

PORTUGAL

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

Alternative operators have continued to gain market share in the fixed and broadband markets, which however remain below the EU average. On the fixed market, the number of subscribers using an alternative operator for direct access is the highest in the EU. As regards the broadband market, alternative operators have significantly invested in local loop unbundling (LLU), while Portuguese consumers are increasingly using mobile broadband and subscribing to bundled offers.

The regulator has adopted a full range of remedies to be imposed on the incumbent operator. Although the effective implementation of some regulatory measures introduced by the regulator has been delayed (e.g. wholesale line rental or leased line reference offer), others are producing positive results, such as LLU. During 2007, the regulator was active in preparing the next spectrum assignments. An important challenge ahead is the evaluation of the effects of the spin-off of the incumbent's cable subsidiary, in November 2007.

REGULATORY ENVIRONMENT

Main regulatory developments

Most markets were analysed by July 2005. No detailed calendar for the second round of market analyses has been announced yet although the regulator, ICP-ANACOM, plans to review the relevant markets in 2008. In August 2007, the regulator notified the final regulatory measures for the broadcasting transmission services market. In October 2007, it also notified the Commission of an amendment to the price control remedies for 2008 for the voice call termination market to introduce asymmetric regulation of mobile termination rates (MTRs). The Commission commented that this amounted to the imposition of a substantially different remedy and noted that cost orientation had not yet been implemented, although the further price reductions were welcomed.

Following the spin-off of the incumbent's cable subsidiary in November 2007, the regulator would need to evaluate its effects on competition in the market and possibly review the existing regulatory obligations accordingly. There are now two separate undertakings with different boards of directors, but a more or less common shareholder structure. The incumbent is requesting a full regulatory revision, since previous market analyses considered all the undertakings of the incumbent's group. Meanwhile, the

regulator is taking a cautious approach so far as the spin-off is still rather recent, although it expects more competition to emerge in the future.

Two infringement proceedings are currently pending in relation to the Universal Service Directive: one on the designation of universal service providers and one on the availability of a comprehensive directory and directory enquiry service (C-458/07).

Organisation of the NRA

ICP-ANACOM has regulatory competences in the postal and electronic communications sectors, but overall its organisation does not reflect any division of tasks. During the reorganisation of the national regulatory authority (NRA) in 2007, a Communications Security Office was established with competences for the security of communications networks and services, in particular access to emergency services.

The NRA has consistently provided assistance to the national competition authority (NCA), AdC, in its relevant areas of competence during the last takeover bid and in relation to other issues. In August 2007, AdC adopted a decision imposing a fine of €8 million on the incumbent for abuse of dominant position on account of its refusal to grant access to ducts before the duct reference offer was mandated.

The effectiveness of appeal mechanisms has been raised as a critical issue by market players, although appeals do not have the effect of automatically suspending NRA decisions except in cases where fines or sanctions are imposed. Only four of the 36 NRA decisions so far appealed have been resolved in first instance, though the final decision is still pending in each case. Moreover, some appeals lodged with the administrative courts in 2001 have been pending for almost seven years, thus creating legal uncertainty in the sector.

Decision-making

Following the first review of markets, the NRA found the incumbent to have significant market power (SMP) in all but one of the markets analysed, and imposed a full range of obligations. It should be noted that there is still a significant level of retail regulation in the Portuguese market and there has been an increase in some wholesale obligations, such as 'naked DSL'.

In 2006 the Commission started infringement proceedings against Portugal for failure to notify all relevant markets under the first Commission Recommendation. Since the two remaining relevant markets (mobile access and wholesale international roaming) with no *ex ante* regulation imposed have been withdrawn from the list of relevant markets, the Commission has finally closed the case.

Stakeholders have complained about the long period between the end of a public consultation and the adoption of a final decision by the regulator, and about the delay in resolving some disputes between operators.

There is no public debate yet about next generation networks (NGNs), though the regulator envisages a consultation on this topic during 2008. It seems that the first fibre deployments are already taking place even in local exchanges that are currently open for LLU. Alternative operators consider that this regulatory uncertainty is critically affecting

their business plans. In September 2007, the regulator organised a conference on convergence under the auspices of the Portuguese presidency.

MARKET AND REGULATORY DEVELOPMENTS

According to data from ICP-ANACOM, investment in the electronic communications market in Portugal totalled €784 million and turnover was €7.38 billion in 2006. There is a trend towards consolidation in the fixed and broadband markets on the one hand and an increase in the number of mobile market players on the other hand, although the latter mostly do not have an infrastructure-based business model.

In March 2007, the takeover bid launched by an alternative Portuguese operator for the incumbent and its cable subsidiary failed, as one of the necessary conditions for the takeover bid was not approved by shareholders. However, as part of a plan to fend off the hostile bid, the incumbent had announced its intention to divest its 58.4% stake in its cable subsidiary should the takeover bid fail.

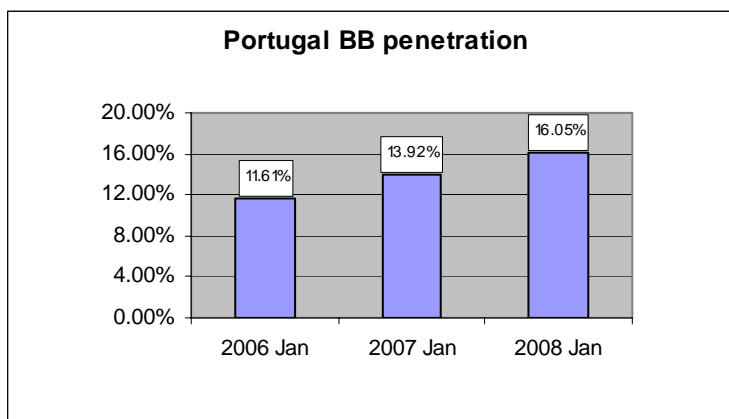
The spin-off of the cable subsidiary became effective on 7 November 2007 when the incumbent's shareholders exchanged their shares. Separate ownership of the copper and cable networks should prove beneficial to competition in the Portuguese fixed and broadband market by creating incentives to invest in fixed network upgrades and to compete in developing new services. It should be noted that the Portuguese Government still holds a 'golden share' in the incumbent, and an infringement proceeding is pending in this regard.

Portugal occupies fourth place in the EU in terms of bundled subscription offers. There are different triple-play offers in the market, including a widespread cable service, one service based on wireless local loop (WLL) with limited coverage, and three services over DSL (two from alternative operators and the incumbent's offer). The triple-play offer recently launched by the main cable operator includes a VoIP service with geographic numbering. During 2007, retail mobile prices decreased while voice fixed telephony tariffs remained stable and among the highest in the EU.

Broadband

Market situation

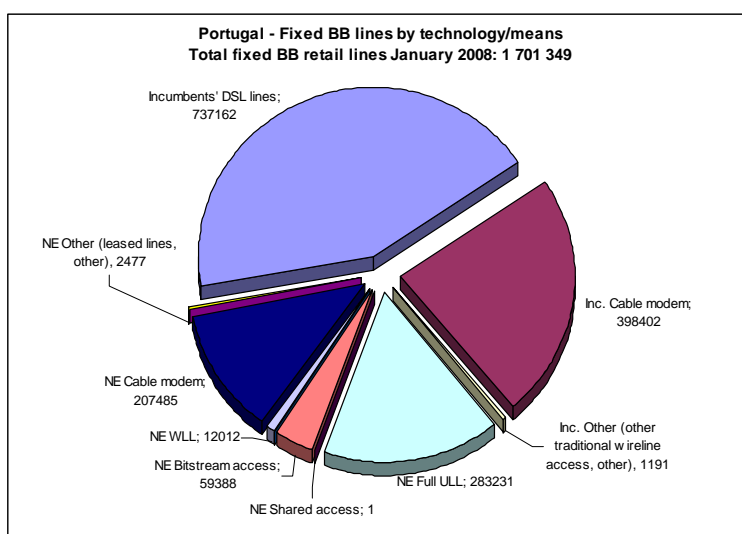
Although fixed broadband penetration grew to 16.05% by January 2008, it was still below the EU average (20.04%). In fact, the Portuguese fixed broadband market has one of the lowest growth rates in the EU. The shares of the different technologies have remained unchanged: DSL has the highest percentage of broadband lines (63.5%),



although cable (35.6%) is still a significant means of access. This situation might evolve in the future following the ownership separation of the incumbent's copper and cable

networks. Mobile broadband is being increasingly used in Portugal with 4.5% of the population active customers as of October 2007¹. A recent study of broadband availability shows that the digital divide between the national average and rural areas in Portugal in terms of DSL coverage is 10 percentage points (94% and 84% of the population, respectively), although cable coverage in rural areas is the highest in the EU (48% compared to the 80% national average)².

Since the beginning of 2005, the incumbent's share of the retail broadband market has been declining. Its major competitor reinforced its position during 2007 through the acquisition of a fixed competitor and the residential part of another. However, before the spin-off of the incumbent's cable subsidiary in November 2007, the incumbent still held seven out of ten broadband lines. Following the spin-off, the incumbent's former cable subsidiary now has approximately a quarter of the market (23.4%), with the incumbent still holding a 43.3% market share. The regulator would need to evaluate effects of the spin-off on competition in the market.



Alternative operators are increasingly investing in fully unbundled lines (shared access is still not used) for the provision of broadband services, which constitutes an encouraging trend for increasing competition in this important market. The number of unbundled local loops grew to over 291 175 unbundled lines in January 2008 compared to 68 608 two years earlier, while the

number of bitstream accesses decreased slightly to 59 388 in January 2008. During 2007, the second mobile network operator (MNO) started investing in LLU.

Regulatory issues

Although no further change to unbundling fees was introduced last year, LLU prices are among the lowest in the EU. The regulator is concerned about the efficient use of collocation space in local exchanges, which might improve following the recent acquisitions in the market and the new rules established by the regulator in April 2007 to implement the 'use it or lose it' principle. Alternative operators indicated that there is room for improvement in the prices for collocation and service level agreements (SLA).

In July 2007, ICP-ANACOM called upon the incumbent to include 'naked DSL' in the bitstream reference offer (known as Rede ADSL PT), aiming to have this operational by February 2008 the latest, without the need for further regulatory intervention. The incumbent has recently published an updated reference offer including 'naked DSL',

¹ ICP-ANACOM's 3Q report.

² 'Broadband coverage in Europe', IDATE, October 2007 (data as of 31 December 2006).

which is currently being examined by the NRA. To avoid margin squeeze problems, the regulator has maintained a retail-minus obligation on the incumbent, for which the methodology was revised in October 2007.

Mobile markets

Market situation

Mobile penetration continues to grow in Portugal and had reached 122% by October 2007. The market shares of the three MNOs have remained more or less constant, and the incumbent's mobile subsidiary still leads the market. Portugal makes very intensive use of mobile services, with 58% of overall voice traffic originated in mobile networks and one of the highest proportions of prepaid customers (78%).

The Portuguese mobile market is also characterised by low churn and high customer loyalty, so the figure for ported mobile numbers is still low (156 490 as of October 2007). Mobile operators have launched upgraded broadband access services and extended the coverage of advanced mobile networks.

Regulatory issues

As of October 2006, all mobile termination rates had converged to a target of €0.11 following the glide path established by the regulator at the beginning of 2005. However, this rate is currently above the EU average. In October 2007, ICP-ANACOM notified the Commission of an amendment to the price control remedies for the voice call termination market, establishing a new glide path for the year 2008 to further reduce mobile termination rates (MTRs), though applying asymmetry, with the aim of addressing network effects and traffic imbalances. Although the regulator expects to implement cost orientation in 2008 as envisaged in its first notification of 2004, MTRs are still based on benchmarking.

The NRA has not yet notified the mobile access market, but it is evaluating the possible existence of joint dominance in this market. In addition to three commercial agreements signed during 2006 with mobile service providers, the postal incumbent launched commercial services in November 2007 following the signature of an MVNO agreement.

International roaming

The implementation of the Roaming Regulation in Portugal has run smoothly. All three mobile network operators in Portugal have opted to offer a tariff in line with the maximum ceilings. No problem has been detected in the Portuguese outermost regions as operators are offering national mobile tariffs. The regulator is preparing legislation to establish deterrent sanctions in the event of non-compliance.

Fixed

Market situation

The incumbent was still dominant with 74% of the fixed voice market in terms of revenue in December 2006, though its share was gradually decreasing. During 2007, its major competitor reinforced its position through the acquisition of two other competitors.

The use of alternative operators for the provision of fixed voice services has significantly increased in the last two years, due to the existence of cable providers, operators investing in LLU, and above all the provision of fixed telephone services using mobile frequencies. In particular, all three MNOs have now been authorised to use mobile frequencies for the provision of fixed telephone services under certain conditions (e.g. using numbers for fixed services and a limited number of network cells). As of July 2007, 23% of subscribers were using a provider other than the incumbent operator for direct access, which constitutes a significant increase compared to 15.1% one year earlier and the 13.5% EU average.

Regulatory issues

In May 2007, ICP-ANACOM reduced interconnection prices by 10% under the reference interconnection offer (RIO), in order to adapt to the new universal service tariffs. The annual review in November 2007 resulted in an additional 2% decrease. Since the beginning of 2007, the incumbent is offering capacity-based interconnection, in addition to the metered interconnection model, and so far one alternative operator is using it.

The offer for wholesale line rental (WLR), known as ORLA, was updated in November 2006, enabling alternative operators to provide access together with telephone services. As its implementation proved to be problematic, the regulator previously banned retail offers in which the incumbent bundled subscription and calls. As certain improvements were subsequently introduced for WLR, the regulator permitted these bundled offers from March 2007. There were about 168 000 access lines under the WLR offer in October 2007, compared to 120 000 one year earlier. The NRA has now finally included ISDN access and clarified, among other things, the conditions for service suspension by the incumbent in the event of non-payment. The NRA has also published an amendment to the regulation on selection and preselection to eliminate certain inefficiencies in relation to service request cancellation and compensation for delays.

Some operators have complained to the NRA about phones installed for free by the incumbent for exclusive use via the incumbent's phone cards. In May 2007, the regulator imposed a fine of €60 000 (later reduced to €40 000 by court decision) on the incumbent and requested a new offer to be submitted to it. According to the latest information from the regulator, the discrimination issue has been solved but the cost orientation analysis is still ongoing.

Broadcasting

Market situation

Although the main platform for the provision of broadcasting services is analogue terrestrial TV, cable constitutes the second most important means of access followed by satellite and, with only marginal shares, IPTV and WLL. In addition to two analogue terrestrial networks, Portugal has one of the most widespread cable networks, covering almost three in every four households, with some regional cable operators and one main nationwide cable operator. The incumbent operator is very much present in the broadcasting market as well: in addition to its current IPTV offer, it will shortly launch satellite TV services and participate in the tender for digital terrestrial television (DTT) frequencies following the spin-off of its cable unit.

The policy for DTT is being reevaluated in Portugal, although there is no concrete date for the launch of DTT services yet. Analogue switch-off will tentatively take place between 2010 and 2012 in Portugal, following a regionally staggered timetable. Frequencies for mobile digital television are not expected to be assigned until analogue switch-off has been completed.

ICP-ANACOM has recently launched a public consultation before launching a public tender for the assignment of frequencies for DTT, both for free-to-air (including certain must-carry obligations) and for pay-TV channels.

Regulatory issues

In August 2007, ICP-ANACOM adopted final measures regarding the market for broadcasting transmission services. The regulator considered only the analogue terrestrial television broadcasting to be a wholesale market susceptible to *ex ante* regulation. As a result, the obligations under the concession granted to the incumbent until 2025 have been maintained and further obligations to ensure transparency and accounting separation have been imposed. In future, the development of DTT networks could be facilitated by these measures.

Horizontal regulation

Spectrum management

The regulator has been very active on spectrum issues during the previous year, launching public consultations on DTT, Broadband Wireless Access (BWA) in the 3.4-3.8 GHz band, and mobile services in both the 450-470 MHz and 900/1800 MHz bands. For BWA, the regulator might launch auctions next year while for other spectrum assignments it prefers to launch public tenders. The regulator envisages the gradual introduction of neutrality in terms of spectrum use. Following the renewal of the GSM licence of one mobile operator in 2006, ICP-ANACOM renewed the GSM licence of the incumbent's mobile subsidiary in 2007 (the third licence will not expire until 2012).

Under the national frequency allocation plan (known as QNAF), all rights of use for frequencies may be transferred, subject to the NRA's approval in accordance with the terms established under national law. However, some stakeholders are requesting more specific conditions for it to be applied in practice. The Portuguese authorities are currently studying options for a general policy on secondary spectrum trading. An internal study on spectrum trading was commissioned by the regulator, which plans a public consultation on this matter in 2008.

In order to implement the remaining Commission Decisions adopted under the Radio Spectrum Decision and other decisions taken on spectrum management, the regulator published an updated QNAF in July 2007. It had already repealed the exclusive use of the 900 and 1800 MHz bands for GSM technologies, although they are still reserved for mobile services and are subject to decisions at EU level.

Administrative charges

The administrative charges and spectrum fees paid by operators cover the administrative costs of ICP-ANACOM, which is both the postal regulator and the electronic communications regulator. It is evaluating the possibility of establishing accounting

separation for these different activities. In 2007, it submitted to the Government a proposal on administrative charges and spectrum fees. The Commission services are closely following this issue.

Rights of way and facility sharing

Under national law, the concessionaire is obliged to provide a reference offer for access to ducts and associated infrastructure (known as ORAC), whereas previously the regulator had intervened to guarantee access to ducts on an ad hoc basis. Although the implementation of ORAC took some time, there are currently 14 undertakings using the reference offer. In September 2007, moreover, ICP-ANACOM consulted operators on the possibility of including ducts and other infrastructure in an inventory in order to facilitate infrastructure sharing.

THE CONSUMER INTEREST

Universal service

Under the current concession contract, the incumbent operator continues to provide universal service until 2025. Since, in the view of the Commission, this unduly excludes any other operator from being designated as a universal service provider, the Commission started infringement proceedings. The Portuguese authorities have indicated their intention to launch a new universal service designation process before the concession expires, with a public consultation in October 2007 being the first milestone. However, there has been no such consultation so far and it has been further postponed to 2008.

So far the regulator has always rejected the incumbent's claims for compensation for the cost of universal service: prior to 2001 on the basis that the market had not been fully liberalised, and subsequently on the basis that the data provided were incomplete. In December 2007, the regulator adopted a draft decision rejecting once again the costs submitted for the years 2001-2003. However, it plans to launch a public consultation on the methodology for net cost calculation and the definition of unfair burden.

The residential tariffs for fixed telephony services (connection, monthly and call fees), which are subject to price caps under the universal service obligation, were revised in February 2007. As a consequence, wholesale interconnection and WLR prices were decreased in order to meet the retail-minus obligation. After the Portuguese government decided to stop paying the 50% discount on subscription fees for retired people, the universal service provider has been obliged to carry these costs itself.

Two mobile operators have not yet supplied their subscriber data to the universal service provider. Consequently, a comprehensive directory and a directory enquiry service covering all subscribers of telephone services are still not available in Portugal. Infringement proceedings were brought before the ECJ in June 2007 (C-458/07).

While the appeal against its decision of December 2003 was still pending, the regulator issued a new decision to enforce the existing obligation on all mobile operators to provide subscriber information to the universal service provider. Although there were bilateral negotiations in 2007, the necessary agreements between the relevant operators have not yet been reached.

Number portability

Fixed number portability has started to be used as a competition tool, with 610 000 ported numbers by October 2007. However, the use of mobile number portability remains low (156 490 numbers by October 2007). At wholesale level the maximum price for a ported fixed number had significantly decreased by November 2007 to €5.39, while remaining €15 for a ported mobile number though with volume discounts.

There is a period of eight days for porting fixed numbers and five days for porting mobile numbers, as from the date when the recipient operator submits the request to the donor operator.

Consumer complaints

The NRA has set up a specific unit to deal with complaints and requests for information, which is gradually becoming operational. However, the regulator cannot issue binding decisions on conflicts between end-users and operators. It provides information, identifies areas for regulatory intervention, and sanctions possible breaches of legislation and regulatory decisions.

European emergency number 112

In April 2006, the Commission started infringement proceedings against Portugal due to the fact that caller location information was not available to emergency services for calls from mobile phones. The situation changed following the adoption of a 'push' solution for mobile calls, and caller location information became available throughout Portugal as from 31 July 2007. ICP-ANACOM has played an important role as a mediator among the emergency authorities and the mobile operators. The infringement proceedings were consequently closed in October 2007.

Moreover, an improved solution for fixed calls has been implemented to give Public Safety Answering Points (PSAPs) direct access to the subscriber database, which is updated at least once a week. The Portuguese authorities are considering an overall reorganisation of the 112 service for the future. It should be noted that, for the fixed services provided via mobile frequencies, emergency authorities will receive the registered address. The National Institute for Medical Emergency (INEM) has recently launched an awareness campaign about false emergency calls to 112.

Must-carry

The Media Regulatory Authority, ERC, has so far not reviewed the channels that should have must-carry status, and ICP-ANACOM has not yet imposed any must-carry obligations on transmission operators. The current must-carry obligations imposed on cable operators to provide two national and two regional public channels derive from the previous regime. The awarding of DTT frequencies, expected for 2008, may include further must-carry obligations. The Commission services will closely monitor compliance of any must-carry obligation with Article 31 of the Universal Service Directive.

Data protection

The transposition of the Data Retention Directive (2006/24/EC) is under way and the text was sent to Parliament in September 2007. Portugal did not request the postponement of

its application to internet data, and the new law will come into effect immediately for all network operators and service providers. The retention period is one year and the costs will be borne exclusively by market players.

In cooperation with other national organisations, ICP-ANACOM is working on a national strategy to fight spam. The initiatives planned include cooperation with internet service providers and the promotion of an awareness campaign.