

GERMANY

INTRODUCTION

While fixed and mobile broadband penetration rates continued to increase during 2009, the growth rate for mobile subscriptions has slowed as this market reaches maturity. The incumbent, together with the largest alternative fixed-line competitor, gained the largest share of new fixed broadband customers. Cable broadband connections have continued to grow, driven by consumer demand for broadband services bundled with TV subscriptions. The incumbent continued to expand its VDSL infrastructure and diversified its VDSL-based portfolio of services by offering double-play retail offers alongside triple-play premium services. Investment in fibre-to-the-building networks has continued.

The new German Government, which came into office in September 2009, has placed increased emphasis on ensuring ubiquitous broadband coverage in Germany. The national regulatory authority (NRA), the Bundesnetzagentur (BNetzA), has set out principles for the regulation of next generation access (NGA) networks however, in practice, the regulatory response to NGA developments remains slow and reactive. The BNetzA appears to be very reluctant to intervene in the evolving NGA market in anticipation of new technologies stimulating infrastructure-based competition. Reliance on commercial negotiations between the incumbent and competitors can lead to unresolved disputes and consequently long delays before obligations are ultimately enforced thus reducing market impact.

A spectrum auction comprising frequency resources of 360 MHz in total is in the final phase of preparation and is expected to take place in the second quarter of 2010. The NRA has also decided on rules for flexible use of the 900 MHz frequency band, which is currently used for GSM services.

The European Court of Justice delivered its judgement on the infringement case against Germany regarding the amendment of the German Telecommunications Act from February 2007 on the principles of regulatory treatment of ‘new markets’ (C-424/07). The Court confirmed the Commission’s position that national legislation may not exempt next-generation (‘new’) electronic communication markets from regulation or limit the discretionary powers of the NRA in its exclusive right to assess whether markets should be regulated or not.

REGULATORY ENVIRONMENT

Main regulatory developments

In February 2009, the German Government adopted a broadband strategy which aims to ensure broadband coverage for all German households at speeds of at least 1 Mbps by the end of 2010. As a second step, this strategy aims to make advanced broadband connections at speeds of at least 50 Mbps available to at least 75% of German households by 2014.

Since the end of 2008 the incumbent has been in negotiations with some fixed-line competitors, energy utility companies and fibre-based regional network operators, on the joint deployment and/or operation of VDSL infrastructure. The first of such commercial agreements on VDSL bitstream were signed in July 2009. One of the largest fixed-line competitors requested the BNetzA to impose on the incumbent the same regulatory conditions

for wholesale VDSL products as for other DSL products because of their alleged substitutability as double-play only products.

In order to facilitate competitors to deploy their own VDSL infrastructure the BNetzA imposed in 2007 a general obligation on the incumbent to grant access to its street cabinets ("Multifunktionsgehäuse") and ducts or to its dark fibre. However, it was only in December 2009, following requests by competitors submitted in August 2009, that the NRA issued the first ruling to finally provide the applicants with the access rights contained in the original general obligation. However, the prices for access are still subject to separate pending approval procedures. The delayed adoption of these remedies, which are still not yet effective, demonstrates the passive regulatory approach of the BNetzA over the past few years to promoting competition in the new NGA broadband environment. This has led to a first-mover advantage for the incumbent.

In this regard, in January 2010 the incumbent applied to the NRA for authorisation of its proposed rates for access to its passive infrastructure and dark fibre. However, at the same time, the Supreme Administrative Court revoked that part of the BNetzA's ruling which grants access to dark fibre.

In March 2009, the BNetzA adopted regulatory measures on the levels of mobile terminations rates (MTR) for the four mobile operators, effective from 1 April 2009 until 30 November 2010. However, the BNetzA failed to notify both the proposed MTR levels and the underlying cost accounting methodology under the Community consultation mechanism required by the regulatory framework since it considered that such was not required. Consequently, the Commission launched an infringement procedure.

The BNetzA has decided to conduct an assignment of radio frequencies in the range 790-862 MHz (a part of the digital dividend spectrum) in a simultaneous auction procedure together with other frequency bands (at 1.8 GHz, 2.0 GHz and 2.6 GHz). In October 2009, the BNetzA adopted the rules for this spectrum auction together with rules for spectrum re-farming upon request, including the 900 MHz band currently used for GSM services. Following intensive contacts on the conformity of these rules with the Community principles of objectivity and non-discriminatory treatment of undertakings and exchange of additional information between the Commission and the BNetzA, the BNetzA decided to continue with the schedule for the auction. However, the NRA has committed to an evaluation of the competitive conditions on the mobile markets within three months of the outcome of the auction procedure. The two smaller mobile operators have appealed the auction rules. In this respect, a national administrative court has taken initial decisions in two summary proceedings which suggest further judicial investigation without suspending the auction.

Organisation of the NRA

The BNetzA has responsibility for regulation of electronic communications, postal services, electricity and gas supply, and railways. About 11 % of its staff and two of its ruling chambers are dedicated to e-communications and spectrum management.

The rules for appointment and dismissal of the president and vice-president of the BNetzA as well as the concentration of important regulatory decisions in the presidential chamber of the NRA have been criticised by the German Monopoly Commission¹³⁹.

Decision-making

The decision making process of the BNetzA continues to involve lengthy proceedings which can impede effective regulation. For example it may take more than 2 years to carry out a complete market analysis and to impose remedies. The practice of separate notifications of market analysis and remedies continues to lead to delays. In some cases, e.g. ATM bitstream and partial-private-circuits (PPC), remedies appear to have become outdated before their eventual enforcement, thus not meeting market demands. In addition, the lengthy judicial review process for most regulatory decisions creates periods of legal uncertainty.

The BNetzA launched and partly completed several second-round analyses of wholesale and retail markets. With regard to retail markets, the NRA deregulated the markets for local and national telephone services and also proposed the removal of remedies in the leased lines market. In the market for access to the public telephone network at a fixed location it was proposed to maintain the previous regulation, which also removed the obligation of prior notification.

With respect to wholesale markets, the NRA completed its analyses of the markets for call origination and termination at a fixed location, and also notified the corresponding remedies to be imposed on the incumbent. Furthermore, the BNetzA analysed and notified the markets for mobile termination for mobile virtual network operators (MVNO). The NRA decided to remove regulation from the market for transit services. In fulfilment of a decision by a regional administrative court, the BNetzA re-imposed price control obligations in the market for broadcast transmission services. A second-round analysis of this market and the market for terminating segments of leased lines is still pending.

The wholesale broadband markets were subject to public consultation at the end of 2009 including VDSL access and fibre-to-the-building (FTTB) but excluding fibre-to-the-home (FTTH) access. So far, the incumbent has not revealed any plans to roll out FTTH. In this regard, the BNetzA's planned shift to ex-post price regulation in the wholesale broadband markets may adversely affect the competitive position of alternative operators in light of the possible switch-off of main distribution frames following the incumbent's steady migration to fibre-based infrastructure.

The first-round regulatory measure on the market for IP bitstream was revised and re-adopted by the NRA, following a judgement of the Supreme Administrative Court. Furthermore, the regulator issued individual rulings under the current remedies for the market for wholesale unbundled access. These grant access under price control for competitors to specific switches in areas where this is necessary to provide DSL services at downstream speeds of at least 1 Mbps, thus facilitating in particular the offering of competitive broadband services in rural areas.

¹³⁹ As stated in the annual report of the German Monopoly Commission on the state of competition in the German telecommunications market, 14 December 2009 (see paragraph 150).

MARKET AND REGULATORY DEVELOPMENTS

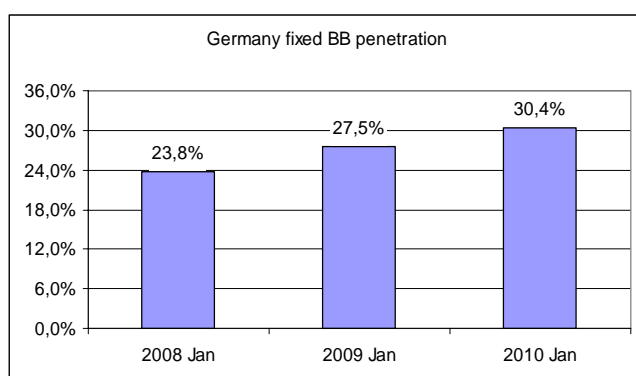
The total turnover of the German telecommunications sector amounted to € 62.3 billion at the end of 2008 which is a decline of 2.5% compared to the previous year. The revenue from the fixed markets was € 36.8 billion (€ 38.1 billion in 2007), and from the mobile markets was € 25.5 billion (€ 25.8 billion in 2007). The total value of investments by fixed telecommunications operators (including the incumbent) was € 5.0 billion and by mobile operators was € 2.2 billion. The total investment in the communications sector was therefore of € 7.2 billion (up by 1.4% compared to 2007) or just 0.3% of the gross domestic product. The alternative operators invested 58%^{140, 141} of the overall total.

While infrastructure based competition has intensified, the importance of resale has declined. Although the incumbent has not yet extended the scope of its investment to FTTB or FTTH, there is a considerable number of regional providers deploying and/or operating fibre-based infrastructure (city carriers, municipal utilities and energy utilities). Utility companies and fibre operators are continuing to co-operate on sustainable investment in broadband infrastructure. Cable operators have continued to expand their market share in broadband and triple-play services and are launching products at speeds of up to 100 Mbps.

The incumbent's strategy still seems focused on obtaining regulatory forbearance as a precondition for deploying last-mile fibre access infrastructure. At the end of 2009, the incumbent merged its fixed and mobile arms into one entity. It continued to expand its VDSL network in 50 large cities, covering approximately 10 million customers¹⁴². The incumbent offers triple-play services (via VDSL and ADSL2+) and has launched a VDSL-based double-play retail product (without IPTV). The largest alternative fixed operator has also advanced plans for expanding its own VDSL network.

Broadband

Market situation



The growth rate in the number of new broadband connections has declined although there are signs of increasing platform competition. The incumbent and the second largest operator attracted most of the newly connected DSL customers.

In January 2010, the fixed broadband penetration rate was 30.4% (up from 27.5% in January 2009), which is above the EU average of 24.8%. There were

nearly 100 alternative broadband operators (mainly regional) on the market. 85.4% of all fixed broadband connections operated at a speed of at least 2 Mbps, whereas 24.8% of all connections had speeds exceeding 10 Mbps. The proportion of broadband lines with

¹⁴⁰ This estimate is taken from the Dialog Consult/VATM market study “11. gemeinsame Marktanalyse 2009”, based on a poll of the member companies of VATM.

¹⁴¹ The BNetzA estimates the proportion of investment by alternative operators at 54%.

¹⁴² This figure includes also cases, where the incumbent operator has deployed indoor VDSL access multiplexers allowing the provision of VDSL access to customers closely located to one another.

download speeds exceeding 50 Mbps including VDSL, cable and fibre technology largely exceeded 1%.

The incumbent operator's market share of all fixed broadband lines in January 2010 remained stable at 46.2% (47% in January 2009), whereas it was 51.8% including resale lines. The cable operators' broadband market share has again grown significantly reaching 8.3%.

DSL remained the main form of broadband access with a market share of 89.8% of all fixed broadband lines in January 2010. Alternative operators provided slightly less than half of all DSL lines (48.7%). The main form of access used by alternative operators was full local loop unbundling (LLU, 78.7% of the alternative broadband lines) and resale (12.7%), whereas bitstream accounted for just 7.7%. The average monthly rental price of a full LLU connection in October 2009 fell slightly to € 10.20 (down by 2.9% compared to one year before).

In December 2008, 27.1% of the population were using bundled offers, the vast majority of which were double play. Retail prices for DSL-based flat and bundled offers remained stable during 2009.

Alternative DSL providers reported declining growth rates due to high costs for new customer acquisitions and a small margin between the rental costs for last mile infrastructure and the average revenue per user. In May 2009, the second largest alternative fixed broadband provider (United Internet) increased its fixed-line market share by acquiring the DSL business of another competitor (Freenet).

While the take-up of VDSL-based IPTV had progressed quite slowly, the incumbent managed to win a large number of new customers and claims to have reached 1 million IPTV customers at the end of 2009 – most of these having ADSL2+ connections. In general, more triple-play customers have been acquired by adding internet service to a current TV subscription via cable access than by adding IPTV service to an existing broadband DSL connection. The ease of access to content is reportedly a key product differentiator for DSL-based TV services.

In July 2009, the incumbent signed agreements for wholesale VDSL bitstream with some of the largest alternative fixed operators. The incumbent and the largest fixed competitor announced regional co-operation on the parallel deployment of NGA, which is based on mutual access to passive infrastructure. The incumbent also co-operated with regional fibre-based carriers for the purpose of complementary deployment of NGA infrastructure. Despite these market-driven developments, the competitive environment on the wholesale market for next-generation broadband access, which also includes VDSL bitstream access, still requires consistent regulatory attention. Alternative operators have requested the BNetzA to develop a framework for fair prices that provide incentives for all market participants alike to invest in broadband expansion.

A new association of fibre-based operators was founded in February 2009 (Bundesverband Glasfaseranschluss, BuGlas). BuGlas members – mainly regional FTTB/FTTH operators – reported the investment of € 275 million in infrastructure as well as the provision of half a million broadband connections to households in large and medium size cities in 2009. They are offering both wholesale and retail products (double-play, triple-play) which are mostly based on FTTB and, less often, on FTTH, with speeds of up to 100 Mbps.

Cable operators strengthened their position by continuing to upgrade their broadband connections in terms of transmission speeds and service diversification. Cable-based

broadband access, with typical maximum transmission speeds of 32 Mbps, is now offered also at a speed of up to 100 Mbps (DOCSIS 3.0 technology). More than 60% of the German households are covered by cable connections. According to the association of German cable providers, the sector plans to invest a further € 700 million in upgrading cable networks in the next few years. However, cable stakeholders have expressed concerns about possible interference with TV equipment arising from the opening of the digital dividend to mobile services.

The use of mobile broadband continued to grow and reached 2.6 million customers in 2009 using dedicated cards, modems or keys. However, residential customers do not yet consider mobile broadband connections as a viable substitute for fixed in terms of bandwidth and quality-of-service and also partly due to lack of radio coverage.

Regulatory issues

In accordance with the Government's broadband strategy, the BNetzA launched in May 2009 a public consultation on its overall approach to NGA regulation. This approach concentrates on the principles of risk reduction, promoting investment and innovation, planning security, and transparency. In its NGA strategy, the BNetzA gives preference *inter alia* to voluntary commercial agreements, longer periods between regulatory reviews (3 years), innovative tariff models (e.g. fixed cost sharing), and appropriate access price regulation. In addition, in November 2009, the NRA published a report on 'consistent price regulation' addressing both, consistency between wholesale and retail rates as well as between various business models. Furthermore, the BNetzA outlined the growing challenges for assuring consistency resulting from the migration towards packet-switched networks. In order to facilitate co-operation and enable synergies for the deployment and co-usage of broadband infrastructure (ducts, fibre, masts etc.) the BNetzA has launched a national infrastructure atlas in December 2009 containing data on existing fibre lines, ducts, radio towers and masts as well as radio stations. However, despite these efforts, market awareness of the BNetzA's regulatory initiatives on NGA remains low.

Furthermore, the NRA announced that it will conduct an auction of a part of the digital dividend spectrum (790-862 MHz) for the provision of electronic communications services, which will include an obligation for rural coverage.

In March 2009, the BNetzA imposed an obligation on the incumbent to grant access to switching distributors (Schaltverteiler) in areas, especially rural regions, where this is necessary to enable competitors shorten the length of their last-mile cable deployments with the aim of providing DSL-services with a bandwidth of at least 1 Mbps downstream. The NRA also re-imposed its remedy for IP bitstream access as a consequence of a ruling of the Supreme Administrative Court which had revoked the obligation of approval of charges for formal reasons. Prices for IP bitstream fell slightly in September 2009 (down by 4.3%), with effect until 30 November 2010. A second-round analysis of the wholesale broadband markets has been launched.

Alternative market players have also been raising concerns as to how the incumbent fixed operator will proceed with the future closure of obsolete main distribution frames (MDF). Under the current reference offer, the incumbent may not cease to offer unbundled access to the local loop via MDF.

The BNetzA also approved in March 2009 a marginal reduction of the wholesale price for fully unbundled lines, effective from 1 April 2009 until 31 March 2011 (at € 10.20 per month). Alternative fibre-based operators are opposed to further reductions in the regulated prices for unbundled and bitstream access. Furthermore, while they don't object to deregulation as such, they criticise the lack of clear procedures for the transition from ex-ante to ex-post regulation. Finally, they argue in favour of higher termination rates for fibre networks in order to reflect high investment costs.

Many alternative operators are supportive of an open access model for NGA development, which envisages *inter alia* access to street cabinets for any operator and at any time of market entry at cost sharing terms which are based on proportionate remuneration of earlier investments. The BNetzA has addressed this issue in its draft paper of May 2009 on “Key elements for progressing modern telecommunications networks and creating powerful broadband infrastructures”, where the NRA welcomes the non-discriminatory implementation of cooperation models.

Mobile

Market situation

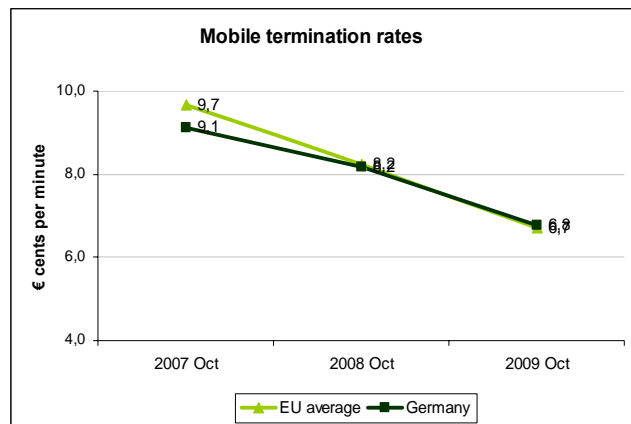
The mobile penetration rate in October 2009 reached 131.9% (up from 128.9% in October 2008), which remains well above the EU average of 121.9%. The mobile broadband penetration rate in terms of users accessing data services via dedicated data modems, cards or keys was 4% in January 2010 (up from 1.8% in January 2009). Mobile operators' market shares have been relatively static with the two largest mobile operators covering about two thirds of the mobile subscribers. The incumbent's market share by subscribers was 36.6% in October 2009 (35.8% one year before). The main competitor held a market share of 32.1% (33.5% one year before). The third and fourth mobile network operators had a total market share of 31.3% (30.7% one year before). The largest mobile service provider (Freenet), which had acquired another competitor (Debitel) in 2008, had attained higher revenues than each of the two smaller mobile operators. The proportion of pre-paid mobile users increased to 56%.

Mobile data services were the main driver of revenue growth. The average revenue per user has dropped from € 280 in 2007 to € 248 in 2008 (by 11.4%). In this period, the average price per minute of mobile calls has fallen from € 0.17 to € 0.14 (by 17.6%). SIM-only and MVNO products were preferred by consumers seeking low-cost options. It is argued by the operators that the increase in non-voice (messaging and data) revenues did not compensate fully for the continued pressure on voice service revenues arising from cuts in MTR, lower roaming prices and stronger competition.

All mobile operators have continued expanding 3G network coverage and are upgrading these to high-speed packet access at downstream speeds of up to 7.2 Mbps.

Regulatory issues

The BNetzA adopted new decisions on MTR as of 1 April 2009 but did not notify the Commission of the exact MTR levels and the cost accounting methodology applied. The termination rates for the two big operators were set at 6.59 €-cents per minute (down by 16%) and for the two smaller operators at 7.14 €-cents per minute (down by 19%). In effect, in October 2009 the average MTR fell to 6.76 €-cents per minute (down from 8.19 €-cents in October 2008). Germany also notified remedies on the mobile termination markets of two MVNOs.



However, the incumbent's mobile operator still does not appear to be passing MTR reductions to its customers using standard tariff options. Furthermore, MTR reductions do not seem to have led to a proportionate reduction in end-user prices for fixed-to-mobile calls, both for the incumbent and alternative operators¹⁴³. In this regard, it is important for the NRA to monitor market developments closely.

Roaming Regulation

All mobile operators have reported timely implementation of the tariff provisions of the amended Roaming Regulation from June 2009. Germany complied with the first Roaming Regulation of 2007 in full only in 2009 by including the provisions on penalties in its Telecommunications Act.

Fixed

Market situation

As of July 2009, the proportion of telephone subscribers using direct access to an operator other than the incumbent increased to 33.0% (up from 28.0% in July 2008) as a result of increasing competition from alternative telecom operators (either with own infrastructure or LLU-based) and cable operators. Analogue or ISDN connections are less popular as customers increasingly choose broadband connections including VoIP.

While the total number of alternative operators in Germany was 181, the number which offered public telephony through direct access rose to 137 (including shared access). 36% of all alternative operators used full LLU, whereas 31% utilised proprietary infrastructure¹⁴⁴ and only 9% used shared access. The use of alternative operators' services for national and international calls increased from 37% to 40% and from 39% to 42%, respectively, in the period July 2008 - July 2009. The demand for VoIP grew and reached 13% of all voice traffic

¹⁴³ This has been confirmed by the German Monopolkommission in its annual report on the state of competition in the German telecommunications market of 14 December 2009 (s. Paragraph 75).

¹⁴⁴ Cable operators have the largest share when it comes to ownership of the access network, whereas the share of city carriers is very small.

volumes as of December 2008. The proportion of the volume of outgoing voice minutes using call-by-call and pre-selection in 2009 fell significantly to 29.3% (from 39.4% in 2008)

Regulatory issues

While the incumbent launched a double-play all-IP retail product, the BNetzA also included all-IP access lines in its draft remedies for the markets for access to the public telephone network at a fixed location. These remedies refer to the 'complete access line' (Komplettanschluss), which bundles the access line with the telephone service so that the user does not need an additional line for telephone calls. After the notification of the relevant market analysis in March 2009, in November 2009 the NRA notified remedies for these markets – where the incumbent voluntarily offers resale products – based on ex-post price control.

The BNetzA decided in 2009 to deregulate the fixed national calls markets and the wholesale market for transit services in line with the latest Recommendation of the Commission on relevant product and service markets of 2007¹⁴⁵.

International operators which focus on business customers complain that the BNetzA does not pay due attention to the specific service requirements of business customers at more remote national locations. In particular, the NRA responsiveness to market demand with respect to upgrades in leased lines interface technology seems slow. In this regard, the retail market for leased lines has been analysed by the BNetzA for a second time. The regulator did not find the incumbent to have significant market power. Since their adoption in October 2007, the regulatory remedies for leased lines have been subject to implementation delays. Despite an access obligation on the incumbent operator, alternative operators claim that PPC or Ethernet wholesale products are not available. In addition, the incumbent has introduced offers with an Ethernet interface into the market, however, these products do not appear to correspond to the market demand in terms of bandwidth and service parameters. According to the NRA, alternative operators have not adequately specified their requirements during negotiations with the incumbent.

Broadcasting

Market situation

The overall situation in the retail broadcasting markets remained stable. In July 2009, end-users mainly used cable (46.6% of households) or satellite (40.9% of households) access. The share of households with digital terrestrial television (DVB-T) reached 6.9%. Television via DSL ("IPTV") gained a significant number of new customers and reached 0.7% of all households¹⁴⁶.

¹⁴⁵ Commission Recommendation 2007/879/EC

¹⁴⁶ In comparison, according to the '2009 Digitisation Report' published by the Association of Media Authorities for Broadcasting of the German Bundesländer, the proportion of households using cable, and satellite in June 2009 was 52.8% and 42.1%, respectively. The share households using DVB-T was 11.3%. In general, 55% of the German households (37.4 million in total) had access to digital TV (more than one TV reception path per household may be available).

Regulatory issues

The BNetzA notified to the Commission the re-imposition of a remedy for the broadcasting transmission services market, following a decision of an administrative court in Germany. A new round of analysis of this market is expected to be finalised in early 2010.

The switch-off of analogue terrestrial broadcasting in Germany was completed at the end of 2008. The release of broadcast radio spectrum for fixed and mobile services in the frequency range for the digital dividend (790-862 MHz) was decided in July 2009 by amending the frequency allocation ordinance with the agreement of the Bundesländer.

Horizontal regulation

Spectrum management

The German NRA adopted in October 2009 a decision on the rules of a joint auction of 360 MHz of radio spectrum (scheduled for April 2010), including a part of the digital dividend spectrum in the frequency range 790-862 MHz, and a decision about the terms of re-farming of certain frequency ranges, including the GSM band at 900 MHz. Given the potential of this valuable digital dividend frequency resource, an assessment of the competitive situation on the mobile markets by the NRA, in line with the requirements of the amended GSM Directive¹⁴⁷, has become crucial. Taking into account the outcome of the future auction and the current frequency assignments in the GSM band, the BNetzA has already committed itself to examine whether the existing spectrum assignments in the 900 MHz band to mobile operators are likely to distort competition in the relevant mobile markets and, where justified and proportionate, to address such distortions. The Commission is following the matter.

Implementation of spectrum decisions

As regards frequency harmonisation at European level, most Commission decisions adopted by the end of 2008 are implemented. The implementation of the Decision 2007/344/EC on the harmonised availability of information regarding spectrum use is still under way.

Germany failed to implement the Commission Decision 2008/477/EG on the harmonised use of the 2.5-2.69 GHz frequency band for electronic communications by allocating this frequency band solely to mobile services in the national frequency allocation ordinance, which as such has created legal uncertainty with respect to the use of other wireless services, in particular fixed services, in this band. In this regard, the Commission launched an infringement procedure in October 2009 to ensure that there are no restrictions for the usage of the 2.5-2.69 GHz frequency band for fixed wireless as well as other innovative applications.

¹⁴⁷ Directive 2009/114/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community (Text with EEA relevance), OJ L 274, 20.10.2009, p. 25–27.

Administrative charges

The BNetzA does not include in its annual budgetary report, or the following year's draft budget, a comparison on how the levels of collected administrative charges reflect underlying administrative costs. In accordance with the provisions of Community law¹⁴⁸, this is necessary to provide a reference for determining whether adjusting these charges may become necessary. The Commission services are looking into the matter.

THE CONSUMER INTEREST

Tariff transparency and quality of service

The transparency of DSL offers with respect to the actual download rates and related contractual obligations continued to be the subject of complaints by German citizens to the NRA.

An amendment of the Telecommunications Act entered into force on 1 March 2010, which improves tariff transparency and strengthens consumer rights by imposing price caps for calls to service numbers from mobile phones at € 0.42 per minute or € 0.60 per call, depending on the destination number¹⁴⁹. However, the BNetzA may decide to set different price caps based on market analysis.

Universal Service

In Germany no undertaking is designated for the provision of universal service. The State authorities have not intervened as they consider that the market provides the necessary services.

In December 2009, a request for a preliminary ruling was submitted by the German Supreme Administrative Court to the European Court of Justice regarding the question as to whether a member state may require electronic communications service providers to make available data in their possession of subscribers of other providers for the purpose of the provision of directories and directory enquiry services, and if so, whether such a requirement may depend on the consent of, or at least the lack of objection by, the other electronic communications service provider or its subscribers to the transmission of the data¹⁵⁰.

Users' access to the Internet and network management

The possibility to make voice-over-IP (VoIP) calls over the mobile access network as a part of 'mobile internet' offers has become a topic of controversy in Germany. The NRA requested all mobile operators in May 2009 to explain their practices but found no grounds to intervene. Three out of four mobile operators reported that they have enabled their customers to use VoIP services – either without restrictions or – as in the case of the two larger operators – charging an additional tariff for VoIP use.

¹⁴⁸ Cf. Article 12(2) of the Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive).

¹⁴⁹ Bundesgesetzesblatt Jahrgang 2009, Teil I Nr. 49 (3. August 2009), Erstes Gesetz zur Änderung des Telekommunikationsgesetzes und des Gesetzes über die elektromagnetische Verträglichkeit von Betriebsmitteln vom 29.07.2009, p. 2411, Art. 2, Abs. 4c.

¹⁵⁰ C-543/09.

Number Portability

In 2009, the average period for having a phone number ported and operational was five working days both for fixed and mobile numbers. However, in case where notification of contract cancellation is timely, consumers normally have their numbers ported to their new provider without any delay. No wholesale charges are applied for porting fixed numbers and the retail price charged by the incumbent operator is no longer regulated. However, the price of € 5.81 still applies. No wholesale charges are applied for porting mobile numbers, yet mobile operators charge retail customers between € 21 and € 30 for porting a mobile number.

Between 1 October 2008 and 1 October 2009 there were 659 368 newly ported mobile numbers giving a total of 2 647 015 ported mobile numbers in Germany (2.5% of all mobile subscriptions). The number of ported fixed (geographic) numbers in Germany slightly exceeded 58.5 million on October 1 October 2009.

Consumer complaints

According to the BNetzA, consumer complaints in 2009 were focused on number portability, contractual relations and conditions of licensing.

Certain complaints have also been directed to the Commission. Some citizens are concerned about the lack of possibility to use broadband internet in rural areas or the lack of choice. An increasing number of complaints referred to difficulties when changing a fixed or broadband provider, which have led to periods of up to several weeks and even months without telephony services or a broadband connection.

European emergency number 112

As indicated in previous reports, 112 has been operational in Germany for many years. Whilst 75% of the Germans know 112 as a number to call in case of emergency in Germany, only 18% are aware that this emergency number can be called from other Member States. The proportion of interviewees who said they had received information about 112 in the last 12 months has also increased from 10% in 2009 to 16% in 2010, which is below EU average (22%)¹⁵¹.

The Commission has been in close contact with the State Government of the Bundesland Baden-Württemberg in order to ensure that concrete measures for raising awareness of the use of 112 and of its co-existence with the regional non-emergency-number are taken so that a complaint by a citizen's initiative on this issue could be settled. Consequently, legislative steps were taken in Baden-Württemberg in November 2009 in order to change the state law on emergency services (Rettungsdienstgesetz).

Harmonised numbers for harmonised services of social value (116)

In Germany, harmonised services of social value are currently offered under the harmonised numbers 116111 – the child helpline, since December 2008, and 116123 – the emotional support helpline for life aid, since March 2009. At the time of writing the BNetzA was planning a tender for assigning the harmonised numbers 116006 (helpline for victims of crime) and 116117 (for non-emergency medical call services).

¹⁵¹ Eurobarometer Flash survey on the European emergency number 112 (February 2010)

Must-carry

In 2009, the Commission terminated its infringement procedure against Germany after the European Court of Justice – upon a request for a preliminary ruling by a German national court with regard to must-carry legislation for the Land of Lower Saxony (C-336/07) – ruled that the provisions of the Universal Service Directive do not preclude national legislation from requiring a cable operator to carry channels and services over its analogue cable network television that are already broadcast under DVB-T, even if this results in the utilisation of more than half of the channel capacity available. In the event of a shortage of available channels, national legislation can also provide for an order of priority of applicants, which may result in full utilisation of the channels available on that network. The Court stated, however, that these obligations should not give rise to unreasonable economic consequences, which is a matter for the national court to establish.

E-privacy

In August 2009, the German legislature adopted a comprehensive new law package on data protection, which laid down stricter conditions on the transmission of personal data as well as higher penalties. The new legal provisions lay down the right of a person, whose data have been circulated, to be informed about the particular data transferred and their origin in order to be given the opportunity to appeal. Providers must keep relevant documentation for at least 2 years and ensure transparent information about any data leaks which may occur. Automatic data processing systems for marketing purposes or opinion polls have to be registered with the supervisory authority. Furthermore, the ability to make a purchase via the internet may not be conditional upon the customer's consent to allow personal details be used for marketing purposes.

In this regard, the incumbent reported the adoption of a set of remedies aimed at counteracting the consequences of previous cases of data leakage and at improving the level of data protection for its customers.

At the time of writing this report the German constitutional court was dealing with numerous pending constitutional complaints about the provisions on data retention (Vorratsdatenspeicherung), which were adopted in 2007 and partly incorporated in the Telecommunications Act. As of 2004, the Telecommunications Act contains provisions on the collection and retention of certain personal data for mobile pre-paid customers such as name, address, date of birth and the identification number of the mobile device.

The adoption of a law on blocking the access to child pornography content via communication networks (Zugangsschwerungsgesetz) was pending at the time of writing the report.