

AUSTRIA

Note: This document is an excerpt from the Staff Working Document attached to the Communication 'Towards a Single European Telecoms Market – 13th Progress Report (COM (2008)153)). The Communication and the Staff Working Document, as well as the corrigendum of 28th May 2008 can be found on Europa at the following url address: http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/annualreports/13th/index_en.htm

INTRODUCTION

The Austrian market continues to be characterised by strong competition in the mobile market and increasing market shares for the incumbent fixed network operator in various market segments. While fixed broadband penetration in Austria is now below the EU average, mobile broadband services have become very popular, with end-user prices for these services having gone down.

Lengthy negotiations between market players and the fact that the NRA in various cases refrained from setting concrete wholesale prices has led to delays in the application of remedies in practice. With regard to Mobile Termination Rates (MTR), however, the NRA set detailed prices in October 2007 together with an ambitious glide path towards a symmetric mobile termination rate for all mobile network operators.

REGULATORY ENVIRONMENT

Main regulatory developments

While the regulatory framework is firmly established and the NRA is well on the way to completing the market reviews on time, it may be questioned whether regulation based on the 2002 regulatory framework is producing results in the markets efficiently and quickly enough.

The situation is nearly unchanged compared to the previous year. The NRA is very active in carrying out market reviews and, where necessary, imposing remedies. The second round of market analyses has nearly been completed. In practice, however, it is difficult to judge the effectiveness of the remedies imposed. Several remedies under the new regulatory framework have still not yet been applied in practice due to the fact that the NRA normally does not set prices in its market analyses. These are, in general, set by operators on request following dispute settlement procedures, despite the fact that the NRA has the power to set prices if it observes any deviation from the price setting standard it has imposed as a remedy for a particular service. The NRA's practice has led to delays in setting tariffs, with a negative impact on the efficiency of the regulatory process.

As a consequence, some market players appear to prefer applying old agreements rather than waiting for new reference offers to be approved, while others are clearly asking the NRA to be more active and to better follow up and monitor the application of imposed remedies in practice.

Organisation of the NRA

The Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR) acts as the operational arm of the Austrian Communications Authority (KommAustria), a subordinate administrative body of the Federal Chancellery, which regulates the broadcasting sector, and the Telecommunications Control Commission (TKK), which is responsible for the review of electronic communications markets.

The coalition agreement of the current Austrian government addresses the reform of the National Regulatory Authority and changes to the structure of decision-taking in the field of electronic communications. However, discussions on these issues have not yet come to any conclusion. The Commission services will continue to monitor this process closely. It may be recalled that in previous Reports the Commission had expressed concerns about the independence of KommAustria given that the public broadcasting infrastructure is largely owned by a foundation under public law. Any new authority would certainly have to be examined with regard to its ability to come to decisions in an independent and impartial way.

Decision-making

TKK had already started the second round of notifications in 2006. As in the first round of market reviews, it found no SMP on the residential international calls market and the trunk leased-lines market. It withdrew existing regulation in the market for transit services in the fixed public telephone network. Regarding the latter market, the Commission had vetoed the first notification. Given the information provided by TKK in its second notification, the Commission accepted the non-SMP finding. In the first round of market analyses, the market for mobile access and call origination was found to be competitive and therefore no regulation was imposed.

TKK had imposed almost the full set of remedies in all wholesale markets found to be non-competitive, with the main exception of the markets for fixed termination by alternative operators, where lighter remedies were imposed. In general, TKK maintained strict remedies in retail markets. In particular, cost orientation based on cost accounting was again imposed in all retail markets where TKK found SMP. However, TKK now uses a different method for controlling retail fixed call prices: the SMP operator may apply tariffs without prior authorisation, but the NRA can subsequently prohibit these tariffs. Alternative market players have expressed concerns, since this way of *ex-post* price control appears to be less effective in combating market failures identified in the course of SMP designation, as it allows the SMP operator to apply an uncontrolled tariff at least for a certain period of time.

Several remedies are *de facto* not applied yet since they are not sufficiently detailed. The details then need to be clarified in dispute settlement procedures before the NRA if the parties cannot achieve agreement. This delays their application. In several cases, lengthy negotiations between operators have meant that the corresponding remedies have not yet been applied. Under Austrian administrative law, third parties do not in general have a right to appeal market analysis decisions. The Austrian Administrative Court referred this issue to the European Court of Justice through a request for a preliminary ruling (C-426/05). The ECJ is expected to take a decision in early 2008.

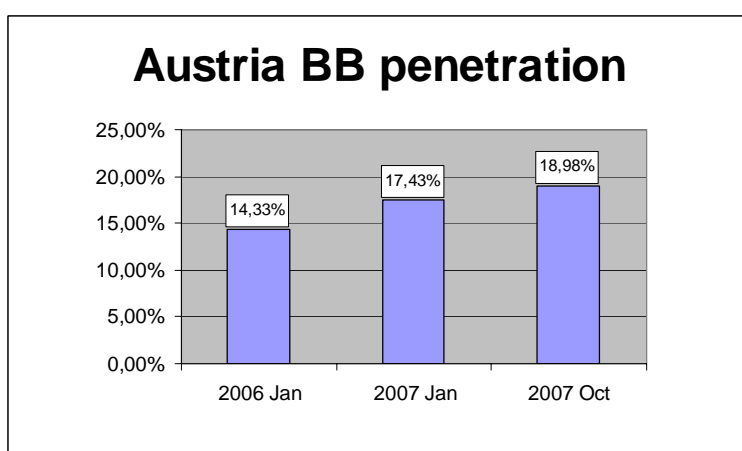
Market players as well as the NRA have expressed concerns that, overall, the mechanism for the enforcement of regulatory obligations imposed by the NRA is not sufficient.

MARKET AND REGULATORY DEVELOPMENTS

The total turnover of the Austrian telecommunications sector was €5.95 billion as of 31 December 2006, with revenue from the fixed markets (including broadband and leased lines) amounting to €2.26 billion and revenue from the mobile markets totalling €3.69 billion. The total value of tangible investment in telecommunications networks was €750 million, including €218 million by the incumbent in fixed telephony networks and an estimated €105 million by alternative operators in fixed telephony networks. Mobile operators invested around €27 million.

Broadband

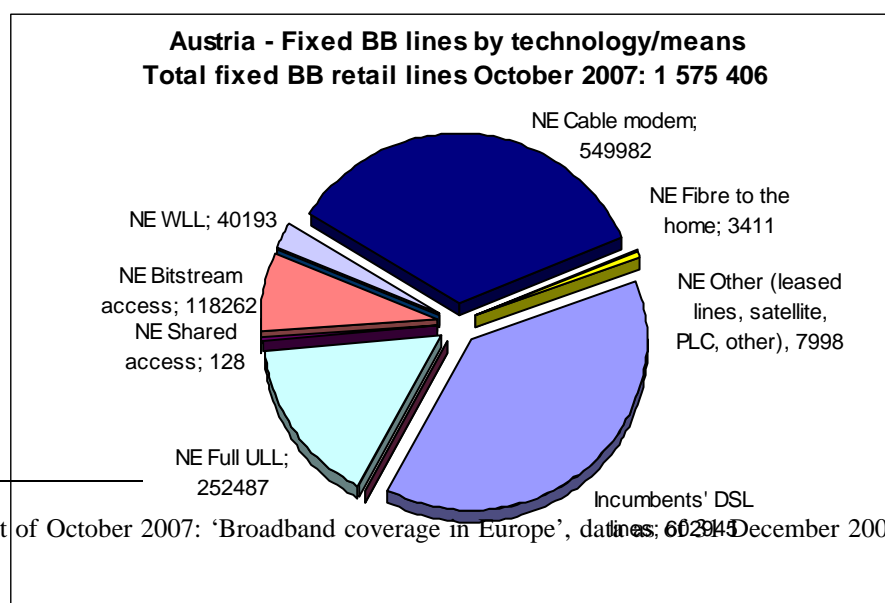
Market situation



The penetration rate was 18.98% in October 2007 (up from 16.42% in October 2006, but still below the EU average of 20.04%). Whereas urban areas have 100% DSL coverage, rural areas enjoy only 79%¹. In urban areas, however, cable continues to be the most popular technology despite the fact that the market share of cable broadband

lines has declined. In the previous year, cable had a market share of 38%. In October 2007, all 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 only 38.2%.

As regards broadband lines, the market share of alternative operators was 61.7% in October 2007, up from 60.3% in October 2006. 61.8% of broadband lines in Austria were



¹ IDATE report of October 2007: 'Broadband coverage in Europe', dated 6 October 2007, page 42.

based on DSL technology. The market share of the incumbent fixed network operator in DSL lines was 61.9% in October 2007. In October 2007 new entrants had 252 487 DSL lines on PSTN using full LLU (up from 143 301 in the previous year).

Whereas 372 266 new broadband lines were created from July 2005 to July 2006, the year from July 2006 to July 2007 saw this figure decrease to 238 963. A clear broadband strategy by the Austrian government to counter this development is still lacking.

According to the NRA the retail prices for fixed broadband have been decreasing².

Retail prices for mobile data transfer within Austria have fallen considerably. However, concerns in this area have been raised by the consumer protection department of the Austrian Chamber of Labour with regard to the long duration of retail contracts, which bind consumers to one operator for up to 24 months. Nevertheless, mobile broadband data cards have recently become very popular in Austria, with end-user flat-rate prices just below €20 per month. However, the bandwidth available with these cards in practice is quite low compared to fixed-line broadband. This appears to support the assumption that these offers complement fixed-line broadband offers rather than being currently able to substitute them.

Regulatory issues

In the wholesale broadband access market, TKK has imposed retail-minus pricing obligations and required the dominant undertaking to establish an appropriate cost accounting system to implement these obligations.

Despite the imposition of remedies, however, the market share of the incumbent fixed network operator has remained relatively stable. This may be because in practice regulated bitstream access is not fully operational yet. Wholesale broadband access for alternative operators is still broadly based on agreements between market players under the old regulatory framework. The NRA does not seem to enforce its measure obliging the incumbent fixed network operator to have an attractive bitstream offer in place in a sufficient way.

Alternative market players have again reported that the incumbent fixed network operator tends to create new obstacles to LLU by invoking practical problems in opening lines, imposing additional conditions and delaying the actual unbundling work. In addition, the incumbent fixed network operator introduced a retail triple-play offer in mid-November 2007 lasting two months, which its competitors regarded as resulting in a margin squeeze, in particular on broadband tariffs at wholesale and retail level. TKK checked this triple-play offer and imposed conditions on it. The general monthly rental fee for LLU has therefore been reduced from €10.70 to €10.44 (EU average: €10). Some alternative operators claim that this is still too high to permit an acceptable profit margin. It remains to be seen whether the regulatory safeguards imposed by the NRA have been sufficient to prevent market distortions due to this offer.

Like other markets, the wholesale broadband access market is defined by a decree published by RTR. In the reporting year, RTR changed the explanatory remarks

² RTR's Communications Report 2006, p. 142.

accompanying its definition of this market to state that purely optical fibre lines were not included. Despite the fact that the legally binding wording of the decree as such remained unchanged, some market players expressed concerns that with this amendment to the explanatory remarks the NRA might want to exempt certain next-generation networks from regulation. The Commission services are closely following developments in this regard.

RTR has initiated a national discussion on next-generation networks but has not published clear guidance yet.

Mobile markets

Market situation

Mobile penetration was 113.52% in June 2007 (up from 108%), with 9.42 million subscribers. There are now four mobile network operators in the Austrian market. The second largest operator has acquired what was previously the fourth largest. The merger was approved by the Commission following commitments on the part of the second largest operator. When assessing the merger, the Commission stressed the previous role of the fourth largest operator as a ‘maverick’ who had promoted competition through remarkably low end-user prices. Despite the merger, end-user prices for mobile communications have in general remained very low and among the lowest in Europe.

There are no figures on market share published this year, as the NRA claims that they are ‘confidential’.

According to the NRA, retail rates for mobile communications have been decreasing³.

Regulatory issues

The decisions by TKK in the first and the second round of market reviews concerning the market for voice call termination on individual mobile networks were appealed by the mobile network operators (MNOs), and subsequently annulled by the Administrative Court (VwGH). The main reasons for annulment were: (i) insufficient examination of countervailing buyer power; (ii) TKK’s failure to take into account the Commission’s comments concerning the inefficiency of the procedure, and (iii) the concept of LRAIC for an efficient operator. The latter concept, which forms the basis of the cost orientation obligation imposed by TKK on the MNOs with SMP, was considered by the VwGH to be unclear. In consequence, TKK was invited by the VwGH to carry out the market analyses again for the period 2004-2008 and to set concrete mobile termination rates.

In its new decision, TKK heeded the Commission’s previous comments and this time set the mobile termination rates in the remedy itself, without waiting for a dispute settlement procedure. TKK set out a glide path towards a symmetric target mobile termination rate of 5.72 cents as from 1 January 2009 at the latest. This level is to be reached by all MNOs through linear decreases towards the target level. As the MTRs had already been fixed by TKK for the period 2004-2006, TKK left them unchanged. However, the decision has since been appealed by all mobile network operators.

³ RTR’s Communications Report 2006, p. 142.

The Commission welcomed TTK's decision to modify its price control measures and to set symmetric mobile termination rates as from 1 January 2009. The Commission also invited TTK to revisit its analysis as soon as a common approach is established at European level.

Roaming Regulation

The Roaming Regulation was applied in time and the NRA reported no difficulties. By the end of August 2007, every mobile operator offered the Eurotariff, which in nearly all cases was set at almost exactly the price cap level. Only one operator offered tariffs clearly below the maximum ceiling. The mobile branch of the incumbent fixed network operator was reported to have introduced a new special package just before the entry into force of the Roaming Regulation, which allegedly hindered customers on that tariff from moving automatically to the Eurotariff. Operators reported difficulties in meeting the Regulation's transparency obligations in time. However, they apparently managed to meet the deadlines.

Fixed

Market situation

The incumbent fixed network operator has maintained its leading position in the market. Regarding calls from fixed to mobile, its market share even went up from 49% to 51.34% based on outgoing minutes of communications. For other types of calls its market share has remained high. For instance, its market share for national fixed calls is 59.99% based on outgoing minutes of communications and 59.95% on the basis of retail revenue.

Retail rates for fixed voice telephony have been stagnating⁴.

Regulatory issues

TKK imposed most of the remedies needed in all wholesale markets found to be non-competitive. In the markets for fixed termination, lighter remedies were imposed for alternative operators.

TKK also imposed an obligation on the incumbent fixed network operator to offer wholesale line rental to its competitors. However, this has not been taken up in practice, and will probably not be taken up because of a lack of interest expressed by the market.

Broadcasting

Market situation

As of 1 July 2007 there were 130 000 households with analogue terrestrial TV and 200 000 households with digital terrestrial TV, which was launched only in October 2006. At the end of 2006, 1.67 million households received TV via satellite and 1.33 million households used cable as their TV platform.

⁴ RTR's Communication Report 2006.

Mobile TV based on DVB-H is not provided yet. However, the NRA has launched a public tender for the assignment of spectrum for the broadcast of mobile TV. The NRA expects this service to be launched just before the European football championships in Austria and Switzerland from 7 June 2008.

Regulatory issues

The Austrian broadcasting legislation was amended in August 2007 to incorporate provisions on mobile TV to serve as a basis for the assignment of frequencies and the further development of this technology.

Horizontal regulation

Spectrum management

Austria has implemented almost all relevant Commission decisions under the Radio Spectrum Decision by adapting the federal frequency usage plan accordingly. The last to be implemented was the decision on the harmonisation of the 169.4-169.8125 MHz frequency band (2005/928/EC). The implementation of Commission Decision 2007/131/EC on allowing the use of radio spectrum for equipment using ultra-wideband technology, Commission Decision 2007/98/EC on mobile satellite services (MSS) in the 2 GHz frequency bands, and Commission Decision 2007/90/EC amending Decision 2005/513/EC on the harmonised use of radio spectrum in the 5 GHz frequency band for the implementation of Wireless Access Systems including Radio Local Area Networks (WAS/RLANs) is under way. In the light of the envisaged digital switchover in 2010, alternative operators have expressed an interest in the re-farming of frequencies.

THE CONSUMER INTEREST

Universal service

Up to now, the funding of universal service has not been based on the funding mechanism laid down in the Telecommunications Law, as operators had agreed among themselves on compensation for the universal service provider. This was also the case for 2005.

Number portability

In general, number portability is not very much 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 is one of the countries in Europe with a very high wholesale price. As far as mobile number portability is concerned, the wholesale price is quite moderate with an average of €8.21. However, the incumbent's mobile subsidiary has just announced an increase in the retail price for mobile number portability to €29, which could discourage consumers from making use of this facility.

Consumer complaints

The consumer protection department of the Austrian Chamber of Labour has reported that the number of consumers complaining of inadvertent roaming has increased

considerably, above all in border regions. In the case of data roaming in particular, this problem has resulted in considerable costs for consumers in some cases. The consumer protection department reports that many users are simply not aware that their computer might log onto a foreign network even though they are in Austria. However, the NRA reports that this issue has not been mentioned by many consumers.

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').

Must-carry

Austria has changed various laws in order to update its legislation for mobile television. In doing so, it has also introduced a 'must-carry upon request' provision in favour of the state-owned public broadcasting station and the nationwide private television station. According to Article 31 of the Universal Service Directive, Member States may impose reasonable 'must carry' obligations on undertakings providing electronic communications networks only *where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts*. The Austrian legislator has limited this controversial provision to the first one and a half years of operation of the platform.

Data protection

Austria has not yet transposed the EU Directive on data retention. Concerning data on telephone calls, the European Commission has addressed this issue in a letter of formal notice to the Austrian authorities. Regarding data on internet use and emails, Austria has to transpose the relevant EU rules by March 2009.