

Creating a brighter future

Response to the consultation on the 'Draft review of the BEREC Common Position on geographical aspects of market analysis (definition and remedies).'

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Summary

The FTTH Council Europe believes that geographic differences are an important characteristic of markets that needs to be reflected in the regulatory approach dealing with FTTH investments in order to ensure that an appropriate treatment is given to such investments. An appropriate regulatory treatment strikes a balance between rewarding and encouraging the allocation of capital to long term investments with correct build or buy signals while at the same time ensuring adequate competition is in place such that consumers are the ultimate beneficiary of policy (both in the short and long term). It is in this context that the appropriate treatment of geographic segmentation must be viewed.

The FTTH Council notes the metrics which BEREC adjudges to be appropriate in determining the extent to which geographic segmentation might be justified. The pricing differentials, market shares, number of operators etc. are all about the here and now and give little weight to the prospective force of competition. Such an approach risks institutionalising competition whereas, with a series of initiatives taken at EU level, NRAs now have the possibility to look more to what is possible in a prospective sense rather than what has happened in the past. Prospectively, competition in certain areas is possible but using regulation to enable easy entry undermines the threat of capital intensive entry ever happening and so a self fulfilling prophesy may result.

Regulation, existing and signalled, has a profound impact on the market operations. Credible, predictable and stable policies create a framework in which capital can make strategic choices over the longer term. BEREC is correct and justified to express concern to have market boundaries which are stable, not for the administrative burden it might impose on Regulators but rather because of the uncertainty it can create in a context where returns may take 20 years to be realised.

It is for this reason that the FTTH Council believes that a broad urban/rural divide is appropriate in regulatory assessments. The most extensive and detailed cost modelling¹ exercise conducted in Europe was commissioned by the FTTH Council (and in which its Members co-operated and participated) and one of the key cost drivers is density and associated built environment characteristics. The fact is that over a 20 year period, some areas can support competitive entry whilst others have a much less likely capacity to do so. An appropriate differentiation of regulation in these areas will be important for investors. The cost drivers identified above will remain stable over time and thus can form the basis of a predictable regulatory delineation of geographic markets.

This fact appears to be recognised and enabled by the Commission in their forthcoming Recommendation on Relevant Markets where it is noted that

As ex ante regulation addresses the lack of effective competition that is expected to persist over a time horizon in accordance with Article 16 of Directive 2002/21/EC, NRA's market analyses have to

¹ FTTH Cost Model Report

be forward-looking. Therefore, for the purpose of this Recommendation, markets have been defined prospectively².

And again when they note that :

*The starting point is the definition of retail markets over a given time horizon taking into account demand-side and supply-side substitutability from the end-users perspective and on the prospective time horizon considered, especially in sectors like electronic communications where technological change can rapidly alter the boundaries of markets over time³. The definition and assessment of retail markets **should be done from a forward-looking perspective**, which may reasonably extend beyond the review period indicated in Article 16 of Directive 2002/21/EC.*

Although entry barriers are high they are not evenly so throughout a Member State. It seems likely that multiple NGA enabled networks could be deployed in urban areas where the cost of deployment will be low compared to deployment in other areas. Already, at least two NGA networks are available over about 30% of the EU population.

Again with multiple networks and excess capacity and the threat of further market entry it seems likely that the second criterion will not be met in these areas.

The entry threat of NGA enabled networks will be limited to low cost urban areas and the FTTH Council recognises that other access products will be necessary outside those areas. The FTTH Council believe that access remedies should be available outside major urban areas with a population density that will not support a competitive deployment.

The Council notes that other access remedies, in terms of access to passive infrastructure can best be delivered using other symmetrical access means and that such remedies will be further enhanced through a regulation and that such provisions will sit outside the market analysis procedures.

The Council emphasises its belief that such a European regulatory approach will give clarity and certainty to investors and operators and the confidence that the approach can be delivered. In effect, this approach reaffirms a graded-remedy mechanism that facilitates and moves forward an appropriate environment for large scale network investment.

The FTTH Council believe that the NGA broadband market should be geographically delineated into Urban and non-Urban areas.

² Recital 27 of the Framework Directive.

³ Section 2 of the SMP Guidelines.

Introduction

The FTTH Council Europe welcomes the opportunity to comment on the draft BEREC work programme 2014.

The FTTH Council Europe is an industry organisation with a mission to accelerate the availability of fibre-based, ultra-high-speed access networks to consumers and businesses. The Council promotes this technology because it will deliver a flow of new services that enhance the quality of life, contribute to a better environment and increase economic competitiveness. The FTTH Council Europe consists of more than 150 member companies more details at www.ftthcouncil.eu Telecoms operators are not members of the FTTH Council and we have our own perspectives regarding the appropriate regulatory policies to accelerate NGA deployments.

The FTTH Council believes that the imposition of different remedies in different geographic areas is inherently necessary to set the correct incentives for competition and welcomes consideration of these factors. The Council recognises that there are likely to be large differences in the possibility for network competition between densely populated urban centres, sparsely populated rural areas and the areas in-between. The FTTH Council also believes that there can be competing networks (either duplicated or based on LLU) in urban centres, that there may be no FTTH network in rural areas without public support and that there may be very limited competition on fibre networks in-between.

The FTTH Council believes that BEREC needs to geographically isolate areas where the prospects for physical competition are greater from those areas where such prospects are not so great the analysis presented is too static and is based on what has happened in the past. The FTTH Council believes that the assessment that needs to take place should be forward looking and should happen regardless of the current state of competition in these areas but be based on an identified potential to support competition in order to ensure the broadest geographic areas for infrastructure competition.

While the FTTH Council welcomes BEREC's attempt to give clarity on a seeming trend for a greater need for geographic differentiation, there needs to be a willingness to accept that different competition is likely to emerge in different areas based on a more forward looking approach.

A determination of where, geographically more than one prospective infrastructure could be deployed, or where a single infrastructure could effectively support multiple networks through unbundling, would warrant a different treatment of those areas. In particular, other remedies which would undermine the incentives to make the appropriate investments should not be available on that market and more importantly, it should be clearly signalled ahead of time that they will not be available. Where parallel networks are not viable or effective infrastructure sharing is not feasible, NRAs should concentrate their efforts to making sure that other forms of access are put in place as effectively as possible in the appropriate market analysis (market 5).

The FTTH Council believes that the imposition of different remedies in different geographic areas is inherently necessary to set the correct incentives for competition. The Council recognises that there are likely to be large differences in the possibility for network competition between densely populated urban centres, sparsely populated rural areas and the areas in-between. The FTTH Council believes that there is likely to be competing networks in urban centres, that there may be no FTTH network in rural areas without public support and that there may be very limited competition on fibre networks in-between.

Regulators will need to geographically isolate those areas where the prospects for physical competition are greater from those areas where such prospects are not so great. Regulators should do this regardless of the current state of competition in these areas but base their decisions on an identified potential to support competition in order to ensure the broadest geographic areas for infrastructure competition.

While the FTTH Council welcomes the Commission's acknowledgement of a greater need for geographic differentiation in the single market proposal, many of the references are less explicit than would be liked⁴. The Council recognises that the Commission has moved considerably from their original position which was that it was too early to take decisions on the geographic scope of markets. In particular there would appear to be a willingness to accept that different competition is likely to emerge in different areas.

Different treatment in the context of State Aid

Public bodies have a crucial role in ensuring that tomorrow's networks get built today. However, the form of intervention must be tailored to the specific circumstances of a State or indeed an area within a State. If we take the standard black, grey and white model of analysis where black is potentially competitive with more than one access network being viable, grey being capable of supporting only one network and white not being capable of commercially supporting any networks; the FTTH Council believe that a range of deployment models could be used to achieve maximum FTTH coverage. While competitive deployment may be appropriate in urban areas based purely on a sharing of passive infrastructures, a co-operative/collaborative deployment models will be needed in grey areas if white areas are to be minimised.

Regulators will need to geographically those isolate areas where the chances for competitive outcomes are greater from those where competitive processes are unlikely to deliver consumer benefits. Public bodies should consider doing this regardless of the current state of competition in these areas but base their decisions on an identified potential to support competition in order to limit those geographic areas where state interventions are required.

While public support beyond those competitive areas will be needed this document is consistent with the Commission's basic approach that infrastructure competition should be pursued where it is possible.

⁴ Articles 26, 30, 32, 34, 42, 44, 46 and Annex 1.

Today, there is a broad range of solutions, technologies and deployment models which are all competing with each other in the market. This does not imply though that the Commission should opt for or favour a particular technology or deployment model. On the contrary the FTTH Council believe that the solutions deployed should be determined on the market. The FTTH Council supports the fundamental approach of the Commission's State Aid approach which requires investments that use public funds to support competition and the competitive process to the maximum extent possible.

Clearly, identifying geographic areas that are likely to see market driven deployment will be more difficult as the assessor moves from white towards black. In such circumstances the FTTH Council believes that the Commission should restrict public interventions to those that lower barriers to entry, for instance by emphasising investments in passive infrastructures.

Competition neutral interventions such as the creation of Government managed funds to make available finance for fibre investments should also be encouraged and developed further in the Council's view.

The FTTH Council believes that the public sector can act as a vital catalyst to accelerate the roll out of infrastructure by lowering entry barriers and facilitating competition. This can be developed based on access to passive infrastructures and the ability to pursue independent deployment strategies. Investments in passive infrastructures lower entry barriers for all operators and provides for any operator to move first which in turn may create its own dynamic. Even if the first operator to deploy in a given area does not ultimately engage in a large scale deployment, the real possibility that it could happen may, of itself, stimulate other operators to accelerate their investments in NGA. The FTTH Council believes that this can be the best mechanism for ensuring mass market deployment in an appropriate and timely manner.

NRAs and Market Analysis

The FTTH Council believes that there should be a stronger correlation between the treatment of geographic segmentation and the treatment of geographic markets in the State Aid Guidelines. The SMP process which includes both product and geographic market definition in stage 1 must be conducted on a forward looking basis. This is also true of a State Aid assessment which takes a (proposed) five year forward looking perspective to determine which areas are to be classified as white (no prospective infrastructure) grey (only one prospective infrastructure) or black (more than one prospective infrastructure). If such an assessment can be conducted for a State Aid assessment then it is equally capable of being conducted in the context of an Article 7 market review.

A determination of where, geographically more than one prospective infrastructure could be deployed would warrant a different treatment of that area. Where parallel networks are not viable, NRAs should concentrate their efforts to making sure that other forms of access, where appropriate, are put in place as effectively as possible.

The FTTH Council believes BEREC should be much more explicit therefore about the need to geographically segment the market (though this is already apparent in the cost accounting and non-discrimination Recommendation⁵). The FTTH Council believe that this is preferable to an alternative approach which would be to allow NRAs to apply different remedies in different parts of a national market. The conditions of competition have been markedly different within certain Member States that have found a national market but put different remedies in different geographic parts of that market⁶.

Many of the issues involved in managing network competition are intrinsically linked to the issue of geographic markets and a determination of where infrastructure competition ought to be viable and where it is unlikely to be viable. This is an issue which is linked not only to geographic factors such as population densities etc. but also to a temporal factors as operators need time to roll out their networks even where such network competition is viable.

The FTTH Council observes that the draft Recommendation provides very little guidance on sub-national markets and more guidance would help. There may be a feeling that it is too early to take a decision on geographic markets. There is already some experience of operators building networks on a street by street basis and of competing operators avoiding each other, street-by-street. Taking a decision in such circumstances on what constitutes a relevant geographic market may be prone to errors.

Nevertheless, NRAs have been examining sub-national markets in more developed product markets and BEREC has been taking a view on those market analyses.

The Council believe that the recent decisions regarding what is the current market 5 could tell us something about the likely range of FTTH⁷. This is a route BEREC should explore. For example if BEREC believes that it is unlikely that end to end competitive access infrastructures will get built beyond the current scope of ULL, where ULL processes are working well and have had 5 years or more to develop then that would be a valuable data point for regulators. Another possible delineation concerns areas where State aid has been permitted as those areas are almost by default areas which are part of a separate geographic market⁸.

In the alternative, if BEREC is not confident it can give advice regarding the scope of geographic markets as part of the analysis, the Council would invite BEREC to strenghten its view on NRAs' ability to apply different remedies in different parts of a national market. The conditions of competition have been markedly different within certain Member States which have found a national market but put different remedies in different geographic parts of that market⁹.

⁵ http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

⁶ AT/2008/0757

⁷ UK/2007/0733, AT/2008/0757

⁸ State Aid approval implies that the market cannot deliver the infrastructure whereas in the general market competition is presumed.

⁹ AT/2008/0757, ES/2008/0804-0805

NRAs need guidance from BEREC which focuses their attention on where they can have maximum impact with a set of remedies in those areas where infrastructure competition is potentially possible and another set of remedies where infrastructure competition is not possible.

In whatever way it is achieved, either by geographically segmenting the market or varying remedies within a national market, NRAs must focus their interventions where they can have maximum impact with a set of remedies in those areas where effective competition in market 4 is potentially possible and complimented with another set of remedies where effective competition in market 4 might not be possible.

The FTTH Council would therefore like to see guidance that geographic market assessments should be forward looking in an NGA context; a further clarification of when and where different remedies can be used within national markets as opposed to geographic segmentation.

