



Contribution of Orange France Telecom Group
to the public consultation of the European
Commission
on a Draft Recommendation on
regulated access to Next Generation Access
Networks (NGA)

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Executive summary

The Commission's draft Recommendation proposes guidelines to foster the application of consistent regulatory remedies throughout the EU in Markets 4 and 5 with particular attention related to FTTH and FTTN/VDSL networks roll-outs.

Orange FT Group embraces the Commission's objectives of promoting competition in broadband services, investments in new infrastructures, with a particular emphasis on the role of infrastructure competition.

OFTG supports the separate treatment between FTTH and FTTN/VDSL and the general regulatory policy proposed in each case by the draft Recommendation. OFTG also agrees that emerging services should not be regulated. OFTG does not however share the pricing principles expressed in the draft Recommendation and suggests them to be reconsidered. Critical points on transparency, symmetry and stability are also mentioned.

General regulatory policy

Concerning FTTH, OFTG believes that a competitive roll-out of several FTTH networks is both desirable and realistic for a large part of the households. In OFTG's view, such competition is however only possible in markets where competitors have reached sufficient scope and scale, including deployment. It is also dependant on effective, non discriminatory access to ducts as well as symmetric access to the shared intra-building wiring. OFTG holds that further access obligations are not appropriate in this case. This corresponds to the French situation. However, in other national markets, if the above conditions could not be met, other forms of passive or active remedies would be needed to guarantee competition at retail level.



Concerning FTTN/VDSL, OFTG welcomes the Commission's distinct treatment of FTTN/VDSL and recognises the need for a transparent migration path when the VDSL roll-out of a SMP operator may interfere with the broadband services offered by alternative operators making use of unbundled loops. NRAs should elaborate fair solutions which preserve competition and which do not jeopardize investment and technological development of the current networks while preparing for the future sunset of the copper local loop. OFTG also insists that technical and economical replicability of retail offers of SMP operators rolling-out VDSL at the sub-loop will have to be guaranteed through passive and active remedies.

The draft Recommendation rightly states that new services which are fully specific of new fibre access networks do not belong to the broadband market and are therefore outside the scope of markets 4 and 5 regulation. OFTG considers that the concept of "chain of substitution" would not deliver the adequate level of certainty to what characterises such new services and suggests a clear cut boundary to be drawn between broadband and new very high broadband services in order to avoid discretionary decisions. Therefore, the fuzzy concept of "chain substitution" mentioned in the draft Recommendation should be deleted in the final version.

Regulatory pricing issues

Duct access pricing

OFTG believes that historical cost, as a reference for the access price of ducts, would not give the correct economic signal to keep the vital telecommunication infrastructure alive in the long term. It would lead to a slow but irreversible degradation of the infrastructure. Ducts reference costs should at least correct the effects of inflation in the valuation of assets and take into account actual assets' lifetime for amortisation calculation. Such an economic depreciation formula also leads to more stable values over time than accounting depreciation.

Reference to historical cost would also threaten harmonization as they are arbitrarily dependant on national accounting standards, history of ducts ownership, financial and accounting operations which accompanied this history. They would lead to large random variations of the costs of ducts throughout Europe.



Moreover, the use of historical costs for ducts would be inconsistent with cost references used for unbundling of the copper loop as historical costs have been explicitly rejected as cost reference for unbundling price by the European Court of Justice in its Arcor/Deutsch Telekom judgment in April 2008.

OFTG proposal, which is intermediate between historical and replacement costs, is fully consistent with the aforementioned ECJ judgment.

Risk sharing wholesale prices

National Regulatory Authorities should refrain from mandating or regulating access, should commercial voluntary agreements be concluded between undertakings. Where no infrastructure competition can exist and no voluntary commercial agreement can be concluded, National Regulatory Authorities may regulate access to new generation access networks. In which case, wholesale access price should have a similar structure than network costs. In particular, all the access costs should not be covered by a variable price per access, which would be extremely high as long as the utilisation of the new infrastructure is low. On the contrary, if part of the access cost is recovered by some form of fixed wholesale price, independent of the quantity of access required by the access beneficiary, then the variable wholesale price per access can be much lower. Such a low variable wholesale price per access would allow both access providers and access beneficiaries to adopt demand oriented retail price schemes, including low retail tariffs, in order to achieve fast service penetration. On the contrary, a high variable wholesale price per access, while the infrastructure is still empty, would imply that the access provider has no other outcome than commercial failure or margin squeeze.

Such a type of “Risk sharing” wholesale price structure, with a lower variable price per access and a fixed component should be authorised in the Recommendation. Beyond its positive impact on the retail market, it would insure a fair share of the risks of the investment between the access provider and the access seekers. Moreover it would avoid granting the last mover the strategic advantage of being able to switch at any time from a variable to a fixed cost structure.



Other critical points

Transparency

While OFTG agrees that transparency is necessary concerning network information which is critical for the operations of the networks of incumbent and alternate operators, more attention should be brought to some critical confidentiality issues.

Symmetric access to infrastructure

As seen in Paris and other large cities, different kinds of ducts are suitable for fibre deployment. To foster the fibre deployment, Member states and Regulatory bodies should engage all owners of ducts, outside the electronic communications sector, to make their capacity available when necessary and possible (Municipalities, Electricity providers, Sewers...).

Moreover, OFTG considers that CATV networks should be included in the relevant market analysis in order to achieve equal treatment and symmetry among electronic communications providers.

Regulatory stability

The regulators should not underestimate the risk of regulatory instability that could be the consequence of the new market analysis to be undertaken as per the issuing of the future NGA Recommendation. The regulatory environment should be predictable for a period consistent with the time required to establish the profitability of heavy investments.



Introduction

The roll out of New Generation Access Networks has not yet started on a large scale. However, the development of new higher capacity networks is a positive trend that must not be jeopardized by regulatory uncertainty. The Commission proposal intends to answer the need of predictability, clarity and consistency in the regulatory responses to the changes that may result from the roll-out of NGA networks by providing some guidance to NRAs.

This proposal concerns the Market 4 – Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location and the Market 5 – Wholesale broadband access.

It sets out remedies related to all kinds of NGA networks roll outs, and in that context differentiates FTTH and FTTN.

OFTG welcomes the clear separate treatment between FTTH and FTTN deployments which takes into account the fact that they lead to different competitive contexts, bottlenecks and therefore regulation options.

Concerning FTTH, most comments that have been made in this document consider that entrants have reached the critical size that allows them to go to a new wave of investment in local fibre networks. This is the case in some EU markets, and especially in France, as broadband competition has been successful, and ULL has demonstrated to be a very efficient wholesale service, provided under excellent operational conditions for many years. Entrants under these conditions have succeeded in gaining substantial market shares, acquiring the critical deployment to invest and progressively migrate their customer base from copper to fibre. Whereas OFTG's overall national retail ADSL market share is below 50%, and each of its two main competitors' shares are between 20 and 30%, in unbundled areas where fibre roll-out is to take place first, the situation between the three competitors is even more balanced. Fully operational access to ducts and the strong commitment from the authorities to ensure that in-building fibre wiring can be accessed by all operators on equal footing are substantially reducing the cost of competitive fibre roll out. Moreover, fibre roll out is a long



process, and as long as no operator acquires a time advantage on the other, competition is preserved.

This situation is not generalized throughout EU countries. However, as market situations differ profoundly, and consequently remedies do too, the path to reach infrastructure competition cannot be the same if the initial competitive conditions are different. Therefore, it is important to evaluate the starting point of NGAs in each national market, whether competitors have started on an equal footing in the beginning of the roll out, or whether one operator holds substantial advantages over its competitors.

Regarding the text of the draft Recommendation, OFTG's concerns relate mainly to transparency issues, to the absence of reference to risk sharing wholesale prices, and the mention of historical costs as reference for the pricing of ducts.

In the following part of the text, OFTG will make more detailed comments going through the proposed Recommendation and Explanatory Note.



I – Draft Recommendation

The following comments refer to the corresponding paragraphs of the Draft Recommendation.

General principles

(3) Great care must be taken to accompany possible geographic analysis in order to avoid rupture in commercial parameters detrimental to the market, the risk of digital divide and circular regulation.

OFTG wishes to underline that the process leading to the definition of geographical market must be very strict and documented and at the same time must:

- Remain simple and transparent in order to be predictable and consistent with common sense,
- Avoid to artificially creating irreversible discontinuity in market conditions, producing digital divide and circular regulation,
- Be consistent with the market definition within competition law.

As per the analysis process, the conclusion must be without any ambiguity.

(4) The only ducts considered in this document are the ones that belong to electronic communication network operators and OFTG regrets that nothing has been planned so as to include ducts suitable for fibre deployment coming from other actors such as cable operators, local authorities, electricity providers, sewers....

The Commission could take advantage of the opportunity of the Recommendation to encourage Member States to include other relevant actors within the scope of ducts sharing regulation.

OFTG questions the absence of symmetry in the obligations applying to undertakings (be they SMP or not). OFTG submits that any operator rolling out fiber (regardless of whether he holds SMP or not) should be subject to duct sharing obligations – in the case of non-SMP operators, the appropriate legal basis would be Article 12 of the Framework Directive.



With regard to the principle of technological neutrality, cable operators should be viewed as electronic communication network providers. No actor must be favoured in comparison with the others applying the regulatory concept of technological neutrality. The regulatory framework should therefore apply to cable where the processes of market analysis and remedies are concerned, notably for dealing with ducts and in-door wiring.

The draft Recommendation fails to strike an appropriate balance when forcing SMP operators to ensure that, when they build new ducts, sufficient space is foreseen as appropriate to allow other operators to make use of these ducts. It should be stated that this extra capacity will be taken into account in the price calculation. Symmetry should also be the rule for such a constraint.

It could be also recommended that once an entrant has benefited from existing ducts, it must leave enough spare capacity in order for another operator to benefit from the same infrastructure.

(5) See comments on annex I

(6) See comments on annex I

(7) The chain of substitution concept used in the Draft Recommendation should be clarified. The limit of the substitution should be assessed very precisely. Otherwise, misinterpretation could arise in respect to the definition of new markets or upgrade of the current offers. NRAs would have a too important discretionary power to impose wholesale access obligations any time on emergent services, and be in contradiction with competition law principle. Several services can illustrate real rupture and can be considered as new markets:

- High Definition on multiple TV screens,
- Very fast data upload to share and back up user contents in an instant,
- Very fast data download enabling storage on hard drive disks or burning onto a DVD.

For instance, a critical rupture between broadband and very high broadband is due to the symmetry of the upload and download flows. This is a substantial difference between FTTH and VDSL. Clear cut frontier between broadband and very high broadband is thus necessary.



For service bundles, the principle of retail offer reproducibility remains valid. This principle may be satisfied if the set of wholesale offers available is sufficient to duplicate the bundle.

Transparency

(9) While OFTG agrees with the principle of transparency, it considers that boundaries should nevertheless be defined.

It is reasonable to provide the available and relevant information (maps, chambers' location...) enabling competitors to design and lay down their own network elements applying appropriate engineering rules in a non discriminatory way.

But it would be unreasonable to oblige to provide, a priori, the information on the availability of all the ducts to third parties. To provide on line information on all the capacities is impossible, it would represent a huge amount of work, is prohibitively expensive and potentially useless if nobody is interested, totally or partly.

Within a reasonable operating process, each party should check by itself whether or not there is available space in existing ducts, just in time for roll-out purposes.

(10) Transparency on information regarding network modification plans must also be subject to appropriate boundaries. NRAs must be careful when handling confidential business information and the transparency requirement must be proportionate notably considering the third party' degree of seriousness and the commitment towards its own development projects.

When local authorities act as electronic communication service providers, or own an electronic communication network, they should be treated the same way as the other electronic communication services or network providers. The same level of transparency concerning their own developments or the request for accessing operator information should apply to them.

Regarding the requirement of submitting information concerning future networks modifications plans to interested parties; it is worth mentioning that these plans may change continuously with market developments.



This request should only arise if such plan could disturb technical or operational activities of alternative operators and if information handling safeguards business confidentiality. In a VDSL scenario, it seems crucial, however, that clear information concerning the network evolution be given in due time in order to insure reproducibility for alternate operators on the retail market in satisfactory conditions, to avoid losses in terms of return on unbundling investments as well as being granted a reasonable prior notice period before any MDF closure, in order to implement alternative solution for the operators impacted. It is vital to insure the required level of transparency on network roll out, so that entrants do not discover the situation at the last moment, without any possibility to adapt.

(11) For responsibility and technical reasons, OFTG believes that the option of risk sharing is more efficient and preferable than investment sharing (see comments on annex I).

FTTH

The success of infrastructure competition in a FTTH context must be founded on essential elements: a competitive broadband market, a non discriminatory and operational access to ducts and in priority, if it is adapted to national market, symmetric obligations in the access to in-door wiring under the efficient supervision of NRAs. Asymmetric access obligation to in-door wiring may be justified in specific markets, but only in cases where, for local reasons, symmetric obligations do not appear the most relevant. This could be the case, for instance, if a specific undertaking has privileged opportunities to build in-door wiring in buildings.

In France, the ADSL market is shared by several actors, the three major being Orange, Free and SFR. The national market shares are: less than 50% for Orange and between 20% and 30% for each of the other two, with higher figures in unbundled areas where market share are more balanced between the three. This situation is a good base for NGA deployment. Empirical evidence proves that infrastructure competition has started in France, with the deployment of fibre by several competitors, with a non discriminatory and operational access to ducts and symmetrical sharing obligation of in building wiring.



In the following, OFTG comments are in the hypothesis that these conditions for successful FTTH infrastructure competition are gathered. If these conditions were not gathered, notably if there were only theoretical but not real access to ducts, other remedies such as fibre or bit stream access could be necessary even in an FTTH context.

(13) OFTG agrees with the principle of access to in-house wiring and thinks that this should be carried out on a reciprocal basis when it is relevant in the national market.

(14) For the avoidance of doubt, we understand that a “concentration point” refers to what is also called the “mutualisation point”.

The relevance of the mutualisation point location is related to the potential economies of scale. Cost analyses have showed that the most efficient solution is to have the mutualisation point within the building.

Economic, operations and maintenance, network planning and industry organisation reasons imply that mutualisation points should be situated within the building:

- Mutualisation points in buildings would save the creation of numerous stand alone mutualisation points in the public domain,

- There are large economies of scale on operations and maintenance between the mutualisation point and fibre wiring of the building, when the former is located in the building. These economies of scale concern the roll-out of the building fibre network and also interventions at the customer premises. These economies of scale would be lost if the mutualisation is not in the building or attached to the building.

- Mutualisation points outside buildings would imply the addition of a specific layer of network nodes and technical areas to be managed by a multi-party, conflicting and cumbersome process,

- If the extension of the in-building fibre network stays limited to the building, a full range of companies can operate in this market. If building fibre networks are extended to the public domain and to the use of ducts, the market will be limited to network operators.



It should be noted that having the mutualisation point in the street faces some difficulties:

- The need for the construction of new chambers. The environment of this chamber may not be adapted to optical splitters because of the pollution generated by water, dirt... The chamber should be large enough to containing equipment and allowing human intervention without interrupting the service.

- Operational difficulties for intervening in the chamber and the associated costs: prevention plans, security of the persons...

- When the mutualisation point is in the building, the connection of a new subscriber requires only one visit. This is not the case when the point is in the street, whereby two visits are necessary.

Other mutualisation configurations also exist, in particular the multi-fibres solution in customer premises. Experimentations are required to specify the multi-fibres configuration and assess its efficiency. Such experimentation is planned in France, by OFTG and SFR. ARCEP will follow the results of this experimentation. Of course, the experimentation is opened to any undertaking which agrees to participate.

(15) Provided necessary conditions for FTTH infrastructure competition are met, wholesale services should be provided at the lowest level of the value chain. For example, this means that, when duct access is viable, no further wholesale services should be imposed.¹

The notion of “sufficient number of operators”, often used in the Explanatory Note and the draft Recommendation is imprecise and could lead to various interpretations. It is a factor of regulatory uncertainty.

¹ A single level of access as an alternative to a “ladder of investment” type of regulation. A Ladder of Investment regulation is meant to allow new entrants to take a share of an existing market, covering only a superficial part of the value chain and then go down the value chain. Such a type of regulation is not applicable when the entire value chain needs to be created which is the case for NGAs.



VDSL (FTTN /FTTB)

The project of Recommendation separates the regulatory analysis of FTTH and FTTN. OFTG agrees with the need to separate these two network architectures. In the mean time, it also believes that the difference is between FTTH and VDSL technologies. Therefore, for regulatory purposes, FTTB case with a VDSL DSLAM in the building should be considered as VDSL and be analysed the same way as FTTN.

The general regulatory principle in this case is that VDSL regulation should be in continuity with ADSL regulation.

Satisfactory operational and economical transition conditions should be made available to ADSL based alternative operators in the context of a move of the incumbent towards VDSL at the sub loop, bearing in mind that the economic equation of the alternative operators is very sensitive due to:

- Extra technical costs caused by the technical changes due to the MDF removal,
- Less margin in the products' offers, if only bitstream is offered,
- A lack of economic space regarding prices if wholesale prices are too high,
- Migration path when an SMP intends to go FTTN/VDSL if VDSL service perturbs ADSL service or if the SMP intends to suppress MDF and copper lines.

Moreover, as shown by several studies and acknowledged by the European Commission, SLU is not an equivalent to LLU. Therefore to ensure that DSL competition is not entirely put at stake by the VDSL roll out, NRAs should adopt specific obligations in such a scenario and in particular:

- A more flexible and enriched Bitstream VDSL offer allowing a full technical and economical replicability of VDSL retail services; keeping in mind that such an offer will be the sole wholesale offer allowing the DSL competitors to offer national DSL retail offers. As the SLU business case is likely to be very difficult for alternate operators, Bitstream VDSL will have a critical role to keep competition alive.

- Additional ancillary obligations for the SLU, in the very specific case where SLU may be technically and economically feasible.



(16) The measures to be taken dealing with such a transition must lead to a stable permanent regime for all the operators.

(19) (20) Ancillary remedies to SLU are critical in order to allow the operators to invest in SLU in the very specific case where it may be technically and economically feasible. Several studies have shown that the SLU business case is particularly difficult to achieve; not to say quasi economically impossible in major parts of the country concerned. This is mainly due to the high fixed costs of the very numerous active VDSL DSLAMs to deploy, and the new cabinets including energy and cooling to lodge them. Such large fixed cost new infrastructure has no equivalent in the FTTH case. In such a scenario, duct access cannot be regarded as sufficient to address the competitive issues at stake. NRAs should therefore ensure that SLU access regulation is imposed together with dark fibre or Ethernet backhaul solutions at cost oriented prices. Without such obligations, there will be no business case at all for SLU anywhere. SLU feasibility must be preserved wherever it can happen, but will cover at best only a minority of case. Therefore VDSL bit stream ensuring full replicability is critical to maintain competition. The Commission should make this clearer in its final Recommendation.

Wholesale Broadband Access

(23) It is necessary to differentiate the regulatory approach between legacy and new networks, avoiding unnecessary regulatory obligations on undertakings providing new networks and or services.

OFTG supports the draft Recommendation statement page 4: "Newly emerging markets are considered to comprise products of services where due to their novelty, it is very difficult to predict demand conditions or market entry and supply conditions and consequently difficult to apply the three criteria test". The demand for new services that run on new networks such as fibre networks is subject to a high degree of uncertainty. A clear cut distinction between broadband services and very high broadband services should be provided instead of the fuzzy concept of "chain substitution" which leads to regulatory discretion and uncertainty.



In order to foster new services provided by new networks, OFTG agrees not to include them in markets 5. The uncertainty of their commercial success is already a factor of risk for those who provide these services; regulatory measures would increase the risk. However, in countries where VDSL is being rolled out and where SLU is analyzed as not being an equivalent to LLU nor a viable economic solution, NRAs should ensure that an enriched and flexible bitstream VDSL offer is granted to the operators at cost oriented prices.

Annex I

(1) The proposal states that the usage prices of ducts should be based on volume (m³). This proposition is sound for new fibre access networks which is the scope of the draft Recommendation.

Geographical de-averaging of ducts prices:

Geographical de-averaging would not be consistent with existing unbundling policy. Supposed to work with the same cost base, the unbundling tariffs and the de-averaged tariffs of ducts would not be coherent, as unbundling prices are not geographically de-averaged.

Such inconsistency in the overall mechanisms must be avoided.

(2) Historical costs:

For long lasting assets such as local loop access infrastructure, the accounting lifetime is generally shorter than the real lifetime. Consequently, an important proportion of the operational assets is depreciated in the books. Furthermore, the non-depreciated part is calculated in current currency according to accounting standards applied in a lot of European countries. For these two reasons, accounting costs of local loop assets and in particular of ducts assets are not relevant references for the access prices of ducts. Tariffs based on historical costs would be below the efficient level that guarantees the durability of the infrastructure in the long term. **Historical costs do not give the economic signal necessary to keep this vital infrastructure alive in the long term;** it will lead to a slow but irreversible degradation of the infrastructure.



Economists and the European Commission have constantly stated that the historical costs method is not an efficient basis for tariff calculation.

The European Commission has described the flaws of the historical cost method². Since 1998, it has recommended that the assets along with their constant value be taken into account. This is also the Ofcom's position, as stated in its document "Valuing copper access, Proposals" (2005): "Charges based on HCA give poor signals for investment since they reflect cost of when the asset has been purchased rather than what it could cost now. There is a danger that basing prices on HCA... could stifle efficient investment in access networks in the longer term" (3.10, page 11).

In its decision n°05-0834 related to valuing local loop assets and cost accounting, ARCEP states that the historical cost method is not adapted and that the Economic Current Cost method has positive characteristics with respect to valuing these assets. It allows the inflation rate and the technical progress to be taken into account.

Such an approach is also supported by Martin Cave when he writes "the incorporation of economic depreciation in a CCA accounting framework has the advantage of approximating the trajectory of costs more closely with that of competitive prices"³.

The application of ARCEP's method requires a certain number of parameters, namely: the history of investments, the index of price evolution, the WACC, the rate of technical progress, and the asset lifetime.

The fact that historical costs may be the base for valuing ducts in particular countries is not a sufficient argument to extend this method to all European countries. Historical costs are dependent on the particular history of the telecommunication infrastructure in each country. Historical costs are also dependent on the particular accounting standards of each country. As telecommunication history and accounting standards vary widely between countries, the use of historical costs would lead to major inconsistencies in duct price regulation in Europe. Therefore, consistent European regulation implies that costs used as a reference for ducts price regulation should necessarily:

² Since the study done for the DGXIII in 1994 and 1995, notably by WIK

³ Valuation issues relating to the local loop, 2005



- Correct figures corresponding to the value of historical assets to correct the effects of inflation in the evaluation,

- Take into account real instead of accounting assets lifetimes,

It is also well known that, technically, economical depreciation formulae give results which are more predictable than accounting depreciation formulae.

It is also necessary to recall that a judgment of the European Court of Justice: dated April 24, 2008 on unbundling prices, have rejected historical costs as a reference for unbundling prices.

According to the ECJ, it is the NRAs' task to define detailed rules for determining the basis of calculation. The Recommendation proposal appears to be in contradiction with the ECJ:

“193.6. It is apparent from Article 4(1) and (2) of Regulation No 2887/2000 that, when examining the rates of notified operators for the provision of unbundled access to their local loop in light of the pricing principle laid down in Article 3(3) of that regulation, the national regulatory authorities have a broad discretion concerning the assessment of the various aspects of those tariffs, including the discretion to change prices, and thus the proposed tariffs. That broad discretion also relates to the costs incurred by the notified operators, such as interest on invested capital and depreciation of fixed assets, the calculation basis of those costs and the cost accounting models used to prove them.”

The ECJ also states that the real costs must be taken into account and that historical costs place the SMP in a disadvantageous situation:

“115- It results from the above mentioned provisions that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation requires account to be taken of actual costs, namely costs already paid by the notified operator and forward-looking costs based on an estimation of the costs of replacing the network or certain parts thereof.”

” 193.2- When applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000, in order to determine the calculation basis of the costs of the notified operator, the national regulatory authorities have to take account of actual costs, namely costs already paid by the notified operator and forward looking costs, the



latter being based, where relevant, on an estimation of the costs of replacing the network or certain parts thereof”,

“108- **It follows that the cost calculation basis which must be taken into account when setting rates for unbundled access to the local loop cannot be based exclusively on historic costs, otherwise the notified operator would suffer, compared with the beneficiary, unjustified disadvantages,** which is precisely what Regulation No 2887/2000 seeks to prevent. The aim of that regulation is to enable both beneficiaries and the notified operator to operate on the market so as to establish normal competition in the medium term. »

This means that prices should not be oriented towards historical costs.

ARCEP has concluded that the Economic Current Cost is the most efficient solution, because it accounts for the history of investments, the index of price evolution, the WACC, the rate of technical progress and the assets lifetime.

Above all, if a massive change arises in the network, the use of Economic Current Cost avoids rupture in the calculation of costs, consequently in prices, which is not the case when historical costs are used.

Several properties must be verified by the method to be used valuing the ducts:

- The method has to allow the recovery of the investments. Indeed, an investor who would anticipate a risk of total or partial expropriation would choose not to invest or would require in return a high risk allowance. Therefore the method of valuation has to guarantee to the investor that its initial spending will be recovered once, amortised on the full time during which the investment is operational.

- The method must allow the necessary level of the assets renewal. The method of valuation must be forward-looking, in the sense that it has to allow the company to be able to anticipate the renewal of its assets. This property is translated in practice by the ability of the method to take into account the valuable evolutions whether it concerns inflation or real technical progress.

Prices evolution is a concern common to the regulator and the entrepreneur. The methods of current costs look attractive to the regulator because of their virtues in the incentive for the investors to suitably amortize.



An additional concern is to guarantee that the prices of the essential infrastructure are not influenced by the operator's short-term investment choices. In other words, smoothing the cycle of investment is desirable. Ideally, the price for providing the infrastructure should evolve concurrently with assets prices.

The method of the economic annual instalments is based precisely on this principle. It is thus similar to the method of current costs regarding the consideration of price evolution, while integrating the additional objective of smoothing but, as historical costs, takes into account historical and not replacement assets.

So, while deviating deliberately from pure accounting logic and by incorporating fundamental concepts into economy (constant instead of current currency, life cycles, technical progress, cycles notably), the method of the economic annual instalments or the current economic costs is both fair and efficient.

The above OFTG propositions lead to an intermediate valuation between historical costs and the replacement costs. It is fully consistent with the guidance given by ECJ in its Arcor judgement. Furthermore, these propositions would correct discrepancy factors between countries.

To conclude, the important parameters to consider when selecting the methodology are:

- The correction of the inflation effect,
- The real lifetime instead of accounting lifetime,
- The coherence with cost reference used for unbundling.

(3) It is recommended in the Commission's project to base the usage price for new investments on costs with an additional risk premium.

First of all, this applies only where competitive investment cannot take place.

Where access obligation applies: if risk premium means classical access price which covers costs on a per access price basis, but with a price somewhat higher, it does not solve the investment incentive problem because it maintains the last mover's strategic advantage of choosing between fixed and variable costs when the first mover faces fixed costs.



Risk premium addresses the question of access price level but not the more critical question of access price structure.

Where no voluntary commercial agreement can be concluded in the presence of SMP a National Regulatory Authority may regulate access to new generation access networks, in which case, wholesale access prices should have a similar structure than network costs, whilst ensuring that access seekers bear a reasonable share of the risk incurred by the investing operator. Risk sharing contracts may for instance include a specific component to access the network in a particular region or area, independently of the number of individual accesses, or take the form of long-term access contracts with minimum quantities for given time periods.

Such « risk sharing » wholesale prices have the following characteristics:

- Regarding costs, it avoids the first to invest to have a structural disadvantage compared to the second investor. This would be the case if the latter had a permanent choice to switch from a variable cost structure of the wholesale offer to the fixed cost of building its own infrastructure. If it is structurally unprofitable to be the first to invest, then nobody will invest.

- Regarding the impact on retail prices, a “risk sharing” wholesale price favours a much larger flexibility of prices on the retail market than a “risk premium” price per access.

In the case of a wholesale “risk premium” price per access, the full cost of the infrastructure is contained in the variable price per access of the wholesale offer. Then the variable wholesale price per access will be very high because the new infrastructure will be empty at the beginning. This very high wholesale price per access will be included in retail prices of the access beneficiary and also in the retail prices of the infrastructure’s owner due to the risk of application of a margin squeeze test.

On the contrary, in the case of a wholesale “risk sharing” price, with fixed and long terms elements, what is not paid per access is not part to the variable cost per customer. The operators on the retail market have more flexibility to market their offers and prices. So, at the same time, they can offer cheaper prices in order to foster the penetration or higher prices in order to cover their fixed costs.



(4) Same comments as for (2)

The notion of composite LLU products is unclear. If it means that the different constitutive products could come from different providers, the statement that the price of composite LLU should not be higher than the wholesale price charged for LLU is not applicable; because none of the providers is in control of the overall offer.

Moreover, this proposal does not take into account that, in a VDSL scenario, the LLU offer has high risk to disappear at least for technical reasons which makes the comparison to it unclear.

(5) Same comment as for (2) and (3)

(7) Risk premium access prices should be introduced; same comments as (3).

Annex II

1). Information on ducts and other physical assets must be given request per request at the expense of the information seeker.

3) and 4). The principle of compensation for non compliance to commitments is acceptable but only under certain conditions. Compensation in the case of non conformity with delay commitments must be accompanied by conditions allowing the supplier to fulfil its obligations. Typically, conformity with wholesale product delivery time is dependant on the availability of certain information: the supplier must know where to deliver, how much to produce in order to organize its production-delivery chain. What is more, it would be most efficient if the new entrants smooth out the orders; command peaks lead to production disorganisation for all the parties involved. If this information is not available or erroneous, no compensation should be due.



II - Explanatory Note

OFTG does not share the Commission's view on the inclusion of FTTB within FTTH, when FTTB goes with VDSL technology. (top of page 5).

When FTTB uses VDSL, it leads to very different outcomes than FTTH. VDSL technology used in FTTC and FTTB solutions (a) corresponds to a substitution of the existing ADSL service, (b) has mainly the form of massive roll-out plans by incumbent operators, (c) may lead to technical and competition problems.

By contrast, FTTH networks (a) are rolled-out as overlays of the existing network, (b) are entrants as well as incumbents, (c) increase the competition as they are being competitively rolled-out and they will have to compete with existing DSL, cable and TV satellite services, (d) genuinely overcome the copper bottleneck.

In paragraph 2.1.1, when the Commission states that “to date most fibre actually deployed is P2P, whereas many announced future deployments are PON-based”, it is referring to Europe. Millions of accesses are already available worldwide in PON mode (in Japan, Korea, US).

This paragraph does not mention that significant cost differences between the two types of FTTH may relate to the higher ducts occupation by P2P, with a risk of higher needs in civil works investments. By contrast, in France where ducts have been built for copper networks, it is possible to deploy several PON networks in parallel without increasing the capacity of existing ducts or only with very marginal additional civil work investment.

About VDSL, it should be mentioned that contrary to FTTH, VDSL does not bring an additional new network to the customer premises. VDSL roll-out may be technically incompatible with existing ADSL service, because of radio electric perturbations. If VDSL is modified to stay compatible with ADSL, its performances are reduced and its performances become comparable to ADSL2+ ones.



Page 7, cable operators are mentioned regarding the current upgrade of their networks. This leads to the question: What is the cable operators' status in respect to NGA regulation?

Page 7, the document mentions a potential savings of as much as 70% of the current operating costs without mentioning any documentary sources for this figure.

Whatever this percentage really is, the savings concern all undertakings deploying fibre networks.

Page 7: The document states that in Greenfield areas the cost differences between established technologies and new ones are sufficiently narrow for new technologies to be invariably chosen. This hypothesis has not been validated through any experience. It should be taken into account that a new technology must be integrated into an existing environment in the most harmonized way. This integration must be managed in a predictable way and within industrialised processes (information systems, engineering, operation and maintenance process, training ...). Besides the fact that Greenfield areas are not relevant geographic markets, the investment decision cannot be made without taking into account this general context. Furthermore, the cost of the network is not the only parameter for making a decision; regulatory environment and notably the one related to Universal Service must also be considered.

While OFTG supports transparency on critical information for network operation, special attention must be paid to confidential business information and the reliability of the information seekers.

In case of VDSL deployment it is very important to protect the migration path of the alternative operators: non discrimination and reproducibility are critical in this context.

3.3.1. The document states that, when fibre networks have been deployed based on a PON architecture, their topology starts to look like that of a cable network, therefore the NRAs should carefully analyse whether placing cable and telecommunication networks in the same relevant market is appropriate.

OFTG is concerned by the equal treatment of cable and telecommunication networks. Neither actor must be favoured in comparison with the others. Therefore the regulatory



framework should apply to cable where processes of market analysis and remedies are concerned, notably for dealing with ducts and indoor wiring.

3.3.1. Non discrimination is part of the foundation of the regulation and it is regrettable not to read anything about its importance, notably in the part 3.3 “General regulatory provisions”.

As mentioned in the comments on the Recommendation project, the issue related to the issuing of data linked to ducts must be handled with care. On the question of the availability of the data, it would be very inefficient to ask huge efforts to gather an enormous stock on possibly useless information in advance and not on demand.

Page 11, it is mentioned that mandatory access conditions should reflect the characteristics of different assets (existing or new ducts, for example). OFTG shares the ERG’s comment about the feasibility of this recommendation. It imposes taking ducts one by one, making the assumptions that there is a database with all the related information at the local level which is untrue.

Fostering the investments means to leave the stakeholders free to take their own decision with respect to the risks associated to the investments and the way they will deal with them. Competition is an incentive for investment only if stakeholders are free to invest.

3.3.2. The NRAs approach must be pragmatic and the transparency issues must be handled with care and in a realistic way. As already mentioned, this is the case for the display of the proper information on ducts. The reference offers will be built step by step, also in a progressive way along with the deployment of the new networks. The NRAs will have an important task to organise multilateral meetings between incumbents and alternative operators in order to enhance these offers and the related operational processes.

Non discrimination must remain the main foundation for progress in this new environment.



3.4.1.1. The current deployment of fibre shows that the situation changes in respect to SMP and first movers. For example, incumbents and alternative operators are alternatively the firsts to access buildings. So, the in-building wiring is a new and sensitive matter that requires attention. A priori, symmetric remedies seem to be the more natural approach.

The relevance of the mutualisation point situation is related to the potential economies of scale. Cost analyses have showed that the most efficient solution is to have the mutualisation point inside the building.

For reasons of economic, operations and maintenance, network planning and industry organisation mutualisation points should be situated within the building:

- In buildings, mutualisation points save the numerous stand alone concentration points in the public domain,
 - There are large operations and maintenance economies of scale in building mutualisation points and fibre wiring of the building, notably with respect to the roll-out of building fibre network and intervention at the customer premises.
 - Mutualisation points outside buildings would imply the addition of a specific layer of network nodes and technical areas to be managed by a multi-party, conflicting and cumbersome process,
 - If the extension of the building fibre network stays limited to the building, a full range of companies can operate in this market. If building fibre networks are extended to the public domain and to the use of ducts, the market will be limited to network operators.

Nonetheless, it should be noted that having the mutualisation point in the street faces some difficulties:

- The environment of mutualisation point in the public domain is not adapted to optical splitter because of the pollution generated by water, dirt... The mutualisation point that should be large enough to containing equipment and allowing human intervention without interrupting the service,
 - Operational difficulties for intervening in the mutualisation point and the associated costs: prevention plans, security of the persons...



- When the mutualisation point is in the building, the connection of a new subscriber requires only one visit. This is not the case when the point is in the street, in whereby two visits are necessary.

Other mutualisation configurations also exist, such as the multi-fibres solution in customer premises. Experimentations will be required to assess the efficiency of these possibilities. For example, a multi-fibres experimentation is planned in France, between OFTG and SFR. Arcep will follow the results. This experimentation is opened to all undertaking wishing to participate.

3.4.1.2. Alternative passive remedies

In the case where the infrastructure competition is not possible and also during all transition phases, it is necessary to have the bitstream offer available at the MDF.

3.4.2 FFTN

Indeed, the VDSL scenario requires additional regulatory remedies in terms of transparency, bitstream, migration path, and backhaul solutions for SLU and collocation at street cabinets, or remote optical platforms, to guarantee full and permanent replicability of incumbent retail offers. In particular, in such a case, access to ducts will not be sufficient to improve the SLU business case and replicability of the incumbent retail offers. Even if the Commission seems quite clear in this paragraph on the need to also impose dark fibre obligation, we consider that it should review the draft Recommendation that quasi only refers to ducts access in this case. Even with dark fibre for backhaul, SLU may only be feasible in a minority of case and VDSL bit stream is critical.

3.4.3- 5th sub paragraph. The chain of substitution concept used in this document should be clarified. The limit of the substitution should be assessed very precisely. Otherwise, misinterpretation could arise in respect to the definition of new market or upgrade of the current offers. NRAs would have a too important discretionary power to impose wholesale access obligations any time on emergent services. Several services can illustrate real rupture and can be considered as new markets:

- High Definition on multiple TV screens,



- Very fast data upload to share and back up user contents in an instant,
- Very fast data download enabling storage on hard drive disks or burning onto a DVD.

A critical rupture between broadband and very high broadband is due to the symmetry of the upload and download flows. This is a substantial difference between FTTH and VDSL. Clear cut frontier between broadband and very high broadband is thus necessary.

3.5. Where the bitstream relates to different services than copper ones, the tariff definition must be flexible enough to allow risk sharing and price flexibility in the retail market.

However in a VDSL scenario and in the very usual case where SLU has been found not being economically viable, NRA must ensure that the wholesale bitstream tariff allows the alternative operators to compete under fair conditions and compensate the disappearance of LLU. In such case, NRA should impose cost orientation to bitstream tariffs.