

Comments on the Draft Commission's Recommendation on Regulated Access to Next Generation Access Networks (NGA)

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I. Introduction

Sonaecom believes that the proposed Recommendation is of great importance for the competitive development of Next Generation Access Networks (NGA) in Europe. The regulatory instruments proposed there are, in our opinion, adequate for the successful balancing of the interests involved: investment incentives and the promotion of competition in the market.

Additionally, it addresses the fundamental issue of creating a common market within the EU. This issue, due to the structural nature of NGA for the future of the European electronic communications market, is of paramount importance and must not be downplayed.

It is even more relevant when it is acknowledged that the current international financial crisis has a deep impact upon operator's investment capabilities, thus reinforcing the urgency of minimizing regulatory uncertainty.

In this regard, and looking at the European regulatory landscape, one finds that many regulators, as is the case in Portugal, are late in providing the market with regulatory guidance for NGA deployment, thus benefitting the incumbent. It is common knowledge that the incumbents are the ones which benefit most with the absence of regulation in this regard, since it is them who control the essential facilities for NGA deployment.

The Portuguese case is similar to others occurring throughout Europe: under the umbrella of the regulator's lack of decision, the incumbent plays a strategic game where it publicly refuses to invest on a FTTx network, asking for a regulatory holiday as the only way to ensure its investment, while it deploys fibre "under the radar" so that as soon as the rules are set (which is in the incumbent's interest to delay as much as possible) it may start a commercial sweep of the already connected households.

Sonaecom believes that this "bluff" must be called out since, as all players acknowledge, NGA is inevitable in the medium term and no incumbent is in a position where it can let this opportunity pass. What is not (unfortunately) an inevitability is that this roll out will be made in conditions of equivalent and transparent access to essential infrastructures such as ducts, street cabinets, concentration points and fibre and that, competition conditions will be similar throughout European markets.

Thus, it is in these dimensions (enforceability of remedies and the need of equivalence of access and transparency) that the present Recommendation is of paramount importance and where Sonaecom believes it must be reinforced so that it may effectively fulfill its objectives.

The remainder of this document further develops Sonaecom concerns on the subject matter, which are mainly focused on the lack of mechanisms to minimize deviations from the proposed approach and the deconstruction of some myths we believe exist regarding duct access in Portugal, while highlighting the main concerns to be tackled for an effective and non discriminatory access to this facility.

II. On the role of the proposed Recommendation towards a common market

As stated above, regulatory certainty is essential to the competitive development of NGA. This is so, since all incumbents are already deploying fibre in their ducts, even though this investment is not made public due to strategic reasons. Portugal is a clear case of this strategic behavior, since Sonaecom has already detected several FTTH deployments of the incumbent and the migration of local loops from the main central offices to remote access points is well underway at least since 2006.

However, these actions have been occurring without any ex-ante control of the regulator, which, we fear, may lead to market preemption by the incumbent.

It is within this context that we believe that the Recommendation may play an important role since, if it is taken seriously by national regulators, it will provide, while they do not take any final decision, a regulatory guidance on what kind of regulation will exist.

But for this guidance to be more effective, it is essential that less leeway is given to NRA's to deviate from the regulatory guidance which is given by this Recommendation.

This, in our view, can only be achieved if there is a clear statement that each remedy proposed on the Recommendation must be analyzed by the NRAs and, in case of a decision that does not adopt one or several of them, a detailed and reasoned justification must be given.

The objective of such procedure is to ensure that there are clear reasons that justify, for any recommended remedy, its non adoption by NRAs. In this way, in time, there will be a comprehensive identification of market idiosyncrasies which justify the non adoption of each specific recommended remedy and, thus, a valuable tool for the harmonization of market conditions throughout Europe.

III. On the role of equivalence of access and transparency

When deploying NGA time to market is critical. All studies call out to the fact that the first operator deploying infrastructure in any given zone will have a higher market share than the ones who arrive at a later date.

Thus, one cannot understate the relevance of a level playing field in what regards network deployment. For this to be a reality, it is essential that the procedures to access essential infrastructures are the same for all operators. The emphasis of regulatory action must no longer be solely directed to pricing issues but, also, to the processes which impact the speed of network deployment.

For this, the effective application of the principle of equivalence of access is essential. Sonaecom has for a long time been advocating the relevance of functional separation in this regard. Although it falls outside the scope of this Recommendation, one cannot but stress its relevance as an effective mean to ensure equivalent access conditions to all operators.

However, this can be achieved if the equivalence principle is imposed while its compliance by the notified operator is closely monitored by NRAs.

This principle's relevance is not exhausted in FTTH/B deployments, but also FTTC, including the copper loop segment.

Thus, Sonaecom strongly urges the Commission to explicitly state in the body of the Recommendation that this principle is to be applied in all offers involved in NGA (including current or adapted local loop unbundling offers).

Additionally, **the reference to this principle in the Recommendation must be accompanied by close supervision of its implementation in the field by NRAs, which must not be confined to the publication by the notified operator of the level of services effectively given to its own subsidiaries vis-à-vis its wholesale clients (alternative operators).** Regular compliance monitoring actions should be made, with special emphasis on the processes and relevant systems used by the vertical integrated operator's business units vis-à-vis the ones used by its competitors.

Regarding transparency, Sonaecom wishes to address its specific importance to a competitive and non-disruptive migration plan from the current legacy environment to a NGA scenario.

Sonaecom does not foresee any situation where a NRA may reach the conclusion that no action is required in this regard. Thus, we are very concerned with the Recommendation proposal of NRA's "inviting" operators to negotiate between themselves the terms that this migration should follow.

This is a critical aspect where no incentive for negotiation can be identified on the notified operator's side. This invitation for commercial negotiations will only lead to further delays and an additional time advance for the incumbent to ensure a "matter of fact" position in the market.

For example, a relevant component of this negotiation will surely be the characteristics (such as space and number of clients connected) of street cabinets to be deployed. As long as the negotiation is delayed, the incumbent will have more leeway to proceed with technical options which do not ensure a minimum set of conditions to ensure technical and economic viability to alternative operator's investment.

Thus, Sonaecom strongly urges the Commission to revise its proposal in this regard and clearly exclude of the private negotiation process the conditions by which the migration process should proceed.

Additionally, **the Commission should be more specific on issues to be addressed in this matter. A minimum set should be put forward to NRAs, which should clearly include minimum timings for decommission of central offices, compensations (which may be financial or in terms of specific conditions in accessing relevant network components) in cases where no sufficient time was given in terms of prior notice or no replication conditions were ensured (which will be the case of the situations where the incumbent made changes**

to the network before any regulatory guidance on its terms was provided), non-disruptive customer migration processes and, of course, always under the equivalence of access principle.

in this regard, the Commission generic reference to the publication of this information is clearly insufficient.

IV. On the Portuguese experience with duct access

Portugal as, for some time, been acknowledged as a reference in Europe due to the fact of being the first country which mandated duct access.

This is a fact. However, what is not so true is the success of this experience. The incumbent usually stated that from the 24 thousand kilometers of ducts it possesses, operators have deployed fibre in 11 thousand kilometers of those.

However, one must make the following questions:

- To whom are those 11 thousand kilometers of fibre rented to?
- When was it deployed?
- What is the proportion of access network vis-à-vis backhaul?
- Regarding the component that relates to the access network what is the share of the former PT Group company Zon Multimédia (the main alternative cable operator which spun off from PT Group in November 2007)?

When analyzing the answers to these questions, the Commission will certainly find that the main external user of PT's ducts is Zon Multimedia and that the installation of its fiber occurred quite before the above mentioned spin off and outside the rules of the current duct access offer.

Thus, the success portrait that PT Group describes is, in fact, the result of years of discriminatory behavior favoring one of its former affiliates and not the result of the usage of the current offer.

In fact, with the current offer, it is impossible for operators to efficiently deploy, within the access network component, their own fibre:

- First of all, the duct access offer does not include access to poles which, in the case of Portugal, are of paramount relevance. PT has put forward a non regulated offer which does not have any penalties for SLA breach and, accruing to this, has SLA's which are the double of the ones which the regulated duct offer provides (which, as we will see later on, are already clearly insufficient). Also, and in this regard, the prices set out for pole access are clearly abusive;

- Secondly, it is unsustainable a situation where operators do not have access to information regarding duct occupancy. This information is only made available on a per request basis, which implies that already at this stage PT will know what areas operators are planning to address. Since, as already mentioned, time to market is critical, we cannot understate the competitive advantage that this process gives to PT.

Due to this process, PT has access to the detailed deployment plans of alternative operators with one month prior notice.

Meanwhile, it is public that PT is changing its own network, by deploying fiber to the cabinet and FTTH. At least, in these areas, there is no doubt that PT already possesses a full description of those ducts occupancy and there is no reason to not provide this information as it goes updating its databases. Alas, that is not the case.

- Thirdly, there is a clear discrimination in processes when dealing with municipalities when it comes to obstructions (situations where, in the installation process, the cable is impeded to pass because of, for example, debris in the duct). Whenever a de-obstruction is necessary, PT submits the process for approval in the municipality, which implies a severe delay in the installation process. However, for its own services PT assumes the operation as an emergency intervention and does not involve the municipality, thus ensuring a quick and cost effective solution.
- Then, fourthly, there are also restrictions regarding viability requests which are rejected due to lack of space. Although alternative operators are able to ask for an alternative path, there are restrictions on its length thus jeopardizing its feasibility.
- Other issue relates with the penalty system. PT is only obliged to pay compensations for SLA breach if the operators provided it with sufficiently accurate estimations (20% margin of error) of their demand of duct access (with a 6 month prior notice). This is a clear problem in two ways: first, it implies that operators are providing visibility on their macro deployment plans with a 6 month advance; secondly, it is very difficult for a operator, within a dynamic market such as this, to commit itself with a 6 month prior notice to the areas it will be deploying. This is, in fact, a restriction on their strategy and there is no clear argument to support this demand.

Of course, the disproportion of these demands only favors PT, since whenever the estimations fail, there are no penalties for not fulfilling the established deadlines.

- A sixth aspect relates to rules for intervention in the duct network. PT obliges operators to certify their personnel in accordance with a specific set of requirements. This aims to ensure that all personnel is aware of the rules by which duct intervention should abide. However, in addition to this, PT also obliges operators to pay an “escort service” by PT’s employees which have the sole obligation to observe the alternative operators’ personnel work. This is unreasonable, since the certification process envisages exactly this and only serves one purpose: to delay interventions, since they have to be scheduled.

- Finally, the SLA's which are provided are clearly insufficient, as the aforementioned case of obstructions clearly indicates: there is no SLA for PT to submit the intervention request within the municipality services, neither any mechanism to ensure effective pressure on the services to solve the issue (municipalities do not have an SLA themselves).

Transversal to all these problems is the issue of PT own services not being subject to these rules, which gives greater relevance to the applicability of the equivalence of access principle.

Taking into consideration all that was described above, Sonaecom believes that duct access in Portugal cannot be considered as a positive experience and the lack of regulatory action regarding these issues is cause of great concerns to alternative operators.

We cannot be more affirmative: the Portuguese duct access offer is not viable to mass network deployment since it is discriminatory, incomplete and deeply flawed in what regards the processes which it includes.

Sonaecom urges the Commission to take these problems in consideration and insert, with more detail, the elements that NRA's should include as a minimum set of conditions for duct access offer. A on-line, secured, database with duct availability and occupancy, processes in accordance with the equivalent of access principle, cost oriented prices, compensations independent of the provision of demand estimations by alternative operators and the reliance of an accreditation process by which the alternative operators personnel will be entitled to install fibre within the notified operator's duct network without any further bureaucracy are essential aspects to be included in such list.