

Comments of the Czech republic on European Commission's Consultation on draft Recommendation on regulated access to Next Generation Access Networks (NGA)

The Czech Republic (hereinafter "CZ") welcomes the opportunity to respond to the European Commission's Consultation on draft Recommendation on regulated access to Next Generation Access Networks (NGA) (hereinafter "draft recommendation"). CZ supports the objectives of the draft recommendation to ensure a predictable regulatory environment promoting competition in the electronic communication market as well as promoting investment in high-speed broadband infrastructure as a driving force for the recovery of the European economy.

CZ also welcomes that the new draft emphasizes in step with European council conclusion usage of a new instrument – the cooperative agreements among investors – that could support the efficient impletion of the aims of this recommendation.

CZ positively evaluates improvements on the earlier version, e.g. amending the section on definitions (point 8 of draft recommendation). Nevertheless CZ recommends these proposed definitions to be consistent with the other Commission's documents (especially broadband state aid guidelines and other EC legal documents).

Despite the improvements CZ still considers this proposal too normative, rigid and prescriptive. The European Commission builds on relevant market analyses procedure; nevertheless some draft provisions do not respect general principles of the current regulatory framework, especially the provisions for the market analyses and for the imposition of the remedies on the basis of these analyses.

The draft recommendation restricts competences of the national regulators and the possibility to respect the specific national conditions. On the other hand it imposes new obligations beyond the current competences. According to the current regulatory framework and Czech legal framework these new competences are not possible and efficient. The draft recommendation gives rise to legislation amendment (and not only in the field of electronic communications). Some provisions would initiate the conflict with the competition law.

The proposal anticipates the ex ante exceptions especially in the process of imposing remedies. The remedies in the draft recommendation in some cases could be imposed or not imposed only on the basis of mechanical conditions. The mechanical conditions do not respect the possibility of the regulator's flexibility in the process of imposing adequate remedies coming out of market analyses.

The CZ outstanding concerns are:

1. The principle of technology neutrality is in danger

According to the recitals 19 and 22 of the draft recommendation the principle of technology neutrality and independence of remedies on specific network topology should be maintained. Some provisions of the draft recommendation nevertheless do not respect this principle and unambiguously prefer some solutions on NGA network, e.g. points 23, 24, 38 and 39.

CZ considers that the draft recommendation does not respect other solutions of NGA networks implementation, which could be important or suitable in some Member States or particular geographic areas especially regarding unique national or geographic conditions.

According to the points 14 and 18 the NRA should support or even mandate the specific way of building the infrastructure in order to make possible the access for a third party, which could lead to incompetent privileging of specific kind of network infrastructure. We also believe this should be for the companies to decide on the basis of the specific national conditions.

2. Market analysis (SMP identification, imposing of remedies)

According to the European regulatory framework for electronic communications it is possible to impose remedies only to SMP, depending on results of the relevant market analysis.

However, the current draft recommendation sets exemption in specific business cases of NGA deployment and in case of existence of access for at least one independent alternative provider competing on the downstream market (paragraphs 23 and 24 of the draft recommendation). Draft recommendation prefers one deployment type (e.g. multiple fibre lines). In our view, effective competition can be reached also with other deployment types.

The current draft recommendation does not provide the NRAs with sufficient discretion with regard to the choice of remedies. Setting some prescribed kind of remedies in advance, as proposed in draft recommendation, seems to be in contradiction with principles of current regulatory framework, where each NRA should choose the most appropriate remedies to ensure competitive market environment, according to the identified competitive problem. These remedies must be imposed appropriately and proportionally with the purpose of elimination of such problem (Art. 8 (4) of the Access Directive). Draft recommendation does not respect this principle, for instance in identification of cost orientation as the only possible way of price regulation.

The draft recommendation seems to recognize to some extent gradation of remedies (recital 21 and paragraph 41 of the draft recommendation). However, this principle should be made clearer and more specified in the whole text.

According to the above-mentioned, we have doubts about the proposed wording in Annex III and corresponding paragraphs 23 – 26, 37 – 39, 42 and recitals 29, 30, 32 and 46.

3. Price regulation

Imposing pricing schemes and remedies connected with price regulation (paragraph 22 and Annex I) is a part of the NRAs' supervisory activities and should not be decided in such detailed and too prescriptive way at the European level.

Price regulation should exclusively follow the market analysis, without any restriction of specific ways of price regulation. Regarding this, NRA should have the whole portfolio of remedies at its disposal. Therefore, it is not appropriate that the draft recommendation presumes a general obligation of cost-orientation and accepts/presumes possible non-systematic exemptions.

4. Risk of collision with competition law

In the view of CZ it is necessary, that cooperative agreements (as mentioned in the draft recommendation) would not be anticompetitive and would not lead to incompetent practices from operators. Setting unjustified exemptions is unsystematic and could lead to a collision between sector-specific regulation and competition law.

5. New obligations for NRA

Beyond the current competences of the national regulatory authorities another obligation may result from recommendation (in recitals 16, 42 and point 31), namely determination and specification of the technical protocols and interfaces for specific FTTH cases. We do not consider this obligation as appropriate one. The regulators participate in creation of the technical documents and standards in the relevant international organisation.

The Czech Republic thanks the Commission for consulting and will continue to cooperate with the Commission services in order to achieve the common goal of this recommendation.