



CABLEEUROPA S.A.U. Calle Basauri 7/9, Urbanización La Florida 28023 Aravaca – Madrid

## **ONO response to the European Commission consultation on a Draft Recommendation on regulated access to Next Generation Access Networks (NGA)**

14 November 2008

### **I. Introduction**

ONO is the leading alternative provider of telecommunications, broadband Internet and pay television services in Spain and the only cable operator with national coverage. ONO offers its services to almost 1.9 million residential cable customers through its own last-generation hybrid fibre-coaxial network which gives direct access to nearly seven million homes across Spain, including the nine largest cities. With a customer base of more than 1.6 million in telephony, 1.3 million in Internet and 1.0 million in pay TV, ONO is the principal competitor to the incumbent telecommunications and pay television operators in Spain. For the second Quarter 2008, ONO generated revenues of €1,632 million and EBITDA of €716 million, on an annualized basis<sup>1</sup>.

ONO highly appreciate the opportunity to comment on the European Commission's Draft Recommendation on regulated access to NGA given the utmost importance and impact of this regulation over investment and market development over the next years. ONO is at the forefront of these developments in Spain. Our last generation hybrid fibre coaxial (HFC) network, upgraded with the DOCSIS 3.0 standard, allows us to position ourselves as an NGA network. In fact, we have started providing ultra high speed broadband services of 50 Mbps in Madrid which safely compete with the incumbent's services.

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<sup>1</sup> More information about ONO's key statistics and financial performance at:  
<http://www.ono.es/pdfs/pdfsinvestor/ONO%20Q2%2008%20Full%20results.pdf>

## II. Comments

1. ONO agrees with the Draft Recommendation that the transition to NGAs raises new regulatory questions which some regulators (e.g. Ofcom in the UK, Arcep in France, TKK in Austria and CMT in Spain) are already dealing with but not always in a consistent and harmonized way. In particular, we note:
  - A diverging degree of reliance on access to passive infrastructure (market 4) as an effective way to promote alternative fibre infrastructure, which ranges from some scepticism (Ofcom) to full reliance (Arcep).
  - A diverging approach to wholesale broadband access (WBA) remedies (market 5), specially on the issue of pricing principles, which ranges from no regulation at all (Arcep, CMT for offers above 30Mbps) to cost-pricing regulation (CMT's in the so called zone 2 for offers up to 30 Mbps) through Ofcom's light "anchor pricing" approach.
2. Whereas we think that the viability of access to physical infrastructure to bring about competition in a NGA scenario might have a strong "national" component that justify diverging approaches, consistency with remedies adopted with regard to wholesale broadband access demands an harmonized approach across the Community.
3. The Draft Recommendation, however, seems to adopt a completely contrary approach: while it is excessively prescriptive with regard to access to ducts, it is ambiguous as to how best to achieve consistency between this measure and an upstream remedy such as wholesale broadband access.
4. In effect, in the Draft Recommendation we note a bias in favour of access to ducts at historic costs (existing ducts) that on the one hand might not be justified under national circumstances and, on the other, implies a departure from the Regulatory Framework (which does not prejudge a particular pricing principle when access is imposed) and current EC practice (which recommends LRIC pricing for regulated services).
5. National circumstances play a role at deciding whether access to ducts is both a proportionate and an effective measure to ensure competition in a NGA scenario. This is so because the likely success of this measure depends on a

- number of national-specific factors, such as availability of duct space, the ability shown by NRAs to enforce access to the incumbent's physical infrastructure (e.g. ULL) in the past, the presence of alternative cable operators (which reduce the economic feasibility to deploy a third and fourth network) and socio-demographic variables (population density and broadband penetration).
6. The pricing principles applied by NRAs to the SMP's wholesale access services, whether they refer to passive or active network elements, have an important impact over the prospects for the deployment of alternative NGA infrastructure by the incumbent and alternative new entrants as well as for the sustainability of infrastructure competition provided by cable operators.
  7. However, whereas the Draft Recommendation formally acknowledges the importance of infrastructure competition and of regulating NGA networks in a way that do not distort the incentives to invest, it prescribes a pricing principle for existing duct access (historic costs orientation) which collides with the objective of preserving an important source of sustainable infrastructure competition such as cable. This might be due in part to the fact that the Draft recommendation seems to be committed to ensuring the economic feasibility of alternative fibre through ducts and forget the presence of cable networks (which can be easily upgraded to NGA networks) in areas where an NGA deployment is most likely.
  8. Access prices do not only affect the incentives to invest by the incumbent and alternative service operators, **but also the incentives faced by a cable operator**. This is certainly the case in Spain, where cable networks have been deployed "from the scratch" ever since the start of the liberalisation process in 1997. During this 11 year period, ONO has largely replicated the incumbent's network, both in term of access lines (8,110,000 access lines vs Telefonica's 16,660,000) and of duct deployment. This means that, at least in the Spanish case, it cannot be argued that the duct network is a nonreplicable bottleneck asset which demands a heavy-handed regulatory approach in order to ensure competition, especially in a context of NGA deployment, where it is highly likely that the Telefonica's and cable operators' footprints closely match each other.



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9. Regulation at historic costs, or even at the current costs of a **large scale operator**, would transfer the legacy advantages enjoyed by the incumbent to new non infrastructure-based operators entering the market. This, in turn, **goes to the detriment of cable companies**, which have (and are) incurring higher deployment costs. In addition, this regulatory approach would not be technologically neutral as it would favour a model of NGA deployment based in fibre-only (as opposed to an alternative deployment of a hybrid fibre-coaxial NGA cable network capable of ultra-high speed access) which is not fully independent of the incumbent's decisions (when alternative operators deploy fibre through the incumbent's duct network they depend on the decisions adopted by the incumbent as to where and when to "dig" ducts).
10. In our view, in order to provide the right signals for efficient investment and market entry in the context of NGA network development, access prices to ducts, if regulated at all, should be set according to the current costs of an efficient operator. This will not necessarily be the incumbent, but in line with the Draft European Commission Recommendation on (mobile) terminating rates, an efficient operator operating at 1/n scale (n representing the number of network operators deploying ducts, which can be set as two for the Spanish fixed infrastructure market).
11. Conversely, the Draft Recommendation is vague about the consistency between such over prescriptive and biased policy to assist new entrants to deploy fibre through ducts and the principles to be applied to regulating a "downstream" access remedy to active network elements in market 5. In this regard, the Draft Recommendation merely states that:

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

Some clues about the way this is to be interpreted by NRAs may be found in the Explanatory memorandum, which states:

*"where access to active elements is mandated, this should not undermine investment closer to the customer or deeper in the network."*

12. However, as we have said before, in practice different regulators (Ofcom, TKK, Arcep, CMT) seem to be adopting different views about the way consistency between pricing of access to physical infrastructure and access to active elements is to be achieved without apparent justification in diverging national circumstances. Therefore, it appears to us that further clarification on consistency between market 4 and market 5's remedies should be included in the Draft Recommendation in order to ensure harmonisation.
13. In this respect, ONO considers that if access to ducts is mandated then **cost-oriented prices for wholesale broadband access** would not be coherent with such measure as it gives alternative operators incentives to “rent” the incumbent's network instead of investing in deploying their own fibre.
14. In addition, cost-orientation for wholesale broadband access is always detrimental to investment when there is alternative cable infrastructures competing with the incumbent, as cable operators have no option but deploying its own network at current market costs. This “negative incentive effect” on alternative investment is compounded when the incumbent is obliged to develop an ALA (active line access) service which gives the alternative service operator the possibility of designing an independent retail service from that of the incumbent, something which cable operators have only achieved at the cost of heavily investing in alternative infrastructure.
15. This concern seems to have been shared by other regulators, such as Ofcom, Arcep and TKK, as they have avoided the imposition of **cost-oriented prices** for bistream services. Therefore, while Arcep does not impose obligations to provide wholesale broadband access at all, Ofcom has imposed no price regulation for these services in the non competitive markets (market 1 and 2) on the basis that *“in a developing market characterised by growth and innovation, such as broadband, there is a risk of setting the price control at an inappropriate level. In particular, in such a situation there is a risk a price control could result in a reduced level of investment in the market, which would ultimately be to the detriment of UK citizens and consumers.”* Likewise, the Austrian regulator, TKK, only imposes an obligation on the incumbent of providing wholesale bitstream access in the less competitive area **at retail-minus prices**. This pricing principle is clearly less intrusive with investment incentives than cost-

orientation, as it is closer to a price regulation based on reasonable prices not implying a margin squeeze.

16. In order to contribute to harmonization, the Draft Recommendation should draw on the regulatory practice described above and recommend NRAs not to impose cost-orientation in market 5 where they have imposed cost-oriented access to physical infrastructure (market 4) or there is alternative cable infrastructure present in areas where the incumbent deploys its NGA network.
17. The Draft Recommendation also touches on the issue of geographic market segmentation. However whereas in the 3rd “whereas” it rightly points out that “caution should be exercised in prejudging the extent of [geographic variations in] network competition”, the Draft (in “general principle” 16) seems to encourage the use of sub-national markets when it states that:

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

18. The question of the need for sub-national markets is one on which NRAs have taken a variety of stances. Ofcom for example has apparently concluded that sub-national markets are necessary in order to impose sub-national remedies, whilst other NRAs argue that national market definitions still allow for geographical differentiation of remedies. By contrast, The Spanish CMT, in its recent notification on markets 4 and 5, has concluded that whereas market 5 is of national dimension, there are geographically differentiated pressures that justify geographically differentiated remedies.
19. However, the analysis of geographically differentiated pressures in these notifications has been mainly driven by the extent of ULL deployment at the incumbents’ exchanges and has not taken into account the deployment of NGA networks. In our view, “the need to define geographic market” is precisely very much reduced when “taking into account the competitive conditions created at both a national and sub-national level by the progressive roll-out of NGA networks”.



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20. In effect, on the one hand under an NGA scenario the presence of ULL operators at local exchanges -in order to assess whether the incumbent might be subject to a competitive constraint in the WBA market- is irrelevant as ULL does not provide a way to enter the NA market. On the other hand, as the incumbent NGA's offers can only be replicated with either cable self-provision or alternative fibre deployment by operators enjoying access to ducts (a market 4 remedy), the relevant question in order to consider the geographic dimension of a notional NGA WBA market is whether the mere presence of cable networks or the economic feasibility of alternative fibre deployment through ducts will determine different geographical competitive pressures **within the incumbents' NGA footprint** that justify geographically differentiated markets or remedies.
21. However, as the European Commission points out in the Relevant Market Recommendation and in its comments to Ofcom's notification, additional structural and behavioural evidence to the mere presence of alternative network is necessary in order to conclude whether conditions of competition within a geographic area are similar or sufficiently homogeneous. Clearly, such evidence (distribution of market shares and their evolution, pricing of both the incumbent and alternative operators, differences in the functionalities of the services being offered, etc.) is not available for NGA services yet and therefore the whole exercise is nonsense at this stage.
22. Finally, it might be worth mentioning that on the basis of our comments above we have made a number of comments to the CMT's review of market 4 and 5, in the sense that a consistent set of remedies for these markets under an NGA scenario should include:
- An obligation to provide access to ducts at current prices incurred by an efficient operator holding a 50 % of the access market. This would give the right signals for efficient investment by new infrastructure operators while not jeopardising the prospects for existing competitive cable infrastructures.
  - An obligation provide a line active access (ALA) service where and when the PSM operator intends to provide own retail services over fibre NGA networks. As this service is intended **to temporarily assist operators**



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**deploying their own fibre through the incumbent's ducts** it will be offered at **reasonable prices** and should be removed when the CMT, upon continued market surveillance, detects that it is not longer necessary to sustain alternative infrastructure deployment.

Please do not hesitate to contact us at [carlos.olivo@ono.es](mailto:carlos.olivo@ono.es) should you wish further clarification of the points raised in this submission.