Committed to Europe

Orange position on the revision of the Recommendations on NGA and Non-discrimination and costing methodologies

Executive summary

With the adoption of the Directive establishing the European Electronic Communications Code, most of the previous framework has been either integrated in the Directive or is now obsolete. Orange thus calls to limit the review of the NGA and non-discrimination and Costing methodology recommendations to a formal exercise that would delete the paragraphs of the recitals and articles that are no longer valid, necessary or relevant, while keeping those still of interest. Moreover, given the recent adoption of the EECC and the fact that its transposition – and its implementation following Berec's Guidelines – in the various Member states is still not achieved, the review of the two Recommendations shouldn't lead to the introduction of new concepts, obligations or any change of practice within the current regulatory framework.

In that context, Orange is of the view that once it has been reiterated that the promotion of appropriate schemes to manage access while sharing risk between investors and access seekers, among which co-investment, is key to ensure the right incentive to roll-out VHCN, the non-imposition of pricing obligations should be the base case.

The sole topics for which further elements could be useful are limited to:

- Copper costs evaluation and pricing when strictly necessary,
- Non-discrimination, and in particular, the ERT, that should be carefully looked at in the case of co-investment offers and more generally when risk sharing is implemented.

The new competitive and political landscapes should drive the review of the Recommendations

The context of the 2010 and 2013 Recommendations on NGA and non-discrimination/cost methodologies has profoundly evolved. The update of these Recommendations should take into account the new regulatory framework, the EECC, as well as the new landscape, notably the deployment of NGA/VHCN, and new competition features. They include substantial developments and technological progresses in the way networks, products and services are provided by an increasingly large scope of market players, and in the increased diverse ways these are being used by retail and wholesale customers.

The objectives of these Recommendations[1] remain valid in substance even if revisited. Despite these objectives, the current regulatory framework has yet to deliver its promises; the growth of the digital ecosystem is still much lower in Europe than at the global level, where it is more than three times higher than the growth of GDP. In Europe, the growth of the ecosystem has even been lower than the growth of global and European GDP for the last 10 years. The revenues and the market value of the telecom operators are still decreasing in contradiction with the necessity of investing in fibre, 4G and now 5G. The roll out and the adoption of the VHCN by retail end users is far from being satisfactory, leading to an increasing pressure on telecom operators on the sustainability of their model.

[1] The promotion of effective competition, enhancing the single market for electronic communications networks and services and fostering investments in next-generation access (NGA) networks

Nevertheless, in the context of the Covid crisis, Recital 2 of the September 2013 Recommendation is even more accurate: "*The deployment of high speed broadband plays a more important role in Union investment, job creation and overall economic recovery*". The European Commission should continue developing a regulatory framework fit for purpose regarding the deployment of VHCN and its adoption by the European customers and businesses. The recently published Recommendation on a common Union toolbox for reducing the cost of deploying very high capacity networks is a first good step in that direction. It is notably right and important when it asserts that "*widespread gigabit connectivity underpins bandwidth-intensive use cases in the fields of health, education, transport, logistics, and media, which can play key role in economic recovery. More generally, fixed and wireless connectivity contributes significantly to providing affordable and accessible services and bridging the digital divide*".

Hence, Orange is fully aligned with the fact that a healthy telecommunication sector is to be one of the building pillars of the new European industrial policy. It will be key in achieving the Green Deal objectives and, more broadly, the social and economic European cohesion and recovery.

This ambition also sustains our strong commitment to continue investing in networks. In that sense, private investment must continue to take precedence over public investment in the deployment of broadband networks. In parallel, the regulatory framework and its implementation should be totally aligned with this new political ambition and support the investment capacities of the operators.

New features of wholesale markets to be taken into account: Co-investment, copper to fibre migration, and access to civil engineering

Infrastructure-based competition and co-investment have strongly developed

While one of the objectives of the Recommendations was to maintain competition, the latter has strongly developed compared to 2010 and 2013. The market has definitely changed, with widespread infrastructure-based competition as well as services competition in many Member States. Also, the level of retail prices has decreased in parallel to the multiplication of offers. The new entrants are not anymore new entrants; they are also deploying VHCN and benefit from strong market shares. The concept of ladder of investment is definitely outdated and is being supplanted by practices like network sharing and co-investment.

As far as fiber development is concerned, Members states have also taken decisions to foster it with new rules, for example with law for new constructions to provide the necessary installations. Concerning the terminating part of the FTTH networks, due to the economic gains expected from sharing it, commercial agreements or symmetric regulatory practices have developed.

Due to the effectiveness of such operations in terms of cost saving and acceleration of network roll-out, cooperative sharing agreements should be facilitated by the regulators. The related part of the NGA Recommendation should then be updated to integrate these trends, in line with current practices. Even, given BEREC's future guidelines on the topic (Art. 76.1- annex IV), the relevance of maintaining such a dedicated text in the future Recommendation can also be questioned.

Migration from copper to fibre is ongoing

At the same time, transition from copper to fibre is progressing, at different paces, and operators, including Orange, have already announced some significant plans for the shut-down of their copper networks.

The EECC responds to the necessary visibility and flexibility given to the SMP and alternative operators in that domain. NRAs can indeed withdraw the obligations on copper in such a context: copper will de facto be less and less a bottleneck, and the review of the market analysis should lead to a progressive decrease of the level of constraint on copper, taking into account the decline of volumes on these networks, as referred to in the Recital 25 of the 2013 Recommendation.

However, cost recovery remains an essential topic. In that respect, the regulatory framework should take into consideration, during this transition period, the cost of maintaining two networks. This should be mentioned in the revision of the Recommendations due to the importance that migration will take in the near future. If copper is still regulated, before it becomes irrelevant, the reference to the "band" (point 41 of the 2013 Recommendation) remains a valid reference for the underlying cost "net of all taxes", once properly revised given price evolution.

Wholesale markets and civil engineering

As far as wholesale access markets are concerned, the Recommendation should apply the principle of proportionality of the EECC. For instance, multiplication of wholesale products and obligations should be avoided, notably for cost efficiency (cf. WBA part of the NGA Recommendation).

Orange agrees on the importance of a proper non-discriminatory framework, in particular regarding access to physical infrastructure – ducts (which represent the most costly part of the network), cabinets and poles – to foster and facilitate the deployment of VHCN and favor infrastructure-based competition. Access to physical infrastructures has proven to be absolutely essential for an efficient fiber roll-out. In Orange's view, such a physical infrastructure market would certainly meet the three-criteria test; following the modified Greenfield approach in certain countries, it could then qualify as relevant market. This would avoid regulating forever the market of wholesale access to the network, in order to be able to impose the access to ducts as foreseen by EECC art. 72.

Furthermore, as the Broadband Cost Reduction Directive is currently under revision, it would be sound to homogenize the rules on ducts sharing, independently of their owners, from telecom sector and other factors (financing, etc.).

Harmonization, notably in the way the regulation is locally applied is an objective of the EC that Orange fully supports. This has not been achieved yet and while the competition level has definitely increased all over Europe, situations vary also a lot between countries and local geographies. Consequently, the geographic definition of markets is even more important today to take these heterogeneities into account.

Updating the remedies and ensuring more price flexibility

The need to set up more price flexibility and to carefully use the ERT

Regarding the evolution of remedies, the NGA recommendation needs to be updated, simplified, and lightened due to the environment, the EECC, and the cooperative operations of VHCN deployment, taking into account the competitive context. In particular, the framework should give the appropriate incentives to invest in VHCN, which means for the Recommendation to acknowledge the fact that the non-imposition of pricing obligations is the base case.

Price flexibility, as mentioned in the 2003 Recommendation remains fundamental for increasing the adoption of VHCN services that is still lagging in Europe. To that regard, the possibility for the investing operator to provide access to its network with new types of scheme, allowing both access seeker and investing operator to benefit from reasonable economic conditions regarding the exposure to the risk while having the capacity to provide retail services at reasonable tariffs is of utmost importance. In particular, all the schemes relying on co-investment are to be promoted, while other types of access remedies, e.g. access per line or line rental, are clearly detrimental to the deployment of VHCN and to the migration from historical infrastructure to the new one.

Orange is of the view that the ERT should be looked at carefully in that context given its potential counterproductive effects; it can negatively constrain an investing operator in its provision of reasonable co-investment offer due to the price of per-line wholesale access. In that context, the provision of EECC art.76 and Annex IV are sufficient and no additional remedy is required.

Predictability, stability, less intrusive measures and flexibility to review remedies to meet the criteria of proportionality, as stated in the EECC, are of utmost importance to accompany the migration from copper, which will not be any more a bottleneck, to fiber that is mainly deployed in sharing mode or under symmetric regime.

When, in extreme cases, pricing remedies still apply, it should be limited to copper products, taking into account when assessing the cost of the "modern equivalent asset" infrastructure the relevant economic conditions (e.g. the risk premium and a realistic WACC, not the one computed following the 2019 Notice and published yearly by the BEREC). On this very topic, regulators should still use a fair rate of return with an adequate assessment of the cost of capital and underlying risks of investments incurred by operators, in line with Annex 1 of the 2010 NGA Regulation, taking into account that there is no difference of the risk profiles of civil engineering and copper infrastructure. On the contrary, Orange considers that the recent implementation of the 2019 Notice (Communication 2019/C 375/01) on the calculation of the cost of capital for legacy infrastructures has increased significantly the risk of underestimating the return on investment for telecom assets in the EU.

Other non- discrimination remedies

Transparency and non-discrimination practices are not debatable. The regulatory framework should always ensure that they are set at a proportionate level considering the context, the implementation costs and potential benefits. The regulator should always look at the imposition of EoI very carefully due to the numerous downsides and the complexity of its implementation, especially taking into account higher compliance costs (as recognized in the Recital 14 of the 2013 Recommendation). The sole moment this remedy could be imposed, in our opinion, is for the critical access level and before the related technical product deployment has begun for both the incumbent/investing operator and the access seekers, in order not to disorganize the production/roll-out (as recommended in the Recital 15 of the 2013 Recommendation). In particular, EoI should only be applied at one level of access (e.g. if EoI is imposed for access to passive infrastructure, none of the downstream wholesale products – local or central wholesale access, for mass market or businesses – should be regulated with such an obligation).

Orange has never been in favor of any kind of separation. This remedy, be it functional and even more if structural, is not an adequate tool, notably due to its intrusive and costly aspect which is even more disproportionate today due to the observed level of competition and cooperative arrangements in the telecom market.

Proportionality of the obligations is still of utmost importance. Article 68 of the EECC states the fact that NRAs shall choose the least intrusive way of addressing the problems identified in the market analysis. Apart from the level of competition, access to ducts, symmetric access obligations, commercial agreements should be taken into account when addressing the wholesale access products offered. This applies to fiber but even more to copper that will not be a bottleneck anymore in the near future due to the migration to fiber.

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