



Position Paper

Cable Europe position paper on the Telecoms Review

Executive Summary

This Position Paper outlines Cable Europe's response to the Commission's consultation on the revision of the electronic communications regulatory framework (Telecoms Review) in December 2015. For further details, we invite the reader to go through our complete response.

Cable Europe believes that the current regulatory framework is generally sound. It has allowed for a robust infrastructure-based competition, in particular by cable operators. The current regime of ex-ante regulation, based on the identification of operators with 'significant market power' (SMP) has been successful to promote competition, investment and deliver the desired level of quality or long term efficiency. We are convinced that the ex-ante regulatory framework and ex-post competition law provide the necessary tools to address any issue that may arise. We also consider that symmetric obligations (non-SMP based) should only apply in truly exceptional circumstances. Furthermore, we do not believe that any differentiated regulatory approach should be applied in challenge areas (primarily rural or semi-rural areas) where there is little scope for commercial roll out of broadband networks. State aid should play a role if there is no prospect for market delivery.

However, we believe that electronic communication services should be deregulated by moving consumer protection requirements into horizontal consumer legislation. All services that are substitutable should fall under a clarified definition of "electronic communication service". Moreover, must-carry rules should be revised to reflect technology evolution and provide with adequate remuneration for service providers who are subject to the rule. Lastly, we believe that the universal service obligation should be repealed, given that notably through investments, competition and innovation nowadays, accessibility to electronic communications services is feasible at an affordable price.

Policy objectives

Cable Europe believes that sustainable competition, infrastructure based competition and efficient investment should be taken as a basis to deliver on other policy objectives. We consider that article 8.2. of the Framework Directive can be withdrawn from the list of policy objectives as it appears redundant with other articles. Article 8.4 (universal service) should also be withdrawn. Moreover, we believe that the objective of promoting infrastructure-based competition should be set out more clearly in article 8.5 c).

Furthermore, we believe the framework should be completely technology neutral. It is wrong to think broadband targets should be met with fixed-line networks only. We believe that a mix of



technologies will do the job. Fixed high-speed connectivity will be supplied according to customers' demand. A gradual pace of upgraded services will take place to satisfy demand.

Access Regulation

a) Cable Europe believes that the current regulatory framework in most cases has worked well.

In general terms, the access regulatory regime has succeeded in creating more competition and hence more options and better prices in the interest of citizens. By avoiding overregulation of wholesale active services over Next Generation Access (NGA) networks, National Regulatory Authorities (NRAs) have ensured that private operators' incentives to invest in competing infrastructures are maintained and sustainable. This has, for example, led cable operators to make substantial investments in many Member States, delivering real choice and innovation to end-users and acting as a strong competitive catalyst to investment by incumbents. For cable companies, average Capex levels are high and remain fairly stable (between 25% and 20% of revenues) from 2004 till 2014 (Source: SOLON Cable Survey 2014) and this is expected to remain the case in the future.

It is key to note in this context the importance of promoting and incentivising infrastructure-based competition. Competition between separate, competing, privately funded infrastructures has proven to deliver the best outcomes for end-users. NRAs and policy makers should, as their main objective, strengthen and expand this result. The effects on (incentives for) competitive investment in infrastructure should also be a key consideration when deciding if/how to impose access conditions on incumbent (former monopoly) operators. Put very simply, an overly aggressive or intrusive approach to regulating the incumbent will serve not only to disincentivise investment by the incumbent, but will also have a damaging effect on the incentives of other, competing providers in the market, like cable operators – ultimately to the detriment of end-users.

Therefore we believe that a SMP-based analysis is, in itself, a sound methodology to identify market structures and dynamics that could exceptionally demand ex ante regulatory measures only for those markets where there is clearly a competition problem. The current regime should continue to apply. However, in order to ensure a sound implementation of the methodology, it is important to have: 1) a correct market definition 2) an expert economic analysis by NRAs and the European Commission and 3) harmonisation among NRAs while taking due account of national specific factors.

There is great benefit in having certainty and stability in the regulatory regime. Making material amendments to the approach taken to determining regulation would disrupt the market and act as a disincentive to investment. The markets should, to the greatest extent possible, be left to evolve naturally.



b) Extending NRAs tools?

To the extent that new markets structures materialise, the ex-ante regulatory framework and ex-post competition law regime already provide the tools to address any issues that may arise. We therefore **believe there should be no exceptions to the principle that ex-ante access regulation can only be imposed in circumstances where regulators can demonstrate that there is clearly a competition problem. And in those markets only operators with a ‘significant market power’ should be subject to ex-ante regulation. We do not support the application of symmetric regulation. Ex-ante regulation is an exceptional measure that needs to be handled with care. Departing from the ‘significant market power’ methodology would be very risky. NRA’s should be mindful about the impact symmetric regulation could have on investment.**

Any extension of the concept of “joint dominance” beyond the way it has been applied in competition law would be misguided.

Furthermore, we do not support any regulation of “tight oligopolies” either. The telecoms sector is an area where massive investments are still needed, by ADSL, cable, mobile or even satellite. Given that competition has evolved and is evolving in electronic communications markets, a policy assumption that ex-ante regulation is necessary in light of a specific market structure and a set of loose and difficult to ascertain criteria is likely to remove investment incentives and therefore will probably affect dynamic efficiencies and innovation in the sector.

On the other hand, the effect on investment of creating a new layer of ex-ante regulation based on a new market failure approach will likely result in locking in regulation permanently contrary to the initial goal of the regulatory framework which is designed to allow for a transition towards the application of competition rules.

While such regulation may be perfectly justified on static efficiency grounds when there is a single dominant operator, it is harder to justify when there is effective competition among infrastructures because the static efficiency gains will be smaller than with a single operator.

As such, regulation would undermine incentives for further investments by competing networks, such as cable, and therefore limit competitive constraints exerted on incumbents. Infrastructure competition will not play out and more regulation will be needed in an endless vicious circle.

We believe that some degree of market power is necessary to ensure a return on investment. Situations with moderate market power – but not dominance – are unlikely to justify the cost of regulation (including error costs due to information asymmetries), in particular in situations where regulation may negatively affect investment.



Moreover, with this type of approach the risk for overregulation is much higher as it involves regulating a former monopoly and a privately financed operator that has never held SMP status.

Lastly, any competitive analysis should be based on a market behaviour approach rather than a market structure approach.

c) Addressing challenge areas?

We do not support a differentiated regulatory approach in challenge areas (such as rural or semi-rural areas). If some areas are not yet addressed by the market or if there is no prospect for market delivery, then state aid should play a role. In any case, the market analysis will determine where regulation is still necessary.

Spectrum

Spectrum is one of the critical elements that enable electronic communications' operators to deliver their services. And such a fast paced industry has to rely on legal instruments that can cope with the technology evolution and challenges ahead.

For example, the rules on harmonisation of radio and non-radio end-user equipment [for fixed broadcasting and broadband electronic communications services using licensed and license exempted spectrum bands] are one important topic that requires a consistent approach.

Cable Europe believes **that coexistence of spectrum users is possible** and we have set out several soft regulatory proposals that will minimise the effect of interferences. However, the outcome is still very dependent on a regulatory framework that treats spectrum allocation and Electro Magnetic Compatibility (EMC) inconsistently.

As another example, the efficient use of spectrum is highly recommended and the present structure creates artificial scarcity of spectrum for the communications industry. The consequence is the existence of very high spectrum costs which limits the Digital Single Market development.

The coexistence between existing and future users of spectrum needs to be taken into account and the common approach that the EU can provide is crucial. Developing policy objectives that consider all the technologies and respective uses will result in a more efficient electronic communications market.

Secor specific regulation for communication services

Firstly, Cable Europe believes that **the electronic communications services should be deregulated by moving consumer protection requirements to the horizontal consumer**



legislation. Various sector-specific consumer protection rules in the regulatory framework and provisions of the e-Privacy Directive are overlapping with some other existing rules.

Secondly, we do not support **a review of the definition of ECS but believe that a clarification is necessary.** Given the current market changes, we believe it is necessary to clarify the Framework's scope with regards to the following elements:

The ability of NRAs to demand information to all services providers, specifically in the context of market analysis, should be strengthened.

- Competition analysis should routinely reflect the presence of non-electronic communications services that compete with electronic communications services in analysing competitive effects
- Data breach notification obligations should be applicable to all
- OTTs should notify their operations to NRAs
- Obligations in relation to privacy and security should be similar to all services providers
- OTTs should contribute to any fund put in place for fulfilling universal service obligations. This should only be the case if a universal service obligation remains and is not funded by the State. Cable Europe believes indeed that universal service obligation is not justified anymore (see below).

Must Carry Rules

Cable Europe believes that must carry provisions laid down in art. 31 of the Universal Service Directive should be revised. As the bottleneck justifying must-carry obligation increasingly ceases to exist, we believe that it is worth investigating whether the said rules must be replaced with some that are more adequate to the current situation. The balance of powers is shifting dramatically towards broadcasters, who are using their must carry position to enforce distribution agreements at non-commercial rates. As long as the legislator sees must-carry rules relevant in order to grant pluralism and cultural diversity, must-carry obligations should be aligned with an obligation for broadcasters to pay an adequate remuneration for transport. Today, the must-carry regime does not include an obligation to pay for transport. This has led to the situation where broadcasters refuse to pay for the transmission of their signals via cable networks. **A fairer balance between privileged broadcasters and content distributors must be sought.** This imbalance should be readjusted in the course of the telecoms review.

In any case, the must carry discussion should not be correlated to a “must-be-found” type of regulation. The privileged treatment of certain providers and content regarding their “findability” is neither necessary nor appropriate. With current developments, users can choose devices, interfaces and content of their choices freely and they should remain masters of their



screen. In order to enable consumers to find the content most relevant for them, cable network operators no longer just offer mere program lists to their customers, providing current channel numbers and, as needed, categories – increasingly, they are putting in place search and recommendation engines that deliver recommendations for the content available on the platform. Such recommendations are aligned with customer behaviour or searches performed previously. These search and recommendation tools are non-discriminatory and include OTT content in addition to linear television and VoD offerings. All content is hence “findable” for users. Therefore, there is no need for a regulation on content findability – neither regarding non-discriminatory treatment of content or a positive discrimination of certain (public-interest) content.

Universal Service

The current universal service regime was designed to play a role in the transition phase from a monopoly to a liberalised competitive market. Its role in this respect has been outpaced by both technological and market developments. Thanks to investments made, competition among different technologies (fixed, mobile, internet) and innovation in high-quality services, EU citizens can nowadays access to electronic communications services at affordable prices (prices having dropped down over the years).

Universal service goes against this evolution and would even put at risk the investments made by discriminating between those who have made these investments and others.

A further dimension is whether **broadband** should be included. This is not advisable as it **may have a negative impact both on investment and competition.**

As for increasing availability in rural areas, we believe that public subsidies in line with the state aid guidelines can help further broadband roll-out.

About Cable Europe

Cable Europe is the trade association that connects leading broadband cable TV operators and their national trade associations throughout the European Union. The regulatory and public policy activities of Cable Europe aim to promote and defend the industry’s policies and business interests at European and international level. The European cable industry provides high speed broadband internet, TV services, and telephony into the home of 64.5 million customers the European Union.

This paper represents the views of the full members of Cable Europe, and not necessarily those of our associate members, partners or affiliates.



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