

European Commission
DG Communication Networks, Content & Technology
Unit B2 – Regulatory coordination & users
Avenue de Beaulieu 33, 06/068
B-1049 Brussels

E-Mail: cnect-g1-avmsd-refit@ec.europa.eu

Vienna, 4th December 2015

ISPA CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE EVALUATION AND THE REVIEW OF THE REGULATORY FRAMEWORK FOR ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES

Dear Sir/Madame,

ISPA (Internet Service Providers Austria; Identification Number: 56028372438-43) is pleased that the European Commission has issued this public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services.

I. Regulation and Competition

Question 11: To what extent is the regulatory framework for electronic communications coherent with other EU policies, in particular:

- a) Competition policy and state aid
 significantly moderately little not at all do not know
- b) Data protection and privacy
 significantly moderately little not at all do not know
- c) Audiovisual policy
 significantly moderately little not at all do not know
- d) Rules applicable to online service providers under the e-Commerce Directive
 significantly moderately little not at all do not know
- e) Other EU policies
 significantly moderately little not at all do not know

As regard to a), the regulatory framework for electronic communications (hereafter ECS Framework), on one side, and competition/state aids policy, on the other, are fully coherent, since

they are based on the same methodological and economical approach: definition of a relevant market, assessment of a (single/collective) SMP, potential remedies.

About b), there is consensus in ISPA that the current data protection regulation is, due to historical reasons, too focused on market sectors, while it could be applied with a broader perspective. In this respect, ISPA is of the opinion the e-Privacy directive may no longer be necessary and could be covered by the (incoming) new General Data Protection Regulation.

About c) and d), we believe the ECS framework is coherent with existing legal frameworks in respect to both the audiovisual and electronic commerce disciplines, since they are perfectly complementary to each other.

Question 13: In your opinion, what is the additional value resulting from the implementation of the EU regulatory framework for electronic communications? Please explain your responses

The EU regulatory frameworks for telecommunications (1988-1996 EU directives) and for electronic communications (2002-2009 EU directives) have been highly successful in fostering competition for the provision of retail open internet access on a widespread basis by requiring careful definition of relevant markets susceptible to ex-ante economic regulation, by requiring identification of significant market power on relevant markets based on proven technical/economic bottlenecks, and by enabling the imposition of ex-ante regulation only where objectively justified.

The current regulatory framework provides a coherent and well-tuned set of policy objectives, which has proven to be effective. Competition is a key driver of network investments and should remain a primary objective of the framework. If the efficient investment aspect (which is a sub-policy objective in Art. 8 (5) of the Framework Directive) were to be considered for amendment, it should only be done in a way which reinforces the requirement that investments are efficient, and that all players, big and small, are effectively able to invest.

Promoting effective competition based on a competition law and a principles-based regulatory framework has worked in the past to address bottlenecks. Fixed access network bottlenecks will be enduring, irrespective of whether they are made of copper or fibre. We have to acknowledge, on the basis of data published by the Commission on broadband speed, deployment etc, that promotion of competition has been a win-win-win from a consumer, industry and investor perspective. Access regulation is the key enabler of investments in fixed networks by alternative operators. Investments are enablers, but they are not an end in itself, and should not become an overriding political priority. Affordability and innovation, proven to be driven by competition, should be the top political priority. We don't think that there is a trade off between competition enabled by regulation and efficient investment. Nothing could be more pro-investment and pro-innovation than a pro-competitive framework.

Question 16: Have you identified regulatory or any other type of obstacles which could constrain fixed-line networks from fully contributing to the provision of full ubiquitous and accessible very high-speed connectivity across the EU?

yes **no** **do not know**

The declining competition in the fixed broadband market is in ISPA's opinion the main constrain for operators to fully contribute to the provision of full ubiquitous high-capacity networks. ISPA would like to point out to empirical evidence that the assumption that fewer fixed line market players would lead to greater investments and thus to an increased development of broad band networks is highly questionable. In regard to the connection speeds in Europe and the US, OECD (2015) EC (2014) studies¹ have found that:

- Whereas only 3 in 100 people in the US have fixed-line BB-access with over 30 MBit/s, in the EU 7 out of 100 do.
- While on average 2 in 100 (2,024) Europeans have internet BB-access of more than 100 MBit/s, only 1 in 3000 Americans does.
- Only in regard to connection speeds of less than 30 MBit/s, the US trumps the EU by a small margin of 3 percent at 27 against 24 European subscriptions per 100 inhabitants.

Furthermore recent studies² published by the EC commission which also examined costs found that the least expensive offers per country (in the EU) are, in around 80% of cases, provided by new entrants which, however, are generally not available to all customers, because they have lower coverage than the incumbents.³

When taking a closer look at the countries (in the EU) where a new entrant offer is the least expensive one, the incumbent's offer with the lowest price is on average between around 20% and 35% more expensive than the least expensive offer overall, and the relative difference is the highest for Standalone offer.

The EU28 is less expensive than the US for broadband above 12 Mbps. For 30-100 and 100+ Mbps, trends are very similar for all types of offers – the EU28 average of least expensive offers is in all cases substantially lower than the least expensive offer prices in Canada and the USA:

- For the 30-100 Mbps range, prices in the EU28 are between 4 and 14% higher than in Japan and between 25 and 54% more expensive compared to South Korea. They are

¹ OECD Digital Economy Outlook 2015 - © OECD 2015; OECD Studie; Chapter 2. The foundations of the digital economy; Figure 2.26 Fixed (wired) broadband penetration by speed tiers, June 2014

<http://dx.doi.org/10.1787/888933224603>; Broadband access in the EU: Situation at 1 July 2014
http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=8704

² European Commission, Broadband Internet Access Costs (BIAC) 2015, <https://ec.europa.eu/digital-agenda/en/news/study-retail-broadband-access-prices-february-2015>

³ EU-Commission Study, Broadband Internet Access Cost (BIAC) 2015, Prices as of February 2015. p. 27.

however between 36 and 51% cheaper than in Canada and between 21 and 38% cheaper than in the USA.⁴

- For 100+ Mbps, the difference with Japan and South Korea is larger (minimally 33% and up to 74%). On the contrary, EU28 prices are between 23 and 43% cheaper than in Canada and between 13 and 34% cheaper than in the USA.⁵

We urge the European Commission and NRAs to focus on policies that promote competition. A pro-competitive regulatory framework for alternative operators is a key driver of network investments and should remain a primary objective of the framework.

Question 17: Have you identified regulatory or any other type of obstacles which could constrain advanced wireless technologies from fully contributing to the provision of full ubiquitous and accessible very high-speed connectivity across the EU?

yes

no

do not know

Wireless technologies can only fully contribute to the provision of full ubiquitous and accessible very high-speed connectivity across the EU if (i) spectrum policy is coordinated and (ii) spectrum assignment is designed in a way which is pro-competitive, enabling viable challenger operators, who actively invest in their own networks, not to be squeezed out of the market as a result of protectionist/non-competitive spectrum decisions. Only a pro-competitive market structure will ensure that the needed investments are made.

The foremost priority of the Telecom Framework should be the promotion of technology neutral and pro-competitive market structure in Europe, which would allow both mobile technology and fixed wireless technologies to foster competition by providing diverse access solutions for the needs of end users and businesses even in remote and rural areas throughout Europe.

Question 19: To what extent has the access regulatory regime overall contributed to deliver the three objectives set in Article 8 of the Framework Directive:

Framework Directive has significantly contributed to competition in the provision of electronic communications networks, electronic communications services and associated facilities and services, by providing specific rights and obligations to both operators requesting and requested to interconnect or to grant access to their services, networks or networks elements.

This is definitely the case as to services, networks or networks elements provided by incumbent operators, since in addition to the generic access and interconnection obligation, specific harmonised regulatory measures have been enacted in each Member State such as

⁴Ibid, p. 36.

⁵ EU-Commission Study, Broadband Internet Access Cost (BIAC) 2015, Prices as of February 2015. p. 36.

disaggregation, transparency (with publication of all the information necessary to interconnect or have access), non-discrimination and cost orientation.

Framework Directive has significantly contributed to the development of the Internal Market and to increase the welfare of the citizens of the European Union and, if amended as above suggested, it will reveal a tremendous boosting tool for such aims.

Question 23: To what extent is the current scope of the symmetric obligations (i.e. imposed irrespective of SMP) of co-location and sharing of network elements and associated facilities for providers of electronic communications networks as established in Article 12 of the Framework Directive effective?

significantly moderately little not at all do not know

We would discourage the wider application or use of symmetric regulation as this would represent an unwelcome circuiting of the SMP process which has served well as an effective cornerstone of the regulatory framework. Indeed, the asymmetry of access regulation possible through the current framework has been highly effective in stimulating investment by alternative platforms, and therefore establishing sustainable infrastructure competition.

For this reason, we would be very concerned if the current scope of symmetric regulation were to be significantly expanded. This would undermine the SMP framework and could result in significant harm to competition and investment.

The review process is an opportunity for the Commission to make clear that symmetric regulation may have a place, but that this is tightly circumscribed and that SMP threshold and process, and the role this has played in stimulating effective infrastructure competition, must remain the overriding approach to regulatory intervention in European telecoms market.

Question 24: Should access and interconnection to electronic communications networks and services continue to be regulated *ex-ante*?

strongly agree agree disagree strongly disagree do not know

There is a plethora of evidence showing that access regulation has been the key enabler of competition in the provision of electronic communications services. Competition has led to enhanced consumer welfare in Europe, a massive increase both of broadband take-up (from 30% in 2005 to 73% in 2014) and of broadband revenues for the sector (from EUR 19 billion in 2005 to EUR 46 billion in 2014).

It has also triggered significant network investments. In this regard, total NGA coverage in Europe (including cable, FTTH/B and FTTC) has increased significantly, reaching 68% of households at the end of 2014, up from 48% in 2010. FTTx coverage is at 47% of households, up from 23% in

2010. Investment in FTTx networks is increasing since 2011. In addition, there are numerous currently ongoing and committed NGA deployments across Europe, leading to an estimated FTTx coverage in Western Europe by 2020 of around 80%. Europe is not lagging behind – but in fact ahead of – other countries such as the USA in terms of FTTH/B roll-out: Europe holds a coverage of FTTH/B of 19%, whereas the USA only 17%.⁶

Competition enabled by access regulation has been a win for all. It has led to an increase in broadband penetration and revenues, with benefits shared between end users, who have gained access to (better) broadband products at lower prices, and operators, through a massive increase in revenues which has allowed re-investment in network development.

Alternative operators, enabled by regulation, in particular LLU, have made broadband a mass-market (there are currently more than 40 million unbundled lines at EU level; LLU and shared access account for around 80% of new entrants DSL subscriptions). Alternative operators (ANOs) have also kick-started FTTH/B deployment in many EU Member States and their role in stimulating FTTH investments has been recognised in several studies and reports, most notably in a recent study by WIK for Ofcom.⁷

Alternative operators are currently investing heavily, with CAPEX amounting in some cases to roughly 30% of revenues.⁸ A study for the European Parliament/ITRE Committee has also concluded that competitors relying on fixed are NOT ‘cream-skimming without making significant investments of their own:

“There is no evidence to suggest that entrants are making supernormal profits from the rental of access at the expense of incumbents or consumers. They pay incumbents a rate which reflects (at least) costs with a reasonable return on capital to rent access. Entrants are also significant actors in the roll-out of FTTP technologies (...)”⁹

Alternative operators invest in NGA but cannot do so everywhere. Bottlenecks persist in the last mile of the physical network, which constitutes a natural economic bottleneck due to the high costs and scale economies involved, with physical network duplication not economically feasible or desirable at all times. This has not changed and will not change despite the move to NGA, the emergence of OTT services and the developments in network virtualisation, which by definition are not physical.

A fundamental truth remains unchanged – that bottlenecks in the last mile persist and will not disappear in the foreseeable future. This renders *ex ante* regulation, namely of fixed infrastructure and fixed wholesale broadband markets, an essential competition enabler in an NGA environment. The availability of harmonised, appropriate, fit-for-purpose and pro-competitively defined fixed wholesale NGA access products, at prices which allow a return on investments for all parties involved, must be ensured if we want competition to be safeguarded in an NGA environment.

⁶ see Analysys Mason (2015) for ECTA, *The digital single market and telecoms regulation going forward*.

⁷ See WIK (2015) for Ofcom, [Competition & investment: An analysis of the drivers of superfast broadband](#).

⁸ See e.g. Iliad 1H 2015 Strategy & Results Presentation, August 31, 2015, slide 22, available at http://iliad.fr/en/finances/2015/slideshow_S1_2015_310815.pdf and Fastweb's press release available at http://company.fastweb.it/wp-content/uploads/2015/08/2015_08_19_CS_FASTWEB-Risultati-1-semester_ENG.pdf.

⁹ See WIK, TNO and RAND (2013) for ITRE/EP, [Entertainment x.0 to Boost Broadband Deployment](#).

This is all the more relevant at a time when the EC is considering how to incentivise take-up of fast and super-fast broadband services, which remains rather low and only slowly increasing. We recall that a high level of take-up is always delivered by a highly competitive market which makes products affordable, appealing and tailored to what end users want and need. Competitors, enabled by regulation, have taken and continue to take a leading role in the diffusion and take-up of fast and ultra-fast broadband services. When compared to incumbent operators, alternative operators tend to:

- (i) more aggressively promote higher speeds and offer more services in their bundles than the incumbents, and
- (ii) set lower prices than incumbents for similar NGA bundles or bundles which exceed those of incumbents.¹⁰

A recent study commissioned by the EC also concludes that the least expensive offers per country are, in around 80% of cases, provided by new entrants.¹¹

Ex ante regulation will be necessary in the long term and as long as the economic bottlenecks of the last mile persist. The objective of any *ex ante* regulatory intervention is ultimately to produce benefits for end-users making retail markets competitive on a sustainable basis. Sustainable competition today, which will drive the necessary take-up of fast and ultra-fast broadband, depends and will continue to depend on effective *ex ante* regulatory access.

Question 25: Will the current access regime model, including the analysis of relevant markets and the identification of Significant Market Power (SMP) operators as well as the three criteria test used to identify markets susceptible for *ex ante* regulation, continue to be the appropriate operational tool in determining the threshold for *ex ante* regulatory intervention beyond 2020, in all types of geographic areas and economic conditions?

We consider that the existing access model, including the analysis of relevant markets and the identification of SMP operators, as well as the three criteria test used to identify markets susceptible for *ex ante* regulation, continue to be the appropriate operational tool in determining the threshold for *ex ante* regulatory intervention beyond 2020, in all types of geographic areas and economic conditions.

In ISPA's opinion the European digital economy can only survive in the global competition, if a high-capacity telecommunication infrastructure is available, in order to enable the development of innovative digital services. This is necessary in order to promote the digitization in all social and economic sectors and to raise the welfare potential of the digital economy in Austria and Europe. As the European Commission has held relevant in its Strategy for a digital EU internal market, competition is a very important driver for the further development and modernisation of

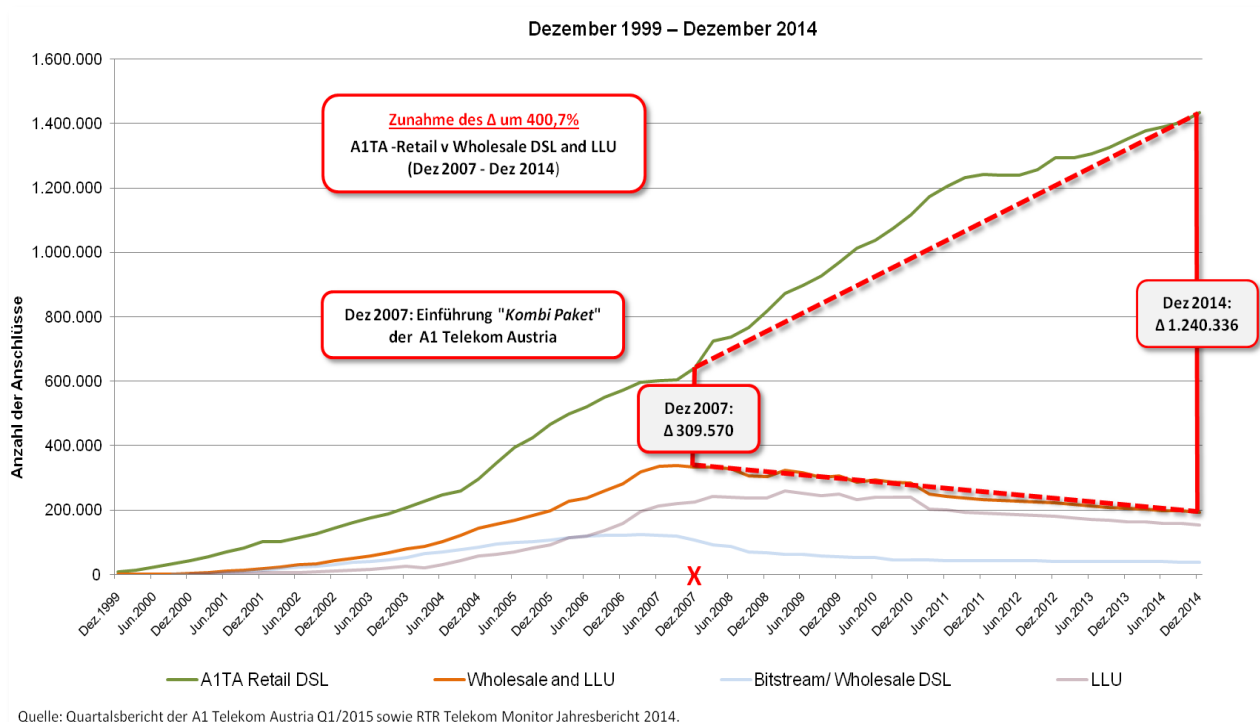
¹⁰ See Analysys Mason (2015) for ECTA, *The digital single market and telecoms regulation going forward*.

¹¹ Van Dijk (2015) for the EC, *Broadband Internet Access Cost (BIAC) 2015, Prices as of February 2015*.

telecommunication networks and ensures that consumers and business benefit from better service quality and lower rates.

The regulatory framework in relation to the deployment of broadband networks must counteract the trend of declining competition in the fixed broadband market. As the voice of the Internet industry in Austria, ISPA also highlights in the context of global competition that a reversal of the declining competition, will not only accelerate the deployment of fixed broadband networks per se, but in the long-term it will also make Europe more attractive location for establishing new and innovative enterprises.

Graphic: Development of the Austrian fixed-line broadband-market



The main objective should be to ensure access for alternative operators at the retail level based on wholesale level remedies. The alternative operators which need access to the incumbent's network in order to be able to be active at the retail market do not seem to have any bargaining power, if there are no regulatory measures in place. The incumbent simply has no incentive to offer wholesale access when it does not expect to gain a higher profit by allowing alternative operators the entrance to the market. As a consequence, only few operators would offer broadband products on the retail level, which would hinder effective competition and increase the risk of welfare losses for the end consumer. The lack of competitive constraint could lead to an incentive for increase of prices on the retail level.

For all the above reasons ISPA considers the current *ex ante* regulatory model an indispensable tool in order to promote effective competition. The goal of *ex ante* regulation is the evolution from markets experiencing significant market power by the incumbent to markets where the incumbent is no longer dominant. It allowed more than 300 ISPs in Austria, most of which are small and medium operators which provide broad variety of access technologies and products tailored to the needs of local businesses and users in remote and rural areas throughout the country. *Ex ante* regulation of fixed infrastructure therefore remains an essential competition enabler in an NGA environment.

The Austrian market has successfully demonstrated that development in the fixed line broadband telecom sector is driven by competition which, in the case of Austria, has always had its source in fixed line small and medium access operators and their innovative solutions. Whilst bigger operators have traditionally mainly focused their activities on urban and highly populated areas, small and medium size operators have always aimed at also connecting rural areas to the internet by deploying innovative wireless or sophisticated unbundling solutions.

II. Unbundling and wholesale products

Question 28: In 2020 and beyond, will the essential inputs that an access seeker would need to effectively compete downstream in the retail market be the same as they are today, when legacy copper networks still play an important role? If not, which will be those vital inputs?

strongly agree agree disagree strongly disagree do not know

As stated in response to Question 24, the transition to new generation access (NGA) has not changed a fundamental principle – that enduring bottlenecks persist in the last mile and that regulation of fixed infrastructure remains an essential competition enabler in an NGA environment. Therefore appropriate, fit-for-purpose and pro-competitively defined fixed wholesale NGA access products, which consider the national speciality of the different Member states must be made available to alternative operators.

Effective competition in retail markets depends on ANOs being able to avail themselves of multiple and complementary access products, mandated in the context of concrete analyses, the availability of which is meant to tackle the lack of competition in defined markets. In this regard, fibre unbundling, access to the fibre terminating segment, ducts access, VULA, bitstream and access to terminating segments of leased lines will remain key wholesale access products. Until copper switch-off takes place – which we expect will take a long time to materialise – copper LLU and SLU will also continue playing a fundamental role.

We would like to restate the utmost importance of physical access/unbundling in the on-going transition to NGA. Physical remedies, namely local loop unbundling (LLU/Shared Access), which allow ANOs to differentiate their offers from those of the SMP operators and thus effectively compete and innovate at the retail level, have been the key wholesale remedies used by alternative operators: around 80% of alternative operators' xDSL lines are delivered using

LLU/Shared Access to the local loop; LLU and SLU still account today for around 40% of all fixed broadband DSL subscriptions in the EU. The key role of physical access has not changed in the transition to NGA.

At a time when the push for virtual products is being considered, we would like to restate our long-standing position that virtual and physical unbundling products are not substitutable but complementary products and must therefore not be made alternative. These products are not comparable in terms of the level of differentiation achievable in the provision of retail services and the scope for innovation and differentiation *vis-à-vis* the incumbents' retail offers (e.g. by offering higher speeds and higher quality of service). Virtual products put technology choices, technology upgrade cycles, definition of technical specifications, and determination of (downstream and upstream) speeds in the hands of the dominant operators. Physical unbundling products require more investments by alternative operators but also allow further differentiation at the retail level. Going forward, physical access/unbundling must therefore NOT be made alternative or replaced by second class/virtual products.

ISPA opposes tendencies of replacing successful last mile LLU access products with inapplicable virtual products and technologies like vectoring which provide in the short term improvement of the speed quality, but in the long term are no adequate substitutes for physical unbundling products. The telecom Framework should focus on technical solutions regarding the deployment of the NGA Networks in the long term and enable products, which have multi-client capability.

Wholesale products in a fibre world must be designed to allow similar gains and benefits to what LLU has enabled. A regulatory push for fibre unbundling solutions must therefore be made and non-competitive solutions must be prevented.

Question 29: Should the number of wholesale products providing access to SMP networks be reduced?

We strongly disagree that the number of wholesale products providing access to SMP networks could be reduced.

ISPA fears that the reduction of the number of wholesale products would primarily convey advantages for a very limited number of multinational telecom operators urging to access European national telecom markets at the price of sacrificing effective competition and sustainable development in these markets, which has in the past been driven to a substantial degree by successful small and medium size national telecom operators.

Wholesale access obligations are imposed on operators with SMP in specifically defined electronic communications markets. The imposition of such access obligations, and thus the provision of such products to access seekers, aims at tackling the lack of competition in distinctly defined markets (even if related and/or located upstream or downstream).

It is the overall availability of several different access products at different levels of the investment ladder, with different characteristics and available at different access points and layers of the network, which allows challenger operators to effectively compete in the provision of electronic communications services to several types of customers and in diverse geographies.

In fact, not all operators can pursue the same business models and use the same access products, with the situation varying between countries. Economies of scale and density play a key role in this regard. For instance, operators focused on high-end business services and cross-border services can typically not achieve the economies of density to justify the purchase of LLU or SLU, and the same applies for Layer 2 Wholesale Access Products (L2 WAPs) with local point of handover (PoH). Operators focused on consumer markets, or hybrid consumer/business services, may also lack the market share and scale to realistically pursue physical access including LLU, SLU and access to the fibre terminating segment access. In these cases, the availability of bitstream access becomes essential.

Depending on the outcome of the market analyses performed by the national regulatory agency (NRA), an ANO will be able to avail itself of variety of wholesale products which are complimentary and not substitutable. These include: physical unbundling (copper LLU and SLU, fibre unbundling); access to the copper/fibre terminating segment; VULA; bitstream, duct access, terminating segments of leased lines.

We restate, in particular, our long standing position which refutes any alleged substitutability between physical access and any form of active or 'virtual' access, including all L2 WAPs, regardless of the point of handover. Our position has always been, and remains, that physical access is paramount to enable competition, whilst active access is a relevant and in most cases necessary complement, when/where physical access is not viable (which does not mean not available) and depending on alternative operators' ability to compete (overall market share, residential/business focus, and indeed regulation). We would therefore restate the critical importance of the availability of both physical access and VULA/L2 WAP, and also the parallel availability of VULA/L2 WAP with local PoH and with regional PoH. Each of these access solutions is and will remain necessary to enable and promote competition, innovation and investment by alternative operators.

Physical access/unbundling may in some specific circumstances not yet be entirely possible, but the right regulatory push can and should make it happen. All in all, we strongly disagree that the number of wholesale products providing access to SMP networks could be reduced. Going forward, it must be ensured that whatever technological developments take place, access remedies remain appropriate, fit-for-purpose and pro-competitively defined, allowing ANOs to effectively compete and differentiate their offers in an NGA environment.

Question 30: What will be the appropriate type, layer and number of wholesale access products that would ensure that investment is incentivised and that retail competition thrives in new and enhanced infrastructures, such as NGA networks?

Should the answer to this question take into account the interest in incentivising all market participants – historic incumbents and alternative operators – to invest in the highest capacity networks, instead of more incremental upgrades, in areas where infrastructure competition is possible?

Strongly agree agree disagree strongly disagree do not know

As stated in Questions 28 and 29, ISPA is very sceptical about any shift away from traditionally unbundling products towards mere wholesale or bit-stream products. Traditional unbundling products have proven especially valuable due to their flexibility, allowing providers to create products which are better suited in terms of quality and services provided to fulfil the requirements of their customers than 'one-fits-all-products' offered as wholesale products. Such individual products would not be possible on a mere wholesale or bit-stream basis, thus endangering the existence of small and medium size operators, the provision of internet access for rural and remote areas and valuable workplaces in these regions. For this reason the existing unbundling products need to remain on the market.

The Commission has in the past correctly emphasized the importance of small and medium size operators for the European economy¹². Against this background ISPA would like to underline that any shift away from traditional unbundling products towards wholesale and bit-stream products will severely affect these small and medium size operators. Such a shift would not only deprive them from the opportunity to develop new products which would also lead to frustrated investments, it would also decrease the likelihood that these operators remain the driving force of development on national markets.

ISPA therefore would like to express its serious doubts that paving the way for a small number of multinational telecom operators at this enormous price would be in the best interest of the development of the economy of Europe.

Question 32: Are incremental upgrades to copper networks likely to be exposed to such a level of investment risk in 2020 and beyond, that specific regulatory incentives will continue to be justified for all NGA technologies?

strongly agree agree disagree strongly disagree do not know

If not, should regulators provide specifically targeted incentives for operators that choose to roll out the most advanced NGA networks up to, or very close to, the premises of the customer?

¹² Neelie Kroes European Commission Vice-President for the Digital Agenda Facilitating a competitive environment for SMEs to develop future Internet business models Telecom Conference of the SME Union Brussels, 14 July 2010.

Please explain your response, and indicate which incentives you would consider appropriate (e.g. continued application of the Non-Discrimination and Costing Recommendation to Fiber-to-the-premise (FTTP) networks only (or equivalent), improved access to passive infrastructure, adaptation of wholesale access products to SMP networks, lifting of access obligations to the highest capacity SMP networks if a credible anchor access product is made available, or others).

In ISPA's opinion wholesale access regulation does not forestall NGA investment. To the contrary, it ensures that competition can develop which in turn spurs the take-up of services and makes network investments sustainable. As recently acknowledged in the Digital Single Market Strategy, in several recent EC Commissioner speeches, in the BEREC Strategy 2015-2017 and in the 2010 EC NGA Recommendation, there is no trade-off between competition and investment. Competition is the best driver of investment.

We fundamentally disagree with the idea that regulatory leniency granted to SMP operators - including the adaptation or reduction of the number of available wholesale access products, lifting regulated access and/or price controls - could constitute an incentive for SMP operators to roll-out NGA networks, including FTTH. In particular, there is no evidence that the weakening of competition and guaranteed higher revenues for SMP operators, collected from their competitors, will spur more investment in NGA. On the contrary, empirical evidence suggests that high wholesale access charges and the lack of pro-competitive regulation result in high retail prices for end-users, limited take-up, stifled innovation and thus no or limited positive impact on economic growth as well as less investment. We therefore reject any policy of regulatory forbearance aimed at incentivising the roll-out of FTTH.

The level of investment risk associated with NGA network roll-out can be rewarded by means of an appropriate return on investments guaranteed by a costing methodology which ensures an adequate recovery of costs. Incentives of a de-regulatory nature are no guarantee of increased NGA roll-out.

III. Analyse relevant markets

Question 43: In the event that the wholesale access market in a given area is deemed no longer subject to SMP, or that access remedies are no longer deemed appropriate in that area, by virtue of ongoing infrastructure-based competition on quality and price between a limited number of operators, would you consider it justified in the interests of market stability and existing levels of competition to maintain for some period wholesale access comparable to that previously enjoyed by access-based operators?

strongly agree agree disagree strongly disagree do not know

In the case of a positive response, please indicate under which conditions (e.g. what degree of infrastructure competition, nature of the transitional access product, duration, etc.)

With regard to the withdrawal of access regulation, NRAs must be able to introduce, when deemed appropriate, a phasing out period of at least 3 years which ensures that sunk investments by fixed access seekers are safeguarded and that competitors are not removed from the market. The specific conditions under which the phasing out should take place must be assessed case-by-case. The key point must be to ensure that competition is safeguarded.

Question 45: If so, should this be subject to certain criteria (for example to binding regulatory commitments and agreements between access providers and access seekers) in the interest of legal predictability and certainty for the market and/or to specific investment or other performance criteria required to the SMP operator?

strongly agree agree disagree strongly disagree do not know

Whenever NRAs analyse relevant markets and identify operators with SMP, the most adequate and fit-for-purpose obligations, aimed at properly and effectively addressing uncompetitive outcomes, must be imposed.

Legal predictability and certainty of regulation must be ensured by the appropriate enforcement of the remedies imposed, namely by having NRAs scrutinising the suitability of reference offers and fine tuning them, performing margin squeeze tests and addressing discriminatory practices.

If the market requires *ex ante* regulatory obligations, these must be imposed and not swapped by binding commitments or agreements with access providers. Any commercial agreements that affect the market must be well understood by the NRA and reflected in the market analysis.

Question 46: Should key principles of the non-binding guidance provided in Commission Recommendations on EU-wide regulatory approaches in respect of wholesale access regulation be made binding?

strongly agree agree disagree strongly disagree do not know

We should first look at Article 19 of the Framework Directive, the legal basis which enables the Commission to adopt Recommendations on EU-wide regulatory approaches in respect of wholesale access regulation.

According to Article 19, Recommendations can be adopted where the Commission finds that divergences in the implementation by the NRAs of the regulatory tasks specified in the Framework Directive, and in other relevant Directives, may create a barrier to the internal market.

Recommendations are not binding but NRAs must take them into utmost of account when carrying out their tasks. When an NRA chooses not to follow a Recommendation, it shall inform the Commission accordingly, giving the reason for its position.

The Commission has so far adopted several Recommendations under Article 19 of the Framework Directive, including the 2009 Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates, the 2010 NGA Recommendation, and the 2013 Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.

The key principles included in the Commission Recommendations are not binding but constitute useful guidance for NRAs when applying the regulatory framework. The subsidiarity principle and the fast-changing technological nature of the sector require that, while key long-standing principles are established in binding law (Regulations and Directives), more granular guidance is provided in non-binding Recommendations, thus giving NRAs leeway to tailor regulation to the objectively justified specificities of national markets and also to cope with the fast-changing technological developments in the sector.

We consider that some pro-competitive founding principles – and only those – could potentially be made binding e.g. the requirement that NRAs mandate unbundled access to the fibre loop irrespective of the network architecture and technology implemented by the SMP operator (Recommend 23 of the NGA Recommendation on costing methodologies). Just as in 2000, when the unbundled access to the copper local loop was considered a key priority in the ‘e-Europe’ Action Plan and the LLU Regulation (Regulation N. 2887/2000) was enacted, also today a focus on making fibre unbundling a reality is required. Only those principles included in Commission Recommendations which are by nature pro-competitive and fully aligned with the foundational principles of the EU Regulatory Framework can be made binding.

IV. Virtualization

Question 50: Will the virtualisation of network infrastructures and services have a role to play in the provision of pan-European services?

strongly agree agree disagree strongly disagree do not know

In ISPA’s opinion the priority of the EU-regulatory framework should be the safeguarding of competition in the transition to “all-IP” - rather than incentivising the migration to “all IP” networks by withdrawing access regulation.

The development of the virtualisation should follow the natural deployment of NGA, because in many countries physical unbundling is still possible and viable despite NGA roll out. Technological impossibility of physical unbundling should be the only reason to impose migration to a Layer 2 WAP on ANO. The specifics of the national markets and the different business strategies of ANO should be considered (“one-size-fits-all”, a pan-European L2 WAP are not a solution).

Access regulation and the inclusion of virtual access are vital for the provision of competitive end-user products by ANOs. Promotion of competition has been a win-win-win from a consumer,

industry and investor perspective in the past, thus the EU-regulatory framework should keep its pro-competitive approach.

V. Consumer protection

Question 99: To what extent has the current regulatory framework for electronic communications, as last amended in 2009, contributed to effectively achieving the goal of ensuring a high level of consumer protection in the electronic communications sector across the EU?

significantly moderately little not at all do not know

Please explain your response and indicate the provisions which have contributed the most/less to this goal.

First and foremost, it must be noted that competition is the best guarantor of consumer protection, because operators facing competition must work hard to win customers, and need to work hard to keep meeting customer demands so as not to lose customers. The regulatory framework promotes competition, and is highly successful in doing so, which results in consumers and businesses in the EU getting a better deal than in the rest of the world.

Second, it is clear that provisions on contracts and facilitating change of provider have diminished unfair lock-in practices and ensure a high level of consumer protection.

Despite of the fact that we believe that the existing framework has significantly contributed to ensuring a high level of consumer protection, we believe that the time has come to consider whether ECS could and should be released from being regulated in regard of the non-market analysis related aspects of the electronic communications framework, e.g. consumer protection, date protection, transparency. The question needs to be asked as to whether: (i) ECS could be provided under less constraining and more generic legislation which is applicable to providers of internet content, applications and services (ICAS), or (ii) in particular the authorisation directive, the universal service and users' rights directive, and the e-Privacy directive could be amended to or abolished in favour of the existing general rules on consumer protection and the upcoming Data-Protection Regulation.

Question 100: Are there any provisions which constitute a particular administrative or operational burden? If so, please explain why and provide a quantitative estimate of additional burden.

Differences between consumers and business customers are insufficiently recognised in the existing framework. Legislation and rules aimed at protecting consumers' rights often extend the scope of specific obligations to business-focused operators even if such extension is not required and not even intended. Imposing rules whenever negotiated contractual arrangements with business customers (of potentially any type or size) are already in place through contract negotiations can add an unnecessary administrative burden or create disproportionate obligations

on operators serving business customers. This results in additional costs in service provision, investments in very expensive IT solutions and potentially prevents business-focused operators from providing innovative and future-proof services to business customers.

This type of situation should be avoided by clearly defining the scope of application of consumer protection rules e.g. by consistently using appropriate wording (i.e. “consumers” or “mass market”). This issue should be considered during the review of the Universal Service Directive and of the EU Regulatory Framework more generally.

Question 101: As regards sector-specific end-user rights provisions, have you identified sector-specific end-user rights provisions in the current framework which are not relevant and should in your view be repealed (deleted) because they are wholly or substantially covered by general EU consumer protection law?

ISPA would like to highlight the importance of creating a level playing field among European telecom providers. Austria’s level of consumer protection is above the European average and thus any regulatory approach in this field must take into consideration that providers stemming from countries with a high level of protection must not be discriminated by the obligation to fulfil European consumer rights provision in addition to their national provisions in this field at the same time.

The main question is whether such high-levelled sector-specific rules are needed or the generic rules on consumer protection are sufficient. In ISPA’s opinion the sector-specific end-user rights provisions are in many cases obsolete, because most of the objectives of these provisions could be reached by the generic rules in place.

This statement however only relates to the general obligations, e.g. consumer protection, data protection, transparency, foreseen in the ECS Framework but not to provisions relating to market definition and market analysis, and even less so to the technical and economic bottlenecks which continue to exist at the wholesale/network level and which require *ex ante* access regulation.

As already stated in Question 100 in ISPA’s opinion it should be differentiated between the level of protection needed in respect of consumers and businesses. Moreover ISPA considers the sector-specific consumer protection regime to lay down an excessive administrative and operational burden on the traditional electronic communication services. ISPA would like furthermore to highlight that a balance between end user rights and the ability of providers to offer competitive services needs to be struck.

For instance Article 20, 21 and 22 of the Universal Service Directive (hereafter: USD) obliges providers of ECS to make their offers transparent. Besides the sector-specific consumer protection obligations there are also generic rules on transparency of services. Articles 6 and 8 of Directive 2011/83/EC on consumer rights (hereafter: Directive on Consumers Rights) impose numerous obligations on every trader entering into a distance contract with consumers. ECS providers are not exempted from the application of this Directive. Obligations imposed by this Directive include:

“consumer information for contracts”, “formal requirements for off-premises contracts” and “for distance contracts, “right of withdrawal” conditions. Also, Directive 93/13/EEC on unfair terms in consumer contracts (hereafter: Directive on unfair terms in consumer contracts) is applicable to any contract concluded between a professional and a consumer, defined in a very similar manner than in the Directive on Consumers Rights. The Directive on Consumer Rights and the Directive on unfair terms in consumer contracts are both applicable to internet content, applications and services and electronic communications networks and services but only when contracting with consumers. This is the difference between the general consumer protection regime and the specific legal regime set up by USD which applies to all end users.

The Austrian legislator acknowledged that the sector-specific consumer protection rules are too harsh to be both implied equally on B2B and B2C contractual relations. This was the reason why in the last amendment of the Austrian Telecommunication Act some of the sector-specific rules were restricted only on B2C contracts. ISPA supports this development and highlights that the sector-specific obligations imposed on ECS are often disproportionate. The modern consumer is well informed and equipped to deal with the challenges of the new technologies, which makes many of the current sector-specific rules for ESC obsolete.

Question 108: Do you consider that there is still a need for sector-specific regulation of communications services in the EU?

ISPA believes that the time has come to consider whether retail ECS could and should be released from being governed by the non-market analysis related aspects of the electronic communications framework, and from widely differing national implementations thereof. If that is deemed to be too far-reaching, consideration could and should be given to addressing issues in the traditional electronic communications framework. We refer to:

- telecoms-specific consumer protection legislation/regulation;
- telecom-specific data protection (and retention);
- telecoms-specific security legislation/regulation;
- universal service provisions and systems, etc.

Today, such national legislation/regulation not only varies widely, and is interpreted in different ways by different NRAs and by national courts, but it often also conflicts with provisions in other EU Member States due to the different implementation of the same EU framework.

The question needs to be asked as to whether most retail ECS could instead be provided under same less constraining and more generic regulatory frameworks which are applicable to providers of internet content, applications and services. In ISPA’s opinion the sector-specific rules should be levelled down, because most of the objectives of the sector-specific rules could be reached by the generic rules in place. We consider that data protection is clearly a distinct area, and should be subject to horizontal (i.e. not sector specific) regulation, for which we prefer maximum harmonisation.

VI. Integrity and security of networks

Question 106: Do you consider that the rules on integrity and security of networks and services (Articles 13 and 13a of the Framework Directive) have been effective in achieving their objectives?

The current framework ensures a sufficient level of integrity and security of the telecommunication networks. Based on the ENISA Guidelines and in cooperation with ISPA and the Austrian NRA the Austrian ISPs developed a standard security concept, which ensures the integrity and security of the networks of the Austrian alternative operators. Additional security obligations would merely lead to additional administrative, financial and operational burdens for the ISPs, without any incremented value.

VII. Harmonization

Question 133: The current sector-specific end-user provisions are based on the principle of minimum harmonisation. This approach provides Member States more flexibility and allows them to maintain or adopt more protective measures. But it also leads to a fragmented level of end-user protection across the EU and additional complications for the cross-border provision of services. The Consumer Rights Directive of 2011[1] therefore adopted a full harmonisation approach. Should any (maintained, amended or new) sector-specific end-user provisions aim at:

- minimum harmonisation
- full harmonisation
- minimum harmonisation at a very high level
- do not know

As stated in Question 101 in ISPA's opinion it is of great importance to create a level playing field among European telecom providers. Austria's level of consumer protection is above the European average and thus any regulatory approach in this field must take into consideration that providers stemming from countries with a high level of protection must not be discriminated by the obligation to fulfil European consumer rights provision in addition to their national provisions in this field at the same time. In ISPA's opinion the more appropriate mechanism would be full harmonisation at a lower level.

VIII. Universal service

Question 149: Will a universal service regime still be needed in the future to ensure that a minimum set of electronic communications services are made available to all users at an affordable price at a fixed location?

strongly agree agree disagree strongly disagree do not know

Whilst it is clearly justified to adopt policy to ensure the availability of access to a network capable of delivering high-speed broadband including Internet access, its means of delivery should not be universal service, and especially not industry funded universal service. We believe that targeted State Aid for making available the network, subject to the 2013 EU broadband State Aid Guidelines (2013/C 25/01), as amended in 2014 (2014/C 198/02) so as to promote competition, is a more appropriate mechanism. The current universal service regime mainly results in financial transfers between economic operators, without contributing to competition.

ISPA would like to reiterate that it is very thankful for this opportunity to contribute. For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Maximilian Schubert

General Secretary

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework to support optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.