



With our 24 million customers in 11 countries, Tele2 is one of Europe's leading alternative telecom operators. We offer price-leading and good quality communication services. Ever since Tele2 was founded in 1993, we have been tough challengers to incumbents and other established providers. Tele2 strives to offer our customers the best deal at all times.

**THE EUROPEAN COMMISSION DRAFT RECOMMENDATION ON
REGULATED ACCESS TO NEXT GENERATION ACCESS NETWORKS
(NGA) for 2nd public consultation**

TELE2 GROUP POSITION

JULY 2009

Tele2 AB ("Tele2") welcomes the opportunity to comment on the Commission's draft proposals on regulated access to Next Generation Access networks (NGA), now issued for 2nd public consultation.

Tele2 generally supports the objectives and measures proposed in this new second draft of the above mentioned Recommendation and Tele2 is pleased to recognize that the Commission has made several improvements in relation to the first draft. One positive aspect of the revised draft is that the Commission now acknowledges that access to ducts is unlikely to be sufficient in most cases and hence moves towards the ladder of investment approach, involving a number of access products. Another positive aspect of this revised draft is the requirement for 6 months advance provision of wholesale products by dominant firms to prevent foreclosure.

However, there are some further aspects of this second draft Recommendation that Tele2 finds notable. In this regard, Tele2 would like to highlight the fact that all statements made by Tele2 in the response to the first public consultation during autumn 2008 are still valid and shall be considered as a starting point in this response



to the second public consultation now at hand. Additionally, Tele2 would hereby like to submit the following remarks.

As a general remark Tele2 wants to point to the fact that the Recommendation overall implies giving a higher priority to investment incentives laying aside consumer welfare (which should be fostered by among other things competition). The outcome of the Recommendation in the current state will be an insufficient amount of competition which cannot be remedied by the National Regulatory Authorities with the tools they have at their disposal today. In essence the likely outcome is an oligopolistic market where the consumer welfare, with competitive prices and diversity of offers, has been sacrificed on the political altar.

Target of fair and sustainable competition not yet received

First of all it can be established that the Recommendation should be drafted bearing in mind that the objective of effective competition has not yet been achieved in many retail broadband markets despite long-standing regulated cost based and non-discriminatory access to copper lines. Moreover, there are significant downside risks to competition during any transition environment, as operators with existing ducts and building assets, a low cost of capital and a large market share transfer customers to the upgraded networks, both transferring and potentially enhancing existing market power. In order to be able to maintain even the existing levels of competition in the broadband market in Europe, increased efforts and vigilance on the part of the Commission and national regulators will be required going forward.

In order to achieve effective competition it is important to secure that there will be a continuous growth of the technological development seen in the market at present. It is however also very important that the roll-out of NGA does not occur to the detriment of competition since that would mean a risk of re-introducing a de facto monopoly for broadband and related services (incl. double, triple, quadruple play) .

Further, to secure competition and hence for alternative operators to be able to move along with the incumbents' roll-out of NGA, it has to be ensured that alternative operators are able to make use of their investments already made. Regulatory uncertainty does not promote further investments, and the Commission must send the strongest signals to the alternative operators that the cost of existing investments in LLU, co-location and backhaul can be fully recovered under the present and coming regulatory regime, and therefore that a continuous regulated access to the dominant operators' bottleneck facilities (existing or new, relying on leverage of legacy assets) is secured, no matter what technique will be used ahead. Further it is of utmost importance that a convenient transition and upgrade to NGA is secured in order for alternative operators to be able to migrate on fair and reasonable terms and that they are allowed sufficient time to do so. Regulatory certainty, and hence incentives to continue investing, requires that the Commission designs and regulates a clear and unconditional migration path along which alternative operators may continue to

compete where incumbents move to NGA. Unless this happens alternative operators will find themselves in a situation where their investments have become sunk costs. Upon investing in ULL, Tele2 and other alternative operators have evidently relied on the possibility to continue utilising the legacy network also when technology changes occur and to be invited to take part in a migration to such new technology.

Unless European regulation takes proper and timely action, NGA deployment by incumbent operators can significantly reduce the (already limited) degree of competition in the access market currently reached on the basis of unbundling.

It is crucial to realize consumer benefits and to maintain open access to legacy network infrastructures not only to enable competition in consumers' access services but even more to protect and enable accessibility of all kinds of innovative services being realized in core networks and network independent platforms by a growing number of providers. Historically, since the liberalisation of the fixed telephony market, legacy network owners have built barriers with respect to such services in order to increase their revenue streams and to hinder competition. History has shown that monopolies are not the most apt at satisfying consumer welfare.

Since any limitations for the development of competition risk creating serious consequences for end-users and society for a long time into the future, Tele2 strongly believes that dominance over bottleneck facilities needs to be forcefully addressed in order to avoid a reduction of competitive pressure and related price competition and innovation in the future.

However, there are some provisions recommended by the Commission in this second draft to promote investment and co-operative arrangements that do not, in Tele2's view, support the vital aim of securing sustainable competition in the broadband market and the principle of non-discrimination. These will now be accounted for below.

Co-investment clauses/two operators deals

Provisions which reward a dominant operator for entering into a deal with one other player should, in Tele2's view, be deleted (Art. 23, 24, 37, 38, Annex III (1) etc) since such deals are discriminatory as it allows the incumbents to offer different terms to its chosen partner compared with other operators and hence allow dominant firms to pick winners and losers. For example, this proposal invites the incumbents to enter into, for them strategically, co-operations with competitors in order to e.g. encourage a duopoly in the retail market and basically discriminate against challenging operators. Bearing in mind that this proposal would imply a possibility for dominant operators to enter into co-investment agreements with very small operators, e.g. a scenario where the dominant player invests 99%, this proposal would mean a formal possibility for incumbents to easily avoid the obligation of cost-orientation, since the SMP operator would only need to grant access to one other operator, and thus lock out the rest of the

competitors from the retail market in question. Thus, such a proposal opens up the possibility to avoid appropriate regulation and to effectively hinder competition.

One such situation occurred in Sweden in the beginning of 2000 when the incumbent exclusively started offering ADSL services to its customers. After some time the incumbent offered the possibility to resell ADSL services to a small company, Bostream. That company was, as became evident later, offered a lower price than other subsequent resale operators were offered. The probable reason that Bostream in the first place was offered to resell ADSL services ahead of other alternative operators was that it targeted a customer group which the incumbent did not target. The reason that other operators subsequently were given the opportunity to resell ADSL services was most likely due to the ULL Regulation. The said example shows that it is quite simple for the incumbent to find a small operator who targets another part of the market which does not interest the incumbent. It is quite possible to enter into a “two operators deals” while in essence retaining a monopoly situation in the market.

Further, a proposal like this would mean deals that would be more or less impossible for NRAs to assess and monitor since the conditions stipulated in the draft Recommendation may be very difficult for NRAs and the courts to verify, particularly whether the co-investors enjoy equivalent access or whether offering the same terms and conditions to others in the market would realistically be capable of being taken up by others. With a standard market analysis, NRAs are assessing actual tangible characteristics such as market shares, prices and trends. In this scenario the NRAs are asked to assess the fairness of terms without having perfectly equal information of the underlying costs and business plan, and are invited to confirm unverifiable pre-judgements.

Provisions which reward a dominant operator for entering into a deal with one other player would also imply the creation of little regulatory certainty, fail to provide investment incentives, detract from achieving any fair multi-operator solution and could breach antitrust rules by laying the foundations for anticompetitive collusion.

In Tele2's view, remedies (including cost orientation) should not be dictated and/or lifted on the basis of the existence of such deals but rather should be defined following proper analysis of the competitive situation in the market, i.e. in accordance with an ex ante assessment. There is very little evidence that ex ante margin squeeze tests have been or can readily be specified and enforced effectively by NRAs. Experience shows that ex post margin squeeze cases have been extremely time consuming, at the expense of competition and thus the end-users, and very difficult to address through the ex ante framework.

Also, it should be remembered that operators with SMP status per se do not become less dominant just because a certain number of operators or a certain number of cooperation agreements are achieved, but rather the incumbents still have the unique possibility of relying on leverage of legacy assets.

With regard to the above-mentioned, Tele2 is of the firm opinion that this proposal should be removed and that the only effective tool to rely on is a full and proper market analysis procedure in accordance with an ex ante assessment.

Multi-operator deals

Sections 26, 42 and Annex III (2) aim to describe multi-operator co-operative arrangements in which the conditions are such as to indicate effective competition.

In Tele2's view, multi-operator deals should not be considered as contributing to effective competition unless the terms and outcomes resulting from such arrangements are found through a market analysis to genuinely indicate absence of dominance. Further, objective analysis of existing market circumstances and forward-looking trends based on past experience is the only relevant test for absence of SMP. Thus, it should be up to the NRAs applying the regulatory framework to analyse and decide when a market should be considered as being subject to effective and sustainable competition.

According to Tele2's opinion, the conditions described in annex III (2) do not sufficiently capture the meaning of 'no dominance'. However, if the above-mentioned sections are to be retained, the model and the applicable conditions described therein should be refined to avoid gaming by dominant firms, whose objective may be to avert or delay regulation through holding out the possibility of a multi-operator arrangement that they do not intend to fairly honour, or to select partners which minimise the threat of future competition. It should also be ensured that it is genuinely compatible with the competition law concept of 'effective competition'. For example, no reference to specific number of operators should be made, but the primary criterion should be that the number of operators, market shares, prices and trends at wholesale and at retail levels are indicative of an "absence of dominance". Further, the co-investment prerequisites must not be controlled by the dominant firm and the barriers to entry must be addressed such that there are reasonable guarantees within the co-investment structure that demand from operators requiring wholesale products in market 4 and 5 to innovate in consumer and business markets will be met on an ongoing basis.

Ladder of investment

In this revised draft (paragraph 44) the Commission states that effective physical access remedies might render the imposition of an obligation of wholesale broadband access unnecessary for achieving effective competition on the downstream market. Further, refraining from imposing an obligation of wholesale broadband access under certain circumstances may result in better investment incentives for all operators and foster timely deployment.

Tele2 is very critical to this proposal due to several reasons. Not only is it almost impossible for NRAs to administer the monitoring of the market in a way implicitly proposed in this second draft, namely on a household-by-household basis. Further, FTTH investments with access to the unbundled fibre loop for alternative operators will not as such promote competition since the nature of FTTH investments realistically means that all investments but one will turn into stranded investments.

Therefore, Tele2 advocates that all rungs of the ladder of investment, including WBA, must be available simultaneously at consistent and reasonable terms and conditions, including costs, in order to enhance competition. Further, retaining rungs on the investment ladder is important in order to reduce entry barriers to maintain competition. As a consequence of this paragraph 41 should be omitted from the draft.

In Tele2's view, since any limitations for the development of competition during this crucial period of time risk creating serious consequences for end-users and society also in the long-term, the NGA development demands that regulated access to bottleneck facilities is secured by means of a correct application of the investment ladder. In this regard it should also be mentioned that access regulation in a NGA context no longer solely regards how to provide access to existing network elements or services but also attaches great importance to how new network elements should be structured in order for efficient access opportunities to actually emerge. Hence, the Recommendation should even more focus on adapting and extending the existing ladder of investment concept in order to reflect the NGA developments and thus, in Tele2's view, delete statements such as Whereas Clause (44) referred to above. Tele2 would therefore once again request that the Recommendation contains a list of all regulated access remedies, passive as well as active, which are relevant in relation to NGA and hence should be made available as they constitute necessary new rungs on the adapted investment ladder. This approach would also increase the regulatory certainty to the benefit for further investments.

The following NGA related access remedies should be added, or adapted where relevant, to the existing ladder of investment concept;

- Wholesale Broadband Access, WBA (technology neutral and with technical and economic conditions that enable competition and are suitable to innovation and differentiation, and with hand-over point at a location that is economically viable for the alternative operator)
- Optical Wavelength access (with hand-over point at a location that is economically viable for the alternative operator)
- Dark Fibre LLU (with hand-over point at a location that is economically viable for the alternative operator)
- Sub-Loop Unbundling (technology neutral)
- Dark Fibre Backhaul

- Ducts and associated/ancillary passive infrastructure

In this regard it is worth recalling that alternative operators have been heavily encouraged to make investments based on the current regulatory approach and thus the present ladder of investment concept. Only this engagement of alternative operators was the basis for the consumer benefits achieved in the past years. Hence, in order to secure the future competition in broadband and related services, including multi-play bundles, it is crucial that alternative operators are able to move along with the incumbents' roll-out of NGA, and thus are able to make use of their investments already made. This means that a useful harmonising Recommendation would be not only for the Commission to make clear that a range of regulated access products should be made available in accordance with what has been stated above, but also that sunk investments of competitors, related to LLU infrastructure to enable a viable migration path to NGA, have to be dealt with.

Since NGA to a great extent still relies on leverage of legacy assets and (existing and new) bottleneck resources, and hence on the dominant market position incumbents transferred from former monopoly status to today's markets, the access network will play a vital role for innovative service offerings on the retail level for many years to come. It is therefore of utmost importance that alternative operators are granted continuous access to SMP operators' bottleneck facilities, no matter what technique or architecture is used today and going forward. Such regulated access is justified by dominance over bottleneck facilities, on a technology neutral basis, and should include a mandate to ensure unbundling at economically viable points, so as to preserve alternative operators' ability to compete on a nationwide basis also in the future.

With regard to economically viable points it should be highlighted that investment decisions of alternative operators are and will be conditional upon realistic economics being guaranteed by regulation that takes into account the objective needs of reasonably efficient competitors. Experience with LLU throughout the EU has demonstrated that alternative operators can only realistically target access locations aggregating 10.000 customers or more. In line with this, NGA-related studies conducted by Analysys for NRAs (OPTA, ComReg and BIPT) have shown that alternative operators (including LLU users) - which typically have market shares below 15% of lines - cannot reasonably be expected to move to metallic sub-loop unbundling. Metallic sub-loop cable distributors enable delivery of services to a few hundred lines at best, calling economic viability severely into question. There are no reasons to assume that the economics for fibre access would be in any way substantially different.

Based on the above WBA must be seen as an inherit part of FTTN due to the fact that copper sub loop nodes do not host a sufficient number of end-user connections in order to be commercially viable for the access seeker.

Simultaneous availability of a range of regulated access products with varying levels of refinement at consistent and reasonable terms and conditions is necessary for the ladder of investment to be able to function in practice. The more complete the chain of available access products is, the higher the competitive dynamic. Further, it has to be secured that the migration processes, i.e. making it possible for an operator to invest in the next level of the ladder without disturbing the relation to the existing customer base, are well prepared.

Tele2 fully supports the Commission's new concept of the Principle of Equivalence, which gives much clearer signals than the previous Non-Discrimination approach. It should however be pointed out that functional separation, according to Tele2's opinion, is the single most effective tool by which the NRAs' control of cost based pricing and invoking of the principle of equivalence could be made possible and hence to reach a majority of the regulatory objectives. In Tele2's view, functional separation would have a positive effect on investment overall in the sector due to increased certainty for all operators, including the incumbent, and greater effectiveness in enforcing regulation. As the UK process has proved, functional separation, when well-applied, can help to strengthen competition, lower prices and provide certainty for all investors. Hence, all regulators should be empowered to apply functional separation where this would be the best way to ensure fair and open access to an essential bottleneck in the market, irrespective of if there is co-investment or not.

In summary, Tele2 advocates that all rungs of the ladder (and corresponding wholesale access products) must exist simultaneously, thereby enabling companies such as Tele2 to select the most suitable access input on the most granular case-by-case basis (geographically down to the last cable distributor and if appropriate the customer location, depending on efficient competitors' existing own network deployment reach). A coherent ladder of investment has to be composed of wholesale access inputs on a technology neutral basis that are technically as well as economically viable. Further, wholesale-wholesale and wholesale-retail margin squeezes have to be avoided. Only if this approach is followed, regulators can expect competitors to expand competition and climb the new NGA adapted ladder of investment.

Principle of equivalence

The equivalence provisions stated in Annex II should apply to any access products (bottlenecks) in markets 4 and 5 where SMP has been found, including fibre-based access and not just ducts. This is essential in order to enable competition.

Pricing principles and risk (Annex I)

1. COMMON PRINCIPLES FOR THE PRICING OF NGA ACCESS

Tele2 is of the opinion that one should base risk in the wholesale business on risk in the retail business. If an investment is risky because it depends on increased market shares (retail) this is actually counteracted by the fact that if that increased market share fails to materialize, then most likely the access lines would be rented to a competitor instead. Thus the risk is actually lower in the presence of wholesale business than without such presence.

Tele2 is further of the opinion that since the retail price for broadband access usually is the same across a country then the wholesale price of access to physical network infrastructure should indeed also be a geographical average, otherwise the risk for margin squeeze is obvious. This should be the case even in the presence of substantial cost differences between various areas as long as the retail price is averaged across the nation, which has been the situation for copper based networks. Only if the retail prices of the incumbent differ from region to region is it fair to also let the wholesale price vary. It would then present a regulatory challenge to monitor and correct the wholesale price as soon as the retail prices change in any of the regions.

Accounting information and separation would best be monitored in an environment where the network production, including wholesale, is within a separate legal unit (functionally or structurally separated from the mother company) on which regular corporate book-keeping and accounting laws could be applied.

5. PRICING OF ACCESS TO THE COPPER SUB-LOOP IN THE CASE OF FTTN

Tele2 interprets the draft Recommendation in a way that leaves the possibility of pricing the Copper Access ("existing infrastructure") based on Historical costs open. This is something that Tele2 welcomes. Tele2 wishes that the Commission makes this point in a clear statement in the final version of the Recommendation. In Tele2's opinion there are two very strong arguments for this position:

- a) A LRIC approach has hitherto been motivated with the argument that it gives the right investment signals (incentives to invest). But since new investments in the copper access network no longer takes place in most countries, there is no need to give incentives for further copper investments.
- b) A LRIC approach gives almost always much higher calculated costs for the copper access network than a Historical Cost approach. The reason is that the copper network to a substantial part was built at much lower labour costs and also has been partially or fully depreciated. Wholesale prices based on LRIC cost for copper access components will therefore lead to much higher EBITDA margins (profit) for the incumbent when rendering access to its copper network than in the case of rendering

access to its new fibre network. This in turn would counteract the Commission's wish to provide incentives to invest in future access fibre, since the return would be much lower on fibre rental than on the copper rental given a LRIC based pricing for both technologies.

It is now generally recognised that investments in parallel access network infrastructure is not feasible in most parts of any country. The one operator most suited for and most likely to make further investments in future access networks is the incumbent, and this is based on the fact that only the incumbent has all or most of the network nodes and backhaul facilities already in place together with a very high market share. The incumbent's geographical presence is far superior to any other operator's. The incumbent is probably also the only operator with the financial muscles to even consider such an investment. In the view of Tele2 the outcome of the regulatory measures is not to impede the incumbent's incentives to invest in new fibre access networks as long as competition and thus and consumer is sufficiently accounted for and safeguarded.

Migration

As has been stated in Tele2's response to the first round of public consultation, one of the most serious consequences that derives from the NGA roll-out is that the investments, already made in LLU (own DSLAM equipment at the MDF and often own fibre backhaul) and promoted by the NRAs, become less, or even not at all, useful in the future. As the NGA deployment of FTTN means that the population covered by each site (e.g. street cabinet) will be significantly smaller, it will be more difficult for alternative operators to make viable business cases. In order for alternative operators to be able to make use of such investments already made, and hence avoid sunk costs, support from NRAs will be needed. Also, it is crucial that the simultaneous availability of fit for purpose WBA products and all other rungs of the investment ladder are guaranteed. This means that there will be an increased need for WBA in order to retain sustainable competition in the market.

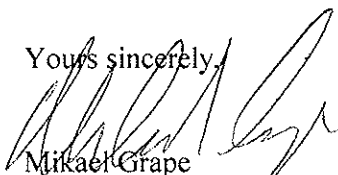
Tele2 welcomes the fact that the Recommendation takes into account the need of fair transitory rules in order to enable for competitors to migrate to NGA. Tele2 finds the proposals on migration procedures broadly positive. In particular that parallel running should be required over a sufficient period to allow returns for competitive investors unless an agreement is reached with competitors for a shorter transition or fully equivalent access is granted at the same interconnection location.

However, in Tele2's view the period for parallel operation should be at least five years in order to provide for payback where unbundling investments have been made. Further, it would be helpful to include the more general principle that migration processes should be supervised by the NRA and should not have the result of any stranding of the assets of competitive investors and should otherwise compensate

adequately for any such loss. This principle is particularly important to prevent any freeze of further investment in unbundling.

Tele2 is at the disposal of the EU-Commission should there be any questions or clarifications needed. We are also prepared to discuss the issues above at a meeting.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mikael Grape', written over the typed name.

Mikael Grape

Regulatory Affairs
Tele2 AB