Comments on ERG Bitstream Access Consultation document

This paper provides the European Competitive Telecommunications Association, ECTA, comment on the ERG consultation document. ECTA represents over 200 EU communications companies, delivering innovation, competition and choice to Europe's businesses and citizens.

ECTA welcomes the opportunity to contribute to the ERG's consultation on bitstream access. We appreciate the clear priority being given to this critical subject at European level as well as by regulators directly at national level. A consistent pro-competitive approach to bitstream access will help to establish a competitive market for broadband which will lead to benefits for all EU users in terms of increased choice, innovation and investment (not only by new entrants in the telecoms industry but by the convergence sectors more generally). In turn, competition will ensure that users more readily find broadband products that meet their specific needs and hence accelerate adoption in line with the objectives of *e*Europe.

ECTA broadly concurs with the ERG's characterisation and analysis of the bitstream environment, and we also endorse the recognition that a change in the financial climate has led to an evolution in the regulatory agenda. That said, we believe that the massive human resource investments made by regulators in implementing the Unbundling Regulation will not be wasted by an increase in emphasis on bitstream access. On the contrary, this consultation and the specific national decisions on wholesale broadband access will enable competitive players to develop critical mass in the broadband space – they are largely excluded in most markets at present – and lead to greater, rather than less, reliance on unbundling, line sharing and alternative infrastructures in the medium term.

We would therefore like to offer comments on the 5 questions in the text.

1 Q1: The options

ECTA concurs with the classification of the access points proposed by the ERG. We have emphasised in two main position papers in the last year (attached as part of our contribution to this consultation) the importance of access to the ATM network (2), but this is not a substitute for access to the managed IP network (3) and vice versa.

It is clear – and the consultation document very clearly illustrates – that the key variable between the options is the ability to differentiate the retail offerings to users. This is of course a basic objective of any company in any industry. As the consultation document notes, to take advantage of local loop unbundling there are huge investments needed by new entrants to lay new networks to match the ATM or IP facilities that the incumbents have switched into use for broadband, and hence a range of other access products (which may entail more or less ability to differentiate) is and will remain a key regulatory goal.

However, it has to be borne in mind that the use of ATM for backhaul may be transitory, and IP solutions are already being employed in some instances. The choice of ATM was often made for expediency by incumbents as it was the backhaul data network they had in place and hence required the least new investment to employ for broadband.

Given its current prevalence, ATM interconnect is critical at the present time. However, successful implementation of bitstream access is expected to dramatically increase adoption of broadband by consumers and business users and may lead to a review of backhaul solutions by SMP operators and new means to enable differentiation by various types of packet prioritisation[1]. The ERG will therefore need to consider in due course more generic definitions of bitstream access to SMP operators' networks in order that new entrants can continue to invest in delivering choice and innovation to end-users.

2 Q2: Regulatory approach

The consultation document proposes that bitstream should be made available if requested by OLOs/ISPs and on a non-discrimination basis.

ECTA would welcome clarification from the ERG as to how existing bitstream products would carry over into the new regime – is the ERG suggesting that they have to be re-requested? That could lead to a worrying transitional period between regimes creating considerable legal uncertainty. While a market review is appropriate under the new regime, any continuation of the existing obligations, if based on SMP, should be seamless.

ECTA has provided more detailed comments on regulatory approach in its response to the ERG's consultation on remedies and in its previous position papers. It is sufficient to reiterate some of these points.

As regards the point of access for handover of traffic, ECTA endorses the ERG's suggestion that "the appropriate point of access should be made from the perspective of the beneficiaries", although we would add that in many cases were are talking about point**s** of access.

Non-discrimination is a difficult concept to implement in a broadband environment. Vertically integrated SMP operators will often have a strategic interest in declaring that the internal handover points and transfer prices used – and hence to be available on a non-discriminatory basis to others – are those that are the least attractive for alternative operators. Ensuring that non-discrimination does deliver a truly true level playing field will be the vital challenge for regulators. At the same time, non-discrimination has a big role to play if and when SMP operators make changes to the broadband access networks for their own purposes. Non-discrimination should not only apply to access, but also to advanced notification of system changes, quality of service in general, processes applied to incumbent versus competitor's products and the systems used to deliver each service (in other words, the incumbent should not be able to provide services to competitors using outmoded higher cost technologies whilst providing services to its own downstream arms on lower cost technologies).

Given the difficulties in relying upon non-discrimination for pricing issues in the context of vertical integration, ECTA would invite the ERG to augment their proposed approach with price controls and to look at the effective application of the accounting rules which should be in place to ensure the proper application of the non-discrimination principle. ECTA's previous papers have highlighted the importance of cost-orientation requirements (including a reasonable return on investment) but also the need to avoid price squeezes. The charges for both the monthly service and the set-up costs need to be carefully scrutinised.

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[1] This may be a result of IPv6 routing, MPLS or some other system.

While an obligation to meet reasonable requests for access is clearly the only way to provide for novel access requirements, the consultation document itself demonstrates that there is now a degree of consensus across the EU regarding the basic sort of access products required to connect to ATM and IP backhaul architectures. National regulators should therefore be looking to use transparency remedies to ensure that standard bitstream products are put into a reference offer directly and without further recourse to dispute resolution mechanisms.

Vertical integration issues

As the consultation document notes, because of the vertical integration in the broadband market of local access operators with backhaul and ISP activities, access obligations will generally be necessary at multiple levels in an SMP operator's network. ECTA would welcome confirmation from the ERG that options 2 and 3 are not substitutes for each other.

As regards market definition and remedies in the context of vertical integration, two approaches appear possible:

- Consider the demand by retail players (i.e. service providers) for wholesale products and identify multiple wholesale markets and require access in each market; or

- Review retail demand as the basis for identifying the characteristics of wholesale demand. Identify as a single market the part of the network where competition is not effective and impose multiple access remedies to meet market needs.

ECTA would welcome further guidance by the ERG and Commission as to the relative merits of each approach.

2.1 Customer ownership

ECTA would welcome confirmation from the ERG that bitstream access does necessitate a change in customer ownership. Even today, some incumbents continue to offer DSL products that, although they work with all ISPs, can only be bought directly from the incumbent. This creates confusion for consumers who have to buy two products, with two brands and two bills in order to have broadband.

3 Q3: What needs to be harmonised?

There will clearly be differences between member states. The starting points vary, so too do the network architectures in question. At the same time, where situations are similar, ECTA clearly welcomes the ERG's desire that similar regulatory decisions are taken. The construction of the regulatory decision making process and the use of a Recommendation from the Commission on a basic set of relevant markets to examine are steps towards a more consistent approach. Much will depend however on whether regulators are consistently given the powers and resources to police the market.

One clear need in the interests of harmonisation is to escape from member state differences in bitstream regulation that derive solely from different legal approaches to mandating bitstream under the old regime. As the paper notes several legal solutions have proven necessary in the member states, and no solution has yet been implemented in some member states.

A number of pointers towards consistency in the area of remedies are listed in answer 2, as well as in our response to the ERG remedies consultation. There is clearly scope to learn from best practice with respect to SLAs and penalties for non-compliance, migration rules and pricing, DSLAM configurations, and non-discriminatory access to the SMP operator's economies of scale.

4 Q4: cable operators

An obligation to provide a bitstream equivalent can only be imposed upon a cable operator that has been found to have SMP in a particular market. The question is therefore what market cable broadband is part of and whether it has SMP (single or joint) in that market.

4.1 Cable broadband and the WBA market

According to the Relevant Market Recommendation the wholesale broadband access market includes anything that "offers facilities equivalent to bit-stream access", and the explanatory memorandum gives three (presumably non-exhaustive) specifications of bitstream access:

- [footnote 37] "bitstream is a service which depends in part on the PSTN and may include other networks such as the ATM network".
- "Resale [of wholesale end-to-end (i.e. option 4 in the ERG paper)] products are not considered part of this market"
- "The point in the network at which the wholesale broadband access market will need to be supplied will depend on the market analysis and in particular on the network topology and the state of network competition."

The explanatory memorandum discusses cable explicitly and concludes that upgraded cable systems are not widely deployed across the EU. By contrast broadband over the local loop is much more widespread and the wholesale service in this context is bitstream. It goes on to conclude that "[f]*or now the wholesale broadband access market is limited to bitstream services but defining the market in this way allows NRAs to take account of alternative infrastructures when and if they offer facilities equivalent to bitstream services.*"

In addition, COCOM03-04rev2 links bitstream to a notion of "differentiation" (see also answer 5.1).

ECTA would like to offer a number of comments to these elements.

4.1.1 What is meant by "offers facilities"?

EU cable operators have traditionally not made their networks available for interconnection or services from third party ISPs, favouring instead a policy of vertical integration. To that extent most do not currently "offer" wholesale services. It would clearly be a trap for any regulator to conclude that as there are currently no wholesale offers, they play no part in a wholesale market (be it the same one as bitstream or otherwise) and hence there would be no scope to impose remedies to make wholesale products available. In so doing, a massive loophole would be established entrenching a lack of wholesale offerings not just in this context but potentially more widely.

It follows that consideration will need to be given to the hypothetical demand of (perhaps themselves hypothetical) operators serving end-users looking to offer broadband products (i.e. ISPs and service providers) to define the wholesale market.

4.1.2 "equivalent to bitstream" – demand side

ECTA believes that equivalence needs to be assessed from the point of view of a potential purchaser of WBA products – this might be a residential ISP or a supplier of more complex business data services. There are a variety of elements that such a retail player would need to review when considering alternative wholesale services.

4.1.2.1 Coverage

Most service providers will be looking for widespread national reach in order to be able to offer services to the largest customer base and hence simplify their marketing proposition. For business providers widespread coverage is often also necessary so that a service can be offered to all the sites of a customer (as noted elsewhere LLU players are specifically looking for the wider geographic reach to complement the services they are providing on their own infrastructure).

Where a network provider has only limited geographic reach a national ISP would be looking for it to provide technical characteristics equivalent to a national bitstream offering so that it could be integrated with the existing marketing proposition.

The importance of coverage also needs to be born in mind when defining the geographic market (see below).

4.1.2.2 Performance

While ECTA supports the ERG's proposal that options 2 and 3 are both bitstream products and will need addressing by national regulators, the general ambition of bitstream users is to differentiate their products from their competitors and to be able to determine the consistency and quality of their service. Indeed, this is an absolute prerequisite for providers of services to businesses.

The fact that cable is a shared local access network clearly makes quality of service guarantees more of a challenge. Likewise, while ECTA looks forward to ATM bitstream products offering the ability to define the bandwidth of the virtual path and the ability to choose of CBR, it is unclear what the equivalents in a cable context are.

Where national regulators are also choosing to consider SDSL as a WBA product, the cable equivalent is also hard to identify.

4.1.2.3 Switching costs

While most SMP bitstream operators are currently using ATM for backhaul, cable operators often are not. There could therefore be considerable switching costs for a bitstream user to move from ATM interconnect to connect to a cable wholesale product.

In addition, the service provider would need to take into account the switching costs for their customers, which would take several forms:

- A new modem could be needed as might a physical connection to the network passing in the street.

- Disconnection costs may be charged
- The inconvenience and possible service interruption arising from the change.

4.1.3 "equivalent to bitstream" – supply side

Depending on the maturity of the cable infrastructures and the technological focus they have, in some markets the costs of upgrading cable TV networks can be very high and these are networks are not necessarily always ready supply-side substitutes for bitstream.

4.1.4 The geographic market

The Commission appears to be suggesting that cable should be excluded from discussion because it is not widespread in the EU as a whole. However, the relevant geographical market is either national or, as explicitly referred to in the Framework Directive and the Commission's SMP Guidelines, may be regional. In practice, the retail Internet access market has national characteristics.

The residential market is a national mass market - ISPs cannot be an effective competitor against an incumbent and its ISP subsidiary if they are restricted to geographic pockets of activity, or if they had to offer different products in different areas. National pricing is also the norm in this market.

The business xDSL market consists, in part, of large companies with geographically widespread subsidiaries or offices, e.g. bank branches, retail stores. Whilst the service may have to be differentiated customer-by-customer, large customers require common features (e.g. IP-VPN) in all locations, across the entire national territory. Companies seeking to purchase services such as IP-VPNs will often put it out to tender on a national basis, which implies that only operators with national coverage have the ability to bid for these contracts. In addition, in most cases cable networks were built to provide residential services and have are often not present in business parks – this is true even in countries with a high cable density (e.g. the Netherlands).

With LLU/SA alone, or a hypothetical service from a cable operator, neither business nor residential focussed operators would be able to achieve the necessary critical mass of customers to be viable market participants (and achieve economies of scale approaching those of the incumbent competitors): the residential-focused operator needs to be able to market its services in all the same locations as the service is available from the incumbent, or would otherwise suffer an enormous commercial handicap; the business-focused operator needs to be able to win large bids for geographically dispersed customers.

<u>Consideration of SMP</u>

This section necessarily assumes a regulator has found cable to be part of WBA market.

4.1.5 Single operator SMP

In a few areas, the cable operators did take an early lead in the broadband market. However, there are clear signs that any lead is being whittled away by DSL based on incumbent-offerings. Looking to the future it is also clear that while updates in DSL technology are enabling a greater proportion of the existing local loop infrastructure to be used for broadband, further expansion of cable networks needs physical deployment of new infrastructure in the ground (either adding a fibre overlay to an existing network or to pass more homes), and the financial climate is not conducive to this. In addition, cable networks are often poorly located to meet the needs of the business markets.

ECTA's preliminary assessment therefore is that the market is national and that the incumbent telecom operator would normally be expected to be found to have SMP. The ERG also needs to give consideration to the status of cable networks when they are owned or controlled by incumbent operators.

4.1.6 Collective SMP

We have argued above that the substitutability of cable products at the wholesale level is questionable, and that as the market is national it is typically the incumbents that will have SMP.

In the event that specific national characteristics lead to cable being included in the WBA market and where market shares are broadly equal between bitstream and the cable offering(s), ECTA would recommend that the ERG give consideration to what it would expect to see in an "effectively competitive" wholesale broadband access market (c.f. Article 16.3 of the Framework Directive). Regulation should only be lifted from the market when it is effectively competitive. ECTA does not believe that a situation where there are two vertically integrated network and service providers can be considered as effectively competitive and meeting the needs of users in terms of choice, investment in content and applications and innovation.

One avenue that might be explored in this context would be whether the conditions exist for a finding of collective SMP. The Framework Directive provides explicit guidance on the assessment of this concept, and it is worth recalling that in 1997 the Commission had already discussed the possibility of joint dominance under competition law of a telecoms and cable operator:

> *80. To take as an example access to the local loop, in some Member States this could well be controlled in the near future by two operators – the incumbent TO and a cable operator. In order to provide particular services to consumers, access to the local loop of either the TO or the cable television operator is necessary. Depending on the circumstances of the case and in particular on the relationship between them, it is possible that neither operator holds a dominant position: together, however, they may hold a joint monopoly of access to these facilities. In the longer term, technological developments may lead to other local loop access mechanisms being viable, such as energy networks: the existence of such mechanisms will be taken into account in determining whether dominant positions or joint dominant positions exist. (Access Notice)*

5 <u>Q5: Other comments</u>

ECTA would like to add three additional elements.

<u>Definition of bitstream</u>

The consultation document refers to a number of existing EU documents to derive its definition of bitstream. The resulting definition and approach suggested is broadly correct in ECTA's view, but it is worth recalling that in these documents "bitstream" has effectively meant "the type of access to high speed services that is covered by Article 16 of the Voice Telephony Directive", and subsequently elaborated upon in Commission Communication 2000/C 272/10. This legalistic definition is not required to be carried over to the new framework and will not automatically correlate to the economist's definition of wholesale broadband access that emerges from applying competition law principles to market definition. The Article 16 definition should not therefore be treated as an absolute precedent for defining the “wholesale broadband access” bitstream market.

LLU and bitstream presented as initially having been substitutes

ECTA strongly disagrees with the suggestion at the bottom of page 8 that LLU and bitstream have previously been substitutes. They have, and will remain, complements to each other. The emergence of effective LLU and bitstream products has been hindered by an uneven legal environment (LLU was mandated in some countries well before the 2000 Regulation, while the provisions in the 1998 telecoms framework for bitstream were poorly understood and unevenly enforced), the sheer complexity of the subject matter to implement, and a whole host of anti-competitive practices by SMP operators to delay and reduce the commercial attractiveness of access options. New entrants have therefore used that which was available in order to ‘do something’ in the broadband access space, and avoid being left completely behind. They therefore retain a number of legacy resale and inadequate wholesale products, and this reinforces the need for effective migration options to be put in place to complement the bitstream products that will emerge from this consultation process. The attention to cost orientation and price squeeze needed throughout should also apply to migration costs.

Bitstream remains a complement for LLU and alternative local access infrastructure investment in that it provides the means to develop scale on which to base investments in LLU, although this has to be born alongside the following consideration.

Foreclosure in the ISP market

Although not mentioned in the consultation document, one of the consequences of the poor LLU performance and the difficulties in putting in place effective bitstream offerings has been that the SMP operators have mostly been able to translate their market power at the access network level into market power in the ISP market.

With the help of this consultation process, more effective bitstream products will start to emerge but many SMP operators already enjoy considerable scale in their broadband ISP activities. They have in many countries established a first mover advantage and have considerable inherited brand power. To the extent that they are able to foreclose this downstream market the incentives to develop new access products (based on LLU or alternative infrastructures) will be severely diminished as it will much harder to establish successful retail products to take advantage of them.

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