



Cable Europe response to the Commission's Consultation on its Draft Recommendation on Next Generation Access Networks

17 November 2008

I. Executive summary

Cable Europe, the European Cable Communications Association, groups all the leading European cable TV operators and their national trade associations throughout Europe. The aim of Cable Europe is to promote and defend the industry's policies and business interests at European and international level, and to foster co-operation among its members. The European cable TV industry provides broadband, telephony, digital TV to more than 73 million customers.

Cable Europe welcomes the opportunity given by the European Commission (EC) to comment on its draft Recommendation on Next Generation Access Networks (NGA) as we share the Commission's view on the critical role that NGA deployment may have to support the further development of the European economy. Cable networks are at the forefront of these developments in Europe as some of our members have started or are about to start offering ultra high speed broadband services of up to 130 Mbps. Upgraded cable networks therefore represent one of the first NGA networks in the Community and are very well positioned to compete with the incumbents'. On such basis we would like to offer comments on the Commission's draft Recommendation.

We approach this exercise with caution as we question the added value of a recommendation when a coherent regulatory framework is already in place at the EU level, the review of which is currently ongoing and is already taking these new developments into account. While certain specific adjustments will undoubtedly be required, we support the Commission's approach of perpetuating the general principles and believe that the underlying Framework will be capable of providing for the regulatory issues that are likely to happen because of the development of NGAs.

The stated objective of the European Commission recently published draft recommendation on next-generation access (NGA) is to:

"foster the application of consistent regulatory remedies to SMP operators throughout the EU in Markets 4 and 5 regarding access to 'NGA' networks... Such a consistent approach is required in order to provide regulatory certainty to investors and foster investment and innovation for the benefit of all parties involved.¹"

¹ Introduction, paragraph 4



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This position is to be welcomed, in particular the recognition of the importance of investment and the need for a clear and consistent regulatory regime to support it. However, we consider that any remedies that are prescribed in advance can be dangerous for investment if they are not sufficiently future proof and we are opposed to a rigid application of a confined set of common short term remedies that could have detrimental consequences for the market. In the long run, we believe that the Commission should address this issue at a macro-management level and not micro-management and that there are a number of ways in which the draft recommendation fails to meet its objectives. In particular:

- Whilst the importance of the role of network infrastructure-based competition is recognised, some of the proposals risk deterring infrastructure-based competition. In particular we see a need for a recommendation to provide guidance to national regulatory authorities (NRAs) on how to deliver a clear 'ladder of investment' that would encourage alternative operators to invest in their own infrastructure where doing so would cost them less than using incentive compatible priced SMP operator's wholesale offers.
- The excessive emphasis on duct access as prime remedy to facilitate alternative network deployment by new entrants without regard to different national market realities that can make such remedy ineffective or without considering a range of other access remedies such as unlit fibre, managed RF over fibre or bitstream access which may be more suited under particular circumstances.
- The proposal to use historical costs for access to existing duct, which reflects the overly importance given by the Commission to this remedy is inconsistent with established regulatory practice. As well as risking a distortion of competition by encouraging inefficient entry based on below-cost wholesale inputs, this introduces uncertainty into the market, particularly given the failure of the draft recommendation to provide a reason for the proposed departure from reliance on current costs.
- The proposal to use historical costs would also add significantly to the complexity of regulatory accounting, whilst reducing its transparency. The additional costs associated with regulatory accounting would ultimately be paid for by consumers.
- The very limited guidance on pricing principles and methodologies to be applied to wholesale broadband access (WBA). While the Commission rightly points out the need of consistency between WBA's prices and the prices charged for physical access products, it fails to provide operators with clarity and regulatory certainty about the economic principles that ensure such consistency. This is clearly an area where harmonisation is required as the evidence suggests that different regulators (e.g. Ofcom, the Austrian TTK and the Spanish CMT) are adopting different views that cannot be explained on the basis of diverging national realities. The lack of a 'ladder of investment's approach' to WBA prices risks the imposition of suboptimal remedies that are detrimental to infrastructure investment and to the development of competition.
- Finally, the draft recommendation touches on some issues relating to geographic market segmentation which we believe might be irrelevant



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under an NGA scenario as it is impossible at this stage to foresee whether the mere presence of cable networks or the economic feasibility of alternative fibre deployment through ducts will determine different geographical competitive pressures within the incumbents' NGA footprint. Therefore, the Recommendation should not address the issue of de-averaged wholesale prices either. Their inclusion in the draft recommendation risks a lack of clarity and possible inconsistency with other work on harmonisation.



II. Comments

With the following lines we would like to examine several concerns cable operators have towards this draft Recommendation.

The issues we examine are as follows:

- the importance of infrastructure-based competition, and the apparently limited consideration of it in the EC's recommendation
- the (unjustified) use of historical costs in certain cases to derive prices
- the emphasis on duct access, and vague text on pricing policy for other price-regulated wholesale products
- the discussion of market definition within the recommendation.

1. *The importance of infrastructure-based competition*

1.a General assessment

The draft recommendation recognises that the existing regulatory framework places strong emphasis on the role of network infrastructure-based competition and the need to protect such competition². However, a number of the new proposals appear to run counter to this objective, and risk encouraging inefficient entry based on below-cost wholesale inputs, whilst deterring genuine infrastructure-based competition.

In particular, there is a proposal to mandate access to passive infrastructure on the basis of the depreciated historic costs of the SMP operator. This implies a risk of prices being imposed at a level that is below the costs of **an efficient new entrant or existing infrastructure-based competitor** (such as a cable operator).

Similarly, access to wholesale broadband access priced at a suboptimal level (for example based on cost orientation allowing for historic costs) is likely to reduce the incentives for operators to invest, and to have a detrimental effect on the viability of cable as an alternative infrastructure platform.

Although the role of cable is occasionally mentioned in the draft recommendation, it appears to be underestimated, if not wholly forgotten, when the explanatory note says:

*"On the other hand, most of the alternative players that have invested in the unbundling of the local loop may be compelled to change their business model or may face seeing some of their network assets being stranded, and there is a consequent risk that the transition to NGA could provoke a re-monopolisation of e-communications markets."*³

This point fails to recognise the potential for cable operators to continue to deliver infrastructure-based competition in the context of NGA.

² Whereas (7), page 4

³ Section 1 Introduction, page 4



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So far, cable networks have provided sustainable infrastructure-based competition, something which has been widely recognised by the ERG and others as generating positive outcomes for consumers (through innovation and low prices). It is generally accepted that where competition from cable is strong, digital TV and broadband markets tend to be more competitive, and service take-up increased. This situation will continue under an NGA scenario as cable networks are already well positioned to provide broadband capacities of up to 100 Mbps and beyond by adopting the DOCSIS 3.0 standard.

Without proper recognition of the role that cable can (and does) play in delivering infrastructure-based competition, there is a risk that NRAs will fail to consider the potentially negative implications for cable of the proposed remedies. Most notable is the risk that cable faces competition from other operators relying on below-cost passive wholesale inputs priced on the basis of the historical costs of a former monopoly, or on active wholesale broadband access inputs that are similarly mispriced. Whereas this might provide asymmetric regulatory assistance to entry to alternative non network operators (and their business cases) it will be detrimental to cable's past and future investments. We however believe that cable investment is sustainable, future-proof and key to guarantee long term competition in a NGA environment.

We believe that the consequences of the EC's proposal to rely on historical costs as the basis for pricing access to passive infrastructure are potentially very serious for preserving infrastructure-based competition:

- If the proposal is successful in **stimulating alternative fibre deployment through ducts**, it however risks creating inefficient competitors supported by perpetual regulatory intervention to deliver wholesale inputs at prices below the true economic costs faced by cable or a new entrant building from scratch today.
- If **alternative fibre deployment is not stimulated** by this means, then the EC's proposals would leave the industry with (as a minimum) substantial additional costs (including costs associated with duct surveys, reference offers, and additional regulatory accounting requirements) for no benefit. In addition, the feasibility of cable investment may be hampered, since even the announcement of such regulation could reduce the access of cable operators to financial resources from their own shareholders or creditors.
- An even worse failure scenario would be one in which these measures do not stimulate investment in additional parallel infrastructure and **lead to even less rational regulatory interventions**, made in order to try to cover up a regulatory failure and "force" an otherwise inefficient market structure (e.g. even lower prices for passive access to stimulate fibre deployment through ducts).

In addition, a lack of guidance in the draft recommendation on pricing principles for wholesale broadband access (market 5) might also result in some NRAs imposing suboptimal prices that are detrimental to investment in infrastructure by both alternative operators that are considering using a market 4 remedy in order to deploy their own fibre and by cable operators. This would not only go against the Regulatory Framework objective of promoting investment but also against the necessary **coherence between markets 4 and 5 remedies** and the harmonization of regulatory measures across the Community.



1.b Suggestions

Investment in NGA networks by cable operators and others is a capital-intensive process that will take place over a number of years, gradually bringing fibre closer to the customer in order to cope with rising bandwidth demands. The draft recommendation could do much to encourage such investment, for example by:

- Providing guidance to NRAs on how to ensure a clear 'ladder of investment' that would encourage alternative operators to invest in their own infrastructure where doing so would cost them less than using the incumbent wholesale offers. This would be likely to use LRIC+ or CCA methods in cases when cost-based pricing is considered necessary for physical access (market 4) and no cost regulation for bitstream services (market 5) even if an obligation to provide such services is imposed in areas where market 4 services are not sufficient to ensure a competitive outcome.
- Setting pricing principles consistent with previous policy and practice except where there is strong evidence that a change is needed. This would include providing guidance to NRAs on how to ensure consistency between market 4 and 5 measures in a way that is supportive of efficient investment by all market participants (incumbents, alternative network operators, services providers and cable operators). This approach should also contribute to increased harmonization and regulatory certainty that in turn will help operators to make long-term investment decisions.
- Ensuring that complexity of implementation (e.g. geographic segmentation of markets and remedies) is kept to a minimum as this leads to significant costs that are paid for by the industry and ultimately by consumers, and also increases the risk of imposing suboptimal regulated prices.

2. Use of historical costs

2.a General assessment

As already mentioned, the draft recommendation requests NRAs to change their long-standing practice and move to an historical cost accounting (HCA) method in some cases, when it states that:

"The usage price for existing ducts, other civil engineering works and other elements which are not active, should be based on cost estimates contained in the regulatory accounts of the SMP operator. These cost estimates should be historical costs minus depreciation, or, where this information is not available, current costs minus depreciation."⁴

The explanatory note to the recommendation provides some additional explanation of the circumstances in which historical costs should be used when it says:

"Mandatory access conditions including price controls should reflect the characteristics of different assets (existing or new ducts, for example) such as asset lifetimes and levels of risk in terms of uncertainty of demand and

⁴ Annex 1, Rule 2: Pricing of existing ducts, other civil engineering works and other elements which are not active



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*technological obsolescence. Access conditions should thus in some cases reflect historical costs and in other cases the value associated with the new investment.*⁵
This is a non-sequitur.

The draft recommendation also recommends higher risk premiums be used in calculating the WACC for certain new investments in fibre (not including those that are considered as a modernisation of the copper-based network).

The consequences for infrastructure players (including cable operators) would be:

- **Likely fall in profitability:** Excessively low prices for wholesale inputs could result in excessively low retail prices (potentially below the cost of an efficient new entrant) which would in turn lead to loss of market share and/or fall in margin for competing infrastructure players such as cable.
- **Devaluation of past investments:** Part of the value of a broadband-enabled cable network comes from its ability to enable commercial launch of retail broadband services without having to buy wholesale inputs from the incumbent. If the price of wholesale inputs falls, so does the value of the cable network (all other things being equal).
- **Reduced incentives for future investments:** The availability of wholesale inputs below the cost of an efficient new entrant will clearly discourage further investment in end to end network infrastructure.
- **Reduced access to financing:** As a consequence of the points above, the willingness of shareholders and creditors to contribute additional funds for cable expansion (e.g. upgrading to DOCSIS 3.0 or new roll-out) may be severely reduced.

In proposing the use of historical costs, the draft recommendation is inconsistent on two counts:

- Firstly, it is inconsistent with established regulatory practice. Current costs methods such as CCA or LRIC+ allow NRAs to price on the basis of the costs that would be incurred by an efficient new entrant (who can decide to “build or buy”). A wholesale price below this level is likely to distort “build or buy” decisions, and risks encouraging inefficient entry based on the use of artificially cheap wholesale inputs (i.e. a regulatory arbitrage). Previous regulatory practice has therefore been based on the premise that it is most appropriate to use CCA or LRIC+ costing methodologies in areas where the retail market is either competitive or contestable.
- Secondly, it is internally inconsistent. The explanatory note states that: *“Such obligations imposed on operators designated as having SMP on a relevant market ... must be appropriate and be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive, in particular maximising benefits for users, ensuring that there is no distortion or restriction of competition, encouraging efficient investment in infrastructure and promoting innovation.”*⁶ Given that pricing based on HCA is a distortion of competition and encourages inefficient investment, the proposal to use

⁵ Section 3.3 General regulatory provisions, subsection 3.3.1. Access to ducts, civil engineering works and other elements which are not active (“duct access”), page 11

⁶ Section 3.1 General considerations, subsection 3.1.1. General principles of the imposition of remedies, page 8



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depreciated historical costs contradicts the general principles laid out in the explanatory note.

Furthermore, the recommendation does not provide a reasoned explanation for the proposed departure from relying on current costs. One possible motivation might be a desire to deliver prices that are as low as possible for assets that are assumed not to be replicable. However **it is far from certain that competitive passive infrastructure will be impossible, particularly given the presence of cable**. As we have already discussed in Section 1, it is precisely the use of historical costs that risks making end-to-end competitive infrastructure uneconomic. At the same time, access to ducts at below the costs of an efficient new entrant might encourage inefficient network replication based on laying fibre in legacy ducts. There is also a significant risk that the investment incentives of the SMP operator are distorted regarding, for example, renovation of duct or new build design (e.g. burying cables rather than ducting them).

A reasoned explanation for the proposed departure from relying on current costs is missing. Inconsistency will increase regulatory risk and increase the cost of capital in the industry. The EC itself notes that long-term regulatory certainty is important:

"Such a consistent approach is required in order to provide regulatory certainty to investors and foster investment and innovation for the benefit of all parties involved".⁷

Finally, the proposal has significant implications for regulatory accounting:

- The draft recommendation implies multiple different approaches to the treatment of costs depending on the type and age of assets (some assets will be considered "new and higher WACC", others "new but no higher WACC", others "old" and therefore based on historical costs). This introduces considerable additional complexity to the preparation and analysis of regulatory accounts. The costs associated with regulatory accounting are recovered over a variety of wholesale products that other operators, including cable operators, buy (e.g. voice termination and origination, and bitstream access). Raised costs are reflected in raised wholesale prices and are ultimately paid for by consumers.
- It is not clear from the draft recommendation whether the same principles of duct pricing are to be applied in all cases or just to the costs to be recovered from FTTx networks. If the former, this may have significant implications for the regulated price of many services, notably LLU. If the latter, then the way in which regulated prices relate to the regulated accounts will be much more complex. Transparency – which is a critical means for alternative operators to check that SMP operators are not managing to earn supernormal returns from their cost-oriented pricing – is also likely to be seriously compromised.

⁷ Whereas (4), page 3



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2.b Suggestions

Established regulatory practice dictates the use of a current cost methodology that accounts for the entire lifetime of assets and does not distinguish between old and new infrastructure. Consistent use of this also helps to ensure transparency across the entire asset base of the SMP operator. We strongly recommend that the EC allow NRAs to retain this practice when pricing access to ducts at cost is considered necessary for regulatory purposes.

Likewise it is important that when NRAs concludes that under particular national circumstances it is proportionate to impose access to the incumbent's legacy ducts at efficient costs, these are calculated with reference to a hypothetical fixed network operator with 1/n market share within the coverage area of a NGA network (n being the number of own network infrastructures in that area, which will be 2 in the majority of cases). If the LRIC or current costs are referred to the incumbent's scale then they will not be representative of real duct costs incurred by alternative cable operators and therefore a legacy advantage will be transferred from the incumbent to the duct access seeker to the detriment of cable competitors.

3. Emphasis on duct access and vague text on pricing policy for other wholesale products

3.a Emphasis on duct access

In its draft recommendation, the EC sets out detailed pricing principles and methodologies to be applied for access to passive elements; we have already discussed some of the potential problems with the proposed reliance on depreciated historic costs for such access. We also have concerns regarding the relative importance that appears to be attached to duct access in comparison to access to other wholesale products (such as next-generation bitstream), at least with respect to the guidance provided on appropriate pricing principles and methodologies to be applied.

We believe that wholesale broadband access products (which prices need not necessarily be regulated) may have a much more significant role to play in delivering competition than the Commission's papers seem to recognise. Firstly, outside urban areas the strong economies of density may well prevent new entry to supply mass-market ultra-high-speed broadband services. Secondly, in some countries it is possible that duct access may turn out to be impractical due to technical issues, the absence of duct in cases where cables are buried directly in the ground, or to an absence of sufficient demand to justify the costs of implementing the relevant regulation.

According to the EC's 'gradation of remedies' principle, this means that SMP may be found on Market 5 on the basis of a forward-looking analysis and that therefore regulatory remedies (e.g. some sort of bitstream) may well continue to be necessary, at least in some geographical regions (or possibly for some limited time in areas where competitive networks are to be rolled out). This means that the



pricing of wholesale broadband access products (and indeed their capabilities) is crucially important, and it is therefore surprising that the draft recommendation provides such limited guidance to NRAs in determining whether and how to regulate this (even if recent statements by EC officials have emphasised that the recommendation is not narrowly focussed on duct access).

3.b Implications of the vague text on pricing policy for other wholesale products

There are a number of problems with the limited discussion of appropriate pricing principles and methodologies to be applied for access to active elements other wholesale products such as unlit fibre, RF over fibre and next-generation bitstream.

The draft recommendation notes the need to provide adequate incentives for companies, whilst promoting efficiency and sustainable competition and maximising consumer benefits. It does not refer explicitly to the 'ladder of investment' model that has been important in wholesale broadband access to date, although the explanatory note does state that: "*where access to active elements is mandated, this should not undermine investment closer to the customer or deeper in the network.*"⁸ This implies that NRAs should seek to ensure that – if wholesale products are to be provided – sufficient margin exists between the price of wholesale broadband access and the cost of more infrastructure-based deployment.

However, the draft recommendation also states that:

*"NRAs should ensure that the pricing of wholesale broadband access products based on fibre for Market 5, and more broadly in cases where the relevant wholesale inputs satisfy the three criteria test, is consistent with the prices charged for physical access products."*⁹

Whilst this statement is in itself unobjectionable it sets a very weak constraint as it might be open to interpretation. For instance, if passive elements are priced based on historical costs then some NRAs might understand this 'consistency' as leading to pricing of wholesale broadband access, a "downstream" service that uses access to ducts as an input, in a way that reflects such historic cost too and thereby at a level that is lower than the cost of an efficient operator. This may not deter infrastructure investment that relies on the passive (below current cost) elements as inputs, but **it would certainly deter investment in other competitive infrastructure such as cable.**

However other interpretations of the Commission's consistency principle are not only possible but also more congenial with the objective of promoting investment and infrastructure competition. In particular, other approaches to the regulation of wholesale broadband access products – such as non-discrimination based on self-supply, or price regulation based on retail-minus obligations – might also deliver this 'consistency'. In any case, the absence of guidance as to how the consistency

⁸ Section 1 Introduction, page 5

⁹ Recommendation (18) p. 7



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is to be achieved, risks widely divergent, unharmonised and possibly inappropriate measures being adopted by NRAs.

In fact, the following statement, although somewhat open to interpretation, seems to support our view that when access to ducts is regulated at cost, wholesale access services situated upper in the network should receive a less stringent regulatory pricing regime in order to encourage a "ladder of investment":

The explanatory note to the recommendation refers to a 'gradation of remedies' approach, which is also intended to support infrastructure investment:

*"Thus the gradation of remedies approach aims to ensure investment at the lowest level of the network infrastructure. In general, this means that when lower elements of the network such as ducts are available permitting a sufficient number of operators to ensure effective competition on the basis of infrastructure competition, upper level remedies such as bitstream or its equivalent should not put at risk the revenues that the investor expects on the corresponding retail markets."*¹⁰

However, this 'gradation of remedies' approach receives a different and rather obscure treatment later in the explanatory note:

*"In line with the principle of gradation of remedies, where SMP is found on Market 5 on the basis of a forward-looking analysis, NRAs should maintain the current regulatory access remedies in place, in order to safeguard the level of existing competition."*¹¹

Substantially more clarity is needed on this 'principle' to avoid NRAs interpreting it in widely differing ways.

The last clause quoted above is of particular concern. It should not be the role of the regulator to accept a particular level of retail competition as 'right' and to seek to maintain it whatever the historical circumstances, or in future circumstances where greater economies of scale imply fewer networks can be built. If a forward-looking analysis finds SMP in a relevant market, remedies will be required: these may be either greater or lesser remedies proportionate to the situation.

Cable operators are themselves unlikely to rely significantly on bitstream as a wholesale input, however the pricing of bitstream will be a key determinant of the costs borne by their competitors, and therefore of the continued viability of cable as an alternative infrastructure platform. Without more detailed guidance from the EC there is certainly a risk that prices for bitstream which are based on the SMP operator's historical costs for passive elements may be below the current costs of an efficient competitor of reasonable size (1/n as suggested before).

The threat of NRAs later revisiting whether and how to regulate the bitstream market should other remedies fail also lends significant uncertainty to the environment in which cable operators need to make long-term investment decisions.

¹⁰ Section 3.1 General considerations, subsection 3.1.4. Gradation of remedies, page 9

¹¹ Section 3.4 Specific regulatory provisions, subsection 3.4.3. Wholesale Broadband access remedies imposed on Market 5, page 16



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The intention of the draft recommendation is to ensure harmonisation between NRAs and to provide the necessary clarity and regulatory certainty that operators require in order to make long-term investments. The discussion of pricing principles and methodologies to be applied to wholesale broadband access is a key area in which the recommendation fails to achieve this.

In particular, whilst the draft recommendation encourages NRAs to ensure sufficient margin exists to promote infrastructure investment, the approach to pricing does not make clear how this can be achieved alongside the proposed historic cost basis for some non-active elements.

Appropriate pricing for bitstream services is a crucial part of ensuring that there is a clear 'ladder of investment' that would encourage alternative operators to invest in their own infrastructure where doing so would cost them less than using the incumbents wholesale offers for active inputs. It is also crucial to delivering service-based competition in those areas where infrastructure-based competition might not be possible.

Already, there is evidence that NRAs are taking different views on the appropriate way to regulate wholesale broadband access. Recent consultations by CMT in Spain and Ofcom in the UK show significant variations in their treatment of bitstream pricing in an NGA scenario. CMT¹² proposes dividing Spain into two zones. In the more competitive zone, Telefonica's obligations to offer WBA would be significantly reduced and no price regulation is imposed; in the other zone, a high-capacity bitstream service of up to 30 Mbps at **cost-oriented prices is imposed**. Ofcom¹³ on the other hand proposes "a near-term approach to the pricing of access products while the market is in the early stages of development" that would include an **anchor pricing approach for active access** (i.e. no price controls for new bitstream products but an expectation that similar services as today are made available at similar prices).

It is likely that without clear guidance, the divergence of views amongst NRAs may continue to grow, reducing harmonisation and regulatory certainty. In some cases this may result in the imposition of suboptimal prices that are detrimental to investment and to the development of competition.

3.c Suggestions

It is important for the draft recommendation to ensure that NRAs retain the freedom and flexibility to impose those regulatory remedies that are most proportionate and effective in the national context, whether this includes access to passive or active elements or both. In particular, it seems inappropriate to mandate duct access in all cases without reference to the findings of national market analyses as is currently being proposed by the Commission in the review of the Regulatory Framework.

¹² CMT's NGA consultation, 10 Oct 2008

¹³ Ofcom's Delivering super-fast broadband in the UK, 23 Sep 2008



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In addition, where access to passive elements is made available and delivers effective retail competition, price regulation for wholesale broadband access products would not be required.

Furthermore, provision of clearer guidance on the appropriate pricing principles and methodologies that should be applied to wholesale broadband access products would help to ensure harmonisation between NRAs and to provide the clarity and regulatory certainty that is necessary to encourage investment in infrastructure. It is important that these principles are designed to preserve the incentives for cable and other operators to build and maintain end-to-end infrastructure of their own, as well as for incumbents to make efficient investments in NGA.

4. Discussion of market definition

4.a General assessment

The draft recommendation raises a couple of issues relating to market definition, but in neither case does this seem to be the right context for the issues to be considered.

Firstly, the draft recommendation appears to encourage the use of sub-national markets when it 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 a national and sub-national level by the progressive roll-out of NGA networks and the status of infrastructure competition".¹⁴

The question of the need for sub-national markets is one on which NRAs have taken a variety of stances. Ofcom for example has apparently concluded that sub-national markets are necessary in order to follow a deregulatory move, whilst other NRAs argue that national market definitions still allow for geographical differentiation of remedies.

In addition, in its comments to Ofcom's and TKK's notifications of their wholesale broadband access market analysis, the European Commission itself provided guidance concerning the principles to be applied by NRAs when analyzing the geographic dimension of the relevant market and the issue of geographic differentiation of remedies.

However, the analysis of geographically differentiated pressures in these notifications has been mainly driven by the extent of ULL deployment at the incumbents' exchanges and has not taken into account the deployment of NGA networks. In our view, **"the need to define geographic market" is precisely very much reduced when "taking into account the competitive conditions created at both a national and sub-national level by the progressive roll-out of NGA networks"**.

¹⁴ General principle 3



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On the one hand, **under an NGA scenario, the presence of ULL operators at local exchanges in order to assess whether the incumbent might be subject to a competitive constraint in the WBA market is irrelevant** as ULL does not provide a way to enter the NGA market. On the other hand, an NGA deployment will likely be restricted to some areas where the incumbent's offer can only be replicated with either cable or alternative fibre deployment by operators enjoying access to ducts (a market 4 remedy). In these circumstances the relevant question in order to consider the geographic dimension of a national NGA WBA market is whether the mere presence of cable networks or the economic feasibility of alternative fibre deployment through ducts will determine different geographical competitive pressures **within the incumbents' NGA footprint** that justify geographically differentiated markets or remedies.

However, as the European Commission points out in the Relevant Market Recommendation and in its comments to Ofcom's notification, additional structural and behavioural evidence to the mere presence of alternative network is necessary in order to conclude whether conditions of competition within a geographic area are similar or sufficiently homogeneous. Clearly, such evidence (distribution of market shares and their evolution, pricing of both the incumbent and alternative operators, differences in the functionalities of the services being offered, etc.) is **not available for NGA services** yet and therefore the whole exercise has no value at this stage.

Secondly, the draft recommendation questions whether, in the context of NGA, cable might fall within Market 5 when it notes 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."¹⁵

This matter is clearly important for NRAs to consider. As such it is questionable whether it is appropriate to use an aside in an explanatory note about a single hypothetical case (PON FTTH deployment) as the place to change the treatment of a long-standing issue that has been the subject of considerable debate between the NRAs and the EC in the Article 7 process (with the EC usually being opposed to the inclusion of cable in the relevant market).

4.b Suggestions

Given that its objective is to provide guidance to NRAs with respect to remedies, we do not believe that it is appropriate for the NGA recommendation to raise issues relating to market definition. In addition, we think that the question of geographic markets is largely irrelevant in the context of NGA developments as there is no empirical evidence to sustain one such analysis at this stage. We therefore suggest that these references be removed from the final recommendation and dealt with instead in a more appropriate context.

¹⁵ Explanatory note, section 3.1.3



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