

AUSTRIA

INTRODUCTION

The Austrian electronic communications market remains characterised by strong dynamism in the mobile sector. Fixed to mobile substitution continues to grow and mobile operators are innovating and competing strongly by offering attractive retail packages to consumers. Mobile broadband services continue to be very popular and mobile broadband penetration is one of the highest in the EU; it has been considered that, under current market circumstances for residential customers, mobile broadband is a substitute to fixed broadband services, despite possible technical or capacity constraints. Against the success of mobile services, the fixed sector in Austria is facing important challenges; the size of fixed voice markets continues to decrease, the market share of the incumbent operator in the fixed broadband market has been increasing over the past two years mainly due to its bundled offers and there is a decline of alternative fixed infrastructures largely to the benefit of mobile broadband. The development of next generation access (NGA) networks has the potential to influence considerably the current situation between fixed and mobile services in Austria.

Legislative provisions have been introduced to facilitate the deployment of NGAs and with the next round of market analysis it is essential that the National Regulatory Authority (NRA) establishes an appropriate regulatory approach towards NGA, in a timely manner, to introduce further dynamism and enhance competition in the fixed market and eliminate the shortcomings that have been present in the past. The future use of the Digital Dividend in Austria is also currently one of the major policy issues at stake, and it is necessary that the debate and the decision making process on this issue advance rapidly, with sufficient transparency and legal certainty for the sector, which are crucial to enable operators to plan and advance in their future investments.

REGULATORY ENVIRONMENT

Main regulatory developments

Following the adoption of the new Telecommunications Market Ordinance in December 2008, the NRA continued to proceed with the third round of market reviews. While some markets have been deregulated, competition is not yet effective in other markets which had been removed from the Recommendation on Relevant Markets⁹⁸ and they continue to be defined by the NRA as relevant for ex ante regulation.

In this respect, the NRA withdrew existing regulatory obligations in the retail calls markets for residential customers, the transit market and some submarkets for wholesale terminating segments of leased lines. On the other hand, the NRA defined as susceptible to ex ante regulation the market for national and international calls markets for business customers as well as the market for broadcasting transmission services, which was divided in three submarkets.

⁹⁸ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344, 28.12.2007, p. 65-69

After the annulment by the Austrian Administrative Court in December 2008 of the previous market analysis for wholesale broadband access, the NRA notified a new decision where, on the basis of substitution at the retail level between fixed and mobile broadband services for residential customers, it only proposed to define for the purposes of ex ante regulation the market for wholesale broadband access for the subsequent use of business customers. This decision will imply the deregulation of the wholesale broadband access market for the subsequent use of residential customers. The Commission initiated a second phase investigation and, in December 2009, decided to accept with comments the draft measure proposed by the NRA, taking into account the evidence provided and the particular circumstances in Austria.

In addition, several important decisions have been adopted in respect of call termination markets. The NRA notified a new market analysis for mobile call termination networks where it proposed to lower the level of termination rates significantly on the basis of the costs of the most efficient operator in the market, which was the 3G spectrum only operator. On the other hand, as a result of a dispute settlement brought before it, the NRA decided to increase the fixed termination rates of the incumbent operator on account of the cost methodology employed, which questioned the results of long term economic efficiency. The NRA has declared that a pure Long Run Incremental Cost (LRIC) model is under development which should apply to the next round of market reviews. This will bring more legal certainty and incentives towards economic efficiency to the market as well as contribute to consistency in regulation across the EU in line with the Commission Recommendation on the regulatory treatment of fixed and mobile termination rates in the EU.

Amendments to the Telecommunications Act were adopted on 17 June 2009 with the aim of fostering the deployment of NGA networks. In particular, these amendments provide for the possibility to access existing infrastructure (not limited to electronic communications infrastructure) to facilitate network deployment by electronic communications operators. Stakeholders saw these amendments as a favourable step, and expected that it would lead also in practice to positive results facilitating investment. In addition, the new law also modifies some provisions in relation to the obligations to be imposed on significant market power (SMP) operators, specifying that when imposing a cost orientation obligation, the NRA shall take into account the investments made and the risks involved, as well as the future market developments.

Organisation of the NRA

The Austrian Regulatory Authority for Broadcasting and Telecommunications (Rundfunk und Telekom Regulierungs-GmbH - RTR) acts as the operational arm of the Austrian Communications Authority (Kommunikationsbehörde Austria - KommAustria), which is a subordinate administrative body of the Federal Chancellery that regulates the broadcasting sector. RTR also acts as the operational arm of the Telecommunications Control Commission (Telekom-Control-Kommission - TKK), which is responsible for regulation of the telecommunications markets.

As indicated in the previous report, there is legislation in the process of adoption that is expected to modify the legal framework of KommAustria; this legislation was under public consultation at the end of 2009 and is expected to be adopted soon. It has been indicated that the new law will establish a fully fledged independent regulator in the broadcasting sector. The Commission services will follow that matter.

Decision-making

During 2009, the NRA has continued with the third round of market reviews and has recently consulted with the interested parties on several draft proposals. In accordance with the broad interpretation of affected party given by the European Court of Justice⁹⁹, the NRA has involved all the appropriate stakeholders in the market review process. The draft measures currently under preparation will already include the details of the remedies to be imposed in each relevant market, as appropriate. This practice represents an improvement with regard to the previous rounds of market analysis, where the details of the remedies were often only imposed at a later stage as a consequence of dispute settlement procedures between operators. It will facilitate the full effectiveness of ex ante regulation in a timelier manner and provide more legal certainty to the market. However, the NRA continues to conduct the market definition and the market analysis as separate processes. The time taken for the completion of the overall decision making process, that is, from the start of market definition until a decision on the market analysis and the imposition of remedies is reached, continues to be long and further efforts from the NRA to improve the duration of this process would be beneficial for the market.

During the reported period, the NRA continued the discussions and regulatory dialogue with stakeholders on current issues such as the appropriate regulatory approach towards NGAs. Alternative operators welcomed this approach but indicated that more transparency and legal certainty in relation to issues that affect operators' strategy and investment decisions are necessary, in particular as regards the future use of the digital dividend in Austria.

The amendments to the Telecommunications Act adopted in June 2009 established that once a market is no longer included in the Austrian market definition ordinance (the Telecommunications Market Ordinance) all existing obligations in that market should be automatically withdrawn. Alternative operators were concerned that their right of appeal would be affected and that this provision would not enable them to contest the NRA's decision to withdraw regulation from a market, since currently they do not appear to have legal standing to challenge the Telecommunications Market Ordinance. However, the NRA confirmed that in these cases, operators would be in a position to appeal the NRA's decision and reasoning not to include one market in the Ordinance. The Commission services will follow this matter.

Alternative operators are concerned about the fact that the deadline for completing the dispute settlement procedures is not always respected and would welcome more efforts from the NRA to adopt important decisions, such as in relation to market analysis or dispute settlements, in a timely manner.

MARKET AND REGULATORY DEVELOPMENTS

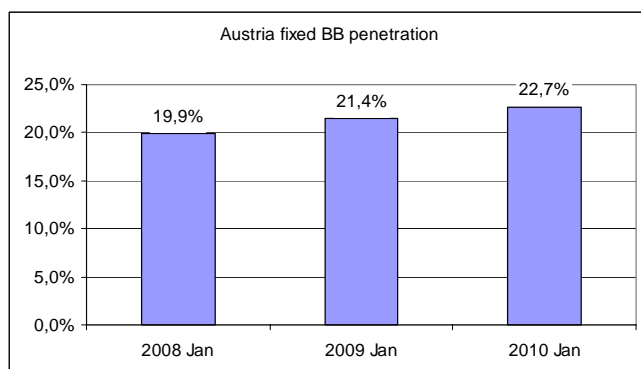
The total turnover of the Austrian electronic communications sector was €5.54 billion¹⁰⁰ as of 31 December 2008, representing 2.0% of the gross domestic product. The total value of tangible investment in electronic communications networks for 2008 was €711 million, a reduction of 19.1% with regard to the previous year.

⁹⁹ See case C-426/05.

¹⁰⁰ Revenues from international roaming not included.

Broadband

Market situation



The penetration rate was 22.7% in January 2010 (up from 21.8% in July 2009 and 21.4% in January 2009), but still below the EU average of 24.8%. In January 2010, all fixed broadband lines based on means other than DSL, which includes wireless local loop, cable modem, fibre to the home, leased lines, power line communications and others, had a market share of 31.9%.

As regards fixed broadband lines, the market share of the incumbent operator has been increasing over the past years, and it was 51.1% in January 2010 up from 45.4% in January 2009 and above the EU average in January 2010 of 45.0%. In January 2010, 68.1% of broadband lines in Austria were based on DSL technology and the market share of the incumbent fixed network operator in DSL lines was 75.0%, well above the EU average of 55.8%. In January 2010 82.8% of DSL broadband lines provided by new entrants were based on full LLU.

The decline in the rate of growth of fixed broadband services in Austria continues and between January 2009 and January 2010 only 107 733 new lines were created, compared to the 130 533 new lines created between January 2008 and January 2009. For broadband fixed retail lines using technologies other than DSL, there has even been a negative growth between January 2009 and January 2010 of – 36 810 lines. This declining growth in fixed broadband lines may be explained by the popularity of mobile broadband services in Austria.

In this respect, mobile broadband has continued its growing trend during 2009 and mobile broadband penetration in Austria was among the highest in the EU in January 2010 at 15.1%, up from 11.4% in January 2009 and well above the EU average of 5.2%, taking into account only the number of mobile broadband connections using only dedicated data cards/modems/keys¹⁰¹, typically allowing mobile Internet via laptops.

According to the NRA, residential customers consider mobile broadband services as a substitute for fixed services and do not perceive significant differences in the functionalities of these two types of broadband services. Mobile operators have continued to offer attractive mobile broadband packages at the retail level, even with the possibility for customers to get a subsidized notebook with their contract, either for free or at a reduced price. The NRA has reported that mobile broadband connections account for 35% of the total retail broadband connections.

The incumbent operator continued to offer promotional bundled offers (Kombipaket) during 2009, and it also started to offer triple-play products to business customers combining fixed,

¹⁰¹ Figures are estimates based on Q3 2009. Mobile broadband dedicated data services via cards/ modems/ keys are defined as the number of contracts with included dedicated data volume of 250 MB or more per month as well as dedicated pre-paid data services (UMTS/HSDPA) including at least 750 MB downloaded per quarter.

mobile and broadband services. These bundles remain a matter of concern for alternative fixed operators, which consider that the margins allowed are not sufficient to enable them to compete in the longer term. The incumbent operator has also started during 2009 to commercialise, together with its mobile branch, a fixed and mobile broadband bundled product which enables customers to use the fixed broadband connection while at home and the mobile connection elsewhere. The main cable operator has entered into an agreement with a mobile operator to offer similar packages at the retail level.

The incumbent operator announced its plans to invest in the NGA network; it has divided the country into different areas depending on the population density and is intending to upgrade its network with FTTH, fibre to the curb (FTTC) or VDSL2 depending on the area. The main cable operator has also started to upgrade its network to offer very high speeds in the main cities.

Regulatory issues

The Austrian Administrative Court annulled on 17 December 2008 the NRA's decision in the wholesale broadband access market where it defined a national market but recognised certain geographic variations in the competitive conditions when defining the remedies. Following that Judgement, on 5 September 2009 RTR notified to the Commission a new definition of the wholesale broadband access market to be included in the Telecommunications Market Ordinance. RTR identified two separate markets for broadband access at the retail level, for residential and business customers, respectively. Whereas the business market included only DSL based connections, the residential market comprised DSL as well as cable TV and mobile broadband connections. On the basis of the situation at the retail level, RTR defined a wholesale broadband access market for the subsequent use of business users and further argued that due to the degree of competition existing at the retail level, it is not necessary to define the market for wholesale broadband access for the subsequent use of residential customers as relevant for ex ante regulation.

On 5 October 2009 the Commission adopted a "serious doubts" letter opening the second phase investigation under Article 7 on this draft measure. The Commission had serious doubts as to the inclusion of mobile broadband in the retail broadband market for residential customers and as to the treatment of external and self supply of bitstream connections for the subsequent use of residential customers in the wholesale broadband access market. On 7 December 2009, after further investigation and amendments made by RTR to the draft measure, the Commission withdrew the serious doubts. The Commission thus accepted RTR's conclusion that on the basis of the current market situation mobile broadband connections are substitutes of fixed broadband connections for residential users in Austria but it invited RTR to closely monitor the market developments, in particular with regard to constraints of further mobile take-up in comparison to the evolution of fixed broadband networks and the impact of NGA deployment.

Alternative operators expressed their concerns as to the situation of fixed broadband services in Austria and were strongly opposing the NRA's decision to withdraw regulation from the wholesale broadband access market for the subsequent use of residential customers. Alternative operators claimed that the wholesale products available do not enable them sufficient margins to compete with the incumbent operator's bundle offers in the long term and are thus urging the NRA to set appropriate regulatory conditions in relation to fixed services and in particular as regards NGA deployment to establish sustainable competitive conditions.

During 2009, the monthly rental prices for full local loop unbundling (LLU) were further reduced to the price which was previously applicable during the Kombipaket promotion period, €6.35, which is below the EU average of €8.55. These LLU prices were further reduced to €5.87 as from November 2009. The monthly rental price for shared access is €3.18 which is however above the EU average of €2.24. During the promotion periods, the one-off connection fee for shared and full LLU is not applicable. As regards the bundle offers of the incumbent, the NRA stated that it regularly verifies that the conditions applied by the incumbent do not lead to a margin squeeze situation. Alternative operators regret that these conditions allow only the incumbent operator to drive competition and that they cannot innovate with similar promotional offers.

RTR had initiated a national discussion on next-generation networks and established an industry group to discuss technical and regulatory issues related to NGA networks; these discussions have continued over 2009. The investment plans of the incumbent operator are now made public, the challenge is to create a regulatory environment which fosters investment and innovation and promotes competition in the fixed broadband market. Alternative operators claim that, due to interferences, the incumbent FTTH and FTTB planned deployments in densely populated areas will prevent them from using their existing LLU infrastructure to provide services on the basis of VDSL. The NRA intends to develop a regulatory model based on coordination meetings between the operators with the aim to facilitate investments and create a level playing field for network deployment. The coordination meetings would give operators an opportunity to declare their commitments and plans to invest in an area. In case several operators are planning to invest in a given area and it is not possible to deploy both networks, the option which would give higher bandwidth to the consumers should prevail, with the possibility to establish compensation payments.

In relation to the possible remedies to be imposed in the market for physical infrastructure access, the NRA envisages the access to the incumbent's ducts and, in addition, a wholesale product for NGA access (called 'virtual unbundling'). The NRA believes that this product should offer the same technical and economical possibilities as well as independence to alternative operators than LLU. Alternative operators consider that this product is essential for preserving competition in the broadband market. It is important that the regulatory approach towards NGA networks is adopted in a proactive manner and solves appropriately the current problems observed in the fixed market in Austria.

Mobile

Market situation

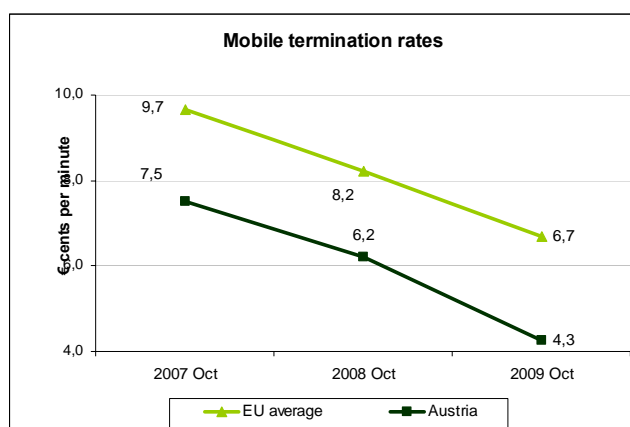
Mobile penetration stood at 133.5% in October 2009 with more than 11 million subscribers, above the EU average of 121.9% and an increasing proportion of the total voice traffic volumes handled through mobile networks (71% at the end of 2008). The mobile market in Austria continues to be highly competitive, with attractive retail prices and innovative services, and with high popularity of mobile broadband services as well. There continues to be important innovation and mobile operators in Austria have stated their commitment to start investing in Long Term Evolution (LTE) during the next year, if legal certainty is provided as regards frequency usage. As the NRA has also stated, the low level of the regulated mobile termination rates has promoted innovation in the offers, facilitating the development of flat-rate offers and delivering lower prices for consumers.

As of June 2009, the leading mobile operator had a market share of 42.9%, the second largest operator had a market share of 31.5% and the rest of the operators together had a market share of 28%¹⁰². Almost 70% of the users have a post-paid service, with 30% using prepaid services.

The average price per minute of mobile communications in 2008 was €0.10¹⁰³, which is below the EU average of €0.13. The average annual revenue per user has decreased slightly and at the end of 2008 it was €333 compared to €350 the previous year, but it is above the EU average of €323. This suggests that with more competition lower prices for consumers are leading to increased use of these services.

Regulatory issues

The previous market decision concerning voice call termination on individual mobile networks had set the mobile termination rates with a glide path towards a symmetric target rate of 5.72 €-cents to be reached by all operators from 1 January 2009 through linear decreases. Following the annulment by the Administrative Court (VwGH) of this decision in June 2008, the NRA notified a new market definition for mobile call termination at the end of 2008. During



2009, TTK also adopted a decision on a dispute settlement concerning the retroactive setting of the mobile termination rates. In that decision, taking into account newly available data for 2007 and 2008, the NRA resolved to achieve the symmetric target rate of 5.72 €-cents six months in advance of the previously targeted date, i.e. as from 1 July 2008, followed by 4.50 €-cents per minute as from 1 January 2009. Some alternative operators have expressed their concerns about this decision, which could only have an impact on the retroactive payments between operators but could not benefit the consumers.

In addition, TTK notified the third round analysis of the market for voice call termination on mobile networks where it proposed a symmetric glide path for the reduction of mobile termination rates reaching the target charge of 2.01 €-cents as from January 2011. In the final decision, the target charge was to be reached five months later, from June 2011. This substantial reduction is established drawing upon the costs identified for the lowest-cost operator as a benchmark for the efficient operator which, for the first time, was not the incumbent mobile branch but the 3G spectrum only operator. The significant reduction in this operator's costs is driven by the substantial growth of data traffic carried over its network. The Commission welcomed the important reductions in mobile termination rates in Austria, but highlighted the importance of LRIC models using the current or forward-looking costs of an efficient operator. In that respect, the NRA has already indicated that a pure LRIC model is under preparation and that it envisages its application by the time of the next market review. Alternative operators also welcomed the adoption of this decision which, after different appeals and disputes, brings legal certainty to the sector as to the level of mobile termination rates.

¹⁰² Source: Informa Telecoms and Media (2Q 2009).

¹⁰³ Including a fixed fee for minute packages.

Roaming Regulation

The price caps established in the Roaming Regulation and in the amendments to the Regulation that entered into force in July 2009 were applied in time and operators offered the Eurotariff, which in all but one case was set at almost at the level of the price cap. However, the NRA adopted a decision against a mobile operator which introduced a set up fee instead of the initial minimum charging interval of 30 seconds and, in addition to this set up fee, a per-second billing from the first second on. The NRA indicated that it was not possible to introduce such a set up fee in combination with per-second billing from the first second of the regulated call, and ordered the operator to stop this charging method immediately and to adjust the wrong charging method for the affected customers since 1 July 2009. One mobile operator started offering roaming tariffs alternative to the Eurotariff such as the elimination of roaming charges when travelling in another country where that operator is also present, and operators are also offering roaming bundle offers combining voice, SMS and data roaming, in particular during the summer period.

The amendments to the Telecommunications Act adopted in June 2009 also established the penalties to be imposed in case of non-compliance with the Roaming Regulation, as required by Article 9 of this Regulation.

Fixed

Market situation

The decreasing tendency of the fixed market has continued over the reported period and fixed to mobile substitution remains strong in Austria. In 2008 it was estimated that 29% of the total minutes of communication went over fixed networks and 71% went over mobile networks.

As of July 2009, 83.0% of the subscribers were using the incumbent operator for direct access¹⁰⁴, a percentage which has remained at the same level of the past year and which is above the EU average of 75.9%. However, the market share of the incumbent in calls markets has remained stable or decreased slightly in some segments during 2009; for instance the market share of the incumbent for all fixed calls was 59.6% in December 2008 at almost the same level of 60.8% of December 2007 based on revenues, which was below the EU average of 63.3%. Based on outgoing minutes, the market share for all fixed calls went down from 58.8% to 55.1%, and was also below the EU average of 60.5%. The market share of the incumbent operator for international calls has also gone down from 40.7% to 35.7% in terms of outgoing minutes and from 57.9% to 52.1% in terms of revenues, which remains however slightly higher than the EU average of 50.6%.

Regulatory issues

Whilst the NRA withdrew existing regulation in the retail calls markets for residential customers, it defined as susceptible to ex ante regulation the market for national and international publicly available telephone services for non-residential customers, noting that market entry barriers are high and the incumbent operator was regaining its market share. These markets are no longer listed in the current Recommendation on Relevant Markets and, after carrying out the three criteria test, RTR concluded that these markets were relevant for ex-ante regulation. The Commission urged RTR to re-examine in the SMP analysis the

¹⁰⁴ Data are estimates.

market entry barriers it identified and invited it to work on improving the efficiency of the current wholesale remedies in the context of the market analysis of the relevant wholesale markets. The NRA is expected to notify at Community level the SMP analysis and the proposed remedies on this market shortly.

In relation to fixed termination rates, TKK adopted a decision in a dispute settlement procedure between the incumbent fixed network operator and an alternative operator concerning the setting of fixed interconnection rates. Following a calculation of the relevant costs on the basis of a hybrid forward-looking Long Run Average Incremental Cost (FL-LRAIC) model, TKK finally set the incumbent's regulated costs at the level of those requested by the incumbent in the dispute, since these were lower than the ones yielded from the hybrid model. However, these rates were higher than the ones previously applied by the incumbent. The NRA justified this conclusion, among others, on the declining volumes of traffic in the fixed network. The Commission expressed its concerns about the use of the hybrid model by TKK and invited it to consider, when setting regulated wholesale charges for fixed termination, only the costs which are directly related to the provision of those wholesale services.

As a result of existing regulation, the current fixed interconnection charges in Austria are among the highest in the EU. In October 2009, the rate for fixed interconnection at local level was 0.82 €-cents, compared to an EU average of 0.52 €-cents, and in the framework of the dispute settlement referred to above they were further increased to 1.12 €-cents. The rates for single and double transit were 1.28 €-cents and 2.25 €-cents, significantly higher than the respective EU averages of 0.79 €-cents for single and EU 1.09 €-cents for double transit. Following the dispute settlement decision, these rates were set at 1.58 €-cents and 2.16 €-cents for single and double transit, respectively.

The analysis of the market for fixed call termination was notified at the beginning of 2010 together with the remedies proposed.

In the telecommunications market definition ordinance adopted in December 2008, the NRA defined two separate relevant markets for wholesale terminating segments of leased lines, depending on the bandwidths, and for the higher bandwidths RTR proposed to take account of geographic variations in the competitive conditions by defining sub-national markets. Following this market definition, RTR notified a draft measure proposing to deregulate the nationwide market for wholesale terminating segments of leased lines with very high bandwidths and the market for wholesale terminating segments of leased lines with high bandwidth covering twelve Austrian cities. The Commission invited RTR to closely monitor the market developments and the evolution of competitive conditions in the different geographic markets identified.

In light of the situation of the fixed market in Austria, where the size of the market continues to decrease with strong fixed to mobile substitution and where alternative operators are finding difficult to compete, the NRA is reflecting on the appropriate regulatory approach to introduce more dynamism in the fixed market competition. In particular, and given that wholesale line rental was never taken up in Austria, it is considering imposing an obligation on the incumbent to provide voice over broadband, and is discussing with stakeholders the possibility to establish a capacity-based interconnection model. The Commission will follow these developments.

Broadcasting

Market situation

As of July 2009 there were 91 000 households with analogue terrestrial TV, representing 2.5% of the households, and 169 000 households with digital terrestrial TV, amounting to 4.7% of the households. At the same time, 48.5% of households (1.73 million households) received TV via satellite and 39.4% of households (1.4 million households) used cable as their TV platform.

The consumer adoption of digital terrestrial TV, launched in October 2006, is progressing and the set top box was subsidised to increase take up. Coverage of digital terrestrial TV is significant, and for both MUX (A and B) it is according to Austrian authorities around 90% population coverage (93% for MUX A and 87% for MUX B).

Mobile TV based on DVB-H was launched in June 2008 and its coverage is above 50% of the population. Currently there seem to be no plans to increase this coverage and the usage of mobile TV does not appear to be significant.

IPTV was introduced by the incumbent telecom operator, but the take-up continues to be limited and in July 2009 it amounted to 69 000 households (representing 1.9% of households).

Regulatory issues

New broadcasting legislation is still under the process of adoption. Public consultation on the draft law took place at the end of 2009. It should include the restructuring of the broadcasting regulatory authority which, according to the governing agreement of the coalition parties, would then become fully independent from the government. The Commission services will follow this matter.

The digitalisation process in Austria was initiated in October 2006 and the switchover is scheduled to be completed during the summer 2011. For local and regional digital TV, 16 licenses were granted in December 2008, however not all of them are operating yet since the obligation established in the license was to start operations within a year. Between September and November 2009 there was a second round of tenders to apply for regional licenses.

KommAustria notified to the Commission the definition of the market for broadcasting transmission services in Austria as being relevant for ex ante regulation. In particular, KommAustria identified the following markets after the application of the three criteria test: (i) the market for the multiplexing of broadcasting signals via the multiplex platforms MUX A and MUX B and the transmission of digital terrestrial TV broadcasting signals to end users; (ii) the market for analogue terrestrial FM radio broadcasting, and (iii) the market for access to broadcasting facilities and digital terrestrial transmission of television signals to end-customers. The Commission invited the NRA to conduct as soon as possible the market analysis and to assess at that moment whether the market definition notified still reflected the market reality, particularly with regard to market developments in terms of infrastructure and services competition, and whether the market still met the three criteria test. The analysis of these markets is expected to be finalised early 2010.

Horizontal regulation

Spectrum management

Amendments to the Frequency Utilization Ordinance were adopted on 21 July 2009 and 12 October 2009, in view of introducing some provisions regarding the digital dividend frequency band and implementing several Commission decisions under the Radio Spectrum Decision of 2008 and 2009, respectively. According to the modifications introduced in July 2009, the Frequency Utilization Ordinance reserves the digital dividend frequency band (790-862 MHz) to broadcasting services until June 2015; no further allocations will however take place except for simulcast and for a maximum period of 18 months. It is also foreseen in the Frequency Utilization Ordinance that the date of June 2015 could be advanced and allocation of these frequencies to mobile operators could take place provided that three conditions are met: (i) there is no further demand for these bands for terrestrial television, (ii) there is an agreement on the use of these frequencies with the neighbouring countries to avoid interferences and (iii) a final decision at Austrian and EU level on the future use of the digital dividend is taken¹⁰⁵.

The Austrian Federal Chancellery and the Federal Ministry for Transport, Innovation and Technology have reported that a comprehensive study on the implementation of the digital dividend (frequency band 790-862 MHz), which is expected to form the basis of the decision on the subject, is currently underway and is planned to be finalised in spring 2010. According to the authorities, secondary services (mainly professional wireless microphones for major events) are present in this band more densely than in other Member States and might need to be phased out to another frequency band. Alternative operators stressed the importance of the digital dividend frequency band for the provision of mobile broadband services, in particular in rural areas, and would like the political environment to achieve a rapid and appropriate solution for the digital dividend that would facilitate the objective of bridging the digital divide in rural areas. The Austrian authorities reported that broadcasting operators also claim the need to consider the frequency demand for new developments in the terrestrial broadcasting sector. It is necessary to establish a transparent and structured process in respect of the digital dividend and possible refarming of frequencies in order to give operators the necessary legal certainty and enable them to plan their investments.

With regard to the 900 MHz GSM Directive, it is already indicated in the Frequency Plan that this band will be opened up for other services than GSM if they are technically compatible. The frequencies are assigned until 2015 and currently there are discussions between the Ministry and the NRA on the most appropriate approach on this issue that would ensure that competition can be preserved. The Commission services will follow these issues.

In April 2009 the NRA launched a tender for 3.5GHz frequency licenses. The licenses were divided in one frequency package for eight separate regions and were assigned to 4 operators, who are under the obligation to start providing services by the end of 2009.

¹⁰⁵ On 28 October 2009, the Commission adopted a Communication on 'Transforming the digital dividend into social benefits and economic growth' (COM (2009)586/2) and a Recommendation on 'Facilitating the release of the digital dividend in the European Union' (2009/848/EC).

Implementation of spectrum decisions

As already indicated, amendments to the Frequency Utilization Ordinance were adopted in 2009 in order to implement several Commission decisions under the Radio Spectrum Decision of 2008 and 2009. As regards the implementation of the Commission Decisions adopted pursuant to the Radio Spectrum Decision, the Commission services are currently following the correct implementation of Commission Decisions 2005/513/EC, 2008/411/EC and 2008/477/EC in Austria.

Rights of way and facility sharing

The amendments of the Telecommunications Act adopted in June 2009 have the aim of facilitating access by electronic communications operators to existing infrastructures, not limited to electronic communications infrastructure, to promote NGA deployment. In this respect, owners of rights of way, of use of, and access to these infrastructures have to provide access to electronic communications operators, as long as it is financially viable and technically possible. Operators can thus request access to ducts or cables and, in the event that an agreement between the parties is not reached within four weeks, the NRA should solve the dispute setting, if necessary, the appropriate financial compensation. The law specifies the elements that could be factored for establishing this compensation, such as costs of the facility, including acquisition, operating costs and other costs associated with the shared use as well as charges prevailing on the market.

On the basis of these provisions, the NRA adopted a decision in November 2009 ordering the Austrian railways operator to offer access to a certain cable duct to an alternative ISP. The decision also establishes the fee that the alternative ISP will pay for accessing this particular cable duct of the railways operator, which is 0.64€ per meter per month. Another dispute concerning access to the incumbent's ducts was introduced by the same alternative operator and has however been pending before the NRA for more than one year.

THE CONSUMER INTEREST

Universal service

As in previous years, the financing of the universal service was not based on the funding mechanism laid down in the Telecommunications Act, and operators have continued to agree among themselves on compensation for the universal service provider. There are no discussions at the moment to modify the scope of universal service, but alternative operators consider that with the high mobile penetration and usage in Austria, the need to keep the public payphones is becoming less evident and advocate for the suppression of the provision of public payphones from the scope of the universal service.

Number portability

Number portability continues to be only moderately used in Austria and in absolute figures there has only been a slight increase in both fixed and mobile number portability. Regarding the prices for fixed number portability, Austria remains one of the countries in Europe with a high wholesale price of €21.79¹⁰⁶. The wholesale price for mobile number portability is not currently regulated by the NRA but has remained stable at an average of €8.21. The price to

¹⁰⁶ Maximum price (one-off fee).

be paid at the retail level by users requesting mobile number portability is at the level of €19, which has been as considered a maximum by the NRA.

Last year certain alternative mobile operators had voiced concerns regarding the message that users get when calling a customer whose number has been ported, informing them of the fact that the number has been ported to another network, since this may discourage consumers, especially business customers, from making use of this facility. During 2009, the NRA resolved a dispute settlement procedure between two mobile operators and confirmed the necessity of keeping the automatic voice message informing the caller of the actual destination network of the call. All operators except the mobile branch of the incumbent operator are in favour of eliminating this message or at least replacing it for a simpler solution. In the dispute settlement, an alternative operator proposed to shorten the voice message but the NRA's decision was to allow any sort of voice message, so that mobile operators can choose to provide either a short or a long version of the message.

While the need to inform the consumer of the ported number is established in the law, with the generalisation of flat-rates at the retail level the necessity of having this message, especially in a long version, appears less evident. Number portability is an essential tool to facilitate competition between different providers, and it is for the NRA to ensure that the pricing and conditions guarantee consumer protection but at the same time not act as a disincentive for consumers to port their numbers. The Commission services will monitor this issue.

Consumer complaints

The NRA has reported a decrease in the number of consumer complaints for 2009, in comparison with 2008¹⁰⁷. These complaints related mainly with payment disputes and contract issues. The consumer protection department of the Austrian Chamber of Labour expressed concerns as to the lack of tariff transparency for consumers, since tariff plans change very often and there is an increasing number of retail tariffs and packages, as well as the high switching costs for consumers to change to a different provider. The Austrian Chamber of Labour was also concerned about the high charges for data roaming services and the sometimes abusive contract conditions for consumers, such as warranty requirements, debt consequences or contract termination fees.

European emergency number 112

The European emergency number 112 can be called from both fixed and mobile telephones. Caller location information is provided for all calls, upon request ('pull-system'). There are different national emergency numbers in Austria and there is currently no significant awareness among the population on the European emergency number 112. It would be appropriate that the Member State authorities undertake activities to promote 112 at the national level in order to increase awareness. The Commission services will follow these developments.

¹⁰⁷ See also RTR's Annual Report on the conciliation procedure: "Tätigkeitsbericht der Schlichtungsstelle 2008", where it was reported that in 2008, the RTR conciliation board recorded, with 5.226 proceedings, around a 50% increase in complaints as compared with 2007. The amount of complaints of 2008 was considered an all time high.

E-privacy

The EU Directive on data retention has still not been transposed in Austria. Regarding data on Internet use and emails, Austria had to transpose the relevant rules laid down in the EU Directive on data retention by March 2009. Drafting of the legislative text was requested to the Ludwig Boltzmann Institute of Human Rights which presented a draft in September 2009. All stakeholders are being consulted in the process of implementation of this directive and discussions are taking place between the relevant Ministries. Alternative operators considered that the draft presented in September appears to be quite balanced and the political aim is to finalise the law early in 2010.

Following the ordinance from the European Court of Justice in February 2009 at a request of a preliminary ruling¹⁰⁸, Austria's High Court decided that ISPs cannot be forced to give personal details of their subscribers to rights holders with a view to enforcing copyrights without a Court order.

¹⁰⁸ See case C-557/07