

Výber častí týkajúcich sa SR z dokumentu EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION AND MARKETS 2004 (10TH REPORT)

... in Slovakia it remains to be seen whether structural separation of regulatory and ownership functions has been achieved.

In Poland, where regulatory functions are spread among three bodies (including the Ministry of Infrastructure responsible for defining relevant markets), some ambiguity has been noticed in the allocation of tasks regarding broadcasting between URTiP (the telecommunications NRA) and the National Broadcasting Council, **while in Slovakia and the Czech Republic the division of tasks between the NRA and the national competition authority is somewhat unclear.**

Resources

The need for NRAs to undertake the initial market reviews in addition to their ongoing work on supervision, dispute settlement and enforcement has clearly placed a severe burden on all regulators during this crucial period. **The question of resources, in terms of expertise or start numbers, is clearly an important element, and the Commission services are not yet convinced that they are fully available in particular in the case of Cyprus, Latvia, Lithuania, Luxembourg, Slovakia, Poland and Sweden.**

The Commission services are scrutinising whether the consultation procedures in Articles 6 and 7 of the Framework Directive have been fully transposed in Latvia, and **whether in Slovakia some consultations exclude certain interested parties such as consumers from the process, and whether the requirements of Article 7 are fully transposed in the case of draft measures under the Universal Service Directive.**

In some Member States, such as Italy, Hungary, Slovenia, Slovakia and Sweden, **legal deadlines for completion of market analysis and choice of remedies have been included in national laws. However, this does not guarantee that the deadlines will be met, as evidence by the situation in four of those countries, where the national deadline has already passed without completion of all market reviews** (in Slovenia the deadline has not yet passed). In Sweden the status of existing prior obligations on the passing of the deadline is also an issue, because of the wording of the transitional provisions.

NRA POWERS TO IMPOSE OBLIGATIONS ON NON-SMP OPERATORS

The Directive (Article 5) requires that NRAs should have the power to take action where necessary to ensure adequate access and interconnection and interoperability of services, by imposing appropriate and proportionate obligations on undertakings even when they do not have SMP.

Further scrutiny will be needed as to whether the **transposition measures adopted in Slovakia and Latvia ensure that the NRA has the complete set of powers and duties required under Article 5.**

In Slovakia the law itself appears to impose nondiscrimination and transparency obligations in relation to interconnection on all operators providing public networks, irrespective of whether they have SMP or of the conclusions of a market analysis. The application of the requirements presented in this paragraph may also affect the rights of affected parties to appeal against the outcome of a market analysis procedure, and the conformity of such transposition with the requirements of the Directive will need to be further scrutinised.

The Directive lays down that NRAs may impose access and interconnection-related remedies on SMP operators which are additional to those listed in the Directive, provided this is done in accordance with the special procedural requirements set out. **The legislation in Finland, Latvia and Slovakia appears not to provide for such exceptional remedies.**

However, incumbent operators claim that the **tariff rebalancing process has not been fully completed** at least in Portugal and several new Member States (e.g. Cyprus, Latvia, Malta, Czech Republic, Slovenia and Slovakia).

In Slovakia, **neither CS nor CPS appears to be available at present, but could be put in place following market analyses by the NRA.**

However, the **Commission services are investigating the lack of availability of number portability in Latvia, Poland and Slovakia.**

Secondary legislation (quite significant, in some cases) will be required before transposition can be considered to be complete in the Czech Republic and Estonia (where there is no transposition, as yet), and **the Commission is examining whether this is also the case in Cyprus, Latvia, Poland, Slovenia and Slovakia. As well as the problems of delay, a number of issues need to be examined in regard to the conformity of the transposition measures that have been adopted.**

However, some of the New Member States seem to have failed to implement fully prior to accession the “starting conditions” under the old framework, particularly those under the Access and Interconnection Directive which stood as a basis for imposing obligations on undertakings designated as having SMP in accordance with the criteria under the old framework, and this failing has been compounded by the delays that took place in transposing the new framework. The Commission services are looking into the application of some of the key transitional obligations on operators with SMP (over the 25% threshold as defined in the old Directives), relating notably to the apparent **absence of adequate cost accounting and/or tariff transparency (Cyprus, Lithuania, Poland, Slovakia, Slovenia) and/or of an interconnection reference offer, or one that adequately meets market needs (Cyprus, Lithuania, Poland, Slovakia, Slovenia) to ensure that interconnection is competitively available on non-discriminatory conditions.**

The Commission services are also examining whether the cost accounting system applied in Malta ensures that the NRA is able to monitor compliance with the cost orientation obligation imposed on the incumbent in the market for fixed public telephony, given that the interconnection charges applied are among the highest among EU Member States. Latvia and Slovakia also have very high interconnection tariffs. **In Slovakia also, due to the failure to impose key obligations of the old framework and lengthy decision-making, fixed to fixed**

interconnection is virtually non-existent – there is only one interconnection agreement concluded by the incumbent, with an operator which does not compete on the retail market.

As well as examining such matters, the Commission services are looking at whether regulatory obligations have been incorrectly applied to operators, either because they do not have SMP in the markets identified under the old framework (Czech Republic, Slovenia) or because different markets have been identified (Malta). In particular, in the Czech Republic the current law requires accounting separation to be imposed on all operators, whether or not they have SMP.

Other important market opening rules were also not implemented prior to accession in some of the New Member States. **Carrier selection and pre-selection was a key tool in the EU15 for enabling competition to develop in the first place, and its apparent absence in some New Member States (Latvia except for international calls; Slovakia) seriously undermines the development of competition.** In some cases, **the scope of CS/CPS was limited, either in terms of the markets to which it applies (Poland; as well as in Hungary where the problem has now been resolved), or simply because it was not defined as an SMP obligation (Slovakia).** The Commission is examining whether **fixed number portability has been implemented in some New Member States (Latvia, Poland, and Slovakia).**

Local Loop Unbundling is proving to be increasingly important for the development of competition and the roll-out of broadband services in the EU. However, in a number of New Member States the Commission is examining whether LLU has been implemented because **there does not appear to be a Reference Unbundling Offer (Malta, Poland, Slovakia),** or, where this exists, the conditions it establishes do not appear adequate to allow actual competition in local access through unbundling (Czech Republic, Lithuania, Slovenia).

While not part of the “starting conditions”, the existence of an independent and properly resourced national regulatory authority is in fact a determining factor in the successful implementation of the framework. Accordingly, the Commission is monitoring closely the **administrative capacity of the NRA in several New Member States (Latvia, Poland, Slovenia, and Slovakia)** and/or its independence (Cyprus). In some countries, the Commission is also examining whether there are limitations or constraints on the powers of the NRA to carry out its tasks (Slovenia, Latvia), particularly in relation to market analysis (Poland, where relevant markets are defined by law) and the imposition and enforcement of remedies.

SLOVAKIA

TRANSPOSITION

The new Law on Electronic Communications, which aims to transpose the new EU regulatory framework, including the ePrivacy Directive, into national law, came into force on 1 January 2004, i.e. before the date of Slovakia's accession to the EU. This new law replaced the previously valid Law on Telecommunications, which aimed to transpose the previous regulatory framework that was based on the 1998/2000 *acquis*.

The Commission services are proceeding with their examination of the notified text, including conformity of the provisions relating to the powers of the regulator with respect to SMP regulation at retail level, number portability and consultations. These are referred to in more detail below.

MARKET OVERVIEW

There has been very little entry into the fixed line market, due in particular to the lack of effective measures to implement the law. Although the regulator has taken a number of positive initiatives this year, substantial space for improvement appears with regard to ensuring necessary conditions for effective liberalisation of the fixed market.

According to the regulator's market analysis, **the fixed incumbent has 100% market share on the markets for fixed call origination and fixed call termination.** Fixed line penetration stands at 22.3% of the population.

The fixed incumbent operator was originally formed as a state enterprise. In 1999 the company was transformed into a joint stock company. The company is the designated universal service provider and operates a fixed telecommunications network covering the territory of the Slovak Republic. Leased lines form an important part of the company's portfolio of services.

July 2000 was an important milestone in the development of the company, which was 100% state-owned until that date, as a strategic investor acquired a share of the company at that time. This strategic investor now has a 51% share of the company, while the Ministry of Transport, Post and Telecommunications (the Ministry) and the National Property Fund own 34% and 15% respectively. The company is currently a 51% shareholder in one of the two operators providing mobile services in Slovakia. The incumbent is to acquire the remaining 49% of this mobile operator shortly.

On the basis of the previous law which was in force until the end of 2003, the fixed incumbent has been designated with SMP on the market of public telephony services by means of public telecommunications networks and on the market for public telecommunications service using leased lines.

Mobile licences have been issued for 2G and 3G networks. The mobile operator controlled by the fixed incumbent also operates an NMT network. The two mobile operators have 56% and 44% market shares respectively as of June 2004. Both operators offer GPRS services, while the mobile operator controlled by the fixed incumbent also provides EDGE services. Both operators were also granted 3G licences and are obliged to launch 3G services by 1 April

2006. A third applicant participated in the beauty contest for 2G and 3G licences in 2002 and was awarded licences as a result. However, as this applicant failed to pay the licence fee, the regulator subsequently withdrew these licences.

Mobile penetration is approximately 74% as of June 2004. On the basis of the previous law in force until the end of 2003, both the established mobile operators were designated with SMP on the market for public telephony services provided by means of public mobile telecommunications networks.

Sales of broadband connections began in mid 2003. The number of ADSL lines was approximately 17 100 as of July 2004. A large number of internet users, especially residential households, still use dial-up access to internet. Due to the fact that alternative operators may provide competitive ADSL services to their customers only in those cases where these customers have a voice telephony or ISDN subscription from the fixed incumbent, the regulator made a decision in June 2004, to take effect four months later, prohibiting the fixed incumbent from bundling its ADSL services with its voice telephony and ISDN services. **In August 2004 the Supreme Court decided on further postponement of the effectiveness of the regulator's decision, based on incumbent's proposal.** As of July 2004 approximately 3 800 customers were using broadband services via cable. Only one of the Slovak cable operators provides broadband services. At that time the market share of fixed incumbent on broadband market was 46% and broadband penetration was 0.4% of the population.

THE NRA

The Telecommunications Office of the Slovak Republic (TÚSR) was established in 1993. It is financed from the State budget. Market players report that TÚSR does not have its own budget chapter, as it is included in that of the Ministry. **TÚSR faces problems related to lack of human resources.**

It is being examined whether the current law provides sufficiently clear guidance with regard to the division of competences between the TÚSR and the Antimonopoly Office of the Slovak Republic (the NCA in Slovakia). Cooperation between TÚSR and the Ministry appears to work well.

The Commission services are examining whether the full separation of regulatory and operational functions has been fully achieved, in the light of the fact that the Ministry controls part of the State's shareholding in the fixed incumbent operator and universal service provider in Slovakia as it controls 34% shareholding in the incumbent, while at the same time being empowered to adopt secondary legislation dealing with universal service and to propose a national policy for electronic communications to the government for approval. The Ministry has competence in the area of preparation of the legal framework. The Ministry is also competent to prepare the draft national frequency spectrum table and to submit it to the Government for approval.

Appeal mechanism

Under the current law decisions taken by TÚSR in the first instance are reviewed by the President of TÚSR in the second instance. Filing of an appeal against a decision taken by TÚSR in the first instance generally has suspensory effect. However, TÚSR's decisions can be subject to review by a court. Such a review does not in itself introduce suspensory effect of

the decision being reviewed. **Market players report that in practice this decision making process tends to be lengthy.**

Market analysis

The regulator defined 18 relevant markets on the basis of the Commission's Recommendation in January 2004. The regulator was required under Slovak law to carry out an analysis of the defined markets by the end of June 2004. **However it has made the results of its analysis publicly available only with respect to four relevant markets, which are wholesale markets 8 (call origination on the fixed telephone network), 9 (call termination on individual fixed telephone networks), 11 (wholesale unbundled access to metallic loops and sub-loops for provision of broadband and voice services) and 16 (voice call termination on individual mobile networks) in the Commission's Recommendation.** Of those markets, the incumbent fixed operator was found to have SMP (with 100% market share) on markets 8, 9 and 11, while in the case of market number 16 both mobile operators were found to have SMP. One pre-notification meeting relating to Article 7 of the Framework Directive has taken place between the regulator and the Commission. The regulator intends to impose SMP remedies after the necessary consultation processes are complete. TÚSR has to date notified to the Commission under Article 7 of the Framework Directive three draft measures concerning determination as to significant market power and the imposition of resulting obligations in respect of the wholesale markets for call origination on the fixed telephone network, for call termination on individual fixed telephone networks and the market wholesale unbundled access (including shared access) to metallic loops and subloops for the purpose of providing broadband and voice services. The draft measures are under Commission's review.

The full transposition of the procedures under Article 7 of the Framework Directive needs to be verified. **In particular it needs to be seen whether the specific provision of the law giving TÚSR the obligation to make the draft measure accessible to the Commission and to NRAs in other Member States obliges TÚSR to make accessible draft measures which fall within the scope of the Universal Service Directive.**

The compatibility of the definition of the notion "consultation" in the law, which narrows the consultation mechanism only to undertakings, NRAs and the Commission, needs to be assessed for conformity with the Framework Directive, which refers in this context to "interested parties", which may cover also consumers, their associations, etc. Moreover, a subsequent provision of the law imposes an obligation on the NRA to consult only with undertakings.

STARTING CONDITIONS

The Slovak fixed voice market was formally liberalised in January 2003 by a previous law transposing the old, 1998/2000 regulatory framework for telecommunications, which remained in force until the end of 2003.

However, while that law provided for the licensing of competitive fixed network operators, it did not ensure all necessary conditions for effective liberalisation of the market. For example, it granted only what appear to be weak powers to the regulator to ensure interconnection between the incumbent and new entrants; there was no obligation to publish a reference interconnection offer (RIO); obligations related to local loop unbundling (LLU) including

publication of a reference unbundling offer (RUO) were missing; and number portability was only required to be made available from 2005. Obligations for call by call carrier selection and pre-selection were applied as general obligations on all operators rather than as a condition of SMP status. Carrier selection and pre-selection were not implemented in practice under the previous law.

Attempts to improve that law by means of amendment failed. Because a substantial part of the 'starting conditions' for application of the new framework did not exist under the previous law, **it has not been possible to maintain these conditions in place, as required by the new regulatory framework, pending completion of the market review process under the new framework.**

The Commission services are examining **whether the current law states explicitly that previous SMP obligations will be maintained until market analyses are completed. It remains to be seen whether the law makes it clear that a particular existing SMP obligation should only be removed when analysis of the equivalent market under the new framework has been completed.**

MAIN REGULATORY ISSUES

Access and interconnection

Only one fixed to fixed interconnection agreement has so far been concluded by the incumbent, and in that case the undertaking concerned does not compete on the domestic fixed retail market.

The fixed incumbent's reference interconnection offer was submitted to TÚSR in January 2003; however **it has not yet been made publicly available as a complete document.** The failure of negotiations on interconnection to date is generally attributed by new entrants to **excessively onerous conditions demanded by the incumbent, e.g. unacceptable contractual penalties, high bank guarantees, unreasonable conditions for traffic forecasting, etc.**

Because of **restrictions on access to the fixed incumbent's interconnection offer imposed on grounds of confidentiality, the document cannot be analysed objectively by third parties.**

In June 2004 TÚSR made a decision on the technical and operational conditions for interconnection and the pricing methodology to be included in the incumbent's draft reference interconnection offer. This decision deals with interconnection between the network of the fixed incumbent and new market entrants. This decision did not come into force on its adoption because it was appealed. A second decision by TÚSR was made at the end of September 2004 as a result of the appeal. By virtue of this decision the fixed incumbent was required to make changes to its interconnection offer within 30 days. **However, the interconnection charges imposed by TÚSR are not based on a cost accounting methodology, but on a benchmarking exercise by reference to nine EU15 Member States, by excluding from consideration the three countries with the highest interconnection charges and the three with the lowest.**

Calculation of interconnection charges based on this decision also takes into account the ratio between fixed line penetration in these nine countries and fixed line penetration in Slovakia. As a basis for this benchmarking exercise, the decision refers to the Ninth and Sixth Implementation Reports of the Commission. *Interconnection charges for call termination on incumbent's fixed network clearly exceed the EU average if compared to these charges in those EU Member States for which these data are available (2.87 €cents per minute at local level; 3.72 €cents per minute on single transit and 5.74 €cents per minute on double transit).*

TÚSR has also taken three decisions between July and September 2004 imposing an obligation to conclude interconnection agreements on the fixed incumbent and three new entrant operators. Of these three decisions, one was later rescinded by TÚSR and the other two have as of 1 October 2004 not yet become legally binding, as one has been appealed and the other was still open to appeal.

Due to the virtual absence of wholesale level fixed to fixed interconnection with the incumbent's network, one of the only ways in which alternative operators can compete in the fixed retail market is by offering voice services using the incumbent's network for dial-up access to the internet. However, even this solution faces problems in practice and creates tensions between the fixed incumbent and new entrants.

The incumbent announced its intention to implement certain changes in its pricing for access to the internet in this respect, which the new entrants consider unjustified. In July 2004 TÚSR made a preliminary decision prohibiting the incumbent from implementing these changes and a final decision on this case is still awaited. **In the same month TÚSR fined three alternative operators for providing voice services via an access code reserved under the current numbering plan for dial-up access to internet services.** An appeal against this decision is still pending.

Negotiations on interconnection between new market entrants and mobile operators are proceeding without major problems, as both mobile operators have now concluded a number of interconnection agreements with new entrants.

It needs to be examined whether the powers of the NRA as stipulated by Article 5 of the Access Directive are transposed correctly, and **whether the law provides the possibility for the NRA in exceptional circumstances to impose other access or interconnection obligations than those listed in the Access Directive on operators with significant market power.** The Commission services are also examining the conformity of the law to the extent that it imposes directly on all undertakings providing public networks, obligations of transparency and non-discrimination in relation to interconnection.

LLU

It is being assessed whether local loop unbundling is in place and whether a RUO has been published.

WLL

In April 2004 TÚSR launched a tender for the assignment of frequencies in the 3.5 GHz frequency band for the establishment and operation of a wireless local access network. On 1

October 2004 TÚSR cancelled this tender, referring to a conflict between two applicable provisions in the Law on Electronic Communications dealing with fees for rights of use. There are two operators providing services in the 26 GHz frequency band.

Leased lines

The prices of leased lines are not regulated. Prices for national leased lines (64kb/s and 2Mb/s) clearly exceed the EU average if compared to these prices in those EU Member States for which these data are available (€5 084 per year for 64kb/s, 2 km circuits; €13 160 per year for 64kb/s, 200 km circuits; €22 371 per year for 2Mb/s, 2 km circuits and €67 592 per year for 2Mb/s, 200 km circuits).

Universal service

The fixed incumbent operator is designated as a universal service provider and it provides all basic services covered by the universal service obligations. No universal service financing mechanism has been implemented in practice. Based on secondary legislation dealing with the universal service financing mechanism that came into force in mid September 2004, the universal service provider may apply for recovery of the net costs of provision of universal service.

Fixed tariffs have not yet been rebalanced, which means **that monthly line rentals are offered below their actual cost**. Regulation of retail tariffs is achieved by means of a price cap. The powers of TÚSR with respect to SMP regulation at retail level are significantly limited by the law. The scope of SMP regulation at retail level is narrowed in the law only to undertakings identified as having SMP on “public telephony service markets”.

The Commission services are examining whether carrier selection, carrier pre-selection, fixed number portability and mobile number portability have been implemented. Under the law the facility of number portability is made conditional on technical feasibility, the implications of which are also being examined.

The correct transposition of the right of subscribers to withdraw from their contracts upon at least one month’s notice of proposed modifications to contractual conditions needs to be verified. Under the law a subscriber has the right to withdraw from his contract on condition that the undertaking provides him one month’s prior notice on proposed modifications in the contractual conditions. The law does not however grant the subscriber the right to be given such prior notice.

Policy objectives and regulatory principles

The correct transposition of the policy objectives and regulatory principles set out in Article 8 of the Framework Directive needs to be verified.

ePrivacy

The correct transposition of the exception from the opt-in principle applicable to unsolicited communications and of the rules governing the use of networks to store information or to gain access to information stored in the terminal equipment of the user (cookies) also remains to be verified.