

FTTH Council Europe – Milan 10 February 2011

Regulation of NGAs to achieve the Digital Agenda goals

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The consistent implementation of the EU Recommendation on regulated access to NGAs by national regulators constitutes a crucial step towards achieving the goals of the Digital Agenda Europe (DAE). This ambitious strategic initiative targets the deployment of high speed networks across Europe allowing every citizen to access fast broadband by 2013 and ultra fast broadband by 2020.

BEREC, the Body of European Regulators for Electronic Communications, shares the view that NGA networks, such as fiber networks or upgraded copper networks, have the potential to drive economic growth and to bring benefits to all European citizens. In this regard, BEREC issued two opinions on the Draft Recommendation in March and May 2010. We do believe our suggestions have contributed to its improvement before adoption in September 2010.

From an economic viewpoint, NGA network roll out requires huge capital expenditure per passed or connected customer, depending on the particular FTTx technology deployed. Those high cost figures make an NGA infrastructure a rather non-replicable asset.

From a business perspective, control of such a network gives competitive advantage to the potential investors. On the one hand, this exercise involves important risks on the demand side, such as civil engineering, cost of capital, population density, network penetration rates, total estimated turnover and so on. Those considerations are particularly relevant in the current financial downturn.

Alternative operators do not face such a risk, when they negotiate access to a third party NGA infrastructure. On the other hand, if no access is mandated by regulators, alternative operators may face serious competition problems, such as undue discrimination leading to the quick depreciation of their existing LLU investments.

In this complex environment, the main concern of the BEREC and the NRAs is how to strike a right balance between those two conflicting interests. Our ultimate goal remains to trigger long term multi-billion investment necessary to achieve the coverage objectives of the Digital Agenda, while safeguarding competition at the deepest network level, where it is likely to be effective and sustainable. Such a balanced policy

shall contribute to the development of the internal market while promoting the interests of the end-users.

The EU Recommendation examines the deployment of NGA networks upon initiative of operators, who already have or are expected to attain significant market power as a result of new network deployment. The recommendation prescribes that any regulatory measures imposed on them should be consistent with the standard market analysis procedure, followed by the NRAs as per the Regulatory Framework. The measures adopted by national regulators usually fall within the scope of two ex-ante regulated markets, namely Market 4 for Wholesale Physical Access and Market 5 for Wholesale Broadband Access.

In this context, any “regulatory forbearance” or “regulatory holiday” vis-a-vis NGA as an emerging market is clearly not an option. On the contrary, the Recommendation prescribes a full list of potential remedies and wholesale products, to be made available by Significant Market Power (SMP) operators to allow competitors climb the “ladder of investment”.

Such remedies include access to ducts, dark fiber, network terminating segments, street cabinets, fiber loop or sub-loop, physical or virtual collocation, together with non discrimination, transparency and technology neutrality obligations. The recommendation enables, under specific conditions, risk sharing schemes, such as long term contracts.

It also tackles migration issues, stating that obligations in relation to markets 4 and 5 should not be undone by changes to the existing network architecture and technology. Exceptions may be introduced if agreement is reached on an appropriate migration path between the SMP operator and undertakings currently enjoying access to its network.

In conclusion, despite strong criticism expressed for the NGA Recommendation, BEREC considers that this “soft law” document meets most requirements of stakeholders (policy makers, regulators, incumbent or alternative operators, investors). The Body of European Regulators for Electronic Communications, invests substantial resources to investigate all the underlying issues and to provide, when necessary, guidance in the form of Common Positions. Through our joint action within BEREC, I am convinced that we, as national regulators, will manage to effectively reconcile the quest for legal certainty with the objective of flexibility in investments. Our vision is to pursue the objectives of the Digital Agenda while adjusting our regulatory intervention on the specific network and competitive conditions of our national markets.