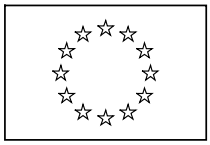

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

European Electronic Communications Regulation and Markets 2003

Report on the Implementation of the EU Electronic Communications Regulatory Package

[SEC(2003) 1342]

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1. SUMMARY AND PRINCIPAL CONCLUSIONS

1.1. Introduction

In its final report on the implementation of the 1998 regulatory framework[1], and subsequently in its Communication 'Electronic Communications: the Road to the Knowledge Economy'[2], the Commission stressed the importance of a **full, effective and timely transition to the new EU framework for electronic communications networks and services** adopted by the Parliament and Council in March 2002. This position has been strongly endorsed by the European Parliament.[3]

The transition to the new framework will support the continued growth of the electronic communications sector, and in particular of **broadband connections** as a major factor contributing to the fulfilment of the Lisbon objectives. The Growth Initiative[4] launched by the Commission in July 2003 underlines the importance of broadband for economic prosperity, competitiveness and job creation.

The new framework is designed to ensure that ex ante regulation is applied only where the **level of competition** in defined markets is considered to be insufficient on the basis of an analysis consistent with competition law methodology. **Newly emerging markets** also should in principle be free from regulation. This approach should **boost competition at the level of networks and platforms**, while giving national regulatory authorities (NRAs) the tools to mandate access to networks where justified by a lack of competitive pressure on dominant operators.

Other key aspects of the framework are designed to support this approach to regulation and the promotion of consumers' interests. NRAs are given **increased powers to promote a single European market** for electronic communications networks and services; players can in principle enter markets on the basis of **general authorisation**; access and interconnection regimes are based on **commercial negotiation**, backed by strong NRA powers to ensure end-to-end communications in Europe; and the citizen is protected by a clear and comprehensive framework of **universal service and privacy rules, including rules against spamming**.

1.2. Implementation of the new regulatory framework

The European Parliament and Council set a legal deadline of 24 July 2003 for the transposition of the main provisions of the new framework.

As of 1 November, only **eight countries had taken action** to incorporate the Framework, Authorisation, Access and Universal Service Directives into national law. These are:

Denmark, Spain, Ireland, Italy, Austria, Finland, Sweden and the United Kingdom.

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1 European telecoms regulation and markets 2002: Eighth report on the implementation of the telecommunications regulatory package, COM(2002) 695 final, 3 December 2002.

2 COM(2003) 65, 11 February 2003.

3 See European Parliament Resolution of [17 November 2003].

4 An initiative for growth: Investing in Trans-European Networks and major R&D projects, SEC(2003) 813 09, July 2003, which was followed by a further Communication from the Commission – A European initiative for growth: Investing in networks and knowledge for growth and employment – Interim Report to the European Council, COM(2003) 579 Final, 1 October 2003.

In some cases, secondary legislation is still required to ensure full transposition.

Of those Member States that have not yet notified the Commission of transposition measures, there is particular concern that the passage of drafts through the legislative process is likely to be lengthy (**Germany, France**); that political uncertainties are causing delays (**Belgium**); or simply that despite the existence of drafts the legislative process has not yet been completed (**Greece, Luxembourg, the Netherlands, Portugal**).

Infringement proceedings against the Member States that had not then adopted legislation were opened in early October 2003 under Article 226 of the Treaty, for failure to communicate transposition measures to the Commission.

Five countries had adopted measures to transpose the **e-Privacy Directive** by the deadline of 31 October. They are:

Denmark, Spain, Italy, Austria and Sweden.

In the United Kingdom the regulations transposing the e-Privacy Directive are due to come into force on 11 December 2003.

Six countries had notified measures transposing the Competition Directive by 31 October. They are:

Denmark, Ireland, Italy, Austria, Finland and the United Kingdom.[5]

1.3. Markets for electronic communications networks and services

In its last report the Commission referred to the fragile state of the electronic communications market in the light of a number of factors, including the global economic slowdown and the level of debt on the part of some market players due to ill-timed investment in backbone networks, the cost of 3G licenses and the high prices paid for the acquisition of other operators in other countries.

The situation now appears to be stabilising. As far as the wider economy is concerned, the Commission's Autumn Economic Forecasts[6] indicate that there are now signs that the EU area is about to embark on a period of recovery. Both business and consumer confidence are reported to be improving as the world economy gathers momentum, while financial conditions are believed to be supportive of growth.

This renewed confidence is echoed in the electronic communications market.

- The **rate of growth in revenues** is expected to reach between 3.7%[7] and 4.7%[8] in nominal terms in 2003.

- The number of **mobile subscribers** will grow at a higher rate than in 2002, even if the penetration rate is close to 90% in a number of EU countries. **3G services** are now available in at least four Member States.

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5 Measures aiming to transpose the Competition Directive were adopted by the Spanish Parliament on 16 October 2003.

6 http://europa.eu.int/comm/economy_finance/publications/european_economy/2003/ee503en.pdf

7 Source: EITO (European Information technology Observatory) 2003, Update October.

8 Source: IDATE.

- The number of fixed **broadband access lines** almost doubled between July 2002 and July 2003. New entrants' market share is starting to pick up but its impact is limited and competition in the broadband sector is still weak.

- The number of **new unbundled lines** has increased by 828 000 between July 2002 and July 2003. This is double the number compared to the previous year but is still low as a proportion of total subscriber lines and the development of local loop unbundling is still rather unbalanced across the EU and has not yet taken off.

- The recent period of economic weakness has discouraged **new fixed operators** from entering the voice telephony market: the number of large competing operators in each national market has remained more or less stable. Many operators have refocused their efforts on home markets.

- Existing fixed operators now aim mostly at maintaining the position acquired in the market during the years of market growth, in particular for international and long-distance traffic, where there was strong competition during the first stage of liberalisation. Competitive pressure seems to have moved to the **local call segment**, where the **incumbents' fixed market share** has on average decreased by 6% since December 2002.

- This is a consequence of the increasing use by subscribers of **alternative operators for local calls**; this has grown over the past year by 39%, due partly to the more widespread availability of carrier pre-selection. Moreover, despite a converging trend there is still a substantial difference between the use of alternative operators for local calls (25% of the total subscribers) and for long distance/international calls (33%).

- Alternative fixed operators actually competing in the market are continuing to focus on their core markets, through carrier selection or pre-selection (two thirds of active operators) or through direct access to the users (one third of active operators).

- Since August 2002, the EU weighted average charge for **call termination on fixed networks** has decreased slightly at local and single transit levels (down 4% and 6% respectively), but has remained stable at double transit level.

- The EU weighted average **call termination charges on mobile networks** have decreased by 15.3% for SMP mobile operators, while for non-SMP operators they have remained more or less stable. Despite these decreases they remain more than nine times higher than the average fixed-to-fixed interconnection charge (double transit).

1.4. Regulatory concerns

The Commission recognises the **enormous amount that has been accomplished** by the Member States that have transposed the framework in ensuring that the principles on which it is based are faithfully carried over into national law.

The national measures (and drafts in the case of Member States that have not yet transposed) however give rise to **some concerns** that the Commission considers should be addressed if the objectives of the new framework are to be realised to the full. The Commission will monitor in particular where the Member States have complied with their obligations as regards:

- The **wider powers and discretion conferred on NRAs** under the new framework in order to fulfil their specific objectives relating to the promotion of competition and the development of the internal market.

- The **assignment of the tasks** attributed to NRAs by the framework to competent national bodies, and the **clear attribution** of those tasks where they are distributed between different bodies.

- The availability to NRAs of the **full range of remedies** provided for in the new framework, when they find a lack of effective competition in a relevant market.

- The **timely completion of the market analyses** and review of existing obligations by the NRAs. Undue delays would undermine the consistent application of the new framework and postpone the attainment of a single market for electronic communications networks and services.

- The principles that must apply to procedures for the grant of **individual rights of use of frequencies**.

- The **scope of the universal service**, which should be clearly defined in accordance with the new framework, and the requirement that any mechanisms for designating universal service providers and for funding any unfair burden on them be established in a way that minimises market distortion and upholds the principle of non-discrimination. National measures which diverge from the Community definition of the universal service or *de facto* preclude certain operators from being designated as a universal service provider, will jeopardise the attainment of this objective.

2. OBJECTIVES AND METHODOLOGY

Between 1997 and 2002 the Commission submitted eight reports on the implementation of the package of directives liberalising and harmonising the European markets for telecommunications services.

Following a review, the Commission proposed in 2000 five directives to replace the twenty-five or so instruments then in force, together with a decision on the use of spectrum for communications services. Four of the directives subsequently adopted by the European Parliament and Council were required to be transposed into national law by 24 July 2003. They are the Framework, Authorisation, Access and Interconnection, and Universal Service and Users' Rights Directives.[9] The remaining directive, known as the e-Privacy or Data Protection Directive[10], was due for transposition by 31 October 2003. In parallel with this process the

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9 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and facilities; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services; Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services; and Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, all published in OJ L 108, 24.4.2002.

10 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, OJ L 201, 31.7.2002, p. 37.

Commission adopted a directive on the basis of Article 86 of the Treaty (Competition Directive), consolidating previous directives liberalising the provision of services on these markets.[11]

The Commission is convinced that regular reporting on the status of implementation of the former regulatory package and on market developments contributed to the success of this sector in the European economy. The present report marks the Commission's determination to continue this process in the context of the new framework.

The main objective of the report is to identify concerns as to the manner in which the key aspects of the new framework are incorporated into national law, or drafts thereof in the case of Member States that have not yet transposed.[12] Where Member States have not yet transposed, the latest publicly available drafts have been analysed. No draft has been made available by Portugal. No analysis is made of national measures or drafts relating to the e-Privacy Directive, given the later deadline for transposition. However, **in view of the importance of subjects such as the treatment of traffic data and unsolicited faxes and e-mails (spam) covered by the directive**, Section 5 identifies key elements of the e-Privacy Directive which the Commission will take particular care to ensure are effectively transposed by the Member States.

The Commission's assessment of the transposition of the key elements of the new framework **represents its view as at 1 November 2003**, in the light of the texts transmitted to it and of bilateral contacts with national authorities. However, in the final resort it is the European Court of Justice that has sole jurisdiction for assessing the compliance of national transposing measures with the Member States' Treaty obligations.

Furthermore, since the report has been prepared at a time when the legislative picture across the Community is still developing, any assessment of conformity can only be of a preliminary nature and cannot represent a definitive view on the part of the Commission. In view of this fact, the annexes to this report do not contain country-specific chapters detailing the level of implementation in each Member State, as was the case in previous reports.

The report also provides key market data, supplemented by further information in Annexes 1 and 2. Market data has been supplied by the NRAs on the basis of a questionnaire compiled by the Commission's services. Where tariff data from sources other than the NRAs has been used, it has been validated directly with the latter. **The market data used in the report shows the situation at 1 August 2003**, unless otherwise stated. The annexes are in the form of a Commission services' working document.

The data given in this report and the assessments made of regulatory and market issues are based on a format that has evolved since the first such report was issued in May 1997. In particular, data is presented in a way that has responded to the need to give an overview of market developments in fifteen Member States in an easily accessible form. In some cases, in particular in relation to the rollout of broadband networks, it has been subject to discussion in the Communications Committee. **This presentation is without prejudice to any action the Commission may decide in the framework of its responsibilities under the Treaty or the directives adopted pursuant thereto, including Article 7 of the Framework Directive.** It

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[11] Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services. OJ L 249, 17.9.2002, p. 21.

[12] As regards Spain, the analysis reflects the latest drafts made available to the Commission prior to the adoption of the legislation by the Parliament on 16 October 2003.

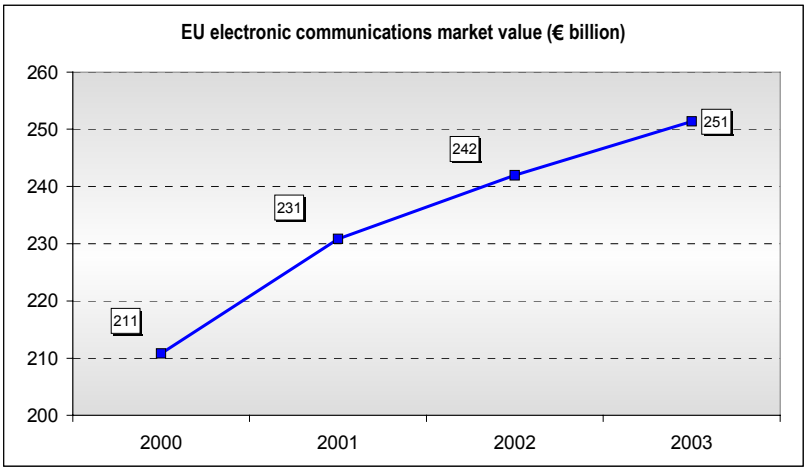
should also not be considered to carry any implications for the definition of relevant markets or the market analysis to be carried out by the NRAs.

3. MARKET DEVELOPMENTS

3.1. Electronic communications services market

The market will experience a growth of between 3.7% and 4.7% in 2003, in a stabilising macroeconomic framework.

The electronic communications market will grow this year at an estimated rate of between 3.7%[13] and 4.7%[14] in nominal terms. This compares with a forecast rate of EU GDP growth of 0.8% (3% in nominal terms) for 2003. The combined national markets of the 15 Member States will be worth an estimated € 251 billion in 2003.[15]



3.2. Mobile telephony

Continued success of mobile telephony

There were 305.6 million mobile users in the EU as at 1 August 2003. The number of mobile subscribers has increased at a higher rate than in 2002 (6%), and 81% of EU citizens now have a mobile telephone. For the first time in one EU Member State, Luxembourg, the total number of mobile telephones (pre-paid and subscribers) is higher than the population (115 telephones per 100 population).

Luxembourg is also the country that has experienced the strongest increase in the number of subscribers (+16%), followed by Denmark, a country that also shows a high penetration rate (84%). A number of Member States where the penetration rate is close to 90% have also experienced significant increases in this value since last year, of between 7% and 10%. This contrasts with the situation in Belgium and the Netherlands, which (with the exception of France, at 66%) present the lowest penetration rate (73% and 74% respectively) and annual growth rates among the lowest (2% in the Netherlands, 4% in Belgium).

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13 Source: EITO (European Information technology Observatory) 2003, Update October.

14 Source: IDATE.

15 These figures include revenues from CaTV services and are therefore not comparable with the numbers presented in previous reports. The five segments included are telephone services, internet and online services, mobile telephone services, switched data and leased-lines services and CaTV services.

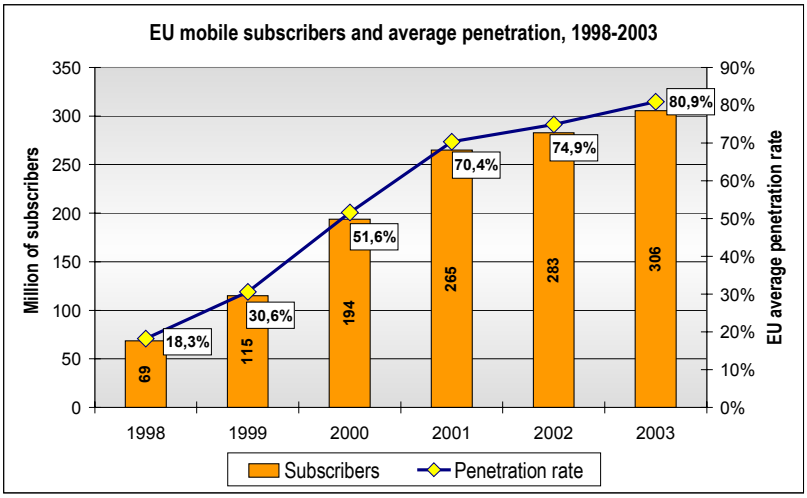
The market share of the subsidiary of the incumbent operator has increased in three Member States, with reductions in the other twelve. As a result, the market share of the leading[16] operators has gone down slightly to 46.7% of subscribers.

There are two clearly defined periods in the development of mobile telephony in the EU in the period 1998-2003. The first was characterised by very rapid penetration, with annual increases in the EU penetration rate of around 20%. In this same period competitors gained most of their customers to the detriment of the subsidiary of the incumbent (or the leading operator in the case of the United Kingdom) and in 2000 there was a 50-50 market share split between incumbents and new entrants. In the second period, starting in 2000, the subsidiary of the incumbent continued to lose market share, but at a much slower pace (with shares of 50% in 2000, 48% in 2001, and 47% in 2002).

In 2003, in line with the trend to maintain positions in the market, the variation in the market share of the leading operator has been less significant (0.5%).

Work is well under way to bring third generation ('3G') mobile technology, applications and services to the wider market and the first commercial launch in Europe of 3G services occurred in the first half of 2003. 3G subscriptions are estimated at around 375 000 in Italy, 195 000 in the United Kingdom, 12 000 in Sweden and 10 000 in Austria. Guidance in this area was provided by the Commission which adopted two exemption decisions[17] in April and July 2003 which set out how far mobile operators in Germany and the United Kingdom can cooperate through network sharing.

Data on interconnection for call termination on mobile networks is provided in the section on interconnection, below. As regards international roaming tariffs, the Commission continues its enquiry into their compatibility with the EU competition rules.



16 Apart from the United Kingdom, the leading operator is a subsidiary of the incumbent fixed network operator.

17 Commission Decision of 30 April 2003 in Case No. COMP/38.370 - O_2 UK Limited/T-Mobile UK Limited ('UK Network Sharing Agreement'), OJ L200, 7.8.2003, p. 59. Commission Decision of 16 July 2003 in Case No. COMP/38.369 T-Mobile Deutschland/O_2 Germany: Network Sharing Rahmenvertrag, not yet published.

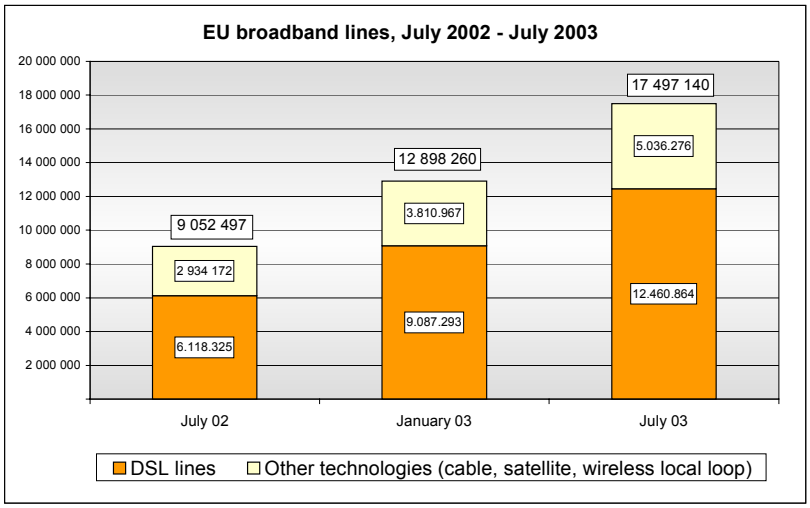
3.3. Broadband

Significant increase in the number of broadband lines but impact of new entrants still limited

Broadband roll-out in the EU

There were 17.5 million broadband[18] connections in the EU at the end of June 2003. 12.46 million of these connections were DSL lines (71% of the total), while 4.1 million were cable modem access lines (24% of the total). The remaining 0.9 million lines (5%) used other technologies, mostly satellite and fibre.

Broadband connections have almost doubled from the 9 million broadband lines available in July 2002. Growth has been more intensive in the period from January to July 2003, when more than 25 000 new broadband lines were being added daily.



Competition on the broadband market

Alternative operators can provide broadband services through proprietary alternative platforms or using the incumbent's network.

Cable access is at present the main alternative technological platform used by new operators to provide broadband access, but this option is feasible only in those countries where CATV networks, which need to be upgraded, are already deployed.

In the countries where alternative technological platforms (cable in particular) are not developed, the deployment of the DSL technology depends on the use of facilities and networks in the hands of incumbent operators. The EU regulation on broadband access has therefore focussed on unbundled access to the local loop[19] (fully unbundled local loop and shared access to the local loop) and on different forms of network access[20] (bitstream and resale), in both cases aiming at facilitating market entry and developing competition in the high speed access

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18 Broadband capacity: capacity equal to or higher than 144 Kbit/s.

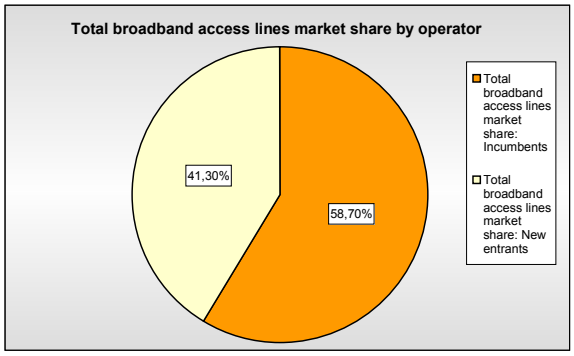
19 Obligation for SMPs to publish a reference offer for unbundled access (RUO) to their local loops and related facilities. Prices for unbundled access must be cost oriented.

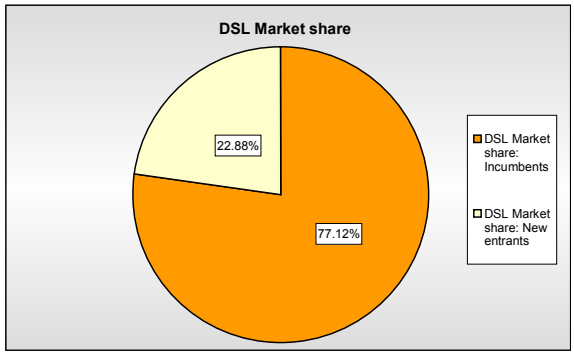
20 Obligation for SMPs to provide special network access facilities and information to others under the same conditions and of the same quality as they provide for their own services or those of their subsidiaries or partners.

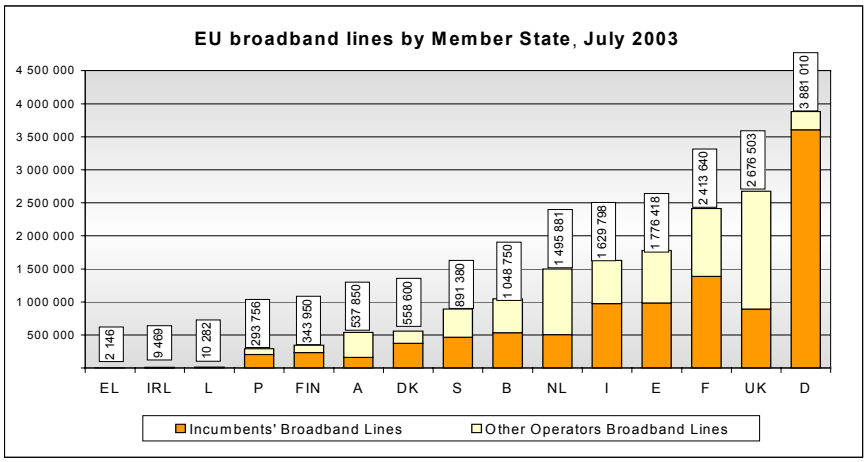
market. As indicated in the 8th Implementation Report, the Commission has stressed the complementary role of full unbundling, shared access and bitstream access in the process of overcoming the limited competition in local access and developing broadband access.

The rise in the number of broadband lines has been boosted by DSL and cable modem lines, although the predominance of DSL technologies has increased, from 67.6% of all lines in July 2002 to 71.1% this year. With regard to DSL lines, it appears that new entrants' market entry is starting to pick up but its impact is still limited. In July 2002, 85.6% of DSL lines were in the hands of the incumbents. In July 2003 this had gone down to 77%. New entrants market share taking into account all broadband technologies is improving in Spain, France, Italy, Finland and Sweden. In Belgium, Denmark, the Netherlands, Portugal and the United Kingdom the incumbent appears to be re-gaining market share and in Germany the incumbent still retains 93% of total broadband lines. In general, the competitive situation in broadband is weaker where there is a lack of competition from alternative platforms such as cable. The Commission will actively monitor the development of competition in this sector and will intervene where appropriate to protect competition.

On 16 July 2003, the Commission adopted a decision[21] relating to a proceeding under Article 82 of the Treaty, in which it found that France Télécom's subsidiary Wanadoo was engaged in predatory pricing for retail ADSL. The abuse ended in October 2002 with the entry into force of new wholesale prices charged by France Telecom, more than 30% down on the previous prices charged. Since then the French high-speed Internet access market has been growing much more rapidly and in a more balanced way.







21 Commission Decision of 16 July 2003 in Case No. COMP/38.233 – Wanadoo Interactive. 'High-speed Internet: the Commission imposes a fine on Wanadoo for abuse of a dominant position' - Commission Press Release IP/03/1025.

Unbundling of the local loop

With regard to unbundling, 828 000 new lines were taken up between July 2002 and July 2003, whereas only 400 000 lines had been unbundled between October 2001 and October 2002. This significant increase has not been brought about by full unbundling only, as was the case in previous years, and the 171 000 shared lines available now represent 6% of all new entrants' DSL lines, against 1.5% in October 2002. The development of local loop unbundling is still rather unbalanced across the EU and is only just starting to take off. Germany accounts for more than 63% of the unbundled lines[22] and more than 95% per cent of the unbundled lines are concentrated in six countries (Germany, Italy, Denmark, Finland, the Netherlands and Sweden). In the other Member States local loop unbundling remains at a very low level.

Despite the improvement in the number of fully unbundled lines, only 19% of new entrants' retail broadband access lines using the incumbent's network are fully unbundled lines. Resale is the most commonly used way (51% of new entrants' DSL lines), followed by bitstream access (24.3%). Between July 2002 and July 2003 there were 1 660 000 new resale lines in the wholesale market, twice as many as the number of fully unbundled lines.

Prices charged for unbundling have decreased over the last year, and the average EU monthly total cost for full unbundling (monthly rental plus the connection fee amortised over a year) is now € 19.4, 9.5% cheaper than in 2002. Price reduction has been more significant for shared access, at 28%, with the EU average monthly price going down from € 15.9 in 2002 to € 11.4 this year. This might help to explain the 241% rise in the number of shared access lines provided by the new entrants to their customers between January and July, admittedly from a very low base. This increase is concentrated in 5 countries (Denmark, France, Netherlands, Finland and Sweden). Price reductions may have helped to foster the spread of unbundled lines.

Despite price reductions for full unbundling in Germany, the Commission adopted a decision[23] on 21 May 2003 under Article 82 of the Treaty regarding *Deutsche Telekom*'s pricing strategy for local access to the fixed telephony network. In that decision, the Commission found that Deutsche Telekom was engaging in a margin squeeze by charging new entrants higher fees for wholesale access to the local loop than what subscribers had to pay for retail lines. This decision demonstrates that the Commission will take action under the anti-trust rules, in order to preserve long-term competitiveness on the market.

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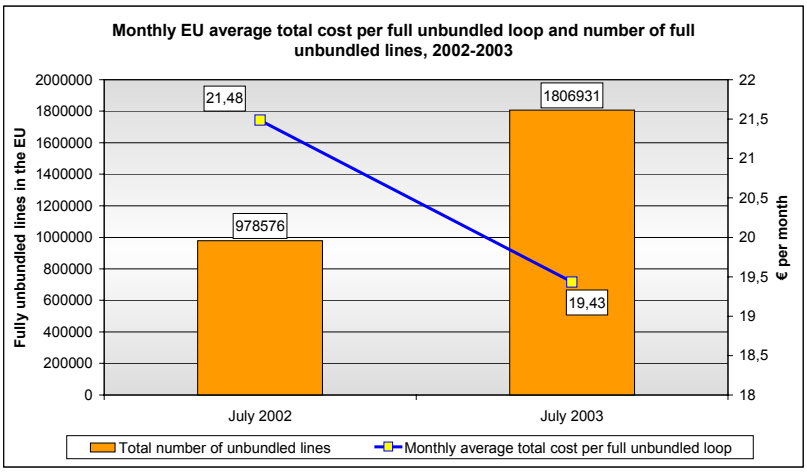
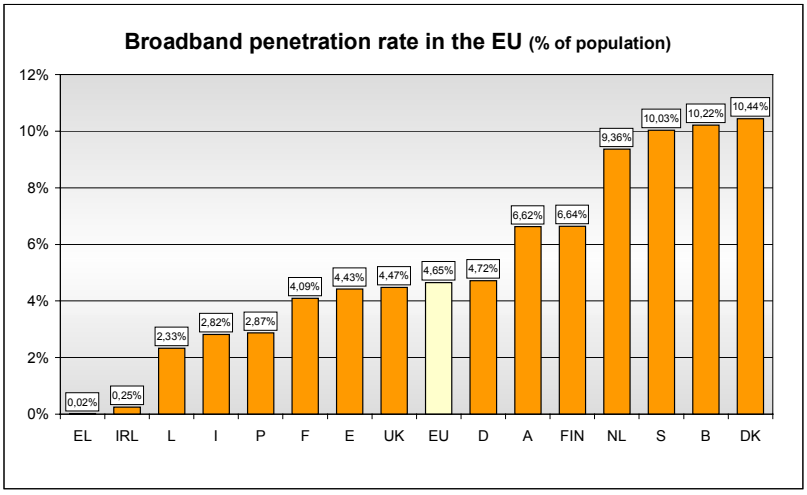
22 It should be noted that not all of the fully unbundled lines are used for the provision of broadband services. In Germany, only around 20 per cent of the unbundled lines are used for this purpose.

23 Commission Decision of 21 May 2003 in cases No. COMP/37.451, 37.578 and 37.579: 'Price squeeze for local loop access in Germany' - Commission Press Release IP/03/717.



Broadband penetration in the EU



Ranking the EU countries according to broadband penetration rate, which is measured as the total number of broadband lines per 100 population, can help to analyse the evolution of the EU broadband market. Three countries are excluded from this breakdown due either to the lack of data for 2002 (Luxembourg) or to the very limited presence of broadband lines in the market (Greece and Ireland).

a) Countries with a penetration rate around 10%

As at July 2003, the Member States with the highest penetration level were Belgium, Denmark, the Netherlands and Sweden, with a penetration rate of around 10%. These countries already topped the league a year ago and they all have had the highest increases (an increase of 2.7 percentage points on average) in the penetration rates in the past 12 months. The population of these countries varies from 5 to10 million.

With the exception of Denmark, where 70% of the broadband lines are DSL lines, in the other three countries there appears to be facilities-based competition. Alternative operators use proprietary platforms (CATV networks mainly) that were already deployed for the provision of TV signals. Incumbents' share of the overall broadband market varies according to the use of alternative platforms and it is hence lower than the EU average.

It can be observed from the data that in Belgium and the Netherlands, where facilities-based competition exists, new entrants seem to have fewer incentives to enter the DSL market and

incumbents' share of the DSL lines market is higher than the EU average. More than 84% of DSL lines are in the hands of the incumbent while the EU average is 77%.

b) Countries with a penetration rate between 4% and 7%

The second group is made up of Germany, Spain, France and the United Kingdom, with a penetration rate of around 4%, along with Austria and Finland where the penetration rate is almost 7%. The penetration rate in this second group increased by approximately 2 percentage points. The rise in the number of broadband lines has been led by DSL connections, with the exception of Austria and Spain.

In Austria and the United Kingdom there exists an alternative platform and DSL represents 40% of the total broadband lines. In these two countries the incumbents have maintained their overall broadband market share, which is around 30%. It is worth noting that in the United Kingdom the incumbent's share of DSL lines is the lowest in the EU, while in Austria it is above the EU average.

On the other hand, DSL is the predominant technology in Spain, France and Finland, where it accounts for 70% to 80% of all broadband lines, as well as in Germany, where 99% of the broadband lines are DSL. Alternative operators in the former countries have gained some market share (7% on average), while in Germany the incumbent has kept control of the broadband market (93% of all lines).

c) Countries with a penetration rate below 3%

The countries in the third group have a penetration rate of around 2.6%. The growth in the penetration rate has been slower (1.5 percentage points) than in other countries. In Portugal there is technological competition, although in this country the incumbent provides broadband access using both DSL and cable. In Italy 88% of all broadband connections are DSL lines. In line with the rest of the EU, the preponderance of DSL has augmented in the last months and new operators have gained 4% of the broadband market.

3.4. Fixed telecommunications operators

Introduction of competition and progressive liberalisation of a former monopoly sector

After the massive entry into the market that characterised the first stage of liberalisation (+113% between 1998 and 2001), the number of operators authorised to offer public telecommunication services in Europe has started to decrease. In August 2003 there were in the EU a total of 1 202 operators authorised to offer public voice telephony (269 local and 933 national operators) and 1 484 public network operators (555 local and 929 national operators).

Since August 2002 the number of potential players has remained more or less stable for the voice telephony market, while the number of public network operators has decreased by 5%.[24]

The weakness of the general economy has discouraged new operators from entering the market, and has caused some bankruptcies and stimulated intensive merger activity. It should be underlined that the target of the great majority of new entrants has been the business market,

[24] The peak in the number of authorised operators was reached in 2001 with 1 352 operators authorised to provide voice telephony services and 1 583 public network operators.

notwithstanding the fact that it has suffered heavily from the consequences of the present stagnation of the economy. The operators remaining in the market have started to reorganise their activities, streamline their operations and focus on their core markets. Only the big groups, which are usually present in both mobile and fixed markets, have continued to target the mass fixed market.

The number of authorised operators indicates only the potential for competition in the market, rather than the current level of competition. Among the 1 202 operators legally authorised to provide voice telephony in the EU (in the sense that they have an individual licence/authorisation or they are subject to a notification/registration procedure), less than half (around 500) have started operations, the majority only in some local areas or for business users. It should in particular be noted that one third of operators effectively providing local calls are local operators only.

The **real number of competitors** in each national fixed mass market is thus considerably lower than both the number of authorised operators and the number of active operators. Generally speaking there are in the great majority of EU countries no more than 3-4 large competing players for public voice telephony.

3.5. Fixed voice telephony market share

Dismantling monopolies

The recent period of economic weakness of the market has influenced the commercial strategies of the operators, which now aim mostly at maintaining the positions acquired during past years of market growth.[25] This is particularly evident for the international voice telephony market which, experienced strong competition during the first stage of liberalisation. The incumbent's share of this market decreased by 15% in some countries in the period 1999-2000, but is now decreasing at a slower pace (on average by 2.5% a year in the EU since December 2000), and stood at 62% in December 2002.

The EU incumbents' average[26] market share on the long distance calls market segment now also appears to have stabilised at around 70%. Between December 2000 and December 2001 there was a reduction of 3.3%, while since last year the reduction has been only 1.6%.[27]

EU incumbents' average market share on the calls to mobile segment (69% in December 2002) is also diminishing at a lower rate than in the past, even if competitive pressure is still present. It decreased in absolute terms by 6.6% for the period December 2000-2001 and only by 4% for the period December 2001-2002.

Some of the competitive pressure now seems to have moved to the local call market (which includes both local phone calls and local calls to Internet) and, during the period December 2001-2002, there was a reduction in the incumbents' market share from 87% to 81%. The reason for this is probably the introduction of carrier pre-selection (CPS) in all the Member States, and more effective implementation, which has increased the number of customers that

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25 Data are not comparable with the previous reports, due to several factors: (1) figures for the years 2000 and 2001 have been updated to reflect revised data received from Member States; (2) the EU average is now a weighted, rather than a simple average.

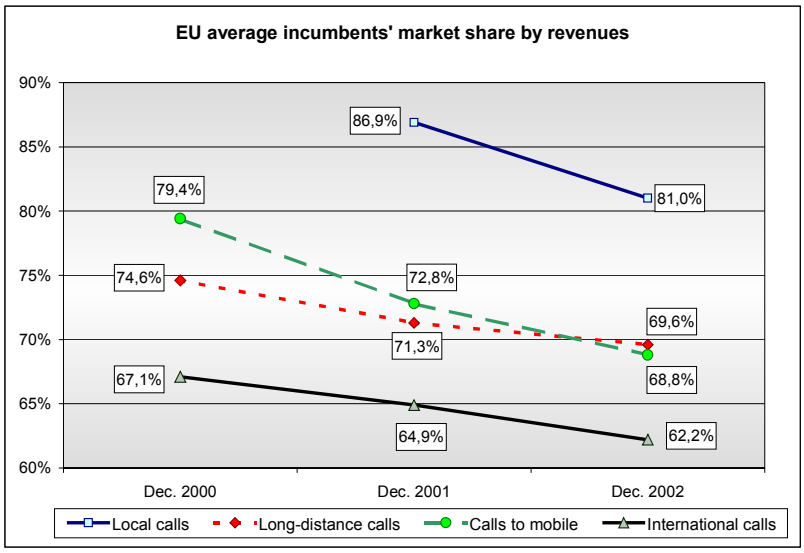
26 Weighted average on the basis of retail revenues.

27 Data are not comparable with the previous reports, due to several factors: (1) figures for the years 2000 and 2001 have been updated to reflect revised data received from Member States; (2) the EU average is now a weighted, rather than a simple average.

have chosen an alternative operator as the default option for all types of calls, including local. The second reason could be the increasing competition in the Internet market, and the subsequent erosion of incumbent's market share for local calls to Internet.

Moreover, the persistent differences between local and long-distance/international market share show the difficulties new entrants still face in entering the local market, due to the access bottleneck.

It should be noted that in those countries where carrier pre-selection was introduced first, the incumbent is increasing its focus on customer retention and win-back strategies, which limit new entrants' ability to grow their customer base. In Ireland, for example, the initial strong growth in CPS which saw approximately 10% of PSTN lines become CPS lines within the first 12 months of operation has now stagnated and the incumbent now estimates that it has won back approximately 59% of all customers who had moved.



3.6. Consumer choice

How consumers have benefited from the increased number of operators in the fixed market

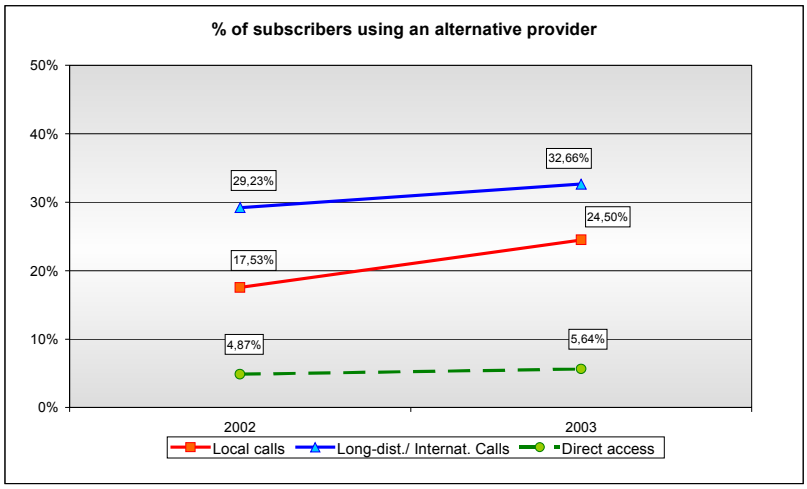
Traditional incumbents' customers are more and more aware of the possibility of using a provider alternative to the incumbent, either by dialling a call-by-call prefix (*carrier selection*) or by choosing to route all calls by default to the network of an alternative operator (*carrier pre-selection*). *Direct access* is also available to users through alternative operators' proprietary wire/wireless access or through unbundled local loops leased from the incumbent.

As at August 2003, 33% of EU subscribers used an alternative provider to route long-distance and international calls, while only 25% were using alternative providers for local calls.[28] At the same time, direct access from alternative providers was used by 6% of EU subscribers.

Since last year, the percentage of subscribers using an alternative provider has grown by 16% for direct access, 12% for long-distance/international calls and 39% for local calls. The increase in the use of alternative operators for local calls is partly due to more extensive diffusion of carrier pre-selection. Moreover, despite the tendency to converge there is still a sub-

[28] The use of carrier selection does not exclude the possibility of using the incumbent.

stantial difference between the use of alternative operators for local calls and for long distance/international calls.



3.7. Interconnection

Fair use of the incumbent's network

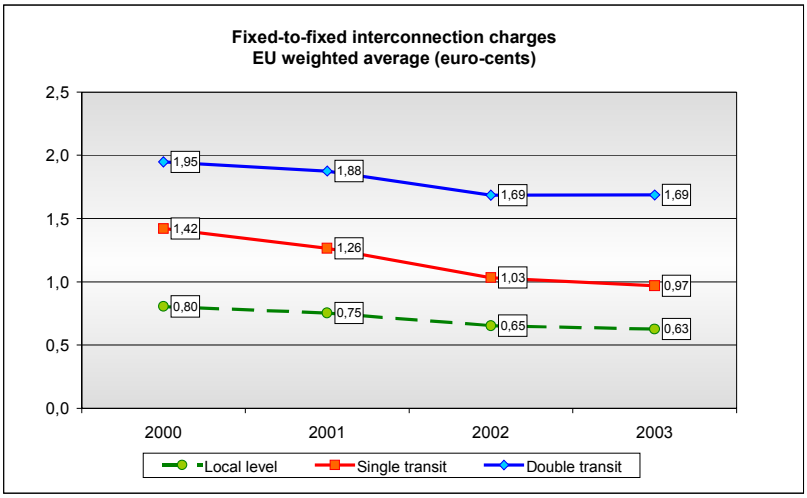
Fixed-to-fixed interconnection

The state of interconnection services, especially the level of charges, has an overwhelming effect on the potential for competitive entry in the market and on the sustainability of competition between undertakings providing electronic communications services. All three segments detailed here are essential elements for ensuring the continuation of competitive pressure on undertakings with significant market power, thus indirectly influencing the quality and price level of the retail products provided on the basis of these interconnection services. Interconnection therefore remains a focus of regulatory efforts.

Since August 2000, the EU weighted average charge for call termination on fixed networks has decreased by 32% for single transit, by 22% at local level, and by 16% for double transit. This happened mostly in the period up to August 2002; during the past year the level of interconnection charges seems to have stabilised (around 5% less for the retail and single transit levels; –3% less for double transit). Price differences between countries are still significant, in particular at the double transit level, and even seem to have increased over the past three years.

The major changes since last year have been the significant decrease in Luxembourg (–29% for local and single transit and –20% for double transit), in Denmark (–17% for local transit and –28% for double transit) and in Italy and Ireland, where there has been a general decrease of 14% and 10% respectively at all levels of interconnection.

The interconnection charge for double transit has significantly increased in Greece (+35%), which bought it up to the second highest position.



Interconnection for call termination on mobile networks

In August 2003 the EU weighted average interconnection charge for terminating a call on mobile networks was 15.93 euro-cents for the 16 European mobile operators declared by the NRA as having significant market power on the national market for interconnection (SMP). It was 18.98 euro-cents for the remaining 34 mobile operators (covering 55% of the EU market).

The difference in charges between the two classes of operators has arisen mostly during the past year as a result of regulatory intervention by NRAs to bring about cost orientated charges for SMP operators. Since August 2002, average interconnection charges for SMP operators has decreased by 15.3%, while for non-SMP operators has increased slightly.

The main decreases in the charges since then have been achieved in Italy (-25% for one SMP operator), in France and Spain (around –18% for both SMP operators), in Ireland (-13% for one SMP operator), in Belgium (-14% for one SMP operator), and in Greece, where charges have decreased on average by 9% for the four non-SMP operators, after intervention by the NRAs.

On the other hand, fixed–to–mobile interconnection charges have increased in the Netherlands by 10% for one operator.

The difference between the level of the charges for SMP and non-SMP operators can be explained by the increased number of SMP operators (which now account for 45% of EU subscribers compared to 41% in 2002), but mostly by the cost orientation requirement for interconnection charges on SMP operators. It should be noted that even for non-SMP operators[29], interconnection charges are sometimes set by the NRAs , for example as a result of intervention on the basis of a competition enquiry or to set a price ceiling to avoid excessive tariffs. Furthermore, in some countries NRAs intervene in setting the charges for non-SMP operators in order, for example, to resolve a dispute between market players.It should be noted that although there has been a decrease in the interconnection charges, their level remains on average more than 9 times higher than the average fixed–to–fixed interconnection charges (double transit).

[29] At the moment there are no operators designated with SMP on the national interconnection market in 6 countries: Germany, Luxembourg, the Netherlands, Austria, Portugal and United Kingdom.

Leased lines interconnection

Leased lines are used by network operators and service providers as the basic transport infrastructure upon which their services are built, and by large business users as the means of linking their locations world-wide for the transport of internal voice and data communications traffic.

New entrants are not always able to provide complete end–to–end leased lines to meet all their customers' needs, and often have to rely on the incumbent to provide a short–distance leased circuit to link the customer's premises to the new entrant's network (a 'leased line part circuit').

Under the Leased Lines[30] and Interconnection Directives[31], national regulatory authorities were required to impose obligations for transparency, non–discrimination, and cost-orientation on certain services, including leased line services, provided by operators notified as having significant market power.

Ceilings for monthly rental prices of leased line part circuits provided by notified operators have been applied between 1999 and 2002. These prices were defined by comparing the data of notified operators in all Member States and identifying the Member State with the third lowest price, which determined the value of the ceiling.[32]

With regard to 64 Kbit/s and 2 Mbit/s, the EU average price has decreased since 2001. This reduction has been progressive in the 64 Kbit/s circuits over the period 2001–2003, whilst it was more significant between 2001 and 2002 in the case of 2 Mbit/s circuits. The deviation from the price ceiling for 2 Mbit/s circuits has dropped from 46.50% to 7.3%. In real terms this means that the weighted average price for the monthly rental of a 2 Mbit/s leased line part circuit has gone down from € 512.75 in 2001 to € 375.54.

With reference to 34 Mbit/s circuits, the EU weighted average price in 2002 was at the level of the third lowest price. This means that there were significant price reductions between 2001 and 2002. These price reductions have continued this year, from an average price of € 2 023 in 2001 to € 1 636 in 2003 for the 2 km circuits and from € 2 933 to € 2 250 in the case of 5 km circuits.

However, considerable concerns with regard to the price level remain. For 64 Kbit/s circuits, prices in 10 Member States are still above the ceiling established in 1999, for 2 Mbit/s circuits prices in 7 Member States and for 34 Mbit/s circuits prices in 3 Member States are still above those ceilings.

Also, the variation of prices for leased line part circuits across Member States remains very high when compared to retail leased line prices. For the different capacities considered, the

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30 Council Directive 92/44/EEC of 5 June 1992 on the application of Open Network Provision to leased lines (OJ L 165, 19.6.1992, p. 27), as last amended by Commission Decision 80/98/EC (OJ L 14, 20.1.1998, p. 27).

31 Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ L 199, 26.7.1997, p. 32), as amended by Directive 98/61/EC (OJ L 268, 3.10.1998, p. 37).

32 Although the ceiling is not used anymore, it has been a very helpful tool to benchmark progress towards the reduction of leased lines wholesale interconnection prices. It is therefore used in this report in order to present progress.

price in the Member State with the highest price is up to 15 times higher than in the Member State with the lowest price. With regard to delivery times, there are also wide variations between Member States, as shown in the *Leased Lines Report 2002*.[33]

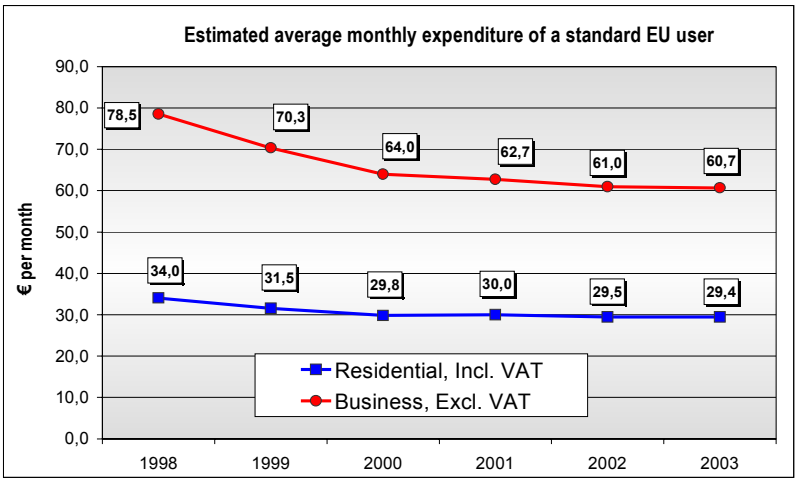
3.8. Fixed telephony tariffs

Competition in the sector has resulted in lower tariffs for consumers[34]

The dynamic of fixed voice telephony tariffs highlighted in previous Reports has continued in 2003. While the downward trend has been maintained, the pace in 2003 is significantly slower than in previous years and less than half of that reported in 2002. This trend is common to both national and international calls.

National calls – data from the national basket

This assessment is based on data from the Teligen/OECD basket.[35] Reduction rates were higher in the years immediately after the liberalisation of the fixed voice telephony market i.e. 1998; since 2000, the pace of reduction has decreased significantly. Between 2002 and 2003, the average monthly expenditure for national calls of a residential and a business user (this category includes local and long distance calls and fixed charges) went down by 0.3% and 0.5% respectively. In the five-year period since the opening of the voice telephony markets, the EU weighted monthly expenditure for national calls by residential users decreased by 13.5%; over the same period, the overall reduction in EU weighed monthly expenditure for national calls by business users almost doubled, at 22.7%.



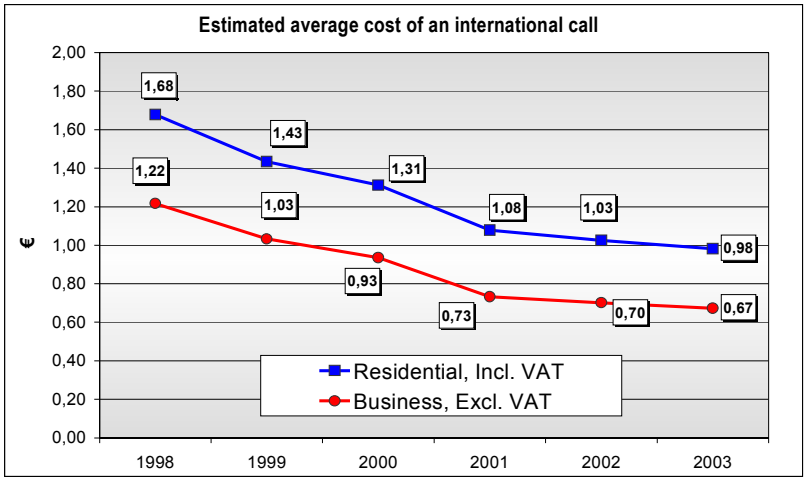
33 COCOM03-42.

34 Detailed information on fixed tariffs (including line rental) and mobile tariffs (including mobile to mobile) can be found in Annex 1 and also in the DG Information Society Tariffs Annual Report http://europa.eu.int/information_society/topics/telecoms/regulatory/studies/documents/tariff_report_2002_12.pdf

35 The OECD basket methodology allows the calculation of the average monthly expenditure of a standard European consumer. The user is assumed to be using national PSTN service from the incumbent operator. The OECD national PSTN basket structure covers 14 distances (3 km to 490 km) and 6 times of day (4 at weekdays and 2 at weekends), all with individual weights. Call duration is varied over the distances and time of day. Fixed charges are included with the appropriate annual rental charge, and 1/5 of the installation charge.

International calls – data from the international basket[36]

Between 2003 and 2002 there has been a decrease of 4% in the average cost of an international call for residential users, marginally higher than the reduction reported between 2002 and 2001. The average cost decreased from € 0.7 to € 0.67 (including VAT). As regards the average cost of an international call for business users, the reduction is similar to that of residential calls (4%), with an average price of € 0.98 (excluding VAT). The overall reduction for the period 1998–2003 of the average cost of an international call has been substantial, that is 45% for business users and 42% for residential users.



3.9. Numbering

Impact of number portability in increasing competition in the fixed and mobile markets

Mobile number portability (MNP) only became compulsory in the EU with the entry into force of the new regulatory framework on 25 July 2003. However, most Member States had already introduced MNP in advance to develop competition on the mobile market. This has proved particularly successful in some Member States: as many as 11% of mobile numbers are ported in Denmark, 5% in the Netherlands, Sweden and the United Kingdom. In absolute numbers, around 6 million numbers are ported in Europe, which represents about 2% of all mobile numbers. Austria is the only country where MNP is not available: secondary legislation has recently been adopted, but mobile numbers will probably not be able to be ported - until some time in 2004.

Mobile number portability is a key tool in fostering competition on a market where the number of players is limited. Until now, the need to change numbers acted as the biggest deterrent for consumers to change operator. As a result of the removal of this constraint, prices should gradually decrease in Member States, benefiting from more intense competition.

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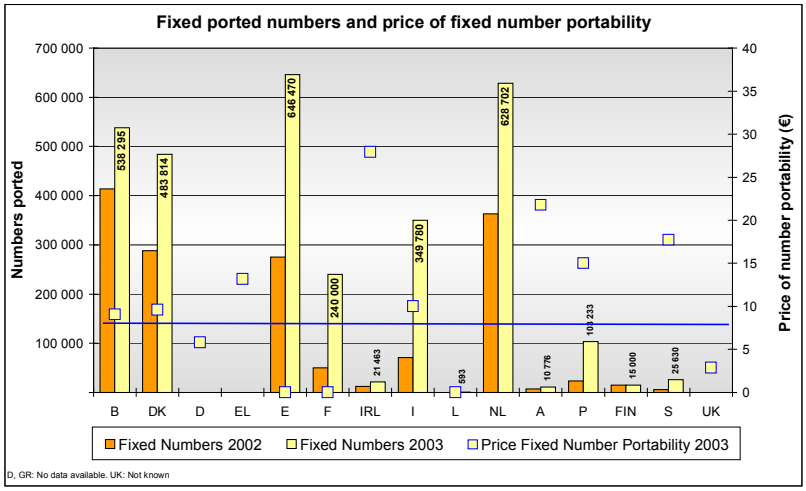
36 The international PSTN basket, when used separately, shall reflect the cost of a single call, calculated according to the weighting method described below. No fixed charges are included.
The basket calculates **an average charge** for calls to all OECD destination countries. The charge is calculated as the average of:

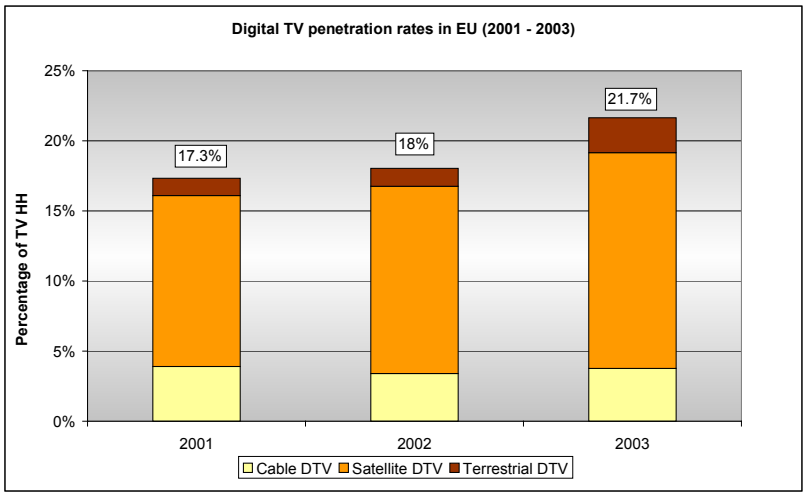
	Call duration	Residential basket weight	Business basket weight
Peak time call	3 minutes	25%	75%
Off-peak time call	5 minutes	75%	25%

Fixed number portability (FNP) is a good indicator of the intensity of competition in fixed telephony services. It is only starting to make an impact on the market in some Member States. Again, Denmark leads the way with 13% of numbers ported; Belgium (11%), the Netherlands (7%) and Spain (4%) are also doing well. In Italy and France, FNP has been applied to a limited amount of numbers, but has picked up rapidly (5 times more numbers in 2003 than in 2002).

The success of FNP seems to be directly linked to the charge imposed by the incumbent operator for porting numbers. In all Member States where FNP is making significant progress, the charge does not exceed € 10. On the other hand, in Ireland, Austria and Sweden, where the fee is above € 17, very few numbers are ported.



3.10. Digital TV



The EU's digital TV market has been showing signs of recovery, after the significant slowdown in growth in the year 2002 (due to the difficult overall situation in the information and communications sector, characterised by limited availability of capital). Digital TV household penetration has increased from about 18% to around 22% in the year 2003. The falling price of set-top boxes (STBs) has increased the appeal of DTTV (digital terrestrial TV) to

consumers[37] and more coherent approaches to the roll-out of FTA (free–to–air) terrestrial DTV seem to be proving successful in several Member States (United Kingdom, Finland).

Progress with digital television varies widely across Member States – with penetration levels that vary from less than 5% to above 50% – although there are still many difficulties in obtaining reliable data on growth and penetration rates throughout the EU. Market development is being delayed for a number of reasons. So far, digital TV has mainly grown on the back of satellite pay-TV (through the migration of analogue subscribers to digital services) which combines a multi-channel offer with operators' subsidies for STBs. However, the growth potential for pay-TV in its current form has its limits (especially in cable TV countries, where users already have a multi-channel option) and generally the uptake of premium services is slowing. Financial problems are affecting all platforms, although this is currently most evident in the case of cable operators. Not the least of the problems is the lack of a forward-looking, harmonised and co-ordinated strategy between market players and Member States for implementing DTTV across the EU.[38]

The figures regarding the development of different delivery platforms indicate that digital satellite TV still remains the main delivery mechanism and represents about 70% of the overall DTV market, while more than 65% of satellite households are digitised. Satellite DTV penetration is still increasing and FTA (free to air) digital satellite is now having significant impact. Digital cable TV represents less than 20% of the overall DTV market and only about 13% of cable households are digitised. The current financial difficulties faced by cable operators across Europe, coupled with the fact that their subscribers already enjoy multi-channel choice within the analogue medium and the lack of a clearly identifiable strategy for cable DTV roll-out, has led to only modest cable DTV deployment, as compared with the United States where cable has played a major role.[39] The penetration rate for DTTV has improved, doubling to 2.5% of total EU TV households over the past year, mainly thanks to the successful take-up of FTA DTTV in the United Kingdom, following the relaunch of the terrestrial platform with an exclusively free-to–air service offer. Finland has also achieved a strong launch for FTA DTTV. Although satellite, cable and terrestrial are the main platforms for the delivery of digital television, new technologies are evolving, such as digital television over ADSL, which has already been introduced in some Member States. However, the penetration rates for DSL TV are still very low and do not exceed 1% of total EU TV households.

4. STATUS OF TRANSPOSITION IN THE MEMBER STATES

The information in this section sets out the main concerns relating to transposition of the key issues in the new regulatory framework, arising from an initial assessment of the transposition measures adopted so far and the draft transposition measures available in some Member States. It inevitably presents an incomplete picture and constitutes only a preliminary and provisional view on the issues concerned.

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37 Recall that digital terrestrial normally offers around 30 channels against 100 or more channels available on digital satellite or cable platforms.

38 For more information on status of digital Television in the EU and some policy options see: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions on the transition from analogue to digital broadcasting (from digital 'switchover' to 'analogue switch-off'), COM(2003) 541 final, 17 September 2003.

39 However, the US industry is much more concentrated than the European one; 10 operators control 85% of cable subscribers.

4.1. Framework Directive

The Framework Directive[40] contains the rules and the principles that apply horizontally to all the activities covered by the other, specific directives which make up the new regulatory framework. It focuses particularly on the responsibilities and powers of the NRAs, since they are the foundation of the new regulatory system.

Key issues for transposition:

- The objectives for NRA action established at EU level should be fully reflected in national laws, as should the requirement that NRAs act independently of operators and impartially;
- The full range of powers available to NRAs under the new framework must also be available to them as a matter of national law;
- It is important that the various tasks attributed to NRAs should be clearly identified, so that operators and users know who is responsible for dealing with any particular problem;
- Member States must ensure that there are effective mechanisms for appeal and dispute resolution;
- National laws should ensure the timely completion of the implementation process, particularly as regards the NRAs' first market reviews;
- National legislation should contribute to transparency in the sector by ensuring that the requirements of the framework regarding the public provision of relevant information on the market and its regulatory conditions are fulfilled.

Main concerns:

– In certain Member States there is no explicit transposition of the requirements of the Framework Directive as to the NRAs' independence from operators or their impartiality;

– The attribution of NRA tasks between different national bodies is not always clear;

– In some cases national laws would appear to limit the NRA's ability to exercise the full range of powers contemplated by the framework;

– The aims of the framework could also be put at risk if the NRAs do not act in a timely manner once they have the requisite powers under national law. In some countries the legislation may fail to provide a time limit for carrying out the first market reviews or provide only a very extended one.

National regulatory authorities

– Clear attribution of NRA tasks

Each Member State is free to decide which body within its territory is to carry out the tasks attributed to an NRA under the new framework. Consequently there may be more than one designated NRA within a Member State. However, because of the risk of confusion as to who

[40] Directive 2002/21/EC: see footnote 9 above.

does what, the Framework Directive requires that each task is assigned to a competent body and that, where tasks are assigned to more than one body, the tasks undertaken by each must be published in an easily accessible form.

In some countries the powers accorded to a NRA under the new framework are so widely dispersed between different national bodies (including in some cases the 'government' itself), that the effective exercise and co-ordination of those powers may be in doubt. This can also give rise to a lack of clarity as to how potentially overlapping responsibilities will be shared. In some countries the separate treatment of television and radio broadcasting regulation from the regulation of electronic communications networks and services generally means that there is a risk that some activities (e.g. cable networks and internet access services) could be subject to double regulation.

In some Member States which have adopted legislation, there is no clear requirement to publish in easily accessible form the different tasks of the NRA(s). It is questionable whether the attribution of tasks within the legislation itself will be sufficient to fulfil this requirement.

– Independence and impartiality of NRA

In most Member States the independence of the NRA from all organisations providing electronic communications networks, equipment or services is now assured, since it was also a key element of the previous regulatory framework.

With regard to NRAs' exercise of their powers, it is noteworthy that in the draft legislation under discussion in one Member State, a number of key decisions require the consent of officials in the NRA appointed by the Ministry.

In some Member States the draft legislation would introduce a mechanism for review of the NRA's decisions by the Ministry and certain tasks have also been transferred from the NRA to the Ministry.

In certain Member States there is no explicit transposition of the requirements of the Framework Directive as to the NRAs' independence from operators or its impartiality. In some cases, however, such independence or impartiality may be ensured by general principles of administrative law or in other pieces of legislation.

– NRAs' powers to act

In some countries which have transposed the framework, it appears that some powers have not been explicitly conferred on the NRA. For example in one case there is no express power for the NRA to impose publication of a reference offer or transparency of internal transfer pricing; in another the power for the NRA to intervene on its own initiative to secure the objectives of the new framework does not seem to be transposed.

In another Member State, the draft law seems to spell out in detail the remedies that can be imposed by an NRA following its market analysis, potentially limiting its discretion to determine which is the most appropriate remedy in a particular set of circumstances. The power of the NRA to apply certain remedies is also restricted in some cases (e.g. transparency and non-discrimination), even if significant market power has been found in the relevant market.

The ability of NRAs to take proper account of the comments of the Commission and other NRAs in the Article 7 process will also be constrained if primary legislation predetermines

the nature of the remedies to be imposed as a result of a finding of SMP in a particular market.

On the other hand in another Member State which has adopted legislation, the discretionary powers of the NRA are so widely drafted that in some instances the question arises whether certain mandatory requirements under the new framework have been fully transposed into law.

– Regulatory Objectives

The Directive requires Member States to ensure that, in carrying out their regulatory tasks, NRAs take account of the objectives enshrined therein, namely that they promote competition to the maximum benefit of users, contribute to the development of the internal market and promote the interests of EU citizens.

In some Member States which have adopted legislation, the objectives enshrined in the national legislation do not directly reflect the regulatory objectives set out in Article 8 of Framework Directive. In some cases this is because the regulatory objectives provided for have been significantly reformulated (perhaps to reflect the legislative culture or traditions of the country concerned) and in others it seems that some objectives have simply been omitted from the national legislation. As a result it is not always easy to determine whether the necessary objectives have been adequately transposed.

A similar problem arises in some countries which have not used the same definitions in their national transposition measures as are used in the Framework Directive. This makes an assessment of the conformity of the national provisions with Community law considerably more difficult.

Likewise the draft laws of some Member States do not expressly mention certain of the objectives contained in Article 8.

– Co-operation between NRA and National Competition Authority

In one country which has adopted legislation, there is no provision in the sector-specific legislation requiring co-operation between NRA and national competition authority, although co-operation between all authorities is provided for in general administrative legislation.

– Appeals

In two Member States it is not clear from the transposing legislation whether a proper appeal mechanism exists from decisions of local authorities that relate to the grant of rights of way.

In some cases decisions stand pending appeal only if there is a specific order by the NRA to that effect, whereas the Framework Directive requires that decisions should stand unless the appeal body decides otherwise.

While Member States have a discretion (as discussed above) in determining which national bodies should carry out the individual tasks of an NRA, the Framework Directive nevertheless requires that the decisions of those bodies in exercising their assigned tasks should be subject to appeal, by any user or undertaking providing electronic communications networks and/or services who is affected by them, to a body that is independent of the parties involved. Although such appeal mechanisms normally exist with respect to the decisions of the authority which is responsible for the day–to–day supervision of the electronic communications mar-

kets, it is less clear how this requirement is met when another body has been designated as an NRA in respect of a particular task, such as a Ministry or even 'the government'.

Market analysis and review of obligations

– Timely and effective market reviews

It is in the interests of consistency and fairness that the process of market analysis and review of existing regulatory obligations be completed across the EU as soon as possible after the date from which the new framework was due to be applied by the Member States (25 July 2003). This process has already been undermined by the failure of a number of Member States to transpose the new framework on time. It could also be further put at risk if the NRAs do not act in a timely manner once they have the requisite powers under national law. In some countries there is no time limit provided by the legislation for carrying out the first market reviews or there is a very extended time limit. This can be contrasted with another Member State which requires the market reviews to be completed within a specified number of days after entry into force of the national law.

– Consistency with Recommendation and Guidelines

It is also important that NRAs act in a co-ordinated manner when exercising their powers under the new framework. This is why the Framework Directive stresses the need for co-operation and consultation between NRAs across the EU and also requires that they take the utmost account of guidance issued by the Commission in the form of Recommendations (including the Recommendation on relevant markets susceptible to ex ante regulation) and the Guidelines on market analysis.

There is concern as to the full transposition of these requirements in the Member States, in particular the requirement to take 'utmost account' of the Commission's recommendations.

In one Member State which has adopted legislation, there is no transposition of the requirement for the NRA to take utmost account of Recommendations issued by the Commission under Article 19 of the Framework Directive or to provide reasons if it does not follow a Recommendation.

The laws of at least two Member States would appear not to ensure that all markets listed in the Commission's Recommendation on relevant markets will be analysed by the NRA.

– National consultation procedures (Article 6 Framework Directive)

In one Member State, despite the adoption of transposition measures, the procedures for national consultation of interested parties on NRA's decisions require further clarification.

Management of Radio Frequencies

In one Member State which has adopted legislation there appears to be no explicit transposition of the requirements of Articles 9(1) and 10 of the Framework Directive regarding the conditions governing the allocation and assignment of frequencies and numbers respectively.

One of the new elements in the Framework Directive is an explicit recognition that Member States may allow operators to trade the rights they hold to use frequencies, under the supervision of the national regulatory authority and subject to certain safeguards. To date six out of

the eight Member States that have adopted transposition measures have made some provision in their national law for such secondary trading.

Dispute resolution

In one Member State which has already adopted legislation, it appears that the scope of the provisions on cross-border dispute resolution (c.f. Article 21 of the Framework Directive) is limited to matters of access and interconnection, whereas it may be possible that other matters could be subject to such disputes.

In another there is no provision in the legislation specifically governing the resolution of cross-border disputes (Article 21 of the Framework Directive).

In another the transposition of exceptions to the four-month time limit for resolving disputes is drafted in such a manner as to imply more frequent recourse to it than the 'exceptional circumstances' contemplated by Article 20 of the Framework Directive.

In a Member State, the draft law limits the scope of the matters that can be subject to the dispute resolution mechanisms to specified issues, which could therefore leave some other issues without access to dispute resolution.

Transparency

In a number of Member States there is no express provision dealing with the publication of information relating to the application of the Directives, as required by Article 24 of the Framework Directive. It is worth noting that the first publication of a notice as required by that Article, describing how and where the relevant information has been made available, should have been made before 25 July 2003, the date for application of the new framework.

In another Member State the draft law does not clarify the requirements relating to provision of easily accessible information to the public will be satisfied in practice.

4.2. Authorisation Directive

One of the key objectives of the new regulatory framework is to reduce the regulatory burdens on market access and to ensure a more consistent treatment of operators, both as between Member States and as between different, but converging, technologies. The Authorisation Directive[41] responds to such a need by creating a legal framework, which ensures the freedom to provide electronic communications networks and services, subject only to the limited conditions laid down in the Directive.

The 8th Implementation Report referred to the existence of additional burdens on the sector which, *inter alia*, took the form of specific taxes on telecommunications services. In this regard, the European Court of Justice has ruled[42] that the former Licensing Directive 97/13/EC[43] (notably its Article 11) prohibited Member States from imposing financial charges other than and in addition to those allowed by the directive on undertakings which

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41 Directive 2002/20/EC: see footnote 9 above.

42 Judgment of 18 September 2003 in joined Cases C-292/01 (Albacom SpA) and C-293/01 (Infostrada SpA).

43 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services, OJ L 117, 7.5.97, p. 15.

hold individual licences in the telecommunications sector, solely because they hold such licences. Although the Licensing Directive was repealed on 25 July 2003, the ruling provides some guidance for the interpretation of national measures similar to the contested charge (a levy on the turnover of telecommunications operators) under the new framework, since the Authorisation Directive contains similar provisions.

Key issues for transposition:

- The provision of electronic communications networks and services is henceforth subject to general authorisation only and individual rights should exist only for the use of radio frequencies and numbers; conditions imposed must be limited to those laid down in the Directive;
- Individual rights of use should only be granted, or limited in number, where there is a need to do so;
- Where the number of rights of use needs to be limited, the procedures and selection criteria must be transparent and respect the underlying principles of Community law;
- The administrative charges imposed on undertakings should be limited to those required to recover the actual administrative costs of the NRAs' activities.

Main concerns:

– It is important that the conditions attached to the general authorisation and to rights of use are clearly defined and established under national legislation, to ensure legal certainty for the undertakings as to their rights and obligations;

– In certain Member States there is a risk that the procedures or the selection criteria for the grant of rights of use of radio frequencies may not respect the principles established under the Directive (transparency, non-discrimination, etc.); in other cases, limits on the number of rights of use may be imposed even when this is not necessary;

– In some cases the requirement that any limitation on the number of rights of use of frequencies be reviewed at regular intervals or at the request of affected undertakings may not be transposed;

– In some Member States there is uncertainty as to whether the NRA can make adjustments to balance administrative costs and charges and no clear requirement to publish a yearly overview of such costs and charges.

Conditions attached to the general authorisation and to rights of use of radio frequencies and numbers

In some Member States which have adopted legislation, it is not always clear whether the requirement that the conditions of a general authorisation be limited to those in the Annex to the Directive is fully met. In one case conditions attached to the authorisation or to rights of use include additional elements than those provided for by the Directive.

In two Member States the draft measures available to the Commission services do not seem to define the conditions that may be attached to a general authorisation and to rights to use frequencies and numbers. In this regard, secondary legislation would need to be adopted, fol-

lowing the adoption of the new primary legislation, to provide for the terms and conditions that can be attached to such authorisations and rights of use.

Rights of use of radio frequencies and numbers, and procedures for limiting the number of rights of use to be granted for radio frequencies

In one Member State the provisions of the Directive establishing the procedure for limiting the number of rights of use of radio frequencies do not appear to be fully taken into account. Elements missing from the transposing legislation concern: i) the requirement that Member States shall not limit the number of rights of use to be granted except in cases where this is necessary to ensure the efficient use of frequencies; and ii) the obligation to review the limitation of the number of rights of use at reasonable intervals or at the reasonable request of affected undertakings.

In some Member States, the principles underlying the selection criteria for the grant of rights of use of radio frequencies (objectivity, non-discrimination and proportionality) do not seem to be explicitly and fully reflected in the legislation.

The Authorisation Directive acknowledges the possibility that specific criteria and procedures may be used for the grant of rights of use of radio frequencies to providers of radio or TV broadcast content services, with a view to pursuing general interest objectives in conformity with Community law. However, it appears that transposition measures applying such specific criteria and procedures do not always make clear how they relate to the pursuit of general interest objectives. Clarity is needed on this point in order to ensure that the requirements of the Authorisation Directive for open, transparent and non-discriminatory procedures are not bypassed in areas where they should apply.

In one Member State, the national legislation contains enabling provisions which would recognise a particular right of access to spectrum for the purposes of reception of signals from abroad and impose corresponding obligations. These provisions could give rise to the risk of a fragmented approach to spectrum management across the EU, duplicating and increasing the burdens on affected operators. In assessing any future national measures implementing this right of access in relation to specific spectrum bands, the Commission would need to consider the proportionality of the measures concerned. In particular it would need to consider whether the principle in the Authorisation Directive has been respected that where possible, in particular where the risk of harmful interference is negligible, spectrum should not be subject to individual rights of use.

As regards the time-limits for decisions on rights of use (both numbers and frequencies), it appears that two Member States do not include the relevant deadlines in their adopted or draft laws. As regards the time limits in the Authorisation Directive for decisions on the grant of rights of use of numbers, it appears that in one Member State which has produced draft legislation the relevant deadline will only be set out in forthcoming secondary legislation.

Compliance with the conditions of the general authorisation or of rights of use

In one country the transposition measure seems to provide the possibility for the granting authority to prohibit the provision of services within sixty days after the notification by the undertaking of its intention to commence business. The granting authority can take such action in the event the applicant does not fulfil the conditions required. This seems to call into question the proper implementation of the procedural requirements of the Authorisation Directive governing compliance with the conditions of an authorisation or a right of use as well

as those governing specific obligations regarding access and the provision of universal service. Under those provisions NRAs can prohibit an undertaking from providing services only in cases of serious and repeated breach of the conditions, where measures aimed at ensuring compliance have failed.

Administrative charges

In order to ensure transparency in relation to the administrative charges imposed on undertakings, the Directive introduced a requirement for the national regulatory authority to publish an annual report on the total sum of charges collected and the administrative costs incurred, and to adjust charges accordingly. In some Member States it is not clear whether the NRA can make adjustments to balance administrative costs and charges. In one case, the requirement to publish a yearly overview of administrative costs and charges collected does not seem to be included in the adopted legislation.

It would appear that the draft legislation in one Member State does not refer explicitly to the principles which are to govern administrative charges (objectivity, transparency and proportionality).

Existing authorisations

In one Member State the draft law provides that the conditions attached to existing licences are intended to remain in force until the adoption of a Regulation concerning the modification of the conditions attached to existing licences.

It is worth noting that in another Member State which has not yet transposed the new framework the NRA has issued guidance to the effect that in general it no longer requires undertakings to obtain an individual licence for the provision of electronic communications networks and services.

4.3. Access and Interconnection Directive

The Access Directive[44] sets out the principles that should govern the exercise by the NRAs of their powers to oversee and, where necessary, regulate relations between electronic communications operators, i.e. the wholesale markets in the sector. The purpose of the Access Directive is to ensure that the relations between operators are left as far as possible to competitive market forces, while giving flexible powers to the NRAs to intervene where market forces alone cannot ensure the fulfilment of the policy objectives set out in the Framework Directive. There is therefore a clear need for NRAs to justify their decisions to impose regulatory obligations on market players and the market analysis procedures established by the new framework provide the key mechanism by which they can do so.

Given the wide degree of discretion accorded to them, NRAs are under a corresponding duty to co-ordinate their actions at national and Community level and, in particular, to co-operate with the Commission and the NRAs of other Member States so as to ensure the consistent application of the regulatory principles across the EU.

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44 Directive 2002/19/EC: see footnote 9 above.

Key issues for transposition:

- Access and interconnection conditions should be primarily a matter for commercial negotiation, but the NRA must still have power to intervene to ensure the policy objectives of the framework are met;
- NRAs should be able to apply the full range of remedies with the necessary flexibility to tailor them to the conditions they find in the relevant market;
- Remedies linked to SMP in the Access Directive should be applied only on the basis of a market review consistent with competition law;
- NRAs should be empowered to impose other obligations than those listed in the Access Directive only in justified cases and in accordance with the necessary consultation procedures.

Main concerns:

– Some transposition measures would tend to pre-determine the obligations to be imposed on undertakings with SMP, without regard to the particular competition concerns or circumstances found in that market;

– In some cases legislation would limit the NRA's power to impose particular obligations upon a finding of SMP, e.g. requiring an undertaking to have SMP in both a wholesale and a retail market;

In some Member States there may be a lack of power on the part of the NRA to ensure that the minimum elements of reference offers are in place and to require changes where appropriate.

Powers and responsibilities of the NRAs with regard to access and interconnection

– Ensuring end to end connectivity

The Access Directive envisages that the responsibility for ensuring end to end connectivity and the accessibility for end-users to digital and radio television broadcasting services, and the powers with which to do so, should be conferred on the NRAs. This provision does not seem to be transposed in one Member State which has already adopted its transposition measures. On the other hand, in two Member States which have not yet transposed the new framework the draft transposition measures appear to envisage that obligations in this field be integrated within the legislative measures themselves. In one case the legislator intends to adopt a general obligation to interconnect in secondary legislation. This approach raises questions as to which body constitutes the NRA for the purposes of the specific tasks assigned by the Access Directive and how the safeguards provided by the new framework will be met, such as the right of persons affected by decisions of the NRA to be consulted and ultimately to appeal against them. In the other Member State concerned the draft law would provide for a general non-discrimination obligation imposed on operators that connect end users. Similar concerns arise in this case, particularly as it appears that the obligations concerned would be fixed in primary legislation.

– NRA's general power to intervene in access and interconnection matters

While conditions for access and interconnection should in principle be left to commercial negotiation, the NRA should have the legal power to intervene – either on its own initiative or at the request of the parties – in order to secure the policy objectives set out in the Framework Directive. The power for the NRA to intervene on its own initiative to secure the policy objectives set out in the Framework Directive appears to be missing in one Member State that has already transposed the current framework.

Obligations on operators linked to market review procedures

Principles

– Periodicity of market analysis

There is one Member State among those that have not transposed the framework in which it is still not clear from the draft legislation what requirements will be imposed on the NRA as to the timing of its market analyses and review of obligations.

– Obligation to impose at least one remedy (if the market is not effectively competitive)

Except for requirements applicable generally under the new framework or under special procedures referred to in Article 8 of the Access Directive, the possibility of imposing remedies on a given undertaking only arises if an NRA has found that the relevant market is not effectively competitive and that consequently one or more undertakings have significant market power. Conversely, if an NRA finds that there is a lack of effective competition in a relevant wholesale market, then it is bound to impose at least one obligation on the operator with SMP in order to remedy that lack of effective competition. In one Member State that has already transposed the framework, it is not clear that this requirement is reflected in the legislation. A similar problem is likely to arise in at least one of those Member States that have not yet transposed the new framework.

– Remedy should be linked to the problem identified

In one Member State that has not yet transposed the new framework the legislator seems to intend to pre-determine which obligations (namely cost orientation and the obligation to publish a reference offer) are to be imposed on all undertakings found to have SMP, without regard to the particular competition concerns in that market. Similarly, the local loop unbundling obligation is intended to be embedded in the law. These solutions risk removing the necessary discretion from the NRA to determine which is the most appropriate remedy based on the nature of the problem identified.

– NRAs' power to apply a full set of remedies

The draft legislation of some Member States does not seem to make available to the NRA the full range of possible remedies detailed in the Access Directive, thus potentially depriving the NRA of its ability to apply them. In one of them, the NRA can include cost-orientation in access obligations only if the operator has SMP in both the access and the end-user markets.

– NRA power to impose other obligations

To ensure maximum flexibility the Access Directive provides for the possibility that NRAs may impose obligations other than those set out in the Directive, subject to prior authorisation by the Commission. In one Member State that has not yet transposed the new framework the draft legislation envisages that in such an event the NRA must first obtain legislative backing

for the imposition of a particular obligation by means of secondary legislation. In such a situation it would appear that the role of NRA is effectively being shared between different institutions and it will be important to ensure that the safeguards provided by the new framework (such as consultation and appeal mechanisms) are assured.

Specific remedies

– Transparency

The Access Directive provides that in cases where an NRA has imposed an obligation on an SMP operator to publish a reference offer it should be in a position to order changes to that offer. Experience of the implementation of the previous regulatory framework shows that this power is a crucial one for NRAs. However, a number of Member States have not included this power for their NRA in their adopted or draft legislation, while another Member State has provided the NRA with the power to require that a reference offer be made publicly available, but has not given it the power to require its publication.

In some Member States, which have adopted transposition measures, the current reference unbundling offer does not contain all elements set out in the Access Directive or remains to be established by secondary legislation. On the other hand, the draft law of one Member State does not contain a definition of unbundling, which means that it does not fulfil the transposition requirements concerning the minimum elements of a reference unbundling offer.

– Accounting separation

According to the provisions on accounting separation the NRA should have a power to make transparent the internal transfer prices of a vertically integrated company. This power is missing in the adopted or draft laws of at least two Member States.

– Price control and cost accounting

The Access Directive stipulates that in making decisions on cost accounting and pricing matters NRAs shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved. One Member State has provided for an additional consideration to be taken into account, namely investments for the development of networks and innovative services.

The directive also provides that where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs should lie with the operator concerned. It would appear that the draft transposing legislation of one Member State does not incorporate this requirement. In another this principle is not contained in the primary legislation but remains to be established in the regulatory decisions of the NRA.

The directive stipulates that in the event that a NRA requires a cost accounting system to be implemented, a description of that cost accounting system should be made publicly available. Two Member States seem not to have reflected this requirement in their draft laws.

Digital broadcasting

One Member State which has not yet adopted legislation has excluded conditional access systems from the scope of its draft law and the primary legislation (adopted or draft) of some others seems only to deal with a part of the requirements of the Directive in this area.

4.4. Universal Service Directive

The Universal Service Directive[45] contains a set of rules and principles designed to safeguard the interests of users and to ensure that liberalisation does not occur at their expense. It is founded on the premise that competition and market forces are the most effective means to satisfy user needs, but provides national regulatory authorities with the necessary powers to protect users' interests where they need to do so.

Key issues for transposition:

- The scope of universal service should be defined in accordance with the Directive;
- Universal service should be implemented in a way that minimises market distortions;
- The designation of undertaking(s) with universal service obligations should ensure that universal service is provided in a cost-effective manner. No undertaking should be *a priori* excluded from being designated;
- Only the net cost to designated undertakings of the provision of those services that are covered by the universal service obligation as defined in the Directive may be recovered through a sharing mechanism or from public funds;
- End-users across the EU should enjoy all of the rights conferred to them in the Directive, and NRAs should be fully empowered to enforce those rights;
- Obligations should only be imposed on undertakings with SMP in a relevant retail market where the market is not effectively competitive and NRAs consider that obligations imposed at the wholesale level and/or carrier selection and pre-selection are not sufficient to achieve the objectives of the new framework.

Main concerns:

– In some Member States the scope of universal service has not been delineated in accordance with the Directive. This has implications regarding the calculation of the net cost of universal service and any funding schemes;

– The adopted and draft transposition measures of some Member States seem to have excluded *de facto* some operators from being designated with universal service obligations. It is also not clear as yet whether sufficient account has been taken in all Member States of the need that the implementation of universal service minimise market distortions;

– Not all the provisions relating to the rights and facilities to be made available to end-users appear to be consistently transposed in the Member States;

– Some national laws (adopted or draft) do not reflect the principle that *ex ante* obligations should be imposed on operators as the result of a finding of SMP in a relevant retail market only if the NRA considers that wholesale remedies and/or carrier selection or pre-selection are insufficient.

[45] Directive 2002/22/EC: see footnote 9 above.

Universal service obligations

– Scope

The keystone of universal service remains the provision on request of a connection to the public telephone network at a fixed location and access to publicly available telephone services, at an affordable price, in the whole territory of the European Union. As compared with the previous regulatory framework, this requirement has been made more precise in terms of the technologies which may support such connection (which may be fixed or wireless) and the data rates that the connection should allow for (they must permit functional Internet access).

Some transposition problems arise in regard to the scope of the services covered by the universal service obligation: in one Member State, there is no explicit provision in the draft law that universal service should be available in the whole of the national territory. In another Member State the draft legislation does not require explicitly that the connection to the public telephone network must permit functional Internet access.

It is not clear whether the obligations relating to specific measures for disabled users or users with low incomes or special social needs are included within the scope of universal service in the adopted or draft law of some Member States.

In one Member State certain universal service obligations including social obligations are applied to all operators as general conditions, rather than as universal service obligations applicable only to the designated universal service provider(s).

– Designation of undertaking(s) with universal service obligations

In one Member State, universal service obligations are imposed in the law on operators having significant market power. Since there is no designation 'proper' of universal service operators, many of the relevant provisions of the Directive are not transposed (e.g. relating to the publication by designated undertakings of information on quality of service).

In another Member State, the draft law also appears to exclude most operators from the possibility of being designated as a universal service provider, at least as regards the provision of access at a fixed location and telephone booths, since it creates the possibility for designating an operator for each service, but requires that the operator be able to supply the service on the whole of the national territory. The objective of the Directive is to ensure that the whole territory is covered. To this end Member States may designate one or more operators, and this designation can be on a regional or a national basis. However, they should use an efficient, objective, transparent and non-discriminatory mechanism for designation whereby no undertaking is a priori excluded from being designated.

This in turn could compound the problems of costing the universal service and the operation of a funding mechanism: since the net cost of the service may be established either by the cost accounting method or by the results of a call for tender, there is a risk that if the latter option is taken the incumbent operator could name its price for the costs that are to be reimbursed by other operators, without regard to the principles of least market distortion or non-discrimination.

– Calculation of the net cost of universal service and its financing

Some Member States have availed themselves in their adopted or draft transposition measures of the possibility foreseen in the Directive to determine the net cost of universal service through a tendering procedure.

Most Member States' adopted or draft transposition measures contain provisions on a sharing mechanism for financing of universal service obligations. In one of them, while the draft law only mentions one financing method, namely that of covering the net cost of universal service by levying contributions from market players, public (ERDF) funds have been requested to meet certain universal service obligations. In this case the risk of double financing should be avoided.

Not all the safeguards contained in the Universal Service Directive to ensure that a sharing mechanism to finance universal service obligations does not distort competition appear to have been adequately transposed. In some Member States the relevant provisions are not included in the draft law. In another Member State it appears possible for the incumbent operator to recover from other communications providers part of the cost of providing a service imposed as a universal service obligation, without the use of any sharing mechanism.

It should be recalled that where Member States choose to operate a scheme for the costing and financing of universal service obligations, the scheme should be communicated to the Commission for verification of compatibility with the Treaty.

End-user rights

Beyond the provisions falling within the category of universal service, the Directive contains a number of requirements that reinforce end-users' interests by means of specific rights, ranging from the minimum information to be included in contracts through to the availability of specific facilities such as directory services and number portability.

Many national transposition measures fail as yet to transpose all the relevant provisions in sufficient detail to allow their application as from the entry into force of the primary transposing legislation. In particular, it appears that not all NRAs are empowered to impose and enforce the information and transparency requirements of the Directive.

– The provision of various facilities

The provision of directory enquiry services and directories is open to competition. The Universal Service Directive provides that all service providers that assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner. In some Member States, the draft law does not oblige undertakings to provide relevant information for directory purposes on a cost-oriented basis.

Also, not all Member States which have adopted transposition measures have transposed the requirements of the Directive relating to the provision of tone dialling and calling line identification. It remains to be established whether this is because the countries concerned have concluded, after taking into account the views of interested parties, that there is sufficient access to these facilities.

In one Member State which has adopted transposition measures, the availability of mobile number portability may be delayed until some time in 2004, following recent adoption of secondary legislation in addition to the primary law aimed at transposing the new framework.

– Must carry

Most national measures transposing the new regulatory framework do not introduce must carry rules; they are usually embedded in other pieces of national legislation, such as audio-visual laws. Nevertheless, such must carry rules must comply with the principles set out in the Universal Service Directive, namely that they should only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent.

The compliance with the Directive of existing and new national must carry rules has been called into question by market players in some Member States, particularly in the light of the proportionality principle.

Regulatory controls on undertakings with SMP in specific retail markets

– Principles

Not all national laws (adopted or draft) reflect the principle that *ex ante* obligations should be imposed on operators as the result of a finding of SMP in a relevant retail market only if the NRA considers that wholesale remedies and/or carrier selection or pre-selection are insufficient.

In one Member State the structure of the draft transposition measure does not distinguish clearly between remedies to be applied at the wholesale level and remedies to be applied at the retail level, and the question arises as to whether the NRA has been empowered to adopt all the possible remedies mentioned in the Directive.

One Member State which has adopted legislation has not transposed the provision that where retail tariff regulation is imposed appropriate cost accounting systems must be implemented and verified annually and the NRA shall ensure that an annual statement concerning compliance is published.

– Leased lines and carrier selection and pre-selection

In some Member States, the requirements of the Directive relating to the provision of the minimum set of leased lines are not included, or are only partially included, in the transposition legislation (adopted or draft), or remain to be completed by means of secondary legislation.

In other Member States, either the requirement that pricing of interconnection and access related to carrier selection and pre-selection by SMP operators be cost oriented is not transposed or it is unclear whether cost orientation is applicable.

5. E-PRIVACY DIRECTIVE

5.1. Introduction

The e-Privacy Directive was required to be transposed by the Member States before 31 October 2003. It effectively replaced the previous Telecommunications Data Protection Directive[46] from that date. In view of the closeness of this deadline to the date of publication,

[46] Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, OJ L 24, 30.1.1998, p. 2.

this report does not contain an analysis of national transposition measures or draft laws. However, the e-Privacy Directive constitutes a vital element in the new regulatory framework, designed to protect the fundamental interests of end-users, and some of its key requirements (which the Commission will take particular care are properly reflected in national transposition measures) are therefore described in this section.

5.2. Traffic data retention

The e-Privacy Directive requires that processed and stored traffic data be erased or made anonymous when no longer needed for transmission of the communication. Traffic data necessary for billing or interconnection payment purposes may be processed, but only up to the end of the period during which the bill may be lawfully challenged or payment pursued. Data may be processed for the provision of value added services, but only for the period necessary and after consent has been given. Withdrawal of this consent should be possible at all times.

It is important that national law requires subscribers to be informed of the purposes behind the retention of traffic data (before giving consent) and of the types of data retained.

5.3. Location data

There is a new provision in the directive focusing on the treatment of data indicating the geographical position of the subscriber's terminal equipment. A different treatment applies to location data than applies to traffic data, in that the former may be processed either anonymously or with consent of the user.

It is important that national legislation should ensure that, where processing of the location data is allowed with the consent of the user, prior to obtaining such consent the user must be informed of (1) the type of location data that will be processed, (2) the purposes and duration of the processing and (3) whether the data will be transmitted to a third party. It is also important that the user can withdraw its consent at any time**.**

5.4. Unsolicited Communications (spam)

The e-Privacy Directive introduces a requirement that Member States apply an 'opt-in' system, as a general rule, to unsolicited communications (or spam) produced by means of automatic calling machines, fax machines and electronic mail (including SMS messages).

While the Directive does allow for the possibility of an exception to the general opt-in principle under which, in the context of a sale of a product or service, contact details may be used for direct marketing of a company's own similar products or services), it is important that, if such an exception is provided by national law, it is strictly drawn, so as to avoid effectively undermining the opt-in approach.

For other types of direct marketing practices, the Member States can choose to apply an opt-in or an opt-out system.

Effective and timely enforcement of compliance with the new opt-in approach will be essential to ensure that subscribers' interests are protected. The Commission will therefore look to confirm that national transposition measures provide for real sanctions in the event of breach of the relevant requirements by direct marketers, including where appropriate financial penalties. This also means that the competent authorities, be they the NRAs or the Data Protection Authorities, need to have the requisite investigation and enforcement powers.

5.5. Cookies

The e-Privacy Directive contains a provision, not in the previous Telecommunications Data Protection Directive (97/66/EC), governing the use of devices for storing or retrieving information, such as 'cookies'. Users must be informed of the purposes of such devices and have the opportunity to refuse their use or installation on their terminal equipment.

6. COMPETITION DIRECTIVE

6.1. Introduction

In order to make the rules on liberalisation simpler and more transparent, on 16 September 2002 the Commission adopted Directive 2002/77/EC on competition in the markets for electronic communications networks and services (the Competition Directive). This Directive consolidates the previous directives in this area[47] and seeks to maintain the necessary coherence with the new Regulatory Framework.

6.2. Main content of Competition Directive: Abolition of special and exclusive rights

In line with the provisions established under Directive 90/388/EEC, the Competition Directive requires Member States to abolish special or exclusive rights relating to electronic communications networks and services (including those involving the use of frequencies) and to ensure that any undertaking is entitled to provide them. Moreover, Member States shall ensure that any general authorisation allowing undertakings to provide such networks or services is based on objective, non-discriminatory, proportionate and transparent criteria.

The scope of the Competition Directive is in line with that of the new regulatory framework: it applies to all networks and services which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means, e.g. fixed, wireless, cable and satellite networks. It therefore applies to transmission networks and services used for broadcasting of radio and television programmes but excludes services providing or exercising control over their content. The Commission is currently investigating whether the regulation of the networks and services used for the broadcasting of radio and television programmes and other audio-visual services in a number of Member States complies with the Competition Directive.

It is worth noting that the Competition Directive also applies to so-called 'dark–fibre' networks, which are networks that enable third parties to convey signals, using their own switching or routing equipment.

6.3. Notification requirements

Member States are required to provide the Commission with such information as will allow it to confirm that the provisions of the Competition Directive have been complied with. They must also communicate to the Commission their schemes on sharing the net cost of the provision of universal service. In addition, if a Member State considers that there is sufficient competition in the provision of local loop infrastructure to justify the ending of the obligation of legal separation of a cable television network from other electronic communications net-

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[47] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10) and its successive amendments.

works, then it must inform the Commission accordingly, so that the Commission can decide whether the obligation may be ended in that Member State.

7. ACCESSION COUNTRIES

Ten countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia) will join the European Union on 1 May 2004. These accession countries agreed, in the course of the accession negotiations, to implement the 1998 telecoms *acquis*. They must clearly also ensure compliance with the new framework as from the date of accession.

Since the new framework is a development, and builds on the achievements of, the 1998 framework (in particular market liberalisation and 'open network provision' (ONP)), the effective implementation of the old framework by the existing EU 15 was an essential pre-requisite for the transition to the new one.

Likewise, it is a prerequisite for the accession countries that the same process of liberalisation and regulation be effectively achieved in the run-up to the full application of the new framework within their territories. Once the requirements of the old framework have been put in place, the process of market analysis and review of obligations can be conducted effectively as contemplated by the new framework.

This is consistent with the provisions of Article 27 of the Framework Directive, which requires Member States to maintain under national law the regulatory obligations imposed under the old framework provisions referred to in that article (essentially the SMP obligations), until those obligations are reviewed in accordance with the process of market analysis and consultation with the Commission and other NRAs provided for in the new framework (particularly the Article 7 notification process). In the case of the accession countries, it is possible for this process to be carried out legally only once they have formally acceded to the EU.

As a result it is anticipated that the accession countries will take the following steps in order to meet their Community obligations in the electronic communications sector:

- The accession countries will implement in full, and maintain in force until after the date of accession, the requirements of those provisions of the old framework referred to in Article 27 of the Framework Directive. They should then conduct (or complete) the market analysis and review of obligations in full conformity with the procedures of the new framework (including notification to the Commission and other NRAs under Article 7), as soon as possible after accession, so that the obligations concerned can be amended, withdrawn or maintained as appropriate;

- As far as the other requirements of the old framework are concerned (i.e. in broad terms the general legal framework for telecommunications and the rights and obligations generally applicable in the sector), by the date of accession these will have been, on the one hand, implemented effectively in accordance with the commitments made in the accession negotiations and, on the other, adapted where necessary to comply with the requirements of the new framework. As an example, by the date of accession the system of authorisation of electronic communications networks and services in an accession country would comply with the new framework by providing for general authorisation and rights of use only.

In the next implementation report, which the Commission intends to issue in the fourth quarter of 2004, the status of transposition and application of the electronic communications directives in the newly acceded Member States will be assessed alongside that of the current Member States (EU 15).

8. PROCEDURE FOR NOTIFICATION OF NATIONAL REGULATORY MEASURES

In order to ensure the development of a consistent regulatory practice throughout the Community, Article 7 of the Framework Directive puts in place a new procedure requiring NRAs to notify to the Commission and all other NRAs *inter alia* all draft measures defining relevant markets and designating undertakings as having Significant Market Power (SMP), where the measures in question would affect trade between Member States. Pursuant to that Article, the Commission has a power of veto, since it can require an NRA to withdraw and amend the notified measure if it has serious doubts as to its compatibility with Community law.

The Commission has created the structures necessary to enable it to perform its tasks in the most efficient way from a legal and operational point of view.

The first notification was received on 4 August 2003 from OFTEL, the United Kingdom regulatory authority. The notifications received so far from that authority concern the following markets: i) mobile access and call origination, ii) fixed geographic call termination, iii) wholesale unmetered narrowband internet termination, iv) fixed narrowband retail, v) wholesale international services, and vi) fixed narrowband wholesale exchange line, call origination, conveyance and transit.

The Commission made comments on the draft regulatory measures pursuant to Article 7(3) of the Framework Directive.[48]

An increasing number of notifications is expected in the coming weeks and months. A number of 'pre-notification' meetings with NRAs have been held, and have proved extremely useful. Additional meetings have also taken place with industry players and associations for the purpose of clarifying the Article 7 procedures.

9. INFRINGEMENT PROCEEDINGS

As stated above, the Commission has stressed the importance of full, effective and timely implementation of the new regulatory framework for electronic communications. The Commission's Internal Market Strategy[49] in particular points out that late transposition and ineffective enforcement remain a serious problem for the proper functioning of the single market as a whole.

The Commission opened around 250 infringement proceedings to support the implementation of the 1998 regulatory package, and will continue to play a proactive role in relation to the new framework in order to achieve maximum legal certainty for market players and investors in this highly dynamic sector.

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48 See Commission website at http://forum.europa.eu.int/Public/irc/infso/ecctf/home.

49 COM(2003) 238, 7 May 2003.

The Commission is monitoring the transposition process closely, and has already opened proceedings against those Member States which failed to incorporate the four directives (Framework, Authorisation, Access and Users' Rights) into national law by 24 July 2003.[50] It will also launch infringement proceedings against Member States that have failed to transpose the e-Privacy Directive by 31 October 2003.

The correct implementation of the Directives will be one of the priorities to be focused on when analysing national transposition measures. Further, and for the sake of legal certainty and transparency, the Commission regards it as a priority to enforce the specific notification requirements imposed on Member States under the new framework, concerning, for instance, the individual NRAs and their assigned tasks and responsibilities as well as SMP operators and universal service providers. The Commission will also monitor the fulfilment of the Member States' obligation to take account of recommendations adopted to ensure the consistent application of the new framework, including the Recommendations on relevant markets and on procedures under Article 7 of the Framework Directive.

The Commission has also pointed out that it is important to complement formal infringement proceedings with alternative means of achieving rapid results when monitoring the application of Community law.[51] This may be a more effective and proportionate method than infringement proceedings. In this regard the Commission is working closely with the Member States' authorities, and in particular with the independent national regulatory authorities. In addition to the European Regulators' Group (ERG), co-operation already takes place in the Communications Committee (COCOM), the Radio Spectrum Committee (RSC) and the Radio Spectrum Policy Group (RSPG), and in bilateral meetings with the Member States.

Finally, regular reporting on the implementation of the regulatory framework and market developments has proved to be an efficient tool for monitoring correct implementation, which the Commission intends to continue to use in the future.

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50 See press release IP/03/1356, 8.10.2003.

51 Commission Communication on better monitoring of the application of Community law COM(2002) 725, 11 December 2002.