

SPAIN

INTRODUCTION

Overall growth in the Spanish electronic communications market has stabilised, while mobile and broadband markets continue to be the more dynamic sectors. Fixed broadband penetration is growing more slowly than the EU average, while mobile broadband is increasingly prominent. On the fixed market, the proportion of subscribers using an alternative operator, mainly cable and local loop unbundling (LLU) operators, for direct access is one of the highest in the EU. Spanish consumers are increasingly choosing bundled services and the use of number portability is very strong, especially for mobile services where new entrants in the market are benefiting from this facility.

The national regulatory authority Comisión del Mercado de las Telecomunicaciones (CMT) has focused on establishing a regulatory framework for Next Generation Access (NGA) networks with a view to fostering infrastructure competition, although some of the principles still need to be adopted or further defined. The regulator has been working on the second round of market analyses and has notified all but one of the relevant markets in the Recommendation. The Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información (SETSI) is preparing new legislation for users' rights. It appears that the electronic communications sector has a significant and increasing number of users' complaints compared to other sectors in Spain, which can only be partly explained by the relatively high number of contracts.

REGULATORY ENVIRONMENT

Main regulatory developments

The CMT initiated a second round of market reviews and, by November 2008, had notified to the Commission all markets in the Recommendation except the market for wholesale terminating segments of leased lines (market 6). There is a clear trend towards withdrawal of retail regulation in the fixed markets while maintaining wholesale regulation in general. One of the main developments was the imposition on the incumbent of an obligation to provide access to physical infrastructure, although the Commission commented that a detailed reference offer and price obligations should be developed.

During the reporting year, the CMT has been active in defining a regulatory approach for NGA networks. Following a public consultation, in January 2008 the CMT published its regulatory position on NGA in the form of a Guidelines document. In July, the regulator adopted provisional measures imposing an access obligation in regard to the incumbent's physical infrastructure at cost-oriented prices. In November 2008, following verification of the implementation of that obligation, the CMT authorised the incumbent to launch the first commercial offers based on FTTH. The incumbent is also required to provide a bitstream service to collocated operators at a discounted price. This is a compensatory measure for those operators affected by reduced availability of unbundling due to instalment of remote nodes between the local exchange and end-users.

Moreover, the Ministry of Industry, Tourism and Commerce has established an Advisory Committee, which should identify possible barriers to the deployment of high speed access networks and propose recommendations to the Ministry.

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

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 i.e. the CMT and the SETSI, which is at the moment concurrently responsible for telecommunications policy within the Ministerio de Industria, Turismo y Comercio.

There will be major changes in the CMT, as the mandate of the President and some members of the Board expired at the end of 2008, although they are still in office pending a decision of the Government. In June 2008, the CMT signed a cooperation agreement with the national competition authority (NCA), the latter having established telecommunications as a priority area for 2009.

Decision-making

During the last year, the CMT has been working on the second round of market analyses. For the first time, the Commission raised serious doubts about the compatibility with EU law of a CMT draft market analysis (wholesale broadband access market), which were finally withdrawn in December 2008.

In May 2008, the regulator adopted draft provisional measures under Article 7(6) of the Framework Directive, relating to the physical network infrastructure access market (market 4) where an obligation for access to the incumbent's physical infrastructure was imposed at cost-oriented prices, and on non-discriminatory and transparent terms. The Commission pointed out that the above-mentioned article should only be relied upon in exceptional circumstances with full justification for the urgent need to act and invited the CMT to notify as soon as possible the analysis of the physical network infrastructure access market, which the regulator did in September 2008.

While the CMT has continued monitoring the fulfilment of obligations, and it imposed two major fines on the incumbent in 2008, alternative operators are still requesting a more proactive role on the part of the regulator, in particular in relation to non-discrimination obligations and they claim that sanctions have never acted as a deterrent. In this respect, in May 2008 the regulator adopted a decision that should allow comparability of the incumbent's self-provision with the service provided to third parties, and it is currently devising an efficient procedure for payment of penalties, which will be applicable to all reference offers.

Moreover, dispute resolutions are taking on average much longer than four months. The 15 dispute resolutions that were resolved by the CMT during the last year have taken an average of one year.

MARKET AND REGULATORY DEVELOPMENTS

The high figures for total revenue and investment over gross domestic product (GDP) for the Spanish electronic communications sector show the importance of this sector for the economy. Total turnover for the sector was €44.2 billion, of which fixed revenues accounted for €9.2 billion and mobile €18.9 billion in 2007. The growth of retail revenue for the electronic communications sector stabilised at 4.53%, whilst growth of wholesale revenue decreased due to the reduction of regulated prices and consolidation in the sector. Investment figures in the Spanish electronic communications market remained more or less constant (€5 755 million in 2007), amounting to 13.0% over revenue. The incumbent group has

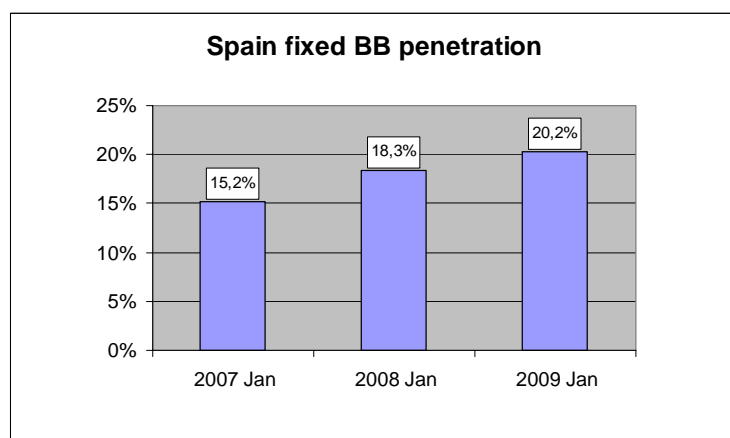
increased its investment compared to previous years, while investment by alternative operators continues to represent about 60% of the overall figure.

In Spain the trend towards bundled services continues to be very significant, with broadband as the main driver: 12.01% of the population had subscribed to a double play offer and 2.91% to a triple play offer as of July 2008. Moreover, IPTV has experienced significant growth during the last year, reaching 668 520 subscribers by July 2008.

Broadband

Market situation

The number of fixed broadband lines continued to grow last year although at a slower pace than the EU average: broadband penetration increased by less than two percentage points to reach 20.2% in January 2009, but it is still below the EU average (22.9%).



penetration increased by less than two percentage points to reach 20.2% in January 2009, but it is still below the EU average (22.9%). The majority of broadband residential customers in Spain subscribe to broadband services as part of a bundled offer.

With almost four out of five fixed broadband lines being DSL, this constitutes the main technology,

followed by cable. The use of mobile data services is increasing and there were 1 161 167 datacards in Spain in January 2009 and a high percentage of mobile terminals enabled with a UMTS functionality.

The digital divide in terms of DSL coverage between the national average and rural areas in Spain remains more or less stable at only four percentage points while it is significantly higher in terms of cable coverage (39 percentage points).

Following the upgrading of their networks, cable operators launched the first broadband offers of 50 Mbps and 100 Mbps in the market. The incumbent launched a pre-commercial offer based on VDSL with speeds up to 30 Mbps, while the CMT is in the process of amending the reference offer in order to include new bitstream modalities.

The upward trend in the number of unbundled lines continues (1.70 million lines in January 2009, compared to 1.35 million lines in January 2008). Since 2006, LLU is the option preferred by alternative DSL operators whilst the number of indirect access and resale lines continues to decrease. Market shares have remained more or less constant: alternative DSL operators held 23.22% of the retail broadband market and cable operators 19.39% as of January 2009. However, the incumbent is adding the majority of new broadband subscriptions and slightly gained market share in 2008.

Regulatory issues

During the reporting year, several important regulatory decisions were taken regarding NGA networks, and some modifications were made to the existing regulatory obligations in the broadband market.

In May 2008, the CMT adopted draft provisional measures under Article 7(6) of the Framework Directive, relating to the physical network infrastructure access market (market 4)

where an obligation for access to the incumbent's physical infrastructure was imposed at cost-oriented prices and on non-discriminatory and transparent conditions. The proposed obligation to provide an access service at a local exchange at a reasonable price, while access to physical infrastructure was not available, was withdrawn in the final decision of July 2008, on the basis that the incumbent was ready to fulfil the obligation to provide access to physical infrastructure by September 2008. Appeals before national courts are pending in this regard. Following verification of the online system for access to the incumbent's physical infrastructure, the CMT gave the green light for the incumbent to launch offers over fibre.

In September 2008, the regulator notified the physical network infrastructure access market, where it proposes to maintain LLU obligations and access to physical infrastructure including the provision of dark fibre in cases where access to infrastructure is not technically or physically feasible. The draft measures also contain a detailed information obligation and conditions for the closure of local exchanges, in order to ensure the transition to NGA networks. The Commission commented that a detailed reference offer and price obligations should be developed. The experience with LLU in Spain has shown that, even when procedures are specified, the efficient implementation of this type of access obligation can raise many problems. Moreover, it appears that the regulator has not conducted any study or audit in order to analyse the feasibility of network deployment by alternative operators based on the access to physical infrastructure obligation in Spain.

On the wholesale broadband access market the regulator has proposed to impose an obligation on the incumbent to provide a single bitstream product replacing the existing ATM and IP bitstream, for the provision of speeds up to 30 Mbps in the whole national territory. In December 2008, the Commission withdrew the serious doubts it had about this market analysis.

In October 2008, the CMT launched a public consultation on draft measures intended to impose symmetric obligations on operators regarding in-building fibre infrastructure. The CMT notified these to the Commission, in accordance with Article 12 of the Framework Directive, which provides for the imposition of obligations on operators for facility sharing according to certain criteria. Under the proposed measures, the first operator to reach a building with its fibre network, regardless of its significant market power (SMP) condition, should meet reasonable access requests by third parties, at reasonable prices and under transparent conditions. Although this type of measures seems to be a positive step towards removing bottlenecks, the CMT did not provide sufficiently specific justification to support their imposition in accordance with the facility-sharing provisions under EU law.

At the same time, the Ministry of Industry, Tourism and Commerce has established an Advisory Committee, which should identify possible barriers to the deployment of high speed access networks and propose recommendations to the Ministry. This Committee will examine ICT rules in Spain, network deployment in roads and railways, and obstacles to infrastructure deployment in the public and private domains.

In March 2008, the CMT adopted a new reference offer for bitstream (known as OIBA) and further reduced wholesale prices, which should apply nationwide and retroactively, the latter being currently under verification by the regulator. A new service for 'naked ADSL' was included for the first time in the offer allowing alternative operators to provide broadband services over lines without a telephone service subscription by paying an extra charge of €9.55. In December 2008, the regulator reduced the monthly fee for full unbundled loops by 20% (to €7.79), while the weighted monthly average total cost for shared access continued to

be higher than the EU average (namely €5.83 compared to €4.13 EU average) mainly due to high connection fees.

In relation to the incumbent's deployment of remote nodes between the local exchange and end-users, in July 2008 the CMT modified the Reference Unbundling Offer (RUO) establishing that the incumbent should provide, as a compensatory measure to collocated operators affected by reduced availability of unbundling, an indirect access service at a discount of 23.5% for ATM bitstream and 40.6% for IP bitstream. However, this measure does not enable alternative operators to provide the same services as they already can from the local exchange. The incumbent should inform the CMT six months in advance of any new installation of remote nodes. According to the figures provided by the incumbent, 621 000 local loops were affected in May 2008 by instalment of remote nodes in Spain.

Mobile markets

Market situation

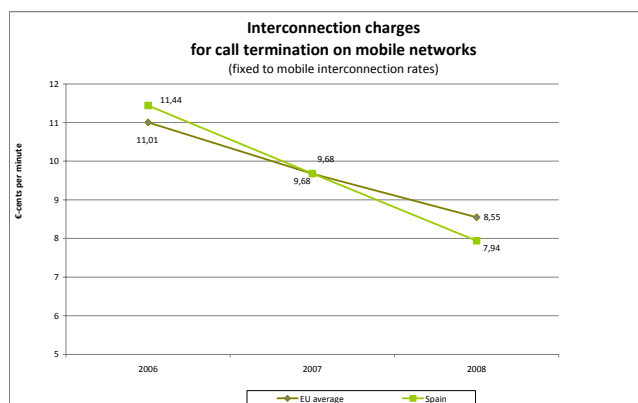
The mobile penetration rate grew significantly last year (114.27% as of October 2008), but it is still below the EU average (119%). This is partly due to the increase in the number of players in the mobile market, with the fourth UMTS licence-holder and several mobile virtual network operators (MVNOs) launching commercial services. Most of the new entrants are mobile service providers, although some others are MVNOs with an infrastructure-based business model. New uses of mobile service appeared in the market, for example, the number of machine-to-machine lines, enabling communications between electronic devices through mobile networks, has doubled over the past year.

For the second year running, the market share of the incumbent's subsidiary in terms of subscribers dropped slightly in favour of the second operator. The fourth mobile network operator (MNO), which launched commercial services in December 2006 and, in contrast to its main competitors only holds a UMTS licence, still has only a small subscribers' market share of approximately 1.5%, which is similar to the overall share so far obtained by MVNOs. The fourth MNO and MVNOs are seeing a positive net gain of lines by using mobile number portability.

Competition in the mobile market is strong, with number portability being used intensively as a competition tool (35.45% of mobile numbers ported over total number of mobile subscribers) and three of the main European mobile players present in the market. In 2007, the average price per minute for voice traffic on mobile networks was €0.17, which is above the EU average (€0.14), and annual average revenue per user (€308.56) was higher than the EU average (€282.49).

Regulatory issues

The mobile termination rates (MTRs) of the four MNOs have decreased according to the established glide paths and are below the EU average (€0.0794 compared to €0.0855 EU average). In February 2008, the CMT adopted measures requiring the six 'full' MVNOs at the time to set reasonable termination charges at the same rate as its regulated host MNOs. In December 2008, the CMT decided to extend the current obligations to a further seven 'full' MVNOs and



to oblige SMP operators to set a single per-second billed tariff. The regulator will set the new glide paths for the MNOs by July 2009, although details on the cost methodology have not yet been communicated.

Following the access obligations imposed by the regulator on the three MNOs present at the time, several new entrants are currently providing mobile services in the market. Conditions were agreed on a commercial basis without requiring further regulatory intervention. The appeals to the national courts, which were lodged by the MNOs against the regulator's finding of joint dominance, are still pending. The CMT has not yet come up with a review of the former mobile access market, which is no longer in the Recommendation.

Roaming Regulation

The CMT and the SETSI both have competence in relation to the Roaming Regulation. Spain gave notice that the current sanctioning regime provided for in the Ley General de Telecomunicaciones will also apply in cases of breach of the Roaming Regulation.

Fixed

Market situation

There has been a consolidation trend in the fixed market. For another year, the incumbent remained dominant in the fixed telephony retail market with a more or less stable market share in terms of revenues (75.49% compared to the 64.76% EU average in December 2007), while overall revenues in the fixed sector continued to fall. The market share of VoIP is still marginal at 0.38%.

In Spain, 14.92% of the population had subscribed to a bundled offer as of July 2008. The double-play offer of fixed telephony and Internet access is still the most frequently purchased service package. Fixed number portability is used frequently to facilitate switching of providers, although the growth in the number of fixed ported lines per year has now stabilised.

By July 2008, as a result of cable and LLU infrastructure investments, 21.9% of subscribers were using a provider for direct access other than the incumbent (compared to an EU average of 18.6%), one of the highest proportions in the EU. The number of pre-selected lines continued to decrease in the course of 2008.

Regulatory issues

Retail regulation has been reduced significantly: the regulator has proposed the withdrawal of obligations on the fixed retail call markets, which are not part of the current Recommendation, after finding that these markets are competitive. The CMT will set the maximum increases for the monthly fee for fixed access, while the set-up fee is no longer regulated.

Moreover, the CMT has proposed to broaden the scope of regulation on the fixed wholesale call termination market by including IP interconnection, while it has maintained the previously established asymmetry of 30% between the incumbent's and other operators' termination prices. It is not yet clear how the incumbent's migration to IP may impact on the existing interconnection obligations.

The introduction of wholesale line rental (WLR) as a remedy in the fixed wholesale call origination market, which allows alternative operators to provide their customers with a single bill, has not had a significant impact. Operators may gain some interest in this wholesale offer

as a complement to the recently introduced ‘naked ADSL’ service. However, alternative operators have stated that conditions for both WLR and ‘naked DSL’ service would have to be significantly improved before this offer could be taken up by market players.

The CMT imposed obligations not only for traditional interfaces but also for Ethernet and Fast Ethernet interfaces on the market for wholesale terminating segments of leased lines. The reference offer (known as ORLA) was adopted in December 2007 with prices established through a retail-minus methodology. Several operators have concluded agreements for Ethernet interfaces under the new ORLA, and the first lines have already been delivered.

Broadcasting

Market situation

Spain has one of the highest terrestrial television market shares in the EU (36.68% of households over population for analogue TV and 13.64% of households over population for digital TV). During the past year, there has been an increase in the number of IPTV subscribers in Spain, though the market share is still marginal (1.48% of subscribers over population). The majority of cable and IPTV subscribers are benefiting from an offer bundled with additional services, such as fixed telephony or Internet. The incumbent is likely to intensify its presence in the pay TV broadcasting market, if it finally acquires the only satellite TV service provider in Spain, which has two million customers (4.59% of subscribers over population) and many exclusive contracts for premium content.

During the past year, the broadcasting transmission market continued to grow mainly because of the gradual introduction of digital terrestrial television (DTT) services.

Regulatory issues

At the beginning of 2006, the CMT imposed an access obligation at cost-oriented prices on the SMP operator, which owns the only terrestrial broadcasting transmission network with national coverage. The CMT is about to approve the cost accounting model, an issue which has been pending for a long period. However, it seems that the measures will come at a time when there might be no potential beneficiary of this access obligation due to consolidation in the broadcasting transmission market.

The switch-off of analogue TV will take place according to a regional staggered timetable, which started with a pilot trial in July 2008 and should be completed by April 2010. In 2005, the government provided for the allocation of a single multiplex for mobile broadcasting services before the switch-off. However, there is as yet no date envisaged for the tender for assignment of the frequencies.

Horizontal regulation

Spectrum management

The SETSI currently retains competence in relation to spectrum, since the Radio Spectrum Agency, which would be responsible for managing radio frequencies, has not yet been established. Several stakeholders have called for an evaluation of the efficiency of spectrum use in Spain. Although national legislation allows transfer of spectrum rights of use, in May 2008 Spain adopted a regulation on radio spectrum management specifying the conditions for spectrum trading for very limited frequency bands only and a more flexible use of spectrum through technological and service neutrality.

Spectrum refarming is still a contentious issue in Spain, as assignment of spectrum in the relevant bands is unequal and new operators are also interested in obtaining frequencies. In July 2008, the SETSI launched a public consultation on the future use of frequencies in the 2.6 GHz band (including the options for tender/auction/mixed and regional/national scope) and the amendment of licences for 900 MHz, 1800 MHz and 3.5 GHz.

The Spanish authorities decided that a large part of the digital dividend is still to be used for broadcasting terrestrial services to the exclusion of other services, and this has resulted in a significant increase in the number of allocated digital channels. Moreover, the upper part of the UHF band was allocated to national digital TV channels in 2005, contrary to the recent trend in other Member States and to the intention expressed in the Commission Communication on digital dividend⁴⁶, for which the Spanish authorities seem to be exploring different scenarios.

Spain has taken measures to implement the remaining Commission Decisions adopted under the Radio Spectrum Decision to harmonise spectrum use in specific bands. The national frequency allocation plan (known as CNAF) already makes provision for the use of 900 MHz and 1800 MHz bands for different technologies but mobile licences will still need to be adequately modified.

Rights of way and facility sharing

Operators are still concerned about difficulties in network deployment. 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. Some publicly financed programmes (*Plan Avanza*) are giving incentives to the relevant authorities for facilitating network deployment.

An increased number of local authorities started imposing a tax equivalent to 1.5% of gross revenue on mobile operators for the use of installed facilities. The interpretation of these local authorities is that mobile operators are not excluded by a 2003 law on municipalities funding. Some of the appeals by mobile operators have already been rejected by national courts.

THE CONSUMER INTEREST

Users' rights and tariff transparency

In February 2008, Spain adopted legislation for data premium services (SMS and MMS)⁴⁷, which establishes the right of subscribers to disconnect from these types of services, improved transparency conditions regarding service information and itemised billing, and provides for new numbering ranges. As a follow-up, a code of conduct on the provision of these services is currently being prepared.

The SETSI has also presented a draft *Charter of rights of users of telecommunications*, which, among other things, will establish an obligation on operators to ensure that the theoretical speeds for ADSL connections are at least 80% of the contracted speed.

At the end of 2006, general consumer legislation⁴⁸ prohibiting the rounding up of tariffs entered into force, with practical implications for mobile services. The NCA investigated the

⁴⁶ COM(2007) 700.

⁴⁷ Orden ITC/308/2008, de 31 de enero.

⁴⁸ Ley 44/2006, de 29 de diciembre.

increase in domestic prices that followed the modification of mobile tariffs and seems to have found evidence of collusion by the three main MNOs. A final decision of the NCA is still pending.

Universal service

An infringement proceeding is still pending 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. 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. In December 2008, following applications by three operators, the incumbent was awarded a tender for the provision of directory enquiry services for a period of three years and it has also been designated for the provision of the remaining universal service elements for a period of two years.

In November 2007, the CMT approved the net costs for the provision of universal service during the years 2003, 2004 and 2005 and it has become one of the first regulators to decide to activate the universal service financing mechanism. In August 2008, the regulator determined that, apart from the incumbent, only mobile operators will contribute to the universal service fund in view of their revenues. The contributions are: the incumbent's mobile arm €59.4 million (33%), the second MNO €31.65 million (17%) and the third MNO €18.98 million (10%). Mobile operators have announced their intention to appeal the decision. In November 2008, the CMT launched a public consultation on the draft decision on net cost calculation for the year 2006.

European emergency number 112

Spain has a system with a network of 17 centralised Public Safety Answering Points (PSAPs) at regional level in addition to two PSAPs in Ceuta and Melilla, as responses to 112 calls are a matter of regional competence. The implementation of 112 in Spain is considered satisfactory and the most efficient 'push' system for caller location information is used in most PSAPs.

In October 2008, the main public television channel started broadcasting a series on real interventions by 112 emergency services, which could contribute to raising awareness of 112. According to a Eurobarometer survey, 64% of the population know 112 as a number to call in case of emergency in Spain, but only 21% mentioned 112 as the number to call from other EU countries⁴⁹.

Number portability

Spanish consumers continue to benefit significantly from number portability, with more than four million fixed ported numbers and 18.3 million mobile ported numbers (35.45% of the total mobile numbers) by October 2008, one of the highest figures for ported numbers. The use of mobile number portability in Spain entails no cost for the end-user or for the operators. The fourth MNO and MVNOs are getting a positive net gain of lines by using this facility.

There is currently an average period of five days for porting both fixed and mobile numbers in Spain, which is below the EU average. The draft *Charter of rights of users of*

⁴⁹ Eurobarometer Flash survey on the European Emergency Number 112 (February 2009).

telecommunications contains a proposed reduction to one day for the porting of both fixed and mobile numbers.

Consumer complaints and out-of-court dispute resolution

The number of complaints in the telecommunications market continues to increase. The main areas for improvement seem to be transparency of contracts, difficulties in subscribing, cancelling contracts and billing issues.

Consumers and users' associations claim that there is a lack of coordination between the different bodies dealing with complaints in the area of electronic communications at national, regional and local level. The office established within the SETSI to deal with users' complaints and to provide information on their rights received an average of 782 queries and 84 complaints a day in the first half of 2008. The number of complaints relating to fixed access has decreased, although it is still the second area of concern with 14.7% of the overall number of complaints, after billing issues (35.7%)⁵⁰.

⁵⁰ SETSI's report on queries and complaints, June 2008.