

## GERMANY

Note: This document is an excerpt from the Staff Working Document attached to the Communication 'Towards a Single European Telecoms Market – 13<sup>th</sup> Progress Report (COM (2008)153)). The Communication and the Staff Working Document, as well as the corrigendum of 28<sup>th</sup> 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](http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/annualreports/13th/index_en.htm)

### INTRODUCTION

Broadband penetration has increased considerably, infrastructure-based competition has further developed, and end-user prices have continued to fall. The number of fixed subscribers using a provider other than the incumbent operator to make their calls has gone up markedly, but much of it remains resale. Convergence is becoming more and more a reality. Moreover, retail prices for mobile communications have continued to fall with new mobile service providers entering the market.

However, there is still room for improvement in terms of regulatory effectiveness. Important remedies imposed — like IP-based or ATM-based wholesale bitstream access — are not in place yet in practice. While BNetzA has considerably reduced mobile termination rates, alternative market players have criticised a lack of pro-activeness and guidance on the part of the NRA with regard to the roll-out of next generation access networks. Finally, the introduction of legal provisions on the (non-)regulation of new markets led the Commission to refer the issue to the European Court of Justice.

### REGULATORY ENVIRONMENT

#### Main regulatory developments

The recent legislation on new markets which was published in the Federal Law Gazette on 23 February 2007 has been the main point of concern regarding regulatory developments in Germany. The Commission is of the opinion that under this provision new markets can only be regulated and the Community consolidation mechanism will only be applied if certain requirements are met. Following publication of the new provision in the Federal Law Gazette, the Commission sent a letter of formal notice to Germany, since Germany's approach could in effect grant a “regulatory holiday” to the incumbent fixed network operator, not provided for in the European regulatory framework, with regard to the fibre networks rolled out to street cabinets. In effect, it reduces the discretion of the German NRA and bypasses the consultation and consolidation mechanism provided for in the EU regulatory framework. The case was referred to the Court of Justice in summer (C-424/07).

Germany completed the first round of market analyses with the exception of the national wholesale market for international roaming. Despite the fact, however, that market analyses have been completed, the remedies imposed are, in several important wholesale access markets, still not in place in practice. Time-consuming negotiations between

market players on reference offers and delayed decisions by the NRA on drafts of these offers have led to delayed applications of remedies, for example, in important markets like unbundled local loop, IP based wholesale bitstream access and ATM based wholesale bitstream access. For the interconnection market, the reference offer was only approved by the German NRA in the second half of 2007 whereas the final remedy had already been notified to the Commission more than a year ago. Only on 21 December 2007 did BNetzA take the final decision on the reference offer for local loop unbundling. The effectiveness of imposed remedies can therefore still not be assessed at this stage. For the time being the remedies actually applied in practice are still in many cases those imposed under the old regulatory regime.

In the mobile markets, the NRA regulated the applicable MTRs, with the effect of lowering them by about 10%. However, not all end-users have apparently yet been able to benefit from this regulation as the incumbent fixed network operator is allegedly not passing on these reductions to its customers.

### **Organisation of the NRA**

Concerns continue to exist inasmuch as the members of BNetzA's presidential chamber depend on political appointment. It appears that in important political questions, like the treatment of VDSL based markets, the presidential chamber plays a decisive role. Market players expressed concerns that regular meetings between representatives of the Ministry and members of the Presidential Chamber are allegedly used by the government to give guidance to the NRA.

### **Decision making**

BNetzA finalised the first round of market analyses and has taken important regulatory decisions, for example concerning wholesale access and leased lines markets. It has already started with the second round of market analyses. The fact, however, that in general there are separate decisions for market definition/analysis and for remedies has tended to lengthen the proceedings, including during the reporting period. However, it is worth mentioning that in one case BNetzA notified the draft market analysis and the underlying remedies in a single decision to the Commission, which indicates that by law BNetzA is under no constraint to separate market definition/ analysis from the decision on which remedies to impose.

Given the order of market analyses some market players raised concerns that BNetzA was prioritising certain business models. BNetzA informed the Commission that the second round of market reviews would in principle follow the same order as the first round as the NRA is obliged by law to repeat market reviews every two years.

## **MARKET AND REGULATORY DEVELOPMENTS**

The total turnover of the German telecommunications sector was €66.1 billion as of 31 December 2006; the revenue from the fixed markets was €39 billion, and from the mobile markets €26.6 billion. The total value of tangible investments by alternative operators in fixed telephony networks was €3.7 billion. Mobile operators invested €2.7

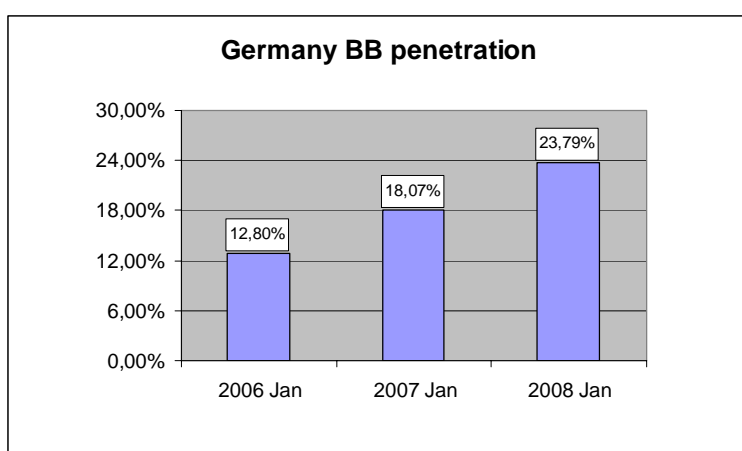
billion. The incumbent fixed network operator invested €3.2 billion in its fixed and mobile infrastructure in 2006<sup>1</sup>.

Fixed-mobile convergence is becoming more and more a reality, with mobile offers aimed at persuading customers to give up their fixed subscription, and triple play offers continue to gain in popularity. Many mobile operators have added broadband and fixed telephony offers to their portfolio. Ten operators, including the incumbent and the major cable network operators, offer triple play.

## Broadband

### *Market situation*

The market situation has improved further compared to the previous year. This was mainly due to alternative operators who were able to significantly increase their market shares concerning retail access. Moreover, retail prices have fallen considerably.



In January 2007 the broadband penetration rate was 23.79% (up from 18.07%; EU average is 20.04%). However, compared to leading countries in Europe weaknesses in infrastructure persist<sup>2</sup>. In rural areas in particular additional infrastructure efforts appear to be needed to generate further penetration growth<sup>3</sup>.

For example, whereas in urban areas DSL coverage is 99%, in rural areas this figure was only 58.5%<sup>4</sup> at the end of 2006. Cable continues to be used mainly for television, but the cable network operators have continued to offer broadband internet services, and by January 2007 their market share was about 5% (up from 3.17%).

<sup>1</sup> Since no official data are available for the incumbent's investments, the latter figures are taken from Dialog Consult/VATM Study "Der deutsche Telekommunikationsmarkt — Zehn Jahre Liberalisierung im Festnetzmarkt".

<sup>2</sup> This is confirmed by the first ePerformance Report 2007 "Germany in the international benchmark", a study by TNS Infratest Forschung GmbH, published by the Federal Ministry of Economics and Technology, p. 18.

<sup>3</sup> See second ePerformance Report 2007, published by the Federal Ministry of Economics and Technology, p. 7.

<sup>4</sup> "Broadband Coverage in Europe", 2007 Survey, Study by IDATE, data as of 31 December 2006, p. 86.

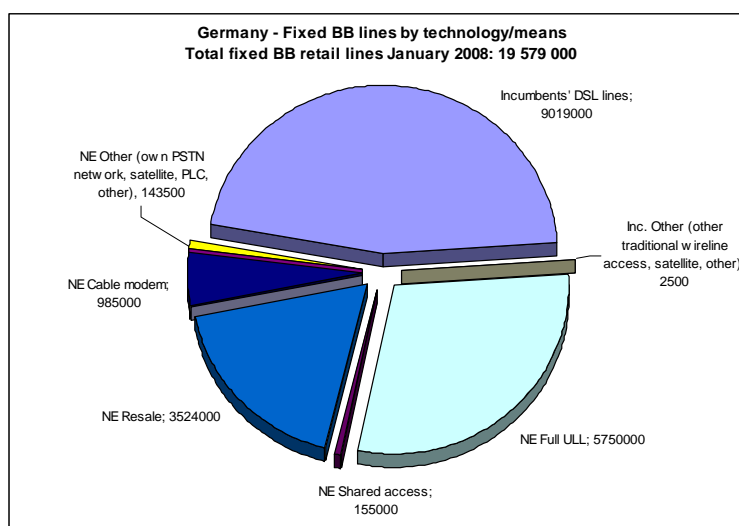
The alternative operators' share in the DSL retail lines market has increased from 50.3% in January 2007 to 51.4% in January 2008. However, a closer look at these figures demonstrates that this positive development is to a large extent based on resale products from the incumbent. If DSL resale lines of new entrants were included in the incumbent's market share, this would still amount to 64.1% in January 2008 (down from 69.5% in January 2007).

As far as market shares for fixed broadband access lines in general are concerned, the alternative operators' market share stood at 53.9% in January 2008 (up from 52% in January 2007). Whereas in the previous year the incumbent had offered resellers high discount rates, it appears to have recently changed its strategy by trying to bind its customers by long-duration contracts which are automatically extended by one year if not cancelled in due time. Alternative operators fear that due to this new strategy customers will be unduly bound to the incumbent.

Compared to the previous year, the number of new entrants using fully unbundled lines increased more significantly than the number using resale. In addition, providers operating mostly at the regional level have continued to roll out their own infrastructure, including fibre to the building. Infrastructure-based competition has thus improved compared to the previous year.

Cable operators have continued to strengthen their role in Germany's broadband market. With regard to triple-play offers some cable network operators have reportedly gained more new customers than the incumbent's largest competitor on the fixed market. However, the remaining separation of the German cable network into various levels based on the history of this technology in Germany makes it difficult for this technology to perform as well as it could<sup>5</sup>. Consolidation of the market has continued with network level 3 operators merging or cooperating with operators at level 4.

In the fixed network, many operators provide special offers such as a reduction in the connection fee or fixed sums of credit. Furthermore, end user equipment (modems etc), in particular for new DSL subscribers, is often offered free. Flat-rate tariffs for DSL subscriptions continue to fall. 40 operators providing fixed voice telephony services combined their offers with broadband (double-play).



<sup>5</sup> For historic reasons, the cable network in Germany is divided into four network levels. Network levels 1 and 2 serve to transport signals from broadcasters to regional distribution points. Network level 3 extends from these distribution points to the transfer points outside the subscriber's home. Network Level 4 is the part of the network from the transfer point to the cable jack in the subscriber's home.

### *Regulatory issues*

As noted above, resale and the unbundled local loop are in place, while bitstream wholesale access is still not provided. In September 2006, BNetzA notified to the Commission the final remedy imposing an obligation on the incumbent fixed network operator to offer an IP-based wholesale bitstream access offer. In January 2007 the NRA notified a similar obligation concerning ATM-based wholesale bitstream access. Since then there have been lengthy negotiations on reference offers proposed by the incumbent. As regards IP-based bitstream the NRA decided that the proposal had to be modified. Then the incumbent took a while to come forward with a modified offer which now will again have to be approved by BNetzA. On 28 August 2007, however, BNetzA decided that the incumbent fixed network operator had to introduce a stand-alone bitstream offer by 1 January 2008. The incumbent has in the meantime announced its intention to offer such a product, but only as of 7 April 2008. Regarding ATM-based wholesale bitstream access the NRA has not decided on what modifications have to be implemented in the incumbent's first proposal for a reference offer. As negotiations between the incumbent and its competitors on the details of this offer were ongoing, the NRA wanted to wait for the results of these negotiations before taking a decision. It is therefore not foreseeable when wholesale bitstream access products will be available in practice for alternative operators.

Despite the final results of the wholesale broadband access market analysis (see 11<sup>th</sup> Report), alternative operators expressed concerns that when demanding access to the incumbent operator's new VDSL infrastructure BNetzA might reject this request with reference to the new German legislation to exempt certain markets from regulation. In its interim decision on the incumbent's draft reference offer for IP-based wholesale bitstream access from August 2007, the ruling chamber referred to a letter from BNetzA's presidential chamber expressing the view that certain markets based on VDSL technology could be regarded as not belonging to existing ADSL 2+ based markets.

Infrastructure-based competition and investment by alternative operators would be hampered if the incumbent fixed network operator did not continue to have to grant access to its network, regardless of whether or not it was upgraded to VDSL. Despite the fact that BNetzA published an administrative document on how it intends to apply the new German legislation on new markets, it remains unclear how far the German regulator could use this new provision to justify denying access to markets based on new infrastructure rolled out by the incumbent fixed network operator.

Alternative operators complained also about the fact that the incumbent fixed network operator is not revealing its plans for NGN roll-out. They criticised the NRA for remaining too passive in this respect and for not seizing the opportunity to play a mediating role by trying to bring together different investment models. The incumbent fixed network operator nevertheless appears to have continued to roll out VDSL infrastructure.

### **Mobile markets**

#### *Market situation*

Mobile penetration was at 113.3% in 2007 (up from 101% in 2006) with 93.3 million subscriptions. There were four mobile network operators, seven main mobile service

providers and one MVNO in the market. The overall market share of the incumbent fixed network operator's subsidiary was 37.0% in 2007 (36.9% in the year before). The main competitor held a market share of 34.9% (35.6% in the year before). The third and fourth mobile network operators together had 28.2% market share.

Further new low-cost mobile operators entered the market, offering a minimum service and an easy tariff system, with just one price for calls to all national mobile and fixed line networks and SMS and particularly low costs for on-net calls. A popular newspaper and almost all discount supermarket chains now offer mobile telephony products as resellers. All but one mobile network operator started subsidiary low-cost brands with only a minimum service. As a consequence, tariffs have continued to fall. Prices for mobile flat rates have also gone down in the reporting year.

### *Regulatory issues*

At the end of 2006, BNetzA imposed a reduction of MTRs on all four operators, with the consequence that on average the MTRs were mandated to go down by 16% between November 2006 and November 2007. This decision was appealed by all four mobile network operators. At first instance, the Administrative Court of Cologne decided that BNetzA had not shown that its decision to impose ex-ante tariff obligation had been proportionate. The Court was of the opinion that ex-post tariff control might have been sufficient. BNetzA appealed this decision and its remedy is still executable. Now the Federal Administrative Court will have to decide whether to confirm BNetzA's decision to impose ex-ante tariff control as has been imposed by all other European regulatory authorities for this market. However, due to the underlying provision of the TKG, an issue that was addressed in previous reports and on which the Commission based an infringement proceeding, general legal uncertainty remains. Even if, however, the Federal Administrative Court upheld the annulment, BNetzA would not necessarily have to establish a different level of MTRs when deciding on them ex post. In this case, however, BNetzA's new decision could only have effect for the future.

Whether the lowering of MTRs by BNetzA has been the reason for growing competition on the retail mobile markets is still too early to judge. New and bold business strategies of operators are encouraging. However, it is not clear in how far the incumbent fixed network operator has passed on savings from the reduction of MTRs to its customers. The relatively stable level of prices of fixed to mobile calls for end-users seems to argue against a pass-on. Consequently BNetzA explicitly asked the undertakings concerned to pass on the reduced wholesale tariffs to their customers.

In November 2007, BNetzA had to decide again on MTRs as the previous decision was limited until then. It decided to further lower the MTRs by about 10% for the two largest mobile network operators and by about 11% for the other two mobile network operators. The applicable termination fees are now 7.92 cent/minute and 8.8 cent/minute (EU average 9.78 cent/minute).

### *Roaming Regulation*

The Roaming Regulation was applied on time by the operators, and the NRA reported no difficulties. The mobile subsidiary of the incumbent fixed network operator was the first operator to offer its customers a Eurotariff (July 2007). The other network operators followed suit, and by the end of August 2007 every mobile operator was offering the

Eurotariff, which in all cases was set close to the price cap level. Operators reported difficulties in meeting the transparency obligations laid down in the Regulation in a timely fashion. However, in the end they apparently managed to adhere to the set deadlines.

## **Fixed**

### *Market situation*

The total number of operators offering public fixed voice telephony stood at 165 in July 2007. There were 13 managed VoIP operators offering public voice telephony, with a market share of 4% on the basis of outgoing minutes of communications at the end of 2006.

In July 2007, 31% of subscribers (up from 27%) were using a provider other than the incumbent operator for national calls, 34% (up from 30%) were doing so for international calls, and 16% (up from 11%) had direct access (either through proprietary infrastructure or LLU) to a provider other than the incumbent operator. This shows that competition has further increased in Germany. The number of alternative operators offering public voice telephony through direct access by means of full LLU has gone down in the reporting year from 49 to 45, while the number of operators using proprietary infrastructure has gone up from 65 to 69. This shows that there is a move to more own infrastructure on the part of alternative operators.

On the basis of retail revenues and outgoing minutes of communications, all types of calls show further decreases in the market shares of the incumbent fixed network operator. On the basis of outgoing minutes of communications, the following increases in alternative operators' market shares can be noted: from 51% to 52% for national fixed calls, from 44% to 46% for calls to mobile and from 51% to 52% for all national calls, while the share of international calls has risen from 72% to 75%.

C(P)S is broadly applied, and the fact that the incumbent fixed line operator also collects the charges for call-by-call connections made through its competitors makes it attractive for customers to use carrier selection.

### *Regulatory issues*

BNetzA notified the second market analysis for the wholesale unbundled access market and the planned remedies for this market. Alternative operators were afraid that the incumbent fixed network operator would close down main distribution frames when rolling-out new fibre infrastructure, rendering investments by these operators for establishing connections to the MDF worthless. In general, competitors expressed concern as to the lack of transparency regarding the incumbent network operator's plans on network roll-out. In commenting on BNetzA's draft analysis<sup>6</sup> the Commission made it clear that several business models should in principle remain economically viable and possible for alternative operators. BNetzA imposed various remedies on the incumbent fixed network operator designated with SMP.

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<sup>6</sup> Commission comments in proceeding DE 2007/646 SG-Greffe (2007) D/203748.

To enable competitors to reach the incumbent's street cabinets, BNetzA imposed on the incumbent the following new obligations: to give access to ducts; if access to ducts is not possible for technical or capacity reasons, to give access to the unlit fibre between the MDF and the street cabinet; to inform the requesting party about the availability of access to ducts/unlit fibre and to make it clear when it intends to equip a street cabinet with its own DSLAM.

The Commission had asked for further investigations of the wholesale leased lines markets at the end of September 2006. BNetzA decided to withdraw the notification of these markets, and re-notified them in 2007. It has in the meantime also notified the remedies for the wholesale terminating segments of leased lines market. However, these remedies are not being applied in practice yet. In the wholesale trunk segments of leased lines market BNetzA found no SMP. Market players criticised the delay in carrying out the review for the leased lines markets.

## **Broadcasting**

### *Market situation*

In the German market for TV and radio, end-users mainly use cable (53.7%<sup>7</sup>) or satellite (42.5%) to receive the radio and television signal. Analogue terrestrial TV has virtually ceased to exist as an alternative access platform (1.6%), whilst digital terrestrial television (DVB-T) continues to grow (around 9.9%, compared to 3.9% in the previous year). Both television via ADSL ("IPTV") and UMTS account for less than 1% of all connections and are considered by BNetzA as still nascent alternative platforms for the delivery of the television signal.

### *Regulatory issues*

As regards BNetzA's notification of the broadcasting transmission services market the Commission did not challenge the NRA's finding that the three major German cable operators enjoy significant market power for parts of the cable network (network level 3<sup>8</sup>). In this case, BNetzA quickly imposed remedies, such as the obligation to grant signal delivery access to downstream cable operators, and to provide collocation at the signal delivery transfer points and access to these facilities at all times. The cable network operators fear that by imposing obligations on the operators of this network level to the advantage of operators of network level 4, the artificial separation of the German cable network infrastructure between these two levels could be perpetuated. In previous reports the Commission had welcomed consolidation between the two network levels in Germany on the grounds that this could help cable network operators to up-grade and further digitalise their networks in order to become an alternative supplier of broadband offers to end-users.

## **Horizontal regulation**

### *Spectrum management*

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<sup>7</sup> This year's figures come from the digitisation report 2007 by the Commission on Digital Access (an institution formed by the Media Authorities of the Länder).

<sup>8</sup> See FN 6.



As regards frequency harmonisation at European level, Germany implemented almost all relevant Commission decisions based on the radio spectrum decision by making changes to the national frequency usage plan. The implementation of Commission Decision 2007/131/EC on allowing the use of the radio spectrum for equipment using ultra-wideband technology (UWB) is under way.

In October 2007, BNetzA awarded a subsidiary of the incumbent fixed network operator the task of rolling out the network for mobile TV. According to a decision by the Media Authorities of the Federal States (“Bundesländer”) in October 2007, the intention is to operate the pilot platform for mobile TV by a joint venture of three undertakings. The joint venture still has to provide the requisite agreements, in particular regarding content rights and the inclusion of public service broadcasters' programmes in an economically sound overall concept. The Commission would point out in this context that the imposition of must-carry obligations under Article 31 of the Universal Service Directive is limited to cases where a certain network is used by a significant number of end-users as their principal means of receiving radio and television broadcasts.

## **THE CONSUMER INTEREST**

### **Tariff transparency**

The consumer protection association regards the lack of transparency of tariffs as a problem, in particular with regard to mobile tariffs. At the same time, the association welcomes improvements on international roaming charges as introduced by the Roaming Regulation.

### **Universal Service**

In Germany no undertaking is designated for the provision of universal service. As the market provides the service there appears to be no need for intervention by State authorities.

### **Number Portability**

On 1 October 2007 there were almost 1.5 million ported mobile numbers, some 400 000 more than in the previous year. The average period for having the ported number operational was five working days, as in previous years. The major mobile operator charges recipient operators more than €1 for porting a number.

### **European emergency number 112**

112 is fully operational in Germany. According to the German authorities and as confirmed by network operators, caller location information is available both for fixed and mobile calls. 112 has been in use in Germany for decades. German citizens were informed by the GSM network operators that 112 can be used in all EU countries. Before the holiday season telephone bills sometimes include a notice on emergency numbers in foreign countries.

### **Must-carry**

Must-carry is regulated in all sixteen “Bundesländer”, and in some of these all analogue channels are reserved for must-carry. It appears that in a few Bundesländer the stations that take part in terrestrial digital TV provision (DVB-T) receive in turn must-carry status for analogue provision via cable. Restrictions are regulated in laws and in cable allocation statutes of the Bundesländer. Some must-carry rules have been called into question by market players, and the Commission initiated an infringement proceeding against Germany in October 2006. In so doing, the Commission addressed the legislation of four Bundesländer, without prejudice to the legislation dealing with must-carry rules or the application of these rules in the remaining Federal States. The target grievance is the obligation to have 100% of all available cable channels reserved for stations identified by the Federal State. In summer 2007, the Administrative Court of Hanover put four questions to the European Court of Justice concerning the Lower Saxony must-carry regime (C-336-07), which is the one the Commission is now focusing on in the aforementioned infringement proceeding.

### **Data protection**

Parliament adopted the law transposing the EU directive on data retention in autumn 2007. It took effect on 1 January 2008. Shortly after its entry into force, 30 000 interest groups and private persons reportedly filed complaints against the law with the Federal Constitutional Court.