



15 June 2007

EuroISPA Response to European Regulators Group (ERG) Consultation

Regulatory Principles of Next Generation Access ERG (07) 16

EuroISPA welcomes the consultation launched by the ERG on next generation access. We support the development and creation of an ERG Common Position on Regulatory Principles of Next Generation Access (NGA) to be issued as soon as possible, preferably by the end of 2007.

EuroISPA agrees with the analysis and conclusions reached in the ERG consultation document and, in particular, with the proposed revisions to the Relevant Market Recommendation in order to ensure technological neutrality.

In addition thereto, EuroISPA is pleased to formulate the following general remarks.

Promoting investments and competition in a NGA environment. Broadband Premium

EuroISPA's members have contributed considerably to investment and innovation in the ICT sector, both in infrastructures and services, and are committed to continuing such investment in the emerging NGA scenario. To do so, it is of paramount importance that regulatory rules, pursuant to the appropriate market analysis procedures, are applied in a timely and effective way. Indeed, while EuroISPA's members are experiencing widespread divergence in the implementation of the EU Regulatory Framework throughout the European Union, our members recognise that where regulation is applied effectively, investment increases and there is greater broadband take-up and service innovation.

EuroISPA believes that the current EU regulatory framework is fundamentally sound (and that its fundamental principles remain valid in an NGA scenario), however there is a need to focus on enforcement and consistency as to how this framework is applied throughout the EU. Consistency of application and effective enforcement are key to establish the EU as a world leader in the electronic communications industry and to boost investment for both traditional and next generation networks.

Promoting investments by new entrants is essential to enable telecoms competition, which is the bedrock of the broader convergence economy. In addition to our remarks about the need for a sound and consistently applied regulatory framework, EuroISPA is convinced that new entrants must be allowed to recover the actual costs incurred for the deployment of alternative infrastructure. This is particularly important in an NGA scenario, where sunk investments are particularly high and the ability to gain returns on such investments may constitute an extraordinary risk for altnets (unlike incumbent operators which, having large customer bases for traditional and broadband services, are subject to a very limited *al/ea*). EuroISPA therefore welcomes measures aimed at ensuring such cost recovery by altnets. Amongst the various available models, specific attention should be paid to the so-called "Broadband Premium", a model recently launched in some EU Member States consisting of allowing altnets to receive termination rates reflecting the actual costs supported for the roll-out of their NGAs. This model deserves attention because it is based on cost-orientation

and reflects the disparities of risks and costs between altnets and incumbents competing in an NGN environment.

It must be stressed that the Broadband Premium constitutes a corollary of the ladder of investments in coherence with the Technological Neutrality Principle. Since asymmetric termination tariffs are acknowledged for traditional PSTN networks (and subject to market analysis procedure and SMP), the suggested model extends the same principle to NGN with the aim of avoiding technological discrimination. EuroISPA further acknowledges that in a forecasted, all-IP scenario – when all platforms will be shifting to NGN – the difference between termination and transport may be blurred, and accordingly so too the traditional tariffs models. In this case, the termination model should also be appropriately reviewed.

Proper migration towards NGA

The migration towards VDSL and FTTH is critical. Various members of EuroISPA have made considerable investments into local loop unbundling (LLU), relying on the present technical and regulatory setup. There is a high risk that investments will be lost if the incumbent – especially when deploying VDSL before investing directly in FTTH/B – is allowed to unilaterally change the network infrastructure, also dismantling its Main Distribution Frames (MDFs). To avoid this risk, incumbents should be obliged to keep MDFs operative and effective migration processes should be established to allow new entrants to keep the value of their investments.

Therefore, should incumbents decide to develop NGA through a double step process, that is to say firstly installing VDSL at street cabinet level, and then FTTH/B, NRAs should make sure that this approach is not actually aimed at re-monopolising the market.

To achieve this result, it is essential that incumbents are obliged to fully disclose, in a timely fashion, their planned NGA migration process. Nevertheless, in various Members States such an obligation does not exist and neither the NRA, nor the altnets, may know how and when the incumbent will migrate towards NGA, with the result that the situation is uncertain and altnets' investments are at risk. EuroISPA therefore recommends that NRAs proactively require incumbents to disclose information about their NGA rollout – in the absence of this information, NRAs cannot identify and apply appropriate remedies.

In this respect, it is also recommended that consultation/working group processes are managed by NRAs not only to collect the necessary information from the incumbent but also to involve altnets in the process. The objective should be to have a transparent and multilateral discussion as how to migrate the whole sector towards NGA in a competitive manner. This is important to develop a system whereby unilateral commitments from the incumbent, or solutions to identified issues, can be agreed voluntarily by all stakeholders.

Evolution of LLU/bitstream in an NGA environment (learning from the past)

EuroISPA encourages the ERG's efforts to verify whether the traditional markets 11 and 12 are viable in the NGA scenario and to carry out the necessary adaptations, both from the technical and regulatory perspectives. The objective must be to ensure continuity of investment from all stakeholders and fair competition. EuroISPA fears that, without proper implementation of LLU and bitstream remedies in the evolved NGA scenario, incumbents would be in the position to re-monopolise the broadband market as many tried to do when migrating from dial-up to ADSL. One should look back to the roll out of ADSL in Europe in the years 2002-2003 when, due to the uncertainty of the regulatory tools available (especially bitstream), incumbents were able to take a significant lead in the broadband market with market shares of up to 90%. It is important to stress that such initial monopolization was due to a inexcusable regulatory failure and not based on successful move of incumbents in a level playing field: this is evidenced by the fact that once alternative operators were finally able to enter the ADSL market (by getting the necessary wholesale tools, i.e. bitstream and refined LLU) prices dramatically decreased and broadband penetration took off.

As a consequence of the above, all necessary regulatory analysis should be undertaken in order to safeguard non-discriminatory access to the NGA. EuroISPA believes this exercise to be critical because, even more than in the "copper era", the physical local access (civil infrastructure, ducts, etc.) evolved into

NGA will constitute an essential facility. Thus, bottlenecks will be stronger and replicability harder, due to the multiplication of sites to be covered by LLU. The changes to the financial scenario will also make it difficult for new entrants, especially these of small to medium size, to afford high sunk investments (the Internet bubble, which made possible financial support for diversified projects, is definitely over).

Therefore, it is of paramount importance that regulatory remedies cover all bottlenecks of the NGN access networks: FTTH/FTTB (the whole technical chain up to the DSLAM) and VDSL (copper, DSLAM in street cabinet, and backhauling).

In particular, beside LLU (which however will not be feasible everywhere), (IP and optical) bitstream offers must be available. In this respect, EuroISPA is particularly concerned that in some countries, bitstream does not cover fibre (such as in Austria) or there is a persistent lack of clarity about the scope (for example Italy, with respect to Ethernet).

Network separation

EuroISPA believes that network separation could be an appropriate tool to increase transparency and create a more level playing field in telecoms by supporting the enforcement of existing rules. This could be particularly valuable in a NGA migration scenario.

Amongst the various options for network separation, EuroISPA recognises that functional separation is the most appropriate regulatory tool to be applied in markets with a vertically integrated SMP owner of the enduring bottleneck facilities of the access and backhaul network.

Functional separation is particularly valuable because it does not replace but rather reinforces the existing pro-competitive rules in the regulatory framework. The separation of business functions can make it much easier for regulators to enforce the existing rules and prevent the incumbent from discriminating against its competitors. Functional separation is particularly appropriate where sustainable and effective competition is not present or likely in the medium term, and is a lighter measure than full structural separation (functional separation is easier to reverse in the event that competition develops ahead of expectations). However, structural separation should continue to be taken into account as an *extrema ratio* or a means of altering the power relationship between NRAs and incumbent operators.

As regards concrete examples, the Openreach model developed in the UK constitutes a very valuable point of reference. However, this solution is not necessarily the form of network separation best suited for all markets and is a solution particular to the UK. In addition, Openreach is based on the traditional network of BT and it does not provide for bitstream, the latter being an essential access model in a NGA environment. Therefore, reference to the Openreach example can be a good starting point, but it should not necessarily be considered a model solution.

Evolution of the platform competition concept

EuroISPA observes that the financial burden to convert the whole traditional local access networks into NGN (via VDSL and/or FTTH) is huge – thousands of billion Euro may be needed.

In this respect, EuroISPA's initial observation is that the migration towards NGA should be driven by market forces rather than by tactical or political reasons. Although NGA constitutes an important step for the development of services and – in turn – the economy of a country, all related investments should be justified by effective demand as regards timing and location. On the contrary, it seems that some incumbents' campaigns for prompt NGA national roll-out are essentially driven by an intent to be granted regulatory holidays and public funding, without objective justification from a market and business standpoint. This approach cannot be accepted. Although public interests may exceptionally justify deviations from basic competition and regulatory principles, there is no evidence – in the present context – that NGA development deserves special treatment. Extraordinary measures could eventually be envisaged with regard to the digital divide, an issue which – unlike NGA – requires ad-hoc interventions. In other words, and taking some Member States as an example, it makes sense to undertake extraordinary efforts to deploy broadband in

Scotland, Lapland or Sardinia, rather than jeopardise competition to install advanced broadband technologies in the centre of London, Helsinki or Milan.

That said, EuroISPA believes that while altnets should continue to be encouraged to invest by any means, one should however consider that the systematic duplication of NGN access networks everywhere is financially absurd – it and may bring the sector back to the bankruptcy crises seen around the year 2000 for carriers and backbone operators, with the final price to be paid by consumers and investors. In addition, the concrete viability for unlimited numbers of local access network operators to compete in the same local area may be doubtful, due to physical constraints (limited space in streets cabinets, access to the buildings).

Therefore, EuroISPA believes that the traditional platform competition doctrine could be partially revised. While ensuring that altnets and new entrants will continue to be encouraged to invest and compete in the NGN environment (especially thanks to the Broadband Premium concept as described above), one should also consider collective investment models (investment pools), which will allow all operators (incumbents and altnets) to share investment risks. Although collective investment models should not be mandated, regulators and public authorities should not discourage them if they may be an instrument to enhance investment in areas where there is market failure or where the duplication of infrastructure would seem to be inefficient or counterproductive (and provided that antitrust rules are not affected). Such models appear particularly interesting, though not only, in areas where operators (including the incumbent) are reluctant to invest due to the low density of the population.

Common carrier

Some EuroISPA members (for example, our Italian member association) are looking with interest at the so-called “common carrier” solution, which would centralise the NGA access network in given areas, as a result of complete market failure. While this model cannot be considered mandatory under the current regulatory framework, some of EuroISPA’s members believe that such a solution should be attentively examined by NRAs and operators in the course of the consultation for the NGA migration in given areas, and could be the result of a voluntary agreement amongst all stakeholders. In most Member States NGN development has not yet begun, therefore there may now be a unique opportunity to examine the model and lay down appropriate rules, if necessary.

The common carrier solution may be interesting because it could ensure efficient use of the financial resources needed for NGA roll-out and may be best-placed to ensure Universal Service and harmonious coverage. This is particularly important in areas where platform competition does not seem to be feasible, due to low density of the population or other constraints. Therefore, it should be stressed, in accordance with the views of some other EuroISPA members, that this model is not even appropriate for serious discussion where platform competition is expected to function properly.

If the model is correctly implemented, there will be a substantial simplification of access issues. However, it must be clear that the common carrier will be prevented from operating at retail level: it will only provide access to providers, including the incumbent, at non-discriminatory conditions. Providers would buy access from the common carrier and would sell wholesale/retail services to the market. In principle, no retail regulation will be needed. However, if the incumbent is dominant in the retail broadband market, specific practices shall continue to be monitored by NRAs (e.g. walled gardens, fixed-mobile convergence). Supervision would also be needed for the content market (eg. content aggregator and satellite distributors, such as Sky in Italy).

The ownership of the common carrier should be open and neutral: the incumbent, altnets, financial investors, municipalities and the State may be the shareholders. Appropriate governance rules should ensure the effective neutrality of the common carrier. Shareholders should provide the common carrier with financial resources and may also contribute with existing local access infrastructures (contributions in kind) as far as they are relevant for NGA access.

Multicast and IPTV

It is essential that NGA access regulation allows altnets to replicate the IPTV offers of the incumbent. The bitstream access model should therefore be priced accordingly.

In addition, as far as bitstream offers are concerned, alternative providers' access relating to multicasting should be compulsory where it is not automatic within the network facilities already provided (such as in the case of passive optical fibers). Being a simple technological function which is already available via current equipment, multicasting must be provided by the incumbent without extra-costs. It must be however considered that multicasting is only conceivable for broadcasting (linear IPTV services), not for video-on-demand.

About EuroISPA:

EuroISPA is the world's largest association of Internet Service Providers, representing approximately 1000 ISPs across the EU. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet. Its secretariat is located in Brussels. EuroISPA is predominantly funded by its member and associate member associations and the members of the EuroISPA Industry Forum.

For further information on this and other matters concerning EuroISPA, please contact Richard Nash, Regulatory Affairs Manager and Secretary General, at the address set out below.