



ERG (09) 16rev3

I/ERG Response to the draft NGA Recommendation

July 2009

The European Regulators Group welcomes the opportunity to respond to the European Commission's Consultation on regulated access to Next Generation Access Networks.

The investment in fibre across Europe has, in ERG's view, the potential not only to contribute to Europe's economic recovery but also has the capacity to make a critical input for longer-term, structural and sustainable competitiveness and the completion of the internal market in communications. We also fully recognise that these are challenging economic times, that the investment involved is significant and different in scale from those that fixed line operators have undertaken for some time and is considered by some operators and investors to involve more risk. ERG therefore fully supports the objectives of the Draft Recommendation and is committed to working with the Commission to do all in our power to ensure a viable and predictable regulatory environment which simultaneously promotes efficient investment and competition.

ERG welcomes the many improvements that are contained in this latest version of the Draft Recommendation. In our view it should be recognised that the deployment of next generation technologies needs to be based around a long term strategy for investment in innovation. Regulation will therefore need to be transparent, predictable, sustainable and fair to all categories of investors, both in the short and longer term.

The key driver of investment and innovation, as history has taught us, is competition and cross platform competition in particular. In our view, it would be a false premise to consider that a choice needs to be made between a competitive environment and one that supports investment. Evidence from around the world indicates that competitive pressure is one of the key catalysts encouraging the sustained deployment of fibre.

ERG believes that the Commission, in correctly pursuing regulatory predictability, creates the risk of enacting a Recommendation which, instead of being high-level, is overly prescriptive and reflects the needs of particular market conditions. The concern remains that attempts to apply the Recommendation to markets where these conditions do not apply, or are inappropriate, could lead either to distortions in competition or a failure to invest. The ERG's own analysis indicates that the rollout of Next Generation technology is currently at different stages across EU Member States and that there are significant differences in both the competitive environments and other local conditions. In this context ERG believes that the details should be left to individual NRAs, who have the relevant national market knowledge, to use the appropriate tools and guidance available to them around risk premiums, suitable pricing freedoms and migrations from legacy infrastructure to achieve the outcomes that are agreed on by all. In seeking to achieve this objective, it would in our view be useful for operators to share as early as possible their future plans for investment in next generation technologies and the access they would intend to provide so that NRAs can respond in a flexible and appropriate manner commensurate with the needs of their particular market.

ERG is convinced that open NGA architectures represent an opportunity rather than a threat for the developers of NGA. Unlike the PSTN environment when regulation needed to be retro-fitted into an existing environment, the fact that NGA networks are largely still under development or yet to be developed represents a unique opportunity to plan ahead to avoid as much as possible the creation of new access bottlenecks. The current stage of NGA deployment can allow for the adoption of a different process. ERG believes that market participants that are willing to invest in NGA should engage in early discussions with the NRAs to make sure that the access network that is being designed is future proof not only from a technological perspective but also from the regulatory standpoint. This in turn allows NRAs to take an active role in consulting with market players on the implications of various design options. There are many possible combinations of NGA architectures and regulatory options (availability of passive and/or active wholesale products) that are capable of ensuring the continuation of a secure long term competitive environment. The recommendation should in our view not be over prescriptive in this respect.

ERG fully recognises the many challenges that lie ahead and the potential benefits that can accrue from the deployment of next generation technologies and looks forward to further positive and constructive engagements with the European Commission on this critically important issue.

I. Improvements and new points welcomed

1. The ERG welcomes the opportunity to provide comments on the new draft Recommendation on NGA networks.

2. The ERG fully supports the objectives of the draft Recommendation to ensure a predictable regulatory environment promoting investment in high speed broadband infrastructure as a driving force for the recovery of the European economy and the benefits of the European citizens realising the goals of the Lisbon Agenda.

3. Furthermore the ERG welcomes open access co-investment projects to create synergies and make welfare-improving investments possible provided they are in conformity with competition rules and competition is preserved. Moreover the ERG agrees with the Commission that such projects may lower investment risks and thereby have the potential to accelerate the roll-out of fibre networks.

4. The ERG welcomes many changes made since the publication of the first draft of the Recommendation last autumn, in particular:

- It is welcomed that the current document is more balanced with regard to the application of active and passive instruments (e.g. Recital 7)¹. For example, the current draft is no longer disproportionately focussed on duct access.
- The implementation of remedies will look different according to national circumstances, depending on the technology and the network architecture used. Nevertheless, ERG appreciates that in line with the principle of technology neutrality the choice of remedies should not be affected by the SMP operator's decision on the network topology (Recital 22, Article 18).²
- The ERG expressed concern in its previous response (October 2008) at the way risk sharing was not clearly defined and was intertwined with the concept of risk premium. The distinction between "co-investment" on the one side and new pricing models is now clearly drawn.
- The ERG welcomes that the current draft is less prescriptive with regard to pricing methodologies.

5. Despite the improvements in several respects on the earlier version, the ERG still has a number of outstanding as well as new issues and concerns which we would like to draw to the Commission's attention.

The following section deals with issues of principle and concern which the Commission Recommendation gives rise to. The Key areas are summarised under a number of headings followed by more detailed analysis. Particular emphasis is given to the impact the Recommendation has on the market analysis process particularly in the areas of pre-emption of market analysis, determination of SMP and remedies. More specific issues with regard to markets 4 and 5 as well as migration and issues of terminology are covered in the Annex.

¹ Reference to the Draft Recommendation on NGA made in the following way: Recital and Article for the main text

² See "IRG/ERG Response to the Draft Recommendation on the regulated access to Next Generation Access Networks (NGA) of 18th September 2008", ERG (08) 38 rev2, October 2008, http://www.erg.eu.int/documents/docs/index_en.htm. p. 8; "Remedies should not depend on how FttH is implemented (either as PON or P2P), in order to prevent inviting operators from gaming by choosing PON architecture to avoid unbundling obligations rather than for efficiency reasons."

II. Summary of issues and concerns

Investment V's Competition

6. The objective of the EU Framework is not only to encourage efficient investment and innovation, but also to promote effective competition. Therefore the ERG welcomes that Recital 1 mentions the need to maintain effective competition. However, we are concerned that the draft Recommendation does not fully recognise the role of effective competition in driving efficient investment and innovation implying that there is a trade-off to be made between investment and competition.

Impact on the Market Analysis Process

7. The ERG welcomes that the Commission does not presuppose a one-size-fits-all approach as strictly as before, implicitly acknowledging that a divergence of regulatory approaches may be appropriate (Recital 2). However the ERG considers that the Recommendation as drafted remains too prescriptive and detailed. As it stands, the draft Recommendation directs the outcome of the market analysis and limits the choice and form of remedies available to the NRA in an inflexible and deterministic manner i.e. certain remedies are either excluded or included depending on mechanistic criteria. ERG considers that the draft Recommendation needs to be significantly amended to avoid this outcome.

Pricing and Risk

8. In order to incentivise efficient investment it is important to calculate a reasonable rate of return that adequately reflects the risks as this is done now when regulating access prices ex ante. However, the ERG does not agree with the presumption that a higher risk premium applies only because new infrastructure is rolled-out or because it is a large investment. Fibre in itself does not presume a greater risk, rather it is the uncertainties as outlined below. In some cases fibre investment can be an upgrade of existing networks (see Recital 24).

New Pricing Models

9. Assessing pricing schemes and possible discriminatory or exclusionary effects (Article 22 and Annex I) is part of the NRAs' supervisory activities and should not be decided upon in detail at the European level.

III. Investment V's Competition

10. ERG would draw the attention of the Commission to its previously commissioned research and findings that competition itself is a driver rather than a detractor of investment. More generally the ERG considers that the Recommendation needs to be clearly drafted in a wholly consistent manner with the Framework which sets promotion of competition as one of its 3 main objectives as well as encouraging efficient investment and promoting innovation (see Article 8 of the Framework Directive).

11. The Recommendation should provide high-level guidance which NRAs can usefully follow and it should emphasise the principle of promoting competition at the deepest level in the network, where it is likely to be effective and sustainable. ERG considers that this approach is still appropriate for the regulation of enduring economic bottlenecks in NGA networks in line with the ladder of investment as stressed within the ERG Common Position on NGA (ERG CP NGA)³.

³ See ERG (07)16rev2 „ERG Opinion on Regulatory Principles of NGA“. This ERG Opinion constitutes at the same time the ERG Common Position on NGA (http://erg.ec.europa.eu/documents/docs/index_en.htm).

IV. Impact on the Market Analysis Process

12. It is important that the Commission Recommendation reflects the fundamental principles of the Regulatory Framework, in particular Art. 7, 8, 14-16 of the Framework Directive, Art. 8, 9-13 of the Access Directive as well as Art. 82 EC Treaty which stipulate that NRAs have to conduct a proper market analysis based on general competition law principles to determine SMP and to impose remedies. Only after a finding of SMP should the proportionate and justified regulatory obligations be imposed. While it may be helpful to set out some likely scenarios, if these legal requirements are followed there cannot be any a priori exemptions nor any presumptions. Consequently, the ERG considers that it is appropriate to delete Annex III and the relevant Articles 23-25, 26, 37-39, 42 and adjust Recitals 29, 30, 32, 46 accordingly.

13. By appearing to predetermine the outcome of the market analysis, the Commission draft risks overruling case law on Art. 82 EC Treaty, which is not legally sustainable. The ERG considers that if the Commission addresses these concerns it would go some way to meeting the objective of providing legal certainty to market players when they make investment decisions. NRAs cannot build their decisions on questionable legal grounds which appear to contradict the EC Treaty and the EU framework.

14. According to Art. 8 (4) of the Access Directive obligations imposed shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). The ERG considers that the current drafting is not in line with this principle as it recommends that a certain remedy is always (or never) proportionate and justified regardless of the competition problem.

15. The ERG considers that there is a risk of applying remedies which do not adequately reflect the specific national circumstances. This can lead to a need for continuous readjustment of detailed guidance resulting in a high level of uncertainty, which may in turn hamper investment. Instead a higher level and less prescriptive Recommendation would give NRAs the necessary guidance while preserving their necessary flexibility in a consistent manner, thus providing more certainty to market players across the EU.

16. As drafted, there appears to be a fundamental discrepancy between the Framework, underlying competition law principles for determining SMP and the proportionality of (pricing) remedies on the one hand and the principles for NGA network regulation in this Recommendation on the other..

IV.1 Pre-emption of Market Analysis

17. It is important to recall that the criteria for dominance/SMP are not only the number of competitors or a particular roll-out model or deployment type used (including multiple-fibre lines). More specifically according to the SMP guidelines (No. 78) NRAs should undertake a thorough analysis of the economic characteristics of the relevant market before coming to a conclusion about the existence of SMP. In that regard the following criteria, among others, can be used:

- market share;
- overall size of the undertaking;
- control of infrastructure not easily duplicated;
- technological advantages or superiority;
- absence of or low countervailing buying power;
- easy or privileged access to capital markets/financial resources;
- product/services diversification;

- economies of scale and scope;
- vertical integration;
- a highly developed distribution and sales network;
- absence of potential competition; or
- barriers to expansion.

18. The key concern is that Articles 23, 24, in conjunction with Annex III, appears to use overly mechanistic criteria to determine whether SMP is present on a market, namely, the deployment type (multiple-fibre lines) and the number of operators. We agree that these criteria are important, but they will not be relevant in all circumstances, or, even if relevant, it is likely that other criteria – as listed above - will be equally relevant. For example, a number of studies have shown that in general two players are not enough for effective competition.⁴

19. At such an early stage of multiple-fibre lines deployment, with little or no evidence available or provided in the document it is difficult to know how this will work in practice or draw such far-reaching conclusions in terms of the potential for multiple-fibre lines to support multiple players and in turn the extent to which it would increase competition. The Commission itself recognises the risk of co-ordinated effects. ERG is of the view that the risk of co-ordinated effects should be taken into account when carrying out the market analysis.

IV.2 Pre-emption of Remedies

20. The appropriateness of remedies should result from a thorough analysis by individual NRAs taking into account the specific circumstances in the country in question. As concluded in the ERG CP on NGA, the principle of the ladder of investment remains valid in an NGA environment. As stated there, the expected result is a more sophisticated ladder, with changes in the relative importance of the rungs and, in general, different dynamics, as a consequence of a shift in the economic bottlenecks. In any case the principle of promoting competition at the deepest level possible is still appropriate. In an NGA environment this level may change due to the increasing economies of scale or the change of the possible access points. In an NGA environment the lesser importance of LLU may imply both a stepping back to the bitstream access (BSA) rung (which means that BSA is likely to become more important and sophisticated) or stepping up to street cabinet/duct access/own deployment. The specific dynamics will be determined by national circumstances and the operator's choice.

21. The current Draft does not provide the NRAs with sufficient discretion with regard to the choice of remedies to deal with the complexities of NGA markets. In particular, the ERG considers that the current Recital 20 to be very prescriptive as it unilaterally favours a multiple-fibre approach which may be appropriate in some countries but not in all. This is not in line with the ERG's statement that there is no-one-size-fits-all solution as NGA deployment will differ across Member States and indeed we are already seeing different NGA rollouts already taking place. While it is acknowledged that multiple-fibre lines is technology neutral in the sense of allowing PON and point-to-point, the Commission should recognise that effective competition outcomes can be achieved using other deployments types than multiple-fibre lines. Furthermore, by defining regulatory exemptions to multi-fibre situations, the choice of deployment type might be steered in one direction. This, on the other hand, does not preclude that multiple-fibre lines might be considered as an obligation in a FTTH scenario where appropriate.

⁴ See OPTA, "Is Two Enough?", Economic Policy Note, No. 6, September 2006, <http://www2.opta.nl/asp/en/publications/document.asp?id=2051>

22. It is a matter of concern to the ERG that where SMP is found, the Commission recommends not to impose cost-orientation simply because of the presumption that there are two players only in a multiple-fibre lines environment (see Annex III, No.1: Co-investment of multiple-fibre lines by the SMP operator with at least one other operator in a non-exclusive project, where both SMP and non-SMP co-investors enjoy equal access to joint infrastructure). These criteria in themselves do not guarantee that anti-competitive behaviour will be prevented. More specifically, Article 23 provides opportunities for strategic behaviour aiming at avoiding regulation. For example the condition for refraining from cost-orientation may be achieved easily by the SMP operator, as he will only need to grant access to one other (“dummy”) operator.

23. Articles 23, 24, 26 (with Section 2 of Annex III) and 42 encourage the establishment of oligopoly market structures and agreements between competitors which could be anticompetitive (e.g. cartels). It seems inappropriate that an SMP operator could avoid regulatory obligations by entering into such potentially anticompetitive agreements. This argument reinforces the ERG’s suggestion to delete Annex III and the relevant articles.

24. In any case, coordinated anti-competitive behaviour (by co-investors) is dealt with by the National Competition Authorities (NCA) in each Member State. Cooperation agreements must generally be submitted for clearance to the NCA. As they relate to markets susceptible to ex-ante regulation, NCAs and NRAs should cooperate closely in the assessment of the impact of such arrangements on competition in those markets (see Art. 3 FD and ERG (09) 17 NGA Economic analysis & Regulatory principles Report, Section D.4).

IV.2.1 Exemption from cost orientation

25. The imposition of cost-orientation should follow the market analysis and be based on the specific competitive conditions. Therefore, it is not appropriate to presume a general obligation of cost-orientation nor to make mechanistic exemptions.

26. Intermediate ways of price control mechanisms like price-cap, anchor pricing, retail-minus or eviction prices should also be considered as options. Especially for bitstream access it is not necessarily convincing to ignore a price control instrument which a number of NRAs use: Retail-minus, which could be introduced in an intermediate way and is applied effectively in a number of MS.

27. ERG considers that the imposition of cost-orientation, including a rate of return adequately reflecting the investment risk, simulates the effects of competitive markets and therefore does not reduce investment incentives. Therefore the ERG questions the statement that “the motivation to enter into such co-operative arrangement would be greatly reduced” (Recital 30). In principle the same holds for the statement “there would be no incentive to deploy multiple fibre rather than single fibre lines in the first place” (Recital 29).

28. ERG welcomes that different prices may apply for initial access seekers and operators purchasing access at a later stage as long as they are justified by cost differences. It is suggested to use this concept of price-differentiation (Recital 29) also in Recital 26 rather than implying that price-discrimination may be “due”. The same approach should be taken for co-investment arrangements (Recital 30).

29. With regard to non-discrimination Recital 30 of the draft Recommendation is currently weaker than Art. 8 Para 5 (d) FD as adopted at second reading by the European Parliament on 6 May 2009 *"Promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of*

investment, whilst ensuring that competition in the market and the principle of non-discrimination are preserved." The ERG considers that the crucial part with the emphasis in bold should be included in Recital 30.

30. Art. 10 AD enables NRAs to impose a non-discrimination obligation in relation to interconnection and/or access. However, the Directive contains no legal basis for access to be provided in accordance with the principle of equivalence (see Article 11 [civil engineering], Article 16 [terminating segment], Article 40 [WBA]) as set out in Annex II. Equally the imposition of non-discrimination does not require functional separation (Article 40), although ERG recognises that functional separation may be a useful remedy in some cases.⁵ Non-discrimination can also be effectively implemented in other forms such as virtual separation, strict definition of procedures and KPIs between the retail and wholesale arm of SMP operators.

31. Conclusions regarding "co-operative arrangements" (Recitals 32-33, Article 22-23, in conjunction with Article 27) appear too prescriptive, and may be difficult to implement in practice: automatic exclusion of cost orientation on the basis of the existence of such arrangements, and "quasi-automatic" switch to cost-orientation obligations in case of anti-competitive coordinated effects is not in line with regulatory principles as set out in the Framework, and may increase legal uncertainty.

32. Where the NRA after having conducted a proper market analysis does not consider it appropriate to impose cost-orientation, the NRA could apply an *ex ante* margin squeeze test where appropriate to prevent unwarranted/anti-competitive outcomes. In any case a margin squeeze test cannot be generally considered a substitute for the obligation of cost-orientation; in the same sense, cost-orientation does not preclude the application of a margin squeeze test.

V. Pricing and risk

33. The ERG's position on risk assessment is that any investment – whether regulated or not – is risky by nature. When deciding on taking the risk inevitably associated with an investment project, each investor (operator) will therefore assess the risk by calculating the "hurdle rate" he requires for making the investment. The following factors influence (inter alia) the riskiness of an investment project:

- Uncertainty of demand (will consumers take up new services?);
- Uncertainty regarding the ARPU (willingness to pay for new services; if customers are simply migrated from the existing copper to the fibre network, there would be only limited demand-side risk, but still a risk of getting enough additional ARPU of new services);
- Uncertainty of technological progress (will there be a new technology that would compete with fibre?);
- Uncertainty regarding the market dynamics, i.e. competitive situation (will there be actual or potential competitors taking away demand, will there be inter-modal competition, how is the general market environment developing?);
- Uncertainty regarding the general development of the whole economy (macro-economic evolution, i.e. will the economy grow and have a general need for more communications services?);
- Uncertainty over the costs of deployment (incl. civil engineering).

⁵ Cf. ERG Opinion on functional separation, ERG (07) 44.

These factors will take different values in different countries across Europe and the overall effect will vary across countries depending on the market situation in the Member States. The risks must be carefully assessed using analytical tools such as CAPM or DCF before any definite statement is made which may pre-empt the result.

34. The concept of a “risk premium” is related to a regulated access price and thus an SMP remedy according to Art. 12 and 13 of the Access Directive. A risk premium is part of the rate of return (cost of capital) and rewards the risk an investor takes. Whether or not the risk premium to be calculated is higher than the one currently factored in approved access prices needs to be carefully assessed by the NRA.

35. The ERG considers that for the purpose of calculating the rate of return, existing practices remain valid in an NGA environment. When determining the regulated access price which includes a reasonable rate of return (r) a regulator will reproduce (simulate) the calculation of an investor and assess the weighted average cost of capital (WACC) including a risk premium to reward the investor for taking the risk associated with making the investment. The risk premium is part of the rate of return on equity reflecting the risk associated with the investment born by shareholders. This covers all costs of equity incurred. There is no need for an “extra”-premium on top of the rate of return on equity. However, this does not preclude that the risk premium factors in additional risk when compared to current risk premiums and possibly allows a higher rate of return where appropriate.

36. Furthermore in the Recommendation as it stands high costs seem to be equated with high risk while ignoring that risk must also be relative to uncertainty of demand (Recital 24).

37. The concept of a “risk premium” is not used consistently throughout the document due to the fact that a number of presumptions regarding the level of the risk premium are made without an analysis of the risk through an assessment of the uncertainties faced by the investor.

- Annex I No. 3: Access to the terminating segment in the case of FttH includes a higher risk premium, where appropriate to reflect additional and quantifiable risk.
- Access to unbundled fibre loop includes a higher risk premium (Recital 24: “*should reflect the higher risk of investment relative to investment into current networks based on copper*”, Annex I No. 4: “*should include a higher risk premium to reflect any additional and quantifiable risk ..*”), while for sub-loop unbundling in the case of FttN (Annex I No. 5) the risk profile is not to be considered “*different from that of existing copper infrastructure*”.
- Annex I, No. 6: Risk premium applicable in particular to FttH, while it is considered that FttN is an upgrade, which normally has a significantly lower risk profile. For WBA based on VDSL risk should not be presumed to be of similar magnitude as the FttH based wholesale access products.

38. Greater clarity is sought on the basis on which these presumptions are based. As it stands, the ERG considers that such an introduction of different risk classifications for the different scenarios could pre-empt a proper analysis of the roll-out situation and a forward-looking assessment of the competitive effects and market developments inherent to investment decisions which determine the value the various parameters used to describe and quantify the risk may take.

39. Applying a *a priori* risk classification risks steering the choice of technologies in one direction thus potentially distorting investment decisions as well as of second-guessing of the market.

40. The proportionality of a risk premium should not necessarily be related to the type of access product (FttH, FttN, ducts) but to objective factors influencing the level of investment risks (see para. 33. above) and should be determined according to the concept set out above.

41. The ERG welcomes the acknowledgement of the importance of a consistent regulatory approach over appropriate review periods (Article 6). An NRA can provide regulatory predictability by announcing under which conditions a possible (price-) intervention will occur and what type of intervention is to be expected. More specifically, a NRA can specify in advance the principles of tariff regulation that will apply to new infrastructure access by an SMP operator. This removes uncertainty about the way the industry is to be (price-) regulated. These principles of tariff regulation will, in themselves, act as a constraint on the risk on investments in new infrastructure because the NRA has set out in this document the manner in which it will regulate the tariffs for new infrastructure access.

VI. New Pricing Models

42. ERG considers that long term contracts (Annex 1, No. 7) and large volume contracts (Annex I, No. 8) have to be assessed separately with regard to their potential anti-competitive effects.

43. ERG acknowledges that price discounts in case of upfront commitments or long-term contracts may be considered non-discriminatory where this only reflects an actual reduction of the investment risk (Recital 26) and allows a sufficient margin (Annex 1, No. 7). It would be useful to clarify in Annex I No. 7 and 8 that long-term access pricing and volume discounts shall not take account of a reduction of investment risk if this is due to discriminatory practices.

44. Contracts with large volume discounts may only be considered non-discriminatory if the discount does not exceed the cost saving in relation to the total market volume.

45. However in a non-competitive market these price discounts may be discriminatory in favour of the retail arm of the incumbent, which - having the highest (potential) market share – is likely to be able to commit to larger long-term upfront volumes contracts than competitors and can actually reduce the investment risk. In such a scenario the retail arm of the incumbent will pay a lower access price than competitors, which will hamper effective downstream competition. The ERG is of opinion that any price discount resulting from long-term volume discounts must not result in anti-competitive outcomes such as those outlined above. The ERG is also of the opinion - in conformity with the treatment of volume discounts (point 8, Annex I) - that where such anti-competitive outcomes are likely to arise, the price discount as a result of an actual reduction of investment risk due to a large long-term upfront volume commitment by the retail arm of the incumbent should be available to all access seekers in that area.

46. In any case, new pricing models should be compatible with Community competition law, which must be assessed on a case-by-case basis taking into account ECJ case law, in particular on Art. 82 EC Treaty.

VII. Concluding remarks

47. The ERG fully supports the objectives of the draft Recommendation and agrees with the Commission that it is important for NRAs to provide regulatory predictability, because this will have a positive effect on investment in NGA infrastructure as it reduces uncertainty through the announcement of e.g. regulatory guidelines before the investment decision is taken.

48. The ERG welcomes that Recital 1 mentions the need to maintain effective competition as the objective of the EU Framework is not only to encourage efficient investment and innovation, but also to promote effective competition. However, we are concerned that the draft Recommendation does not fully recognise the role of effective competition in driving efficient investment and innovation.

49. The ERG welcomes that the Commission does not presuppose a one-size-fits-all approach as strictly as before, implicitly acknowledging that a divergence of regulatory approaches may be appropriate. However the ERG considers that the Recommendation as drafted remains too prescriptive and detailed. As it stands, the Commission directs the outcome of the market analysis and does not provide the NRAs with sufficient discretion with regard to the choice of remedies to deal with the complexities of NGA markets.

50. The ERG asks the Commission to state that it is not granting a priori exemptions within the Recommendation in order to ensure that the fundamental principles of the EU Regulatory Framework are followed. In particular, it is important to stress to operators that NRAs must run a proper market analysis based on general competition law principles to determine SMP and to impose remedies. Otherwise, any apparent mismatch could create uncertainty for investors. The ERG considers that if the Commission addresses these concerns it would avoid challenging the objective of providing legal certainty to market players when they make investment decisions.

51. Therefore, the ERG thanks the Commission for consulting and will continue to cooperate with the Commission services in order to achieve the common goal to deliver a Recommendation providing the high level principles and greater certainty to market players to incentivise efficient investment in NGA infrastructure as well as to ensure a competitive roll-out to the benefit of the European citizens and the European economy.

ANNEX

1. Specific Issues with regard to market 4

52. Regardless of the fact that the unbundling obligation could equally be applied to copper and fibre this obligation should not be imposed a priori but only after a proper market analysis of Market 4 has been carried out (Article 19).

53. The legal basis for determining the location of the distribution point (Article 13) does not seem to be contained in the Framework as this power is not necessarily covered by Article 12 FD. However national laws may provide the legal basis, e.g. in France.

54. ERG welcomes Article 35 that NRAs could facilitate the development of standards by the industry, including working with the relevant standards bodies and industry stakeholders. However Recital 42, is not fully in line with Article 35. .

55. The ERG would like to ask the Commission for clarification whether the statements with regard to SMP obligation in Articles 15-18 are also applicable in the case of symmetric regulation, e.g. the requirement for a reference offer, for cost-oriented prices or to provide detailed information on network architecture (Art. 5 Framework Directive).

56. Articles 10 and 28 request that NRAs should assess the demand of Market 4 remedies (like access to civil infrastructure and subloop unbundling), with Article 11 mandating that access to civil infrastructure should be imposed in accordance with market demand. However, an obligation to meet reasonable requests for access - implying a right for access seekers - should not depend only on the potential demand for it, which – as studies show – may be low, but is nonetheless an option, as long as it is not disproportionate or unreasonable acc. to Art. 12 AD. If the obligation to impose access depends on the forecasted demand only, some forms of unbundling may have never been imposed. This would preclude other possibilities, such as to impose access without detailed terms in a reference offer. Moreover by requiring NRAs to assess “*demand from potential access seekers*” as well as “*SMP operator’s cost*” (Article 10 and 28), new unspecified and subjective criteria are added ultimately increasing uncertainty and decreasing predictability.

2. Specific issues with regard to Market 5

57. The decision whether (or not) to impose bitstream access should result from a Market 5 analysis and not simply be made contingent on Market 4 as stipulated in Article 41.

58. Presuming (Article 41) that fibre unbundling may lead to efficient competition in the market without additional WBA obligations is viewed contrary to the established practice of imposing an obligation of bitstream access based on the nature of the problem identified in Market 5. To date the Commission has encouraged parallel regulation of unbundled local loop and bitstream access on copper networks according to the principle of the ladder of investment. Therefore, the ERG suggests deleting this Article or at least to bring it in line with the relevant articles of the Framework, in particular Art. 8.4 and Art. 12 AD. In general, remedies should only be imposed when appropriate.

59. With regard to the timeframe for a reference offer of six months in advance mentioned in Article 13 ERG would like to refer to the IRG/ERG Response to the previous Draft Recommendation⁶ where it was pointed out that “*to require a reference offer in all cases, and within six months after the imposition of SMP obligations is too rigid and goes beyond what is possible under the current Framework*”.

⁶ ERG (08) 38 rev2, October 2008, http://erg.ec.europa.eu/documents/docs/index_en.htm.

60. The ERG considers that the provision of wholesale products prior to the launch of the corresponding retail offer (Article 33) is reasonable to allow competitors the possibility to launch their retail offer at the same moment as the incumbent to prevent anti competitive and discriminatory effects. The exact period of prior provision is difficult to assess.

61. The ERG welcomes that the Recommendation foresees the provision of different bitstream products with different qualities and functionality to enable alternative operators to compete effectively.

3. Migration and phasing out

62. The ERG welcomes the attention to issues relating to migration and phasing out. The ERG supports a transitional period for the closing of the MDFs to give operators an appropriate time to prepare for the changes that substantially affect their investments and their business case. However, more clarification is needed for the basis for choosing 5 years and the conditions under which the transition period should apply. A general five year transitional period may be disproportionate in some circumstance, for example if assets have yet to be depreciated. The situation for unbundling differs from country to country (e.g. when did collocation occur, or which backhaul methods are used) so the ERG is of the opinion that every regulator should have the freedom to set a proportional period based on its national circumstances.

4. Clarification resp. consistent use of terminology

Clarification of terminology

63. The ERG would like to ask for a clarification regarding the definition of multi-fibre (Article 8 vs. Recital 20).

64. The use of the word “terminating segment” is confusing as it is normally linked to the leased lines market (M6 of the 2007 Recommendation on relevant markets).

65. What is meant by virtual co-location (Article 30)?

66. Why is Metropolitan Point of Presence introduced? Isn't it identical to the Optical Distribution Frame?

67. ERG wonders what the statement at the end of Article 26 (“*and review their decision not to impose cost orientation if necessary*”) refers to, because an imposition of cost-orientation is not possible in case SMP has not been found.