Associazione Italiana Internet Providers

European Regulators Group

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Milano, 8 August 2008

Subject: E contribution to the ERG Public Consultation on "*Geographic Aspects of Market Analysis*"

AIIP welcomes the opportunity to comment on the important issues raised in the ERG consultation and intends to provide, below, its own assessment.

In broad terms ERG suggests Geographic Segmentation as a means to reduce Bitstream regulatory obligations of incumbents in areas where there is a certain degree of ULL and cable TV investments on the part of Altnets.

AIIP supports the ECTA response the ERG Public Consultation that is hereby attached and that should be considered ad integral part to our response.

In addition AIIP wishes to indicate in more detail the reasons why AIIP believes that geographic differentiation should be an exception and not the mainstream rule, why in its opinion it is contrary to contrary to consumer interest, why it would decrease competition, why it runs against NGN trends and, should it still be adopted, tests that should be passed before it is brought forward.

The following AIIP comments will focus on the Wholesale Broadband (Bitstream) market.

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ULL ALTNET INVESTMENT DOES NOT NECESSARILY LESSEN THE NEED FOR BITSTREAM REMEDIES

In the Broadband arena the underlying premise of deregulation based on Geographic Segmentation is that ULL investment by Altnets lessens the need to regulate Wholesale Bitstream offers of incumbents. Our on-the-field experience is that this is not true because:

- Altnets are not necessarily interested and in some cases not even equipped to offer Bitstream wholesale services to competitors. This is certainly the experience of AIIP in Italy, where most of the Altnets do not offer wholesale Bitstream services.

- In our experience, even when Altenets offer wholesale Bitstream offers, the quality of service in terms of provisioning and assurance is not comparable to that of the Bitstream service offered by the incumbent. Lacking an effective functional or structural separation of the whole access network, each activity of deployment or assurance on a retail target would involve 3 parties (the retail operator, the wholesale operator, and incumbent privinding LL access) instead of two (the reatil opreator and the incumbent privinding LL access). The extra step renders the Altnet wholesale offers not comparable with that oft he incumbent in terms activation and repair times, a often reflected in less stringent SLAs and lower or no penalties.

- To lighten broadband regulation is not therefore enough to demonstrate that ULL Altnets exist in a given area, it must be proven that they actually offer wholesale Bitstream services (not simple resale) and that the SLAs and contractual penalties offered are comparable to the Bitstream service offered by the incumbent, otherwise service quality would fall and/or consumer prices would rise.

BROADBAND GEOGRAPHIC SEGMENTATION COULD BE AGAINST CONSUMER INERESTS

- Consumers in high density areas where Altnets have invested in ULL would be damaged as competition in these areas would decrease. As we have seen before, Wholesale Broadband offers from Altnets either do not exist or do not have comparable SLA standards. Therefore competition would be weakended because non infrastructured ISPs dependent on the regulated Bitstream offer would be either driven out of business[1] or obliged to invest in their own ULL assets, rising costs because of the chunky nature of the investments required and because of the short time frame before such ULL investments are rendered obsolete by NGNs.

[1] As a result a large number of smaller operators - typically innovators - would be forced to close causing unemployment.

- This effects would particularly significant in countries such as Italy, Denmark, Belgium and Portugal where SMP market analysis has led to cost-plus Bitstream offers[2]), in countries where the Wholesale Bitstream offers are based on retail minus criteria (Austria, Greece, Ireland, Luxemburg, Sweeden), and in countries where, unlike the UK, there are no cable TV networks competing with telco networks.

- Furthermore in high denisity areas the current safeguards against predatory prices on the part of incumbents would be weakened, leading to even less competition. This is because with non geographic segmentation the retail offers of incumbents must be pass the replicability test based on Bitstream Wholesale prices. With Geographic Segmentation there would no longer be Bitstream Whoelsale offer in the rich areas, rendering the test non applicable. This in turn would further reduce the number of competitors, against the interests of consumer welfare.

- We therefore conclude that the adoption of Geographic Segmentation should be avoided in order to defend competition, and in ina case suspended in all countries where national SMP dominance analysis have led to cost-plus Bitstream obligations or retail-minus obligations, and/or in countries where there is no competition from cable TV newtorks. So long as such conditions persist its adoption would eventually lead to less competitors and higher consumer prices.

- Finally an incumbent's end-user broadband national market share above 50%, or rising market share, is on our opinion an unequivocal and string sign that competition in insufficient, and that therefore any decrease in regulation would be further detrimental to end-users and competition.

BROADBAND GEOGRAPHIC SEGMENTATION COULD LEAD TO LOWER INVESTMENTS IN AREAS OF DIGITAL DIVIDE

- Consumers in areas of digital divide would also be hurt, as capital would be diverted from investments in areas of digital divide to the further duplication of ULL investments in the high density areas for the reasons exposed above. Today smaller players reliant on regulated Bitstream offers in the "rich" areas are massively investing in the coverage of areas if digital divide via alternative methods (for example in Italy AIIP members have covered more than 5.000 municipalities not reached by ADSL) . With Geographic Segmentation these players would have to divert their investment to the further duplication of ULL buildouts in rich areas, further starving the poorer areas form investments in alternative broadband coverage

- We therefore suggest that broadband Geographic segmentation should be avoided in order not to lessen investments in areas of Digital Divide.

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[2] In Spain this should also be so but the needed accounting structure was not yet ready when we last performed our last analysis of pan European Broadband regulation in 2007

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BROADBAND GEOGRAPHIC SEGMENTATION COULD DISCOURAGE MARKET ENTRY

- Eliminating one of the intermediate steps in the broadband ladder of investment would deter new entrants as they would need to acquire critical mass very quickly in order to justify ULL investments. This would in turn lead to higher retail prices than otherwise.

- Furthermore one important additional element we miss in the ERG draft Common Position are more intensive remarks to adjacent markets. It should be clear that the effects of measures (like deregulation in one market) on adjacent markets have to be analysed before. Especially the system of an efficient ladder of investment has to be kept alive across all markets. The markets have to be seen more or less connected together because most of the operators participate in more than one market with the consequence that measures taken in one market move the whole market system.

BROADBAND GEOGRAPHIC SEGMENTATION COULD INDUCE INVESTMENTS THAT WOULD BE QUICKLY OBSOLETE BECAUSE OF NGN ROLLOUTS.

- As seen above broadband Geographic Segmentation would incentivize the smaller players to invest in ULL at a time when NGN rollouts would render such investments obsolete, it impossible to recoup costs. VDSL and FTTx rollouts make ULL services obsolete because the price/performance of the new technologies cannot be matched by ULL while at the same time reducing the opportunity for infrastructued competition[3]

- For this reason we suggest that broadband Geographic segmentation be excluded in countries where there are plans to roll out NGNs (fiber based or VDSL based) in the next three / four years, otherwise the ISPs that would be forced to invest in ULL would not have the time to recoup the investments in time

BROADBAND GEOGRAPHIC SEGMENTATION AND SIZE OF THE COUNTRY

- Beyond of that element the size of the national market was not taken into consideration. In a small country like Luxemburg, Belgium or Austria the whole market is much more conjunct and constraint than in big countries like UK, France or Germany where often one state has the size of a small country.

[3] Almpst all analysis recently published including those carried out by Analysys for OPTA, Comreg, and BIPT as well as studies conducted by the OECD and WIK – conclude that the economics for upgraded VDSL or FTTH networks will be even more affected by scale effects, and hence unlikely to be economically addressable by multiple network builders/operators. Thus, except in exceptional circumstances, we can rationally expect that there will continue to be variously one or two parallel networks for high speed broadband (cable + incumbent or incumbent + FTTH challenger) with little variation in the competitive intensity between regions.

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- Whereas the premises are quite similar in most of the European states: one incumbent telecommunications network operator which operates on an national scale with an network possible to supply nearly all regions in the country, some existing (more or less local) cable network operators and developing ULL, wholesale or similar operators, differences between big and smaller countries are obvious.

- In bigger countries the essential homogeneity of different areas, especially regarding a different level of competition in these areas, can more easily been argued than in smaller countries where the natural homogeneity and conjunction of the different areas in most cases makes no sense to split up different regional markets or handle remedies different in distinct areas. It should been taken into consideration that in smaller countries the difference between a higher developed urban area with more competition and a less developed rural area with less operators is as well present as in bigger countries. However in bigger countries the connection between the different areas is much less important than in smaller countries thus resulting from the higher number of urban areas with rural surroundings in bigger countries than in smaller countries where often just one really urban area can be identified. As in a small country the connection between the urban area and its rural surrounding plays a special role, this situation demands a particular treatment and attention by the NRA when geographic separation measures are planned.

- For these reasons we suggest that broadband Geographic segmentation be excluded in small countries or treated with particular attention by the NRA.

SUMMARY

For all the reasons above, AIIP believes that geographic differentiation should be an exception and not the mainstream rule.

As seen above, we believe that, in order for Geopgraphic semgnetation to be adopted for the broadband market in any given country, none of the following conditions must be true:

- Absence of Cable TV network;
- Mandated Cost-plus orientation of the Bitstream offer or retail minus orientation;
- National surface areae below 100,000 Sq Km;
- Incumbent with more than 50% of national end user market share or rising market share.
- four or less ULL operators offering true Bitstream offers (access disaggregated from transport) with SLAs and penalties equal or better than those of the incumbent's bitstream offer.

BROADBAND GEOGRAPHIC SEGMENTATION AND NGNs

As indicated in the previous sections, ULL investments are not susbtutuets for NGN investments because the price/perfomance characteristics of NGNs (VDSL and/or FTTx) are no mach for ULL technology.

Therefore, should Geographic Segmentation be adopted, despite the negative consequences indicated above, based on the presence of multime ULL investments in a given area, it cannot in any way justify lifting regulatory obligations on NGNs.

Best regards,

Marco Fiorentino
President of AIIP

ATTACHED 1 to AIIP'S POSITION

ERG draft Common Position on Geographic Aspects of Market analysis
ECTA response August 2008

Executive summary

ECTA welcomes the ERG's publication of draft guidance on geographic aspects of market analysis, which provides a detailed and useful complement to the European Commission's comments on the first relevant cases in application of the Art. 7 procedure.

We are mostly supportive of the ERG proposals with the following comments:

- Geographic segmentation is a tool that requires considerable care. It would be helpful for the ERG to highlight that the **main objective for regulators is to promote competition and consumer welfare**, including where necessary, through effective regulatory mechanisms. **Geographic segmentation and deregulation are not objectives in their own right** and should not be pursued where they would undermine competition and user interests.

- Geographic differentiation could be relevant in some, but not all circumstances. We agree that in advanced competitive markets supported by effective regulation of upstream bottlenecks - in particular regulation of wholesale access and backhaul segments - downstream markets, such as aspects of **core networks and retail markets – and in particular consumer wholesale broadband access, trunk leased lines, transit and possibly retail access - could exhibit differentiated competitive conditions**.

- The **local access market is unlikely to present significant competitive differences, due to scale economies**. Studies from Analysys, OECD and WIK add to evidence that only limited replication is economically viable and that VDSL and FTTH technologies do not change these economics, and in fact tend to reinforce scale effects, as has been noted by the ERG in its conclusions on Next Generation Access.

- Business and residential demand and supply characteristics differ. In general we would consider that **segmentation is not relevant for business service markets** (including asymmetric business-grade broadband) unless competitively supplied quality business inputs are available.

- When assessing the need to carry out a geographic analysis, it is **the actual state of competition between different regions and not assumptions about prospects for replicability or technological change that is relevant.** Care is needed on investment 'plans' which may have been announced but not materialise, or which may in themselves depend on regulatory expectations.

- Regulators should **carefully consider whether in the regions examined, the observed competitive intensity depends on regulation**, whether due to any additional competitive presence or threat in the market or through the existence of measures which prevent cross-subsidy and leverage. **Regulation should not be removed from an area unless it is reasonable to expect that effective competition is sustainable and irreversible**.

- Barriers which prevent new innovative entry or weaken competitive threat to existing players are a crucial criterion when considering competitive intensity in a particular region (or nationwide). it is important in this context to assess the **supply conditions for voluntary wholesale services**.

- Segmentation could lead to differences in tariffs to the detriment of rural consumers including remote locations for professional users (businesses and administrations). The **guidance should explore the implications of segmentation on universal service objectives in rural areas**.

- Segmentation could increase regulation costs, and increase risks of error. It is therefore important to include the following conditions within the ERG's guidance. In all cases, the benefits should outweigh the costs and risks.

  - A rigorous **market segmentation and no SMP finding should be required whenever a regulator intends to entirely remove requirements to provide access.**

  - Regulators should not segment markets or remedies unless they have relevant disaggregated data to support their analysis and any resulting differentiated remedies and market impact.

  - **Remedies in segmented markets with little prospects for competition (eg rural WBA) should be subject to tighter regulation – particularly on cost-based pricing and non-discrimination**, as well as measures to monitor and prevent leverage to avoid retail abuses and cross-subsidy.

  - **Deregulated areas should be closely monitored by NRAs** with a trial period to test assumptions, reserve powers to intervene rapidly if warranted and re-apply remedies in the specific market without waiting for the next market analysis, and a further detailed review at least in the subsequent review period.

- ERG should use this opportunity to provide guidance concerning proposed changes to the EU Framework for Telecoms including:

  - **No additional provisions on geographic segmentation are needed in EU law.** Geographic scope of market should be a technical judgement in line with competition law. The current text of the Directives is sufficient.

  - **need for clear and unambiguous provisions in EU law (FD art 14, USD art 17) enabling regulators to apply remedies cross-market (including cross-region) to identify and address leverage**.

  - **The relevance of wholesale price averaging should be recognised in relation to universal service objectives of nationwide affordability (USD art 9)**

ECTA's response to the ERG Draft Guidelines on Geographic segmentation

1. The case for geographic segmentation

ECTA understands that in some specific circumstances , segmentation may be considered objectively justified under a market analysis. However, it is important to recognise that this is a technical and complex tool, and not a political objective for NRAs. Nor is 'deregulation' at any cost an appropriate goal. It would therefore be worthwhile to highlight that the primary objectives of regulators are to promote competition and protect user interests (including citizen-consumers and professional users). Segmentation should be evaluated only where it can be demonstrated that segmentation would support – and not undermine these goals – in theory or in practice.

In particular in view of their objective to promote and protect competition, NRAs should provide evidence that the level of effective competition in a specific area would be at least be maintained (and preferably continue to increase) following deregulation of that region.

2. Introduction (chapter 1)

The draft ERG position from the outset suggests that recent developments are likely to increase the scope for geographic differences in competitive intensity, and particularly mentions roll-out of competing cable, fibre and wireless products – alongside competition from local loop unbundling.

Whilst ECTA accepts that in some circumstances core network markets may exhibit differences in competitive conditions, there is an increasing weight of evidence that suggests that competitive intensity in access markets will not be substantially affected by the developments described.

2.1 Some core network markets may display characteristics that support differentiation

ECTA agrees that in some countries significant take-up of unbundling may have affected the competitive dynamics in downstream markets such as the market for wholesale broadband access, particularly where competitive intensity has been sufficient to ensure continued provision of WBA absent regulation. We also agree that certain 'thick' routes for transit and trunk leased lines are competitive.

Competition in these areas can be achieved in advanced markets in which upstream bottlenecks have been properly addressed and where competition is supported by the economics of replication for such services, allowing for a variety of providers, addressing various market segments on a sustainably competitive basis to roll-out networks and offer services profitably.

However, we do not agree that developments in cable, FTTH and WLL significantly alter the conditions for competition between regions in local access, as is explained below.

2.2 Studies show economics of local access support only limited competition

Most European countries today have one or two access networks capable of supplying broadband on a wide scale – typically the incumbent and cable. Virtually all studies recently published including those carried out by Analysys for OPTA, Comreg, and BIPT as well as studies conducted by the

OECD and WIK - strongly suggest that the economics for upgraded VDSL or FTTH networks will be even more affected by scale effects, and hence unlikely to be economically addressable by multiple network builders/operators. Thus, except in exceptional circumstances, we can rationally expect that there will continue to be variously one or two parallel networks for high speed broadband (cable + incumbent or incumbent + FTTH challenger) with little variation in the competitive intensity between regions.

Differentiation might be needed in types of remedies depending on the network architecture and technologies in different regions, but we do not expect sufficient competitive variation in NGA to warrant segmentation of the market definition or deregulation of local access.

It is important also that NRAs do not prejudge the level of duplication that might be possible on the wholesale (physical) network market at fixed locations. If it transpires that four or five fibre networks are rolled out in parallel with each operator enjoying a position on the market sufficient to constrain the behaviour of others to a similar degree as experienced in highly competitive MDF sites with effective unbundling then segmentation could be appropriate, but we are not aware that this is presently the case or in prospect in local access, and there are no indications that this would become the case in the foreseeable future.

For this reason we strongly oppose the assertions given on pages 7 and 9 on this issue and contrast these with conflicting statements in the ERG Opinion on NGA – supported by the abovementioned analysis - that NGA may increase the scope for scale economies potentially leading to an enduring economic bottleneck.

Those regulators which have conducted detailed economic analysis of these issues, such as OPTA, Comreg and BIPT, have provisionally concluded that there will be limited competition in the access network with NGA.

2.3 Wireless access technologies may not substitute for high speed wireline broadband

As regards WLL, it is important to consider the extent to which this technology is capable of exerting a significant competitive constraint on high speed wireline broadband services, or whether it is technologically capable of offering the triple play services or cost-effective high broadband speeds that are now expected by many customers. Increasingly we expect that the broadband market may become fragmented with wireless providing some competitive constraints at lower speeds and lower qualities (including in terms of monthly bandwidth allocations, suitability for certain applications requiring low packet-loss, ping times and jitter, etc.) whilst those demanding and supplying high speed broadband and IPTV require underlying high speed fixed access networks.

Indeed we note that some of the more recent analyses of broadband, such as that by Arcep, explicitly exclude wireless technologies.

3. Is there a need for detailed geographic analysis (chapter 2)

The ERG draft guidance appears to set a very low barrier beyond which regulators are expected to perform what is later accepted to be a very detailed and complex geographic assessment. This covers just two criteria – one of which could mean that with just one additional operator present across less than the whole territory a geographic analysis could be triggered. ECTA advises that a number of additional criteria and qualifications should be added - in particular that:

- Several competitors (and not just one) should be present
- Differentiated conditions (competitive constraints) are actual and not speculative
- Differentiated competitive conditions are not due to regulation and are persistent and preferably improving
- Differentiated conditions apply across all relevant customer-types (particularly business and residential) – otherwise a customer-based market segmentation should be carried out first

3.1 Several competitors should be present in a significant capacity

It is already common across Europe that consumers have a choice of one or two significant operators (incumbent + cable) in certain areas. However, this has not been considered to provide a sufficiently differentiated competitive constraint in any case to segment the market for local access. And in the countries where segmentation has occurred – particularly in the WBA market - one competitor was not considered sufficient in either case.

We would therefore advise a threshold of several competitors both to indicate that a very limited number operators is unlikely to result in varied conditions and to avoid requiring very complex analyses in cases where these would be unnecessary.

3.2 Differences in competitive conditions must be established and not speculative

When assessing whether or not a geographic assessment is appropriate – and when identifying segmented markets or remedies – the state of actual competition (as opposed to competition which may theoretically emerge) needs to be a primary driver of the analysis.

For example it would be inappropriate for an NRA to carry out a detailed geographic analysis and segment the market for local access on the basis that it believed that fibre access networks will be replicated in a particular area (thereby satisfying a condition of ‘several operators exercising a constraint), or that WLL presents a significant competitive challenge, before there is evidence demonstrating this in the market.

In connection with this we would urge caution when assessing operators’ investment plans as evidence of future segmented conditions. It is an unfortunate, but not infrequent occurrence that declared investments fail to materialise or indeed investment plans may be based on an expectation that regulatory conditions will remain stable or improve.

For example measures that may in effect prevent margin squeeze through stabilising the price for downstream products, could provide the regulatory certainty that underpins investment plans. Meanwhile, in the FTTH environment announcements have been made concerning investment that are contingent on the effectiveness of regulation for duct and fibre access.

3.3 Competitive intensity must be sustainable and not due to regulation

A particularly crucial issue that NRAs should take care to examine is whether the observed differences in competitive intensity are dependent in any way on existing regulation, and if the removal of regulation would also weaken or limit the differences in competition between regions.

For example, competitive intensity in unbundled regions could be conditioned in part through the continued prospect of further market entry by operators that could use WBA and initially compete on price and later invest in LLU. Or indeed the competition from existing LLU providers could depend on their being able to complement their service using WBA. Conditions which limit the possibility for margin squeeze or other anti-competitive behaviour could also be underpinning competition in the market whilst competition could diminish once these are removed.

A regulator could therefore find paradoxically that the effective competition which justified segmentation and removal of remedies could be diminished once remedies are withdrawn.

3.4 Business service product markets should be presumed to be nationwide

ECTA welcomes the recognition elsewhere in the ERG draft position that the needs of business service providers might differ from those of other operators in view of the demand from their customers for geographically dispersed sites to be connected and the resulting lower scale economies achievable in particular locations than are relevant for consumer-focussed providers.

However, the ERG position should highlight this point in the section discussing whether there is a need for a detailed geographic analysis. In the case of business services, the scope of demand is typically nationwide, due to requests which link sites in different areas (e.g. for ultra high speed connectivity in a few key sites, combined with remote branches, factories, etc, situation throughout the territory, in suburban and even rural locations). Suppliers likewise tend to have extensive geographic coverage with less dense infrastructure replication. Their focus is on adding value at the upper end of the value chain (ICT integration), which is no less valid and in many cases more economically significant than providing services for residential customers.

In this context there should be a presumption that markets for the provision of business products (including business-grade asymmetric bitstream) are nationwide in scope. A geographic assessment of competitive variations would not be relevant in this case except if there was reason to believe that intense competitive conditions allowed nationwide provision by business service providers on the basis of voluntarily provided wholesale products suited to the business market or if all major business suppliers had extensive network coverage equivalent to those of the consumer providers being considered.

4. Criteria for assessing homogeneity of competitive conditions (chapter 4.1)

ECTA agrees with the criteria listed as relevant to assessing homogeneity of competitive conditions. It is important that these are assessed in combination.

However, we are concerned that the crucial issue of 'wholesale supply' has been omitted. This is particularly relevant to assessing 'barriers to entry' and the overall competitiveness of the market.

4.1 The existence or otherwise of barriers to entry is a key factor in assessing competition conditions and any differences between them

The ERG draft guidance recognises that telecom markets are often subject to high entry barriers., and that this is an important criteria when considering geographic differences. However, it does not examine this issue in detail and tends to suggest that the 'number of operators' should be used as a proxy for making this assessment.

ECTA believes that much further consideration must be given to this issue over and beyond counting operators, and should involve an economic and technical assessment as well as considering important factors that may limit barriers to entry – such as the availability of wholesale supply.

Generally markets will be more dynamic if entry possibilities are maintained. Operators with new innovative ideas will be able to bring these to market and existing players will face and respond to the continuing 'threat' of competitive entry. In a market which is consolidating, further entry possibilities may also be essential in order to maintain the degree of choice that contributed to a region being declared 'competitive'.

On the other hand if a regulator declares a region competitive which has high entry barriers, he is effectively determining the maximum number of operators that will be present in that market – with a significant risk that this number – and the competitive intensity – could decrease over time, potentially resulting in a sluggish oligopolistic structure.

4.2 Wholesale supply is a crucial component of the market analysis

Barriers to entry may be economic – due to scale economies – or they may be technical, for example the lack of sufficient space in an exchange. In both cases, wholesale supply may be the crucial factor which determines whether the market would remain contestable following deregulation.

A well functioning market (regional or otherwise) should present few barriers to an innovative new provider entering and offering services. Such a provider could theoretically invest in an upstream product and self-supply (see discussion below). However, it may not yet have the necessary scale to do so, there may be no economic space for a further upstream infrastructure to be built, or indeed the provider may specialise in services or content. In any event, in a well-functioning market some-one should have the incentive to provide a suitable wholesale product and not deny access.

In addition to issues relating to new entrants, existing operators may find that they are unable to completely cover an area identified by the regulator with their own infrastructure and would need to complement this with purchase of wholesale products for full coverage to allow them to compete with ubiquitous competitors such as the incumbent.

It is therefore crucial that - when assessing whether there are any variations in competitive conditions – and afterwards when assessing SMP, regulators assess thoroughly in the relevant areas the voluntary wholesale market for relevant products (such as voice minutes or transmission capacity at competitive prices in the case of transit and trunk segment routes, appropriate bitstream for both business and residential customers in the case of WBA), and also the likelihood or otherwise of the regulated firm continuing to offer reasonably priced products absent regulation.

Indeed the European Commission highlights in its response to the UK WBA case, the need to assess the provision of wholesale services for consumer and business services, and examines closely in this case and in the Austrian case the incentives for voluntary supply by the incumbent.

Wholesale offers and competitiveness are mutually reinforcing. Service providers can, as described, contribute to enhanced price competition and innovation in services and content. Meanwhile, there is strong evidence to suggest that more competitive environments tend to favour the emergence of secondary markets because existing players are incentivised to benefit from the innovation and marketing operations of others, or to maximise their network usage to benefit from scale economies.

Wholesale transit and international capacity are for example often freely available on competitive routes between large cities (although may not be on 'thinner' routes). In more competitive areas served by a number of LLU operators, wholesale broadband access may be offered on a voluntary basis.

Regulators should however directly assess the existence of and incentives for wholesale supply and not rely on the presence of a given number of operators when assessing the prospects for entry and competitiveness.

For example, 3-4 LLU operators alongside the incumbent in a particular site does not necessarily mean that WBA will be provided to meet reasonable demand in the market or that further competition is viable through self-supply.

The incumbent's decision to supply will be based partly on its expectations as to whether it could regain some of its existing wholesale customers as retail customers if it ceased to supply. And even if it does decide to supply it may offer a less than ideal wholesale product, but which is just sufficient to maintain wholesale subscribers who could otherwise defect to a rival.

Meanwhile LLU operators may not necessarily be well-placed to provide for the wholesale market, particularly if:

- They do not have sufficient co-location resources to offer wholesale services (in many cases co-location space is limited so alternative operators may prefer to use it for their own retail customers)

- They do not have the organization or resources required to offer wholesale services which require a dedicated organization in terms of staff, billing systems, support systems, operational systems, procedures, etc.

Even where WBA is provided voluntarily – by the incumbent or entrants – the focus may be on consumer needs, whilst the specific needs of businesses may not be catered for – because the operator has not scaled its network accordingly, and/or in the case of incumbents, because they can gain a competitive advantage in nationwide business service contracts by not offering business-grade WBA.

4.3 Reliance on self-supply is unlikely to be sufficient

Self-supply is often cited as being sufficient to allow effective competition even where wholesale products are not voluntarily available. However, further self-supply may not be economically viable in a market which requires a certain level of scale economies, or may not be viable without an operator first having the opportunity to build up a customer base using WBA.

Moreover, self-supply would only be viable for operators with a business plan based on scale economies. Even if a consumer provider had the required scale to invest for example in LLU, a multi-national business service provider would almost certainly not have this scale. And yet, as described above, the customer and economic value provided by the business service provider is no less than that from the consumer operator.

Competition in services and content is also relevant in this context. A concentrated market with high entry barriers and a requirement that entry requires own infrastructure may tend to result in problems with 'walled gardens' or restrictions on services which would not be possible in a fully contestable market. Content and service providers are legitimately not infrastructure investors, but are also important in delivering customer value.

Reliance by a regulator on 'self-supply' alone is therefore likely raise entry barriers and undermine the diversity of telecoms services required by different customer segments.

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5. Local geographic markets or differentiated remedies? (chapter 5)

ECTA agrees that differentiating remedies is not a substitute for differentiating markets. However, the ERG does not provide sufficient guidance on which approach should be used in which circumstances, nor does it explain the extent to which variation in remedies is appropriate in the absence of a segmented approach to the underlying market definition.

5.1 Removal of access obligations should be conditional on finding 'no SMP'

Confidence for a competitive investor depends crucially on an expectation that dominance will be addressed in a predictable fashion by the regulator and that deregulation will only occur following a robust assessment in which the market is found effectively competitive in the absence of regulation. For this reason we urge the ERG to provide guidance that:

- Segmentation of market definitions and a finding of 'no SMP' in a given area is necessary in any case where a regulator intends to remove obligations which require access to be provided on given terms and conditions.

- Segmentation of remedies in a market in which a player has been found to have SMP may apply only to the nature, terms and conditions of such remedies (for example the pricing structure), but may not extend to the removal of requirements to provide access on regulated terms and conditions.

If access obligations are no longer required in a particular market, this suggests that the regulator considers it to be competitive absent any access obligation. This would seem to us to be such a significant competitive difference compared with an area where access obligations are deemed necessary – that a full and separate market definition should be made and notified to the European Commission and other NRA for their review under the Art. 7 procedure.

Retaining only a transparency and/or accounting separation requirement on an operator designated as having SMP would seem to us insufficient to address SMP, if it is truly present. In addition, we doubt whether such a provision is legally sound, since both the transparency and accounting separation obligations are intended under the Access Directive to be applied 'in relation to access and/or interconnection' whilst the access definition refers to the provision of services 'under defined (presumably regulated) conditions'.

5.2 Nationwide SMP is not required for nationwide accounting separation

ECTA agrees that there is an important need to ensure full transparency conditions across markets (vertically, horizontally and geographically) in order to prevent problems such as anti-competitive cross-subsidy between regions. This may necessitate remedies of accounting separation and transparency. However, the Commission has provided guidance in the Explanatory Note associated with the second edition of the Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation, confirming that these conditions may be applied cross-market, in which case a nationwide finding of SMP is not required to monitor conditions across a segmented country.

6. Possible implications (chapter 6)

ECTA welcomes the ERG's recognition that geographic segmentation could lead to complexities in applying regulation, increasing the data gathering burden, and expanding the possibilities for regional cross-subsidies and pricing anomalies which impact competition. It is certainly clear that 'red tape' and risks of error are often increased by localizing regulation.

However, the ERG does not provide any guidance about how a regulator should take account of these potential practical issues when reaching a decision about segmenting markets or remedies, and about how the 'costs' of geographic segmentation (including importantly potential risks of competitive deterioration due to difficulties in implementation) should be weighed against any potential benefits.

Moreover very serious issues relating to the impact of segmentation on consumers and on NRAs' objectives as regards universal access to telecom services are not explored.

6.1 Segmentation should depend on sufficient availability of disaggregated data

ECTA would suggest that as a precondition to a market or remedy segmentation, NRAs must have available sufficient relevant geographically disaggregated data on market conditions and costs both to empirically support the decision to segment the market and to enforce any remedies which require disaggregated information – such as price control.

If such information is lacking or enforcement would be significantly impaired, NRAs should by default avoid introducing complex measures that may in theory appear warranted, but could in practice undermine wider application of regulation that is in accordance with NRAs mandate under Art. 8 Framework Directive to promote competition.

For those cases in which it is decided to proceed with a segmented approach, ECTA agrees that mechanisms to test for price squeeze and control again cross-subsidy will almost certainly be necessary.

6.2 Tightening obligations such as price control in non-competitive areas must be considered alongside lifting them in competitive areas

In addition, it is important to note that markets which may have been considered 'more competitive' on average when considered on a nationwide basis may be split into areas of full competition and entrenched dominance following segmentation. This could for example be the case for consumer WBA in rural areas vs urban areas in a country with very effective LLU. As such remedies in the non-competitive areas should be strengthened (for example by moving to cost-orientation from retail minus) both to protect consumers from excessive pricing and to reduce the potential for cross-subsidy into other areas arising from super-normal profits.

6.3 Need for continued monitoring and review in deregulated regions

Given the risks for error and implementation failure when implementing geographic segmentation, the ERG should provide guidance that regulators closely monitor conditions in deregulated regions, retain reserve powers to reintroduce regulation within a short timeframe if assumptions prove to be incorrect, and conduct a full review of the deregulated areas at least during the next review period.

6.4 Relationship with universal service should be explored

Geographically segmenting markets or remedies can lead to geographic deaveraging of prices which would tend to result in higher prices being charged in rural areas. This may conflict with NRA's and national objectives to promote consumer welfare including fair access to services for those living in rural areas.

The guidance should advise that NRAs consider the implications of any segmentation on consumer protection and universal service objectives. There may be circumstances where an averaged national wholesale price – which would tend to be reflected in closer pricing between regions at the retail level - may be considered important to meet the combined objectives of competition and consumer welfare.

7. Implications for the EU Telecoms Review

The guidance to NRAs on geographic segmentation should be accompanied by guidance to legislators who are currently considering how to ensure that the Framework is futureproof and can adequately handle changing market analysis trends.

ECTA considers that the following points are most relevant in this context:

- Defining the geographic scope of a market is a technical exercise which should be conducted in accordance with competition law. Today's Framework provides sufficient flexibility to enable regulators to segment markets appropriately and correctly. Segmentation should not be presented as a political objective or favoured over nationwide approaches. The relevant approach will differ depending on the country and on the particular market under review.

- Geographic segmentation may increase the opportunities for leverage of dominance between one part of a market and another (eg through anti-competitive cross-subsidy). NRAs powers to address such leverage through the appropriate application of cross-market remedies where needed to identify or address leverage should be clarified under the Framework. NRAs should not be required – as today – to define dominance in both the source and target market of leverage – in order to address such issues. This requires some changes to article 14 of the Framework Directive and article 17 of the Universal Service Directive.

- Wholesale price averaging may be increasingly important in ensuring universal service objectives of affordability across the national territory whilst providing choice – in broadband services as well as voice. This 'consumer welfare' aspect of wholesale pricing could be explicitly recognised under article 9 of the Citizens Rights Directive.