

The comments of Slovak Telekom, a. s. on the Commission's Draft Recommendation on regulated access to NGA Networks

1. Failing to reach the fundamental goal – promoting NGA investment and competition

The Draft Recommendation sets its own goal to promote investment and competition in NGA and to foster sustainable infrastructure-based competition in the process as far as possible. Contrary to what the Commission has communicated throughout the review process, the Draft Recommendation does not address the lack of investment incentives for NGA roll-out in Europe. The scope of the Draft Recommendation is limited to remedies to be imposed on operators designated as having significant market power.

Surprisingly, the Draft Recommendation focuses on preservation and development of traditional regulatory approach developed for legacy networks based on access regulation of SMP fixed operators active on markets 4 and 5 (physical access and wholesale broadband access). Rather than minimising asymmetric SMP regulatory intervention, the Draft Recommendation is boosting SMP regulatory intervention not only into legacy networks but into SMP operators' strategic planning of NGA roll-out. It becomes fairly obvious that the Draft Recommendation is only directed at the treatment of the incumbent operators and that the intention is to ensure that the existing regulation of legacy networks which is not favourable to new investments is applied to new fibre networks as well.

The Commission focuses on SMP players which hold the third place in building NGA networks (representing only 11 % of FTTx connections in Europe at the end of 2007) lagging behind alternative operators (64% of FTTx connections) and municipalities (22 %)¹, therefore imposition of additional remedies on incumbents will certainly not have decisive effect on promoting NGA investment and competition development.

2. The Draft Recommendation thwarts prospects for high-speed access in less densely populated areas.

The Draft Recommendation neglects the policy challenge of serving Europe's citizens in less densely populated areas with high-speed next generation networks. The aim of fostering private NGA investment to bring high-speed broadband services also to citizens and SMEs outside Europe's metropolitan areas is not once mentioned in the Draft Recommendation. Neglecting the responsibility of dealing in a consumer- and investor-friendly way with the NGA and Broadband development in rural and remote areas creates the risk of enlarging the digital divide between these and metropolitan areas.

In Slovakia, the first and the biggest progressive NGA network roll-out was done by an alternative operator (Orange Slovensko, a. s.) and many other local players (Slovanet, SWAN, etc.) are following its example. The focus of alternative operators stays logically limited only to geographical areas with a high enough density of potential customers. In this situation an incumbent can catch up with its infrastructure competitors only by employing the very same investment costs, because these competitors do not have the burden of sharing their duct, civil engineering works and other passive or active elements of their network, that could be used by incumbents when later entering the market with NGA services in the same geographical areas, and this is because the Draft Recommendation suggests applying the above obligations only to SMP operators.

3. Geographic segmentation without further clarification will be not observed by NRAs

The Draft Recommendation does not set clear criteria for geographic segmentation. In recital (3) it only refers to possible geographic variations in network competition, which should be incorporated in the NRA's analysis and, in recital (3) of the General Principles there is stated that NRA should examine the need to define geographic markets taking into account the competitive conditions created

¹ IDATE (2008) Merrill Lynch (4/2008) – survey involved in FTTX Project or Pilot or Commercial deployments. A total of nearly 170 players involved in FTTx initiatives, excluding FTTN, FTTC, FTTLA/B (cable) and VDSL/VDSL2 deployments. *IDATE (2008)*

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at both a national and sub-national level by progressive roll-out of NGA networks and the status of infrastructure competition.

Without clearer geographical segmentation criteria, SMP operators will have to offer open access to these elements also in areas with viable infrastructure competition with two or more NGA network operators present, which is clearly not reasonable.

4. FTTH gradual regulation

In Slovakia, FTTH GPON is proven to be the most efficient and therefore the most frequent NGA solution and nearly every new NGA operator in Slovakia is building this type of NGA network architecture (not considering cable operators plans of upgrades). Thus, as soon as the incumbent starts to build NGA networks in the very same geographical areas where its competitors are already present, pursuant to the Draft Recommendation lacking clear geographical segmentation criteria, the incumbent should immediately be obliged to favour every other access seeker with its own network elements.

Under the gradual regulation concept, only an SMP operator will, at first, have to offer access to its ducts, civil engineering works and other passive elements. Secondly, if the previous options are not possible, only the SMP operator should offer access to unlit fibre or physical access to fibre sub-loops in concentration points where it is economically viable. Only with more clear criteria for geographic segmentation this approach can be considered as reasonable.

5. Wholesale broadband access

In parallel to FTTH and FTTN gradual regulation, wholesale broadband access should be also provided on FTTH and FTTN networks architectures unless there are clear indications of a break in the chain of substitution as compared to current product markets. Pursuant to the recital 22 of the Draft Recommendation, this break in the chain of substitution is crucial for considering services provided over NGA networks as more than incremental upgrades and therefore constituting new markets. The explanatory note, in section 3.4.3, includes an example of very high bandwidth internet connectivity services, managed IPTV, high definition audiovisual content as candidates for thorough analysis of their substitutability with currently offered services (different demand and supply side substitution characteristics), which could also result in clear and adequate justification of newly emerging retail markets not susceptible for the wholesale broadband access regulation. Without clearer criteria for the aforementioned substitutability analysis and geographic segmentation this approach can not be considered as reasonable.

6. Draft Recommendation does not take into account EP debate on NGA sufficiently

The European Parliament has called upon the Commission to align its upcoming recommendation on the subject with the EP debate or at least develop a common understanding before a recommendation is published. Nevertheless, the following has happened so far:

- Contrary to the Commissioner's pledge to the EP, the draft Recommendation does not address the problem of a lack of investment incentives for NGA roll-out in Europe (see above).
- the Recommendation is very prescriptive and does not take up any of the elements developed by the Parliament for fostering NGA roll-out in Europe. In particular it
 - **lacks guidance on the necessary symmetric facilities sharing obligations** by only focusing on the SMP operator,
 - **does not develop the concept of geographical segmentation any further and**
 - **does not foresee any appropriate risk sharing mechanisms** between the investor and access seekers on the basis of the ITRE proposal and **does not address the need for pricing flexibility** as opposed to the current strict cost-orientation of access products.

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The recommendations of the draft document themselves in fact strongly contradict the goal of bridging the digital divide. By discouraging established operators to roll-out their NGA networks the draft Recommendation would penalise less populated and sub-urban areas in particular, as established operators are most likely to be able to roll out NGA networks in less densely populated areas. A chance for achieving a market solution for less densely populated areas would be wasted.