenditures on telephony because of the low tariffs. However, subscription charges are still quite high, and the price for DSL access is still quite high, except in the bundled offer of the incumbent.

Tariff transparency

For fixed services, the existence of discount schemes and the bundled products referred to above make it difficult for the consumer to know exactly what tariffs apply. The mobile market, while presenting the same diversified tariff plans as in other Member States, appears to have relatively transparent tariffs, because of the fact that most broadband customers have a product sold by the incumbent or a resale product.

Universal Service

The incumbent continues to be de facto the universal service operator, although this situation may change and the ILR may find it necessary to proceed to a formal designation. No problems have been reported in the provision of the universal service, including directory services.

Data Protection

As part of the package of laws adopted in May 2004, Luxembourg has transposed the ePrivacy directive concerning data protection in electronic communications. This is a significant move, as Luxembourg had failed to transpose the old telecommunications data protection Directive. Implementation has been entrusted to the national committee responsible for the implementation of the horizontal data protection Directive, but so far the Commission has not received any information concerning the effective implementation of the Directive.

Internet dial-up

The ILR has taken action to address the growing problem of “dialers” (computer programmes downloaded knowingly or unknowingly by Internet users, which dial access to internet sites using numbers in the “0800” range that are charged at very high rates). Following approval of the 2005 reference offer, the ILR decided in August 2005 to open access codes for internet dial-up, which will be moved to the 12xyz group of numbers, and there will be an obligation of transparency by means of a public register identifying the operator and the ISP responsible for the number. However, while clearly seeking to address the problem of surcharging, the Commission is examining the decision of the ILR to prevent charges for access via these numbers from being greater than a local call, and this would appear to remove the choice of an operator to charge for legitimate value-added or shared revenue services.

Emergency services (112)

The European emergency number ‘112’ is in operation in Luxembourg and is in fact the standard number used. One problem that appears to arise, however, is that caller location information is not made available for calls from mobile networks to the emergency services handling calls. The Commission is examining the issue of the technical feasibility of mobile caller location as part of the ongoing exercise to ensure the full and proper implementation of the 112 number throughout the EU.

Number Portability

The introduction of mobile number portability has been a success in Luxembourg, adding to the level of competition in the mobile sector and providing greater choice to consumers.

Must-carry

The law in Luxembourg does not explicitly impose must-carry provisions on transmission service operators. No problems have been reported by cable operators or other concerned undertakings.

HUNGARY

INTRODUCTION

Given that the Hungarian legislator had transposed the 2002 regulatory framework before accession, the main regulatory developments in Hungary in 2005 consisted in the continuation of the market analysis process commenced in 2004. As a result, sixteen of the eighteen markets have been notified to the European Commission. This process gives a basis for assessing Hungarian regulatory activity in 2005, taking account also of other aspects of the regulatory framework.

2005 was a very important year in the Hungarian electronic communications market, as the major CS/CPS residential fixed line operator strengthened its market position by offering both domestic and international call services with 100% territorial coverage, VoIP-based services appeared in the market, UMTS licences were allocated to the three mobile network operators in December 2004, and the 3G services of each of them are already available for consumers. However, the relatively low broadband penetration, the lack of MVNOs and the small number of unbundled local loops must also be emphasized.

As for Hungarian market trends in 2005, privatisation of the major television and radio transmission company, the acquisition by the owner of one of the five Hungarian LTOs (local incumbent operators) of a new entrant specialising in the business segment of fixed telephony services, the merger of the nationwide incumbent with its affiliate mobile company and, in general, the approach between fixed and mobile network operators are to be underlined.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Hungary finalised the transposition of the 2002 regulatory framework by first adopting the Act C on Electronic Communications on 24 November 2003 (the “Act”) and by adopting gradually the whole package of the related secondary legislation.

The NRA

Powers and objectives

The Hungarian legislative framework places the National Communications Authority of Hungary (the “NCAH”) as the central body of the regulatory system. According to the Act, the NCAH is composed of the Office and the Board. The members of the Board are appointed for five years, and as legislative elections take place every four years in Hungary the appointment of Board members does not coincide with government changes. The Act allocates inter alia market surveillance, responsibility for market analysis and imposition of the necessary remedies on undertakings having SMP.

Independence

As for the golden share held by the Hungarian State in the major Hungarian incumbent (the “nationwide incumbent”) (see below), the Ministry of Informatics and Communications (the “Ministry”) (notified as an NRA) exercises ownership rights in respect of the said golden share. In addition, concern has been raised by the market players about the fact that the NCAH is under the supervision of the Ministry and not the Parliament. This way of exercising the ownership rights is examined by the Commission’s services in the light of the Framework Directive. In this respect, the necessary further legislative steps to be adopted have been communicated by the Hungarian authorities to the Commission services in order to ensure the separation of management and regulatory functions of the Ministry.

The revenues of the NCAH include, amongst others, a portion of the fees paid for the assignment and use of frequencies (within the limits of the portion specified by the currently applicable Budgetary Act) and fees paid for market surveillance by the electronic communications service providers. On the basis of the 2005 Budgetary Act, the NCAH is required to pay HUF 4 billion 115.9 million (about € 17 million) to the treasury from its revenues and the use of frequencies. This legislative provision needs to be scrutinised for compliance with the Authorisation Directive.

Appeals

A large number of NCAH decisions are systematically challenged by the operators before the Courts, which obviously has the effect of considerably slowing down in some circumstances the final decision-making process and reducing legal security and predictability in the market. In this respect it has to be underlined that if an NCAH decision is challenged, taking into account the fact that Hungarian Courts are overburdened, a final decision rendered by the Court (second instance) can take several years, which is not optimal in a dynamic market.

The Permanent Court of Arbitration (the “Arbitration Court”) has been set up by the Board in accordance with the Act. The Arbitration Court has rendered only two decisions so far, as the operators do not seem to have recourse to arbitration clauses and this means of dispute settlement remains too expensive for the operators in comparison with classic court processes.

Concerning the immediately applicable temporary decisions adopted by the Board on the basis of Article 65(6) of the Act, these cannot be challenged before the Court according to Act IV of 1957 on administrative procedures (the “Administrative Procedure Act”)⁸⁷, as only decisions maintaining temporary decisions can be challenged before the Court. Taking into consideration the practice of the NCAH, final decisions maintaining temporary decisions can intervene several weeks after the adoption of the temporary decision. As a result, an immediately binding temporary decision cannot be challenged before the Court for a certain period of time. The relevant provisions of the Act and the existing practice of the Courts refusing to consider the merits of the case of a temporary

⁸⁷ The Act CXL of 2004 on Public Administrative procedures replacing the Administrative Procedure Act entered into force as of 1 November 2005

decision need to be examined in the light of the requirements of the Framework Directive.

In respect of the appeal mechanism against the reference interconnection offers (RIOs) and reference unbundling offers (RUOs) adopted under the former Hungarian regulation, the competent Courts did not, on the basis of the Administrative Procedure Act, regard operators, other than the operator which has to have the RIO or the RUO approved by the NCAH, as an interested party to the proceeding; in consequence they could not challenge any decision by the NCAH related to the RIOs or RUOs before the Courts. According to the Hungarian authorities, under the Act interested parties shall already be regarded properly by the Courts, however no court decision has been rendered so far in respect of the RIOs and RUOs adopted under the new framework. The Commission services are therefore following closely the practice of the Courts in the light of the Framework Directive.

In addition, the price-setting decrees taken by the Ministry, according to the Act, can only be challenged before the Hungarian Constitutional Court, focusing exclusively on aspects of constitutionality. This practice is also being scrutinised for compliance with the Framework Directive in the light of the Hungarian Government's response.

Decision making

In 2005 the major regulatory task in Hungary was to carry out the market analysis.

For the purpose of market definition and market analysis, electronic communications service providers are subject to reporting and are required to deliver the necessary data to the NCAH within 30 days according to the Act. The operators have often emphasized that this deadline is not enough in all circumstances to provide data properly. Moreover, taking into consideration the fact that data already delivered are often required once again in a slightly different way, as the data once collected cannot be used for other purposes, the operators have to carry out further data collection. In consequence, operators consider that the data collection is sometimes very burdensome in terms of financial and human resources.

NCAH is required to publish the draft decision at least 30 days before the adoption of the final decision, and the interested parties according to the Act are entitled to make comments on the draft decision within 20 days following the publication in question. In the final decision an explanation is provided where an operator's comment is not taken into consideration by the NCAH within the market analysis. Some operators regret that service providers are not allowed to read or react to each other's comments and consider that disregard of some remarks by operators are not always sufficiently commented on by the NCAH.

Close cooperation between the NCAH and the Office of Economic Competition (the "NAC") is provided for by the Act. A cooperation agreement has been signed between the NCAH and the NAC in order to establish the precise framework of the cooperation, including that of the market analysis process. During the market analysis carried out in 2004 and 2005 the NAC was consulted and the NCAH has always provided explanations where comments have been disregarded. In order to tighten the already existing

cooperation between the NCAH and the NAC, the latter has expressed its willingness to be more involved in the market analysis process.

Following the national consultation, the NCAH had notified to the Commission sixteen of the eighteen markets and all respective final measures have also been adopted. Underlining the serious work carried out by the NCAH, some operators have expressed regret that no wholesale cable offer is available on the broadband wholesale access market. Moreover, it has been underlined that the possible cross-subsidy between the different offers of the cable network operators cannot be verified on a market where about one third of the broadband traffic is provided via cable. Some new entrants regret that wholesale line rental has not been considered as an obligation on the fixed retail market for residential and non-residential customers. Moreover, some electronic communications operators consider that in order to develop the Hungarian MVNO market, access-related obligation should be imposed in the mobile access and call origination market.

A temporary decision taken on 20 July 2005 and the decision maintaining the temporary decision adopted on 12 September 2005 by the NCAH on the basis of Article 7(6) of the Framework Directive and the Act in respect of the mobile voice termination market have been vigorously criticised by both fixed and mobile operators. After having designated the three Hungarian mobile network operators as operators with SMP, the NCAH imposed inter alia cost orientation as a remedy. In this respect, the NCAH did not accept the LRIC model proposed by the three operators and it itself determined the final call termination tariffs on 20 July 2005 on the basis of a benchmarking, pursuant to Article 7(6) of the Framework Directive. The mobile network operators contest the decisions in question on the grounds that the fact that a regulatory authority and operators cannot agree upon a LRIC model over several months does not justify the use of ‘urgency’ provisions. On 23 November 2005, the NCAH fined the major mobile network operator HUF 150 million (about € 600 000) for incorrect application of the temporary decision of 20 July 2005 as the average wholesale interconnection tariff of the operator in question, according to the NCAH, exceeded the level that the NCAH had determined and required it to perform retroactive settlement.

According to the Act, the NCAH is required to review its market analyses within 2 years of the imposition of remedies pursuant to the previous market reviews.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Competition/Market situation

In Hungary there were historically several operators with exclusive rights in the provision of public fixed local telephony: the nationwide incumbent, with territorial coverage of about 80% (36 primary areas out of 54), alongside four other local telecommunications operators (LTOs) (the “local incumbents”) which formerly enjoyed exclusive rights in geographic areas covering about 20% of the country.

All operators in the Hungarian market are private companies; nevertheless the Hungarian 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. On the basis of revenues, the incumbent companies collectively have in 2005⁸⁸ 99.27% market share as far as the local market is concerned, with 95.68% (98.7% in 2004) and 88.27% (93.1% in 2004) market shares respectively on national and international calls markets. . In this respect it has to be emphasized that fees related to the portability of fixed numbers in Hungary is higher than the EU 25 average.

It has to be underlined that fixed line penetration is at 33.29% in 2005 compared to 35.5% in 2004, with 92.4% mobile penetration in 2005 (208 000 fixed lines of the LTOs were withdrawn in 2005 alone, and the fixed-line traffic is decreasing).

In general, new entrants in the fixed communications markets are more active in the non residential than in the residential segment of the market, providing voice telephony services through carrier selection and pre-selection. The nationwide incumbent, in line with other European incumbents, is moving towards becoming a brand-based group; in October 2005 it announced a merger with its mobile phone affiliate. In this respect and particularly concerning the impact of the eventual marketing of bundled fixed and mobile products, a number of concerns were raised mostly by the fixed competitive operators.

Similarly, the outcome of a recent public tender procedure (for the operation of the Electronic Governmental Backbone Network) which was won by the nationwide incumbent also received heavy criticism from alternative operators as they fear that governmental institutions will exclusively have recourse to the services provided by the nationwide incumbent for the provision of related communications services of the Electronic Governmental Backbone Network (secondary loop). Prime Minister's Cabinet stressed that the service providers on the secondary loop are chosen by the concerned governmental institutions by means of special tender for which several new entrants are eligible and no discrimination will be made between the operators.

Access/Interconnection

Hungarian interconnection charges are higher than the EU 25 average, and geographic asymmetry in the operators' interconnection charges was stressed equally by both local incumbents and new entrants. According to the RIOs approved by the NCAH, the whole cost of the interconnected link must be paid by the requesting party and not the local incumbent. The Competition Council within the NAC has recently required the nationwide incumbent to change this practice and to share the costs of links with the interconnected party.

Carrier selection (CS) and pre-selection (CPS) in accordance with the Universal Service Directive (USD) have been implemented in Hungarian law. The Hungarian regulation needs to be scrutinised for compliance with Article 19 of the USD, as according to the Act, CS is automatically imposed on operators with SMP and not by the NCAH. Moreover, the operator requesting CPS may be asked by the operator with SMP to undertake, in order to get CPS, to terminate all international calls and/or to terminate

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Data of 1 January 2005

calls to all fixed telephone and mobile networks. The USD does not require any condition to the interconnection in respect of the CPS obligation of the operator with SMP, and consequently this issue will be examined by the Commission's services. Several operators have stressed that in Hungary, the activation fee for CPS (installation) charged by operators with SMP varies greatly from one operator to another, which has negative effects on the homogeneity of the market. In addition, the NCAH fined in May 2005 one local incumbent for having offered a subscriber package restricting CPS by offering CPS packages at a price three times higher than packages that did not allow CPS.

Broadband Markets

Penetration

After liberalisation in 2001, there were no signs of a significant increase in internet penetration, in particular as regards broadband development. Following 2.6% broadband penetration in 2004 and with 5% broadband penetration in 2005, even if it is still far from the EU 25 and EU 15 rates (respectively 12% and 13%), broadband constitutes an important vector of the Hungarian electronic communications market. One of the purposes of the National Broadband Strategy, adopted on 6 December 2005 in order to develop broadband in Hungary, is to reach total territorial coverage before 2010. In Hungary, two thirds (65%) of the broadband lines are based on xDSL and one third (about 34%) on cable based technology.

Local loop unbundling

As regards the market for wholesale access to unbundled loops, the local incumbents were designated as operators with SMP on the relevant geographic markets, and access and interconnection-related obligations were imposed on them. On the basis of the existing transitional⁸⁹ obligations, RUOs were adopted and approved by the NCAH by the end of August 2004. Framework agreements under the RUO of the nationwide incumbent had been signed by several operators, but only a small number of lines have actually been unbundled so far. In this respect, market players have stressed that despite the decrease in tariffs (the monthly rental fee is approaching the EU 25 average), the level of the one-off fee of the nationwide incumbent (much higher than that of the EU 25 average) still constitutes an obstacle to local loop unbundling development.

Mobile Markets

Towards the end of the 1990s, mobile network operators were playing an increasing role in shaping market trends, especially after the entry of the third mobile network operator at the end of 1999. The full liberalisation of the fixed telephony market took place six months after mobile penetration had passed that of fixed telephony. In 2005 mobile penetration reached 92.4%. The third operator increased its market share to 21.78% which establishes it as a serious competitor to the second operator, whose market share in turn has eroded from 35.3% in 2004 to 33.22% in 2005. The leading operator, which is the affiliate of the nationwide incumbent, has 45% market share. All the mobile network

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Linked to the starting conditions and not to the market analysis

operators have emphasized the degree of competition in the mobile market, as a result of the latest market developments.

All three mobile network operators have been designated as operators with SMP in the market for mobile voice termination, and as a result, wholesale mobile call termination fees have had to be decreased on the basis of a benchmark. So far, there is no MVNO in Hungary, but according to information from the market, some mobile network operators have been approached for such a purpose. In this respect, it has to be underlined that mobile network operators have no access-related obligations as no operator with SMP has been designated on the market for mobile access and origination.

The decision to issue rights of use for 3G mobile networks was taken by the government in 2004, and the tender for the provision of 3G services was issued on 31 August 2004. As a result of the whole allocation process reaching its end on 22 December 2004, all three Hungarian mobile phone operators obtained an UMTS licence for 15 years, and they have already begun to provide 3G-based services. A public hearing was held on 10 May 2005 in order to harmonise the expiry dates of rights of use for 2G and 3G frequencies. So far no decision has been taken.

THE CONSUMER INTEREST

Under Hungarian law, electronic communications consumers can be protected by several bodies, such as the NCAH, the NAC or the Consumer Protection Authority. In consequence, the need and importance for cooperation between these bodies have been emphasized in order to avoid confusion, and a better and clearer division of competences is necessary in order to allow consumers effective access to the competent body.

Several cases in 2005 underline the positive developments that have occurred in relation to consumer protection. When the major Hungarian ISP terminated its contracts in 2005 with fifty private users generating heavy traffic volume (170-540 Gb), the Representative for Communications Consumer Rights within the NCAH agreed with the ISP concerned on the definition of “extreme use” (traffic superior to 150 Gb) and the consequences arising from it. Given that the transfer of a DSL modem in Hungary could take several weeks following a change of ISP, on the Representative for Communications Consumer Rights’s initiative seventeen ISPs and wholesale operators, including several incumbents, agreed to limit this period to eight days.

The Data Protection Commissioner, faced with the practice by mobile network operators of making a copy of subscribers’ identity cards, took rapid action to ensure that operators ceased this practice and deleted any copies already obtained.

Universal Service

The Act and ministerial decrees introduced in 2004 a system whereby undertakings providing universal service are designated by the Minister of Informatics and Communications. The designation occurs on the basis of applications. A public call for tender was published in March 2004 to select the universal service providers, but in the absence of applications, the Minister designated the local incumbents which had already

provided all the four components of the universal service in the past in their respective geographic areas.

Each of the five LTOs signed a USP contract with the Hungarian State and provides the four components of the universal service in their respective geographic area. The Commission launched on 13 July 2005 an infringement proceeding against Hungary for breach of Article 8 of the USD, on the ground that operators which are not capable of providing all the four components of the universal service are excluded ab initio from the tender process.

In 2004 a new method for assessing the need for compensation was introduced by the Act. The basis for the new system is the calculation of the net avoidable costs and the definition of any unfair burden. If the costs of universal service are proved, the operator bearing the net avoidable cost of universal service can benefit from the Universal Electronic Communications Support Fund.

For the year 2004, the local incumbents submitted their application for compensation (about HUF 2 billion – € 8 million). Their request was refused by the NCAH as the applications contained formal and substantive irregularities. In this respect, the operators concerned stressed that the method of calculating the net avoidable cost was too complex and not very clearly defined, and as the new system is based upon a new calculation method they regret that the competent authorities, in refusing their applications, have not provided them with more explanation concerning the method used. Moreover, the decision to pay compensation to the universal service providers for the year 2003, the effect of which was suspended after the decision had been challenged by some operators, was definitively invalidated by the Court in September 2005.

On the initiative of the Ministry, a social fund for low income subscribers was established in June 2004. This system allows local incumbents' low income subscribers to receive HUF 1000 (€ 4) a month from the Ministry for their fixed telephone bills. According to a Report by the Hungarian State Audit Office in July 2005, only HUF 126 million (€ 504 000) has been spent of the HUF 3 billion (€ 12 million) set aside. The electronic communications service providers operate the whole system (complaints, receipt of calls), and the claims against the social fund are addressed to the operators, who send them to the NCAH which controls whether the claim is justified.

Emergency services (112)

Under the Act, electronic communications service providers must guarantee free access to emergency call services, including the single European emergency call number 112. The 112 emergency call services are operational in two call centres in Hungary. The services in question are available in Hungarian and English. On the basis of information available to the Commission services, it seems that caller location services are not operational in Hungary. This situation will be examined by the Commission's services in the light of the obligations laid down in the USD. A project has been launched under the coordination of Ministry of Interiors having for scope technical and financial feasibility studies of the Public Safety Answering Points with the harmonised European 112 and e112 functions and also with capabilities for future eCall features.

Must-carry

The Commission's services' attention has been drawn to possible non-compatibility of Act I of 1996 on Radio and Television Services (the "Media Act") with Article 31 of USD, as the number of programmes to be broadcast by the cable TV operators appears not to be specified, and the general interest objectives are allegedly not clearly defined by the Media Act. In addition, it is claimed that the Media Act does not provide for any periodic review in respect of this obligation as required by the USD. The Commission's services are looking into this matter.

MALTA

INTRODUCTION

Except for the appeals mechanism, the regulatory environment in Malta seems to have evolved without great difficulty. However, the electronic communications market continues to be characterised by a limited number of network operators active on relevant markets. In the fixed telephony sector, the formal liberalisation of the sector in 2001 has not, so far, brought benefits to end users in the form of an enhanced freedom of choice between network operators and service providers. Despite some positive developments, all the markets remain strongly dominated by historical operators and a number of issues remain to be resolved. High fixed telephony interconnection tariffs, a lack of practically available wholesale products on the broadband market, a lack of number portability, as well as retail prices of the fixed telephony incumbent that are not fully rebalanced, seem to be the most important regulatory problems that have an impact on the development of competition and consumer welfare.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The new legislation (including secondary regulations), which aims to fully transpose the New Regulatory Framework of 2002, came into force on 14 September 2004.

The NRA

The Malta Communications Authority (MCA) is the independent regulator for the electronic communications sector in Malta. With the coming into force of the new law in September 2004 it has assumed most of the responsibilities of the NRA under the new regulatory framework with the exception of assigning frequency rights directly to providers of radio or television broadcast content services.

Independence

The provisions of the Maltese law that allow the Minister responsible for electronic communications to give directions of a general character to be followed by the MCA, and the possibility of a transfer of regulatory functions to the Ministry in case MCA fails to do so, add to the uncertainty expressed by some market players about the NRA's position, even if these provisions have not been used so far. MCA strongly challenges such allegations, noting that out of 20 outstanding appeals in the various appellant fora, nearly one third are appeals by the fixed incumbent and that the issue of lack of impartiality has never been raised by any appellant to MCA decisions.

Powers and objectives

The MCA appears to have all the necessary powers and most of the stakeholders consider its performance satisfactory. There appears to be some confusion on the part of some

market players with regard to the respective powers of the MCA and the competition authority in Malta, as the former seems to be responsible inter alia for ensuring fair competition in the electronic communications sector. It is to be noted that a Memorandum of Understanding (MoU) was signed in May 2005 between the MCA and the Office of Fair Competition (OFC) in order to address this matter. The MoU also sets out further details of the cooperation of the two bodies regarding the definition of markets for electronic communications, the degree of effective competition in these markets, and the existence of dominance or Significant Market Power (SMP) in such markets.

Decision making

The MCA conducted the data collection exercise between December 2004 and January 2005, and the market analysis process was continuing at the time of writing of this report. In May 2005, Malta notified to the European Commission the first draft decision that concerned the market for mobile call termination. In October 2005 a national consultation with regard to a number of fixed telephony markets (wholesale fixed call origination, call termination and transit services; and at retail level – access to the public telephone network at a fixed location and national telephone service provided at a fixed location) was published. It was to be followed by a notification of draft decisions to the European Commission in early 2006.

Appeals

The duration of the appeals against MCA decisions and the alleged lack of sufficient expertise and knowledge of the sector by the appeal body are referred to by a number of stakeholders as a serious problem in Malta. Under the new law, the Communications Appeals Board was 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. This board replaced a former Telecommunications Appeals Board with a view to ensure a better quality of appeal procedure.

In a recent judgement a civil court (acting in its capacity as a constitutional court) ruled that imposing access obligations on a cable operator constitutes a deprivation of property within the terms of the Constitution, which is only allowed where this is specifically required by a disposition in law. Furthermore, adequate compensation is to be awarded and the person dispossessed may contest the amount of compensation before an independent and impartial court or tribunal. The court further ruled that the Telecommunications Appeal Board did not meet the requirements of an independent and impartial appeal body because, among other things, it was appointed by the Minister and its security of tenure was limited (to the three year term of its members). Furthermore, any appeal to the board's decision is limited to the points of law only. Without prejudice to the fact that, as indicated above, the new law established a different appeal body, this ruling could⁹⁰ have far-reaching consequences for the appeal process in Malta. The

⁹⁰ In case the constitutional court ruling is sustained (the government will most probably appeal the first instance judgement)

question of independence of the appeal body and the judicial review of its decisions will also be subject to further scrutiny by the Commission services.

Administrative charges and fees

The 10th Report noted a relatively high level of administrative charges and fees applicable for electronic communications undertakings in Malta. The fixed element of the administrative charges (payable by all public communications networks operators and all publicly available telephone service providers as well as broadcasting distribution services providers⁹¹) has been recently lowered significantly from € 46 600 to € 11 650 a year.

In addition, undertakings authorised to provide nationwide fixed electronic communications networks that have equipment installed over or under roads in more than 50 (out of 71) localities in Malta, have to pay a fee of 0.4% of gross revenue and not less than € 279 600 for rights of way. In practice, as a result of the specific threshold of the number of localities, only the fixed telephony incumbent and the monopoly cable operator are subject to this fee. It remains to be verified how the fee corresponds to the requirements of Article 13 of the Authorisation Directive in a situation where operators of other distribution networks (e.g. water and electricity utilities) are not subject to a similar fee.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

In the reporting period, the fixed incumbent operator maintained, to a large extent, its very strong position in local access and local/national as well as fixed to mobile calls, with market shares close to 100%. However, the decision of a monopoly cable operator (which owns a ubiquitous network with potential access to almost every household in Malta) to enter the voice telephony market can soon undermine the fixed incumbent's position. So far, the cable operator is providing on-net (only) calls for a flat monthly rate and international calls (both based on VoIP) to any of its broadband and/or cable TV subscribers that decide for this service. Once it concludes interconnection agreements with the fixed incumbent and mobile operators, it can become an important competitor to the fixed incumbent operator.

In addition, a new entrant operator started provision of a telephony service on a so far limited scale based on its own wireless network (WiFi technology). New entrants' prospects remain, to a large extent, dependant on the interconnection agreements with the incumbent operators (both fixed and mobile) that however seem to be reluctant to start negotiations.

Access/Interconnection

Concluding any interconnection agreement with the fixed incumbent, proves so far to be rather difficult, especially since, as indicated in the 10th Report, the wholesale tariffs of

⁹¹ And cumulative in case an undertaking is providing more than one of these elements.

the incumbent published in its reference offer and believed to be cost oriented appear to be very high. Despite a significant decrease, by half, in the fixed incumbent's termination rates the tariffs remain the highest in EU. The high interconnection tariffs combined with relatively low retail prices are posing a question of a possible margin squeeze (call termination rate is € 0.028 per minute, in comparison to retail € 0.125 charged every five minutes) and make the prospects for development of competition on the fixed market questionable. MCA has undertaken some work in this regard and, among other things, has built a bottom-up cost model of the incumbent's network. Interconnection rates resulting from this model differ significantly from the rates offered by the incumbent in his reference interconnection offer, however they remain to be implemented⁹². As long as the interconnection tariffs are not lowered and balanced in respect to retail prices, no prospects for service based competition (on the basis of carrier selection and pre-selection) seem to be available in Malta.

Tariff rebalancing

Retail tariff rebalancing in the fixed telephony market needs to be finalised. Charges for line rental for residential customers seem to be relatively low and they include free minutes of talk. Tariffs for local/national calls appear to remain lower than the associated wholesale cost. Some changes (including per second billing – instead of current per 5 minute – and discontinuation of free minutes bundled with line rental) were to be introduced in 2006.

Broadband Markets

The broadband penetration in Malta has noted a significant growth in the reporting period and as of October 2005, with 44 819 lines, it amounted to 11%, in comparison to 3.82% in October 2004. This is despite the hitherto failure of local loop unbundling or the lack of existence of a bitstream offer.

This seems to be thanks to the existence of two ubiquitous networks – fixed incumbent and cable operator as well as a large number of ISPs operating at a retail level. DSL connections constitute 58% of all retail broadband lines (out of which 53% are offered largely on a resale basis by the ISPs) with the rest of the market being served by the cable monopoly operator.

The market for broadband access can see further competition with the entry of new wireless operators, as the tender for Broadband Wireless Access (BWA) for three individual rights of use for frequencies in the 3.5 GHz band has been decided in October 2005 (two licences went to the current 2G operators and a third one to a limited liability company whose shareholders individually own separate ISPs). Once introduced to the market the BWA will allow for portable high speed connections, capable to compete with wired broadband alternatives and of providing triple play offerings.

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On 28 November 2005 the Malta Communications Authority published a proposed statement of decision whereby it was proposing to reduce the average call termination rate of the fixed incumbent by 33% as from 1 January 2006.

Local loop unbundling

The reference unbundling offer of the fixed incumbent was published for the first time in December 2004. Following a detailed review and analysis conducted by the MCA, it was recently amended in August 2005 with respect to prices as well as some technical conditions of the offer. Despite these steps, none of the local loops has been unbundled so far.

A pure bitstream access offer is not currently offered by the fixed incumbent to third parties. A cable operator is also not providing a wholesale access product to third parties, which leaves alternative service providers with no other options but a resale of the incumbent's DSL product. In this regard, a number of ISPs have raised allegations concerning potential price squeeze practices of the wholesale broadband access provider (subsidiary of the fixed incumbent) after its decision to enter the retail market (and merging with the fixed incumbent's ISP retail arm) with inexpensive offerings.

Mobile Markets

Mobile penetration is growing (in October 2005 80.7% of the Maltese population were subscribed to a mobile network, in comparison to 74.8% in October 2004) and the number of subscriptions has reached 325 000.

Currently there are two operators active on the market, with the subsidiary of the incumbent fixed operator – second to enter – serving approximately 48% of all subscribers. In August 2005 they have been assigned individual rights of use of radio frequencies in the 3G band⁹³.

As mentioned above, in May 2005, the MCA notified to the Commission the draft decision concerning market for call termination on individual mobile networks in Malta. Both mobile operators have been found to enjoy a significant market power with regard to call termination on their respective networks and obligations with regard to non-discrimination and transparency are proposed to be imposed⁹⁴. With regard to cost orientation a revision of the interconnection strategy is currently under discussion with all MNOs. The issues under discussion include *inter alia* (i) the move from Historic to Current Costs based accounting methodology (using Long Run Incremental Costs ("LRIC")); and (ii) the introduction of glide paths to facilitate the process of setting cost oriented termination rates⁹⁵.

⁹³ A call of interest has been published in March 2005 and only three undertakings applied. After a process of due diligence the rights have been granted to the current 2G operators in August 2005. One frequency slot remains unassigned.

⁹⁴ At the time of drafting of this report the respective decision of the MCA has not yet been published.

⁹⁵ A proposal for a decision in this regard has been published for consultation on 11 November 2005.

Market and Technological Developments

As noted in the previous report, the international calls market has so far been characterised by some competition to the incumbent from the side of a number of ISPs offering cheaper VoIP calls⁹⁶. This situation has been changing since mid-2005. The first cable operator introduced its international calls service using a broadband connection and the fixed incumbent immediately followed suit. The fixed incumbent introduced a retail offer for the same price as the cable operator (€ 0.035 per minute to most of foreign countries) advertised as VoIP, in which a consumer needs to dial a special prefix for his/her international call to be routed over the IP network. Coming to the conclusion that this offer could be anticompetitive vis-à-vis a number of ISPs that are providing international calls services (using calling cards, where the cost of local call of € 0.125 (Lm 5c35) per five minutes has to be covered), MCA issued a carrier selection for VoIP decision. The regulator directed the incumbent, in accordance with non-discrimination obligation, to provide wholesale carrier selection services to other VoIP providers under the same terms and conditions and quality that it provides to its own retail arm. It also ordered the incumbent to lower its call origination prices and to introduce per minute billing. However, according to ISPs, in order to take advantage of this decision they would need to have interconnection agreements and taking into account the associated cost, this does not seem to be feasible. As a result, ISPs fear to be excluded from the market for international calls.

THE CONSUMER INTEREST

Number Portability

Number portability for fixed as well as for mobile services is not available in Malta and an infringement proceeding in this regard is on-going. Despite legal provisions, MCA has so far failed to ensure its practical availability and its decision of March 2005 requires operators to provide for this facility only as of March 2006. Its practical implementation as soon as possible is awaited by the cable operator as well as the smaller WiFi network operator and any other potential new entrant and it is expected to help them establish their market position. Despite objections, current mobile operators seem to be prepared to introduce the service by the end of 1st quarter of 2006. The fixed incumbent, on the other hand, claims that it will not be technically ready for the introduction of number portability by that time.

⁹⁶ According to the data published in a report the MCA in April 2005 – “Telecommunications market review. October 2004 – March 2005” – VoIP amounted to more than 40% of the aggregated international outgoing minutes by the end of 2004.

Directory services

Contrary to the provisions of Universal Service Directive, a comprehensive directory service that would comprise all subscribers, fixed and mobile is not available in Malta⁹⁷. The existing on-line directory of the fixed incumbent does not give access to phone numbers of the mobile telephony operators. The MCA has undertaken some steps with a view to ensuring the availability of a fully comprehensive on-line directory by the end of 2005 to complement the already existing comprehensive directory enquiries services.

Excise duty

It appears that the *Budget Measures Implementation Act, 2005* introduced an excise duty on mobile telephony services that seems to be imposed on the charges levied by mobile operators from their services. The 3% excise duty is added to net charges for telephony services raising the final prices to be paid by consumers. Some voices are being raised that this effectively constitutes a fee on mobile operators that is not allowed under the Authorisation Directive. The Commission services are looking into this matter.

Digital TV

With regard to transmission of broadcasting services, a new digital terrestrial television (DTT) operator started commercial operations in June 2005, after being assigned 8 frequency channels by the MCA as a result of a tender. The fixed incumbent operator was the second undertaking to be assigned frequencies (also 8 channels) in this tender and is expected to start operating its DTT network in 2006. Three frequency channels remain to be assigned by the Malta Broadcasting Authority for the purpose of transmitting local TV content services in a digital format. Malta plans to turn off the analogue terrestrial TV transmission by 2010.

Must Carry

An obligation to carry all national channels (currently five) seems to be imposed on the monopoly cable operator. It is not clear if a similar obligation applies to the DTT provider⁹⁸. The Commission services are examining the compliance of the Maltese must carry regime with the applicable Community law. A joint exercise by the MCA and the Broadcasting Authority is currently underway to determine the options and way forward with regards to general interest objectives and must-carry obligations.

⁹⁷ Infringement procedure in this regard is ongoing.

⁹⁸ According to the Maltese Broadcasting Act must carry obligation applies to “any person licensed to operate a cable television system or any other system for the retransmission of a number of television broadcasting services”. However, since coming into force of the new regulatory framework no licence is needed to provide a broadcasting transmission network.

THE NETHERLANDS

INTRODUCTION

Strong infrastructure competition between fixed network operators and the cable operators has been intensifying. However, cable operators still have a dominant position in the distribution of TV signals in their respective coverage areas and the incumbent has been found to be dominant in almost every part of the fixed telephony market. Both cable and telecom operators are actively developing consumer-friendly triple play services including voice transmission, high-speed internet and TV. Coupled with the relatively quick spread of VoIP, these developments appear to confirm a strong link between the existence of competition, on the one hand, and innovation and consumer choice on the other.

From the regulatory point of view, the Commission has, however, several important issues to raise. The regulatory interaction between the two bodies with NRA functions does not always result in a clear and predictable business environment for the market players. Cost accounting, price-squeeze risks, interconnection, fixed subscribers migration, spectrum management procedures, designation of the universal service provider and must carry obligations would appear to merit further attention and/or corrective action on the part of the Dutch authorities.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The national legislation transposing the new regulatory framework entered into force in the Netherlands on 19 May 2004. In February 2004, through a legislative amendment, the existing national regulatory authority *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA) had already been given the necessary new powers to start the market analysis procedures.

The NRA

Powers and objectives

Market players are concerned about the division of the role of national regulatory authority between OPTA and the Ministry of Economic Affairs (the Ministry), and the legal uncertainty that this division occasionally produces. The most recent example has been the Ministry's move to define *a priori* in a Ministerial Decree the "other access obligations" referred to in Article 8(3) of the Access Directive and Article 6a.11 of the Dutch Telecommunications Act and the exceptional circumstances in which they could be applied. According to the alternative operators and OPTA, the proposed approach was too restrictive – it could have limited unnecessarily the possibility to impose such obligations in practice. For the fixed incumbent, the draft measure was not in line with the principle of cost causation and could have distorted competition with cable operators.

After consultations with the Commission services, the Ministry decided not to proceed with the adoption of the draft “other access obligations” decree.

Independence

Furthermore, in the view of the alternative operators, a number of issues are covered by policy directions from the Ministry unnecessarily because they are already regulated by law (e.g. the possibility to use different cost accounting models), other issues are addressed in a too abstract manner (e.g. the directions that require OPTA to accept the regulated undertaking’s level of service quality, in which case it is not clear whether extensive quality-related investments by a mobile operator would lead OPTA to allow higher termination rates to be charged). From the Ministry’s point of view, the policy rules cannot give the level of detail requested by the alternative operators, because they only provide general directions and it is the responsibility of the NRA to apply them in individual cases.

Decision making

The start of the market analysis process was delayed until Spring 2004 due to the fact that, before the relevant amendment of the Dutch Telecommunications Act was adopted, OPTA did not have the necessary information gathering powers. However OPTA has already analysed and notified to the Commission by November 2005 all markets “recommended” by the Commission except for the market for wholesale mobile international roaming. With respect to the retail market for broadcasting transmission services over cable networks, a market which raises considerable public concern in the Netherlands but which is not included in the Commission Recommendation, the NRA modified its initial position and decided, for a limited period of one year, not to intervene on retail tariffs. In the meantime, it will be monitoring the evolution of new technologies and the potential tendency towards effective competition arising on the relevant market.

As regards the market analysis procedure, as in other Member States many market players criticised the extensive questionnaires and claimed that the completed analyses were of insufficient quality. A number of market players suggested that proper feedback is still not always part of OPTA’s consultation procedures, which has a negative effect in terms of clarity and the perceived fairness of the regulatory situation. They also observed a possible lack of resources affecting OPTA, since the whole process of market analysis apparently puts a strain on OPTA’s other activities.

OPTA has pointed out that it had put significant effort in collecting accurate data from market players. The extensive data gathering is partly due to the fact that initially it planned a two stage process (market definition followed by SMP assessment), but ultimately decided that it would take too long and therefore it concentrated all information requests into single questionnaires. Nevertheless OPTA expects that, having gained experience of the process, it will be able to manage with less data.

Spectrum management

A couple of issues have been brought to the Commission’s attention in the form of complaints.

Firstly, it appears that in the process of assignment of radio frequencies for the development of wireless local loop the Dutch Government has limited the number of rights of use for the radio frequency range 2523 MHz – 2667 MHz of 2.6 GHz frequency band to one single licence. As regards this complaint, the Dutch government points out that the available spectrum was assigned to one single licence, together with a second licence in the 3,5 GHz band, and that at a later stage other five licences were issued in the 26 GHz band for the same type of services.

Secondly, it appears that in 2003 an undertaking was awarded two licences for the broadcasting of free-to-air radio programmes using certain specified radio frequencies. The award of the licences was preceded by a comparative selection procedure combined with an auction. The successful undertaking not only made a substantial financial payment, but was also charged by the Dutch Government considerable additional sums for the use of the radio frequencies concerned.

Rights of way and facility sharing

According to the Ministry, compliance with the principles of transparency and non-discrimination in the process of granting of rights of way is ensured by (a) general administrative law; (b) proposed legislative amendment mandating structural separation in case a municipality simultaneously acts as a private party; (c) the fact that rights of way are no longer granted by municipalities – such rights stem from the law, municipalities have a say on timing only. Cable operators express doubts, however, given that municipalities are becoming more active in the roll-out of optical fibre networks.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection

The alternative operators claim that they are faced with access and interconnection charges that include considerable extra costs of the incumbent (e.g. marketing expenses) due to inefficient cost accounting procedures applicable to the incumbent and a lack of transparency. They are also unclear as to the future development of the cost accounting models: they question plans to use different models for fixed and mobile operators and the planned references to the local exchange carriers in the USA (in the context of comparative efficiency analysis), which are presumed to operate in a truly competitive environment. According to OPTA the new price control system has been extensively explained in its market analysis decisions, the wholesale tariffs will be set in a way that operators have certainty about the tariffs during the next three years but it is impossible to give the exact tariffs at this stage. The approach chosen should result in a multi-annual wholesale price cap system that provides the market with a predictable tariff development and the incumbent with an additional efficiency incentive, while not interfering with the important choices that the incumbent has to make.

The fixed incumbent is however also not satisfied with uncertainty surrounding the cost accounting systems. In particular it is opposed to OPTA's intention to switch to a cost accounting system with clear annual wholesale tariffs.

Competition/Market situation

According to the data of October 2005, the fixed incumbent's market share of fixed calls (by revenues) amounted to approx. 75%.

Margin/price squeeze issues

The alternative operators are uncertain how the price-squeeze test will be used in the future and drew attention to what was in their view an example of wholesale price squeeze by the fixed incumbent. Recently the fixed incumbent has introduced a wholesale non-regulated rent-a-switch product. In contrast to the previously regulated product, use of the rent-a-switch requires much lower investment (e.g. four interconnection points – to backbone – instead of eighteen, a billing system is available, no need for carrier systems, fibre) and allows lower retail prices to be set as a result. Accordingly, the benefits of the previous investments by alternative operators are to a certain degree lost, and the investment ladder is disrupted. However the fixed incumbent is convinced that its competitors may replicate the model.

In OPTA's view, rent-a-switch is a bundle on the wholesale level usually used for international calls and allowing a voice telephony offer without any network investments. OPTA considers that the fixed incumbent should unbundle the product, because it contains regulated elements.

Carrier Pre-Selection

Carrier pre-selection operators point to a high ratio of rejections of subscribers migration requests by the fixed incumbent (approx. 15%), which is apparently due to inconsistencies between post codes, addresses, etc. Part of the problem is that the migration process is not clearly defined.

ULL-operators also raised the problem of the absence of synchronisation between line portability and number portability with the result that customers are left without service for approx. one day, which is especially damaging for small and medium-sized enterprises.

OPTA agrees that the synchronisation needs to be further improved but notes that the issue is covered by a fairly elaborate agreements-based protocol, and that complaints on the issue are really few. The cut-off period has been reduced from up to four weeks in extreme cases to approximately one day. As this issue will become much more relevant in relation to VoIP, it will have to be addressed in order to further reduce the cut-off period. As regards the high ratio of rejections of migration requests by the fixed incumbent (apparently due to bad interaction between databases), OPTA noted its decision in a dispute mandating the fixed incumbent to enable operators to check its databases before sending a migration request.

The fixed incumbent, on the other hand, criticised OPTA's inconsistent regulatory approach concerning carrier pre-selection "CPS III" which relates to the extension of CPS to include non-geographical and information service numbers. In a dispute initiated by an alternative operator, OPTA concluded that the request was reasonable and decided that cost-orientation was applicable. The alternative operator refused, however, the

additional service because tariff issues had not been resolved. Afterwards, the parties involved commonly agreed to the tariff and the incumbent has been obliged to settle under/over recovery in 2006. As to possible negative business regarding CPS III for alternative operators, the tariffs for the wholesale inputs needed are according to OPTA based on cost orientation and cannot be lowered.

Broadband Markets

The Dutch broadband market is characterised by high penetration if compared to the other EU Member States – measured at approx. 24% according to the data of October 2005 (compared to approx. 16% in October 2004), which means that it is now the highest penetration in the EU.

The success of broadband development in the Netherlands is to a large extent built on infrastructure competition. Cable operators were the first to offer broadband connections in 1998 (followed by an ADSL offer of the fixed incumbent in 2001), but DSL has meanwhile (in 2004) taken over. On the other hand, cable operators are almost not visible in the business market, which is dominated by DSL technology. According to the data of October 2005, the fixed incumbent's market share of fixed broadband retail lines is approx. 44%, and its market share of DSL retail lines is approx. 72%; the incumbent's market share of DSL retail lines is still decreasing.

According to the data of October 2005, DSL is the prevailing broadband provision technology, but its share is not as high as in many other EU Member States (approx. 61%). It has almost doubled since 2003 and stabilised in 2005.

Local loop unbundling

According to the data of October 2005, the prices for connection and monthly rental of a fully unbundled local loop as well as shared access were below the EU 25 average (and since July 2004 these tariffs have continued to decrease). The number of fully unbundled lines has remained limited (68 880) and is starting to increase due to the introduction of new services (VoB, IPTV). The number of shared access broadband lines is one of the largest in EU 25 (588 247) and is rapidly increasing.

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 incumbent. These attempts have been annulled in court as the obligation could not be derived from the relevant applicable legislation. The incumbent introduced a bitstream-type offer in April 2005 on a voluntary basis. Six operators currently avail of this bitstream type offer.

Bundling

The fixed incumbent is concerned that some cable operators offer pure bundles, i.e. their customers have to buy TV in order to get broadband. However OPTA sees it as a positive development, which will enhance the fixed incumbent's network investments to enable high quality TV services.

Mobile Markets

According to the data of October 2005, the penetration rate in the Netherlands reached 94% (compared to approx. 89% in September 2004). Mobile subscribers are almost equally split between the prepaid and monthly paid segments.

Four mobile network operators (after one having been taken over by the mobile subsidiary of the fixed incumbent) and one mobile virtual network operator are active in the Dutch market. The market share of the the fixed incumbent's subsidiary is approx. 36%, according to the data of October 2005 (not taking into account the recent acquisition).

Five UMTS licences have been issued in the Netherlands so far, and two operators already offer 3G services on commercial basis.

Mobile regulation

The mobile operators pointed out that the market analyses will not achieve real decrease in mobile termination tariffs and will only formalise the current situation that was arrived at as a result of OPTA's efforts and agreements between mobile operators themselves. Furthermore mobile operators apparently lack precise information on the way the cost-orientation of tariffs will be implemented.

However, according to OPTA, the reduction of mobile termination tariffs was a response to investigation by the Competition Authority rather than truly voluntary. As regards the way cost-orientation of mobile termination tariffs will be implemented, this is to be dealt with in the market analysis decision as well as in the regulatory follow-up procedures. OPTA has concluded that each mobile network operator has SMP on its network for the termination of mobile calls. As of 1 July 2006 the tariffs for mobile call termination will be based on a new accounting model which is currently being developed by OPTA with the participation of market players.

The regulation of interconnection in the Netherlands would appear to be an example of overly detailed and complex rules. The documents to be taken into account by market players in order to understand their rights and obligations include the Government's explanatory memorandum to the Telecommunications Act, a parliamentary report on the draft Telecommunications Act, a ruling of the Dutch Trade and Industry Appeals Tribunal and OPTA's public consultation document.

Consequently, mobile operators point to a degree of uncertainty as to operators' rights and obligations towards each other. For instance, the Interoperability Decree mandates voice end-to-end connectivity, but the scope of this obligation is not clear.

On the other hand, a number of alternative fixed operators noted that direct interconnection with mobile operators remains an expensive option, if compared to indirect interconnection using the fixed incumbent's network.

Market and Technological Developments

Cable operators are making substantial investments into broadband, in particular to develop interactive services, VoIP and they are moving to multi-play.

The fixed incumbent itself conducted initial talks with OPTA on the introduction of VoIP already in autumn of 2004. The commercial offering of the incumbent's new VoIP product has already started. The fixed incumbent stressed the need to avoid overregulation so that it can compete with cable operators, pursuing a triple-play strategy. The alternative operators, on the other hand, call for application of the same rules as in case of traditional fixed telephony services. Approximately 4% of Dutch households are estimated to become VoIP users by the end of 2005.

THE CONSUMER INTEREST

Universal Service

By virtue of Article 20(1) of the Dutch Telecommunications Act, the fixed incumbent has been designated as the provider of the complete set of the universal services without following the usual designation procedure described in the same law. This Article also provides that the designation will come to an end one year after the moment at which the fixed incumbent has notified the Minister in writing that it no longer wishes to comply with an obligation to provide a particular service or facility, or the Minister has notified the fixed incumbent in writing that an obligation to provide a particular service or facility no longer exists. Thus provision of the universal service by the incumbent is not specifically limited in time.

According to the Ministry, the aim of the transitional designation of the fixed incumbent as the universal service provider was to avoid a legal vacuum. As long as there are no complaints and the provision of the universal service is without compensation, the transitional period will not be terminated. The directory element of the universal service is effectively competitive – all operators may provide it and have a possibility to obtain numbers from other operators. The Commission services are looking into this matter.

Number Portability

According to the data of October 2005, 1 167 984 fixed numbers (one of the highest in the EU 25) and 1 230 356 mobile numbers (a below average indicator in EU 25) were ported in the Netherlands.

Alternative operators stressed that the costs of number portability are five to ten times higher than in neighbouring countries (e.g. one geographic number – approx. € 30 in the Netherlands, and only € 5 in Belgium). OPTA admits that number portability tariffs are still high, but at the same time notes that they have already went down by approx. 70%.

Must Carry

According to the Dutch Media Act, broadcasting network providers must transmit to all those connected to the broadcasting network at least 15 television programme services for general broadcasting purposes and at least 25 radio programme services for general broadcasting purposes. The must-carry set of channels is composed of the Dutch national, regional, local and Dutch-language Belgian national channels which are indirectly specified in the Act itself as well as the non-specified channels to be indicated by the municipal programme service councils on the basis of the social, cultural, religious and spiritual needs existing within each municipality. The Commission services are looking into the Dutch must carry regime's conformity with the regulatory framework.

AUSTRIA

INTRODUCTION

Implementation of the new regulatory framework is well advanced in Austria. Austria is also part of the group of Member States that is most advanced with the notification of market analyses and remedies. Hence, the main regulatory issues are linked to the final market analyses and to dispute settlement procedures, in some of which the NRA has taken controversial decisions. The 'glide path' developed by the NRA to gradually cut fees for termination of calls from fixed to mobile has been particularly controversial. Market players have expressed disappointment that the analysis for the very important market for wholesale broadband access has been delayed. Austria notified this market on 18 November 2005.

The act to introduce a tax on mobile transmitters passed by the Federal State of Lower Austria led to a very critical reaction both from market players and other governmental bodies, and the Commission services were in the process of investigating the measure. Finally, the law has been repealed by Lower Austria before it would have become applicable from January 2006.

Consolidation and concentration in the market continues; the second largest fixed network operator acquired the third largest, and the second largest mobile network operator is about to purchase the fourth largest. This acquisition still has to be approved by the Commission, which has opened an in-depth investigation based on the Merger Regulation in November 2005.

Consumers have been able to profit from falling prices, above all in the mobile and broadband areas. Overall, the market continues to develop. However, with regard to certain kinds of calls market shares of the incumbent fixed line operator have recently started to grow again.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Austria has transposed most of the new regulatory framework through the 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 been transposed by legislation covering this sector.

The Commission initiated two infringement proceedings against Austria based on the Framework and the ePrivacy Directives. Austria reacted promptly and the Parliament passed a bill to remedy the majority of the Commission concerns. The Austrian authorities have announced further amendments to remedy those that remain.

The NRA

The Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR) acts as the operational arm of the Austrian Communications Authority (KommAustria) and the Telecommunications Control Commission (TKK). The RTR is divided into two specialised sections (broadcasting and telecommunications) and is, inter alia, responsible for market definition in the telecoms sector.

The duties of the TKK are specified in the TKG. Among these are determinations of significant market power in the relevant electronic communications markets (all but broadcasting transmission) and the imposition of specific remedies. RTR provides expertise and handles all administrative matters on behalf of the TKK. No regular legal recourse against TKK's decisions is possible. There is, however, the possibility to file a complaint before the Administrative and Constitutional Courts.

KommAustria regulates the broadcasting sector. Its responsibilities are laid down inter alia in the Austrian Federal Act on the establishment of the Austrian Communications Authority (KommAustriaG) and were extended by the new Telecommunications Act in 2003. Its competences include the administration of the broadcasting frequency spectrum.

Impartiality

The impartiality of the NRA is not explicitly regulated in the specific legislation. However, constitutional and general administrative law contain provisions which seem to guarantee a satisfactory level of impartiality of all administrative authorities. Among these provisions is one regulating the prohibition of partiality of administrative bodies.

Transparency

The NRA's decision-making process is strictly regulated in the TKG and the KommAustriaG. That means that in principle the procedure has been determined and is comprehensible to the market players. In addition, the NRA has made clear that an oral proceeding will usually take place before it comes to a final decision. With regard to market analysis proceedings, it is regulated by law that only the undertaking being the addressee of (the lifting/imposition/modification of) a particular obligation is party to the proceedings.

Market players express their concerns that despite the fact that at the commencement of proceedings the authority usually acts in a transparent way e.g. by inviting market players to take part in discussions, by the end it is not clear how the NRA comes to a final decision. According to the NRA, statements from market players are, however, taken into account.

Powers and objectives

Doubts existed as to whether the TKG contained provisions relating to the obligation in the framework that the NRAs are to take into account the interests of the disabled when carrying out their regulatory tasks. Due to this, the Commission initiated an infringement proceeding, which has led to a modification of the TKG, which will come into force on 1 March 2006.

Appeals

From 1997 to 2004 there were 180 appeals against decisions by TKK before the Administrative Court. As far as SMP designations under the old TKG are concerned, TKK won all appeal proceedings. As far as interconnection is concerned its success rate is 50%.

The NRA reports that in general proceedings before the Administrative Court do not take longer than six to eight months.

Appeals against KommAustria's decisions have to be addressed to the Federal Communications Senate, an administrative body with court-like competences, and they have suspensory effect in general as here, unlike in the telecommunications area, general administrative law (Allgemeines Verwaltungsverfahrensgesetz – AVG) applies. The Commission initiated an infringement proceeding based on this ground, and the Austrian government has announced that an amendment of the law is under way.

In November 2005 the Administrative Court requested a preliminary ruling from the European Court of Justice concerning the question whether parties other than the direct addressee of an NRA decision should have the right to appeal against it.

Dispute resolution

In 2004 and 2005 there have been considerably fewer dispute settlements before the NRA than in previous years, which in the opinion of the NRA is due to the market analysis process. Important proceedings concerned mobile termination charges, unbundling and a newly-introduced access charge for the use of public phone boxes.

The NRA is not always able to respect the deadline of four months provided for by the framework to decide on a dispute. According to the NRA in some cases, this is due to delayed data provision by the parties involved in the dispute. The Commission services will further monitor this practice.

Spectrum management

The Austrian legislation differentiates between radio frequencies for broadcast use and other kinds of frequency. The first are administered by KommAustria, the latter by the Fernmeldebüros, administrative authorities with regional responsibility. If certain of the latter frequencies are declared "scarce" (as for mobile networks), TKK receives the responsibility of administering them. Owners of frequencies can pass them on to third parties, but only after receiving authorization from the NRA. There has been one case of such "frequency trading" in Austria so far.

Rights of way and facility sharing

In the broadcasting sector, facility sharing is very popular as it is much cheaper than relying on one's own facilities alone. Since the UMTS roll-out started, facility sharing has also become popular in the telecoms sector.

Attempts by the Parliament of the Federal State of Lower Austria to promote the sharing of facilities for mobile communication by the introduction of a tax have met critical reaction both from market players as well as from government bodies, and the Commission services were in the process of investigating the measure. In the end, mobile network operators and the regional government agreed to an increased sharing of

facilities and the law has been repealed by Lower Austria before it would have become applicable from January 2006.

Cooperation with the national competition authority

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 did not provide for a specific legislative basis for such collaboration. The Commission addressed this issue in an infringement proceeding. As a consequence, a modification of the TKG in this regard has been adopted by Parliament.

Decision making

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 market definition in the telecommunications area. TKK is responsible for market analysis and the imposition of remedies for telecommunication markets. All eighteen 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 a separate ordinance of KommAustria, Austria's definition deviates from that recommended by the Commission. The definition of the wholesale broadband access market was the last to be finalised.

Pursuant to the TKG a revision of the definitions will have to be carried out at the end of 2005. At this point, it is worth recalling that the last implementation report already mentioned 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. This 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. 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 in principle not to be able to simply modify the market definition accordingly under national law.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/interconnection

The TKG appears to ensure that the NRA has the full range of remedies under the new regulatory framework at its disposal. The fact that there are growing market shares of the incumbent fixed network operator with regard to certain kinds of calls might have to be taken into account at a later stage by the NRA when evaluating the efficiency of the imposed remedies. Market players criticise the fact that the new regulatory framework does not give the Commission sufficient means to exercise its influence on remedies, in particular via the veto mechanism

Competition/market situation

The incumbent fixed network operator has strengthened its leading position in the market. Whereas in the last year there was a decline in its market share; there has now been an increase, from 47% to 49% 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, rose from 54% to 55%. On the basis of outgoing minutes the incumbent has increased its market share for all fixed phone calls excluding internet from 48% to 51%.

The two biggest of the five major competing alternative operators in the fixed telephony market merged. Before that they held 14% and 12% market share respectively on the basis of retail revenues. The others hold 4% each.

Austria had to face one veto decision from the Commission concerning its analysis of the market for fixed transit services. Due to the fact that no measures on the basis of the new framework are in force for this market, the transitional provisions appear to ensure that the existing regulatory measures remain applicable. The NRA asked for an assessment of the veto by the European Court of Justice pursuant to Article 234 of the EC Treaty. The Court, however, rejected the request as being manifestly inadmissible⁹⁹.

As a result from the analysis of the markets of access to public telephone networks at fixed locations for residential/non-residential customers, the incumbent fixed network operator submitted a Standard Offer on Wholesale Line Rental. However, alternative operators are of the opinion that the offer of wholesale line rental would not make any sense from an economic point of view as it gives them only a profit margin of € 1.66 per line and month, not taking into account the activation costs that the incumbent imposes. Nevertheless, the NRA has accepted the amount requested by the incumbent due to the result of prior dispute settlement procedures at the end of 2004.

All in all, the NRA is of the opinion that the system of market definitions and analyses and remedies as introduced by the new regulatory framework represents a workable way of finding solutions for the regulation of the markets.

Broadband Markets

Broadband penetration is at 13% (up from 8.7%). Fifty six percent of total fixed broadband retail lines are DSL lines, the rest being mostly cable. The incumbent fixed telephone network operator has a market share of 37% (down from 42%).

The unbundling of the local loop seems to progress slowly and in a phased manner. Alternative operators report that less than 4% of the incumbents' fixed lines have been unbundled.

The national consultation on the analysis of the market for wholesale broadband access has started on 16 November 2005. Market players severely criticise the fact that the NRA has postponed the analysis of this important market for so long.

⁹⁹ Decision of the ECJ of 6 October 2005, proceeding C-256/05.

Mobile Markets

Competition/market situation

The mobile penetration rate is at 99%. There are five mobile operators in the Austrian market. However, the second largest operator is about to acquire the fourth largest; the merger still needs to be approved by the Commission, which opened an in-depth investigation in November 2005. The market share of the mobile operator owned by the incumbent fixed network operator has decreased slightly in the past year and is now at about 40% (down from 43%). The market share of the second largest operator has fallen from 27% to about 25%, and that of the third operator from 20% to 19%; the fourth operator's market share has risen to 12% (10%). A fifth operator entered the Austrian mobile market in December 2003 and had a market share of just over 3% in October 2005.

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.

Mobile regulation

With regard to mobile termination charges, the NRA had proposed a very lengthy "glide path" solution according to which the termination fees for all five mobile operators should be fixed at the amount of the operator with the lowest costs for the operation of its network, which is that of incumbent's mobile subsidiary. This amounts to € 0.068. This amount should now be reached in steps by 2008, varying from operator to operator according to the date of market entry.

The consultation procedure for wholesale international roaming market has been announced for Autumn 2005.

Market and Technological Developments

The NRA observes an increasing possibility of substitutability of fixed line communications by mobile communications. However, it has come to the conclusion that for the time being there is not sufficient substance to include both services in the same market.

In October 2005, RTR published guidelines for VoIP service providers, which classifies these services into two main groups: VoIP services (regulated as telephone services) which enable access to the classic telephone network and (unregulated) "Internet-only" VoIP services.

The guidelines also focus on the telephone numbers available for VoIP services. Certain number ranges are created for innovative services but geographical numbers are also available to VoIP service providers if the specific conditions for use (i.e. addressing of a specific network termination point at a fixed location) are fulfilled.

THE CONSUMER INTEREST

Retail price trends

The trend concerning retail rates for fixed line voice telephony has been decreasing and partly stagnating. The trends concerning retail rates for mobile communications and for broadband have also clearly been decreasing, to the consumers' benefit.

Universal service

According to the Ministry responsible there have not been any problems in Austria yet concerning the availability of the Universal Service. The NRA verifies that every tariff for the provision of the Universal Service is affordable.

Pursuant to the new TKG the Ministry had to evaluate, before the end of 2004, whether the preconditions for an open tender for the designation of universal service provision were met. This is the case if more than one provider is able to offer the Universal Service. At present the incumbent fixed network operator is designated and notified as the Universal Service provider.

In Autumn 2004, the NRA rendered an expert opinion based on the ordinance on universal service and came to the conclusion that pursuant to the prerequisites laid down in this ordinance with the exception of two areas, no other undertaking was able to offer the Universal Service. As far as the other universal service categories are concerned, the Austrian authorities regard the formal procedure as having ended for the next five years. It may appear doubtful, however, whether the review carried out can really serve as a correct legal basis for such an approach, as it only looked at undertakings able to provide the service throughout the national territory ("flächendeckend"). It may be recalled that pursuant to the regulatory framework it is sufficient if an undertaking is able to offer the universal service for just a limited region or area. This issue is being examined by the Commission services.

In 2004 a civil law agreement between the incumbent fixed network operator and its competitors for the compensation of the costs for the provision of universal service in the past was concluded. For 2005, the incumbent can apply to the NRA for such compensation. Alternative market players seem concerned that the incumbent fixed network operator could ask for compensation the calculation of which they would not be able to check. The NRA confirms, however, that the alternative market players will be regarded as "parties" with all associated rights in the upcoming proceeding concerning the fixation of the compensation.

Data protection

The transposition of the spam provision unduly limited the beneficiaries of the prohibition to send spam to "consumers" ("Verbraucher"). Due to this, the Commission has initiated an infringement proceeding. In the meantime, a modification of the respective provision has been adopted by Parliament.

Emergency services (112)

Doubts exist with regard to “112” whether sufficient awareness has been achieved as to the fact that the number can be also used in other EU Member States. The Commission services will continue to examine this issue.

Number Portability

Mobile number portability has been available in Austria only since 16 October 2004. In comparison to other European countries, the rate of take-up in Austria appears to be low. According to the consumer protection association this is due to the deterrent and excessive prices that operators requested when mobile number portability was introduced. The Administrative court annulled the NRA decision by which the amount of this fee was limited to €19. The NRA will now decide separately for each network operator which amount is to be regarded as cost-oriented and will publish separate decisions for each operator.

Must-carry

A year ago, new rules on must-carry were passed by 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 (ORF I and ORF II). Upon request and for remuneration, the only nationwide private TV programme must also be carried (ATV+). 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.

There is, however, no detailed specification of the general interest for the must-carry obligation concerning the two nation-wide broadcasting public stations. The NRA is of the opinion that the general interest follows from the task of these stations to deliver a basic supply of broadcasting services. No further administrative decision is required to impose this obligation. The Commission services are investigating whether this can be regarded as being in compliance with the EU framework.

POLAND

INTRODUCTION

The landscape of fixed electronic communications services in Poland continues to be dominated by the incumbent, which in 2005 only slightly decreased its market share in the telephony sector and gained significant market share with regard to broadband services. On the mobile market, three operators are active and have similar market shares. Some questions as regards the legislation transposing the regulatory framework remain to be addressed (including with regard to the appeal mechanism). There have been significant recent upheavals as regards the status of the Polish NRA, which have heightened concerns among operators about its ability to play an active and effective role in the market. Despite some progress (e.g. publication of reference offers, implementation of the “112” emergency number) a number of issues that have a significant impact on undertakings (e.g. access to incumbents infrastructure, market analysis in general) and ultimately on consumers (e.g. number portability, directory services, itemised billing) remain unresolved.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The Telecommunications Act of 2004, aimed at transposing the EU regulatory framework for electronic communications, came into force in September 2004. It was followed by a number of secondary measures that were required to complete transposition. A few measures still remain to be adopted.

The NRA

Three regulatory bodies are charged with responsibilities of a national regulatory authority, including the Ministry of Transport and Construction¹⁰⁰ which is responsible for defining relevant markets. The Office of Telecommunications and Post Regulation (URTiP) was, until the end of 2005, the main body responsible for regulation of electronic communications networks and services, charged with carrying out the market analyses, but this was replaced by another body [the Office of Electronic Communications] in January 2006. With regard to broadcasting transmission services, URTiP partly shared its responsibilities with the National Broadcasting Council (KRRiT), which is the audiovisual regulator mainly responsible for media content issues.

Independence

URTiP appeared to be functionally independent from operators on the electronic communications market. However, questions have been raised as to its ability to operate effectively in the uncertainty surrounding the parliamentary elections in 2005 and the change of government – following which there were strong suggestions that the

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Until 31 Oct 2005 - Ministry of Infrastructure

replacement of the President of URTiP was being considered. According to the law, it is difficult to replace the head of the NRA, but the establishment of a new body replacing URTiP¹⁰¹, to which a new head would be appointed, was the approach eventually decided on. A similar situation arose in Poland in 2002, on the occasion of the previous elections, when the President of the Office of Telecommunications Regulation (URT) was replaced by the current President of URTiP following the change of the name and responsibilities of the regulatory body.

Powers and objectives

URTiP appears to have all the necessary powers to fulfil its regulatory functions, with the notable exception of those in the field of market definition, where it has to analyse the relevant markets previously defined by an ordinance of the Ministry of Infrastructure and does not seem to have the practical possibility to deviate from the pre-defined markets. This appears to lead to a lack of flexibility or discretionary powers of the Polish national regulatory authority when defining markets¹⁰².

In addition, it appears that URTiP does not have sufficient powers to collect data from the market players. It seems that formally it can ask market players to provide the economic data (not related to the fulfilment of obligations imposed by law and/or regulation) on two grounds only: (i) once a year as part of general data collection exercise and (ii) for the purpose of market analysis. No other grounds for data collection have been laid down in the Polish legislation. The Commission services are looking into this matter.

Decision making

Despite the formal empowerment of URTiP, it is a common perception among operators that its performances, quality and effectiveness in the execution of its powers require improvement. In spite of some progress, electronic communications undertakings still lack confidence in the way URTiP performs its tasks and criticise the regulator for not being pro-active in addressing the existing limitations on the market.

As regards analysis of the relevant markets, the procedure has been divided between the three regulatory bodies. The Ministry defined in an ordinance the relevant markets that are subject to analysis by URTiP. The ordinance repeated the markets listed in the Commission's Recommendation (as regard the products / services scope of the market) and established that all markets (except call termination) are national (as regards the geographical scope). These pre-defined markets are now analysed by URTiP. KRRiT, for its part, is responsible for the market analysis in the areas of conditional access systems, electronic programme guides and multiplexing of a digital signal. It is not yet clear how these areas correspond to the relevant markets susceptible for ex ante regulation in

¹⁰¹ This body will assume the responsibilities in the field of electronic communications currently held by KRRiT.

¹⁰² Theoretically, if URTiP concludes during its market analysis that there is a need for a different market definition (in terms of products and services and/or geographical dimension) it could request the Ministry to issue an ordinance as appropriate. This however seems to be a time consuming exercise and could significantly delay the market analysis process.

accordance with the regulatory framework, nor how KRRiT will proceed with its market analysis.

Concerning the notifications of the draft decisions resulting from the market analysis, Poland is one the Member States that until mid November 2005 had not completed any notification under Article 7 of the Framework Directive and an infringement procedure has been initiated in this regard. According to the information available to the Commission services, URTiP was at that time finalising its analysis of a market for mobile access and call origination. The analysis of the remaining seventeen markets is planned to be finalised only by the end of 2006.

Appeals

A provision of the Framework Directive, according to which, pending the outcome of an appeal, the decision of the NRA shall stand unless an appeal body decides otherwise, has not been incorporated into the national law¹⁰³. A vast majority of regulatory decisions is appealed (by the incumbent as well as alternative operators) and the suspensive effect of these appeals may significantly delay any regulatory intervention. URTiP is trying to ensure the effectiveness of any of its decisions that would have an impact on the interests of end-users and/or undertakings by giving them an immediate effect clause. Imposing such a clause requires, however, fulfilling a number of conditions (i.e. to secure the national economy from grave losses or in view of an important social interest or a very important interest of a party to a proceeding).

In addition, one point which the Commission is looking into is the extent to which an effective mechanism exists to ensure that a decision defining relevant markets (which are made in a ministerial ordinance) can be effectively appealed on the merits of the case¹⁰⁴.

The appeals against URTiP's decisions can be launched before administrative or civil courts (in this case, specialised in economic and competition matters), depending on the issue in question. It appears that as a result of a heavy work load, and despite some procedural time limits, all cases before the Polish courts, including in electronic communications matters, take a long time to decide.

Dispute resolution

The length of the procedure is reportedly also an issue with regard to dispute resolution between undertakings. URTiP formally has a deadline of 90 days to resolve such disputes, but it appears that this deadline is rarely respected and resolving some disputes can take over a year.

Rights of way and facility sharing

The Telecommunications Act of 2004 imposes an obligation on all public network operators with regard to facility sharing and co-location, if undertakings do not have access to viable alternatives from a planning, human health or environmental protection perspective or there is a lack of technical or economic legitimacy to duplicate the existing

¹⁰³ An infringement procedure in this regard is ongoing.

¹⁰⁴ An infringement procedure in this regard is ongoing.

infrastructure. To the extent that it covers also technical and economic considerations, this obligation goes beyond the provisions of the Framework Directive¹⁰⁵.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

The incumbent fixed network operator remains by far the largest player with regard to fixed telephony and has between 77% and 89% of all call markets.¹⁰⁶ In the reporting period, its market share has mainly decreased with regard to international and long distance calls (by ten and eight percentage points respectively).

There are more than 60 registered undertakings providing fixed telephony; however, they are mostly active on local markets. A number of service providers have been assigned prefixes for the purpose of carrier selection and preselection, but only a few of them started to provide their services, mainly due to the lack of appropriate interconnection agreements with the incumbent operator. Some of the main competitors to the fixed incumbent are building their own local access networks and their subscribers constitute about 10% of all fixed telephony subscribers. Few cable operators started providing telephony services but their share in the market is so far negligible.

Access/Interconnection

A reference interconnection offer (RIO) of the incumbent was published for the first time in March 2004, following a favourable decision of URTiP. Concerning the interconnections tariffs, the decision was based on benchmarking, as no cost model was approved by that time. As a result of an appeal from alternative operators the decision approving the RIO was declared void by a court in July 2005 (on the basis of lack of billing rules for non-geographical services in the RIO); however, the RIO is still valid as long as a last resort appeal against the mentioned judgement (brought by the incumbent) is not decided.

Despite negative opinions of all alternative operators, the RIO remains to a large extent unchanged since March 2004¹⁰⁷. Some tariff changes may be introduced subsequent to the approval in August 2005 of the audit of the cost calculation of the incumbent. At the end of October 2005, URTiP published for consultation a bottom-up cost model for the incumbent's network that was prepared by a consultancy.

A reference offer for leased lines of the incumbent was published for the first time in August 2005 as a result of URTiP's decision issued at its own initiative. Both alternative operators and the incumbent appealed against this decision.

¹⁰⁵ An infringement procedure in this regard is ongoing.

¹⁰⁶ As of December 2004, on the basis of retail revenues, the incumbent had 88.8% of the market for local calls, 76.9% of long distance calls, 78.5% of international calls, and 77.9% of the market for calls to mobile networks.

¹⁰⁷ However, some proceedings concerning the amendment of the current RIO are on-going and a few decisions have already been taken – e.g. a decision of 24 November 2005, obliged the incumbent to ensure that alternative operators may provide local interconnection services to its subscribers from a local access level.

Carrier Pre-Selection

As a result of lack of appropriate interconnection agreements, carrier selection and pre-selection for local calls was not available in Poland until late 2004. It was only in November 2004 (after more than a year of dispute resolution) that URTiP issued a first decision mandating carrier selection and pre-selection for local calls and ordering necessary changes to be made in the interconnection agreement between an alternative operator and the incumbent. More than a year later, still only few alternative operators have managed to have appropriate amendments introduced in their respective interconnection agreements.

Wholesale Line Rental

In view of the fixed incumbent's offerings, often bundling the line rental with different packages of call minutes, alternative operators in Poland are strongly in favour of imposing a regulatory measure of wholesale line rental (WLR) on the fixed incumbent. The relevant changes to the interconnection agreement allowing for the introduction of this wholesale product have been subject to a dispute procedure before URTiP since more than a year. Although stakeholders agree that introducing WLR would be beneficial for the development of competition, URTiP appears to be reluctant to impose this as a transitional measure on the basis of ONP regime and, so far, does not seem to have taken all the appropriate steps in order to ensure that a proper relevant market analysis – which could be basis for imposing WLR – would be finalised. However, it is to be noted that in November 2005 URTiP published a draft decision concluding on the lack of effective competition on the market for access to the public telephone network at a fixed location. The final decision identifying an SMP undertaking and imposing appropriate remedies was planned for the second quarter of 2006.

Broadband Markets

There is limited competition in the market for broadband access in Poland and despite a reported increase the penetration is amongst the lowest in EU 25. With 657 293 lines in October 2005, it amounted to 2%¹⁰⁸, in comparison to 0.6% in October 2004. After an intensified marketing campaign for its broadband DSL offer, the fixed incumbent operator¹⁰⁹ increased its share in the retail broadband market to 63% in October 2005 (from 46% in January 2004). Competitors to broadband DSL offering of the incumbent include mainly cable operators (with 175 562 lines in October 2005) but also some alternative fixed operators that build their own infrastructure (36 389 DSL lines in October 2005).

A reference unbundling offer was published for the first time in March 2005, and was a result of an administrative decision of URTiP imposing its publication on the incumbent operator. Following appeals from the incumbent operator as well as alternative operators, another decision introducing an amended RUO (taking account of certain arguments

¹⁰⁸ In fact, despite some growth in the number of DSL lines, the number of broadband lines has decreased between July and October 2005, possibly due to the fact that some subscribers after an increase in VAT from 7 to 22% switched to a cheaper service below 144 kb/sec.

¹⁰⁹ The number of incumbent's broadband DSL lines was 532.284 in July 2005 in comparison to 108.901 in July 2004.

raised in the appeals brought by the parties, mainly with regard to tariffs) was issued in August 2005. Despite the administrative steps taken, by November 2005 no local loop had been unbundled and alternative operators continued to claim that the conditions provided in the offer are unreasonable and discriminatory.

Bitstream access is not available in Poland and, despite a clear obligation under Polish law imposed on the fixed incumbent, at the time of drafting of this report it seems that the latter has not published a reference offer in this respect. A decision introducing a complementary reference offer for bitstream access *ex officio* was expected to be published by the end of 2005. A consultation with operators on the content of a draft offer drawn up by the regulator was initiated in early November 2005. The Commission services are monitoring closely these developments.

In order to help the development of broadband access in Poland, URTiP published a number of tenders for the individual rights of use of the radio frequencies in spectrum bands that can be used for the wireless provision of high speed data services. Two tenders for the national wireless networks in band 3.6 – 3.8 GHz have been organised for the grant of 16 duplex channels. As a result, four operators have been granted four channels each. In the same band, 317 tenders for the local networks are currently running.

There are plans to introduce the possibility to use the spectrum band 450-470 MHz – currently restricted to analogue mobile - for digital technologies that could include broadband access. The whole band is now owned by a mobile subsidiary of the fixed incumbent¹¹⁰ and this move, if decided, could raise questions of equal opportunities for all potentially interested parties.

Mobile Markets

Penetration rate has reached 71% in October 2005 and, despite a growth of more than 15 percentage points (since September 2004), remains the lowest in EU 25.

Mobile services are currently provided by three network operators with similar and relatively stable market shares (36%, 34% and 31%)¹¹¹. URTiP concluded in September 2005, as part of its market analysis, that a market for access and call origination on public mobile networks is not effectively competitive. This conclusion will be followed by another decision designating undertaking(s) enjoying significant market power on this relevant market. It appears that URTiP is considering imposing, among other remedies, access obligations for national roaming on the three network operators. Until now, none of more than a dozen authorised MVNOs managed to start their operations and no appropriate agreement has been signed.

The market analysis for mobile call termination has not yet been finalised and, in general, the mobile markets remain largely unregulated, as most of the relevant regulatory decisions issued under the previous regime (that according to the transitional provisions would remain in force until the market analysis is finalised) seem not to be implemented.

¹¹⁰ The individual right of use is valid till 2016. In fact almost nobody in Poland uses analogue mobile telephony, but the frequencies are partly used for the provision of wireless fixed access.

¹¹¹ On the basis of number of subscribers.

Whereas URTiP has issued several decisions designating SMP undertakings on the previously regulated markets (mobile telephony and national market for interconnection in the public mobile telephone network), only one decision designating one undertaking as an SMP operator on the market for mobile telephony appears to be enforceable and imposes obligations prescribed by the previous regime (transposing the ONP Directives). As regards the market for interconnection in the public mobile telephone network, 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, until the appeals are decided or the market analysis is finalised.

A decision of URTiP of May 2005¹¹² assigning to a new entrant a fourth individual right of use for radio frequencies in the 3G band will be important for the development of competition in the mobile markets in Poland. This decision, which was a result of a tender, raised a number of concerns on the side of the three mobile network operators (that have obtained licences for 3G frequencies in 2000) with regard to the criteria used in the tender procedure and state aid rules.

Published at the same time as the tender for 3G frequencies, another tender for DCS 1800 frequencies was undecided and a new tender in this regard was published on 23 November 2005. This time the 99 duplex channels available will be offered in three equal portions providing a possibility for three undertakings to enter the market. Together with the potential national roaming obligations these steps are thought to ensure further development of a market for the provision of mobile service in Poland.

THE CONSUMER INTEREST

Retail price trends

The fixed incumbent has introduced a number of new tariff options that offer for one price line rental together with a number of minutes of “free” on-net calls or unlimited on-net calls during specific periods (off-peak hours or weekends) etc. Similar offers are also provided by the fixed alternative operators owning their own infrastructure as well as by mobile providers.

With regard to mobile telephony, pre-paid consumers enjoyed significant reductions and simplification of the retail tariffs as a result of intensified rivalry between mobile operators after putting on the offer two new brand names by two of the operators. Prices for the post-paid users remained more stable¹¹³.

¹¹² The individual right of use can be used as of 1 July 2006.

¹¹³ According to the NRA report on the telecommunications market for 2004 – “Raport o stanie rynku telekomunikacyjnego – rok 2004”

Universal Service

A competition for the designation of undertaking(s) obliged to provide all elements of universal service was published in August 2005 and the designation process should be finalised by the beginning 2006. Until that time universal service is provided by the fixed incumbent. The service provided, however, does not include a comprehensive directory enquiry service and a comprehensive directory that would encompass all fixed and mobile telephony subscribers.¹¹⁴

Number Portability

Number portability was not going to be effectively available in Poland for subscribers to either fixed or mobile telephony until at least January 2006¹¹⁵. For fixed telephony, URTiP suspended, at the request of operators, for technical reasons, subscribers' rights in this regard until the end of 2005. Similar decisions have been adopted with regard to mobile subscribers, but the suspension was granted only till 10 October 2005. Nevertheless, it appears that starting from that date all three mobile operators introduced only a pilot phase of number portability and that it was not going to be fully functional and commercially available before January 2006. In any event, not all subscribers will be able to take advantage of number portability as the relevant provisions of the Law exclude pre-paid customers of mobile services from its scope¹¹⁶.

Digital TV

So far digital terrestrial TV is not available on a commercial basis. In May 2005 the government has adopted a switchover strategy and established end of 2014 as an analogue turn-off date. Poland adopted an accelerated conversion model (with simulcast limited to 12 months max) and soon a tender for the first two multiplexes with national coverage will be published by KRRiT (URTiP has already identified the frequencies).

Must Carry

The law on media provides for the sequence in which programmes may be put on offer by cable operators – first all national, then all regional and social terrestrial programmes and only thereafter all other, including foreign programmes. Depending on the region, the must carry obligation accounts to 3 up to 6-8 programmes that have to be carried by cable operators – normally for no remuneration on either side. The Commission services are examining the compliance of these provisions with the requirements of Article 31 of the Universal Service Directive.

¹¹⁴ Infringement procedure in this regard is ongoing

¹¹⁵ Infringement procedure in this regard is ongoing

¹¹⁶ As a result of a definition of the subscriber in the Polish law that requires a written contract with an operator to be in place, thus depriving subscribers not having such a contract of their rights including a right to number portability. Infringement procedure in this regard is ongoing

Out of court dispute resolution

Consumer arbitration courts have been established by the Telecommunications Act in order to facilitate the resolution of disputes involving consumers¹¹⁷. The establishment of these arbitration courts has been strongly supported by consumer organisations and telecom associations, as the experience of similar bodies working with the chamber of commerce has shown that they can be much quicker and efficient in solving disputes than standard court proceedings. The arbitration courts should be financed by the budget of URTiP; however, due to financial limitations, the start of functioning of these courts is delayed. The charges foreseen for consumers for launching a case before the arbitration court (ca. € 26) may act as a disincentive for some consumers.

Emergency services (112)

The single European emergency number 112 has been made available for fixed telephony subscribers only in September 2005. Although some organisational measures to ensure its proper handling still need to be taken, currently all end users of fixed and mobile telephony services can call 112, in addition to other national emergency numbers, free of charge.

Other consumer rights

It appears that free of charge itemised billing, that would allow for verification and control of charges incurred, is not available for the subscribers of the universal service provider. Apparently the fixed incumbent, as well as the NRA, are of the opinion that this cannot be legally required before the formal universal service provider designation is finalised. The Commission services are examining the issue.

The question of availability of selective call barring for outgoing calls, free of charge will also be looked into by the Commission services. It appears that the universal service provider offers this facility free of charge only for calls to a priori specified and limited types of numbers.

¹¹⁷ In addition and next to mediation possibility before URTiP

PORTUGAL

INTRODUCTION

The Portuguese market for electronic communications has grown in 2005. As in most other EU countries, the main drivers for this growth are mobile and broadband communications.

The incumbent operator continues to enjoy a strong position on the whole market, and even more so on the broadband market. It has a very large share of the DSL market (85% in July 2005) and also owns the main cable operator. As a whole, PT has 78% of the broadband market, certainly one of the highest shares among incumbents in the EU 25. The penetration of broadband (11.1%) is still slightly below EU 25 average (11.5%), despite progress in 2005.

A key aspect of the Portuguese market is the fact that the incumbent is present on the whole value chain of electronic communications, in particular for content. This constitutes a major barrier to entry for new entrants' on the triple play market, as the incumbent owns, directly or indirectly, the rights for most attractive content such as football and film distribution.

In order to ensure a level playing field amongst competitors, the National Regulatory Authority (NRA), Autoridade Nacional das Comunicações (ANACOM), has decided to intervene strongly on the broadband market. The price of unbundled loops (ULL) is now in line with EU average: as a result, the number of unbundled lines is now growing (around 43 000 lines), whereas ULL was virtually non-existent a year ago. New entrants are using full ULL, but not shared access.

Mobile termination rates (MTR) have also been an area where the NRA has been active. A "glide path" has been defined until October 2006. Prices have already decreased significantly, bringing MTRs in line with the EU average, whereas these rates in Portugal were still amongst the highest of the EU in 2004.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The EU regulatory framework was transposed by a single piece of legislation, Law 5/2004, of 10 February 2004.

The NRA

Independence

The question of the independence of ANACOM vis-à-vis the incumbent operator, which had been raised by new entrants in the past, does not seem to be an issue any longer. The Ministry responsible for electronic communications (Ministry of Public Works,

Transport and Communications) is also perceived as having a neutral stance towards all market players.

Powers and objectives

The NRA's empowerment appears to be in line with the requirements of the directive. New entrants however point out that ANACOM has been reluctant to impose heavy fines on the incumbent, even when it has been found guilty of not applying ANACOM's decisions. If this claim is true, the effectiveness of the NRA's action may be hampered in the future.

Decision making

ANACOM has, to date, conducted most of its market analyses, using, in some cases (markets 1 to 6, 8, 9 and 19), a two-phase approach: analysis of markets, followed by remedies in a second step. The notification of the remaining markets, 15 (access and call origination on public mobile networks) 17 (wholesale national market for international roaming) and 18 (broadcasting transmission services) to the Commission is expected in the first half of 2006. There has been no complaint from market players as far as transparency is concerned. ANACOM has dedicated great attention to its website, which it sees as an important tool of transparency: as a result, this site is very informative and helpful for all users.

Appeals

The law establishes an appeals mechanism through the courts for commercial law or the administrative courts. Appeals do not have a suspensory effect of the NRA's decisions, except appeals against decisions taken by the NRA imposing fines or additional sanctions. The appeals procedure before the administrative courts is extremely long: it is estimated that a ruling can take up to five years. The incumbent has appealed a number of ANACOM's decisions in court. However, none of these appeals have been successful so far, and a suspension of challenged measures has not yet been granted. In addition, ANACOM can request the court not to grant a suspension if it believes that the public interest is in jeopardy.

Spectrum management

ANACOM is responsible for spectrum management. By law, a national frequency table has to be published yearly, including information on allocations and assignments, as well as frequencies potentially subject to transfer of rights of use. The law stipulates that transfer of rights of use should not distort competition, is limited to certain frequency bands, and subject to ANACOM's (which also consults the Competition Authority) approval within 45 days. Frequencies should also be used effectively and efficiently.

Rights of way and facility sharing

The European Court of Justice recently ruled against Portugal¹¹⁸ concerning an exemption of fees and licensing procedures related to rights of way granted to the incumbent operator under the previous regulatory regime. The Portuguese legislation (Law 5/2004, supplemented by ANACOM's Regulation n° 38/2004 of September 2004) establishes a new regime whereby each local authority is able to levy its own charge on the bills of fixed subscribers located on their territory (up to 0.25%). Other municipality fees are a cause of concern for all operators, as rates applied by cities vary greatly from one to another, and may pose a threat to the deployment of fixed as well as mobile networks. It appears that some operators are currently refusing to pay these fees. As far as building permits are concerned, mobile operators do not report particular problems in deploying their infrastructure.

An important step towards ensuring effective competition on the Portuguese market was the introduction of a reference offer for access to the ducts of the incumbent (known as ORAC), whose minimum elements were imposed by the regulator in July 2004. It determines the main principles and general conditions applicable for access and use of ducts and infrastructure of the incumbent by other operators, and in the incumbent is due to present an amended version of the ORAC in 2006. New entrants welcome this measure. The incumbent appealed the regulator's decision, but was not granted a suspension by the Lisbon Administrative Court. In September 2005, ANACOM approved a draft Decision on the alterations to be introduced in the ORAC.

The NCA

The Competition Authority was created by Decree-Law 10-2003 of January 2003. It succeeds the Competition Council and the Directorate General of Competition and Trade, as an independent and financially autonomous institution. The Authority is empowered to deal with competition issues in all sectors of the economy, including regulated sectors such as electronic communications, the latter in coordination with the relevant sector regulators. It has recently announced that telecommunications would be one of the sectors where it would be most active.

In 2004 the Competition Authority commissioned a number of studies on the telecommunications sector. One of these studies made a structural evaluation of the telecommunications sector, identifying problems and proposing corrective measures. Another paper discussed the role of cable television networks and their ownership structure in promoting competition in the local access market. The result of the study indicated that the dual ownership of a local telephone network and a cable network, as compared to separate ownership, might have an influence on the incentives to invest in upgrading the cable television network. Separate ownership of the two networks would, according to this study, be important in order to promote competition in local access.

In July 2005, the Competition Authority also published a report evaluating the status of competition in the different telecommunications markets.

¹¹⁸ Case C-334/03: Commission of the European Communities v Portuguese Republic, 20 October 2005

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection

The market for fixed telephony is still dominated by the incumbent. Its overall market share is declining at a slower pace than in many Member States: 84.7% in 2002, 82.7% in 2003, 79.4% in 2004 (in terms of revenue, excluding Internet traffic), whereas the incumbent's average market share was around 65% in the EU 25 in 2004.

In December 2004, ANACOM imposed remedies on the incumbent on this market, including the publication of a Reference Interconnection Offer (RIO) and flat-rate interconnection. In addition, a public consultation was launched in June 2005 concerning the introduction of capacity-based interconnection, following the Spanish experience in this field. Following a draft Decision of ANACOM in October 2005, flat-rate interconnection is included in the RIO and is due to be implemented in the first half of 2006.

Interconnection prices in Portugal have been significantly reduced in 2005. However, they still remain above the EU average for all types of interconnection: €0.0069 vs. €0.0058 for local, €0.0097 vs. €0.0092 for single transit, €0.0147 vs. €0.0142 for double transit. New entrants have asked for significant reductions for 2006 as they claim that interconnection prices in Portugal are 30% above the EU best practice. The 2006 RIO, which should lead to significant decreases, is expected to be published in December 2005. New entrants are concerned about the recent introduction of flat-rate pricing plans for fixed calls by the incumbent and have hinted at the possibility of a price squeeze. However, the regulator intervened in the past to prevent such practices. For instance, in May 2005, it opposed a proposal from the incumbent regarding a new universal service package bundling subscription and weekend calls.

CPS

Carrier pre-selection (CPS) has made a limited impact on the Portuguese market. Six operators are using this facility to compete with the incumbent, and had 452 000 customers as of 30 June 2005, equivalent to about 11% of all fixed lines of the country. It is worth recalling that ANACOM has 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. CPS was successful in the early stages of liberalisation (2000-2001), but new entrants turned away from this facility due to pricing and implementing problems: as a result, the number of CPS customers declined until 2003. The overall trend changed then, due to active marketing of only one operator. New entrants complain about the price of CPS, which they believe is still too high. Carrier selection figures (CS) are stable, with about 100 000 customers. As a whole, indirect access (CS and CPS) accounts for 20.7% of the fixed telephony traffic.

As far as fixed direct access is concerned, the incumbent's market share stood at 91.6% vs. 94.1% a year ago. Fixed termination rates of new entrants are capped at the incumbent's termination rate + 20%.

WLR

The NRA imposed wholesale line rental (WLR) as a remedy to the incumbent in December 2004. In April 2005, it approved the minimum elements to be included in the WLR reference offer and the specifications applicable to those who could benefit from this offer. This decision is criticised by new entrants to the extent that it leaves the incumbent the choice whether or not to allow them to provide a single bill to customers. Two important final Decisions related to WLR and bundling of subscriptions and traffic by the incumbent are expected in December 2005.

Leased lines

Leased lines prices are, as a whole, below EU 25 average. The incumbent presented a reference offer for wholesale leased lines to the regulator in June 2005 which, once approved, should lead to further reductions in prices. New entrants have repeatedly complained about delivery times. Backhaul services to submarine cables had been mentioned in several implementation reports as a particular area of concern: this does not seem to be the case any longer, following action by the regulator.

In November 2005, ANACOM launched a public consultation on the regulatory approach to VoIP technology. This consultation, which ended in December 2005, aims to ensure that the analysis is consistent with the regulatory objectives set in the law: promotion of competition, development of innovative and diversified services, protection of users' interest, effective use of numbering resources.

Broadband Markets

Penetration

Broadband penetration stood at 11.1% of the population in October 2005 (1.14 million lines), compared to 6.3% a year earlier. Cable is still a very significant means of access, as it represents 46% of all broadband subscribers. However, DSL has made steady progress and has overtaken cable in the course of 2005.

Competition/Market situation

The incumbent's market share has slightly decreased, compared to 2004, at 78%. This operator owns the larger of the two main cable players. The NRA found it had significant market power on the DSL market (85% market share in October 2005), and imposed a full range of remedies, ranging from accounting separation to cost orientation and the obligation to publish a Reference Unbundling Offer (RUO).

Local loop unbundling

Until last year, the number of unbundled lines in Portugal was insignificant. ANACOM has taken several decisions in 2004 and 2005 as far as local loop unbundling is concerned. In April 2005, the connection fee was reduced from €92 to €38 for both full unbundling and shared access, the monthly fee was reduced from €11.96 to €9.72, the disconnection fee was cancelled and prices for new entrants' connection through fibre to collocated equipment were reduced. These amendments were appealed by the incumbent.

New entrants, although pleading for further reductions in prices to correct the imbalance in market shares, no longer claim the existence of a price squeeze on bitstream access. Deadlines for providing loops have been shortened from 13 to 7 working days if the number is ported. ANACOM increased in November 2005 the level of compensations imposed on the incumbent for failing to provide loops within the deadline; this is due to the incumbent's systematic delays in this matter. ANACOM also notes that it lacked evidence from entrants to impose fines on the incumbent when it failed to comply with the terms of the RUO.

New entrants acknowledge the progress made on ULL following the regulator's interventions. Simultaneously, the latest data on the number of unbundled lines (43 000 as of 1 October 2005) is showing an encouraging trend. However, shared access is still not used by competing operators. The 2006 RUO will be decided upon by ANACOM in the end of 2005 and will enter into force in January 2006.

ANACOM made several interventions on the incumbent's ADSL wholesale offer. Prices decreased in May 2005, and the incumbent was forced to offer a higher number of interconnection points (bitstream access over ATM) in 2004. The migration of customers towards their new operator has to take place without subscribers having to request a cancellation of the service from the incumbent. New speeds (2, 4 and 8 Mbps) were also introduced into this offer, following a proposal of the incumbent to upgrade downstream speeds for its customers free of charge.

In 2005, the three mobile operators launched several offers for broadband Internet access, based on 3G and GPRS technologies. These offers typically include mobile connect cards with specific tariffs, which enable to connect laptop computers to Internet.

Mobile Markets

Penetration

Mobile penetration is very high in Portugal (105.8% in October 2005), well above the EU average (91.4%). Prepaid customers account for more than 80% of the total number of subscribers. Three operators are active: the incumbent's subsidiary has 50% of the market, the second operator has 30% and the third 20%. The three operators were identified as having significant market power (SMP) on the wholesale market of call termination, and were forced, among other things, to accept reasonable requests for access and to introduce cost-orientation. The smallest operator appealed the NRA's decision.

3G was introduced in 2004 on a limited commercial basis by all three operators. 3G coverage improved in 2005, and all three operators now cover about 50% of the population. It is expected that 3G should start playing a significant role on the market in 2006, as more and more services become available.

Competition/Market situation

Mobile termination rates (MTRs) were extremely high in Portugal until 2004. ANACOM introduced a "glide path" to reduce MTRs from 18.5 eurocents in 2004 (27.79 eurocents for the smallest operator) to 14 eurocents in March 2005 (20.5 eurocents for the smallest

operator) and 11 eurocents for all operators in October 2006. At the same time, the incumbent was requested to reduce its retention charge from 7.5 eurocents in October 2005 to 6.3 eurocents per minute in October 2006 for calls to mobile networks. This has led to significant reductions on fixed to mobile call prices for consumers. A convergent fixed/mobile offer was launched by an operator in November 2004. It was initially barred by the regulator, on the main grounds that the service did not comply with the terms of the national numbering plan. A revised offer was approved in February 2005: customers are able to use their phone as a fixed line; the handset must be connected to one network cell, and in any event not more than three cells.

THE CONSUMER INTEREST

Retail price trends (covering all major market sectors above)

According to ANACOM, end-prices for consumers decreased significantly in 2005: by 6% for local calls, by 20% to 30% for long distance and fixed to mobile calls. This is mainly a result of regulatory intervention, which lead to more competition on the Portuguese market, and was achieved in spite of the incumbent's continuing dominance in fixed telephony, as found by the NRA.

As far as broadband is concerned, new entrants have been able to launch competitive offers, based on local loop unbundling. In parallel, data speeds have increased, and 2Mbps is now the average downstream speed for ADSL or cable customers. Competition, though limited in terms of market share, exerted pressure on prices and helped the development of broadband. The number of broadband subscribers in Portugal is now 52% higher than a year ago.

In mobile services, the main event in 2005 was the launch of "no frills" offers, with identical rates for on-net and off-net calls, through the launch of new independent brands. It is still too early to evaluate the impact of these tariff plans on the market. An observatory of mobile prices was set up by the NRA, with the participation of all three mobile operators. This is a very useful tool for transparency, as it can be consulted online by consumers on ANACOM's website, and even gives the possibility to simulate a monthly bill in the light of any call profile.

Universal Service

In 2003, with the revision of the concession contract, the incumbent operator had been granted the universal service obligation until 2025 without prior public tender. The Commission took the view that this was not in line with the relevant Community legislation and started an infringement proceeding. The proceeding is currently pending.

In May 2005, ANACOM approved a Regulation on Quality of service which only applies to fixed operators, at an initial stage.

Until now, the regulator has always rejected the incumbent's claims for compensation of the cost of the universal service for the years 2000, 2001 and 2002(albeit on different grounds for the first two years). The mechanism foreseen in the law is either a compensation through public funds or the establishment of a fund with contributions from the sector, should the regulator find that the provision of universal service represents an

unfair burden for the operator. The Government decides which mechanism should be applied.

Directories

A comprehensive directory is still not available in Portugal. Two mobile operators had appealed the regulator's decision of December 2003 concerning the provision of subscriber data to the undertaking in charge of the universal service. In one case, the Court suspended ANACOM's decision, which means that the directory does not contain data from one mobile operator.

Data Protection

The ePrivacy Directive was transposed in Portuguese law by Law n°41/2004 of August 2004 and, for unsolicited communications, by Decree-Law n°7/2004 of January 2004. The Portuguese legislation provides for an opt-in mechanism for messages to individual consumers and an opt-out mechanism for collective bodies. There is also a Data Protection Authority in Portugal.

Emergency services (112)

112 is very widely known in Portugal, as it is the main number to call emergency services. Caller location information however is only available to emergency services for calls from fixed phones, using calling line identification. The Commission is checking the compatibility of this situation with the relevant provision of the Universal Service Directive.

Number Portability

Fixed number portability (FNP) is developing steadily (229 000 numbers ported as of 1 October 2005), but does not make an enormous impact on the market yet. This may be linked to the price of FNP, which, at 15 euros, is above the EU average, as well as to the incumbent's strength in fixed telephony. Mobile number portability is not very popular in Portugal either (65 000 numbers ported as of 1 October 2005). There could be two explanations: one could be the existence of a recorded message to callers of a ported number, stating that the number is ported. Whereas this measure was intended to protect consumers, it may actually deter mobile subscribers from porting their number. The most obvious reason is linked to network externalities, as most tariff plans offer significant discounts for "on-net" calls to the same mobile network. This may also explain why the market share of the third operator remains stable, contrary to what is happening in many other Member States. The recent introduction of "no frills" tariff plans, with similar call charges for on-net and off-net, may, in the medium or long term, limit the impact of network externalities on the Portuguese mobile market.

Must Carry

In Portugal, two public service channels enjoy, free of charge, must-carry status. It is expected that a new authority responsible for content, called Entidade Reguladora para a Comunicação Social (ERC), was established in November, and will define the channels which will enjoy must-carry status. ANACOM will retain responsibility for regulating transmission operators, in particular to impose must-carry obligations.

Out-of-court dispute resolution

For the purpose of out-of-court dispute resolution, ANACOM is creating a specific unit dealing with requests for information and complaints. This unit should be active from 1 January 2006.

In September 2005, ANACOM approved guidelines for minimum terms to be included in contracts for electronic communications networks and services.

On the whole, consumers have benefited from regulatory action taken in 2005. The trends in fixed telephony prices are encouraging, whereas mobile telephony appears to be growing still, despite the high penetration rate achieved so far. Competition could flourish with the launch of MVNOs, which may take place in the course of 2006.

SLOVENIA

INTRODUCTION

2005 was a year of high expectations for the Slovenian telecommunications market, as a number of measures to resolve regulatory issues and enhance competition were foreseen. However, they appear to have been inhibited by a number of market factors, including the low level of prices in general together with the incumbent's position on the fixed and mobile markets. The Commission is examining if there are weaknesses in the transposition legislation, as a result of which for most of 2005 neither fixed nor mobile operators were subject to SMP obligations with regard to interconnection. The national regulatory authority concentrated its efforts on completing the market analysis process. In addition, the Commission services are examining issues regarding the effective application of other requirements of the regulatory framework. This is the case, for example, with the continued lack of availability of fixed and mobile number portability, which impinges on consumers' right of choice and compounded the difficulties of developing competition.

The questions regarding effective and timely regulation have heightened concerns about the independence of the regulatory process in Slovenia, particularly in view of the state shareholding in the principle fixed and mobile operator. The Commission has concerns with regard to effective structural separation between certain regulatory functions and ownership or control functions regarding the incumbent, and the Commission has launched infringement proceedings against Slovenia in this matter.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

Overall, the Electronic Communications Act (the ECA) is regarded as quite satisfactory by the majority of market players, while some of the alternative operators consider the ECA to be premature, since the market has, in their view, not been liberalised fully. With regard to the conformity of the ECA, some of the principles of the regulatory framework do not appear to have been transposed, in particular the transition from the old regulatory framework. For example, with SMP obligations having expired due to the temporary nature of the previous decisions before market reviews have been completed, there existed a legal vacuum on the market, which could have had consequences for the competitiveness and stability of the Slovenian telecommunications market. The National Regulatory Authority (the NRA) has reported, on the other hand, that the operators which had SMP obligations under the old framework and which had expired, seemed to have been acting as if they had these obligations. Other potential conformity issues have been identified and require further verification by the Commission services.

The NRA

Independence

Towards the end of 2004 a major change occurred in terms of responsibility for the telecommunications market. Following the change in government at the end of 2004, the new government introduced some structural reorganisation, including the abolition of the Ministry of Information Society, whose responsibilities were divided between by the Ministry for Higher Education, Science and Technology, which is responsible for coordination of activities related to ICT policy, e-contents (i2010, CIP, WSIS), and the Ministry of Economy, which is responsible for the areas related to the implementation of the regulatory framework. Moreover, the government of Slovenia adopted, in March 2005, a decision which required the incumbent operator to remove the existing members of its supervisory board. In the same decision the government of Slovenia proposed a senior official in the Ministry of Economy to become a member of the supervisory board and this appointment to the board was confirmed in April 2005, meaning that the Ministry of Economy became directly involved in the supervision of the incumbent operator. Following an examination of the implications for regulatory independence, the Commission launched infringement proceedings against Slovenia in October 2005 for its failure to ensure effective structural separation of the regulatory function from activities associated with ownership or control, since the Ministry seems to have some regulatory tasks.

Several operators also criticised the National Competition Authority (the NCA) for not being independent of the Ministry of Economy, again because of the Ministry's direct involvement in the incumbent, despite the fact that the Competition Act from 1999 authorised the NCA to have a sole competence to decide over antitrust cases. This criticism is related to a decision of the NCA in June 2005 on a complaint by the third mobile network operator. The NCA has, in its partial decision, rejected the request of the alternative operator regarding the alleged cross-subsidisation on the basis of insufficient evidence proving the existence of the abuse. Despite the concerns raised by operators about the alleged weaknesses in cooperation between the Agency for Post and Electronic Communications (APEK) and the NCA, the two institutions have taken joint action in some areas, one of them resulting in the abolition of differentiation between PSTN and ISDN connections in the case of broadband access. At the same time, the mobile branch of the incumbent operator agreed, on the initiative of the NRA, to unlock mobile handsets.

The Commission also notes that, following the departure of the previous Director in January 2005, the government failed to appoint a permanent head of the NRA, and the current Director has remained in an acting capacity for almost a year while the call for the selection of a candidate was re-launched. This is an undesirable situation from the point of view of the stability and continuity of the NRA's activities.

Powers and objectives

The activities of the national regulatory authority continue to be subjected to criticism, even though there appears to be agreement among all operators that the responsiveness and willingness of APEK to intervene have improved since the last report. Despite an increased number of interventions in dispute settlement cases, APEK's actions do not

appear to have significantly improved the situation on the market in comparison with September 2004. Above and beyond, APEK decisions appeared to be ill timed; in particular, this can be said for the measures addressing the issue of a legal vacuum in the case of expired obligations issued under the previous regulatory framework or the case of enforcing number portability. In both cases, in July 2005 the Commission decided to open infringement proceedings against Slovenia. In the second half of 2005, the NRA focused its activities on the implementation of number portability. In August 2005 the General Act on number portability was adopted and in October 2005 the central database manager was selected.

Decision making

APEK has to date notified to the Commission sixteen market analyses, two of which were withdrawn subsequently (regarding leased lines) in light of concerns of the Commission services about insufficient information on which to base an assessment. As well as re-notifying its analysis for these two markets, the NRA was expected to notify its analysis of the national wholesale market for international roaming, leaving just one market analysis to be completed after the end of 2005. In general, the data collection process has been perceived to be rather lengthy.

Appeals

Decisions of the NRA that are appealed to the Administrative Court usually remain in force while the Administrative Court is considering the substance of the appeal.

Against a final decision of the NCA there is no possibility of administrative appeal, whereafter the only possible remedy is a judicial review, requested by a party challenging a decision of the NCA before the Administrative Court.

Dispute resolution

One alternative operator has been particularly active, requesting, on several occasions, the intervention of APEK in disputes concerning commercial negotiations with the fixed incumbent operator in the unbundling market. Out of four dispute requests that had been initiated, two were withdrawn by the alternative operator in mid 2005.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Access/Interconnection

The fixed incumbent operator has not had SMP status with regard to interconnection for most of 2005. The current version of its reference interconnection offer (RIO) was published in May 2004 and was expected to be modified once the findings of the relevant market analysis had been confirmed. The status of SMP with regard to direct access (local loop unbundling) was designated to the incumbent in the middle of 2005, as a result of the market analysis and has resulted in a decrease of LLU prices. Two alternative operators (in addition to the incumbent's internet service provider (ISP) subsidiary) that have signed interconnection agreements, offer services to customers on

the basis of direct access (reference unbundling offer (RUO) signed) and one more was expected to reach a similar deal when this report was being prepared. In general, alternative operators continued to be reluctant to sign reference interconnection and unbundling offers, as the conditions were in their view either adverse or not adapted to market needs (e.g. discriminating conditions on damages, warranties, penalties and installation fees, high prices for collocation, installation and leased lines).

Competition/Market situation

The Slovenian fixed telephony market is one of the smallest in the EU. It is characterised by the incumbent operator's huge market share, in both the national and international segments, i.e. 100% and 91%¹¹⁹ respectively, measured in terms of retail revenues. It has a fully digitalised network. The situation on the market has changed since the 10th Report, as three operators, one of them being a new entrant, started offering services on the basis of local loop unbundling. However, as it is quite recent, this action has not yet been reflected in terms of a change in market shares. On the other hand, the fixed international telephony market already shows signs of development, since the market share of alternative operators rose to some 12% (in terms of minutes of traffic). APEK has assigned non-geographic numbers to seven alternative operators of publicly available telephone services via IP-telephony; however, none of these providers has yet started with their service provision. Several SMP obligations, based on the market analysis, have been issued by the NRA towards the end of 2005.

CPS

Four alternative operators have interconnection with the fixed incumbent operator on the basis of carrier selection (CP) or carrier pre-selection (CPS); however two companies operate on the basis of APEK's earlier individual decisions setting forth the conditions of interconnection, as the agreements were difficult to negotiate. CP and CPS are, however, used for international calls only.

Leased lines

The leased lines are largely in the hands of the State; there are several alternative providers apart from the fixed incumbent, but the majority of them are state owned. The market share of cable TV companies which offer leased lines remains marginal. The situation is, according to APEK, different between the wholesale trunk segment of leased lines and the terminating segments of leased lines. In the former case, in APEK's view the market appears to be dynamic and no SMP obligations are expected for regulation of the market. On the other hand, the fixed incumbent has ca. 90% of the market share in the terminating segment. The incumbent is currently under no obligation to offer partial circuits, however, leased lines are available to alternative operators on a commercial basis. Both APEK and alternative operators consider the incumbent pursues high prices' policy, while the fixed incumbent contends that those prices, offered on a commercial basis, despite exceeding heavily the European benchmarking average, are applicable only to instances when the first line is being leased. Conversely, the incumbent argues that in the case of multiple lines being leased for the same distance, prices could decrease by

¹¹⁹ 83% in May 2005

50%. Nonetheless, one can note that prices are in the case of 2 km rental amongst the highest in the EU-25 and the highest in the case of 5 km rental. The incumbent is expected to have an obligation to provide partial circuits as a result of market analysis.

Broadband Markets

Penetration

Broadband has significantly increased its market presence. There were 108 346 ADSL subscribers in October 2005, increasing by some 101% in comparison with the last year's July data. There appear to be no significant obstacles remaining to the development of the broadband market, as competition has grown, also thanks to the presence of cable operators. All cable operators remain local players. APEK, however, plans to impose obligations on the biggest cable operator to provide access to third party ISPs, in line with powers given to it under the ECA, even though it does not consider including cable operators in the scope of the market analysis. The Commission services are currently examining the proposed measure.

Competition/Market situation

Cable operators seem to represent strong competition to fixed telephony technologies, with a fairly constant market share over a period of time. Alternative technologies, i.e. cable, fibre and WLL represent around 37% of the broadband market share. DSL market developments have been less dynamic since the incumbent's subsidiary managed to retain a market share of nearly 96%, profiting from the use of its parents company's leased access network and facilities, as well as the commercial clout of the incumbent's fixed line access position. More competition is expected as a result of a new partnership involving three alternative ISP providers and the incumbent's subsidiary.

Local loop unbundling

De-coupling of ADSL from ISDN, which was influenced by results of market analyses represented one of the key objectives for a wider and quicker development of DSL services for alternative operators, but this only became available as of September 2005. The situation on the market is expected to improve since three alternative operators had started offering services on the basis of local loop unbundling. VDSL has recently been introduced by one of these operators on the basis of LLU, however, the operator reports significant technical difficulties with the incumbent operator. Similarly, those operators that eventually managed to sign agreements on the basis of the RUO reported lengthy delays in the provision of access and the installation of required facilities. They also complained that they have been experiencing problems with accessing the incumbent's transit network or with connecting with their own fibre networks at collocation sites, or that they have been forced by the incumbent to collocate in more space than required. The incumbent, has recently been designated with new SMP obligations to provide wholesale unbundled access, and it reassures alternative operators that all connections are ensured on time and in the line with the conditions spelled out in the RUO. It also offers fibre connections to collocation sites.

Bitstream access

The incumbent published in January 2005 a new bitstream offer for operators based on a user as a cost account unit. APEK established that even with this improved offer (third in the last two years) costs for operators remain high if compared with retail prices of the incumbent's ISP and there is little room for alternative operators to make a business case.

Authorisation

APEK revoked one licence for provision of WLL-Wimax services in October 2005. The alternative operator concerned had not paid the relevant fee, despite several APEK warnings, and had not started providing services commercially within a period of one and a half years. According to the APEK, the free frequency band will be subject to the tendering process. This particular decision strengthens the position of the fixed incumbent operator as provider of Wimax service in Slovenia.

Mobile Markets

Penetration

Penetration in the mobile market ostensibly dropped by 2% points to 90% since 2004, but this was as a result of a modification to the methodology for counting subscribers, introduced by the NRA, which is a positive step that gives rise to greater clarity of the real market situation.

Competition/Market situation

The incumbent's mobile arm added more net subscriptions than the aggregate of alternative operators together in the course of this year. The market share of the incumbent's mobile arm, measured by the number of subscribers represents 74% of the mobile market. Alternative operators have argued that the current situation is partly due to anomalies with the on-net/off-net tariff differentials, and cross-subsidisation which manifests itself in low ARPU and returns on capital, as well as very low retail tariffs. Alternative operators are also concerned that the market leader will be able to transfer its behaviour onto a new emerging UMTS market. In this context, the third mobile network operator took legal action against the government and the mobile market leader, accusing the latter of abuse of a dominant position, cross-subsidizing and off-on net price discrimination. It attacked the government for its alleged incapacity to intervene appropriately. Simultaneously, the incumbent's mobile arm took several commitments upon itself, which, according to the operator, should improve the market conditions and to which the NCA agreed consequently. In November 2005, the fifth mobile and thus the second virtual operator began to offer mobile telephony services. In late December 2005 the NCA published a decision, whereby allegations of the third MNO, regarding abuse of a dominant position by the market leader (in particular, allegations concerning cost-non-oriented prices for calls originating and terminating in the network of the incumbent's mobile arm) were dismissed as unsubstantiated.

Technologies (2G/3G)

3G services (one licence and one network only) are currently accessible to nearly 82% of the population, with around 18 000 subscribers at the end of June 2005.

Mobile regulation

APEK, in October 2005, proposed remedies on the market for the provision of access and call origination on public mobile telephone networks, which by themselves might not necessarily be effective to render the retail market competitive, if not complemented by effective regulation of voice call termination on individual mobile networks. APEK has decided to have a strict regulation on both markets which is based on comparison of the wholesale prices with self supply prices of the mobile market leader. Small operators, which terminate most of their calls towards the network of the mobile market leader, are interested in setting up off-net call prices lower than the market leader's on-net call prices, in order to speed up migration from larger to smaller networks. As a result of the obligations imposed on the mobile market leader to open up its network for new mobile virtual network operators the market awaits the arrival of new MVNO operators in the pre-paid segment. Small mobile operators on the other hand fear that this measure will only benefit the incumbent's mobile arm, since there are only two networks with full national coverage and the market leader is most likely the one that can offer better discounts.

Access/Interconnection

On the mobile segment, the second biggest operator continues to enjoy the benefits of asymmetric regulation in the voice call termination market (call termination priced almost 60% above the incumbent's termination rate), however, it has not managed to translate this advantage into a bigger number of new subscriptions. The smallest mobile network operator believes that such regulation could not improve the situation on the market, where roughly 80% of the calls originate from and terminate in the incumbent's mobile arm network and the main issue relates, according to them, to the level of retail prices. Fixed telecom operators continue to experience imbalances in terms of call termination charges for calls from fixed to mobile networks. Mobile-to-mobile termination is on average 63% cheaper than fixed-to-mobile termination. APEK estimates that the cost oriented price of the mobile market leader is between fix/mobile (high) and mobile/mobile (low) termination charge. APEK defined a period (more than 2 years) following which all the prices shall be levelled. In order to achieve that a single termination charge for all kinds of calls shall be applied as a result of the regulation. APEK expects that the relation between retail and wholesale prices will be improved gradually.

On the base of APEK's intervention the operators have stopped using GSM gateways in mobile networks as means of interconnections.

Tariff Issues

Many alternative operators report that the major issue requiring attention in the fixed telephony market is the extremely low level of retail prices. Retail prices are currently not regulated. While this is of short term benefit to consumers, despite the availability of a wide range of access options, no significant customer migrations can be observed, and the fixed incumbent's market share, on both call originating and call terminating segments of the interconnection market, remains close to 100%. As an objective reflection on the allegations, it is noteworthy that in its draft decision of 7 October 2005 on the call termination on individual public telephone networks provided at a fixed location, APEK found that under certain conditions current wholesale termination prices are higher than the corresponding retail prices charged by the incumbent.

Market and Technological Developments

Two market operators are currently offering triple-play services (i.e. voice telephony provision, internet and data transfer provision and television/radio provision). These include the incumbent's ISP subsidiary and a new entrant with a direct fixed access, whereas the biggest cable operator has announced its operations to be launched shortly. One alternative operator is currently considering launching four-play services (triple play plus mobile telephony).

THE CONSUMER INTEREST

Retail price trends

The fixed incumbent maintains a policy of very low retail prices (prices are ca. three times lower than the EU-25 weighted average, calculated on the basis of a 3 minute national call charge), possibly the lowest across EU-25. Apparently, the retail prices are kept artificially low by the government due to macroeconomic policy reasons. Average monthly expenditure of both residential and business users remains amongst the lowest in the EU-25.

As a result of the intervention of APEK, the fixed incumbent's mobile arm equalised on-net and off-net prices in a pre-paid segment in May 2005, which affected ca. 46% of the operator's subscriber base. The market leader also introduced single off-net tariffs for all post-paid packages, leading to a situation where the market leader charges, on average, the lowest off-net and highest on-net prices on the mobile market. In terms of revenue generated the situation is less apparent, as the incumbent's mobile arm still practices a special discount policy for certain groups of callers. One can also notice that retail off-net prices of the second mobile network operator for calls into the network of the market leader are currently lower than the on-net prices of the latter, representing a significant incentive for migration of subscribers between the networks.

Universal Service

In November 2004 APEK designated the fixed incumbent operator as the universal service provider (the USP) for the whole territory of Slovenia on the basis of a public tender. The inclusion in the designation of an obligation to provide special measures for disabled users has not been possible until November 2005, when the new secondary legislation, defining the technicalities has been adopted. In October 2005 the USP issued the first ever universal directory comprising data of all fixed, mobile and IP telephony operators in Slovenia. Data is also accessible via on-line directory or by calling a directory enquiries service.

The ECA provides that the USP shall be obliged to send to APEK within 90 days of the end of the business year an estimate of net costs, audited accounts and information used in the estimate of net costs of universal service provision, otherwise they shall lose the right to claim net costs. APEK has not received any such request for year 2004, meaning that the fixed incumbent operator lost its right to claim net costs incurred during the provision of universal service.

Number Portability

Number portability was practically not possible until August 2005 (even though the incumbent's mobile arm reduced customers contracts' lock-ins to a period of 12 months), when APEK finally issued the General Act on number portability, defining technical aspects of the porting process. According to APEK's schedule that took account of public consultations on this issue and views of the operators about their technical limitations to provide number portability in a prescribed way, number portability for mobile numbers will only be implemented by the end of 2005, while portability of fixed numbers is expected towards the end of June 2006, which is not in line with the requirements of EU law. This finally led to the opening of an infringement proceeding by the Commission addressed to Slovenia in July 2005. The concept of number portability has never been accepted thoroughly by the alternative mobile operators, which have expressed a lot of discontent with regard to the selection process of the central database manager of ported numbers, organised by APEK.

Digital TV

Slovenia is currently preparing a Strategy plan for switchover from analogue to digital transmission. According to the plan, in preparation of which APEK is actively involved, there will be three regional multiplexes, each with eight layers, as it is the case of the neighbouring Member States. APEK envisages some problems with regard to the availability of radio spectrum due to the technical limitations arising from the requirement to broadcast both in analogue and digital technique in a transitional period. According to the draft Strategy plan all broadcasters will have the same possibility to compete for digital broadcasting. The envisaged plan for switch-over is the period from 2006 – 2010 and for the final switch-off by the beginning of 2012.

Must Carry

The Slovenian Mass Media Act establishes the legal provisions for must carry obligation. Undertakings providing electronic communications networks used for a distribution of broadcasts to the public, regardless of a distribution method, must tolerate free-of-charge dissemination of radio and television broadcast channels and services (includes national, regional, local, student and non-profit stations; altogether around 30), if there are technical possibilities for a quality reception of signals at the operator's main receiving station, in a such way that they are accessible to all users of their services. No remuneration system has been imposed either by law or by the authorities. In practice only national public channels benefit from must carry obligation.

SLOVAKIA

INTRODUCTION

The opening-up of the fixed market to competition has dominated regulatory developments in Slovakia in 2005. The publication of a RIO by the incumbent and the availability of carrier selection have certainly improved market entry prospects. However, a number of market liberalisation instruments, namely number portability and carrier pre-selection, still remain to be implemented. Even though the RUO has been published, wholesale local access is still not available. High interconnection charges and high prices for wholesale local access appear to hinder the establishment of a more competitive environment.

Despite the fact that the broadband market has grown rapidly, this is still only to a rather modest extent. The enhancement of competition in the provision of broadband services could possibly result in lower prices which would be more affordable for the consumer. New frequencies for the operation of WLL, assigned by the NRA to four competitive operators, have opened up an opportunity for them to compete with the incumbent.

As regards the mobile market, the consumer still only has a choice between two mobile operators and does not have the possibility of porting numbers between the two.

The NRA has continued with carrying out the market review process. However, not all of the measures imposed appear to address sufficiently the need for effective price control via practical implementation of cost orientation principles.

The NCA has also been active most notably by fining the incumbent for the lack of a RUO (before the RUO was published). The case was appealed and there is no final decision yet.

The Ministry, which continues to be the incumbent's shareholder, has been working on an amendment to the primary law seeking to improve it both in terms of its overall quality as well as better transposition of the EU regulatory framework.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The Law on Electronic Communications (the "Law") aiming to transpose the EU regulatory framework has been in force since 1 January 2004. A number of issues have been identified relating to the conformity of the Law with the EU regulatory framework. Consequently, the Commission launched infringement proceedings to address the main issues which concern the transposition of the Framework Directive, Access Directive, Universal Service Directive as well as the ePrivacy Directive. The secondary legislation necessary for transposition appears to be in place. The Ministry of Transport, Post and Telecommunications (the "Ministry") was trying to address these conformity issues, by preparing an amendment to the primary Law. The Commission services have been

informed that the Slovak Parliament adopted this amendment on 13 December 2005 with its entry into effect being envisaged for 1 February 2006. The amendment to the primary law also envisages introducing the possibility of secondary spectrum trading. The Commission services will be able to scrutinize the amendment as regards its conformity with the EU regulatory framework once it is notified.

The NRA

The Telecommunications Office of the Slovak Republic (“TÚSR”) was established in 1993. TÚSR appears to be facing problems related to a lack of resources. During the reporting period, progress has not been achieved with respect to the financing of the TÚSR, which is still financed from the budget chapter of the Ministry. At the same time, the Ministry controls 34% of the fixed incumbent operator. The ensuing question of structural separation of regulatory functions from ownership functions led to an infringement proceeding opened by the Commission. The Ministry’s status as shareholder in the fixed incumbent operator and universal service provider in Slovakia has not changed during the reporting period. The Ministry is 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 also has competence in the area of preparation of the legal framework, and is responsible for preparing the draft national frequency spectrum table before submitting it to the government for approval. A new law intended to change the current situation in the area of financing of the NRA is currently being prepared by the Ministry.

Decision making

The regulator has continued to show considerable efforts in proceeding with the market analysis process and the imposition of obligations on SMP operators. To date, the regulator has notified the results of market analyses of six relevant markets, as defined in the Recommendation on relevant markets, four of them being wholesale markets. TÚSR has already imposed obligations on SMP operators with respect to five markets, three of them being wholesale markets. The TÚSR’s strategy was influenced by the urgent need to liberalise the fixed markets by enabling market entry and by the urgent need to establish conditions for the development of a competitive environment in those markets. This strategy was also visible from the sequence in which the relevant markets were analysed.

From the procedural point of view, the Commission drew the TÚSR’s attention to the need to carry out thorough prior consultations with all interested parties at the national level in the context of the market analysis process. From the ‘substantive’ point of view, the Commission drew the TÚSR’s attention to the imposition of proper price controls, cost accounting and cost orientation obligations, as these appear to be the main tools at the TÚSR’s disposal which could be beneficial to the state of competition. Based on the Commission’s comments which pointed out the need for imposition of proper price control, cost accounting and cost orientation obligations, the TÚSR has notified measures in that respect as regards one market being the wholesale market for fixed call termination.

Appeals

The decisions taken by TÚSR in the first instance are reviewed by TÚSR's President in the second instance. TÚSR's second instance decisions may be reviewed by a court. While the decisions are being reviewed by a court, they stand unless the court decides otherwise. The Commission's services are examining whether the decision-making process, where a court is the appeal body pursuant to the Framework Directive, is not over-lengthy in some cases.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

The opening-up of the fixed market to competition was among the main regulatory developments in Slovakia during the reporting period. Fixed line penetration now stands at 21.9 % of the population, whilst in 2004 this number was 22.3%. It thus appears that the incumbent's fixed line business is slowly declining. This fact might be one of the reasons why the fixed incumbent increased its shareholding in its mobile arm from 51% to 100 % in December 2004. Moreover, in August 2005 the fixed incumbent acquired 90% of a major Slovak internet portal.

Eight interconnection agreements between the fixed incumbent and new entrants in the fixed voice market were concluded and call-by-call carrier selection became available for end-users in August 2005. In the same month, the fixed incumbent's reference interconnection offer was published as a consequence of a remedy imposed by TÚSR based on the process of market analysis.

The current interconnection charges for call termination on the incumbent's network are not yet based on a costing methodology and are consequently relatively high if compared to the EU average (in peak time these charges are € 0.0131 per minute on local level, € 0.0194 per minute on single transit and € 0.0281 per minute on double transit, it should however be noted that three interconnection time windows are applied by the incumbent and recalculation of the average price into two time windows might lower the peak price approximately by 12%). This indicates the validity of the Commission's previous comments on the need to impose proper price controls, cost accounting and cost orientation obligations, as emphasised in the context of the market analysis process. The current level of interconnection charges does not appear to be a supportive factor in the endeavour to establish a competitive fixed market, as the possibilities for alternative operators to enter the fixed markets are still limited.

Carrier selection and pre-selection are amongst the main tools at the disposal of alternative operators to enter the market. In Slovakia, carrier selection has been available since August 2005, and is available for national and international calls. As regards the availability of this facility for calls to non-geographic numbers, it is available only for calls to mobile numbers. As of 1 December 2005 carrier selection was implemented based on a commercial agreement between the fixed incumbent and the new entrants, as the relevant remedy based on the market review was not yet legally effective. Carrier selection and carrier pre-selection will not be available for the incumbent's 'low usage' tariff plan. Carrier pre-selection is not yet available. Nevertheless, this facility is expected

to become available once the relevant remedy based on the market review comes into effect.

Wholesale line rental is not available. The prices of leased lines remain unregulated. These factors do not appear to contribute to the competitiveness of the fixed market. Retail prices for 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 (€ 5 304 per year for 64kb/s, 2 km circuits; € 13 728 per year for 64kb/s, 200 km circuits; € 23 337 per year for 2Mb/s, 2 km circuits and € 70 510 per year for 2Mb/s, 200 km circuits).

In October 2005, the NCA launched administrative proceedings to investigate whether the incumbent abuses its dominant position in the context of the provision of virtual private networks. These proceedings were initiated by the larger mobile operator.

The Slovak NCA imposed a fine of approximately € 388 000 on the fixed incumbent operator for abuse of its dominant position effected by terminating the agreement with a major cable TV operator on the use of facilities in the fixed incumbent's cable ducts. The decision is a first instance decision which is not yet legally binding.

Broadband Markets

During the reporting period, the number of DSL lines grew rapidly. Whereas in July 2004 there were approximately 17 100 lines, in October 2005 this number was approximately 80 600. The DSL market is the hands of the fixed incumbent operator, as the market share of the fixed incumbent on the DSL market is reported to be 100 %. In October 2005 approximately 16 800 customers were using broadband services via cable. To date, only one of the Slovak cable operators provides broadband services. It thus appears that even though the growth of broadband is visible, the level of broadband penetration is still not impressive, as it stands approximately at 2 % of the population. The fact that bitstream internet access is not available and alternative operators are only providing resale products of the incumbent's DSL services, combined with the fact that the incumbent's DSL wholesale prices are not regulated, appear to be factors which limit competition. The limited competition on the DSL market does not contribute to the affordability of prices for the consumer, which in turn leads to lower penetration.

In its February 2005 decision, the Slovak Supreme Court confirmed the imposition of a fine of approximately € 527 000 on the fixed incumbent, imposed originally by the NCA in 2003 for abuse of its dominant position when providing DSL services. The reason was that the NCA identified the commercial conditions for entry into the DSL market, stipulated by the incumbent, as inadequate. According to the NCA, the inadequacy of these commercial conditions led to elimination of competition and to the foreclosure of the retail DSL market.

One of the main events during the reporting period related to the NCA's decision of May 2005 establishing that the absence of the incumbent's RUO was an abuse of its dominant position under Slovak competition law. This was established based on the fact that the incumbent, as a holder of non-replicable infrastructure, did not provide access to its network to other operators, thus preventing the establishment of competition on the fixed market. On that basis the Slovak NCA fined the incumbent € 22 million. The imposition of the fine is not yet effective as it has been appealed by the incumbent.

The incumbent's RUO was published in August 2005; however LLU has not yet been implemented. One of the likely reasons for the lack of implementation might be the prices offered, which are currently unregulated and are clearly high: In October 2005, the price of the monthly rental was € 14.1 and the price for the connection was € 162.6 as regards the fully unbundled loop. The price for the connection as regards the fully unbundled loop thus appears to be more than three times higher than the EU average. As regards shared access, the price of the monthly rental was € 9.9 and the price for the connection was € 170.9. In the area of shared access, the price of monthly rental and the connection price appear to be almost three times higher than the EU average. Moreover, prices for co-location are not regulated. The aforementioned prices do not seem to work towards the opening of local access for alternative operators and thus do not promote consumer benefit in terms of choice of service provider.

After the failure of the tender, launched in 2004, for the assignment of frequencies in the 3.5 GHz frequency band for the establishment and operation of a wireless local access network, the TÚSR re-launched the same tender in March 2005. The minimum fee for the frequency was set at € 128 000. Fourteen applicants filed their applications with the TÚSR. As a result, four smaller competitive operators obtained frequencies in the 3.5 GHz frequency band for the establishment and operation of a wireless local access network in July 2005. These operators will now be able to build their own access networks and provide the 'last mile' to other operators independently from the incumbent. The prospect of the enhancement of competition on fixed markets via WLL appears thus now to be closer to reality. In addition to this, there are also two operators operating WLL via 26 GHz. Due to the relatively high connection price, this frequency is not being used for the provision of services for residential customers, but is being used for the provision of services to bigger business customers.

Mobile Markets

On the mobile market, only two mobile network operators are competing, while no MVNOs are present. Their market shares in the provision of 2G services are 44 % and 56 %. Both operators offer GPRS and EDGE services and are required to launch 3G services by 1 April 2006. Mobile penetration is 80 %. In November 2005 the regulator announced its intentions to run a tender for allocation of the 2G and 3G frequencies, which were intended for a third mobile operator in the beauty contest in 2002, as that beauty contest did not finally produce a third mobile operator in Slovakia. The tender is envisaged for the first half of 2006.

Tariff Issues

Regulation of retail tariffs, where several tariff plans of the incumbent are regulated, is achieved by means of a price cap. The price cap is stipulated for a period of five years and expires by the end of 2005. There has been no rebalancing of fixed tariffs, which means that monthly line rentals are offered below their actual costs.

In 2005, local call charge for a 10 minutes call in Slovakia appeared to be the highest in the EU (this price was € 0.588, VAT included).

An interesting development took place in February 2005 when the then virtual monopoly of the fixed incumbent on the fixed market combined with high tariffs offered on that

market enabled the larger mobile operator to come up with new mobile tariffs which aimed at challenging the incumbent's fixed voice retail offer.

The TÚSR's decisions based on the review of two retail markets obliged the incumbent not to bundle its DSL and voice telephony retail offers from January 2006 onwards. Consumers will certainly welcome these decisions.

Market and Technological Developments

The incumbent intends to follow the trend of convergence of electronic communications networks into one universal network based on IP technology, which would be able to converge voice, video and data and thus to offer customers new integrated services for lower prices. With a view to finalising digitalisation of its network by the end of 2004, it has opted for NGN technology. Thus, in the period between August 2004 and the end of the same year, this technology has been implemented in approximately 170 analogue switchboards to which approximately 152 000 customers were connected.

A video-on-demand internet service was launched by the fixed incumbent in October 2005.

The four operators who were assigned frequencies in the 3.5 GHz band in 2005 launched wireless broadband services via their access networks using WiMAX technology.

New technologies have been implemented in the mobile market. The mobile operator owned by the incumbent launched a new mobile broadband service based on wireless network FLASH-OFDM (i.e. Fast Low-latency Access with Seamless Handoff – Orthogonal Frequency Division Multiplexing) technology in October 2005. The service operates in the 450 MHz frequency band, which was formerly used for NMT services. In the same month, the larger mobile operator announced testing of high-speed mobile technologies HSDPA and UMTS TDD.

THE CONSUMER INTEREST

Universal Service

The Law does not set a deadline for designation of the universal service provider. At present, the universal service is being provided by the fixed incumbent based on the transitional provisions in the Law that refer to the scope of the universal service under the previous law. However, on 1 August 2005, shortly after the Commission launched infringement proceedings relating to the absence of at least one comprehensive directory and at least one comprehensive directory enquiry service that would cover all fixed and mobile subscribers, the TÚSR invited applications from those operators interested in providing the universal service. The fixed incumbent and the larger mobile operator applied. It is thus expected that the universal service provider(s) might be designated in the due course. As the universal service scheme under the new Law has not yet been implemented, no universal service financing mechanism is currently in place.

The incumbent decided to reduce gradually the number of public pay phones. This decision does not appear to be controversial, as it has not yet been subject to any consumer complaints.

Non-geographic numbers

Non-geographic numbers appear to be accessible for calls made from abroad, with the exception of 'freephone' numbers allocated to mobile networks. This appears to be in line with work currently being undertaken in the Communications Committee.

International roaming

International roaming charges remain unregulated. The wholesale national market for international roaming on public mobile networks has still not been analysed.

Disabled users

The incumbent operates public payphones with wheel-chair access. Payphones are not equipped for use by blind or deaf users.

Emergency services (112)

The single European emergency number, 112, can be reached from fixed and mobile phones. However, according to the NRA, there is room for improvement concerning the precision of caller location information.

Number portability

Fixed and mobile number portability are not yet available and are only expected to be in place from March 2006 onwards. Secondary legislation dealing with number portability copied the limitation for implementation of number portability from the primary Law, which subjects availability to situations in which it is "technically feasible". Moreover that piece of secondary legislation also included several other limitations for the implementation of number portability. The Commission has addressed the issue via an infringement proceeding. The TÚSR subsequently amended the secondary legislation with a view to withdrawing the limitations for implementation of number portability. A specialised association, comprising fixed as well as mobile operators, which is aiming at implementation of number portability, was established in September 2005.

Digital TV

A pilot digital TV broadcasting programme is operating in the capital as well as in two other cities. According to a document entitled "National policy for electronic communications" approved by the government, the conditions for regular digital TV broadcasting are to be made available by the end of 2005 and the switch-over from analogue TV broadcasting to digital TV broadcasting is to be finalised by 2015. Slovakia however supports finalization of this process by the end of 2012.

Must-carry

A Law on Broadcasting and Retransmission, currently in force in Slovakia, appears to contain a provision falling under the scope of Article 31 of the Universal Service Directive on ‘must carry’. This law has not yet been formally notified and it needs to be examined by the Commission services whether it correctly transposes the EU ‘must-carry’ provision. The issue is that the rule under which ‘must-carry’ obligations may be imposed on undertakings providing networks used for 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 TV broadcasts, does not appear to be transposed. Similarly, the rule under which ‘must-carry’ obligations are to be imposed only where they are necessary to meet clearly defined general interest objectives, and are to be proportionate, transparent and subject to periodical review, also appears not to be transposed. As stated, the Commission services are looking into this matter.

Out-of-court dispute resolution

There appears to be room for improvement concerning out-of-court dispute resolution. The NRA’s involvement in disputes concerning consumers is of a non-binding nature under the Law. During the reporting period, the bulk of disputes between the incumbent and consumers related to incorrect billing. Only approximately 30% of them were successfully solved via reconciliation. In all other cases the NRA referred the consumers to the court.

FINLAND

INTRODUCTION

The Finnish NRA is the first to have notified draft decisions to the Commission for all relevant markets in the Commission's Recommendation. Court proceedings over appealed decisions are nevertheless taking considerable time, creating much legal uncertainty. Finland is an EU leader in electronic communications usage. Large parts of the country retain the structure of small, co-operative fixed telephony incumbents, but such operators increasingly co-ordinate their activities, and the trend of consolidation has accelerated. The average monthly prices for unbundled local loops are still above the EU average, but the number of unbundled lines has grown rapidly. As a consequence of intense mobile call price competition, the migration from fixed to mobile has increased, and the wholesale access and call origination market has been deemed effectively competitive. However, the Commission still considers that Finnish legislation unduly restricts the NRA's ability to impose regulatory remedies as regards wholesale mobile call termination. Terrestrial digital TV is available to almost all and relatively widely used.

REGULATORY ENVIRONMENT

Legal framework, including transposition

Amendments to the Communications Market Act, the main transposing instrument of the regulatory framework, came into force on 1 March 2005. The amendments *inter alia* strengthen the powers of the NRA, to some degree alleviating concerns expressed by the Commission in infringement procedures. Relevant parts of the bill are discussed in their topical context below. Some further amendments to the Act have been proposed by the government in 2005 and are subject to parliamentary procedures.

The NRA

The Finnish NRA is *Viestintävirasto* (FICORA), a government agency under the Ministry of Transport and Communications ("the Ministry"). Operators agree that FICORA is doing a good and professional job, and the situation has been further improved by the recruitment of several staff from the competition authority. Given FICORA's available powers according to the implementation in Finland of the regulatory framework, the alternative operators are satisfied with the market analysis outcomes. There has been an increase in formal intervention from the regulator, whereas it previously to a larger extent favoured persuasion over decision-making.

Powers and objectives

The Finnish authorities have amended the Communications Market Act in order to extend the powers of the NRA. However, the Commission is further examining whether FICORA's powers to impose access obligations and conditions are unduly restricted by

the Finnish Act as concerns how the obligations allowed for in the latter cover the full range of obligations following from Article 12 of the Access Directive.

Cooperation between the NRA and the competition authority has been good. There is a formal cooperation protocol which clarifies the respective authorities' roles and their division of labour in the market analysis process and with complaints, as to avoid "forum shopping". However, operators have sometimes not pursued competition-related matters with FICORA or the competition authority at all, due to time pressure and a conviction that the authorities would not have the resources to deal with the matters quickly enough to make a difference in the individual case. The competition authority also considers that its involvement in the market analysis process is limited by a lack of resources.

Independence

Following concerns expressed by the Commission in a letter of formal notice that ownership and regulatory functions were not adequately separated, the administration of the ownership of the former incumbent was transferred from the Ministry of Transport and Communications to the Ministry of Trade and Industry as of 1 October 2005.

Decision making

FICORA was the first NRA to notify draft decisions for all relevant markets in the Commission's Recommendation, with the notification of the relevant market for wholesale international roaming being submitted on 18 November 2005. A second round of analysis is currently being prepared. The administrative costs have been felt severely by the small, local, co-operatively owned fixed telephony incumbents, in particular in responding to consultations in the first round of market analysis. Such costs have also been a factor when such operators have considered whether to appeal market analysis decisions.

Appeals

Decisions on significant market power and regulatory remedies are appealed directly to the Supreme Administrative Court. While there have been few appeals of the market analysis decisions, the implementing decisions have been challenged to a greater extent. A common ground for appeals of FICORA's decisions has been that they are not motivated enough in detail. In October 2005, the Supreme Administrative Court overturned FICORA's decisions of February 2004 to assign significant market power-status in the call termination market to mobile network operators. While the Court decided that the overturned decisions must be adhered to until FICORA has taken new decisions, it considered that the decisions had failed to sufficiently assess all the factors which must be taken into account when considering whether the operators have significant market power. There are currently six appeals regarding the price ceiling on unbundled local loops based on the market analysis decisions, all of which have been suspended. In November 2005, the Court overturned two of FICORA's LLU price ceiling decisions on procedural grounds. The decisions must nevertheless be adhered to until FICORA has taken new decisions.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Competition/Market situation

Fixed call minutes in Finland appear to have decreased significantly over a two-year period, reducing the scope of business for alternative operators. Moreover, due to the geographically fragmented fixed-line market in Finland, it is difficult for alternative operators to establish and run their business nationwide. If alternative operators want full national coverage, they are forced to negotiate individually with local, co-operatively owned fixed telephony incumbents – a very resource-consuming exercise for smaller operators. Alternative operators have therefore tended to focus in particular on the capital city, a few other larger cities and to some degree the areas in the country served by the partly state-owned operator. In total, the market share of all incumbents by revenue of fixed calls was 95% at the end of 2004, compared to 93% one year earlier.

Carrier preselection

The main actors in the carrier pre-selection market are incumbents offering their services in other incumbents' areas. Most alternative operators have either exited Finland or been purchased by one of the main incumbent actors. However, there has been an improvement in carrier pre-selection take-up since the amendment of the Act on 1 March, 2005 to allow the regulation of wholesale termination from callers using carrier selection and carrier pre-selection. A not insignificant portion of all fixed-to-mobile minutes now come from carrier pre-selection users, and there are now several hundred thousand such contracts, having doubled in the first three months after the amendment. Retail prices for call to mobiles are significantly lower with carrier pre-selection than without.

Broadband Markets

Competition/Market situation

Finland has the third highest rate of broadband penetration among EU Member States with 21% using a broadband connection as of September 2005, as compared with a fifth place at 11% in July 2004. Services are relatively widely available but are on average not among the cheapest in the EU. Voice over IP using regular telephone numbers is used only by a few thousand households, but tens of thousands of businesses. In total, the market share of all incumbents of retail broadband connections in October 2005 were 67%, as compared to 72% in July 2004.

Local loop unbundling

The local loop market is shared between the three main incumbent actors with each controlling approximately one third of the local loops in Finland. The monthly rental prices for fully unbundled local loops continue to be around the EU average, while connection prices have decreased from last year but are still at the high end. Shared access prices for connection and monthly rental are both above the EU average.

Connection prices and periodical prices vary between geographical areas. Delivery times for unbundled local loops are still a problem with all operators with significant market power.

An additional one-time fee is frequently levied by the operator with significant market power for checking and ensuring the operability of the connection inside the building where the customer resides. According to an amendment to the Telecommunications Act in 1992, the local loop operator has no responsibility for the line inside the building where the customer resides, as the in-house line is owned by the property owner. Costs related to this part of the line are therefore not part of the local loop unbundling reference offer in Finland. The Commission services are looking into this matter.

In spite of the above, data for 2005 show that the number of unbundled local loops has grown rapidly. Wholesale xDSL/bitstream services are also growing, but to a lesser degree. Competitive operators in Finland seem to be investing in infrastructure in a way that is in line with the objectives of the regulatory framework for electronic communications. However, the six appeals regarding the price ceiling on LLU all of which have been suspended, risk not being settled for a considerable period of time. Wholesale bitstream access is relied upon to a lesser extent by operators, *inter alia* because they tend to use unbundling where they have their own core network.

There have been around ten court cases involving as many operators with significant market power regarding LLU connection charges and delivery times based on the first round of market analysis, none of which have yet been ruled upon approximately a year and a half after the appeals were lodged. All have been suspended, and the old LLU regulation prices remain in force in the meantime. The national competition authority has around 10 ongoing cases regarding local loop price squeeze.

Technologies

While many of the 37 small, local, co-operatively owned fixed telephony incumbents have cable-TV networks, some of them are still unidirectional and as such not upgraded for broadband communications. Some have invested in fiber networks – up to distributed points – which carry all types of electronic communications. However, the only large investment in cable-TV broadband access in Finland so far seems to have been made by the independent, non-incumbent-owned cable-TV operator in Helsinki.

Mobile Markets

Penetration

Finland's mobile penetration has grown from its already high level – to 98% in October 2005 compared to 94% in June 2004. Simultaneously, as a consequence of intense mobile call price competition, the migration from fixed to mobile has increased with a decrease in fixed subscriptions and an increase in calls from mobile phones.

Competition/Market situation

In June 2004, the largest mobile operator had a 46% share of the market for calls to mobile in terms of subscribers. Due to the confidentiality imposed on mobile market share data in Finland as of this year, no data can be made available for 2005, but it is

understood that this operator's market share has been increasing. There were 14 operators authorized to provide mobile services in all, whereof 11 service providers. However, the latter's combined share of subscriptions remains low. As a consequence of competitive results and following a veto from the Commission on an earlier draft decision, FICORA has decided that the market for wholesale mobile access and call origination is effectively competitive and therefore not subject to special obligations. However, it remains to be seen how the competitive situation will change with the absorption of the alternative operator with the only virtual mobile network by one of the main incumbent actors.¹²⁰ It also remains to be seen whether other virtual mobile network operators will be let in on the mobile networks. Finally, much also would seem to depend on the future of the 3G-licence which has been returned by an operator exiting the Finnish market.

Technologies (2G/3G)

While all licence holders have fulfilled the initial 3G-licence requirements, only two of the originally four licence holders have begun commercial 3G operations. Cooperation in mast sharing and co-location has worked sufficiently well. Whereas all subsidisation by operators of mobile phones is presently prohibited, a government bill is proposing to allow such subsidisation for 3G-phones.

A wireless broadband data communications licence for the 450 Mhz-band was granted on 22 June 2005. The rollout, using a wireless access technology¹²¹ and an IP-architecture, should enable the extension of higher-bandwidth services to more remote parts of Finland. As elsewhere, fixed wireless access has generally still had limited uptake. One of its main areas of usage has so far been the relay of traffic between mobile operators' base stations and the core network. Energy companies, traditional telecom operators and some others provide WiMax access in Helsinki and elsewhere. Some municipalities are planning or considering plans to offer free wireless access.

Mobile regulation

Against the background of increased direct competition between fixed and mobile voice calls, fixed network operators are concerned over an alleged mobile price-squeeze situation in that some fixed-to-mobile wholesale termination prices are higher than retail prices for mobile-to-mobile calls. The competition authority is also on its own initiative conducting an investigation concerning possible price squeeze related to mobile termination.

The Commission services continue to examine whether the Finnish legislation unduly restricts the NRA's ability to impose appropriate regulatory remedies as regards wholesale mobile call termination. While the Finnish Act has been amended to take account of the Commission's concerns, FICORA is still not able to impose a wholesale termination price on such calls from fixed to mobile networks which are not made using carrier selection or carrier pre-selection. The Commission has issued a *reasoned opinion* stating its position to this effect.

¹²⁰ The competition authority on 25 October 2005 cleared the acquisition. According to the authority, the purchase does not lead to the creation of a dominant position in mobile telephony services.

¹²¹ "Flash-OFDM".

FICORA is in the process of establishing a cost accounting methodology for mobile networks based on fully distributed costs. FICORA cannot impose a cost accounting methodology on an operator, in the sense that it is explicitly stated in the Act that an operator is free to choose its own cost accounting methodology. However, the authority has issued guidelines. The Commission services are examining the Finnish Act's compliance with the Directives in this regard.

Finnish spectrum policy is oriented towards technological neutrality with flexible usage requirements in licences. However, the sale of spectrum or secondary trading is so far not allowed in Finland. Administrative charges for spectrum management constitute one of the main sources of revenue for FICORA. Finland has favoured beauty contests over spectrum auctions as a way of promoting mobile services as being a component of the information society.

Market and Technological Developments

Finland is one of the European Union leaders in electronic communications usage. In 2005, the already ongoing consolidation trend accelerated. However, in large parts of the country the structure with small, co-operatively owned local fixed telephony incumbents remains, although these operators increasingly co-ordinate their activities. Larger Nordic or international operators are purchasing smaller operators. Many cable-TV networks, with the notable exception of the Helsinki area, are owned by the local fixed telephony incumbents and are not up for sale. Neither do there appear to be any discussions of consolidation within the group of small incumbents.

The Finnish market essentially has three main incumbent actors: the group of 37 small, local, co-operatively owned fixed telephony incumbents, the still partly state-owned operator whose fixed network serves *inter alia* Lapland, and the operator whose fixed network serves the capital and some other areas. Of these actors, each has one of the three existing mobile networks, nationwide trunk networks, and competes or aspires to compete against the others in the provision of fixed broadband.

The migration from fixed to mobile voice services – where consumers cancel their fixed-line subscriptions in favour of only relying on their mobile phones – is far advanced in Finland and has continued in 2005 *inter alia* as a consequence of mobile telephony price competition.

THE CONSUMER INTEREST

Number portability

Mobile number portability has continued to be a success in Finland with 2 774 000 ported numbers in total as of October 2005.

The take-up of fixed number portability has been significantly less successful than its mobile equivalent, although the latter has existed for much less time. The total number of fixed ported number continues to be relatively low, at 25 000 in October 2005. An obstacle was removed in March 2005 when the numbering database used by all operators was extended to covering fixed numbers.

Universal service

The Commission continues to be concerned about the automatic designation of operators with significant market power in the fixed telephony access market – alternatively the operator with the largest market share – as universal service operators. The Commission believes that Finland by this rule is *a priori* excluding others from the possibility of designation in conflict with Article 8 of the Universal Service Directive. It has therefore sent a *letter of formal notice* to Finland, stating its concern in this regard. The Finnish authorities have informed the Commission that preparations for the amendment of the legislation in question have begun.

Digital TV

Terrestrial digital TV is widely available, and could be received by at least 99% of the population at the end of 2005.¹²² More than one third of those who rely on terrestrial broadcasting as their principal means of receiving television broadcasts were using digital TV at the end of the year. The analogue terrestrial TV broadcasting network is scheduled for switch-off in the fall of 2007.

In the broadcasting transmission sector, the Finnish Ministry for Transport and Communications has notified digital terrestrial television transmission services, analogue terrestrial television transmission services, digital terrestrial radio transmission services and analogue terrestrial radio transmission services as relevant markets. It has designated a mainly private operator as having significant market power in all four markets. The main regulatory remedy imposed is a wholesale access obligation.

Must carry

The Commission services are examining whether Finnish legislation sufficiently defines the extent of must-carry obligations to meet the requirements in Article 31 of the Universal Service Directive. The issue is under further investigation.

Data protection

The Finnish data protection act is being reviewed by the ministry *inter alia* as regards the need to clarify parts of the legislation. The review includes examining the need to clarify the right of corporate customers to privacy of their internal communications over networks, such as virtual private networks. Rules may also be changed so that the government has the right of priority to mass-sending of SMS for information purposes during natural disasters and other crises. As for data retention rules, Finnish “log data” for billing purposes must be retained three months and may be retained up to three years, which is the maximum prescription time for claims on consumers.

¹²² Source: Ministry for Transport and Communications.

SWEDEN

INTRODUCTION

By November 2005, most of the first round of market analyses has been completed in Sweden. However, a majority of PTS decisions on regulatory remedies have been appealed, giving rise to significant legal uncertainty in several areas. As a consequence, the government is reviewing the regulatory decision-making process. The wholesale line rental reform seems to be successful. The regulatory situation with regard to interconnection charges for call termination in mobile networks is still unclear, pending appeals by SMP operators. Although the total average prices for unbundled local loops are above the EU average, LLU sales increased significantly while the wholesale broadband access market remained unregulated due to regulatory decisions suspended in court. Sweden, with one of the highest mobile penetration rates, enjoyed increasing mobile price competition and the wholesale mobile access and call origination market was determined effectively competitive. The migration from fixed to mobile services accelerated considerably. The consolidation trend in the sector increased. Operators tended to offer more bundled services in efforts to tie customers. The switchover to digital terrestrial TV is under way and should be finalised in 2007.

REGULATORY ENVIRONMENT

Legal framework, including transposition

In June 2005, the Swedish government submitted to Parliament a bill on the country's future IT-policy ("the IT-bill").¹²³ The bill is in large parts a strategic document, but also proposes some legislation, including minor amendments to the Electronic Communications Act, the main transposing instrument of the regulatory framework. Relevant parts of the bill are discussed in their topical context below.

The NRA

The Swedish NRA is *Post- och telestyrelsen (PTS)*, a government agency under the Ministry of Industry, Employment and Communications ("the Ministry"). The Ministry is also responsible for the state's holding, around 45 %, in the incumbent operator. Some concerns remain in the marketplace as to whether PTS has been given sufficient resources to deal with the market analyses and at the same time monitor the market and provide dispute resolution. However, key personnel have been recruited and the legal affairs department has been expanded in order to cope with the additional work-load. As most of the first round of market analyses has now been completed, there should be fewer grounds for resource concerns.

¹²³ Regeringens proposition 2004/05:175 Från IT-politik för samhället till politik för IT-samhället.

Dispute resolution

Some criticism nevertheless remains regarding the time it takes for PTS to solve disputes between operators. According to PTS, 80 % of dispute resolution decisions in 2004 were taken within 4 months from the date when the request first was received. However, based on *inter alia* the wording in the preparatory works of the Electronic Communications Act, PTS considers that the required 4-month timeline starts only when the agency has received all necessary information from all parties, rather than when the request for dispute resolution is lodged. The Commission services are looking into this matter.

Decision making

As PTS is engaged in the process of defending its decisions from the first market analysis round in court, it has not regarded the start of a second round of market analysis as urgent, and has as of yet no fixed timetable for such a process. However, preparations for a second round started in the autumn of 2005 in the form of pre-studies on specific issues such as substitution between traditional fixed, mobile and IP-telephony. The pre-studies will form a methodological basis for the second round of market analysis.

All market analyses required under the new EC regulatory framework, except those for the markets for leased lines trunk segments and for wholesale mobile international roaming, have been completed by PTS. A majority of PTS decisions on regulatory remedies has been appealed by at least one of the interested parties (see also Appeals below). 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 former legal obligations under the old regulatory framework cease to exist, was still at the end of 2005 a matter of some concern. By that time, the market for leased lines trunk segments had still not been notified to the Commission in accordance with Article 7 of the Framework Directive. In July 2005, the Commission issued a *reasoned opinion* stating its position that the Swedish transitional arrangements are not in line with Directives of the framework, which lays down that Member States shall maintain the obligations of the old framework until such time as a determination is made of those obligations by a national regulatory authority on the basis of the new framework.

Appeals

The most serious challenge to achieving the goals of the regulatory framework in Sweden is the functioning of the appeal process. There appears to be agreement amongst nearly all operators – combined with a shared concern regarding the understanding of the issues by the courts – that the appeal procedures take too long and result in significant legal uncertainty to the point of calling into question the functioning of the marketplace. Since the transition to the new Electronic Communications Act, there has been a tendency to systematically appeal decisions based on the new legislation. In the case of each relevant market, PTS's decisions on remedies, compliance control and dispute resolution¹²⁴ respectively can be appealed to two or three court instances. No fast-tracking or priority mechanism is available. Between 2003 and 2004, the number of pending court cases

¹²⁴

However, the question whether dispute resolution decisions can be subject to stay of execution is subject to trial in the Supreme Administrative Court.

concerning PTS decisions more than doubled, while the number of judgements in such cases increased to a lesser degree. There are still no judgements regarding PTS decisions on regulatory remedies based on market analysis according to the new Act. While several such appealed decisions stand – and can therefore be enforced – the prospect of a possible negative court decision creates enforcement problems.

The cases where stays of execution have been granted, such as regarding the cost calculation of termination and the regulation of wholesale broadband access, are causes for yet more serious concern. In such cases, there is a risk that legal uncertainty will prevail for years while the appeals are processed in the courts. As a consequence, operators do not know what to pay one another for interconnection, and must accrue funds of significant proportions in case a court decision would be retroactive to their disadvantage. Several operators have indicated that the resulting legal uncertainty in the Swedish marketplace has had a directly negative effect on investments.

The government has appointed an investigatory committee to evaluate the decision-making process according to the Electronic Communications Act and propose measures to make it more efficient. The investigation will *inter alia* take into account an earlier proposal to have PTS decisions on regulatory remedies appealed to the Swedish Market Court, which currently handles competition law cases. The assignment also calls for an analysis of the distribution of responsibilities between national authorities and suggestions for any necessary changes. In addition, the committee will submit proposals for legislative amendments that would follow as a result of its findings. All proposals are to be submitted by 15 June 2006.

There still appear to be doubts as to the rights of third parties to appeal decisions of the NRA. The Commission services are examining whether the extent of persons which according to general administrative procedural law are entitled to appeal is narrower than the extent according to Article 4 of the Framework Directive, as there are no specific provisions specifying the scope of appeal as regards decisions taken on the basis of the Electronic Communications Act.

Spectrum management

PTS has initiated a dialogue with interested parties in order to develop a future strategy for spectrum licence allocation, including the scope for technology neutrality and spectrum trading. According to the IT-bill, technology neutrality should generally be pursued in the radio communications sector, *inter alia* when allocating frequencies. The bill also refers to the needs of individuals and the industry as well as EU- and international efforts in this area.

The government has commissioned PTS to investigate the spectrum implications of the terrestrial digital TV switchover (see below). The investigation includes the amount of spectrum that will be released by the switchover and what types of use can be foreseen for that spectrum. The investigation shall be concluded by 1 September 2006.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Wholesale line rental (WLR) was launched by the operator with significant market power on its own initiative in the autumn of 2004, by which time it was also clear that PTS was considering an obligation to provide such a product. A decision to that effect was taken by PTS in February 2005, followed by a still ongoing process to determine the correct price. The WLR reform seems to be successful. Already before PTS decision on WLR was taken, the incumbent's wholesale product was being purchased by alternative operators. On the basis of the available product, retail subscription products from alternative operators have had significant take-up. Consumer complaints related to *inter alia* incorrect registration ("slamming") or delayed registration of WLR echo similar problems in relation to the provision of carrier pre-selection. The latter now seem partly to have been resolved.

The percentage of subscribers using an alternative provider for direct telephony access – normally IP telephony through cable-TV and new local area networks – increased from 1% in July 2004 to 2.2% in September 2005.

On 28 October 2005, the Swedish competition authority challenged the fixed telephony incumbent operator in court for abuse of a dominant position. The authority considers that the operator has selectively applied more attractive conditions for those households who cancelled the operator's fixed telephony subscription in favour of a competitor's subscription services, with the intent to lure such customers back to the operator's own services.

Broadband markets

Seen over a longer period of time, Sweden's broadband penetration growth has slowed down in comparison with other countries. Previously one of the world's frontrunners in broadband uptake, the country has seen its position somewhat slide globally and within the EU over the last few years. 20% of Swedes were nevertheless using a broadband connection in October 2005, maintaining Sweden's fourth place within the EU from the year before, when its penetration was 12%. Services are relatively widely available and tend to be highly advanced and high-speed. The incumbent's market share of retail broadband connections in October 2005 was 36%, as compared with 40% in July 2004.

Local loop unbundling

The Swedish connection prices for fully unbundled loops have decreased, but remain among the highest in the EU. The monthly rental price continues to be around average. Connection prices for shared access have decreased and are now around the EU average, whereas the monthly rental price is still above average. 2005 figures clearly show that wholesale xDSL/bitstream services, in spite of significant retail growth, are not growing. Instead, LLU sales are increasing significantly. Alternative operators in Sweden seem to be investing in infrastructure in a way that is in line with the objectives of the regulatory framework for electronic communications. In December 2005, PTS published a report on the competition situation in different stages of the broadband access value chain, pointing to the importance of bitstream access for retail competition in the significant number of

exchanges where investment in ULL is not as commercially feasible due to *inter alia* the size of the exchange.

Bitstream access

However, the wholesale broadband access market so far remains unregulated, as PTS' decision on the wholesale broadband access market has been appealed and suspended. Additionally, it has taken the national competition authority approximately three years of investigation to decide in 2005 to take the operator with significant market power to court for alleged abuse of a dominant position by way of a price squeeze on xDSL services. There is concern among fixed network alternative operators that the operator with significant market power is able to discriminate more freely than before in the provision of wholesale broadband services while the NRA's decision is in court. The increased reliance on LLU may therefore partly be a consequence of the "legal vacuum" in the wholesale bitstream access market.

Meanwhile, in order to enable "naked DSL", PTS has ordered the operator with significant market power to comply with the prohibition against the bundling of retail or wholesale broadband access with fixed retail telephony subscriptions. The prohibition is based on one of the incumbent's obligations in its capacity as operator with significant market power in retail fixed telephony access.

Additionally, PTS has taken action in a number of non price-related access network matters such as concerning non-price discrimination and the provision of information.

Technologies

The uptake of fixed wireless access is increasing. Whereas the relay of traffic between mobile operators' base stations and core networks was previously its main scope of application, fixed wireless access is now increasingly being used to provide broadband services.

Mobile Markets

Penetration

With one of the highest mobile penetration rates in the EU, Sweden has nevertheless seen a slow-down of mobile penetration growth in 2005 – at 101%^{125 126} in October 2005 – as the market has become more mature. Simultaneously, as a consequence of fierce mobile call price competition, the migration from fixed to mobile has taken off with decreasing fixed subscriptions and an increase in calls from mobile phones. An important reason for the intense mobile telephony price competition seems to have been the new 3G entrant's wish to gain market share partly through offering low voice call prices.

¹²⁵ The above 100 % figure may be due to *inter alia* the use of separate mobile numbers for business purposes and machine-to-machine communication. See also footnote 3.

¹²⁶ The definition of pre-paid active subscribers has changed resulting in a 20% reduction compared to previous years.

Competition/market situation

In June 2004 the largest mobile operator had a 45 % share of the market for mobile telephony¹²⁷ in terms of subscribers. Due to the confidentiality imposed on mobile market share data in Sweden as of this year, no data can be made available for 2005. There were 24 operators authorised to provide mobile services in all, whereof 20 service providers. However, the latter's combined share of subscriptions remains low. As a consequence of the general development in the retail market, PTS has concluded that no operator had significant market power in this market.

Technologies (2G/3G)

According to a March 2005 PTS survey, UMTS coverage was around 85% of the population for all four network operators. In 2005, PTS investigated the feasibility of alternative technologies, such as CDMA2000/450, for the continued roll-out in order to fulfil the coverage requirements in the licences. This investigation was connected to the investigation into a possible extent of the deadline for covering the equivalent of ca 98% of the population by all operators, which according to the original licence conditions – reflecting the promises of the applicants – was to have been achieved by 31 December 2003. On 14 October 2005, PTS determined that alternative technologies did not provide acceptable substitutes for UMTS networks. It also foresaw ordering licensed operators in the spring of 2006 to finish the network build-out under threat of penalties. Following an auction, PTS in March 2005 granted a licence for the build-out of “digital 450” mobile telephony on technologically neutral conditions, replacing the analogue NMT 450 network run by the incumbent. According to the licence conditions, 80% of the geographical area in each county shall be covered as of 1 July, 2007. The build-out, when realised, could further reduce the need for universal service regulation of basic telephony and Internet access.

Mobile regulation

The regulatory situation with regard to interconnection charges for call termination in mobile networks is still unclear due to pending appeals by the SMP operators. The principal example of lengthy appeal procedures regarding interconnection prices in Sweden is the “cascade case”. Originally the subject of dispute resolution related to the transfer of traffic, “cascading”, through the incumbent's network from various fixed to mobile operators, the mobile termination rates have been subject to continuous litigation since the year 2000. As a consequence, accumulated claims in mobile termination litigation under the old telecoms legislation now amount to hundreds of millions of euros.

An investigation into problems with cooperation amongst operators regarding co-location in mobile masts resulted in a law proposal in November 2005 to further sharpen the rules on mast space sharing in relation to protecting the environment, public health or public security.

¹²⁷ Excluding analogue services.

Market and Technological Developments

In 2005, the already ongoing consolidation trend accelerated. It is mainly a question of larger, international groups purchasing smaller, national or local operators.

There has been an increased tendency of vertically and horizontally integrated operators to bundle services in efforts to tie customers more strongly to the own company. An example in the business segment is the bundling of virtual private networks and mobile access, whereas a consumer example is the emergence of “triple play” (TV, Internet and telephony) or “quadruple play” (including mobile access).

Many electricity network operators commercially provide electronic communications services, some of them owning relatively extensive local or regional electronic communications networks.

The migration from fixed to mobile voice services – where consumers cancel their fixed-line subscriptions in order to rely only on their mobile phones – accelerated considerably in 2005 *inter alia* as a consequence of mobile telephony price wars. The migration tendency away from fixed telephony subscriptions could be reinforced by the possibility of having an xDSL connection without such a subscription. The operator with significant market power is prohibited by PTS from bundling retail or wholesale broadband access with fixed retail telephony subscriptions. However, the decision to enforce this prohibition has been appealed and suspended by the court.

THE CONSUMER INTEREST

Universal Service

On 19 August 2005, PTS designated the fixed network incumbent as universal service provider for connection at a fixed location to the public telephone network, including functional access to the Internet. For the purposes of the universal service obligation, the government has determined that functional Internet access is at least 20 kilobits per second in both directions. The brief motivation in the public document laying down the decision cites a lack of commercial interest in providing connections at a fixed location to the public telephone network due to high buildout costs in sparsely populated areas. The fixed network incumbent has appealed the decision, citing *inter alia* the lack of need for such regulation due to the buildout of competing wireless voice and high-speed data networks. The PTS decision has been suspended by the court.

Digital TV

Digital terrestrial TV was available to 98% of the population in November 2005.¹²⁸ Prices for set-top boxes necessary for the reception have declined significantly and are as a consequence now widely available at a moderate cost. A gradual phasing out of the analogue terrestrial network has already begun in 2005 – some areas no longer being served by analogue terrestrial transmissions – and will according to the plan be finalised in 2007 when 99.8% of the population is to be covered by digital terrestrial TV.. A report

¹²⁸

Source: Teracom.

from the Radio- and TV authority highlights the problem with proprietary standards in application program interfaces (APIs, platforms for interactive television services) and electronic programme guides (EPGs). The report stresses the need to promote one common industry standard (MHP), and the increased urgency of doing so with the terrestrial digital switchover already being under way.

PTS has defined three relevant broadcasting markets in which lacking competitive conditions warrant the introduction of regulatory remedies: analogue terrestrial television broadcasting, digital terrestrial television broadcasting, and analogue terrestrial radio broadcasting. It has proposed *inter alia* access obligations subject to cost-oriented prices for the designated operator with significant market power. Sweden has only one, state-owned provider of digital terrestrial transmission services. According to the digital broadcasting licence conditions, licence holders must purchase the state-owned operator's multiplexing service – a crucial element of digital broadcasting where signals from several TV channels are collected and mixed into one signal, which is separated at the receiving end – unless they use all the transmission capacity in one frequency channel.¹²⁹ In addition, licence holders must purchase the signal encryption/decoding system services¹³⁰ – which enable access to encrypted program content and services – by a subsidiary of the state-owned provider. The Commission has taken the preliminary view that these arrangements de facto confer exclusive or special rights upon the state-owned operator. Therefore, the Commission sent a letter of formal notice to the Swedish government on 12 October 2005, stating its concerns that Swedish regulation is in breach of the Competition Directive in this respect.

Must carry

In Sweden, the must-carry regime (as set out in the Swedish Broadcasting Act) applies to two public broadcasters and one private broadcaster and requires that certain general conditions are met. However, the question remains whether general interest objectives are clearly defined.

As analogue terrestrial broadcasts will be phased out, the regulation concerning must carry obligations was revised in 2005 in order to adapt it to the fact that all terrestrial broadcasts will be digital. The revised rules in particular clarify that the must-carry obligation is conditional upon conformity with conditions in immaterial rights legislation for re-transmission. The situation seemingly only concerns cable-TV operators in Sweden, since satellite and xDSL transmissions of TV channels are so far exempt from must-carry rules. Intellectual property rights organisations have earlier refrained from claiming compensation for such retransmission, but have announced that they will do so in future. Cable-TV operators are concerned that this in practical terms will mean that they will have to pay intellectual property rights compensation related to the broadcasting of certain channels, while according to the must-carry rules not being able to charge end users for such channels. In the light of this, the Commission services are examining Swedish must-carry conditions as to their conformity with Article 31 of the Universal Service Directive.

¹²⁹ To date, no broadcaster does so. . All multiplexing services are therefore undertaken by the state operator.

¹³⁰ SMS/SAS services.

UNITED KINGDOM

INTRODUCTION

The regulatory landscape in the United Kingdom has been dominated over the last year by Ofcom's Telecommunications Strategic Review, the outcome of which has been generally welcomed by the market. Underlying the settlement reached with the fixed incumbent is the understanding that de-regulation will follow, once competing operators obtain true equality of access to the "enduring economic bottlenecks" in the fixed network, on the basis of the incumbent's undertakings. However, the detailed implementation of the undertakings is still under way and the effects of the regulatory settlement therefore remain to be seen.

Ofcom has been pro-active in addressing new technological and regulatory challenges (e.g. next generation networks and VoIP) in a timely fashion, while there is still a chance to determine the outcome. At the same time it has continued to address ongoing regulatory matters in a thorough and authoritative manner (for example by deepening its analysis of the cost of the incumbent's copper local loop, the cost of capital, and the fitness for purpose of key wholesale products).

The United Kingdom regulatory experience shows the benefits that can flow from an approach which combines hard law such as SMP obligations with more consensual mechanisms such as codes of practice, voluntary commitments and industry consultative bodies. The Telecommunications Adjudicator, working towards effective processes for LLU, is one clear example of this.

Against this regulatory background, the communications sector has shown particular dynamism in the broadband and mobile markets. This is reflected in intensified M&A activity, showing a trend towards consolidation, with market players positioning themselves to offer converged services such as the triple play of telephony, Internet and audio-visual services.

A range of operators have announced increased investment in LLU, suggesting that a move up the "ladder of investment" is under way, even if these investments have not yet fed through to mass migration to LLU products. At the same time, as convergence becomes a reality content services are becoming increasingly important, with new content-related services being trialled, both on fixed and mobile platforms.

As retail competition has intensified, giving rise to greater consumer choice, higher quality and lower prices, so inevitably have consumer-related issues such as mis-selling, pricing transparency, abuse of the premium rate pricing mechanism and misuse of the networks (e.g. silent calls), which have needed close supervision by the regulators.

REGULATORY ENVIRONMENT

Legal Framework, including transposition

The national legal framework transposing the EU regulatory framework is substantially in place, through the Communications Act 2003 and its implementing measures. Ofcom has completed the first round of market analysis and review of existing obligations, with the exception of the wholesale national market for international roaming on public mobile networks. Consequently all transitional obligations, imposed by means of “Continuation Notices” under the Communications Act, have now been withdrawn and replaced where appropriate with obligations following market analysis.

The NRA

Powers and objectives

As a converged regulatory authority with responsibility for oversight and regulation of both electronic communications networks and services on the one hand and broadcasting on the other, Ofcom has one of the widest ranges of powers and responsibilities of any regulator within the EU. While its dual responsibilities are clearly delineated within its internal structures, this broad remit is generally seen to offer a coherent and inclusive approach to the phenomenon of convergence and the resulting challenges for the industry. It has also given it an authoritative voice whose independence from vested interests or political interference has not been seriously questioned.

Ofcom published a number of important forward-looking policy documents in 2005, including proposals relating to: (i) the acceptance by Ofcom of structural and governance undertakings offered by the fixed incumbent, in lieu of a reference to the Competition Commission under the Enterprise Act 2002 (which could have resulted in full structural separation of its wholesale and retail businesses); (ii) Ofcom’s revised approach to the issue of undue discrimination by SMP operators; (iii) Ofcom’s intentions with regard to broadband regulation; (iv) the future regulatory treatment of next generation networks; and (v) Ofcom’s conclusions on its review of the Universal Service Obligation.

Ofcom’s Telecommunications Strategic Review

Much of the focus of regulatory activity and public debate in 2005 centred on Ofcom’s Telecommunications Strategic Review, the key outcome of which was announced on 22 September, following a public consultation on Ofcom’s proposed approach published in June.

At the core of Ofcom’s thinking in the review was the conclusion that the incumbent’s position as a vertically integrated fixed network provider and its enduring dominance in many of the fixed telecoms markets gave the incentive and ability to engage in discriminatory behaviour favouring its own downstream business over the business of its competitors. This was particularly a problem in relation to those enduring economic bottlenecks where replication of the fixed incumbent’s network is not practicable, and where accordingly other operators must rely on the incumbent for the provision of wholesale access products. Ofcom further reasoned that even where the prices and

conditions for those products are subject to *ex ante* regulation (following a finding of dominance) the scope remains for non-price discrimination, through practices and processes that put alternative operators at a disadvantage. Ofcom stated its belief that the incumbent had acted in accordance with those incentives to discriminate in the past, with a consequential effect on competition.

It therefore considered that the most effective solution for this enduring competition problem was a structural one, involving the separation of those key access products from the rest of the incumbent's business, so that they could be provided to its competitors and its own downstream business on genuinely equivalent (and wherever possible identical) conditions. This proposed solution therefore took the form of the structural and behavioural undertakings offered by the incumbent under the Enterprise Act, which came into effect on 22 September 2005. Ofcom considered that the undertakings offered were sufficient to address the problems they had identified in the market, and that it would therefore not be proportionate to break up the fixed incumbent at this time.

The fixed incumbent's undertakings following the Strategic Review

These undertakings fall into five basic categories: (i) the establishment by the incumbent of a separate Access Services Division (ASD), to be called 'openreach', to provide specified wholesale access products and services to other operators and its own downstream businesses, under conditions which ensure its independence within the group; (ii) the provision of specified wholesale products under conditions of "equivalence of input", involving the same timescales, terms and conditions (including price) and the same systems and processes applicable to all; (iii) other organisational commitments, e.g. governing Chinese walls between the retail and the remaining wholesale activities; (iv) undertakings relating to the design of the incumbent's planned next generation core network, intended to ensure non-discriminatory access for other operators and a smooth transition from existing services; and (v) the establishment of an Equality of Access Board, a new internal compliance board to monitor compliance with the undertakings and to make recommendations on remedial action.

It should be noted that the legal basis for the undertakings, the Enterprise Act, is a national competition law instrument, and that the undertakings do not affect the validity or continuing application of the obligations imposed on the incumbent under the Communications Act by virtue of its SMP. The Commission will continue to monitor carefully the implementation of the undertakings, and the manner in which they inform future market reviews by Ofcom, with a view to ensuring their continued conformity with the EU regulatory framework.

Decision making

While the initial market reviews required by the EU framework were already largely completed at the time of publication of the 10th Report, Ofcom has continued to take decisions in the implementation of its obligations under the EU framework to review relevant markets and decide on appropriate measures to be applied as a result of its findings.

In particular it completed and notified the results of its review of the broadcasting transmission services market and adopted the final measures related thereto in April

2005. The only relevant market identified in the Commission's Recommendation on relevant markets that remains to be reviewed and notified to the Commission is the wholesale national market for international roaming.

In addition Ofcom has conducted further reviews of certain relevant markets where it considered this appropriate. For example its second review of the markets for local-tandem and inter-tandem conveyance and transit on fixed public narrowband networks resulted in the withdrawal of obligations in the inter-tandem market in August 2005, on the basis that it was now effectively competitive.

Ofcom has also taken or proposed a number of decisions which supplement or modify obligations imposed in earlier market reviews, such as in relation to the rental price for fully unbundled local loops, changes to regulatory financial reporting obligations or the extension of obligations on operators with SMP in the market for voice call termination on individual mobile networks.

Ofcom has also developed its policy in a number of key areas, in a way that underpins and gives authority to its decisions when setting SMP conditions. For example it completed a detailed assessment of the cost of the fixed incumbent's copper access network and its cost of capital. Another key statement of policy with ongoing implications for Ofcom's enforcement activity is its revised approach to the issue of undue discrimination by SMP operators. This makes clear that in future, where obligations of non-discrimination are imposed on an SMP operator, the provision to others of products or services on different non-price conditions to those which it affords its own business will need to be justified.

Appeals

The body that hears appeals against Ofcom decisions, whether under the Communications Act or its competition law powers, is the Competition Appeal Tribunal (CAT). There have been relatively few appeals to date against decisions by Ofcom.

A judgment by the CAT in the appeal by one of the mobile network operators against Ofcom's finding that it had SMP in the market for termination on individual mobile networks was issued at the end of November 2005. The CAT found that Ofcom did not adequately consider whether the fixed incumbent exerted countervailing buyer power against the (new entrant) mobile operator, and sent the case back to Ofcom with an instruction to re-consider countervailing buyer power in its SMP analysis. An appeal is also pending before the CAT against a decision concerning the fixed incumbent network operator's residential broadband pricing.

Concerns have been expressed as to the length of time that appeals before the CAT have been taking to reach a conclusion. In some cases appeals result in the remittal of a decision to Ofcom, whose subsequent decisions may in turn be appealed. Smaller operators are also concerned about the costs involved in launching an appeal and say that this can act as a disincentive. While the CAT has some discretion when deciding on the apportionment of costs and can take the financial resources of appellants into account, this remains an ongoing concern.

The CAT has in fact established the principle that in appeals against regulatory decisions the normal rules regarding the imposition of costs (whereby the unsuccessful party bears the successful party's costs) will not necessarily apply.

Dispute resolution

Ofcom has reported a significant rise in the number of complaints and disputes referred to it and a corresponding increase in the number of investigations opened. It has also made clear it will only accept disputes supported by evidence of the failure of meaningful commercial negotiations. Ofcom is conducting an internal review into the way its Investigation Programme operates and intends to announce any required changes in the first quarter of 2006.

In 2005 Ofcom published its first review of the independent dispute resolution procedures (ADR) which every public communications provider is required to provide for its domestic and small business customers. The Communications Act requires Ofcom to undertake periodic reviews of the procedures it has approved in accordance with certain criteria laid down in the Act. The two ADR services approved by Ofcom are the Office of the Telecommunications Ombudsman (Otelo) and the Communications and Internet Services Adjudication Scheme (CISAS).

Spectrum management

Ofcom has over the last year pursued its plans for liberalisation of spectrum use and the introduction of spectrum trading. While tradability has been introduced in a limited number of spectrum bands, the actual exercise of trading rights has up to now been very limited.

Rights of way and facility sharing

In comparative terms the issue of the time taken in obtaining permits for mobile masts and antennas would appear to be less of an issue than in some other Member States, no doubt partly due to the fact that operators can benefit from streamlined procedures if the infrastructure concerned meets certain pre-defined criteria. Also, operators have signed up to a voluntary code of practice whereby they have agreed to address local concerns about the siting of masts through consultation.

The system of commercial taxation applicable to business property in the United Kingdom (business rates) has given rise to a complaint that the different methodologies applied to value the communications infrastructure of the fixed incumbent and of other operators for the purposes of this tax may have discriminatory effects. The Commission is currently investigating this issue under the state aid rules.

REGULATORY AND MARKET DEVELOPMENTS

Fixed Markets

Ofcom have reported¹³¹ that overall fixed-line call revenues in the United Kingdom continued to fall in the year ending March 2005, and have attributed this decline to increasing price competition, particularly from carrier pre-selection, as well as the growing use of non-geographic numbers by business customers and the trend towards packages which include varying levels of voice calls within the monthly subscription.

It is noteworthy that the United Kingdom has the lowest interconnection charges in the EU for call termination on the incumbent's fixed network at both the local and single transit levels, and the second lowest such charges at the double transit level. This can be attributed, at least in part, to the consistent application of remedies for SMP in the fixed interconnection markets associated with the application of sophisticated cost-orientation methodologies.

The incumbent's market share (by revenues) stands at 51%, which is the lowest in the EU, down from 63.7% in 2004. The number of operators with a combined 90% market share of fixed calls in 2005, is among the highest in the EU. Carrier pre-selection (CPS) is now a major feature of the market for fixed services in the United Kingdom, with Ofcom reporting that at August 2005 the number of CPS lines now represented over 15% of all UK exchange lines. The number of CPS subscribers now exceeds 5.5 million. In August 2005 Ofcom issued a decision further reducing the charges for CPS. The rise in popularity and use of CPS has brought with it an increase in the churn rate for subscribers and a corresponding number of complaints and allegations of misselling. For details of Ofcom's response to this issue, please see under the Consumer Interest below.

While the take-up of wholesale line rental (WLR) products is less advanced than that of CPS, there are real signs of growth in this area also, with nearly 2 million WLR lines in operation. On 9 November 2005 Ofcom issued proposals to reduce the charge ceilings for certain categories of WLR to reflect the outcome of its reviews of the cost of the incumbent's copper access network and of the cost of capital. Ofcom also issued a consultation document in October 2005 proposing that the WLR product should be declared "fit for purpose", in which case a relaxation of retail price controls would occur from December 2005.

Charges for the range of leased lines categories subject to regulation tend to be well below the EU average for reporting Member States, whereas one-off charges tend to be comparatively higher.

In view of the state of development reached in the CPS, WLR and leased lines products provided by the incumbent fixed operator as a result of its SMP obligations in the relevant wholesale markets, Ofcom launched a series of consultations in July and September 2005 on whether or not the retail business calls, exchange lines and leased lines products offered by the incumbent were now replicable by competitors. It indicated that if certain specific improvements were made in the provisioning of those products, so

¹³¹ The Communications Market, August 2005 Quarterly Update

that replicability existed, then a lifting of some of the pricing obligations imposed on the incumbent in relation to the provision of retail business calls could take place. No final decision has yet been announced on this issue.

Broadband Markets

The increased growth in broadband lines has been one of the main success stories, with a total of 8 943 019 broadband lines in operation at 1 October 2005, an increase of 70% over the previous year. According to Ofcom the number of broadband lines now exceeds those using dial-up Internet. By the summer of 2005, 99.6% of the population fell within the area of a broadband-enabled exchange.

The incumbent fixed network operator has only a 25% share of the total fixed broadband retail market, the lowest in the EU. This is due partly to the presence of a significant cable broadband offering, representing most of the 28% of fixed broadband retail lines provided by non-DSL technologies, as well as the large take-up of the incumbent's wholesale bitstream (DataStream) and resale (IPStream) offerings.

The broadband sector has also been undergoing a process of consolidation over recent months, often with a view to enabling operators to attain the scale and range needed to permit a triple-play offering. Convergence is therefore now acting as a real catalyst in the broadband market. The announcement in October 2005 of the merger of the two main cable operators should also increase the scope for broadband infrastructure competition.

Local loop unbundling, on the other hand, is still at a relatively low level by comparison to other access methods. At 1 October 2005 there were 110 827 unbundled lines (with fully unbundled lines now slightly exceeding the number of shared access lines). However, the reductions in the LLU charges introduced in conjunction with Ofcom's review of the wholesale local access market, together with the work of the Telecommunications Adjudicator on the detailed processes required to ensure provisioning of LLU on a mass-market basis and a renewed sense of commitment from the fixed incumbent (including further price reductions announced in November 2005), appear to have strengthened confidence in this market and demand for LLU products is growing. Indeed, a number of fixed operators have announced their intention to make significant investments in local exchanges to take advantage of the offerings now available. Nevertheless, the number of bitstream access (DataStream) lines, standing at 717 736 in October 2005, was still significantly higher than the number of unbundled lines.

The fixed incumbent's resale product, IPStream, is not subject to SMP obligations, and therefore concerns have been expressed over the risk that alternative operators who use this facility, which still represents the largest share of the wholesale broadband access market, will be subject to price squeeze as the prices for downstream access products (such as LLU) go down. However, margin stability for IPStream has been addressed through voluntary commitments on the part of the fixed incumbent. This issue also highlights the importance of ensuring that bulk migration of customers from one broadband product to another can take place in an efficient manner. In this regard the Key Performance Indicators which Ofcom has required the relevant SMP operators to publish regarding the provision of regulated products are an important tool.

Mobile Markets

The United Kingdom mobile market is characterised by the presence of five mobile network operators and a large number of service providers and MVNOs. The rate of churn is high and much of the mobile operators' efforts are devoted to customer retention. Growth in mobile revenues has outstripped any other sector in the communications market, with Ofcom reporting a 17% increase in the year to March 2005. While the official mobile penetration rate stood at 103% in July 2005, Ofcom estimates from research that actual adult penetration of mobile services was around 80% (Q1 2005) and that consequently a significant number of subscribers have more than one subscription.

While 3G services have not grown as quickly as may have been expected, there is an increased focus by operators on new services and applications, such as music, ringtones and wallpaper downloads. One operator has launched an i-mode service to provide enhanced mobile Internet access, and a number of operators are engaged in trials of mobile television.

The regulatory conditions for mobile operators have been relatively stable, after Ofcom's finding in October 2003 that the market for mobile access and call origination was effectively competitive and its imposition in June 2004 of SMP obligations in the markets for mobile call termination. In June 2005 Ofcom announced its intention to prolong the charge controls imposed on the four 2G network operators, which were due to expire on 31 March 2006, until 31 March 2007. By that date, Ofcom expects to have finalised a new round of market analysis.

Having ruled that the commercial operation of mobile gateways (which convert fixed calls into mobile calls, thereby offering the benefit of lower on-net termination rates) was illegal under current national legislation, Ofcom has consulted the market on their future regulation. A decision on how to proceed is awaited, and the Commission will consider Ofcom's conclusions in the light of the requirements of the EU framework.

Market and Technological Developments

As indicated above, convergence is beginning to have a strong impact in shaping the United Kingdom communications markets, with consolidation taking place in order to enable operators to provide a complete package of communications services, covering voice telephony, Internet access and audiovisual content, be it by cable, DSL or other means. VoIP services have been growing, particularly in the corporate market, but with the rapid expansion of domestic broadband connections, the prospects for significant growth in residential VoIP are also good. Ofcom have attempted to facilitate the development of VoIP by making geographical numbers available for these services.

Another example of convergence is the launch by the incumbent fixed operator in the summer of its Fusion service, which enables subscribers of the incumbent's mobile offer to make calls with their mobile handset at cheaper fixed rates over a wireless link to their BT Broadband connection (VoIP) when in the immediately vicinity of their home. Other operators are gearing up to provide similar services.

A major investment commitment has been made by the fixed incumbent to upgrade its core infrastructure over the coming years under its next generation network (NGN) programme, so as progressively to replace the PSTN with an IP-based network. In turn other fixed operators have announced their intention to invest in NGN technologies to varying degrees. Ofcom has sought to address the need of all operators for transparency and predictability as to the future regulatory landscape for NGNs, both by means of the incumbent's undertakings and in its own statements on future policy towards broadband regulation. A key element is the identification by Ofcom of the regulatory principles that will apply as future NGN infrastructure and products are developed. Another key role is played by the consultative bodies that have been established or confirmed by the Review and are designed to provide all communications providers with visibility as the changes take place that will impact their own investment plans. Ofcom plans to look at NGNs Access as a follow-up project to the Strategic Review.

While the practical implementation of the outcome of the Strategic Review is still to come, it would appear that in broad terms the industry considers that the right questions have been addressed and there is a degree of confidence that the structures and resolve exist to achieve sustainable competition.

THE CONSUMER INTEREST

Tariff transparency

Ofcom has promoted price transparency for consumers through its "Ofcom Price Assurance Standard" (Ofcom PASS); any website providing price comparisons which displays the Ofcom PASS logo certifies its compliance with a code of practice designed to ensure independent, accurate and up-to-date price information.

Universal Service

Parallel to its Telecoms Strategic Review, Ofcom conducted a review of the universal service obligations (USO). This concluded that there is no case for extending the scope of the USO to cover broadband or mobile services at this stage. Certain detailed legal changes were proposed to the USO however, such as in relation to the provision of public call boxes and a new scheme for those on low incomes, to ensure affordability for those in real need (as opposed to, for example, owners of second homes who could benefit from a low user tariff). Certain changes were also proposed to improve transparency and accountability of services available for customers with disabilities.

Ofcom also concluded that for the moment no undue financial burden was borne by the universal service provider and that consequently no funding mechanism needs to be activated. However, it intends to carry out a further analysis once the changes to the USO have been introduced.

The Commission is concerned that the apparent absence of mobile numbers from directories in the United Kingdom is incompatible with the requirements of the Universal Service Directive.

Number Portability

In the course of a dispute resolution in 2005 Ofcom found that the fixed incumbent was not required by currently law to port geographic numbers to a mobile operator. Therefore, having considered whether current rules for number portability were consistent with technological and service developments; Ofcom's policy on the allocation of geographic numbers for mobile services; and Ofcom's numbering policy for new voice services, Ofcom proposed in November 2005 to modify the number portability rules to enable geographic numbers to be ported between platforms, including fixed and mobile.

Digital TV

In September 2005 the United Kingdom authorities confirmed that analogue television signals would be switched off in a four-year rolling programme starting in 2008. Ofcom reported in November 2005 that 63% of UK households were watching digital television, with an additional 200,000 households moving to digital each month. In November 2005 Ofcom launched a review of the options arising from the release of spectrum afforded by the digital switchover programme.

Misselling

In May 2005 Ofcom introduced a mandatory requirement for all telecoms providers, engaged in sales and marketing of fixed-line telecoms to have a code of practice for sales and marketing. This was in response to evidence that misselling and slamming of fixed-line telecoms services was growing as a problem, particularly by operators using CPS and WLR. However, these rules do not yet cover LLU.

The fixed incumbent operator has launched a service that helps its customers protect themselves against unsolicited telemarketing calls. Caller Display is offered (no charge) to all residential customers (including CPS customers) making some calls on the incumbent's network. The fixed incumbent also offers to register its customers with the Telephone Preference Service (a mechanism to protect consumers against unsolicited marketing calls). This has given rise to complaints from alternative operators that the incumbent's service restricts their ability to compete. However, any operator can provide a similar service.