



Cable Europe comments on the ERG Working Programme 2009

7 November 2008

Cable Europe appreciates the initiative of the ERG to invite the industry to comment on its Working Programme 2009.

First of all, we are happy to communicate to the ERG our support for its good work over the last years and we are keen to encourage the ERG to continue in that direction. However, we would kindly request the ERG to give associations at least one month when launching a consultation allowing them to consult their members and be able to submit the most appropriate comments. A somewhat longer consultation period (6 weeks) would also be very helpful during main holiday periods to enable the association to support the ERG's work as effectively as possible (deadline for comments should ideally not be set during a holiday period).

As for the background set in its Working Programme 2009, Cable Europe supports the ERG in its understanding of the needs the market has for regulation. We agree that regulation will need to be applied in a dynamic and differentiated way in the future. Fast-changing market conditions may require quick interventions and regulatory adjustments to support and promote the development of competition. Moreover, as competition increases, the framework's deregulatory agenda means that regulation should – where possible – be gradually phased out in favour of general competition law oversight. Regulators will also have to take account of the future legal and institutional frameworks that they will face in a few years' time; managing today's market conditions with an eye on tomorrow!

Generally speaking also, regulation must take into account high investments made by operators to develop new services. Regulation can not lead to distorting operators' incentive to invest in the first place. NRAs have indeed a big challenge ahead of them to take account of the market drivers before applying any 'dynamic and differentiated' regulatory approach.

Cable Europe supports OFCOM's view as follows¹. The most valuable ways regulation can support private sector investment is to:

- provide a clear, consistent and transparent regulatory regime;
- ensure any regulation takes account of the uncertainty and risk in investment;
- provide flexibility in trialling and piloting to help develop and test new technologies, commercial relationships and services;
- support experimentation by all organisations on how to deploy or run these services; and
- reduce barriers to entry wherever possible.

¹ OFCOM, Superfast Broadband Consultation, 23 september 2008



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Effective regulation must, as far as possible, avoid unintended consequences that could lead to undesirable structural and economic changes to the market. NRAs should understand the important responsibility they have when defining the geographic scope and regulating the market. They should be cautious about the potential impact of remedies such as functional separation or ducts access.

Next Generation Networks

We do not think that the move to new, next generation access networks means we need to fundamentally change our current regulatory approach. The degree of competition will drive investment and innovation; competition brings the most benefits in terms of consumer outcomes, investment and efficiency.

Therefore implementing both active and passive NGA products should be done with caution and, as implied above, regulators should consider whether and how any such remedy will affect the market in the short term, as it might otherwise lead to unnecessarily intrusive regulation and unintended consequences in the long term.

Having said that, we support the ERG's view on the Commission's Recommendation stating that NRAs should maintain some flexibility as otherwise they cannot impose remedies that are proportional and solve competition problems in the best possible way. We agree that ducts access remedy should not be seen as a panacea. If duct-sharing has *the potential to* remove significant entry-costs and make the commercial case for infrastructure competition more attractive, it is only practical / feasible in certain areas.

It is essential that NGA policy encourage the investments made by the cable industry. For 2007, this investment represented 22% of the turnover (incumbents Capex / Revenues is only around 13%) and cable operators are in the move to deploy Eurodocsis 3.0 offering up to 100mbps download speed. Cable investments in NGA may well precipitate action by other players. Conversely if cable operators do not invest, it will slow down investment by access competitors as there is less incentive of becoming an early mover.

Geographic Aspects of Market Analysis

Cable Europe has acquainted itself with the ERG Report on the Public Consultation on the ERG Common Position on Geographic Aspects of Market Analysis (definition and remedies). We encourage regulators to look first at differentiating remedies geographically before markets.

The advantage in utilizing differentiated remedies lies in the fact that it is arguably the best means of preserving the existence of fundamental



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wholesale access obligations, while at the same time taking into account localized competitive conditions, thereby relaxing the impact of other additional remedies such as price caps, transparency obligations, and non-discrimination obligations, as is deemed necessary in any given case. Accordingly, a fundamental wholesale supply situation continues, while at the same time identified competition problems are solved with appropriate remedies.

As per our submission on the topic (Cable Europe 4864), the identification of sub-national geographic markets might be justified in well defined circumstances for certain product markets and based on an SMP finding, but this approach has also the potential to create many more complications in the coherent and consistent implementation of the EU Regulatory Framework than in providing positive and justified examples of regulatory forbearance.

We consider that there are many analytical, practical and technical reasons why NRAs need to approach the issue with great caution, especially when dealing with wholesale local access markets and we therefore encourage regulators to look first at a segmentation of remedies.

Convergence

Cable Europe would like to remain closely involved in the ERG work on telecom and media convergence. We therefore would like to understand the status of the ERG discussions on this topic and urge the ERG to open a real consultation process before any Common Position/Report is reached. We do not understand that such an important work would not be accompanied by a proper consultation of the industry.

Convergence has many different aspects. For instance, bundling offers are widespread in any economy and in most cases are beneficial as they respond to consumers needs, improve quality, bring about cost efficiencies and allow, in general terms, for a better performance of the market mechanism.

Cable Europe believes that the new business dynamics, innovative technologies and the benefits for the consumers will have to be carefully addressed by regulators. Ample room should be left to competition law to examine bundling practices in the telecoms sector.