

A warning for NGA in Europe – luring incumbent investments could cost future competition

To provide background to the issue of Next Generation Access broadband networks (NGA), the EC in September 2008 launched a public consultation on the regulatory principles to be applied by EU Member States to promote fair access to the new fibre networks being built across the region both by incumbents and by a number of alternative operators. A draft Recommendation suggested definitions for categories of regulated services, access conditions, rates of return and appropriate risk premiums (estimated to be between 8-12%, though probably higher in the final analysis). Among the key components were the regulatory principles considered appropriate to foster investment in NGNs while ensuring competitor access to them.

The EU is currently heading towards a final deal on the new telecoms package, which has been debated since November 2007 and which will reshape Europe's telecoms regime from 2010. The principal components of the package provide for the establishment of a new EU telecoms authority (ultimately to be controlled by the EC), the introduction of functional separation to spur competition, a review of radio spectrum management, and a range of consumer protection measures. At the end of March 2009 the EC strengthened the force of its recommendations by securing the right to issue legally-binding decisions in the event that recommendations are not applied by national regulators within two years. The EC also secured greater backing to enable it to veto remedies decided at a national level which could be considered anti-competitive.

As for the development of NGNs thus far, it is clear from the experiences of several markets, including France, Switzerland, Denmark, Sweden and The Netherlands, that they have been most effectively undertaken in the context of regulated non-discriminatory access, whereby the incumbent and other providers – alternative operators, housing associations, municipal governments and utilities – build networks providing equal access to partners and other ISPs (as retailers). This level of effectively regulated cooperation reduces initial investment costs and allows NGNs to progress more rapidly.

As for the EC's proposals to encourage NGNs, the matter of fostering investment remains problematic, for the EC now risks jeopardizing fair access in order to secure the cooperation, and investment potential, of incumbents. More specifically, as the telecoms review reaches its closing stages there is a real threat that the EC will succumb to political pressure from Germany and recommend that regulated competitor access to NGNs be abandoned in favour of allowing regulatory holidays for incumbents. This would go against the EC's position held since the German government in February 2007 provided Deutsche Telekom with a three-year grace from competitor access to its VDSL/FttC network (done largely in return for Deutsche Telekom's substantial investment, and by the device of amending the country's Telecommunications Law to alter the definition of what constitutes a new market). Spain has also followed this protectionist route: in October 2008 the regulator, while professing its intention to encourage facilities based competition on FttH networks, ruled that Telefónica would only have to provide wholesale access to its VDSL and fibre platforms delivering data rates at up to 30Mb/s. This was amended under pressure from the EC: as of January 2009, the regulator's draft regulation on wholesale broadband access is not limited to speeds of up to 30Mb/s and does not exclude cable and LLU from the relevant market. The EC considered that imposing wholesale broadband access only for speeds of up to 30Mb/s would hinder the competitive process in Spain, as new entrants would be unable to match the large-scale fibre deployment plans of Telefónica in the near future. Cable and DSL operators would have been forced to invest in their own fibre networks to remain competitive with the incumbent. Given that the small number of ISPs is in no position to finance fibre networks individually or collectively, the regulatory regime as it stood effectively granted Telefónica a monopoly on high-end fibre services.

Lobbying by Germany may yet reverse the principles on which the EC's position has hitherto rested, leading to an end to the current obligation to grant equal access to infrastructure, to the acceptance of regulatory holidays, and to the dubious canard that co-operative agreements between major players perform represents competition and thus negates the need for market regulation.

If these changes are accepted in the final revision consumers across Europe will be detrimentally affected. Legislated protectionism and the resulting harm to competition will not give consumers the services which they should otherwise expect: more of them, at a cheaper price, and delivered in a faster time-frame. The implications for business users are also potentially disastrous, since they will be unable to develop the seamless networks to support the improved business processes needed to meet future requirements. Thus it

is clear that the potential risk to the interests of all end-users is profound, and any appeasement now to the lobbying of incumbents will take much effort, and time, to undo.

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