Pillar 1

Regulatory developments

INSTITUTIONAL FRAMEWORK

Independence and organisation of national regulatory authorities

Effective and independent national regulatory authorities (NRA) have been a requirement for ensuring impartial regulation since the liberalisation of electronic communications markets. Independent regulators contribute to a consistent and coherent implementation of the regulatory framework to support the digital single market. While initially the notion of independence focused around the principle of separation between regulatory and operational functions, more recently it has been acknowledged that independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this effect, the Better Regulation Directive amended the Framework Directive by requiring *inter alia* that national regulatory authorities responsible for *ex-ante* market regulation or for resolution of disputes are protected against external intervention or political pressure. Moreover, the revised Directive mandates that rules are laid down which would allow for dismissal of the heads of an NRA only when they no longer fulfil the conditions required for the performance of their duties. In order to allow them to effectively perform their functions, it must also be ensured that NRAs have appropriate human and financial resources including their own budget. Member States must transpose the revised Directive by 25 May 2011.[1]

The Commission continues to monitor closely the institutional arrangements with regard to the independence and effectiveness of national regulatory authorities. The Commission constantly follows developments concerning the appointment and dismissal of the heads of NRAs as well as the availability of adequate financial and human resources. Where necessary, the Commission has taken action and in a number of cases the issues have been resolved in 2010.

As regards the requirement of effective structural separation of regulatory functions from activities associated with the ownership or control of electronic communications providers, this continued to cause concern in certain Member States. In November 2010, the Commission decided to refer Lithuania to the EU Court of Justice for lack of effective structural separation as the Ministry of Communications, which is directly involved in regulatory activity, continued to exercise control over electronic communications operators. In Romania, despite commitments to transfer all regulatory powers from the Ministry to the NRA, the rules on structural separation remained unchanged and on 24 November 2010 the Commission decided to send a Reasoned Opinion. The Commission services were also looking into a similar situation in Estonia concerning the Ministry of Economic Affairs and Communications. At the same time, the case concerning the lack of structural separation regarding the Ministry of Transport in Latvia was finally resolved with its regulatory functions regarding frequency and numbering management being transferred to the Ministry of Environmental Protection and Regional Development.

Clear rules regarding the formal establishment and dismissal of the NRA are a prerequisite for the impartiality and the transparency of the NRA's functioning. In June 2010 the Commission

[1] In order to assist with the implementation of the revised EU rules in this respect, the Commission services provided initial guidance to Member States in the Communications Committee's Working Document on the *Independence of the NRA* (COCOM10-16).

was able to close the infringement proceeding against Slovakia after the relevant amendments to national legislation setting out the rules for dismissal of the NRA management had become effective. Also in Slovenia following the launching of an infringement procedure by the Commission in March 2010 on the need to establish clear rules for the dismissal of the head of the regulatory authority, legislative amendments to the Electronic Communications Act aimed at addressing the issue were underway. In Romania, an additional letter of formal notice was sent in May 2010, prompted by the concern that the regime granting the government a large discretion to restructure the NRA by way of emergency acts would not be consistent with EU law. However, following the parliament's approval of the emergency ordinance which secured a stable statute for the NRA, the infringement proceeding was closed in November 2010.

In Austria, the NRA responsible for the regulation of the broadcasting sector which had been a subordinate administrative body of the Federal Chancellery became an independent authority.

The issue of whether a legislative body is suited to act as a national regulatory authority was the subject of a preliminary ruling request of the Belgian Constitutional Court (case C-389/08). The ECJ held that while this is not in principle precluded, the requirements of competence, independence, impartiality and transparency must be met and that its decisions can be made the object of an effective appeal.

A number of structural changes were witnessed in 2010. In Hungary, following legislative changes, the NRA was merged with the National Radio and Television Commission and the new management including a vice president responsible for electronic communications was elected for 8 years and was vested with strong safeguards against dismissal. As regards the attribution of additional responsibilities, in the Netherlands new consumer protection tasks were entrusted to the NRA. In Ireland the regulation of premium rate services was attributed to the NRA and in Belgium the regulator's internal structure was reorganised. Finally in the UK, the Government proposed to relieve the NRA of some of its tasks in the media and content field and at the same time to transfer to it the regulation of the postal sector.

Resources and powers

In order to be able to effectively perform their tasks, national regulatory authorities need to be able to rely on the necessary resources in terms of staffing, expertise and financial means. In the context of the economic downturn, limitations on human and financial resources have been faced in a number of Member States. Reductions in the number of NRA staff were reported in Slovakia and the UK while pressure to decrease personnel was also felt in the Czech Republic. In Romania and Bulgaria the number of Board members was reduced and this was also proposed in Spain.

The availability of sufficient financial resources is essential for an effective and independent functioning of the NRA. In 2010, cuts in budgetary resources were reported in France and the Netherlands. Significant salary cuts were reported in Greece. In Malta, a lack of organisational flexibility was felt due to delays in the government's approval of the authority's budget and in Belgium strong concerns have been expressed again regarding the human and financial resources of the NRA and in particular regarding the use of the budget.

Legislative amendments with regard to NRA budgets were also reported in 2010. For instance in Cyprus the presentation of the NRA's budget has been amended and now provides for a

more specific classification of items and amounts allocated to this body. To that end, any potential disapproval on the part of the Cypriot Parliament of the regulator's budget would now relate to a specific item, and not to its totality. In Luxembourg new legislation strengthened the autonomy of the NRA's budget, complementing an earlier legislative measure that allowed for staff increases.

As regards the powers of the NRA with regard to market analysis and regulation, the German legislation of 2007 on the regulatory treatment of 'new markets' was in the process of being annulled by draft legislation adopted by the government in May 2010 and expected to enter into force in March 2011. This followed a judgment by the ECJ in case C-424/07 where it declared that an NRA's discretionary powers cannot be limited as to its responsibility to carry out market analyses. In March 2010, an infringement proceeding was launched against Poland as it appeared that Polish law allowed the NRA to deviate significantly from imposed cost orientation remedies without a new market analysis. Also in Poland an amendment to the Telecommunications Act entered into force in December 2010 which allows the NRA to approve voluntary commitments by operators.

The need to increase the transparency of NRA decisions was noted in several countries including Slovakia, Slovenia and Greece. In Ireland and Italy operators expressed a desire for greater predictability and certainty regarding the regulator's work plan.

Dispute resolution

In the event of disputes arising between providers of electronic communications networks or services, the NRA should be able to issue a binding decision in the shortest possible time frame and in any case within four months except in exceptional circumstances. The need for a swifter reaction when dealing with dispute resolution requests was noted in some Member States.

In Sweden, following legislative amendments which entered into force in August 2010, the Commission was able to close the infringement case concerning the limited competence of the NRA to settle disputes regarding interconnection agreements.

Appeals

In accordance with Article 4 of the Framework Directive, any user or undertaking providing electronic communications networks and/or services that is affected by a decision of a national regulatory authority has the right of appeal against the decision to an independent appeal body.

Institutional changes to the appeal process were being considered in some Member States. In Greece, a decision was still awaited on the issue of the handling of appeals of the regulatory decisions of EETT. In the context of a case examined by the Council of State in December 2009, a division of it decided that the Administrative Court of Appeal would only have the competence to annul or repeal the regulatory decisions taken by the Greek national regulator, and not to amend these decisions. As for individual administrative decisions, the said Court would have the competence to amend the decisions without having to request EETT to issue a revised decision. The case is still pending in front of the Plenary. In Latvia, legislative amendments have been proposed whereby dispute resolution decisions of the NRA would no longer be open to appeal to the Administrative Court but the appellant would have to bring proceedings against the other party to the dispute in the civil court. In the UK, the government

proposed replacing the current appeals system in the Competition Appeal Tribunal (CAT) with an "enhanced" judicial review.

The effectiveness of the appeal mechanism and the frequency of appeals varied between Member States. Frequent and systematic appeals had been reported in Sweden, Bulgaria Slovenia, Poland, as well as in the UK. By contrast, in Ireland no appeals had been registered in 2010. The number of proceeding had also gone down significantly in Poland as a result of the agreement between the incumbent and the NRA on non-discriminatory treatment of alternative operators.

In accordance with Recital 14 to the Better Regulation Directive, in order to ensure legal certainty for market players, appeal bodies should carry out their functions effectively; in particular, appeals proceedings should not be unduly lengthy. In Sweden in order to address the issue of lengthy proceedings, new legislation was adopted requiring that each appeal should only take six months in each instance. Long delays in addressing appeals were reported in Greece. A lack of improvement as regards the effectiveness and timely resolution of appeals by the Communications Appeal Board has also been noted in Malta.

In Germany, lack of sufficient motivation of certain decisions imposing obligations led to the repeal of decisions by German courts and the Swedish regulator's decisions were also often overruled by the Courts including on the grounds of insufficient justification of decisions.

IMPLEMENTATION OF REGULATORY MEASURES

Main trends in Article 7 procedures

In 2010 the Commission issued 131 decisions under the Article 7 procedure, compared to 134 in 2009. Of these, 96 decisions included comments on regulatory draft measures and in 33 other cases the Commission did not make any comment. On two occasions the Commission opened a second phase investigation which resulted in one veto decision. Nine notifications were withdrawn by regulatory authorities, one of which during phase II.

The Commission veto decision of March 2010 concerned a Polish notification of the market for IP traffic exchange. The Commission concluded that the data provided by the regulator did not support the finding of two separate markets for IP traffic exchange. The Commission could also not agree with the SMP finding on those markets. An appeal against this Commission decision has subsequently been filed with the General Court by the President of UKE.

Other important cases concerned the infrastructure access and wholesale broadband access markets and the consistent treatment of next generation access (NGA) networks from a market definition and remedies perspective. With regard to market definition the Commission opened one second phase investigation where the exclusion of fibre optic infrastructure from the infrastructure access market was not sufficiently substantiated. With regards to remedies the Commission issued comments to NRAs in those cases where the NGA Recommendation was not fully taken into account. As will be reported below, this concerned among others (virtual) access remedies which fell short of full unbundling, clauses which made full unbundling conditional on other factors, and the lack of an appropriate costing method for the fibre loop.

In this context the Commission also assessed French proposals for symmetric regulation of fibre optic networks, which foresee access to the terminating segment plus certain backhaul obligations in less densely populated areas. The French proposals are based on Article 12(3) of the Framework Directive and the Commission services raised concerns about the compatibility of the French regulator's approach with EU law.

During 2010 the Commission has on a number of occasions assessed the extent to which draft measures in both fixed and mobile termination markets comply with the Termination Rates Recommendation. The general trend in mobile markets is towards lower and symmetric rates and the majority of those NRAs which have notified MTRs appear to be broadly on track to adopt the recommended approach by the end of 2012. In fixed termination markets the Commission has on two occasions reminded NRAs that different network topologies and degrees of interconnection of alternative fixed network operators should not normally justify higher termination rates, which should be geared towards the cost of an efficient operator.

Three regulators have proposed regulation of the market for SMS termination. Although not listed in the Recommendation on Relevant Markets the Commission did not contest that this market can fulfil the three criteria test for ex-ante regulation in the specific Member States. The Commission did, however, express strong concerns with regard to the introduction of so called reciprocity clauses or other attempts to make regulated rates available only to operators resident in the country concerned.

The Commission has noted that calls markets but also retail leased lines are still subject to ex ante regulation in a number of Member States, although these markets are no longer listed in the Recommendation on Relevant Markets. When assessing the draft measures the Commission found that competition problems at retail level often result from insufficient wholesale regulation. Consequently, the Commission asked regulators to address competition problems at wholesale level, and, once such regulation is properly implemented, re-examine the three criteria before the end of the review period.

The last important group of cases concerned the setting of prices for key access products such as the local loop and bitstream products and the Commission has asked NRAs, in particular, to apply appropriate cost methods in a consistent manner along the value chain. Similar consistency issues also arose in the context of non-discrimination remedies. In this respect the Commission is aiming to provide further guidance to regulators on costing methods and non-discrimination remedies.

Broadband Implementation

The Digital Agenda for Europe and the Europe 2020 strategy have underlined the importance of broadband deployment to promote social inclusion and competitiveness in the EU. To this aim, the Digital Agenda for Europe has set ambitious targets with regard to the availability and take-up of fast and ultra-fast broadband. The Communication on broadband[2] which was adopted by the Commission on 20 September 2010 outlines a common framework within which EU and national policies should be developed to meet these targets.

In this context, the past year saw the launch by several Member States of new broadband strategies setting out future policy plans for broadband development; while other Member States registered progress towards achieving their existing national broadband targets (see

[2] Commission Communication, European Broadband: investing in digitally driven growth, COM(2010) 472

section on broadband market development). Moreover, in some Member States expert forums have been set up in order to discuss issues linked with broadband and NGA deployment. This shows that broadband development has become a firmly established political priority throughout the EU, although work remains to be done in those Member States where no comprehensive national broadband plan with clear targets is yet in place.

To foster the continuous development of broadband, an essential part of the process is to ensure that the regulatory environment remains in line with evolving market circumstances by carrying out timely and regular market reviews. Throughout 2010, regulators in a number of EU countries started – and in a number of cases completed – new rounds of wholesale broadband market(s) analyses (e.g Sweden, Cyprus, Austria, Germany, the Netherlands, Denmark, Belgium, the Czech Republic, Romania, Bulgaria, Latvia, Hungary, Poland, Slovenia, Lithuania and the UK). Moreover, reviews of market analyses have been announced for 2011 by the Czech Republic, Denmark, Finland, Portugal, France and Malta. In contrast, a few NRAs have focused their activity in 2010 on monitoring markets and obligations, such as in Finland, or on implementing market remedies, such as Italy.

With respect to the market for wholesale physical network access, new obligations on the incumbent have been introduced or envisaged in a number of countries, such as Romania, Bulgaria, Slovakia, Poland, Ireland, Belgium and the UK. In some of these countries, this may facilitate the take-up of LLU and thus lead to a richer broadband offering.

As to the wholesale broadband market, the reviews carried out in Austria, Romania and the UK resulted in total or partial deregulation of the market, which brings the number of countries in which this market is currently not (or not fully) subject to *ex-ante* regulation to 7 EU countries (Romania, Luxembourg, Sweden, Malta, Austria, Portugal and the UK). In Luxembourg and Malta, it was reported that commercial offers are not considered satisfactory by alternative operators. As far as remedies in the wholesale broadband market are concerned, a new wholesale product at regional level based on an Ethernet interface has been defined in Spain and is perceived as essential for the maintenance of competition in the market.

In terms of the implementation of remedies, several regulators have adopted new methodologies for a price control obligation (e.g., Denmark, Estonia, Greece, Italy and Belgium). As significant divergences still remain in applied cost accounting methodologies, the Commission has repeatedly emphasised the need to apply consistent prices for key access products. In addition, some regulators have started working on a new margin squeeze evaluation model, for example in Cyprus, Denmark and Italy. Furthermore, 2010 has seen a high level of activity by NRAs with respect to the adoption or update of Reference Offers (e.g. in Malta, Portugal, Spain, Cyprus, Belgium, Poland, Italy, Greece and Luxembourg).

NGA

In a number of countries, regulators have set out the framework conditions for the roll-out of NGA networks, or are in the process of doing so, by conducting new market analysis and extending existing remedies to NGA networks or adopting new remedies. The number of countries in which regulators have included or proposed to include fibre in market definitions is growing (e.g Sweden, Denmark, the UK, Ireland, Austria, Germany, the Netherlands, Poland, the Czech Republic, France, Estonia, Finland, Slovenia and Italy). In the Czech Republic notably, the regulator re-assessed the second review of the wholesale network access market in 2010, the original market review notification having been withdrawn in 2009 due to the failure to include fibre networks in the market definition. Furthermore, the Commission

opened a second phase investigation procedure concerning a notification of the market for wholesale network access by the Lithuanian NRA, on the grounds that the exclusion of fibre optic infrastructure from this market was not sufficiently substantiated.

As regulatory clarity is key to fostering a competitive environment for long-term investments in super-fast broadband networks, the Commission adopted in September 2010 a Recommendation on the regulatory treatment of NGA networks[3]. This instrument was designed to preserve investment incentives for the roll-out of these next-generation networks while at the same time ensuring that such networks remain open to alternative operators. Following the adoption of the NGA Recommendation the Commission expects NRAs to revise their market analyses and remedies imposed on wholesale broadband markets as soon as possible and, in doing so, take utmost account of the NGA Recommendation. However, in 2010 the Commission noted that some NRAs had departed significantly from important provisions of the Recommendation.

A number of NRAs have adopted a differentiated regulatory approach concerning fibre and metallic local loops and are thus imposing less burdensome remedies on fibre. In most cases, these consist only of transparency obligations, including concerning the migration from current to next generation access products. Access or pricing obligations with respect to NGA networks are however not imposed yet in a number of cases (e.g., in the Czech Republic, Finland and Estonia), or not yet set out in detail.

In contrast, specific regulatory obligations related to NGA have been adopted by NRAs in other Member States, such as for example virtual unbundling where LLU access obligations need to be replaced or supplemented in areas of NGA roll-out. The UK has pioneered the imposition of such virtual unbundling local access products and has been followed by Austria. The Danish NRA was also considering the possibility of virtual unbundled local access for its wholesale regulation of the broadband market. In its comments, the Commission stressed that such a remedy should just be a transitory measure and should be replaced by fibre unbundling as soon as it is technically and economically feasible.

In France, the regulator adopted a decision setting out symmetrical rules and conditions for access to in-house fibre optic lines, obliging all operators to provide access to their in-building fibre network to alternative operators. The French proposals are based on Article 12(3) of the Framework Directive and the Commission raised concerns about the compatibility of the French regulator's approach with EU law, since the symmetrical remedies are extended beyond what is foreseen in that provision.

As far as access to passive infrastructure is concerned, a duct and poles access remedy for broadband services was notably imposed on the fixed incumbent by the regulator in the UK and an obligation of access to ducts was introduced in Estonia. In Austria, access to ducts and dark fibre were part of the list of obligations imposed by the NRA. Overall, access to dark fibre is being mandated in an increasing number of Member States, although in certain countries only as a last resort remedy. In other countries however, such as Bulgaria, access conditions to passive infrastructure still appear problematic.

[3] Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), SEC(2010) 1037 final

Mobile Implementation

Mobile Termination Rates

Mobile call termination markets were subject to a review in a number of Member States (e.g. Malta, Poland, Romania and the UK). Meanwhile in Germany, the NRA set mobile termination rates (MTR) based on an interim measure until the new rates were set in February 2011 following the EU consultation. The Commission has assessed these cases in the light of the Recommendation on the regulatory treatment of termination rates, according to which the NRAs ensure that termination rates are implemented at a cost-efficient, symmetric level by 31 December 2012.

NRAs have continued to set glide paths, with rates falling across the EU. Overall, the effects of the regulation of MTRs has led to a reduction in the EU average rate from 6.70 €-cents in 2009 to 3.73 €-cents in October 2010.

In some cases rates are still set using benchmarking (e.g. Estonia, Malta, Portugal and Slovakia). In commenting on benchmarking, the Commission has emphasised that inappropriate benchmarks imply persistent competitive distortions and has invited NRAs to use the benchmarks only of those countries which already apply the rates of an efficient operator.

Regarding symmetry of termination rates, further progress was made. Symmetry has already been achieved in a number of Member States (e.g. Finland, Greece, Hungary, Latvia and Slovakia) and is planned in others, e.g. Belgium (2013), Denmark (2011), Italy (2012) and the UK (2012).

In Bulgaria, the practice of exempting calls originating from outside the territory from MTR regulation was of a major concern. The Commission urged the NRA to remedy this urgently and is following the matter closely.

Regarding SMS termination, the Danish and the Polish NRAs concluded that the market was susceptible for *ex ante* regulation. Also, France continued the regulation of SMS termination market and decided to continue on the glide path of termination rates towards 1€cent. Although not listed in the Recommendation on Relevant Markets the Commission did not contest that this market can fulfil the three criteria in the specific Member States. The Commission did, however, strongly object to the introduction of so called reciprocity clauses or other attempts to make regulated rates available only to operators resident in the country concerned. In each case the Commission has asked the three NRAs to monitor the development of this market and consider removing the currently proposed regulation.

Roll-out of next generation mobile networks

Long Term Evolution (LTE) technology was launched commercially over the course of 2010 in a number of Member States (Austria, Denmark, Estonia, Finland, Germany, Poland and Sweden). MNOs in most of the remaining Member States were testing the technology.

Roaming Regulation

Retail prices were generally at or very close to the maximum level permitted by the Roaming Regulation. Prices for data services on the other hand, have generally remained high despite the decrease in prices at wholesale level. Alternative roaming packages are available in a

number of Member States (e.g. Romania, Slovakia). Operators in some Member States (e.g. Estonia, Finland, Germany and Sweden) reported difficulties with meeting the requirement to set cut off limits for data. Spain reported problems regarding the implementation of transparency measures for data roaming. Hungary and Portugal ran awareness campaigns on the new rules and tariffs. Luxembourg reported problems with inadvertent roaming in border areas. Finally, in June 2010 the ECJ confirmed[4] the validity of the legal basis for the 2007 Roaming Regulation, which was challenged in the UK by the leading mobile operators, as well as the subsidiarity and proportionality of the European legislator's action.

Fixed Implementation

Retail regulation

In 2010, the market for retail access at a fixed location was found to be competitive and de-regulated in Finland. In contrast, regulation was maintained in the retail access market in Cyprus, the Czech Republic, Hungary, Estonia and Austria. The Czech NRA decided however not to impose price regulation in this market. Furthermore, in several countries NRAs have decided not to impose a wholesale line rental remedy (e.g. in the Czech Republic, Estonia, Hungary and in Austria, where it has been replaced by VOB access). In continuity with 2009, *ex-ante* regulation was withdrawn by several NRAs from retail fixed calls markets that are no longer listed in the current Commission Recommendation on relevant markets (e.g. in Slovakia, Cyprus and partially in Italy).

Interconnection

Further reviews of the wholesale markets for fixed call origination and/or termination were notified or completed by several Member States throughout 2010 (e.g. Austria, Czech Republic, Cyprus, Malta, Italy, Poland, Estonia, Greece, Slovakia, the Netherlands, Latvia and the UK).

In revised Reference Interconnection Offers adopted in 2010, it can be noted that the current implementation of cost accounting principles still differs widely across the EU. There is therefore a clear need for NRAs to align their methodologies with the principles recommended by the Commission. As regards the call termination market, a number of countries have indicated that they are in the process of developing new cost models in line with the Commission Recommendation (e.g. the Czech Republic, France, Portugal and Malta).

Asymmetry in the application of remedies between the incumbent and the alternative operators remained in the fixed termination market in Austria, Italy, Poland, Greece and Czech Republic. In some countries, this coincided with persistently high fixed interconnection charges. In contrast, in Lithuania the NRA has removed the asymmetry of remedies imposed in this market, while in Luxembourg the NRA had to do the same following a ruling by the Administrative Court.

New market developments have so far only been addressed by a limited number of NRAs. In Spain, while the revised Reference Interconnection Offer does not include details for direct

[4] Case C-58/08: Judgment of the Court (Grand Chamber) of 8 June 2010 (Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queens's Bench Division (Administrative Court) (United Kingdom)) — The Queen on the application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform (Regulation (EC) No 717/2007

interconnection services for VoIP, a working group involving several operators will work on developing a new IP interconnection model. With regard to next-generation access networks (NGA), the UK regulator is engaged in industry discussions regarding the provision of voice services over FTTH networks and will consider this issue in the next calls market review.

Leased lines

The market for wholesale terminating segments of leased lines was re-assessed in several countries and regulation was maintained in Austria, Czech Republic, Poland, Estonia, France and Romania. In Italy however, it was partially deregulated whereas in the Netherlands the 2008 market decision of the regulator was annulled by the Appeal Court, resulting in the absence of regulation of this market. In Austria, the current general cost orientation obligation was replaced with price-cap regulation. In Spain, the NRA adopted a revised reference offer for leased lines.

Broadcasting Implementation

Regulation of broadcasting markets

In 2010 several Member States carried out the second round of market analysis for broadcasting transmissions, which are not included in the 2007 Commission Recommendation on relevant markets. In some cases the existing regulatory remedies have been repealed, as the three criteria test for *ex-ante* regulation was not met. This happened in the Czech Republic (analogue terrestrial television), Germany (markets for feeding broadcasting signals into the cable network) and Italy (analogue terrestrial television). On the other hand *ex ante* regulation has been confirmed and remedies, including price control, have been imposed in other cases, such as Sweden (for both digital terrestrial television and analogue radio), Romania (analogue terrestrial television), Poland (wholesale radio and television broadcasting transmission services), Spain (terrestrial broadcasting transmission services) and Germany (analogue radio).

In the Netherlands *ex ante* regulation was imposed on the two largest cable operators in 2009, following the second market review; however in August 2010 the regulator's decision was annulled by the courts. Currently there is no regulation in place.

As far as "must carry" is concerned, Finland has just reviewed its rules, with new legislation expected to enter into force by July 2011. Must-carry channels have been reduced and they have a special obligation to provide subtitling and special voice services for disabled people. Cyprus included must carry obligation for existing analogue channels in the auction for digital terrestrial multiplexes Moreover in March 2011 the ECJ ruled on the incompatibility of Belgian "must carry" obligations *vis à vis* the Universal Service Directive in the Brussels area. It held that Belgium had failed to fulfil its obligations by designating entire undertakings, rather than specific channels, as beneficiaries of the obligation, and by not establishing a transparent procedure for designating "must-carry" channels, based on clear and foreseeable objectives.

Digital switchover

The gradual switch-off of analogue terrestrial broadcasting transmissions across Europe progressed and in many cases it appeared to be in line with the target deadline recommended by the Commission, i.e. 1 January 2012[5].

In 2010 switch-off of analogue transmission has been completed in five Member States (Belgium, Estonia, Latvia, Spain, Slovenia), adding to the ones having switched off previously (Denmark, Finland, Germany, Luxembourg, the Netherlands, Sweden). In addition to that in 2010 a number of Member States showed substantial progresses towards completion of the switch-off (Czech Republic, France, Italy).

Overall, while by the end of 2011 four Member State are planning to complete their switch-off (Austria, Cyprus, France and Malta), in further eleven Member States final switch off is envisaged by the end of 2012 (Greece, Hungary, Ireland, Italy, Lithuania, Portugal, Slovakia, United Kingdom) or even later (2013 in Poland; 2015 in Romania and Bulgaria, which decided to postpone it). In Czech Republic, while it is expected that analogue transmission will be switched off mostly in 2011 (11 November 2011), in two regions the switch-off is envisaged on 30 June 2012. In Greece, due to delays in defining the secondary legislation there are doubts on whether the original switch-off date will be met. In Hungary it may be postponed to 2014 if certain conditions on coverage and decoder availability will not be met. From a technical point of view, difficulties with cross-border coordination have sometimes affected the smooth transition to digital broadcasting, due to cross-border interference.

In the meantime, licensing of rights of use for digital terrestrial broadcasting multiplexes progressed in several countries. In 2010 licenses were granted, via comparative or competitive procedures, e.g. in Belgium, Bulgaria (in addition to ones already granted in 2009), Cyprus and Portugal. In other countries the process was still on-going, sometimes with some delays (as in Ireland, Italy and Romania). The Commission is monitoring legal and procedural arrangements during the transition towards full implementation of digital television as to their compliance with EU law.

HORIZONTAL REGULATION

Spectrum management

Digital dividend

In line with the Digital Agenda objectives, in 2010 the Commission intensified its efforts to promote efficient management of the digital dividend - high-quality radio spectrum freed as a result of the switch-over from analogue to digital television broadcasting - and, in particular, in order to ensure that sufficient spectrum is made available for wireless broadband. In May 2010, the Commission adopted a Decision (2010/267/EU) establishing EU harmonised conditions of use of radio frequencies in a part of the digital dividend, the so-called 800 MHz band[6], when allocated by Member States for electronic communications services, in particular for deploying high-speed wireless Internet services. Furthermore, in September 2010 the

[5] COM(2009) 586 and C(2009) 8287.

[6] Commission Decision 2010/267/EU on harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union, in OJ L 117, 11.5.2010

Commission submitted to the Council of Ministers and the European Parliament a proposal for the first radio spectrum policy programme. This draft programme, spanning a period of five years, includes specific measures to facilitate the introduction of wireless broadband services including the obligation for Member States to effectively open the 800 MHz band for wireless broadband services by January 2013[7], on the basis of the technical conditions set in the previous Decision.

Notably, several Member States have already embraced the digital dividend as part of their overall strategy to address the wireless broadband challenge. In May 2010, the 800 MHz band, as well as spectrum in the 1800 MHz, 2 GHz and 2.6 GHz bands, has been assigned for wireless broadband use in Germany through a competitive procedure. In early 2011 the digital dividend in the 800 MHz band was also auctioned in Sweden. Several Member States also envisage assigning the digital dividend already in 2011 (namely Denmark, France, Ireland, Italy, Spain) or in 2012 (the United Kingdom, Austria, the Czech Republic). Even if a specific roadmap has not yet been adopted, the debate on the allocation of the digital dividend to mobile broadband has taken off in most Member States, with official declarations and/or plans put to consultation in Cyprus, Finland, Hungary, the Netherlands, Poland and Slovakia. The rights of use shall generally be assigned by means of competitive procedures, sometimes with attached coverage obligations (e.g. Cyprus, Czech Republic, Germany, France and Sweden) or subject to a spectrum cap (the Czech Republic, Slovenia and Spain). In many countries the 800 MHz band will be available after 1 January 2013 (or even in 2014, as in Spain and in some areas of the United Kingdom).

Some Member States are also considering a multi-band approach, with plans to assign other spectrum bands suitable for innovative technologies and services along with the digital dividend (mostly in the 2.6 GHz band, as envisaged in France, Poland and the United Kingdom, but sometimes also involving other comparable or technologically/commercially linked bands, such as 900 and/or 1800MHz, for example in Cyprus, the Czech Republic, Slovenia and Spain).

Notwithstanding the above positive developments, the timely use of the digital dividend is still subject to the successful resolution of cross-border spectrum coordination issues, both *vis à vis* neighbouring third countries (e.g. with Russia, Belarus) and within the European Union (potential issues regarding frequency coordination have been reported by Luxembourg, Italy, Slovenia and Malta). Coordination with neighbouring countries is still on-going in Estonia, Latvia, Lithuania and Luxembourg, whereas an agreement for trials has been reached by Finland with Russia, which also signed a Memorandum of Understanding with Poland according to which both sides agreed to streamline co-ordination on this issue. In the CEPT (European Conference of Postal and Telecommunications Administrations) context, a template (so-called framework agreement) for spectrum coordination in the 800 MHz band between individual Member States affected and RRC (Regional Radiocommunication Conferences) countries was drafted.

Overall the choice to allocate the digital dividend to broadband is increasingly gaining political support from Member States, although there are still significant coordination issues that might hinder its smooth implementation. In this regard the adoption of the Radio Spectrum Policy Program should accelerate the resolution of those technical challenges.

[7] COM (2010) 471

Spectrum liberalisation and refarming

In 2010, Member States took steps towards the introduction of market-based approaches in their spectrum management practices, in order to ensure a more efficient use of this scarce resource. In 2010 provisions aiming at extending or regulating spectrum trading have been proposed or introduced in Spain (regarding the main frequency bands for mobile services), Estonia (along with the implementation of the Revised Regulatory Framework) and Belgium, whereas in contrast spectrum trading has been limited to rights of use acquired through an auction in Latvia.

On 9 May 2010 the deadline for transposition of the amended GSM Directive (2009/114/EC) allowing new advanced, next generation wireless technologies to co-exist with GSM in the 880-915MHz and 925-960 MHz frequencies, expired. Following this date the European Commission monitored the effective transposition of the GSM Directive in all EU countries and in 2010 infringement proceedings were opened against Austria, Cyprus, France, Hungary, Italy, Spain and United Kingdom for lack of notification of transposition measures. While most of these countries adopted and notified to the Commission the final decisions amending the allowed use included in national allocation tables at the latest in early 2011, Hungary and Spain had failed to do so at the end of the reporting period.

The Directive requires that Member States shall examine whether the existing assignment of the 900 MHz band to the competing mobile operators in their territory is likely to distort competition in the mobile markets concerned, also in view of the broader national spectrum strategy. In general public consultations on the refarming process have been carried out, sometimes before the adoption of the Directive, in Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Malta, the Netherlands, Portugal, Spain and the United Kingdom, whilst they are expected to be launched or to be completed by 2011 in Cyprus, Germany, Luxembourg, Slovenia and Slovakia.

Most Member States have amended the actual terms of the existing licenses, ex officio or following a specific request of the right holders. The Commission is closely following the refarming process in order to ensure its compliance with the requirements of the GSM and Authorisation Directives.

In 2010 other slots for wireless broadband in the 900MHz and 2.6, 3.6, 3.8GHz bands were assigned in 2010, following competitive or comparative procedures, in Austria, Denmark, Estonia, Germany, Latvia, Malta, the Netherlands, and Portugal. In Sweden the final assignment of slots in the 900 and 1800MHz bands is still subject to the outcome of judicial review, in Belgium the auction for the 4th 3G license has not been finalised and in Cyprus the tender for a slot on the 1800MHz was not successful. Finally, it appears that 2x5MHz slots in the 2GHz band have been assigned to the major mobile operator in Bulgaria without a comparative or competitive procedure and the Commission is looking into the matter.

Implementation of Spectrum harmonisation decisions

As far as the Commission's Spectrum Decisions adopted until 2009 are concerned, Cyprus, Germany, Italy, Luxembourg, Portugal and Romania modified relevant implementation measures in 2010, whereas the infringement procedure opened against Bulgaria involving the implementation of Decision 2005/928/EC on the harmonisation of the 169,4-169,8125 MHz frequency band has been closed, following clarification by the Member State on its specific requirement for use for the purposes of national security.

It appears that there is not yet full availability of information regarding spectrum use from several Member States, as mandated by Decision 2007/344/EC. Moreover, Romania has not yet implemented Decision 2009/381/EC amending Decision 2006/771/EC on harmonisation of the radio spectrum for use by short-range devices and the Commission is still assessing the compatibility of the measures adopted in March 2010 by Germany with regard to the implementation of Decision 2008/477/EC on the harmonisation of the 2500-2690 MHz frequency band for terrestrial systems capable of providing electronic communications services.

Moreover, according to a Study conducted for the Commission, at the end of the reporting period not all of the necessary preparation, which would facilitate the granting of an authorisation to the operators of systems providing mobile satellite services (MSS) selected by the Commission in accordance with European Parliament and Council Decision 626/2008/EC, has been made in twenty-one Member (namely in Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and the United Kingdom).

As far as Mobile Communication on Aircraft (MCA) is concerned, in accordance with Decision 2008/294/EC in 2010 two service providers notified to the Commission several new airlines providing the service on their aircrafts.

In 2010, three spectrum harmonisation Decisions were adopted by the Commission related to harmonisation of radio spectrum for use by short-range devices (Decision 2010/368/EU), harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services (Decision 2010/267/EU) and harmonised conditions of use of radio spectrum for mobile communication services on board vessels (Decision 2010/166/EU). The process of verification of the state of implementation of the Decisions adopted in 2010 is on-going.

Rights of way and facility sharing

Aimed at a flourishing digital economy by 2020, the Digital Agenda for Europe[8] outlines policies and actions to maximize the benefits of a digital revolution for all. To that end, the roll-out of open and competitive broadband networks is imperative to stimulate a virtuous cycle in the development of the digital economy. Proposals depicted in the Broadband Communication[9] suggest that national and local authorities may play an important role in lowering investment costs for the deployment of these networks. For example, at a time when a number of operators in Member States are deploying next generation networks (NGNs especially using fibre), efforts by national and local authorities to simplify and accelerate procedures for the granting of rights of way (mainly using town planning rules or access remedies) and to enhance facility sharing may considerably help to reduce the costs of network deployment.

[8] See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *A Digital Agenda for Europe*, 26 August 2010.

[9] See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *European Broadband: investing in digitally driven growth,* September 2010.

As stipulated by the regulatory framework, the procedures for granting of rights of way to install facilities on, over, or under public or private property must be timely, non-discriminatory, and transparent so that conditions of fair and effective competition are guaranteed. When considering an application of rights of way, competent authorities must act without discrimination and delay. The provisions in the revised regulatory framework[10] substantially reinforce the need for timely procedures requiring that decisions for rights of way should be taken within six months of their application, except in cases of expropriations.

A number of issues in connection with network deployment relating to the lack of legislative acts, difficulties in obtaining permits, conditions for road excavations, and to health consideration were reported in certain Member States. The framework and procedures for the granting of rights of way still remains incomplete in Greece and Romania, while in Bulgaria, lengthy administrative procedures delay the issuance of permits by municipalities. Fragmented procedures in Italy, unnecessary constraints in Malta imposed by Local Councils, and the alleged problematic application of rights to excavate by local municipalities in Sweden has hindered the excavation work on public property.

New legislation was adopted or was under preparation in some Member States in 2010 to facilitate network deployment. In Cyprus, the national regulatory authority was working on amending the procedures for rights of way in areas under development realising the need for a more efficient excavation techniques based on fewer manholes that would reduce the cost of network rollout addressing in parallel the possibilities of developing multiple networks, in particular NGNs. New legislation adopted in Portugal reinforces operators' rights of way by establishing a harmonised procedure for local authorities and coordinating underground intervention. In Poland, legislation was adopted which would facilitate the investment process by removing numerous administrative obstacles in particular with regard to rights of way. In addition, action towards establishing infrastructure inventories or centralised information systems on infrastructure works (e.g. in Lithuania, Portugal, and Luxembourg) was underway. New legislative provisions in Slovenia oblige investors in public infrastructure to provide information relating to new constructions to the national regulator, which publishes them online to facilitate new investment plans. In Italy, the national regulator held a public consultation in December 2010 a regulatory framework on rights of way and access over existing infrastructure of public authorities and concessionaries for the deployment of backbone networks. This framework also envisages an inventory of all existing ducts and infrastructures suitable for deployment of the network.

As stipulated in Article 12 of the Framework Directive[11], national regulatory authorities shall encourage the sharing of facilities and/or property for the benefit of town planning, public health or environmental protection. These provisions on facility sharing are further reinforced through the revision of the regulatory framework enabling the national regulatory authorities to impose mandatory sharing of facilities or property in certain circumstances taking full account of the principle of proportionality. Specific legislation was adopted in certain Member States to facilitate network deployment in buildings in 2010. This was the case in France, where the national regulator adopted a decision concerning fibre regulation for less densely populated areas, thereby complementing existing decision applying to mostly populated areas adopted a year ago. In Slovenia, the new amended version of the Electronic Communications Act adopted in January 2010 set provisions for facilitating the utilisation of communications infrastructure in private buildings by all operators. In Cyprus, a harmonised

[10] OJ L 337 18.12.2009
[11] OJ L 108 24.02.2002, pp. 33-50.

approach for access to in-building wiring and private land was being formulated to establish infrastructure standards for building owners based on a technology neutral approach. In addition, two draft legislative initiatives to facilitate network deployment in Spain, one for common infrastructure for telecom services inside buildings upgrading previous rules for the NGA era (adopted in March 2011), and the other on the deployment on roads and railways in public domain (work on this was ongoing).

Facility sharing of other utility infrastructure which can be of benefit for town planning, public health and security, or environmental reasons, was considered in certain Member States (UK and Germany). In Finland, Best Practises on Join Construction of Infrastructure Networks were published in December 2010 providing examples of coordinated construction.

Administrative charges

The EU regulatory framework expressly restricts the amount of administrative charges that may be imposed by NRAs to cover the administrative costs resulting from their regulatory work, such as management, control and enforcement of the general authorisation scheme and of rights of use. Appropriate adjustments also need to be made in light of the difference between the total sum of the charges and the administrative costs. Systems for administrative charges should not distort competition or create barriers to market entry. The European Court of Justice has consistently maintained that administrative charges must relate to the costs of regulatory activities provided by the framework and may not be used in order to organise the financing of other activities or costs.[12]

The Commission launched an infringement proceeding against France and Spain in January and March 2010, respectively, as reforms of financing arrangements for their national public broadcasters resulted in the imposition of specific taxes on the revenues of operators in their capacity as authorised providers of electronic communications networks or services. The Commission questions the compatibility of the taxes with Article 12 of the Authorisation Directive, which provides that administrative charges should only cover the administrative costs for management, control and enforcement of the authorisations.

The Commission services were also looking into a similar issue in Hungary, which imposed a special tax on electronic communications services due on activities defined as being registered under the general authorisation scheme, and into Portugal's plan on imposing a charge on telecoms operators' revenues.

Throughout 2010, the Commission has been following the development in Latvia concerning administrative charges for ensuring electro-magnetic compatibility, which is subject to infringement proceedings. The Commission received a complaint from some operators regarding Portugal's legislation of 2008 approving a new system for the fees including administrative charges and rights of use for spectrum and a numbering resource. The Commission services are examining this issue.

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12 This concerns such costs as research activities in the field of telecommunications (Case C-104/04, Commission vs. France) or state investments aimed at ensuring the liberalisation of the telecommunications sector (joined cases C-292/01 and C-293/01, Albacom and Infostrada). See also joined cases i-21 Germany GmbH (C-392/04) and Arcor AG & Co. KG (C-422/04). On the other hand, fiscal measures imposed on owners of communications infrastructure, as opposed to charges imposed on undertakings as holders of authorisation to provide electronic communications services, do not fall within the scope of application of the rules on administrative charges. See joined cases Mobistar SA (C-544/03) and Belgacom Mobile SA (C-545/03).

In Luxembourg and Italy the rate of administrative charge on operators increased in 2010, in order to offset the corresponding reduction in public funds or the NRA's increased workload. In Ireland, the rate was decreased and in Spain a decrease was expected. In Romania, in 2010 electronic communications providers were waived the obligation to pay the administrative charge as the NRA was financed from other resources such as the spectrum tariff.

The Commission services were looking into the matter of the German NRA that does not provide an analysis of how the levels of collected administrative charges reflect underlying administrative costs. The issue of the transparency of the differences between the total sum of the charges and the administrative costs, and appropriate adjustments to be made, concerns also Bulgaria, Lithuania and Slovakia. The Commission services were looking into the practice in Belgium, where the revenues collected by NRAs through administrative charges exceed NRAs' expenses and the surplus is then transferred to the state treasury. Under the EU regulatory framework, such surpluses, including savings realised through cuts in the budgetary resources of NRAs, should be refunded to the sector.

THE CONSUMER INTEREST

Universal Service

There are three Member States where universal service is available in the market without a formal designation: Germany, Luxembourg and Sweden. The remaining EU countries have designated universal service provider(s), albeit many have chosen to withdraw certain components from the universal service obligations following a conclusion that these are provided satisfactorily by the market under normal commercial conditions.

New designations for some or all components of universal service were carried out in 2010 in the Czech Republic, Slovenia, Greece, Spain, Finland, Ireland and Malta. However, there were still several Member States in 2010 where universal service was provided on the basis of a transitional regime where the undertakings involved have not been designated on the basis of the procedure envisaged by the 2002 framework. This is the case in Italy, the Netherlands, Portugal, Belgium (for components other than social tariffs) and Bulgaria, although in the latter a new designation procedure has already been launched. In this context, the Commission notes that designations respecting the framework should be initiated as soon as possible.

Several Member States have carried out reviews of the scope of their national universal service obligations, or a review of the provision of non-designated components to verify whether a formal designation was unnecessary. A reduction of the number of required public payphones is thus envisaged in the Czech Republic, Italy and Romania, while the results of the review do not foresee any imminent changes to the current universal service regime in Poland. Romania, on the other hand, proposes significant modifications to its current concept of access at a fixed location to align it with the requirements of the EU framework.

Finland was the first Member State where the scope of universal service obligations was extended to delivery of broadband connections (at 1 Mbps). Considerations on broadband are being taken also in other countries[13]. In Spain, the new draft legislation proposes to establish 1

[13] In order to assist with the implementation of the revised EU rules in this respect, the Commission services provided initial guidance to Member States in the Communications Committee's Working Document on *Implementation of the revised Universal Service Directive: Internet-related aspects of Article 4* (COCOM10-31).

Mbps as functional access to the Internet within the scope of universal service from 2011. Malta has launched a public consultation on the inclusion of broadband connections permitting a minimum speed of 4Mbps within the scope of universal service. Sweden envisages extending its public procurement process to encompass broadband connections at 1 Mbps as of 2011. Romania has proposed to define functional Internet access as 144 kbps ('best effort'). In contrast, several other Member States do not intend to include broadband connections in the scope of universal service at national level, such as for example Czech Republic, Denmark, Estonia, Hungary, Poland and Slovakia.

Measures for disabled users have in general not been subject to substantial modifications in the reporting period. In Poland, however, the draft law proposes to require all operators to enact facilitating measures for disabled users. The revised scope of universal service in Romania also envisages a series of new provisions for end users with disabilities enabling inter alia better access to emergency services, payphones and directories, as well as information adapted to their needs. A new video-relay telephony system is available for disabled users in Germany.

Finland, Sweden, and most recently also the Czech Republic envisage the financing of universal service from public funds. A mix of both public and sector-specific funding is allowed for in Portugal and Malta. The compensation mechanism for universal service remained activated only in Belgium (for social tariffs), Italy, France, Romania, Latvia, and Spain. The administrative proceedings on compensation requests for the period of 2006-2010 are ongoing in Poland. Although a request for compensation has been received in several other Member States, such as Ireland, Greece and Slovakia, and, compensation has not been granted either due to a rejection of compensation request (Greece) its withdrawal (Ireland), or a conclusion that no unfair burden was found (Slovakia).

The net cost calculation, evaluation of unfair burden and setting up of the sector-specific fund appears to be a complicated and time-consuming process in a majority of the countries involved. For example in Italy, consistent delays in the calculation of the net cost from 2004 onwards have been noted, mainly due to a new net cost calculation methodology (established in 2008 and revised again in 2009). Moreover, the net cost decisions for 1999-2003 were annulled in 2010, giving rise to regulatory uncertainty. No progress in financing has been reported in Belgium. Similarly, there were no developments concerning the introduction of sector funding in Latvia (envisaged by law) although the terms of state compensation were agreed in 2010. The Czech NRA is revisiting the net cost calculations for 2001-2006 as a result of a judicial decision, although the designated undertaking already received compensation.

The need to increase transparency and legal certainty in universal service costing and financing is thus apparent. In fact, several Member States have already started preparations for regulatory action in this regard. Poland, for example, proposes measures aimed at increasing transparency in the process of granting compensation in its draft legislation. Public consultations on the net cost calculation methodology and the assessment of unfair burden have been launched in Portugal and Ireland.

Three ECJ rulings with respect to universal service were delivered in 2010 in relation to infringement proceeding against Belgium[14] (financing of social tariffs) and Portugal[15]

[14] C-222/08.
[15] C-154/09.

(designation of universal service). In the former case, the ECJ confirmed that benefits, including intangible benefits, have to be assessed in the net cost calculation, and that the NRA is requested to determine whether the net cost of universal service obligations represent an unfair burden individually for each designated undertaking.

Consumer complaints

Issues related to billing, tariff transparency and contracts are traditionally the most frequent sources of consumer complaints. As regards the latter, consumers have voiced their concerns mainly in relation to difficulties in the termination of mobile subscriptions, unfair advertising, unclear contractual conditions and a lack of information on switching providers. The quality of service provided by operators appears to be of increasing concern in a number of Member States, in particular with regard to broadband speeds actually delivered over subscriber connections. Besides the general tariff transparency issues, an increasing number of complaints has been noted with respect to value-added services and premium-rate SMSs.

The volume of consumer complaints received across the EU shows a mixed picture for 2010. Some Member States report a steady increase of consumer complaints (e.g. Belgium), whereas in others the tendency for complaints is decreasing, mainly as a result of previous actions of the regulator to address the most prominent issues (e.g. Greece). In this context, several Member States took specific measures to alleviate consumer concerns. The Polish NRA is very active in consumer initiatives, issuing for example a new consumer guidebook clearly setting out subscriber rights and duties, as well as leaflets on safe telephony and safe Internet use, for the disabled and senior citizens.

Tariff transparency and quality of service

Many Member States have taken specific action to further advance measures on tariff transparency and quality of service, including the imposition of fines or consumer compensation where tariff transparency or the specified quality of service were not respected. In particular, a lot of attention was paid in 2010 to the development and updates of web-based tools for tariff comparisons. For example, a tariff calculator based on customer profiles is newly available in Austria. In a similar fashion, an online tariff comparison and optimal tariff selection tool became operative in Italy. Sweden, Estonia and Slovenia have updated or redesigned their tariff transparency portals.

The unclear pricing of services provided over non-geographic numbers, in particular premium rate call services and premium rate SMSs have been reported as an issue of concern in an increasing number of Member States (Austria, Hungary, Spain, Netherlands, Poland and the United Kingdom) and in many instances measures aimed at facilitating consumer confidence in non-geographic numbers have been considered. In the United Kingdom, for example, the regulator launched a consultation to identify the best option for regulatory treatment of calls to non-geographic number ranges, which included a possibility of unbundling the charges for the service provider and those for the originating telecoms provider.

The broadband speeds actually delivered to end-users over fixed or mobile networks have been the centre of attention as regards quality of service. This is in reaction to an increasing number of subscriber complaints on unreliable and often unpredictable broadband speeds. In Poland, for example, the new draft law proposes that broadband service providers are obliged to declare the minimum guaranteed data transfer speed in the contract which could not be lees than 90% of the connection speed advertised in promotional material. To test the speed of

Internet connection in real time, speed testing facilities are already available by the NRAs in Denmark, Italy, Latvia, Greece, and have been proposed in Romania. The United Kingdom has strengthened the requirements on information provided with regard to estimated maximum broadband speeds.

Number portability/switching

The key actions of Member States related to number portability in 2010 revolved around the reduction of the time it takes to port a number and the simplification of national porting procedures. This is a welcome development in view of the revised EU rules for number portability, where it is envisaged that subscribers who have concluded an agreement to port a number should have that number activated within one working day.

Regulatory measures to shorten the porting time have been taken in Italy, Portugal, Greece, Sweden, and the United Kingdom. Further simplification of porting procedures has been facilitated via one-stop-shop in Bulgaria and Slovakia (for mobile numbers). A new centralised database for porting has been launched in France and Luxembourg. A move to a centralised system for mobile number portability has also been taken in Spain. In contrast, a central database has been reported as an issue of concern where this facility does not exist (e.g. Slovakia for fixed numbers).

The average time it takes to port a fixed number ranges from 3 days (Austria, Netherlands, Sweden, and Slovenia) to 21 days (Poland[16]). The best performers for the speed of mobile number portability are Ireland, Malta and Poland (1 day), while Greece with 12 days is at the opposite side of the range. A similar pattern of a wide range for wholesale prices applies, from zero to charges of €21.5 for mobile and € 23.7 for fixed numbers in the Czech Republic. As regards retail prices, no charges are applied to consumers in a number of countries, such as for example Spain, United Kingdom, Luxembourg, Latvia and France.

Few developments were reported in 2010 with respect to the switching of Internet providers. A new obligation on Internet service providers to allow their end-users to use their original email address during a certain period of time was imposed in Belgium. An innovative decision regarding email portability was taken by the Maltese NRA, requiring operators to forward free of charge, and within a certain time period, emails sent to the previous email address to the new one.

An infringement proceeding is pending against Bulgaria on the non-implementation of fixed number portability with respect to analogue fixed lines and certain digital fixed lines.

Net neutrality

In 2010 the debate on net neutrality issues intensified both on the national and EU level. While no major net neutrality issues have been reported in the majority of Member States, the relevant authorities generally share the Commission's view on the importance of preserving the open and neutral character of the Internet. A number of Member States (e.g. France, Poland, Denmark, Italy, UK and the Netherlands) held public consultations, set out forums for discussions or published reports and recommendations on the neutrality of the Internet and networks.

[16] In Poland, fixed number portability may take from 1 day up to two months, depending on the choice of subscribers. The indicated time period of 21 days therefore represents the average time requested by subscribers.

A potential issue of concern is access to voice over IP which is not always offered on mobile networks (with some exceptions e.g. the Netherlands), or is subject to premium tariffs in many Member States. Furthermore, mobile operators generally offer tariff plans according to which the speed of the Internet connection may be degraded once the end user exceeds a certain traffic threshold. This applies for example to peer-to-peer traffic consuming large bandwidth. The Commission, together with BEREC, will continue to monitor the situation and gather more information on such practices. Traffic management by operators was reported in many Member States, particularly in the case of mobile networks, but also on fixed networks (Italy, the Netherlands and UK). The authorities in France and in the UK stressed that when providers apply traffic management, they should keep end users properly informed.

The prevailing opinion of NRAs is that the revised telecom package provides sufficient regulatory tools to safeguard net neutrality. In their view, competition in the market together with transparency for end users and the possibility of switching should render *ex-ante* regulatory intervention unnecessary. As a matter of fact, the new framework strengthens transparency requirements and provides the NRAs with powers to set quality of service parameters so as to prevent the degradation of services and the hindering or slowing down of traffic over networks.

The European Commission, in line with its Declaration on net neutrality attached to the Telecoms package, has conducted a public consultation and held a joint summit with the European Parliament in November 2010. At the time of writing this report, the communication to the Parliament and the Council setting out the Commission's conclusions was expected to be finalised by May 2011.

European emergency number 112

The Commission gives primary importance to ensuring the availability and service quality of the single EU-wide emergency number 112 as well as to raising citizens' awareness about this essential service. While Member States must ensure that citizens are kept informed about the existence and purpose of 112, only 26% of EU citizens could spontaneously identify 112 as the number to call for emergency services from anywhere in the EU[17] (just a marginal increase of one percentage point compared to the previous year). This alarming trend calls for further action and more information campaigns.

The Commission has been closely monitoring the implementation of the EU provisions related to 112 in the Member States. Particular topics of concern in 2010 were citizen's awareness and caller location information. The Universal Service Directive imposes on Member States the obligation to ensure that their citizens are adequately informed about the existence and use of 112, and operators provide emergency authorities with information to locate people calling 112 from fixed or mobile phones. In this regard, the Commission urged all Member States in letters of February 2010 to step up efforts in informing their citizen's about the availability of 112 services across the EU.

The Commission services are currently investigating the availability of caller location information for roaming users or for users whose subscriber data are not included in the directories in Estonia, Finland, France, Hungary, Ireland, Lithuania, Malta, Poland, Sweden,

[17] Eurobarometer Survey on 112 (February 2011): http://ec.europa.eu/information_society/activities/112/docs/survey_summary2011.pdf

Spain, the Netherlands and the UK. As a result of a pending infringement proceeding, the Italian authorities have set up a provisional nationwide caller location system and in parallel announced the development of an advanced system for handling calls to all emergency numbers. The Commission closed in January 2011 another infringement case against Italy on 112 call handling issues.

The Commission has continued to promote the cooperation and exchange of 112 best practices among Member States, concerning issues related to the performance and enhancement of 112 services, through the Communications Committee and the Expert Group on Emergency Access. The Commission is also working to make 112 more accessible for all citizens by financing research projects and coordinating standardisation initiatives.

The revised regulatory framework enhances the scope of obligations regarding emergency services and 112. In particular, it includes strengthened provisions on the prompt transmission of caller location information, awareness raising for travellers, access obligations for certain categories of Internet telephony providers and improved access for disabled users. National regulators have to specify accuracy and reliability criteria for caller location information.

Harmonised numbers for services of social value - the 116 numbering range

The harmonised numbers for services of social value aim to enable citizens to reach such services by using the same recognisable numbers in all Member States. In 2007, Commission Decision 2007/116/EC[18] (116 Decision) reserved the national numbering range beginning with '116' for harmonised numbers for services of social value. Following the adoption on 30 November 2009 of the second Commission Decision[19], five numbers have now been reserved. As of January 2011, four of these numbers were operational, but not in all Member States: 116000 (Hotline for missing children) was functioning in 15 Member States, 116006 (Helpline for victims of crime) in two and 116111 (Child helpline) in 17, while 116123 (Emotional support helpline) was operational in seven Member States. The Non-emergency medical on-call service (116117) was not yet operational in any Member States, although three organisations have already been assigned by national authorities. Although the numbers adopted in 2007 were not yet operational in the majority of Member States in January 2010, there have been a number of assignments throughout the year, and the take-up showed signs of growth in the second semester[20]. In order to promote take-up, the Commission services have engaged in discussions with Member States in the Communications Committee throughout the year. Furthermore, in November 2010, in its Communication "Dial 116 000: The European hotline for missing children", the Commission renewed its call on Member States to implement the missing children hotline as a matter of priority and to ensure that the same high quality of service is offered throughout the Union.

[18] 2007/116/EC: Commission Decision of 15 February 2007 on reserving the national numbering range beginning with 116 for harmonised numbers for harmonised services of social value (notified under document number C(2007) 249) (Text with EEA relevance), OJ L 49, 17.2.2007, p. 30–33

[19] 2009/884/EC: Commission Decision of 30 November 2009 amending Decision 2007/116/EC as regards the introduction of additional reserved numbers beginning with 116 (notified under document C(2009) 9425) (Text with EEA relevance), OJ L 317, 3.12.2009, p. 46–47

[20] See: Working Document COCOM11-01 on the implementation of the reserved '116' numbers as of 1 January 2011

E-Privacy

The Digital Agenda for Europe recognises that a lack of trust in the online environment is seriously hampering the development of Europe's online economy, and that privacy must also be effectively enforced online. The ePrivacy Directive[21] further develops and complements the general Data Protection Directive[22] in the area of electronic communications. It provides for basic requirements to ensure the security and confidentiality of communications over EU electronic communications networks, and gives consumers a set of tools to protect their privacy and personal data. The revised regulatory framework provides for reinforced enforcement powers, e.g., penalties must be effective, proportionate, and dissuasive. Better cross-border cooperation is also expected following the inclusion of the ePrivacy Directive in Regulation 2006/2004/EC on consumer protection cooperation. While the transposition of the ePrivacy Directive as amended by the Citizens' Rights Directive was ongoing in a number of Member States, a review of the general Data Protection Directive was launched in November 2010.

Marketing techniques using electronic communications, in particular online behavioural advertising, continued to focus attention in 2010[23]. The Commission services notably facilitated discussions between stakeholders, including consumer associations, on an EU self-regulatory initiative led by the advertising industry aimed at more effective protection of consumers online. Self-regulatory discussions are also being held in a number of Member States (e.g. United Kingdom, the Netherlands, Denmark, Bulgaria, and France). Investigations into illegal marketing practices using browsing information were ongoing in Spain. Finally, the Commission decided to refer UK to the Court of Justice in a case of incorrect transposition of the EU law requirements on the confidentiality of communications. At the end of 2010, UK authorities were running a public consultation on amendments to the Regulation of Investigatory Powers Act 2000.

As regards unsolicited phone calls, the Commission opened a case against Italy as databases had been set up for telemarketing purposes on the basis of public subscriber directories with no explicit consent. In reaction, Italy has adopted secondary legislation introducing an opt-out approach, which would become operational in early 2011. In Germany, against the background of a substantial increase in complaints, the NRA issued a number of fines in 2010 and started an awareness campaign towards users. Increasing activity was reported in relation to unsolicited marketing by SMS (e.g. the Netherlands, Sweden). This led to significant fines in the Netherlands.

Some Member States have taken measures to ensure the integrity and security of electronic communications. Hungary adopted in December 2010 legislation restricting the processing of certain data of public interest to public entities. Authorities in a number of Member States

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21 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, 31.07.2002, p. 37).

22 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L. 281, 23.11.1995, p. 31).

23 In order to assist with the implementation of the revised EU rules on storage and access to information on users' terminals (e.g. cookies), the Commission services provided initial guidance to Member States in a Communications Committee's Working Document on the implementation of Article 5(3) of the ePrivacy Directive (COCOM10-34).

(e.g. Portugal, Lithuania, and the Czech Republic) were also taking preventive steps, including awareness raising campaigns in relation to online security risks.

In Austria, Greece and Sweden, the Data Retention Directive 2006/24/EC had not been transposed at the end of the reporting period. In addition, the constitutional courts of Germany and Romania annulled national transposition measures as incompatible with their Constitution. While Luxembourg has finally transposed the directive in 2010, other Member States have adjusted (e.g. Bulgaria, Slovenia) or are considering adjusting their laws (e.g. Estonia) on for example retention periods or financing. In the meantime, the Commission services held a series of preparatory activities related to the application of the Data Retention Directive, in view of its review in 2011.

MONITORING AND ENFORCEMENT

Enforcing effective implementation of the regulatory framework for electronic communications remained a priority in 2010. This is in line with the Digital Agenda for Europe, which recognises that a swift and consistent implementation of the revised regulatory framework is a priority in order to reinforce the single market for telecommunications services.

In the course of 2010, the Commission opened seventeen new infringement proceedings. Infringement priorities in 2010 remained focused in particular on structural issues and consumer protection. In total, there were 27 proceedings for incorrect implementation pending at the end of 2010. In addition, the Commission opened seven infringement proceedings for non communication of measures transposing the revised GSM Directive, which was due to be transposed in May 2010[24]. The Commission continues to frequently issue press releases on infringement proceedings. These press releases are available on the implementation and enforcement website dedicated to the Information Society and Media sector[25] together with overview tables.

Structural issues included in particular the functioning and the independence of the national regulatory authorities. As regards independence, the Commission has systematically monitored the requirement for independence of national regulatory authorities (NRAs), and has taken action when necessary. An infringement was still pending in Slovenia in relation to the rules for dismissal of NRA management, while a Slovakian and a Romanian case could be closed following legislative amendments. Secondly, concerns remained regarding the effective structural separation between regulatory and control functions in some Member States e.g., Romania, Latvia, and Lithuania. In the latter case, the Commission decided to refer Lithuania to the Court of Justice.

Moreover, attention was also being paid to the full application of the Community consultation procedure involving national regulatory authorities and the Commission which aims to consolidate the internal market for electronic communications (Article 7 procedure). In addition to the pending infringement against Germany concerning the absence of communication to the Commission of mobile termination rates, a case was opened against Poland concerning the absence of communication to the Commission of wholesale broadband access rates and costing methodology.

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[24] OJ L 274, 20.10.2009, p. 25

[25] http://ec.europa.eu./information_society/policy/ecomm/implementation_enforcement/index_en.htm

Finally, an increasing area of concern has been the imposition of specific telecom taxes on providers of electronic communications, in contradiction with the EU rules on administrative charges. Reasoned opinions were sent to France and Spain in this regard.

A second priority concerned the protection of consumer rights including privacy. Consumer protection goes hand in hand with the growth and diversification of electronic communication services and a growing number of service providers. Infringement cases in this respect included: the functioning of the European emergency number 112 (Italy); the possibility to keep one's number when changing telecom operators, thereby allowing consumers to fully benefit from competition (Bulgaria); an effective mechanism to settle disputes between consumers and service providers that offers a light and inexpensive alternative to court proceedings (Luxembourg); and respect for consumer privacy (United Kingdom, Italy).

As certain Member States have not complied with the regulatory framework following infringement proceedings, the Court of Justice ruled in 2010 on 3 cases. It found breaches of EU law concerning broadband retail regulation without prior market analysis in Poland (C-545/08), universal service – a financing mechanism for special rates to certain categories of low-income or disadvantaged customers in Belgium (C-222/08) and designation of a universal service provider in Portugal (C-154/09). The Commission was closely following whether the judgments of the Court of Justice were fully complied with. In particular, as Italy was not complying with the judgement concerning the availability of caller location information for the 112 emergency number, it was decided to refer Italy to the Court of Justice under Article 260 TFEU which allows imposing financial sanctions on Member States that have not complied with a judgement of the Court of Justice. In view of the progress made by Italy to comply with the judgement, the Commission decided to suspend the application to the Court of Justice. At the same time, the Commission was able to close the case against Poland (with regard to judgement C-492/07 delivered in 2009) as the issues were resolved.

The Commission welcomed the progress made by Member States, even after the initiation of infringement proceedings, and continued to apply its policy of closing cases as soon as the problems were resolved. A total of seven cases were closed in 2010 following progress in Member States. As the definition of subscriber was amended in Polish law in line with the requirements of the Framework Directive, the relevant case was closed by the Commission. Following modifications of national law, the Spanish case related to universal service, as well as the Swedish case in relation to dispute resolution, have been closed. As the handling of calls to the European emergency number "112" in Italy became effective, the relevant case has been closed as well. Other closed cases concerned the rules for dismissal of NRA management in Romania and Slovakia. Both cases could be closed following modifications of national law. Finally, the case of non implementation of spectrum decisions concerning the 169 MHz frequency band in Bulgaria was closed following clarifications provided on the use of frequencies for security and defence purposes in line with the said Decisions. In addition to the pending infringement proceedings, the Commission was able to close 10 presumed infringements based on complaints. At the end of 2010, there were only two complaints pending.

In line with the Commission Communication on better monitoring of the application of Community law[26] and the Commission Communication 'A Europe of Results – Applying Community Law'[27], the Commission services have continued to prevent the recourse to

[26] COM(2002) 725, of 11 December 2002.
[27] COM(2007) 502, of 5 September 2007.

infringement proceedings by making use of bilateral contacts with the relevant national authorities. They also provided general guidance on implementation requirements via the Communications Committee (COCOM) and the Radio Spectrum Committee (RSC).

The Commission monitors the correct application of the provisions contained in the EU regulatory framework, also via contacts with stakeholders and complaints received from EU citizens. The online web tool 'EU Pilot' has been increasingly used to facilitate contacts with the participating Member States on the implementation of the EU rules relating to electronic communications. Three Member States joined the project in 2010, leading to 18 participating Member States. 21 new cases concerning electronic communications were opened in 2010 (out of 41 cases opened since the launching of the project). 10 cases were closed in 2010, leading in two cases to the launch of an infringement proceeding.