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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE  
EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**European Electronic Communications Regulation and Markets 2004**

**[SEC(2004)1535]**

## 1. INTRODUCTION

Successive Commission Communications have built on the Lisbon vision of the European knowledge-based economy. The Commission has highlighted the vital role the electronic communications sector plays in nearly all other economic activities, and has identified the role of innovative communications services as a potent driver of labour productivity<sup>1</sup>.

One factor for achieving these goals, pinpointed in several European Council conclusions, is the implementation of the new EU regulatory framework for electronic communications<sup>2</sup>. This provides technologically neutral regulatory principles which, when fully operational in the Member States, will assist the market to deliver choice and value for the consumer. The optimum timeframe for implementation is short and critical. The effective application of EC competition rules also plays a vital role.

The Commission has promoted implementation of the EU framework vigorously through reporting, co-operation with Member States' authorities and, where necessary, infringement proceedings. The last report on regulation and markets<sup>3</sup> concentrated on the Commission's main concerns resulting from the transposition process. This Communication focuses on market developments and the main persisting regulatory issues. It is based on more detailed analysis and market data set out in a Commission services' working document adopted in parallel, and covers all twenty-five Member States for the first time. The regulatory situation described here is generally that at 1 October 2004. Market data, unless otherwise indicated, cover the period up to and including 1 August 2004.<sup>4</sup>

## 2. MAIN MARKET DEVELOPMENTS

The e-communications services sector is characterised by an increasingly positive outlook. Competition is intensifying in most markets, bringing increased benefits in terms of price, quality and innovative services to consumers.

The industry, particularly the fixed sector, is emerging from a period of cost cutting and debt reduction. Innovation in mobile and broadband and to some extent traditional fixed services is driving the search for growth. Overall growth in the sector, estimated at 4.6%<sup>5</sup> for 2004, has stabilised and will outpace GDP expansion for the EU 25. The key drivers are fixed data and mobile services, which show strong growth of 11.5 % and 7% respectively<sup>6</sup>.

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<sup>1</sup> See Commission Communication 'Connecting Europe at high speed: recent developments in the sector of electronic communications' COM(2004) 61 final. See also Commission Communication 'Mobile broadband services', 30 June 2004, COM(2004) 447

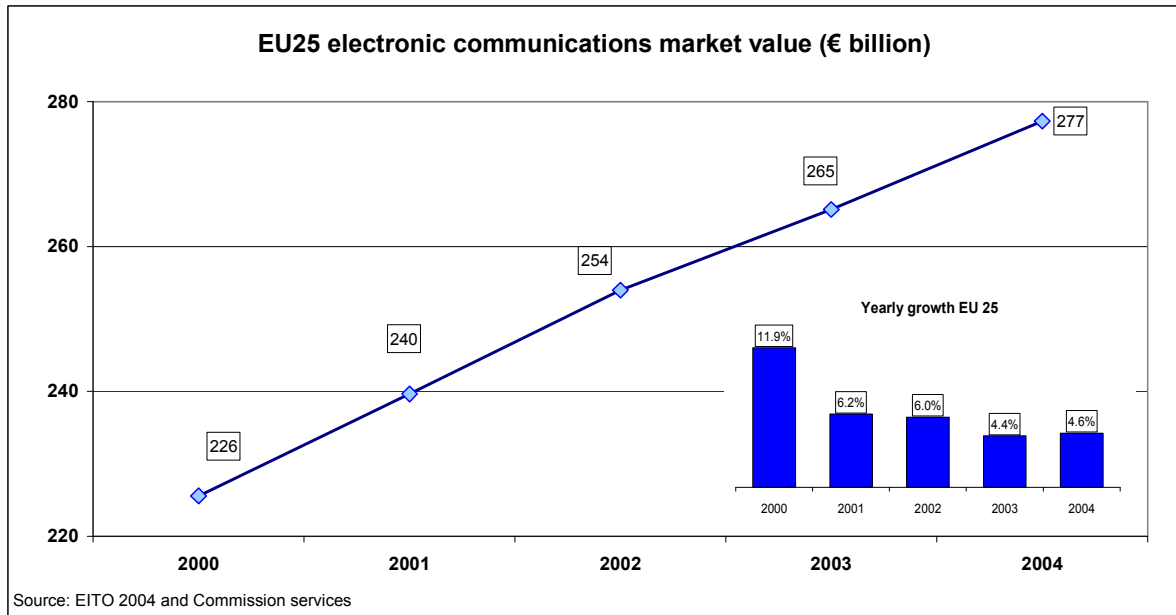
<sup>2</sup> [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm)

<sup>3</sup> European Electronic Communications Regulation and Markets 2003, COM(2003) 715

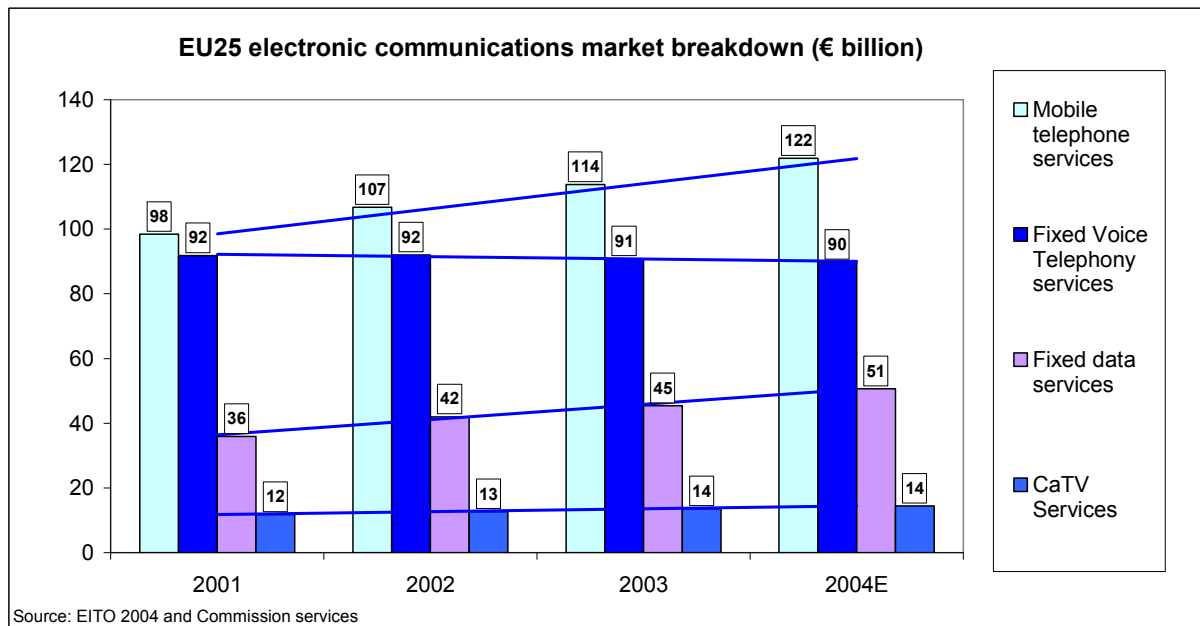
<sup>4</sup> Data is provided by national regulatory authorities unless otherwise stated

<sup>5</sup> In nominal terms. Source: EITO and IDATE

<sup>6</sup> Source: estimate by EITO



Underlying these general trends are a number of specific developments. First, traditional fixed line telephony has declined in terms of value, as increasing competition forces prices down. Second, broadband penetration has increased dramatically, spurred by lower prices and intensifying infrastructure-based competition as new entrants start climbing the investment ladder<sup>7</sup>. Third, mobile penetration continues to increase and, while voice is still dominant, there is evidence of growth in mobile data services. 3G networks and services have been launched in most Member States.

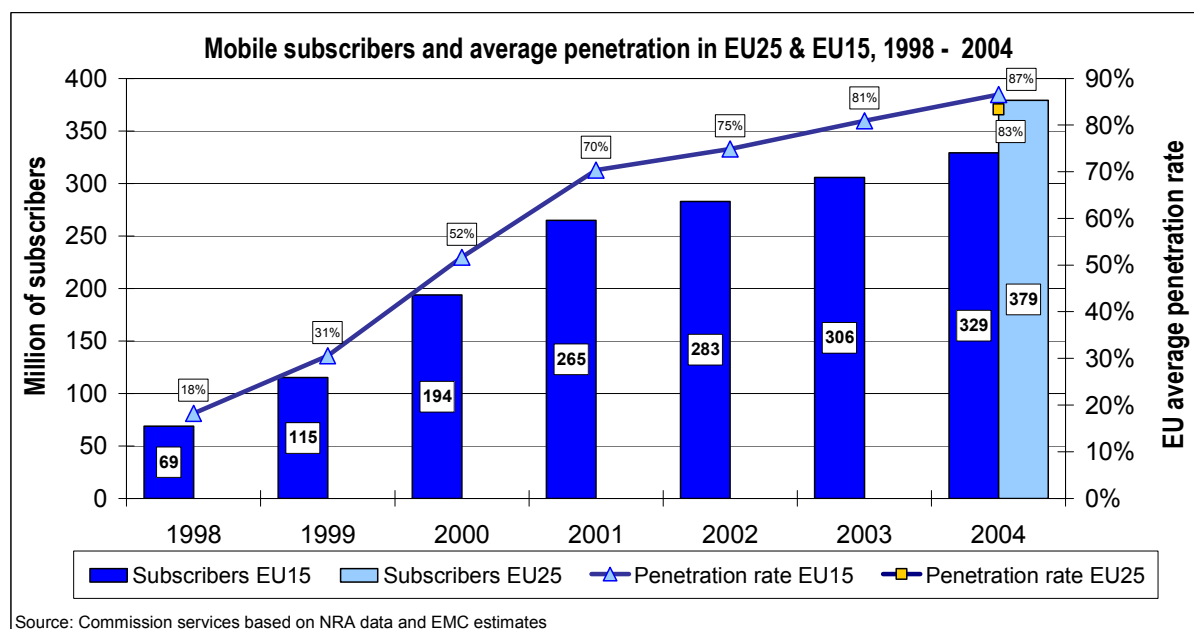


<sup>7</sup>

This term relates to a situation where a new entrant benefits initially from access products at different levels of the value chain in order to build customer base, and then progressively rolls out its own infrastructure towards the customer

## 2.1 Mobile services

Revenues from mobile services exceed those of fixed voice services. Continued strong growth of 7% was achieved in 2004, driven in part by mobile data services. The average penetration rate also continues to grow, and is now at 83% for the EU 25; the rate for the EU 15 has increased by 6 percentage points to 87%. There are now more than 379 million mobile subscribers. The key driver of future growth in the mobile sector in the EU is likely to be the deployment of advanced value added services.



A few general trends suggest that competition in aspects of the mobile sector is increasing. The average market share of leading operators has dropped from 46.6% last year to 43.2% this year, a fall greater than that seen in the last three years combined. Mobile number portability, which allows subscribers to retain their number when they move from one operator to another, has increased during the year, significantly in some countries. This service has been most successful where the charge for porting numbers has been set at a relatively low level.

As shown in the section on interconnection below, there has been a welcome reduction in mobile termination rates in many EU countries during the year, although further reductions will undoubtedly follow from intervention by NRAs. Concerns persist as to the high level of international roaming charges. The Commission is continuing its investigation under competition rules into wholesale international roaming tariffs charged between mobile network operators, and in July of this year issued its preliminary position on infringements of Art. 82 of the Treaty with regard to the UK market for wholesale international roaming<sup>8</sup>. The European Regulators Group (ERG) is also currently examining international roaming. The Commission urges regulators to complete analyses of the markets for call termination on individual mobile networks and wholesale international roaming as quickly as possible.

<sup>8</sup> Commission Press Release IP/04/994 <http://europa.eu.int/rapid>

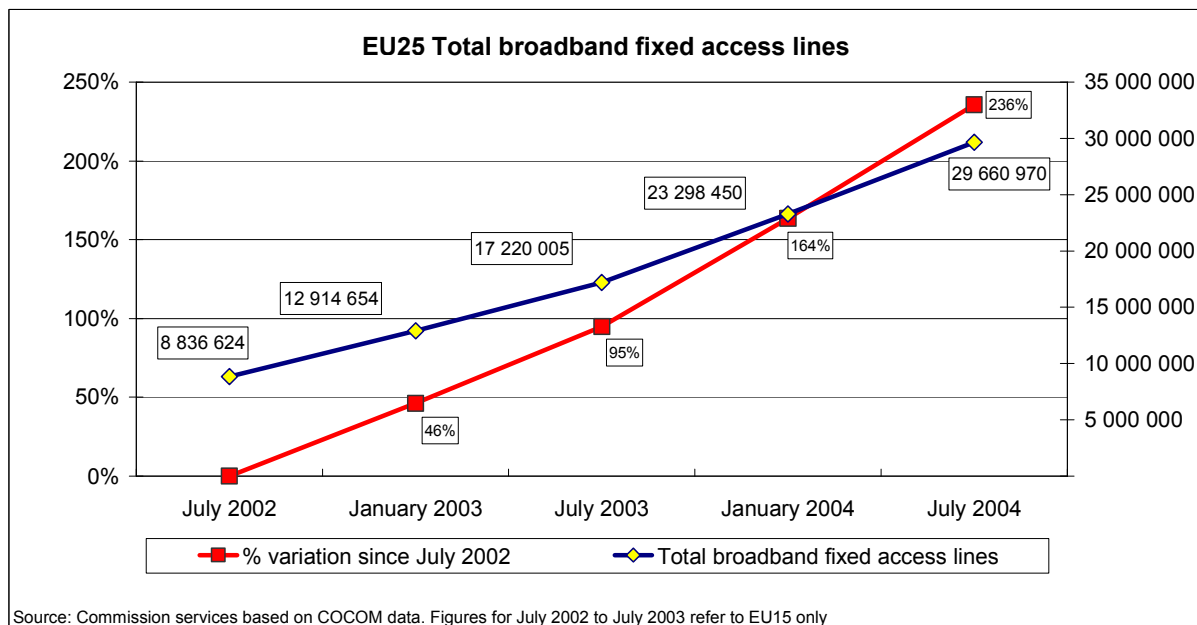
## Launch of 3G services

3G launches have accelerated in 2004; of the 75 licensed 3G operators, 30 are now offering commercial services, and 21 are in the pre-commercial phase. It is estimated that there are around 2.6 million 3G subscribers in the EU and that on average there will be population coverage of at least 43% throughout the EU by the end of 2004<sup>9</sup>. Full scale commercial deployment will increase during the course of 2005, and the extent of mass market take-up of 3G services can be assessed at that stage.

## 2.2 Broadband

The broadband sector has seen continuing growth this year, with the total number of broadband access lines rising by more than 72%. Deployment in the EU 25 is now at 29.6 million lines, which represents 6.5% of the population; the figure for the EU 15 is 7.6%, which compares with 4.5% last year. The growth in broadband deployment is being driven largely by intensifying competitive pressure and by the desire of fixed operators to offset eroding voice telephony revenues. The new entrants' share of the broadband market has continued to rise and is now at 43.7%, an increase of 2.2 percentage points on last year. The new entrants' share of the DSL market, a technology which now accounts for 78% of the overall broadband sector, has also increased and is now at 30.2%, up almost 8 percentage points in the year. However, competition in broadband access is still weak in certain countries, and the Commission will actively monitor its development and intervene where appropriate.

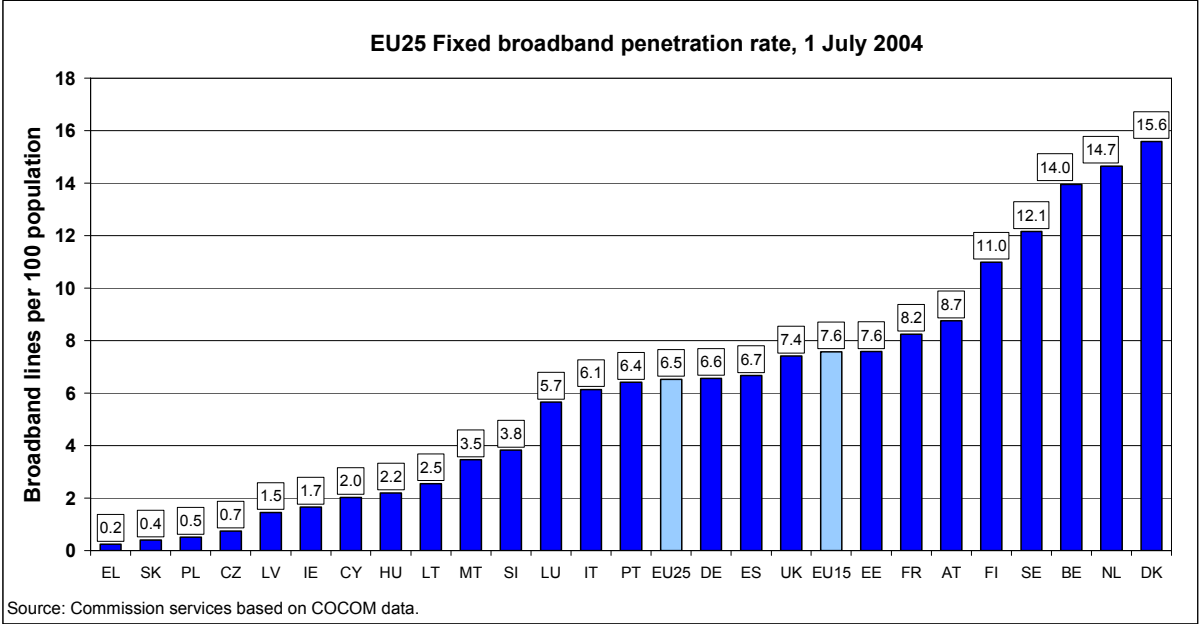
Following a competition investigation on the basis of Art. 82 of the Treaty, Deutsche Telekom committed vis-à-vis the Commission to terminate a presumed margin squeeze as regards broadband access by reducing its tariffs for shared access (line sharing) with effect from 1 April 2004.<sup>10</sup>



<sup>9</sup> Based on NRA data

<sup>10</sup> Commission Press Release IP/04/281 <http://europa.eu.int/rapid>

Broadband penetration varies considerably across Member States and is generally highest in those countries where viable infrastructure-based competition exists via cable and other alternative networks and via local loop unbundling.

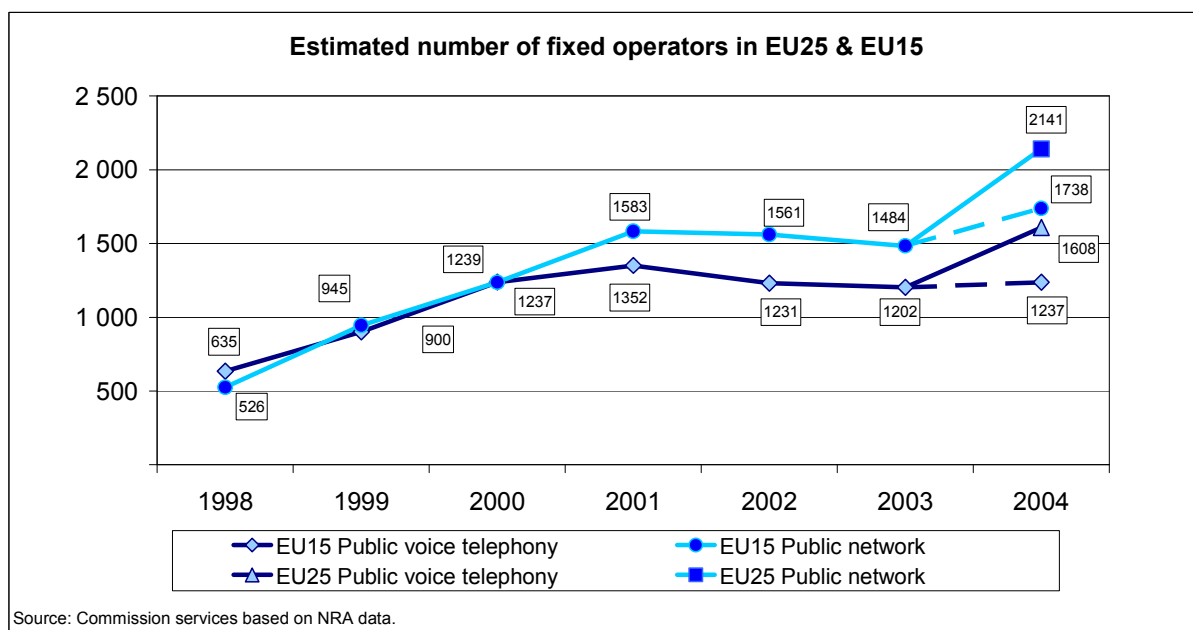


### 2.3 Unbundled local loops

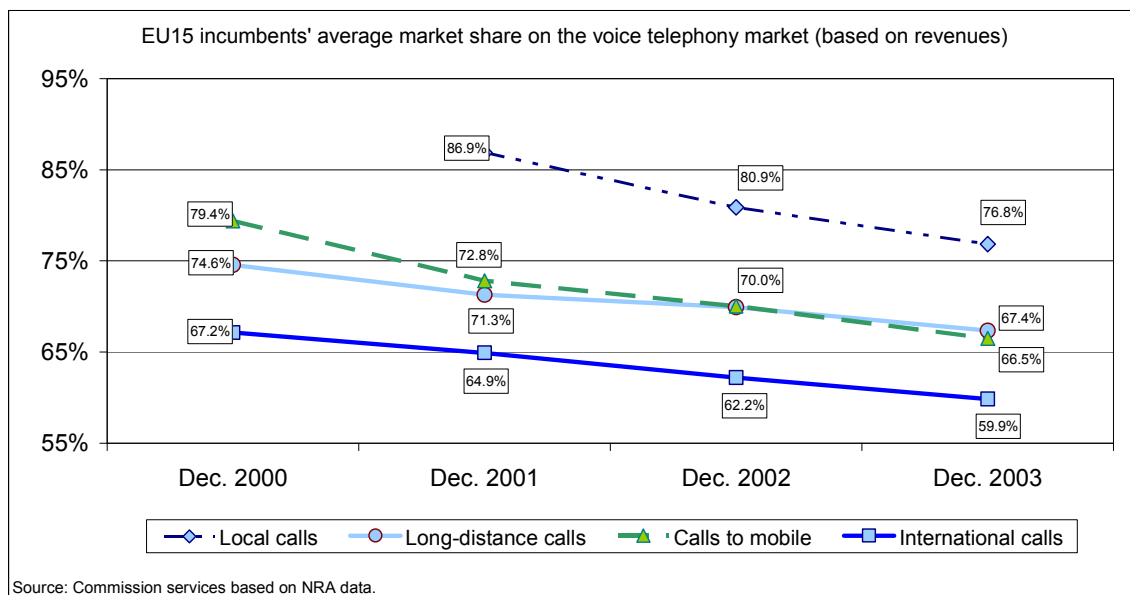
A noteworthy trend has been the increase of 110% in unbundled local loops (fully unbundled and shared lines) from 1.8 m in July 2003 to more than 3.8 m in the EU 15 in July 2004. Two factors underlie these results: decisive regulatory action, in particular in terms of pricing, has yielded positive results, and in certain countries, new entrants are beginning to increase their investment in infrastructure.

## 2.4 Fixed voice services

Despite the continued slow decline of fixed sector revenues, there has, for the first time in a number of years, been an increase in the estimated number of players entering this market.



This fact, combined with a continued general decline in incumbent market share, suggests that the level of competition in the fixed market in several countries is increasing. Prices have declined in some segments during the year and incumbent operators are offering more diverse and tailored pricing packages aimed at retaining customers. There has also been a significant increase in the take-up of fixed number portability across Member States.



As the graph above shows, the decline in incumbent market share is continuing across all fixed call segments. However, in some Member States the incumbent's share of the local call segment in particular remains high. There is also a strong correlation between the timing of liberalisation of the market and incumbent market share. This is particularly evident for the

new Member States, where the incumbents' share, again most notably in the local call segment, is over 90% in many cases.

31% of consumers now use an alternative operator for long distance or international calls. For local calls the figure is almost 20%. The majority of this access is provided indirectly, using for example, carrier selection or pre-selection. Only 6.47% are using direct access<sup>11</sup> to another operator.

Given the increase in mobile revenues, the decline in fixed revenues could, in part, be due to fixed-to-mobile substitution. For many of the new Member States, where the penetration of fixed infrastructure is relatively low, new subscribers may well opt directly for mobile telephony. However, there are indications that innovation, including the arrival of new technologies such as voice over internet protocol and converged fixed-mobile products, may arrest the decline in fixed voice revenues over time.

## **2.5 Interconnection**

Interconnection is one of the basic building blocks for a competitive market. In the fixed sector the downward trend in interconnection tariffs has continued, albeit at a slower pace, and is showing signs of stabilising. In the mobile sector, on the other hand, concerns have been expressed for some time that in many cases mobile termination rates bear no relation to costs. In response to regulatory intervention there has been a welcome downward trend in these rates over the last year. The average fixed-to-mobile termination rate for SMP operators in the EU 15 fell by 14% between July 2003 and July 2004.

## **2.6 Consumers**

The pattern of increasing consumer benefits, in terms of lower prices, greater choice and more innovative services, that has been evident since e-communications markets were first liberalised, is continuing as a result of the more competitive environment and the flexibility provided by the new regulatory framework. This year has seen increased choice through the entry of new operators into the market and more options for broadband<sup>12</sup>. As competitive pressure intensifies, prices have fallen in some segments<sup>13</sup>.

Innovative converged offerings can be seen in the fixed and mobile sectors, 3G is becoming a reality, and advanced high-value data services, underpinned by increasing infrastructure investment, are widespread. However, many challenges remain. Competition in the local loop and in broadband in certain countries is still relatively weak, and the general competitive situation across Member States is mixed. Further progress will depend on the extent to which the new regulatory framework is successfully implemented and applied in all Member States, as well as the effective application of EC competition rules.

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<sup>11</sup> Services provided over proprietary infrastructure or over fully unbundled lines

<sup>12</sup> Increasing variety of offerings in terms of price and capacity

<sup>13</sup> Long distance and international calls



### 3. TRANSPOSITION IN THE 25 MEMBER STATES

Member States were required to transpose the EU regulatory framework by 24 July 2003 (EU 15) as regards the core directives<sup>14</sup> and by 30 October 2003 as regards the ePrivacy Directive; it applied in its entirety from 1 May 2004 for the ten new Member States.

Rapid and correct transposition is of vital importance to the sector. Delay will slow down the process whereby national regulatory authorities (NRAs) analyse markets and withdraw, amend or impose regulation in the light of the level of competition found to exist. More worrying, however, is the negative signal delay sends to consumers and the market. In the five years to 2003, non-incumbent fixed line operators invested 70 billion euros in the EU 15 alone<sup>15</sup>. Incumbent and non-incumbent players are looking to make substantial further investments in the coming years. An unsound legal framework could jeopardise that objective.

Twenty Member States have completed the adoption of primary legislation and notified the Commission thereof. This is a major achievement which in all cases has involved either a complete recasting of existing laws or the introduction of major new legislation. However, five Member States, although they have in all cases carried out significant steps in the legislative process, still need to adopt primary legislation to transpose the framework:

**Belgium, Czech Republic, Estonia, Greece, Luxembourg.**

The Commission has launched infringement proceedings for non-notification, and proceedings are pending before the European Court of Justice against Belgium, Greece and Luxembourg.

Secondary legislation (substantive, in some cases) is still to be adopted in eight Member States in order to give full effect to primary legislation:

**Spain, France, Cyprus, Latvia, Lithuania, Poland, Slovenia, Slovakia.**

The Commission is currently assessing the conformity with the EU *acquis* of the transpositions carried out in all Member States, and will take appropriate action in accordance with the Treaty.

### 4. ARTICLE 7 PROCEEDINGS

Under Article 7 of the Framework Directive NRAs' draft measures must be notified to the Commission for assessment prior to adoption, to ensure market definition and market analysis are carried out in accordance with EU competition rules and to allow for harmonisation within the Single Market. The Commission may comment on the draft measures and, should it consider the market definition or SMP designation to be incompatible with Community law or to create a barrier to the Single Market, require their withdrawal.

As of 1 October 2004, the Commission had received 101 notifications from nine Member States, the majority submitted by Austria, Finland, Portugal and the United Kingdom. The

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<sup>14</sup> Framework, Access, Authorisation, Universal Service and Competition Directives

<sup>15</sup> Investment by New Entrants in Europe, 2004, Strategy and Policy Consultants Network

Commission has since closed 92 cases, providing guidance to NRAs in their market reviews whilst addressing policy and implementation issues to ensure a consistent yet appropriately nuanced approach in all Member States. Furthermore, the Commission services have held 58 pre-notification meetings with NRAs from 15 Member States to address issues arising from proposed measures. To date, there has been at least one notification on each of the markets identified in the Recommendation on relevant markets except one, namely the wholesale national market for international roaming on public mobile networks. Up to 1 November 2004, the Commission used its veto powers on only three occasions <sup>16</sup>.

The overall picture emerging from the assessment of notifications is that regulation has become more focussed in addressing market failures. NRAs have tended not to deviate from the markets defined in the Recommendation. However, two markets in particular have been subject to differing approaches, the wholesale broadband access market (inclusion of broadband access via cable, which, in the Commission's view, is only possible where a product equivalent to bitstream is actually offered via cable), and the market for broadcasting transmission services (split by platform, i.e. terrestrial, cable, satellite).

The general approach to SMP designation has been to follow the principles set out in the SMP Guidelines. While market share remains an important factor, other factors have also proved to be significant in the overall analysis (including market dynamics, barriers to entry and potential competition).

In terms of remedies, NRAs in general tend to impose obligations on undertakings designated with SMP according to the competition problems identified in the relevant markets. In some cases, NRAs have adopted an asymmetric approach, i.e. imposing different remedies on SMP undertakings in similar markets in the same Member State. This is possible according to the framework, provided such treatment is justified.

Finally, experience shows that NRAs have taken utmost account of the comments issued in Commission decisions when adopting their final measures.

## **5. IMPLEMENTATION OF THE NEW REGULATORY FRAMEWORK IN THE EU 25**

While the picture in the market is broadly positive, the Commission has identified a number of key areas where regulation in the Member States needs to be improved. The following section refers to some of the major regulatory issues arising.

### **5.1 National regulatory authorities (NRA)**

The ability of national markets to function well is directly proportionate to the quality of the legal framework put in place in the Member States concerning the NRAs.

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<sup>16</sup> These cases concerned the market for international calls (Case FI/2003/0024 and FI/2003/0027) and the market for access and call origination on public mobile telephone networks (Case FI/2004/0082) in Finland, and the market for transit services in the fixed public telephone network (Case AT/2004/0090) in Austria

NRAs must be independent of all commercial or other vested interests. They must also be entrusted with all of the powers laid down in the framework, and be able to exercise them without outside interference.

The Commission is strongly supportive of the work the NRAs have carried out so far in preparing or notifying market analyses, and in particular their cooperation in the European Regulators' Group to seek common approaches to regulation in conformity with the framework.

However, the Commission has substantial concerns that the principles of independence and impartiality are still not fully observed in all twenty five Member States. Some of these arise from the fact that full separation between the State's shareholding and the taking of regulatory decisions is still not ensured in all instances. There is also concern that in some countries NRAs may be impeded in the application of appropriate regulatory remedies in the light of their market analyses. This can arise for example where ministries, which have not been notified as NRAs responsible for market analysis, intervene by giving instructions or directions affecting the NRAs' regulatory decisions. In certain cases it is rather the national legislation that is at fault for limiting the discretion of the regulator to regulate the market. This may take the form of a limitation on the regulatory remedies available to the NRA, or the imposition in the legislation of excessive criteria for the imposition of regulatory requirements. Even where national law confers full powers on the NRA, there are cases where effective competition is precluded by the lack of enforcement of NRA decisions.

A further issue of major concern to the Commission is the length of the procedures for appeals against NRA decisions. The Commission is examining the situation in this regard in a substantial number of Member States. This is, in some cases, aggravated by the systematic suspension of NRA decisions pending appeal.

Finally, the need for NRAs to undertake market reviews in addition to their work on market supervision, dispute settlement and enforcement has, in some cases, caused severe resource problems for a significant number of regulators.

## **5.2 Charges for authorisation of services**

Charges relating to the management of authorisation systems and the granting of rights of use should be transparent, proportionate and objectively justified and cover only the actual administrative costs incurred. Other charges may not be imposed.

The Commission is examining the position in a number of Member States where charges are relatively high and where compliance with these principles needs to be verified. It is also scrutinising various charges on market players and contributions to schemes for the dissemination of broadband for conformity with the directives.

## **5.3 Individual rights of use for radio frequencies**

Where individual rights of use of radio frequencies are granted by Member States, open, transparent and non-discriminatory procedures should be used. While this requirement has been extensively transposed, the Commission is examining whether the practical application of these criteria can be observed in practice in a number of Member States, in the absence of a national frequency allocation table or because of the licensing procedures.

#### **5.4 Rights of way, colocation and facility sharing**

The Commission notes the persistent problems that have arisen across the Union in particular in the granting of rights to install masts and antennas for the provision of mobile services, and related fees. This has in a number of cases delayed the rollout of third generation (3G) infrastructure, sometimes in the face of strict rollout requirements in national licences. One instance of best practice in this regard is the setting up by an NRA of a publicly available database of current and future locations of masts.

#### **5.5 Provision of universal service**

The provision of a minimum set of services to all end-users at an affordable price and specified quality is a key principle of the regulatory framework; Member States are required to ensure that no undertaking or category of undertaking is precluded a priori from providing universal service. The Commission is examining closely concerns that in a number of Member States the universal service provider may be designated without regard to this principle, or without the necessary transparency.

#### **5.6 Must-carry obligations**

Member States may impose must-carry obligations only where they are necessary to meet clearly-defined general interest objectives. The Commission is examining the way in which these obligations are imposed in some countries, in particular to see whether a clear link between the obligations and objectives has been established, so that the discretionary powers of the authorities to grant must-carry status do not give rise to arbitrary decisions.

#### **5.7 Unsolicited commercial communications**

The Commission notes that, while the opt-in rules in the ePrivacy Directive have in general been transposed, there is a tendency to move also towards voluntary codes to protect users. This development is welcomed.

#### **5.8 Traffic data**

The Commission will examine the growing tendency for the authorities in a number of Member States to increase the statutory period during which a requirement for the retention of traffic data may be imposed for law enforcement purposes.

#### **5.9 Implementation of the transitional provisions in the EU 15**

Member States from the EU 15 are required under the transitional provisions to ensure that existing regulatory obligations on SMP undertakings remain in place until determinations are made by regulators in accordance with the new framework.

The Commission is examining concerns that there are still instances where such obligations, relating for example to cost accounting and accounting separation, are not well implemented, leading to margin squeezes on new entrants. Differences in the manner and detail of the regulatory scrutiny to which wholesale, access and retail tariffs have been subjected produces similar effects in some cases.

The Commission is also concerned that the positive development of investment by new entrants and the migration of customers to better-grade products via a move from resale

products to bitstream and local loop unbundling may in some cases be frustrated by process-related problems. As a result, developments for example relating to rollout of local loop unbundling are patchy across the Member States. In any case market reviews need to be speeded-up and application of the transitional regime limited to a minimum in order to address outstanding issues.

#### **5.10 Implementation of the ‘starting conditions’ in the new Member States**

The new Member States were required to ensure that regulatory obligations were in place on SMP undertakings by the date of accession. Some of the outstanding problems in the EU 10 replicate those persisting under the old framework in the EU 15, such as cost accounting and tariff transparency. The existence of an appropriate reference interconnection offer is also questionable in some of the new Member States. A further weakness in a number of them is the absence of full implementation of carrier selection, carrier pre-selection and number portability.

### **6. CONCLUSION**

Europe is at a critical stage in the development of a new and dynamic economy driven by the convergence of technologies and service innovation. While e-communications markets are showing signs of resurgence, ground needs to be made up if the benefit to the wider European economy is to accrue.

Full and correct implementation of the e-communications regulatory framework and the effective application of EC competition rules are essential prerequisites. The potential for competition, innovation and investment will be fully realised only if Member States give high priority to transposing and giving full effect to the EU principles already decided. The Commission will continue to report on progress, and will focus in particular on the practical application of transposed national provisions.