

# AUSTRIA

## INTRODUCTION

Following last years' trends, the Austrian market continues to be characterised by a highly innovative and competitive mobile market, covering not only voice but also mobile broadband services, the expansion of which has grown significantly during this year. There are low mobile end-user prices with flat-rate offers, and mobile TV has also been launched. At the same time, with the increasing popularity of mobile broadband services, end-users are becoming aware of the capacity constraints that these services present. Against the success of mobile services, the fixed markets are likely to undergo significant changes in the coming years; the size of the fixed market is decreasing but the market shares of the incumbent's fixed network operator are increasing in several segments of the fixed retail calls markets. Fixed broadband penetration in Austria is below the EU average. To face the challenge of mobile broadband services, the incumbent operator is offering triple-play and quadruple-play bundled offers at very low end-user prices. In addition, alternative operators have invested in their own infrastructure in the most densely populated areas, such as the main cities, and competition in the wholesale broadband access market appears to be more intense in these areas despite the fact that on a nation-wide basis alternative operators appear to be losing market shares. The coalition agreement of the new Austrian government which was established in December 2008 addresses the existing digital divide, and sets access to broadband at a minimum speed of 25 MB/s for the whole population as a target to be achieved before 2013.

There continue to be delays in the implementation of the NRA's decisions and concerns as to the need in certain areas for a more pro-competitive strategy towards the regulatory challenges facing the sector as a whole.

## REGULATORY ENVIRONMENT

### Main regulatory developments

The NRA continues to be very active in carrying out market reviews and, where necessary, imposing remedies. However, there continue to be delays in the implementation of these decisions. The second round of market analyses was completed with the review of the wholesale broadband access market. The third round of market analyses has already started, with the consultation on the draft for a new telecommunications market definition ordinance.

While the NRA considered that the obligation to provide wholesale broadband was not necessary in certain areas, due to heightened competition on the basis of alternative infrastructures, and since the mobile markets are characterised by intense competition, it is difficult to judge the effectiveness of the remedies imposed in other markets, in particular the fixed markets. The triple-play and quadruple-play retail bundle offers of the incumbent fixed network operator have been analysed by the NRA, but they remain at the moment a matter of concern for alternative operators.

With the completion of the second round of market analyses, several remedies under the new regulatory framework have only been specified following dispute settlement procedures between operators, despite the fact that the NRA has the power to set prices if it observes any deviation from the price setting standard it has imposed as a remedy for a particular service.

The NRA's practice has led to delays in setting tariffs, with a negative impact on the efficiency of the regulatory process. The way in which the NRA will specify the remedies in the third round of market analyses remains to be seen.

Market players have expressed concerns about the overall effectiveness of the performance of the NRA, regretting in some cases the lack of transparency and pro-activity of the NRA. Some operators consider that regulatory intervention is not sufficiently fast for this dynamic sector.

### **Organisation of the NRA**

The Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR) acts as the operational arm of the Austrian Communications Authority (KommAustria), which is a subordinate administrative body of the Federal Chancellery that regulates the broadcasting sector. RTR also acts as the operational arm of the Telecommunications Control Commission (TKK), which is responsible for regulation of the electronic communications markets.

No modification of the organisation of the NRA took place in the reporting period. However, new legislation in the broadcasting sector is under preparation. According to the coalition agreement of the new Austrian government, the organisation of the NRA should be restructured, by extending the scope of responsibilities of KommAustria to also cover electronic communications. Particular attention will need to be given to whether this new NRA will fully comply with the requirement of independence as established by the EU regulatory framework.

### **Decision-making**

TKK notified the second market review for the wholesale broadband access market during 2008, thereby completing the second round of market analyses. Taking account of the different degrees of infrastructure-based competition in this market, TKK proposed geographic variations in the remedies imposed on the incumbent fixed network operator and withdrew most of the obligations currently imposed on the incumbent fixed network operator in those areas with higher competitive pressures.

Furthermore, at the end of 2008 RTR launched the public consultation on the new telecommunications market definition ordinance, thereby initiating the third round of market reviews. The proposed new ordinance defines nine electronic communications markets susceptible to ex ante regulation. The market for access to the public telephone network at a fixed location is proposed to be subdivided into two access markets for residential and for non-residential customers respectively. There are two separate markets defined for wholesale terminating segments of leased lines, depending on the bandwidths, and for the higher bandwidths RTR proposes to take account of geographic variations in the competitive conditions by defining sub-national markets. In addition it is proposed to define a retail market for the minimum set of leased lines. Some market players felt that there was not sufficient transparency and cooperation with RTR in the preparation of this draft ordinance, prior to the launching of the official public consultation. The Commission commented on the approach entailing separate notification of the market definition and the market analysis, considering it as an inadequate means to identify and address all competition problems on the relevant telecommunications markets.

The NRA reported that dispute settlements continued to play an important role during 2008. The market analysis decision sets the general regulatory framework applying in a particular

market, and the dispute settlements specify the concrete elements of the imposed obligations. However, alternative operators are concerned about the fact that the deadline for completing the dispute settlement procedures is not always respected and, recently, TKK has expressed its intention to resolve the disputes in a timelier manner. Furthermore, the annulment of some market analysis decisions by the Austrian Administrative Court has made it necessary to review the dispute settlement procedures already completed. In such cases the NRA can impose the level of prices that would apply retroactively via dispute settlement decisions, but according to the Austrian Administrative Court not within market analysis decisions, which results in legal uncertainty for market players. The Commission services are looking into this matter.

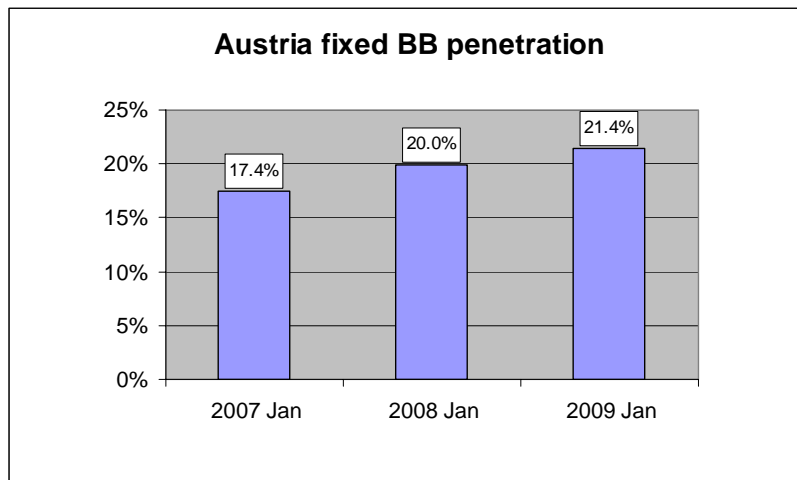
In the request for a preliminary ruling (C-426/05) made by the Austrian Administrative Court, the European Court of Justice interpreted the relevant provisions of the regulatory framework in a way which allowed affected undertakings that are not the direct addressee of a decision by the national regulatory authority to have this decision reviewed by a court. They are to be regarded as "affected" by such a decision if they can demonstrate that it adversely influences their rights deriving from EU telecoms rules, e.g. the rights corresponding to non-discrimination or access obligations of SMP undertakings. The Court thus promoted effective legal protection of alternative operators in the market review procedure. As a result of that judgment, the NRA gives all interested parties, including alternative operators, the opportunity to submit comments during the process of adoption of the market analysis decisions.

## **MARKET AND REGULATORY DEVELOPMENTS**

The total turnover of the Austrian telecommunications sector was €5.91 billion as of 31 December 2007, with revenue from the fixed markets (including broadband and leased lines) amounting to €2.25 billion and revenue from the mobile markets totalling €3.66 billion. The total value of tangible investment in telecommunications networks for 2007 was €879 million, including €219 million by the incumbent and €101 million by alternative operators in fixed telephony networks. Mobile operators invested around €559 million.

## Broadband

### Market situation



The penetration rate was 21.4% in January 2009 (up from 18.98% in October 2007 and 20.8% in July 2008, but still below the EU average of 22.9%). National DSL coverage remained relatively stable from 91.3% at the end of 2006 to 92% at the end of 2007. DSL coverage in rural areas increased slightly from 79% at the end of 2006 to 80.6%

at the end of 2007. In urban areas cable continues to be the most popular technology. Cable coverage in rural areas also increased slightly from 17% at the end of 2006 to 18% at the end of 2007. In January 2009, all broadband lines based on means other than DSL, which includes wireless local loop, cable modem, fibre to the home, leased lines, power line communications and others, had a market share of 36%, down from 38.2% in October 2007.

As regards broadband lines, the market share of alternative operators was 55% in January 2009, down from 61.7% in October 2007. In January 2009, 64% of broadband lines in Austria were based on DSL technology and the market share of the incumbent fixed network operator in DSL lines was 71%. In January 2009 new entrants had 293 909 DSL lines on PSTN using full LLU (up from 252 487 in the previous year).

Whereas 372 266 new broadband lines were created from July 2005 to July 2006, the year from July 2006 to July 2007 saw this figure decrease to 238 963, and from July 2007 to July 2008 it further decreased to 174 212. There is therefore a decline in the rate of growth of broadband services. According to the NRA the retail prices for fixed broadband have been dropping<sup>81</sup>.

Mobile broadband continued to grow significantly during 2008, with very competitive prices. Mobile broadband penetration stood at 22.8% in January 2009, well above the EU average of 13%. Furthermore, taking into account only the number of mobile broadband connections using only dedicated data cards/modems/keys, typically allowing mobile Internet via laptops, Austria is the leading country with 11.4% penetration, compared to the EU average of 2.8%. According to the NRA, whereas in the past mobile broadband connections were mainly used by business customers and certain residential customers as a complement to fixed broadband access, the expansion of mobile broadband is now exerting a certain competitive constraint on fixed broadband, and influencing its development. The NRA reports that, in the residential segment, most of the consumers with a mobile broadband connection do not have an additional fixed broadband connection. However, the bandwidth available with mobile broadband services in practice remains low compared to fixed-line broadband despite the fact that the actual bandwidth appears to be increasing, and the growth of these services is also

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<sup>81</sup> RTR's Communications Report 2007, p. 142.

making consumers more aware of the technical constraints. However, market adoption stayed strong over the reporting period.

The incumbent operator responded to these developments by offering retail triple play bundled products at a reduced price, for a limited period of time, that were very well received by customers.

### *Regulatory issues*

The NRA adopted the second review of the wholesale broadband access market. In its decision, TKK defined a national market but recognised certain geographic variations in the competitive conditions when defining the remedies.

TKK included in the market definition wholesale broadband access by means of DSL, cable and fixed wireless access (WLAN, WLL). In addition to external wholesale provision, self-provided services by vertically integrated undertakings were also included, and this was largely based on the indirect competitive constraints exercised via their retail products. The incumbent fixed network operator was designated as having SMP on the national wholesale broadband access market. However, TKK considers that competition problems arise mainly in areas with a more limited presence of alternative infrastructure operators.

TKK proposed to differentiate the remedies by maintaining the existing remedies in the less competitive areas, including access, price control on a retail minus basis, non-discrimination and cost accounting, and removing the existing obligations on the incumbent with the exception of accounting separation in those areas with more infrastructure competition. However, by a recent decision by the Austrian Administrative Court on 17 December 2008 this decision has been annulled. Therefore, the previous decision still applies.

In addition, a new bitstream offer was put in place during the reporting period, but so far only one alternative operator appears to have applied for this new offer.

The incumbent fixed network operator introduced a retail triple-play offer in mid-November 2007 lasting two months, which its competitors regarded as resulting in a margin squeeze, in particular on broadband tariffs at wholesale and retail level. During the promotion period, the price for full unbundled access was set at €6.35. TKK analysed this triple-play offer and imposed conditions on it. The reduced price would apply permanently for those new customers acquired by alternative operators during this period. Furthermore, following a dispute settlement procedure introduced by one alternative operator against the incumbent fixed network operator, the NRA decided to reduce the level of LLU fees for full unbundled access to €9.33 applying retroactively as from 1 January 2008. For the first time, the NRA thus set those fees below the Forward Looking Long Run Average Incremental Costs (FL-LRAIC) level in order to avoid any potential margin squeeze, which, for some alternative operators, calls into question the effectiveness of the wholesale prices applied up to that date.

Given the success of this bundled offer in 2007, the incumbent operator introduced a similar offer in November 2008, and this has also been examined by the NRA. Even though the prices for LLU and WBA were again reduced for new customers acquired by alternative operators during the promotional period, some alternative operators claim that the current conditions of the wholesale products are not sufficient to reproduce the incumbent's retail offers whilst also permitting an acceptable profit margin. The NRA considers that these offers did not have an appreciable impact on the fixed line competitors, but noted that the increase in mobile broadband services slowed down during the promotional period and a number of fixed

broadband customers were acquired. Alternative operators claim that the volumes in WBA and LLU were significantly reduced during that period. While a reduction in WBA volumes in favour of LLU services was observed, as regards broadband lines at the retail level, the market share of alternative operators declined from 61.7% in October 2007 to 55% in January 2009.

RTR has initiated a national discussion on next-generation networks and established an industry group to discuss technical and regulatory issues related to next generation access (NGA) networks; however, no definitive investment decision by the incumbent fixed network operator has yet been taken. The incumbent operator would like risk-sharing arrangements to be put in place, whilst alternative operators complain about the lack of transparency regarding these future developments.

## Mobile markets

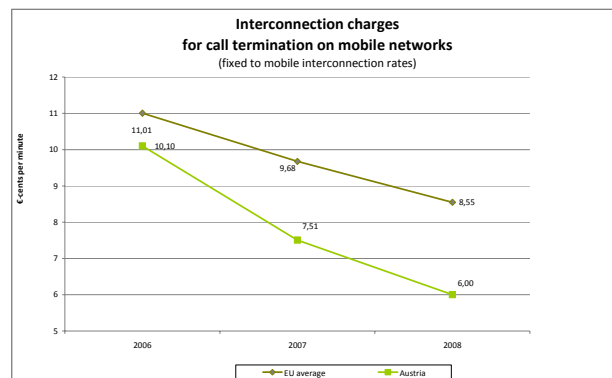
### Market situation

Mobile penetration was 122% in October 2008 with more than 10 million subscribers, and an increasing proportion of the total voice traffic volumes handled through mobile networks (62% at the end of 2007). The mobile market in Austria continues to be characterised by highly competitive retail prices and innovative services, such as mobile TV. As of October 2008, the leading mobile operator had a market share of 41.83%, the second largest operator had a market share of 32.42% and the rest of the operators together had a market share of 25.75%.

According to the NRA, retail rates for mobile communications have continued to decrease<sup>82</sup>. Diversity of offers, including the introduction of flat rates as from 2007, lowers prices considerably, and end-user prices for mobile communications have in general remained among the lowest in Europe.

### Regulatory issues

Following the annulment by the Administrative Court (VwGH) of the decisions by TKK in the first and the second round of market reviews concerning the market for voice call termination on individual mobile networks, TKK was invited by the VwGH to carry out the market analyses again for the period 2004-2008 and to set concrete mobile termination rates.



TKK adopted a new decision setting the mobile termination rates, and set out a glide path towards a symmetric target mobile termination rate of €0.0572 as from 1 January 2009 at the latest. This level is to be reached by all MNOs through linear decreases towards the target level. The decision was appealed by all mobile network operators and this appeal is still pending, thus creating some legal uncertainty.

During the reporting year, the NRA resolved two disputes between the mobile branch of the incumbent operator and another mobile operator in relation to the fees and charging principles for call origination on the public mobile networks, and in relation to the fees for SMS termination, respectively. Given that no operator has been designated as having significant market power in the markets concerned, the NRA did not impose cost-oriented prices but set the prices at a reasonable level. In the case of mobile origination, the prices are set at an asymmetric level for the past, with lower origination prices for the mobile branch of the incumbent operator, and at a symmetric level as from 1 January 2009. In the case of SMS termination, the NRA established symmetric rates.

## *Roaming Regulation*

The price caps established in the Roaming Regulation were applied in time and operators offered the Eurotariff, which in all but one case was set at almost exactly the price cap level, with billing unitisation intervals higher than per second. The number of complaints about inadvertent roaming fell, but taking into account the level of mobile broadband penetration in Austria, the high invoices for data roaming services remain a problem and operators have already taken different measures in this respect. A Court judgment was delivered on the issue of inadvertent roaming as regards voice calls and SMS.

## **Fixed**

### *Market situation*

While the overall size of the fixed markets appears to be decreasing due to the pressure from mobile services, the incumbent fixed network operator has maintained its leading position in the market and its market share has increased in many of the segments, in particular in terms of revenues. Regarding calls from fixed to mobile, its market share went up from 49.7% to 59.2% based on retail revenue. However, it remains at a lower level than other EU countries. For other types of calls its market share has also remained high. For instance, its market share for national fixed calls is 60.1% based on outgoing minutes of communications and 64.1% on the basis of retail revenue. The NRA also reported that the incumbent's market share had increased significantly in 2007 for national calls, including calls to mobile<sup>83</sup>. There has been consolidation in the fixed market, with the incumbent fixed network operator having acquired an alternative fixed operator.

Retail rates for fixed voice telephony have been stagnating and even slightly decreasing<sup>84</sup>.

### *Regulatory issues*

TKK had imposed an obligation on the incumbent fixed network operator to offer wholesale line rental to its competitors. However, this has not been taken up in practice and the NRA expects that naked DSL will provide a basis for the provision of VoIP by alternative operators.

Given the relevant position and regaining of market share of the incumbent fixed network operator in the retail calls markets, in particular in the business segments, alternative operators argue in favour of continuing retail regulation. In the new telecommunications market definition ordinance, RTR did not propose to define as susceptible to ex ante regulation any retail calls markets, in line with the new Recommendation on Relevant Markets.

## **Broadcasting**

### *Market situation*

As of August 2008 there were 118 000 households with analogue terrestrial TV, representing 1.42% of the households over population, and 158 000 households with digital terrestrial TV, amounting to 1.90% of the households over population, the latter having been launched only in October 2006. At the same time, 20.56% of subscribers (1.71 million subscribers) received

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<sup>83</sup> RTR's Communication Report 2007, p. 149 and 150.

<sup>84</sup> RTR's Communication Report 2007.

TV via satellite and 16.80% of subscribers (1.4 million subscribers) used cable as their TV platform.

Mobile TV based on DVB-H was launched at the time of the European football championships in Austria and Switzerland in June 2008, and consumer take-up is increasing. Three mobile operators provide this service and at the end of 2008 its coverage was above 50% of the population.

IPTV has also been introduced by the incumbent operator, but so far with limited take-up and as of August 2008 it amounted to 50 000 subscribers (0.6% of subscribers over population).

### *Regulatory issues*

New broadcasting legislation announced by the recently formed government should include the restructuring of the broadcasting regulatory authority which, according to the governing agreement of the coalition parties, would then become fully independent from the government. The Commission services will follow this matter.

Following the allocation of the nationwide licences for digital terrestrial TV, the process for revoking the existing analogue licences has been finalised. The NRA is reportedly in the process of granting licences for regional digital TV. Discussions as to the use of the released frequencies are expected to take place from the beginning of 2009.

## **Horizontal regulation**

### Spectrum management

Austria has implemented the relevant Commission decisions under the Radio Spectrum Decision up to 2007 by adapting the federal frequency usage plan accordingly. Commission decisions from 2008 are in the process of implementation. In the light of the envisaged digital switchover in 2010, alternative operators have expressed an interest in the re-farming of frequencies. This would be in line with the Commission's policy on the digital dividend and would allow operators to take advantage of the technical characteristics of the upper UHF band to increase the range of broadband wireless services, particularly in rural and isolated regions, and to combine with higher frequencies to increase capacity for these services. In a similar vein, spectrum in the 900 MHz frequency band was assigned during 2008 to one of the mobile network operators. However, the tender procedure covering a part of the 450 MHz band did not result in the assignment of the frequency band. The NRA took the view that the current economic situation might have temporarily diminished the interest from operators in this frequency band.

In December 2008, TTK also assigned several regional frequencies in the 3.5 MHz band.

## **THE CONSUMER INTEREST**

### **Universal service**

As in previous years, the funding of universal service was not based on the funding mechanism laid down in the Telecommunications Law, as operators had agreed among themselves on compensation for the universal service provider. There are no discussions at the moment to modify the scope of universal service.

## **Number portability**

In general, number portability is not very much used in Austria and in absolute figures there has only been a slight increase in both fixed and mobile number portability. Regarding the prices for fixed number portability, Austria remains one of the countries in Europe with a very high wholesale price. As far as mobile number portability is concerned, the wholesale price is quite moderate and has remained stable at an average of €8.21 (without taxes). However, the prices to be paid at the retail level by users requesting number portability are at the level of €19, but are often reimbursed by the operators. The incumbent's mobile subsidiary announced last year an increase in the retail price for mobile number portability to €29, which was considered as excessive by the NRA, and therefore the price of €19 continues to apply and is considered as the maximum. Furthermore, the incumbent's mobile branch also charges significant termination fees to business customers, a situation which has been examined by the NRA. As a result, the termination fees for old or new customers applied by the incumbent's mobile branch were prohibited. Alternative mobile operators have also reported on the message that users get when calling a customer whose number has been ported, informing them of the fact that the number has been ported, since this may discourage consumers, especially business customers, from making use of this facility. In that regard, given that number portability was introduced some years ago, and taking into account the generalisation of flat rates for mobile services which do not make a distinction between on-net and off-net calls, the obstacles to competition that this measure creates may outweigh its consumer protection benefits.

At the retail level, the standard length of contracts over two years, the high costs for number portability and, in some cases, the contract termination fees applied, increase significantly customers' switching costs, which may make it difficult for operators to compete.

## **Consumer complaints**

The NRA has reported an increase in the number of consumer complaints for 2008, in comparison with 2007<sup>85</sup>; the number of complaints for 2008 rose to 5 230 from 3 494 in 2007. In particular, as mobile broadband becomes more popular, there have been more complaints in relation to the capacity available in mobile broadband services as well as to the billing of those services. The consumer protection department of the Austrian Chamber of Labour has also reported that a number of consumers have complained about mobile broadband services, and has conducted a study on the real transfer speed available with that technology, which revealed the capacity constraints that mobile broadband services present. The Chamber of Labour reported on the large number of complaints received regarding high bills for data roaming services, while the NRA reported a small proportion of the complaints received on this issue.

Due to the sometimes contradictory decisions on the general terms and conditions between the NRA and the consumer protection authorities, some market players have argued that enhanced cooperation between these authorities would be desirable.

## **European emergency number 112**

The European emergency number 112 can be called from both fixed and mobile telephones. Caller location information is provided for all calls, upon request ('pull-system').

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<sup>85</sup> See also RTR's Annual Report on the conciliation procedure: "Tätigkeitsbericht der Schlichtungsstelle 2007".

## **Must-carry**

Austria introduced for mobile TV operators a ‘must-carry upon request’ provision in favour of the state-owned public broadcasting station and the nationwide private television station. The Austrian legislator limited this controversial provision to the first one and a half years of operation of the platform, and the authorities have indicated that it will not be extended.

## **Data protection**

The EU Directive on data retention has still not been transposed. The Commission sent a reasoned opinion to the Austrian authorities in this respect. Regarding data on internet use and emails, Austria has to transpose the relevant rules laid down in the EU Directive on data retention by March 2009.

Operators have indicated that they are satisfied with the solution adopted for the financing of interception costs and would expect a similar solution for the financing of data retention obligations. Following an amendment to the general police law, there has been an increase in requests for data from the police, since in certain cases it is not necessary to have a Court ordinance to obtain data in the course of an investigation.