

Draft Commission Recommendation on regulated access to Next Generation Access (NGA) Networks



BSG Response

About the Broadband Stakeholder Group (BSG)

The BSG is the industry-government forum in the UK that is tackling strategic issues across the converging broadband value chain. It provides a neutral forum for collaboration for organisations across the converging broadband value-chain (from the telecoms and technology sectors through to content providers and rights holders) and aims to be a 'critical friend' of government and the regulator, both of whom are directly represented on the BSG in the forms of BERR, DCMS and Ofcom. Further information about the BSG can be found at www.broadbanduk.org

The UK market

The UK broadband market has developed from a challenging position at the start of the new millennium in to the most competitive market in the EU. The regulatory framework has promoted competitive service delivery through a variety of remedies, including the functional separation of the access network within the incumbent BT. In six years the market has developed from only a few thousand broadband connections to over 16m connected households, with well over 4m unbundled lines. The competitive environment has led to increased speeds and improved services at low prices, benefitting consumers, with six major ISPs vying for market share, and no service provider holding more than 27% of the market.¹

The development of such a strong broadband market in the UK is broadly recognised as a success. At the heart of this achievement was a robust regulatory framework tailored to the specific conditions of the UK market that has successfully encouraged both investment and competition. This was enabled by Ofcom having the flexibility to determine the most appropriate way to implement its regulatory principles in the specific context of the UK market.

As we move towards next generation broadband, we believe that the most appropriate regulatory framework for the UK will be based on implementing regulatory principles in the context of the unique conditions of the UK market.

Overview

The BSG welcomes this timely output from the Commission. While we do not yet see widespread deployment of NGA across the EU, many deployments are either planned or under construction, and it is likely that this trend will continue. In the UK, for example, Virgin Media has announced it will deploy DOCSIS 3.0, and BT has committed to deploy FTTC to 10m households by 2012, providing certain regulatory conditions are met. Given the high cost of deployment and uncertainties about demand, it is unlikely that multiple infrastructures will be deployed. Any NGA network would therefore likely become an enduring economic bottleneck, and so regulated access will be required to enable competition in the market. Therefore, it is welcome that the Commission should seek to harmonise approaches to regulation of access to NGA networks across the EU at this early stage, prior to widespread deployment.

¹Point Topic, UK ISP Market Shares, Q2 2008

The BSG welcomes the general principles set out by the Commission. We believe that these are appropriate to guide NRAs across the EU. Guidance on these principles, and key issues for consideration such as competition remedies, transparency and migration, and pricing, are helpful to ensure a harmonised outcome of efficient investment in NGA networks, with effective, sustainable competition at the deepest level possible, across the EU.

The BSG supports the Commission's push towards a single telecommunications market across the EU. Given the variable conditions within national and regional markets, however, it is more appropriate for the Commission to focus on harmonising outcomes through the setting of regulatory principles, rather than harmonising the application of specific competition remedies. The Commission should support this by providing NRAs with the responsibility for implementing the principles in the most appropriate way for their local market conditions.

Broadband markets across the EU have very different characteristics. Some are well established and are nearing saturation; some are still developing and building up penetration. Some are very competitive at the retail level, or have significant infrastructure competition from alternative operators such as cable providers; others have retail markets dominated by incumbents and no alternative infrastructure to speak of. Furthermore, each market has its own set of socio-economic circumstances that add to the unique environments, and often lead to significant regional differences within national markets. Markets also face different challenges from one another when deploying next generation access. Some may be further towards deployment than others; some may have different market shapes involving regional providers.

These differences across markets suggest that different regulatory remedies are appropriate within each market in order to harmonise regulatory outcomes. In turn, this requires that NRAs have the flexibility to regulate their markets in the most appropriate way. Regulatory solutions adopted by NRAs should be suitable for their local market, based on implementation of the regulatory principles set out by the Commission. Currently, the level of prescription set out in the draft Recommendation would prevent the required flexibility. This could create unintended consequences in markets where the prescribed approach may be inappropriate for the local conditions, and therefore hinder investment and market development.

Regulation is often the art of establishing the correct balance between often competing principles. Establishing this balance in a next generation broadband world should be the responsibility of the NRAs, rather than the Commission; it is only with this responsibility that NRAs could make the important decisions regarding trade-offs between principles that will ensure the development of an appropriate regulatory environment that will stimulate both investment and competition.

Gradation of remedies

BSG agrees with the Commission that establishing the guiding principles and methods open to NRAs to enable competition is appropriate. However, we are concerned by the level of prescription placed on NRAs by the proposed gradation of remedies. In regulating their local markets and attempting to achieve the desired outcomes, NRAs will need to balance competing principles, such as between competition and investment. These judgments are best made by NRAs, based on local market conditions, and not set at an EU level; more fundamentally, the appropriate balance between competing principles may be different for each market, and therefore not appropriate to be set at an EU level.

The BSG agrees with the remedies set out by the Commission. The various options available will allow varying degrees of innovation and differentiation, for different levels of investment, by service providers in the market. The suitability of these remedies within markets will vary, however. The BSG believes that the responsibility for determining which of these remedies is most appropriate within markets should lie with NRAs.

The BSG believes that both passive and active (wholesale broadband access) remedies will be useful in enabling competition. However, we feel that the use of passive remedies may be limited, particularly in the UK but also generally elsewhere, for two broad reasons, set out below.

The availability within a market of infrastructure that can support some types of passive competition remedies will vary and will in some cases be limited. For example, in many instances access to ducts is not possible either because ducts are full, the infrastructure is not suitable, or lines are buried direct in ground. The suitability of BT's ducts is currently unknown, although Ofcom is currently conducting a survey to ascertain their condition. It is unlikely that duct access will be technically viable in all areas. Alternative active remedies will therefore be required. Similarly for dark fibre, availability will differ from region to region, and so alternative active remedies should also be supported.

A second consideration that may limit the use of passive remedies is the issue of economies of scale in an NGA market. Given the high level of investment required, particularly for the passive remedies, it is likely that in any particular location a high level of market share would be required to make the investment viable for a service provider, making the economic case for multiple users of passive remedies difficult. The BSG makes no comment on the appropriateness of such solutions, but believes that the responsibility for this trade-off, and its suitability in any market, should be with NRAs.

Furthermore, the option of active solutions is an area which the UK has looked at in some detail, with Ofcom's ALA work stream and BT's development of a GEA product. It is the view of the BSG that this type of product will be very important to complement other remedies available in the market, particularly given demand side uncertainties and difficult economic conditions for investment. These types of product have significant scope for innovation and therefore service differentiation between providers, and should play an important role as a product to encourage and maintain entrants to the market.

The BSG is also keen to ensure that NRAs have the freedom to balance competing principles. Therefore, a further issue is the degree to which different types of access should be mandated. As previously discussed, regulation in this area requires a careful, balanced trade-off between competing principles, such as investment and competition. The required balance would differ in each market, and possibly within markets. We make no comment here on what that balance should be, but do consider that the responsibility for determining this should sit with NRAs rather than the Commission; fundamentally, the different approaches required cannot be supported by a single prescribed approach across the markets in the EU.

The BSG therefore recommends that the Commission steps back from the level of prescription currently set out in the Recommendation and focuses on harmonising outcomes, to allow NRAs to determine the most appropriate range of remedies for their markets. In particular, support for active solutions as a complement to passive remedies should be made explicit, rather than set out as a remedy of last resort, and

responsibility given to NRAs to determine the exact nature and mix of remedies required.

Pricing – rate of return

We support the Commission's view that, where price regulation is appropriate, risk should be reflected in the regulated rate of return on NGA investments. It is appropriate that risk-taking is permitted a return commensurate to that risk, in order to incentivise the investment.

However, we believe the approach set out by the Commission in Annex I is again overly prescriptive. It is important that local conditions are reflected in the application of this principle. While we agree with the view that where price regulation is appropriate, the rate of return should be aligned to the investment risk, we believe that the method for addressing this, and the decision of the appropriateness of price regulation per se, would be best determined by the NRAs.

NRAs have experience in this type of activity, and are in a better position to apply this principle to the local market conditions than the Commission. Prescribing the methodology for establishing a suitable rate of return across the EU fails to take into account the specific national market environments, and could in turn generate unintended consequences that could hinder investment and/or competition in some cases.

Migration and transparency

We agree with the Commission's view that during any transition from current generation to next generation infrastructure there needs to be transparency of network development plans, such that competitors are given sufficient time to adapt their strategies and make the necessary commercial arrangements. We also agree that the NRAs will have an important role to play in ensuring that the processes set out for the transition are clear and are held to.

Again, however, we are keen that NRAs are able to maintain a degree of flexibility over their role in this process. Commercial deployments are in their infancy and will vary greatly in their scope and impact. Furthermore, each market has different characteristics – in the UK this is especially true given the existence of functional separation.

The appropriate role of the regulator therefore has yet to emerge on this issue, and again may well differ across markets. We therefore urge the Commission to set the high-level principles associated with the transition, and allow NRAs the flexibility to establish the appropriate processes and roles for their particular market.

Contact

Antony Walker
Chief Executive Officer
Broadband Stakeholder Group
Russell Square House
10-12 Russell Square
London WC1B 5EE
Direct Dial: +44(0)20 7331 2025
E-mail: antony.walker@intellectuk.org