

## **Fastweb's response to the ERG public consultation on the Work Programme 2010**

Fastweb s.p.a. welcomes the opportunity to be consulted on the ERG/IRG draft work programme 2010 (WP2010).

Fastweb recognizes that the WP2010 will not necessarily be the final bylaw document for the future Body of European Regulators in Electronic Communications (BEREC), but it would like to emphasize the importance of the preliminary WP2010, and therefore submits its contribution to the public consultation. We consider it to be important that the ERG delivers solid results on important policy issues that help the new Commission and prove to be useful for challenging situations in the Member States.

Generally, we are pleased with the dedication of the national regulators to cover a broad range of issues in 2010. We consider it to be essential that these issues will be carried along and will not remain at theoretical level. As it is not foreseen, perhaps, a weighting of the topics is advisable in order to make sure that the most important matters are treated with special care. In order to best achieve this, more comprehensible timelines might be needed.

In addition to the indicated topics, we suggest that two significant issues be also addressed: *non-discrimination* and *fixed access costing methods in relation to investment incentives* for alternative operators<sup>1</sup>.

For Fastweb, the following issues are pursued with great attention: *Next Generation Networks regulation and the implementation*, *Regulatory Accounting* activities and the *Legislative Activities* related to the transformation period to the *BEREC*.

### **I. Next Generation Networks and Implementation Issues relation to the Commission's NGA Recommendation<sup>2</sup>**

The development of NGA networks is a priority for the European telecoms market but it is also fundamental that this does not undermine the objectives of electronic communications Framework, i.e. ensuring fair competition. Therefore it is vital that there are no developments that encourage incumbents to use the deployment of NGA networks to exploit their dominance on the access markets in order to strengthen their position on the wholesale and retail markets – or, to regain monopolistic positions. In Italy, this is potentially a serious risk, due to Telecom Italia's vertical integration and well-built market position. Said incentives are capable of enabling the incumbent to

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<sup>1</sup> Fastweb considers these issues to be particularly important in the light of the Italian incumbent's market status and continuing behaviour. Telecom Italia still has 98% market share in the wholesale broadband access network for LLU and 94% for the same market regarding bitstream services. In addition, the incumbent holds 61.3% of the broadband retail access market.

<sup>2</sup> Fastweb considers that the question of fixed access costing methods in relation to investment incentives for alternative operators is closely linked to this topic, therefore will deal with it accordingly.



exploit strong first mover's advantages to the detriment of its competitors, who still rely on access services<sup>3</sup>.

We broadly support ERG's criticism on some aspects of the Commission's NGA draft Recommendation, namely those potentially leading to anticompetitive duopolies or in any event artificially creating dangerous regulatory holidays (in as much as eliminating the need of a thorough market analysis before lifting regulation).

The investment in the deployment of NGA networks is of considerable importance. No investments – let it be funded privately or in the framework of private-public partnership agreements - should lead to closing out competing rivals. As regards the cooperative agreements – as they are currently proposed by the draft NGA Recommendation of the Commission -, Fastweb thinks that these agreements may exist but should not be a substitute for regulatory remedies, and should not legitimize any presumption of either the status of SMP or the need for other remedies (namely, cost-orientation), nor the lack of the relevant market analysis by the NRAs.

***We deem that ERG should continue to encourage a pro-competitive approach and should urge the new Commission to finalize as soon as possible its draft Recommendation, in order to grant legal certainty to all market players.***

We would like to emphasize that we support ERG's position regarding costing methodologies because we also believe that general upfront rules regarding e.g. the lifting of cost-orientation in traditional or fibre environment would actually be more damaging than supportive of competition in the field. As the ERG had already expressed, "... a basis for a consistent and coordinated regulatory approach ... should at this stage focus on the harmonisation of the principles of regulation rather than being overly prescriptive regarding the implementation of remedies such as pricing of ducts."<sup>4</sup>

***We would like to ask the ERG to further keep on advocating likewise. Best practices may also be identified across Europe regarding the unbundling of fibre.***

It is also of great importance that NGA network investments are not traded off with unjustified increase in access prices for traditional networks, i.e. incumbents should not be allowed to increase LLU prices on the copper networks, including for the purported reason of financing the development of NGA networks as this would not encourage competitive investments, but rather grant further privileges to existing SMP operators. Without accurate addressing of the problem, incumbents would undoubtedly also gain excessive returns on their legacy copper networks.

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<sup>3</sup> According to the latest COCOM data, Telecom Italia still holds more than 61% of the retail fixed BB access lines (more than 96% of the same market for DSL lines). Available at: [http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/broadband\\_access/Broadband\\_data\\_july\\_08.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/broadband_access/Broadband_data_july_08.pdf)

<sup>4</sup> I/ERG's answer to the Commission's consultation on NGAs, October 2008. Available at: [http://ec.europa.eu/information\\_society/policy/ecomm/doc/library/public\\_consult/nga/i\\_erg\\_oct2008.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/nga/i_erg_oct2008.pdf)



In particular, in the latest years and following a slight reduction trend, Italy has seen continuous increases of LLU and bitstream access fees relating to copper networks. As for LLU, this has caused Italy to become, from a best practice example, one of the main EU countries where LLU rates are higher (now ranking 14<sup>th</sup> in terms of level of LLU rates). The above wholesale pricing is coupled with a retail strategy based on the proposal of bundled offers for VoIP, Internet and TV services, with no access fees and the elimination of (or application of a very low) fee for TV services. As a result, the incumbent's competitors are squeezed out of the market, and the former is being able to regain positions on all relevant markets and in particular to pre-empt broadband markets.

These and other anticompetitive behaviours widely demonstrate that existing non-discrimination regulatory obligations are not effective, in Italy, to prevent the incumbents from benefitting from their vertical integration and large economies of scale, for the purposes of damaging competitors and, ultimately, consumers, which are also deprived of innovative services.

In the context of the NGA development, it is also essential that open access policies are pursued. Therefore, all appropriate access methods should be made available and incumbents should not be given the chance to try to circumvent the listed mandatory access tools in order to come up with unreasonable access conditions for rivals.

***The ERG should further examine the possibilities to set durable and fair access prices for NGA environments across Europe. The follow-up action on Bill and Keep methodologies are also required, especially in the light of the ongoing ERG public consultation. Fastweb asks the ERG to place further emphasis on non-discrimination, perhaps measure this problem in working groups and issue guidelines for national regulators, identify best practices and, ultimately, assess the application of the pseudo-new remedy of functional separation provided by the Framework.***

## **II. Regulatory Accounting**

In order to create a single telecommunications market across Europe, we need a coherent approach by the NRA's regarding their regulatory accounting rules, especially in key wholesale access markets.

We appreciate the intention of ERG to acknowledge the most important parameters - different price control methods and modelling choices - that hamper pure harmonisation across NRA's in Europe. Today, as mentioned above, there is a strong need for accounting rules that ensure efficient and competitive access from incumbents' competitors across Europe. In particular, Fastweb would like to stress the importance that at the end of complete harmonization process, ERG will be able to enact guidelines necessary to push NRA's to introduce consistent regulatory accounting rules thus stimulating the creation of internal market.

In a particular way, we would like to provide some thoughts on how the envisaged reform of cost accounting methodologies across Europe may ensure that prices for wholesale services charged by



SMP operators be based on the principles of efficiency and true cost orientation, thereby bringing positive effects on competition, investments and consumer welfare.

Fastweb has constantly expressed concerns regarding costing methodologies used for regulating copper access products in Italy and across Europe. This is because, in the past years effective cost orientation and price control of wholesale access services have represented the most relevant tools to allow new entrants to climb the ladder of investments, in order to ensure infrastructure-based competition in the telecoms market and push operators to compete on quality of services, thereby triggering investments, growth and technological innovation. On the contrary, accounting methodologies, which do not efficiently reflect costs that have been actually borne by SMP operators, inevitably lead to excessive prices of LLU and wholesale services in general, thus seriously undermining Altnets' ability to compete.

Consequently, we would like to stress that pure harmonization of cost accounting methodologies across Europe will not *per se* result in more competitive prices. Even worse, in some cases a change of methodology (for instance from historical costs to LRIC) could even cause an increase of wholesale tariffs.

In this regard, we recognise the specific value of LRIC methodologies, specifically their capability of modelling costs that an efficient operator would face, eliminating inefficiencies and non pertinent costs. If properly applied, we believe that models of such kind could be extremely effective, as they would prevent incumbents from being compensated for costs, which have been incurred through inefficiencies - linked to the monopolistic context - or other factors.

For this purpose we would like to stress that any cost efficiencies gained through the LRIC methodologies would not offset increases determined by wrong hypothesis such as depreciation rules, allowable costs, substitution values.

We would like to remind that more than 90% of incumbent's access network are completely depreciated in Italy since TI's legacy network has been deployed about 40 years ago.

Finally, it would be suitable if any LRIC model for the copper access network takes into account the value of depreciated assets or maintains an historical cost approach for some cost elements (such as civil infrastructures and digging costs) as also recognised by the Commission itself in its NGA Recommendation, where it is clearly stated that "*access prices should capture the proper value of the infrastructure concerned, including its depreciation*" (Annex 1 §2).

With regard to pricing issues in relation to NGA wholesale products such as duct access and dark fibre the importance of a real cost orientation principle must be stressed in order to preserve investments and foster competition.

***The ERG would be welcomed to fabricate Europe-wide accounting rules so that the internal telecoms market can be truly single and operators have the same scrutiny everywhere.***



### **III. Challenges regarding the new institutional set-up and legislative changes as proposed by the Review**

Fastweb understands the novelty in setting up a new “independent expert advisory body” at community level, but we would also like to remind the ERG that this should be an internal matter and the transition of institutional appearance - from one system to another - in a greatly regulated industry might involve some danger if it is overemphasized. The technical details of the various markets, implementation of Common Positions, Regulatory Accounting and future challenges are as well important.

*Whilst agreeing with the ERG that this should be carefully handled, we kindly ask the group to dedicate supplementary attention to other policy issues, which concern more directly the telecoms markets and operators.*