



## **Com Hem's Response to the draft Recommendation on regulated access to Next Generation Access Networks (NGA) of 18th September 2008**

### **1. General Arguments**

#### **1.1 Successful development work for a competitive market**

It is with great interest that Com Hem has taken part in the Commission's draft Recommendation on regulated access to Next Generation Access Networks (NGA). The Commission's significant efforts to develop the regulatory framework and improve conditions for competition and the development of infrastructure and services are highly encouraging to both businesses and consumers.

As an investor in NGA, Com Hem would like to stress in particular the important fact that the common regulatory framework promotes effective investments in infrastructure and innovation. The best long-term conditions for a competitive European market for electronic communications services are created by allowing businesses themselves to make economically rational, commercially-based investments in infrastructure and service development. It is also generally recognised that businesses commanding their own infrastructure have the greatest opportunities to diversify their offer and cut their prices – a market situation that favours European consumers in the long run.

Com Hem is also highly satisfied that the Commission attaches such importance to regulatory certainty. Investments in NGA are long-term, and market operators must be capable of assessing current and future risks and regulations.

#### **1.2 Important principles for regulation of the electronic communications sector**

Based on its general position referenced above, Com Hem would like to stress that it is of utmost importance that every remedy that can potentially change the bases for market operators' investment decisions is considered and tested thoroughly. Article 5.3 of the Access Directive emphasises that any obligations and conditions introduced shall be proportionate.<sup>1</sup> Proportionality is also one of the general principles in EC law, which prescribes the minimum intervention required to achieve the established goals.

In order to comply with the proportionality requirement, the European Regulators Group (ERG) has recommended that the choice of remedies should include a consideration of alternative remedies. For each alternative, the national regulatory authority should weigh the burden on the regulated company and the costs arising from regulation against the intended benefit, and should choose the least burdensome effective remedy based on this assessment.<sup>2</sup>

It should also be emphasised that the actual assessment of the need for remedies shall be carried out in accordance with established methods. The Access Directive prescribes that

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<sup>1</sup> Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

<sup>2</sup> ERG Common Position on the approach to appropriate remedies in the new regulatory framework, ERG (03) 30rev1, p. 54



decisions governing the imposition, amendment or withdrawal of duties shall be based on market analyses performed in accordance with the Framework Directive.<sup>3</sup>

Pursuant to Article 15 of the Framework Directive, the Commission shall adopt a recommendation on relevant product and service markets and shall publish guidelines on market analysis. In defining relevant markets in their respective countries, national regulatory authorities shall, to the greatest extent possible, take the Commission's recommendation and guidelines into account. When analysing relevant markets they shall, in accordance with Article 16 of the Framework Directive, take the Commission's guidelines into consideration to the highest possible degree.<sup>4</sup>

In sum, and fully in line with the Commission's goals on regulatory certainty, Com Hem stresses that regulation is justified where *significant market power* has been verified by a *due analysis of properly defined markets*. Remedies are justified where they are *proportionate*, i.e., where they are judged to be less burdensome than alternative remedies.

### 1.3 Summary of Com Hem's Arguments

Com Hem believes that the above-referenced principles should guide the Commission's formulation of the Recommendation on regulated access to Next Generation Access Networks (hereinafter the "NGA Recommendation"). Accordingly, Com Hem has the following viewpoints on the Commission's draft Recommendation:

a) The definition of relevant product and service markets need not be addressed in the NGA Recommendation

*Proposed:* The third paragraph of section 3.1.3 in the draft Commission staff working document, accompanying document to the Commission Recommendation on regulated access to Next Generation Access Networks (hereinafter "staff working document"), should be deleted.

*Rationale:* The NGA Recommendation and the appurtenant staff working document focus on measures taken against operators with significant market power. The Commission's view on market definitions is clarified in its recommendation on relevant product and service markets<sup>5</sup> and its guidelines on market analysis<sup>6</sup>. The wording in the staff working document risks leading to regulatory uncertainty and to the definition of product and service markets on grounds inconsistent with the applicable recommendation and guidelines.

b) Duct access should be one of many possible remedies

*Proposed:* Article 4 in the draft NGA Recommendation should be amended to allow, but not require, national regulatory authorities to prescribe access to new and existing ducts when they deem appropriate.

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<sup>3</sup> See footnote 1

<sup>4</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive)

<sup>5</sup> Commission recommendation of Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2007) 5406)

<sup>6</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165(03))

*Rationale:* The present wording of the draft Article represents a departure from the Commission's previously very balanced approach to access remedies. It offers limited scope for the consideration of alternative remedies, and there is a risk that the principle of proportionality will not be taken into consideration to a great enough extent. The draft Article also lacks essential references to Article 8.2 of the Framework Directive and to Article 12.2 of the Access Directive.

c) Geographic aspects of relevant product and service market definitions need not be addressed in the NGA Recommendation

*Proposed:* Amend Article 3 of the draft NGA Recommendation to prevent any uncertainties regarding the recommendation of relevant product and service markets and the guidelines on market analysis.

*Rationale:* The NGA Recommendation and the appurtenant staff working document focus on measures taken against operators with significant market power. The Commission's view on the geographic aspects of market definitions is clarified in its recommendation on relevant product and service markets<sup>7</sup> and its guidelines on market analysis<sup>8</sup>. The wording of the draft Article risks leading to regulatory uncertainty and to the definition of product and service markets on grounds inconsistent with the applicable recommendation and guidelines.

## 2. Detailed arguments

### 2.1 The definition of relevant product and service markets need not be addressed in the NGA Recommendation

In the third paragraph of section 3.1.3 of the staff working document, the Commission states that:

"Where fibre networks have been deployed based on a PON architecture, their topology starts to look like that of a cable network. NRAs should therefore carefully analyse whether this may indicate that placing cable and telecommunications networks in the same relevant market would be appropriate."

It is Com Hem's opinion that the above paragraph refers to the definition of relevant product and service markets. Article 1 of the NGA Recommendation clarifies that the Recommendation applies to remedies implemented with respect to operators having significant market power. It is unclear why the Commission chose to also address the issue of definitions of relevant product and service markets.

Com Hem would like to point out, with reference to Article 8 of the Access Directive and Articles 15 and 16 of the Framework Directive, that definitions and analyses of relevant product and service markets shall take the utmost account of the Commission's recommendation and guidelines. The Commission has for this purpose submitted its recommendation on relevant product and service markets<sup>9</sup> and its guidelines for market analysis and assessments of significant market power.<sup>10</sup>

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<sup>7</sup> See footnote 5

<sup>8</sup> See footnote 6

<sup>9</sup> See footnote 5

<sup>10</sup> See footnote 6



The above-cited paragraph from the staff working document makes no reference to the recommendation on relevant product and service markets or to the guidelines. Rather, it suggests that the definition of relevant markets, particularly concerning cable networks, shall depend on the architecture of the fibre network.

Com Hem believes that it is both unnecessary and inappropriate that the principles for definitions and analyses of relevant product and service markets are addressed in different recommendations that have divergent purposes. The wording in the staff working document risks leading to uncertainty for both market operators and for the national regulatory authorities, and also risks decreasing the level of regulatory certainty.

Com Hem proposes that the third paragraph of section 3.1.3 in the Draft Commission staff working document, accompanying document to the Commission Recommendation on regulated access to Next Generation Access Networks, be deleted.

## **2.2 Duct access should be one of many possible remedies**

In the draft NGA Recommendation, the Commission assigns great weight to the fact that national regulatory authorities shall instruct operators with significant market power to grant access to new and existing ducts. The Commission writes in Article 4:

“Where NRAs find that one or more operators have SMP in Market 4 (including shared or fully unbundled access), they should mandate access to new and existing ducts (with associated measures and processes necessary to ensure access is effective), civil engineering works and other elements which are not active (...)”

Com Hem is of the opinion that the Access Directive already includes provisions for prescribing duct access. Under Article 12, national regulatory authorities may impose obligations to grant access to specific network elements and associated facilities. However, the Commission’s draft NGA Recommendation goes further than the existing Access Directive; the draft states that the regulatory authorities *should* mandate duct access, not that they *may* do so.

Com Hem would also like to observe that the draft NGA Recommendation represents a departure from the Commission’s previous, very well-balanced approach to access remedies. For example, in the staff working document published in conjunction with the recommendation on relevant product and service markets the Commission states that remedies such as access to ducts and dark fibre may be considered where appropriate, with due regard taken to the fact that remedies shall, in accordance with Article 8 of the Framework Directive, stimulate effective investments in infrastructure.<sup>11</sup> The Commission’s emphasis on proportionality is clearly on display here.

The ERG has adopted a similar approach. In its common opinion on selection and utilisation of remedies, the ERG stresses that selection of a remedy should be preceded by an analysis of alternative measures so that in each case the least burdensome remedy (that is, the most proportionate) can be selected.<sup>12</sup>

<sup>11</sup> Commission staff working document, explanatory note, accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Second edition, (C(2007) 5406), p. 17.

<sup>12</sup> See footnote 2



The Commission's draft Recommendation provides limited scope for consideration of alternative remedies, thus creating a risk of reducing opportunities for regulatory authorities to implement proportionate measures. This risks in turn leading to the imposition of unjust obligations on network-owning market operators.

Com Hem would also like to highlight that the draft Article contains no reference to the Framework Directive's Article 8.2 (c) or to the Access Directive's Article 12.2. The application of these Articles reduces the risk of the application of excessively stringent obligations that would distort market operators' investment decisions. The staff working document, referenced above, which accompanied the recommendation on relevant product and service markets includes just such a reference to the Framework Directive's Article 8.

Com Hem proposes that Article 4 be amended as follows:

"Where NRAs find that one or more operators have SMP in Market 4 (including shared or fully unbundled access), they **may** mandate access to new and existing ducts (with associated measures and processes necessary to ensure access is effective), civil engineering works and other elements which are not active, necessary for the roll-out of competing infrastructure, and in particular of fibre, street cabinets or an optical equivalent, **taking utmost account of the objectives set out in Article 8.2 of the Framework Directive and the factors enumerated in Article 12.2 of the Access Directive.**"

### **2.3 Geographic aspects of relevant product and service market definitions need not be addressed in the NGA Recommendation**

In Article 3 of the draft NGA Recommendation, the Commission states that:

"In undertaking market reviews according to Article 16 of Directive 2002/21/EC, NRAs should examine the need to define geographic markets taking into account the competitive conditions created at both the national and sub-national level by the progressive roll-out of NGA networks and the status of infrastructure competition."

Com Hem believes that draft Article 3, like the third paragraph of section 3.1.3 of the staff working document, refers to the definition of relevant product and service markets. The Commission has not stated its reasons for choosing to also address the issue of geographic aspects of market definitions.

Again, Com Hem would like to point out that the Commission has already presented a recommendation on relevant product and service markets<sup>13</sup> and guidelines on market analysis and assessment of significant market power.<sup>14</sup>

Com Hem reiterates its argument that it is unnecessary and inappropriate that the principles for definitions and analyses of relevant product and service markets are addressed in different recommendations with divergent purposes. This serves to decrease the level of regulatory certainty and creates uncertainty for both market operators and national regulatory authorities.

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<sup>13</sup> See footnote 5

<sup>14</sup> See footnote 6



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Com Hem proposes that Article 3 be amended as follows:

**"In defining relevant product and service markets and undertaking market reviews, NRAs should, according to Article 15 and 16 of Directive 2002/21/EC, take the utmost account of the relevant recommendation and the guidelines."**

### **Com Hem in Brief**

Some 40% of Sweden's households, or 1.78 million, are connected to ComHem's network and have access to the market's broadest TV offering, plus value-for-money, high-quality, complete broadband and fixed telephony services. Com Hem also offers interactive services that rationalize real estate operation, communication and maintenance for landlords. The company was incorporated in 1983, has some 700 employees and is headquartered in Stockholm, Sweden. Com Hem is owned by The Carlyle Group and Providence Equity Partners.

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