



**QSC AG: Submission to the ERG
Public call for input on Bitstream Access**

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For additional information please contact Christof Sommerberg, QSC Regulatory Affairs
Tel. +49 (0) 221 6698 830, facsimile +49 (0) 221 6698 830
christof.sommerberg@qsc.de

QSC welcomes the opportunity to contribute to the ERG's consultation on bitstream access. We appreciate the clear priority being given by regulators across Europe to this critical subject. As an integrated telecommunications provider based on an extensive DSL network covering 74 large German cities, QSC invested heavily into its own infrastructure using the unbundled local loop to cover the last mile. QSC initiated the regulatory action leading to the implementation of shared access in Germany in March 2002.

We agree with the main positions taken and the analysis provided in the Consultation Document and we also endorse the recognition that a change in the financial climate has led to changing behaviour of market participants and therefore requires fine-tuning of the regulatory agenda. Local loop unbundling (shared access included) therefore was and is no misdirected investment of regulatory resources. When alternative providers do achieve a critical mass with the help of non-discriminatory and fair bitstream access offers, they still should have an incentive to investment in infrastructure – using the fully unbundled local loop or shared access. Only with infrastructure competition alive and sustainable, regulators across Europe have a chance to reduce the level of regulatory intervention concerning resale, bitstream access and interconnection on behalf of service providers of any kind.

We would therefore like to comment on the questions raised in the document. In addition we fully support the comments from ECTA you will have received within this consultation.

Question 1: Evaluation of options

The classification of technically possible access points is complete from our point of view. We concur with the position of the ERG, that Option 4 does not constitute bitstream access.

However, options 1 & 2 still generate some comments.

For option 1 to become reality, DSLAM have to have more than one interface on the network side to allow access at this point. As the majority of DSLAM do have only one interface on the network side, option 1 may not be as viable as the other two options.

Option 2 will be a viable option for the time being. However, ATM networks in the concentrating network are something resembling a legacy system. With raising user numbers and traffic volumes and pressure to reduce network costs, more and more SMP operators (incumbents) will have to think about switching their network technology. So the ATM network may reasonably vanish and gradually give way to other network technologies. A reliance solely on ATM-based bitstream access will either increase the danger of misguided investment by alternative operators for setting up corresponding networks or tie incumbent operators to sub-optimal technologies.

Nevertheless, option 2 today is necessary to provide services to business customers with demand for quality differentiation, as this is possible with option 3 only to a lesser extent. Increasing quality in the incumbent concentrating network comes with a price tag though, which may make it too costly for mass-market services. Therefore something resembling option 3 has to be provided in addition to option 2. Not only are bitstream access and LLU/shared access complements to each other, the same holds for the different options mentioned in the document.

Question 2: Regulatory approach

The regulatory approach to make LLU und bitstream access both available if requested has Sac's total support. Even if LLU and its satellite processes (collocation; ordering etc.) are already established in some member states, bitstream access should be mandated, if no fair and non-discriminatory contractual arrangement with the incumbent operator is possible. No major member state currently has alternative operators relying on LLU, who have covered

the total geographical area. So even if there is some LLU infrastructure, operators will need bitstream access to beef up their geographical coverage and be able to compete nationwide.

Concerning price regulation, it is important for the NRAs to balance the wholesale prices for all regulated access products in a consistent manner.

On the one hand, price squeezes like the ones still familiar to operators using LLU must not be allowed for bitstream access. Otherwise incumbent operators will be able to keep other providers from entering the market, fortifying their market position in the downstream markets even further. Cost-based price regulation as well as the „retail minus“ approach is available to NRAs. Whereas cost-based pricing – if done properly - will make price squeezes economically more painful to incumbent, it will offer protection only if combined with a retail price regulation (anti dumping). Retail minus does protect the wholesale customer against price squeezes even in the case of retail price dumping.

Retail minus, combined with an anti-dumping retail price control, will also stimulate investment into alternative access networks via LLU or shared access. This is due to the fact, that strictly enforced cost-based price regulation will presumably capture the economics of scale enjoyed by the incumbent operator from its near-monopoly in the DSL markets today. With the price level for bitstream access thus reduced, alternative operators providing competitive bitstream access services will have no chance to enter this market successfully and make regulatory intervention unnecessary in the long run.

Price regulation of bitstream access products will require a lot of complex and interacting decisions by the NRAs to keep bitstream access products out of price squeezes without choking the incentives to invest further down the value chain and create new infrastructure.

Question 3: Harmonization

QSC clearly welcomes the ERG position that similar regulatory decisions should be taken where situations are similar. Nevertheless, concerning bitstream access, there are and will be differences between member states. Network architecture and product strategy by the incumbent operator are different in each member state. Regulatory decisions have to take this into account.

Different approaches towards the goal of providing fair and non-discriminatory bitstream access do not matter, as long as this goal is attained. Therefore the common definition of bitstream access by the ERG is a remarkable starting point.

The developments in certain member states have made it clear to market participants that there is nevertheless one area left where harmonization is required. The legal approaches to implement bitstream access under the old regime – which may last in some member states for another year – were quite different. As a result bitstream access was not yet mandated in one member state. The situation of having a similar European framework and similar market conditions but no regulatory action in some member states should be avoided at all cost in the future.

Regulators may harmonize – always assuming conditions are similar – wholesale pricing approaches and effective means to control non-discrimination, especially concerning order management and delivery times.

Question 4: Cable Operators

A request towards cable operators to offer bitstream access would have to answer two questions:

a) Does the cable operator offer something like bitstream access?

Missing wholesale offers of bitstream access should not lead to premature decisions. Even if the cable operator does currently not offer anything resembling bitstream access, its network topography may offer this capability nevertheless. This is the important parameter for the decision of the NRA. A cable operator does have to the ability to provide bitstream access if it or an affiliate offers broadband (internet) access to its customers over its own – upgraded - network.

b) Does the cable operator have SMP?

For being able to take on this questions regulators have to look in the geographical market definition first. Cable operators do cover only some portions of a national market. But within these portions, they may –according to the state of their networks and the structure of the industry – have attained some market share.

In order to find SMP with cable operators, single operator SMP and collective SMP will have to be analysed. The incumbent telephony operator will always be found to have SMP in the bitstream access market due to the nation-wide geographical reach and the high market shares in broadband access found always everywhere.

It is deemed quite difficult to establish that two different operators have separate SMP in a single geographical market. So single operator SMP seems to be restricted to geographical areas where the incumbent operator has no broadband offer and capability at all, whereas there is an active cable operator.

Collective SMP is a concept where the Framework Directive provides some guidance. But already in the Access Notice of 1997 (No. 80), the EU Commission foresaw the possibility of collective dominance between incumbent and cable operator. Such an approach is necessary due to the fact that a duopoly with two integrated operators does not result in effective competition for the benefit of consumers and the economy. Nevertheless the FCC seems to embark on just such a policy of “liberated duopoly”. There is reasonable doubt, if this policy constitutes sound economic policy. It seems more likely that the ILECs are now harvesting the benefits of supporting the governing party, damaging consumer benefits and the competitiveness of the American economy in the process.

Question 5: Any other business

Urgency

Especially in member states without any bitstream access offer resp. without any adequate offer incumbent operators have achieved overwhelming dominance in the consumer markets for broadband access. LLU was usually not able to stem the tide due to price squeezes and operational delay tactics of the incumbent, which were not – intentionally or not – countered by NRAs (see for example the interview with Dave Edmonds, Financial Times August 12th 2003 and the findings of the EU Commission against Deutsche Telekom).

The dominance in the broadband access market was and is transformed into market power in downstream markets like ISP and content markets. Alternative operators are not able to offer attractive content due to low subscription levels, because content providers are looking for big customer bases. Having attracted huge customer bases for their own ISPs (or themselves) to the tactics described, now helps incumbent operators to secure contracts with content providers – sometimes with contracts prescribing exclusiveness. Market power gained in the access market is transported into ISP and content markets. The longer high incumbent market shares prevail the less alternative operators and ISPs have a chance to make significant inroads and attract interesting content.