23 July 2009

COMMENTS ON THE EUROPEAN COMMISSION'S DRAFT NGA RECOMMENDATION OF 12 JUNE 2009

EXECUTIVE SUMMARY

DIGITALEUROPE believes that the deployment of NGA networks is beneficial as far as consumers, businesses and economic development are concerned, in particular in the context of the current economic and financial crisis.

DIGITALEUROPE also considers that at this stage the deployment of NGA networks requires significant investment; hence regulatory measures applied to such networks should focus on promoting investment, innovation and infrastructure-based competition.

Therefore, the proposed regulatory measures must:

- Be technology neutral, fair and non-discriminatory.
- Take into account geographic differences and market specificities.
- Be gradual, implemented only when the analysis of the various markets clearly demonstrates a lack of competition and applied to long lasting bottlenecks.
- Allow those investing in NGA networks to freely choose the most relevant technology, network topology and pricing strategy.
- Be symmetrical, irrespective of the nature of the investor in NGA infrastructure (cable operators, telecoms operators, utilities providers, municipalities etc).

1- INTRODUCTION

The European Commission's second draft Recommendation on regulated access to next generation access networks (NGA) stresses that deploying fibre optical cable in the access networks is a desirable objective from the perspective of both end-users and economic development.[1] This is a view shared by DIGITALEUROPE.

The benefits of the services facilitated by NGAs are well-known, and therefore a timely move to NGAs is needed. DIGITALEUROPE notes that NGA capabilities will be provided by more than one alternative infrastructure. In some geographical zones market forces have already resulted and will increasingly result in the deployment of alternative broadband networks. Infrastructure competition exists or is imminent, and regulating the migration of one of the competing infrastructures towards NGA networks should be done gradually if at all. For all

[1] Draft Commission Recommendation of […] on regulated access to Next Generation Access Networks (NGA) Brussels, [Draft 12 June 2009 for 2nd public consultation] C(2009) (hereafter "the draft Recommendation").

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services but those requiring very high bit rates, competition will also increasingly come from mobile systems.

DIGITALEUROPE believes that regulatory measures should be defined in accordance with the competitive situation of each market; ex-ante regulation, if needed at all, should focus on long-term enduring bottlenecks only. Competition law is sufficient in markets where no such bottlenecks exist. Avoiding an automatic extension of existing ex-ante remedies is of paramount importance, as such remedies may act as a serious disincentive to any large scale investment.

2- REGULATORY CERTAINTY: A REQUIREMENT FOR STIMULATING INVESTMENT IN NGA NETWORKS

DIGITALEUROPE strongly supports the Commission's attempt to provide greater regulatory certainty with respect to NGA networks. Regulatory certainty greatly contributes to removing investment barriers.

The risks involved in building expensive next generation broadband infrastructure are high, with a long payback period. Therefore regulation should not put off companies interested in investing in this type of infrastructure and should ensure that all market players have sufficient incentives to move into these markets.

NGA networks are essential for today's economy; they spawn new business models and numerous new applications for end-users. In the context of the current crisis, multibillion investments would constitute a major tool for fostering competition, innovation and infrastructure development that in turn would lead to new jobs. The current NGA Draft Recommendation tends to weaken the benefits of infrastructure-based competition that is generally supported by the Commission. Investments in NGA networks are of a long-term nature and several stakeholders (incumbents, alternative operators, local authorities, utilities providers etc) are willing to invest in such critical infrastructures. Remedies should focus on fostering investment, as infrastructure-based competition and the deployment of NGA networks will benefit IT, equipment suppliers, the construction sector, application and service providers as well as the society as a whole.

3- NEED FOR CONSISTENCY IN THE DEFINITION OF NGA NETWORKS

The draft NGA Recommendation defines NGA networks as "wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks. In most cases NGAs are the result of an upgrade of an already existing copper or co-axial access network".[2] While this definition seems to include both fibre and cable infrastructures, the rest of the draft focuses exclusively on fibre and mentions cable only in Annex III. There, cable is mentioned only in relation to the significant market power (SMP) analysis, which requires taking into account competition from cable operators at retail level.

[2] Ibid, para 8.

The definition of NGAs in the draft Recommendation is not in line with the one given in the draft Broadband Guidelines issued by DG Competition earlier this year.[3] Paragraph 46 of the latter defines NGA networks as “mainly fibre-based or advanced upgraded cable networks that are intended to replace in whole or to a large extent the existing copper-based broadband networks or current cable networks”, whereas paragraph 48 clarifies that “upgrading current cable networks [...] using the new 'DOCSIS 3.0' cable modem standard” is indeed included in the definition of NGA networks.

Furthermore, while paragraph 48 of the draft Broadband Guidelines states that an NGA network is defined as involving (i) laying fibre to existing street cabinets, (ii) upgrading current cable networks, and (iii) connecting newly built homes and offices with fibre connections, the draft NGA Recommendation appears to concentrate on FTTN and FTTH[4]. Regarding FTTH, the draft NGA Recommendation asserts that “NRAs should, in accordance with market demand, encourage, or, where legally possible under national law, oblige the SMP operator, when building civil engineering infrastructure, to install sufficient capacity for other operators to make use of these facilities.”[5]

Since the draft Broadband Guidelines are likely to impact the approach to be taken for deploying NGA networks, DIGITALEUROPE believes that coherence between the eventual Guidelines and Recommendation is of utmost importance. We also believe that a technology choice in the form of an encouragement to deploy multiple fibre is not helpful.

4- EU MARKET REGULATION PRINCIPLES IN THE ELECTRONIC COMMUNICATIONS SECTOR AND THE DRAFT NGA RECOMMENDATION

NGA networks are at a nascent stage. Their roll-out has just started and Europe is far from having a significant number of installed lines. Therefore NGA networks represent a new market that requires substantial investments. The volume of investments required and the related long investment cycle and payback period call for a long-term regulatory certainty.

Regulation must aim to breed competition, foster innovation and create incentives for investments. Rapid market and technology developments call for technology-neutral regulations enabling entities that invest in NGA networks to freely choose the relevant technology and network topology.

Regulation should focus on long-lasting bottlenecks, whereas remedies (where needed) should apply in a gradual fashion and avoid hindering investment. The number of commercially viable parallel NGA networks depends on average revenue per user and user density. In densely populated areas, the roll-out of several alternative next generation networks will probably be achieved rather quickly. In areas with a low population density the market may not even support a single network and there might be a need for public investment. Hence, we appreciate the clarifications given by the Commission in the draft Broadband Guidelines, a view we expressed in our comments on that document.[6]

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[3] Draft Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, published on 19.05.2009.

[4] FTTN stands for fibre to the node and FTTH stands for fibre to the home.

[5] Draft Recommendation, para 14.

[6] DIGITALEUROPE’s comments on the draft Guidelines were published on 19.06.09 and are available at http://www.eicta.org/index.php?id=34&id_article=363.

In areas where several NGA networks are viable, infrastructure-based competition is clearly the most advantageous form of competition. DIGITALEUROPE strongly believes in this type of competition. In order to achieve it, ensuring an investment friendly regulatory regime for NGA networks is essential. Such a regime has to be not only technology neutral but also symmetrical, irrespective of the nature of the investor in NGA infrastructure (cable operators, telecoms operators, utilities providers, municipalities, etc). Encouraging investments leading to infrastructure competition will result in a strong and competitive wholesale market that will generate even more competitive retail markets.

Different environments require different technologies, whereas network topologies, technical progress and infrastructure competition make the evolution of NGA networks unpredictable. Fibre to the home (point to point or point to multipoint, including GPON), to the curb, to the building or the node – and in some areas wireless technologies – will be providing high speed services.[7]

DIGITALEUROPE understands that the proposed NGA Recommendation focuses on fibre-based NGA networks only. It builds on the local loop unbundling (LLU) Regulation that was used to open up the legacy copper access networks of incumbent public switched telephone network (PSTN) operators (generally deployed in a monopoly situation) to competition by alternative operators.[8] Although the LLU Regulation was quite successful in developing competition over copper networks, it mainly applied to existing infrastructure rather than to newly built networks requiring substantial investments. Applying comparable regulatory measures to a very different situation is likely to lead to far less positive (or even negative) results.

5- TECHNOGOLY NEUTRALITY

DIGITALEUROPE is very concerned by the clear technology preferences (i.e. point to point FTTH multifibre) prescribed by the proposed NGA Recommendation. A premature technology choice is not only contrary to the principle of technology neutrality, which is enshrined in the EU regulatory framework, but is also likely to be counter-productive as far as market development is concerned. Multiple fibre FTTH as defined in the Commission's draft Recommendation requires multiple fibre deployment in both the feeder and the drop segments. From a technical perspective, multiple fibre in the feeder segment up to the multiple point of presence (MPoP) combined with the possibility to unbundle seem more relevant than multiple fibre up to the end customer (drop/terminating segment), as the latter creates redundancies and unused infrastructure which still needs to be maintained.

Point to point networks on a logical network layer are likely to constitute the next technology wave. A future-proof and technology neutral approach needs to take into account technical progress, as well as existing technologies and rollout plans of operators.

6- FAIR, NON-DISCRIMINATORY REGULATION

The draft Recommendation builds on the SMP principle and requires SMP operators to open up their networks to competition. As already mentioned above, regulatory measures should be symmetrical and an SMP test must be undertaken. This is a much better approach than

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[7] GPON stands for gigabit passive optical network.
[8] Regulation (EC) 2887/2000 of the European Parliament and of the Council on unbundled access to the local loop [2000] OJ L336/4.

presuming that operators with SMP in copper access networks become automatically SMP operators when they invest in fibre access.

Furthermore, the proposed Recommendation suggests a cost orientation obligation and explicitly forbids SMP operators from using any ‘time to market’ advantage in retail markets, by imposing on them the obligation to give a six month advance notice to any access seeker.

In summary, should the draft Recommendation be adopted as is, an investing company would:

- not be able to choose the most cost-effective or appropriate technology for a given market;
- not be able to use price differentiation and run a business-driven investment plan;
- not be able to make use of its ‘first mover’ advantages;
- be forced to shoulder all the risk related to investments, while the alternative operators, using unbundling, would be able to enter the market at any stage with very limited risk;
- be expected to make substantial (€300 billion) investments in a private capital market.

The level of competition will vary over time and across geographic areas: Lucrative urban areas will undoubtedly breed competition, whereas the situation will be significantly different in areas of lower population density. Duct sharing should be available and, depending on the outcome of the analysis of the various geographic markets, additional remedies might need to be applied in a gradual manner.

In conclusion, regulation should facilitate co-investment ventures in a flexible manner in this nascent market. Existing competition rules are sufficient for regulating such ventures, whereas companies embarking on them should be allowed to select their technology/network topology and implement the most relevant pricing strategy, unless market analysis demonstrates the lack of competition and the need for gradual remedies.

7- GRADUAL APPROACH TO REMEDIES

The first draft NGA Recommendation was based on principles such as geographical segmentation and gradual remedies, principles which are key to market analysis and lead to proportionate remedies.[9] Given that investments will depend on various parameters – density of population, network topology etc – remedies should be adapted to each particular situation.

The current draft Recommendation envisages all remedies applying simultaneously and cumulatively, irrespective of market specificities and geographical differences. In our view, the different categories of “zones” defined in the draft Broadband Guidelines are also relevant in the context of the draft NGA Recommendation, particularly when it comes to determining remedies in “white”, “grey” or “black” zones.[10]

Moreover, the current draft NGA Recommendation does not provide for a gradual approach which would foster stimulating infrastructure-based competition, particularly at the deepest level of the network.

[9] Draft COMMISSION Recommendation of […] on regulated access to Next Generation Access Networks (NGA), published on 18.09.08.
[10] Draft Broadband Guidelines, paras 45-50.

DIGITALEUROPE believes that applying all remedies cumulatively (access to ducts, access to terminating segment which must be deployed in multifibre, unbundled access to fibre loops, access to copper sub-loops, cost orientation) will not lead to genuine competition in the infrastructure or service markets. We maintain that remedies should depend on the level of competition.

In summary, DIGITALEUROPE considers that the approach proposed in the draft Recommendation will have a negative impact on investment in NGA networks and that the national regulatory authorities should take into account market specificities and geographic differences when applying gradual remedies.

8- ACCESS TO DUCTS AND CIVIL WORKS: THE NEED FOR A PRAGMATIC APPROACH

According to various estimates, the cost of civil works necessary for building the passive infrastructure of an NGA network represents 50-80% of the total investment. This includes trench digging, duct and cable installation, building new optical street cabinets and central offices, installing indoor cabling etc.

Access to ducts and the cost of civil works are therefore of key concern for the investor in NGA networks. Timely and equitable access allows the deployment of alternative networks and true infrastructure competition between operators. As emphasized earlier in this paper, DIGITALEUROPE believes that infrastructure-based competition provides the best basis for sustainable competition, investment and innovation.

Nevertheless, DIGITALEUROPE notes that duct availability and management as well as approaches to infrastructure usage vary significantly throughout the EU. Today, the full scope of civil works infrastructure is not subject to regulation specific to the electronic communications sector. Thus, harmonization via a Recommendation is a challenging task. From a DIGITALEUROPE perspective, a harmonized approach to open alternative civil works infrastructures (e.g. water/electricity) for the deployment of fibre is desirable.

Access to ducts and civil works could be considered a “public utility” obligation similar to roads, water works etc. When such facilities are publicly controlled or owned they should be available on equitable terms to all investors in NGA networks and possibly financed by access fees from service providers. When no such facilities exist, any regulation of access should be symmetrical and not limited to ECS providers. The inclusion of ECS ducts into local planning procedures should be strongly supported.

Besides regulatory measures, a number of other policy measures can be adopted to encourage deployment of fibre by all market players. These include smoothing the process for obtaining rights of way and lowering the relevant fees; planning civil works in other domains such as electricity, gas, roads or water in such a way that ECS operators can simultaneously deploy fibre; and promoting access to existing and available ducts owned by public utilities or local government to all operators and service providers on a non-discriminatory basis. An inventory of all available ducts is highly desirable from the standpoint of operators who may want to deploy fibre and provide services using such ducts.[11]

DIGITALEUROPE recommends the creation of NGA national forums to facilitate coordination between public institutions (local communities, ministries, regulatory authorities etc) and stakeholders (incumbent and alternative operators, equipment manufacturers, consumers etc). One of the major topics that need to be addressed by such forums is NGA deployment in suburban and rural areas.

DIGITALEUROPE believes that, in general, facility sharing should be market-driven and regulatory intervention should only take place in case of market failure. Regulatory intervention, if needed, should be objective, transparent and proportionate and should provide for a sharing of costs on a fair basis.

[11] See for example Portuguese Decree-Law no. 68/2005, of 15 March 2005, aimed at enabling synergies between civil works and deployment of electronic communications networks. http://www.anacom.pt/render.jsp?contentId=451181

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