

***Telecom Italia response to Draft BEREC report on relevant
market definition for business services BoR (10) 46***

18 November 2010

Executive summary

Telecom Italia (TI) appreciates that BEREC followed-up a consultation on the issue of market definition for “high end” business services and agrees with the guidelines BEREC gives to inform specifically the NRA market definition for high end business services.

As to the retail level, we highlight that the Italian national regulatory authority (AGCom¹) identified in the second round of access market analysis two separate markets for residential and non residential customers, without analysing the possibility of a narrower market for high end business access services. However, AGCom defined different rules regarding the implementation of remedies (i.e. post notification instead of prior and different guidelines for the assessment of replicability) for access services offered in public competitive tenders and public procedures called by private customers for the service provider selection (hereinafter “tenders”) with respect to the other access services offered to residential and non residential customers.

We actually envisage the opportunity of identifying a separate narrower market limited to the access services offered in tenders. As regard the other access services provided to high end business customers (not through tenders) and to “small” business and residential customers, we deem that they represent a single market characterised by homogeneous competitive conditions and by an evidence of demand and supply side substitution.

The tender market, as recognised by AGCom too, presents specific competitive conditions and is certainly distinguished by a higher level of competition, therefore we believe that access services (stand-alone or bundled with other telecommunication services) offered in tenders represent a **separate market which is not susceptible anymore of ex ante regulation**. Only ex post replicability of tenders should be assessed in order to ensure the respect of the non discrimination obligation in the provision of the upstream wholesale SMP services.

Regarding the **wholesale level**, **we do not envisage the need to define a separate wholesale (“high end”) business market**, as already expressed in response to the previous ERG Report on the regulation of access products necessary to deliver business connectivity services². As a matter of fact, AGCom concluded its second round of market analysis identifying single wholesale access markets for the wholesale (physical) network infrastructure access (including shared or full unbundling access) at a fixed location (market 4) and the wholesale broadband

¹ Autorità per le Garanzie nelle Telecomunicazioni

² See ERG (09) 51

access (market 5), despite the identification of two separate markets at the retail level for residential and non residential customers.

The imposition of a wide range of remedies with detailed technical specification and service level requirements for TI's wholesale access services ensures that these wholesale services can be purchased by OLOs and by TI's Retail Operation for the provision of both tender and other retail customers offers. Moreover, TI's pro-competitive Undertakings ensure and strengthen the equivalence of service provision for TI's Retail Operations and the alternative operators (OLOs) and the effective respect of the non discrimination obligation.

Therefore, since for the formulation of offers in response to a tender TI's Retail Operation and OLOs can use the same wholesale inputs and SLAs under equivalent conditions, we deem that it is not necessary to impose on the SMP operator an obligation to provide new profile of service or higher SLA at wholesale level in order to allow OLOs to offer specific retail services, in case the SMP operator does not compete in the provision of those retail services.

As pointed out in response to the ERG Report cited, new and dedicated SLAs that OLOs would require (specifically for tenders) can be however successfully and efficiently covered by the market parties' contractual agreements. Companies are willing to pay higher prices for dedicated SLAs for business customers, therefore network operators will generally offer these services, where required, in order to get higher wholesale payments. This is a typical market-driven mechanism.

As to the **geographic market segmentation**, we deem that the wholesale broadband access market (market 5) should be segmented in order to reflect the different competitive conditions which characterise LLU areas (for the copper based WBA services) and the areas where an infrastructure-based competition is promoted by the development of NGAN and to differentiate the regulation accordingly.

This document provides TI's views regarding the topics analysed in the BEREC report and is structured in the following sections:

1. Background: national market analysis
2. Evidence on the retail access market definition
3. Evidence on the wholesale access market definition
4. Evidence on the geographic market definition

1. Background: national market analysis

AGCom concluded the second round of Italian market analysis for the wholesale and retail access at a fixed location markets.

It actually defined two separate **retail access markets**, without identifying a market for the high end business customers³:

- i) Access to the public telephone network at a fixed location for residential customers (market 1 / 2007 EC recommendation);
- ii) Access to the public telephone network at a fixed location for non residential customers (market 1 / 2007 EC recommendation);

AGCom justified the identification of these two separate markets as follows⁴:

*“Although, from a strictly functional point of view, the service can be the same for both types of customers, **the overall needs in terms of quality of service and assurance differ substantially moving from residential to non residential customers.** These different needs mean that operators tend to organize their offers according to the two different types of customers, that are served with different commercial and marketing policies, and thus with significantly different terms and conditions. In particular, sales and distribution channels that underlie the supply for residential and non residential customers are organised and managed differently. For example, most operators use different numbers for customer care services aimed at the two types of customers and provide additional services to non residential customers, such as a higher level of assurance, a provisioning coordination system, a dedicated sales channel. Note also that only a few of the major players (such as Fastweb, Wind, Tiscali) commercialise offers to both types of customers in Italy. The other operators are specialised to offer services exclusively to either non residential (BT and Colt Telecom Italy) or to residential customers (Tele 2). This scenario confirms the **existence of differences in technical and commercial service features offered to the two types of customers that do not allow an operator specialised in the sale to only one type of customers to offer its services - quickly and without incurring substantial investments – also to the other type of customers.**”*

In regard to the **wholesale access markets**, AGCom identified single markets for:

- 1) Wholesale (physical) network infrastructure access (including shared or full unbundling access) at a fixed location (market 4 /2007 EC recommendation);
- 2) Wholesale broadband access (market 5 /2007 EC recommendation).

³ See AGCom Decision no. 314/09/CONS

⁴ See par. 81, cited decision

Both retail and wholesale markets include access services provided on the copper, optic fibre or WLL (*wireless local loop*)⁵.

AGCom imposed detailed remedies regarding the provision of equivalent (or even better) assurance and provisioning SLAs and SLA plus to the ones ensured to TI's Retail Operation.

As regard specifically the WBA product, TI must offer: different access profiles, both ATM and Ethernet backhaul services with various class of services (ABR, VBR and CBR for ATM and Cos 1, 2 and 3 for Ethernet), different interconnection levels (at DSLAM, parent switch, distant switch or IP level) and multicast functionality.

2. Evidence on the retail access market definition

As highlighted in the BEREC draft report, we agree that the first step should be an assessment of the retail level.

With regard to the definition of the product market at retail level, **we deem that access products offered to (high end) business customers by means of tenders represent a separate market**. As regard the other access services provided to high end business customers not through tenders and to "small" business and residential customers, we deem that they represent a **single market** characterised by homogeneous competitive conditions and by an evidence of demand and supply side substitution.

The identification of a separate market for tenders is justified by the following evidences:

a) **There is not a demand side substitution** between offers in tenders and standard offers to the other customers (residential, small business and high end business not in tenders).

From our point of view, the factors BEREC calls for distinguishing the high end retail business services from the others at point no. 74 of the Report, in the Italian context can be actually attributed to high end retail business services offered through tenders and not to all the high end business services.

As a matter of fact, business customers who call for tenders usually:

- define all the service specifications and service level agreements they need;
- require higher SLAs, dedicated capacity and bespoke technical solutions;

⁵ In Italy, cable infrastructures have not been developed and Powerline Communication have not been commercialised after a trial phase.

- require fixed access services bundled with other services (e.g. fixed and mobile traffic and data services);
- have specific technical skills and capabilities regarding the telecommunication service management;
- can exert a countervailing market power;
- are multi-sited and often interested in the development of international communication services.

Also due to the presence of pluri-annual contract, it is therefore evident that customers who call for a tender are unwilling and unable to switch to other products and services in response to a SSNIP.

In the light of the above, we conclude that there is a strong evidence of a separate market for tenders from the demand side perspective.

b) **There is not a supply side substitution.** On the supply side, we deem that the operators who enter in tenders and provide telecommunication services in this context need to be structured and organised specifically for satisfying the customer requirements and efficiently manage the contract. They usually have a separated Division for the management of tenders and local staff for the direct relationship with the contracting customer, as generally highlighted by AGCom regarding the overall business access market.

Therefore, despite the availability of a wide range of wholesale inputs in terms of provisioning and assurance SLAs, technical profiles, level of quality offered at regulated prices, we deem that there is not a supply side substitution because an operator who offers services to business and residential customers not through tenders, needs a certain period of time and investments in order to organise its internal structure for the management of tender offers. On the contrary, we believe that such “organisational improvement” is not necessary for the provision of access services to high end business customers not by means of tenders.

In conclusion, the market of tenders, as recognised by AGCom too⁶, presents specific competitive conditions and is certainly distinguished by a higher level of competition. We believe that **fixed access services (stand-alone or bundled with other telecommunication services) offered through tenders represent a separate market which is not susceptible**

⁶ AGCom, in the assessment of the Intercent – Emilia Romagna tender, clarified that the case of tenders represents a special case different from that of generalised offers. In tenders, the contracting customer generally establishes: the quantity of services, the delivery period (usually pluri-annual), the service provision features (e.g. bundling of services or specific offer conditions), sometimes even the maximum price of the contract. Tenders represent a special situation, where demand conditions are clearly defined and actually impose some constraints to the strategies of suppliers in terms of quantity and price.

anymore of ex ante regulation. Only an ex post replicability of tenders should be assessed in order to ensure the respect of the non discrimination obligation in the provision of the upstream wholesale SMP services.

Italian current regulation⁷, despite a separate market for tenders is not identified, already provides for a different implementation of remedies with reference to tenders (i.e. post notification instead of prior notification obligation, different guidelines for the assessment of tender replicability with respect to the other TI's retail access offers).

3. Evidence on the wholesale access market definition

Despite the proposed identification of a separate retail market for tenders, we believe that at the wholesale level there is no need for a definition of separate (product) access markets. From our point of view there is in fact evidence of demand and supply side substitution among wholesale services used for the provision of retail services to all type of customers.

Regarding the **demand side substitution**, as pointed out in the above background section, we highlight that TI is currently obliged to offer wholesale products with standard and premium SLAs and a wide range of technical and quality profiles. AGCom has specifically required TI, together with the non discrimination and accounting separation remedies, to offer wholesale access services with equivalent (or even better) SLAs than those ensured to its Retail Operation and the same service specifications.

Furthermore, in Italy the pro-competitive Undertakings adopted by Telecom Italia⁸ and transformed into remedies (AGCom Decision no. 731/09/CONS) further support an effective "*Model of Equivalence*" based on the operational separation of *Open Access* from the TI's Retail Operations. Open Access is a "separate" business unit with its own staff, information systems and investment budget and the obligation of ensuring technical and economic equal treatment both to OLOs (through the Wholesale Division), and to TI's Retail Operations.

In particular, from 2010 TI has to apply the regulated wholesale price for the transfer charges between Open Access and TI's Retail Operations, to draw up separate accounts for Open Access and to publish "key performance indicators" for access service delivery and assurance.

In TI's point of view, therefore:

⁷ See AGCom Decision no.731/09/CONS on the definition of remedies for markets 1, 4 and 5 of the 2007 EC recommendation notified to the European Commission under cases IT/2009/0987/0988/0989

⁸ See AGCom Decision no.718/08/CONS

- there is evidence of demand side substitution, since wholesale access services currently provided by TI are suitable for Retail providers to serve both large customers who require sophisticated products through tenders and standard business and residential customers.
- The effective Italian model of equivalence ensures that for the formulation of offers (whether in tenders or not) TI's Retail Operation and OLOs can use the same wholesale inputs and SLAs, without better conditions or additional profiles provided for TI's Retail Operation only. In this respect, we deem that it is not necessary to impose on the SMP operator an obligation to provide new profile of service or higher SLA at wholesale level in order to allow OLOs to offer specific retail services, in case the SMP operator does not compete in the provisioning of those retail services.
- As pointed out in response to the ERG Report cited, new and dedicated SLAs required by OLOs (specifically for tenders) can be successfully and efficiently covered by the market parties' contractual agreements. Companies are willing to pay higher prices for dedicated SLAs for business customers. Therefore network operators will generally offer these services, where required, in order to get higher wholesale payments. This is a typical market-driven mechanism.

Regarding the analysis of the **supply side substitution**, we recognise that, as stated by BEREC, the underlying infrastructure is the same for all type of customers. We deem that any infrastructure operator could provide retail services also in the context of tenders through its own network or the availability of wholesale products without the need of relevant additional investment or long time to upgrade transport infrastructure in order to support the supply of services for tender customers.

The availability of Bitstream Access over the whole national territory and of Wholesale Line Rental (WLR) services in the geographic areas where unbundling services are not requested (MDF not open for the unbundling provision) avoid the possibility of a reduced supply side substitution.

In conclusion we deem that there is a supply side substitution between the supply of wholesale access services supporting tender offers and the supply of wholesale services supporting the other type of offers to business and residential customers.

Since there is evidence of demand and supply side substitution, we do not envisage the need to identify separate wholesale access markets for the provision of retail services in the context of tenders.

4. Evidence on the geographic market definition

We generally highlight that nowadays a significantly different level of competition can be observed in Italy between the "LLU areas"⁹ and the other areas (not LLU areas), especially in the broadband access services retail market (whether for residential or non residential customers). The different (not homogeneous) competitive conditions between LLU and not LLU areas should be reflected in the definition of the relevant wholesale broadband access geographic market, in order to allow, where appropriate and proportionate, a differentiation of regulatory obligations with lighter remedies in the LLU areas, which are characterised by a higher level of competition.

The expected development of NGAN for the provision of *ultra-broadband* services, which will interest specific geographic areas, should further support a geographical segmentation of the wholesale broadband access market in order to deregulate the geographic areas where effective infrastructure-based competition is promoted by the development of NGAN by the operators.

⁹ Areas where OLOs have activated LLU lines