

ECTA response to the consultation on the ERG's 2009 Work Programme

Summary and suggested actions

ECTA thanks the ERG for the opportunity to respond to its draft work programme. We broadly support the work items identified, but would suggest the following specific additional actions and focuses:

Comments on the action plan

- The need to add consideration of business connectivity markets

ECTA invites the ERG to examine business service markets, which have distinct characteristics from consumer markets. We encourage the ERG to define a Common Position regarding wholesale local connectivity markets underlining the need for NRAs to analyse markets such as business-grade wholesale broadband access separately from the wholesale markets behind provision of retail services to consumers/SMEs, and providing guidance to members on appropriate remedies. Our elaborated suggestion jointly adopted with INTUG and EVUA is in the Annex of our response.

- Framework Review

ECTA welcomes the ERG's planned activities on the Framework Review. However, we urge the ERG to focus more than has previously been the case on competition aspects and regulatory objectives that will significantly affect the toolbox and operation of each NRA. The ERG's independent and expert judgement on these issues would be particularly valued by the Parliament – we believe.

- NGA best practice

ECTA particularly appreciates the work that has been done by the ERG to provide templates for best practice regulation and invites the ERG to update the WLA/WBA tables to reflect NGA developments in order to ensure consistent treatment. Separately we welcome the intention to work on more detailed product specifications for an NGA ladder. We would particularly appreciate attention being given to fibre unbundling issues, including the location of the concentration point and examination of new technologies such as WDM (wavelength-division multiplexing) which allow wavelength unbundling. As regards bitstream, we would urge the ERG to look separately at specifications for consumer-grade bitstream (which should be triple-play capable) and business-grade bitstream.

Other observations

○ Fixed mobile substitution

The ERG plans to look at the potential substitutability between wireless and fixed retail and wholesale products. We find this focus surprising at this point in time in light of the fact that fixed networks are currently being upgraded and thus made capable of very high speeds and the provision of a multitude of services.

Wireless and DSL/fibre services have different characteristics regarding capability to provide triple play, download and upload speed and quality of service (incl. packetloss and jitter – affecting voice and video over IP), and thus DSL/fibre is not substitutable by wireless services except maybe at the very low end of the market. We note for example that Arcep excluded Wimax as well as mobile from the wholesale broadband markets.

○ NGN/NGA and geographic segmentation

The ERG seems to suggest that geographic segmentation may become more pronounced with more NGA. Again, we find this a surprising suggestion. It is our understanding that in a technologically neutral market analysis it is the demonstrable different conditions of competition that justify geographic differentiation, not the presence of a particular technology.

In any event, there is ample evidence (OECD, Analysys, WIK) that NGA does not affect the economics of infrastructure duplication and the replication of access networks will remain uneconomic with the deployment of fibre.

A further issue trending away from segmentation is that it might be necessary to review segmentations where NRAs have segmented WBA on the basis of competition from copper LLU.

○ References to phasing out regulation

We recognise that regulation should be kept to the minimum necessary to ensure a competitive market. However, it is unhelpful for the ERG to highlight the need to move towards competition law. A far more serious problem than over-regulation in today's markets would seem to be a trend whereby incumbents market shares have stopped falling and indeed are rising again in many countries due to inadequate action to address competition problems.

In light of this it is particularly important that NRAs keep monitoring those markets that have been removed from the list of relevant markets and ensure a proper transition from sector specific regulation to competition law.

Background

NGN/NGA and geographic segmentation

In the section of the consultation document setting out the background to the Work Programme for 2009 the ERG suggests that due to the gradual rollout of NGA/NGN a mix of technologies increasingly depending on regional characteristics can be envisaged, which might require geographically segmented regulation.

Our understanding is that in a technologically neutral market analysis, the geographic boundary of the market should be determined not by the presence or otherwise of particular technologies, but by demonstrable (existing and foreseeable within the Review period) differences in the degree of competition for products and services. This interpretation of the conditions which may justify segmentation is supported in the ERG's October 2008 common position on geographic markets, and in comments made by the Commission in relation to UK (14/02/2008) WBA.

On this basis, the main and consistent message from the ERG should be that the presence or otherwise of NGA does not per se affect the geographic scope of the market (and in market 4 in particular). Rather, the geographic boundary would only be affected if (and once) further infrastructures are installed that result in competition that is effective (or at least tangible and foreseeably effective in the near future) in distinguishable regional areas.

There is ample evidence in independent economic reports by the OECD and Analysys for regulators as well as more recently by WIK that NGA does not affect the economics of infrastructure duplication. The replication of access networks will remain uneconomic with the deployment of fibre networks, the cost of which is undisputedly high. It costs between 1000 and 2000 euros to roll out a fixed fibre access line in cities and is much more expensive in suburban, not to mention scarcely populated rural areas.

The ERG has recognised in its response to the public consultation on the Commission's draft NGA Recommendation that "NGA deployment is likely to reinforce economies of scale and density thereby rendering the business case more difficult" and concluded that more demand for enhanced active wholesale products can be expected¹.

It can be envisaged, however, that regional NGA SMP players emerge where economics prevent duplication, and the first mover thereby secures a dominant position. This does not mean that competitive levels are different, but rather that there could be differences in the SMP operator in different areas.

NGA might affect the geographic scope of those markets that have been segmented and may necessitate desegmentation. In light of NGA developments there may be a need for countries, which have segmented WBA on the basis of competition from copper LLU to re-review this market and potentially reintroduce WBA on a nationwide basis.

¹ IRG/ERG Response to the Draft Recommendation on the regulated access to Next Generation Access Networks (NGA) of 18th September 2008, p. 4

References to phasing out regulation

In the t section of the consultation document setting out the background to the ERG's 2009 Work Programme there are two references to the phasing out of regulation.

In view of the fact that the underlying incumbent shares of fixed access lines remain above 80% (e.g. in the access network where incumbents maintain 82% access lines for broadband and >90% for telephony) it would be premature to suggest that there will be no SMP and ex ante regulation will be removed any time soon.

Competition today is mostly the result of pro-competitive regulation to address bottlenecks, which follow from the economics of fixed access networks, i.e. that their duplication is not economically viable. This characteristic of fixed access networks is largely due to the structure of fixed networks and will remain unchanged irrespective of the underlying technology.

Unless consumers are ready to pay much higher amounts for fixed services than today, which is hardly conceivable, two or more fibre access lines are not foreseeable under economic terms. Consumers should not be forced by regulatory policy decisions to pay more nor should operators be led to make inefficient or loss making investments.

Therefore regulation of these access markets will be needed in order to ensure competition in retail services over fibre networks. Should access regulation be prematurely removed competition securing choice, competitive prices and innovative services for consumers will suffer.

Deliverables

Framework review

ECTA welcomes that the analysis of legislative proposals in the context of the Framework Review, in particular on harmonisation measures and remedies is on the ERG's 2009 agenda.

We encourage the ERG to take an active role and focus on the development of the competition aspects of the Framework Review that will significantly affect the toolbox and operation of each NRA. ECTA especially urges the ERG to actively contribute to the ongoing debate concerning NGA and NRAs' objectives under the Framework.

For example, concepts of 'risk sharing', infrastructure-based competition and a political preference for geographic segmentation seem unclear and could conflict with the existing principles of effective competition, efficient investment, fair return reflecting risk and technical case by case judgements on geographic segmentation.

Next Generation Networks – Access

The ERG plans to revisit its Common Position on NGA as well as to look at practical implementation issues relating to NGA products. In the context of these exercises ECTA urges the ERG to translate the Common Position as well as the views expressed in the ERG's response to the Commission consultation on the draft NGA Recommendation into measurable best practice.

As the ERG has recognised this is a dynamic market where the development of competition and efficient investment will be impacted and steered by the regulatory environment, which make consistency and predictability essential.

That is why ECTA encourages the ERG to identify measurable best practices on NGA perhaps through updating the existing best practices on WBA and LLU and take action against NRAs making unjustified departures from the collective will of all European Regulators.

We welcome the inclusion of discussion on ODF access – this should include consideration of appropriate concentration points. Other specific issues the ERG should look at is the impact of new technologies on fibre unbundling, in particular WDM (wavelength-division multiplexing) unbundling, which we understand is imminent and the availability of equivalent bitstream access, i.e. triple play capable bitstream in the consumer market and high quality bitstream for businesses.

Fixed mobile substitution

The ERG plans to look at the potential substitutability between wireless and fixed retail and wholesale products.

This item on the ERG's work plan is surprising at this point in time in light of the fact that fixed networks are currently being upgraded and thus made capable of very high speeds and the provision of a multitude of services.

Wireless and DSL/fibre services have different characteristics regarding capability to provide triple play, download and upload speed and quality of service (incl. packetloss and jitter – affecting voice and video over IP), and thus DSL/fibre is not substitutable by wireless services.

While wireless and DSL/fibre services might in some cases be substitutable at the very low end of the market, characterised by low download and upload speeds, DSL is capable of triple play, much higher, guaranteed speeds and virtually no data download limitations. The average download speed of wireless technologies is 1.6 Mbps versus the average DSL speed of 9 Mbps and the average wireless upload speed is 128 Kbps, while the average DSL upload speed is 1.2 Mbps². All wireless broadband offers include a monthly download cap, whereas only 36% of the DSL offers limit the volume of data traffic. Clearly those consumers who look for higher speeds and more intense usage of their broadband connection will not find their quick and thick lines substitutable by serious limitations on usage and restricted, non guaranteed speeds and poorer quality for similar prices.

As fixed networks are being upgraded to fibre the differences between the characteristics of fixed and wireless increase and their substitutability becomes even more limited. The average download speed over fibre is 80 Mbps and the average download speed is 62 Mbps today against the 1.6 Mbps and 128 Kbps over wireless technologies.³

The great difference in reliability and speeds will certainly not make wireless and DSL/fibre products substitutable for businesses.

² OECD Broadband statistics <http://www.oecd.org/dataoecd/10/56/39575137.xls>

³ Ibid.

These differences in fundamental characteristics have been recently recognised by ARCEP and wireless services have been excluded from the relevant market in its market 4 and 5 decisions.

Margin squeeze

ECTA welcomes that the ERG continues working on margin squeeze issues. Today bundles are a significant competitive tool for operators wishing to genuinely challenge the incumbents' still very strong dominant positions and high market shares across Europe.

The fact that despite EU competition law decisions on price squeeze such anticompetitive behaviour is still used by many incumbents to foreclose retail markets and has been extended to bundles (triple/quadruple play offers) demonstrates the need of a continuous monitoring and swift intervention on the side of all NRAs. The ERG's guidance would be very helpful in order to ensure uniformity of approach and further regulatory tools to tackle this problem.

In this context it is particularly important that NRAs keep monitoring those markets that have been removed from the list of relevant markets and ensure a proper transition from sector specific regulation to competition law.