

Response from the Independent Post and Telecommunications Regulator (OPTA) to the public consultation on the Commission's Recommendation on regulated access to Next Generation Access Networks (NGA).

Introduction

First of all I would like to mention that OPTA fully agrees with both the reaction of the ERG and the reaction of the Netherlands on the draft Recommendation on NGA-access. From our national perspective and experiences as NRA on NGA-regulation we would like to take the opportunity to raise your attention to some specific issues we have encountered so far.

OPTA shares the goals that the EC has set out in its draft Recommendation. OPTA has already encountered regulatory dilemma's due to our incumbent's plans to roll-out a NGA. On November 5th 2008 we notified our market analysis decisions of the access markets 4 and 5 to the European Commission. In these decisions OPTA proposes a set of remedies fit for NGA regulation, which aims at promoting infrastructure competition based on access to subloop unbundling and fibre unbundling (access to the optical distribution frame), both including backhaul as an ancillary facility. Wholesale broadband access on fibre will only be lightly regulated (only high quality (business) services). Duct access is not imposed as an SMP-remedy. Duct sharing is already regulated on the basis of a general, symmetric facility sharing provision in the Dutch Telecommunications law. The Dutch scenario is probably a unique combination of elements, since there are no ducts used in the existing (copper) access networks, there is a high penetration of cable access networks and the incumbent is planning to use Point-to-Point-fibre in its NGA. Our choices for NGA regulation fit within the goals as set out by the EC, specifically the stimulation of investments in NGN and the promotion of infrastructure competition through the principle of the ladder of investment.

No one-size-fits-all approach and flexibility individual NRA's

While OPTA supports the aim of the Recommendation to provide NRAs with guidance that will form the basis for a consistent and coordinated regulatory approach OPTA also underlines the issue raised in the reaction of the ERG that a detailed one-size-fits-all approach is risky in this early state of regulatory experience with NGA deployment and regulation. There is still limited experience with the effectiveness of remedies in the context of NGA networks so it is important that NRAs maintain flexibility in applying the most appropriate remedies depending on national circumstances. In this light OPTA has the opinion that the Commission puts too much emphasis on ductsharing, especially since such a remedy will have no effect in the Netherlands, due to the lack of ducts in the access networks.. This example shows that the draft recommendation does not provide enough flexibility for NRA's to use the most reasonable and proportionate set of remedies towards NGA networks.

Furthermore, as mentioned in the ERG reaction, some of the proposed rules by the Commission are very detailed and too prescriptive, without any explicit reasoning for that, while other important issues are not addressed at all. An example of a premature conclusion is that the Commission states¹ that duplication of infrastructure should be avoided where it is impractical or undesirable, *such as in-building wiring*. OPTA has experienced in concrete cases based on the general symmetric facility

¹ Consideration 7 of the Draft Recommendation on regulated access to NGA

sharing provision in the Dutch Telecommunications law, that in some circumstances there is a business case for duplication of in-building-wiring. A statement by the Commission implicating that duplication of in-building wiring is impractical or undesirable is likely to harm such a business case.

OPTA also thinks that the Commission is too prescriptive on the issue of pricing. OPTA supports the general view of the Commission that the return that is allowed ex ante on equity capital to finance NGA networks should strike a balance between providing adequate incentives for companies to invest, while at the same time promoting efficiency and sustainable competition and maximizing consumer benefits, but it is very premature and risky to set specific tariff-principle rules. There is still limited experience with tariff-principles in the context of NGA-regulation.

Furthermore the (type of) risk of NGA-investment will likely vary considerably across Europe and even within member states. Probably the most important factor influencing the risk of NGA-investment in the Netherlands is the expected (growth of) the penetration rate of the NGA infrastructure, which, among other things, is influenced by the success rate of the cable companies who can also offer triple play services. At this early stage of NGA-development OPTA thinks it is particularly important for NRAs to maintain flexibility in the development and execution of pricing regulation to gain experience. These experiences can be shared between member states within the ERG and result into a more in-depth study on factors influencing the risk of NGA investment and on tariff-principles.

Regulatory certainty

Another important factor which is important for investment decisions that we encounter at this moment, but which is not present in the draft Recommendation, is that market parties seek for more regulatory certainty and long term tariff-principles that go beyond the life cycle of market analysis decisions. Although briefly mentioned by the Commission no clear guidelines are given within the Recommendation on how to implement these within the existing European framework. We therefore strongly support the mentioned invitation in the ERG response to the Commission to give NRAs more guidance on this issue by providing the tools and flexibility to NRAs to give sufficient regulatory certainty to market players for a sufficiently long period in order to encourage efficient investment in infrastructure.