EUROPEAN COMMISSION
Information Society and Media Directorate-General

Electronic Communications Policy
Implementation of Regulatory Framework

18 June 2012

EUROPEAN UNION

2011
Telecommunication Market and Regulatory Developments

This report is a Commission Services working document, issued as part of the Scoreboard 2012:
http://ec.europa.eu/information_society/digital-agenda/scoreboard/

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Telecommunications
Market & Regulatory Developments

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1. STATE OF TRANSPOSITION OF THE REVISED EU FRAMEWORK

To date (June 2012), there are four Member States that have not yet transposed the new Telecom Framework in their national legislation. This is well beyond the deadline set by the European Parliament and Council of EU of 25 May 2012, so the European Commission has launched infringement procedures against these Member States.

The revised EU Telecom Framework (Citizen's rights and Better Regulation amending Directives) was adopted by the European Parliament and Council of the EU in November 2009. It amends five different existing EU Directives (Framework Directive, Access Directive, Authorisation Directive, Universal Service Directive and the e-Privacy Directive). The deadline for transposition into national legislation was 25 May 2011. A new Regulation setting up the European Body of Telecoms Regulators (BEREC) was also adopted. The BEREC office was established in Riga and became financially autonomous in September 2011.

In July 2011, the European Commission sent letters of formal notice to the 20 Member States which had not notified measures to implement in full the new EU telecoms rules into their national law at that time.

At the end of November 2011, *i.e.* six months after the deadline for transposing the new EU telecoms rules into national law, 16 Member States which had failed to do so received a reasoned opinion: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Romania, Slovenia and Spain.

To date (June 2012), 23 out of 27 Member States have notified the full transposition of the revised Telecom Framework. The Member States which have not yet notified the full transposition of one or two of the amending Directives are Belgium, Poland, Portugal and Slovenia.

In the absence of transposition and notification, the Commission has launched infringement proceedings in the form of a referral to the Court of Justice of the European Union, including a request for financial sanctions[1].

🔴 **no notification**

🟠 **partial notification**

🟢 **notification**

✓ **full notification (both Directives)**

Member State		**Better regulation** Directive	**Citizen Rights** Directive	Both Directives
BE		○ 🟠 ○	○ 🟠 ○	
BG		○ ○ 🟢	○ ○ 🟢	✓

[1] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/524&format=HTML&aged=0&language=EN&guiLanguage=en

Member State		**Better regulation** Directive	**Citizen Rights** Directive	Both Directives
CZ		○ ○ ●	○ ○ ●	✓
DK		○ ○ ●	○ ○ ●	✓
DE		○ ○ ●	○ ○ ●	✓
EE		○ ○ ●	○ ○ ●	✓
IE		○ ○ ●	○ ○ ●	✓
EL		○ ○ ●	○ ○ ●	✓
ES		○ ○ ●	○ ○ ●	✓
FR		○ ○ ●	○ ○ ●	✓
IT		○ ○ ●	○ ○ ●	✓
CY		○ ○ ●	○ ○ ●	✓
LV		○ ○ ●	○ ○ ●	✓
LT		○ ○ ●	○ ○ ●	✓
LU		○ ○ ●	○ ○ ●	✓
HU		○ ○ ●	○ ○ ●	✓
MT		○ ○ ●	○ ○ ●	✓
NL		○ ○ ●	○ ○ ●	✓
AT		○ ○ ●	○ ○ ●	✓
PL		● ○ ○	● ○ ○	
PT		○ ○ ●	○ ● ○	
RO		○ ○ ●	○ ○ ●	✓
SI		○ ● ○	○ ● ○	
SK		○ ○ ●	○ ○ ●	✓
FI		○ ○ ●	○ ○ ●	✓
SE		○ ○ ●	○ ○ ●	✓
UK		○ ○ ●	○ ○ ●	✓
TOTAL		1 2 24	1 3 23	23

2. NATIONAL REGULATORY AUTHORITIES (NRA)

While the need for NRAs to be independent from the market seems to be more or less consolidated and accepted by the Member States, with some notable exceptions, dealt with by

infringement proceedings, the main trends of the reporting year (2011) reveal that some Member States are reluctant to fully recognize the enhanced political independence requirements of Article 3(3a) of the Framework Directive.

2.1. Independence and organisation

With regard to the requirement for effective structural separation, the Commission was able to close in 2011 three infringement proceedings against Romania, Lithuania and Latvia, after these Member States shifted regulatory responsibilities away from the Ministries which were also performing activities associated with the ownership and control of electronic communications networks or services providers. By contrast, a Letter of Formal Notice was addressed to the Estonian Authorities, in October 2011, since the Ministry of Economic Affairs and Communications performs regulatory functions in the area of spectrum regulation, numbering and of universal service and, at the same time, it performs activities associated with the ownership or control of an undertaking providing electronic communications networks and/or services.

Independence and impartiality of the French regulator was threatened by an amendment tabled by the French Government, in the beginning of 2011, aiming at establishing a "*Commissaire du Gouvernement*" within the national regulatory authority, whose function would have been to put forward the Government's opinion on certain topics. The Government decided to withdraw this controversial proposal before the vote in the Senate.

Article 3(3a) of the Framework Directive ensures independence of NRAs responsible for market analysis and dispute resolution, by prohibiting binding instructions or directions, related to the exercise of their powers. The absence of explicit transposition of this prohibition in some Member States may raise concerns, if political independence is not ensured by other provisions. The UK law transposing the revised regulatory framework removed the Government’s power to issue directions to the NRA regarding its activities related to ex ante market regulation and dispute resolution. Irish law empowers the Minister to give binding policy directions to the NRA, subject to a number of requirements..

With regard to dismissal conditions, the revised Framework Directive mandates that rules are laid down which would allow for dismissal of the heads of an NRA only when they no longer fulfil the predetermined conditions required for the performance of their duties. Thus, a removal process which does not make reference to the level of importance of the infringed provision or to the seriousness of the breach may raise concerns and render difficult or useless any judicial review. In 2011, the Commission closed an infringement procedure against Slovenia as the country adopted a new law laying down strict conditions for the appointment of directors and acting directors of the national telecom regulator and limiting the Government's discretion in removing the head of the telecom regulator defining very limited circumstances for dismissal. Certain legislations, however, do not provide at all reasons for dismissal of the head of the NRA or make reference to general provisions applied for agencies in other sectors. Broad or vague conditions for dismissal still exist in certain legislations bearing the risk of dubious interpretation, for instance, misbehaviour, indecent conduct, doubts about ability to maintain state secret. Judicial review is also an important safeguard for the independence and the impartiality of the Regulatory Authority.

2.2. Resources and capacity/administrative charges

Reinforcing the independence of the regulators entails ensuring that they dispose of all the necessary resources, in terms of staff, expertise and financial means for the performance of their tasks. The Italian, Polish, Luxembourgish and Portuguese regulators recruited additional staff in order to cope with enhanced responsibilities. By contrast, in Slovenia, despite the new tasks assigned to the regulator, the Government has still to ensure adequate resources through new legislation. The number of functional posts continued to decrease in the Czech Republic, in line with the governmental policy on the medium-term expenditure for the years 2010 to 2012, while in Malta the regulator is being affected by lengthy bureaucratic procedures in relation to recruitment. In Ireland, a moratorium on staff recruitment together with commitment to share human resources with other agencies, as part of Public Service Agreement Process, may put additional pressure on NRA's staff resources. In Italy the number of Board members was reduced and in Spain legislation regarding amongst others, the number of Board members of the NRAs was introduced while at the end of the reporting period, the position of Deputy Commissioner in Cyprus was vacant since September 2011.

In the context of the general public expenditure cuts, NRA budgets were reduced in certain countries. In the UK NRA a budgetary reduction of 28.2% over a four year period (until 2014) was being implemented, while in Cyprus, NRA budget will be significantly reduced in 2012 (minimum 8.5%). NRA personnel has also experienced salary reductions, especially in Greece, Romania, Slovenia, Italy and Cyprus. Operators reported that in Greece, a 24-hour spectrum surveillance was no longer ensured, because of significant constraints in overtime work.

With regard to the requirement for budget separation, ambiguity was reported in Belgium with regard to the source of the amounts that are transferred from the NRA to the State budget. In addition, the Belgian regulator may not commit itself beyond the hedging of running costs.

A recent trend partly motivated by economies of scale in financial and human resources leads certain Member States to restructure the National Regulatory Authority, merging it into a cross sector agency or vesting it with responsibilities in other sectors. In Italy and the UK, the regulators saw their responsibilities extended to cover postal services. In Denmark, the decision to dissolve the telecom regulator and transfer its responsibilities to 4 ministries was followed by the creation of a new agency called the “Danish Business Authority”. Two other Member States, Spain and the Netherlands, have communicated their intention to proceed with a restructuring of their NRAs. In Spain, the government has announced plans to merge into a single regulatory authority (National Commission for Competition and Markets) the national competition authority (CNC) and all the sector specific regulators in Spain, including the Telecommunications Market Commission (CMT). In the Netherlands, the plan provides for a "merger" between OPTA (electronic communications and post regulator), the NMa (Competition authority) and the Consumer Authority (currently an agency of the Ministry of Economy). The main objective for such "mergers" is to create synergies and avoid overlaps between institutions. However, they may produce adverse effects and lead to a reduction of independence guarantees[2].

[2] According to a Dutch draft law merging OPTA with the Competition authority and the Consumer authority, seen by the Commission, the new Authority would be deprived of its legal personality and its personnel would be “borrowed” by the Ministry of economic affairs, while the Minister would have the power to annul decisions of a general nature on grounds of lack of competence.

The EU regulatory framework expressly provides that administrative charges levied on providers of electronic communications services and networks should be limited to cover only the administrative costs of the regulatory activities provided by the framework, as consistently held by the European Court of Justice. In this regard it delivered a judgement in July 2011 in the context of a preliminary ruling concerning the Spanish system, confirming that a charge calculated on the gross income of operators might be considered in line with EU law to the extent that the combined revenue received by that Member State by way of such a fee does not exceed all of those administrative costs[3].

As a matter of fact in several instances the charges and taxes specifically levied on electronic communications service providers do not bear any relationship with the administrative costs. Therefore infringement cases on this issue are also pending. In 2011 the Commission has decided to refer France and Spain to the Court of Justice in view of the fixed charges levied on the turnover of the electronic communications operators. Similarly, an infringement proceeding has been launched against Hungary, with a Reasoned Opinion sent in September 2011 concerning the special "crisis tax" imposed on telecom operators[4]. An additional letter of formal notice has been sent to Latvia regarding the methodology for calculation of the administrative charge for spectrum usage adopted in 2010, and concerns have been raised with regard to the misuse of charge levied in Lithuania in 2008. Overall the Commission is closely monitoring the administrative charge systems in several Member States, also in view of the savings on administrative costs stemming from several budget measures aiming at cutting administrative expenditure.

2.3. Dispute resolution and powers of the NRAs

In the area of dispute resolution, new guidelines to facilitate the resolution of disputes were issued in the UK in June, while in Italy and in Greece, the dispute resolution procedure is increasingly used in order to regulate access outside a market review (regulation by litigation). Article 5 of the Access Directive allows a NRA to impose remedies to a non SMP operator, provided that the criteria prescribed by this provision are met and the procedure laid down in Article 7 of the Framework Directive, i.e. public consultation, notification of the draft measures to the Commission and European consultation, is respected.

Several regulatory authorities saw their powers enhanced during the reporting year, independently from the transposition of the 2009 EU reform package. The Austrian and the German regulators received the power to adopt market definition, market analysis and remedies together in one step, thus correcting existing regulatory practice which obliged them to define the relevant markets in a first step and to carry out market analysis in a second, with the risk of having relatively long periods between the two. In Hungary, the NRA, which was merged in 2010 with the Media Authority, received several new powers previously exercised by the Government. By contrast, in Finland difficulties related to *ex ante* price regulation persist, as current legislation seems to allow *ex ante* price caps only in exceptional circumstances.

Lack of transparency was reported in Greece regarding the methodology for setting the reserve price for the competitive tender procedure for the granting of rights of use in the 900 MHz and 1800 MHz frequency bands. Greater predictability and time planning of data

[3] Judgement of 21 July 2011, case C-284/10.

[4] On 22 March 2012 the Commission referred Hungary to Court of Justice for failure to end the special tax on telecom operators.

gathering exercises was acclaimed by the market operators in Ireland as well as in Italy. In Portugal, operators stressed the need to improve the NRA's priorities between its regulatory functions, dispute resolution and handling of consumer complaints. New requirements were introduced to improve the feedback from the NRA to the stakeholders in the context of public consultations in Latvia.

2.4. Appeals

Lengthy appeal procedures were reported in Malta, the Netherlands, Poland and Greece. Certain operators expressed their preference for specialized Courts or appeal bodies. This was the choice made in Portugal, by creating a specialized Court for competition, regulation and supervision, while in Sweden, the legislator preferred to reduce the number of the instances of jurisdiction.

Regarding competency for handling appeals against the decisions of the Greek regulator, the Council of State ruled partly in favour of its own jurisdiction and partly of the jurisdiction of the Athens Administrative Court of appeals.

Article 4 of the Framework Directive recognizes the right of any user or provider who is affected by a decision of a NRA to appeal against it to an independent appeal body. Concerns have been raised regarding the Slovenian legislation which does not grant automatically to third operators the right to appeal decisions which designate another operator as having SMP. As it is quite difficult for other operators to obtain status of a party in such procedures, the SMP decision can in practice be appealed only by identified SMP operator, to whom remedies are directed. In Sweden, on the contrary, the right of appeal was extended, through legislation, to all affected market players.

While regulators' decisions are in most times upheld by the appeal bodies, legal uncertainty has been reported, as an important number of decisions of the Finnish, Swedish and Dutch regulators were quashed during the reporting year. All the judgements against decisions of the Finnish regulator were negative this year. The Swedish regulator saw three of its decisions quashed in 2011, while 4 other decisions risk annulment. Finally, the Dutch Court has overturned a considerable number of NRA decisions, often exercising a thorough review of the merits of the cases. By contrast, regarding the scope of judicial review, the German BVerfG confirmed that the German courts have only limited capacity in assessing the discretion given to national regulatory authorities by the EU electronic communications framework.

3. REVENUES AND INVESTMENTS

The electronic communications sector performed slightly worse in 2011 than the year before. The overall revenue growth was negative (-1.3%), revenues grew in fixed internet access (+2.9%), mobile data services (+9.8%) and pay TV (+2.5%), but fell in traditional fixed voice (-7.1%) and mobile voice (-4.7%).

After a slight decline in revenues in 2010, the negative growth rate of revenues [5] of the European telecom sector accelerated in 2011 due to a worsening of the European economy.

[5] Based on EITO and the operators' financial statements.

Domestic revenue growth for most European carriers was negative in 2011 although some operators were able to experience some revenue growth in overall revenue thanks to the diversification of their businesses in emerging markets. In line with the economy, the situation of the telecoms market in Europe is worse than in 2010 with growth mainly sourced from the mobile and fixed data markets. However, despite the worsening of the economic situation, mainly due to the pressure of the sovereign debt crisis, EU GDP in 2011 is estimated to have grown by 1.5%,contrasting with the decline of the carrier services revenues in Europe by 1.3%.

Mobile and fixed operators are under pressure to upgrade their networks to cope with booming demand for internet-connected phones and PCs. However, operators still seem to lack sufficient incentives to invest in next generation networks due to sluggish demand and the positive revenue stream generated by existing copper networks and current business models.

In the short term, as data traffic is increasing and (partly) substituting voice or SMS traffic, operators are focusing on revenues arising from internet access through the development of integrated tiered pricing plans or agreements with over-the-top internet platforms. Also, strategies focus on cutting prices only to specific groups of consumers (for instance discounts on tariffs only through operators' websites), avoiding price wars between carriers.

3.1. Revenues

Table 2: **Telecoms sector growth**

	Growth rate (2009-20010)	**Growth rate (2010-2011)**	**Share in e-communication services revenue (2011)**
Fixed voice telephony and Internet access and services	-2.9%	-3.4%	35.0%
Fixed voice telephony	*-7.6%*	*-7.1%*	*21.3%*
Internet access and services	*6.4%*	*2.9%*	*13.8%*
Mobile voice telephony and mobile data services	0,2%	-0,8%	46.4%
Mobile voice telephony	*-3.3%*	*-4.7%*	*32.6%*
Mobile data services	*11.1%*	*9.8%*	*13.8%*
Business data services	-1.1%	0.4%	7.4%
Pay TV	6.1%	2.5%	11.1%
Total Telecom services (carrier services)	**-0.4%**	**-1.3%**	**100%**

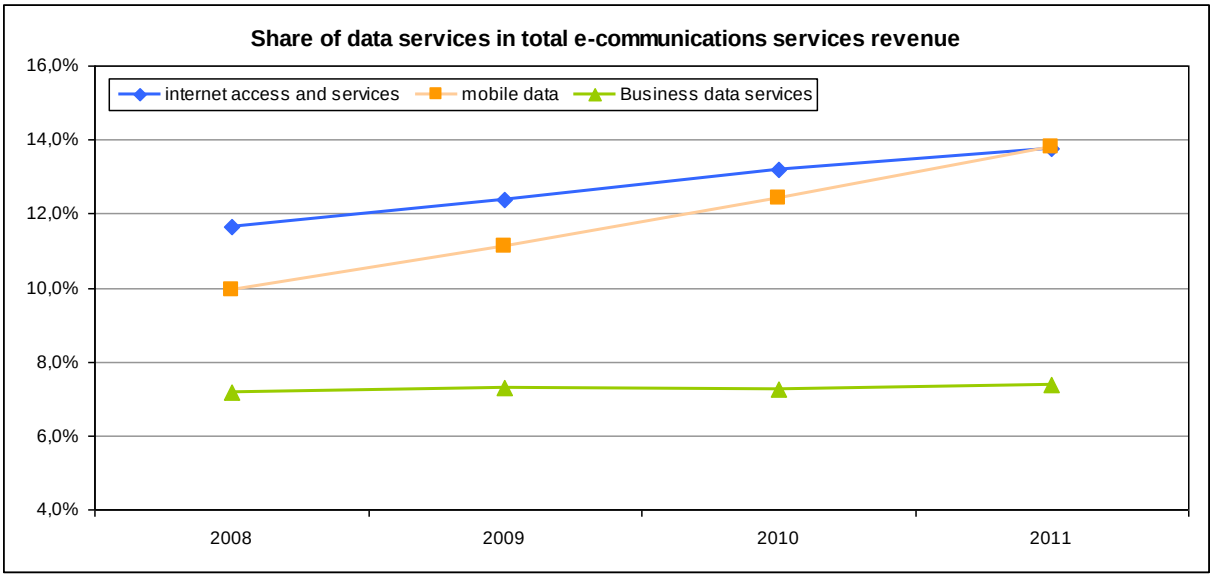
Source: EITO 2011

The negative growth of revenues coming from telecoms services in Europe accelerated to -1.3% in 2011[6], from -0.4% in 2010; in absolute figures, carrier services' revenues were EUR 278.9 billion in 2011. Taking into account the whole EU telecom sector (carrier services plus telecom equipment), revenues were EUR 354 billion in 2011; that compares to EUR 356 billion in 2010. Revenues from voice are still the main driver (accounting for 54% of revenues for EU telecom operators) but its importance continued to decrease (-7.1% in the

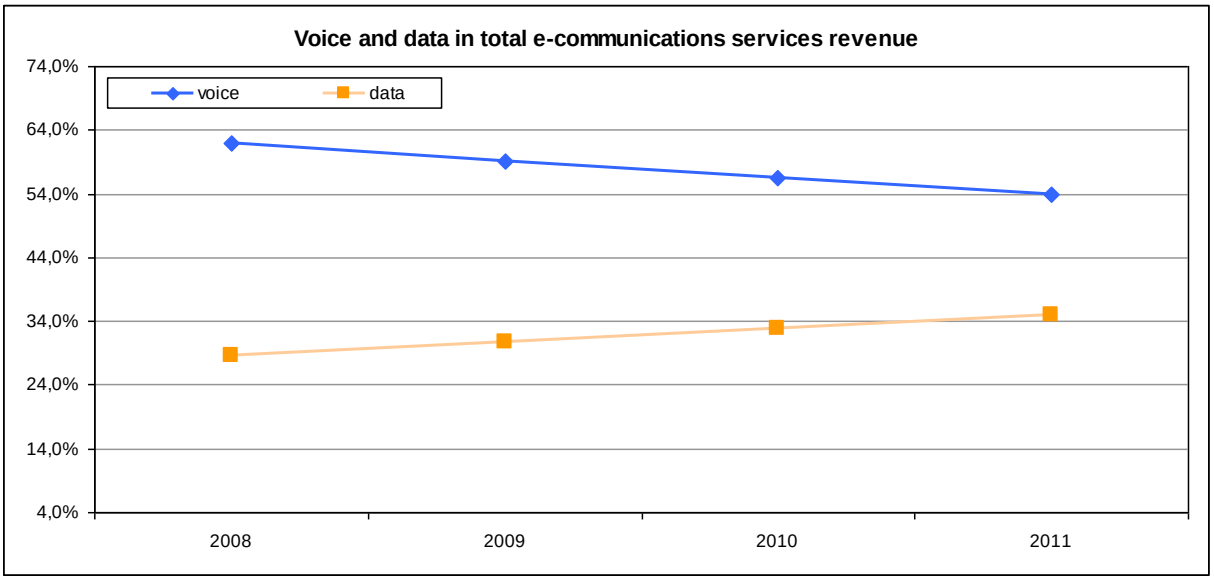
[6] EITO January 2011.

case of fixed voice telephony and -4.7% in the case of mobile voice telephony) while revenues from data (27.6% of the total for individuals and households and 7.4% for companies) kept on growing, in particular revenues for data related to mobile services (+2.9% in the case of fixed internet access and +9.8% in the case of mobile data services).

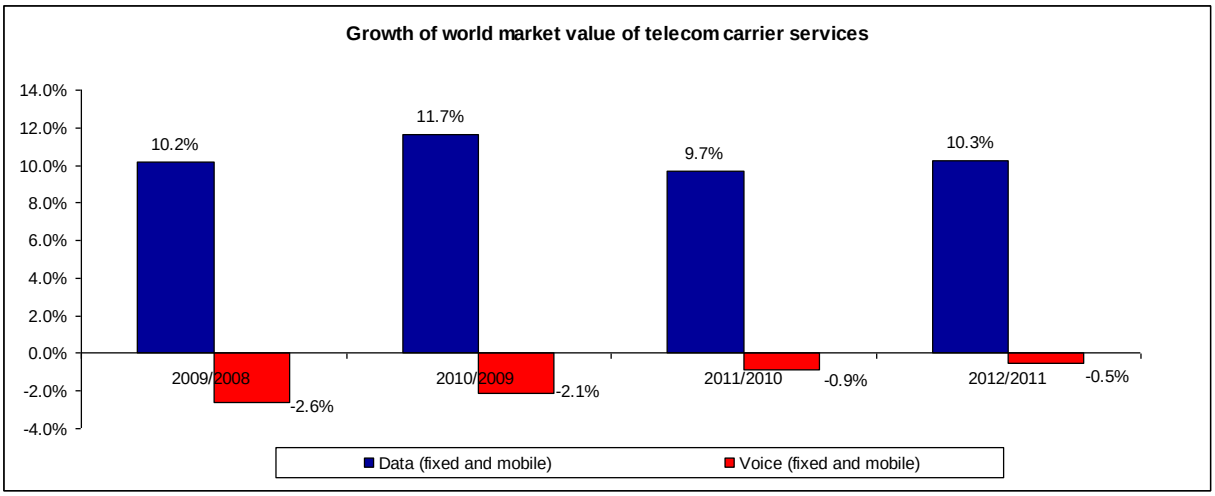
Worldwide revenues for the telecom services presented a 3.1% year-on-year revenue increase in 2011 which contrast with the trend in the EU market.

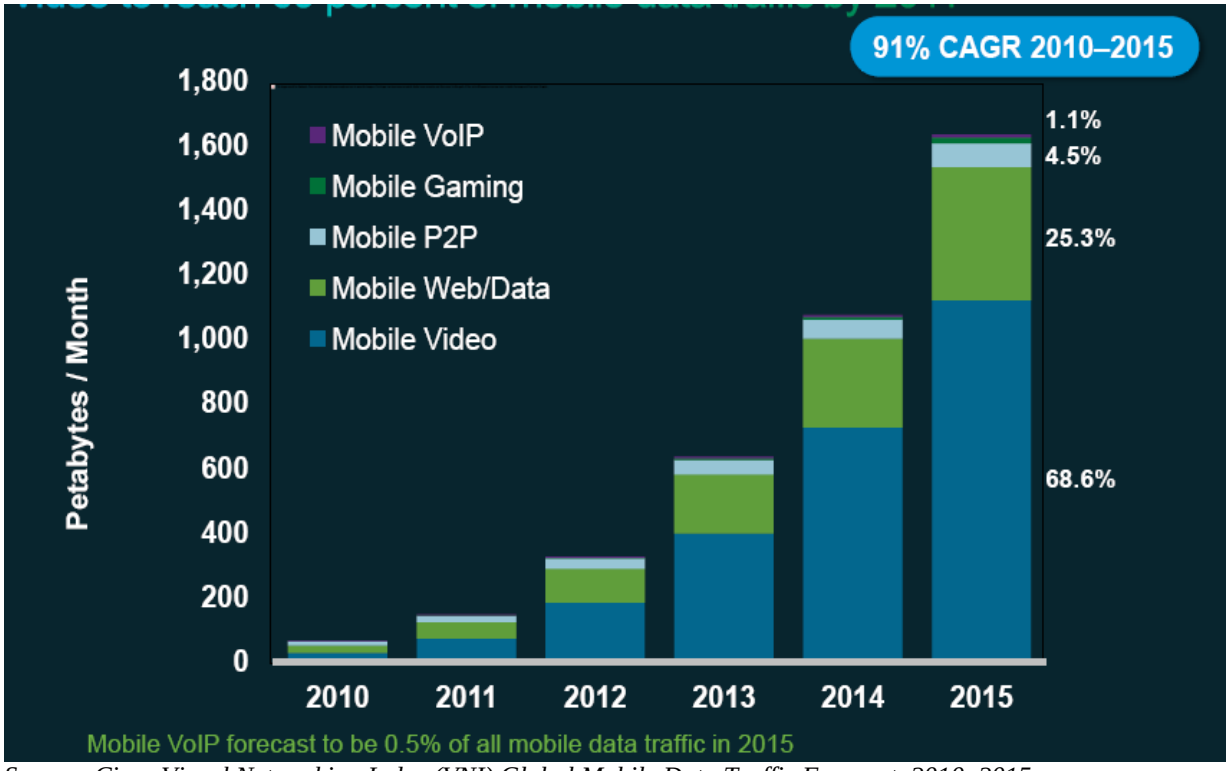


Source: EITO 2011



Source: EITO 2011





Source: Cisco Visual Networking Index (VNI) Global Mobile Data Traffic Forecast, 2010–2015

Sources of revenue growth are shifting. All the areas that have traditionally made money, like voice calls and SMS, are being eclipsed while data demand on networks is growing steadily. As for data revenues, the gap between mobile and fixed data revenues continued to widen in 2011 although the contribution of data revenues arising from mobile networks accounted for the same percentage (13.8%) to total revenues in 2011 as it did in 2010.

Electronic communications account for more than half of revenues in the ICT sector. However, the importance of the IT sector, especially IT services, is attracting the attention of operators. The reason for this is that operators need to change their business model to keep on growing and cloud computing services are offering new opportunities for diversification.

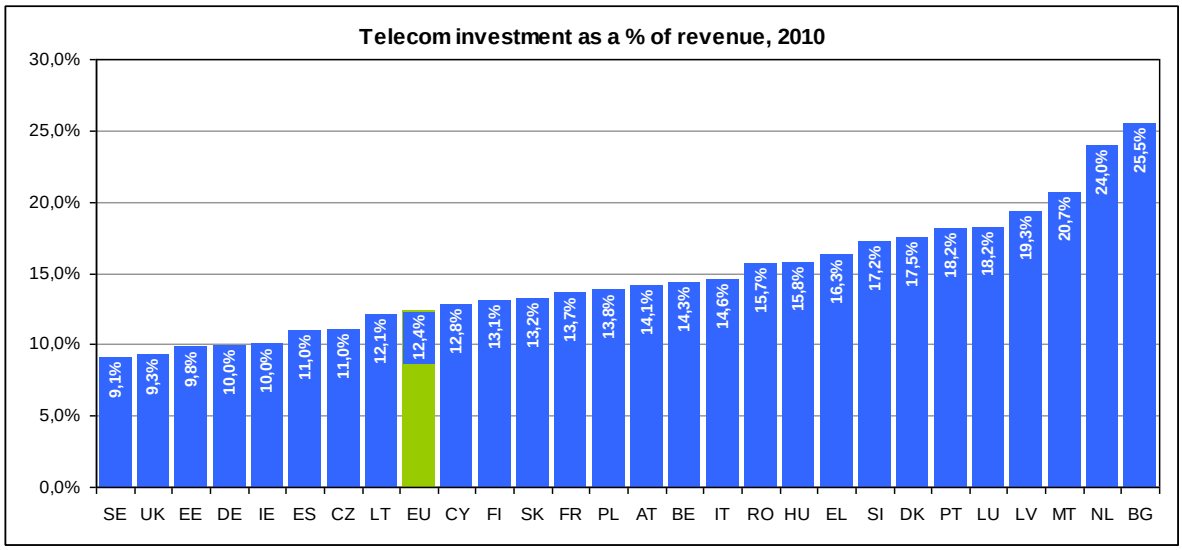
3.2. Investment and access to finance

As indicated above, the economic crisis contributed to the decline in operators' revenues in their domestic markets. For the main EU operators[7], domestic revenues declined by about 4.5%, although this decrease in revenues was compensated by a 17.3% increase in revenues made by European operators in markets outside Europe.

A weighted average of Capex (capital expenditure) [8] increased by about 7.5% for many operators due, to some extent, to investment in coverage and high speed broadband. The big funds needed to roll out NGA networks prompted several major operators to team up to share the costs to reduce Capex and operating costs. Overall, capital expenditure rebounded compared to the previous year. The increase in Capex[9] was thanks to an increase of 2.1% in fixed equipment. Meanwhile, there was a decrease of 1.5% in expenditure on mobile.

Capex over revenues increased by 0.4 percentage points in 2010 compared to the previous year.

The weighted average EBITDA margin[10] for the main European operators decreased by 4.8% in 2011 compared with 2010.



Source: Commission services

4. BROADBAND

The EU is on track to achieve the Digital Agenda for Europe (DAE)[11] target aiming at providing a basic broadband connection for all EU households by 2013 : 95% of EU citizens already have access to at least a basic broadband connection (144 Kbps to 2 Mbps). While there is also progress in the deployment of fast (over 30 Mbps) and to a lesser extent of ultra-

7 A sample with a group of eighteen European operators: Deutsche Telekom, Telefonica, Vodafone, Orange, Mobistar, TPSA, KPN, Telecom Italia, Tele2, Telia Sonera, Telekom Austria, Belgacom, TDC, Portugal Telecom, Elisa, OTE, Telenor and BT. Third quarter 2011-Third quarter 2010 growth rates.

8 Capital Expenditure based on our sample of European operators. Third quarter 2011-Third quarter 2010 growth rates.

9 EITO January 2012. Capex figures for 2010. No figures yet available for 2011.

10 EBITDA over revenues based on the sample of European operators. Third quarter 2011-Third quarter 2010 growth rates.

11 http://ec.europa.eu/information_society/digital-agenda/publications/index_en.htm

fast broadband lines (100 Mbps and above) - they cover 50 % of EU households in 2011 as opposed to 28.7 % in 2010 - this is mostly driven by cable upgrade (DOCSIS 3) and therefore limited to some Member States and to urban areas. The actual take-up of high-speed broadband is even more limited: it concerns only 8.5 % of all suscriptions to broadband lines in the EU - 7.2 % (over 30 Mbps) and 1.3 % (over 100 Mbps) of the total number of fixed broadband lines.

In this context, the Member States are stepping up their efforts to make broadband a political priority, notably through their broadband plans[12] and market reviews and regulatory remedies. However, the Commission sees a need to increase consistency in the policy response to issues such as the costing methodology of broadband access products and non-discriminatory remedies, as well as to reduce the cost of civil engineering works in the deployment of New Generation Access (NGA) networks.

4.1. National plans

The Digital Agenda for Europe (action 46) calls on Member States to develop and make operational national broadband plans by 2012 which meet the coverage, speed and take-up targets defined in the Digital Agenda and in Europe 2020. The Commission plans to monitor Member States' progress in this respect regularly as part of the Digital Agenda governance. To this effect, in March 2012 it published a first inventory of Member States' broadband plans with particular attention to coverage and take-up objectives and the sets of measures defined[13].

To date, 22 Member States have national broadband plans (some of which are under review) and the remainder are in the process of drafting their plans. Eight Member States (Denmark, Finland, France, Luxembourg, Latvia, Malta, Netherlands and the United Kingdom) have already achieved full coverage for basic broadband services and a further 17 have set a corresponding quantitative target, or are about to do so. There is a range of definitions of ‘basic’ download speeds from 512 Kbps to 4 Mbps. In many cases the timing is more ambitious than the DAE deadline of 2013; however, not all plans envisage full basic coverage by that date. Three countries (Austria, Belgium, and Romania) have defined penetration targets for basic broadband.

Closing remaining gaps in basic broadband coverage is the predominant focus of public funding currently committed to broadband roll-out. The most important budgetary sources for these initiatives are either national budgets or structural and rural development funds. Some countries have enacted universal service obligations, several have devised comprehensive national schemes to eliminate remaining connectivity gaps while others rely on a decentralised model in which responsibility and competence for project planning and tendering has been devolved to municipalities. Generally, the deployment of LTE mobile networks is expected to bring about additional improvements, in some cases it is the pivotal factor.

The level of ambition of countries' NGA coverage targets varies greatly. Some have not yet adopted any NGA coverage targets whereas a group of more advanced countries pursues objectives well beyond the NGA coverage target specified in the Digital Agenda (up to

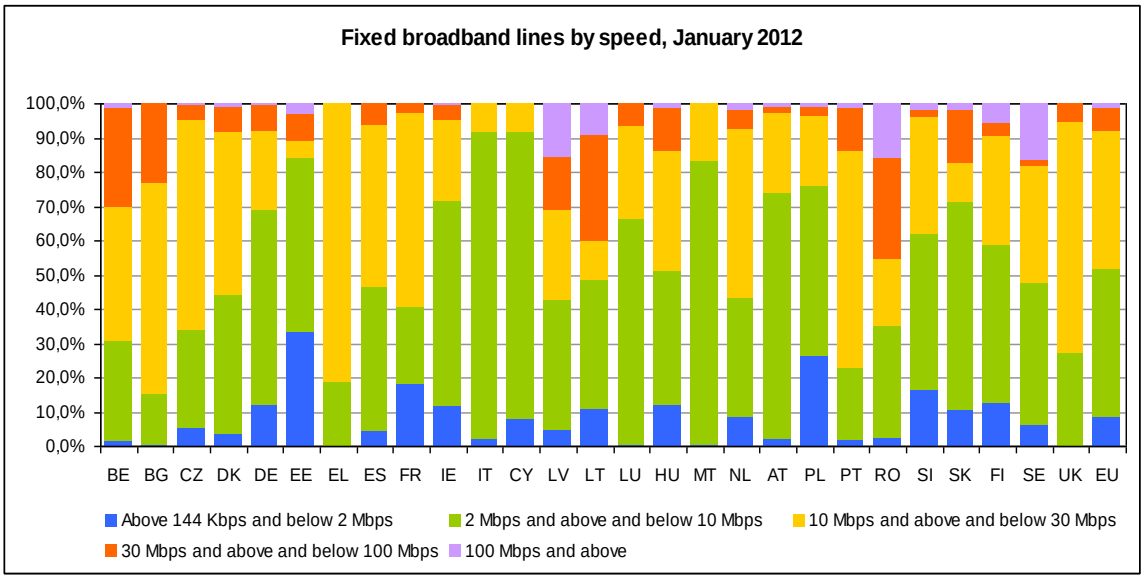
[12] Commmssion staff working document on the implementation of national broadband plans ; SWD(2012)68/2 of 23 March 2012.

[13] SWD(2012)68/2 of 23 March 2012.

1000/500 Mbps for download/upload by 2020 in Luxembourg). So far, 21 Member States have defined quantitative coverage objectives for NGA with download targets ranging from 25Mbps to 1Gbps and with coverage footprints between 75 % and 100 % of households or population. The most common approach is to define targets which moderately exceed what governments forecast to be achieved by the market as a means of protecting public budgets against claims for large-scale spending. Many also wait for more clarity to arise with respect to future demand for bandwidth and market players' prospective investment plans. With the exception of Luxembourg, upload speeds receive no attention. In sum, at this stage private and public funding/investment plans fall short of the investments required to meet the NGA objectives, in particular if the investment is taken into account which will be necessary to enable the Digital Agenda ultra-fast subscription target.

There are some examples in which administrations have earmarked measureable amounts of funding for NGA including parts of LTE auction proceeds, but overall public spending on NGA has been relatively modest – e.g. € 2.2 billion for the IT infrastructures under the 2007-2013 Structural Funds programming period in the whole EU territory - reinforcing the pivotal importance of measures to facilitate private investment.

4.2. Broadband market

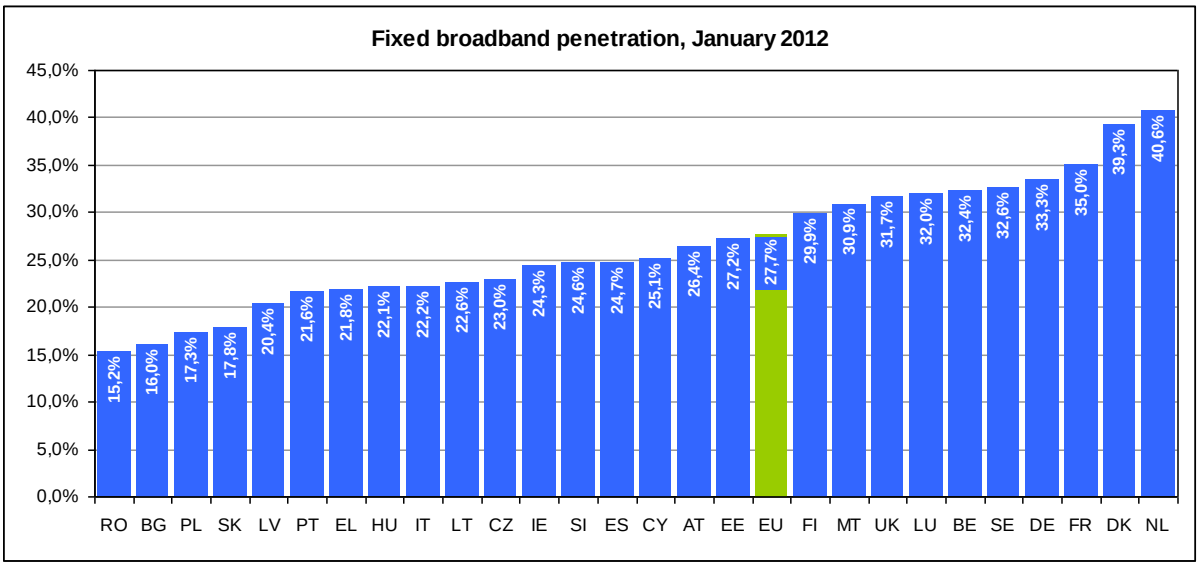


Source: Communications Committee

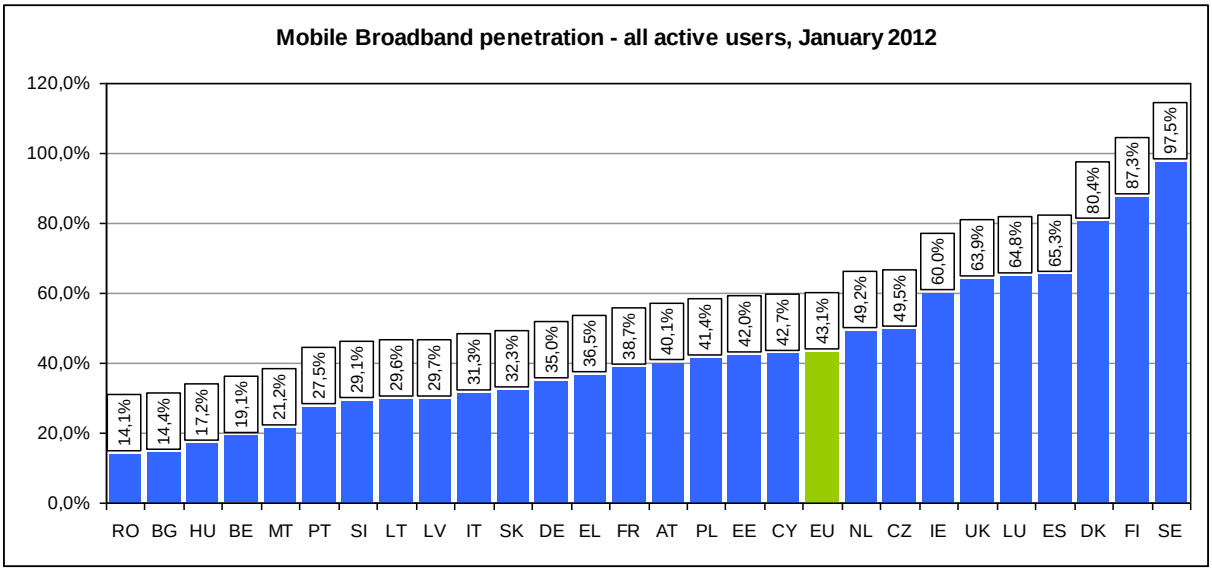
The broadband market grew in 2011 with some 6.7 million new lines to reach more than 139 million fixed broadband lines, but the growth rate continued slowing down to a 5 % year-on-year growth. In January 2012, the fixed broadband penetration rate – measured by the number of subscribed lines per 100 inhabitants - was 27.7 % in the EU, just 1.2 percentage points up from 26.5 % in January 2011. The mobile broadband penetration rate during the same period reached 43 % on average at EU level – a jump from 26.8 % of mobile subscriptions a year before, which was mainly driven by the wide adoption of smartphones.

These indicators show that the market for "basic broadband" (from 144 Kbps to 30 Mbps) is mature and it is reaching its ceiling in many countries. The broadband gap continued to decrease but this reduction in 2012 slowed down slightly with respect to 2011. Despite the

slow growth, in 2011 the EU penetration rate for fixed broadband overcame Japan for the first time and it now almost equals that of the US.

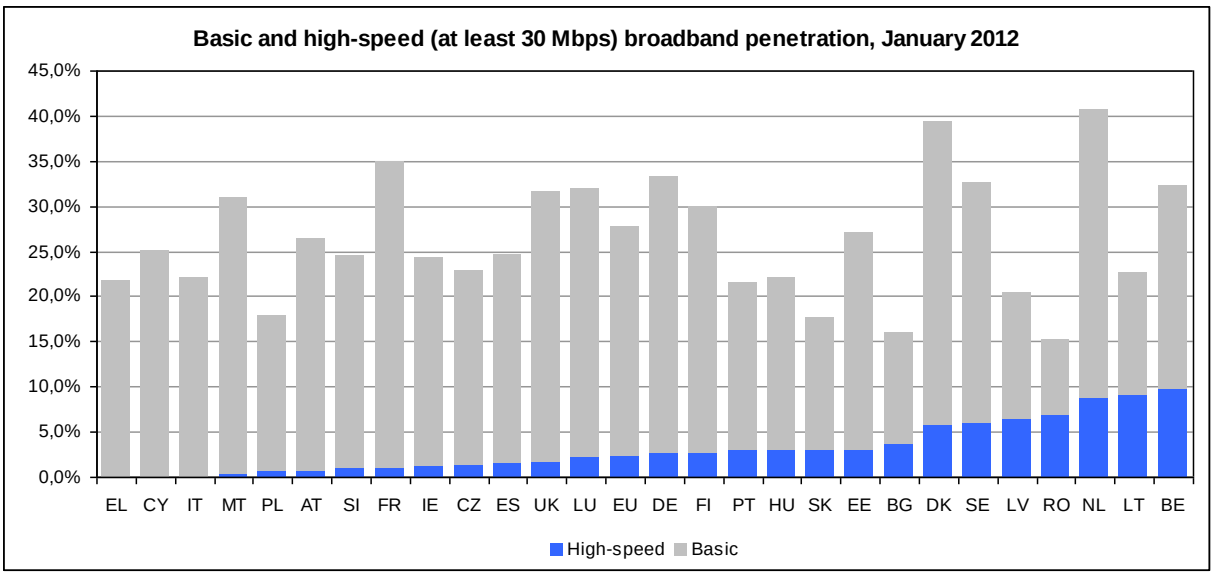


Source: Communications Committee



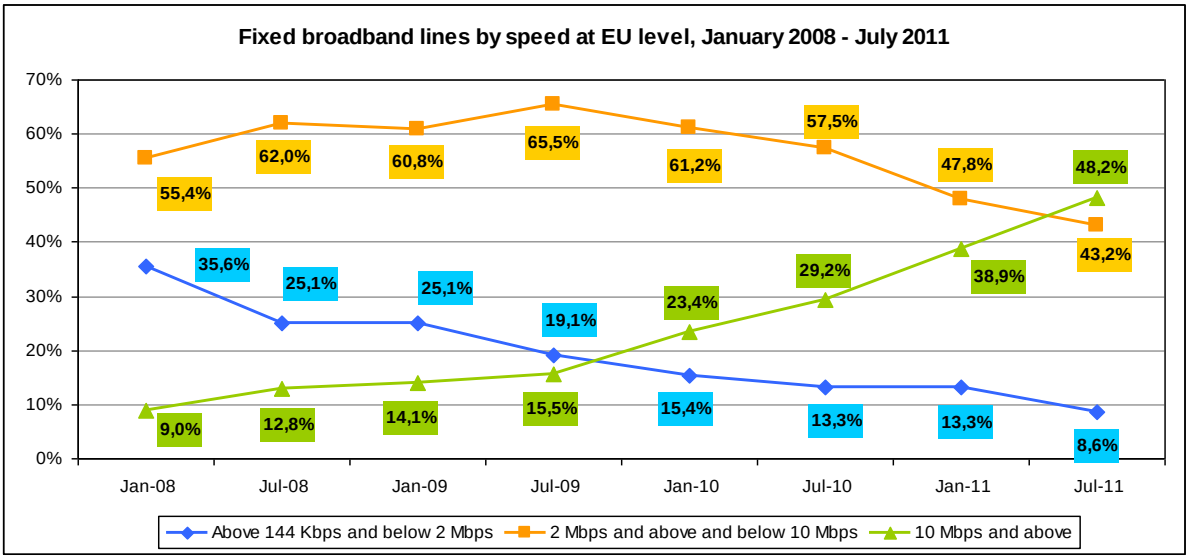
Source: Communications Committee

DSL continues to be the predominant technology in the EU broadband market, despite the decrease in its share, from 80.9 % in January 2006 to 75.9%. Most of the gains in market share went to lines based on cable modem.



Source: Communications Committee

The EU is on track to achieve the DAE target aiming at providing a basic broadband connection for all EU households by 2013 : 95 % of EU citizens already have access to at least a basic broadband connection and the speeds of fixed broadband lines increased significantly in 2011, with almost 50 % of all lines providing download speeds of 10 Mbps and above. Intermediate speeds (2 Mbps and below 10 Mbps) that included the largest share of lines in 2011 (47.8 % out of the total) decreased to 43.4 % in 2012. The range of speeds below 2 Mbps continued decreasing and only represented 8.2 % of the total broadband market in 2012.

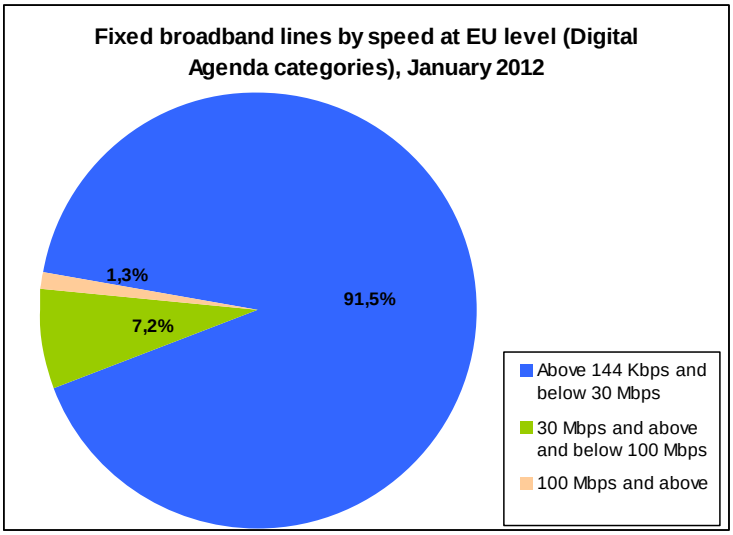


Source: Communications Committee

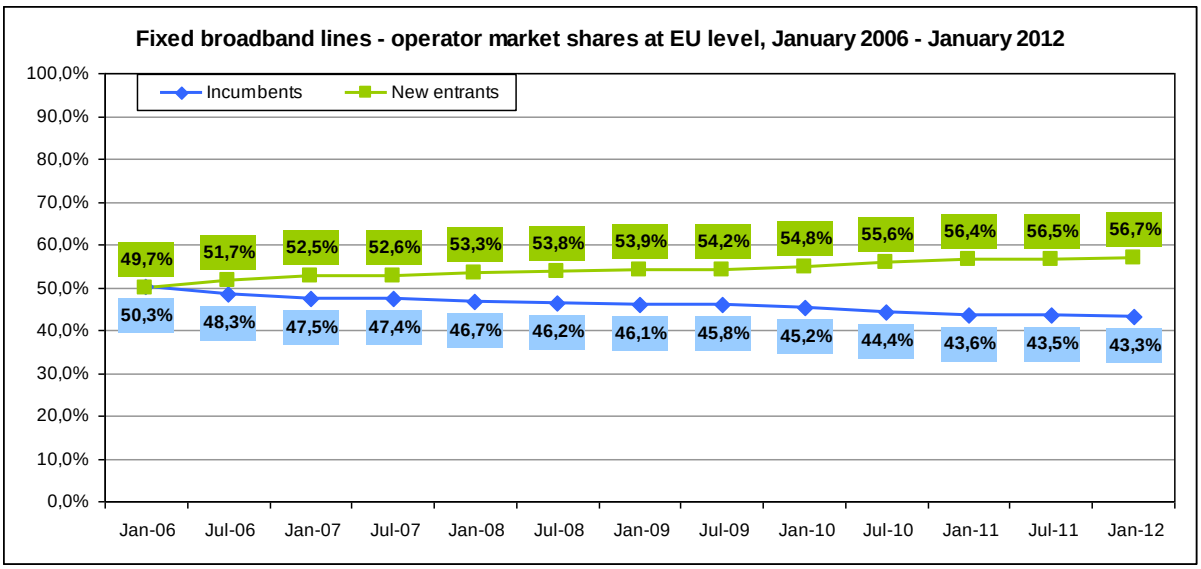
The DAE also sets as targets that, by 2020, all EU households should have access to at least 30 Mbps and that 50 % of subscriptions should be of 100 Mbps. Although the growth of alternative technologies also brought an increase in nominal speeds (*i.e.* as advertised by telecom operators in their offers), the take up of fast and ultra fast broadband (over 30 Mbps and 100 Mbps respectively) is still low, with just 7.2 % and 1.3 % of all fixed lines providing those speeds.

There is also progress in the deployment of fast (over 30 Mbps) and to a lesser extent of ultra-fast broadband lines (100 Mbps and above) - they cover 50 % of EU households in 2011 as opposed to 28.7 % in 2010 – however this is mostly driven by cable upgrade (DOCSIS 3) and therefore limited to some Member States and to urban areas.

Overall, very high speed lines went up from 5.1 % of all fixed broadband lines in January 2011 to 7.8 % a year later. Significantly, the proportion of broadband access lines that can be qualified as NGA because they are based on fibre infrastructure and can be easily upgraded to provide speeds of 30 Mbps and beyond already represent 12 % of all broadband lines.



The market share of the incumbent fixed operators continues to follow a slow but steady downward trend since 2006.



New entrants are using local loop unbundling (fully unbundled lines and shared access) as the main option to access the incumbent network. Full LLU lines increased by 12.3 % in 2012. There is a transfer from the other types of accesses to full LLU, with shared access decreasing by 2.6 % and bitstream and resale accesses also going down (by 1.3 % and 1.6 % respectively).

The amount of State aid for broadband networks increased again in 2011, with 1,868 million Euros, slightly above the 2010 record. In 2011 the Commission adopted a plan -the Connecting Europe Facility (CEF), for a € 50 billion boost to Europe's transport, energy and digital networks between 2014 and 2020, out of which € 9.2 billion are to be spent in broadband networks and services in line with the EU competition and State aid rules. At least €7 out of the €9.2 billion would be available for investment in high-speed broadband infrastructure. The remaining funding (around € 2 billion) would support public interest digital service infrastructure such as electronic Government and Health records, electronic identification, electronic procurements or cooperation to take down illegal content.

4.3. Regulatory developments

In 2011, the most important regulatory cases (e.g. BE/2011/1227, FR/2011/1213) concerned infrastructure access (fix and wireless) and the markets of wholesale broadband access: from the Commission viewpoint, there are still too many cases of inconsistent treatment of next generation access (NGA) networks in the digital single market, both from a market definition and from the remedies perspective.

In 2011 Regulators completed new rounds of wholesale physical and/or broadband access market analyses in a number of countries (such as BE, BG, DE, DK, EL, ES, FR, HU, IE, LT, NL, PL) and the consultation process was launched or was not completed in several others (such as FI, SK). Since 2010, it is therefore a majority of Member States that will have gone through the 2nd or even the 3rd wave of broadband market reviews – a clear sign of the rapid evolution of these strategic markets. Several regulators adopted new methodologies and in many instances introduced different pricing regimes with regard to copper and fibre.

The Commission issued comments to NRAs in those cases where the NGA Recommendation[14] was not fully taken into account. This concerned notably clauses which made full unbundling conditional on other factors (PL, LT), and the lack of an appropriate costing method for the fibre loop (e.g. DE, FR, SK).

Fibre was included in the relevant market definitions in several countries (such as BE, BG, EL, DE, FR, LT). On the other hand the Commission opened one second phase investigation concerning NL considering that the exclusion of fibre optic infrastructure from the infrastructure access market was not sufficiently substantiated.

All national regulators now propose to include fibre in market definitions although a number of NRAs have adopted a differentiated regulatory approach to fibre and metallic local loops and impose less burdensome remedies on fibre.

With regard to remedies concerning fibre access networks, several NRAs mandated full unbundling obligation, such as BE (except where vectoring is deployed), DE, DK, HU, EL (for FTTH). In SI, alternative operators started providing retail services based on unbundled fibre wholesale offer mandated in 2010. On the other hand, physical unbundling and bitstream access were not imposed on fibre in FR, which relies instead on symmetrical regulation and co-investment agreements – an approach that was criticised by the Commission as circumventing SMP regulation and lacking sufficient detail. The EL and HU regulators

[14] Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), SEC(2010) 1037 final

required the SMP operator not to offer a retail product before a period of six month after making available the relevant wholesale product.

Several NRAs worked on pricing of access products, for example, the DK, EL and ES regulators imposed specific price control remedies, including on fibre wholesale products. Furthermore, the IT regulator imposed cost-oriented access obligation to ducts, dark fibre as well as to fibre terminating segments on an aggregate basis (so-called end-to-end) subject to feasibility and reasonableness of requests in case infrastructures are not available, and the SE regulator revised the cost model for wholesale broadband access products.

The price for key access products, such as the local loop and bitstream products varies significantly within the EU (for example, the monthly average cost for full LLU ranges between 5.3 € and 14.4 €) despite the Commission's repeated calls to NRAs to apply cost methods in a more consistent manner along the value chain. Similar consistency issues also arise in the context of non-discrimination remedies. For both aspects (costing methods and non-discrimination remedies), the Commission is preparing further guidance to regulators that will be issued in 2012.

The access obligation and/or price regulation for passive infrastructure access (ducts and/or poles) were established and/or revised in e.g. ES, FR, IT, PL and the UK. On the other hand, the HU regulator did not implement Commission’s recommendation to mandate duct access. Continuing issues with the practical implementation of the access to duct infrastructure were reported in BG and SI. Symmetrical access to ducts obligation has been introduced in LT and was contemplated in LV in 2011.

As regards the virtual unbundling remedy on fibre, which the Commission regards only as transitional measure before full unbundling is feasible, the reference offer for virtual unbundling was revised in AT; the IT regulator imposed this remedy subject to cost orientation in case of inexistence of infrastructure based competition and the MT regulator adopted it as part of measures regarding transition to NGA. However, in the UK, which was first to mandate this type of remedy in 2010, its take-up remained limited in 2011.

With regard to traditional copper networks, the take-up of LLU continued to progress in a number of countries and improvements in the provision of wholesale access products resulting from previous market reviews were reported in, for example, CY and PL. On the other hand, a continuing lack or limited take up the regulated wholesale products was reported in BG, EE, LT, LV, RO and SK as operators compete mostly on the basis of alternative infrastructures. The broadband access markets are normally defined national. The few exceptions included UK and PT for wholesale broadband market and PL where, although no separate regional markets were defined, the remedies applied differ regionally.

4.4. Rights of way and measures to facilitate broadband rollout

Given that it is estimated that up to 80% of the costs of next generation network (NGN) deployment are related to civil works, every effort by national and local authorities to facilitate procedures for the granting of rights of way (e.g. using town planning rules or access remedies) and to enhance facility sharing can be seen as a key success factor for reaching the DAE targets by 2020.

While the regulatory framework provides that the procedures for granting of rights of way to install facilities on, over, or under public or private property must be timely, non-discriminatory, and transparent, and those provisions have been reinforced in the last revision[15] by requiring that decisions for rights of way should normally be taken within six months of their application, a number of issues remain unsolved : the lack of specific legislation to facilitate NGA deployment, difficulties in obtaining permits, conditions for road excavations, and health consideration of electromagnetic fields are often reported as significant obstacles (EL, RO, BG, IT, MT etc.).

Nevertheless, also progress in the area of rights of way was reported in several Member States, either in the form of improvements in the actual handling of administrative requests or in the form of positive legislative changes (AT, FI, EL, LV, NL, etc.)

Moreover, certain Member States[16] have initiated various measures, beyond rights of way, aimed at facilitating broadband rollout, such as nationwide broadband mapping, civil infrastructure register / sharing initiatives, co-deployment / co-investment incentives, possibility to mandate access to civil infrastructures across utilities, streamlining of administrative procedures, development / imposition of standards, and communication & coordination measures. These measures are nevertheless strongly differing in their scope and in their effectiveness, from country to country and sometimes from region to region. Best practices should then be combined and scaled up, so that their effect in maximised. In order to accelerate this process, the Commission is envisaging an EU initiative on reducing civil engineering costs for high-speed broadband rollout in the beginning of 2013.

5. VOICE AND OTHER ECOMMUNICATION SERVICES

5.1. Mobile Services

European consumers and businesses increasingly use mobile communication services and get better deals for mobile services. Both SIM card penetration rate and mobile broadband penetration rates increased by 4.3 percentage points and 16.4 percentage points respectively, while the average revenue per user dropped from €244 to €221.

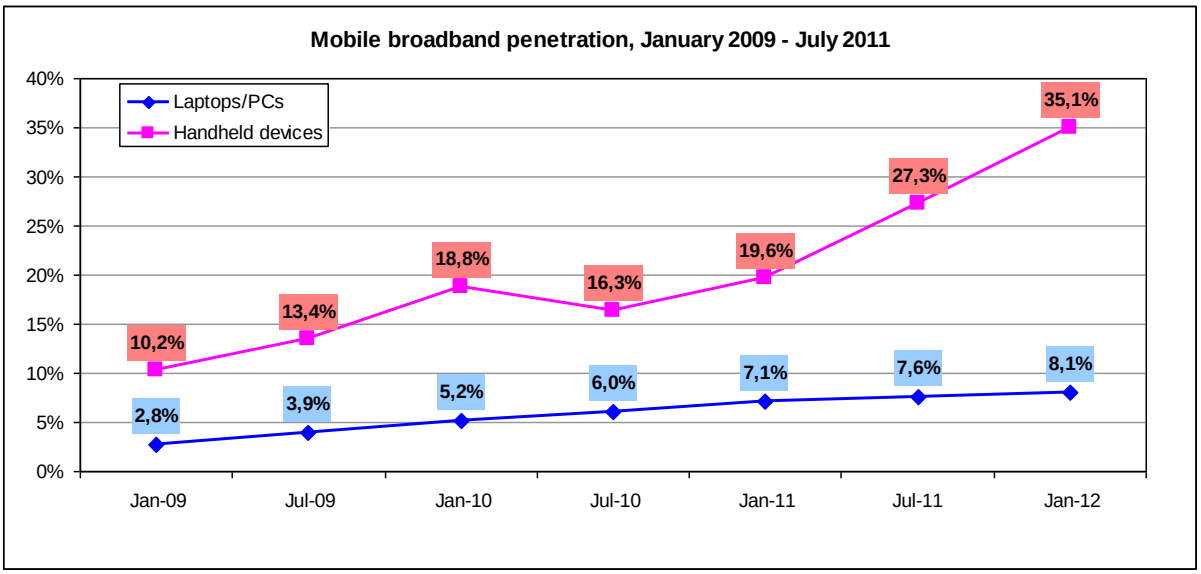
With regard to regulation of mobile markets, NRAs continued to set glide paths, with rates falling across the EU from on average €5.47 cent/min in October 2010 to €3.87cent/min in October 2011.

5.1.1. Market situation

European consumers and businesses increasingly use mobile communication services. This is illustrated by the mobile SIM card penetration rate, which further increased in 2011 throughout the EU from 123% to 127%, despite the deactivation of inactive pre-paid SIM cards in some Member States. The largest levels were observed in Latvia, Finland, Italy, and Portugal and the largest increase was observed in Malta, Estonia, Finland, and Bulgaria. The mobile broadband penetration rate in terms of mobile broadband subscriptions increased from 26.8% to 43.1% at EU level, which was mainly driven by the wide adoption of smart phones.

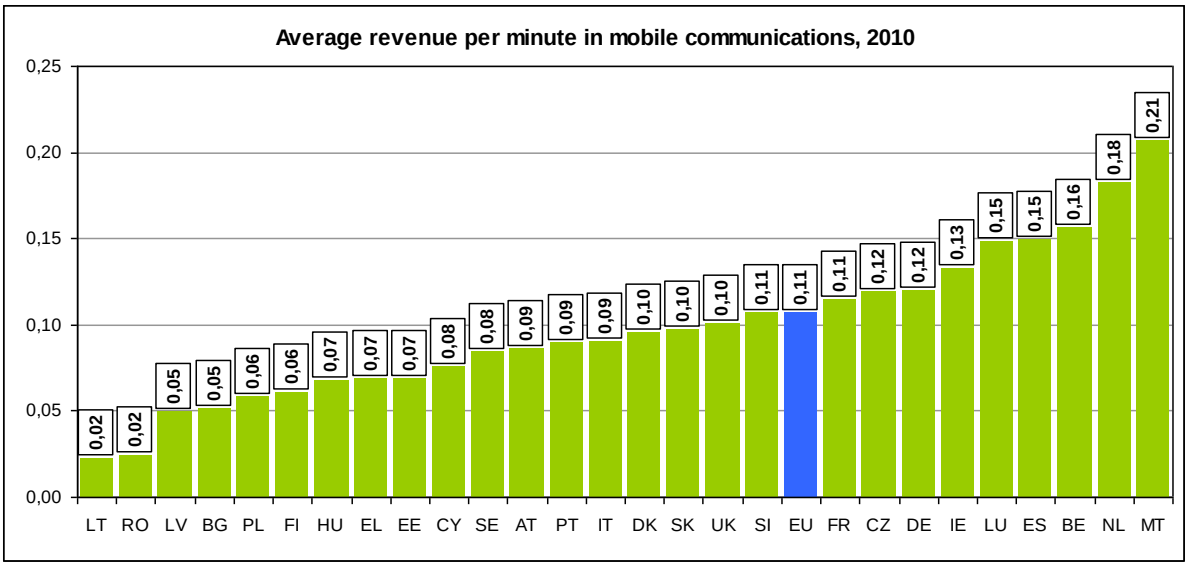
[15] OJ L 337 18.12.2009

[16] Annex 2 of SWD(2012)68 of 21.03.2012



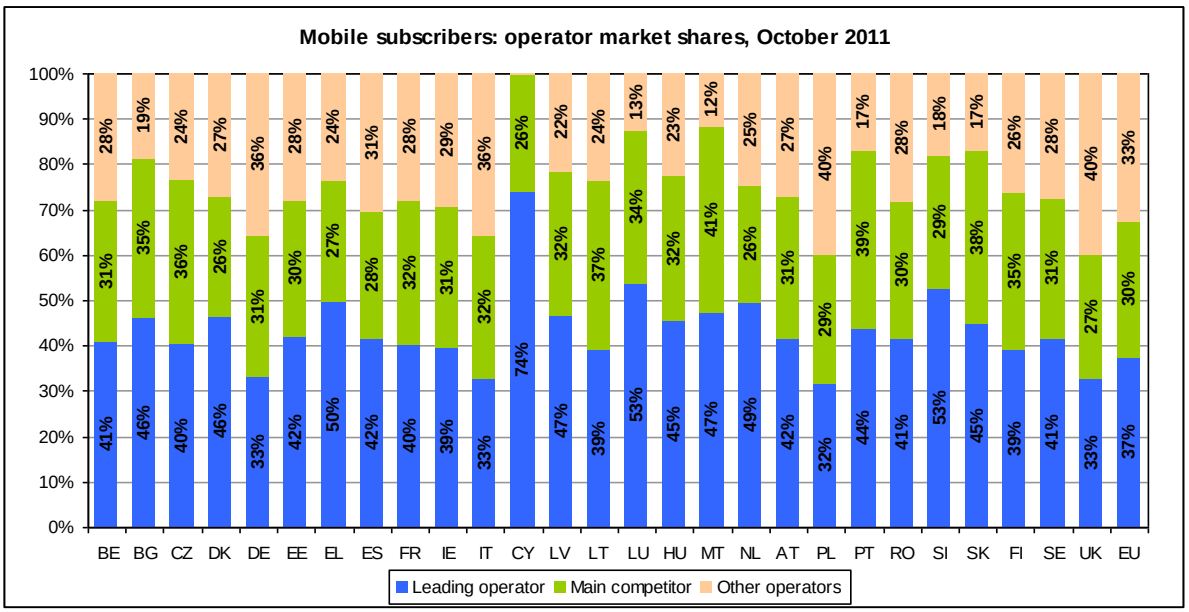
Despite the growth in the number of subscriptions and usage, the total revenue of the mobile markets declined by 0.8% in 2011. Revenues on mobile voice services went down by 4.7%, while data revenues increased by 9.8%. Nevertheless, data revenues represented only 13.8% of total mobile revenues.

Consumers, overall, got better deals for mobile services. The average revenue per user (ARPU) dropped in many Member States with the average EU level decreasing from €244 in 2009 to €221 in 2010. In the same year the average revenue for mobile voice minutes stood at €11 cent/min in the EU.



Source: Commission services

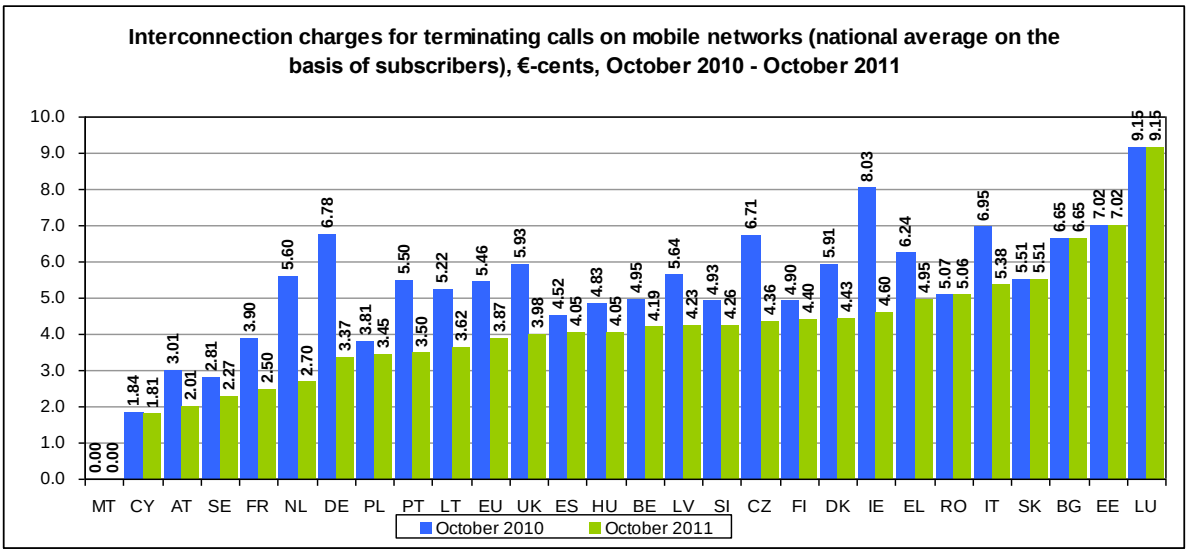
In 2011, the level of competition in the mobile markets slowly increased with strong variations across Member States. The main mobile network operators' market share in most Member States ranged between 32% and 74% compared to an EU average of 37%. In France, Spain, and Belgium new entrants based on newly obtained licenses and MVNOs have entered in 2011 or prepared for mobile market entry foreseen in 2012.



Source: Commission services

5.1.2. Regulatory issues

In 2011, mobile call termination markets were subject to a review in a number of Member States (e.g. France, Germany, Hungary, Italy, Romania and the UK) and the NRAs in a number of Member States notified costs models and related MTRs (e.g. Italy, Germany, Poland, Denmark, and Sweden). The Commission has assessed these cases in the light of the Recommendation on the regulatory treatment of termination rates, according to which the NRAs ensure that termination rates are implemented at a cost-efficient, symmetric level by 31 December 2012. The Commission, if necessary, using its new powers to suspend NRAs plans for 3 months of detailed investigation, will continue to follow closely through the market analysis mechanism that regulation of termination rates is aligned with the Recommendation



Source: Commission services

NRAs have continued to set glide paths, with rates falling across the EU. Overall, the effects of the regulation of MTRs has led to a reduction in the EU average rate from €5.47 cent/min in October 2010 to €3.87cent/min in October 2011.

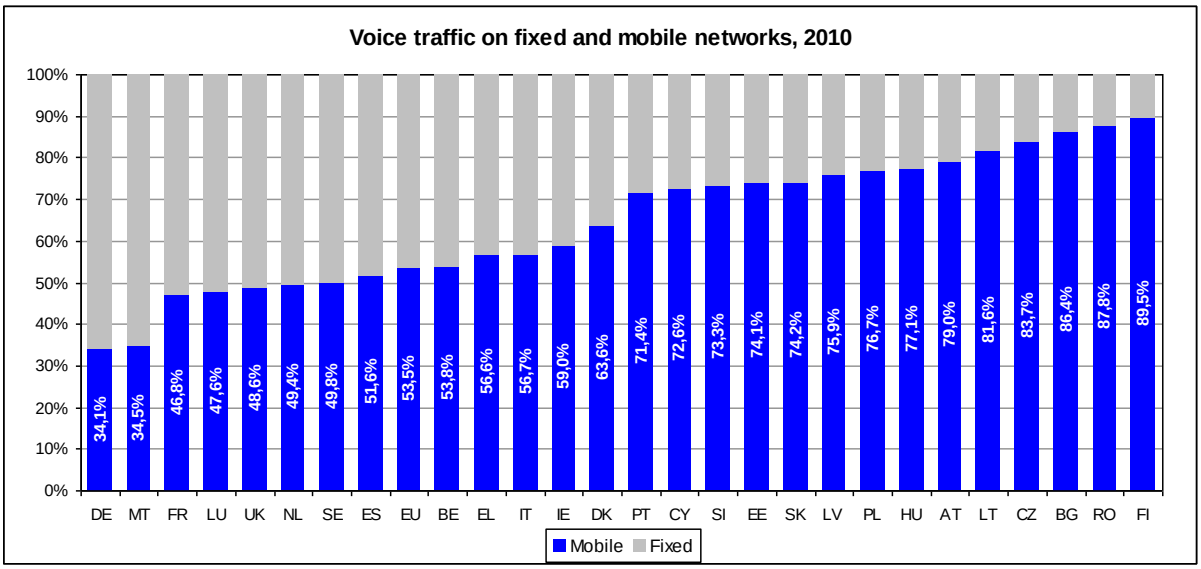
In Bulgaria, the practice of exempting calls originating from outside the territory from MTR regulation remained a major concern. Despite the NRA's decision to apply non-discriminatory MTRs and imposing financial penalties for non-implementation of the decision, the three mobile operators continue not applying the regulatory measure. The Commission is following the matter closely.

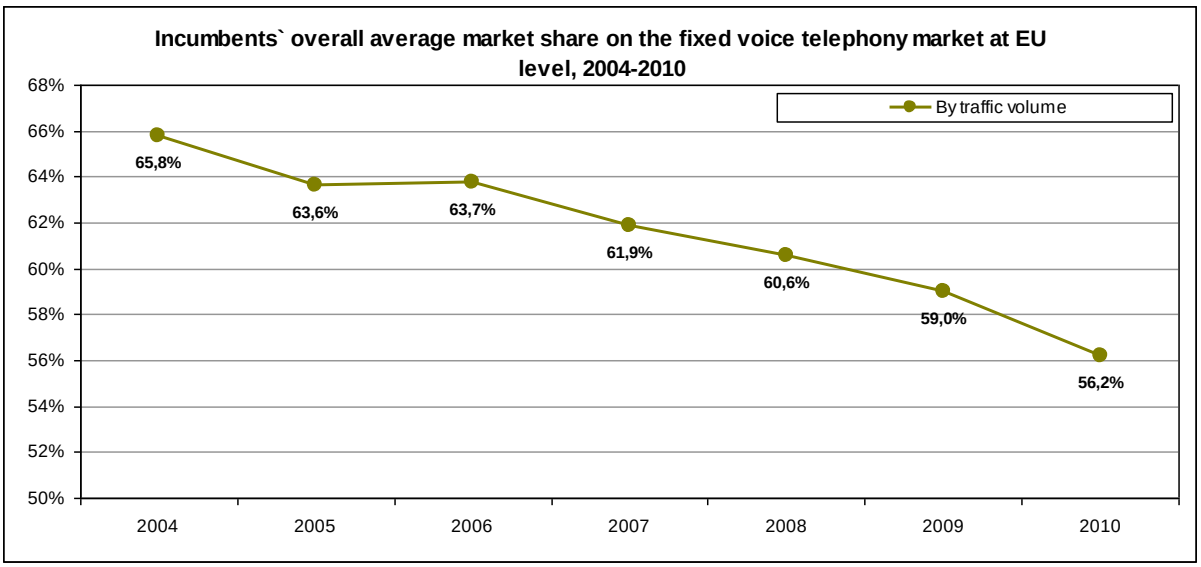
5.1.3. Roaming Regulation

The provisions of the amended Roaming Regulation were reportedly applied by all operators. Overall, in 2011 roaming tariffs were still significantly above domestic tariffs in most Member States. Whereas operators in several Member States introduced new roaming tariffs in 2011, the average EU retail roaming prices for voice and SMS were still just below the retail caps and the average data roaming price remained above €1.40/MB.

5.2. Fixed

The overall trend for fixed line revenue and traffic has continued to decline over the year reflecting both the effects of the fixed-to-mobile substitution. The incumbents' market share remained robust and decreased only marginally in most cases pointing towards stagnating competitive development.





5.2.1. Retail access and calls

Further deregulation of retail markets took place in 2011. The market for retail access at a fixed location was found to be competitive and deregulated in Finland and partially in the Netherlands, while regulation was maintained in all other Member States. For retail fixed calls markets that are no longer listed in the current Commission Recommendation on relevant markets, ex-ante regulation was withdrawn in most Member States. Such services are subject to some (usually light) regulation still in 10 Member States (Bulgaria, Belgium, Greece, Cyprus, Lithuania, Latvia, Luxembourg, Austria, Poland and Portugal).

5.2.2. Interconnection

Further reviews of the wholesale markets for fixed call origination and/or termination were ongoing or underway in several Member States throughout 2011 (e.g. Malta, Czech Republic, Denmark, Hungary, France, Ireland, Germany, Latvia, Romania and Slovakia).

The current implementation of cost accounting methodologies still differs across the EU. There is therefore a clear need for NRAs to align methodologies with the Recommendation for termination rates. While for fixed termination rates none of the NRAs apply yet the costing methodology in line with the Commission Recommendation on termination rates, a number of countries have indicated that they are in the process aligning their cost models in line with the Recommendation (e.g. France, Ireland, Italy, Portugal, Romania, Slovakia and the Czech Republic). Asymmetry in the application of remedies between the incumbent and the alternative operators remained applied practice e.g. in Cyprus, Ireland, Poland and Romania.

5.2.3. Leased lines

Competition problems still persist in the leased lines markets. At retail level, on the market for minimum set of leased lines, which is no longer listed in the current Commission Recommendation on relevant markets, regulation is maintained in 10 Member States (Bulgaria, Greece, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Austria, Poland, UK), at least with regard to the low bandwidth leased lines.

The market for wholesale terminating segments of leased lines remains regulated in most Member States, however in few Member States regulation has been relaxed and price regulation withdrawn in the whole market (Czech Republic, Hungary, Finland, Sweden), or in the segment of high bandwidth wholesale leased lines (Slovakia, , UK, Romania and Hungary).

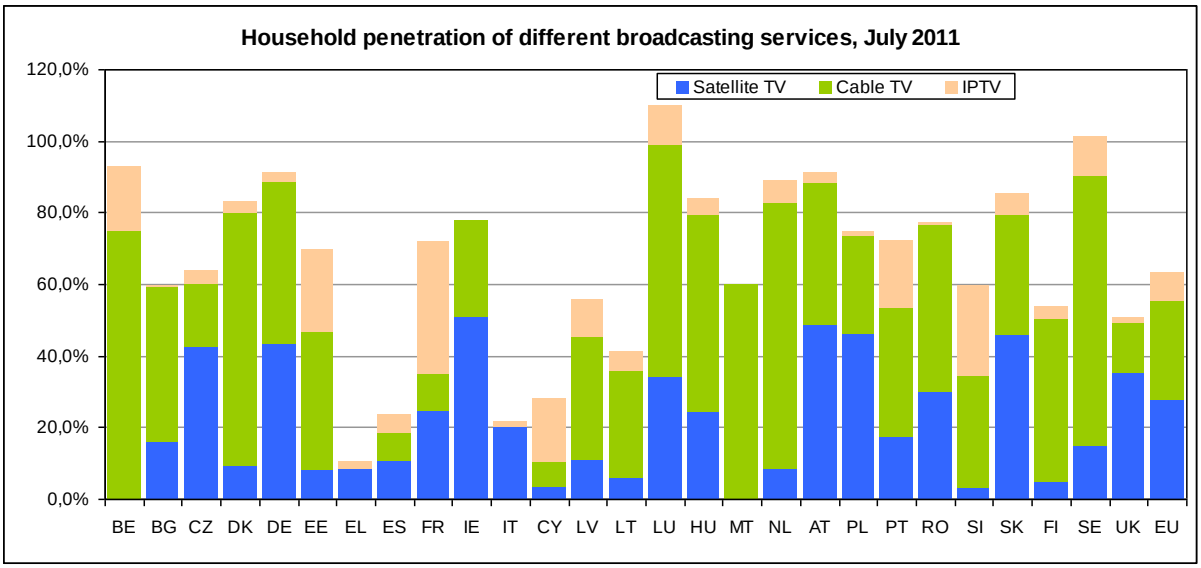
Finally, in Italy the market for terminating segments between the incumbent's node to which an alternative operator is interconnected, and a mobile operator's BTS is deregulated.

The market for trunk segments is still regulated (as a whole or partially) in some countries (e.g. UK, PL, ES).

5.3. Broadcasting

With the switch over of analogue terrestrial and cable transmissions progressing in most Member States, most broadcasting platforms available to European citizens are now digitalised. Also in view of this digitalisation process, the *ex ante* market regulation was being reviewed in view of the three criteria test in some Member States.

In all Member States at least two platforms are available for the transmission of television signals. In general, analogue transmission either via cable, terrestrial or satellite broadcasting is rapidly becoming obsolete. On the contrary, divergences among Member States still characterise the availability of cable (in view of structural differences among Member States, where no cable infrastructure is available, such as in Italy and Greece) as well as the penetration of IPTV. With regard to the latter, while in some Member States it managed to achieve a substantial market share (like in Belgium, Cyprus, Estonia, France, Luxembourg, Latvia, Lithuania, the Netherlands, Portugal, Slovenia and Sweden) it still represents a niche market in most Member States and in some cases its market share is declining (such as in Greece and Italy). Satellite confirms to be a platform homogeneously present across the Union, with a relevant market share (beyond 10% or as second most used platform) in most Member States.



5.3.1. Regulation of broadcasting markets

In 2011 a handful market analysis concerning the broadcasting transmission markets have been carried out, in order to assess whether ex ante regulation should be maintained in view

of the three criteria test. In some cases the analysis led to the application or a confirmation of remedies (such as in Belgium, where also regulation of the retail transmission price has been mandated, and Estonia), while in The Netherlands OPTA finally concluded that the market is competitive, following the annulment by the national court of the former market analysis. On the contrary in 2011 Portugal notified modifications to existing remedies still on the basis of the old 2007 market analysis.

The repealing of market regulation does not always wipe out all regulatory obligations on the broadcasting transmission platforms and/or associated facilities, either introduced as a condition attached to the rights of use of spectrum (such in Cyprus) or in the context of antitrust scrutiny (such as in Italy). In the Netherlands a bill entailing some regulatory obligations on retail television is being considered and the Commission is looking into the matter. In Spain, the national competition authority (CNC) has imposed a fine for abuse of dominant position in the digital terrestrial TV transmission market. Finally, in 2011 amendments of "must carry" obligations, concerning in particular the number of beneficiary channels and adapting them to the technological neutrality principle (therefore including digital networks) took place in The Netherlands, Poland, Portugal, Sweden, while in Romania the extension to digital networks is being considered. On the contrary existing "must carry" rules applied during the switch-over are being repealed in Italy, in view of the switch-off planned for 2012. Belgium has not adapted yet its legislation concerning must-carry in order to comply with the Judgement of the Court of Justice (C-134/10).

5.3.2. Digital switchover

In line with previous plans, in 2011 analogue terrestrial transmission have been ceased in Cyprus, France, Malta and Slovakia, while completion of the switch off is planned before the end of 2012 in Czech Republic, Italy, Ireland, Lithuania and Portugal.

There are few Member States where digitalisation of terrestrial broadcasting has not yet been completed or is not foreseen before the end of 2012, such as in Bulgaria (following anticipation of the deadline) and Poland (both planned in 2013), Hungary (postponed to 2014), and Romania (postponed to 2015). In Greece a final deadline is not yet established.
Alongside with the completion of the switch-over, rights of use over digital terrestrial multiplexes have been assigned in 2011, via comparative or competitive procedures, in Estonia, Ireland (concerning public broadcaster multiplexes), Poland, while in Italy the ongoing assignment procedure has been suspended. In Hungary, several rights of use for radio broadcasting have been tendered.

The Commission continues to monitor legal and procedural arrangements in several Member States concerning the assignment of rights of use for television and radio broadcasting as to their compliance with EU law.

6. SPECTRUM MANAGEMENT AND GENERAL AUTHORISATION

In view of the EU Radio Spectrum Policy Programme, the on-going refarming exercise in several Member States and the expiry of old licenses, a significant amount of spectrum has been made available for electronic communications services in several Member States in 2011, thus contributing to the roll-out of mobile broadband networks.

6.1. Spectrum Strategy

In line with the Digital Agenda objectives and with a view to ensure that sufficient spectrum is made available for wireless broadband, a significant part of national spectrum strategies are being harmonised thanks to the final approval of the Radio Spectrum Policy Programme (RSPP) in February 2012.

In view of the adoption of this act, several national spectrum strategies were already adapted in order to take into account of the opening up of the 800MHz band to wireless broadband, the refarming of the frequencies once reserved to GSM and the availability of new spectrum in several bands. Indeed national spectrum strategies in several Member States such as Austria, Cyprus, Czech Republic, Denmark, Germany, Spain, Finland, France, Ireland, Italy, The Netherlands, Portugal, Romania, United Kingdom have led to or foresee multiband assignments, where frequencies both below and above 1 GHz are made available simultaneously, also in view of the deployment of 4G mobile networks.

In 2011 important steps in order to reduce risk of international interference in the use of spectrum for wireless broadband have also been undertaken. In particular international agreements on the use of spectrum have been signed among Member States and with third countries (in particular Russia), such as in Estonia, Finland, Lithuania, Latvia, Luxembourg Poland, Slovakia. The issue of international coordination with third countries as well as among Member States, on the contrary, appears to be more problematic between Italy, Malta, Slovenia and Croatia; in Cyprus; and between Estonia and Latvia.

6.2. Digital Dividend

The allocation of the 800MHz band to wireless broadband has a significant impact on the investments and the competitive dynamics of the entire sector and it usually requires an overall re-organisation of spectrum among different utilisations and across countries. In this regard Article 6(4) of the Radio Spectrum Policy Programme requires Member States to carry out the authorization process by 1 January 2013 in order to allow the use of the 800 MHz band for electronic communications services and the Commission is closely following the on going authorisation processes.

In line with this deadline, following the German auction of 2010, in 2011 the authorisation process of this band has been carried out, in line with previous plans, in Spain, France, Italy, Portugal and Sweden. The completion of the process by 2012 is planned in Austria, Czech Republic, Denmark, Ireland, The Netherlands, Romania, United Kingdom. In several other Member States, however, there are not yet concrete deadlines for this assignment (such as in Belgium, Bulgaria, Cyprus, Estonia, Lithuania, Luxembourg, Latvia, Malta, Slovenia) or this is foreseen after 1 January 2013 (such as in 2013 in Greece, Finland, Poland; 2014, in Hungary), due to difficulties in the switch off of digital terrestrial broadcasting and/or in the international coordination or with devices using that band.

6.3. Refarming / Auctions, incl. prolongation issues/ Spectrum trading

Following the modification of the National Frequency Plans in line with the amended GSM Directive due to be transposed by May 2010, also the last infringement proceedings for lack of communication of transposition measures against Hungary and Spain have been closed in 2011.

Notwithstanding the changes in the plans in all Member States, however, the implementation of the re-farming process, i.e. the process of changing the allowed uses of specific rights of use of frequencies, remains a complex exercise where several factors are involved and where

the heterogeneity of conditions at national level does not allow for one-size-fits all approach. Depending on the timing, the balance of spectrum holdings, the duration of existing rights of use and the financial conditions attached to these rights, the re-farming process can lead to different regulatory actions by Member States, including changes in the terms of the individual licenses, trading among operators, reshuffling of current holdings, additional payments. In view of the obligation to examine competitive distortion due to existing assignments in the 900MHz band provided for under the amended GSM Directive as well as the entry into force of the 2009 Regulatory Package as from 25 May 2011, in particular taking into account the new procedural and substantive requirements concerning the extension of rights of use beyond the terms specified in these rights, the Commission has closely monitored the refarming process in Member States in 2011. Moreover best practices have been exchanged in collaboration with the Communications Committee and the working group on Authorisation of rights of use.

Some Member States in 2011 have completed (such as in Greece, Malta, Hungary, Portugal, Spain) or planned (such as in Austria, Ireland, the Netherlands, Romania, Sweden) the the granting of technologically neutral rights of use in the context of an overall reorganisation of spectrum holdings together with the assignment of new rights of use; in the case of Ireland and Romania this led to short technical extension of existing rights of use for GSM, in order to avoid disruption of the service. In other Member States a reorganisation of existing spectrum holdings was decided in 2011 by the national regulatory authorities (like in Belgium, Lithuania), while in others the re-farming processes authorised in the past were progressing (such as in Estonia, Italy). In Bulgaria, Germany, Latvia and Slovenia the national authorities have carried out competitive assessments of the impact of liberalisation of the GSM bands.

The vast majority of the numerous assignment procedures carried out in 2011 applied auction mechanisms, such as in Belgium (2,1 and 2,6GHz), Greece (900MHz and 1,8GHz), Spain (800 and 900MHz, 1,8 and 2,6GHz), France (800MHz and 2,6GHz, although also qualitative criteria were included), Hungary (900MHz, 1,8 and 2,1GHz), Italy (800MHz, 1,8, 2 and 2,6GHz), Latvia (2,6GHz), Malta (900MHz and 1,8GHz), Portugal (800 and 900MHz, 1,8, 2,1 and 2,6GHz), Sweden (800MHz). The assignment of frequencies below 1GHz has been often coupled with specific coverage requirements aiming at bridging the digital divide of rural areas (such as in France and Italy, in addition to the requirement set out in 2010 in the German auction), as well as with frequency caps. Sometimes the multiband auctions included rights of use that will be only available in the medium term, either because some of the tendered licenses are not yet expired (such as in Greece) or in view of the ceasing of broadcasting transmissions (like in Italy); in this way it has been possible to implement a general reorganisation of spectrum with access to a wide spectrum holdings suitable for both 3G and 4G networks, although this requires that the spectrum assigned will be available in due time.

6.4. General authorisation

In order to stimulate the development of new electronic communications services and networks across Europe, the EU Regulatory Framework provides for a maximum harmonisation of general authorisation regimes and notification requirements, where applicable.

However, following some complaints, it appears that in some Member States (like in Czech Republic, Greece, Hungary, Portugal and Slovakia) additional notification requirements and conditions beyond those listed in the Authorisation Directive are imposed as a part of the general authorisation regime or as a prerequisite to submit valid notifications; the Commission is therefore looking into the matter.

Moreover, during 2011 Berec has carried out a public consultation on the impact of administrative requirements in the provision of cross-border electronic communications services under the current regulatory regime17.

6.5. Implementation of spectrum harmonisation decisions

The Commission services are monitoring the implementation of all EC Decisions adopted pursuant to Radio Spectrum Decision 676/2002/EC. In 2011, the Commission services focussed on verifying the state of the implementation of EC Decision 2007/344/EC on harmonised availability of information regarding spectrum use in the Community. A detailed assessment of the information on individual rights of use in EFIS database has been undertaken. In this context, administrative letters requesting further clarification have been sent through the EU pilot system to 10 Member States - Bulgaria, Germany, Spain, Estonia, France, Hungary, Malta, Portugal, Poland and United Kingdom. All Member States concerned sent their reply within the prescribed deadline. The replies from all Member States were considered as satisfactory.

6.6. Implementation of Mobile Satellite Services (MSS) Decision

According to a study conducted for the Commission, at the end of the reporting period authorisation arrangements for MSS were considered to be in place in all Member States but one (Ireland has yet to conclude its consultation but can grant general authorisations). The approaches that Member States have taken towards authorisation of the MSS component vary considerably: eleven Member States apply either a license exemption or general authorisation for the MSS component; ten Member States require an individual right of use for the MSS component and six Member States require an individual right of use for a consolidated / integrated MSS and Complementary Ground Components (CGC) network. With respect to CGCs, as of the end of December 2011, authorisation structures are said to be in place in whole or in part for 25 Member States, of which 18 seem to be fully defined. The fee structures for MSS and CGC are extremely diverse, both in the amount of fees and in their nature. 16 Member States have issued authorisations of some sort to the MSS operators or do not consider that they are needed (Austria, Belgium, Denmark, Estonia, Finland, Germany, Ireland, Italy, Lithuania, Luxembourg, Slovenia, Spain, Sweden, The Netherlands, United Kingdom) .

On 10 October 2011, the Commission adopted Decision 2011/667/EU on modalities for coordinated application of the rules on enforcement with regard to MSS. The Decision sets up a coordinated approach for Member States to decide on potential breaches of the common MSS authorisation conditions, identified by a competent national authority, as well as to ensure consistent remedies and sanctions if required. At national level, enforcement modalities rely mainly on general legislation and regulations that give NRAs substantial flexibility.

7. CONSUMER INTEREST

7.1. 116 – the harmonised range of phone numbers for Services of Social Value

[17] BoR (11) 56, *BEREC Report on the impact of administrative requirements on the provision of transnational business electronic communication services*, December 2011, available at http://erg.eu.int/doc/berec/bor/bor11_56_businessservicesreport.pdf.

The revised regulatory framework introduced enhanced requirements on Member States concerning awareness, promotion and implementation. However, as of May 2012, 116000 (Hotline for missing children) was functioning in only 17 Member States. While further 116 numbers have been assigned to helpline providers in 2011 take up remained below the level suggested by the requirements of the revised regulatory framework.

The Eurobarometer survey of May 2011 confirmed the strong support expressed by Citizens for the 116 helplines. However, the low level of awareness of operational 116 services underlines the need for enhanced efforts to provide information. To this end the Commission launched a revamped website to promote these numbers and the create synergies for the awareness efforts of stakeholders:
http://ec.europa.eu/information_society/activities/116/index_en.htm

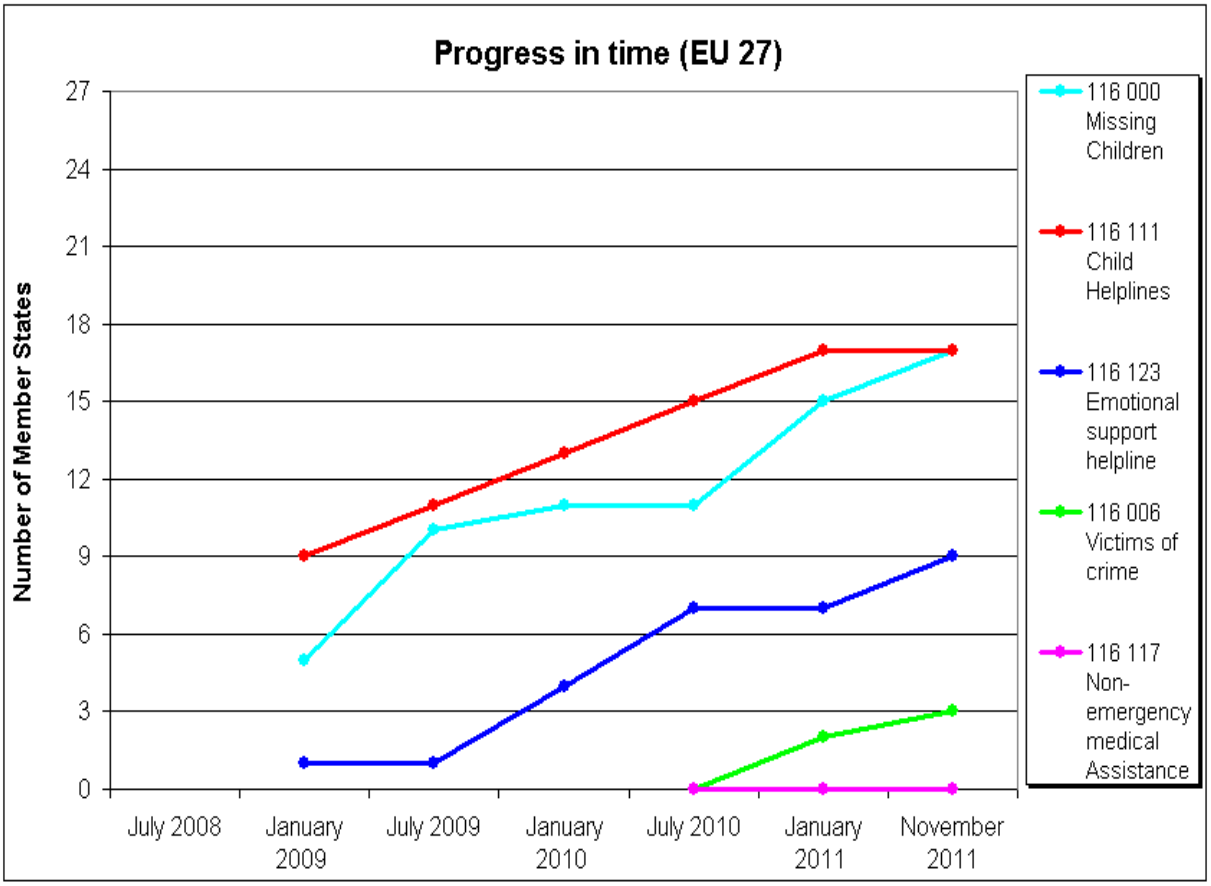
116 is a range of easy-to-remember and free-of-charge phone numbers to assist European citizens in need. Five short numbers with a single format (116 + 3 digits) have been reserved for services of social value that should be accessible to everyone in Europe.

Since 2009, five numbers are reserved for these services: 116000 (Hotline for missing children) was functioning in 17 Member States, 116006 (Helpline for victims of crime) in three and 116111 (Child helpline) in 17, while 116123 (Emotional support helpline) was operational only in nine Member States. The Non-emergency medical on-call service (116117) was not yet operational in any Member States.

7.1.1. Implementation of the 116 numbers

The revised regulatory framework introduced enhanced requirements on Member States concerning awareness, promotion and implementation. Member States were required to incorporate the new requirements into their national laws until 25 May 2011, however, the table below shows that many Member States have not yet made operational nor assigned the 116 numbers.

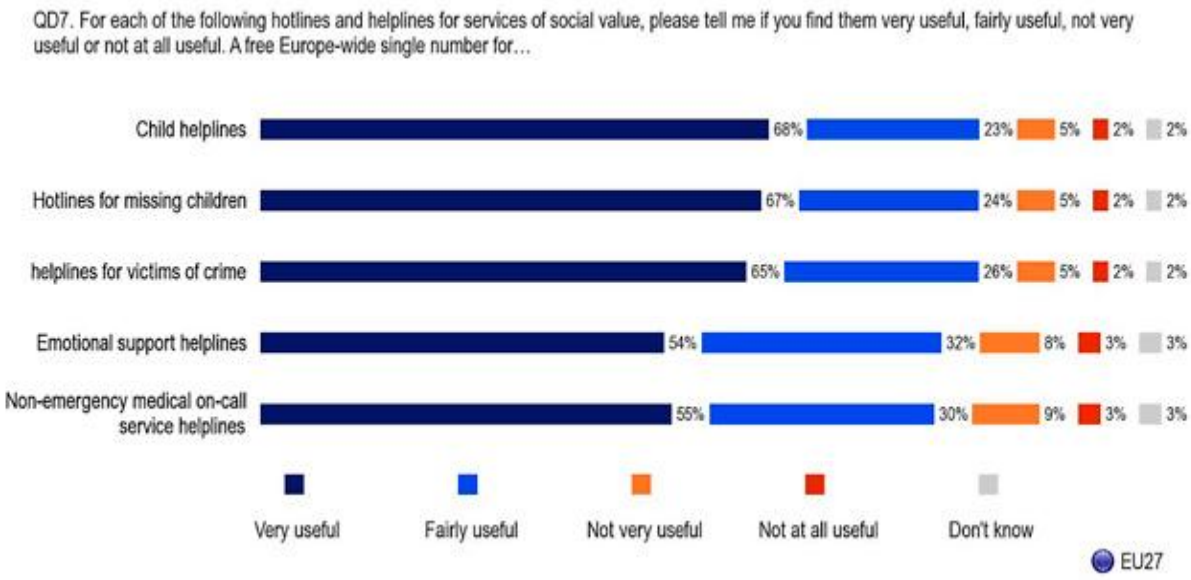
Implementation of 116 numbers (operational lines)



7.1.2. Eurobarometer survey 2011

In May 2011, the Commission carried out a Eurobarometer survey to assess the level of awareness in the Member States. The strong support expressed across the European Union for the five types of helplines (85-91% of Europeans think that these numbers are fairly or very useful) demonstrates the importance of providing these services and of unifying them under a single numbering range throughout the EU. Across the EU, three out of four people feel that their Government does not provide enough information about the 116 helplines. The low level of awareness of those 116 services that are operational (seldom exceeding 1% and never exceeding 7% for any number in any Member State) underlines the need for enhanced efforts to provide information.

Usefulness for services of social values



Source : Eurobarometer 2012

Detailed information at Member State level can be found on the Commission website: http://ec.europa.eu/information_society/activities/116/
.

7.2. 112 – the European Emergency Number

The conclusions of the COCOM 112 implementation report show significant delays in the implementation of the new regulatory provisions on 112. Moreover, some Member States do not have measured data on the performance of their 112 systems in order to assess the effectiveness of access to 112 on their territory.

Article 26 on the Single European emergency call number of the Universal Service Directive 2002/22/EC was replaced by Directive 2009/136/EC with a redrafted article on the Emergency services and the Single European emergency number, providing further obligations on equivalent access of disabled people to emergency services, caller location delivery, establishment of caller location accuracy and reliability criteria, awareness raising. The directive had to be transposed in national law by 25 May 2011. The COCOM 112 implementation report[18] and the 112 Eurobaromenter[19] report were the main tools of the Commission's scrutiny of the compliance assessment of the notified legislation.

The Commission is closely monitoring the implementation of the new regulatory provisions and will take action if it is deemed that coordination at EU level is needed. Therefore, in 2012 the Commission is to propose Key Performance Indicators to be measures throughout the EU for the assessment of the Member State's compliance with their obligation under article 26 of the Universal Service Directive.

[18] http://ec.europa.eu/information_society/activities/112/docs/cocom2012.pdf

[19] http://ec.europa.eu/information_society/activities/112/docs/report_2012.pdf

7.2.1. Caller location

The Commission calls on the Member States to step up their efforts to lay down accuracy and reliability criteria for caller location in order to ensure effective response to the emergency call. To date no such criteria is defined in the Member States, therefore EU level coordination is considered by the Commission.

7.2.2. Access for disabled end-users

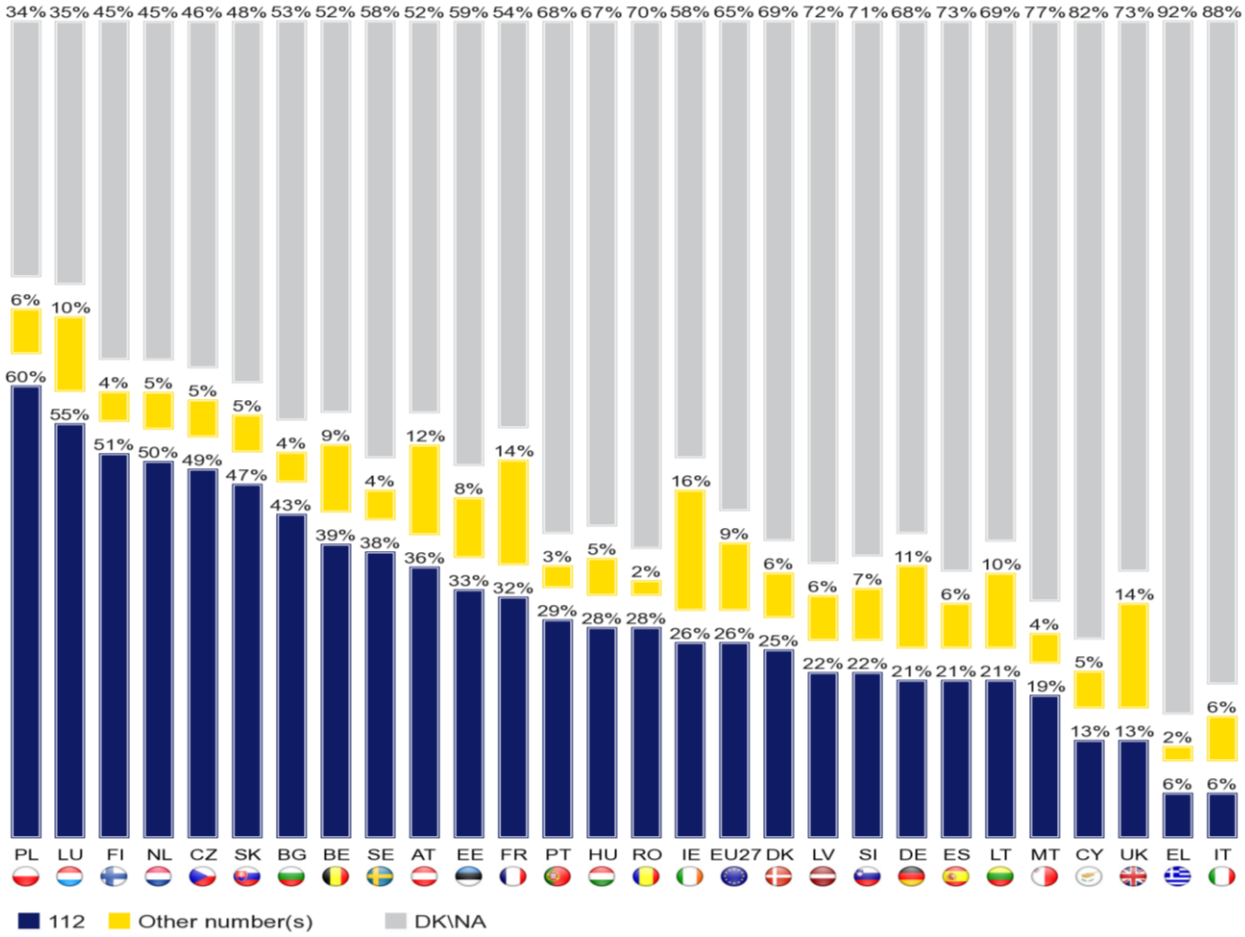
Article 26(4) of the Universal service Directive requests Member States to ensure that disabled end-users enjoy equivalent access to 112 with other end-users. Alternative means to voice as measures to provide access to emergency service were introduced only in Denmark, Spain, Luxembourg, Austria, Sweden, Slovenia, the United Kingdom, France through SMSs. In Spain also chat is available, in the Netherlands real time texting whereas in the United Kingdom and the Czech Republic – text relay using appropriate terminals. In Slovenia access to disabled end-users in provided through WAP 112. Finland will introduce 112 SMS in 2015.

7.2.3. 112 Awareness

This year's survey reveals that the low awareness of the European emergency number 112 has remained unchanged from a year ago. EU citizens remained relatively unfamiliar with the European emergency number 112 with only about a quarter (26%) of respondents being able to spontaneously identify 112 as the number to call for emergency services from anywhere in the EU and large variations persist between Member States. While 86% of Europeans were able to mention a valid emergency number, 112 or a national emergency number, 14% are at risk not being able to call the emergency services when needed. Efforts to inform about the European emergency number 112 could be further stepped up with 70% of respondents stating that they had not received any information about 112 during the past year.
The table below provides the figures on the awareness on the EU-wide character of 112 in Member States.

Awareness of 112 as the EU-wide emergency number:

Can you tell me what telephone number enables you to call emergency services anywhere in the European Union?



Base: all respondents, % by country

7.3. Network Neutrality and quality of service

In 2011, several regulatory measures on network neutrality and quality of services have been developed at national level ranging from non-binding instruments and more elaborated guidelines to the enactment of specific legislation on net neutrality.

In 2011, following an intense debate on net neutrality which spread out through the EU, Member States have started to issue rules relating to transparency and quality of services when transposing the revised regulatory framework of 2009. Regulatory measures have been developed at national level ranging from non-binding instruments and more elaborated guidelines to the enactment of specific legislation on net neutrality.

Some Member States have chosen a cautious approach towards the implementation of net neutrality rules. In Luxembourg, the Parliament adopted a resolution reminding the regulator to ensure that operators provide non-discriminatory access to the Internet. In Denmark, a Net Neutrality forum has been established and has adopted a Code of Practice to keep the Internet open and non-discriminatory whereas in Belgium the NRA has published some guidelines on net neutrality. In several Member States the debate is still on-going (e.g. Italy and Slovakia) and in others it has been chosen not to issue specific measures but to empower the NRAs

(Austria) or a Ministry (Germany) to adopt ordinances setting the general approach towards net neutrality.

At the end of 2011, only 15 Member States had completed transposition into their national laws of the Citizen Rights Directive including the new provisions under the Universal Service on transparency, publication of the content of end-users' contracts and quality of service. In line with the revised Framework, regulators have been granted new regulatory powers to address issues of transparency (on the speeds proposed, traffic management techniques and other contractual limitations) and have started monitoring the quality of Internet access. This has enabled NRAs to gather susbtantial information on the provision of services including on traffic management techniques (Italy), technical and pricing terms governing the interconnection market (France), broadband speeds measurement and advertisement (Ireland, Finland, Malta). Very few cases of complete blocking of services were reported (VoIP by MNOs in Romania and Germany) but other questionable practices were observed for instance in Sweden where investigation showed that some operators have been systematically slowing down traffic and that mobile traffic gets throttled for P2P use.

Based on the monitoring of their markets, NRAs have started adopting measures in order to ensure more transparency and quality of services.

A first range of measures aimed at making available to the public the essential information about the service offered. In France, the biggest fixed operators have published on their website quarterly results of the measurements of the quality of their services and ARCEP has issued its yearly report on the quality of service of mobile network operators. In the UK, Ofcom invited the ISPs to take further steps, in addition to the publication of key indicators, for increased transparency and kept the possibility of intervening more formally if necessary. Beside this soft approach, some NRAs have been more actively involved into the design of transparency rules and quality indicators. In Romania, ANCOM has established the quality indicators for the provision of the Internet access service and imposed the obligation for providers to publish comparable, adequate and up-to-date information on the quality of the services. For this purpose an interactive application to measure technical quality parameters (data transmission speed, delay, jitter[20], packet loss rate) will be made available on its website by the end of 2012. In a similar way, EETT in Greece has developed a Web 2.0 application featuring broadband quality measurement tools, geo-mapping of broadband connections and their performance characteristics, graphical statistics per connection and historical measurements data. A mapping tool for mobile and fixed broadband coverage is being implemented in Italy.

A second range of measures has put the accent on controlling the information provided to the consumers for instance in Finland where operators are requested by law to provide sufficient information on data transmission speeds in the customers' contracts in order to enable the comparision of the different offers in the market. In Luxembourg, the regulator plans to launch a project of making available on its website factsheets that would enable consumers to compare tariffs of different operators to be updated by operators.

Finally some Member States have discussed as well the opportunity to implement more stringent measures to ensure transparency and quality of services. Some legislative proposals have been discussed for imposing guaranteed parmeters (including speeds) for Internet access

[20] Delay variation indicating small-scale latency.

services or for better informing the consumers (in France). But, so far, only in the Netherlands has adopted strict net neutrality legislation, which prevents operators from setting the tariffs for internet access services on the basis of the services and applications run over the internet and sets out strict limits under which traffic management techniques are allowed.

At the time of writing, some Member States must still complete the transposition into their national laws of the revised Framework including the new provisions on net neutrality and quality of services. Furthermore, BEREC recently submitted to the Commission its findings on reported Internet traffic management practices, following a Europe-wide data collection exercise launched jointly with the European Commission in December 2011. BEREC's findings have shown that, whilst the majority of operators offer unrestricted Internet access, some operators actively discriminate between applications, in some cases, and throttle or block some applications because of congestion or have packages which have limitations to internet access. According to the data gathered by BEREC, these restrictions affect a significant number of users (more than 20%), especially in the mobile sector. These investigations and implementation processes demonstrate that the extent of the problem warrants action to ensuring network neutrality and quality of services in order to safeguard consumers and business and that there is a risk of having diverging and conflicting approaches in the EU.

7.4. Universal Service

Main aspects regarding universal service developments throughout 2011 evolve around the issues of designation, scope and financing. Since a number of Member States are reflecting in initiatives regarding the scope of universal service, in particular concerning functional internet access, further guidance on universal service scope seems necessary. Although the provision of universal service is overall ensured at EU level there are still cases where designation is not in compliance with EU law or where financing is problematic.

Designation

New designations of universal service for some or all components of universal service have been carried out in Czech Republic, Ireland, Spain and Cyprus. In Spain, the universal service provider was designated for the period 2012-2016. Several Member States such as Poland and Portugal intend to fully or partially carry out new designation processes over the next year. In Finland, the regulator considers re-analysing the designation decisions in 2012 taking into account latest market developments. In Bulgaria the process of launching a designation procedure in 2012 has been delayed due to recent amendments to the national legislation.

In several countries, there is not a designated universal service provider. In Germany, no undertaking is designated as universal service provider as the authorities consider that the universal service provision is ensured in the current market conditions. In Luxembourg, there is not a designated universal service provider and the incumbent provides universal service on a voluntary basis. In Italy, the designation mechanism envisaged in the Electronic Communication Act is till not implemented and universal service is still provided by the incumbent on the basis of the transitional regime.

Problems regarding the designation of the universal service provider have been reported in several countries. In Poland the designation arrangements expired in May 2011 and have not been extended. The incumbent has been providing since then the universal service without any specific legal basis. In Portugal, compliance with the judgement of the Court of Justice of November 2010 regarding the existence of an efficient, objective, transparent and non-discriminatory mechanism for the provision of universal service has not been ensured.

Scope

Several Member States have so far extended the scope of universal service in order to include the delivery of broadband connections. As reported last year, Finland was the first Member State where the scope of universal service obligations was extended to delivery of broadband connections (at 1 Mbps). In Malta, the NRA adopted a decision on the extension of the scope of functional internet access in relation to the provision of access at a fixed location which requires the USP to provide a connection capable of supporting functional internet access (4 Mbps) as of August 2011. In Spain, new legislation adopted in 2011 establishes 1 Mbps as functional access to the Internet within the scope of universal service. In Sweden, although there is not a nationwide designated universal service provider, the NRA aims to ensure since December 2011 functional access to the Internet with a minimum speed of 1 Mbps.

Since a number of Member States are considering initiatives regarding the scope of universal service, in particular regarding functional internet access, further guidance on universal service scope appears necessary to ensure a more consistent approach at EU level. For instance, in Germany, there were discussions regarding the extension of the scope to access to broadband connection which were not adopted. In Finland there have been discussions about the increase of the current functional internet speed within the scope of universal service, but also about the widening of this scope to cover summer cottages.. In Romania, a decision was adopted by the NRA reviewing the scope of universal service.

Financing

In several Member States there have also been developments regarding the financing of universal service. Net cost calculations for the universal service financing were carried out in some countries like the Czech Republic, Latvia and Spain. In Spain, operators have systematically appealed the different CMT decisions on US net cost calculation over the past years. Ireland adopted a decision on the principles and methodologies for the calculation of the universal service net cost. In Italy, the application of the funding mechanism for the period 1999-2003 is still not implemented, whereas the net cost for the year 2004 has been adopted in 2011.

A number of problems have been reported regarding the financing of universal service obligations. In some countries the universal service provider has requested compensation for the financing of universal service obligations. In Bulgaria, the universal service provider has requested such compensation for 2009 and 2010 but the decision of the NRA is still pending. In Greece, the universal service provider has also submitted a study evaluating the cost of the provision of universal service for the year 2010. In Latvia, the agreement between the government and the universal service provider on compensation from public funds was extended to cover also the 2009 net cost. In Slovakia, the NRA concluded in January 2011

and July 2011 that the provision of universal service for the years 2005-2006 and 2007-2008, respectively, did not represent an unfair burden. In other countries, the financing of universal service is implemented through specific arrangement like in Austria where operators continued to agree amongst themselves on compensation for the universal service provider. In Denmark, the Commission had opened infringement proceedings in January 2011 on the financing of additional mandatory universal services which are not within the scope of Universal Service as defined in the Universal Service Directive (USD). A constructive dialogue followed a reasoned opinion sent to the Danish authorities in September 2011. A new Act addressing the Commission's concerns entered into force as of 1 April 2012.

7.5. Number portability

Transposition of EU revised rules regarding number portability has been carried out in a number of Member States throughout 2011. Moreover a significant number of countries have adopted implementation measures with the objective of reducing the time needed to port numbers. However, concerns regarding adequate implementation of EU rules exist certain countries. A more consistent approach for the implementation of the new EU rules regarding number portability appears necessary. Overall the average time needed to activate the ported number has decreased in 2011 but is still significantly above one working day required by EU law.

Main actions regarding number portability have been mostly related to review of national portability rules, simplification of procedures and related initiatives seeking to reduce the number of days needed for number portability. The revised electronic communications framework introduced reinforced provisions through establishing that subscribers who have concluded an agreement to port a number should have that number activated within one working day. n certain Member States concerns have been reported regarding adequate transposition measures for the revised number portability rules (i.e. Czech Republic, , ,). Several countries have also reported implementation problems regarding number portability (Hungary, or Cyprus where the market players reported inconsistencies due to the absence of a centralised automated data base) while in other cases portability is reported as functioning smoothly (Austria, Ireland, The Netherlands, and Denmark where the porting process is facilitated through agreement between operators).

Several Member States have taken regulatory measures to shorten the period needed for porting a number throughout 2011 (Spain, France, Italy). In Spain the national regulatory authority adopted in July 2011 new procedures regarding the implementation of the 1-day mobile number portability, and intends to adopt implementation measures with regard to fixed number portability in 2012 in view of its final entry into force before April 2013. In France, a new system for porting mobile numbers under the guidance of the national regulatory authority was adopted in November 2011. The Portuguese NRA adopted in March 2012 new procedures for number portability establishing that the ported number should be ported within one working day from the moment the client submits its request unless there is specific exception. In Italy, the NRA has also adopted new rules aiming at ensuring mobile number portability in accordance with EU rules. In the UK, the rules adopted by the NRA in 2010 on one day porting procedure for mobile numbers entered into force in April 2011.

Volume of transactions has continued to increase in the EU over the past year. In fixed number portability, transactions average in the EU has increased from 4,1% to 5,5%, with The Netherlands and Greece being the countries with the highest reported volume of overall transactions in fixed number portability reaching 15,3% and 8,6 respectively. With regard to volume of transactions in mobile portability, EU average has increased from 2,9% to 3,4%, and Malta and Spain are the countries experiencing the highest volume of transactions of 9,3% and 7,4% respectively.

The average time needed for fixed number portability has overall decreased in the EU in 2011, as a result of improved implementation rules and procedures for porting numbers. However, in the case of mobile number portability, there has been an EU average increase in terms of total time needed to port a number from 9 to 10 days, for the period between October 2010 and October 2011. With regard to fixed number portability, EU average has decreased from 20 to 15 days. However this is still substantially higher than the reported time needed in terms of the existing regulation, which has decreased from 5,4 to 3,8. With regard to mobile portability, whilst there is a decrease in terms of the regulatory average from 4,1 to 2,5, as referred above, the EU average of number of days needed to port a number has increased from 9 to 10 days.

In spite of the overall trend towards a decrease throughout the EU, the average time needed for number portability still varies substantially between Member States. In view of this, a more consistent approach for the implementation of the new EU rules regarding number portability appears necessary.

Substantial differences exist as well between Member States regarding wholesale and retail prices for both fixed and mobile portability. In mobile, there are generally no retail prices in most countries, although retail charges for mobile portability still exist in several Member States. There are no wholesale charges in mobile porting in many Member States (i.e. United Kingdom, Lithuania, The Netherlands, Italy),
In fixed, no retail charges are applied in most Member States, although they exist in some others,. Wholesale charges in fixed number porting exist in most Member States, with several exceptions (ie. Germany, Estonia, Luxembourg, The Netherlands, and Slovenia), and can be

7.6. Consumer complaints and tariff transparency

The number of consumer complaints in the electronic communications sector continues to be a relevant issue for end-users in most Member States. Overall volume of consumer complaints in the different countries continues to show a mixed picture. As in the previous years, issues related to billing, transparency and contractual conditions have been reported as the main sources of consumer complaints throughout the EU.

Issues related to billing, tariff transparency and contracts continued to be the most frequent sources of consumer complaints in the electronic communications sector in 2011. The volume of consumer complaints received across the EU shows a mixed picture. In some cases, Member States report a steady increase of consumer complaints whereas in others the tendency for complaints is decreasing, mainly as a result of previous actions of the regulator to address the most prominent issues.

Against this background, several Member States have taken specific measures improve rules and procedures for dealing with consumers complaints.

New measures regarding consumer protection were adopted by several Member States throughout 2011. In February 2011, the French NRA published a set of recommendations seeking to ensure that consumers are able to make an informed choice and related consumer protection aspects. In the UK, new rules concerning handling of users' complaints entered into force in July. In Ireland, a new dedicated website has been launched in order to raise awareness with regard to the potential harm of premium rate services. In Belgium, the NRA started in 2011 a monitoring programme aiming to ensure conformity of legal and regulatory measures on consumer protection. The Netherlands adopted in April 2011 new consumer protection legislation concerning in particular premium SMS billing which is to be implemented by the NRA. In Greece, the average time for handling complaint has been significantly reduced from 12 to 5 working days. In Lithuania, new consumer protection rules have been adopted regarding the SIM locking of mobile handsets. In Italy the NRA approved a regulation defining automatic minimum indemnities due to the consumers for breach of certain quality parameters in case of disputes between users and operators

In other cases, Member States have implemented cooperation mechanisms with operators to deal with consumers complaints regarding electronic communications services (ie. Spain, Sweden, Portugal). In addition to activities carried out by the national consumer protection authorities and organisations, the ombudsman has also been involved initiatives regarding consumer protection in the sector of electronic communications in a number of countries (Finland, Spain).

With regard to tariff transparency, most initiatives are related to the development and updating of web-based tools for tariff comparisons. In the Czech Republic has made available a new tariff calculator enabling consumers to compare offers in the market, which is for the moment to mobile services. In Belgium, the existing tariff simulator has been updated with a module focussing on bundled offers. In Romania, an initiative financed with structural funds for the implementation of an online price calculator was also adopted in 2011.

Some other countries have carried out relevant assessments regarding tariffs in the electronic communications sector. For instance, in the Netherlands, where tariff transparency rules have been implemented since 2010 with focus on the comparability of offers online, an assessment was carried out in 2011 showing that most providers have improved their tariff transparency on they website. In France, a first index of prices of mobile services was published in July 2011 showing that prices have annually decreased by 2.8% between 2006 and 2009. In some other countries like Slovenia tariff transparency seems not completely assured, although a tariff transparency portal is expected to be operational in the first half of 2012.

As announced in the January 2012 Communication on "a coherent framework for building trust in the Digital Single Market for e-commerce and online services", the European Commission, in its attempt to address the issue of transparency and reliability of information intermediaries through a direct dialogue with stakeholders, organised in May 2012 a workshop on comparison tools, as part of this year's European Consumer Summit. The workshop brought together various stakeholders providing comparison tools or being directly impacted by them and is the first step of this process which could eventually lead to the development of codes of good conduct and/or EU-wide guidelines.

Given the increased use of those comparison tools and the significant influence they have on consumers' choices, it is vital to ensure the transparency and reliability of the information they provide. However, it is also quite important that these intermediaries extend their comparison to include cross-border offers too, a point which was stressed in the Workshop and which relates to measures for boosting cross-border e-commerce. Further analysis and multi-stakeholder discussion is needed to identify more concretely best practices and agree on necessary steps for further improving the situation. The Commission will look into the best ways to structure this process.

7.7 E-Privacy

In the course of the reporting period Member States' activity focused very much on the transposition of the modified provisions of the ePrivacy Directive, as amended by the Citizens' Rights Directive[21]. In the meantime, the Commission made a proposal for a general Data Protection Regulation as part of its reform of EU data protection rules.

The Digital Agenda for Europe recognises that a lack of trust in the online environment is seriously hampering the development of Europe's online economy, and that privacy must also be effectively enforced online. The ePrivacy Directive[22] further develops and complements the general Data Protection Directive[23] in the area of electronic communications. It provides for basic requirements to ensure the security and confidentiality of communications over EU electronic communications networks, and gives consumers a set of tools to protect their privacy and personal data.

The revised regulatory framework provides for reinforced enforcement powers, e.g. penalties must be effective, proportionate, and dissuasive. Better cross-border cooperation is also expected following the inclusion of Article 13 on unsolicited communications of the ePrivacy Directive in Regulation (EC) 2006/2004 on consumer protection cooperation. It also aims at better protection of confidentiality of communications via new rules on personal data breach notification (Article 4) and reinforced rules on cookies and similar applications (Article 5(3)).

To help Member States transpose the latter provisions on cookies, the Commission published a guidance document in early 2011[24]. Analysis of the transposing measures reveals that most of the Member States followed or intended to follow strictly the wording of the Directive. Only a few Member States adopted guidance specifying the expectations with regard to deployment of cookies under the new regime (DK, FR, LT, UK). The enforcement powers related to Article 5(3) have been conferred in most (reported) cases onto the Data Protection Authority (BG, CY, CZ, EE, EL, IE, FR, IT, LT, LU, MT, SI, RO, UK (partially also in HU, LV)), while in fewer cases to the NRA (BE, CR, FI, NL, PL, SE).

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[21] The Citizens' Rights Directive 2009/136/EC

[22] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31.07.2002, p. 37).

[23] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L. 281, 23.11.1995, p. 31).

[24] http://circa.europa.eu/Public/irc/infso/cocom1/library?l=/public_documents_2010/cocom10-34_guidance/_EN_1.0_&a=d

In July 2011 the Commission launched infringement proceedings against those Member States which had not notified national measures transposing the amended provisions of the ePrivacy Directive, due to be implemented by 25 May 2011. By the end of 2011 the Directive had been transposed in 15 Member States.

In the context of the ePrivacy Directive, the Commission has continued efforts to facilitate discussions among stakeholders on the development of self-regulatory initiatives concerning online behavioural advertising (OBA) and the do-not-track (DNT) standard, which should help to facilitate compliance with the ePrivacy rules.

As regards the new provisions on personal data breach notifications, the Commission organised a public consultation on technical implementing measures, with a view to ensuring a harmonised approach to the practical aspects of notifying personal data breaches. The technical implementing measures are expected to set the circumstances, formats and procedures for notifying personal data breaches. This work coincided with some publicly debated data breach incidents in several Member States raising the awareness of the security and integrity of networks and services.

In 2011 a number of Member States developed specific initiatives targeting unsolicited communications. In France the ICT sector's initiative Signal Spam[25], developed in partnership with the personal data privacy regulator, brought very good results and its promotion abroad is also under consideration. In February 2011 a public register of objections[26] was launched in Italy, with approximately 900,000 subscribers registered by the end of the reporting period, out of 15 million subscribers. Enforcement remains a challenge however. In Lithuania the inability to impose fines outside of a Court was flagged as a shortcoming. Nevertheless, the number of complaints in Lithuania was relatively stable and low. On the other hand, in the Netherlands, OPTA continued to impose high fines against major spammers. In addition, it has also embarked on a self-regulation exercise concerning the reporting of infected botnet clients to consumer ISPs who have signed the “botnet treaty” as well as the reporting of malware- and spam-related infrastructure to hosting ISPs, urging them to take appropriate action towards their clients or resellers. The regulations were often supplemented by awareness-raising actions, such as in Poland, where the NRA developed certification actions (safe Internet, safe Phone etc.).

In terms of pending proceedings, during the reporting period the Commission closed in January 2012 the infringement against the UK with regard to incorrect transposition of EU law requirements concerning the confidentiality of communications, as provided in the ePrivacy Directive 2002/58/EC and the Data Protection Directive 95/46/EC.

In November 2011, the CJEU gave a preliminary ruling in joined cases C-468/10 and C-469/10 from a referral by the Spanish Supreme Court on Art.7 (f) of Directive 95/46[27] establishing the direct effect of this provision. The CJEU decided that the purpose of the Data

[25] Signal Spam enables users to install a plug-in that reports spam e-mails to CNIL which can then act against the largest spammers.

[26] Also called Robinson list, containing the customers wishing to refuse permission to marketing operators to use their telephone numbers

[27] 'Member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent; or … (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).’

Protection Directive 95/46/EC was full harmonisation, and that therefore the provisions of the Directive are fundamentally exhaustive and further-reaching restrictions of the permissible handling of personal data in national regulations could be prohibited.

Also in November 2011 the CJEU also gave a preliminary ruling in case C-70/10 from a referral by the Belgian Court of Appeal (Scarlet case). The Court ruled that an injunction of a national Court imposing upon an ISP the obligation to introduce a system for filtering all electronic communications, in particular peer-to-peer ones, and which applies indiscriminately to all its customers as a preventive measure, exclusively at the ISP's expense and for an unlimited period, in order to spot alleged infringements of copyright, is not compatible with EU law.

In line with the Digital Agenda for Europe the Commission presented in January 2012 a proposal of a general data protection Regulation. The proposal aims at strengthening the rights of individuals and improving the clarity and coherence of the EU rules for personal data protection.

This coincided with the decision[28] of the Czech Constitutional Court to derogate part of the Act on electronic communications[29] with the result that provisions obliging to retain traffic and location data and to make this data available to competent authorities ceased its legal effect. Also in Germany, further to the ruling of the German Constitutional Court of 2010[30], a political discussion took place on retention of traffic and location data by telecoms providers for billing purposes, but no amendments of the German law were presented in this regard. In the meantime the Commission has also been preparing the grounds for the review of the Data Retention Directive with the publication in April 2011 of an evaluation Report.

8. MONITORING AND ENFORCEMENT OF TELECOM LEGISLATION

The Commission has paid much attention to delays in the implementation of the revised regulatory framework due in May 2011, which is a priority in the Digital Agenda for Europe. This led to non-communication infringement cases against 20 Member States in July 2011. In the meantime, progress made by Member States on conformity issues allowed the Commission to close a total of 16 cases. The Commission is particularly concerned about structural issues such as independence, consumer protection, but also taxes on operators.

Swift implementation of the revised regulatory framework for electronic communications, which includes the Better Regulation Directive and the Citizens' Rights Directive, has been identified as a priority in the Digital Agenda for Europe, one of the flagships of the Europe 2020 Strategy aiming at growths and jobs in Europe. In 2011, the Commission has accordingly paid much attention to the transposition of the revised regulatory framework[31] due in May 2011.

[28] Decision No.94/2011
[29] Articles 97(3,4) of the Act on electronic communications and Regulation 485/2005
[30] Bundesverfassungsgericht, 1 BvR 256/08 of 2 March 2010,
[31] Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No

With regard to the transposition of the revised regulatory framework, 39 infringement proceedings against 20 Member States were opened in July 2011 for **non-communication** of implementing measures concerning the Better Regulation Directive and/or the Citizens' Rights Directive. In November 2011, 31 reasoned opinions were sent to 16 Member States. In the same reporting year, all seven remaining infringements for non communication of measures transposing the revised GSM Directive[32] could be closed following Member States' action.

At the same time, efforts have been made to address ongoing infringement proceedings concerning **non conformity** with the regulatory framework. Progress made by Member States allowed the Commission to close a total of 16 non conformity cases, while opening five new infringement proceedings. In total, there were 16 proceedings for incorrect implementation pending at the end of 2011. Non-conformity infringement **priorities** remained focused in particular on structural issues and consumer protection.

Structural issues included in particular the functioning and the independence of the national regulatory authorities. Following legislative amendments, the infringement concerning the rules for dismissal of the NRA management in Slovenia could be closed, as well as the infringement proceedings regarding the lack of effective structural separation between regulatory and control functions in Romania, Latvia, Lithuania and the United Kingdom (Gibraltar). In the meantime the Commission had to open infringement proceedings against Estonia in this latter regard. As regards respect for the EU consultation procedure involving national regulatory authorities and the Commission, which aims to consolidate the internal market for electronic communications (Article 7 procedure), infringement proceedings were opened against France. However, while the latter, in spite of Commission comments, had adopted a decision including a reciprocity clause reserving regulated tariffs to regulated operators, thereby favouring national operators, the decision concerned was adjusted by the French authorities, which allowed the Commission to close the case. Finally, pending cases concerning the absence of communication to the Commission of mobile termination rates (Germany) as well as wholesale broadband access rates and costing methodology (Poland) could be closed.

The protection of **consumer rights,** including privacy, has remained another priority. Progress at national level has allowed closing a number of infringement cases in 2011, in the following areas: the functioning of the European emergency number 112 (Italy), the possibility to keep one's number when changing telecom operators (Bulgaria), effective "out-of-court" mechanisms to settle disputes between consumers and service providers (Luxembourg) and the protection of personal data (Italy).

An increasing area of concern has been the imposition of **specific telecom taxes** on providers of electronic communications, in contradiction with the EU rules on administrative charges.

2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ("Citizens' Rights" Directive), OJ L 337, 18/12/2009 p. 11.

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services ("Better Regulation" Directive), OJ L337, 18.12.2009, p. 37.

[32] OJ L 274, 20.10.2009, p. 25

While Hungary was sent a reasoned opinion, France and Spain were referred to the Court of Justice for cases opened in 2010 (C-485/11 and c-468/11).

The **Court of Justice** ruled in 2011 on an infringement case against Belgium (C-134/10). It found breaches of EU law concerning Belgium's "must-carry" rules imposed on broadcast transmission networks in the Brussels-Capital region. The Commission was closely following whether the judgments of the Court of Justice were fully complied with. In particular, as Belgium was not complying with the above mentioned judgment and with the judgment delivered in 2010 concerning the cost of provision of the social component of universal service (C-222/08), the Commission sent two letters of formal notice under Article 260 TFEU to Belgium. Such a letter has also been sent to Portugal for non compliance with the judgment C-154/09 condemning Portugal for its system of designation of universal service provider. At the same time, the Commission was able to close three cases with regard to judgments delivered in 2009 as the issues were resolved: against Portugal (C-458/07), Italy (C-539/07) and Germany (C-424/07).

The Commission continued to issue **press releases** on many infringement proceedings. These press releases are available on the implementation and enforcement website dedicated to the Information Society and Media sector[33] together with overview tables.

The Commission monitors the correct application of the provisions contained in the EU regulatory framework, also via contacts with stakeholders and complaints received from EU citizens.

The Commission services have continued to prevent the recourse to infringement proceedings by making use of bilateral **contacts with the relevant national authorities**, in particular during the transposition process. In particular, the **Communication Committee** (COCOM) which gathers the representatives of authorities responsible for electronic communication has been a forum for regular exchange with Member States and for sharing best practice in implementing different provisions. In addition, exchanges via the online web tool **'EU Pilot'** have been successful in preventing infringements in a number of cases, for instance, in the area of radio spectrum management or concerning the functioning of the European emergency number '112'. Seven Member States joined the project in 2011, leading to 25 participating Member States. 38 new cases concerning electronic communications were opened in 2011 (out of 69 cases opened since the launching of the project in 2008). 15 cases were closed in 2011, leading in 3 cases to the launch of an infringement proceeding.

[33] http://ec.europa.eu./information_society/policy/ecomm/implementation_enforcement/index_en.htm