



COLT Telecom Group SA

Response to
Commission Draft Recommendation on
regulated access to Next Generation Access Networks (NGA)

24 July 2009

EXECUTIVE SUMMARY

Encouraging investment

There is a risk that the political goal of encouraging investment in fibre can easily lead to inefficient investment that detracts from competition and that, in the longer run, can result in significant economic and consumer detriment. There should not be a bias for NGA investment at the cost of maintaining or improving effective competition. The Commission should not accede to the pleas from incumbents for reduced regulatory intervention but should continue to promote competition through appropriate and proportionate regulatory measures, thereby encouraging efficient investment and sustainable benefits for all users (consumers, businesses and the public sector).

State aid

It is absolutely critical that any State intervention is restricted only to “grey” and “white” areas and is expressly prohibited in “black” areas (ie. those areas which already benefit from a good coverage of communications infrastructure). Any decision to permit State Aid for NGA in “black” areas would have a very significant detrimental impact as a precedent for investors in competitive communications infrastructure throughout the EU. The Commission should clarify the following key principles in respect of State Aid for NGA deployment:

- No State Aid or SGEI in black areas;
- No State Aid to duplicate existing fibre infrastructure;
- Any State Aid or SGEI must be subject to a requirement for open tender; and
- A requirement to provide open access.

Business market

Policy and regulatory debates generally ignore the specific communications requirements of business users. This failure has significant negative effects on EU competitiveness. Businesses have distinct communications needs, in particular the requirement for nationwide provision of higher quality services, and these should be recognised in separate market reviews by NRAs. In particular, without access to nationally available fit-for-purpose wholesale broadband access (WBA) services, business users may face a de facto monopoly situation. There is therefore a clear need for continued regulation for access to cost oriented WBA services.

The Commission’s proposals

COLT is supportive of many of the Commission’s proposals in the draft Recommendation. However, we have particular concerns about:

Co-investment multi-fibre schemes

The current proposals would grant too much oligopolistic power to SMP operators (and their chosen co-investors), with the risk of collusive behaviour and market failure in the provision of wholesale access to fit-for-purpose business services.

SMP operator multi-fibre networks

COLT disagrees with the proposal to remove cost orientation requirements for such networks because of: the flawed assumption that a duopoly would provide a sufficient level of competition; the reinforcement of the market power of the SMP operator which would result; the risk of collusive behaviour; and the risks of gaming by the SMP operator.

Margin squeeze tests

The Commission proposes the substitution of margin squeeze tests for pricing equivalence in a number of areas of the draft Recommendation. COLT disagrees with this approach because of concerns about timing and fairness:

- Margin squeeze tests are applied ex post so that there would be a delay in establishing the right price, during which time the incumbent stands to benefit from any unfair practice;
- An imputation test is not a reasonable substitute for a price regime based on the non-discrimination and equivalence. An imputation test only ensures that the downstream business can trade profitably, not that it can compete on an equal basis with the downstream arm of the integrated incumbent. Thus, applying an imputation test encourages discriminatory behaviour.

Discounts and differential pricing

COLT disagrees with the proposal to permit term and volume discounts, and differential geographic pricing. Term and volume discounts invariably benefit high volume mass market players more than other competitors and therefore generally disadvantage innovators and providers of more specialised services, such as business providers. Allowing such discounts therefore is by definition handing an unfair advantage to the incumbent. Differential geographic pricing also operates significantly to the disadvantage of business providers which necessarily need nationally available and consistently priced wholesale off-net access services to meet the demands of multi-site business customers.

Non-price terms

The draft Recommendation tends to focus on pricing but non-price terms of access can also form very significant barriers to competition, and these too require regulatory attention and guidance. In particular, operational conditions, quality of service and SLAs should all be provided on an equivalence basis, and should be available as fit-for-purpose for business customers.

Migration

COLT welcomes the specific provisions in the draft Recommendation covering the mandatory transparency requirements and the minimum notice periods for migration, although these provisions should be made more specific to ensure that the safeguards offered are actually secured in practice.

INTRODUCTION

This document contains the response of COLT Telecom Group SA (COLT) to the Commission's revised proposals for a Recommendation on regulated access to Next Generation Access Networks (NGA). COLT previously commented on the Commission's initial set of proposals for an NGA Recommendation in November 2008 and our comments in this current consultative process should be taken to include the comments we made in November 2008.

COLT is a leading European provider of business communications to major enterprises, SMEs and wholesale customers, offering a broad portfolio of data, voice and managed services. COLT owns and operates one of Europe's most advanced communications networks in 13 countries, through its 20,000km fibre network connecting around 100 cities, with metropolitan area fibre networks providing direct customer access in 34 cities and 18 integrated data centres. COLT complements its own fibre network by the use of off-net connectivity and local loop unbundling.

ENCOURAGING INVESTMENT

It is clear from the tone of the Commission's statements on NGA and from the approach adopted in the draft Recommendation that NGA has become a major political issue, such that the Commission's proposed European Broadband Strategy is likely to contain specific goals regarding the rollout of new high speed fibre networks. The risk, of course, is that the political goal of encouraging investment in fibre can easily lead to inefficient investment that detracts from competition and that, in the longer run, can result in significant economic and consumer detriment. COLT has consistently expressed its concerns that the understandable political desire for greater investment in high speed NGA networks may tempt Member States, the Commission and NRAs towards a new regulatory approach which establishes a bias for NGA investment at the cost of maintaining or improving effective competition. This must not be allowed to happen - establishing and maintaining effective competition is the only guarantee for end users of choice and high quality of service. Without effective competition, the EU's communications providers will be less responsive to the needs of end users and, as a result, the EU's competitiveness will suffer.

The dichotomy between investment and competition is a false one. It is misleading for proponents of regulatory relaxation to seek to justify such an approach on the basis that significant new private investments will only take place if regulatory policy changes. In fact, a brief survey of countries around the world considered to be leaders in next generation broadband development reveals that this leadership has been developed either from massive public investment (eg. Korea, Singapore) or as a result of pressure on the incumbent telecommunications operator(s) from strong competitor cable providers. Although incumbents always seek relaxation of their regulatory obligations (of course they would because this strengthens their ability to take advantage of their dominant position), nowhere has this led to any significant acceleration in the development of national next generation broadband networks.

One can easily test this hypothesis by remembering the history of communications before market liberalisation. At that time, the (now) incumbent operators were monopolies, enjoying massive uncontested profits and effectively no regulation. However, this situation did not

create an environment where substantial investments were made and innovative new services created, even though the risks to the incumbents were then negligible. In fact, it was only when competition was introduced that the incumbents started to respond to innovation from new entrants like COLT and to choose to increase the level of investment in their networks. In this context, it is inaccurate and somewhat objectionable to many competing operators that the draft Recommendation labels them as “access seekers”, distinguishing this category of operators from “investors” – in fact, a number of competing operators (while also “access seekers”) have made significant private investment into the EU’s communications network infrastructure.

Therefore, the Commission should not accede to the pleas from incumbents for reduced regulatory intervention but should continue to promote competition through appropriate and proportionate regulatory measures, thereby encouraging efficient investment and sustainable benefits for all users (consumers, businesses and the public sector).

Without prejudice to the points raised above, if any form of regulatory relaxation were to be introduced as a means to encourage or accelerate next generation network development, such relaxation should be subject to safeguards, such as being time-limited or subject to reviews or other capping mechanisms. The intention of these provisions would be to ensure that any miscalculations by the regulator as to the extent of the additional risk or as to the detrimental impact on competition can be promptly addressed and in fact would have an automatic presumption of correction. Thus, if a risk premium were to be introduced, it would be entirely appropriate for there to be a capping mechanism, automatically preventing the incumbent from enjoying excessive profits in addition to the permitted risk premium. Similarly, if certain existing regulations were not to be applied to next generation access services, there should be a form of safeguard clause which would automatically reapply these regulations once it were established that the communication facility or service in question had recovered its reasonable costs or that competition was being significantly impacted. It would be critical for the regulator to possess strong investigative tools to apply these measures in practice; these would include detailed transparency obligations being enforced on the incumbent.

INVESTMENT GAPS

In adopting a pro-competition approach, the Commission may fear that there will be slow or under-provision of NGA in the EU. However, COLT believes that competition will be able to deliver many of the services and benefits required to support the EU’s ambitions implied by the proposed European Broadband Strategy. In many Member State areas, the further enhancement of cable broadband services not only provides an option for those residential consumers wishing to access very high speed broadband but will also provide a strong competitive incentive for national incumbents to respond by investing in their own higher speed broadband capabilities. Other infrastructure providers may also emerge, particularly wireless providers, where this technology proves to be economic and marketable. However, in respect of the development of next generation broadband services, two significant gaps may remain unfilled by the competitive market:

- Providing broadband services in very rural (so-called “white”) areas, which currently have no or poor broadband coverage and for which there is no realistic business case to justify fibre rollout; and

- Ensuring competitive broadband access in areas or for services where there is no realistic competitor to the incumbent, including:
 - Areas which can not be classed as very rural (ie. “grey” areas outside the first gap, defined above) but which are outside the cable coverage area and in which therefore residential consumers have no choice of fibre infrastructure provider except the incumbent; and
 - Business services which rely upon a national broadband infrastructure and for which cable does not provide a realistic alternative because cable operators focus on the residential consumer market and because they do not provide national coverage.

The first gap probably requires direct State intervention, either through some form of public funding or through a redefinition of the universal service obligation. COLT’s views on public funding (State Aid) are provided in the next section of this response, below. On universal service, COLT believes that the Commission and Member States should be wary of over-extending the concept of the universal service obligation as a means to deliver high headline speeds for broadband. Other countries outside the EU where Governments have adopted aggressive interventionist broadband policies have typically not pursued market liberalisation policies based on infrastructure competition (as the EU has promoted) and / or have decided to invest very significant levels of Government money into the construction of a national fibre network (which is contrary to the EU legal and regulatory framework). Very substantial increased costs and regulatory burdens may be imposed on industry if the universal service concept were to be extended significantly, and these effects could be highly damaging to the competitive market for communications in the EU.

The second gap requires regulatory intervention or, more accurately, the continuation (and perhaps extension) and rigorous enforcement of existing access regulations on national incumbent operators. COLT’s views on these matters are discussed later in this response (see below).

STATE AID

While recognising that there is a role for State Aid in the financing of NGA, it is absolutely critical that any such State intervention (including the designation of State Aid as a “service of general economic interest or “SGEI”) is restricted only to “grey” and “white” areas and is expressly prohibited in “black” areas (ie. those areas which already benefit from a good coverage of communications infrastructure). Any decision to permit State Aid for NGA in “black” areas (or in “grey” areas without due consideration of the circumstances and appropriate safeguards to sustain competition) would have a very significant detrimental impact as a precedent for investors in competitive communications infrastructure throughout the EU.

European regulatory and competition policy has been instrumental in the development of a liberalised and competitive communications market within the EU. The establishment of clear regulatory conditions have encouraged competitive entry and private investment in communications networks by competing altnets, such as COLT. Having invested in this infrastructure, COLT and other providers of competitive high quality business communications services are highly vulnerable to the introduction of publicly-subsidised fibre.

Private investors are critically affected by changes in regulatory and Government policy because, unlike economic cycles or other market effects, such intervention is particularly unpredictable and difficult to mitigate. Future investment will be significantly affected by any changes in Government or regulatory policy which initially seeks to attract investment but then, once the investment has been made, undermines its value by removing fundamental regulations or crowding out private investment with public money. Such Government behaviour therefore has a long-lasting effect on the future prospects of attracting private funds into any industrial sector.

Moreover, even the prospect of public investment in communications infrastructure renders any planned private investment significantly more risky. While existing private investors may continue to upgrade their networks to safeguard future revenues, investment in new networks is likely to be severely, if not totally, curtailed by news of the possible construction of a publicly-funded network. Once impacted in this way, private companies will become extremely wary of any further infrastructure investments in the communications sector.

Therefore, private investors like COLT rightly fear a growth in State-funded fibre investments. As explained above, these have the effect of critically damaging the business model for private fibre, causing significant losses from stranded investments and setting strong disincentives for any further investments in fibre infrastructure. Any uncontrolled State intervention therefore threatens to counteract the Commission's own parallel policy goals to encourage investment in fibre networks and to meet the targets of the European Economic Recovery Plan and of the proposed European Broadband Strategy.

To avoid such problems, while retaining the ability of Governments to intervene in appropriate cases, COLT proposes that the Commission should issue a policy statement setting out the following key principles in respect of State Aid for NGA deployment:

- No State Aid or SGEI in black areas;
- No State Aid to duplicate existing fibre infrastructure;
- Any State Aid or SGEI must be subject to a requirement for open tender; and
- A requirement to provide open access, and associated terms and conditions, that lead to a preference for fibre point to point (P2P) architectures.

An additional measure would be to limit State Aid to particular network elements, such as ducts and associated facilities, which would be provided under non-discriminatory cost-oriented conditions. Private investment would then focus on fibre cables and electronics, allowing a continued role for private investment in communications infrastructure.

COLT has also recently commented on the Commission's public Consultation on Community Guidelines for the application of State Aid rules in relation to rapid deployment of broadband networks. COLT notes that there is a sharp contrast between the draft guidelines on State Aid, which leave the Commission free to take a position on a given case in the light of the circumstances of the case and Appendix III of the current draft Recommendation on NGA, which seeks to pre-determine regulatory responses to given situations. As discussed below, the pre-defined "solutions" proposed in Appendix III can therefore be criticised not only because of their substantive nature (particularly in terms of facilitating potential cartel behaviour and of the pre-emption of objective market analysis) but also because of their inconsistency with the approach and balance of the Commission's draft guidelines on State Aid.

THE BUSINESS MARKET

COLT is increasingly concerned that policy and regulatory debates generally pass over the specific communications requirements of business users (including public sector users). The Commission's current draft Recommendation is unfortunately just one more example of this trend, with only a passing mention of the need to consider the availability of business grade services for wholesale broadband access (WBA) in Recital 40 and paragraph 34. The failure properly to understand and address the different requirements of the domestic and business markets has resulted in inappropriate or inadequate regulation, often at considerable cost to business users, as well as the providers of business services, with consequential negative effects on EU competitiveness.

A number of recent reports have emphasised the importance of addressing the communications needs of business users. In a recently published report (BT / INTUG / EVUA, "Trends in the ICT environment and business customer requirements for connectivity", June 2007), Professor Martin Cave of Warwick Business School makes the following comments:

"In debates about the regulation of electronic communications services in Europe, attention is primarily focussed upon households and small businesses as the customers...

We have to consider, in particular, the effect on the European economy of the loss of competitiveness associated with poor quality services. And here there is strong evidence, set out below, that advanced services, based upon communications networks, have a major and even a disproportionate effect upon the growth performance of national and supranational economies. This implies that a failure by Europe in the field of regulation of corporate telecommunications services can have effects quite as grave as a failure adequately to regulate the supply of services to householders and SMEs...

As a result of the difficulties of piecing together a seamless offering for corporate clients, the pan-European market for corporate services is underdeveloped. The obstacles lie largely with national incumbents, fixed and mobile, which seek to deny international competitors the key wholesale inputs – high quality bitstream, unbundled loops, leased lines, broadband resale products, MVNOs – which they need to meet the tender requirements. The tragedy of the situation is that the only winners from this situation are the less proficient historic monopolists as the more proficient ones are well-placed to gain a good share of the European market. The invariable losers, however, are the major corporate customers in Europe, which fail to get the services they need to be globally competitive. This in turn has a knock-on effect on the European-wide economy...

In these circumstances, it is vital to ensure that the current trend of regulation, building on successful growth of infrastructure competition for the mass market, does not impede the development of competition for pan-European services still further. Even in the US, there has been a recognition, at least in principle, that wholesale inputs for business services require a different approach than inputs for other

services. Different wholesale inputs are often needed, and quality requirements can rule out of consideration some of those providers which may competently serve the mass market.”

While it is of course critically important to consider the level of choice and competition available to residential consumers, this should not be at the expense of neglecting business users’ ability also to enjoy comparable levels of choice and competition. One is struck, for example, by the focus in policy debates concerning high speed broadband on consumer applications which might justify or consume the additional capacity available (eg. HDTV over IP) but the minimal attention given to the potential benefits for business use and applications.

Since one of the Commission’s major strategic goals is to enhance the EU’s competitive position, COLT would expect the Commission to pay closer attention as to how business users and public sector users can potentially benefit, and to take steps to avoid the risks for the EU’s competitive position if the policies and regulations adopted fail to deliver fit-for-purpose communications services for these users.

There are a number of ways in which the communications needs of a business user differ from those of a consumer, including the following:

- Seamless multi-site provision of services, eg. including branch offices in small towns and home workers, as well as large office buildings in major towns and cities;
- Higher quality of service, including in particular fast response service level agreements;
- Dedicated symmetric connection services, often with high levels of security;
- Different traffic patterns (e.g. time of day peaks); and
- Outsourced management of communications services.

In particular, the need for consistent business communications services across multiple sites has important implications for competition since, if only the incumbent has physical infrastructure across the whole of any one Member State, multiple site business users may, without regulated access for competing communications providers, face a de facto monopoly situation. In other words, a competing altnet will often require off-net access to support bids for contracts which, while mainly being provided through its own physical network, nevertheless also require access to off-net locations. It is only the incumbent that can in practice provide such off-net access since, even in parts of the country where there are alternative providers, such as cable or LLU operators, these have generally not provided fit-for-purpose wholesale services for business needs, as these providers focus very much on the consumer market.

Next generation access for business should mean the provision of better access products with fit-for-purpose service level agreements and other features. While there has been much discussion on passive remedies, there would be numerous practical difficulties in making such an approach effective. There would, for example, be considerable logistical problems, such as:

- Where there is limited duct space, the availability of the same product would be uneven in different parts of the country;
- Issues over different operators’ liability for ducts in respect of repairs;
- Third party wayleave issues; and
- Security issues around access and maintenance.

Therefore, while COLT is interested in the further development of the concept of passive remedies, such as duct access, the competitive market for business users is likely to develop more quickly and more effectively (and perhaps solely) through active remedies. Active remedies which improve access to higher quality bitstream products are essential for business customers. There is little scope for innovation at the transport layer and most development in communications products is now happening further up in the OSI model. There is therefore a clear need for continued (and, COLT would argue, strengthened) regulation for access to wholesale services provided by incumbents which support business products. In particular, cost oriented prices for WBA are critical. Certainly, any relaxation of regulation in this area would remove choice and competition for business users, increasing costs and restricting responsiveness, all of which would be highly detrimental to the competitive position of the EU.

Fortunately, there are some isolated examples of NRAs taking more positive steps to address this problem. In the Netherlands, OPTA's analyses of the WBA market in 2005 and in 2008 distinguished between high quality and low quality services, broadly representing a split between services suitable for businesses and consumers. OPTA went on to impose different remedies for these two markets, including cost orientation and bitstream access to fibre networks for the high quality business market. COLT welcomes this differentiated market analysis approach, which recognises the important and distinct requirements to sustain competition in the business market, in particular needing nationally available, high quality, high availability wholesale access services.

SUPPORT FOR THE COMMISSION'S PROPOSALS

Subject to the further detailed comments provided below, COLT is supportive of the Commission's proposals in the draft Recommendation for:

- Paragraph 5: The co-ordinated review by NRAs of markets 4 and 5 and for NRAs to ensure that the remedies mandated in these two markets are consistent with each other.
- Paragraph 9: The use by NRAs of their powers to ensure the provision of all appropriate information for access to the physical infrastructure of the SMP operator.
- Paragraphs 11, 12, 16 and 17: Access to physical infrastructure and to the terminating segment of FTTH networks to be done on an equivalence basis using cost-oriented charges.
- Paragraphs 19, 20, 21 and 22: Unbundled access to fibre loops for FTTH to be mandated on cost-oriented charges.
- Paragraphs 43, 44 and 45: Providing safeguards and migration provisions for existing access services which rely on the SMP operator's wholesale services.

CO-INVESTMENT MULTI-FIBRE SCHEMES

The Commission's proposed approach to co-investment multi-fibre schemes is both interesting and innovative. The logic of the approach is that the most appropriate way to strike a balance between the encouragement of investment and sustainable competition is to promote the development of multiple communications networks built on a single shared physical infrastructure. In many ways, this approach resembles the mobile network market, where each network operator has constructed and operates its own network and where,

increasingly, operators are seeking to reduce costs by sharing physical infrastructure elements. One of the significant benefits of this approach has been that the mobile market in most EU countries has been found to be broadly competitive, at least for access and call origination, in large part because there is no single infrastructure provider on which most other competitors rely (unlike in the fixed market). However, one must also consider certain concerns with this model.

The market analyses for mobile access and call origination performed in EU countries indicate that the existence of three or four strong competitors at the network level can lead to robust competition, innovation and generally low prices for mobile subscriptions and outgoing calls. Moreover, in most EU countries, the mobile networks have offered access to their networks to resellers on a commercial basis, without regulatory intervention. It is noticeable, however, that mobile networks' access offers are very much focused on the consumer mass market and only make commercial sense when resellers can generate very significant volumes both of customers and traffic. Mobile networks have been notably reluctant to engage in serious discussions about access products for more specialised (relatively) low volume markets, such as that to serve businesses with integrated fixed and mobile services. This is a significant flaw in the model as it allows a small number of operators to exercise their oligopolistic market power to dictate where and how they will be challenged in the competitive market. Unsurprisingly, they choose to protect those parts of their business that serve more specialised high value customers, freezing out competition from any player without its own mobile infrastructure.

In the context of NGA, it is a critical concern to COLT that the rules proposed in the draft Recommendation fail to consider the availability of access services which would be appropriate and fit-for-purpose to serve business customers. In particular, the fact that a multi-fibre scheme is in operation which is suitable to provide competitive service for residential consumers offers no guarantee that business customers will also be able to benefit from competitive provision of services. For example, it might be only the incumbent that provides business quality services, with the other co-investors focusing on the residential sector. If there are a relatively small number of potential business customers dispersed around the area, there will be no commercial case to justify laying fibre to compete with the incumbent for those business customers. This will then mean that the incumbent becomes a de facto monopoly provider for those businesses. Furthermore, if those businesses are part of a larger business grouping, the local monopoly will then turn into a national monopoly since no other provider can serve that grouping's multi-site locations.

Another major concern with the preference for co-investment multi-fibre schemes is the risk of anti-competitive behaviour, notably collusion. It is notable that all of the plans of mobile network operators to share infrastructure have been very closely scrutinised by competition authorities, particularly to prevent arrangements which would foreclose competition and to limit information sharing. Similarly, the Recommendation should spell out the requirement for any co-investment multi-fibre schemes to be subjected to close scrutiny by competition authorities.

One way to pursue the approach proposed in the draft Recommendation, whilst avoiding the associated risks, would be for the Recommendation to limit the regulatory relief which it suggests should be given to co-investment multi-fibre schemes to only those schemes which are structured in a way that avoids all significant risks of anti-competitive behaviour. Such a structure would include a minimum of the following aspects:

- The jointly owned and operated FTTH network should be held in a functionally separate organisation;
- Fit-for-purpose access to the FTTH network must be made available; and
- Access must be on an equivalent basis between the retail arms of the joint owners and the retail arms of any access seeker.

REGULATORY REMEDIES

SMP operator multi-fibre networks

The draft Recommendation proposes that cost orientation should not be mandated where the SMP operator has deployed a multi-fibre FTTH network and has granted effective access to one independent competing provider of downstream services. COLT does not agree with this proposal. Such an approach can be criticised on a number of grounds:

- It seems to establish a principle that two competitors will be enough to guarantee effective competition whereas competition policy and empirical evidence indicates very clearly that duopolies fail to provide effective competition;
- It reinforces the market power of the SMP operator which can choose to shape the future competitive market;
- It could encourage collusive behaviour between the SMP operator and the selected single competitor; and
- It would be very open to gaming by the SMP operator which could select a competitor which is best matched to complement its own service offering (ie. least likely to provide truly effective competition).

This proposal should be deleted.

Margin squeeze tests

COLT notes that in a number of sections of the draft Recommendation the Commission proposes that NRAs should define margin squeeze tests to prevent anti-competitive behaviour. COLT supports the use of imputation tests to examine complaints about anti-competitive pricing but wonders whether this approach is justifiable in the context of access to NGAs. There are two specific areas of concern: timing and fairness.

On timing, margin squeeze tests would tend to be applied *ex post*, after a complaint about pricing had been made. This implies, in the case where the complaint is upheld, that there would be a delay in establishing the right price and, in the meantime, higher unfair prices would continue to be applied, and these would prevent, delay or damage the launch of competing services. As such delays always work to the benefit of the incumbent, there would be an inbuilt incentive for the incumbent to set higher prices, producing detrimental effects for competition and consumers. If this effect is to be prevented, the Commission should also specify that any complaints about unfair pricing should trigger interim relief for

the complainant establishing lower charges (perhaps based upon an NRA benchmark) until such time as the specific complaint is resolved.

On fairness, the question is whether an imputation test is a reasonable substitute for an ex ante price setting regime based on the principles of non-discrimination and equivalence. It is clear that a regulatory approach based on a margin squeeze test could easily produce a different price for the access seeker than the internal (equivalent) price that is being charged by the incumbent's wholesale arm to its retail arm. This is because an imputation test is designed to ensure only that the downstream business can trade profitably, not that it can compete on an equal basis with the downstream arm of the integrated incumbent. In the case of NGA access, it can not be reasonable for the regulatory regime to establish a test for price setting which allows such an imbalance between the integrated incumbent and access seekers. Adopting this approach would encourage discriminatory behaviour and would disincentivise voluntary functional separation (as this would generally be associated with equivalence based access pricing).

It would be preferable for the Commission to delete these references to margin squeeze tests and to extend the application of equivalence to the situations where the Recommendation currently seeks to apply these margin squeeze tests.

Discounts and differential pricing

COLT disagrees with the draft Recommendation where it proposes that incumbents should be permitted to offer term and volume discounts, and differential geographic pricing. Term and volume discounts invariably benefit high volume mass market players more than other competitors and therefore generally disadvantage innovators and providers of more specialised services, such as business providers. Customers are locked in for longer periods of time which dilutes competition. Moreover, the retail arm of the incumbent always has an inbuilt ability to take maximum advantage of such discounts which tend to be designed to align with the expected business of the incumbent's downstream arm and because the incumbent has more volume and better traffic forecasting capabilities than any other market player. Allowing such discounts therefore is by definition handing an unfair advantage to the incumbent.

Differential geographic pricing also operates significantly to the disadvantage of business providers. As stated above, business providers typically need to use wholesale off-net access services to meet the demands of multi-site business customers. If the incumbent is permitted to set high charges for off-net access outside the major conurbations, this automatically gives the incumbent an advantage over all of its competitors in the business market, stifling competition.

Non-price terms

The draft Recommendation tends to focus on pricing but non-price terms of access can also form very significant barriers to competition, and these too require regulatory attention and guidance. In particular, operational conditions, quality of service and SLAs should all be provided on an equivalence basis, and should be available as fit-for-purpose for business customers (not just suitable for residential customers).

Migration

COLT welcomes the specific provisions in the draft Recommendation covering the mandatory transparency requirements and the minimum notice periods for migration. However, the Recommendation should be more specific about the need for equivalent active access products to be fully available, including approved pricing and all non-price terms such as SLAs, before the proposed five year clock starts. COLT also notes that the provision in paragraph 33 of the draft Recommendation states that new WBA products should be available “in principle” six months before the SMP operator itself markets NGA retail services. It is not clear why these words have been included but they clearly detract significantly from the safeguard that is intended to be afforded by this provision. Finally, it should be clear that competing operators should not be required to pay for migration costs or to pay additional charges to resolve any operational issues associated with migration.

RECOMMENDATIONS

COLT proposes the following changes to the draft Recommendation:

Recitals

Add a new recital to recognise the importance and distinguishing features of the business market, thereby justifying separate treatment by NRAs:

It is critically important for the current and future competitiveness of the EU single market to ensure a high level of quality, choice and competition in the delivery of broadband services for customers in the business and public sector. The particular features of this sector, which include the need for the consistent provision of high quality services on a national basis, require NRAs to include a separate consideration in their reviews of markets 4 and 5 of the market for competition in the provision of business broadband services.

Consistent approach

Add a new paragraph to establish the separate review of business markets:

The review of markets 4 and 5 by NRAs should include consideration of a separate market for the national provision of high quality broadband services to non-residential users.

Access to the wholesale physical network infrastructure (Market 4)

Delete paragraph 23 to remove the avoidance of cost-orientation obligations for SMP operator multi-fibre networks.

Amend paragraph 25 to insert the principle of equivalence instead of the current proposal to rely on margin squeeze tests:

In the absence of an obligation of cost-orientation, NRAs, at the request of an operator enjoying rights of access or on their own initiative, should verify the SMP operator's pricing behaviour by applying the principle of equivalence as set out in Annex II.

Wholesale broadband access (Market 5)

Amend paragraph 33 to ensure that the value of this safeguard is not weakened:

NRAs should oblige the SMP operator to make new wholesale broadband access products available at least six months before the SMP operator of its retail subsidiary markets its own corresponding NGA retail services.

Amend paragraph 34 to ensure that WBA services are fit-for-purpose for the critical business market:

NRAs should mandate the provision of different wholesale products that best reflect in terms of bandwidth and quality the technological capabilities inherent in the NGA infrastructure so as to enable alternative operators to compete effectively, including the provision of nationally available high quality business grade services.

Delete paragraph 37 to remove the avoidance of cost-orientation obligations for SMP operator multi-fibre networks.

Amend paragraph 29 to insert the principle of equivalence instead of the current proposal to rely on margin squeeze tests:

In the absence of an obligation of cost-orientation, NRAs, at the request of an operator enjoying rights of access or on their own initiative, should verify the SMP operator's pricing behaviour by applying the principle of equivalence as set out in Annex II.

Amend paragraph 41 to ensure that WBA is not de-regulated unless effective competition in the downstream market applies both to the business sector as well as the residential sector.

Where NRAs consider that there is effective access to the unbundled fibre loop of the SMP operator's network and that such access is likely to result in effective competition on the downstream market for both residential and non-residential customers, NRAs normally should not impose an obligation of wholesale bitstream access.

Migration

Amend paragraph 43 to ensure that fully equivalent access is truly available before any reduction in the five year migration period is permitted.

Existing SMP obligations in relation to markets 4 and 5 should continue and should not be undone by changes to the existing network architecture and technology, unless agreement is reached on an appropriate migration path between the SMP operator and operators currently enjoying access to the SMP operator's network. In the absence of such agreement, NRAs should ensure that alternative operators are informed no less than five years before any de-commissioning of points of interconnection such as the local loop exchange. This period may be less than five years if fully equivalent active access is provided at the point of interconnection and available on the basis of a comprehensive reference offer.

Amend paragraph 44 to ensure that it is clear that competing operators should not be required to pay for migration costs or to pay additional charges to resolve any operational issues associated with migration.

NRAs should put in place a transparent framework for the migration from copper to fibre-based networks. NRAs should ensure that the systems and procedures put in place by the SMP operator, including operating support systems, are designed so as to facilitate the switching of alternative providers to NGA-based access products and that alternative operators shall not be subject to any additional wholesale charges arising from the costs of migration.

Annex I

Amend the third paragraph of Section 1 to prevent any anti-competitive effects arising from the introduction of differential geographic pricing.

The price of access to physical network infrastructure should not necessarily be a geographical average in the presence of substantial cost differences between various areas but any adoption of differentiated geographic pricing should be subject to ex ante review by the NRA to prevent any possible anti-competitive effects arising.

Delete Sections 7 and 8 to prevent anti-competitive effects arising from the explicit allowance of term and volume discounts in the setting of cost-oriented charges.

Annex III

Delete Section 1 to remove the avoidance of cost-orientation obligations for SMP operator multi-fibre networks.

Amend Section 2 to limit the regulatory relief for co-investment multi-fibre schemes to only those schemes which are structured in a way that avoids all significant risks of anti-competitive behaviour.

Joint deployment of FTTH networks by several co-investors under the following conditions would normally be indicative of absence of SMP:

- *At least three operators in addition to the operator having been designated SMP at the time of the market review or, in markets where an alternative operator competes at retail level on the basis of its own network (such as a cable operator), at least two operators in addition to the operator having been designated SMP at the time of the market review, jointly deploy and control FTTH networks; and*
- *The FTTH networks are held in a functionally separate organisation; and*
- *The FTTH networks are based on multiple fibre lines; and*
- *Fit-for-purpose access to the FTTH network at duct, fibre and WBA level is made available to all access seekers;*
- *Any access seeker enjoys equivalent and cost-oriented access to the joint infrastructure on the same terms and conditions as the SMP operator and any of the co-investors; and*
- *The joint deployment scheme has been reviewed and approved by the NRA in conjunction, where relevant, with the national competition authority.*

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