

European Commission public consultation on NGA Recommendation

The *Platform Telecom Operators & Service Providers* (hereafter "the Platform") is the representative interest group of the alternative operators in Belgium which currently has 13 members¹, all of whom are active in some way on the Belgian market.

The association aims to serve the common interests of its members in telecoms and multimedia services sector and:

- to define positions and opinions as well as carry out activities involving topics of interest to the sector, and to do so in ongoing consultation with members;
- to carry out lobbying work with a view to establishing a legal, fiscal and socioeconomic environment in which the market can develop optimally and competition can flourish;
- to represent and defend members at regional, community, federal, European and international level as a single group;
- to serve as the meeting place for colleagues in the sector;
- to be the sector's point of contact for governments, user groups and business partners.

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ASTRID	BT	Euphony Benelux	Mobistar	Verizon Business
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The members of the Platform welcome the Commission's consultation on regulated access to Next Generation Access Networks (NGA) with the objective to have a consistent approach in order to provide regulatory certainty to investors and to foster competitive investment and innovation for the benefit of all parties involved and ultimately of consumers and businesses. We consider that the draft Recommendation is mainly sound but requires some additional improvements and clarifications.

As already mentioned in its comments during the previous Commission's NGA consultation to which we refer for more details, the Platform believes that the NGA can constitute a clear opportunity for launching new and innovative services but it can also lead to the end of DSL competition in case strong and efficient regulatory measures are not adopted.

In that sense, the members of the Platform welcome any willingness to stimulate FTTH, but it is also important to acknowledge that the Belgian situation where VDSL is already largely rolled out requires different and stronger regulatory measures to preserve competition.

We welcome the enhancements of the Commission on the specificities of VDSL and its impact on the market and in particular the following points:

- Additional backhaul solution for SLU is required; ducts access being not sufficient, dark fiber and/or Ethernet backhaul solution must be imposed at cost oriented prices;
- Bitstream offer will remain essential since it will constitute the sole economically viable wholesale offers. It must thus be as flexible as possible, to allow the DSL competitors to compete and innovate, and cost oriented;
- Incumbent must be forbidden to cease delivering current technologies and regulation on NGA does not mean the abrogation of other accesses;
- Transparency and future proof decisions are essential to guarantee investments;
- Migration path should be implemented before any network change is imposed and at the incumbent expenses; 5 years prior information before any MDF closure being a minimum;
- Non discrimination obligation has to be strengthened notably by preventing the incumbent from launching retail offers as long as no corresponding wholesale offer is available;

Following points on WBA VDSL still cannot be supported by the members of the Platform:

- The fact that the incumbent would bare a risk when rolling out its VDSL2 network, while as it replaces the precedent network, demand will remain unchanged;

- The abrogation of the cost-orientation obligation in case of joined investments with another operator or access granted to FTTH network,
- The possibility to withdraw bitstream regulation in areas where unbundling of fiber is available without concrete analysis of the competition conditions at stake;
- It is clear that the draft Recommendation's potential to boost growth, competitiveness and employment is seriously compromised by its proposals to remove in certain circumstances the cost orientation remedy.

Before commenting into detail the draft Commission Recommendation, the members of the Platform deem it necessary to highlight the main issues of the migration towards NGA and VDSL in Belgium.

I. General statements on NGA in Belgium

a. The Belgian migration towards NGA

The current retail broadband market in Belgium has been qualified several times as not being satisfactory in terms of competition. Several reports have showed the slow take off of the DSL competition and its 14th implementation report, the European Commission has indicated that:

“[t]he [Belgian] broadband retail market remains [...] characterized by an overall lack of price competition” and that “Belgium’s European ranking has been falling for the past few years (now in eight place) with 27.6% penetration at 1 January 2009”. Belgium is moreover losing its ranking in terms of broadband penetration years after years.

As indicated previously, the incumbent has decided to migrate its network to an IP network and to use VDSL2. The existing wholesale offers will be stopped, at least in the areas where the local exchanges (LEX or MDF) will be closed. Those LEX closure represent 65 LEX placed in dense areas and widely used by the alternative operators for LLU, Bitstream, leased lines or interconnection services.

As further described in our previous comments to which we refer, the incumbent has chosen to implement a VDSL scenario and currently covers more than 65% of the population with VDSL. It has announced that it will achieve 80% in 2011. Moving from LLU to SLU means in terms of access to look for 28 000 street cabinets (SC) instead of 600 MDF/LEX as well as the closure of 65 MDF/LEX over a period of 4 years.

Such choice hugely impacts the DSL competitors. As highlighted by the BIPT in its decision on NGA, *“l’impact de la fermeture de 65 centraux est considérable. Bien qu’il s’agisse seulement de 10 à 15% du nombre de centraux, cela aura un impact sur 40% des lignes BRUO [LLU] et 14% des lignes BROBA [bitstream] et un espace de colocalisation est en outre présent dans 52 de ces centraux. Il est également important de remarquer que cette fermeture peut également avoir des implications sur les points d’interconnexion des services vocaux et du backhaul mobile”.*

Despite the fact that the incumbent was perfectly aware of the consequences of its VDSL roll out on the business plans and LLU investments, it has decided to disclose that information only very lately to alternative operators and regulator, i.e. once it was sure nobody can interact with its decision.

In this context, we wonder whether the decision of the incumbent to go towards a VDSL scenario does not represent its ultimate solution to put at end the DSL competition. We indeed fear that alternative operators are thus pushed towards VDSL without real impact assessment and customers demand analysis. Public authorities should keep this in mind when addressing VDSL regulation. That's the reason why we strongly support the Commission when it indicates that WBA over VDSL2 is a chain substitute to existing bitstream offer over copper; current regulation must continue to apply and VDSL2, as ADSL(2+)/SDSL, must be regulated at cost oriented prices.

While the BIPT has tried to tackle this issue with the aforementioned decision, we note that the broadband context has been further weakened by the recent decision of the Court of Appeal to annul partially regulation for Market 11 and to entirely annul the SMP analysis for market 12.

b. The Belgium incumbent has managed to roll out its VDSL network in a total lack of transparency leading to discrimination at retail level

We fear that even if we fully support in theory many of the measures proposed in the draft recommendation, Belgium might not benefit of them unless a very strong and quick regulatory action is taken. Many of those proposed recommendations can indeed not be implemented anymore in Belgium; the competition conditions have been jeopardized by the incumbent's unacceptable behavior:

- The VDSL network of the incumbent already covers more than 65% of the population, 80% in 2011;
- Information has never been disclosed until very recently, and only partially, thus too late for DSL competitors to adapt business plans and investments in MDF in particular;
- According to the incumbent, the SC would not be big enough to allow collocation, reason why it would have installed its own Remote Optical Platform (ROP);
- The incumbent considers that the alternative operators have to install their own ROP. It will oppose any access to its SC arguing there is no room left as well as to its ROP.

The draft Recommendation seems thus quite too optimistic timely speaking in its approach to regulate the VDSL NGA scenario, at least for a country like Belgium. As mentioned above, the alternative operators will not be able to benefit of a SC co-location as suggested by Commission when imposing access obligations in the case of FTTN (point 28). The Platform would like to take this opportunity to ask the Commission to add a definition of FTTN (Fibre-to-the-node) within its point 8 "Definitions".

Moreover, the alternative operators in a VDSL context are facing huge uncertainties regarding their past and current return on investments and sustainability of their activities.

In such circumstances where the incumbent has managed to already deploy extensively its VDSL network without informing the sector nor the regulator and without taking into consideration the alternative DSL operators, strong and quick regulatory measures are necessary in particular in terms of migration path (no stop of the current offer, no additional costs for the alternative operators...) and regulation of the SLU (relevant backhaul solution like dark fiber access) and bitstream offer (cost orientation, enriched).

We also wonder how the regulator will address the current, unacceptable, discriminatory behavior of the incumbent that has been using its VDSL2 network for retail offers since April 2008 without having implemented a bitstream regulated VDSL2 offer until now.

It is in the light of these legal uncertainties and unsatisfactory competition conditions for VDSL that the members of the Platform submit the following comments to the European Commission on its new draft Recommendation on NGA.

II. Specific comments on the VDSL measures foreseen by the draft Recommendation

Preliminary, the members of the Platform welcome the fact that the Commission makes a clear distinction between VDSL and the FTTH scenario. As showed and acknowledged by several studies, the VDSL scenario includes *per se* higher risks on competition than FTTH, which justifies stronger and anticipative *ex ante* regulatory measures.

It is important for the alternative operators that have already deployed their own networks by investing in LLU, to be provided with appropriate wholesale access products in order to continue to compete in an NGA context. This consists in particular of access to civil engineering infrastructure, to the terminating segment, or to wholesale broadband access on VDSL. It is important that the whole range of different physical access products, including backhaul, is available in terms of remedies in order to allow the alternative operators to continue climbing the ladder of investments even in a VDSL2 world without merely being pushed back to current bitstream offer without other enriched alternative.

a. VDSL regulation is a continuum to current copper regulation; enriched bitstream offer is the sole possibility to ensure competition on DSL

We support the Commission when it indicates that for VDSL, the SMP operator should be required to provide the whole set of access products and ancillary services in order to safeguard competition. We also support the draft recommendation when it states that existing SMP obligations in relation to markets 4 and 5 should continue and should not be undone by changes to the existing network architecture and technology, unless agreement is reached on an appropriate migration path between the SMP operator and operators currently enjoying access to the SMP operator's network. In the absence of such agreement, NRA's should ensure that alternative operators are informed.

We however regret that it has not been the case in Belgium; alternative operators can only witness that the incumbent is moving towards a migration of its complete network to a VDSL based All-IP network without any clear information towards the alternative operators.

In that sense, because of compulsory move towards VDSL, alternative operators have no other choices than to "come back" to a bitstream level despite their past and current investments in LLU. To ensure competition on DSL and allow alternative operators to continue granting their customers with innovative and competitive retail offers, the VDSL bitstream offer must be enriched compared to current bitstream offer to remedy, a bit, to the LLU disappearance. This applies to quality of services parameters, services allowed on the network, rates available, business parameters, etc.

In that sense, we fully support the Commission when it reminds that such offer must "*enable alternative operators to compete effectively, including for business grade services*" and also when it indicates that WBA "*may be configured in ways that allow for more flexibility and enhanced service characteristic compared to copper based bitstream product*".

b. SLU conditions must be further defined

We welcome the Commission Recommendation according to which SLU must be imposed in addition to access to civil engineering and must be clearly defined within a reference offer with all prices cost based.

Moreover, as further described in our previous comments, additional measures are necessary in a SLU scenario which are backhaul access at cost oriented prices such as fiber and Ethernet backhaul. Without such measures, there is not a chance to see a line unbundled at the sub loop

level. For these reasons it is important for the Belgian competition to adopt appropriate backhaul measures to make any sub-loop unbundling remedy effective. Alternative operators should thus be able to select the solution best fitting their requirements, whether dark fiber (and where relevant copper), Ethernet backhaul or duct access.

We thus welcome the Commission new draft Recommendation in the sense that it puts less emphasizes on ducts access, which will be necessary but not sufficient. It is indeed clear that additional measures such as fiber and Ethernet backhaul regulation are also necessary and justified.

c. 5 years prior notice is a minimum before any MDF closure

We agree with the Commission statement according to which “*no less than 5 years before any de commissioning of*” MDF is justified and that “*this period may be less than 5 years if fully equivalent active access is provided at the point of interconnection*”.

In the aforementioned BIPT decision on NGA, the regulator has also imposed a 5 years prior notice. However, we regret to say that such minimum notice period of five years before any de-commissioning of points of interconnection has not been respected by the BIPT. Under request of the incumbent that unilaterally decided to already sell the building, such delay has been shortened for the 1st LEX to be closed. This creates a bad precedent and also huge uncertainties on the real notice period that will be applied to the remaining 64 MDF to be closed. Moreover, it is worth noting that contrary to the Commission statement, such decision has been taken while absolutely no alternative solution has been defined (and thus even less implemented...).

Finally as the move towards All-IP is forced and that the alternative operators have no other options we believe that the migration costs towards this VDSL network should be at the incumbent’s expense. A further issue associated with transition is the need for the alternative operators to be able to migrate their customers from their LLU based products to appropriate VDSL based products on timely and fair conditions. In that sense, the members of the Platform wonder how the costs of parallel running will be treated by the regulators.

d. Transparency is key

Although we welcome the Commission’s Recommendation to put in place a transparent framework for the migration from copper to fiber-based networks and to ensure that the systems and procedures put in place by the SMP operator, including operating support systems, are designed so as to facilitate the switching of alternative providers to NGA-based access products, we invite the Commission to ensure that NRA defines appropriate remedies within the markets 4 and 5 decisions.

In this sense, it is interesting to observe that despite the efforts of the BIPT in order to create some visibility on the technical aspects of the new wholesale offers as well as on the migration path, no clear information has, at this stage, been provided to the alternative operators by Belgacom. The alternative operators are thus not in a position to, in timely fashion, adjust their own networks and network extension plans accordingly. We feel that the obligation of transparency regarding the incumbent’s obligations to give timely information needs to be strengthened considerably.

It is important that this transparency requirement applies to all items necessary for the provision of VDSL2 bitstream and for sub-loop unbundling, including backhaul and ancillary services to allow continuity of existing offerings. The reference offer should incorporate all pricing conditions to allow entrants to calculate the business case for bitstream and for sub-loop unbundling.

Finally, we also acknowledge the request to ensure that newly-built facilities of the SMP operator are designed so as to allow for several operators to deploy their fiber lines, including sufficient

space in ducts. But we note that this can only benefit for countries where such fiber deployments are to take place which is not the case of Belgium where Belgacom has rolled out its fiber network towards the SC since several years without informing the NRA or the market.

e. Cost orientation has to be imposed without any risk factor

Access to SLU, civil engineering, backhaul measures and WBA VDSL2 must be at cost oriented prices.

We acknowledge the position on the risk profile civil engineering infrastructure and more particularly on the fact that investments in non-replicable physical assets such as civil engineering infrastructure are not specific to the deployment of NGA networks and that their risk profile should not be considered to be different from that of existing copper infrastructure.

The members of the Platform consider that no risk premium should be granted for the replacement of copper by fiber up to an intermediary distribution point (as it is the case in VDSL) as this should be seen as the natural evolution of the network and not as an investment in a new network. Moreover, being a replacement of the current network, there is no particular risk in terms of demand and services. We therefore disagree with the Commission statements within recital 37 and annex I § 6 according to which an investment risk could be taken into account but lower than for FTTH. Those § should be reviewed since we clearly do not understand to which risk the Commission refers to. Such statement is contradictory to the VDSL reality and will lead to unjustified additional costs for the alternative operators since the incumbent, based on such recommendation, will for sure claim for higher access fees.

Finally, the statement made within article 36 is also surprising and particularly intrusive when it indicates that cost orientation has to be imposed taking into account differences in bandwidth and quality of the offers. Cost orientation will be defined by the regulator taking and we do not understand why the Commission deems it necessary to precise further that principle.

f. Non discrimination has to be strengthened

A strong non-discrimination principle in order to avoid any timing advantage for the retail arm of the SMP operator has to be effectively enforced. The latter should be obliged to update its wholesale offer before it launches new retail services based on fiber to allow competing operators enjoying access a reasonable period to react to the launch of such products. We note that despite the fact the Belgian incumbent is commercializing its VDSL retail offer since April 2008, no real wholesale bitstream offer is available for the alternative operators.

In that sense, the Commission is proposing a 6 months period before such retail can be launched starting from the “availability” of the wholesale corresponding offer. To avoid any misunderstanding, we consider that the exact starting point of this crucial delay should be further detailed in recital 39. It should be made clear that such delay does not start as from the 1st draft of any wholesale offer, nor when such draft would be approved by the regulator but only when the regulator decision has been adopted AND implemented at the benefit of the alternative operators.

g. Impact of FTTH roll out on VDSL regulation; risky proposals from the Commission

According to article 37, a cost orientation obligation is no longer imposed to WBA VDSL access in case the incumbent has deployed a FTTH network and has granted access to “at least one independent alternative operator”. This seems to the Platform as being highly risky. This could indeed mean that in case the incumbent rolls out a FTTH network and grants access to a small operator such as an operator active on very limited scale, regulation for WBA VDSL at cost oriented prices would be terminated for the entire country. This can reasonably not be the case. As a consequence, we consider that, to avoid non ending discussions on its clear interpretation and

potential dramatic consequences on competition, the Commission should withdraw that paragraph. Regulation cannot be withdrawn before any concrete analysis is made by the regulator showing that there is a sustainable and effective competition.

Taking into account the sole fact that another operator, whatever its size, its impact on the market or its belonging, would have signed an agreement with an incumbent to withdraw the regulation is particularly risky. It is also in contradiction with the own Commission statement on its comments on markets 4 and 5 where it has insisted several times on the need to show actual competition conditions before withdrawing regulation and this beyond the number of operators or existence of agreements; see in particular comments on the UK, Spain or Finland market 5 notification.

Same remark applies for article 38 where the characteristic of being an “independent” operator is not even mentioned anymore.

We also consider that the price squeeze test as proposed by the Commission, i.e. reasonably efficient competitor test, is an important tool to apply but it must be done in complement to cost orientation obligation and not as a substitute to such obligation.

III. Specific measures for the Fiber to the Home scenario.

Regarding Belgium, the members of the Platform do not have a clear view on the FTTH scenario the incumbent would have decided to implement. We hope that better transparency will be implemented so that alternative operators will not have to face the same dramatic situation as for the VDSL roll out and its impact on MDF. In a recent consultation², BIPT informed the sector that the Belgian incumbent *is carrying out a FTTH test on a restricted scale to make a certain number of technological choices*. It is thus very important that an NRA strongly monitors what is going on regarding FTTH roll out and imposes the appropriate remedies to enable a fair competition.

We also consider that the principle of equivalence is equally very important. In the case of FTTH we agree that NRA's should, in addition to mandating access to civil engineering infrastructure, mandate access to the terminating segment of the access network of the SMP operator, including wiring inside buildings. Detailed information on its access network architecture should be provided by the SMP as a viable access points should be determined, together with the NRA and the alternative operators. It should be taken into account with the fact that any distribution point will need to host a sufficient number of end-user connections to be commercially viable for the access seeker.

We do not fully agree with the Commission on how co-operative arrangements should be taken into account. In particular we believe that no reference to specific number of operators should be made. In order to meet the conditions for ‘effective competition’, the Annex (if maintained) should not give as a criterion a specific number of operators. In case of co-investment, the co-investment vehicle must not be controlled by the dominant firm in order to prevent unequal and discriminatory conditions from being set. Finally barriers to entry must be addressed such that there are reasonable guarantees within the co-investment structure that demand from operators requiring wholesale products to innovate in consumer and business markets will be met on an ongoing basis. Multi-operator co-operative arrangements carry the disadvantage that they can lock in a given number of operators with virtually no possibility for further entry at a later stage. This could encourage collusive outcomes and limit the potential for an innovation by a new entrant.

We also fear that despite the price margin squeeze test as proposed in the Recommendation, the fact that the existence of an access agreement or co-investment with just one other player alongside a specific network architecture is sufficient justification for varying remedies. The

² [Consultation of the BIPT's Council on BIPT opinion to the minister concerning the actions that might contribute to stimulate fibre to the home](#) (Opinion based on art 14 §1 1° of the Act of 17 January 2003)

Commission will be misused by the SMP as under this scenario, the dominant firm may choose its partner from amongst its competitors. This allows the dominant firm to pick “partners’ on grounds which are most likely to be self-interested as opposed to in the interests of competition and investment in the market as a whole. For example, the incumbent may be tempted either to choose a large rival in selected areas in order to encourage a duopoly in the retail market, a rival targeting a different market segment, or an entirely new entrant with no experience in the telecoms market, with a view to retaining the leading position for itself whilst discriminating against operators challenging it more directly. In extremis, incumbent operators could even partner with partially or wholly owned subsidiaries.

IV. Conclusion

The Platform is therefore urging the Commission to modify its draft paper in order to maintain national regulators’ obligations (a) to undertake regular analyses of the markets for access to wholesale physical network infrastructure (market 4) and wholesale broadband access (market 5) markets and (b) to lift regulation only in cases where the absence of dominant market position has been clearly demonstrated.

As mentioned above the Platform welcomes the emphasis on “business-grade” and would also like the final Recommendation to include additional language requiring regulators to take explicit account of the economics of business service provision when analyzing both these markets.