

Cable Europe comments on the ERG Working Programme 2009

5 November 2009

Cable Europe appreciates the initiative of the ERG to invite the industry to comment on its Working Programme 2010.

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 with the establishment and transition to BEREC in 2010. The tasks devoted to BEREC will be of great importance and Cable Europe and its members are committed to be a key industry stakeholder consulted by ERG/BEREC in the years to come.

As for the background set in its Working Programme 2010, 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. This remains the primary challenge for BEREC and NRAs: to take fully account of the market drivers and investment conditions before applying any 'dynamic and differentiated' regulatory approaches.

Section 1 of ERG work programme 2010 - Improving Harmonisation

Work item 1.2 - Next Generation Networks

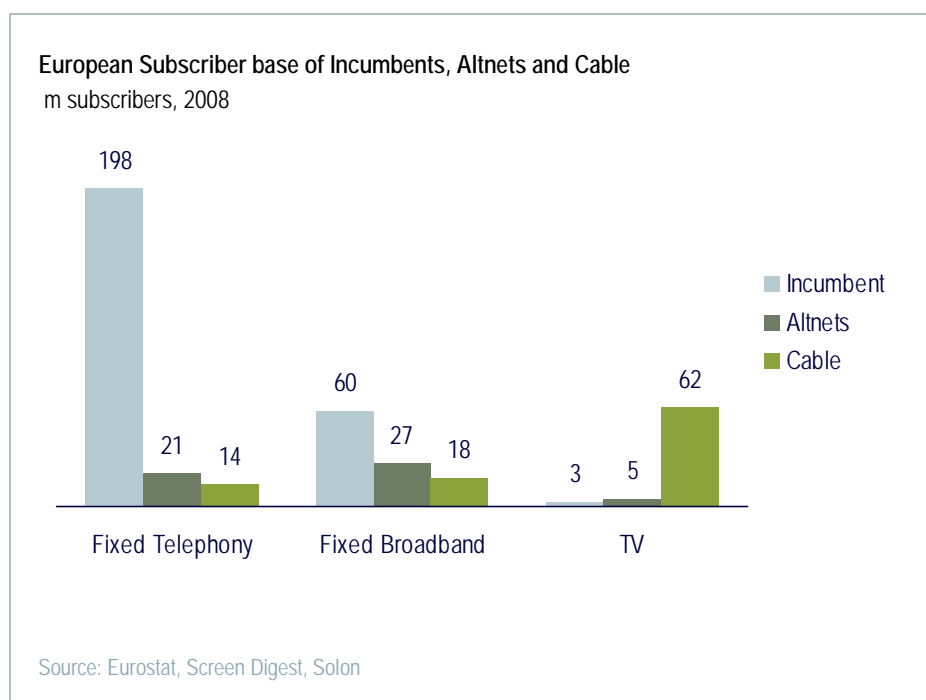
Effective regulation must, as far as possible, avoid unintended consequences that could lead to undesirable structural and economic changes to the market. Next Generation regulation for the cable industry is all about ensuring the right incentives for network operators to compete and innovate.

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 enact remedies that are proportional and solve competition problems in the best possible way.

Cable Europe believes that it is essential that NGA policy encourage the investments made by operators such as the cable industry. Overall the European Cable industry generates a turnover of €18bn on an annual basis of which, on average 25% is reinvested into further network build out¹.

In addition to their own significant investments in next generation networks, Cable operators act as a catalyst for network investments by other telecommunications players, making the Cable industry one of the most important drivers in the roll-out of a future-focused high-speed broadband infrastructure.

The positive impact of the Cable industry on the European Broadband market is noteworthy when taking into account its comparatively limited revenue size. Fixed-line incumbents still account for 71% of telecommunications revenues whereas Cable operators' share is marginal with communications revenues of €7.4bn in 2008 or 2% of total telco revenues.



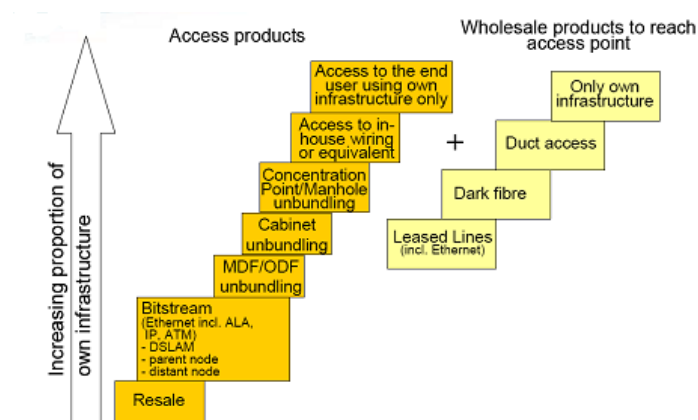
Compared to the telecommunications industry, most Cable operators are relatively minor players in the converging communications and entertainment markets yet still have a remarkably positive influence on overall market development in Europe. For example, recent analysis undertaken by Bain and Company² shows countries with greatest availability of two competing fixed access infrastructures (the Netherlands, Belgium and Switzerland) spur innovation with on average 30% higher bandwidth offers, and 29% greater penetration of broadband. This study also finds that where dual fixed infrastructures exist each infrastructure owner has an incentive to invest (either selectively or nationwide) in the next generation of technology to provide consumers with superior bandwidth performance in

¹ Solon Management Consulting, *Cable Industry in Europe*, 2009 (forthcoming)

² Next Generation Competition – Driving innovation in telecommunications 2009 – Liberty Global Public Policy Series, by Bain & Company, page 28, figure 13. Available at http://www.lgi.com/ir_public_policy.html

order to acquire or retain customers. This typically stimulates a counter-wave of investment.

Regulatory policy should serve to promote genuine infrastructure-based competition so as to allow operators to invest and deploy technologies that are independent of the SMP operators' network. The last ERG Report on NGA economic analysis and regulatory principles concludes that the highest rung in the NGA ladder of investment is "Direct access to the end user" can only be reached with "own infrastructure"³:



In this respect, we believe the draft recommendation on NGA should be modified to reflect the ERG's careful analysis of NGA hierarchy. In certain circumstances, and as demonstrated by economic analysis of broadband penetration, competition and pricing, it is clear that effective competition can be achieved with two end-to-end independent infrastructures in place. Indeed, this conclusion is supported by recent analysis by Bain and Company in their finding that:

'Given the high levels of capital investment required, analysis so far indicates that it is difficult for most markets to support multiple fixed access infrastructures— and two seems to be a more viable environment to promote technology innovation than the alternatives: either a myriad of failures of financially unsustainable players or a monopoly without infrastructure competition to stimulate innovation'⁴.

Accordingly Cable Europe believes that competition between independent infrastructures should be encouraged as the most beneficial for investment and ultimately end-users.

Lastly, Cable Europe would like to understand better the proposed ERG actions in work item 1.2 on 'addressing issues of standardization and a definition of open access' as follow-up actions to implement issues related to the Commission Recommendation on NGA.

³ ERG, Report on Next Generation Access - Economic Analysis and Regulatory Principles, June 2009, p.14 and figure 1.

⁴ Next Generation Competition – Driving innovation in telecommunications 2009 – Liberty Global Public Policy Series, by Bain & Company, page 6.

Work item 1.3 - Conformity with ERG common positions - Geographic Aspects of Market Analysis

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.

Cable Europe considers 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.

In Cable Europe's opinion, in an NGA environment the competitive pressures introduced by alternative network operators should be taken into account by the remedies to be imposed on SMP operators rather than by defining separate geographic markets. Any attempt to capture the effects of competitive pressures by defining geographically segmented markets when demand conditions are still unknown will inevitably create uncertainty in addition to being an extremely cumbersome exercise. The risk of setting inappropriate geographic boundaries and thereby applying inappropriate remedies is very large at this stage of market development. Indeed, as the market develops there is a very real prospect that the scope of geographic boundaries will change. In circumstances where the conditions of competition in a particular area can change quickly either because the NRA initially made an error or because the market evolved faster than expected, remedies will need to be able to adapt to those needs in a speedy manner. The process of geographically segmenting the market and making separate notifications is a lengthy procedure and does not lend itself to reacting quickly to changed circumstances. If an NRA chooses to vary remedies within a broader geographic market they retain the ability to change such remedies rapidly when appropriate. Consequently, a regulatory regime which segments markets geographically runs a far greater risk of regulatory failure.

Work item 1.5 - Regulatory accounting

It is essential to recognize and reward the role that cable operators play in delivering infrastructure-based competition in the context of NGA, a role which has resulted in higher broadband penetration and market dynamism where cable is present.

The implications of this approach are profound. Insufficient recognition of the role that cable plays in delivering infrastructure-based competition will result in NRAs potentially adopting proposed remedies which have negative implications for cable investment, past and present.

The condition necessary to promote efficient investment in infrastructure is a fair access pricing regime which reflects investment risk but which discourages wholesale prices detrimental to infrastructure investment already made, or about to be made. Of particular concern is the risk that cable faces competition from other operators relying on below-cost passive wholesale inputs priced on the basis of the current costs accounting of a former monopoly, or on active wholesale broadband access inputs that are

similarly mispriced. Whereas this might provide asymmetric regulatory assistance for entry to non network operators (and their business cases) it will be detrimental to cable's past and future investments.

It is therefore essential that any work undertaken by ERG in relation to the pricing/costing issues of NGA wholesale products from a cost accounting perspective takes this into account.

Section 2 of ERG work programme 2010 – Emerging challenges

Work item 2.2 - 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 whether the ERG's work in 2010 will differ or not from the work started in 2009.

In any cases, Cable Europe urges the ERG to open a real consultation process before any Common Position/Report is reached.

Cable Europe believes that the new business dynamics, innovative technologies and the benefits for the consumers will have to be carefully addressed by regulators.

Work item 2.4 - ERG/RSPG Cooperation

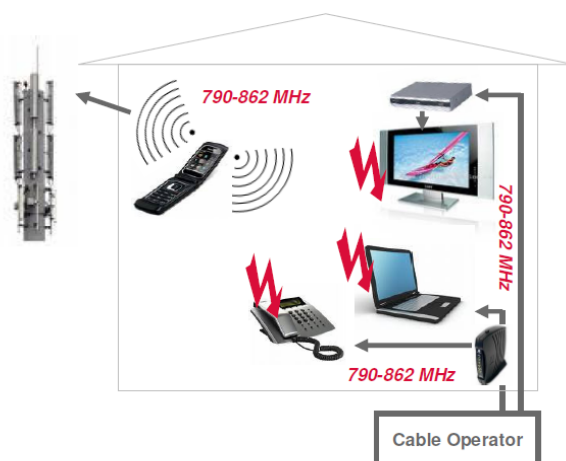
We are heartened to see that the ERG will be working alongside the RSPG on spectrum issues and will be discussing issues of market regulation and spectrum policy. Given the Commission's intention to produce a technical recommendation to Member States and in view of the Spectrum Summit in February 2010, it is important the ERG gives priority to the competitive issues arising from these exercises, and contributes actively to the public debate.

In particular, Cable Europe is concerned that insufficient priority has been given to the potential interference between existing uses of this spectrum and future use by mobile LTE devices is carried out. Preliminary research suggests that 200 million European could be negatively affected if this interference issue is left unaddressed⁵. Given the potential negative consumer impact, it is vital a proper impact assessment is made by NRAs and the ERG.

This is particularly important because the reallocation of spectrum will involve companies making significant investments in the roll out of new networks. It seems essential that the companies making such investments should be fully aware of any obligations they may incur to resolve potential interference problems.

⁵ See Cable Europe press release - Dodging interference to avoid a Digital Deficit EU announcement on digital switchover elicits a call from industry for further Member State inspection of newly identified interference for millions. Available at <http://www.cableurope.eu/index.php?page=press-releases>

Interferences Between Cable and Mobile Broadband Services

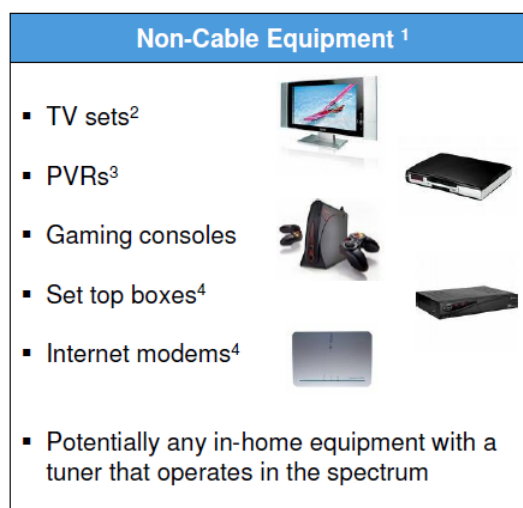


Tests in Germany, Austria and the UK have been carried out that indicate that new mobile broadband services (LTE) are likely to cause interference within customer premises and to customer equipment such as set top boxes, modems, TV sets, flat screens, game consoles... This interference could negatively affect the customer experience with a multitude of UHF receivers.

1) For example TV sets, cable modems, set top boxes
Source: Booz & Company

Since this is a technology issue that could have a direct effect on the general public and consumer and other technologies, it needs to be resolved at the policy level before final decisions on spectrum award and reallocation. In particular, those participating in spectrum auctions should be aware of any potential obligation to mitigate the impacts of interference to other users of the spectrum.

Although we understand the objectives of accelerating analogue switch-off, we caution against an acceleration of the re-use of spectrum for LTE services until a full impact assessment is carried out. Timely completion must be interpreted as getting the conditions right for the delivery of services that will satisfy consumer demands.



Work item 2.4 - Future of Universal Service Obligation

Cable Europe will be very interested to understand and follow ERG proposals for legislative changes to the scope and funding of the Universal Service Obligation. This is an important issue that will impact many stakeholders and we therefore ask the ERG to clarify that the work on this topic will be done on a very transparent manner and based on a consultation process if necessary before any Common Position/Report is reached.

Work item 2.7 - Net Neutrality

Cable Europe is very keen to follow the ERG work on this issue and urges the ERG to open a real consultation process before any Common Position/Report is reached. We believe it is essential that this important work is accompanied

by a full public consultation with industry, and mindful of the commitment the European Commission has proposed to examine the issue in 2010.

While Cable Europe considers that the new Framework, once adopted, will correctly allow the development of targeted best practices by NRAs in dealing with quality of service differentiation in new networks to the benefit of EU citizens and businesses, we believe that Europe with its particularly competitive environment for broadband access services should not become the testing ground for new strict regulation of the delivery of services and applications over networks.

Any future work of regulators in this area will therefore need to be addressed with utmost caution.

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