

## **Response of the Netherlands to the draft Recommendation on the regulated access to Next Generation Access Networks (NGA) of 1 October 2008**

We think the Recommendation is very important. It should give guidance to the NRAs in their difficult task to regulate NGA in order to encourage investment on the one hand and promote competition on the other hand.

The roll-out of NGA requires vast initial investments in the coming years. These investments will have to be recovered over a longer period. This implies that regulatory predictability and legal certainty are very important issues for incumbents and alternative operators as well.

We fully support the principle of gradation of remedies as pointed out in the working document. Competition between networks is the preferred situation but if competition between networks is not possible, appropriate access obligations should be imposed to promote competition on the subsequent layers of the value chain in the telecoms sector. If competition is effective in the subsequent layer the rest of the layers do not need to be regulated. In this respect the recommendation starts rightly with access to passive network components as the preferred option. If this is economically feasible this would generate competition between networks and the need for regulation would be limited.

However we have two comments, namely:

1. NRA's should provide long term regulatory certainty
2. The recommendation is too prescriptive

### *1. NRA should provide long term regulatory certainty*

The situation in the Member States with respect to the roll-out of NGA varies quite a lot from Member State to Member State (e.g. geographic variations, competition situation, roll-out strategies, technological implementation). Therefore it is necessary that the Recommendation gives guidance for NRAs, but also allows the NRAs to take appropriate remedies tailored to specific national circumstances. This implies that the Recommendation should focus on general principles of regulation. These general principles should not be too detailed (as seems to be the case in the current draft recommendation, see below).

On the basis of the NGA recommendation and the general regulatory principles of the framework<sup>1</sup> NRAs should elaborate a more detailed approach of regulating NGA in their

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<sup>1</sup> The draft recommendation seems to suggest a necessary change in regulatory principles because NGN are different from existing networks. However the development of next generation networks is an evolutionary process of gradual replacement of copper and coax by fibre. The main regulatory principles of the framework remain valid and should also be applied to NGN. Only these principles should be elaborated by the NRA taking into account the specific characteristics of NGN.

respective countries in order to give sufficient regulatory certainty. In this approach the NRA should explain when access obligations will be imposed and which access obligations will be applied in what circumstances. For example the NRA should explain its position regarding discounts, geographical submarkets and elaborate pricing principles in great detail in order to provide NGA investors and alternative operators with a sufficiently detailed picture of the (future) regulation approach over a longer period.

The NRA should also indicate in what circumstances this regulation would be adapted and how. Regulation cannot be fixed in detail for a long period because circumstances might change, but the NRA should explain how it will react to specific changes in market circumstances. NRAs should therefore reassess the market situation periodically, in order to adapt regulation to market developments if necessary. If market circumstances change regulation should change, but essential is that such changes should be predictable in order to give regulatory certainty to all market players.

According to the new regulatory framework proposals NRAs are obliged to make a new market analysis every three years. This period might be too short considering the fact that the investments in NGA will have to be recovered over a much longer period. We therefore support the proposal (art. 16 Framework directive) to allow NRAs to extend this period if necessary.

## *2. Recommendation too prescriptive*

The recommendation should only give guidance to NRAs and not try to set out a too detailed picture of the actual regulation because that might pre-empt the NRAs necessary room to manoeuvre in order to respond to specific circumstances adequately. The staff working document seems more nuanced than the draft recommendation. The draft recommendation is sometimes too specific and prescriptive. The recommendation should not try to pre-empt the assessment of the NRA.

This is for example the case when elaborating an adequate risk premium for NGA and suggesting that access to passive and active networks components should be treated differently. This approach is too simple and rigid. As a general rule an NRA should allow for an adequate return on investment taking account of the risks involved if access obligations are imposed on SMP parties. The NRA should make an economic assessment of the efficient cost involved and allow for sufficient profits in line with the usual cost of capital for comparable investments. On the basis of these general principles the NRA should decide what efficient cost is and what risk premium is appropriate taking into account the national market situation..

This also applies for the suggestion in the recommendation that the assessment of cost and risk premiums should be differentiated for different projects. The ERG has pointed out that this might be quite burdensome for NRAs, but more importantly such differentiation is only justified if market circumstances are really different. Different costs as such cannot be decisive. Circumstances might differ in urban areas compared to rural areas, but it is not very likely for every project. In general markets have been defined nationally, geographic submarkets being the exception.

The recommendation prescribes that duct access should be mandated on SMP parties on market 4. This prescription is too rigid and precludes the NRA from making an assessment of the appropriateness of remedies. In the Netherlands duct access in the local loops is not a possibility, because ducts are typically not applied in local loops. Therefore access to FttN, subloop unbundling and access to the Optical Distribution Frame, are the most likely options. For alternative operators it might prove to be too costly to roll out their own fibre towards street cabinets or optical distribution points, i.e. more investments for less customers. This means that alternative operators might have to resort to wholesale options. Therefore, in the Dutch market situation, duct access will probably only be regulated on the basis of general facility sharing provisions.