

**Telecom Italia response to ERG Report on the regulation of access
products necessary to deliver business connectivity services
ERG (09) 51**

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Introduction

Telecom Italia welcomes the ERG invitation to express comments and views on the plans to follow described in the ERG Report on the regulation of access products necessary to deliver business connectivity services.

Our first comment is that, even though the Report is focused on the wholesale product dedicated to "multi-site business companies", the scope and target of the document is not totally understandable, especially in the definition of the "special needs" of the various companies *[Larger businesses tend to have more complex and sophisticated needs. But on the other hand, such needs are not limited to large companies. Smaller companies, especially those operating in certain industry sectors, may have very sophisticated needs [§ page 2 of the Report].*

In particular, on the grounds of the common principles of market definition which should be applied by NRAs we do not envisage the need to define a separate wholesale business market (or, some variety of "high-end business" market).

In addition, the Report itself seems to show a certain level of weakness in its practical application as, standing the current framework, the accountability for market definition and remedy application is strictly in charge of the single NRA. Such remedy application by NRAs, should be consequent to market failure evidence and we are of the opinion that the data showed in the Report do not justify the conclusion that some form of market failure is in place.

In any case, it is not easy to harmonise a wide set of remedies at European level, such as those mentioned in Annex 2 of the draft report.

Moreover, in some countries the NRA itself adopted measures to take into account the internal geographic segmentation of the markets to gradually reduce the regulatory obligations, as competition can assume a local dimension, for example in high density population areas or commercial and financial districts.

Finally, negotiations regarding multinational carrier "high-end segment" services are normally dealt with on a commercial basis, and they regard tailored solutions characterised by a high competitive rate of choice. Consequently, in our opinion the reason why ERG is wondering whether such a market segment should be further regulated is unclear.

Market definition

According to the Framework Directive, the European Commission must identify a list of relevant markets whose features may be such as to justify the imposition of regulatory obligations.

In 2007, the Commission revised the relevant markets list of product and service, reducing the set from the initial 18 to 7 markets.

The aim of the Commission was consistent with the regulatory framework's objectives, i.e. to gradually reduce ex-ante sector specific rules as competition in the market develops.

In this framework, national regulatory authorities can assess whether, on the basis of national circumstances, a market not included in the Recommendation might be deemed susceptible to ex ante regulation, should the three cumulative criteria, referred to in the "Guidelines for market analysis and the assessment of significant market power" be met.

We do not see any need to assess at this stage, as implicitly proposed by ERG, the appropriateness of the existing EC Recommendation on Relevant markets: ultimately, the definition of a separate

wholesale business market, if any, shall be investigated by NRAs at the national level.

We also note that the definition of an additional wholesale market at the European level would not be consistent with the process of gradual reduction of ex-ante rules.

However, we also note that the ERG consultation paper seems to be contradictory since it is also claimed that the definition of a separate business market is not envisaged:

“even though most NRAs conducted a differentiated analysis of customer groups, most came to the conclusion that separate business and user markets should not be defined. It shows that the line between residential and business customers is very thin, especially when it comes to differentiating residential users from small companies...But in any case, separating an individual market for large businesses in itself does not say very much about the state of competition in the market for these services” [§ page 9 of the Report]

We basically agree with this conclusion taking into account that there is not a clear-cut evidence of a market failure in the offer of tailored services for business companies.

At the same time, we would like to recall that, should a competition problem be assessed and new tailored remedies proposed, those remedies should be justified taking into account:

- the nature of the identified market failure;
- the possibility to envisage a model of intervention based on symmetric regulation, as provided by art. 5 of Access Directive.

Potential Competition and Regulatory Problems

With regards to the categories of competition and regulatory problems that, hypothetically, could affect high-end businesses, the ERG Report identifies some critical issues.

As far as the NGAN capabilities mentioned by ERG are concerned, we remind that, regarding next generation access networks, a wide debate is taking place at European level, and the EC itself proposed a draft Recommendation on this specific issue, so we deem that to deal with any NGAN aspect before a common European view is in place may result “asynchronous”.

Consequently, we think that the categories set out by ERG should be limited to legacy networks.

Furthermore, in our opinion, any problem stated by ERG in its report is already managed and possibly solved by NRAs via the market analysis procedures already in place, aimed to the management of specific types of service and to give the market a competitive environment and development, in accordance with the national and European Framework.

Single bottleneck infrastructure

According to ERG, this issue would arise where specific wholesale network services are unregulated and the owner of the relevant infrastructure chooses not to make them available to others.

First of all, if the case is referred to an NGAN environment, as already stated above, this should be out of the scope of the Report.

Secondly, all the aspects analysed by ERG can be included in the set of competition problems arising in the context of vertical leveraging, where a dominant firm’s practice denies proper access to an essential input extending monopoly power from one segment of the market (the bottleneck segment) to the other (the potentially competitive segment).

In particular, problems arise when a firm, operating in two vertically related markets and having SMP in the upstream market, unfairly strengthen its position in the downstream market applying strategies such as refusal to deal, denial of access, leveraging by means of pricing or non-price variables.

All these specific competition problems are extensively dealt with by all NRAs, according to the European Regulatory Framework, so in our opinion the national Regulatory Authorities provisions should be sufficient to avoid competition failures in the downstream markets in which incumbent operate.

TI also points out that an SMP operator should not be obliged to provide services at wholesale level in order to allow other operators to offer specific retail services, in case the SMP operator does not compete in the provisioning of those retail services.

As a direct consequence of the regulatory European policies, a wholesale SMP player may be required to deliver wholesale services only if such services are essential to compete in a downstream market where the player itself operates. Accordingly, if the ERG is indeed also considering the obligation of delivering wholesale services not provided internally, we think that the matter should be treated in a more transparent manner, e.g., by means of an additional specific public consultation.

Furthermore, we believe that the network separation from service provision (i.e. local loop unbundling or terminating segment of leased lines) and the interconnection obligation are sufficient remedies to allow other operators to provide, for example, business grade XDSL based services.

TI also stresses that a voluntary commitment by operators to improve the service provision network operational separation can reach better goals with regards to competitive matters than generic obligations.

Multiple infrastructures

Where there is more than one infrastructure, the ERG itself concludes in its draft Report that competition problems should be less visible, if not disappear completely, and that NRAs would not be allowed much discretionary power under the current framework.

Telecom Italia is of the opinion that in a multiple infrastructure scenario it is highly probable that a retail competition is already in place, so the removal of wholesale obligations should be a direct application of the Regulatory Framework. In this case, the existing wholesale obligations are a sufficient remedy to allow other operators to acquire intermediate or wholesale infrastructure to provide retail services.

Evidence

The ERG assessment shows no conclusive finding of a lack of effective competition in the relevant market segments on the basis of the existing regulation [*§ page 14 of the Report*].

ERG reports that in the past market review the majority of NRAs did not have to deal with any complaints regarding the provision of business services and that the relevant segments show no significant competition problems across the internal market [*§ page 7 of the report*].

Furthermore, ERG concludes that judging from disputes in the market “*there does not seem to be a pressing or strong demand by users or operators*” for segmenting different markets in the area under review [*§ page 8 of the Report*].

Telecom Italia is of the opinion that the added value that a multinational operator can provide to a multinational customer consists in managing the different wholesale commercial solutions that are in place in the different countries to build a global solution that allow customers to access communication

services regardless of the country in which the single site is located.

Many detailed elements are successfully and efficiently covered by the market parties' contractual agreements. Companies are willing to pay higher prices for dedicated SLAs for business customers. So if there is demand for such dedicated SLAs, network operators will generally offer these services in order to get higher wholesale payments. This is a typical market-driven mechanism.

At the same time, Network operators have the utmost interest to set reasonable key performance indicators (KPIs) and publish their performance in order to gain the trust of key customers about the service levels that their networks can actually deliver.

Consequently, an intervention by ERG aimed to push NRAs to improve competition in a niche market like multinational businesses characterized by natural competitive dynamics does not appear to be really justified.

So, even if we appreciate that the competition environment of niche markets like multi-large businesses is addressed by ERG, we think that the data collection performed cannot allow ERG to give any evaluation on the definition and identification of national relevant markets, and recommend the definition of a separate market.