



Virgin Media response to draft Commission Recommendation on Regulated Access to Next Generation Access Networks

We welcome the opportunity to contribute our thoughts to the Commission's draft Recommendation on regulated access to Next Generation Access Networks (NGAs). Access networks are undergoing a fundamental evolution and, as the Commission recognises, the development and deployment of these networks is critical to enabling the competitiveness, productivity and continued prosperity of the European economy. In order to deliver such traits, we believe that it is essential that any underlying regulatory environment is appropriate and proportionate and provides the necessary clarity and certainty that stakeholders will require. Subject to our comments below concerning the scope of the Commission's objectives, Virgin Media is generally supportive of the stated aims of the Recommendation. However, we have a number of concerns with the suggested approach, certain of the principles that the Commission believes should underpin such a regulatory environment and with some of the proposed remedies. We set out these concerns, together with our further comments, below.

Virgin Media is at the forefront of this fundamental change to access networks. As the UK's principal Cable operator, we provide telephony, broadband and television services to over 4 million customers. We have already made substantial investments in next generation facilities and operate a hybrid fibre coaxial (HFC) infrastructure which is a next generation network in its own right. This network architecture provides a fibre to the cabinet (FTTC) solution that is able to reach in excess of 50% of UK households.

Moreover, Virgin Media is in the process of upgrading its cable network further in order to supply higher bandwidth services. This will result in the roll out of a 50Mb/s product to our cable customer base commencing in late 2008.

Overall Approach & Objectives

Virgin Media broadly endorses the Commission's objective to "*provide regulatory certainty and foster investment and innovation for the benefit of all parties involved*". However, we believe that the scope of this objective should be broader and more specific than stated such that in addition to providing an environment that will foster efficient and timely investment in next generation infrastructures it must encourage investments that are sustainable. A key facilitator towards achieving such sustainability will be to avoid the creation of regulatory cul-de-sacs. Any remedies that are prescribed, including specific

technical aspects and their corresponding infrastructural configurations should, as far as possible, be future proof. Sustainability also requires regulatory commitment such that it allows investments to be recovered over the lifetime of the asset.

Of equal importance is the need to create an environment that permits investments in NGA that have already been made to flourish. Absent of such an environment, the investments required to enable the deployment of NGAs are unlikely to materialise (or in the case of investments that have already been made, may be either undermined or onward investments reduced), particularly in the current economic climate. On this basis we believe that the regulatory approach that is adopted by the Commission should allow markets to evolve through competition, driving innovation and consumer choice in nascent markets. This approach should encourage NRAs to intervene only as and when absolutely necessary. Disproportionate and/or premature regulatory intervention will serve only to stifle investment and thereby competition and innovation.

We note the Commission's desire to achieve a consistent pan-European regulatory approach, and to avoid a divergence of methodology across member states. While we accept that a co-ordinated and common regulatory approach is desirable and has tangible benefits, we believe that in the case of NGAs, such a philosophy should be most apparent at the higher principle level, as opposed, for example, to necessarily manifesting itself in the rigid application of a confined set of common remedies. Succinctly, we believe that greater consideration must be afforded to specific national circumstances and the legacy and emerging characteristics of individual member states. Accordingly, while unquestionably needing to be underpinned by common, pan-European principles and objectives, we consider that any remedies applied in particular countries must necessarily take account of the particular competitive and infrastructural conditions of those jurisdictions. In this respect we support the ERG view that a key deliverable of any Commission Recommendation on NGA should be uniformly effective regulation across the European Union as opposed, at the extreme, to a generic set of hard-wired remedies. That such an approach is particularly critical for the roll out of NGAs is borne out by the broad variety of legacy infrastructure configurations, regulatory environments and market dynamics in existence across the EU – and indeed the availability of multiple prospective NGA configurations. It is true to say also that NGA consumption characteristics will vary between member states. For example, there is considerable divergence of maturity in television markets and their associated distribution mediums, which will likely have a significant influence on the extent to which NGA is employed in such a capacity. It is therefore unlikely that a 'one size fits all' approach would cater for the individual needs of particular countries.

The mandating of a constricted or overly prescriptive set of 'central' remedies would likely cause severe disruption and instability in many member states and most likely undermine both existing and future investments. On this basis, NRAs should be afforded the freedom to exercise their discretion based on the specific circumstances within their jurisdiction – and not be constrained by

a rigid set of central requirements. Close co-ordination between independent NRAs is important, but we do not believe that it is essential for remedies to be the same in each member state.

The Commission considers that the promotion of infrastructure based competition and with it competition at the lowest viable network level should be a key aim in the regulation of NGAs. At a conceptual level, Virgin Media believes that it is appropriate and consistent to perpetuate what is effectively a key tenet of existing access regulation philosophy – and indeed that such principles should prevail where practically and economically viable and sustainable. However, we are of the view that in practice, the differing competitive and infrastructural conditions in individual member states will result in the need for a broader approach that allows for a mix of passive and active remedies and indeed variations thereon. An overly prescriptive focus on, for example, mandated access to raw network elements would, to Virgin Media's mind, likely serve only to constrain investment in, and hence the roll out of, NGAs. We expand on this point in our comments on remedies and the regulatory framework below.

Markets and Competitive Conditions

As the Commission and many other observers have concluded, a considerable amount of uncertainty exists with regard to the demand for the products that NGAs will deliver, the nature of those products and indeed the markets in which they will materialise. As such, we believe that the timing of any regulatory intervention is crucial to the successful roll out of next generation infrastructure and services. While the roll out of NGAs has commenced in some member states, in the vast majority of cases such deployment is nascent. NRAs should not therefore make decisions based on a speculative view of demand as representative competitive conditions and market characteristics will take time to materialise. In this respect we welcome the Commission's view that unless there are clear indications of a break in the chain of substitution as compared to current product markets, services provided over NGA networks should be considered as incremental upgrades and therefore not treated as new markets. Further, we fully support the premise that where, based on a clear and adequate justification, an NRA finds that a service provided over NGA networks constitutes a newly emerging retail market, inappropriate wholesale obligations should not be imposed.

We note that the Commission considers that the rollout patterns and varying configurations of NGA deployment may lead to differing internal competitive conditions within member states. While we accept that in the longer term there might be a need to account for such characteristics, we would urge caution in any consideration of geographically varying characteristics. Any analysis of such circumstances needs to be very carefully undertaken - and must not be done prematurely. Given the nascence of NGA and with it the likely irregular evolutionary path, market dynamics must be given time to settle/mature – and as such the Commission and NRAs should not pre-judge any prospective emergence of geographically varying competitive conditions. There will undoubtedly be calls for the definition and formal establishment of

sub-national markets, and with them geographically segmented remedies. On this point, Virgin Media would suggest that where competitive conditions do differ, it does not necessarily follow that current regulatory models would be appropriate. For example, notwithstanding our comments above on substitutability between existing and new next generation markets, we do not believe that the regional geographic markets (and remedies), as recently applied to the UK market 5, should simply be superimposed on to an NGA environment.

At its extreme, an overly prescriptive application of geographic segmentation at the regulatory level could lead to the creation of a high number of 'micro markets' – the management of which would be burdensome and inefficient for both NRAs and undertakings. Furthermore, it is not inconceivable that the application of sub-national regulation could result in the emergence of consequential side effects, such as margin squeeze or anti-competitive cross-subsidy, the monitoring of which would also increase the regulatory burden. We therefore urge the Commission to encourage NRAs to allow sufficient time for emerging markets to mature, and to take a proportionate and efficient approach to instances of geographically varying market conditions.

Remedies and the Regulatory Framework

In general terms, Virgin Media does not see the need for fundamental change to the ECNS Framework in order to support the emergence of NGAs. While certain specific adjustments will undoubtedly be required, we support the Commission's approach of perpetuating the general principles and believe that, subject to adjustments and the provision of clarity, the underlying Framework in its existing form is capable of providing for the regulatory issues that are likely to arise as a result of the deployment of NGAs.

Notwithstanding the concerns set out above in relation to the need to avoid inappropriate and premature application of formal regulation, we believe that the remedies proposed by the Commission are too binary in their constitution. On the one hand, there would appear to be an over-emphasis of 'raw' passive remedies (such as Duct Access and access to Dark Fibre). On the other hand, the Recommendation prescribes the application of (generic) active 'bitstream' remedies where these raw passive solutions prove to be unfeasible. Virgin Media believes that a broader range of remedies should be available to NRAs, taking account of investment risk, economic sustainability and consumer demand. We consider there to be a number of additional intermediate variants between the two extremes that the Commission has prescribed – each of which would be suitable for the purposes of achieving the stated objectives, depending on the prevailing circumstances in each member state. By way of example, we believe that managed RF over fibre (very simply the provision of access, by the fibre owner, to spectrum on its network) would be a viable alternative option. The nascence of NGA rollout provides an opportunity for regulators and undertakings alike to investigate the range of solutions that are available.

While we broadly concur with the view that in 'green field' build circumstances, where any newly provided facility is likely to constitute a bottleneck, the provider of the access infrastructure should deploy raw passive elements in such a way that facilitates sharing or access by third parties, we believe that the mandating of access to such 'low level' infrastructure that is already in existence needs to be very carefully considered on a member state by member state basis. It is a statement of fact that the availability and indeed economic and logistical feasibility of access to raw passive network elements – in particular to ducts - is likely to vary considerably. Such infrastructure will, in many cases, have been installed without shared or third party access in mind (instead having been installed to serve a particular operator's business plans and to accommodate their own current and planned future facilities). Mandating of access to legacy duct would therefore very likely lead to the original business cases for its provision being undermined, to the detriment of the original investor. The same will arguably be true of other types of raw passive network element. Accordingly, we are of the view that in its guidance to NRAs, the Commission should prescribe a broader range of potential remedies such that the diversity of legacy infrastructure configurations can be accommodated. While mandated access to raw passive network elements such as duct could constitute a complementary component of a suite of possible remedies, it should not, of itself, be seen as a panacea for infrastructure competition. Infrastructure based competition can be achieved with less 'utilitarian' extremes of passive remedy.

We welcome the fact that extending from the Commission's objective of encouraging investment in NGA is the recognition that investors in NGA should be permitted to earn an appropriate return on these investments – and for these returns to reflect the higher risks associated with deploying such infrastructure. As mentioned above, Virgin Media believes that the need to foster a regulatory environment in which investments are not only encouraged but will be sustainable is of paramount importance. There is evidence to suggest that legacy regulation has in certain circumstances possibly encouraged investments that are not sustainable – in particular where mandated access to bottlenecks may have undermined the incentive to invest in new infrastructure. We believe that the benefit of hindsight provides an opportunity to consider models that will deliver longer term sustainability of investments in NGA infrastructure. Supporting the need for this more enduring view is the fact that NGA investment lifecycles will be longer and assets will be depreciated over greater periods of time than has traditionally been the case with telecoms infrastructure. As such, investors need to be able to recover their investments over a sufficient duration.

The consequences of applying overly intrusive or prescriptive regulation to incumbents need also to be carefully considered in any setting of remedies. Invasive incumbent regulation carries a very real risk that competitors' investments and business cases will be indirectly undermined. In this respect we support the ERG's belief that regulators of NGAs should stimulate efficient investment by competitors as well as incumbents, leading to greater consumer choice.

A specific case in point is the situation in which price controls are mandated. We broadly concur with the desire for such controls to be set at a level that balances incentives for companies to invest and innovate in a climate of uncertain consumer demand, with the promotion of efficient and sustainable competition. However, we believe it is of paramount importance for NRAs, when setting prices, to ensure that not only are emerging investments in NGA permitted to make an appropriate return, but also that prices are not set at such a level that indirectly undermines the investments of competing providers that are investing at the same time or, in particular, of those providers that have already invested in NGAs. That is, the Commission should encourage NRAs to take a holistic view when setting prices for access to incumbent networks and consider the wider impact of the levels and/or methodologies that are mandated.

Summary

Virgin Media welcomes the publication of the draft Recommendation and the consideration afforded to the regulation of NGAs by the Commission. In summary, subject to the comments that we have made above we broadly concur with the objectives that the Commission is seeking to achieve and the philosophy that it proposes should underpin them. Our principal reservations stem from the need for the regulatory environment to support sustainable investments and for specific remedies to avoid undermining investments in NGA that have already been made or are planned. Further, we believe that greater consideration should be afforded to specific national circumstances, and that the application of an overly restrictive set of regulatory remedies should be avoided. We therefore urge the Commission to ensure that regulatory intervention does not occur prematurely and is proportionate in the context of nascent markets such that market conditions are allowed to evolve naturally.

We would be happy to elaborate on any of the points raised in this submission at your request. By the same token, we would welcome the opportunity to explain our network configuration and imminent high speed broadband upgrade plans in greater detail. Please do not hesitate to contact Andrew Wileman via the contact details below should you wish to progress either of these points.

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