

NGA Recommendation: comments from Belgium
28 July 2009

Belgium thanks the Commission for the opportunity to comment the new draft NGA Recommendation, which on some aspects constitutes an improvement compared with the previous version of the draft. Belgium also repeats that draft texts must be communicated well in advance of COCOM meetings to allow Member States to adequately prepare.

Belgium truly believes that **competition and investment** are mutually reinforcing and complementary objectives. We do not believe there is any trade-off. In particular Europe needs open and competitive networks to drive the innovation that will spur demand for high speed services and pay for the substantial investments.

The European Council Conclusions reaffirmed the importance of competition and non-discrimination as a key principle in the regulatory framework. Whilst the Council agreed that NRAs should 'permit' co-operative arrangements (as opposed to prohibiting such arrangements), there was no intention that co-operative arrangements amongst operators should replace the market analysis process and the imposition of non-discriminatory access measures wherever operators are found to be dominant. In fact the Council strongly affirmed the need for regulation to be technologically neutral (eg through Annex II of the Access Directive).

In this context, Belgium believes that the **NGA Recommendation over-interprets the Council's intentions as regards 'co-operative arrangements' and fails to pay sufficient attention to the need to ensure that competition in the market and the principle of non-discrimination are preserved.**

The following requirements are needed as a minimum to bring the Recommendation into line with the principles agreed by the Council concerning 'co-operative arrangements':

- **Provisions allowing regulatory relaxation where the dominant operator makes a deal with one other operator must be deleted (para 23-24, Annex III(1))**
- **Provisions concerning multi-operator deals (annex III(2)) should either be deleted or amended** to align with the market analysis process. In particular they should not refer to '4' operators in the market, but rather to the 'number of operators, market shares, prices and trends in the market which are indicative of effective competition'. Further conditions are also needed to ensure (i) there are no barriers to entry arising from such co-operative deals and (ii) that a dominant firm does not control the co-investment vehicle
- **Provisions concerning term discounts in Annex 1 need to be amended to ensure they do not have discriminatory effects.** In particular, such

provisions should not be allowed where only the incumbent or a narrow oligopoly can take advantage of such arrangements.

The following requirements are needed to bring the Recommendation into line with the principles agreed by the Council concerning 'the principle of non-discrimination':

- **Annex II concerning 'equivalence' should apply not just to ducts and terminating segments but to any product where enduring dominance has been found.** This annex contains elements that have been agreed as best practice by the ERG and incorporated into Annex II of the Access Directive in the telecoms framework. These need to be more comprehensively reflected by the Commission.
- **The main principles behind effective margin squeeze tests should be elaborated, for example in an annex.**

As regards **multi-fibre**, we agree that it is important that pro-competitive architectures are used for the construction of FTTH networks. The Recommendation should encourage multi-fibre particularly in the context of multi-operator arrangements and should ensure an option for an entrant to pay for cost-based multi-fibre installation is available on the reference offer of dominant firms. However, **no presumptions should be made about the competitive effect of installing multi-fibre networks until the outcome is visible in the market.** In particular, multi-fibre may be useful in dense areas where operators have similar scale, but evidence is that in other circumstances it may not be sustainable or tend towards narrow oligopolies.

Other aspects of the Recommendation in particular **migration provisions, pre-notification of wholesale products in advance by dominant firms to prevent pre-emption and support for the 'ladder of investment'** rather than a duct-only based approach are positive and should not be amended.

Belgium insists that the above mentioned changes are brought by the Commission to the draft NGA Recommendation as the text as it is today cannot be approved.