

Consultation on Commission Recommendation on regulated access to Next Generation Access Networks (NGA)

Response from the International Telecommunications Users Group (INTUG)

Executive Summary

INTUG welcomes the opportunity to provide a response to the European Commission's NGA consultation on behalf of business users of networks. Future economic growth and social inclusion within the EU will depend significantly on ubiquitously available and competitively supplied fibre-based NGA networks and related services. They represent a generational opportunity for investment, innovation, improved productivity and job creation in all sectors. The regulatory environment for NGA networks must facilitate achievement of these goals. Whilst investment risk is acknowledged, especially in the current economic situation, this is not a justification for regulation, which allows a re-monopolisation of telecommunications.

The Commission's draft recommendation states this clearly in its initial paragraph in which taking account of risk and maintaining effective competition are seen as dual imperatives. INTUG believes, however, that the actual wording of the draft recommendation actually creates loopholes, which will allow National Regulatory Authorities to destroy competition, by over-generous compensation of operators with Significant Market Power (SMP) for risk. This is evident in introductory paragraphs 26, 29 and 30, and also in Recommendation paragraphs 23, 24, 37, 38 and Annex III. INTUG requests deletion of these paragraphs.

INTUG believes that market analysis for sustainable, effective and efficient competition must be undertaken at an international, as well as national level, and must recognise the distinct and different sub markets serving residential consumers and business customers. These have major variations in traffic profiles, with more demanding service quality and resilience requirements. Businesses, including SMEs, require access at multiple locations, and need transnational volume packages from single suppliers. Exclusive fibre access rights, during regulatory holidays for incumbents, make this completely impossible.

INTUG is concerned that deregulation of sub national geographic markets where there is effective local competition for residential users ignores the needs of multi site businesses and will further fragment the market for business customers. Their service providers will be faced with network requirements within Member States, which are partly regulated and partly deregulated. Such deregulation is irrelevant to analysis of business markets.

Business users of telecommunications services across national boundaries must be able to construct seamless networks to support standard business process across regional and global operations. Denial of equal access to NGA networks will prevent service providers from building such networks, resulting a continuation of today's patchwork of fragmented national networks in Europe. Furthermore, interconnect charges between operators are a tax on trade between Member States. A single telecommunications market is the aim.

INTUG recommends the following principles for effective competition in high-speed NGA networks and services:

- 1 Access to the fixed access networks of dominant operators must be provided regardless of technology.** This should be explicitly required in the Framework.
- 2 Prices for access must be set to ensure no opportunity for margin squeeze.** This is essential to ensure there is effective competition in services at retail level. Where cost orientation is required to avoid excessive pricing, this should be calculated to ensure a fair return, which reflects any risk incurred appropriately.
- 3 Non-discrimination must be preserved absolutely, with no exemptions.** This is essential to allow all operators and service providers an equal opportunity to compete and innovate. Dominant operators must provide services to all others at the same time, and on the same basis, as for their own use. Differentiated terms, such as discounts for participation in a co-operative arrangement, or for committed volumes and long terms, must be compatible with promoting effective competition.
- 4 Functional Separation must be available to National Regulators as a remedy.** This is needed to support the first three principles and to provide clarity to investors and access seekers, where enforcement of non-discrimination in broadband fails.
- 5 Regulation must encourage networks which facilitate competition, and must ensure a fair migration process is implemented as networks are upgraded.** The process by which incumbents change their architecture must be transparent and consultative, and the rights of competitors such as those who invested heavily in local loop unbundling and other broadband access products should be respected.
- 6 Co-operative arrangements including physical sharing arrangements ducts, base stations, aerial and spectrum, must be compatible with competition law.** Such arrangements must not be used as a substitute for regulation, if an operator or joint venture has significant market power. Competition assessments for wholesale physical and broadband access must be based on market conditions that exist, or can reasonably be foreseen, and not on any theoretical assumptions about the effect of particular arrangements, network designs or access products.

This submission should be read in conjunction with INTUG's submission in response to the consultation on the first draft of the recommendation. The full contents of that submission have not been repeated here. An INTUG press statement accompanies this response.

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Introduction

The Internet revolution and the resulting explosion in demand for bandwidth have created an urgent demand for vastly increased network capacity in both core networks and access networks. This demand shows no sign of abating, and is the principal driver for NGA. The scale of demand was not foreseen even five years ago, nor was the feasibility of 100Mbps on fixed and wireless services anticipated so soon. There is now both expectation and demand for such services and the EU is fully aware of their importance to the economy.

With massive sums of money at stake, two markedly different philosophies have evolved. The open approach of the architects of the Internet world has transformed telecoms markets in a very short timescale. The closed world of incumbent operators with its vertically integrated approach has been turned upside down. IP has transformed what networks can offer. Wireless has undermined the economics of traditional fixed telephony. Convergence of fixed and mobile, combined with content and services, has enabled new business models for both suppliers and customers.

None of these changes could have occurred or been funded without residential domestic consumers and business customers, whether they be national or multinational enterprises. NGAs in corporate networks already exist as the most efficient solution to meet user needs internally. The introduction of the same technologies in public networks, seamlessly linked with private networks, promises to provide huge economic benefits to all concerned. The challenge for regulation is to ensure this opportunity is not lost by recreating monopolies.

This may occur if protectionist policies are allowed to be implemented within Member States to the detriment of the EU economy as whole. The Commission has acknowledged that there is investment risk in new fibre infrastructure, and risk is therefore greater where infrastructure is duplicated without a corresponding increase in user demand. Competition in infrastructure may have benefits in some urban environments, but overemphasis on this alone is misguided since most innovation will come from competition in services, content and applications. This is dependent on equal access to bottleneck infrastructure.

The delicate balancing act which NRAs must perform in stimulating investment whilst at the same time encouraging innovation and competition requires full independence from Member State Governments and incumbents, and close collaboration and consultation with customers and other NRAs to ensure the environment throughout the EU supports transnational business requirements as well as domestic residential consumer needs.

The Commission's NGA Recommendation, in the context of the Regulatory Framework, must provide NRAs with clear advice and guidance and the necessary remedies to ensure these twin goals are achieved, when national transposition occurs, and must act swiftly and effectively where inappropriate actions are taken. The EU market is currently a fragmented patchwork of national networks, with little scope of really effective competition at transnational level, leaving business customers and their network service providers with little or no scope for rolling out efficient, seamless and consistent European networks.

Comments on Introductory Paragraphs (numbers as per recommendation)

- 1 INTUG supports the view that NGA Networks are key to achievement of economic growth and the goals of the Lisbon agenda. INTUG accepts the need to take account of investment risks incurred by all undertakings (not just SMP operators), as long as this is consistent with meeting the need to maintain effective competition. The aim should be to ensure this promotes efficient investment, not duplicate infrastructure as an end in itself.
- 2 INTUG supports guidance to NRAs which prevents inappropriate divergence of regulatory approaches. A consistent regulatory environment throughout the EU facilitates innovation, reduces investment risk and enables improved productivity.
- 5 INTUG acknowledges that this recommendation mainly addresses Markets 4 and 5, but this scope is far too narrow for business customers. As is usual, the paragraph refers to consumers as a homogeneous group with no acknowledgement of the distinct needs of business users. Furthermore, all such relevant markets are solely analysed at national level, ignoring the impact on the maintenance of competition in the provision of transnational services.
- 7 INTUG agrees that NGAs will require a combination of active and passive remedies to ensure effective and efficient competition for everything from civil engineering works to wholesale bottleneck services such as Bitstream and Ethernet.
- 8 INTUG welcomes the need to promote efficient investment by all operators. There is a risk that pursuit of infrastructure competition per se will generate inefficiency.
- 9 INTUG welcomes the need for technology-independent regulation as the aim. The attempts by some NRAs to discriminate based on the medium, or speed, to provide partial regulatory forbearance, have already been challenged by the Commission, and such technology-specific transposition should not be allowed.
- 10 INTUG supports NRA action to ascertain the potential for duct sharing and other measures to maximise exploitation of resources, but does not believe that this in itself will make a substantial contribution to the creation of effective competition.
- 12 INTUG agrees that SMP operators must provide access to civil engineering on exactly the same conditions as to its own downstream arm and third parties.

- 15 INTUG agrees that there is potential benefit in newly-built facilities allowing use by several operators, but this should not be considered a substitute for ensuring equal access to wholesale broadband products such as Ethernet and Bitstream.
- 17 INTUG believes that transparency and non-discrimination in reference offers is essential and that NRAs should have remedies to ensure availability within a timeframe which does not allow the SMP operator to establish dominance.
- 18 INTUG believes that due consideration of investment risk is already covered in provisions for risk premia.
- 20 INTUG agrees that there is potential benefit in deployment of multiple fibre lines in the terminating segment, but this should not be considered a substitute for ensuring equal access to wholesale broadband products such as Ethernet and Bitstream
- 24 INTUG is concerned at the implied exclusive focus on residential consumer usage, as indicated by the reference to costs “per household” and no business measure. INTUG disagrees with the assertion that there is no possibility of risk diversification, since granting of equal access to other service providers gives such diversification.
- 25 INTUG strongly advocates the application of adequate safeguards to co-operative arrangements to ensure there is effective competition, but the existence of such an arrangement must still not be considered as evidence of competition per se.
- 26 INTUG believes this paragraph as worded could be used by NRAs to exempt SMP operators from non-discriminatory obligations, which would be contrary to basic competition law. Up-front commitments on long term or large volume contracts must not be allowed to establish a position of joint dominance which has been demonstrably more difficult to prove.
- 27 INTUG believes the loophole in paragraph 26, if not amended, must be balanced by even stronger protection via margin squeeze tests, which must not be relaxed. The “hypothetical reasonably efficient competitor test”, as may be used in some mobile market analyses, must not be used to justify a particular number of operators.
- 29 INTUG requests removal of the last sentence of this paragraph, which represents a unilateral rewriting of competition law. Exemption from a finding of anti-competitive behaviour for price differentiation on this basis is a recipe for a duopoly or perpetual joint dominance, particularly when taken in conjunction with exemptions granted to “initial access seekers”, e.g. those in co-operative arrangements.
- 30 INTUG requests removal of the third sentence of this paragraph, which represents a major shift from the Commission’s principles regarding regulation. Exemption from cost-orientation for co-investment arrangements will result in higher prices for retail and wholesale customers, and will reduce motivation for innovation in services.

- 31 INTUG believes that review of the decision not to impose cost-orientation ex-post will be too late to avoid the consequent market damage.
- 32 INTUG is extremely concerned by the implication that co-investment in FTTH on multiple fibre lines could in some conditions be indicative of the absence of SMP. This limits assessment of the market and may not reflect effective competition for all products and services.
- 35 INTUG presumes the list of “dark fibre (and where relevant copper), Ethernet backhaul or duct access” are examples rather than a complete and definitive list.
- 38 INTUG strongly supports mandating the provision for wholesale broadband access.
- 44 INTUG does not believe that regulation should limit the range of equal access options by predetermining that LLU removes the need to impose an obligation of wholesale broadband access.
- 47 INTUG strongly supports the recommendation that NRAs ensure an appropriate migration path as this will be particularly important for business customers needing to migrate corporate networks and VPNs, whilst protecting operational continuity.
- 49 INTUG believes any review of a geographically segmented market in sub-national areas must take into account the implications for business users with sites in multiple geographical segments, which may have different regulatory conditions.

Comments on Recommendation Paragraphs (numbers as per Recommendation)

- 1 INTUG believes this recommendation provides a once in a generation opportunity to facilitate the development of a single market for telecommunications, which will in turn facilitate general progress in the establishment of the overall Single Market.
- 5 INTUG strongly supports review of Markets 4 and 5 in a co-ordinated and timely manner and, furthermore, believes the Body of European Regulators of Electronic Communications (BEREC) should encourage collaboration between NRAs to achieve greater consistency of analysis and remedies between Member States. One such example is the need for a level playing field in terms of operator tax liabilities for way leaves and local taxation, to avoid favouring incumbents.
- 8 INTUG accepts the basic definition of an NGA but recommends guidance to aid interoperability, including with corporate networks and VPNs, without denying opportunities for innovation. This would help unblock the single market for customer devices, with beneficial effects for economies of scale and job creation.
- 10 INTUG recommends that NRAs should include customers (business users and residential consumers) in their consultation with interested parties. This will help identify likely future demand patterns, price-sensitivities and the need for access. (Such consultation with customers should be a standard procedure for NRAs).

There is a global trend towards private NGAs. The ITU noted, *“The general Internet is the major IP network in the world, but it is far from the only IP network. In recent years, several private IP networks have been established and utilised for both corporate and residential services, and the future of communications platforms like the NGN architecture is based on IP technology.”* In order to ensure they can interoperate, and play an active part in an EU-wide FTTH network, proliferation of different and incompatible technical equipment must not occur, or investments will be stranded. A patchwork of unconnectable islands will damage the EU economy.

- 15 INTUG strongly supports the mandating of access to the terminating segment of the access network of the SMP operator.
- 17 INTUG strongly supports the continued requirement for cost orientation for access to the terminating segment. See also comments on introductory paragraphs 30/31.
- 19 INTUG strongly supports mandated unbundled access to the fibre loop.
- 20 INTUG strongly supports mandating unbundled access to the fibre loop, irrespective of the network architecture or technology.
- 22 INTUG requests removal of the initial clause referring to paragraph 23.
- 23 INTUG strongly opposes the inclusion of this paragraph, which provides an open invitation to NRAs to establish duopolies, or to grant regulatory holidays to SMP operators granting access to one other operator, e.g. an SMP operator in another Member State granting similar access in reverse. This will result in complete denial of access to business customers seeking access at a site without infrastructure access from its chosen service provider. A direct arrangement for service with the SMP operator would not provide seamless network or consistent service quality and network management facilities. INTUG queries why this paragraph was included at all, if not at the request of an SMP incumbent seeking regulatory forbearance. **THIS PARAGRAPH MUST BE DELETED.**
- 24 INTUG strongly opposes the inclusion of this paragraph, which unilaterally rewrites the Commission’s own principles of cost-orientation. This legalises price-fixing and the establishment of duopolies and/or cartels, creating insurmountable barriers to entry to future innovators. The existence of “at least one other provider.....in a downstream market...based on multiple fibre lines” does not justify exemption from cost-orientation. INTUG queries why this paragraph and the referenced Annex III were included, if not at the request of an incumbent seeking regulatory forbearance. **THIS PARAGRAPH MUST BE DELETED.**
- 25 INTUG is concerned that any dilution of margin-squeeze tests, e.g. by premature definition of an “efficient” competitor, would remove any residual regulatory protection a competitor outside a co-operative agreement might have otherwise.
- 26 INTUG believes that the conditions set out in Section 2 of Annex III are not necessarily indicative of the absence of SMP.

- 27 INTUG believes that whilst the remedy proposed would be justified, it would be applied ex-post, i.e. too late to avoid the economic damage to competition.
- 37 INTUG strongly opposes the inclusion of this paragraph, which provides an open invitation to NRAs to establish duopolies, or to grant regulatory holidays to SMP operators granting access to one other operator, e.g. an SMP operator in another Member State granting similar access in reverse. This will result in complete denial of access to business customers seeking access at site without infrastructure access from its chosen service provider. A direct arrangement for service with the SMP operator would not provide seamless network or consistent service quality and network management facilities. INTUG queries why this paragraph was included at all, if not at the request of an SMP incumbent seeking regulatory forbearance. THIS PARAGRAPH MUST BE DELETED.
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- 39 INTUG is concerned that any dilution of margin-squeeze tests, for example by a predetermined assessment of the definition of an "efficient" competitor, would remove any residual regulatory protection a competitor outside a co-operative agreement might have otherwise.
- 42 INTUG believes that the conditions set out in Section 2 of Annex III are not necessarily indicative of the absence of SMP.
- 43 INTUG supports the minimum notice of 5 years before decommissioning of points of interconnection. NRAs should also ensure customers with corporate networks and VPNs are given adequate opportunity to agree an appropriate migration path.
- 46 INTUG believes any review of a geographically segmented market in sub-national areas must take into account the implications for business users with sites in multiple geographical segments, which may have different regulatory conditions.

Annex III

INTUG objects strongly to this late addition to the recommendation, which appears to have been included at the specific request of those seeking to support national protectionist policies in defence of the narrow self-interest of SMP incumbents, especially where state ownership is also involved. The exemptions provided through this Annex in paragraphs 23, 24, 37 and 38 are wholly unacceptable. THIS ANNEX MUST BE DELETED.