

Bruxelles, 7 novembre 2008

Oggetto: DRAFT per risposta alla consultazione ERG sul Work Programme ERG 2009

Telecom Italia welcomes the opportunity to contribute to the present consultation.

The Draft I/ERG Work Programme 2009 is focused on the following priority areas:

1. Framework Review
2. NGN/NGA evolution – including IP interconnection issues
3. Dynamic and differentiated regulation – a miscellanea of areas on interventions linked with the NGN evolution and the issue of convergence

Telecom Italia is of the opinion that the items listed in the draft work programme 2009 are exhaustive of the ongoing market changes; nevertheless we regret the fact that only in a few cases a public consultation is foreseen, leaving the stakeholders with few chances to express their positions even with relation to important subject such as functional separation.

1. The Framework Review

1.1. Harmonization on remedies and the institutional design “of the ERG’s successor Group”

For the revision of Framework directive the WP appears committed to intervene on very sensitive issues linked with harmonization and the implementation of art. 7.

As far as the new institutional set up is concerned, the current status of the revision process is still uncertain and the evaluation of a I/ERG position paper should first verify the final decision adopted by Parliament second reading.

As far as harmonization is concerned, we think it would be important a transparent assessment of the implementation of this tool whose aim should be the promotion of best practices to the maximum extent possible.

The role of harmonization could have a significant impact in the interpretation of the new rules, also taking into account the revised institutional framework.

Also the fact that the WP envisages to focus its analysis on the revised set of remedies, with an explicit reference to functional separation, underlines the relevance of this item in the ERG Agenda and the need to foresee a public consultation.

The institutional final agreement between Council and Parliament on the burden of proof for the application of functional separation is still under assessment and the I/ERG planned

program of work should be tailored on the basis of the final decision from the Codecision process.

However we think that the **adoption of any deliverable related with harmonization should be foreseen only after an appropriate period of consultation.**

1.2. Analysis of the new content provisions and implications for regulation

As mentioned in the WP the outcome of the revision in relation with content issues is still uncertain. At this stage of the Review, the general principle that defines the scope of the framework within the objective to regulate electronic communications networks and services, and, with a lesser extent content issues, is still valid.

The scope of application of ex-ante regulatory intervention and the fact of envisaging an impact assessment needs to be clarified. Also the reference to an increased convergence should clarify the scope of the analysis proposed.

In principle, taking into account the uncertainty of the legal revision, and the fact that access to content is linked with the future development of our sector and its future possibilities of innovation, **a regulatory intervention on this field is envisaged as premature.**

2. Responding to emerging challenges in the market – “The NGN/NGA Evolution”

2.1. Next Generation Networks - how regulatory measures should be framed in order to provide the conditions for the development of NGA, while promoting both competition and efficient investment.

As far as NGA regulation is concerned the Review process and the Recommendation on NGA under consultation are discussing the objectives of the regulatory intervention in this field, as well as the scope of ex ante intervention.

The principles of graduation of remedies, the criteria for applying geographic segmentation, the “overlay” situation (fiber/copper network), the treatment of newly emerging markets, the in building wiring and the role of duct sharing are examples of sensitive topics under revision that needs in our view a specific consultation considering the rapid evolutions of the debate in the different European countries where these topics are under review.

The WP already envisages in its Agenda the application of the ladder of investment concept, a tool tailored for legacy investments, coupled with the indications to “preserve competitive conditions achieved to date”.

The conditions of application of the ladder for NGA access needs further assessment at political level.

At the same time the principle of gradation of remedies appears an important tool to ensure the proportionality of the regulatory intervention when new investments are concerned, but its interpretation and the conditions for its applications are still uncertain.

Gradation of remedies needs to be assessed in particular in relation with the conditions that the revised framework will envisage as far as duct sharing is concerned and in relation with the criteria of access to passive elements. Service-based competition (bitstream access over NGA) should be mandated only where physical access remedies cannot sufficiently address competition problems.

Finally, Telecom Italia is of the opinion that the gradation of remedies approach should be applied also to FTTN deployments considering that new investments in the NGA context are required in relation to the sub-loop unbundling and associated backhaul and co-location.

Thus Telecom Italia believes that the gradation of remedies shall be also addressed within the ERG 2009 agenda.

We support ERG understanding on the principles to be applied for pricing existing ducts, in particular in relation with the application of historic costs. Historic costs are a base of costs that is not in line with the current set of rules applied at cost accounting level, following the adoption of 2005 EU Recommendation on accounting separation and cost accounting

2.2. IP Interconnection and the Bill and keep workplan

Bill and keep appears to be a relevant item in the agenda for the year 2009: ERG appears committed to investigate the implications related with the application of this tool.

Nevertheless the WP appears to lack an in-depth assessment in relation with the market failure of the termination regime in force.

A costs and benefits analysis of the impact of closing down the current business model and the possibility to impose the new paradigm does not seem envisaged.

At the same time the current status of the Review does not seem to allow the imposition of bill and keep as a new remedy then, in our opinion, we do not deem it appropriate to make a consultation about an issue not yet included in the new framework.

It should also be underlined that the current regulatory model provides the horizontal principle of ensuring the possibility of recovery of the underlying costs in providing access to third parties.

2.2. Dynamic and differentiated regulation

Under this topic several initiatives are envisaged.

We focus our attention on the following ones:

- a) SMP evaluation
- b) Harmonization through implementation of best practices
- c) International Roaming
- d) Benchmarking activities

a) SMP

The WP is envisaging further analysis on markets 4 and 5 with a focus to margin squeeze issues.

As far as the SMP assessment is concerned the criteria of analysis should be based on competition law criteria, as envisaged by the Commission guidelines on this topic, making reference to Court of Justice practice.

Also **the fact that triple plays offers are under analysis in relation to margin squeeze issues requires more transparency on the scope of the intervention envisaged**, taking into account that the criteria of application for margin squeeze tests have their legal and economic justification in the ex-post regime.

b) Further harmonisation of the internal market

The Work Program is proposing to follow previous years' good practice and present its deliverables in the form of ERG Opinions, ERG Reports or ERG Common Positions.

In the area of ERG action of monitoring we agree with ERG that taking into account the importance of a consistent application of the revised framework with the objective of establishing the internal market, the monitoring assessment should be open to public consultation.

The Programme is focussing on the interpretation of a flexible application of the tool of differentiation of remedies in relation with geographic segmentation, as well as the implementation of roaming regulation: being flexibility a desirable objective to ensure proportionality, and "to maintain the balance between the 2 pillars of the regulatory framework, greater harmonization for the promotion of the single market and the flexibility of NRAs to take account of national circumstances", it is nevertheless important that consistent principles of application of the geographic segmentation tool are implemented.

In this sense eu guidelines on geographic segmentation and the implementation of roaming regulation aiming to ensure harmonization, should be appropriately defined on the basis of national circumstances.

c) International Roaming

Regarding the revision of the Roaming Regulation, Telecom Italia deems it appropriate for the ERG to conduct a **proper economic analysis** on the overall impact of the proposal, which should also take into account potential spill-over effects on national markets, but also to advice the European Institutions **on the technical feasibility of the proposed changes**.

d) Benchmarking activities

We support the continuation of the work regarding "Methodology proposal for comparison of broadband retail prices" requiring a complete transparency of the criteria chosen to adopt a specific measure.

Moreover, in **our opinion the stakeholders should have the possibility to express their views on this important topic.**

4. Consumer Empowerment

The consumer satisfaction and protection represents a competitive leeway for Operators to differentiate their offers in the market, therefore Telco Industry pays great attention to consumer protection issue also by way self regulation instruments (i.e code of conducts) .

As a matter of fact the deregulation of a retail markets (since removed from the list of relevant markets or since the market is deemed sufficiently competitive) reflects this situation. Therefore **it is the view of Telecom Italia that closer examinations of consumer protection issues from an ex-ante regulatory perspective should not be a priority.**