

2nd PUBLIC CONSULTATION ON NEXT GENERATION ACCESS NETWORKS (NGA)

OBSERVATIONS BY MEDIASET S.P.A.

Introduction

- (1) Mediaset welcomes the opportunity to provide comments on the European Commission's Recommendation *on regulated access to Next Generation Access Networks (NGANs)* (hereafter: the Recommendation).
- (2) Mediaset agrees with the general spirit of the Recommendation and supports the Commission's goal to provide guidance to regulatory authorities in developing a consistent regulatory framework with respect to NGANs. Yet, Mediaset believes that some issues would deserve to be further clarified.
- (3) First, we would like the Recommendation to highlight the need for some form of functional, or structural, separation as an effective way to address the issue of access in the context of NGA networks.
- (4) Second, when long-term commitments prices and volume discounts are employed, the replicability of the pricing policy of the vertically integrated NGAN operator should be assessed using the hypothetical reasonably efficient competitor standard, rather than the equally efficient competitor standard, as the Commission seems to suggest.
- (5) Finally, as co-operative agreements for the deployment of NGA networks could lead to collusion, we encourage the Commission to suggest further safeguards in order to prevent collusive conducts that might reduce downstream competition.

Vertical separation

- (6) Past experience on traditional broadband networks has shown that accounting separation, coupled with access regulation, is not fully effective in addressing the risk of discriminatory behaviour (especially non-price conducts, such as sabotage tactics) in the provision of access services when the network is run by a vertically integrated incumbent operator.
- (7) Practices such as postponements in the introduction of new services, holdups in the processing of orders, delays in the provision of advanced information to competitors are hard to verify and require case-by-case interventions from the regulatory authorities, which are often long and complex.

- (8) As long as a vertically integrated operator controls the NGAN, the same type of discrimination concerns are likely to emerge also in the provision of access services to this infrastructure.
- (9) Mediaset believes that this Recommendation is a good opportunity to accelerate the path towards **a full implementation of some form of functional or structural separation**.
- (10) Only this form of intervention would guarantee an environment in which operators can compete on a level playing field, by ensuring that all commercial interactions are dealt by a separate organization or company.
- (11) Moreover, the introduction of functional or structural separation would contribute to reduce the monitoring burden that currently holds up a lot of the time and of the resources of the NRAs and would allow a faster deregulation of the industry.
- (12) We recommend that the Commission endorses functional/structural separation as the most effective remedy **to guarantee the principle of equivalence of inputs** for the next generation access provision.

Access price: long-term commitment prices and volume discounts

- (13) The Commission suggests that long-term access contracts and high volume purchases justify lower access prices, as these prices would reflect the lower risk faced by the investor. However the Commission states that there should be a sufficient margin between the wholesale and the retail prices to allow the entry of an efficient competitor (Annex I).
- (14) Although Mediaset shares the Commission's view that risk-sharing is important to speed up the roll-out of NGANs, it believes that **the appropriate standard**, to evaluate the pricing policy of the vertically integrated operator **should be the hypothetical reasonably efficient competitor**.
- (15) In a market that exhibits economies of scale and scope, long-term access pricing and volume discounts may allow the incumbent operator to reinforce its dominant position and may lead to a reduction in downstream competition.
- (16) Under these conditions, using the costs of the competitor, even if less efficient, is the appropriate standard because in the absence of an abusive practice such a competitor may benefit from network effects, which will increase its efficiency in the long run. The hypothetical reasonably efficient competitor test takes into account the cost-differences between the incumbent and its competitors and therefore it is more suitable to pursue the objective of achieving effective competition in the long-run.

- (17) Such an approach is consistent with the Guidance on the enforcement of Art. 82¹ recently issued by Commission, which state that the Commission “ *recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether a particular price-based conduct leads to anticompetitive foreclosure*”, and that the Commission will “ *take a dynamic view of the efficiency constraint, given that in the absence of an abusive practice such a competitor may benefit from demand related advantages, such as network and learning effects, which will tend to enhance its efficiency*” (§ 24).

Co-operative arrangements in the roll-out of NGA networks

- (18) The Commission suggests that co-operative arrangements may be a way forward to ensure a fast roll-out of the NGA networks and the development of competition in the provision of access services.
- (19) The Recommendation acknowledges that such solution may create the conditions for potential collusion between the co-investing operators to the detriment of competition and of consumers. It thus suggests that in this case the obligation of cost-oriented access should be restored.
- (20) Notwithstanding the importance of this ex-post remedy, Mediaset believes that the Recommendation should stress the need for an ex-ante close scrutiny of the co-investors’ conducts by the NRAs. More specifically, Mediaset reckons that further ex-ante safeguards should be suggested in order to avoid that collusive behaviours occur, given the high risk of long-lasting anticompetitive effects resulting from such conducts.

Mediaset S.p.A., July 2009

¹ “Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” issued by the EU Commission on 3 December 2008.