

## **Meeting between ECTA and Commissioner OETTINGER**

**At the Cabinet on 6 September 2016**

**BASIS Request CAB OETTINGER/773**

---

### **I. Scene setter**

Investment in networks is one of main themes of the telecoms review and regulation of access to networks is a key theme as it can affect incentives for network roll-out. On the traditional Telco side, the two big camps in the discussion are the traditional incumbents (ETNO) and the alternative operators (ECTA). In addition, cable operators are the main full infrastructure competitors in the market. The presence and competitive pressure both from cable operators and alternative operators have in turn incentivised investment on the part of incumbents. While alternative operators also deploy networks, they depend on access regulation to reach the end-users.

### **Previous interactions with ECTA**

Article 4(3)

## Article 4(3)

### **Objective(s):**

#### **Our Position**

- Thank ECTA for its contribution to the review process.
- Provide an update on the Commission's plans for the Telecoms reform.
- Hear their views and get the support on these initiatives.

## II. Line to Take

### *General*

- We have been open and transparent regarding our ambitions and intentions. We are keeping the competition focus and adjusting the framework to deal with the more diverse situation faced not only at EU level, but at individual markets level.
- We are putting an additional emphasis on competition to invest, ensuring that all market actors have equal chances to invest.

### *Incentives for deployment and take-up of very high-capacity networks in competitive markets*

- To deliver appropriate incentives, the new telecom rules will require regulators, following guidelines provided by BEREC, to map network investment intentions, enable public authorities to seek investors in under-served areas, and empower regulators to act against operators who deviate from their declared intentions in such areas.
- The new telecom rules will prioritise network access remedies that directly support competitive infrastructure deployment wherever feasible, and will reflect the retail choices already available to end users.
- The new telecom rules will establish predictable regulatory conditions to promote co-investment and wholesale-only business models, facilitating deployment of very high-capacity networks deeper into suburban and rural areas.
- The new telecom rules will clarify that long-term instalment payments for connections are consistent with end-user protection rules.

### *Spectrum rules for mobile connectivity and 5G*

- The new telecom rules will establish key principles for spectrum assignment in Europe, new Union-level instruments to fix assignment deadlines and licence periods, and a peer review among national regulators to ensure consistent assignment practices.
- The new telecom rules will promote a consistent approach to coverage obligations, to small-cell deployment and to network sharing, thereby stimulating 5G deployment and rural connectivity.
- The new telecom rules will facilitate spectrum sharing in 5G networks, and promote end-user access to Wi-Fi-based connectivity.

### *Incentivising take-up through competitive markets, consumer choice and affordable tariffs*

- Very high-capacity networks only produce both a return on investment and wider beneficial externalities if they are taken up by citizens and businesses. The new telecom rules will modernise end-user switching rights, including for retail bundles.
- The new telecom rules will ensure that vulnerable end-users have a right to an affordable connectivity contract so that no one should be excluded from access to basic connectivity.

*Rules adapted to new communications services and to the internal market, a governance model that ensures regulatory stability and coherence.*

- The new telecom rules will secure a fair internal market through maximum harmonization of the main sector-specific end-user rules, applicable as appropriate to comparable services.
- The new telecom rules will establish an efficient EU system of electronic communications regulators, with common objectives of enhancing end-users' access to and take-up of very-high capacity connectivity, of promoting a competitive internal market and of safeguarding end-users' overall interests.

## *Speaking points*

### *General / Short Summary*

- We have been open and transparent regarding our ambitions and intentions. We are keeping the competition focus and adjusting the framework to deal with the more diverse situation faced not only at EU level, but at individual markets level.
- We are putting an additional emphasis on competition to invest, ensuring that all market actors have equal chances to invest.
- Especially for those of you who already own or co-own their networks (and those that want to), we will propose an important set of changes that will favour your ability to do so:
  - Regulated access to duct infrastructures will underpin sustainable infrastructure competition, where possible
  - Infrastructure mapping by NRAs will lead to more transparency, better information and targeted regulation, and will give early-stage security to alternative operators who invest in areas where the incumbent is inactive
  - Commercial agreements will now be way for incumbents to reduce the need for regulatory interventions, but we insist on it being compatible with sustainable competition and there is a regulatory backstop: this should create a business opportunity for everyone
  - Co-investment projects will be your chance to expand network ownership and to compete while being less dependent on regulation – but this also requires incentives for incumbents to cooperate.
  - We also lighten regulation for wholesale-only networks, which may support transition towards a better functioning access market. [This will avoid any of you being over-regulated if your fibre projects are ever found dominant at local level.]
- In areas where access regulation is still necessary, we seek to secure the link between equality of access and pricing flexibility for next-generation incumbent networks – too often, NRAs have taken only one side of the package we set out in 2013.
- All this is of course comes with a very concrete and very important objective in mind, namely to ensure that we achieve the connectivity that we need for the DSM.
- I believe, here we are in agreement!

Topic by topic with more details:

*Connectivity*

- Without connectivity there will be no DSM. It is a rather general consensus.
- I do not think a hollow "competition versus investment" controversy is useful for a debate. I want to underline that the framework is and will be based on competition law principles. None of the ideas considered would work at the expense of competition.
- However, there will be **no competition in places with where the number of very high capacity networks is in fact zero**. Such situations must be addressed by the framework if we are serious about the DSM.
- Business as usual will not achieve the DSM ambition. Rather than focusing exclusively on access-based competition, emphasis is also needed on a regulatory model that gives **sufficient space to competition to invest**.

*Market Regulation, Competition & Investment*

- I am a strong supporter that competition is the main driver for investments and bringing the best outcome for consumers.
- As I said on many occasions - access regulation to dominant networks will remain a central mechanism of the telecoms framework.
- However, business as usual will not help to achieve the DSM ambition. Adaptations to the regulatory model are needed if connectivity ambition is to be achieved.
- Such adaptations should ensure that every market player would then have to have equal chances to invest – or if necessary to co-invest – and those who take that chance should then also get the benefit.
- I am a strong believer in encouraging investment projects which are based on open, good faith and reasonable co-investment offers, including a **possibility for all players** to participate.
- This would ensure that **at least the current level of competition is kept** when a new high capacity network is build - by maintaining regulated access for broadband at the level that was equivalent prior to the new investment.
- However, I am of the view that investment projects which are based on open, good faith and reasonable co-investment offers, should be **accompanied by nuanced regulation of** very high-capacity networks of dominant operators for a period reflecting the most acute initial investment return risk. That way we keep the existing level of competition but also ensure sufficient scope for return of investment incentivising new network deployment.

*Spectrum*

- While connectivity is a central theme in the review process, network access is not the only building block of the telecoms package. The building blocks of the package are not self-standing topics - they are closely linked to the overall connectivity narrative.
- I want to build spectrum debate on a positive foundation and Article 4(3), getting Member States on board in terms of the overall connectivity ambition will facilitate spectrum debate.
- It is imperative to enhance spectrum management framework, especially as it is so important for the success of ubiquitous connectivity.
- There will be a need for a large bandwidth of radio spectrum to be used by 5G networks for various purposes. I count on ECTA's continuous support in spectrum debate and in outlining the role of wireless connectivity and its implications for the success of 5G in Europe.

### *Services*

- High level consumer protection is a prerequisite for consumer confidence. This is best achieved if we have a serious look of what is still sector specific, regulate that and leave the rest for horizontal rules.
- We just need to find for the right instruments in ensuring a continuous protection in light of market and technological advancements.
- We are screening carefully all the existing rules to avoid overlaps. Where horizontal rules are enough, there is no need for sector specific rules.
- On the other hand, we have to be clear that when the provision of services is depended on public resources such as number, the use of these resources is subject to specific conditions. Whoever uses those resources, be they telcos or OTTs, should be subject to the same conditions.
- But there may also be areas where current sector specific protections may need to be extended to all new players.
- It is this combination which ensures that equivalent services are treated in a similar manner.
- Thus clarification and simplification is expected in the area of services. We also need to address the divergent rules at national level. The call for more harmonisation is well founded in my view.

### *Sector governance*

- Changes to sector's governance will also be needed in order to support the substantive adaptations to the framework.
- We will need an efficient EU system of regulatory authorities to increase regulatory predictability for market players. This would necessitate reinforcing the competences of regulators and their capacity to act towards the single market in the European

bodies. BEREK must have a stronger basis and commitment to work towards the DSM.



### III. Defensives

#### *Oligopolistic markets*

- I am aware of calls for the new tools for regulators to address oligopolistic markets.
- I see a risk of overregulation and actually going against the simplification agenda of the DSM. This is not to say that this question does not deserve a careful consideration. On the contrary.
- But I am sure we have tools which should help avoiding non-competitive outcomes. When it is not economically possible to duplicate all parts of the network we would consider that access to those non-replicable network assets is regulated regardless who owns them.
- In parallel to the telecoms review process, revision of guidelines on significant market power could indeed be helpful.
- Regulate only when necessary is an important idea - "just in case" regulation is not the way forward and I believe there are ways to address concerns over oligopolistic markets.

***How can access regulation incentivise investments in very high capacity networks? Should more focus be put on the assessment of retail competition before regulating wholesale markets? Should commercial agreement be taken into account in regulation?***

- Many factors impact investments and many of them, such as overall economic environment, GDP, population density, have very little to do with regulation.
- However, regulation also has an impact on the investment environment. The investment needed to provide Europe with a future proof infrastructure for the digital age requires ensuring a sufficient return for new investments relative to risks.
- We need to increase certainty for investors. This involves setting the right conditions for investments in high-capacity networks and reducing divergences between regulatory practices.
- Regarding regulation of markets, we indeed should keep in mind that we ultimately regulate only to address market failures with a view to assuring good level of end-user outcomes. Retail market may be competitive without heavy regulatory intervention because of competing infrastructures. Infrastructure-competition often also incentivises operators often to open their networks for third parties. In this kind of settings indeed we should probably give more space for commercial access agreements, with of course necessary ex post dispute resolution safeguards by NRAs. The emphasis on addressing retail-level problems is already accepted practice by many NRAs, even if it is not directly enshrined in the Framework. However, the emphasis needs to become more central to the analysis, because the structure of networks and the dynamics of wholesale markets are becoming increasingly varied and complex.

***What is the preferred method to realise high capacity networks in (often rural) areas with one infrastructure operator and no viable case for infrastructure competition? What innovative access regulation models would you find acceptable in promoting investment in these areas?***

- To address the investment challenge we would start from the existing premise that competition is the main driver for investments. Access regulation has allowed market entry and a healthy level of competition, especially at retail level. However, more emphasis should be put on regulatory models that give sufficient space to competition to invest rather than focusing primarily on ensuring access-based competition. To achieve this we are considering a set of measures.

- Our starting point is that public funds can help to reach some of the most remote areas with NGA networks, but they cannot bridge the connectivity gap that we have in Europe. It is for market forces to achieve the best possible network in each area.
- Co-investments, provided they have the right conditions, can play an important role to ensure that the risk is shared between operators, including for the riskiest investments, and that the deployment of new infrastructure is not at the expense of end customer choice. We have seen examples in several Member States, which are starting to reshape the structures of NGA networks.
- In some circumstances, local initiatives aggregate demand and bring enhanced networks to areas where the market has not delivered. If other operators move in to respond to their investment, their business case may be fatally compromised. It may be necessary for legislation to intervene and place some safeguards.
- In order to target regulation to the needs of the most disadvantaged areas, national regulators must have a clear picture of the reach and economic potential for the networks that are deployed within their territory. For this reason, regulators' powers and role in mapping networks in the national territory may need to be enhanced.

***Do you consider that a market structure with two or more fixed networks has a risk of causing consumer harm (less investment, higher prices, lack of product innovation and choice) without some form of access regulation? What access regulation model would you consider acceptable in these markets? What are the conditions to be fulfilled (e.g. symmetry, regulatory certainty)? Could access regulation bring risks to investment incentives in such markets?***

- In the EU, we started from monopolistic market structures in our sector. The fact that liberalisation and regulation have led to oligopolistic market structures is already a great achievement for end users.
- Infrastructure competition has a positive effect on investments. Where alternative infrastructures compete for retail and sometimes wholesale customers, they have a greater incentive to improve the quality and reach of their networks.
- There is no magic number of infrastructures that makes a market effectively competitive, or not. Oligopolies may or may not lead to consumer harm and to retail market problems. This depends on many economic and technological factors, which can provide incentives for healthy competition, or rather for the opposite.
- The Framework already provides for a test to address a market with several network owners, in the case where the conditions for tacit collusion, or joint dominance/SMP, are met. Further clarity could be brought.
- As to other situations, we have to protect market dynamics and end users, but also be mindful of the risk of overregulation. Regulation should only intervene where it is necessary and appropriate, because the connectivity goals in terms of quality, choice and price are not met for end-users.
- For instance in those circumstances, ensuring access to non-replicable parts of the networks can be key to maintain sustainable competition.

## **Sector specific regulation for communication services**

***Is there a political objective to review sector-specific rules for telecom services beyond a mere technical analysis of overlap with general rules?***

- The objective of the revision of sector-specific end-user rights is two-fold. First, in REFIT we are screening the scope for deregulation or adaptation either by concluding redundancy or recourse to horizontal consumer protection legislation.
- Second, we aim at addressing a level regulatory playing field between traditional electronic communications services and functionally substitutable communications services provided by online service providers (OTTs), in order to close gaps in the protection of end-users and foster fair competition.

***Which rights of users of communication services are insufficiently guaranteed by general rules and therefore need sector-specific rules? Does that also apply in case communication services are supplied by OTT players?***

- Our current assessment is that the level playing field and focused end-user protection is probably best achieved by a targeted mix of deregulation and application of a key, but limited, set of sector-specific rules to OTT communication services.
- While the scope for deregulation is the subject of ongoing assessment, we have identified certain areas where leaner provisions may be warranted.
- For instance we are now considering that provisions on contractual information and transparency could potentially be limited to IAS only.
- Furthermore, we aim at adapting the scope of beneficiaries to the objectives of the relevant provisions in the Universal Service Directive. The experience shown that the level of protection needed by (larger) business users is not the same as that of individual consumers and of small and micro enterprises.
- Sector specific rules for communication services appear necessary in areas where these services make use of public resources such as numbers in the national numbering plan. Therefore provisions on number portability, access to numbers or emergency calls appear still necessary. Also provisions on security and confidentiality of communications appear necessary for public policy reasons. It may be appropriate to apply those latter provisions also to OTT communications services.

***Is it necessary and feasible to overhaul the structure of rules, for instance by distinguishing between digital communication services (whether provided by telcos or OTTs) and communication networks?***

- Innovative online services ("over the top ('OTT') services") are increasingly relevant for the electronic communications sector and perform a competitive constraint for traditional electronic communications providers (e.g. VoIP and IP based-messaging make inroads into traditional revenue streams such as voice and SMS). At the same time these novel services also boost demand for the provision of data services.
- The level playing field means different things to different stakeholders and the discussion often lacks clarity. If there is understanding that similar rules should apply to equivalent services it is a prerequisite to assess when different services are equivalent.

- Sector-specific rules for Internet Access Services are largely accepted, divergences exist rather regarding the exact scope of rights and obligations.
- The question of equivalence when communications services are provided in addition to or over the Internet Access is more complex.
- If the provision of a service is dependent on the use of a public resource, such as numbers, in order to ensure end-to-end connectivity there may be good, if not necessary reasons, to treat the service differently from a service which is provided on a best effort basis without recourse to such public resource. It is widely accepted that using public resources is subject to a number of conditions.
- We acknowledge, however, that there are also public policy interest which may eventually require applying certain regulatory obligations to all communications services regardless of the mode of provision or whether they use public resources or not. Security of communications and confidentiality of communications are examples of such public interests.

**Author:** Article 4(1)(b), CNECT B2, Article 4(1)(b)

## IV. Background

### 1. European Competitive Telecommunications Association (ECTA)

Founded in 1998, ECTA is a European non-for-profit trade association representing the regulatory and commercial interests of '**challenger**' electronic communication service providers and their suppliers with more than 100 members. This is in contrast to European Telecommunications Network Operators Association (ETNO) which represents the interests of incumbents.

Promoting Competition in Europe's Electronic Communications Sector  
ECTA's Regulatory Secretariat in Brussels works closely with our Members and key European institutions to bring about change in regulation which supports competition, investment and innovation in the European ICT sector.

ECTA organises an annual regulatory conference and various workshops aimed delivering 'up to the minute' regulatory information to senior decision and regulatory policy makers.

#### *Mission*

To promote and foster a regulatory environment for the European Communications Sector which ultimately supports free market competition and leads to political, social and economic benefits for all Europe's businesses and consumers.

### 2. Elements of ECTA's position on spectrum in the public consultation

Article 4(3)

### 3. Telecom Review

The public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services ended on 7 December 2015. 244 contributions were received online and around 30 contributions through other sources. A wide array of stakeholder groups replied, with the majority of contributions coming from the telecom players. Wider digital economy and traditional non-telco industry players were also active. On 3 March 2016, the results of the consultation were published on the DSM website.

## **Results of the public consultation**

Connectivity is broadly recognised as the underlying driving force for the digital society and economy, underpinned by technological changes and evolving consumer and market demands. Indeed, good connectivity is perceived as a necessary condition to achieve the Digital Single Market. Many respondents pointed to the need for policy measures and possible adjustments to current policy and regulatory tools to support the deployment of infrastructure in line with future needs.

A number of inputs asserted that the current regulatory framework does not much advance the internal market. There is a general perception that the regulatory framework needs to be adjusted to the current market dynamics. Many respondents however acknowledged the achievements ushered in by the liberalisation of the telecom markets, in particular in terms of end-user benefits and competition within most national markets.

On spectrum, the importance of wireless connectivity and wireless broadband are acknowledged. In general, industry is supportive of a more co-ordinated approach and seeks additional certainty for investments and possibilities to develop throughout the EU new wireless and mobile communications including 5G.

Member States' authorities generally underline the achievements in the field of technical harmonisation, and the need for additional coordination to be bottom-up and voluntary; some of them call for a better balance between harmonisation and flexibility. There is general recognition of the importance of a more flexible access and use of spectrum in the future.

While administrations of several Member States, the regulatory community and consumer organisations still see a need for a sector-specific end-user protection based on high-level minimum harmonisation, the telecom sector calls for more reliance on horizontal legislation and full harmonisation, especially for services. The telecom sector in general but also some administrations argue that the same rules should apply to similar services while other administrations, so-called "Over-the-top" players, software and equipment vendors, cable operators and some broadcasters are of the view that the concept of electronic communications services as currently defined has proven itself.

While the continuing role of national regulatory authorities and spectrum management authorities is widely acknowledged, a large group of respondents highlight that the institutional set-up at EU level should be revised to better ensure legal certainty and accountability.

## **Policy options/issues in the review**

We consider that the framework review should pursue one overall regulatory objective, articulated in terms of outcomes: widespread access to and take-up of very high-performance connectivity. It would be made clear, that the current three policy objectives i.e. promotion of

competition, of the internal market, and of citizen interests, as well as the regulatory principles relative to investment and innovation, are at the service of this overriding objective.

### *Network access*

Our future proposals on network access will aim at responding to the objective of the DSM strategy to incentivise investment in very high-capacity broadband networks and to the overall ambition to enhance connectivity, while maintaining a pro-competitive approach. To this end we are working on a set of measures which provide necessary safeguards for access-based competition, while limiting regulation to what is necessary and increasing incentives for incumbents and alternatives to roll out very high-capacity networks and (where feasible) competing infrastructures.

To address the investment challenge we would start from the existing premise that competition is the main driver for investments. Market analysis and appropriate remedies, would remain central tools. However, more emphasis should be put on regulatory models that give sufficient space to competition to invest rather than focusing primarily on ensuring access-based competition.

To achieve this we are considering a set of measures which aim for (1) the simplification and geographic focus of access regulation, (2) Value the well-designed access programmes to the civil infrastructure (ducts, poles, etc.), (3) Improving the investment environment for very high-performance networks of SMP operators (4) Clarifying regulatory treatment of wholesale-only models (5) The legal regime on symmetric access to non-replicable assets could be clarified and (6) To enhance competition in the provision of cross-border business services.

To equip the NRAs with sufficient tools to address the connectivity challenge, in particular in rural areas, the competences and tasks of independent regulators may need to be reinforced, e.g. as regards the powers of NRAs to map broadband investment plans across their national territory.

### *Spectrum*

Spectrum is a core enabler for the deployment and development of current and next generation mobile and fixed wireless networks (e.g. 5G). In addition to affecting deployment, the manner in which spectrum is assigned and the conditions attached to spectrum assignment and usage, are also major determinants of mobile competition, which in turn influence quality of service, prices, speed of roll-out and take-up of mobile broadband. At the same time, fixed-mobile and telecommunications-broadcasting convergence are blurring the distinction between traditional telecommunications markets, which will lead to significant change in the nature of competition for products and services.

The Framework review will be a major building block of the 5G strategy. The objective is to have spectrum rules fit for 5G success and for supporting efficient investments, thereby contributing to the overall objective of deployment of very high-capacity networks throughout Europe. Our proposals would focus on (1) a more efficient timing between allocation and assignment; (2) predictability and consistency for market investors in the next generation of wireless broadband networks regarding the main conditions for assigning or renewing national spectrum rights of use and (3) regulatory clarity on additional needs for 5G beyond spectrum.

Regardless of the question as to what extent the above-mentioned issues should be dealt with exclusively at the national level or co-ordinated at the EU level, it is clear that all of them have a direct impact on the market functioning at the national level and would benefit from greater consistency. Therefore we are reflecting on the right balance of competences between various national authorities, including the role of NRAs acknowledging that, at present, all of them do not have competences in spectrum matters, and on the appropriate setting in which such peers can contribute at EU level alongside the Commission to general policy guidance and to peer-review of specific national proposals, so that the market knowledge is appropriately taken into account in establishing national award procedures, conditions for renewals and main conditions attached to spectrum usage rights.

### *Services*

The objective of revised sector-specific end-user rights is two-fold. First, in REFIT we are screening the scope for deregulation or adaptation either by concluding redundancy or recourse to horizontal consumer protection legislation. Second, in order to close gaps in the protection of end-users and foster fair competition we aim at addressing a level regulatory playing field between traditional electronic communications services and functionally substitutable communications services provided by online service providers (OTTs).

While the scope for deregulation is the subject of ongoing assessment, we have identified certain areas where leaner provisions may be warranted. For instance, the provisions on contractual information and transparency could potentially be limited to IAS only; horizontal rules on alternative dispute resolution and online dispute resolution may have made sector-specific rules redundant. Furthermore, we aim at adapting the scope of beneficiaries to the objectives of the relevant provisions in the Universal Service Directive. The experience and feedback in applying the current framework has shown that the level of protection needed by (larger) business users is not the same as that of individual consumers and of small and micro enterprises.

As regards the level playing field discussion, sector-specific rules for Internet Access Services (IAS) are largely accepted; divergences exist rather regarding the exact scope of rights and obligations. The question of equivalence when communications services are provided in addition to (or over) Internet Access is more complex. If the provision of a service is tightly linked to network operation and is dependent on and benefits from the use of a public resource, such as numbers, in order to ensure interoperability and end-to-end connectivity via the network, such a service may not be in all respects comparable to a service which is provided on a best effort basis without recourse to such a public resource.

It may thus be opportune, for the purposes of further discussion, to reflect on a possible distinction between (1) rules applicable only to communications networks, and to communications services that include provision of connection to the network as a key feature of the service, and which may use public resources to this effect, and (2) a subset of rules also applicable, according to need, to other communications services. Services that could be considered to provide a connection to the network could include POTS telephony, IAS provision, provision of managed services, or provision of any other services using public numbers (in or out).

### *Governance*



We consider that an adequate and efficient institutional set-up is key to ensuring a positive outcome for the overall regulatory framework, and also that an efficient EU system of regulatory authorities is critical for the "connectivity" based digital single market. NRAs and BEREC have been, and should continue to be, at the core of the telecoms regulatory system.

A critical aspect of the governance system is the distribution of competences amongst the different institutional stakeholders (at national level: independent NRAs and other national authorities; at EU level: BEREC, RSPG, Commission...). Another critical aspect is how to efficiently ensure the independence of NRAs, including that they should be adequately resourced to perform their core tasks and to fully participate in BEREC.

In view of market and technological developments, there are areas of pan-European relevance where BEREC could play a (greater) role, such as coordinating the mapping of network infrastructures, monitoring the quality of Internet services or the conditions for provision of cross-border business services, monitoring the development of wider markets for communications platforms or services, and developing as appropriate technical guidance or prerequisite preliminary specifications for standardisation. In co-responsibility with the Commission, BEREC could play a stronger role as repository of regulatory experience.



## ECTA Position

### *The Dos & Don'ts of Co-investment*

May 2016

#### I. General considerations

- Co-investment, understood as investment in and co-ownership of tangible access network assets, can be a means to ensure efficient investment e.g. in non-replicable NGA network segments ('the local loop' or 'the last mile'), by avoiding uneconomic duplication and allowing the sharing of investment risk. If properly designed, co-investment initiatives can be a means to promote competition at the retail level.
- The Commission could consider exploring the possibility to establish a 'right to co-invest' in the last mile. SMP operators planning to roll-out fibre and associated facilities in the last mile should consult other operators/competitors beforehand, propose a co-investment arrangement and meet all reasonable requests for passive wholesale access. This should not replace or modify the market analysis regime and access regulation where SMP is found, except that the NRA needs to take account of co-investment situations when performing its market analyses.

- It is highly doubtful that providing incentives of a de-regulatory nature will push co-investment in otherwise unprofitable areas (white NGA areas). ECTA cautions against tweaking regulation or providing incentives of a de-regulatory nature which can reduce competition. Co-investment should not be used as a means to pursue unwarranted deregulation but a tool to foster network roll-out and allow competitors to further climb the ladder of investment.
- NRAs should be empowered to intervene in co-investment negotiations where an SMP operator is involved, namely by ensuring that the co-investment vehicle is not controlled by the SMP operator and that appropriate technical and economic wholesale access conditions are defined. NRAs should also be empowered to solve disputes.
- A wholesale-only model, whereby all network elements are available at wholesale level (and the 'wholesale netco' does not provide services at the retail level) constitutes the form of co-investment which is most likely to prevent discrimination and to ensure equal access to the deployed infrastructure. It is also more attractive to financial investors. If operators pursue co-investment deals other than a wholesale-only model, it must be ensured that entry into the co-investment is open, *ab initio* and *ex post*. Equivalence of inputs must be ensured between the co-investor which rolls-out the network and the other co-investors.
- If co-investment models are promoted, these must focus only on the roll-out of future-proof fibre technologies (along with backhaul and ancillary infrastructure).
- The success of a co-investment agreement/model will depend *inter alia* on a governance structure which ensures that the investment vehicle is not controlled by one or a subset of co-investors. There is a careful balance to be struck between attracting the incumbent and other operators to join the co-investment and ensuring that the co-investment safeguards competition at the retail level. Prevention from overbuild is also key to ensure that the co-investment works, notably in white NGA areas. In this regard, the broadband State Aid guidelines could be amended to prevent overbuild by an operator who had declared not to have investment plans in the area for which State Aid is granted. Prevention of overbuild by incumbents in non-State Aid cases should also be pursued/aimed at.
- The Commission must avoid excessive prescriptiveness regarding co-investment and other cost and/or risk-sharing models. A soft rather than a hard law approach should be pursued.
- Any measures taken at EU level regarding co-investment should ensure that effective competition is safeguarded and develops in EU telecommunications markets. Co-investment deals must not lead to harmful or non-competitive outcomes.
- Any guidance from the Commission on co-investment should:
  - not prevent operators from entering into co-investment agreements and/or cost/risk-sharing deals;
  - be limited to situations where one of the co-investors has SMP and/or where State Aid is involved. Non-SMP operators must be free to co-invest without being subject to *ex ante* regulatory obligations and oversight (other than complying with competition law requirements).

## II. The 'Dos' and 'Don'ts' of Co-investment

### *The 'Dos'*

#### **Wholesale-only model<sup>1</sup>**

- Structurally separate commercial network entity with clearly separate operating conditions and incentives.<sup>2</sup>
- No control of the co-investment vehicle by one or a subset of co-investors.
- Open and non-discriminatory access to all network elements and to any ancillary facilities.
- Construction of the network so as to allow the independent operation of the network by each co-investor/player.
- If the incumbent enters the co-investment, a commitment by the incumbent to decommission its existing networks could be considered.

#### **Other co-investment and cost/risk-sharing models**

- Sufficient number of participants.
- Symmetric access (if different operators invest in different areas).
- Long term 'Indefeasible Rights of Use' (IRU) that match the lifetime of the network (mostly based on an upfront fee/CAPEX with monthly fees restricted to maintenance costs – OPEX – which are stable over time). NRAs should be able to monitor the costs and act if the tariffs are not reasonable.
- Construction of the network so as to allow the independent operation of networks by each co-investor. The deployed network architecture must allow passive access.

---

<sup>1</sup> Wholesale-only models may not be viable in some areas/geographies especially if the operator with the largest retail market share does not do 'whole-buy' from the co-investment vehicle.

<sup>2</sup> Mandating a wholesale-only model where the investment vehicle is structurally separated may not be adequate at all times. The type of co-investment vehicle and obligations attached should be aligned to the local circumstances, the dimension/technology of the operator(s) at stake, and incumbents' involvement in a co-investment vehicle. For example, a small/medium sized operator could find it unreasonable/not proportionate to carry out a business branch separation.

- Allow co-investors to invest in a proportion of the available capacity. Co-investors should be able to invest progressively e.g. activate up to 5 or 10 % of the lines with the possibility to activate further lines *a posteriori* by paying a risk premium. The IRU should be transferable on the wholesale market.
- Commitment to allow the renewal of the co-investment deal, without a new upfront payment, after the initial period of co-investment or IRUs expire. Legal certainty is key.
- Openness to additional co-investors/late entry into the co-investment agreement possible, with the possibility of a risk premium being paid, as well as wholesale access to non-co-investors, on reasonable terms. Equivalence of inputs must be ensured between the co-investor rolling-out the network and the other co-investors.
- No restriction regarding the use of the deployed network (i.e. the network can be used for the provision of services to residential and business customers, for backhaul to base stations, etc).
- Possibility for operators to share the costs of deploying passive infrastructure (e.g. trenching, duct deployment).

#### **Prevention from overbuild**

- Define geographic areas as ‘co-investment areas’ and carry out a ‘call for co-investment’. Prevent network roll-out outside the co-investment vehicle after market players have indicated that they do not plan to invest/co-invest in a specific area.
- Co-investors commit not to invest in alternative fixed access networks in the co-investment area.
- Limitation of rights of way.

#### *The ‘Don’ts’*

- No financial or operational control or potential for control of the co-investment vehicle by a single or sub-set of the participants.
- No pre-set contractual option to buy out co-investors.

### III. Comments regarding the French co-investment model

The regime currently applied in the '*Zones moins denses*' guarantees that all operators, including competitors with lower retail market shares and less investment capacity, can participate in the co-investment scheme. This regime should, with some improvements, be extended to the '*Zones très denses*':

- Co-investment to cover a sufficient number of lines, ideally the local loop/last mile, with the distribution point located at ODF level and passive access offered.
- Cost-sharing to take into account the projected market share in the deployment area (e.g. in blocks of 5%) instead of an *a priori* 1/N division of costs (which makes it challenging for smaller operators, with lower market shares and less investment capacity to enter into the co-investment).
- Clarity needed regarding the renewal of the IRU after the 20 year' period elapses. No new upfront payments should be foreseen.
- *Ex post* entry into the co-investment vehicle to be cost-oriented and subject to a reasonable risk premium.

The regime applicable to the '*Zones très denses*' should not be replicated as it does not provide proportionate, reasonable and non-discriminatory conditions for altnets/competitors.