

Written response of KPN GROUP



to the public consultation

on a draft

Commission Recommendation of [...]

on regulated access to Next Generation Access Networks (NGA)

NON-CONFIDENTIAL

Koninklijke KPN N.V.
attn. Jos Huigen, KPN Regulatory and European Affairs
PO Box 30 000
2500 GA The Hague
Jos.Huigen@kpn.com

21 July 2009

1. KPN welcomes the effort to strike the right balance

In its second Draft of a Recommendation on regulated access to NGA networks, the Commission aims to encourage investments in the access network and maintain or increase the level of competition in the various markets of the European Union. The Commission also tries to balance the need for regulatory certainty as well as the possibility to allow for national circumstances.

There are distinct changes compared to the first draft. First of all, the focus has shifted towards access to networks rather than on access to ducts. Consequently, there is much more attention to detail with respect to pricing issues, and to the choices operators may consider concerning the topology of these networks and their technological characteristics. Finally, there is a much more open view with respect to the various operational and business models which may be employed to roll out NGA networks.

On the whole, KPN sees these changes as positive and encourages the Commission to follow these changes through. In this respect, KPN is much more positive about this second Draft Recommendation. The discussion on the access issues in NGA networks is also very timely for KPN as there have already been decisions taken by the regulator in the Netherlands with which KPN does not agree, which may impact further roll out and which seem to be at odds at some points with the proposals of the Commission.

KPN has the opinion that there are several issues which need more clarification. The most important issues for KPN are regulatory certainty, the importance of a future proof analysis of the key market in this respect, market 4, and the development of a robust margin squeeze policy.

In their decisions on all of these issues, the Commission and the regulators of Member States should be able to show how these encourage roll out of NGA networks as well as maintain competition. KPN is convinced that the past years have seen too much rhetoric from operators and from public authorities. The stakes in the next years are too high to continue in this way. For the European public, for consumers and companies, it is crucial that the right balance is struck.

2. The Recommendation should aim at regulatory certainty in the EU

There are many views on the necessity of having a Recommendation on NGA networks by the Commission. KPN thinks such a Recommendation should be adopted and KPN also encourages that the Commission actively monitors and comments on regulatory practices on these subjects.

First of all, KPN discerns in this Draft a willingness to make some tough choices which are innovative and which regulators in Member States may be reluctant to make on their own. Important choices concern the appraisal of technological choices by operators and the consideration of innovative ways of investment. For KPN it is very important that it becomes clear how these innovations impact regulation as it will evaluate its NGA pilots in the Netherlands in the second half of 2009.

But, secondly, it is also important that these choices are endorsed by other NRA's. KPN experiences too often that the Dutch regulator follows the lead of the Commission where others do not. This is detrimental to incentives to invest in other markets. Regulatory certainty in this respect is also certainty across member states. KPN would welcome attention in the final Recommendation to the monitoring of its implementation and encourages actions the Commission may consider in this respect. For example, the

Commission could sponsor benchmarking both regulatory circumstances and market development which focus on NGA networks and regulatory measures, confront this with the question of whether or not NRAs work in conformity with the Recommendation and where it deems action necessary, take corrective actions accordingly.

3. Clarity is necessary about the regulation of market 4,5 and about the analysis behind Annex III

An important point which needs to be clarified is the development of market 4 in the future. Currently, e.g., the Dutch analysis of market 4 de facto excludes access to unbundled passive cable infrastructure. In many markets, operators are considering PON-type of networks, which from a technological point of view can be considered very similar to cable networks. It is unclear how the interplay between markets 4 and 5 works out in these circumstances.

The most prevalent mode of market analysis starts with an analysis of retail markets. Subsequently, market analyses of upstream markets are conducted. For instance, on broadband retail markets, some competition problems may be foreseen. In some countries, cable operators reach between 40 and 50% of market share in the retail market as well as 50% in market 5 whereas, due to the lack of unbundling, they do not have market share in market 4. Consequently, operators with copper based networks which might consider investment in NGA networks are regulated with the most burdensome obligations from the start. We arrive at this somewhat counterintuitive result, because regulators rarely return to the analysis of retail markets after they have focused on wholesale markets.

In markets with cable competition, it can, furthermore, lead to a cascade of regulated services for operators that own networks which can be unbundled to passive elements. For instance, in the Netherlands, KPN has both obligations for unbundled copper and unbundled fibre as well as on wholesale broadband access. In KPN's view, these issues need to be addressed in the NGA Recommendation. They will impact regulation of market 4 and, ultimately, the possibility for operators like KPN to develop networks with technologies which are much easier to access than other networks in a very difficult competitive situation.

To be sure, KPN is not advocating that this should lead to total deregulation of retail and wholesale markets. KPN is committed to developing open access NGA networks as this is the most cost efficient model for the industry and KPN recognises that competition concerns will probably have to lead to regulation by way of transparency and non-discrimination obligations. KPN does not believe it is in the interest of investors to trust in a deregulatory model which is not sustainable from a competition policy point of view in the longer run. KPN believes that investors need certainty on key issues for at least 4 to 5 successive review periods.

There has already been much discussion about Annex III. Co-investor models and multiple fiber models are seen by the Commission as inherently more friendly towards access issues than other models. The Commission therefore views a lighter regulatory approach suitable.

Many have called this a regulatory holiday backdoor. Others have called it unacceptable intrusion into the decision to invest in NGA networks. KPN does not understand these rather extreme and opposing points of view. KPN endorses the logic of the Commission and KPN also welcomes the initiative to transcend the stalemate in the regulatory discussion, which has certainly not led to investment in NGA networks on a considerable

scale in the EU. Prolonging this stalemate is certainly not the way to go forward. KPN cannot afford it, its customers want change and public authorities of various administrative levels in the Netherlands want change too. We need to move on and the Annex III is certainly a step in the right direction.

Still, KPN believes the logic behind the Annex III can be strengthened considerably. The Commission should be able to demonstrate in general that a relevant market (4) in which NGA networks are rolled out by a co-investor model with topologies using multiple fibres in the access part of the network would present enough pricing constraints to allow for lifting the most burdensome obligation, namely strict cost-oriented pricing of access. It should be able to reason that the combination of transparency, non-discrimination (including anti-squeeze provisions) and relatively light-weight regulation of wholesale pricing, such as retail minus regulation would suffice. Without such sound analysis, Annex III may easily be dismissed by companies who favour deleting it because of totally opposing views. Some companies will argue Annex III opens up the possibilities to abandon all regulation and some will say that no regulation at all is warranted and any intermediate position as espoused in Annex III is undesirable. The Commission should demonstrate the logic, which is clearly there, and intensify the debate on these issues, rather than bend to pressure of parties from both sides and conclude that it is easier to dispense with the ideas of Annex III. A substantive debate on these issues is called for as it may be a vital part of the puzzle which may ultimately provide Europe with a road map towards larger scale investment in NGA networks than has been the case so far.

4. Remedies focusing on pricing require balancing of incentives

KPN has read with interest the discussion in the Draft Recommendation on pricing principles. It wants to draw attention to one issue which is the most important, as KPN already experiences: margin squeeze regulation. This issue is overarching to issues such as costing and pricing, volume or penetration based discounts, long term contracts, up front investment contributions, etc.

The Commission so far has not been clear towards NRAs as to how it would approach margin squeeze regulation in general. It is also not clear how it would approach the topic in an NGA context and whether or not there would be differences in this context from the general principles. For KPN this matters greatly as it has been confronted with a very limiting squeeze regulation in the Netherlands. KPN invites the Commission to develop this issue further. If the Commission does not want to do this in a very general way, it could maybe start with the question of whether or not the fact that NGA networks involve new investment merits a different approach towards this issue.

5. Conclusion

The EU and its member states recognise that NGA networks will be an important building block for the next generation society. It is, therefore, imperative that the puzzle of regulating NGA networks is solved in the coming years. KPN has consistently displayed its willingness to provide constructive contributions not only in writing, but also in its actions. However, there are huge difficulties which confront investors who contemplate roll out of NGA networks. KPN will always have to demonstrate to the investor community that it will be able to recover these investments, or any other investment for that matter. KPN is also sure that this necessitates innovation in regulatory policies. As far as KPN is concerned, the Commission shows it wants to innovate. There are still many issues which need to be tackled, as has been indicated in the above, but the Draft is an important step in the right direction.