

# FTTH Council

## Response to the second public consultation on

### Recommendation on regulated access to Next Generation Access Networks (NGA)

Brussels 19 July 2009

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## 1. Executive Summary

The FTTH Council Europe (hereafter “the FTTH Council”) welcomes the opportunity to comment on the European Commission’s ‘Recommendation on regulated access to Next Generation Access Networks (NGA)’. The FTTH Council believes that with the passage of time and the substantial changes to the original Recommendation, a second public consultation is appropriate. Facilitating NGA deployment requires co-ordination across a number of policy areas and the FTTH Council welcomes the co-ordination of this consultation with the guidelines regarding State Aid in the area of NGA.

The FTTH Council would like to see non-replicable infrastructure being shared as much as possible (ducts, trenches, in-building wiring etc.) in an effort to stimulate a competitive dynamic in the market. A competitive dynamic might result in parallel deployments which are likely to be limited in scope, but the credible threat of competition is the most important aspect of such an approach. An operator rolling out an infrastructure could roll out multiple infrastructures simultaneously or opt to deploy a network which is easily shared, in both cases seeking to sell into a wholesale market. However, such a scenario is much more likely to happen if that operator believes that competitors might (or could) roll out their own networks.

Such competitive threats also mean that timing of roll-out is more likely to be important and therefore deployment of NGA should happen more quickly. Infrastructure based competition can take different forms and the FTTH Council believes remedies should focus first on enablers of roll-out and competitive roll-out.

The FTTH Council believes that if there is no credible threat of competition then networks are likely to get built later, in a more limited area and perhaps in a manner that lessens competition for end-users. The FTTH Council is therefore disappointed to see that the gradation of remedies approach which was central to the original Recommendation is diluted in the current text and would like to see greater emphasis placed on this approach in the final draft.

It is clear that there is a trade off between certain remedies and how different remedies impact on each other. While the Commission recognises that WBA access will chill incentives to invest in LLU<sup>1</sup>, the FTTH Council believes the effect of WBA is implicitly broader. Therefore a graduated approach is preferable in the FTTH Council’s opinion than making all remedies available simultaneously in broad geographic markets.

The FTTH Council believes that the taking of a graduated approach by NRAs is central to the achievement of many aspects of the Recommendation since it creates an incentive structure which is likely to promote incentives to invest which in turn will increase the incentive for operators to engage in multi-fibre and co-operative investment models.

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<sup>1</sup> Recital 44

Implicit in a graduated approach is the application of different remedies across different geographic regions which the FTTH Council feels is appropriate. Regulators will need to geographically isolate areas where the prospects for physical competition are greater from those areas where such prospects are not great and apply remedies which maximise the competitive access outcomes. The FTTH Council welcomes the increased references to geographic segmentation in this Recommendation but would like to see more explicit statements in this regard. Importantly, regulators should make their assessment of geographic markets not only based on the underlying competition but also based on the identified potential to support competition based on factors such as density and others and vary the remedies applied appropriately.

The FTTH Council believes that in-building wiring represents a particular issue and welcomes the guidance that the Commission gives on access to the terminating segment in the Recommendation. Nevertheless, the FTTH Council thinks that access to the terminating segment should be dealt with using symmetrical remedies rather than to use the market analysis process suggested. The FTTH Council believes that the Commission could be more explicit about the need for in-building multi-fibre and should recommend that NRAs mandate such wiring solutions.

Fibre-based access networks are being deployed today using different architectures and technologies. Different models may be better suited to certain markets or indeed certain market areas within Member States' national markets. The FTTH Council favours remedies which allow any FTTH technology to be deployed and is concerned that some text may be too prescriptive<sup>2</sup>.

Finally, the FTTH Council welcomes the recognition that price differentiation at the retail level is important. The Council believes that the proposals to facilitate price differentiation can be improved by relying on commercial negotiations in certain instances.

The FTTH Council believes that the Recommendation can be improved by incorporating these suggestions in the final version. The FTTH Council would be pleased and willing to meet with the Commission to discuss any of these issues in more detail.

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<sup>2</sup> Article 19

## 2. Introduction and basic principles

The FTTH Council welcomes the opportunity to respond to the European Commission's 'Recommendation on regulated access to Next Generation Access Networks (NGA)'.

The FTTH Council's members represent more than 110 of the technology industry's leading communications companies, all of which are broadband leaders who have many years of experience in deploying complex solutions to the fast growing broadband market. These organisations are also experts in advising governments and service providers in the delivery of valuable services to their citizens, stakeholders and customers. Additional information is available at [www.ftthcouncil.eu](http://www.ftthcouncil.eu)

The FTTH Council believes that the issue of NGA investment is different in character to the regulatory issues which have arisen in the past. At a very basic level, managing access to a non-replicable infrastructure that exists is a very different proposition than setting out the access rules for an infrastructure which, broadly speaking does not yet exist and whose ability to be replicated is not always determined. Large up-front investments are required, and demand for new services over NGA is still uncertain in many instances.

At the same time, there are a range of investment opportunities in terms of different technologies, timing and location and the public interest requires that the right investments occur in the right place at the right time so as to maximise the expected benefits for society. These characteristics imply that the regulation of NGA needs to be very different from the access regulation which NRAs developed to date, where the investment requirements have been modest and the demand and supply side uncertainties have been limited.

The FTTH Council's perspective is clear. The FTTH Council's sole interest is to see the benefits of FTTH made available to the greatest extent possible and in the shortest possible period of time. The FTTH Council believes that the best way to ensure a rapid deployment of FTTH for the mass market is through the competitive process. Infrastructure based competition has been and will be the driver of investment in FTTH. Like the European Commission and many other commentators, the FTTH Council sees investment and competition as synonymous and mutually reinforcing. However, beyond this mantra of 'competition drives investment' there are very different interpretations about what this means in practice. The FTTH Council believes that the nature of competition facilitated by the regulation put in place will have a very dramatic impact on the scope and speed of deployment.

In its original draft Recommendation on the regulation of NGA, the European Commission set out clearly the primacy of infrastructure-based competition based on a gradation of remedies approach to establish a robust competitive environment that maximises consumer benefit while also recognising that it will not be economically

viable to create competing infrastructures everywhere. The FTTH Council endorsed this approach. The 2nd draft of the Recommendation now in consultation appears to the FTTH Council to represent a significant change in direction with the diminution of the gradation of remedies approach.

The FTTH Council recognises that end-to-end infrastructure competition will not be universally possible. However, the way that fibre is regulated and the way competition is facilitated now is likely to determine the speed of deployment as well as the likely extent of that deployment and thereby the future scope for deregulation. Regulation has to facilitate and encourage a form of competition that maximises investment in new networks in order to ultimately maximise the overall benefit to users.

If regulation starts with the objective of achieving infrastructure competition, then it will be successful to the extent that market conditions support such an approach. Starting with the objective of achieving infrastructure competition has the advantage of ensuring that infrastructure competition will be tested to the maximum extent permitted by market conditions. However, if regulation does not recognise the interaction of different remedies on each other there is a danger that WBA may become the *de facto* primary mechanism for access competition and that infrastructure investment and infrastructure competition would be undermined.

*The importance of setting the correct regulatory incentives.*

The FTTH Council is disappointed that the “gradation of remedies” approach, which was central to the previous Recommendation, and which the Council fully supports, is diluted in the present Recommendation. The purpose of the ‘gradation of remedies’ is to force operators as far down the value chain as possible, thereby ensuring that competition happened over as much of the value chain as possible. Where an NRA identified a remedy lower down the value chain (e.g. duct access or other forms of passive access) as being viable for achieving access competition that was the identified remedy and other remedies were avoided. Such an approach required NRAs to take a forward looking approach but had the advantage of identifying where infrastructure based competition was possible and forcing all parties to make it a reality. If the NRA did not believe that access competition would be viable with remedies such as duct access, other remedies higher up the value chain (e.g. LLU or a dark fibre offer) could be identified and if they were not deemed to be viable in the forward looking assessment, then remedies even further up the value chain could be identified (e.g. WBA). The process is iterative so that if at a subsequent market review it became clear that competition had not developed as expected remedies further up the value chain could be imposed. By identifying the appropriate remedy in this way, the incentive for operators to utilise the appropriate remedy was very large if they wished to compete in the market. The Council believes that one of the most important aspects of the original Recommendation was that it created both the incentive and means for a third party operator to take the initiative and deploy their investment in advance of the incumbent.

Implicit in such an approach is recognition of the impact that the different remedies have on each other. Where the physical inputs already exist, it is quicker and cheaper to opt for virtual forms of access such as WBA and expediency may win-out over long term considerations such as control of product evolution and end-to-end cost structures, at least in the short term. Where the physical inputs do not exist, firms that could potentially invest know that they can wait until they are built and can have access at the same time as the investor. The options now facing the firms are whether to invest and face significant risks or wait, let someone else make the investments and then buy access, thereby reducing their exposure to the investment.

The proposal in the current text to make all remedies simultaneously available at different levels of the value chain creates significant doubts about the extent to which operators will opt for physical investments.

In the absence of physical investments by alternative operators or the credible threat of such an investments (the credibility is weakened by the option to choose from alternatives higher up the value chain), established operators face a lower threat of competition and so have less incentive to make early investments themselves or any investments at all.

The FTTH Council recognises that in general the gradation of remedies is not completely lost and that it is implicitly contained in the document. However within Market 4 the gradation of remedies seems to have been lost such that the possibility in some areas of duct access alone being an appropriate remedy is unnecessarily excluded.

The FTTH Council request that the gradation of remedies should be highlighted and clearly explained that the Regulators should explore the possibility to impose different access remedies on market 4 depending on the underlying competition in the market in different areas. The Commission acknowledges at various points the interaction between markets 4 and 5.

The approach proposed in the Recommendation implies that adequate infrastructure competition in Market 4 based on either access to wholesale physical network infrastructure or co-operative multifibre deployments may remove SMP in which case there would be no need for regulation of WBA. The Recommendation then proposes that in the case of co-operative multifibre investments, if the resulting competition is not adequate then LLU would be imposed (presumably also other dark fibre offers but this needs to be clarified as we discuss in Section 5) and if done effectively then this may remove the need for regulation of WBA. Otherwise WBA is imposed<sup>3</sup>.

The FTTH Council believes that under the right conditions, any operator could make the first large scale fibre deployments and already there are indications in some Member States that this is the case. A prerequisite to having entrant operators in a

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<sup>3</sup> Article 26 Article 41

position to take the initiative for large scale fibre deployments is access to the passive infrastructure which constitutes such a large proportion of costs and where access facilitates a speed of deployment not possible without such access.

Creating the possibility for any operator to move first creates its own dynamic. Even if the first operator to deploy in a given area does not ultimately engage in a large scale deployment, the real possibility that it could happen may, of itself, stimulate other operators to accelerate their investments in NGA. The FTTH Council fully believes that where feasible competition based on access to passive infrastructures and the ability to pursue independent deployment strategies is the best mechanism for ensuring mass market deployment in an appropriate and timely manner.

In some parts of the Recommendation, the Commission seems to indicate that all remedies are to be applied simultaneously in market 4 or 5<sup>4</sup> to the maximum extent possible. This seems at odds with the possibility outlined above that a gradation of remedies can be applied. The FTTH Council's preferred approach is that NRAs should follow a gradation of remedies approach. The resulting application of the gradation of remedies would naturally be the decision of the NRA because it depends very much on the local circumstances. However, making remedies available for all forms of access, including WBA, makes the likely emergence of non-SMP in market 4 (or the emergence of non-SMP in market 5 based on market 4 remedies) less likely because potential investors in competing physical infrastructure, whether end-to-end networks or based on LLU have the possibility to rely on WBA access. While there is recognition that cost-orientation will undermine multi-fibre deployments<sup>5</sup> and there is even a recognition that WBA remedies would undermine investments in LLU where available<sup>6</sup>, what appears to be missing crucially from the proposed text is a recognition of the impact that readily available WBA will have on incentives regarding all forms of access competition and the incentives to make the initial investments. The Council believes that the Commission should advise NRAs to be conscious of the effects that applying WBA remedies may have on infrastructure development more generally.

It also appears to the FTTH Council that from a high level perspective, the requirement in the draft Recommendation to base access to civil engineering infrastructure on today's market demand<sup>7</sup> suggests a significant move away from use of passive infrastructures to introduce competition. If one considers the state of competition at the time that LLU was introduced in 2001, there was very limited demand for access both in terms of the level of demand and where, geographically, that demand existed. However, over time the market evolved and demand accelerated and spread geographically.

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<sup>4</sup> Recital 21, Articles 15, 19, 28, 32-34.

<sup>5</sup> See recital 29

<sup>6</sup> See recital 44

<sup>7</sup> Article 10 and 11

At a practical level, the observable demand today is likely to result in access to civil engineering infrastructure being relatively limited. If access were granted on the basis of potential demand based on densities for instance or other metrics, the scope for passive infrastructure access is likely to be far greater. The FTTH Council believes that the Commission should recognise that effective competition may emerge based on access to civil engineering infrastructure and that the geographic scope of that infrastructure should be assessed in a forward looking perspective.

The Council believes that in an FTTH context, it will not be possible as was the case in the legacy network to subsequently reassess demand and then make requirements for access as the market (and in particular construction and the form of construction of these networks) will have moved on.

Many issues regarding the shape of competition can and need to be set ahead of time. By placing far more emphasis on other forms of access competition, notably WBA<sup>8</sup> without very much consideration that the negative impact they are likely to have on infrastructure competition or the competitive dynamic, the speed and scope of NGA deployment will be impeded.

The FTTH Council would therefore like to see

- A clearer text regarding the application of the gradation of remedies and an explicit recognition of the impact those different remedies can have on each other.
- Guidance that demand-assessments for establishing the geographic scope of demand for civil engineering infrastructure should be forward looking.
- Recognition of the possibility of effective competition developing in some areas based on access to civil infrastructure alone.

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<sup>8</sup> Articles 32-42

### 3. Co-operative and Multifibre Solutions.

In its response to the first draft Recommendation the FTTH Council asked that the Commission place more emphasis on the role of commercial negotiations in network deployment and give more guidance to Regulators on how they can facilitate the sharing of risk between the operators. The FTTH Council envisions an unforeseeable variety of commercial solutions emerging in different markets as NGA investments are made. The FTTH Council favours market-driven commercial solutions and would like NRAs to have sufficient flexibility to judge all commercially negotiated outcomes on their individual merits.

The Commission now places very considerable emphasis on co-operative and multi-fibre solutions as the best mechanism to encourage infrastructure competition<sup>9</sup>. If co-operative and multi-fibre deployments can be achieved the Commission sees this as a mechanism which could potentially lead to effective competition. Even if effective competition is not achieved, it would certainly lead to significantly lighter regulation, mostly in terms of access pricing.

The FTTH Council believes that the multi-fibre approach and co-operative approach proposed is correct but that it cannot be viewed in isolation from the incentive structures for investors elsewhere in the Recommendation. Unless the incentive structure promotes investment in infrastructure based competition in all its forms, investors would not be prepared to enter into the arrangements in the first place.

Firms are only likely to enter into co-operative arrangements under certain circumstances. If a firm faces a credible alternative infrastructure already (e.g. cable) in which case the addressable market for the new fibre network is diminished, it means that co-operating with rivals guarantees that the addressable (non-cable) market will sit on that network in one form (retail customers) or another (as wholesale customers). This provides a strong incentive to co-operate and thereby reduce investment risk. A similar incentive exists where two or more telecoms operators are credibly looking at deploying their own physical infrastructures. In these circumstances, the firms investing can build individually but the loss of retail/wholesale customers will not be likely to differ whether the firm deploys individually or collectively. However, if the firms deploy collectively then the deployment costs will be lower and the speed of deployment will likely increase.

Regarding these two possibilities the scenario where two telecoms operators could be credibly looking at deploying their own physical infrastructures is of far greater significance since cable is geographically limited.

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<sup>9</sup> Recitals 19, 20, 25, 28,29,30, 32, 46 and Articles 18, 23, 24, 26, 37, 38, 42.

However, the scenario where two telecom firms make significant investments in deployment is not likely to be credible if it is clear that operators who do not invest are guaranteed access products which preserve them in the market. The FTTH Council fully acknowledges that there is a need for other forms of access competition when full physical access competition does not support multiple networks or the commercial sharing of a single network. However, there is clearly a trade off to be made since the more readily available WBA access products are, the better the quality of these products, and the more attractively they are priced then the less end-to-end infrastructure competition there will be. In order to give firms the incentives to make investments and thereby to give the proposals regarding multi-fibre and co-operative deployments a chance of success, the text needs to be revised in a way that is consistent with the gradation of remedies originally proposed.

### *Terminating segments*

The FTTH Council does not believe that there is any significant possibility for competition within buildings (and indeed for some distance from the end-user depending on density), nor does it see any benefit from trying to promote such competition. The FTTH Council believes that this short but crucial element in the fibre solution should be addressed by building standards which require over-provisioned pre-cabling of all buildings to a European technical standard. The fibre can then be shared on a symmetrical basis between all operators with their own network up to the building.

In its response to the first consultation, the FTTH Council called on the Commission to base the sharing of indoor cabling, up to and including the fibre concentration point on symmetrical remedies and not on Article 7 remedies. The Commission was asked to advocate the adoption of national laws which would reflect the proposals in the new Article 12 Framework Directive.

The Council notes that the current consultation text does not explicitly recognise that the last drop is not competitively replicable. Instead there is a reference to the possible use of Article 12 FWD on the use of symmetrical remedies<sup>10</sup>, but there is recognition that duplicating the termination segment would be ‘costly and inefficient’ and that access should be granted<sup>11</sup> to the last drop. However, the granting of access is based on the SMP regime methodology which creates both doubts and uncertainties. These doubts and uncertainties were the reason that the Council recommended access based on mechanisms outside the SMP process in its response to the original Recommendation, and we would like to request that the Commission encourages NRAs to promote symmetrical solutions in the terminating segment. The Council also

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<sup>10</sup> Article 6

<sup>11</sup> Article 16

endorsed the Commission view that multi-fibres ought to be facilitated where possible<sup>12</sup> but ask that the obligation be made stronger.

The FTTH Council would therefore like to see

- In order to make the multi-fibre and co-operative investment proposals useful, that an appropriate incentive structure based on the gradation of remedies to encourage investment in end to end FTTH solutions be emphasised in the text.
- In-building wiring dealt with on a symmetrical basis.
- Multi-fibre within buildings being mandated.

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<sup>12</sup> Article 20

## 4. The importance of Geographic Segmentation

The FTTH Council believes that the imposition of different remedies in different geographic areas is inherently necessary to set the correct incentives for competition. The Council recognises that there are likely to be large differences in the possibility for network competition between densely populated urban centres, sparsely populated rural areas and the areas in-between. The FTTH Council believes that there is likely to be competing networks in urban centres, that there may be no FTTH network in rural areas without public support and that there may be very limited competition on fibre networks in-between.

Regulators will need to geographically isolate areas where the prospects for physical competition are greater from those areas where such prospects are not so great. Regulators should primarily base their decisions on an identified potential to support competition in order to ensure the broadest geographic areas for infrastructure competition.

While the FTTH Council welcomes Commission's acknowledgement of a greater need for geographic differentiation, many of the references are less explicit than would be liked<sup>13</sup>. The Council recognises that the Commission has moved considerably from their original position which was that it was too early to take decisions on the geographic scope of markets. In particular there would appear to be a willingness to accept that different competition is likely to emerge in different areas.

The FTTH Council believes that there should be a stronger correlation between the treatment of geographic segmentation in this Recommendation and the treatment of geographic markets in the State Aid Guidelines. The SMP process which includes both product and geographic market definition in stage 1 must be conducted on a forward looking basis. This is also true of a State Aid assessment which takes a (proposed) five year forward looking perspective to determine which areas are to be classified as white (no prospective infrastructure) grey (only one prospective infrastructure) or black (more than one prospective infrastructure). If such an assessment can be conducted for a State Aid assessment then surely it is equally capable of being conducted in the context of an Article 7 review.

A determination of where, geographically more than one prospective infrastructure could be deployed would warrant a different treatment of that area. In particular, other remedies which would undermine the incentives to make the appropriate investments should not be available and more importantly, it should be clearly signalled ahead of time that they will not be available on regulated terms. Where parallel networks are not viable, NRAs should concentrate their efforts to making sure that other forms of access are put in place as effectively as possible.

<sup>13</sup> Articles 26, 30, 32, 34, 42, 44, 46 and Annex 1.

The FTTH Council believes the Commission should be much more explicit therefore about the need to geographically segment the market. An alternative approach could be to allow NRAs to apply different remedies in different parts of a national market. The conditions of competition have been markedly different within certain Member States which have found a national market but put different remedies in different geographic parts of that market<sup>14</sup>.

In whatever way it is achieved, either by geographically segmenting the market or varying remedies within a national market, NRAs must focus their interventions where they can have maximum impact with a set of remedies in those areas where effective competition in market 4 is potentially possible and complemented with another set of remedies where effective competition in market 4 might not be possible.

The FTTH Council would therefore like to see

- Advice that geographic market assessments should be forward looking in an NGA context.
- Clarification from the Commission when and where different remedies can be used within national markets.

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<sup>14</sup> AT/2008/0757

## 5. Technological neutrality

Today's broadband usage patterns clearly demonstrate that end-to-end fibre solutions will be needed to meet European broadband requirements in the near future. Investments in potential transition technologies have the potential to raise costs unnecessarily and to delay the ultimate transition to an NGA based network. The FTTH Council therefore welcomes the emphasis being placed on FTTH solutions in the Recommendation. In particular, the Council welcomes the fact that FTTN is dealt with very much as an increment to the existing network<sup>15</sup>. While remuneration for appropriate risk regarding FTTN is included in the text, this is explicitly less than in a FTTH scenario and the sense is that the risks are seen as a 'standard' risk remuneration scenario. In addition, the FTTH Council welcomes the Commission proposal that all FTTN services will be regulated whereas there is a suggestion that all FTTH services may not be regulated<sup>16</sup>.

The Council's belief in FTTH as the only solution should not be misinterpreted as an attack on technological neutrality. The FTTH Council fully endorses the principle of technological neutrality and believes that it is appropriate that free market forces determine the winning technology. However, under any reasonable view of the trends in terms of broadband capacity needs, a threshold will soon be passed where the only technology capable of delivering the necessary bandwidth is fibre. Within an FTTH context there are any number of solutions, technologies and deployment models which will all vie with each other in the market.

In its draft the Commission requires LLU to be put in place irrespective of the fibre technology deployed, irrespective of whether demand for such a product exists (unlike FTTN or access to passive infrastructures), or whether the imposition of such a requirement would be appropriate or proportionate to the objectives being sought. Some of the proposals in terms of how unbundling is achieved are quite specific<sup>17</sup>. The Council believes that the most appropriate point for access is likely to vary and that there should be several possibilities for where access is granted.

While the FTTH Council firmly believes that the only medium capable of delivering the necessary bandwidth is fibre, there is a need to be technologically neutral in choosing the form of that fibre solution. Within an FTTH context there is a broad range of solutions, technologies and deployment models which are all competing with each other in the market. And also, a distinction should be recognised between fibre topologies and networks architectures. A PON technology for example could be deployed on a point-to-point fibre topology.

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<sup>15</sup> Articles 28-31

<sup>16</sup> Article 32

<sup>17</sup> Article 19

Fibre-based access networks are being deployed today based on different architectures and technologies and every deployment scheme of FTTH has its own merits. Different models may be better suited to certain markets or indeed certain market areas within Member States' national markets. There may be no single 'winning solution' therefore and regulators should be cautious not to propose one particular solution.

The FTTH Council envisions a variety of solutions being used within and across different markets reflecting the advantages of those solutions in specific market circumstances. The FTTH Council favours remedies which do not prevent any FTTH technology from being deployed. The draft Recommendation needs to allow a more flexible approach to NRAs in choosing when and what form of access to impose in that context.

The FTTH Council notes that one recital<sup>18</sup> suggests that the multi-fibre solutions which could lead to a withdrawal of regulation are possible in both a PON and P2P topology. There is a possible implication that where dark fibre is available (for instance where multiple PON networks exist and a dark fibre offer may exist) which is available to third parties this could act as an alternative to a P2P solution. Where dark fibre offers are available, the Council suggests this would be a viable alternative. Other dark fibre offers must be considered as a form of unbundling and this should be made explicit in the final text.

The FTTH Council would therefore like to see

- The wording of Article 19 revised to reflect the possibility of different access points.
- Remedies which do not prevent any FTTH technology from being deployed.
- Recognition that where dark fibre offers are available, this would be a viable alternative to unbundling.

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<sup>18</sup> Recital 19

## 6. Pricing Issues

The FTTH Council is concerned that pricing regulated access in order to preserve competition and maintain an incentive for investment looks very difficult to achieve for several reasons. It is very difficult for Regulators to identify the appropriate ‘option value’ that applies to NGA and once estimated it would be very difficult to apply it. Even if an appropriate mark-up could be identified, singular price points necessarily impact the pricing strategy that evolves at the retail level. In extremis, with one wholesale access product and price, pricing above that point will not be possible for the network owner since competitors can come into the market and capture those customers. Similarly, pricing below that price will not be possible for the network owner because of regulatory and competition law obligations such as margin squeeze etc.

The impact therefore of regulated access is to reduce price differentiation and the ability of operators to extract the value under the demand curve much as mobile operators did with the roll-out of mobile networks. Even if Regulators were prepared to support a range of wholesale price points which were constrained in some way from interfering with each other at the retail level, such price-incentive regulation is the weakest commitment by Regulators and network investors realise this. The pricing of wholesale products is something which can change quickly and is a point where previous price-incentive regulation has been consistently reneged upon<sup>19</sup>.

The Commission’s revised Recommendation seems to recognise that price differentiation at the retail level would be a positive development but it suggests that wholesale access price differentiation should be based on objective cost differences<sup>20</sup>. This seems to be at odds with the fundamental basis of price setting (which is driven by demand considerations rather than costs) and more importantly, the cost structure of NGA<sup>21</sup> may not support such an approach.

Therefore if the Commission seeks to encourage infrastructure competition in an NGA context, it must recognise the need to restrict WBA access in some way. The only ways to restrict access is either to limit access to the functionality of fibre or to set prices which may be prohibitive. Since the second option is not viable then only the first option remains. A suggestion of such an approach exists<sup>22</sup> in the text and could be elaborated. Existing and incremental WBA ought to remain available so that competitors can continue to compete. However, a clear signal must be sent that in the

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<sup>19</sup> Termination pricing in the Netherlands and Canadian access prices being the most celebrated examples.

<sup>20</sup> Article 43

<sup>21</sup> Cost difference in the provision of different wholesale inputs for the supply of different retail services are likely to be very small.

<sup>22</sup> Article 32

medium term operators need to make their own investments either individually or under another arrangement.

### *Risk premiums*

The FTTH Council believes that where a firm has deployed an infrastructure it may be appropriate to set lower access prices if the access seeker is prepared to take on part of the investment risk via up-front commitments such as long-term or large-volume contracts. The Council believes that where risk premia are justified, such mechanisms to allocate the investment risk between investors and access seekers would be more appropriate than a risk premium calculated by the NRA.

However, the Council would again express its concern about imposing rigid cost based access which has little scope for either price experimentation or price differentiation. This could lead operators to delay NGA investments where sufficient value cannot be extracted from the market through price differentiation and so to serious economic losses in the longer term.

There is also a lesser problem of regulatory error, where NRAs set the risk premium too low then the access provider may not invest or may only invest in those places where willingness to pay is highest and the cost of supply is lowest. By contrast, if the NRA sets the risk premium too high, then it risks suppressing demand and/or competition.

The FTTH Council would therefore like to see

- Wholesale pricing which allows price experimentation and price differentiation to emerge at the retail level.

## 7. Conclusions

The FTTH Council would like to see non-replicable infrastructure being shared as much as possible (ducts, trenches, in-building wiring etc.) in an effort to stimulate a competitive dynamic in the market. In the original draft recommendation on NGA, the Commission's basic approach was to facilitate parallel fibre access where possible and desirable. This approach seems less central in the current proposals.

The graded remedies approach gives adequate flexibility to deal pragmatically with different levels of infrastructure investment and create the conditions which could support a 'race to invest'. There is a need for the Commission Recommendation to revert to a graded approach.

That approach advocated facilitating competitive network deployment by opening up duct and other civil infrastructures and potentially giving symmetrical access to in-building wiring, in order to lower the static costs as much as possible.

The FTTH Council believes that there is a clear trade off between certain remedies and how different remedies impact on each other. The Commission recognises that WBA access will chill incentives to invest in LLU<sup>23</sup> but the FTTH Council believes the effect of WBA is broader. Therefore a graded approach is preferable in the FTTH Council's opinion rather than making all remedies available simultaneously in broad geographic markets.

What is required is an alignment of returns with the risks being undertaken. If WBA access is given away too easily, it moves the risk completely onto the investor and so it strategically removes incentives for anyone (incumbent or entrant) to invest.

The FTTH Council believes a graded approach is central to many aspects of the Recommendation since it creates an incentive structure which is likely to promote incentives to invest which in turn will increase the incentive for operators to engage in multi-fibre and co-operative investment models.

In addition the FTTH Council would like to see the following elements included in the final draft of the Recommendation:

- Guidance that demand-assessments for establishing the scope of demand for civil engineering infrastructure should be forward looking.
- In order to make the multi-fibre and co-operative investment proposals useful, that an appropriate incentive structure based on the gradation of remedies to encourage investment in end to end FTTH solutions be emphasised in the text.
- In-building wiring dealt with on a symmetrical basis.

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<sup>23</sup> Recital 44

- Multi-fibre within buildings being mandated.
- Advice that geographic market assessments should be forward looking in an NGA context.
- Clarification from the Commission when and where different remedies can be used within national markets.
- The wording of Article 19 revised to reflect the possibility of different access points.
- Recognition that where dark fibre offers are available, this would be a viable alternative to unbundling.
- Wholesale pricing which allows price experimentation and price differentiation to emerge at the retail level.