

## Comments on the ERG Consultation Document on „Wholesale Broadband Access via Cable“

Deutsche Telekom welcomes the opportunity to comment on the ERG Consultation Document on “Wholesale Broadband Access via Cable” (ERG (04) 19 rev1 revised).

Our comments will be limited to observations of a general nature on regulation of the wholesale broadband access market which are contained in the introduction of the ERG consultation document.

The following remarks will not address the technical feasibility of wholesale broadband access on cable networks as such. As a general remark it should be noted, however, that the technical conditions for possible access remedies will vary from network to network and accordingly also from country to country, requiring an in-depth analysis of possible remedies in each Member State strictly respecting the principle of proportionality.

### **De-regulating the Wholesale Broadband Access Market**

In the introduction to its consultation document, the ERG makes a number of critical assumptions regarding market definition of and the need for regulation of wholesale broadband access.

Deutsche Telekom agrees with the ERG’s starting point that the principle of technological neutrality enshrined in the New Regulatory Framework is also applicable when analysing the wholesale broadband access market. Also, the ERG rightly observes the emergence of new technologies/platforms which are capable of providing broadband services for the end-customer.

However, in drawing the conclusions from the observations made, the document does not reflect two core principles of the New Regulatory Framework which ensure that regulation is not imposed where it is not, or no longer, needed:

- regulation can only apply on markets where there are high and non-transitory entry barriers and where no tendency towards effective competition can be observed. (Commission Recommendation COM(2003)497, Rec. 9 ff.)

- newly emerging markets should in principle be exempt from sector-specific intervention by regulators in order to safeguard incentives for the development of new and innovative networks and services (cf. Rec. 27 of the Framework Directive 2002/21/EC and Explanatory Memorandum to COM(2003)497)

A widespread availability of cable networks for broadband services for the end-customer points to the existence of infrastructure competition, raising the question of whether specific existing broadband access obligations are still justified at all in the situation of viable inter-platform competition. Additional consumer choice resulting from the existence of broadband technologies other than DSL indicates that the retail market for broadband services tends towards effective competition without the imposition of regulatory broadband access obligations at wholesale level. In that case, the criteria for applying sector-specific regulation to the wholesale broadband access market would no longer be fulfilled.

The first question to answer in cases where cable networks are widely available as an alternative to DSL is therefore whether the 3 criteria justifying the application of sector-specific regulatory intervention as contained in the Commission Recommendation on relevant markets are still fulfilled.

When, as it is also done by ERG in the consultation document, new broadband access technologies are taken into account, the need for a deregulation in the field of wholesale broadband access becomes even more obvious. Possible alternatives to the existing DSL-technology, as for example WiMax, WiFi and other wireless access technologies are newly emerging. Their development should not be hampered by regulatory intervention. At the same time, they increase actual and potential competition for broadband services for the end-customer. NRAs, starting their analysis by looking at the competitive situation on retail markets, should conclude that where alternative infrastructures lead to increased consumer choice, wholesale broadband access regulation should disappear altogether.

Both above-mentioned preconditions for regulatory intervention are not at all mentioned in the current consultation document. Instead, on page 4 of the document, even an extension of regulation to new and emerging platforms is considered:

*"(...). While at present this discussion is focussed on cable as the predominant alternative to DSL, eventually this reasoning will similarly apply to fixed wireless access (FWA), fibre, 3G, WiFi, WiMax or other broadband technologies that could become widespread and the possibility that wholesale broadband access could be provided over other infrastructures needs to be looked at."*

The ERG apparently sees a potential for additional wholesale broadband access obligations for newly emerging technologies without first reflecting on the positive effects of inter-platform competition for the end-user of broadband services and the potential to roll-back regulation of wholesale broadband access obligations altogether. The impression that regulation of new and innovative broadband networks and services is seriously considered should be avoided to not create uncertainty over future regulatory intervention in these areas. The passage should not be included in a final ERG position.

## **Conclusions:**

- Availability of cable networks for broadband services for the end-customer raises the question of lifting existing wholesale broadband access obligations. Where wholesale broadband access regulation is nevertheless considered, cable networks should be taken into account in a non-discriminatory manner.
- To new technologies which may establish new markets, no sector-specific ex-ante regulation should apply. The very dynamic market situation in these cases differs completely from the market situation in already established markets. It is crucial that incentives for investing in new alternative broadband technologies are maintained for all market players.
- Any regulation of existing broadband networks if justified under the New Regulatory Framework must be strictly proportionate.
- In the upcoming review of the Recommendation on relevant markets the need for an overall deregulation of the wholesale broadband access market will have to be analysed in the light of technological and market development.