



European Commission

Competition

CLEC, 30 September 2010

The regulation of cable networks and the new NGA recommendation

Christian Hocepiéd

The views expressed are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission



Introduction

After almost 3 years of constructive collaboration, involving a large number of dedicated meetings, two public consultations and the very first BEREC opinion, the Commission has on 20 September 2010 adopted its NGA Recommendation

The final wording seeks a balance between the need to maintain the broadband competition brought about by 10 years of ex ante regulation, while acknowledging a number of incentives to promote efficient investment and innovation in new and enhanced infrastructures in the interest of Europe's consumers.



Background

- Legal basis: Article 19 FWD
 - Allows broad scope: the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8
 - *Alter ego* « Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU” C(2009) 3359 final
- Why now?
 - Need to clarify *erga omnes* the Commission’s aim in its infringement procedure C-424/07 against Germany (“regulatory holidays”) as to whether NGA constitute new or emerging markets justifying a novel regulatory remedies;
 - Need to come to a common approach between NRAs at an early stage to preclude the emergence of inconsistent national regulatory responses to NGA deployment



scope

- Does not amend the 17 December 2007 Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation - C(2007) 5406
- But highlights specific issues relating to market assessment and SMP assessment aspects:
 - Markets 4 and 5 should be examined together, or at least that remedies are consistent (§ 5)
 - Cooperative arrangements for the deployment of multiple fibre FttH can affect SMP assessment and designation (§ 28)
 - Segmentation of markets or remedies (§§ 9 and 10 + rec 9 and 10)



Defines NGAs

- *“wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks. In most cases NGAs are the result of an upgrade of an already existing copper or coaxial access network” (§ 11)*
- No single download speed criterion
- Upgraded CaTV networks are NGAs



Main issue Vdsl vs FttH

- The NGA Rec distinguishes between market 4 remedies in case of FttH (§ 18 – 28) and FttN (§ 29-30)
- HFC CaTV networks are FttN, but §§ 29-30 envisage only copper subloop-unbundling
- Unbundling of coax loop is not contemplated



Are CaTV networks covered?

- FWD promotes making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology
- FWD requires NRAs, when they identify a market failure (markets which are not effectively competitive) to impose appropriate specific regulatory obligations
- Remedies must be 1) based on the nature of the problem, 2) proportionate and 3) justified in the light of the objectives.
 - Can cover access to CaTV networks: e.g. DK/2008/0862 of 9 March 2009



Framework regulates SMP operators, not networks

- Bottomline: how to prevent *ex ante*, potential exclusionary behaviour from SMP operators, such as refusals to supply, excessive pricing, discrimination etc
- As long as CaTV operators have no SMP, their networks are not regulated and the NGA Rec is not relevant for them
- Exception:
 - Convincing market features: e.g. growing demand for 3 play and cable lead in 3play, direct or indirect constraints;
 - Recital 26 old FWD: *Two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to coordinated effects, that is, it encourages parallel or aligned anti-competitive behaviour on the market.*



Conclusions

- The NGA Recommendation provides a “benchmark” for pro-competitive access regulation, to assist the NRAs in designing the most proportional access remedies to deal with SMP operators, including in case of joint dominance;
- More than regulation, the competitive threat of CaTV upgrade is driving NGA investment decisions of SMP telco’s. The role of CaTV operators should not be underestimated, including in Belgium;
- User demand is also part of the equation.



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Thank you for your attention!

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