

## **POLAND**

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**

Diverging trends could be observed on the Polish telecommunications market in 2007. Competition became keener in the mobile market, with the entrance of the fourth mobile network operator and a number of mobile virtual network operators. In the fixed market the incumbent continued to be largely dominant, although its market shares declined in both telephony and broadband following regulatory decisions. Broadband penetration in Poland remained one of the lowest in the EU in 2007, despite faster growth.

Poland has not yet finalised the first round of market analyses. This has not prevented the regulator actively promoting the goal of lowering prices paid by end-users via other routes, although according to market players it has caused legal uncertainty. Seven infringement proceedings were pending against Poland, of which one, concerning retail broadband regulation without prior market analysis, was launched in 2007.

### **REGULATORY ENVIRONMENT**

#### **Main regulatory developments**

The President of UKE (Office for Electronic Communications) continued to actively strive to lower the prices paid by end-users for electronic communications services. The Regulator's decisions were notable for a "hands-on" approach to the market as exemplified by the frequent recourse to dispute resolution as a regulatory tool and the continued use of transitional measures. The President of the UKE is currently considering whether to introduce functional separation of the fixed incumbent.

Amendments to the Telecommunications Act of 2004, introducing quite significant changes with regard inter alia to the powers of the NRA, market analyses, consumer rights and corresponding obligations of all undertakings, and the 112 emergency number, were approved by the government in the summer of 2007; however, they had not been submitted for parliamentary discussion when this report was drafted, following political changes in the autumn of 2007.

Poland was in 2007 the Member State with the highest number of open infringement proceedings for incorrect transposition and application of the EU regulatory framework. Seven proceedings are currently pending, of which one was opened in 2007. Two cases are currently before the Court of Justice.

## **Organisation of the NRA**

Following the change in government, the Ministry of Infrastructure took over the responsibilities in the field of electronic communications previously held by the Ministry of Transport. The legality of the process of appointment of the President of the UKE continued to be questioned in court throughout 2007, shedding doubt on the validity of her decisions and causing legal uncertainty on the market. At the time of drafting this report, the ruling of the Polish Supreme Court that would finally resolve the issue was awaited.

The President of UKE is charged with most of the responsibilities of the NRA under the regulatory framework, with the notable exception of market definition for the purposes of market analysis, for which the Ministry is responsible, and UKE appears to have most of the necessary powers to effectively fulfil its regulatory functions. However, the Regulator is experiencing difficulties in retaining experienced staff. This has a negative impact on the day-to-day functioning of the authority, which is financed from the State budget. Legal changes in 2006, which had removed a fixed term of office for the President of UKE and granted the President of the Council of Ministers an unlimited right to dismiss the head of the NRA at any time and without the need to indicate reasons, were not undone in 2007. As indicated in the 12th Report, the Commission is concerned that the changes introduced may influence the impartiality of the NRA and sent a Reasoned Opinion to Poland in June 2007.

The Regulator also seems not to have the necessary specific enforcement powers, in particular the power to encourage, and where appropriate ensure, adequate access and interconnection and interoperability of services irrespective of the market power of the undertakings involved. The case was referred to the Court of Justice in May 2007.

More judges and assistants were appointed to the Competition and Consumer Protection Court, responsible inter alia for hearing most of the electronic communications cases, raising the total number of judges and assistants to 14. Despite this slight improvement, the length of appeal proceedings appears to be an issue as the Court takes approximately 2.5 years to reach a judgment. The number of appealed decisions is also striking as there are currently some 500 proceedings pending against decisions of the Regulator, launched solely by the incumbent.

## **Decision making**

The NRA almost finalised the first round of market analyses in 2007. The re-notification of the market for wholesale trunk segments of leased lines is expected shortly. According to the UKE, the market for mobile access and call origination will also be re-notified. The second round of notifications is not expected to start in early 2008.

While several decisions taken by the NRA have begun to take effect, such as the imposition of wholesale line rental (WLR), bitstream access, or changes in reference offers, many of its decisions are subject to lengthy appeals. Despite market analysis efforts, decisions have in general continued to be based on transitional provisions (the ONP rules). Certain provisions, such as those relating to dispute settlement, are very broadly interpreted. Some operators have also voiced concerns about the frequent intervention of the NRA in dispute resolution, which is seen by operators as taking away the incentives to negotiate in good faith.

At the same time, dispute settlement proceedings are often used by operators to seek further specification of the wide range of not always detailed remedies imposed by the NRA. This is shown by the high number of such proceedings: there were 163 inter-operator dispute resolution requests in 2007. This approach affects transparency and legal certainty for market players.

Moreover, most of the regulatory obligations currently in place are based on benchmarks or retail-minus methodology. Some operators are concerned that rates are not cost-oriented. The incumbent has complained that some rates have been mandated at levels significantly below cost and alternative operators would not like to see tariffs raised in the future as a result of bringing them into line with costs.

## MARKET AND REGULATORY DEVELOPMENTS

Revenues in the telecommunication sector in 2006 totalled €10 504 million as of 31 December 2006. Revenue from the fixed markets was €4 768 million, while the mobile market generated some €5 736 million. The total value of tangible investments in the electronic communications sector was €1 635 million. Mobile operators invested €742 million, which represents almost half of overall investment. Fixed alternative operators invested €398 million, slightly less than the total investment by the incumbent.

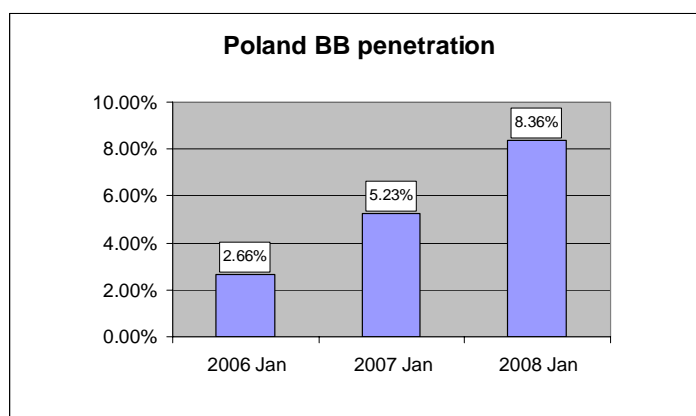
Competition has become stronger in the mobile market following the entry of a new network operator as well as a number of MVNOs. The three large mobile operators are trying to attract new customers by offering innovative services, for example the possibility of making small payments by mobile phone. They are also competing on the fixed market, having signed WLR agreements with the fixed incumbent. All mobile network operators have signed MVNO agreements and more are in the process of being negotiated.

Revenues on the fixed telephony market have continued to fall as a result of lower prices, the growing popularity of PC-based VoIP services and fixed-to-mobile substitution. At least two fixed line operators are offering IPTV services on a commercial basis. In the reporting period, there was an increase in the number of cable operators offering triple play including voice and broadband access in addition to TV services.

The Regulator is in the early stages of considering the possibility of introducing functional separation of the incumbent. A study will be undertaken in this regard, to determine the effectiveness of existing remedies. A decision on whether or not to implement functional separation is expected in mid-2008.

### Broadband

#### *Market situation*

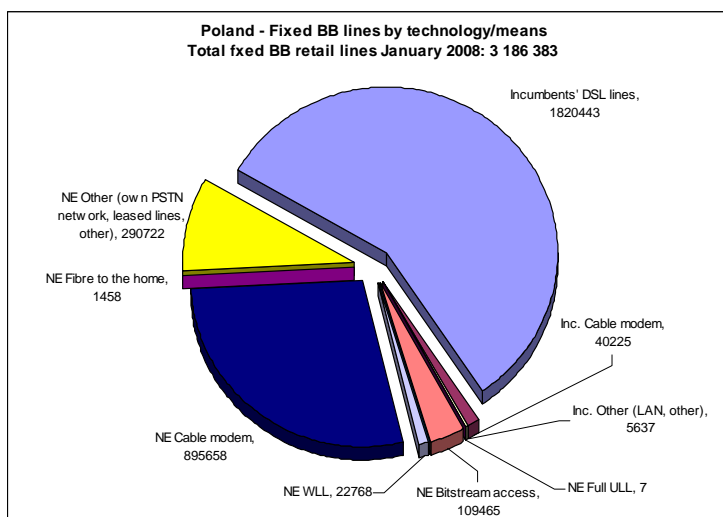


Broadband penetration in Poland, at 8.36% in January 2008 (despite growing by over 3 percentage points compared to January 2007), was the second lowest in the EU-27 and way below the EU average

(20.0%). The incumbent's market share in the retail broadband market dropped significantly (by almost 10 percentage points) during the past year and in January 2008 stood at 58.6%. This results from competitive pressures from alternative operators entering the broadband market on the basis of the incumbent's bitstream offer, as well as dynamic growth in the number of lines in technologies other than DSL (more than 500 000 added lines in 2007).

Despite this, several factors apparently remain which are intrinsic to the low penetration rates in Poland. For instance, fixed line telephony penetration is low (and does not cover many rural areas) and the price of retail broadband services remains high with respect to the disposable income of Polish consumers, despite falling somewhat in the reporting period. The growth in service-based competition following the significant take-up of the wholesale bitstream offer has led to tangible benefits for consumers in terms of price reductions and offers with higher speeds and download capacities. Local loop unbundling, however, was still not functioning in Poland as only five local loops had been unbundled by the end of 2007. However, several agreements were in place that were likely to lead to more local loops being unbundled in the near future.

Competitors to the incumbent's DSL broadband offering included cable operators, which more than doubled the number of lines (to ca. 900 000 lines in January 2008), the DSL offerings of alternative fixed operators using the bitstream offer and their own infrastructure, as well as mobile operators providing internet access using various technologies. The cable sector was however fragmented and penetration did not cover the majority of the population.



The gap in DSL coverage between rural areas and the national average was 12.3% as at December 2006, with 54.8% coverage in rural areas compared to 67.1% at national level. A comparable gap (11%) was observed in cable coverage, with only 7% in rural areas against 18% national coverage. On the whole, the gap between rural and national coverage for both DSL and cable, at 12.3% and 11% respectively, was lower in Poland than the average gap for the EU-25, at 18% and 28.2% respectively. This can be explained by the fact that levels of broadband data coverage are generally low in both urban and rural areas in Poland.<sup>1</sup>

### Regulatory issues

<sup>1</sup> IDATE report: Broadband coverage in Europe, October 2007; data refer to the end of December 2006.

In February 2007, the NRA adopted final measures for the wholesale broadband market. It included bitstream access in the market definition (at the ATM level and to take account of reasonable requests from alternative operators to ensure access at DSLAM and/or IP level). The remedies included an obligation to provide access, including the use of network elements and associated facilities, a non-discrimination and transparency obligation, accounting separation and price control as well as an obligation to present a reference offer.

However, the NRA has continued to regulate bitstream on the basis of the old ONP regime, considering that new measures could only be applied when the SMP operator presents its cost calculation together with the new reference offer and when that offer has been analysed. At the time of drafting this report, the NRA was still in the process of analysing the reference offer for bitstream that had been submitted in May 2007. The Commission is concerned about the continued use of transitional measures more than three years after Poland's accession to the EU.

By August 2007, 16 wholesale agreements had been signed between alternative operators and the incumbent on the basis of this reference offer and further agreements were being negotiated. By the end of 2006, the incumbent had unbundled 59 local loops for the purpose of bitstream access. Moreover, in November 2007, the NRA changed ex officio the terms of contracts between the incumbent and alternative operators for bitstream access. The price at wholesale level was now established using retail-minus methodology at a single rebate of 51%, and a separate rebate relating to special offers (at 41%) was withdrawn.

The changes to the reference offer for local loop unbundling, mentioned in last year's report, which significantly lowered the prices for full and shared access and provided for better and more detailed regulation of co-location and co-operation between operators, had led to only five local loops being unbundled when this report was drafted. However, six agreements had been signed, with the UKE intervening in three cases to help resolve issues between operators. The incumbent has blamed the slow take-up of LLU on over-advantageously priced bitstream access, which takes away the incentive to invest. The NRA adopted final measures on the market for wholesale unbundled access to the local loop in June 2007. It was still in the process of analysing the incumbent's new reference offer for local loop unbundling at the time of writing this report.

It is also on the basis of the previous legal framework that the NRA has regulated the prices of the incumbent's retail broadband services, and has fined the incumbent (including a maximum fine amounting to 3% of revenue in February) for lack of transparency and cost orientation of its retail broadband offerings, as well as failing to submit its retail broadband tariffs for prior approval. However, the Commission sees no legal basis for retail broadband regulation without a prior market analysis and has opened an infringement proceeding.

## **Mobile markets**

### *Market situation*

The mobile penetration rate reached 97% in October 2007, following another year of significant growth (6 percentage points in the reporting period), but is still below the EU average of 111.8%. The mobile market in Poland features three large operators providing

mobile services — voice and data (including 3G services in highly populated areas) with similar market shares, respectively 36%, 32% and 32% (in terms of subscribers as of October 2007). The fourth mobile network operator had attracted 700 000 customers by the end of 2007. The market shares of the three MVNOs are still marginal, not exceeding 10 000 in October 2007.

With regard to retail price trends on the mobile telephony market, subscribers enjoyed further reductions across usage baskets in 2007 and retail tariffs remained among the lowest in the EU. The mobile operators invested strongly over the past year to upgrade their networks and improve HSDPA coverage.

Consumers' choice of mobile operators widened in March 2007 as the fourth network operator that had been assigned 3G frequencies in May 2005 finally entered the market after a long delay due to difficulties in rolling out its network. It offered services based on national roaming both on a competitor's infrastructure and to a lesser extent on its own network. It has continued rolling out its network and plans to cover 50% of the territory by 2009.

At the time of drafting this report there were also five MVNO agreements in place and three operators had launched commercial services. More agreements were being negotiated as cable and fixed operators were planning to enter the mobile market. With mobile penetration approaching 100% these new entrants were targeting niche market segments to compete for market share with the other mobile operators.

Competition was expected to intensify as two frequency slots in the 1800 MHz band (each covering 49 duplex channels) were finally assigned by auction in September 2007, following two unsuccessful tenders in 2005. Both winning bidders were new entrants. The tender conditions were shaped in such a way that a great deal of weight was given to the criteria of promoting competition. There was no restriction with regard to the technology to be used or the type of services to be provided. The rollout requirements are 15% population coverage by the end of 2009.

### *Regulatory issues*

In spite of the lack of a relevant market analysis, the regulator was considering imposing an MVNO access obligation on one of the mobile network operators and notified a draft decision to the Commission in May 2007. The Commission raised its objections in a comment letter. No decision had been taken by the NRA at the time of writing this report.

In April 2007, the Regulator issued a decision imposing a glide path for mobile termination rates, having consulted neither the stakeholders nor the Commission. Commission services are looking into the matter. The rates were set on the basis of benchmarks of three countries with the lowest rates, which was criticised by operators. The termination rates for the fourth mobile operator are not currently regulated.

Certain environmental and public safety regulations were amended in August 2007 to simplify the procedure for deploying masts and network rollout.

### *Roaming*

The new European Regulation 717/2007/EC on roaming on public mobile networks within the Community was implemented on time and without any significant problems. One mobile operator – a new entrant - set prices below the maximum level indicated by the regulation.

## **Fixed**

### *Market situation*

Despite increased competition from alternative operators basing their services on the WLR offer, the incumbent has remained by far the largest player with regard to fixed telephony and has 71% of the fixed calls market (as of December 2006, in terms of revenues). Its market share has however continued to decline (by 5 percentage points since a year earlier). Despite promotional offers aimed at bonding the customer for longer and keener competition following the WLR offer, retail prices for fixed telephony remained generally unchanged in 2007. Fixed-to-mobile substitution continued to develop in Poland in 2007. Mobile traffic volumes (in million minutes) increased from 16 352 at the end of 2005 to 26 238 at the end of 2006, which was reflected in a similar decline in fixed traffic volumes. There was also a decline in fixed subscriptions.

While there were 93 operators offering publicly available telephony services as of July 2007, the main market players were the fixed incumbent, four fixed alternative operators, and the mobile players that are moving into the fixed market. In December 2006 three alternative operators had a market share greater than 5% (5.20%, 6.16% and 7.24%). No significant consolidation took place in 2007.

While there has been significant growth in terms of subscribers to telephony over cable services, their overall market share remains marginal, with 420 000 lines in September 2007 according to figures produced by the cable operators association (PIKE).<sup>2</sup>

### *Regulatory issues*

The incumbent has continued to apply the Reference Interconnection Offer (RIO) based on the former Telecommunications Act despite final measures having been adopted on the markets of fixed wholesale call origination and termination in July and September 2006 respectively. The NRA made important changes to this RIO in July 2006, among other things introducing capacity-based interconnection with a flat rate for a defined capacity of traffic exchange. The incumbent is of the opinion that this flat-rate interconnection offer was mandated at rates significantly below cost (by some 250%) and claims that audit results confirm this. Cost orientation was still not effectively in place in 2007 following the NRA's rejection of the incumbent's (independently audited) cost calculation in October 2007. This decision has been criticised by the incumbent. Commission services are looking into the matter.

By September 2007, the Regulator had issued 14 separate decisions imposing wholesale line rental (at a 47% rebate of the retail price) in the process of dispute resolution between the incumbent and alternative operators. The decisions were based on the transitional measures and a wide interpretation of the ONP regime, and not on the results

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<sup>2</sup> PIKE, September 2007.

of the relevant market analysis despite the final measure imposing regulatory remedies on the wholesale market for fixed call origination (including a general obligation to offer WLR) having been adopted. Operators complain that the process whereby WLR is imposed not on the basis of a reference offer but by recourse to individual decisions leads to discrimination as decisions are issued at different points in time.

In wholesale leased lines markets the final measures still remained to be adopted at the time of writing this report. In October 2007, while in the process of analysing these markets, the NRA introduced significant changes to the reference offer for leased lines (based on the previous regulatory regime). Prices were reduced by up to 49% and the offer was expanded to include additional capacities. The incumbent has appealed this decision citing the lack of legal basis, as the market analysis process was ongoing.

## **Broadcasting**

### *Market situation*

Cable penetration in Poland stood at about 45% (4.5 million subscribers) according to PIKE figures and is concentrated in big cities.<sup>3</sup> Out of more than 400 cable operators registered in 2005, few had a subscriber base greater than 100 000 and only one operator had more than 1 million subscribers. Digitisation of the network has been progressing and in June 2007 there were 122 000 digital cable TV subscribers in Poland.

As of September 2007, there were 6.1 million users in Poland relying on terrestrial broadcasting as their main means to receive (analogue) TV broadcasts. The three satellite digital platforms available on the Polish market had 2.6 million subscribers. At least two operators were offering IPTV services using DSL-enabled networks, although their take-up was limited also because of the low broadband penetration levels.

A new switchover strategy has been prepared by the Ministry of Transport in cooperation with the NRA but has still not been formally adopted. The strategy envisages the creation of a single multiplex in the transitional period. In accordance with the strategy, Poland is planning to switch off analogue transmission by the end of 2014. No frequencies had been assigned by the time of drafting this report. The introduction of mobile digital TV is not expected for some time in Poland as no specific standard has been identified so far and no frequencies have been set aside. This is despite strong industry interest in this innovative service, some debating opportunities provided by the NRA and planned test services in the DVB-H standard.

### *Regulatory issues*

In November 2007, the NRA made significant changes to the Reference Offer for access to the broadcasting infrastructure, lowering tariffs by some 40% in comparison to those proposed by the subsidiary of the fixed incumbent.

## **Horizontal regulation**

### *Spectrum management*

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<sup>3</sup> Ibid.



Poland has implemented the Commission Radio Spectrum Decisions: Decisions 2004/545/EC, 2005/50/EC, 2005/513/EC, 2005/928/EC, 2006/771/EC, 2006/804/EC, 2007/90/EC, 2007/98/EC and 2007/344/EC.

The NRA's policy is aimed at allowing the use of spectrum for all types of services. At present spectrum trading is possible between undertakings if both consent to it. However, this does not apply to spectrum assigned at auction, in which case a favourable decision by the NRA and the competition authority is required.

At the same time the NRA has been actively trying to promote broadband access by means of other technologies including wireless technologies in rural areas. Its policy has been aimed at encouraging local authorities to build local access networks using public funds in areas where operators have not found it commercially viable. To meet the requirements of spectrum for this purpose, it organised a number of auctions in 2007 for WiMAX frequencies in small rural areas.

#### *Rights of way and facility sharing*

Cable operators have complained about the high cost to them in comparison with companies operating in other sectors as well as about cumbersome and not always transparent procedures as far as rights to install facilities on public and private land are concerned. In addition, local authorities appear to impose taxes on the telecommunications infrastructures and each authority appears to have wide discretion in deciding the levies.

## **THE CONSUMER INTEREST**

### **Universal Service**

The fixed incumbent that was designated as universal service provider in May 2006 applied for compensation of the net cost of universal service provision for the first time in June 2007. The President of the UKE has apparently refused to grant such reimbursement on procedural grounds. The NRA considered that the incumbent had not presented sufficient documentation to prove that such a cost had been incurred. The incumbent was considering appealing the decision.

Operators were also concerned by the President of the UKE's interpretation of a provision of the Universal Service Directive which grants customers the right to withdraw from a contract upon notice of a modification of contractual conditions if they do not accept the new conditions. The Regulator has fined a mobile operator for not having informed its customers of their right to withdraw from their contracts upon a change in the terms and conditions mandated by the Regulator, consisting of replicating certain binding provisions of Polish law in favour of the consumer. The UKE considers that its interpretation is in line with the provisions of Polish law, which provide that any change in the contract, whatever its scope, triggers the customers' right to resign from the contract. Commission services are looking into the matter.

### **Directory services and directory enquiry services**

For a number of years there were no comprehensive directory services and directory enquiry services available in Poland covering fixed and mobile subscribers, and the

matter had been referred to the Court of Justice in October 2006. However, after a number of steps taken by the UKE President, a comprehensive directory enquiry service finally became available at the end of 2007 according to the UKE and a fully comprehensive directory is expected at the beginning of 2008. The Commission is looking into the matter.

### **European emergency number 112**

While the single emergency number 112 has been available for all end-users since September 2005, it appears that important deficiencies remain with regard to identifying the caller's location when calls are made from mobile phones. The matter has been referred to the Court of Justice.

### **Number portability**

Number portability for both fixed and mobile numbers has been available since 2006. While operators are concerned about the lengthy and cumbersome procedure for fixed number portability, which takes between 14 and 30 days, work on simplification is ongoing according to the UKE. Mobile number portability is causing less concern and 35 000 mobile numbers had been ported by December 2006.

### **Consumer complaints and out-of-court dispute resolution**

In 2007 the NRA considerably stepped up efforts to better inform consumers. It has delegated the task of interacting with consumers and consumer organisations to its 16 regional offices, which is expected to allow disputes to be resolved more quickly. It has also set up a consumer information centre to advise consumers on all issues relating to electronic communications. This has proved very popular, with more than 5 000 calls being registered in the first six months of operation. The NRA was also considering giving consumers the possibility to lodge their complaints via a website.

In addition, out-of-court disputes involving consumers may be dealt with by the consumer arbitration court established by the Telecommunications Act of 2004 or by the NRA in a mediation procedure.

### **Personal data protection**

Poland has not yet transposed the Data Retention Directive. Transposition was planned as part of the review of the Telecommunications Act currently under way.