



COLT Telecom Group SA

Comments on

ERG Report (09) 51 on the regulation of access products  
necessary to deliver business connectivity services  
dated December 2009

1 February 2010

## **1. INTRODUCTION**

This is the response of COLT Telecommunications (COLT) to the ERG's Report (09) 51 of December 2009 on the regulation of access products necessary to deliver business connectivity services.

COLT is a leading European provider of business communications to major enterprises, SMEs and wholesale customers, offering a broad portfolio of data, voice and managed services. COLT owns and operates one of Europe's most advanced communications networks in 13 countries, through its 20,000km fibre network connecting around 100 cities, with metropolitan area networks in 34 cities and 18 integrated data centres. COLT complements its own network by the use of off-net connectivity and local loop unbundling (LLU).

As a company which is commercially focused on the enterprise sector, COLT very much welcomes the ERG report. All too often in our experience, regulatory authorities fail to consider the particular needs of business users and of their service providers, presuming wrongly both that these needs mirror those of consumers and that the market for communication services for enterprises "must be" effectively competitive. What has been markedly lacking in most Member States is a critical and detailed analysis of the communications needs of business users, the services which will meet those needs, the underlying wholesale services which are required to ensure competitive provision of those end-user services, and the regulatory approach which should be in place to secure effective competition. COLT hopes that the follow-up work to the ERG Report will be the start of a comprehensive re-thinking of regulatory approaches to the communications market as it affects the enterprise sector.

### **Defining the sector**

The ERG Report discusses the difficulties of defining the business sector, as distinguished from the consumer sector. The Report also states that the needs of many business customers can be comparable to those of consumers. COLT believes that this attempt to define different market sectors by the end-user type is a flawed approach. Customers that appear to fall into the same end-user type may have totally different communications needs, depending on the nature of their business and their commercial model. What is much more significant and useful is to define the communications needs of customers, whatever their end-user type, and then to seek to address the competitive provision of services to them.

### **Needs of the sector**

While there are many different sets of customer requirements, three key requirements are highlighted below:

- National (at least - preferably EU-wide) availability of consistent wholesale services to support the provision of communications services for business customers, thus enabling multi-site business users to benefit from choice and competition.

- Provision of wholesale carrier Ethernet services, allowing the provision of flexible, scalable and low-cost communications solutions to business users across a range of different communications technologies and networks. COLT would be very willing to provide the ERG and NRAs with further details of its proposed specification for business-grade Ethernet requirements and interfaces, including E-NNI.
- Provision of business grade wholesale services to meet business customers' requirements for low latency and contention, guaranteed quality of service levels and enhanced SLAs (cf. those suitable to serve residential consumers).

COLT notes that there is an error on page 9 of the ERG Report which makes it unclear what the ERG's conclusions or thoughts are on the issue of appropriate remedies for large businesses. The third sentence of the second paragraph of page 9 is incomplete.

### **Market definition**

Some recent decisions by EU NRAs, notably in the UK and Austria, have sought to define sub-national geographic markets. While such decisions may be justified in certain sectors, COLT believes that defining sub-national markets in respect of wholesale services which are critical to serve business users would be highly damaging to competition. This is particularly the case in respect of multi-site business users where the definition of sub-national markets would most likely lead to inconsistencies in the terms and conditions of supply (or even the non-availability) of critical wholesale services, such that in practice only the incumbent would be commercially capable of providing services for such users across a national footprint. We note that the ERG Report includes reference to comments from business users at the lack of vigorous competition, which could only suffer further if there were to be more regulatory decisions to create sub-national markets for business-critical wholesale services. Therefore, as regards at least the provision of wholesale carrier Ethernet services and the provision of business-grade wholesale services (see above), these should be considered as (at least) national markets, without any division into sub-national markets.

### **Specific problems**

In this section, COLT provides comments, raised by the discussion in the ERG Report, on a range of problem areas for competitive providers of communications services for business users.

**Market analysis:** COLT observes that NRAs often presume that a level of competition exists in the market based on over-simplistic metrics, such as the number of competitors providing certain facilities, eg. the number of LLU providers in an area. For the business market, substantial further analysis is required to assess the true level or extent of competition, looking deeper into the types and quality of the services offered by different suppliers and examining whether business users' needs are being met and, if so, whether there is effective competition between the providers of such services. The ERG Report comments on just such a situation under the heading "Multiple infrastructures, no merchant market" stating on page 6 that "In the event that none of those suppliers have SMP, there would not be much that NRAs could do under the current framework". If this were true, this would surely mark a significant failing of the current regulatory framework. An alternative

view might be to consider that there would only be no finding of SMP in such a situation where the market has been wrongly defined eg. by not separating the consumer from the business market.

**Discrimination:** This is a critical area for regulatory intervention because it is where the SMP operator is best able to exploit its competitive advantage unfairly over its downstream rivals. Discrimination takes place in many ways, through information asymmetries, through the timing of service provision, and through the offering of non-equivalent services, such as poorer quality SLAs. While the only truly effective response to discrimination is probably structural separation, there is much that NRAs can do falling short of separation to counter discriminatory behaviour. Strong transparency rules are critical in order for the NRA to be able to measure and analyse the extent of discrepancies between the wholesale services provided to the SMP operator's own retail arm and to its competitors. KPIs can be a useful tool but COLT cautions that attempting to drive out information asymmetries through new KPIs can often fail. Instead, NRAs should consider placing the onus on the SMP operator by assuming that any KPIs offered and achieved by its retail arm are secured by the underlying wholesale services, and therefore should be on offer to other retail providers at the wholesale level – the SMP operator can avoid such obligation only by demonstrating that the KPIs are achieved through the standalone efforts of its retail arm.

**New wholesale services:** COLT is strongly supportive of the view that SMP operators should be under an obligations to provide new wholesale services, ie. services not currently used by the SMP operator's own retail business. In an effectively competitive market, a provider of wholesale services would be incentivised to develop new services to meet the demands of its retail customers, ie. other service providers. Since the purpose of regulation is to mimic the operation of an effectively competitive market, having such a requirement is clearly justified. The regulatory conditions governing such an obligation should similarly seek to mimic the workings of a competitive market, ie. the obligation should apply to any new wholesale services for which there is a reasonable business case, and the SMP operator should not be permitted to exploit its market power unfairly by imposing unreasonable penalties or clawbacks for unattained forecasts or to seek a share in the commercial success of the downstream retail business of the service requestor.

**Bundling:** COLT is surprised at the lack of consideration in the ERG Report of bundling effects. Many business users prefer the option of having a single supplier of communications services and it has clearly become a strong selling point for some operators to be able to offer a one-stop shop of bundled voice, data and mobile services. The ERG needs to consider the possible unfair effects of bundling in the special context of the business market, particularly because of the different scale issues involved. For example, while it is now possible in most Member States to negotiate commercial mobile reseller agreements, these agreements are nearly always predicated upon large scale mass market sales volumes, thus effectively ruling out “niche” business providers. Furthermore, the difficulties of analysis can make it extremely hard for NRAs to look behind bundled pricing schemes to investigate whether SMP operators are leveraging their market power across different markets to gain an unfair advantage over their competitors.

**Dispute resolution:** Dispute resolution powers are necessary but not sufficient to resolve the many problems faced by business providers which are to some extent reliant upon wholesale inputs provided by SMP operators. Resolving disputes is a slow process, is necessarily restricted to specific detailed cases and is always too late for the complainant –

the SMP operator always gains from delay. Ex ante regulation continues to be required to protect downstream competition in the business market.

**Transnational concerns:** The ERG Report states that a variability of approach across different Member States should not be a matter of concern if NRAs are able to achieve the same ends. As a pan-European operator, COLT disagrees with this assertion. Having a multiplicity of regulatory approaches and remedies across different EU markets does affect the ability of operators to provide coherent and consistent communications solutions for pan-European business customers and therefore hinders the further development of the Single Market.

## 6. CONCLUSIONS

COLT welcomes the ERG Report as an initial step towards a more substantial investigation of the needs of the business communications market. However, a significant amount of further work needs to be done if effective competition for the provision of communications services for business users is to be achieved and maintained. In particular, the ERG and NRAs need to secure:

- National (at least - preferably EU-wide) availability of consistent wholesale services to support the provision of communications services for business customers, thus enabling multi-site business users to benefit from choice and competition.
- Provision of wholesale carrier Ethernet services, allowing the provision of flexible, scalable and low-cost communications solutions to business users across a range of different communications technologies and networks.
- Provision of business grade wholesale services to meet business customers' requirements for low latency and contention, guaranteed quality of service levels and enhanced SLAs (cf. those suitable to serve residential consumers).

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