PLATFORM
TELECOM OPERATORS • SERVICE PROVIDERS

Platform Telecom Operators & Service Providers vzw/asbl
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CONTRIBUTION OF THE **PLATFORM TELECOM OPERATORS & SERVICE PROVIDERS** ON ERG CONSULTATION DOCUMENT ON REGULATORY PRINCIPLES OF NGA

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The *Platform Telecom Operators & Service Providers* (hereafter "the Platform") is a Belgian interest group which currently has 13 members[1], 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.

1. Introduction

ERG has published a consultation on NGA that summarizes their impacts on regulation. This document analyses more precisely two scenarios: fibre to the cabinet (FTTC) and fibre to the home (FTTH) roll-out.

We thank the analysis made by ERG in its document and welcome the opportunity to respond to this forward looking initiative. We agree with ERG on the necessity to examine what will be the good regulatory tools to guarantee that NGA roll-out will be done under fair and reasonable conditions. The results of this analysis could be usefully taken into account by the Commission within the review.

Nevertheless, we do emphasize the importance for competition to regulate and encourage bitstream and metallic local loop unbundling (LLU), as they are still at this stage of market evolution the best ways to achieve infrastructure competition in benefits of the consumers.

This contribution raises several comments from the Platform concerning NGA roll-out in Belgium: the specific context of broadband and LLU in that country and the need for a strong regulation, as well as the necessity to enhance transparency in order to make migration towards NGA a success in terms of competition, investments and innovation and not a stop to alternative operators' investments.

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ASTRID	Colt Telecom	Scarlet	Verizon Business
BASE nv. / sa.	Euphony Benelux	Syntigo	
Brutele SC	Eurofiber	Tele 2 Belgium	
BT	Mobistar	Telenet	

2. Broadband markets still need strong regulation of the historical access network within the current regulatory framework.

If broadband has taken off across Europe, competition is not at this stage effective and NRAs still have to closely monitor it.

This is clearly showed by the last ECTA broadband benchmark[2]. It has indeed "*reported <u>a significant slow down in Broadband uptake across Europe</u>, falling from 23% to only 14% growth in the half year period before September 2006. This slowdown comes at a time when once again Europe is seeing the growth of telecommunication monopolies in key countries, a correlation ECTA believes is not coincidental.*" It added that its benchmark "*for Q3, 2006, released today, shows that incumbents <u>have clawed back market share in a number of key markets including a substantial increase in Europe's broadband hotspots</u>, Denmark and Finland, as well as in France. Incumbents also maintain control of more than 50% of broadband lines in Spain, Italy, Luxembourg, Greece, and Belgium.*
Steen Clausen, Managing Director of ECTA, said, "<u>The Scorecard shows that growth has stalled in a number of countries where we have seen the power of the incumbent on the increase including Denmark and Belgium, which experienced a paltry 3% growth in broadband penetration, and France, which has fallen to 8th place in Europe well behind the UK</u>. In contrast, in Germany, Deutsche Telekom's market share dropped below 50% for the first time, corresponding with a surge in growth in broadband penetration". Europe includes some of the world's leading broadband countries. <u>However, its position could be put at risk if regulators do not act to re-enforce competition and open markets,</u> ECTA warned." (underlines added)

And the Belgium broadband market is a good illustration of that unsatisfactory situation.

If Belgium has today a high Internet penetration rate, 21,84% under the Commission's evaluation[3], it is due to Belgacom and cable operators. **Fixed alternative operators haven't indeed been able so far to benefit from reasonable and fair wholesale conditions from the incumbent Belgacom**. Wholesale prices for full unbundling remain very high: with the raw copper rental at €11.26 per month, the Belgian fee exceeds the tariffs prevailing in most EU-15 countries. Other costs for co-location and activation/deactivation are also excessive.

The Belgium regulator, IBPT, thus acknowledged in its last annual report[4] that "*At present, the impact of unbundling on the development of broadband Internet is rather limited in Belgium*". IBPT has just made a public consultation on a new methodology and tariffs for LLU that goes in the right direction; the new methodology should favour a better tariffs' cost orientation. It is now necessary for IBPT to adopt its decision in the shortest delay in order to allow competition to develop in the benefits of consumers.

Belgium's specific situation regarding LLU and broadband has been highlighted by several reports. First, the Commission in its 12th Report on implementation[5] indicated that "*the number of unbundled fixed lines in Belgium remains one of the lowest in Europe.*" It also stated that "*Nearly half the retail broadband lines are provided by the incumbent. Alternative operators' large market share is mainly due to cable networks (72% of alternative operators' lines).*" It added that "*Most broadband lines of new entrants are still supplied using the bitstream reference offer. Since last year the three main alternative operators have been migrating to unbundling but they complain about anti-competitive conditions, mainly high prices and non-compliance with service level agreements (SLAs).*"

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[2] ECTA press release broadband benchmark, Q3 2006, dated 1st February 2007

[3] Commission staff working document annex to the communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions European electronic communications regulation and markets 2006 (12th report) [com(2007) 155], p. 85

[4] IBPT 2005 annual report, page 22

[5] Commission staff working document annex to the communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions European electronic communications regulation and markets 2006 (12th report) [com(2007) 155], p. 82

Further, Analysys also criticised the Belgian situation in its comparative study[6] of March 2007. If Belgium starts launching broadband offers sooner than the other countries examined (France, Sweden, UK, Germany, Austria, Netherlands), it is now regarding to ULL unbundling, ranked at the bottom of the benchmark. Analysys' benchmark clearly shows "*the very low take-up of LLU in Belgium compared to other countries in the study (other than UK)*"[7]. According to Analysys, this situation is due in particular to the existence of Belgacom's VDSL network and to LLU costs for an alternative operator that are 15% higher than a similar operator in a typical country amongst the benchmark set.

Thus, there is a consensus under which metallic local loop unbundling is not at all a success in Belgium, although several alternative operators have already made considerable investments and are dedicated to continue to make such investments.

The following remarks concerning the ERG document rise from these national circumstances. If we do support ERG when it calls for new tools in order to be able to better address new regulatory challenges imposed by NGA roll-out, **we also want to emphasize that NGA debates and regulatory decisions must not put an end to the frail competition that has lately started to take off in some countries thanks to LLU and bitstream.**

3. NGA: a new challenge for NRAs

3.1. Impact of NGA on LLU and Bitstream regulation

The ERG document mentions several times that NGA roll-out is going to impact LLU and Bitstream regulation. ERG considers that LLU would change, even disappear, whereas bitstream regulation will become more important for competition. Please find below our views on these considerations.

<u>3.1.1. To put an end to metallic LLU regulation at this stage would endanger competition</u>

As ERG highlighted in its answer to the consultation of the Commission on the review in October 2006, "*the Commission should use the opportunity of the revision of the Directives <u>to reinforce the importance of equal access to the local loop to the development of competitive broadband markets in Europe</u>, and not allow the repeal of the Local Loop Unbundling Regulation to undermine the continued importance of Local loop unbundling. For example, it could be included in a recital of the Access directive that LLU is a key instrument for competition within Europe, as it is written in recitals 6 and 7 of the LLU regulation*"[8] (underlines added).

We note that particularly in the specific Belgian context, LLU remains the best tool for NRAs and non-cable alternative operators to enhance broadband competition for the benefit of consumers.

Under both scenarios described by ERG in its document on NGA, the copper local loop will be entirely replaced or won't be usable in the same way. In a FFTH scenario, the all copper local loop will indeed be replaced whereas, in a FTTC scenario, it depends on the incumbent's technical choice and the NRAs actions. Under ERG's opinion, copper and fibre networks will not coexist indefinitely (page 33). However, ERG also insists on the fact that "*a balance has to be found between the commercial freedom of the SMP-party to develop its network and the incumbent and its objective to promote competition, which depending on national circumstances, could require continuation of LLU*".

We do agree with this assertion and request NRAs, in particular BIPT, not to give up LLU regulation at this stage. Such a decision would indeed be dramatic in the specific Belgian context as it will put an end to any chance to recover investments already made in LLU and it will put at risk competition in a long term basis; alternative operators being unable at this stage to develop NGA as incumbent can. Therefore, under the ladder of investments model described by ERG page 40 of its document, stop LLU

[6] Analysys, Lot 1 – A comparative study of retail prices for broadband Internet connections and triple play offers in Belgium and six other European countries, 22 march 2007

[7] Analysys, Lot 2 – An analytic study of the results of Lot 1 showing the factors which explain broadband retail prices differences between countries, 22 march 2007, page 16

[8] Response to the Review of the EU Regulatory Framework for electronic communications network and services, page 4

regulation at this stage would mean withdrawing one step of the ladder without giving the possibility to the alternative operators to jump to the next one. Such an anticompetitive risk is going to occur in some countries where incumbents have unilaterally started to roll-out VDSL. While this move may provide high benefits to incumbents, it causes great damage to LLU operators.

Then, any modification of market 11, as requested by ERG, should in no way mean that unbundling of the metallic local loop is no longer an obligation for incumbents. Moreover, NRAs should already adopt regulatory decisions under the current framework in order to avoid that VDSL roll-out by incumbents puts an end to LLU and competition.

3.1.2. Bitstream: a key input to competition

ERG explains in its analysis that NGA roll-out will increase the importance of Bitstream regulation. **The Platform emphasizes that the development of NGA confirms the continued need of regulation of market 12 and confirms the need of one national bitstream access product** accessible to the alternative operators so as to allow them to compete in the broadband market of the future.

In this respect, ERG concludes (page 35) that "*in order to maintain the benefits of infrastructure competition based on LLU, the design of the WBA product might need to be enhanced to allow alternative operators maximum control of quality parameters possible*".

We fully subscribe to this assertion. It is indeed clear that quality of alternative operators is one of the key factors to increase competition and trust from the end users. We are at BIPT's disposal to work on the future wholesale products and quality parameters BIPT will have to include in the future when analysing market 12.

Moreover, given the overlap of federal and regional powers that exists in Belgium with regard to broadband matters, there is a potential risk of a regional subdivision of the wholesale broadband access market. Such regionalized regulation of market 12 could lead to a fragmented regulatory landscape at two speeds, decreased stability and less legal certainty. It is evident that such an evolution would disadvantage the alternative operators willing to compete on the broadband market through the regulated (ULL and) bitstream access products, and should therefore clearly be avoided.

Finally, it is also essential at this date to guarantee that bitstream access is offered by the incumbent under fair, reasonable, cost oriented and non discriminatory conditions. However, although the Belgian incumbent is currently offering ADSL 2+ on the retail markets, it has constantly refused to include it in its bitstream offer, which means breach of its regulatory obligations and impediment to competition. Therefore, we request strong action from NRAs on market 12 in order to achieve effective competition.

3.2. A need to act on a case by case basis

Migration towards NGA is a key challenge for all operators and regulators. It is the first time since the telecommunication market has been opened to competition in 1998 that alternative operators could be in an equivalent position to the incumbent: to roll-out their own fibre local loops.

But for this to be true, NRAs have a crucial role to play.

They will have to ensure that all operators start under fair conditions, that is to say, to check whether the incumbent's choices won't prevent alternative operators to deploy their own infrastructures. And, as it is clearly stated in the ERG document (see pages 2 or 41), the situation will drastically differ from one state to another. **Therefore, we agree with ERG that it will not be possible to adopt at European level one unique regulatory solution for NGA.**

4. Transparency: a key element for investments, innovation and competition

Metallic LLU as well as NGA roll-out represent huge investments for the sector. If incumbents must be allowed some kind of "*freedom*" to deploy their networks as ERG state, nevertheless it should be made clear that this "*freedom*" should in no way prevent alternative operators to deploy their own infrastructure and to be able progressively to climb, step by step, the ladder of investments.

That is why, **we request incumbents and NRAs to improve transparency regarding incumbents' plan to deploy NGA, as they may put at risk all investments made by the alternative operators**.

Transparency should apply at both levels:

- for the incumbent, to make it clear before implementation and under a reasonable delay to the NRA and to the sector what its plans are and what will be impacts thereof on its network and for the alternative operators;
- for the NRA, to communicate and discuss the way it will support NGA roll-out while ensuring that alternative operators' investments will not be sacrificed. In that sense, we strongly agree with ERG when they deem (page 26) that "*transparency in any decision to remove or modify regulated wholesale products, including suitable signalling of intent and a well defined migration path for operators and consumers using this product would be fundamental as predictability of regulatory intervention is key factor for operators when taking investment decision*".

Unfortunately, a good example of this lack of transparency is already given by annexes 1 and 2 of the ERG document. First, we regret that it is explicitly mentioned (page 53) that "*Belgacom has equipped 5203 streets cabinets with VDSL out of a total of +/- 26000 streets cabinets in Belgium. There is <u>no information (public or subject to NDA)</u> on which streets cabinets have been* equipped" (underlines added). Moreover, if it is explained on page 57 that Belgacom's main objective would be "[…] *not to replace all the existing network; at planned term PSTN/ISDN, ADSL and VDSL will coexist*", such an assertion does not give any guarantee to alternative operators.

Indeed, even if ADSL and VDSL are said to co-exist in Belgium, which would require confirmation by the incumbent and the NRA, there are many possibilities to do so. Therefore, **this does not preclude the possibility of the incumbent to close some MDFs and thus impact alternative operators' networks and investments.**

This risk has also been emphasized by Analysys in its report. It quoted that "*Accordingly, a new entrant intending to use LLU may be faced with a particular dilemma: investment in ADSL2+ and similar MDF-based technologies may be considered to be riskier in Belgium than in other countries because Belgacom has already deployed a superior technology and is in a position to very rapidly offer faster services (for example, it could match the price offered by the new entrant, but offer a higher speed).*
<u>Even if Belgacom chose not to compete on speed, it might in the future reengineer its network along the lines currently proposed by KPN in the Netherlands ('All-IP'), removing the MDFs and thereby making LLU unavailable</u>. The new entrant would then be forced to write off its MDF-based network investments and use a wholesale service offered by Belgacom, if such a service is indeed made available. <u>Whether the regulator could delay this occurrence, or ensure that the wholesale offer was sufficiently attractive, is a further unknown risk. This risk exists in many of the benchmarked countries (e.g. the Netherlands), but is highlighted in Belgium by the advanced state of Belgacom's VDSL deployment and uncertainties about whether VDSL-based bitstream services will become available</u>"[9] (underlines added).

Therefore, **we urge NRAs to ensure that relevant data are given to the entire sector under a reasonable delay and before implementation by the incumbent.**

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9 Analysys, Lot 2 – An analytic study of the results of Lot 1 showing the factors which explain broadband retail prices differences between countries, 22 march 2007, page 41

5. Other issues

Ducts sharing

Taking into account general competition law principles, we support ERG proposals to improve the regulatory framework in order to allow ducts sharing. At first, it appears useful to better understand and assess in each country who the ducts' owners are and which capacity is available. We would at NRAs' disposal to work and contribute to that report.

Similar rules could also apply to civil engineering and in-house wiring.