

Draft Work Programme 2011 BEREC Board of Regulators

Comments by Telecom Italia

1st November 2010

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1. INTRODUCTION

TI welcomes the opportunity to express comments on the 2011 BEREC's draft Work Programme and appreciates the transparency approach adopted. The discussion, by means of public consultation (previously performed by ERG according to practice and at present by BEREC in compliance with Article 5 of the 1211/2009 Regulation), could engender positive effects on this outstanding topic.

In making our contribution to the BEREC's to-do list, we would like to underscore some key aspects and to draw attention on some moot and thorny issues.

Nevertheless, in this concise paper, we wish to mainly focus on NGA-related matters. At this stage, after the adoption of the Recommendation, considering as settled the regulatory scenario for NGA would give a wrong signal to foster new investments.

The implementation of the Commission's NGA Recommendation constitutes a veritable milestone in the FTTx/wireless networks deployment.

However, one should firmly bear in mind that a consistent implementation is needed and appropriate guidance by BEREC is required.

As far as implementation is concerned, we do reckon an overall execution of the 20 September Package (Broadband Communication, NGA Recommendation and to some extent, considering the approval process, RSPP Decision) fundamental.

Aiming at accomplishing the goals set out therein, one should constantly take into due consideration a paramount and all-encompassing tool: the Digital Agenda for Europe. That is and definitely will be in the future, along with its targets and follow-ups, a useful benchmark.

Likewise, sharing the BEREC's viewpoint, TI warmly supports a swift and compliant implementation of the 2009 Review of the EU Regulatory Framework for electronic communications, namely the amendments introduced by Directives 2009/140/EC and 2009/136/EC, and Regulation 1211/2009. In this regard, we share BEREC's ambition *"to continue to develop and disseminate among NRAs regulatory best practices on the implementation of the EU regulatory framework"*.

The momentous changes brought about by all these legal instruments, some binding acts other soft law documents, could definitely pave the path for the deployment of high speed networks and for a full coverage of broadband technologies.

2. SHARING OF BEREC'S SCHEDULE

Before highlighting and dwelling upon some NGA-related themes which we would like to propose, we wish to express our appreciation on some BEREC's proposals.

For instance, the general partition, envisaging a three-theme method, ("Improving harmonisation", "Emerging challenges" and "Set-up of BEREC and implementation of revised framework") is fully shared.

Furthermore, the multiannual approach for some qualified items seems to be functional and could adequately serve the purpose.

Among the goals set out in the draft WP, before shifting the spotlight on NGAN topics, we would like to briefly underline the prominence of a few.

Amid objectives listed in paragraph 3 (Improving harmonisation) of the draft WP, we consider crucial the development of consistent remedies, the correct transposition of Article 7a of the 2009 Framework Directive and the implementation of recommendations (with particular regard to the NGA Recommendation).

With reference to NGA, we support the examination of all the listed issues, namely co-investment of operators rolling out NGA networks, when to remedy fibre networks and on what level should access be offered, best practices for both passive and active remedies.

As to emerging challenges paragraph 4, we surely support the proposals put forward therein, namely promotion of Broadband, Network Neutrality and Spectrum management.

In particular we appreciate the recall of debates regarding the funding of networks and the inclusion/exclusion of broadband access in the USO.

In addition TI takes note of the assertion according to which *"BEREC believes that, at present, it would be premature to consider further intervention with respect to net neutrality on an EU level"*.

With regard to the implementation section (5), we do restate the necessity of a swift and consistent transposition of the 2009 Review of the Package on electronic communications.

3. PROPOSALS BY TELECOM ITALIA

At the outset, we would like to put forward a proposal with reference to a procedural matter mentioned in paragraph 3.2.3 of the BEREC's Work Programme. In order to provide stakeholders with valuable feedback, according to the welcomed transparency approach adopted, we think the work on how to best implement the NGA Recommendation, should be fulfilled by BEREC on a public stage, not with an internal document. Such a work could be shared with interested parties by means of public consultation or through specific Guidelines issued by BEREC itself.

In addition, as to procedure, TI believes it would be useful to maintain, within BEREC's WP, the ERG's summarizing scheme on each subject (e.g. 1. Deliverable, 2. Deadline, 3. Consultation).

We also deem that this public document on NGA policy implementation should ensure transparency on the relevant solutions of access policy adopted in each Member State.

In order to effectively measure best practices and the related outcomes in term of investments and competitiveness achieved, BEREC's Document should take into account, as examples: the symmetric regulation adopted for France, in comparison with VULA solutions in UK, or the impact of the scope of definition of market 4 and 5 in Germany, along with strict equivalence regulation in Italy for market 4 and 5.

Getting straight to the core issue of this document, we would like to point out some significant points related to the Next Generation Access Networks, not included at present in the draft WP. We hope the suggestions submitted could merge as insertions into the BEREC's final agenda.

3.1 Need for a geographic approach for NGAN

To start with, we want to underline the importance of the geographic approach in the transition from copper networks to fibre networks.

TI believes that the current guidelines on the geographic aspects of market analysis offer a suitable tool with regard to the existing copper markets. However, the emergence of NGAN does create new prospective market structures that, in turn, should be investigated by means of forward-looking approaches, aiming at identifying the existence of geographic market segmentation. Regulators should therefore address the geographical variation of remedies through completely different methodologies. TI deems that BEREC ought to provide further guidance on this fundamental issue.

Hence, a review of the 2008 ERG Common Position on Geographic Aspects of Market Analysis, in the light of the NGAN Recommendation and in compliance with the 2009 EC Guidelines on State Aid, is needed.

Moreover, new fibre networks could have a different topological structure in comparison with the copper ones. Consequently, TI deems necessary to linger on this aspect.

Besides, since the market of the services on fibre does not yet exist, the segmentation criteria should be developed in prospect.

3.2 Implementation of Risk Premium and Risk Sharing provisions

The NGA Recommendation takes account of new themes which we think should be introduced and emphasized in the BEREC's Work Programme 2011.

Firstly, TI welcomes the introduction in the text of the Recommendation of the Risk Premium provisions. In fact, it seems to be essential, after a due cost evaluation process, to acknowledge a "premium" to an operator engaged in an uncertain venture related to the deployment of high speed networks. Indeed, one should consider the risk incidental to the investment in NGAN.

In particular, point (25) of NGA Recommendation (as e.g. beforehand stated in Recitals 2, 18, 23, 37) sets out that *"NRAs should duly take into account additional and quantifiable investment risk incurred by the SMP operator when setting the price of access to the unbundled fibre loop. In principle, this risk should be reflected in a premium included in the cost of capital for the relevant investment"*. The specific criteria for such a scheme, laid down in Annex I, are mainly shared but we believe they should be further addressed.

Secondly, we would like to highlight the role of the Risk Sharing model in the deployment of next generation fibre networks. We think additional analysis should be carried out on the possibility of arrangements entered into by operators, aimed at diversifying the risk of deploying optical fibre networks.

We appreciate the insertion of the item of co-investment in the WP. A co-investment project, under which a group of operators invests jointly in NGA facilities using privately negotiated contracts, reduces the scale of the risk faced by each investor. This could encourage investment, and could also lead to competition, but we think that the terms the co-investment should be offered, are still to be dealt with.

3.3 Discussion on topics related to cost accounting and prices.

With regard to cost accounting, we urge to closely monitor the review of systems under the regulatory framework for electronic communications. The aim of such an expected revision should be to foster the application of consistent accounting principles and methodologies at EU level, taking into account the experience gained at the national level in the domain of cost accounting and accounting separation.

The application of the theory referring to "hypothetical efficiency" in order to evaluate network assets should be carefully assessed, taking into account that this exercise is highly discretionary and there is a risk of disharmonised approaches in term of criteria for setting cost oriented prices. The US experience with TELRIC for ULL pricing should be

considered to verify the more proportionate conditions for regulatory guidance on cost orientation.

As to prices, the NGA Recommendation provides for cost oriented wholesale pricing for SMP access providers, as to the offers related to new FTTH networks. We believe a deeper and thorough analysis should be conducted on what this means when considering FTTH investments.

Sticking to the point of prices, we think the topic related to the price tests for the services on fibre should be further addressed. According to point (27) of the NGA Recommendation *“NRAs should thus verify the SMP operator's pricing behaviour by applying a properly specified margin-squeeze test over an appropriate timeframe. NRAs should specify in advance the methodology they will follow for identifying the imputation test, the parameters for the margin-squeeze test and the remedial mechanisms in case of established margin-squeeze”*. In this regard, we call for a clear and advance definition of such a methodology and for an in-depth examination of the criteria illustrated in paragraphs 7 and 8 of Annex I.¹

3.4 Swift and consistent implementation of Article 12 of the revised Framework Directive

In conclusion, we would like to urge BEREC to play an active role in the implementation of the provisions regarding co-location and sharing of network elements and associated facilities for providers of electronic communications networks (Art. 12 FD, as amended in Better Regulation 2009/140/EC). In particular, we would appreciate a BEREC's monitoring activity on the correct transposition of the symmetric rules of access there envisaged, in order to fairly ensure and promote a sound competitive environment.

¹ Annex I of NGA Recommendation, Paragraph 7 on CRITERIA TO ASSESS LONG-TERM ACCESS PRICING IN CASE OF FTTH and 8 on 8. CRITERIA TO ASSESS VOLUME DISCOUNTS IN CASE OF FTTH.