



COLT Telecommunications

Response to

Commission Draft Recommendation on

regulated access to Next Generation Access Networks (NGA)

14 November 2008

## **INTRODUCTION**

This document contains the response of COLT Telecommunications (COLT) to the Commission's draft Recommendation (and accompanying Staff Working Document Explanatory Note) on regulated access to Next Generation Access Networks (NGA).

COLT is a leading European provider of business communications to major enterprises, SMEs and wholesale customers, offering a broad portfolio of data, voice and managed services. COLT owns and operates one of Europe's most advanced communications networks in 13 countries, through its 20,000km fibre network connecting around 100 cities, with metropolitan area networks in 34 cities and 18 integrated data centres. COLT complements its own network by the use of off-net connectivity and local loop unbundling.

COLT recognises the strong desire of Governments, regional and municipal authorities, and regulators to see a rapid rollout of high speed fibre-based (next generation) fixed networks. The Commission's proposed Recommendation is clearly intended to support this drive. However, the Commission and NRAs should always be cautious before introducing new or different regulatory approaches to specific market developments since this offends the principle of technology neutrality and could undermine the benefits of consistency, predictability and stability which are the *raison d'être* of the EU regulatory framework. Therefore, COLT urges the Commission to consider very carefully what specifically justifies the differential regulatory treatment of NGA and, if there is a case, to introduce a particular regulatory approach which deals only with those specific issues but which critically does not risk materially affecting the workings or underlying aims of the existing general regulatory framework.

## **RATIONALE FOR A RECOMMENDATION ON NGA**

The Commission's Explanatory Note explains that the aim of the draft Recommendation is to provide guidance for NRAs to take "a consistent and coordinated regulatory approach in the transition to NGA and simultaneously increase regulatory predictability and legal certainty for market players". While these same aims underlie the entire EU regulatory framework, it seems that the rationale for a Commission Recommendation in the case of NGA is the fact that the deployment of NGA is expected to require substantial investment, that this investment is significantly affected by regulatory predictability, and that NGA deployment may change the competitive landscape for fixed altnets. These factors warrant further analysis to assess both the need for differential regulatory treatment and whether the proposed regulatory approach appropriately addresses the factor identified.

The communications sector is well recognised as being reliant on substantial levels of investment to reflect technological developments and, in a highly regulated market sector, such as communications, any such investment is naturally significantly affected by regulatory predictability. What is it that justifies separate regulatory consideration for NGA investment? COLT presumes that the Commission is persuaded of the need to produce the current draft Recommendation on account of:

- The strong desire by Governments to see NGA developments take place (mainly to enhance the competitiveness of the EU and of Member States);
- The magnitude of the possible investment in NGA (although currently committed levels of investment in NGA are not yet so great); and

- The perceived high levels of risk involved in NGA investment.

Secondly, fears have been expressed that NGA deployment may change the competitive landscape, as the Commission's Explanatory Note itself describes, for example:

- Changing the business model for altnets which have invested in LLU;
- Stranding the assets of investors in LLU; and
- Risking the re-monopolisation of communications markets.

Therefore, one would expect that the Commission's draft Recommendation would seek to establish mechanisms to test and address the following issues:

- How large and risky is the likely investment in NGA?
- How could NGA potentially change the competitive environment?
- How can NRAs ensure that the levels of competition in the post NGA communications market are maintained or preferably enhanced?

#### ***How large and risky is the likely investment in NGA?***

The draft Recommendation does not appear to address this issue at all. Indeed the definition of NGA currently contained in General Principle (2) of the draft Recommendation does not mention the size, scale or riskiness of the investment even though this appears to be a key justification for differential regulatory treatment. In fact, NGAs are defined very broadly in the draft Recommendation, including terms such as "substantially upgraded" and "bandwidths significantly above those currently available". Since these terms are very open to differing interpretation, COLT questions whether the Recommendation can possibly be successful in achieving regulatory predictability and legal certainty since the addressable market is one which is so loosely defined.

As regards the riskiness of the investment in NGA, COLT believes that the Commission and NRAs should be careful to review the different risk profiles that arise depending on the nature of the NGA investment. In particular, the risk profile will be different depending on the extent to which the NGA investment is intended as an open access "utility" type project or as a project which is designed to provide a competitive advantage to the developing operator's retail business. In the former utility case, the key question will be the extent to which the developing operator will be able to attract sufficient levels of revenue-paying services from any other providers offering retail services. In the second case, the business case depends upon the capturing by the developing operator itself of higher retail revenues and market share. In each case, the developing operator will have a different motivation for the investment, different expectations regarding the desired return on investment and a different risk profile. One of the benefits of regulators establishing functional or business separation of vertically integrated incumbents would be to separate clearly these different investment cases and thereby to be better able to assess the real risk profile of NGA development.

#### ***How could NGA potentially change the competitive environment?***

The Commission recognises that NGA could potentially change the competitive environment, specifically by its impact on LLU, stranding altnets' assets, affecting their business plans and leading to a re-monopolisation of communications markets. Having recognised these areas of risk, the Commission should focus squarely on:

- How to ensure that altnets have information sufficiently in advance to understand and develop necessary changes to their business plans;
- How to strike a reasonable balance between encouraging the development of NGA and protecting altnets from the unreasonable stranding of their LLU assets; and
- Assessing the likely areas of risk which would give rise to any possible re-monopolisation of communications markets and putting measures in place to protect against these risks.

The Commission has addressed some of these issues to some extent in the draft Recommendation but should introduce more specific measures to address the potential impact of NGA on the competitive environment (see below for further discussion).

### ***How to ensure competition?***

The Commission's main approach to ensuring competition in the post NGA environment is to propose a range of remedies based on access to passive and active elements of the incumbent's network, with a clear preference towards access to passive elements in line with the principle of the ladder of investment.

COLT is highly concerned that insufficient attention is afforded in the Commission's analysis to the possibility that the regulatory remedies based on access to passive elements may not be economically sustainable. This is a particular risk from the deployment of NGA, where incumbent decisions regarding network topology will dictate the economics and practicality of an altnet's ability to reach customers (whether directly by fibre or via sub-loop unbundling). The Commission itself concedes that "ducts and other relevant infrastructure may not be available in some Member States". Notably, the January 2007 Analysys study for Opta in the Netherlands concluded that sub-loop unbundling is not economically viable except in very specific (and unusual) conditions. In such situations, the Commission's proposed approach which allocates a primacy to remedies based on passive access seems flawed, ie. in an NGA environment, the ladder of investment may either be inapplicable or may need to be construed in such a way that active access is at the top rung of the ladder.

### **END USER BENEFITS CAN ONLY BE SECURED BY EFFECTIVE COMPETITION**

COLT is concerned that the understandable political desire for greater investment in high speed NGA networks may tempt Member States, the Commission and NRAs towards a new regulatory approach which establishes a bias for NGA investment at the cost of maintaining or improving effective competition. Numerous actions and statements in the past 12-18 months have indicated such a trend, with incumbent operators in many Member States asking for relaxation of regulatory oversight as a condition for future NGA investment. However, one must not forget that the history of the liberalisation of the EU communications market sets out a very clear message that establishing and maintaining effective competition is the only guarantee for end users of choice and high quality of service. Without effective competition, the EU's communications providers will be less responsive to the needs of end users and, as a result, the EU's competitiveness will suffer. Therefore, COLT requests that the Commission should state very clearly in the Recommendation that any relaxation of the existing regulatory regime by NRAs is expressly prohibited; there should be no regulatory holidays and no special regulatory "incentives" to encourage NAG investment. A predictable regulatory regime is desirable for all and will help to foster future investment but a specially

relaxed regulatory regime (whether for NGA or any other major communications investment) will simply damage the market and cause long term harm to the interests of end users and to the EU's competitiveness.

## **CRITIQUE OF THE COMMISSION'S PROPOSED APPROACH**

### ***There should be no assumed primacy for passive remedies***

As indicated above, COLT is concerned at the draft Recommendation's overwhelming emphasis on passive remedies in an NGA environment. In particular, it may be wrong to focus on the previous application of the ladder of investment principle in an NGA environment because the topology of NGA networks may change the economic realities for altnets in terms of the point at which altnets are able to invest and compete. If duct sharing and SLU are not available or are not economically viable options, the idea that infrastructure competition (ie. through regulated remedies for passive means of network access) should form the basis for regulated competitive entry is simply wrong. Therefore, for the Commission to promote the primacy of passive remedies could be highly misleading and could allow incumbents the opportunity effectively to re-monopolise communications markets, with disastrous effects on end users and on the EU's competitive position.

There are also some significant practical issues with the approach set out by the Commission. As the draft Recommendation accepts, the nature of competition and therefore the effectiveness of the different possible regulatory remedies, will depend critically upon the network topology of the NGA; in particular the practicality of unbundling (SLU and fibre) being critically dependent on the concentration point. However, since NRAs will not wish to mandate network topologies and investment criteria for incumbents, they will not be able to influence the availability of infrastructure competition. The incumbents, through their design of the NGA, will set the framework for the future availability and effectiveness of infrastructure competition. In such circumstances, giving a regulatory primacy to passive remedies is highly risky; in fact, active remedies such as bitstream access become even more important to safeguard effective competition.

Another important point which is not discussed in the draft Recommendation but which will have a significant impact upon the effectiveness of any proposed passive remedies is that many network infrastructure issues are outside the control of the NRAs responsible for communications markets. For example, many ducts which may be suitable for fibre rollout are not owned by telecommunications companies and the availability of these ducts and the terms on which they may be made available will not necessarily fall within the control of the communications NRAs. Similarly, the conditions governing any street works necessary to implement duct sharing or SLU may not be wholly under the control of the communications NRAs, since these conditions tend to apply more generally to all undertakers of street works and are subject to wider environmental considerations. Therefore, even where passive remedies may appear feasible from the point of view of the communications NRA, there may be very significant wider practical difficulties for any altnets seeking to take advantage of such remedies before being able to deliver competitive services.

In COLT's view, there may be many cases in an NGA environment where passive remedies, such as duct sharing or SLU, will not be practical or will form only a small part of the competitive landscape. In such cases, an automatic assumption of the primacy of such

regulatory remedies could be highly damaging for competition, delaying the application or hindering the design of effective active remedies, such as enhanced bitstream access. Where this happens, incumbents will gain an important unfair advantage over their competitors, competition will be damaged and, as a result, end users will lose out in terms of the choice and quality of service available.

***There should be no automatic assumption of a higher risk premium for NGA***

COLT questions the inclusion in the draft Recommendation of the principle that a risk premium should automatically be incorporated when NRAs impose a price control on reference offers. While such a risk premium may be required in certain cases, there may be other investment cases where there is no justification for a specific NGA risk premium, eg. in the case of greenfield developments where the risks associated with rolling out an NGA network may be no higher than for a copper network (the risks may actually be lower, given the higher capacity and lower operational costs for a fibre network). Moreover, since NRAs already have an obligation, under Article 12(2) of the Interconnection Directive, to consider the risks involved for investments when imposing access obligations, there is no requirement for a new NGA specific principle in this Recommendation. The inclusion of the principle gives rise to the risk that NRAs may be encouraged to adopt a standard NGA risk premium which would be applied in all cases, even where the risk profile of different NGA investments varies considerably (see discussion above). Such an approach would have a distortive effect and would lead to inefficient investment decisions and would have a detrimental effect on competition.

***There should be a greater focus on the needs of enterprise customers***

It is striking that, while much of the political motivation for the encouragement of NGA emanates from a belief that NGA will help to maintain or improve the competitive position of the EU, there is almost no consideration of the distinct needs of enterprise customers as regards the provision of high speed communications services. Instead, the focus (as regretfully with almost all regulatory thinking in the communications sector) is firmly fixed on the residential market, despite the fact that the EU's competitive position will mainly be influenced by the degree to which enterprise customers can access high quality broadband services. COLT believes that the Commission and NRAs need to pay particular attention to the specific market situation for enterprise customers and to the different needs of this sector, in particular:

- The extent to which enterprise customers will continue to benefit from the competitive provision of high speed services in an NGA environment, eg. even where a provider of communications services to the residential market may be able to make an economic case for SLU, the same may not be true in the enterprise market (where the scale economies are very different);
- The need for larger business users to have access to uncontended bandwidth and the degree to which this will be possible in an NGA environment;
- The extent to which wholesale enhanced bitstream services will be fit for purpose for enterprise customers, eg. with SLAs which meet the 24/7 demands of business end users rather than the SLA which may be suitable for residential users; and
- The importance of wholesale products which support communications services which need to be available in a consistent fashion across the entire footprint of an enterprise

customer's office locations, eg. for a bank's headquarters and for each of its branches across the country.

Failure to address these needs will mean that the choice and quality of service available to enterprise customers will be severely limited in the future NGA environment. As a result, the efficiency gains desired from NGA investment will be significantly reduced and the economic performance of the EU and its Member States will be detrimentally affected.

### ***There should be clearer transparency requirements***

COLT welcomes the fact that the draft Recommendation calls for SMP operators to provide interested parties with information about future network modification plans. However, COLT feels that the current text is not sufficiently specific about this information requirement, leaving too much discretion to NRAs. In particular, there should be a specific requirement for SMP operators to publish annual reports on their proposed NGA development and to publish at least 18 months in advance any proposals for major NGA developments which might lead to the closure of local exchanges or the migration of concentration points. Without such advance information, it is impossible for NRAs and altnets to assess the impact on the competitive market or to react to such changes, leaving the SMP operator in the unfairly advantageous position of being able to dictate the future shape of competition.

### **STATE AID**

Although the Commission makes passing reference to the possibility of public investment in NGA, there is no commitment to providing further clarification on the role or risks involved in such State involvement. COLT feels that there is a clear need for more detailed formal guidance for public authorities regarding State Aid for NGA, particularly as there have already been a number of situations in which State Aid has been controversial. While there are existing well-established rules governing State Aid, it is highly likely that NGA investment will be a major area for future public sector involvement. As such, since any public sector involvement could have a significant influence on the profitability of existing communications infrastructure and on the competitive position of communications providers, the Commission could usefully provide additional guidance to public authorities as regards situations where State Aid might or might not be justified. In particular, it should be made clear that there must be a high barrier to the provision of State Aid for NGA investment in areas where there is already substantial provision of high speed communications links.

### **CONCLUSIONS**

The development of NGA will be a major step in the future evolution of communications markets and has the possibility to change the shape of competition in those markets. In this context, it is clearly important for the Commission and NRAs to examine the possible changes carefully and to consider whether the existing regulatory framework is sufficiently robust and contains the appropriate tools to maintain and improve the level of effective competition in the market. However, the Commission should review very carefully the basis on which any differential regulatory approach is proposed, justifying any differences with specific regard to the impact on competition and sustainable end user benefits. In particular,

the importance of maintaining and improving the climate for effective competition must be retained as the primary mechanism for ensuring choice and quality of service for end users; without effective sustainable competition, the benefits of any NGA investment would soon be devalued.

As regards the specific proposals made in the draft Recommendation, COLT's main concerns are that there must be:

- No possibility of regulatory holidays to encourage NGA;
- Careful consideration of the different risk profile of different NGA investment projects;
- No automatic assumption of a higher risk premium for NGA investments;
- No assumed primacy of passive remedies;
- A greater focus on the needs of enterprise customers; and
- Clearer transparency requirements.

Finally, COLT calls for the Commission to produce formal guidelines on the role of State Aid for NGA investment in order to prevent the distortion of investment incentives and competition.

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