

**Response to the European Commission
consultation on the draft Recommendation on
Regulated Access to Next Generation Access
Networks
November 2008**

Summary

Our vision is that European consumers should benefit from a range of high speed services and content at affordable prices, whilst businesses communicate across Europe and beyond over seamless secure networks which span the single market.

We can achieve this objective, even at this difficult time, but only if Europe focuses on efficient and profitable investment in truly open networks that allow services and content to thrive.

The cost of building these networks is indisputably high. Expecting multiple replication – even with duct access – has been challenged as unrealistic across a number of countries in independent economic reports by OECD and Analysys for regulators as well as more recently by WIK.

The Recommendation should therefore at its heart focus on encouraging and incentivising open architectures for fibre and vDSL.

Our experience and practice as the current (albeit temporary) leaders in private sector investment in FTTH lines, is that open networks support the business case for fibre-rollout by maximising the usage of fibre and also expanding the market through competition and innovation in services and content. Some incumbents such as BT and KPN are also following this model. Conversely, closed vertically integrated models which rely for financing on increasing control of the retail services running over access networks may be perceived as preferable by certain interests. However, they are likely to result in higher retail market shares and to limit the demand and innovation stimulated by competitive forces in the electronic communications sector and far beyond, including in the creation and distribution of content and applications and in provision of network independent services that link Europe's multinational businesses together. Such closed vertically integrated models are ultimately likely to have negative economic and 'investment' impacts far beyond the telecoms sector.

- The Recommendation should – in line with the Telecoms Framework - encourage regulators to promote **efficient investment and effective competition** in telecoms networks and services rather than pursuing duplication of telecoms infrastructure (infrastructure-based competition) as an end in itself. The value of services (including business services) should also be acknowledged in driving demand, innovation and economic growth.
- The Recommendation should focus on adapting and extending the '**ladder of investment**' allowing the industry to make efficient investment decisions based on consistently priced **access options which are available in parallel**. This is consistent with today's approach and would allow decisions about the sufficiency or otherwise of particular remedies such as duct access to be made on the basis of experience of actual take-up rather than on a theoretical advance assessment by the regulator.
- A crucial issue in an NGA context is to **encourage network architectures which will enable and not foreclose competition**. A combination of clear and up front expectations and incentives can help to achieve this result.
 - Market 4: Fibre unbundling should be a key remedy in this market. SMP operators should be given the choice to offer **unbundling either through point to point or WDM technologies or to have the regulator determine appropriate concentration/mutualisation points for fibre access**. Backhaul should be provided with any fibre or copper loops or subloops.

1. General remarks

We welcome the opportunity to comment on the Commission's draft proposals on next generation access. This issue is of the highest priority for our members which include leading broadband and triple play providers, including pioneers in fibre investments, as well as pan-European business service providers which aim to offer integrated high speed services to dispersed sites across the EU.

We find some aspects of the proposed recommendation positive – in particular recommendations on transparency, on the need for appropriate transition mechanisms and on the principle of equivalence. We also agree with large parts of the proposals concerning duct access measures and treatment of vDSL/FTTC deployments.

However, whilst many of the underlying principles are positive, ECTA has serious concerns that the NGA Recommendation, in its current form, could be misinterpreted so as to lead to different conclusions from those suggested in the Commission's article 7 cases. As such we fear it will not further 'best practice' in NGA regulation across Europe.

A particular – and primary – concern is that it appears to depart from the current 'ladder of investment' concept, and places too much focus on duct access and duplication. This is likely, due to the economics of fixed access networks, to result in market concentration and weakening of competition, and risks scenarios where operators (and particularly competitors) feel compelled to exit the market or take high risks for investments which may be unprofitable and inefficient.

In these very difficult conditions for capital markets and consumers, the business case for fibre investment can best be supported and risks reduced by maximising the use of FTTx networks, keeping prices at affordable levels and stimulating innovation in services to boost demand. Reach, profitable investment and openness, rather than duplication, should therefore be the main priority for the Commission and policy-makers at this stage.

2. Over-focus on infrastructure-based competition at expense of efficient investment, innovation and services (recital 7)

The NGA Recommendation suggests in recital 7 that infrastructure-based competition is the primary aim in the EU Telecoms Framework. Whilst there may be an ongoing discussion concerning infrastructure-based competition in the Framework Review, the current Framework does not include any such objective. Rather NRAs are required in article 8 Framework Directive to promote 'efficient investment', to 'promote competition in networks and services' and in article 16 Framework Directive to act where there is SMP (no effective competition). In view of the existing legal Framework, the Commission's Recommendation should focus on these aims rather than on infrastructure duplication as an end in itself.

Furthermore, we wonder if due to the emphasis given to investment and infrastructure, insufficient attention has been given to ensuring diverse and healthy competition in telecoms services which is the output that is of most relevance to customers.

In concentrated infrastructure-based markets, there is more scope for access owners to place restrictions on the services which consumers receive. For example, 'walled garden' models rarely survive in a competitive environment in which consumers are free to select providers which offer full and open access to services such as the Internet.

Moreover service competition plays an important role in driving demand, reducing risk and creating the conditions that foster further investment.

Consumer broadband did not take off in Europe when incumbents installed DSL, but only when stimulated by competition from the variety of services – including triple play - provided via cable and local loop unbundling.

No incumbents are now saying that their initial broadband investments in the late 1990s were risky, but just 10 years ago broadband seemed risky and niche until competition created the demand that made it a mass market service.

Countries which are investing in FTTx today are primarily those in which copper capabilities were pushed to their limits through competition and demand was stimulated for higher speeds. Just as in the copper environment, it is highly unlikely that the full capabilities of fibre technology will be realised without competition in the equipment driving fibre and in the services that run over it.

2.1 *Needs of pan-European business and economy neglected*

A particular type of ‘value added’ service which has been recognised as vital to the European economy is services to multi-site and multi-national businesses. For example, in a report for DG Infso on the “Impact of broadband on growth and productivity” WIK/Micus concluded that broadband-based processes improved labour productivity by 5% in the manufacturing sector and 10% in the services sector and identified “the creation of 440,000 jobs in the business services sector in 2006 and 549,000 jobs in other economic sectors with broadband-related innovation in knowledge-intensive activities”.

Businesses representing more than one third of the EU’s GDP rely not only on Internet access but on widespread cross-border, pan-European or even global virtual networks. Wholesale broadband access (as well as leased lines) forms a substantial part of the access requirements needed to serve these businesses.

However, the draft Recommendation does not take into account at all the requirements for this important section of Europe’s economy. Infrastructure-based competition based on duct access or even using unbundled infrastructure is an unfeasible prospect for specialist providers which cover disparate premises across many countries, linking together the single market. In the absence of effective, coherent – and ungeographically segmented - wholesale broadband access, businesses could again be forced to purchase separate communication services (typically from the incumbent) in each country.

3. ‘Bottom-up’ ladder of investment would require NRAs (and not operators) to make investment decisions for the market (article 15)

The draft Recommendation appears in article 15 to depart radically from the current regulatory approach to create a top-down ‘ladder of investment’ which allows operators to choose from a range of parallel options enabling them to make commercial decisions to invest where this is profitable (eg unbundling in cities) and not to invest where duplication would be inefficient and unprofitable (in rural areas, for businesses). The ladder approach has not undermined investment by competitors in any country where it has been rigorously and appropriately applied and has in fact enabled operators to gain the necessary scale required before making further investment commitments. The results from the Commission’s own broadband data collections showing movement from bitstream to unbundling over the years, as well as those of ECTA’s clearly demonstrate this.

A very positive aspect of the ladder model is that a range of options are made available in parallel and the sector, rather than the regulator, makes a judgement on which is the most appropriate product in the given circumstance and invests accordingly. Once competitive development and investment has occurred it is possible for the regulator to see clearly how conditions may vary for different areas and different types of operators. Any

considerations about removal of remedies can then be taken on the basis of actual results and actual competition, rather than on the basis of assumption and theory. Indeed the Commission in its article 7 letters on UK and Austria WBA emphasised the importance of assessing actual competition and competitive dynamics on the basis of unbundling as a necessary condition of removing downstream WBA requirements. The risks of regulatory error in this model are relatively low and experience shows the risks of undermining investment are also low.

Instead the Recommendation appears, whether intentionally or not, to advocate a bottom-up approach whereby duct access is assumed to be adequate unless the regulator determines that it would be insufficient to deliver effective competition. This approach seems to suggest that the decision as to whether or not to ensure access to other standard current rungs of the ladder of investment such as fibre unbundling or bitstream should be based on a theoretical business case for use of duct access developed by a regulator (and not by the industry) which is based on assumptions about the availability, effectiveness and practical feasibility of a wholesale product (duct access) which does not yet exist across much of Europe. With the best will in the world, and even if the economic business case is judged correctly by the NRA, practical issues and even technical problems are likely to significantly influence the extent to which duct access can be used in practice. The risks of a regulator accidentally or otherwise making the wrong decision are very significant and expensive to the economy and consumers – inefficient and unprofitable investment or a reduction in competition and further concentration.

The weight of evidence from studies such as those from WIK, Analysys, OECD and across nearly every country reviewed, is growing that duct access will very rarely on its own be sufficient to support an effectively competitive market, even in cities. The ERG also states in page 4 of their response to the Commission Recommendation that “NGA deployment is likely to reinforce economies of scale and density, thereby rendering the business case more difficult.”

If the ERG’s view and the results from the various studies are correct, an excessive reliance on duct access is liable to lead to outcomes which either are not commercial (unprofitable investment) or are uncompetitive (can only be profitable in very concentrated markets). Neither of these outcomes are consistent with the objectives in the current EU Telecoms Framework.

It should be remembered that even on the basis of the existing ladder – let alone an extended ladder – only entrants which have reached significant scale (typically between 10-20% share of the retail broadband market) have begun to recover their heavy investments, and the majority of entrants remain loss-making, whilst incumbents’ market share has remained high and is now increasing in several major countries including France and Spain. A failure to secure existing rungs of the ladder in an NGA environment is therefore likely to reduce the scope for maintaining even current levels of competition.

Moreover, we find the ‘sufficiency of duct access’ principle inconsistent with messages given in the context of recent article 7 decisions and statements to the press for example regarding German market 4, where the Commission disputed the BNetzA’s proposal that dark fibre backhaul should only be available where duct access was not technically feasible – and Spanish interim measures for NGA, where the Commission appeared to express concern over the focus on duct access as a primary solution.

We note also that the ERG seems to have interpreted the text similarly to ourselves. In their October response page 3 they state that “*Whilst it may not be the Commission’s intention, the current text could be interpreted as implying that duct access seems to be “the” regulatory panacea. ERG considers that depending on national circumstances duct sharing could be an efficient remedy to stimulate infrastructure competition... However this*

might not be sufficient in itself and may have to be complemented by other remedies. Again, in other countries it may not be applicable at all...

ERG backs the principle of the ladder of investment in page 4 of their response saying that *“it is important that infrastructure and service competition are not seen as opposed to each other, but are linked through the ladder of investment allowing competitors through a sequence of regulated access products that are consistently priced to invest in a step by step manner in own infrastructure.⁴ However a reliance solely on passive remedies will create rungs on the ladder of investment that are so high as to possibly deter market entry or prevent market entry based on active remedies to be sustained.”*

Duct access is an important remedy, and we support most of the recommendations concerning this remedy in the Commission text. However – in line with its bottom-up approach, the draft Recommendation seems to focus on duct access excessively (for both roll-out of FTTH and for vDSL backhaul) compared with other remedies such as fibre unbundling, dark fibre backhaul, and fibre and vDSL-based virtual loop access which are likely to be more relevant in the coming years.

On this basis, a useful harmonising recommendation - in line with the ERG's comments on the Recommendation - would be for the Commission to make clear that access options should be made available in parallel – in effect adapting extending rungs of the ladder for NGA and adding duct access. Pricing of the various options should encourage further investment in parallel infrastructure wherever this is viable but not require such investment where it would not be efficient.

3.1 The ladder of investment in an NGA environment

The ladder of investment describes an approach where access options are made available at different points in the network which allow competitors to invest efficiently. Today two or three levels are typically available – physical unbundling at the MDF site and bitstream at regional and sometimes national handover points. Unbundling requires the most investment whilst national bitstream would require relatively little.

Subloop unbundling and duct access are both physical access remedies which require successively more investment than the existing remedy of unbundling at the MDF site. They should be made available together with necessarily ancillary services such as backhaul and may be feasible in some cases. However, as discussed, the impact on competition may be limited and should certainly not be assumed in advance.

More focus should therefore be given to adapting existing rungs of the ladder to ensure that at least current levels of competition can be maintained.

Wholesale Physical access (market 4)

An crucial element of the NGA-adapted ladder that has not received sufficient attention is fibre unbundling, yet this is perhaps the area where greatest focus is needed since if not clearly addressed the design of networks could limit this important possibility, which offers the most scope for innovation in consumer services and content.

We agree fully with the ERG's statement in page 8 that *“In line with the principle of technology neutrality it is important to impose remedies which do not depend on how FTTH is implemented (PON vs. P2P) in order to prevent inviting operators to gaming by choosing PON architecture to avoid unbundling obligations rather than for efficiency reasons.”*

We would therefore suggest that unbundling is featured as a standard remedy in market 4 on a technologically neutral basis and that SMP providers should have the option to provide it in the most efficient way which could be either:

- (i) through point to point or WDM PON technologies; or
- (ii) through other architectures on the basis of concentration points determined by the regulator which enable viable competition

WDM (wave division multiplexing) is a mature technology which has been used in core networks for years. However, most G-PON vendors agree that WDM in the access network (referred to as WDM-PON) will be the next generation PON technology. The first vendors launched their WDM-PON products in September 2008, and announced the first European fibre providers to deploy the technology¹. The importance of this technical development is that WDM-PON may be used to unbundled PON based networks.

As regards option (ii) where the NRA determines the concentration point, we note with interest that the WIK report and reports referenced by the OECD suggest that the cost difference between current PON technologies and point to point is no more than 10-15% with point to point being a more future-proof architecture. Furthermore, our understanding is that the location of the concentration point in a PON network does not substantially influence the cost although it influences competitive possibilities significantly. We would hope therefore that a clear unbundling obligation which does not distinguish between PON or other architectures should provide the right signals to SMP operators to choose more efficient unbundling solutions.

The draft Recommendation does mention the location of the concentration point, but seems to send contradictory signals on who should determine where it lies. It is important that the connection point is decided by the NRA and not by the SMP operator, which may have incentives to design its network to prevent such unbundling/connection to other operators – for example by installing the concentration point very deep in the network hierarchy, e.g. at the foot/basement of each building. This will not provide possibilities for effective competition.

Wholesale broadband access (market 5)

Ideally, if equivalent fibre unbundling provisions are made to copper unbundling at the MDF today, this can be a primary remedy in dense areas for mass-market consumer service provision.

However, bitstream remains a crucial remedy for business service providers which lack mass market scale, for vDSL deployments which will render unbundling at the MDF unfeasible and for rural competition, It may also be a necessary transitional requirement in circumstances where fibre unbundling is in the process of being introduced.

The Recommendation should encourage NRAs to examine consumer/SME and business wholesale broadband markets separately as both the product and demand and supply characteristics differ depending on these customer groups.

Consumer provision may be characterised by high demand for triple play whilst consumer suppliers may have sufficient scale to be able to invest up to the MDF (today most urban 'mass-market' services are provided via local loop unbundling).

Meanwhile, demand from businesses could include multi-site coverage at a nationwide, pan-European or even global level whilst the product requirements may favour high quality, low contention and robust service level agreements. Business service providers may have

¹ http://www2.nortel.com/go/news_detail.jsp?cat_id=-8055&oid=100246941&locale=en-US

wide trans-national reach without having significant scale in any particular market, making unbundling or other access at the MDF site uneconomic for them.

In light of these differing characteristics, the following bitstream requirements may be appropriate:

- (i) For consumers: where unbundled access to the NGA is not feasible at the MDF site, an unconstrained triple-play capable NGA local loop alternative at the MDF should be provided in addition to any regional WBA (also triple-play capable) required for rural competition and market entry purposes.
- (ii) For businesses: a high quality business-grade WBA service should be made available at regional and national locations without geographic segmentation

Annex II of the Access Directive

In line with the suggested amended ladder of investment described above, the Recommendation could usefully list in an annex (as an expansion of Annex II of the Access Directive) the types of remedies relevant in market 4 (access to the local loop) in an NGA environment. We suggest the following as a template, which could be followed by NRAs on a technologically neutral basis in a manner most relevant to the architectures adopted:

- (i) Full unbundling on a technologically neutral basis (ie including fibre unbundling) or obligations relating to wholesale broadband access which offer equivalent functionality in circumstances where full unbundling is not technically feasible;
- (ii) Subloop unbundling on a technologically neutral basis (ie copper and fibre subloop unbundling where technically and economically feasible) + associated facilities ODF/street cabinet access and dark fibre backhaul (or copper backhaul where relevant)
- (ii) duct access (backhaul segment)
- (iii) in-building wiring (copper and fibre)

4. Infrastructure-sharing between SMP and non-SMP operators ineffective in delivering fair terms (article 11)

The draft NGA Recommendation explicitly relates to SMP obligations under markets 4 and 5 of the Commission Recommendation on relevant markets. However, there is a brief statement in article 11 that NRAs should encourage share and build schemes between SMP and non-SMP operators. We assume this falls under symmetric FD article 12 provisions rather than under the market analysis procedures and therefore we wonder why agreements between SMPs and non-SMPs are highlighted.

As a practical matter we expect that voluntary share and build schemes (including investment and risk sharing – as well as profit sharing) may occur amongst operators of equal size in a given area, but we do not believe that worthwhile agreements are realistic between unequal operators where one operator is in a position of power to ‘act independently of competitors’. It is important that NRAs do not neglect their duty to enforce the Framework and SMP rules on the basis that voluntary arrangements are preferable or on the assumption that all operators are equally positioned to invest.

Indeed the ERG itself seems to recognise this in page 3 of their October response in which they state that: *“the investment risk of build-and-share projects between SMP-operators and competitors at the time of new investments to replace or establish cables, ducts and other facilities is high for competitors if the expected market share of the incumbent compared with competitors is large. Especially in the case where cable*

operators hold a strong position and capture a large part of the potential market share, this risk will be even greater.”

Nonetheless, we do not rule out use of symmetric measures under article 12 FD providing that these are complemented as necessary with SMP rules to safeguard competition.

The Commission should also explore and recognise potential anti-competitive effects results from infrastructure sharing and swapping. A sharing or swapping agreement, particularly where it involves an essential infrastructure (eg fibre) could lead to exclusion of others from the market (ie it could have anti-competitive effects equivalent to collusion). It is also important to recognise that the sharing or swapping per se does not increase the degree of infrastructure-based competition and therefore provides no protection against excessive pricing or other forms of leverage of control over the infrastructure.

As regards swapping, it is interesting that in countries such as Finland and Hungary which have regionally dominant companies for historic reasons, the regulator still needed to set conditions on access to facilities such as local loop unbundling in the different geographic areas, since the fairness of voluntary agreements between the parties would inevitably have been affected by the inherited different scales and regional attractiveness of the dominant firms. Furthermore it is unlikely that it would have been in the interests of any operators (but particularly not larger dominant firms) to agree access for others at cost-based rates.

5. Emerging markets guidance does not address issue of leverage and foreclosure (article 23)

The Recommendation is unclear in article 23 on how to treat the issue of ‘emerging markets’ and could support the principle that dominant firms can leverage with impunity into retail markets or prevent the development by competitors of new retail markets.

With convergence telecoms networks and the underlying facilities are becoming increasingly divorced from the services offered over them. This is reflected in the generic nature of wholesale products which typically consist of ‘bandwidth’ or ‘physical lines’ or even ‘ducts’, and the increasingly varied and innovative nature of retail services and bundles.

The key question from a competition perspective should therefore be: are the ducts, lines and/or bandwidth substitutable with existing wholesale access products or do they constitute a new market? And if the wholesale market is new (or not-substitutable) does the wholesale market (for lines, bandwidth etc) pass the 3 criteria test? This approach seems to have been adopted when wholesale broadband access was first included as a ‘new’ market in the list of relevant markets in 2003. Also, in the Commission’s comments on German wholesale broadband access (21/08/2006) the letter states that there is “No indication of a lack of substitution between VDSL and other xDSL products, whether at retail or **at wholesale level**”

Starting exclusively from a retail analysis, as the Commission suggests in the draft Recommendation, will present the NRA with the results of any leverage by the dominant firm – eg launch of a retail service, or failure in retail market development (eg the absence of broadband development in countries such as Greece in the 1990s). This picture could provide false signals about a market being new or indeed a market not existing when in fact the retail market or potential market was foreclosed.

ECTA agrees that newly emerging markets should not be subject to inappropriate regulation. Most newly emerging markets are retail markets and thus would not be subject to regulation in any event. However equally, and importantly from the perspective of the

goals of the Framework, it is vital that wholesale markets which pass the 3 criteria test (whether as an extension of existing wholesale markets or otherwise) are appropriately addressed and newly emerging markets are not foreclosed or prevented from emerging.

6. Geographic segmentation discussion conflicts with technological neutrality and 'actual differences' principle (article 3)

The draft Recommendation in article 3 appears to advocate an analysis of market segments on the basis that there may be geographic differences due to the roll-out reach of NGA and due to overlay with copper networks.

Our understanding is that in a technologically neutral market analysis, the geographic boundary of the market should be determined not by the presence or otherwise of particular technologies, but by demonstrable (existing and foreseeable within the Review period) differences in the degree of competition. This interpretation of the conditions which may justify segmentation is supported in the ERG's October 2008 common position on geographic markets, and in comments made by the Commission in relation to UK (14/02/2008) WBA.

On this basis, the main message from the Commission should be that the presence or otherwise of NGA does not per se affect the geographic scope of the market (for example of market 4). Rather, the geographic boundary would only be affected if (and once) further infrastructures are installed that result in competition that is effective (or at least tangible and foreseeably effective in the near future) in regional areas.

Moreover, the Commission has been vocal in cases on segmentation of market 5 (WBA in UK and Austria) that NGA developments may affect the geographic scope of the market if they reduce the prospect of competition through the upstream remedy of local loop unbundling. It is important that this is echoed in the Recommendation, because there may be an urgent need for countries which have segmented WBA to re-review this market in light of developments and potentially reintroduce WBA on a nationwide basis. For example, in the Netherlands, consumer-grade WBA is proposed to be introduced to address vDSL access issues – whereas it was not considered necessary in an LLU environment.

A further and final issue relating to geographic segmentation that should be raised is the prospect that regional NGA SMP players may emerge where economics prevent duplication, and the first mover thereby secures a dominant position. This does not mean that competitive levels are different, but rather that there could be differences in the SMP operator in different areas such as already exists in Finland, Hungary or in Hull in the UK.

7. Need for timeliness (article 15)

We are encouraged that the Commission has suggested a deadline of 6 months in article 15 for measures to be put in place. However, in many countries NGA developments are already well under way – with the incumbent often gaining a significant first mover advantage. We would suggest therefore a shorter deadline of 2 months in cases where deployments are imminent, through urgent interim measures where necessary.

8. Pricing issues

8.1 Consistent pricing between rungs (article 24)

We welcome the clear statement in article 24 in the Recommendation that pricing should be consistent across various products such as those offered under market 4 and market 5. This issue in fact deserves more attention than has been given in the Recommendation,

because it lies at the heart of the incentive structure that ensures that investment takes place wherever this is viable with a top-down ladder of investment.

It would be helpful to clarify that the margin between products should be such as to allow a fair return for a competitive investor. This may imply calculating costs for the margin on the basis of a lower market share than is held by the incumbent.

8.2 Historic costs and depreciation (annex I)

ECTA welcomes recognition that in some circumstances, historic costs may be a more appropriate benchmark than current costs, and that the costs of incumbents may be considerably lower than those of current investors in cases where assets have been fully depreciated. However, more work is needed to ensure the pricing proposals are internally consistent, consistent with pricing approaches for other products in the value chain and operationally practical.

- If historic costs are encouraged for ducts due to their historic nature, what is the applicable cost-base for other historic (and largely fully depreciated) assets such as copper loops? Might it be appropriate for these also to be charged on a historic cost basis?
- Importantly, if ducts are priced on the basis of historic cost, what does that mean for the cost-base of downstream products which rely on ducts such as unbundled loops, bitstream and leased lines? The presumption would be that the costs of these products would also need to be revised for consistency and to prevent margin squeeze by the incumbent on the basis of lowered duct costs as an input to its own services. Furthermore the newly calculated duct costs should must be properly apportioned (and not double counted) amongst the various products that rely on them (unbundled loops, bitstream, leased lines etc)
- How is depreciation to be considered, and what happens if fully depreciated assets are renewed? It would be inappropriate and provide insufficient predictability for the prices charged to third parties to vary from one year to the next on the basis of specific decisions by the asset owner.

As regards historic vs current costs, our main request is for consistency across the value chain – and particularly the need to use the same duct costs for all products which depend on ducts as an input. On the question of depreciation, we wonder if an alternative less complex approach might be to allow longer asset lifetimes to reflect the actual usefulness of ducts - and indeed copper local loops.

8.2 Geographically segmented pricing for ducts (annex I)

We note that the Commission has suggested that prices for duct access could be geographically segmented. There may indeed be regional cost differences for ducts. However, downstream products such as unbundling partly based on access to civil engineering work are typically priced on an averaged basis. Deaveraging duct prices therefore threatens to undermine the consistency of pricing across different products. If other products were similarly deaveraged, the degree of granularity required is likely to complicate the costing and enforcement process potentially undermining the effectiveness of products.

8.3 Units for duct pricing (annex I)

We would advise against a prescriptive measure concerning the units for duct pricing and other civil engineering works such as the guidance in Annex I para 1 that these should be “based on a volume measure for physical capacity used (such as m^3)”. Different, but equally valid mechanisms could be used in different cases depending on the cost drivers for duct space.

8.4 Project-specific risk premium is positive, but should not assume riskiness in all cases, and especially not for ducts (article 6, annex I)

We support the principle in article 6 that risk should be rewarded through project-specific returns. However, whilst we agree that fibre investments may be risky, we challenge the assumption that all such investments are likely to be risky. A case by case assessment is needed by the regulator, whilst European guidance should indicate circumstances in which there is likely to be greater risk.

In particular, we note that the business cases for investing in NGA have been supported in the annual reports of some incumbents on the basis that they result in operational cost savings. The sale of MDF sites, in the case of KPN, was cited as nearly covering the whole cost of the NGA roll-out plan whilst DT is projected to be earning €3.6bln from building sales associated with the move to FTTx. Meanwhile Telecom Italia is projecting Opex savings of up to 30%. It would be perverse to suggest that investments which are recovered through efficiency savings are more risky than any standard upgrade and renewal of equipment.

We note that the ERG has also challenged the assumption that there would always be a risk involved in page 6 of their response as follows: *“the ERG does not agree with the presumption that a higher risk premium applies only because new infrastructure is rolled-out. The risks must be carefully assessed using state-of-the art analytical tools before any definite state-ment should be made which may pre-empt the result of such a careful analysis”*.

More specifically, we would assume that a business case which shows profitability for FTTx investments for an operator which has depreciated existing copper assets and which does not rely on expectations of higher ARPUs than under current conditions or significantly higher market shares is unlikely to present substantial risk for that investor. In these cases, upgrades could be seen as natural replacement of legacy with more modern infrastructure without any assumptions relating to service developments.

On this basis, areas shown as viable for incumbents in the WIK report, are likely to be viable on a relatively risk-free basis providing copper lines have been depreciated and underlying (access) market shares are currently high – since incumbents could make a profit by transferring existing customers to the new network without making any changes to products or prices. Fibre access may however be risky for incumbents in areas outside the profitable zone where only higher prices would enable fair returns.

By contrast, fibre access investments are likely to be very risky for competitive investors which would have to assume massive increases in market share, as well as perfect effectiveness of regulatory measures such as duct access to realise a profit as well as facing higher costs of capital if funding comes from the capital markets.

The issue of setting the WACC appropriately is extremely important in the context not just of rewarding investment, but also in promoting effective competition. The ‘Economics of NGA’ study from WIK shows in particular that the market shares needed by an entrant for profitability (and thereby the amount of viable competition) are very sensitive to the WACC set on the price for access.

The above discussion concerns riskiness or otherwise of fibre investments. We are surprised to see in the Commission’s recommendation that they consider that new duct access investments might be risky. On the basis that ducts are paid for through a range of services for which demand is very certain (leased lines, voice, broadband etc) we cannot see why – for an operator with existing high shares in such services – renewal of ducts would be risky.

Indeed it would be helpful for the Commission to clarify that normally renewal of depreciated infrastructure (including upgrades of infrastructure where no higher ARPU/shares are required for profitability) is not risky and should be treated as such for the purposes of calculating the WACC.

Open access networks reduce risk

As all business cases are very sensitive to market share (penetration), we would expect that offering wholesale access alongside retail services would tend to reduce rather than increase risk because it would allow the investor to maintain a high market share at the wholesale level to pay for its investments and stimulate demand through competition and innovation in service provision without needing to further dominate retail markets. Most competitive investors in fibre consider that offering wholesale access supports their business case, and BT and KPN have both reached this conclusion as well.

Other incumbents have suggested that offering access would increase their risk, but we wonder in the absence of access how their business plans are constituted. We assume these are based either on further increasing retail market shares (above the typical 50%) today, and/or rely on the infrastructure owner exploiting access to charge high prices for tied services and applications.

The first scenario (of regaining lost retail market share) could be attractive for investors but is incompatible with the objectives of achieving effective competition. On the second – service-based proposition, we are sceptical that leaving innovation in the hands of one firm will deliver the ground-breaking type of service that could demand an additional price over the lifetime of the investment.

Indeed all the experience we have of significant fibre deployments (eg in Japan) suggests that for mass market take-up fibre does not command a higher price, but rather that speeds and enhanced services provide a competitive edge. This has clearly been seen through developments in competitive broadband markets in which consumers are paying the same amounts but for substantially higher speeds (eg 5 Mbit/s compared with 512kbit/s a few years ago) or the inclusion of triple play services.

It is also evident from the current broadband market that cost-based (low) prices and a high degree of innovation in services in countries with unbundling and often also cable were the factor that contributed to the service being mass market.

Risk sharing is contrary to principle of 'rental' vs 'ownership'

During negotiations on the Framework Review, incumbents have put forward the principle of 'risk sharing' as an alternative approach to the risk premium on NGA prices currently proposed by the Commission. Risk sharing is defined by incumbents as 'upfront payments' or extended contract tie-ins for those using access. Incumbents assert that the current access and price control system (with or without) a risk premium – does not allow them to make a return, but enables entrants to make a profit without risk.

ECTA sees no evidence that the current system has prevented incumbents from making a fair return – and this is confirmed by their financial results, which have tended to remain relatively strong even in periods of economic weakness. On the other hand the substantial investments required for local loop unbundling mean that investment recovery for entrants can only be reached after reaching a critical market share (typically of between 10-20% of broadband market). Few entrants have reached this stage, and most remain loss-making.

As regards the specific pricing proposals for risk sharing, they seem to amount to a requirement to both pay for/invest in and rent access without the benefits of owning the

assets. Structures which involve 'facility'/investment sharing and effective joint-ownership of assets would inevitably share risks and profits. Voluntary agreements could be reached on such arrangements between operators of equivalent capacity to invest. However, 'risk sharing' arrangements as described by incumbents are inappropriate when referring to the **rental** (not joint ownership) of access from a dominant (SMP) operator by unequally positioned non-dominant firms. This view also seems to be expressed in the ERG's October 2008 response to the Commission draft Recommendation in which they state (page 6) that *"it must be stressed that in the case of an access obligation, there is no "risk sharing" involved. The risk is born solely by the SMP operator and is already adequately reflected in the reasonable rate of return included in the regulated access price."*

As regards the alternative proposal for extended contract tie-ins/binding forecasts, we note that incumbents proposed and in some cases were granted these arrangements in the context of interconnection and local loop unbundling. However, these practices were found to undermine the effectiveness of access – and have been cited in ERG Best Practice documents as anti-competitive.