

12th Report on the Implementation of the Regulatory Package: conclusions and prospects for the future

Tomasz Jarzębowski

Since 1997 the European Commission has been publishing subsequent (annually, with the exception of 1998 - when four reports were published) regulatory reports on the implementation of telecommunications regulatory package. The latest one, which has been issued on 29 March 2007, presents current economic situation on the ICT market and identifies main challenges for the EU legislator.

Economic perspective – three key segments

According to the Report, the ICT sector continues to be highly dynamic. As a result of progress in the implementation of Europe's telecoms rules prices decrease and new services develop. The mobile sector shows signs of maturing – mobile services grew at 4,6%, mobile penetration has reached 103%¹ and there are first signs of 3G take-up. Also there continues to be downward pressure on mobile termination rates through regulatory intervention. Although the competition in many Member States may be deemed as increasing, there is scope for further growth, especially for Mobile Virtual Service Providers². The overall decrease in the market share of leading operators has been relatively small - the EU average mobile operators' market share was

¹ However the growth in penetration has been less than in 2005 what suggests that mobile voice telephony is a maturing market. The highest growth has been registered in Poland, from 72% in 2005 to 91% in 2006.

² The overall number of virtual operators has risen to 290, however in October 2006 ten Member States (including Poland) still had no mobile service providers.

in 2006 39,4% (0,6% less than the year before).³ The report also points out that mobile roaming charges are significantly higher in comparison to domestic mobile calls.⁴

According to the Report, fixed line telephony overall and accordingly, the average incumbents' market share⁵ and fixed interconnection charges for call termination on the incumbents' network⁶ have continued to decline. Intensifying competition, mostly based on indirect access wholesale products (carrier pre-selection or carrier selection), led to falling prices. Also substitution by mobile services and local loop unbundling has been a factor. Wholesale Line Rental has been introduced in more countries in 2006 and, taking into account countries where WRL products have already been available for some time, there is potential for even greater competition in time. Despite the declining growth in fixed voice sector, the number of request for authorisations has increased. In addition VoIP⁷ has already shown strong growth in some Member States. The report predicts that if this tendency continues, the fixed voice market may be further affected.

As for broadband, it was the fastest growing segment (estimated at ~ 8%), with last years' take-up of fixed broadband lines exceeding 20 million. The report indicates that consumers continue to benefit from lower prices, higher speeds and a variety of broadband offers (including new bundled offerings). The EU average broadband penetration has risen in 2006 to 15,7%.⁸ This segment, due to effective regulation, can be also characterised by significant growth in broadband resale agreements and substantial investments by alternative providers (with more than 4.1 million new fully unbundled local loops). The report concludes that the broadband take-up has been particularly strong in countries where competition between DSL and cable has been effective. However broadband market still relies heavily on DSL networks of incumbent operators (80% of broadband lines) and therefore national regulatory policies have been critical in setting the right conditions for competition to develop by means of access to the incumbents' infrastructure, in particular through unbundling and bitstream access products.

However achievements in the field of price decrease and the development of new electronic communications services shouldn't be overestimated. There are still significant

³ The leading operator with the lowest market share can be found in the UK – 23%. On the other hand in Cyprus it is over 90% and in Slovenia – over 70%.

⁴ This issue has been a bottleneck of mobile sector. Despite political pressure on operators to bring prices down, an intervention was deemed necessary. Therefore, on 23 May 2007 the European Parliament has adopted the draft of EU Roaming Regulation. See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0199+0+DOC+XML+V0//EN>.

⁵ The biggest rate of decline has been experienced in Cyprus, Hungary, Ireland and Poland. However in some Member States (Cyprus, Latvia, Lithuania, Hungary, Malta, Slovenia, Slovakia and Finland) incumbents' market share on overall fixed market still remains particularly high (over 90%).

⁶ Primarily due to regulatory measures taken by the NRAs.

⁷ Especially as regards the enterprise segment.

⁸ However there are significant differences in particular countries. For instance in Netherlands, Denmark and Finland the penetration rate exceeds 25% while in Poland and Slovakia is below 5%.

divergences as regards the situation on fixed, mobile and broadband markets between Member States⁹ and, in some instances, this gap is still widening. Furthermore only the best-performing EU countries are able to keep up with economies of Japan, USA or South Korea. The EU, on average, still lags behind these countries for example in respect of broadband transmission speeds.¹⁰

Regulatory developments

According to the Report, most Member States have completed the first round of market analysis and review of obligations and notified the results to the Commission and other NRAs. The majority of market reviews resulted in finding significant market power and thus the need to impose obligations. On the other hand, in a group of countries (*inter alia* Denmark and United Kingdom) effective competition has been found in a number of retail markets and thus the removal of regulatory obligations was possible. This has been the case in markets for mobile access and call origination. In some instances, where the market was still not effectively competitive, market conditions or the availability of regulated offers elsewhere in the value chain allowed to lighten the regulatory burden.

In some markets (for instance the forementioned UK) the regulatory authorities are introducing new instruments such as *voluntary commitments* (negotiations between regulator and SMP operator with regard to the availability or pricing of specified products) as an alternative to the full application of regulatory procedure.

Although there has been significant progress in the implementation of Europe's telecoms rules some issues still need to be addressed. The Report indicates three such groups. First of all it indicates that there are significant inconsistencies as regards the application remedies. In particular NRAs use different means in similar situations or comparable regulatory instruments while applying different methodologies.¹¹ Secondly the Report points out inconsistencies in sticking to EU telecom rules – improper or incomplete implementation of some measures (e.g. comprehensive directory service, caller location for emergency services¹²), lack or delay

⁹ These are particularly apparent when comparing 12 newest Member States and the EU best-performers (UK, Denmark, Finland, Netherlands, Luxembourg)

¹⁰ According to the Report the predominant speed in US ranges between 2,5 Mbps and 10 Mbps while in the EU it is between 512 kbps and 2 Mbps.

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of market analysis¹³, delays in the enforcement of regulatory measures caused by appeal procedures¹⁴ and concerns with regard to NRAs independence and impartiality¹⁵. Finally, inconsistencies in allocation of scarce resources – both in respect of radio frequencies and numbers. These three groups of issues hinder the achievement of true Internal Market in telecoms and therefore the core of new legislative proposals should be aimed at addressing these in the first place.

Conclusions and prospects for the future

The Report doesn't provide us with a clear answer to the question how the regulatory obligations need to evolve in order to resolve competition problems arising from development of new technologies and new services. It merely indicates that the regulatory environment should adapt in such a way that access to the infrastructure needed to services markets which are not effectively competitive remains available at appropriate level and that competing operators are not prevented from evolving to take advantage of the new opportunities offered.

However, with the main issues as regards the regulatory package identified and given (in outline) the timetable for Commission's proposed legislative measures and the revised Recommendation on relevant markets (both scheduled for 2007), there is hope for finding appropriate remedies for current electronic communications markets constraints. There is no doubt that the change of regulatory framework should be of evolutionary nature (i.e. amendments to the framework), rather than of revolutionary (new framework) as in case of some Member States the provisions of current sector-specific regulation have yet to bear fruit.

¹³ This is the case in most of countries. Only in some Member States, including Finland and United Kingdom, NRAs have started the second round of market analysis.

¹⁴ For instance in Belgium the appeal procedures have led to low effectiveness of regulatory efforts.

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