

European Commission public consultation on NGA recommendation

The *Platform Telecom Operators & Service Providers* (hereafter "the Platform") is the representative interest group of the alternative operators in Belgium which currently has 12 members¹, all of whom are active in some way on the Belgian market.

The association aims to serve the common interests of its members in telecoms and multimedia services sector and:

- to define positions and opinions as well as carry out activities involving topics of interest to the sector, and to do so in ongoing consultation with members;
- to carry out lobbying work with a view to establishing a legal, fiscal and socioeconomic environment in which the market can develop optimally and competition can flourish;
- to represent and defend members at regional, community, federal, European and international level as a single group;
- to serve as the meeting place for colleagues in the sector;
- to be the sector's point of contact for governments, user groups and business partners.

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ASTRID	BT	Eurofiber	Syntigo
BASE nv. / sa.	Colt Telecom	KPN Belgium – Tele 2	Telenet
Brutele SC	Euphony Benelux	Mobistar	Verizon Business

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The members of the Platform welcome the Commission willingness to address the NGA issues. We consider that the draft recommendation is mainly sound but requires some additional clarifications regarding the VDSL scenario.

The NGA can constitute a clear opportunity for launching new and innovative services but it can also lead to the end of DSL competition in case strong and efficient regulatory measures are not adopted.

In that sense, the members of the Platform welcome the fact that the Commission makes a distinction between VDSL and FTTh scenario. As showed and acknowledged by several studies, the VDSL scenario includes *per se* higher risks on competition than FTTh, which justifies stronger and anticipative ex ante regulatory measures.

However, we also consider that public Authorities should better examine what is the real added value of a VDSL roll out compared to current ADSL/ADSL2+ offers. In other words, we strongly wonder whether the reason behind an incumbent willingness to implement VDSL and impose it to its DSL competitors is not merely to kill the DSL competition. In such case, public Authorities should impose that current technologies and offers must remain available to DSL competitors even if the incumbent solely uses its new VDSL network.

Moreover, as acknowledged by several studies, we consider that the Commission should further clarify and emphasis the specificities of VDSL and insist on the following points:

- Additional backhaul solution for SLU; ducts access being not sufficient, dark fiber and/or Ethernet backhaul solution must be imposed at cost oriented prices;
- Bitstream offer will remain essential since it will constitute the sole economically viable wholesale offers. It must thus be as flexible as possible to allow the DSL competitors to compete and innovate and cost oriented;
- Incumbent must be forbidden to cease delivering current technologies;
- Migration path should be implemented before any network change and at the incumbent expenses.

Before commenting into detail the draft Commission recommendation, the members of the Platform deem it necessary to highlight the main issues of the migration towards NGA and VDSL in Belgium.

Thanks to its VDSL roll out, the incumbent has recently (July 2008) announced that it will close at least 65 MDF where the DSL competitors are currently present. This hugely impacts the DSL competitors. As highlighted by the BIPT in its draft decision on NGA, *“l’impact de la fermeture de 65 centraux est considérable. Bien qu’il s’agisse seulement de 10 à 15% du nombre de centraux, cela aura un impact sur 40% des lignes BRUO [LLU] et 14% des lignes BROBA [bitstream] et un espace de colocalisation est en outre présent dans 52 des de ces centraux. Il est également important de remarquer que cette fermeture peut également avoir des implications sur les points d’interconnexion des services vocaux et du backhaul mobile”*.

Despite the fact that the incumbent was perfectly aware of the consequences of its VDSL roll out on the business plans and LLU investments, it has decided to disclose that information only very lately to alternative operators and the regulator, i.e. once it was sure nobody can interact with its decision.

The BIPT has been trying to tackle this issue with its new decision on NGN that was notified to the European Commission in September; it has at this date not been formally adopted yet. We totally and strongly support this BIPT attempt to quickly define some rules to the incumbent. According to this draft decision, the BIPT imposes some transitory obligations *inter alia* on

- The need to have a migration path before any LEX/MDF closure;
- The need for Belgacom to inform its competitors of any MDF closure 5 years in advance;
- Wholesale pricing stability even if Belgacom does not use some LEX;
- The obligation to grant access to Belgacom’s ROP or SC;
- The obligation to grant backhaul solution such as duct sharing, dark fiber or Ethernet backhaul....

It is in the light of this VDSL context and unsatisfactory DSL broadband competition that the members of the Platform submit the following comments to the European Commission on its draft recommendation on NGA.

II. Impact of a VDSL roll out on competition and need for ex ante measures

Preliminary, the members of the Platform would like to welcome the fact that the Commission makes a distinction between VDSL and FTTh scenario. As showed and acknowledged by several studies, the VDSL scenario includes *per se* higher risks on competition than FTTh, which justifies stronger and anticipative ex ante regulatory measures.

We support the Commission when it indicates that for VDSL, the SMP operator should be required to provide the whole set of access products and ancillary services in order to safeguard competition. But the members of the Platform consider that the Commission should nuance some of its conclusions too much FTTh centric and also make clearer the following points.

a. Draft recommendation can already be out of date on some points and too “optimistic” for a VDSL scenario

The Commission seems to consider that its recommendation will be published “just on time” regarding the NGA roll out. For instance, the Commission highlights:

- In the preamble, that NGA roll out *“is only commencing”* (§3) or *“information should be shared in a timely fashion”* (§6) or *“SMP operators may need to design elements of their new networks with third party access seekers in mind or else maintain their existing access offers longer than anticipated”* or *“NRAs should ensure that the street cabinet itself facilitates competitive access”* (§10)
- In the main body, that *“NRAs should take, where necessary, measures pertaining to the adequate size of street cabinets in advance of the NGA deployment as well as appropriate cost-sharing arrangements.”* (article 18)

Unfortunately, even if we fully support in theory the measures proposed in those statements, they cannot be implemented anymore in some VDSL countries. For example in Belgium:

- The VDSL network of the incumbent already covers 60% of the population, 80% in 2011, so not really at its start...;
- Information has never been disclosed until very recently, and only partially, thus too late for DSL competitors to adapt business plans and investments in MDF in particular;
- According to the incumbent, the SC would not be big enough to allow collocation;
- The incumbent considers that the alternative operators have to install their own ROP. It will oppose any access to its SC arguing there is no room left as well as to its ROP arguing that such equipments are active, and do not fall within the scope of regulation, and have been built in a competitive context.

The draft recommendation seems thus quite too optimistic timely speaking in its approach to regulate the VDSL NGA scenario. Moreover, the alternative operators in a VDSL context are facing huge uncertainties regarding their past and current return on investments and sustainability of their activities.

In such circumstances where the incumbent has managed to already deploy extensively its VDSL network without informing the sector nor the regulator and without taking into consideration the DSL operators, the Commission should indicate that the NRAs are entitled to adopt stronger measures in particular in terms of migration path (no withdrawal of the current offer during a reasonable delay, no additional costs for the alternative operators...) and regulation of the SLU (relevant backhaul solution like dark fiber access) and bitstream offer (cost orientation, enrich).

Concerning the Belgian case, we also fear that the remedies proposed by the Commission, even if sound, will arrive too late:

- Concerning the transparency remedy, it is indeed a key factor and we support the draft document on that point. However, one can wonder how the NRA can act when it is already almost too late. To be noted that when the incumbent has decided in Belgium to start installing its ROP and VDSL, meaning it knew that its MDF will be closed in a near future, the alternative operators have been heavily invested in the LLU...
- On the build and share proposal, it is an interesting concept. However, this might not be relevant in the VDSL countries where the incumbent has already rolled out its VDSL network in most part of the country. For example in Belgium, the incumbent already covers more than 60% of the population with its new access network, meaning that at least for more than 60%, the build and share concept cannot be applied. It would also allow the incumbent to further delay any access to its VDSL network.

As a conclusion, we would therefore welcome that the Commission at least adds a new specific recital highlighting that in case the incumbent has managed to already roll out widely its VDSL network in a non transparent and non fair way, the NRA is entitled to adopt specific additional measures to compensate this detrimental situation.

b. To limit (too) bad effects on competition, SLU requires additional backhaul solutions than merely ducts access

In addition to the two studies quoted by the Commission in its draft, it should also be referred to the business case for Belgium² and the WIK study³. On request of the Belgian regulator, Analysys Mason published a study in July 2008 on the SLU business case in Belgium. It confirms that SLU will not at all be an equivalent to LLU (same conclusion as for the NL). The Belgian study concludes that:

² Analysys Mason study on SLU business case in Belgium, July 2008

³ WIK study on the Economics of Next Generation Access – Final Report, 10 September 2008,

“The results of our model show that, in the current market conditions, and especially without regulatory intervention regarding the conditions under which backhaul and co-location services are made available for SLU, the SLU business model is clearly not as commercially attractive as LLU for an alternative operator. However, it seems that a viable case can be constructed provided a strict set of conditions are met, which we detail below:

- the alternative operator limits its SLU roll-out to the densest part of Belgium (typically the 50 biggest LEX representing the densest 30% of the Belgian population)*
- backhaul links to the MDFs are rented from the incumbent*
- the operator co-locates its equipment with the incumbent*
- it gains a market share of around 20% (of copper lines) in the area where it rolls out services*
- SLU allows the operator to provide triple-play services which enable it to achieve an increase in ARPU of around EUR13 per month compared to the double-play services that can be provided via LLU.”*

To be noted that at this stage, the Belgian incumbent refuses any access to its SC or ROP, alternative operators all together reach 10% of market share and TV is not foreseen in the wholesale offers... meaning that none of the conditions mentioned by the consultant are met.

Such conclusions require and justify ex ante intervention. To limit the detrimental effects on competition caused by the move from LLU to SLU, SLU access obligation must be completed by additional remedies and in particular by backhaul solutions.

In that sense, we note that the overall recommendation strongly insists on the ducts access remedy (ducts access, ducts reference offer, ducts charging principles...) that is somehow presented as “best solution”. We think this approach too restrictive and consider that in its final version the Commission should nuance/widen its conclusions since:

- If ducts access could be a solution for a FTTh scenario, it will not be sufficient in a VDSL scenario, see studies already mentioned;
- Ducts are not necessarily present in all Member States. For example, in Belgium most of the incumbent’s cables are directly buried in the ground...access to ducts will thus be clearly insufficient. This is also highlighted by the ERG in its comments on NGA⁴;
- SLU requires additional backhauling solutions: to “improve” the SLU business case, NRA needs to strongly regulate backhaul solutions such as dark fiber access and Ethernet Backhaul at cost oriented prices.

⁴ ERG Response to the draft recommendation on the regulated access to next generation access networks (NGA) of 18th September 2008, ERG (08) 38 rev2.

The need to regulate efficiently backhaul solutions and not only duct access has been clearly showed by the Analysys Mason study on the SLU business case in Belgium:

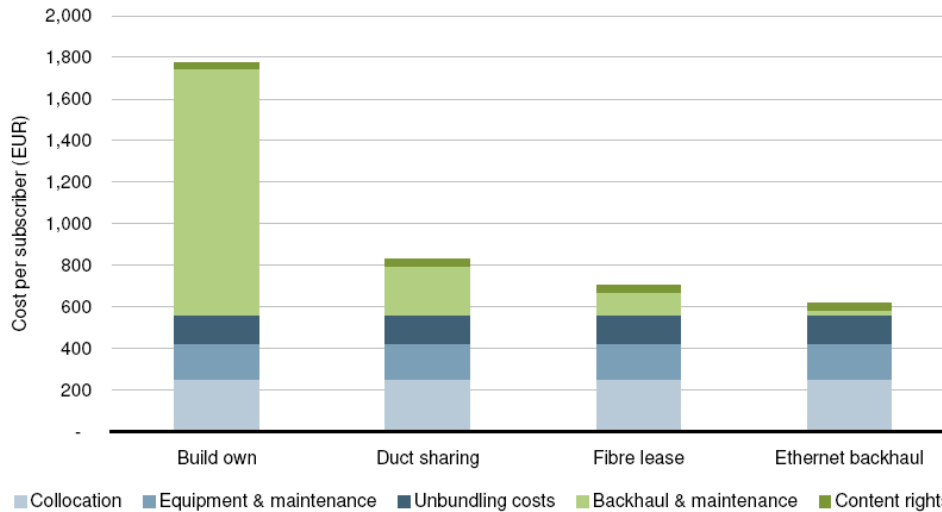


Figure 3.4: Impact of backhaul choice on SLU cost per subscriber for the 50 biggest LEXs [Source: Analysys Mason]

We therefore support the ERG aforementioned Response when it highlights that “*too much emphasis is placed on passive remedies and would like to see more emphasis on active remedies such as enhanced bitstream products (e.g Active Line Access) and/or backhaul solution.*” Similarly, the recent the WIK⁵ study also concludes that “*NRA should take care of efficient backhaul services between the street cabinets and the operator’s network node by ducts sharing and/or access to dark fiber giving the operators choice between both alternatives*”.

The Platform deems it necessary that the Commission widens its § on SLU and ducts access to take into account the difficulties linked with VDSL roll out. In such scenario, the Commission should acknowledge and put more emphasis on the fact that a NRA may also have to **regulate dark fiber and Ethernet backhauling for SLU at cost oriented prices.**

We therefore consider that the Commission should also refer to dark fiber access and/or Ethernet backhaul in:

- Articles 17, 19 and 20 where it only refers to ducts, SC collocation or “*other elements not active*” that remain far too vague.
- The Explanatory memorandum § 3.3.1, p.10-11. For example, the Commission indicates that the NRA should examine whether ducts are available or not and precise what a NRA must do in case it is possible to mandate access to ducts. However, the Commission does not address the situation where ducts would not be available or sufficient....

c. Regulated “bitstream” offer is essential

Knowing all those SLU difficulties, we consider the Commission to be quite “shy” on the need for a bitstream VDSL solution in complement to SLU; it only highlights that the NRAs have to examine “*the effectiveness of sub loop unbundling remedies*” as indicated page 16 of the explanatory memorandum. We consider that

⁵ WIK study on the Economics of Next Generation Access – Final Report, 10 September 2008, p. 236

since SLU is not viable, and even if it represents a step back in the ladder of investments and no return on investments for the LLU operators, bitstream will become the sole alternative for DSL operators in a VDSL context.

Regarding such bitstream offer, even if we support the Commission statement according to which the “*bitstream access or its equivalent should therefore continue to serve existing markets (including chain substitutes) as before*”. We consider that in a VDSL world, the **bitstream current offer should be enriched to compensate, a bit, the LLU disappearance**. This is also confirmed by the aforementioned WIK study that concludes that “*where wholesale broadband access (bitstream) is mandated by the NRA, the SMP operator must make available, on a non discriminatory basis, all technical capabilities embedded in its NGA, to enable alternative operators to define their own products on their own QoS. Multicast capability is one such technical capability.*”⁶

In that sense, we support the Commission statement according to which “*Virtual access remedies may evolve from current bitstream products to something which is more flexible and which better reflects the technical capabilities of the new networks*” (preamble § 11). On the other hand, we do not understand and disagree with the Commission statement on TV (Expl. Memo p. 17). We consider that any retail offer launched by the incumbent thanks to its broadband network should be granted at wholesale level otherwise it will lead to discrimination. For example, in Belgium the incumbent is the sole DSL operator that can launch triple play package including TV offer while it refuses such possibility to its DSL competitors. This is not acceptable. The incumbent has been benefiting of a first mover advantage since 2005...

To conclude, **facing the disappearance of the LLU and the high difficulties of the SLU, the Commission should even more expressly recommend NRAs facing a VDSL scenario to**

- **Ensure that a bitstream VDSL offer is available which allows the greatest flexibility and innovation to the alternative operators;**
- Price of this offer will also be key since it will constitute the sole wholesale broadband offer in place in the coming years. That's one of the reason we consider such access should be **cost oriented**.

We would therefore welcome:

- Re-enforcement of recital 11 on virtual access in order to highlight the necessity of a compulsory bitstream access in case VDSL is implemented and SLU is not viable economically;
- Article 23 should also be strengthened and we would welcome specific provisions on the need for bitstream offer in a VDSL scenario, like for example:
“*Virtual access offer like bitstream offer should be made available in particular when the SLU is not economically viable. In such case, NRA should ensure that the virtual bitstream access will compensate the disappearance of LLU and should become an equivalent, meaning it should be as much flexible as possible and must be enriched compared to the current bitstream offer.*”
- On pricing: see below.

d. Cost orientation remains essential for bitstream offer

We consider that a **bitstream VDSL2 offer should be cost oriented** since it will represent the sole wholesale offer allowing the DSL competitors to launch national retail broadband offers.

Moreover, even if we can understand that the investments made by the incumbent to roll out its new network have to be taken into account, the **Commission and NRAs must not forget that the incumbent will be partly compensated by its MDF re selling and on the other hand, the alternative operators will not recover entirely their LLU investments because of these MDF closure** (nor bitstream or leased lines also located in those places).

e. Definition and implementation of migration path required prior any network change

⁶ WIK study on the Economics of Next Generation Access – Final Report, 10 September 2008, p. 237

We note the Commission willingness to favor agreement between incumbent and competitors in case of network changes. Even if we can support such approach in theory and are always ready to discuss with the incumbent, practice and experience have unfortunately already shown their limits.

We therefore consider that the regulator must define the negotiation framework by defining basic rules such as:

- No substantial change before agreement reached and implemented;
- Real transparency from the incumbent;
- Costs at the incumbent expenses....

Moreover, the regulator must intervene very quickly in case the incumbent adopts delaying tactics and unfair behavior.

We support the Commission when it insists on the need for a proper migration path that will allow the alternative operators to continue to provide services. This is essential. The Commission could give some detail like for instance, **no MDF closure before a reasonable notice period** that cannot be shorter than 8 years. In Belgium, the incumbent has already announced that it will close at least 65 MDF between 2015 and 2018 which does not fit with reasonable delay. If the alternative operators have indeed been informed very recently, they do not have a clue at this stage of an alternative solution and the migration path, if any...

Moreover, we consider that the Commission should make it even clearer that the incumbent cannot cease to deliver the current wholesale offers/technologies the day it will not use them anymore for its own purpose thanks to its new network. In a VDSL context, the incumbent may indeed be in a position to already migrate quickly its end users which could lead to its willingness to stop delivering ADSL/ADSL2+ products whereas its DSL competitors would still mainly use such offers. **The incumbent should not be allowed to stop delivering current DSL products that remain mainly used by its competitors and end users before a reasonable period of time.**

We consider that the European Commission should indicate in its article 16 that the incumbent must be prevented from ceasing to offer current offers and/or to dismantle any current network element before concrete agreement is reached and effectively implemented between the incumbent and market players. Defining the migration path shall not be deemed sufficient and its concrete implementation shall be required before any network/offer change.

Finally, we are surprised to note that nothing is said on the migration costs issue. Since such move is imposed by the incumbent's decision to roll out VDSL, we consider they should be charged entirely to the incumbent. As in the Netherlands, **the migration costs should be at the incumbent's expense.**

III. Other topic : Geographic markets

According to the European Commission, article 3, the NRA "*should examine the need to define geographic markets*" in a NGA context while recital 3 insists on the fiber being deployed in parallel to the current network, referring thus to a FTTh scenario.

The Platform has already given its position on this topic during the ERG public consultation on geographic markets to which we refer. In short, in a VDSL scenario where contrary to FTTh, no new network is rolled out in parallel to the existing one but the current network is upgraded, we do not consider that the VDSL roll out will justify any change in the market definition.

We consider that the Commission should precise at least in its recital 3 that VDSL may not lead to different conclusions than current DSL market analysis and/or nuance its article 3.

In any case, the Commission should recall all the care that shall accompany possible geographic analysis in order to avoid rupture in commercial parameters detrimental to the market, the risk of digital divide and circular regulation. The process leading to the definition of geographical market must be very strict and documented and must be consistent with market definition in competition law as well as unambiguous.