

## Common position of ETP on the European Commission's public consultation on Regulated Access to Next Generation Access Networks (NGA)

The European Commission has issued a draft recommendation on the Regulated Access to Next Generation Access Networks (NGA).

ETP would like to comment on the following issues:

### 1. Potential architectures of fiber deployment

Fixed Very High Speed Networks, based on fibre in the access segment, are at the heart of several massive investment plans announced by European operators and local municipalities. There are two main approaches regarding fibre deployments in Europe:

**"Hybrid copper-fibre"**: Optical fibre is laid in the access network from an optical central or local office to a street cabinet where active equipment (DSLAM utilizing VDSL) is installed. The copper pair is used to link this street cabinet to the end-user premises. This solution is generally called Fibre to the Node (FTTN) or fibre to the Curb (FTTC) and allows up to typically 50 Mb/s symmetrical bandwidth. For multi-occupancy buildings, an extension to this approach that is common in Asia but also growing in Europe is to lay fibre into the building basement where active equipment is then installed. Depending on in-house cabling, this equipment can either be a DSLAM utilizing VDSL2 (for copper TP cabling) or an access switch with Fast Ethernet to the subscriber in case of Cat 5/6/7 cabling. Bandwidth of up to 100 Mbit/s symmetrical can be achieved with FTTB. While most European incumbents choose the FTTC approach, alternative operators prefer FTTB deployments.

**"Pure Fibre / FTTH"**: Optical fibre is laid from the optical central office to the end-user premise. The copper pair is no longer needed for broadband but may still be used for PSTN voice or to support USO commitments. This approach - also called Fibre to The Home (FTTH) - requires the roll-out of a new optical local loop direct to the customers premises, but has the potential for more than 100 Mbit/s up to 1 Gbit/s. Current FTTH deployments are on a smaller scale in Europe and take place in urban areas where density of population is high. In some countries there are some trials ongoing, whereas in Northern Europe as well as in Switzerland there are roll-out plans that will spread from the urban areas to geographically less dense areas in the coming years.

ETP considers that the "fibre-centric" approach (FTTH) is the logical end game if very high bandwidths are required by the market, but "hybrid copper/fibre" (FTTN, FTTB) approaches allow NGA roll-outs with shorter time to market, lower initial capital cost and less commercial risk without necessarily compromising a future upgrade path to FTTH.

There are two different architectures of FTTH deployed in the market: Passive Optical Networks (PON) and Active Optical Networks (such as Ethernet point to point). In most passive optical networks, the optical fibre is shared between multiple customers for network efficiency. Point to Point networks have an individual fibre for each end user and thus are more independent from capacity restrictions caused by parallel use of different customers.

ETP would like to stress that technology advancements are ongoing and next generation optical access (NGOA) networks will be superior to today's technology in terms of bandwidth, distance and coverage. Having said that ETP supports the principle of technology neutrality with regard to the regulatory treatment of various technology options.

The main goal of the Commission with the NGA recommendation is to foster the deployment of NGA broadband networks. NGA broadband is the ability to deliver significantly higher bandwidth than today's networks. In this respect the recommendation focuses on fibre technologies and does not mention cable infrastructure and mobile networks. ETP would like to state, that mobile broadband has the potential to substitute (at least up to a certain bandwidth) the fixed infrastructure. Cable infrastructure competes in the NGA market, in many places as the first mover.

**ETP position:** The principle of technological neutrality in regulation is paramount and should be applied to the different potential architectures of fibre deployment that may be appropriate in different markets. ETP further states that technological neutrality implies that no technology should be favoured over another and that the Regulatory Framework applies to cable as well as to fiber networks.

## **2. Geographical segmentation**

The Parliament proposals support geographical segmentation. In addition the principle of proportionality for any regulatory intervention especially to avoid any risk for innovation at an early stage has been underlined.

Considering the differences between and within Member States with regard to either the chosen scenarios or the pace of migration on NGA it seems unlikely that one-size-fits-all approach would reflect the specific regulatory needs of the respective countries.

**ETP position:** ETP wants to state that regulatory measures need to be adapted to fully take into account sub-national and national differences.

### **3. A consistent regulatory approach**

An underlying principle in this consultation is the need for a consistent regulatory environment. ETP would like to remind the European Commission that the different developments which NRAs have chosen are often well founded because of different sub-national developments and requirements. Although a consistent approach is desirable ETP deems it necessary to understand and take into account the geographic divergences which could lead to different regulatory approaches. The U.K. has already shown that a segmentation in sub-national markets in the broadband access can be a reasonable way forward. Another valuable example is the differentiated application of remedies for SMP operators such as illustrated in Austria. The key principle is to promote innovation and investment and provide real choice to end customers by granting access where otherwise retail business and consumer markets could not become effectively competitive.

ETP would like to point out that a consistent regulatory approach should be compatible with the proposals of the telecom review recently adopted by the European Parliament in first reading. Unfortunately these proposals are not mentioned in the Commission document and, of even more concern to the ETP in view of a consistent EU policy approach, the Commission proposals contain some contradictions to the review proposals on which ETP would like to comment herewith.

**ETP position:** There are already established practices of differentiated approaches in the member states which are well founded. As examples sub-national markets have been introduced and remedies are applied in a differentiated manner. ETP would like to see these approaches extended, because this would allow adaptation of regulation to national and sub-national circumstances, thereby promoting fully competitive markets and end user choice. Guidance on geographic segmentation will increase consistency of regulation, by treating similar areas across the Union in a similar manner

### **4. Incentives for investment**

As an important goal of its regulatory approach, the Commission pursues the setting of incentives for investment. ETP fully shares this goal. However, the approach taken by the recommendation in its present form does not provide an adequate response on the increased risk of NGA investment. It foresees the possibility for the regulated operator to charge a risk premium. However, the access products are already regulated by taking into account the cost of capital, and the cost of capital (or the WACC) takes into account the risk of investing the capital into telecommunications infrastructure rather than investing in the financial market. Therefore the WACC takes into account the specific risk premium of the telecommunications investment. Therefore the introduction of risk premium is nothing new to the regulatory approach in the telecommunications sector. This makes it very uncertain whether the proposed risk premium in its current form will actually lead to a substantively higher access price taking into account increased systematic and unsystematic risks

involved in NGA investment. The beta factor that goes into the calculation of the WACC always contains a portion that is related to the country under consideration. Therefore the beta factor cannot be determined on EU level. ETP thinks that a risk premium needs to be specified on the national level and cannot be recommended on an EU level. ETP thinks that the risk premium (beta factor in the WACC), that has to be specified on a national levels needs to take into account the specific risk of the NGA investment. ETP is concerned that important mechanisms that have been proposed to address the risk of a first mover in the presence of uncertainty over take-up of services and price levels are not reflected in the draft. Notably, the European Parliament has decided in first reading that a fair risk sharing between investor and access seekers should be an important principle of NGA access regulation. Furthermore, the Recommendation should allow for increased pricing flexibility at retail and wholesale level to benefit from consumers' different willingness to pay.

Any promotion of risk sharing agreements might also require lifting the threat of access regulation. As otherwise operators with low cash-flows relying on access regulation might not have an incentive to participate in long term risk sharing contracts. ETP recommends the Commission to take this trade-off between long term commitments and short term access regulation into account when acknowledging their respective impacts on the competitive landscape of the Broadband markets.

**ETP position:** To reach the goals of deployment of NGA further mechanisms for incorporating risk in access prices and conditions, such as risk sharing and value-based pricing, should be explored in the Recommendation. A risk premium is already included in the WACC that is part of the access product pricing and specified on a national level. In addition the impact of access regulation on the negotiating positions in risk sharing agreements should be acknowledged.

## **5. Sharing of and access to passive Infrastructure**

The Commission recommendation requires duct access as a remedy and recommends sharing of infrastructure work. The 'market' for ducts and infrastructure work is very fragmented throughout the European Union. This market is also not governed by sector specific regulation in the telecommunications sector. If asymmetric obligations for SMP operators in this respect are introduced the playing field will become distorted. For example Electricity providers or other utility companies own many of the infrastructures, where optical fibre can be deployed or have already rolled out dark fibre. ETP is in favour of investigating how the sharing of infrastructure like ducts, sewers, etc... can be best achieved. This requires a harmonisation of Rights of Way regulation and housing law. France has e.g. introduced symmetrical access to fibre based in-house wiring. A similar obligation has been introduced in the Italian communications law, which states: "the operator can

lay cables or wires without the authorization of the owner of the estate who is not able to oppose the laying indispensable to meet the request of the tenants or the joint-owners".<sup>1</sup>

**ETP position:** The market of ducts and civil works in member states includes a number of other players such as water and power utilities. In order to achieve a level playing field in this market all players - including both non-telecom and non-SMP players - need to be considered.

## 6. Transparency

Marginal number 6 of the consultation establishes the need to ensure an appropriate migration path which should allow alternative network operators to adapt to the new network developments. ETP agrees with the necessity to develop a common approach which allows competitors to adapt to the network developments of the regulated operator. ETP thinks that consideration should be given to ensuring that this obligation is designed carefully to ensure access to relevant and appropriate information to enable alternative operators to adjust their investment accordingly. Therefore, it should also be considered if a more symmetrical obligation for such transparency would serve the market in a better way. In general a symmetrical approach for access to each other's networks would allow better usage of resources in the case that a duplication of resources is not competitively viable.

**ETP position:** ETP thinks that the obligation for transparency should be more balanced by taking into account the requirement to protect normal commercial confidentiality along with the need to inform alternative operators about the location and development of access assets. The transparency obligation should be more symmetrical and in any case restricted to the amount necessary.

## 7. Migration path

The recommendation mentions several times that existing regulatory obligations are not to be undone by changes in the existing network infrastructure. It should be clarified that this should not mean that incumbent operators have to retain the obligations for access to traditional technologies like unbundling in the main distribution frame for an indefinite time as this will depend on the outcome of the market analysis. ETP agrees with the need to allow a reasonable transition period before these existing obligations can be withdrawn. In designing or in deciding this interim period the requirements of alternative infrastructures of alternative operators and incumbent operators need to be balanced. In addition ETP would like to clearly warn against the encouragement of a specific technology to avoid distortion of competition.

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<sup>1</sup> See article 91 of "Codice delle Comunicazioni Elettroniche" (Telecommunication Code").

The economical considerations that justify investments in fibre systems (FTTX) include the savings in operational costs reaped from the decommissioning of legacy copper access networks. If an investor in FTTX with a legacy network is burdened with operational costs to continue the provision of copper access beyond its business viability his business case is severely jeopardized, especially compared to an investor without the burden of a legacy network.

The competitive service provider may have alternative access network for the provision of his services, if other access networks, e.g. Cable, develop effective wholesale products but these typically don't exist in the market yet.

**ETP position:** The commercial case for investment in NGA is typically finely balanced based on the current market needs, therefore an excessive obligation to extend legacy services longer than necessary to ensure a competitive access market, would make the investment in NGA even more uncertain.

## 8. Annex I - Historical cost vs. current cost

The ETP understands that in most member states, regulatory accounts do not necessarily reflect historical costs. Therefore the Commission's proposal to utilise historical costs for existing ducts access rather than current costs appears to be contradictory to previous guidance and existing regulatory practice; there is no explanation provided on why this is the appropriate cost base. The use of current cost accounting (CCA) is also preferable in view of maintaining incentives for network upgrades and new roll-out.

**ETP position:** The choice of historical cost for existing ducts access is in contradiction to existing regulatory practice.

## 9. Annex II - Application of the principle of Equivalence

ETP is concerned about the use of the term "Equivalence" in Annex 2 and also the limitation of this annex to passive remedies which appears to contradict the principle of technical neutrality. On the first point there is a danger that this could be confused with the principle of "Equivalence of Input (EoI)" adopted in the UK, which is quite specific and not, we understand, the purpose of this Annex. On the second point the ETP recognises the importance of ensuring that regulated products (be they active or passive) are made available on non discriminatory terms. Access to information, provision and service management times and Service level agreements are all elements that can help to ensure a level and competitive market but the ETP would not wish to see this automatically requiring formal EoI requirements.

**ETP position:** There is a danger, that the term equivalence could be confused with the principle of “Equivalence of Input (Eol)” adopted in the UK. ETP would not wish to see formal Eol requirements as part of this annex.

## 10. Inconsistency with the current regulatory framework as regards remedies decision

The regulatory framework provides the background, general obligations and the list of remedies which may be applied if significant market power is prevalent. The market delineation and actual market analysis is done by the NRAs although being validated by the European Commission through a notification procedure (pursuant to Art. 7 Framework Directive). The concrete remedies are also applied by the NRAs, however on this aspect the Commission doesn't have a veto pursuant to the framework directive. Article 8 of the Access Directive requires NRAs to impose one or more obligations as set out in the articles 9 to 13 of this Directive once a market falls into the scope of ex-ante regulation and is not effectively competitive.

Against this background ETP wants to express its concern that some of the detailed recommendations regarding remedies (e.g. in Art. 5 and 11) may pre-empt the outcome of the market analysis and limit the discretion of NRAs to choose the most appropriate remedies close to zero. This seems contradictory to the key principles of the Regulatory Framework that foresees that NRAs have sufficient flexibility to tailor remedies to the national circumstances in order to promote competition in the best possible way. In this context the Commission's recommendation risk to prevent NRAs from applying the most effective remedies for national circumstances thereby potentially conflicting with the principle of proportionality.

**ETP position:** ETP wants to point out the inconsistencies between the prioritizing of remedies and the current framework which puts the responsibilities for application of remedies to the NRAs.