

European Commission
E-Mail: info-B1ext@ec.europa.eu

Vienna, July 24th, 2009

Subject: 2nd public consultation on a revised draft Recommendation on regulated access to Next Generation Access networks¹

Dear Sir or Madam,

ISPA, the Austrian Association of Internet Service Providers, appreciates the invitation to comment the 2nd European Commission draft recommendation on regulated access to Next Generation Access Networks (NGA).

1. General Remarks

We appreciate the stepping back from the idea of “gradation of remedies”, taking up the concept of the “ladder of investment” again. Access to duct and fibre is indeed essential for the deployment of NGA, but many arguments such as to assure the first step into the market or the supply of specific customers, the missing widespread availability of ducts and the often low population density, require a solid system of investment with different possibilities of access. Therefore the “ladder of investment” concept is essential for alternative ISPs to compete effectively and nationwide on the broadband retail market since they cannot build on legacy networks built in monopoly scenarios.

Reflecting the current situation in Austrian the fixed-line broadband market is characterised by a substantial increase of broadband customers of the incumbent while cable operator’s customer base is stagnating and the unbundled lines and DSL-wholesale lines of alternative ISPs are constantly decreasing. As a matter of fact the objective of effective competition in the broadband market has not yet been achieved. In this light a sound balance between incentivising investment into infrastructure and enabling competition between service providers is crucial.

For the future development of the Austrian market and its way to a Next Generation Access Network the Recommendation shall support efficient investment into infrastructure by establishing a fair pricing system for access considering investment risks but at the same time enabling competitors to remain on the market with the freedom to either build or buy infrastructure elements. The availability of non-discriminatory and technology neutral access to bottle-neck facilities is therefore decisive.

¹ http://ec.europa.eu/information_society/policy/ecommlibrary/public_consult/nga_2/index_en.htm

2. Specific Remarks

2.1. The concept of co-investment and favouring multi-fibre architecture supports re-monopolisation and oligopolies

The chapter “Access to the terminating segment (FTTH)” covers the scenario of an FTTH rollout by the SMP operator. ISPA fully agrees with the remedy of unbundled access to the fibre loop and is satisfied to see that co-location and backhaul are mentioned to accompany this remedy since the issues of co-location and the prices for backhauling represent key figures in the business plan of an ULL provider.

In our point of view the SMP obligation of cost-orientation is one of the most important obligations that cannot be counterbalanced by an ex post margin-squeeze test (see Art 25.). In Austria, specifically, very often the margin-squeeze test results in long delays and makes use of NRA calculation models which are transparent in their overall structure but much less so in their application. Also, the preconditions stated in Art. 23. and Art 24. are not sufficient to justify this regulatory restriction.

Even in cooperation with another independent operator who jointly co-deploys the infrastructure, the SMP operator will still remain the operator with significant market power. The here stated model prefers investment to competition, which was not the aim of telecom market liberalisation and bears the threat of re-monopolisation or the creation of a telecom oligopoly. The need for cost-orientation exists as long as one operator has significant market power in order to avoid negative consequences for the entire market.

Co-investment in FTTH, as defined in the draft means “*an arrangement between providers of electronic communications services with a view to deploying FTTH networks in a joint manner, in particular in less densely populated areas. Co-investment covers different legal arrangements, but typically co-investors will build network infrastructure and share physical access to that infrastructure.*” (Art.8., last paragraph)

Referring to this definition, the commission points out that co-investment into NGA networks can both reduce the costs and the risk incurred by an investing undertaking, and can thus lead to more extensive deployment of FTTH. In case the co-investment is based on multiple fibre lines, the dominant position of the SMP operator in the areas concerned would be reduced by taking away its first-mover advantage, by allowing for infrastructure-based competition and ultimately by fostering competition on downstream markets. To motivate such co-operative arrangement the commission suggests suspending the obligation of cost-orientation rather applying a margin squeeze test (margin between wholesale and retail tariffs) which should be sufficient to ensure fair competition. Annex III of the draft recommendation contains (1) the conditions under which cost-orientation is not justified and (2) under which the absence of SMP would normally be indicated by regulated access to the unbundled fibre loop in case of co-investment into FTTH. One of the conditions according to which cost-orientation is not justified is that the SMP operator has jointly deployed an FTTH network with at least one other provider of electronic communications services competing on the downstream market.

ISPA is fully aware that the concept of co-investment aims at positively affecting the NGA deployment by rewarding investors who share risks and costs. However such co-investment cooperation shall be left to the market rather than being instructed by a Recommendation. Cooperation or co-investment per se do not change the SMP status of an operator and therefore do not justify any concessions on access pricing obligations.

Furthermore the first-mover advantage is – in the case of just one other operator in addition to the SMP operator taking part in the co-investment project – just marginally affected. The SMP operator will be the project leader in most cases and decide about the location and circumstances of the deployment. This condition also bears the additional risk that the SMP operator might privilege certain operators (or a certain operator) and therefore create an oligopoly under its sphere of influence. The obligation of cost-orientation is an important remedy and should not be suspended in exchange for investments into infrastructure with yet uncertain possibilities of co-usage. Therefore the Art. 23-24 should be deleted.

Equal arguments as against the concept of co-investment apply to the intended treatment of an multi-fibre architecture. Rather than rewarding the deployment of a certain network-architecture in the Recommendation, multi-fibre – if deployed by SMP operators – should be seen as an option for competitors on the ladder of investment. Since it is not proven that a multi-fibre cooperative environment leads to effective competition, any withdrawal of remedies on SMP operators should be based on a thorough market analysis. Therefore the Art. 37-38 should be deleted.

2.2. More detailed specification of regulation regarding access to civil engineering infrastructure of the SMP operator: Practical feasibility vs theoretical availability

ISPA welcomes the recommended obligations for the SMP operator to inform the market about duct location and duct capacity (Art. 9.) as well as the instructions for NRAs (Art. 10. – Art. 14.) as appropriate and necessary. Please find our remarks concerning cost-oriented prices (section 2.2) below. However, the regulation of the “reference offer” (Art 13.) needs more specification. Our members are being confronted with SMP reference offers often face the problem of being able to **effectively utilise** the purchased services due to an insufficient level of technical detail in the documentation, e.g., because of missing gateway descriptions, insufficient opportunities of testing the new technical environment or some other lack of information necessary to deploy the technology in question. In our opinion the six month term should be seen in conjunction with the **practical** feasibility to actually apply the offer and not be restricted to a **theoretical** availability.

2.3. Wholesale broadband access (Market 5): Not only an essential first step into the market

We agree with the classification of wholesale broadband access over VDSL as a chain substitute to existing wholesale broadband access over copper-only loops (Art. 32.) and see this form of access as a necessary intermediate step in the ladder of investment. However, we want to stress (like we did above in section 2.1.) that new wholesale broadband access has to be **effectively available** at least six months (Art. 33.) before the SMP operator or its retail subsidiary market their own corresponding NGA retail offers. It should be a clear instruction for NRAs to assure an appropriate lead time considering the actual availability.

Wholesale bitstream access is not only the initial step into the market. In addition, it is a substitute in cases where unbundling or “virtual” unbundling is commercially not feasible or as the basis for developing a new area. Thus, we do not hold the commissions view stated in Art. 41. that NRAs normally should not impose an obligation of wholesale bitstream access, when effective access to the unbundled fibre loop of the SMP operator’s network – which is likely to result in effective competition on the downstream market – exists. In our opinion the existence of a SMP operator is an indicator for potential market issues and this situation requires an appropriate regulatory environment providing a continuous ladder of investment.

2.4. No “Knock Out Time Limit” migration path

The migration of the SMP operator to a new access technology like NGA with the consequences of decommissioning of points of interconnection and other reorganisation of the access network bears the risk for alternative operators of devaluation of their infrastructure, which in many cases will threaten their existence. For this reason an appropriate migration path as recommended in Art. 43. is essential. Nevertheless we cannot fully agree with the recommended provisions. After an appropriate period of time, depending on the particular case, the NRA should analyse, with regard to the balance of interests between the SMP and the alternative operators, whether the general conditions changed in a way that a parallel service of infrastructure is in fact obsolete. The prescription of an inflexible time limit is a measure that does not comply with the needs of a market in liberalisation.

2.5. Suggested conditions for long-term access pricing and volume discounts not appropriate for regulated markets

Long-term access pricing and volume discounts are common economic practices. Nevertheless these practices could bear risks in a SMP operator dominated market as correctly described in Annex I Art. 7. and Art.8. From our perspective, the recommended conditions are not sufficient to counter the risks, especially for operators with smaller customer bases. To consider “just” the reduction of the risk of the investor is enough to open a financial gap between alternative operators and the SMP operator. Alternative operators will not be able to compete with the SMP operator’s retail prices, even in case of a sufficient margin between wholesale and retail prices.

2.6. Margin-Squeeze may not avoid anti-competitive outcomes effectively

The recommendation attaches high importance to the term margin and margin squeeze. Thus “margin-squeeze” is used several times (rec 26, rec 27, rec 45, Art. 25. Art. 39 and Art.40) and the margin-squeeze test is presented as a backup for the obligation of cost-orientation. In general, we view an obligation of ex-ante cost-orientation and in case of problems such as not being able to reproduce certain offers of the SMP operator an ex-post margin-squeeze test as more effective. At this point we would like to stress that in Austria the margin-squeeze test as applied by the NRA has not yet yielded its intended effect to avoid anti-competitive outcomes.

As we refer to in several consultations and supported by the market data and telecommunication reports, alternative operators cannot offer an economically reasonable and competitive telephony-broadband bundle product like the SMP operator’s special deal “Kombipaket”. However, the renewed margin-squeeze test passed by the NRA had not the effect of significant change for the retail/wholesale price level with the consequence that the SMP operator had high customer growth at the expense of alternative operators’ customer base. The duly initiated lawsuits have been ongoing for two years now and will not offer the possibility to compensate the original damage of “lost” customers.

3. Concluding Remarks

We appreciate the efforts of the European Commission to provide a balanced regulatory framework with the aim to foster the deployment of NGA. However, as we have outlined, we think that in order to optimise this effort in the light of fair competition, some aspects require a

reconsideration, more clarification and additional remarks. In particular the concept of co-investment supports re-monopolisation and oligopolies since it leaves it to the descretion of the SMP-operator to decide on the future competition on the high-speed internet market through an arrangement with a second operator and thereby rather build new market entry barriers for other alternative ISPs than promoting effective competition.

The goal of the telecom market liberalisation is to create a fair framework for a viable and innovative market. Being confronted with the fact that our members, Internet Service Providers across Austria, who have been the drivers for the development of the Internet in Austria, still have to fight for their fair chance to participate in this market on a daily basis, this aim should be even more respected at the next stage of telecommunication development, the deployment of Next Generation Access Networks.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Andreas Wildberger
Secretary General

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting an optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.