

SPAIN

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INTRODUCTION

The consolidation trend, on the one hand, and the entry into the market of the first mobile virtual network operators (MVNOs), on the other, have resulted in the presence of several integrated operators in the Spanish electronic communications market. There is a greater level of infrastructure competition, with alternative operators notably investing in cable and local loop unbundling (LLU), while mobile operators are gradually upgrading their networks to provide high-speed data services. Spanish consumers are benefiting from falling prices and from increased choice in terms of bundled offers and intensive number portability.

The national regulatory authority, the Telecommunications Market Commission (CMT), has focused on implementing the regulatory obligations, though some regulatory measures have not yet been implemented (e.g. the IP bitstream offer). Additional important remedies were imposed in 2007 (e.g. wholesale line rental). The overall financial burden and the difficulties encountered with the roll-out of networks are still considered by operators to be critical barriers to investment.

REGULATORY ENVIRONMENT

Main regulatory developments

The CMT completed the market review process at the end of 2006, and has been a pioneer in a number of regulatory approaches, such as access obligations for mobile origination, Ethernet interfaces for leased lines or cost-oriented access for wholesale broadcasting transmission services. However, despite the innovative changes to some regulatory measures, their impact on the market has been delayed as some obligations have not yet been implemented (IP bitstream offer or price obligations for wholesale broadcasting transmission services) or have just recently been implemented (leased lines reference offer including Ethernet interfaces, known as ORLA) in practice. On the other hand, where the regulator provided continuity of existing regulation (wholesale fixed markets) or mandated some kind of “light” regulation (MVNOs), remedies have been effectively implemented.

Following the initial market review, in the course of 2007 the CMT notified the obligation to provide wholesale line rental (WLR) as an additional remedy for the call origination market; it also notified further details on the methodology for analysing incumbent’s retail offers to prevent anticompetitive practices, such as margin squeeze or abusive bundling, and to ensure replicability (retail telephony markets and wholesale broadband market). In addition, the regulator set mobile termination rates (MTRs) for the

fourth mobile network operator (MNO), as well as for a “full” MVNO, as defined by the regulator.

In June 2007, the Commission launched an infringement proceeding for incorrect transposition and implementation of parts of the Universal Service Directive.

Organisation of the NRA

The division of regulatory functions between different national regulatory authorities (NRAs) persists, even though the main responsibilities are divided between two of them: the CMT and the Secretariat of State for Telecommunications and Information Society (SETSI), which is concurrently responsible for telecommunications policy within the Ministry of Industry, Tourism and Commerce. As mentioned in previous reports, the CMT appealed two Regulations to the Supreme Court, concerning numbering, for which a preliminary ruling was requested (C-82/07), and audiovisual competences, which is still pending.

Over the last year, the CMT provided assistance on several subjects to the national competition authority (NCA), which has been recently reorganised, and both authorities are currently negotiating a cooperation agreement.

Decision-making

Following the completion of the initial market review required by the EU framework, the CMT has been working over the reporting period on the effective implementation of the obligations imposed on operators with significant market power (SMP). In certain cases, the national two-year deadline for the review of the markets is approaching, whilst the imposed remedies have not yet been implemented. The CMT will soon need to start reviewing the competition situation in a second round of market analyses.

In general, the national consultations by the CMT have been welcomed by interested parties. However, as in previous years, the sector would like to see more transparency on price obligations, while respecting confidentiality. For instance, the benchmarking methodology used for determining the fourth MNO’s termination rates was declared confidential. During the consultation period prior to its final adoption, the decision on universal service net costs was available for consultation only at the CMT’s premises and no extension of the deadline for comments was granted.

The CMT has continued monitoring regulated markets and disputes. Following one of those investigations, the CMT imposed penalties on the incumbent for not fulfilling its obligation in relation to the management system for LLU requests in May 2007 and for not delivering various LLU elements to alternative operators in July and December 2007. Alternative operators request more own-initiative investigations by the regulator to check on the fulfilment of obligations, especially in the field of unbundling obligations.

In May 2007, the CMT launched a national public consultation on several aspects related to Next Generation Access Network (NGaN) deployment, and it expects to announce its regulatory position shortly. The contributions of consulted undertakings showed that 12 operators, including cable operators, are in favour of some kind of functional separation of the incumbent operator. Alternative operators have raised concern that the consultation was a theoretical exercise without any detailed evaluation of the incumbent’s deployment plans. Telefónica is running a pilot VDSL2 and optical fibre test accessible to the CMT

and to alternative operators, and it announced a significant investment in fibre networks subject to favourable regulatory treatment. Meanwhile, the CMT is analysing the regulatory approach to the upgrade to VDSL2 services. Moreover, the regulator plans to study the migration from current platforms to IP core networks.

So far the CMT has always defined national markets and imposed the same remedies throughout Spain, but it seems to be considering the introduction of a different approach.

MARKET AND REGULATORY DEVELOPMENTS

The growth of retail revenue from the electronic communications sector in Spain amounted to 5.8%, 5 points less than the previous year but still higher than the EU average¹; whilst wholesale revenue decreased due to the shift to unbundling and to further consolidation in the sector. Investment totalled €5.7 billion in 2006, which is an increase of 3.1% over the previous year and exceeds the 2002 investment level. Although the incumbent's group is the largest single investor in the Spanish electronic communications market, alternative operators invested 60.7% of the overall figure for investment, the majority of which was driven by the mobile and cable operators.

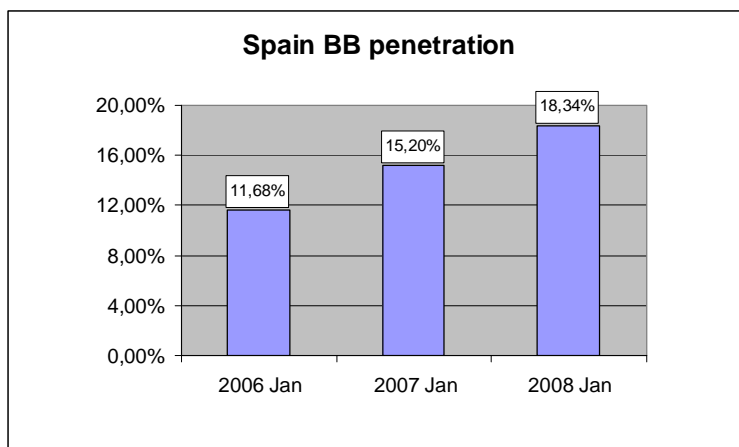
The consolidation trend and the signature of the first MVNO agreements have resulted in the presence of several integrated operators. On the one hand, two MNOs acquired undertakings which were present in the fixed and broadband market. On the other, several cable operators launched mobile services following the imposition of access obligations. Operators still complained about the excessive overall financial burden imposed on the sector, which seems to be higher than for other sectors. This situation might be intensified with the activation of the universal service financing mechanism.

In Spain the trend towards bundled services has particularly intensified: by the end of 2006 one third of residential customers using fixed networks had subscribed to bundled offers and more than one fifth subscribed to the most frequently purchased service package, which is a double-play offer of fixed telephony and Internet access. Moreover, the content offers are assuming growing importance for both cable and DSL operators, with half of the cable customers subscribed to triple-play offers.

Broadband

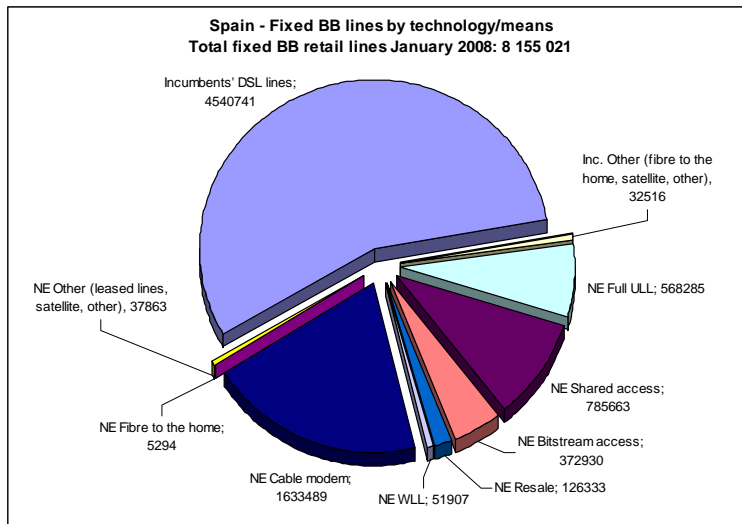
Market situation

The number of broadband lines continued to grow during the last year, though at a slower pace than the EU average: broadband penetration increased from 15.20% in January 2007 to 18.34% in January 2008, but it is still below the EU average (20.04%). Spain, via financed programmes, has



¹ CMT's Annual Report 2006.

sought to extend broadband coverage to rural and isolated areas, which should reach 96% of the population by the end of 2007, although generally at lower speeds than in urban areas. A recent study on broadband availability showed that the digital divide in terms of DSL coverage between the national average and rural areas in Spain is only 4 percentage points (90% and 86% of population respectively) while significantly higher in terms of national and rural cable coverage (48% and 11% of population respectively)². A significant trend is that 87.2% of broadband residential customers subscribed to broadband services as part of a bundled offer³.



Almost four out of five broadband lines are DSL, which constitutes the main technology, followed by cable. Alternative DSL operators hold 22.7% of the retail broadband market and cable operators 20.0% as of January 2008, although the incumbent is adding the majority of new broadband subscriptions. In fact, since mid-2005 the incumbent has gained market share in terms of lines. The upward trend in the number of

unbundled lines seems to continue (1.35 million in January 2008, compared to 939 000 lines in January 2007), and this represents around 8.6% of the incumbent's activated lines. Since 2006, LLU is the preferred option for alternative DSL operators (16.6% of overall retail broadband lines) whilst the number of indirect access and resale lines continues to fall.

Regulatory issues

In June 2006, the CMT imposed an obligation on the incumbent to provide ATM and IP bitstream access and changed the cost model from retail minus to cost orientation. In December 2006, the regulator took an interim measure, which entailed significant reductions of the bitstream charges based on cost accounting data. However, more than one and a half years after the analysis of the wholesale broadband access market by the CMT, the incumbent's reference offer (known as OIBA) including regulated IP bitstream has still not been adopted and no further change in prices has been implemented following a study commissioned by the CMT in order to establish a cost-oriented model for bitstream access. The CMT expects to approve the OIBA in the first quarter of 2008.

Even though LLU prices were not modified last year, they are still in line with the EU average except for the shared access connection fee, which is the third highest in the EU. In September 2006, the revised reference unbundled offer, RUO, (known as OBA) introduced some changes which are not yet in place, such as LLU demand estimates by

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

³ CMT's Annual Report 2006.

alternative operators and regulatory monitoring of the incumbent's internal protocols for service provision in order to strengthen the non-discrimination obligation. Further modifications were adopted in 2007, preventing operators from discounting the incumbent's penalties for non-fulfilment of the RUO conditions directly from their payment for wholesale services. So in the event of a disagreement, reimbursements due from the incumbent to alternative operators will need to be resolved under civil law. In this respect, the CMT can open sanctioning procedures for non-fulfilment of the RUO obligations or non-compliance with CMT's resolutions, including those imposing the payment of penalties.

The decrease in the number of LLU access disputes submitted to the CMT might be partly due to the fact that operators prefer to reach agreement with the incumbent operator, given the regulator's reputation for delayed action in the past, and partly due to a different investment phase of DSL operators. Alternative operators and recently also the Secretary of State for telecommunication issues have called on the CMT to monitor carefully the incumbent's compliance with the current obligations, as the decisions and fines imposed by the regulator so far do not seem to act as deterrents. The CMT itself has acknowledged that problems remain in this area and that non-discriminatory treatment would be key for the competitive situation.

Meanwhile, the CMT continued to monitor the fulfilment of the obligations set out in the RUO by the incumbent, and imposed fines on the incumbent for not fulfilling its obligation in relation to the management system for LLU requests in May 2007 and for not delivering various LLU elements in July and December 2007. Moreover, the regulator is investigating a complaint submitted by an alternative operator alleging that the subscribers' line database provided by the incumbent to its competitors is not accurate, favouring the incumbent's own retail services, as well as an alleged case of discriminatory behaviour by the incumbent in relation to time limits.

In July 2007, the Commission imposed a fine on the incumbent of €152 million for a very serious abuse of its dominant position in the form of a margin squeeze in the Spanish wholesale broadband access market between September 2001 and December 2006. The decision has been appealed by Telefónica (T-336/07) and also by Spain (T-398/07) before the Court of First Instance.

Mobile markets

Market situation

The Spanish mobile market is continuing to grow, albeit at a slower pace than in previous years and, as a result, the mobile penetration rate (110.4%) was below the EU average (111.8%) as at October 2007. Competition in the mobile market is strong, with the most intensive use of number portability in the EU as a competition tool (350 000 mobile numbers ported per month) and three of the main European mobile players present in Spain. During the last year, the number of market players in the mobile market significantly increased: the fourth UMTS licence-holder and the seven MVNOs launched commercial services.

For one more year, the market share of the incumbent's subsidiary in terms of subscribers (45.7) dropped slightly in favour of the second operator (30.7%), whilst the

third one remained constant (23.6%) as at October 2007. The average revenue per minute (ARPM)⁴ decreased further, reaching 16.9 €cent/min at the end of 2006, compared to 18.2 €cent/min one year earlier. The total number of users of UMTS services, although growing, is still low and data traffic, excluding SMS and MMS, amounted to a mere 3.3% of overall revenues.

Regulatory issues

Seven new entrants have launched mobile services following the access obligation imposed by the regulator on the three MNOs present at the time and which have not required further regulatory intervention. The appeals, to the national courts, lodged by the MNOs against the regulator's finding of joint dominance are still pending. So far the new entrants' market share has been marginal, and most of the new entrants are mobile service providers, although some cable operators are MVNOs with an infrastructure-based business model.

Though the establishment of an asymmetrical glide path for MTRs was supposed to increase regulatory certainty, the changes introduced every six months in nominal prices and peak/off-peak time periods might have produced the opposite effect. Following a number of interconnection disputes involving the new players in the mobile market, in October 2007 the CMT adopted further measures setting an asymmetric glide path for the fourth MNO in the market. The fourth MNO, which launched commercial services in December 2006 and contrary to its main competitors only holds a UMTS licence, still has a marginal market share of less than 1%. In October 2007, the CMT notified to the Commission draft measures intended, amongst others, to require 'full' MVNOs to set reasonable termination charges.

Roaming Regulation

The CMT and the SETSI both have competences in relation to the Roaming Regulation. Its implementation has run smoothly in Spain, and no problem has been detected in the Spanish outermost regions as operators are offering national mobile tariffs. The three main MNOs have opted to offer a tariff corresponding to the maximum ceilings. In 2006, the retail and wholesale ARPM⁵ for Spanish mobile operators were significantly higher than the regulated caps. As Spain is a tourist destination, wholesale roaming services have grown over recent years. Although roaming constitutes only 3% of the overall traffic, it generates 13% of mobile revenues.

Fixed

Market situation

Revenues in the fixed sector (€8.8 billion) are falling, although they still represented 21% of the overall revenues in the telecoms sector in 2006. However, the number of fixed lines is growing slightly and, at the end of October 2007, fixed penetration reached 40.63% of the population in Spain. One out of three residential customers have subscribed to fixed services as an additional service to broadband and/or TV services.

⁴ CMT's Annual Report 2006.

⁵ According to CMT's figures, in 2006, the retail ARPM that Spanish mobile operators got from their subscribers roaming abroad was 1.02 €/min, and the wholesale ARPM from foreign customers roaming in their networks was 0.70 €/min (VAT included).

Operators increasingly used fixed number portability to attract customers. One of the main alternative operators recently launched a bundled service including VoIP telephony, contrary to the existing bundled offers with traditional voice services, although VoIP market share is still marginal.

By July 2007, cable and LLU infrastructure investments resulted in 16.9% of subscribers using a provider for direct access other than the incumbent, one of the highest proportions in the EU. Contrary to the trend in previous years, in the course of 2007 the number of pre-selected lines increased slightly. As of December 2006, the shares in the fixed voice telephony retail market in terms of revenues were more or less stable.

Regulatory issues

Although WLR was not considered as a remedy in the initial market notifications in 2006, one year later the CMT finally imposed it as an additional obligation in the call origination market, thus enabling alternative operators to provide their customers with a single bill. The decision of November 2007 stated that the incumbent has six months to implement the wholesale service for analogue lines (€1.53 monthly fee) and two additional months for basic ISDN lines (€7.84 monthly fee), including non-active lines. The NRA has imposed a standstill period of four months on the incumbent.

In 2007, the subscription and monthly fees for fixed access increased by the Consumer Price Index. However, the CMT decided that the subscription and monthly fees will not be increased further in 2009. The CMT has facilitated the migration from shared access to fully unbundled access in cases where the subscriber swaps the incumbent's fixed telephony service for a VoIP service provided by an alternative operator.

The CMT imposed obligations not only for traditional interfaces but also for Ethernet and Fast Ethernet interfaces on the wholesale terminating leased lines market. The reference offer (known as ORLA) was adopted in December 2007 with prices established through a retail-minus methodology. With the publication of the ORLA, leased lines prices for traditional interfaces, which were last updated in November 2005, have experienced an average reduction of between 13% and 47%.

Broadcasting

Market situation

During the last year, the broadcasting transmission market grew by 36.9%⁶ due to the high coverage requirements imposed in July 2005 for national channels and to the significant increase in the number of allocated digital channels. Spain has one of the highest terrestrial television market shares in the EU. The majority of cable and IP-TV subscribers are benefiting from a bundled offer and more than half from triple-play offer. Mobile operators started offering audiovisual content to their mobile users through video streaming.

Regulatory issues

There are positive signs in the wholesale broadcasting transmission market. At the beginning of 2006, the CMT imposed an access obligation on the incumbent which owns

⁶ CMT's Annual Report 2006.

the only terrestrial broadcasting transmission network with national coverage, in 41 locations at cost-oriented prices. Although all national digital terrestrial television (DTT) broadcasters signed contracts with the SMP operator in 2006, two out of seven changed to an alternative operator in 2007, which was first to request access to the SMP operator's network. However, the cost accounting model has not yet been approved and the regulator expects this new entrant to benefit from the obligations at the beginning of 2008. The deadline for review of the market is February 2008.

In July 2005, the government provided for the allocation of a single multiplex for mobile broadcasting services before the switch-off. However, the tender for the assignment of frequencies has been further postponed due to the fact that the necessary legal framework has not yet been approved.

Horizontal regulation

Spectrum management

The SETSI has spectrum competences, since the planned Radio Spectrum Agency (the NRA intended to manage radio frequencies) has not yet been established. Although the Spanish legislation generally allows transfers of spectrum rights of use, the SETSI has recently presented a draft regulation on radio spectrum management specifying the conditions for spectrum trading for very limited frequency bands. Operators have been complaining for a further year about the excessively slow and not always transparent spectrum procedures, although the SETSI has no knowledge of those complaints.

Following the switch-off, the Spanish authorities have decided that a large part of the digital dividend is still likely to be used for broadcasting terrestrial services to the detriment of mobile and broadband communications. There has already been a significant increase in the number of allocated digital channels: 20 at national level, 62 at regional level (only 52 assigned) and 1 148 at local level (only 624 assigned). Moreover, national channels have been allocated in the upper part of the UHF band, unlike in other Member States.

Spain has taken measures to implement the remaining Commission Decisions adopted under the Radio Spectrum Decision to harmonise spectrum use in specific bands and has accordingly updated the national frequency allocation plan (known as CNAF), which was published in November 2007. The CNAF already includes the possible use of 900 MHz and 1800MHz for different technologies subject to EU approval, although the existing licences will need to be suitably modified. Spectrum refarming is currently a very contentious issue in Spain, as assignment of spectrum in the relevant bands is unequal and some of it was directly assigned more than ten years ago.

Rights of way and facility sharing

Difficulties in network deployment continue to be a primary concern of both fixed and mobile operators, and it seems that earlier measures have not been sufficient. The situation is very diverse, and in some regions and municipalities operators are still encountering serious difficulties in obtaining rights of way in the form of burdensome procedures, delays or even dismantling of mobile antennae.

In relation to mobile services, this issue is not just affecting UMTS but also GSM services. In June 2007, the Minister for Industry, Tourism and Trade called on the local

authorities to facilitate the roll-out of network infrastructure as only 20% of the planned GSM mobile coverage plan in rural areas, intended to achieve 99% population coverage by the end of 2008, had been fulfilled at that time⁷. In view of the public concern over antennae, the SETSI created a website, which provides an on-line service enabling citizens to compare the certified electromagnetic emission values for mobile installations to the mandatory limits. A more complete website is under preparation.

More municipalities started imposing a public domain occupation tax equivalent to 1.5% of gross revenue on MNOs, taking the view that the latter are not excluded by a 2003 law on municipalities funding. Mobile operators, who are already paying significant spectrum fees and economic activity charges based on the number of subscribers and antennae, have refused to pay the tax and have appealed a number of cases.

THE CONSUMER INTEREST

Tariff transparency and quality of service

At the end of 2006, general consumer legislation entered into force prohibiting the rounding-up of tariffs, with practical implications for mobile services. The NCA is investigating the increase in domestic prices following the abolition of the rounding-up practice, although the CMT has already established that there were minimal price increases.

Following the adoption of an Order on quality of service (QoS) in March 2006, operators publish a QoS report on their websites on a quarterly basis. Moreover, the universal service provider sends quarterly QoS information to the SETSI, which checks the performance against the minimum QoS targets for provision of universal service.

Universal service

In June 2007, the Commission launched an infringement proceeding for incorrect implementation and transposition of parts of the Universal Service Directive. The Spanish authorities initiated the first designation procedure for a universal service provider under the current regulatory framework, whilst the bundling of universal service elements as laid down in the public consultation may have limited the number of expressions of interest from potential operators. The incumbent operator was the only undertaking to express interest in accordance with the established criteria. The Spanish authorities decided to maintain directory enquiry services within the scope of the universal service and recently extended the current universal service designation until the end of 2008. Moreover, the Spanish Parliament has approved a law which paves the way for the future inclusion of broadband services in the scope of universal service, and will become the first EU country to do so, although the provision of fixed telephone services still constitutes a problem in certain areas.

In November 2007, the CMT approved the net costs for provision of the universal service over 2003, 2004 and 2005 (€284.35 million) and decided to activate the universal service financing mechanism. The regulator now needs to determine how the various operators will contribute to the universal service fund, as no public funding is provided for by law.

⁷ According to the latest E-GSM Plan data, 1 824 (34.2%) of the 5 335 projects had been finalised by November 2007, with 1 453 (27.2%) additional ongoing projects.

The previous decisions, where the regulator established that the unfair burden condition was not fulfilled, were always appealed by the universal service provider. Market players raised concern that this process was not very transparent and that the establishment of the unfair burden had not been sufficiently reasoned.

Number portability

Number portability continues to contribute significantly to the competitiveness of the Spanish market, and this facility has been used extensively as a competition tool to attract customers. October 2007 data indicate that Spain has one of the highest totals of mobile ported numbers (13.40 million, 27.30%) and of fixed ported numbers (3.01 million) in the EU.

The use of mobile number portability (MNP) in Spain entails no cost for the end user or for the operators. MNP has been extended to mobile service providers and MVNOs, which have the responsibility for directly managing the process. The fourth MNO, which entered the market in December 2006, has achieved a positive balance of ported numbers so far. In March 2007, the CMT speeded up the procedure for MNP, reducing the portability period to one and a half days, so that the total maximum time from the subscriber requesting that the number be ported is now five working days.

Consumer complaints

The SETSI has been very active in recent years in adopting legislation to strengthen consumer's rights, in areas such as quality of service, premium-rate services, complaint procedures or the right to automatic compensation for any interruption of service. In April 2007, a new order was adopted regulating complaint procedures and customer service.

The office established within the SETSI three years ago to deal with users' complaints and to provide information on users' rights receives an average of 287 queries and 54 complaints a day. Information about this office and about other consumer protection bodies is now included in operators' bills. The CMT's website includes information about consumer rights, FAQs and complaint procedures. The majority of the complaints (41.7%) concerned subscriptions and cancellations for the various services, followed by billing issues (22.9%). The number of complaints related to fixed access, which is still an issue of concern, increased from 5.9% to 7.8% in the first semester of 2007⁸.

European emergency number 112

The implementation of 112 in Spain is considered satisfactory and the 'push' method for caller location information is used countrywide. Spain has a system with a network of 17 centralised Public Safety Answering Points (PSAPs) at regional level (plus two PSAPs in Ceuta and Melilla), as responses to 112 calls are a regional competence. In September 2007, Spain signed the eCall Memorandum of Understanding.

Data protection

The transposition of the Data Retention Directive (2006/24/EC) was completed in October 2007, although it will require further secondary legislation. Spain did not request

⁸ SETSI's report on queries and complaints, June 2007.

the postponement of application for Internet data, so the provisions have immediate effect for all network operators and service providers. The retention period is one year (same as the existing one), extendable to 24 months, and costs will be borne exclusively by market players. The legislation includes the establishment of a register of mobile prepaid customers.