

3.9 LUXEMBOURG

1. REGULATORY FRAMEWORK

1.1. National Regulatory Authority

As set out in previous reports, regulatory tasks in Luxembourg have been split between the Ministry of Communications and the “Institut Luxembourgeois de Regulation” (ILR). The Ministry of Communications is responsible for the award of licences and for establishing the list of operators with significant market power, in both cases on the basis of a proposal from the ILR, as well as for adopting the frequency allocation plan and assigning frequencies, supervising their use and defining any compensation for universal service. All other regulatory tasks are assigned to the ILR.

The independence of the regulatory authority from the incumbent, including the Ministry of Communications, has been ensured since a government reorganisation which took effect on 11 August 1999 and a reorganisation of the Board of Directors at the end of 1999.

Although the ILR has a total staff of 30 persons, it has only a very limited staff equivalent to 5 full-time employees performing tasks in the telecommunications sector. It has relied on the assistance of external experts to examine the incumbent’s cost accounting system and data. However, very limited progress has been made to date in assessing the incumbent’s cost accounting practice.

At the hearing of 1 October 2002 on the status of the telecommunications market in Luxembourg, consumer organisations were also in favour of an increase in staff at the ILR, in particular with a view to enabling the ILR to establish a consultation procedure for consumer groups.

Appeals do not appear to lead to delays in the implementation of the ILR's decisions. Under the Law on administrative organisation (*Loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif*), operators can appeal against the ILR's decisions to the administrative courts.

1.2. Management of numbers

The ILR adopted the national numbering plan on 19 April 1999 and is responsible for its application. Under the plan, all newly attributed numbers were to have 8 digits, while the shorter 6-digit numbers previously used were not changed to the new format.

1.3. Frequency management

The frequency allocation and assignment plan (Regulation of 10 March 2001) was published in the Official Journal on 12 July 2001. Responsibility for frequency management is split between the ILR and the Ministry of Communications, with the Ministry responsible for the award of the licence, including frequency assignment. The ILR laid down procedures for the assignment of frequencies (Decision of 16 June 1999 on frequency assignment; Decision of 28 June 2001 on the procedure applicable to the

granting of a licence for radio-messaging) and organised the public tender for the award of 3G licences (published in the Luxembourg Official Journal of 2 February 2002).

Only three of the four available 3G frequency blocks have been assigned. One DCS 1800 block was offered in a public tender but could not be assigned for lack of a bidder.

2. INTERCONNECTION AND ACCESS REGIMES

2.1. Interconnection

2.1.1. Reference interconnection offer

EPT's RIO comprises interconnection at two national and three regional points of interconnection.

In its decision of 19 July 2002, the ILR decided to approve the technical elements of the RIO 2002 proposed by EPT in December 2001, but required EPT to modify certain other aspects. EPT was ordered, for example, to offer regional interconnection to non-geographical numbers, thereby addressing new entrants' previous concerns that the RIO had limited regional interconnection to geographical numbers only. The conditions and tariff offered for interconnection to provide internet access are those of the general interconnection charging system.

However, interconnection tariffs for 2002 have not yet been approved (see next paragraph).

2.1.2. Interconnection charges [cost-orientation; cost standard]

The incumbent filed its RIO 2002 to the ILR at the end of December 2001. However, the ILR considered the cost accounting data submitted insufficient to enable it to approve the proposed interconnection tariffs. In its decision of 6 May 2002, the ILR set out the points with which EPT had to comply with regard to cost separation, the cost accounting system and the data submitted for tariff approval. The ILR also concluded in its decision that the cost accounting data submitted were insufficient to enable it to examine whether the proposed tariffs were cost-oriented and that it was therefore not in a position to decide on the interconnection tariffs. The incumbent subsequently submitted additional information. However, after a study by an external consultant, the ILR stated in its decision of 19 July 2002 that the documentation provided was still not sufficient to approve the 2002 interconnection tariffs and issued a warning (“*avertissement*”), the first sanction provided for by the Telecommunications Law for non-compliance with the ILR's decisions.

Pending the approval of the RIO 2002 by the ILR, the tariffs proposed by the incumbent in its RIO 2002 are applicable. The current tariffs at peak hours are 1.02 cents/min plus a call set-up charge of 0.42 cents at regional level, and 1.32 cents plus a call set-up charge of 0.55 cents at national level, which represents a reduction compared to the 2001 tariffs. Those tariffs, however, are still among the highest compared to other Member States

The current tariffs are subject to revision by the ILR with retroactive effect from 1 January 2002.

The fact that the 2002 interconnection tariffs have not yet been approved creates uncertainty on the market. However, the ILR has made clear its commitment to implementing cost-oriented interconnection tariffs, backed by cost accounting data

complying with the principles set out in its decision of 6 May 2002. In its Recommendation of 22 February 2002 (OJ L 58 of 28 February 2002, p. 56), the Commission also proposed reliance on cost accounting data rather than a benchmark.

Furthermore, a complaint was filed to the ILR concerning a price squeeze between the incumbent's retail tariffs and the applicable interconnection tariffs. In its decision of 27 September 2002, the ILR concluded that the RIO 2002 interconnection tariffs did not leave a sufficient margin for operators to enter the market, that the retail tariff was unreasonably low compared to the interconnection tariff and that EPT's retail tariffs must therefore be regarded as predatory. The ILR ordered EPT to reduce the interconnection tariffs from 1 January 2003 by 20.06% and to include this reduction in its (forthcoming) RIO. The ILR based the reduction on a margin calculation. The decision does not, however, constitute approval of the RIO tariffs.

2.1.3. Fixed to mobile call termination

The peak-time mobile termination rates of the two mobile operators, LuxGSM and Tango, are in the lower band, with four countries having lower termination rates (Austria, Finland, Sweden and the UK).

2.1.4. SMP designation

EPT Luxembourg has been designated as having SMP in the fixed wired market.

In its decision of 21 June 2000, the Ministry of Communications decided that the two mobile operators have SMP in the mobile market. No mobile operator has been notified as having SMP in the national interconnection market.

This decision was taken following an opinion issued by the ILR on 17 December 1999 based on the market share ceiling of 25% and further criteria set out in the Interconnection Directive. The ILR did not, however, communicate the market shares of mobile operators in the national interconnection market.

2.1.5. FRIACO

The incumbent does not currently offer competitors flat-rate internet access. Flat-rate offers for customers are available from the incumbent and alternative operators.

2.2. Interconnection leased lines/partial circuits

2.2.1. Availability

The RIO also includes interconnection leased lines (half links).

In its decision of 19 July 2002, the ILR also approved the technical part of the RIO concerning interconnection leased lines, while requiring ETP to include certain information in its RIO (on the capacity of certain lines and on access points).

In its decision of 28 June 2001, the ILR had, on a provisional basis, approved the tariffs proposed by EPT for interconnection leased lines. The level of those tariffs is comparable to the average for the other Member States, with five countries (Denmark, Germany, Ireland Finland and Sweden) having lower tariffs for partial circuits (2km 64 Kbit/s and 2 Mb/s).

2.3. Unbundling

2.3.1. RUO

The conditions in the RUO for full unbundling appear to be complete. Unbundling is still in its early stages. One operator has concluded an agreement for full unbundling. Shared access does not appear to fully correspond to market needs, in particular with respect to the relatively high level of one-off fee charged by EPT. No agreement had been concluded as of 1 October 2002.

In its decision of 28 June 2001, the ILR approved the RUO without a time limit, subject to future changes being made where necessary. In its decision of 28 June 2001, the ILR also set the monthly rental for full unbundling at €13.26 for voiceband usage and €15.79 for broadband usage, and asked EPT to include in its RUO conditions for shared access.

The RUO also contains an offer of shared access at a monthly charge of €7.54. This tariff was fixed by the ILR in its decision of 28 June 2001 (Decision 02/43/ILR).

2.3.2. Collocation conditions and effective implementation

The RUO contains an offer for collocation at all Main Distribution Frames (MDF) in Luxembourg. Some EPT collocation sites do not have sufficient space and alternative solutions are provided in those cases. EPT does not offer co-mingling.

One operator initiated an interconnection dispute settlement procedure to obtain the right to sub-let collocation rooms and to obtain different air conditioning conditions in collocation rooms for interconnection than for unbundling. In its decision of 19 September 2002, the ILR stated that new entrants can sub-let collocation rooms and ordered EPT to provide proof of air conditioning costs.

2.4. Bitstream access

2.4.1. Non-discriminatory access

Since October 2000, EPT has been offering users DSL (LuxDSL). EPT does not offer interconnection at the ATM level, arguing that this would be technically impossible owing to its voluntary network organisation. At the hearing of 1 October 2002 on the status of the telecommunications market in Luxembourg, new entrants stated that they had first requested bitstream access in 2000 and that EPT had the technical capability to offer it. They have not launched a dispute settlement procedure, however (which was not available at the time, see under NRA).

2.4.2. Tariffs

EPT offers LuxDSL on a resale basis to ISP, with a discount on the tariff charged to users. A limited number of ISP linked to EPT offer DSL on this basis. At the hearing of 1 October 2002 on the status of the telecommunications market in Luxembourg, new entrants stated that they do not consider the resale offer corresponded to EPT's obligation to offer non-discriminatory access.

2.5. Situation of the (broadband) local access market

2.5.1. Status of DSL market, position of incumbent

The incumbent's monopolisation of the broadband market appears to have intensified during the reporting period.

EPT has been marketing its DSL offer to its own customers since October 2000, while ISP can only resell EPT's DSL offer. One other operator currently offers its own DSL package to customers, but there are no data available on the number of the incumbent's DSL lines marketed by ISP.

EPT has also acquired a major share of broadband access via cable modem. On the basis of an agreement with cable operators, EPT has created a media platform "Image" together with cable operators, which allows it to market internet access via cable (TV surf). Two other cable operators currently offer broadband internet access to customers on a local basis. During the hearing of 1 October on the status of the telecommunications market in Luxembourg, new entrants stated that they do not have access to the platform organised by EPT and the cable operators. The conditions of the launch of the TV-surf offer and the underlying acquisitions and agreements between cable operators and EPT have not been examined by the competition authorities.

The tariffs charged to customers for ETA's two broadband offers, DSL and internet access via cable modem, are considered to be high. Broadband internet connections appear to be underdeveloped in Luxembourg compared to the high internet penetration (55%).

One operator currently offering broadband access via WLL plans to offer DSL via the fully unbundled local loop. As of 1 October 2002, no data were available on whether it had started offering DSL.

2.5.2. Development of alternative means of access

One operator offers broadband access via WLL and has gained about 1% of total broadband access lines (cable, DSL and WLL). However, even though tariffs for DSL and cable access are high in Luxembourg, WLL is not an economically viable alternative to cable and DSL broadband access except for the business sector. An offer for internet access via cable TV launched by a cable operator in autumn 2002 is now available in certain areas of the City of Luxembourg.

2.6. Leased Lines

2.6.1. Pricing

Rebates offered by EPT to its customers on the tariffs set by the ILR still appear to be a problem. The ILR has not received a formal complaint about this, however.

2.6.2. Delivery periods and quality of service; non-discrimination

There have been no complaints regarding discriminatory delivery of leased lines.

2.7. Numbering

2.7.1. Carrier selection and pre-selection

Carrier pre-selection (CPS) had to be available from 1 July 2000 for all calls (international and national together), and separately for national and international calls from 1 July 2001.

2.7.2. Number portability

Number portability was introduced as from 1 July 2000 for geographical numbers. However, non-geographical numbers cannot be ported.

Introduction of mobile portability is planned together with the move to the new framework in July 2003. It is widely expected that acceptance of mobile number portability by users will be much higher than for fixed number portability.

The ILR is currently preparing the transition to mobile number portability, but discussions are not very advanced. At the hearing of 1 October 2002 on the status of the telecommunications market in Luxembourg, the two mobile operators stated that they will provide mobile number portability (only) together with the marketing of 3G Services in Luxembourg. It is not clear, however, whether both mobile operators will market 3G services from July 2002. They therefore appear to accept possible delays in the introduction of mobile number portability. The discussions at the hearing showed that the ILR will most probably have to coordinate and supervise the development of mobile number portability in Luxembourg. An agenda for this project has not yet been fixed.

2.8. Cost accounting and accounting separation

2.8.1. Cost accounting systems in place, statement of compliance

On 6 April 2000, EPT presented its cost accounting model to the ILR in respect of interconnection and based on LRIC, which it updated in 2001. In its decision of 6 May 2002, the ILR specified the requirements for separate cost accounting in all areas, with which EPT had to comply. The purpose of the requirements is to enable the ILR to examine interconnection, local loop unbundling and retail tariffs with regard to non-discrimination and cost-orientation.

The ILR's decision of 6 May 2002 requires EPT to produce cost accounting data for the activities related to the core network, the local access network, retail activities and other activities, in accordance with Commission Recommendation 98/322EC, and specifies the services falling within each of the above areas. The cost accounting system must show current cost and LRIC.

EPT considers that those requirements go beyond what is necessary to prevent cross-subsidisation and constitute an excessive burden. EPT has not provided the ILR with a description of such a cost system. It acknowledges, however, that it will have to modify its cost accounting system.

The ILR has not yet been in a position to supervise any of EPT's tariffs on the basis of the existing cost accounting system. In its decision of 19 July 2002, as explained above, the ILR stated that the information provided by EPT was insufficient to approve the tariffs for interconnection, and announced that it would impose sanctions in the event of lack of compliance with the cost accounting requirements. A statement of compliance of the

incumbent's cost accounting system has not been issued so far. The Commission has opened an infringement proceeding against Luxembourg for not having carried out the verification EPT's cost accounting system and for not having published a statement of compliance.

3. AUTHORISATIONS

3.1. Licence conditions

The ILR's operational budget for 2001 is €3.5 million, 4% of which is financed by licence fees of new entrants, 20% by the incumbent and 58% by frequency fees (see Regulatory Annex). Those figures are not suited, however, to show whether or not the principle of coverage of administrative costs is observed, as the budget also includes ILR activities which are not related to the issue, management, control and enforcement of licences in the telecommunications sector, as well as activities in the energy sector. The ILR plans to present administrative costs related to its telecommunications activities separately in its annual report for 2002.

3.2. Rights of way - role of local authorities in infrastructure development

Concerns about discrimination with regard to granting rights of way have been addressed by the Luxembourg authorities in a number of legislative measures, but have not been fully allayed.

Discrimination in granting rights of way for the roll-out of fixed infrastructure arose from the fact that in so-called "zones non edificandi", i.e. in areas where construction was not permitted (along highway), new entrants were unable to obtain rights of way, while the incumbent had rolled out its infrastructure. Furthermore, there was a lack of coordination of the granting of rights of way in the municipalities in particular, with the result that, unlike the incumbent, new entrants could not obtain rights of way. The Commission decided to take an infringement proceeding to the Court of Justice on the basis that this legal and factual situation represented a discrimination of new entrants (ECJ Case C-97/01). In his conclusions of 4 July 2002 the Advocate General stated, inter alia, that procedures for granting rights of way must be transparent and clear, that a definitive answer must be given within a reasonable period and that sufficient guarantees must have been given to ensure that discrimination in the process of granting rights of way or its implementation is prevented (conclusion 25), and in the absence of those procedures concluded that Luxembourg had failed to implement the non-discrimination principles for granting rights of way.

In the meantime, Luxembourg adopted a Regulation of 8 June 2001 on the conditions of use of public roads and railways, defining the content of the right of access to public land and setting out the procedure for filing a request to the competent authorities. Under the Regulation, the infrastructure manager (gestionnaire du réseau) has been mandated to grant rights of way. However, this did not always resolve the problem of lack of transparency with regard to powers for granting rights of way. Luxembourg then adopted further regulations to improve access to public land. The Law of 6 June 2002 grants telecommunications operators the right to lay cable and install wireless connections along the rails of the railways, subject to authorisation by the Ministry of Public Works. No experience with the application of this Law has been reported yet and it is not possible, at this stage, to conclude whether the problem of discrimination in "zones non-edificandi"

has been entirely removed by the new legislation. In practice, new entrants have been granted rights of way along highways.

As regards the lack of coordination at the level of municipalities, the discrimination has not been removed and there is still concern about lack of clarity as to the conditions and procedures applicable.

Furthermore, the framework applicable to mast building appears to be prohibitive for the roll-out of 3G, as a result of three procedures which have a cumulative effect: the “commodo-incommodo” procedure (Loi du 10 juin 1999 relative aux établissements classés), which makes the construction of radio transmitters subject to public consultation and an environmental impact assessment if emissions from the mast are likely to exceed 3V/m, while the Council Recommendation of 12 July 1999 relating to limitation of electromagnetic exposure recommends a value of 42V/m; secondly, the land-use planning authorisation procedure (plan d’aménagement du territoire), which allows for construction of masts in 5% of the territory only (business zones only) and thirdly, the authorisation procedure in the municipalities, which does not provide for clear procedures and is often applied arbitrarily. The Luxembourg authorities intend to remove those impediments by adopting a regulation on sector-specific land-use planning for mast and antenna construction. This regulation would not, however, establish procedures for granting rights of way in municipalities, and will not therefore solve the problem of unclear procedures in municipalities addressed in the above-mentioned infringement procedure. It is also questionable whether the legislative process will be in time to allow 3G operators to comply with the obligations for roll-out of their 3G networks specified in their licences.

4. UNIVERSAL SERVICE / CONSUMERS

4.1. Contracts; Itemised billing;

The Voice Telephony Directive requires the level of detail of the standard bill to be sufficient to enable users to verify and check the charges incurred.

The Regulation of 25 June 2002 amends the Regulation on network and services conditions and the Regulation on conditions for granting the ILR the powers to specify the level of detail of itemised billing. In its decision of 19 July 2002, the ILR specified the items to be set out in a standard itemised bill with regard to each call (date, time, duration, called number, charge). The Commission subsequently closed an infringement proceeding relating to itemised billing.

The Regulation of 25 June 2002 also grants the ILR powers to modify, at any time, conditions in contracts between providers and users. Following the adoption of the legislation, the Commission closed an infringement proceeding relating to the ILR's powers to supervise conditions in contracts.

In addition, all consumer contracts, including those with telecommunication service providers, can be revised if abuse is established, under the general provisions on monitoring of consumer contracts. Consumer groups have a right to seek such review through the courts. Those instruments have not so far been used.

4.2. Retail tariffs

Under the Regulation of 18 April 2001 amending the regulations on licensing conditions for network and services, the ILR must ensure that SMP operators' retail tariffs are cost-oriented. However, as set out above (cost accounting), EPT has not yet established a cost accounting system that shows the costs for retail tariffs separately. The ILR was therefore not in a position to examine either the subscription fee or the per minute retail tariffs to establish whether or not they are cost-oriented.

EPT has not changed this tariff since the subscription fee was increased on 1 July 2001. EPT considers that it does not yet correspond to costs, but does not envisage a further increase.

Concern about a price-squeeze between the national per minute retail tariffs and the regional interconnection tariffs was largely removed by an ILR decision of 27 September 2002 (see under interconnection). However, new entrants also complained to the ILR about a price squeeze between the national retail tariff and the national interconnection tariffs, which made it impossible to offer national calls. New entrants therefore intended to focus on providing international calls. The ILR also stated in its decision that, in relation to interconnection tariffs, the per minute retail tariffs were set at such a low level as to eliminate competition.

4.3. Funding – implementation of the Court of Justice ruling

Luxembourg has not established a scheme for compensation of universal service costs.

4.4. Universal directory

The universal directory is provided by a subsidiary of EPT, Editus.

5. DATA PROTECTION

5.1. Implementation/Traffic data retention

As Luxembourg has not transposed the Telecommunications Data Protection Directive 97/66/CE, there are major gaps in the protection of users with respect to almost all the issues addressed in the Directive. Furthermore, the current data retention practice constitutes a substantial burden for operators, which have to store traffic data for 10 years without compensation.

Following publication of the (General) Data Protection Law on 2 August 2002 which will enter into force on 1 December 2002, a bill has been drafted to transpose the Telecommunication Data Protection Directives 97/66/CE and 2002/58/EC. The bill is currently being examined by the government and is expected to be submitted to the Parliament and the Council of the State in October 2002. It provides for the obligation to delete traffic data with the exception of data necessary for billing purposes. It states that traffic data must be retained for security purposes for one year.

5.2. Unsolicited calls and faxes

There are currently no rules on unsolicited faxes and calls. The purpose of the above mentioned government bill is also to transpose the Communications Data Protection

Directive 2002/58/EC, i.e. it proposes the opt-in solution for unsolicited calls, faxes and e-mails.

6. MOBILE ISSUES

6.1. UMTS

The Government's Decision of 18 May 2000 provided for the award of four licences with comparative bidding on the basis of predefined quality criteria. The 3G Decision was implemented by a Regulation of 14 December 2001 concerning licence conditions for mobile operators.

Following a comparative bidding procedure launched by the ILR on 1 February 2002, three licences were awarded on 22 May 2002.

In the tender procedure, operators announced marketing launch dates between January and August 2003, and coverage of between 30% and 95% of the population and 5% to 69.5% of the territory at the time of the launch. However, the licence conditions finally imposed concerning coverage have not been published.

Under the Regulation of 14 December 2001, 3G and 2G operators are obliged to offer national roaming on non-discriminatory terms (i.e. under the same conditions as between 2G and between 2G and 3G networks), but mobile operators' roaming licence conditions have not been published.

6.2. Infrastructure sharing

Site sharing is to be encouraged and can only be denied if technically impossible, e.g. owing to lack of space, wind resistance of masts and radio-electric interference.

7. PREPARATION FOR THE TRANSPOSITION OF THE NEW FRAMEWORK

The government plans to transpose the new framework in four sets of legislation: it is currently elaborating a "Law on Communications" to transpose the Framework, the Authorisations Directive and the Universal Services Directive. Another law will address implementation of the Spectrum Decision, together with certain aspects of the Framework and the Authorisations Directive linked to frequency management, while a further law will address reorganisation of the ILR. In addition, a bill to transpose the new Communications Data Protection Directive has been prepared by the Ministry, and is currently being examined by the Council of State.