

**Comments on the
Call for input on the review of the EU regulatory framework for electronic
communications and services
by mobilkom austria group**

mobilkom austria group welcomes the opportunity to submit comments on the call for input on the review of the EU regulatory framework including review of the recommendation on relevant markets and would like to make the following comments.

1 New approach to spectrum

In general mobilkom austria group¹ ("MAG") supports the broad principles behind a gradual move from traditional spectrum management ("command and control") to more **flexible spectrum management mechanisms** for allocating and assigning radio frequencies.

However, MAG sees a number of difficulties in relation to such an approach, in particular in relation to the issues of interference, which could arise in a more market driven environment both on a national and a international level. The issue of interference in a liberalised spectrum environment is one which if not carefully considered has the potential to result in serious market failure and harm to the interests of consumers and investment incentives. Given the relative efficacy of the current system in preventing interference, MAG can only support the transition to a more liberalised spectrum environment when the total absence of radio frequency interference can be guaranteed. Otherwise, potential benefits of this novel spectrum management model will turn into undesirable negative effects, both in terms of efficiency in the spectrum usage and poorer quality of retail services.

However, in regard to the process of awarding spectrum MAG would like to suggest the introduction of the following principles, which could help to use spectrum more efficiently:

- Within the European Union the award procedures for spectrum should be harmonized and be based on the principles of non-discrimination to ensure equal treatment for all operators. In order to increase the transparency of the awarding procedures spectrum should be awarded in actions while beauty contests should be abolished;
- Revenues of these auctions should be used to fund universal services or other telecom specific services instead of using them for other – non-telecom – purposes.
- To lesser the administrative burdens an easier access to spectrum could be introduced (e.g. awarding a whole block of point-to-point frequencies instead of just one in an administrative procedure);

In principle MAG supports the introduction of technology neutrality and agrees with a more technology neutral approach in the sense that regulations should not hamper technological evolutions, such as re-farming from GSM technologies to 3G technologies at 900 MHz and 1800 MHz. However, MAG beliefs that market mechanisms only work within appropriate regulatory rules. For example, the issue of ensuring non-interference between users and compatibility between technologies (within a particular band and/or neighbouring bands) should be of paramount importance to this discussion, otherwise the proposals risk bringing about a considerable market failure that will affect operators and consumers alike. It is therefore critical that the process for spectrum usage rights definition and the

¹ The mobilkom austria group includes the mobile communications providers mobilkom austria and its subsidiaries Vipnet in Croatia, Si.mobil in Slovenia, Mobiltel in Bulgaria and mobilkom liechtenstein.

usage rights themselves are clearly defined to ensure that user interference does not lead to market failure.

MAG also, in principle, agrees with the concept of service neutrality. However, service neutrality threatens to create even bigger potential competition issues than technology neutrality, in particular given the critical impact of frequency propagation in terms of network rollout cost. For this reason it is crucial that all players in a relevant market are subject to the same obligations. In practice, it should not be possible to modify existing spectrum user rights unless there are efficiency gains to be achieved (e.g. allow use of UMTS in the 900 MHz bands) or no market player can achieve a competitive advantage over another (e.g. broadcasting operators which had/have no costs for spectrum (as it was awarded for free) must not be allowed to offer telecommunication services without additional obligations).

2 Streamlining market reviews:

Before providing comments on the Commission's suggestions on simplifying the market review (and notification) process MAG wants to discuss the broader principles of market definition, market analysis and notifications respectively.

We believe that only markets with a reasonable probability of showing competition problems in at least a *minimum number or member states* should be kept in the recommendation of relevant markets. As it is true for the De-Minimis rule of the general competition law, there should also be a minimum threshold of "community relevance" defined in the sector specific competition law. This refers to the current list of relevant markets as well as the proposed changes of the recommendation.

As regards the first group of markets, today's 18 relevant markets, we believe that, apart from other considerations (regarding fixed retail markets), as a general rule only those markets which NRAs of *at least* e.g. 5 member states found not to be competitive in the first (and partly second) round of market analyses should stay in the market recommendation (since at least one of the criteria of the three criteria test obviously doesn't apply any more).²

Of course the removal from the market recommendation doesn't mean NRAs shouldn't be able any more to conduct market analysis of the *removed* market. As it is already foreseen in the current framework, NRA's are able to individually define relevant markets on national market in addition to the recommended markets. We see, also as a general rule, two cases which could prompt a further market analysis even if the relevant market is not any more part of the recommendation:

- In cases where the NRAs of the relevant countries found a market not to be fully competitive, the NRA should be obliged to conduct another market analysis.

² As regards the second group, the additional markets (or market segments) proposed to include in the new recommendation (e.g. SMS termination), we refer to our separate comments to the proposed changes to the recommendation on relevant product and service markets.

- In markets where significant changes in the market structure had occurred after the first market analysis (e.g. market consolidation) the relevant NRA is able to conduct another market analysis and notify the Commission as specified in Article 7.

Regarding the market analysis and notification procedures, MAG, while generally in favour to any kind of simplification of procedures, is concerned about the imbalances in the Commission's proposal. A simplification of the notification process seems only reasonable if the process of market analysis is simplified as well. However, there are two cases to be differentiated:

- The NRA found SMP in the relevant market: in this case NRAs would have an incentive to reduce their efforts of an extensive analysis as repeating notifications will be rewarded. As it seems questionable to simplify notifications which only update a previous notification without analysing the market thoroughly neither the notifications nor the market analysis procedure should be simplified.
- The NRA didn't find SMP in the relevant market (and the market is still in the recommendation): neither market analysis nor notification should be required as this would neither be in accordance with the commitments of the Commission to deregulation nor to better regulation and European governance. The only two exceptions could be:
 - the NRA deems it necessary to evaluate if its forward looking assessment of assumed market development from the previous market analysis became reality, or
 - there were substantial changes in the market structure which could have an impact on the competitiveness of the relevant market.

3 Consolidating the internal market

MAG believes that the suggestion for a European regulator has no significant advantages but increases the regulatory burden for market players without associated benefits and would, therefore, not be justified. Moreover, MAG sees the role of the EC as key in leading down the deregulatory path and supervising deregulatory trends. MAG believes that the EC should take a clear deregulatory leading role in Europe while, at the same time, acting as a driving force behind harmonised policies to foster investment and innovation. In addition, MAG has serious doubts about an European regulator being in accordance with EU and national law principles, as e.g. the principles of subsidiarity and legality.

- Article 7 procedure:

In connection with the arguments presented above it seems contradictory to introduce an additional bureaucratic hurdle into the process. The existing Article 7 procedure leaves the Commission with extensive veto rights. A further extension of veto rights of the Commission is not necessary and has not been demonstrated to be necessary.

However, in regard to markets where regulation in one member state has a significant direct economic impact on operators in other member states and is of relevance for pan-European competition to operators (e.g. mobile termination rates) the Commission should foster EU wide harmonisation by developing secondary law measures (e.g. guidelines) which help to develop a

common European standard to key questions (e.g. national and international asymmetry of mobile termination rates) and thereby help to ensure that national regulatory decisions on remedies don't deviate too much from each other to the detriment of some member states and/or operators.

- Amend Article 5 of the Access Directive: non-Significant Market Power access and interconnection

It is proposed that NRAs should submit a request to the Commission for authorisation to impose an obligation on non-SMP undertakings.

MAG believes that obligations on non-SMP undertakings should be limited to technically ensure interconnection and interoperability. As, for example, the Austrian NRA interprets this obligation extremely wide it is also used to regulate access and interconnection prices of non-SMP operators (e.g. on the access and call origination market). As price regulation is the most drastic and intrusive obligation, it is clearly meant to be used only in cases of an incurable market failure and only as regards to SMP operators. Therefore, we strongly suggest to clarify, if price regulation of a non-SMP operator (as done in Austria) can be in accordance with Article 5 at all, and if, under what circumstances.

4 Strengthening Consumer Protection and Users' Rights

mobilkom austria group shares the Commission's interest in consumer protection issues since it helps to increase the use of communication services and networks. However, MAG believes that further obligations on transparency or additional rules aiming at consumer protection could be burdensome and are in fact not necessary. Even more, on the level of Member States, there have already been adopted general and specific legislation on consumer protection as well as has been put in place the related institutions. We therefore see a general risk of undermining national initiatives and the EU principle of subsidiarity. Furthermore, in a competitive market, operators have considerable incentives to inform their customers properly or even proactively, since this is an important competitive tool for them to differentiate themselves from their competitors.

- Strengthen the obligation for network operators to pass caller location information to emergency authorities

The obligation for mobile operators to automatically deliver location information for each emergency call (push mode) is unjustified and not proportional as it requires significant data traffic and therefore causes network investments. This data is only necessary in a fraction of such calls and can easily be obtained from the mobile operators (pull mode). It is not justified to have mobile operators to bear the costs for such a public interest issue.

- Number Portability:

Such personal online directory services are confined to certain mobile phone models. These services are immature and do not yet present a general proposition offer and/ or are used by many customers. It is therefore unknown how this will develop and in any event online directories are usually easily transportable by customers own devices or computers so intervention is not required.

5 Security

Although MAG shares some of the EC's concerns, it cannot share its need for imposing new security requirements. Moreover, some well-meaning proposals such as the notification of all security breaches could have the opposite effect and result in a loss of trust and confidence amongst end users when there is no material impact on customers. MAG is convinced that industry is in a better position than Regulators to know which technical measures are needed in the area of security but supports efforts by Regulatory Authorities to foster an exchange of best practices and international co-operation in those issues with a clear international scope such as spam. The GSM industry took the fight against SPAM forward with the GSM Association's Mobile SPAM Code of Practice. MAG would welcome changes or clarification in the regulatory framework which would genuinely allow industry to improve the fight against the dissemination of viruses on mobile terminals.