

ERG – Public consultation
on
Regulatory Principles of Next Generation Access
NGA

Submissions by PT Comunicações S.A.



ERG Consultation on Regulatory Principles of Next Generation Access

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Introduction

The Review 2006 is now in progress and the European Commission launched several consultations, as well as promoting a few hearings about the Regulatory Framework and the Recommendation on Relevant Markets.

The ERG Consultation should be understood within the context of the Review process, meaning that the final outcome of this consultation cannot be simply integrated in the Directives, or in the Recommendations and Guidelines, without a new round of consultations by the European Commission.

Some of the proposals made by ERG were not fully foreseen by the Commission staff and, at the very least, would imply changes in the Recommendation on Relevant Markets.

Nevertheless, PT Comunicações considers that the evolution towards NGA and the upgrade of the access network to optical loops deserve to be analysed within the technical, economic and regulatory contexts.

Some years ago, the regulation process, based on the ONP concept, rested on the belief that alternative wireline infrastructures would flourish all around Europe. The focus of regulation was directed to the liberalisation of telephony. The local access was not a matter of concern. Mobile operators were free from regulatory intervention. But technological innovation and the birth of an Internet open to all users changed completely the communications scene. Broadband for everyone is the new political paradigm.

The regulatory framework became outdated and lagged behind the new technological developments in copper access platforms (mainly XDSL technology). Indeed, it is still trying

to adapt itself to the new environment, forgetting, however, that wireline copper / optical access networks are just a part of the full picture.

Everyone agrees on the importance of the upgrading of the access network to optical fibre in order to deliver new and innovative services, with better quality and greater transmission speed.

To make this possible, fixed operators have to consolidate new network plans and to invest a lot in infrastructure and in new solutions and services. That is why incumbents have been, in the last couple of years, claiming for a stable and coherent regulatory framework. It is the only way to prevent stifling investment.

We are now in a situation, where incumbents are the main source of infrastructure to support alternative broadband services.

The ERG consultation indicates that the regulatory framework will continue to target the incumbent wireline network in wholesale broadband markets. However, ERG gives no explanation as to why it is not considering other access platforms (both cable and wireless). To be more precise, ERG is looking just at a part of the picture.

PT Comunicações is very much concerned about the present situation and believes that it is time to (i) deregulate retail markets and (ii) create a predictable and sustainable environment for incumbents to invest in NGN solutions.

Additionally, we should emphasise that, as the NGA deployment will impact significantly on the network architecture, technology and services, the actual obligations imposed by Regulators on some wholesale offers will have to be reassessed as a result of this change and must be adapted in future. Within this context, Regulators should embrace initiatives from the incumbents to change/substitute/eliminate the different offers provided, according to the services evolution, otherwise the incumbent would have to maintain services supported on obsolete platforms, which could present technological constraints to migrate to NGN.

Answers to Consultation Questions

Q1. Do you agree/disagree with the general approach?

The regulatory framework is based upon the criteria of minimum regulation and the assumption that, as competition develops, sunset clauses should take place. Operators are now evaluating the upgrade of the access network to incorporate optical fibre into the local networks, along with the transformation of the voice and data supporting platforms. This means that operators have to carefully assess the investment to be made and its efficiency in terms of new services, better quality and a reasonable rate of return. The investment in next generation networks should be supported by innovative commercial solutions, which create value to the stakeholders. Operators would be wary to invest if the regulatory framework shows signs that it may turn over time into a hostile and unpredictable one. It would be very difficult to attract investment to the communications sector if regulation induces barriers to the creation of value.

Not only operators are being confronted with new challenges. The regulators themselves are also challenged by these new developments, which require a detailed analysis of the migration process to NGN and NGA.

Nowadays, broadband services are supported on different access platforms and NGA is just one of them. Customers may have broadband services through cable infrastructure, mobile services and various fixed wireless solutions. These are in fact alternative infrastructures and support real service competition. Therefore, infrastructure competition exists already. It is not a "next generation" *mirage*: it is a reality that should be taken into account in the design of the revision of the regulatory framework.

To limit the scope of this consultation to the copper wireline upgrade is misleading and biased, as it does not take into account the broadband retail market situation and does not relate the regulation of the wholesale broadband market with the competition at the retail level based in different infrastructure technologies.

Regulators cannot forget that the broadband market situation changed a lot over the past few years and the pace of competition will continue to increase. So, the question is then: In which direction should the regulatory framework evolve over the coming years?

In our view, the main challenge is to find the right balance between the investment in NGN and the design of regulatory obligations. Such a balance should be built upon the following commitments:

- Withdrawal of all the ex-ante obligations imposed on the retail markets;
- Broadband retail products can no longer be submitted to regulatory restrictions, directly or indirectly;
- Competition amongst different technological platforms should be periodically reviewed and reassessed its implications on the regulation of wholesale offers;
- The investment on NGN should be economically efficient, generating a reasonable rate of return for stakeholders;
- The regulation of wholesale offers should be predictable, proportionate and fully justified.
- Ex-ante regulation doesn't mean always price control or cost orientation. Nor discrimination and transparency in most cases are enough, in a environment where different platforms can compete and full liberalization as taken place in EU 15 Member States at latest on 2000.

The European Commission and the NRAs should agree upon the conditions and the timeframe to implement sunset clauses.

This is our point of departure for commenting on this consultation by ERG, bearing in mind that PT Comunicações is committed to invest in NGN and to develop new broadband services and triple play solutions.

We found that ERG's approach does not take fully into account the commitments mentioned above. Rather, we are under the impression that ERG drew its own set of conclusions, which tend to go in the opposite direction in several aspects.

The main reasons behind the approach presented by ERG seem to be based on the following assumptions (see the Executive Summary):

- *NGA investments are likely to reinforce the importance of scale and scope economies, thereby reducing the degree of replicability, potentially leading to an enduring economic bottleneck.*
- *Given that next generation access networks may be more likely to reinforce rather than fundamentally change the economics of local access networks, NGA may be likely to, at least, provide the same competition challenges to regulators as current generation wireline access networks.*

As the communications sector is also technologically driven, ERG's approach means in fact that new technological developments will incur in a higher level of regulation.

Such assumptions are in contradiction with the expected outcome of the regulatory framework, in particular the 2006 Review: as competition develops, regulation shall be kept to a minimum and sunset clauses shall be considered.

What ERG is in fact saying is that the wireline access infrastructure will never be replicable. What we get from the document about the ERG perspective is "*New networks imply more economic effort, thus more regulatory intervention*". PT Comunicações asks: Is this a reasonable way of promoting the investment, competition and innovation?

ERG says that all the investments to be made on next generation networks shall take into account various regulatory scenarios. However, each regulatory cost should have a correspondent regulatory incentive. The investment PT Comunicações is planning to make on NGN needs a predictable, clear and proportionate regulatory framework.

Moreover, the ERG document never really confronts the evolution of today's metallic access network with other type of accesses: cable, mobile, wireless, etc.

In fact, today market trends evolved from voice and data to multimedia and triple play offers that are addressed, in a very efficient way, also by cable and wireless infrastructures. In particular, cable networks have a relevant market position on this area and, using DOCSIS 3.0, are able to replicate service capabilities of an NGA. Therefore, taking into account technological neutrality, we believe that an analysis of NGA cannot be dissociated from a broader evaluation of all possible access networks. This is, at least, the case in Portugal, but it is common knowledge that this situation applies to several other countries in Europe.

The approach presented by ERG does not take into account the evolution of the communications market as a whole and provides no explanation concerning the way it (mis)aligns with the 2006 Revision process and main objectives.

Let us recall that Europe aims to be the most advanced information society (Lisbon Declaration - initiative i-2010), which is recognized as an important asset to overcome the relative loss of productivity growth against US. Growth in ICT is seen as a powerful tool for development, but it requires huge investment in new infrastructures. In opposition to other societies, which created the conditions for this growth – financial incentives in Japan and Korea, regulatory holidays in US – ERG points instead to further regulation and obligations, even when the studies carried out recognize that:

- NGA requires huge investment;
- Scale is a fundamental factor for a positive business case;
- There are technological limitations to replicating on fibre based networks some of the obligations actually imposed in copper networks, and some of the possible solutions will significantly burden the necessary investment.

In such conditions, PT Comunicações considers that ERG's approach should be revised to accommodate the concerns expressed above, in particular the ability of looking at the overall scenario of the NGA and not only at the fixed line part of it.

ERG should promote an approach that finds the right balance between regulation and incentives to invest, in order to ensure a reasonable return on capital employed.

Therefore, any regulation that may be imposed on incumbents should ensure the minimization of the investment risk incurred by these operators, in order to guarantee that they do really upgrade their networks. This is the right approach to grant the deployment of innovative services to be offered in retail markets.

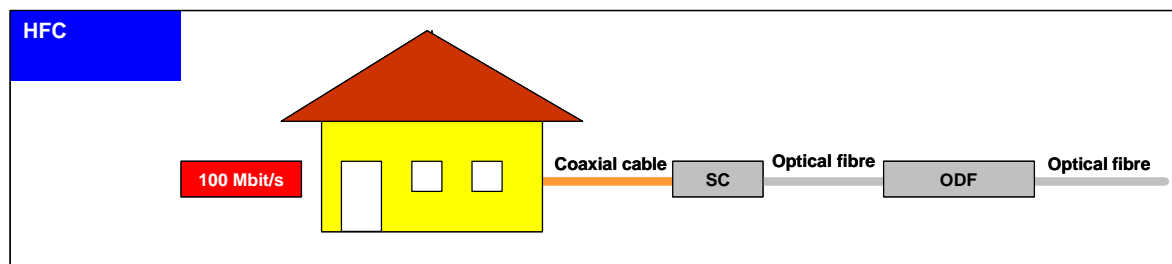
Q2. Do the scenarios describe the relevant roll-out alternatives for NGA?

As we have already said, this consultation is based on a limited view of the broadband offers.

ERG made it clear from the beginning: *This paper has explicitly focused on wireline NGA implementation issues and related regulatory implications, as current upgrades of copper and fibre access networks being carried out in a number of Member States have become a key challenge for regulatory authorities recently.*

All the other broadband solutions are therefore not considered by ERG. This restricts the market analysis to a sole technology, leaving aside other wireline, wireless and mobile solutions, which are competing nowadays with ADSL solutions. On the other hand, ERG reflects upon the evolution of the copper access, without doing a similar evaluation of the cable and wireless technologies. This is of paramount relevance, not only from the technical point of view, but especially from the regulatory and competition point of view, considering that the actual framework claims to encompass technological neutrality.

In fact, the scenarios presented do not describe all the relevant roll-out alternatives since we consider that cable networks, which allow the same type of services, should also be included in the possible scenarios of NGA.



Concerning the presented scenarios, we feel that, although Point to Point FTTH and Point to Multipoint FTTH architectures are mentioned in the text, they represent two highly distinctive solutions that should also be highlighted in figures 1 and 2, since these figures presently only show the Point to Point solution.

ERG should redirect this consultation to effectively meet the technological neutrality principle. In this way, we would have a much clearer picture of the retail side and a better evaluation of the reasonable level of regulation for the incumbent wholesale offers.

PT Comunicações expects that the Review 2006 takes into account the real market situation and revises the Recommendation on Relevant Markets accordingly.

Q3. Do you agree/disagree with regard to the conclusions on economics and business case studies?

We agree with the suggested cost categories and with the conclusion that trenching and ducting are the most significant cost factors. Nevertheless, we believe that some conclusions on economic and case studies do not apply to the Portuguese market. In fact, our wholesale portfolio already includes a duct sharing offer that eliminates the alleged “enduring economic bottleneck” related to existing trenches and ducts.

However, wherever new trenches and ducts are needed (for new areas or due to capacity exhaustion) the impact of this cost factor results in a very difficult business case.

For this reason, we believe that if telecom operators (both incumbents and competitors) could have access to all kinds of existing ducts from utilities (power networks, water distribution, sewer, municipalities, etc.), electronic communication services would evolve dramatically faster, for the benefit of the users in general. This situation is also true for other network layers, namely long distance, where we struggle against some economic bottlenecks imposed by trenches and ducts owners. Assuming that the development of NGA is a key for European development, ERG should consider widening its scope to encompass the owners of all kinds of trenches and ducts.

One should remember that with the introduction of fibre on the local loop, particularly in the case of FTTH, the boundaries of existing access networks may be extended much farther than before. Exchange areas, previously limited to some kilometres, may, in certain scenarios, be extended to tens of kilometres and therefore embrace the actual concept of the transport network.

Given the lower number of end customers per node (a few tens for both FTTC and FTTB scenarios) we could say that the business case is being pushed to the limits. In practical terms, we do not see how, in practice, those customers could be split between two or more providers, while remaining a positive business case for all of them. This can be a powerful inhibitor for investment, especially for incumbents, if they have to plan resources for competitors in advance, which (most likely) might never be used. In this context, we believe that a more pragmatic and cost effective approach would be to allow every competitor to build its FTTC/B infrastructure independently of the incumbent FTTC/B infrastructure (eventually sharing ducts or fibre), and complement its offer with the bitstream offer provided by the incumbent.

Q4. What is your opinion on the regulatory implications and on the evolution of the ladder of investment?

To evaluate ERG's NGA ladder of investment, it is interesting to notice what is said at the beginning of point 3.2 of ERG's consultation: *With the exception of cable infrastructure alternative technologies (e.g. wireless) may not provide an adequate competitive alternative to wireline deployments of NGA networks yet. If this is the case, the question for regulators is therefore "will there be effective competition emerging in the provision of end to end wireline infrastructure?". In some member states this maybe the case, mainly through the availability of cable networks capable of offering TV, telephony and Internet services.*

We conclude, from this statement, that ERG's assessment is:

1. The alternative to the copper platform is the cable infrastructure.
2. ERG does not expect too much from the ladder of investment model, as the ladder of investment concept will not promote infrastructure competition, but only service competition.
3. The ladder of investment does not promote investment. It is in fact a model targeted to regulate the investment of the incumbents, without any reflection on the retail side.
4. The ladder of investment is a self-contained model based on the copper platform. It is not a truly technological neutral model.
5. As it stands, there is, in fact, no economical, technical or legal justification for the ladder of investment concept.

That is why the evolution of the ladder of investment calls for a re-appreciation at the EU level. ERG's statement calls, in fact, for a thorough revision of the concept behind the ladder.

The last step will not lead to “own infrastructure”: *will there be effective competition emerging in the provision of end to end wireline infrastructure?*

However, to be kept as a concept supporting regulatory objectives, the ladder of investment should establish a clear relationship between wireline wholesale offers and the retail markets. This relationship should bridge the regulation of wholesale offers and network investment with the deregulation of retail markets.

The NGA ladder of investment cannot stand only as a theoretical model, designed to justify a more restrictive regulatory framework.

If this is not corrected, the regulatory asymmetry will lead to uncertainty, which will rank as the main outcome of the process launched by the Commission. PT Comunicações would like to believe that this is not the purpose of the review of the regulatory framework.

ERG is anticipating changes in the remedies resulting from MR 11 & 12, without an in-depth forward looking study on the evolution of those markets. ERG is only focussed on the copper platform and the roll-out of optical fibre, without consideration for any the other technologies: cable, mobile and wireless. ERG is also not reflecting upon the implementation of IP solutions.

Due to the coming separation of the cable network from the copper network, PT Group will see its position in the broadband market radically changed as cable networks in Portugal have high penetration rates in those markets and already supply triple play services.

Q5. Do you agree/disagree with the conclusions?

PT Comunicações would like to summarize the main aspects of its position about ERG’s consultation on NGA.

The document presented by ERG helps the operators to understand the strategic objectives of the NRAs, within the revision process of the regulatory framework. However, ERG is, in fact, changing some of the views expressed by the Commission in the 2006 Review.

Some of the aspects of ERG's approach, as it is the case of optical local loop unbundling and access to ducts, imply the revision of the Recommendation on Relevant Markets and the re-analysis of the broadband markets, which means that NRAs shall take into consideration the national environment, without losing of sight the need for harmonisation. As ERG pointed out itself, this approach cannot be seen as a one-size-fits-all solution.

If such steps are not taken, regulatory measures will not be justified and proportionate, and operators will face increased uncertainty in the development of new services and of new network platforms and because of that on its investment process decision.

It is also important to notice that competition among alternative infrastructures is already in place. It is not an emerging scenario. There are now different ways of accessing the customers and of offering broadband services over different technologies.

ERG's approach should not create regulatory barriers to the investment plans of incumbents. There should be a balance between service competition and infra-structure competition. One cannot have all the alternatives, all the time.

That is why the ladder of investment concept has to be aligned with the 2006 Revision process, especially in terms of its relation with other technological platforms and with the full deregulation of retail markets. Each step of the ladder should be connected with a withdrawal of retail regulation and should decrease the regulatory pressure over wholesale offers, each time an alternative infrastructure (cable, wireless, mobile, etc) is present in the market (national or regional). Competition will appear not only in retail markets but also in wholesale markets due to the existence of different infrastructures in the access.

As we have said, the main challenge is to find the right balance between investment in NGN and regulatory obligations. Such a balance should be built upon the following commitments:

- Withdrawal of all the ex-ante obligations imposed on the retail markets. Extensive regulation of the wholesale markets shall free retail markets from regulation;
- Broadband retail products can no longer be submitted to regulatory restrictions, directly or indirectly;
- Competition among different technological platforms should be constantly reviewed and reassessed its implications on the regulation of wholesale offers;
- The investment on NGN should be economically efficient, generating a reasonable rate of return for stake holders (otherwise, progress will be stifled);
- The regulation of wholesale offers should be predictable, proportionate and fully justified;
- There should be a clear timeframe to have sunset clauses.

Finally, it is absolutely indispensable to be clear about the definition of emerging services and markets, as well as about the regulatory approach to be considered by NRAs.

Emerging services should be those that represent an important leap forward in the quality, usefulness and attractiveness.

Any regulation that may be imposed on incumbents should ensure the minimization of the investment risk incurred by these operators, in order to guarantee that they do really upgrade their networks. Additionally, the actual obligations imposed by Regulators on some existing wholesale offers will have to be reassessed.

This is the only way to ensure the deployment of innovative services to be offered in retail markets.