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## **IEN response to the 2nd public consultation on a revised draft Recommendation on regulated access to Next Generation Access networks**

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On June 12<sup>th</sup> the European Commission launched a revised draft Recommendation on regulated access to Next Generation Access networks for public consultation (“Recommendation”).

The Recommendation is based on the assumption that the EU single market for electronic communications services, and in particular the development of high-speed broadband services, 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. Therefore, the Recommendation aims to promote efficient investment and innovation in new and enhanced infrastructure, taking due account of the risks incurred by all investing undertakings and the need to maintain effective competition.

In this context guidance should be given to NRAs on the treatment of regulated access to NGAs, fragmentation of the internal market should be prevented, investment in NGAs should be incentivised, competition in the new environment should be fostered.

IEN is the trade association representing the largest pan-European telecommunications network operators in Germany, including BT, Cable &

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Wireless, Colt, Verizon Business, Orange Business and Airdata. All members are committed to long-term investments made in Germany and thus, share a common interest in fair investment conditions and in a level playing field across all Member States. For the reason of being pan-European providers of broadband products and services, IEN members are particularly dependent on access products complying with international standards. Most Members of IEN are providers of high quality business customer services (including public sector).

## **I. Executive Summary**

IEN generally welcomes that the Commission recognizes NGA as a key theme for the upcoming years. Indeed the operation of a detailed, consistent and harmonised regulatory framework for NGA by all NRAs in the EU is the only way to ensure a level playing field for competition in electronic communications markets. IEN however is concerned the EC's current approach might indeed lead to investment in NGA - but on the cost of maintaining effective competition. IEN is therefore highly emphatic about the necessity not to reduce regulatory intervention but to continue to foster competition by appropriate regulatory measures and thereby encouraging investment.

As a further overall statement, IEN considers that the Recommendation should duly take into account business customers' needs and as such, the different requirements and strategies of the respective service operators. The current recommendation merely focuses on residential consumers whereas business customers are disregarded. This approach is detrimental since operators' providing access to business customers are likely to provide positive incentives as regards competition and technological advances.

IEN especially questions the approach that is mandated by the Recommendation in Annex III. The Commission should carefully reconsider whether the criteria set out in Annex III are capable of fostering investments and innovations on the long run. It strikes the IEN that the EC is currently jeopardizing the effective principles of sector specific regulation in order to encourage rapid investments in NGA. These investments are only capable of serving the demands of providers for mass consumers, whereas, the needs of alternative operators are not taken into account. As a consequence the recommendation allows for temporary monopolies for the investor.

Whereas, IEN as a general rule welcomes the further deployment of NGA it has to be mentioned that this aim cannot be achieved on the cost of effective competition. Effective competition is key to substantive investments and innovations on the long run. By watering down the principles of sector specific regulation EC hazards the achievements of the FD and accepts the potential rise of new monopolies.

## **II. General Remarks**

### **1. Competition**

The aim of the Recommendation is to enhance legal certainty and to promote investment, competition and innovation with regard to NGA. IEN strongly appreciates any initiative that potentially fosters competition and innovation within the telecommunications sector. The deployment of NGA is certainly a major goal for many stakeholders. Nevertheless, the means to achieve this end deserve careful scrutiny in order to guarantee that all stakeholders may benefit from activities in this area. This may only be the case if regulatory approaches manage to strike a fair balance between encouraging investments and safeguarding effective competition.

IEN would like to stress that it is of crucial importance to increase the current level of competition since effective competition has not yet been achieved in many broadband wholesale markets. On the contrary, in Ger-

many as well as on European level the incumbents still have around 80% market share on the relevant market. It is not likely that these shares will change due to the deployment of NGA rather than the risk that incumbents may use their market power within one market in order to adversely affect competition in another market. At current state incumbents use their advantages and as such, demands from competitors for wholesale access on under fair conditions are refused. IEN would like to point out that the deployment of NGA is likely to further restrict competition since it potentially increases barrier to market entry. Moreover, it strikes the IEN that the EC recommendation fosters SMP operators as opposed to alternative operators since under certain circumstances the imposition of remedies on SMP operators is deferred.

In addition, IEN considers it as indispensable that the Recommendation always takes account of the fact that not only investment in infrastructures drive the development of the telecoms markets but also other forms of investment that rely on sufficient access and wholesale products. Especially in the sector of business customers investment in advanced communication services is impossible if access to the networks does not exist. In consequence, those business customers themselves would either refrain from choosing an area as a location for their enterprise or are hindered in increasing their own productivity to increase investments in other sectors. In this case, the multiplier effect of ICT on economic growth could not be accomplished and, as a result the EU's overall competitiveness will suffer .

## **2. Increasing focus on Business Customers**

IEN in general welcomes any approach that aims at enhancing substantial investments in NGA. The deployment of new technologies is key to achieving economic growth in the telecommunications sector. Therefore, IEN holds that apart from safeguarding current investments in alternative infrastructures, the EC should aim at encouraging reasonable investments in NGA. In this context IEN would like to point out that any attempt to encour-

age investments should be driven by the idea to make all stakeholders benefit on the long run. It strikes the IEN that the current recommendation emphasises too much on promoting consumers' interests, whereas, needs of business customers are degraded. In terms of investments the Recommendation aims at providing broadband access for all consumers while access to business-grade products is hardly mentioned.

Providers for business services need to fulfil nationwide or international connection and service requirements from their customers. The needs of business customers differ from those of residential customers especially in the demand for the seamless multi-side provision of services that include branch offices being located in small towns, home office workers as well as large office buildings in major towns. Furthermore, they require high qualities of service, dedicated symmetric connection services that allow high levels of security, variable traffic patterns and often an outsourced management of communications services. To achieve the requirements of those business customers especially with regard to multiple side customers, altnets face a lot of pressure for gaining access and appropriate wholesale products. Considering that only the incumbent has a nationwide infrastructure competitors are reliant upon regulated access. As such, they also could hardly participate in co-operations between national large scale operators. IEN considers it as essential, that market separations for those customer groups are taken into account.

### **3. Migration**

IEN welcomes the EC's approach on migration issues. IEN would like to highlight that migration and switching processes are key for the promotion of infrastructure competition. Without such migration processes, it is impossible for access seekers to climb the ladder of investment, which will significantly curtail the ability of new entrants to move towards the customer and thus increase their own value-add, while reducing usage of the incumbent's infrastructure. However IEN would suggest that the Recommendation

should emphasise the needs of transparency, effective supervision and prevent from double counting of costs.

IEN thus recommends the Recommendation should extend the assumption that such a migration process was likely to be necessary by a clear outline which products (LLU, SLU, QoS Bitstream, IP Bitstream, Wholesale Line Rental, DSL resale) were part of the investment ladder. Additionally, NRAs should provide details of how an acceptable migration process should look like, in particular which service breakdown periods would be acceptable. The EC should also define under which circumstance “national specialities” can and cannot prevent a migration and switching concept to be mandated. In this context, the Recommendation should make sure that a switching concept is mandated, unless there are tangible and objective reasons. The competitors should not be required to pay additional charges to resolve any operational activities related to the migration.

#### **4. Meet competition requirements as provided by the current regulatory framework**

Regulatory approaches taking into account the increased deployment of NGA are highly welcomed by IEN. We believe that the development of NGA has a great impact on the design of the market. Notwithstanding, having in mind that effective competition in many broadband wholesale markets has not yet been achieved, IEN questions the current regulatory approach mandated by the recommendation.

As mentioned above, the Recommendation allows to impose no obligations on an operator even if SMP is found. The IEN does not go along with any attempt that deviates from the principles laid down in the Framework Directive as long as no effective competition is reached. Regulation and the decision whether remedies should be imposed or not should only be based on the results of a market analysis procedure. As such, regulation could only be removed in case any market analysis gives proof that there is no market failures and a SMP operator does not exist. As long as SMP is found, this

indicates according to the FD that a level of effective competition is not yet achieved. The current draft Recommendation results in variations or exclusions from the actual regulatory principles that have proven their effectiveness on driving investment and competition. IEN opines that they are incompatible with the EC's own criteria for analysing markets under the Art. 7 process.

In this context IEN considers recital 44 of the Recommendation as fraught with problems for it foresees that under certain circumstances refraining from imposing an obligation of wholesale broadband access may result in better investment incentives for all operators and foster timely deployment. So called regulatory holidays as regards the wholesale broadband market are detrimental to effective competition and innovation since they prevent the incumbent from providing access to alternative technologies important for alternative operators.

IEN heavily criticises the approach to reward dominant operators that enter deals with other operators (see also below under *V. Annex III*). Such deals allow the incumbent to strengthen its market power by choosing partners that fit into their own strategy either needing a strong or a weak partner. IEN believes that such deals are inappropriate to provide legal certainty because of their most likely possible breach of antitrust rules. Therefore, NRAs would have many difficulties to assess these deals. As a result they do not increase incentives for investment. On a related note, IEN stresses that multi-operator deals might accomplish the intended goals of the EC but should also be subject to a detailed market analysis procedure that provides specific terms and conditions for such deals to prevent dominant positions.

IEN holds that non-discriminatory and fair access should be the main objective of any current regulatory approach in order to achieve effective competition on the long run and prevent incumbents from taking advantage of their dominant position. Regulatory responses in an NGA context should

not step behind the level reached by the FD in order to prevent the rise of new monopolies.

## **5. Margin Squeeze Tests**

The Recommendation includes a number of sections that propose margin squeeze tests to hamper anti-competitive behaviour. However, the Recommendation does not provide any further specifications how the test should be applied in a NGA context. IEN generally considers margin squeeze tests as a useful supplementary instrument to ex-ante regulation. IEN however doubts that margin squeeze tests as a single tool could alone be sufficient to ensure competition and to set access pricing for being generally used to reassess pricing consistencies set on a basis of either cost plus or retail minus. We take the view that these tests could not substitute an ex-ante price setting system that is based on the principles of non-discrimination and equivalence. With reference to the general application of margin squeeze tests ex-post after pricing complaints, delays in non-discriminatory price setting would be the consequence.

IEEN would therefore like to stress that cost-orientation principles should not be abandoned. A sole margin squeeze approach in relation with NGA needs at least specific guidelines about how the test should be applied. Otherwise IEN fears uncertainties for all market participants due to the unawareness of the regulated prices.

## **III. Consistent approach**

### **1. Harmonisation**

IEEN welcomes the EC's positive approach to achieve more legal certainty and a common approach amongst NRAs. A higher level of harmonisation amongst NRAs encourages new undertakings to operate in different EU countries and reduces market barriers. Especially providers connecting customers over different countries may benefit from regulatory approaches

that are not only applicable on a national level but focus on a harmonized level playing field.

IEN follows the EC's approach to demand for market reviews of markets 4 and 5 taking place in a coordinated and timely manner. IEN favours the parallel notification of market 4 and 5 in order to achieve further harmonisation. It has to be mentioned that there is no use of long time procedures not capable of taking due account of rapid technological advances.

Furthermore, IEN understands the EC demand as a support of the principles of the ladder of investment. It is essential for an overall market view to accept that competitors will only climb the next rung of the ladder if this is economically reasonable and they will rely on different products dependent to regions and other circumstances to offer their own products. Especially operators that provide services for business customers are often unable to climb the ladder outside specific regions. As such, IEN would like to ask the EC to emphasise the necessity of separate market examination and regulation for different business strategies as business customers require different offers and services. As an example, regarding the current discussion of deregulation in certain regions NRAs must always consider business models, that rely on nationwide harmonised market conditions to offer their services.

## **2. Extension of review periods**

As regards to the mandated extension of review periods in bullet 6 of the Recommendation, the EC should carefully consider what is meant by "appropriate review periods". In general IEN holds that longer review periods can only be mandated on a case by case basis. On the one hand longer review periods may duly take into account that it takes some time for regulatory methods to affect the market on the other hand longer periods restrain regulatory flexibility.

As an example, in Germany the analyses of the former market 12 (market 5) and the imposition of remedies including the reference offer on ATM Bitstream Access undertaken by the German NRA did take until August 2008 and as such, did not pay enough attention to the technological advance from ATM to Ethernet based Bitstream due to extended review periods. The rapid technological advance inherent to the telecommunication sector clearly demands for flexible regulatory responses in order to safeguard effective competition.

#### **IV. Wholesale broadband access (Market 5)**

##### **1. Increase focus on business customers requirements**

IEN highly appreciates that the EC encourages NRAs to mandate the provision of different wholesale products so as to enable alternative operators to compete effectively. The request for wholesale products depends on the incumbent's rollout strategy and there the incumbent will determine the implementation of wholesale access products. The EC should therefore provide clear guidelines which business-grade products should be made available to alternative operators.

Furthermore, IEN again underlines that the EC should duly take into account business customers' needs. The current recommendation merely focuses on residential consumers' needs whereas business customers are disregarded. This approach is detrimental since operators' providing access to business customers are likely to provide positive incentives as regards competition and technological advances.

As mentioned above, alternative operators that provide services for business customers rely on Bitstream Access in order to offer multi-sited high quality services. Business customers not only request end-to-end connectivity but offers which include a vast, often complex variety of services or applications that run over these customer specific networks. It is not uncommon that business customers outsource their entire telecommunication

needs and ask for managed network management, maintenance and service. Customers often purchase by tendering the services they require to the market. Operators then will put together and submit their individual bids, nationally or internationally. From an economic point of view it is rather reasonable for those network operators to gain access to the incumbent's network. Due to the needs of business customers alternative operators do not merely rely on access but additionally on the provision of high quality Ethernet based services. Simple resale products offered by the incumbent usually do not benefit the business customers' demands. Therefore, the Recommendation should be amended by provisions guaranteeing non-discriminatory access to QoS Bitstream.

## **2. Due regulation with regard to wholesale broadband access**

IEN highly appreciates that the EC defines wholesale broadband access over VDSL as a chain substitute to existing wholesale broadband access over copper-only loops. As a general rule broadband should be classified as an important enhancement of existing innovative markets based on alternative technologies. Therefore, no regulatory exceptions should apply to the provision of broadband access. The German market may exemplify why due regulation of this market is needed. In Germany there is no regulation with regard to VDSL based wholesale products. As a consequence no VDSL Bitstream product is available to alternative operators.

In order to promote alternative effective competition on the long run the EC should impose binding obligations on the SMP in order to guarantee alternative operators are provided with high quality (Ethernet-)Bitstream Access. The incumbent should remain subject to access obligations independent from the technology deployed. These obligations need to guarantee free non-discriminatory access without causing any distortion of competition.

IEN would also like to point out that the existing guidance on Broadband Access is fairly abstract. While this is in the nature of any ex-ante recommendation, it should be noted that the variation in implementation is caused

by a lack of precision in remedies decisions – in some member states such as Germany, remedies decisions tend not to deal with a great level of detail, pushing necessary specifications to disputes that are settled outside the remedies process. This has become a problem particularly in the broadband area, because the question whether a wholesale broadband product is a useful input for access seekers depends on a large amount of detail to be provided.

Therefore, the EC should aim to define a certain level of detail which ideally should be contained in the remedies decision. Regarding the wholesale broadband access markets, NRAs should be obliged to particularly define:

- how many interconnect points must be made available to access seekers (minimum and maximum number of interconnection points) and at which level (ATM, Ethernet, IP aggregation, IP concentration);
- which Quality of Service must be made available to access seekers (e. g. constant bit rate, real-time variable bit rate, unspecified bit rate);
- how the essential parameters of the links should look like (particularly latency, jitter, packet loss parameters); and
- which specification of the xDSL-based customer link must be offered (particularly which type of DSL and whether a ‘naked DSL’ type service must be made available).

## V. Annex I

### 1. Risk Premium

According to Annex I NRAs should assess whether the cost of capital should reflect the higher risk of investment relative to investment into current networks based on copper. Such a risk premium should serve to allocate the risk between investors and access seekers. IEN holds that a risk premium should merely provide an incentive to invest into new infrastructures, whereas, it should not be provided in any case where high invest-

ments are made. IEN shares the EC's point of view that the level of risk deserves to be determined on a case by case basis taking into account the actual risk borne by the investor.

IEN would like to highlight that investments in NGA are not necessarily connected to a higher risk as compared to investments in traditional networks. Only if there are risks that are specifically inherent to NGA risk premiums may be justified. Moreover, the investor is likely to benefit in terms of capital and operational expenditures reductions resulting from the deployment of NGA.

As a general rule IEN questions the lawfulness of risk premiums in the context of ex-ante pricing obligations. The implementation of risk premiums in the context of ex-post pricing obligations may only be lawful if the NRA is fully aware about the actual costs of the investor which will hardly be the case.

Assumptions made by the NRA are only reasonable if the incumbent is subject to obligations of transparency. Furthermore, the assumptions made for the costs and usage of NGA networks should be consistent with relevant assumptions for existing networks.

## **2. Term and Volume discounts**

As regards discounts, IEN would like to object against the proposal that incumbents should be permitted to offer term and volume discounts. IEN would like to stress that any volume and term discounts should meet with the obligations of granting competition and non-discrimination. Both, volume and term discounts are considered as critical for bearing the risk of discriminatory effects. Term discounts could give advantages to the incumbent by granting high cash flows and profits. Moreover, IEN regards the permissibility of such discounts as too early for the lack of equivalence. With regard to volume discounts the incumbent can benefit at the expense of its rivals by discriminating in the access conditions to prevent competi-

tors from achieving or retaining the necessary volumes to benefit from the discount arrangement. Additionally the cost savings associated with higher volumes for the competitors are nearly entirely related to overall scale and penetration achieved compared with expectations of total lines sold in the business plan. Therefore, mass market players would always benefit from such discounts whereas providers of more specialised services (e.g. business service providers) would hardly would have a chance to take a profit.

As such, to ensure that volume discounts would have no discriminatory effect and set pricing mechanisms compatible with overall 'penetration risk', the recommendation should clarify that such discounts should explicitly relate to the total (combined) penetration instead of being operator-specific. Moreover, volume discounts should reward only the risk/cost reduction associated with the effective quantity of fibre lines or Bitstream connections that are purchased and not be tied to any ex ante commitment.

Term discounts should only be permissible if they comply with effective competition and consider achievable market shares for the contract partners. In addition, it should avoid any double counting.

IEN strongly recommends that to ensure appropriate pricing and consistently treated all term discount contracts in involving SMP operators on markets 4 and 5 should be subject to notification to the NRA. It should also be reflected whether NRA decisions to approve such contracts should itself be required to be notified to the European Commission.

## **VI. Annex III:**

Having regard of Annex III of the Recommendation IEN would like to point out that there is a tendency to foster the deployment of NGA on the cost of effective sector specific regulation. Whereas it strikes the IEN that the EC is willing to deviate from the current principles laid down in Art. 14 of the Framework Directive (FD) in order to encourage operators' investments in

NGA, IEN is of the opinion that only effective competition may lead to sustainable investments and technological innovations.

IEN particularly does not see any justification for these considerations by political objectives or by the conclusions found by the European Council. Taking into account the draft provision of Art 8 para. 5 d FD, NRAs should ensure that

- Access obligations take into account the risk incurred by the investing undertaking;
- Various cooperative arrangements between investors and access seeking parties are permitted to diversify the risk of investment;
- Whilst ensuring that competition in the market and the principle of non-discrimination are preserved.

In view of IEN this does not justify the twofold foreseen deviation from the procedures laid down in the FD in Annex III: First, if a dominant operator grants at least one other operator equivalent access, or co-invests with this operator obligations of cost-orientation should not be justified despite an operator is found to have SMP (Annex III, (1)/rec 23, 24); second, irrespective of any outcome of a market analysis undertaken in accordance with the Framework Directive, an operator can be found to have no SMP if certain criteria are met (Annex III, (2)).

According to the wording of the draft Art. 8 para. 5 d FD, especially two operators co-operations should *only be permitted*. This however does not imply any further consequence than the view that co-operations could not be considered as generally illegal for possible breaches of antitrust rules. IEN would like to stress that such a wording cannot be interpreted as a need or an intention to encourage or reward such co-operations as well as not to deviate from the general market analysis process. IEN furthermore seriously doubts that co-operations could be linked to the mandatory access obligations in case of SMP. They can only be considered as voluntary 'ad-ons'. In contrast, competition must be *ensured* and the principle of non-

discrimination must be *preserved* as an overarching objective. This includes the application of the market analysis procedure that dictates the imposition of remedies if SMP is found.

As such, IEN holds that Annex III of the recommendation should be deleted in order to prevent the telecommunications sector from a major drawback as regards the level of competition achieved by the FD.

In case the EC does not refrain from limiting the scope of the FD, IEN would like to highlight the need to lay down precise conditions under which obligations on SMP operators are not justified. Furthermore, the EC then should enumerate reasonable circumstances in which SMP is not indicated. The current criteria are not capable of justifying the foreseen limitation of sector specific regulation.

### **1. Conditions under which cost-orientation is not justified**

In addition to Annex III (1), recitals 23 and 24 of the Recommendation advises to impose no obligations of cost-orientation in case an SMP operator “has deployed an FFTH network based on multiple fibre lines and has granted effective and fully equivalent access to at least one independent alternative provider (...)” or in case “the SMP operator has jointly with at least one other provider (...) deployed an FFTH network base on multiple fibre lines (...).

IEN as a - general rule - appreciates that the EC encourages co-operations amongst providers. On the one hand joint investments potentially increase the deployment of NGA by spreading the financial risks on more than one operator. On the other hand however, co-operations as foreseen in Annex III are bearing the risk that the investors jointly seek to abuse their strong position as opposed to other operators. Therefore, IEN recommends to delete all provisions that do provide strong incentives for the dominant operator to enter into an agreement with another operator. Co-operations may only be a legitimate mean to foster investments if they do not cause distur-

tions of competition. The criteria named in Annex III are not capable of foreclosing any distortion of effective competition caused by an joint agreement of two or more operators. In any case a joint deployment of multi fibre networks may not prevent an SMP operator from abusing its powers vis-à-vis alternative operators. The dominant operator can chose its partner according to the “fitting” into its own business strategies which naturally will differ from fostering competition and investment in the whole market.

Moreover, Annex III discriminates operators that are for various reasons unable to join any agreement of that form. The argument in this case cannot be that these operators should be encouraged by Annex III to make investments since it is not viable from an economic point of view for some operators to enlarge their own infrastructure. This mainly applies to providers of services for business customers as elaborated above.

It strikes IEN that Annex III gives great powers to the incumbent by restraining the obligations that could formerly exposed on the SMP operator. The restrictive approach that is hereafter mandated by Annex III (1) is inconsistent with the current ruling of the FD. According to the Directive the procedure of market analyses is key to achieving sustainable and effective competition. Moreover, if one operator or more operators are found to have SMP this indicates that there is no effective competition in the relevant market. The existence of SMP therefore enables the NRA as a general rule to impose specific obligations. The Recommendation softens this core principle of sector specific regulation since obligations are under certain conditions found to be unjustified, even if the operator is found to have SMP.

Moreover, it remains unclear how these criteria is in line with general considerations that would indicate a dominant position especially with focus in Art. 82 of the treaty. Such procedure as proposed in the Recommendation will lead to the opposite from what was intended to achieve: market uncertainties about the future treatment of proven market and competition principles.

With regard to the co-invest arrangements, Annex (1) defines further conditions that might be difficult to verify for the NRAs - in particular the questions whether co-investors have equivalent access or whether they offer the same terms and conditions to their competitors in the market. Considering the market analysis procedures, NRAs assess tangible criteria such as market shares or prices. In contrast, the co-invest arrangements need to be verified on whether their terms and conditions provide fairness which might be difficult as regards the most likely lack of information on underlying costs. As a consequence the NRAs (or national courts) would have to confirm unverifiable pre-judgements.

Additionally, IEN would like to point out that the criteria may also have adverse effects as regards the approval process foreseen by many member states' antitrust laws. The approval process will be unduly delayed in case the criteria in Annex III need to be taken into account by the national cartel authority. As a consequence operators may suffer from overlong administrative processes caused by imprecise regulatory guidelines.

As a consequence IEN fears that the criteria might have a damaging effect on the overall objectives to foster competition and investment whilst encouraging collusive duopolies.

## **2. Conditions under which the absence of SMP would normally be indicated**

IEN takes the view that Annex III (2) runs counter to the current Art. 14 para. 2 FD. The FD sets out the conditions under which SMP is indicated. Hereafter SMP is found if an undertaking "either individually or jointly enjoys a position equivalent to dominance". According to Annex III (2) SMP shall not be indicated, even if an operator enjoys a position equivalent to dominance, if there is a joint deployment of FTTH networks by several co-investors and certain conditions are met.

IEN would like to stress that the criteria named in Annex III (2) of the recommendation do not provide sufficient safeguards to foreclose a joint dominant position in market 5. Moreover, Annex II of the FD sets out certain criteria under which two or more undertakings can be found to be in a joint dominant position. Whereas, according to the FD, there are plenty of criteria that may indicate a joint dominant position, Annex III of the Recommendation names only a very few conditions under which SMP is not to be found. The Recommendation mainly demands for “equivalent and cost-oriented access to the joint infrastructure” for the co-investors whereas third parties are to be granted cost oriented access. The mere obligation to give cost-oriented access is not capable of providing alternative operators or new market players sufficient safeguards in order to effectively compete on the market. As a consequence Annex III allows for the rise of duopolies and harms competition.

Further on Annex III, (2) narrows the scope of Art. 7, para. 4 (b) FD It obviates the consolidation process in case SMP is found as a result of market analyses but it is not indicated according to the criteria named in Annex III. Hence, the Commission and other NRAs are no longer consulted even if the criteria of Art. 7 para 4 are met. As a result the national NRAs are likely to assess that the conditions of Annex III, (2) are met in order to circumvent the consolidation process.

IEN would like to recall that the EC has in a number of Art. 7 decisions rejected to assess SMP on criteria other than the once provided by the FD. The current Recommendation endangers the consequent approach formerly advocated by the Commission. Consequently, the effectiveness of sector specific regulation is at risk since operators will be exposed to legal uncertainty.

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