

European Commission
Directorate General Information Society and Media

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Response of Skype Communications sarl to the 2nd consultation on a draft “Commission Recommendation on regulated access to Next Generation Access Networks (NGA)”.

Skype Communications sarl (hereafter ‘Skype’ www.skype.com) is a Luxembourg-based provider of peer-to-peer software applications which enable Skype users to communicate with other Skype users, and enabling, optionally and where possible, certain forms of communication with the subscribers of electronic communications networks and services.

Please find hereby Skype’s brief response to the European Commission’s consultation document.


A. General Remarks

Skype welcomes the opportunity to comment on the European Commission’s 2nd public consultation on NGA.

We support the European Commission’s overall aim to promote investment and competition in NGA, which, we hope and trust, can lead, with some elementary amendments, to the adoption of a Recommendation that will contribute substantially to network roll-out and to more competitive wholesale markets, but also, downstream, to retail markets characterised by ubiquitous availability of very high speed unrestricted access to the global public Internet, with a view to achieving key socio-economic benefits.

We wish to stress in particular that it is not the mere availability of NGA infrastructure/connections as such, or the presence of multiple infrastructures/multiple fibres as such, but rather the availability of very high speed unrestricted access to Internet content, applications and services, which is necessary to deliver key socio-economic benefits going forward. We refer in this context to a keynote address delivered by David S. Isenberg in April 2009, entitled “*Broadband without Internet ain’t worth squat*”¹.

¹ <http://www.isen.com/blog/2009/04/broadband-without-internet-ain-worth.html>



Commissioner Reding² has also emphasised the importance of the Internet (not merely NGA) and stated her belief that *'we are at the start of a new phase of internet driven innovation and growth'*, that *'we will only be able to reap the full social and economic benefits of a fast moving technological landscape if we manage to safeguard the **openness** of the Internet'*, and that it is necessary *'to better prevent (such) unfair abuse to the detriment of Consumers'*.

Over the past two decades, the global public Internet has been a relentless source of individual, public sector, and industrial creativity, a massive breeding ground for innovation and for the development of entirely new concepts and models, to the delight and evident benefit of European citizens, European businesses, and facilitating the delivery of key public services by European government authorities at all levels.

The remarkable success of the global public Internet, including its many socio-economic benefits, is largely attributable to its open and non-hierarchical nature, and especially to the fact that there are no gatekeepers deciding on which content, applications and services can be accessed, used and distributed by its users (individuals, public administrations, businesses).


It should be taken into account that very high speed unrestricted Internet (fixed and mobile) is not only relevant for interpersonal communications, but that there are many self-evident and very desirable person-machine interactions, machine-to-machine applications, including for example in 'smart grid' electricity to reduce waste and preserve the environment, safety applications, etc. On existing networks, it has been seen that when these applications are custom-developed, using custom protocols, etc. development is slow and features are limited, but when the Internet is used, development is fast, innovation is great, and take-up is far greater.

It is an undeniable fact that network operators have historically supported, in their own commercial interest, open and unrestricted access to the global public Internet, but it is equally evident that some network operators, including some major European network operators, are now restricting or are seeking to restrict such openness (e.g. many European mobile network operators, and in several cases ALL mobile network operators in specific Member States, restrict the use of VoIP and peer-to-peer applications).

Skype believes that it would be against the European Union's interests, and against all its constituents' interests, if the NGA Recommendation would allow a situation to arise in which fixed/NGA network operators that seek to restrict, or would effectively restrict, open access to the global public Internet, would be able to do so without constraints and without regard by the Commission and by NRAs for the situation on downstream retail markets.

The European Commission's Recommendation should state explicitly that unrestricted open access to the global public Internet is an important policy goal, that regulation (at wholesale and if necessary at retail level) should support the

² http://ec.europa.eu/commission_barroso/reding/docs/speeches/2009/brussels-20090202.pdf



achievement of that goal, and that in case this policy goal is not achieved, further specific intervention will follow.

On the basis of the above, Skype, in this response, suggests various amendments to the draft Recommendation, with a view to enabling the European Union, and all its constituents, to achieve maximum overall socio-economic benefits (inside and outside the ICT sector) from the roll-out of NGA networks.

B. Specific Remarks and Suggested Amendments

B.1. Policy goals - introductory paragraphs (1-4) and recitals (1-5)


Based on what is stated in our general remarks, we suggest that the introductory paragraphs and recitals of the Recommendation should indicate that not just NGA infrastructure as such or high-speed broadband services as such, but in particular unrestricted open access to the global public Internet including the availability of content, applications and services, available on NGA networks, are the real levers for achieving key socio-economic benefits (social progress, productivity, sustainable economic development, etc.).

Therefore, we suggest adding **a new paragraph after paragraph 1, and to amend Recital 1** to read as follows:

(new paragraph) NGA is a key component for the development, adoption and use of information and communication technologies (ICT) in the economy and in society. Use of Internet content, applications and services on NGA networks in particular, is of strategic importance because of its ability to accelerate the contribution of these technologies and their applications to growth and innovation in all sectors of the economy and to social and regional cohesion. The Commission actively supports the widespread availability of broadband services based on NGA including unrestricted open access to the global Internet for all the European citizens as laid down in the Lisbon strategy and subsequent Communications.³

(amended Recital 1) The EU single market for electronic communications services, ~~and in particular~~ the development of high-speed broadband services, and in particular the use of Internet content, applications and services, are ~~is~~ key to creating economic growth and achieving the goals of the Lisbon agenda. The deployment of Next Generation Access (NGA) networks based on optical fibre requires substantial investments in the coming years. To this end, efficient investment and innovation in new and enhanced infrastructure should be promoted, taking due account of the risks incurred by all investing undertakings and the need to maintain effective competition, as well as the need to maintain unrestricted open access to the global Internet.

³ http://ec.europa.eu/information_society/eeurope/i2010/docs/future_internet/act_future_networks_internet_en.pdf



B.2. Co-investment and joint deployment – assumption of competitive outcomes and need for a further ‘test’ for effective conditions of competition

The sections and Annex III in the draft Recommendation dealing with co-investment and with joint deployment + multi-fibre make strong assumptions on pro-competitive or even effectively competitive outcomes.


We are under the impression that the Commission hopes that it can steer fixed markets in the direction of a model analogous to that of mobile markets, where, it is perceived, the presence of multiple access infrastructures leads to absence of bottlenecks and to competitive outcomes.

Much as we wish that there would be competitive outcomes, this is simply not the case. The mobile market, in spite of the existence of multiple access infrastructures, exhibits characteristics that do not reflect an effectively competitive market, offering consumers a meaningful choice and indeed is itself in need of regulatory intervention.

Many mobile network operators, including ALL GSM/UMTS operators in several EU Member States, have decided to adopt conditions preventing end-users from using VoIP and P2P applications, and certain forms of utilisation are otherwise impeded. If NGA network operators are put in a position of adopting this same behaviour, the European Union and its constituents will undoubtedly fail to achieve the full socio-economic benefits that the Commission is pursuing. If companies are entitled to determine the success or failure, extra costs, terms and conditions etc. of content and applications on the Internet, this would mean that individual developers and new small businesses would be discouraged from coming up with new content, software and applications, and from releasing, as Skype has done, revolutionary applications. This would undoubtedly have a brutally chilling effect on the most vibrant source of innovation of the past two decades, and would prevent European users, including individuals, businesses and administrations, from benefiting from the immense opportunities that lie ahead with fully functional open very high speed Internet, as users and as producers. Skype therefore advocates that the Commission adopt unequivocal measures, and exercise strong supervision, to ensure that fixed networks do not experience a reduction of competition expressed at the retail level, and that (the abusive / discriminatory) practices of mobile network operators are not extended to fixed/NGA network operators.

We recognise that the draft Recommendation is focused on wholesale markets 4 and 5 identified in the Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation. The draft, as it stands, refers to the need for NRAs to monitor whether effective competition is achieved ‘on the downstream market’ (paragraph 26 and recital 31).

Determination of whether there is effective competition (on market 4 and on market 5 and on markets downstream thereof, including retail markets) should not be assessed merely on the basis of the number of networks in operation, being built or expected to appear in the geographic area concerned, but on the basis of the effective conditions of competition and the results of that competition as experienced by users.



Skype strongly advocates that the ‘test’ for such effective conditions of competition should include that users (at retail level) have genuine choice and ability to easily switch between providers that are effectively competing with one-another, including for the provision of unrestricted open access to the global public Internet.

Therefore, we suggest **amending paragraphs 26, 39 and 42** to read as follows:

26. When NRAs in their market analyses find that the conditions set out in Section 2 of Annex III are met, this would normally be indicative of the absence of SMP in areas where joint deployment of FTTH networks based on multiple fibre lines takes place in accordance with the conditions set out in this Section. NRAs should monitor whether these conditions will continue to be met throughout the period covered by the market review, and whether they result in effective competition on ~~the~~all downstream markets and result in the availability and competitive delivery of affordable and adequate services, including unrestricted open access to the global public Internet, to satisfy the needs of citizens and professional users, and review their decision not to impose cost orientation if necessary, and adopt further remedies if necessary to ensure that genuine choice is available for unrestricted open access to the global public Internet.

39. In the absence of an obligation of cost-orientation, NRAs, at the request of an operator enjoying rights of access or on their own initiative, should verify the SMP operator's pricing behaviour by applying a properly specified margin-squeeze test. NRAs should specify in advance the imputation test, the parameters for the margin-squeeze test and the remedial mechanisms in case of established margin-squeeze. NRAs should ensure that a sufficient margin remains between wholesale and retail prices to allow for market entry by an efficient competitor. NRAs should monitor whether these conditions will continue to be met throughout the period covered by the market review, and whether they result in effective competition on ~~the~~all downstream markets and result in the availability and competitive delivery of affordable and adequate services, including unrestricted open access to the global public Internet, to satisfy the needs of citizens and professional users, and review their decision not to impose cost orientation if necessary, and adopt further remedies if necessary to ensure that genuine choice is available for unrestricted open access to the global public Internet.

42. When NRAs in their market analyses find that the conditions set out in Section 2 of Annex III are met, this would normally be indicative of the absence of SMP in areas where joint deployment of FTTH networks based on multiple fibre lines takes place in accordance with these conditions. NRAs should monitor whether these conditions will continue to be met throughout the period covered by the market review, and whether they result in effective competition on ~~the~~all downstream markets and result in the availability and competitive delivery of affordable and adequate services, including unrestricted open access to the global public Internet, to satisfy the needs of citizens and professional users, and adopt further remedies if necessary to ensure that genuine choice is available for unrestricted open access to the global public Internet.



Annex III.1. should be amended to include a further criterion, as follows:

- The co-investors are effectively competing on downstream markets, resulting in the availability and competitive delivery of affordable and adequate services, including unrestricted open access to the global public Internet, to satisfy the needs of citizens and professional users.

Annex III.2. should be amended, as follows:


- The co-investors are effectively competing on ~~the~~ downstream markets, resulting in the availability and competitive delivery of affordable and adequate services, including unrestricted open access to the global public Internet, to satisfy the needs of citizens and professional users.

The corresponding **recitals 31 and 32 should then be amended** accordingly:

(31) NRAs should monitor the competitive evolution of ~~the~~all downstream markets, and specifically verify whether affordable and adequate services, including unrestricted open access to the global public Internet, are offered to satisfy the needs of citizens and professional users, and, if necessary, review their decision not to impose an obligation of cost orientation, and if necessary adopt further remedies to ensure that genuine choice is available for unrestricted open access to the global public Internet.

(32) Arrangements for co-investment in FTTH based on multiple fibre lines may in certain conditions lead to a situation of effective competition. These conditions relate in particular to the number of operators involved, the structure of the jointly controlled network and other arrangements between the co-investors which aim at ensuring effective competition on the downstream market, and this resulting in the availability and competitive delivery of affordable and adequate services, including unrestricted open access to the global public Internet, to satisfy the needs of citizens and professional users. Where these conditions are met, then this would normally be indicative of the absence of SMP. Furthermore, where competitive conditions in the areas covered by the co-investment are sufficiently different the definition of a separate market may be justified.

It will be seen from the above that Skype considers that, based notably on its observation of European mobile markets, the existence/promotion of multiple access networks (which is desirable as long as the investments are efficient and the outcome is competitive along the entire value chain) certainly does not lead automatically to a satisfactory outcome on retail markets. Indeed, it is conceivable that the competitive situation on fixed (wholesale and retail) markets could deteriorate. Therefore, the Commission should provide unequivocal assurance that unrestricted access to the global public Internet is not impeded, neither at wholesale level (e.g. through restrictive agreements/conditions on bitstream access), nor at retail level (e.g. through restrictive behaviour, co-ordinated or not), so as to ensure that users have genuine choice and ability to easily switch between providers that are effectively competing with one-another, including choice between providers of unrestricted open access to the global public Internet.



Should you require any additional information with regard to the contents of this response, please do not hesitate to contact us. We would be happy to engage with you to discuss in more depth the points raised here.

Yours faithfully,

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