Response of **Fastweb** to the Commission's consultation on Next Generation Access Networks (NGA)

I. Introduction

Fastweb welcomes the opportunity to respond to the public consultation on the Commission's draft Recommendation on NGA networks (hereinafter, the "Draft" and "NGAN"). Fastweb as the leading Italian alternative electronic communications services provider – and one of the largest in Europe – with 1.4 Mln broadband customers and approximately a 13% market share in the broadband market in Italy, considers this issue to be of high priority.

Fastweb has been one of the first operators in Italy and in Europe to deploy a proprietary New Generation Network (NGN) infrastructure with Fibre To The Home (FTTH) architecture, which today represents approximately 40% of total European FTTH accesses both in terms of active customers (approx. 300k) and homes passes (about 2 million homes reached).

Fastweb believes that the development of NGAN is a priority for the European market but that is fundamental that **this does not undermine the objectives of the electronic communications regulation**, **i.e. ensuring fair competition in the electronic communications market and provide consumers with wider choices, better products and lower prices**. Therefore it is vital that the proposed Draft will not foster incumbents to use their planned investments in NGAN to abusively exploit their monopoly on the access markets in order to strengthen their dominant position on the wholesale and retail markets – if not to regain monopolistic positions and elude regulation- , to weaken competition and ultimately, damage consumers.

Fastweb hereby emphasizes its main concerns in relation to the general policy objectives of the Commission regarding electronic communication services and submits its specific observations to the proposed Recommendation.

We find a great deal of the Draft positive – transparency, transition mechanisms, principle of equivalence and the attempts on predictability. Yet we believe that on some aspects, the proposed text creates a number of potential problems (or raises concerns) – such as on access conditions, remedies, pricing methodologies - which are capable of significantly undermining the Draft's positive achievements.

II. High-level policy considerations.

Fastweb would like the Commission to fine-tune the final Recommendation to fit and reflect important **high-level policy considerations**.

First of all, Fastweb understands that regulators face a very complex task when designing policies addressing the NGAN deployment issue. The need of balancing potentially conflicting objectives, such as the protection of competition (allocative efficiency) and the maintenance of high powered

incentives to invest in upgrading current networks (dynamic efficiency), is considered by Fastweb to be especially challenging. However, Fastweb believes that the **probability of a long term re-monopolisation of the access network in a NGAN deployment** is much higher and less dependent on country-specific factors than the risk of giving poor incentives to innovate to operators in fixed telecommunication markets.

In this regard, it should be noted that:

- **Competition is essential to successful development on NGAN in Europe** since only competition provides the correct incentives to invest and innovate while ensuring benefits to consumers in terms of choice and better prices
- In order to achieve this objective, **NRAs should ensure that incumbents do not use the transition to NGAN in order to adopt technological solutions enabling them to bypass or inhibit the effectiveness of current remedies** (such as unbundled access to the local loop), which have so far proven successful. There is a concrete risk that incumbents attempt to boycott current remedies relating to access to the network, by adopting technological or architectural solutions making access by third parties technologically or economically unviable (see e.g. FTTC solutions where access to the cabinet level is not possible or FTTH solutions such as PON, which do not enable any LLU). The Commission should thus request NRAs to ensure that NGA networks are deployed by the incumbents adopting technological solutions which ensure the possibility of unbundled access by competitors. In this context, an example of open architecture which allows infrastructure based competition could also be the "multi-fibre" solution. This is a FTTH infrastructure that minimizes the additional costs of deploying fibre to home, since this task is carried out by a single operator, in a one-shot intervention. In the "multi-fibre" solution the incumbent is obliged to leave some fibre available to other operators requesting access to it.
- Architectural choices implemented in NGAN by incumbents may have a significant impact on competitive outcome. The Commission has a unique chance to influence the competitive outcome by imposing open architectural models before NGAN are deployed.
- collaboration in research and development between incumbents and new entrants is capable of contributing to more efficient investment and wiser technology while ensuring that legacy of lower investment risks is not unilaterally used;

On a **technical** standpoint, the following issues should be taken into account:

1. Investments in **NGAN do not represent a revolution** to the existing networks or lead to a new market because they do not create a completely new network for services and applications, rather they generally represent an evolution of current networks, which will allow to offer more advanced services to consumers. As correctly stated in the Draft, "*NGAs are access networks which have been substantially upgraded either wholly or in part, using existing local access infrastructures and technologies and/or using new optical fibre infrastructures, and which are capable of delivering broadband access services with bandwidths significantly above those currently widely available*".[1]

[1] See Recital 2 of the Draft.

2. The transition to NGAN **may *structurally* lead to a change in current cost structure – potentially penalizing altnets -** due to the modification of the incumbent's fixed network infrastructure and in the resulting interconnection points and therefore modified wholesale offers made available to altnets:

- as far as incumbents' networks are concerned, the deployment of NGAN will increases **the importance of economies of scale at the local level**. This implies that the incumbent operator who already has a significant market share will be in a better position to benefit from the investment, also in consideration of the benefits it may achieve in terms of cost reduction due to a more optimized network infrastructure or lower maintenance costs of fibre vs copper.
- The main cost category linked to NGAN development refers to (horizontal) civil engineering works (due to digging of trenches and laying of new ducts and fibre). These fixed costs, according to recent estimates[2], account for about 70% of total deployment costs, and imply that scale economies required to bring fibre to the cabinet would be higher than those previously required to lay it down until the local exchange level. Moreover, economies of scale would be reinforced, as the fixed cost per node for communication equipment would be recouped over a smaller base of reachable customers (i.e. those reached by the FTTH system).
- In addition to that, in a FTTN scenario, **altnets** that would like to co-locate their devices at the level of the street **cabinet will be faced with an increase in costs with respect to current LLU scenario and a smaller potential customer base served by each cabinet. Also, altnets who are still in the phase of recovering investments made for co-location sites for LLU would need to face the issue of stranded investments.**
- Furthermore, it should be noted that in a FTTN scenario, space in cabinets is generally limited, availability of power at cabinets is not adequate and environmental regulation on street cabinets is far more stringent than in local exchanges. Therefore, **sub-loop unbundling will lead to higher fixed costs and – as a consequence – to higher economies of scale** potentially benefiting larger operators to the detriment of altnets.
- Fastweb believes that FTTH is the optimal long term objective whereas a FTTC/FTTN solution would only represent a transitory and interim measure which would be quickly phased out in favour of FTTH. Due also to the technical and economic difficulties in implementing FTTC/FTTN, we believe that NRAs should strongly encourage a full deployment of FTTH. Otherwise, operators would be forced to invest in a non-optimal solution while investments should be focused on the long term objective.

In terms of **regulatory measures**, the following should be noted:

- **investment decisions for NGAN by incumbents must not be urged by the condition of "regulatory holiday"** as a prerequisite to ensure return on investment. This would foster incumbents to make investments with the aim of regaining/strengthening their monopoly position via regulatory support, i.e. an objective clearly contradicting the aims of the EU Regulatory Framework. On the contrary, it is essential to favour market dynamics which – by

[2] Ofcom, *Future broadband: Policy approach to next generation access* , September 2007, par. 6.35.

being based on a competitive market environment - ensure a level playing field between multiple operators, by introducing (or maintaining) adequate remedies to prevent illegal exploitation of dominance;

- should inadequate rules favour the re-establishment of the incumbents' monopoly positions over its vertically integrated structure, the latter would in turn enable incumbents to leverage their market power to services provided over NGAN;
- the Draft should also mention other issues which will be essential to successful development of NGAN, such as access to content and the need to stimulate demand for services which can be provided over NGAN;
- in evaluating the remedies for ensuring competition in the access markets, NRAs should take into account the **existing level of infrastructure based competition** (such as the one represented by cable networks).
- In case of transition to NGAN, the **access network will most likely be the main local point** as bottleneck facilities will be reinforced;
- **current regulatory measures in place that aim at facilitating the development of competition must not be removed but rather enhanced** in order to take into account factors such as differences in infrastructures of NGAN, new services (both wholesale and retail), and complementary remedies which can further enhance infrastructure based competition (such as duct access). This implies maintaining for example the most successful regulatory remedy implemented to date to ensure competition, i.e. the obligation to provide **unbundled access to the local loop**. Duct access on the other hand represents a very useful complementary remedy to further enhance infrastructure based competition but has limitations *per se* and therefore cannot be considered a universal and unique solution;
- bitstream access should not be regarded as a universal solution for the purposes of ensuring competitors' access, while it presents benefits in very specific cases, it has strong limitation in ensuring effective infrastructure based competition, both in terms of price and innovation, since the altnet would remain strongly dependent on the incumbent's pricing structure and technological offering.

In terms of **pricing methodologies**, the following should be noted:

- Fastweb agrees with EU Commission's aim to improve coordination in designing the remedies regarding SMP services in NGAN, since a trend to re-monopolisation seems to emerge in several EU Member states. However, as it will be seen below, **a more flexible approach should be applied to pricing regulation**, with particular reference **to cost of capital.** In this domain cross-country differences appear to be rather relevant;
- The incentive to invest in NGAN depends on several factors such as the probability of achieving capital and operating cost savings[3] and the degree of alternative platform

[3] For example, Dutch PSTN incumbent KPN aims at drastically reducing its cost base by dismantling its current 1.361 local exchange locations, while deploying FTTC to 28.000 street cabinets. See OPTA, *Position paper on All-IP* , 2006, available at http://www.opta.nl/download/Positionpaper+All%2DIP+02102006+UK%2Epdf . As another example, Verizon estimated that the decrease of network problems up to 80% for a FTTH network compared to its legacy copper network. See OFCOM Regulatory challenges posed by next generation access network, 2006, available at http//www.ofcom.org.uk/consult/condocs/nga/.

competition. In particular, financial risks associated with investments in NGAN depend upon several parameters, which are very country specific. For example, a fixed incumbent operator having a large retail market share, a legacy network with short copper loop granting higher capacity and no inter-platform competition would be in a better position to deploy NGAN investments at lower risks compared with incumbents or altnets facing stronger competitive pressure;

- Also, Fastweb believes that the risk associated with NGAN investments should not be based on the evaluation of the risk attributed to the single project but should be based on the **evaluation of a WACC** based on the overall level of risk attributable to a single operator, **taking into account the different risk factors between incumbent's investment in NGA N and those for – albeit efficient - alternative operators;**
- The concept of "**risk premium"** may apply to a situation when a person/company is planning to take an uncertain bet. However, in the case of incumbents, it should be taken into account that (i) the financing of NGAN may be done by leveraging investments costs on a massive and existing consumer base, and (ii) there are strong advantages for incumbents due to lower maintenance and operational costs, the level of risk is significantly reduced. This is supported by the fact that these investments will most likely constitute an upgrade of the existing supply and service networks and do not represent "greenfield" investments. It can further be argued that **financial risks for NGAN investments are even lower for incumbents having high market shares in downstream markets** – such as retail access to telephony/internet services and broadband networks -, and for operators not facing viable competition from alternative platforms such as coaxial cable, wireless technologies, interactive digital terrestrial/satellite broadcasting networks or other viable alternative technologies. As the result of the above, it can also be argued that demand and supply side related risks would be minimized, thanks to the lower uncertainty linked to a broader existing customer base at the retail level;

III. Summary of main issues

1. Ladder of investment - Duct Access (Article 15)

Fastweb deems that the current Draft may run the risk of being interpreted as suggesting that in the context of NGAN duct access may become the most important remedy instead of an addition to current remedies. In fact, based on the wording in the Draft, NRAs seem to be encouraged to impose "further physical access obligations […] beyond access to ducts", only "where access to this infrastructure is technically or physically impossible or where it is not economically viable for a sufficient number of operators to ensure effective competition".[4]

Fastweb agrees with the text of the Draft, where it states that civil infrastructure access or infrastructure sharing conditions must be commonly and gradually imposed in all Member States in order to best reflect the aims of the internal market. Nevertheless, we would like to emphasize that **duct access is not in itself a universal solution**. In particular, there is evidence that some national markets, as in the Italian one, do not allow for extensive access to ducts, especially in the access

[4] See Article 15 of the Draft.

segment of the network. For instance, in Telecom Italia's access network, namely from the MDF to the customer's premises, only 10% of existing ducts are suitable for hosting competitors' fibre infrastructures.[5]

Furthermore, the proposal should include also the need for regulation on duct access for all duct owners, including for example public utilities.

Local loop unbundling, bitstream and duct access – therefore active and passive remedies - applied in parallel would better serve the objectives of the Framework that is to create level playing field between competitors and create competitive prices and wider range of choices for the consumers. Fastweb is convinced – based on its own experience – that **the possibility of the application of wide range of different type of remedies** contributes to the development of flourishing market conditions and delivers consumer benefits while hindering illegal regaining of monopoly power.

2. Geographic segmentation (Article 3)

The tendency to consider the possibility of segmenting markets is reflected in the Draft, where it recommended that also competitive conditions at "sub-national" level should be taken into account (Article 3). On a technical standpoint, such conclusion is based on the peculiar features of NGA "network roll-out" – which is assumed to have "limited geographic coverage" – as well as on the likely resulting "geographic variations in network competition" (recital 3).

While Fastweb understands that the possibility of geographical analysis of competition is foreseen in current framework directives, it believes that segmentation of the market and/or of remedies needs to be very carefully assessed by NRAs and only be envisaged in very specific circumstances when irreversible effective competition in the market can unambiguously be demonstrated and when adverse effects in adjacent markets (markets to which a monopolistic firm can leverage market power) can be excluded.

The primary objective of regulators, as also foreseen in the current regulatory framework when conducting a market analysis, is, and should remain, the promotion of competition as well as the protection of consumer. Therefore, it is of utmost importance, that prior to envisaging a differentiation of remedies based on geographic segmentation, consumer gains from deregulation (or lighter regulation) in certain areas must be carefully weighted against consumer losses in other areas and/or markets and the short/medium/long term effect on the level of competition on the market as a result of the modification of remedies.[6]

In fact, geographic segmentation is a highly technical tool and, to date (see below), it has been used in very specific circumstances in certain markets (i.e. not for the access markets but for the "core" network markets). It should also be noted that if regulation is too prescriptive there is a substantial

[5] See e.g. the Belgian example, where almost no ducts have been deployed.
[6] See also the European Regulators Group's Common Position in this respect.

risk to end up with many fragmented national telecoms markets with difficulties enforcing the different remedies and different prices for competitive (urban?) and non competitive (rural?) areas.

In general, Fastweb believes that geographic segmentation should be evaluated only in exceptional circumstances as both the probability for regulatory errors and regulatory costs for both regulators and operators are high and the damages to competition may be irreversible.

If geographic segmentation of remedies is applied inappropriately is can create a serious risk of cross-subsidies by the incumbent between competitive and non competitive areas and have, as an outcome, the reduction of competition in the "competitive areas". In such cases, without ex-ante regulation which prevents discriminatory practices and cross-subsidies, the incumbent may have the incentive of adopting price/margin squeeze practices in competitive areas (which may be cross-subsidized by revenues from non competitive areas), thereby distorting competition and ultimately excluding existing competitors from the market. In this case, then there would be the paradox that the geographic segmentation of markets justified by the presence of competition would lead in the medium/long term to a reduction of competition in the same geographic market.

Geographic segmentation in the presence of operators who have still not completed their network roll-out/coverage may have the adverse effect of discouraging further investments and therefore limiting the national scope of operators and weakening competition by encouraging the development only of metropolitan/regional players rather than allowing the creation of nationwide competitors.

While the above are general concerns regarding the risks of market segmentation, we believe that in the case of transition to NGAN further issues arise and need to be considered. The current competitive framework is based on existing remedies and available wholesale services offered by the current infrastructure of the incumbent operator (so mainly via ULL, WBA and WLR services which utilize the copper lines of the incumbent).

The current debate on the development of NGAN may change this landscape since several incumbents have announced that they are planning changes to their current architecture which may seriously affect current sites for ULL.

If an MDF site is removed or VDSL/FTTH technologies deployed by the incumbent in an area that has been considered competitive (due to the presence of ULL operators) with the consequence for example that there is no obligation by the incumbent to offer WBA services, then we would have the paradox that the incumbent would have even more incentives to wipe out competition by removing the MDF site for ULL, since in that case no other means would be available for operators to compete.

Competition is taking place among operators which have different technological profiles. Technology matters: for example in the case of Fastweb. In the same local areas Fastweb may offer FTTH or ADSL services through wholesale access from incumbent. It could be that developing FTTH is easier and faster in some urban areas than in other, due to timing and costs of civil infrastructure. The possibility for Fastweb to offer ADSL services while developing its own optic fibre network is one crucial way to challenge incumbent's dominant position by attracting customers earlier. Here access to incumbent network is an "accelerating device" towards full competition.

Finally, we believe that NRAs should take particular care in evaluating the opportunity of geographical segmentation in this particular phase of transition versus new network infrastructure and technologies which will have an impact on the competitive landscape both on retail and on wholesale markets.

3. SMP obligations and "emerging markets"

Fastweb strongly supports the overall objective of the Commission that is "*to foster the application of consistent regulatory remedies to SMP operators throughout the EU in Markets 4 and 5 regarding access to NGA networks or in other markets pertaining to NGA*"[7]. For example, information sharing in a timely fashion and appropriate migration paths allowing alternative operators to adapt to the new network developments is one of the consistently applicable principles and practices.

As for censoring of the SMP obligations, **Fastweb is convinced that the proposed risk-premium related provisions must be applied without prejudice to the continuous application of the non-discrimination principle,** i.e. downstream operators must receive the same risk-premium independently whether they are newcomers or affiliates of the SMP's downstream operations. All in all, pricing principles must be consistent across the entire value chain in order to avoid leverage.

We believe that the final goal of regulatory intervention, i.e. sustainable competition, may only be achieved if the non-contestable range of essential facilities – as fibre access, duct access, bitstream access – is systematically and realistically regulated and market deficiencies are recognized ex-ante. Inappropriate regulatory intervention would mean that a regulator could pick winners and losers. This cannot be supported at neither national nor community level.

Closely related to the above is the issue of so called "emerging" markets. In the telecommunications industry, the provision of new services is strictly related to and dependent upon other dominated markets and in fact the deployment of NGAN may become a means for the incumbent to both leverage its market power from the traditional services to the emerging market, and to reinforce (especially in the case of bundles) its position on the dominated market/s. In practical terms, this trend may be detected in the case of innovative services, e.g. IPTV, provided over and strictly dependent upon the (remunerative) access to the incumbent's network and infrastructure. In the case where such link is found between these markets, the Commission should clearly state that the need (and degree) of SMP measures should be assessed by taking into account the above link of dependence.

4. Pricing principles (recital 5 and Annex 1)

Fastweb agrees with the Draft's proposal to consider historical costs as the criterion for setting price to the incumbents **existing infrastructure**. As underlined above, NGAN development does not take

[7] Draft Recommendation for public consultation, p. 3, (4)

place in a technological vacuum and is rather the result of the evolution and development of already existing facilities. In light of the above, a methodology based on historical costs ensures that the price control mechanism take into account the characteristics and real costs of the traditional infrastructure of incumbents, and the benefits deriving from its exploitation and refinement in an NGAN environment. Also, historical costs have the benefit of being demonstrable and based on costs effectively sustained rather than on theoretical assumptions. For new infrastructure the use of historical costs basically means taking into account current costs. Furthermore, the use of historical costs in any case leaves room for the NRA to take into account efficiency parameters.

5. Risk premium (recital 1 and Annex 1)

The proposed Recommendation aims to find the balance between investments, infrastructure based competition and service based competition by advocating that "*fibre optical cable investment is a desirable development which will enable the provision of innovative and better broadband services*"[8].

Fastweb is concerned that the Draft may not be capable of accomplishing this target. Several studies conclude that general investment costs for fibre access networks range between €1000 to €2000 per household in Europe[9]. Network economics rarely support the development of several lines for the provision of the same type of service, especially in the access network, and Fastweb believes that this is applicable to NGAN investments as well. The current regulatory framework has the explicit aim of promoting effective competition and efficient investment. If infrastructure-based competition appears behind or at the front of the objectives it would give strong signals and would weaken the ladder of investment approach which is now followed by NRAs[10]. Nevertheless, profitable investment may be supported by well placed access policies – as competition is sensitive to the pricing of access - as alternative operators do not have historical advantages to lower risks or any additional benefit deriving from the lower level of competition and re-monopolization. In addition, an overly emphasized substantiated risk-premium in the electronic communications sector is not justified more than in other sectors.

In particular, Fastweb does not share the Commission's view that CAPM model should be applied to the *specific stand-alone investment project* when calculating the cost of capital, as opposed to the whole range of activities carried out by regulated firms. Indeed, it is important to underline that NGAN investments are undertaken by companies which raise funds in the same capital markets. In such markets, asset prices would normally ensure that a new investor in the firm will earn the competitive (risk-adjusted) return related to all activities carried out by the firm, regardless of the degree of competition in the product market where firms are operating.[11] Therefore, Fastweb does not believe that NGAN deployment will change significantly the functioning mechanisms by which

[8] Draft Recommendation for public consultation, p. 2, (1)
[9] WIK , The Economics of Next Generation Access Network, Study for the European Competitive Telecommunication Association (ECTA), 2008.
[10] It is advisable to leave the objectives of regulation for the Framework Directive that is under consideration in the Council at the moment.
[11] See OFT, *A Study into Certain Aspects of the Cost of Capital for Regulated Utilities in the U.K.*, 2003, p. 1.

firms raise funds, even if it would probably change the overall risk profile of Telecoms companies. However, this would be discounted by financial markets and company-based WACC would increase.

Moreover, the WACC methodology is the only means to ensure that – in setting the price of access to NGAN – NRAs really take into account the incumbent's characteristics in terms of (superior) structure and (higher) market power. When applying for the financing necessary to lay down NGAs, these elements play a major role in determining the interest rates applicable to the requesting company: obviously such rates will be lower for the incumbent, compared to those available to smaller altnets. Moving away from such criterion in favour of a project-based one, would mean to ignore the role of important elements – e.g. an already existing legacy infrastructure and the high market share on traditional markets - still building the power of the incumbents, which will be allowed to achieve over-profits, to the detriment of competitors requesting access to their NGAN infrastructures and having to pay higher amounts than the ones really reflecting the structure and capabilities of European integrated companies.

In conclusion, Fastweb's opinion is that there **is no strong evidence supporting the need to switch regulatory paradigm from the traditional company-based WACC pricing** of cost of capital to a project-specific pricing scheme.

Alternatively, if the Commission considers that there must be a risk-premium added in order to urge investments, Fastweb considers this being contentious regarding the capability and financial backup of the embedded incumbents. We consider that incumbents should not be given this advantage and risk premium should be looked at from a company specific point – if at all when calculating access prices of the new assets. Moreover, it must be stressed that this risk premium should not apply without taking into consideration several specific factors such as: i) would-be investing **alternative operators financial constraints; (ii) country specificities**; iii) existing level of alternative competing infrastructures (ie. cable); iv) incumbent's market position, both at retail and wholesale level. All of these criteria should be a part of the detailed assessment when deciding about the appropriate method/scheme of rewarding investments that concerns NGAN.

5. Public financing

Fastweb would like to take the opportunity to discuss the possibility of using public financing or state-aids to finance NGAN development. While Fastweb believes that competition and market dynamics should be the preferable methods of fostering investments in NGAN, due to the significant level of investments at stake in view of uncertainty of demand, there are ongoing discussions at national and European level on possible use of public or semi-public funding private (in the form of public private partnerships – PPPs). We believe that in the event of use of public funds for the development of NGA networks, it is even more essential to state the principles that a **prerequisite** for having access to these funds is **to adopt open network** solutions which allow unbundled access by competitors.

IV. Summary of the specific recommendations

The Draft seems to advocate a bottom-up approach in relation to the ladder of investment by assuming that duct access on its own will be sufficient to support an effective competition on the market. This is, however, not satisfactorily underlined by the Commission as several studies seem to conclude that the above is rarely the case.[12]

Fastweb recommends that there should be a list of access options available for the NRA to choose from in such a way that the pricing of access – in whatever form it may be – encourages investment in infrastructure if viable but not requiring if parallel outlay is not foreseen to be profitable, as it can easily be the case in network industries[13].

Fastweb is pleased to see that the Commission aims at transparent regulation with clearly defined access remedies. Yet, Fastweb believes that more concentration will happen if duct access remains at the centre of attention. As passive remedies are not suited for all dynamic markets – if for any at all - the regulatory environment should be able to accommodate active remedies as well. Nevertheless, neither bitstream access nor duct access alone is capable of adequately treat problematic interconnection issues in the field of NGAN. A mere enhanced bitstream access will provide altnets with less functionality control, while bitstream access at higher levels of the network (MDF or above) risks to cause less investment. As already said, bitstream access cannot be considered as an alternative solution to ensuring competitive access to NGAN and a substitute for unbundling since it has very different characteristics and is less a less effective tool for ensuring competition.

Fastweb is of the view that both active and passive remedies should be equally available for NRAs in their regulatory toolbox.

Fastweb agrees with the need to encourage cooperation between all market players and infrastructure sharing agreements. However, it may be unrealistic that a company – typically incumbents – that can act independently of its competitors, may be spontaneously proposing contracts with equal conditions, i.e. worthwhile agreements are not realistic under this scenario. In case of monopolistic bottlenecks, sector-specific ex-ante regulation is of network infrastructures is a must to guarantee non-discriminatory network access. Respectively, the NRAs will have to perform all necessary steps that these voluntary agreements are not infringed with special regards to the joint planning and the rights of use of the civic infrastructure, i.e. shared access under equal terms.

Fastweb calls upon the Commission to ensure that NRAs do not fail to remember their duty to impose ex-ante remedies based on SMP as it is required in the Framework – even if voluntary agreements are encouraged.

In addition, Fastweb is keen on seeing guarantees in the proposed text which may ensure that leverage and excessive pricing issues do not emerge over, or at the expense of, infrastructure. On this point Fastweb would like to recall the special case of emerging markets to the Commission and calls

[12] See, e.g. WIK, Analysys and OECD recent reports.
[13] This is also in line with the Commission comments in Article 7 cases, e.g. market 4 in Germany and Spain.

upon the Commission to handle this with meticulous care as not to consider NGAN markets newly emerging markets and award investors wrongly with ample regulatory holidays.

V. Transitional issues

Fastweb is of the view that erroneously set regulatory objectives may distort competition to a larger extent than eventual regulatory holidays. In practice, one of the most damaging competition distortions may arise when newcomers subsidize established incumbents, be it on investments or service provision. Uncertain regulatory environment and dubious investment conditions may result in similar situations. The need – that was accurately identified by the Commission - to propose a harmonized and consistent regulatory environment must be followed by monitored application of the rules. It is undesirable that national regulatory authorities deviate to such an extent that investment conditions in various Member States become poles apart.

Therefore, in Fastweb's opinion, **the Recommendation should call on NRAs to conduct a market review and impact assessment in order to identify the most appropriate approach – according to national situations, yet, in line with the European agenda – for the transition to a new policy on NGAN, which ensures the maintenance of policy objectives of promotion of competition**. In practice, it should set out the requirements of the changeover and call on national authorities to find the best way to meet those requirements. This is vital to avoid industry failure, concentration and stagnating markets.

VI. Conclusions:

Fastweb is in line with the main objectives of the Commission's proposed Recommendation.

While supporting the main ideas, Fastweb expresses the need to see changes in some parts of the Draft text. In line with what has been explained above in more detail, we call on the Commission to make some important amendments to the current text. To this aim, a **redlined version of the Draft** will also be submitted.

The Commission has stated in several occasions that competition is needed to facilitate consumer choice, generate competitive pricing and provide sufficient incentives for innovation.[14] As innovation is directly related to competition, the well targeted support of innovation is clearly a must. Nevertheless, it would be wrong to transmit the incentive towards only one side of the market, i.e. the incumbents who have so far given unconvincing arguments about investment-related risk premiums.

As the representatives of the Commission have stated, "*facilitating transparent and non-discriminatory conditions is essential to ensure European industry can offer competitive and innovative services and gain market share in what is expected to be a significant (…) global*

[14] Latest in: *Future networks and the Internet, Early challenges regarding the „Internet of Things"*, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. pp. 10-11, 2008.

market."[15] If the Commission wishes to adhere to the above goals, it should ensure that the NGA Recommendation be in line with these objectives.

In the light of the above, Fastweb would very much welcome the Commission's efforts to adjust the text of the Draft to better reflect its repeated messages and established policy on the achievement of European competitive markets and effective competition.

[15] *Future networks and the Internet, Early challenges regarding the „Internet of Things"*, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. p. 11 2008.