



COLT Telecommunications

Response to
ERG Draft Common Position on
Geographic Aspects of Market Analysis
(definition and remedies)

11 August 2008

INTRODUCTION

This document contains the response of COLT Telecommunications (COLT) to the ERG's draft Common Position (draft CP) on "Geographic Aspects of Market Analysis (definition and remedies)".

COLT recognises that much of the draft CP provides a useful review of standard competition law approaches to market definition, applied to the particular context of considering geographic markets in the communications sector and thereby supplementing the European Commission's SMP Guidelines. Since much of the CP therefore consists of clarificatory and explanatory statements rather than policy proposals, COLT has focused its response on a single issue of concern, the treatment of markets serving multi-site businesses, and has included only a few remarks on specific points relating to the draft CP.

MARKETS SERVING MULTI-SITE BUSINESSES

COLT believes in general that more attention should be given to the specific communications requirements of business users as a key driver of economic benefits and of the EU's competitiveness. In the context of the current ERG draft CP, one of the critical aspects which should be discussed in detail is the treatment of markets serving multi-site businesses. While the CP considers that it "may be appropriate" to define the geographic scope of such markets more broadly than residential markets, this is mentioned merely as a short passing comment in the draft CP (see third bullet on page 15). In fact, COLT believes that such markets by their very definition require to be excluded *prima facie* from exercises to segment national geographic markets and this issue should be specifically addressed in the ERG CP.

It is a fact that a majority of businesses (and nearly all larger businesses) operate from multi-site premises and naturally have a requirement for communications services for each of those multiple sites. These sites are commonly located in different geographic areas across a national or multi-national footprint. However, when seeking to procure communications services, these multi-site businesses very commonly make it a requirement (or effectively do so, through the weighting applied to this criterion in the procurement process) that the selected communications provider should be able to supply services to all of those multiple sites, at least at a national level. As an example, in the UK, Ofcom research for the Business Connectivity Market Review in 2008 indicates that around three-quarters of businesses are multi-sited, while a separate survey in 2005 (for the Ofcom Strategic Review) found that it was the third most important factor in choosing a communications supplier that the supplier could serve all of the business' UK sites (after reliability and good customer service but considered more important than price and the range of services on offer).

This criterion (to be able to supply all of a company's multiple sites) can rarely be met by any altnet in any EU country without some degree of reliance on access to wholesale services supplied by the national incumbent. No altnet focused on the business market has nationwide or even 50% coverage of an EU national territory through its own infrastructure and unbundling, leaving only the incumbent with universal national coverage. Therefore, the competing altnets must rely upon the incumbent's wholesale services where the altnet does not have (or can not justify building from new) direct physical infrastructure links to the required business premises.

If geographic markets were to be defined for these wholesale services, this is likely to lead to the uneven availability, pricing or other terms of service (such as quality of service conditions, which are critical in the supply of communications to business customers) of such wholesale access services. For example, if a geographic market is deemed to be competitive (where no operator is found to have SMP), no operator will face ex ante regulations requiring it to provide wholesale access services and thus altnets which rely upon such services to offer national coverage for multi-site businesses may be unable to do so. Unregulated wholesale access services may not be made available (either by the incumbent or by other altnets unbundling the incumbent's local loop in that area) or the terms on which such wholesale services are offered may not be suitable for business communications (large unbundling operators focused on the mass market do not generally provide bitstream access and, where they do, their choice of technology and systems, including SLAs, is generally designed for the residential market and is wholly unsuitable for the business market), and are highly likely to be inconsistent between the regulated geographic areas and the unregulated geographic areas. The end result will be that it will be extremely difficult, if not impossible, for any altnet to construct and provide a consistent nationwide offer of communications services for multi-site businesses.

Thus, applying geographic market analysis to markets serving multi-site businesses will inevitably strengthen considerably the position of the national incumbent, potentially rendering the incumbent the sole qualified supplier and de facto monopolist for such services. The large number of businesses (including nearly all of the largest businesses) which rely on competition to deliver high quality communications services at competitive prices would be significantly disadvantaged, with a serious knock-on impact on national and EU competitiveness. In the communications market, the inability of altnets to compete to provide services to large multi-site businesses would significantly damage the effectiveness of competition overall and would force all altnets to focus exclusively on the residential market and very small single-site business users.

In summary, markets serving multi-site businesses are by their definition national markets. Therefore such markets should be excluded prima facie from exercises to segment national geographic markets. COLT requests that this issue should be specifically addressed in the ERG CP.

COMMENTS ON OTHER ASPECTS OF THE DRAFT CP

Geographic markets have a purely de-regulatory effect

COLT notes that the result of introducing geographic markets is purely de-regulatory, ie. it will make it easier and quicker to remove ex ante regulation from national incumbents than would otherwise be the case. While all parties recognise the appropriateness of de-regulation where competition is shown to be truly effective and sustainable, there are also significant risks from premature de-regulation which should be taken into account. In particular, the ability of incumbents, with their national coverage capabilities and natural scale advantages over altnets, to leverage any additional pricing flexibility and other operational freedoms arising from geographic de-regulation may give rise to the same unfair market conditions and anti-competitive behaviour that the original nationwide ex ante regulations were designed to prevent.

Since the ERG draft CP recognises that there was already sufficient flexibility in the EU Framework to impose geographically differentiated remedies to recognise and account for heterogeneous competitive conditions in different geographic areas, COLT requests that the ERG should include within the CP the requirement for NRAs to conduct a detailed risk and cost/benefit analysis to ensure that the possible negative impacts of any de-regulatory measures arising from geographical markets analysis are fully and appropriately considered, and that the benefits of the geographical markets analysis are compared with those of a geographically differentiated remedies approach.

Geographic markets will generate more rigid regulatory outcomes

COLT also notes that the application of geographic markets will result in a more rigid outcome than would be the case for geographically differentiated remedies. This is because it seems clear that geographic markets are likely to be determined in situations where there are areas where no single operator is found to have SMP, thus removing the basis for any ex ante regulation in these areas (see, for example, the UK wholesale broadband access case). The alternative approach, where a geographically differentiated remedy might be applied, would offer an NRA considerably more flexibility to apply a variety of appropriately justified and proportionate regulations, ranging from self-regulation, to light touch and more onerous obligations. As a result, the geographical market approach would seem to be a backward step, particularly given the practical difficulties of the additional regulatory and informational burdens that will be generated as a result.

Insufficient consideration of the additional regulatory burden

COLT is concerned that the ERG paper contains so little consideration of the significant additional regulatory burden that results from the adoption of the geographic markets approach. It will undoubtedly be a highly complex and time-consuming task for NRAs to assess and justify geographic markets, and to gather sufficient data to inform the NRA's subsequent conclusions about market power in those markets. That this is the case is signalled in the ERG draft CP where the text clearly sets out that pure economic analysis must be tempered by more pragmatic considerations of the impossibility of analysing local "markets" based on the large number of street cabinet sites or even individual premises. Similarly, one wonders whether it is possible to reconcile the fact that the definition of geographical markets in the communications sector almost inevitably leads one to adopt a network structure based approach with the stated requirement that the relevant geographical unit should have clear and stable boundaries – a condition that must be impossible to meet in the context of an operator's evolving network structure (particularly with the advent of NGNs and NGA). Again, one is driven to question whether concerns about the additional regulatory burden of such market analysis have been given sufficient weight in the decision to adopt a geographic markets approach.

Any bias towards geographic market analysis should be avoided

The draft CP contains worrying indications that the ERG may be seeking to introduce a bias towards geographic market analysis. In particular, the statement on page 17 (reproduced below) is wholly unsubstantiated by any detailed argumentation:

“However, the alternative – a geographically uniform treatment – is likely to result in much larger errors (in the one or other direction) in cases where a geographical segmentation would be justified based on an analysis as outlined above.”

It is not at all clear (and is certainly not demonstrated in the draft CP) that geographically uniform treatment would necessarily result in much larger errors than the effects of geographic market segmentation. For the reasons indicated above (notably the additional regulatory burden, the flexibility offered by differential geographic remedies and the risks of premature de-regulation), COLT requests that the ERG should adopt a more objective position on the need for and risks of geographic market analysis in the final text of the CP.

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