contribution to the

BEREC Report on Co-Investment and SMP in NGA networks.

Accessible Version

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WIND company description

Founded in 1997, WIND Telecomunicazioni SpA is one of the few operators in Europe to offer integrated fixed and mobile telecommunication services and Internet services.

WIND is the third largest Italian mobile operator, with 20.8 million subscribers as of September 30, 2011.

WIND is also the leading alternative provider of fixed-line services in Italy with more than 3.09 million voice customers, of which 2.35 million direct subscribers, and 2.07 million broadband customers as of September 30, 2011.

WIND was the first Italian operator to launch MMS and video over GPRS handsets: one of the earliest services to be made available was the first ever pocket news broadcast via videostreaming. WIND was the first in Italy to launch a trading on line service via WAP. New technologies such as WAP and GPRS, UMTS, make a substantial contribution to the creation of new services and applications. WIND offers a particularly wide range of data transmission and Internet services, capable of satisfying the needs of all segments of the corporate market.

In February 2001, WIND became the first alternative operator of fixed-line telephony in Italy to provide access to local loop unbundling, offering the possibility to make fixed-line calls without the need to pay any form of line rental. WIND was the first Italian operator, in May 2002, to launch Number Portability, enabling customers to switch operator whilst keeping their existing telephone number.

In fixed-line telephony, WIND confirmed its status as the leading alternative to the former incumbent for the activation of a new telephone line. By directly choosing Infostrada as their operator, without involving Telecom, from November 2005 users have been able to set up a new line at a highly competitive price.

In 2006 WIND expanded its convergent fixed-Internet product offering, with the introduction of Libero Absolute ADSL, offering bundled domestic calls with only a call-set up charge and a broadband Internet connection for a flat monthly rate. In October 2005 WIND launched the ADSL2+ access network, a new technology offering a considerable increase in connection speed and quality and, consequently, a marked improvement in the fruition of services, especially of the multimedia type, such as audio and video applications.

The WIND Group has a best in class network: more than 21,000 kilometers of optical fibre backbone to 4,440 kilometers of MAN. The company also boasts an extensive and innovative mobile network consisting of more than 12,598 radio base stations and more than 9,000 Node B related to the UMTS coverage. Coverage outside Italy is provided by more than 450 roaming agreements.

Executive Summary

WIND welcomes the reporting activity performed by the BEREC offices on a issue deserving significant attention for its strategic role in promoting fibre roll out and reaching the DAE targets.

In the NGA recommendation, the EU Commission considered that NRAs would have to look particularly at NGA co-investment plans as they could – regionally – have an impact on competitive conditions, both at wholesale and retail level, potentially affect market definition (even on a geographic basis) and SMP identification.

Among the aspects analysed by BEREC in its report, it recognizes the need to evaluate carefully the **different role of co-investors** because their presence not always improve the competition level among subjects involved in the same market: simply refer to the case of co-investors that do not operate in TLC market, or refer also to some particular operators, not joining the Co-investment agreement, but that can influence deeply the behaviour of the co-investing entities, for example through [OMISSIS]

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Particular attention must be placed in providing guidelines to evaluate the role of public co-investors, even if operating in a MEIP (Market Equivalent Investor Principle) logic, granting that **appropriate level of transparency** and **non discrimination** are implemented from the very beginning of the co-investment project. An interesting reading is the paragraph related to the [OMISSIS] case in Italy.

Public entities intervention should, for their social nature, involve the adoption of future proof solutions aimed to grant in the easiest way the adoption of pro-competitive measures involving the choice of technical solution allowing effective fibre LLU provided in an open and non discriminatory way, i.e [OMISSIS] .

Moreover during the market analysis review process, **all the most relevant markets** should be evaluated <u>at the same time</u> by the NRA In order to proper address the overall competition level modifications (and hence SMP definition) and not only in one single market that, even if reasonably, could be considered the most relevant as it is the physical wholesale access (M4). This evaluation would also lead to properly assess the role of both direct and indirect constrains, related to the market power of an operator and safeguard the ladder of investments principle to enhance competition.

In this way, NRAs when performing their evaluations should start from an analysis of the retail markets and then move to analyse both [OMISSIS] wholesale markets.

Accordingly, in order to provide a coherent guidance to the NRAs, BEREC should timely issues an analogous report addressing the M5 aspects of co-investment.

The co-investment impacts on Market Analysis

The NGA Recommendation specifies that :

> "Arrangements for co-investment in FTTH based on multiple fibre lines may *in certain conditions* lead to a situation of effective competition in the geographic areas covered by the co-investment. These conditions relate in particular to the number of operators involved, the structure of the jointly controlled network and other arrangements between the co-investors which aim at ensuring effective competition on the downstream market. In such a situation, if competitive conditions in the areas concerned are substantially and objectively different from those prevailing elsewhere, this could justify the definition of a separate market where, after the market analysis according to Article 16 of Directive 2002/21/EC, no SMP is found." (recital 28).

It is clear that the point listed in recital 28 are *just examples,* not an exhaustive list, and that some more elements must be considered, being in certain cases even more relevant than those listed above.

BEREC should address a set of guidelines for NRA activities that must include also:

- a careful evaluation of the **nature of the different co-investors** besides the SMP operator, namely their nature as a public company or as a financial investor or even as a utility company, which can influence enormously the impacts on competition level, that is the main supposed outcome for co investment agreements;
- the needs to perform a competition level analysis **in all the different TLC markets**, both in the retail and wholesale markets for access, voice, broadband and terminating segments typically used for business services .
- introduction of [OMISSIS]
  should be [OMISSIS] , in order to avoid overestimate of the forward looking approach [OMISSIS] , and by the overall macroeconomic scenario that doesn't allow positive outlook for the few years usually targeted in the forward looking aspects of market analysis.
- Fixed access market should be considered [OMISSIS] .

Detailed obligations should be imposed in case which different technologies coexist in some areas, with the purpose of facilitating customer migration to the new upgraded infrastructure and avoiding stranded costs to Altnets in order to keep alive the on going process, increasing competition level;

- [OMISSIS] .
  This is due to the market power that the current SMP operator in copper network can exercise in driving the migration process from copper to fibre, a process that can be negatively affected also by the NGA wholesale set of offers made available to the Altnet operator, [OMISSIS] ;

- the same cautionary approach should be asked by BEREC to the NRAs when evaluating [OMISSIS]

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A careful evaluation of the SMP level modification introduced by a co-investment agreement must be performed to avoid that incentivizing NGA fiber network fast deploy, in order to reach DAE target, do not put at stake the safeguard for a competitive market, that after more than 10 years of liberalization still shows extremely significant high Incumbents market share.

BEREC clearly states that the report mainly **focus on market 4** as it is the market most immediately relevant to the current status of network deployment across Member States.

Wind believes that in a short term BEREC should assess even at least wholesale Broadband Access market (WBA - M5) or Terminating leased lines market for business customers.

The relevance of Wholesale Broadband Markets is paramount and cannot be left to a later stage because, even historically, WBA [OMISSIS]

increase the level of competition that the market has hardly reached.

Moreover during the market analysis review process, **all the most relevant markets** should be evaluated at the same time by the NRA In order to proper address the overall competition level modifications (and hence SMP definition) and not only in one single market that, even if reasonably, could be considered the most relevant as it is the physical wholesale access M4. This evaluation would also lead to properly assess the role of both direct and indirect constrains, related to the market power of an operator and safeguard the ladder of investments principle to enhance competition.

Elements to be examined in a co-investment scenario

Role of Operators outside the co-investment agreement

Even Co-investment arrangements that do not see the involvement of M4 and/or M5 SMP operator, (not addressed in the BEREC report), could modify the competitive playing field.

As a matter of fact it should be considered that in case that operators outside the scope of the co-investing agreement, are:

- the incumbent (that could act as an almost monopsonist), or
- another Altnet but with relevant market share [OMISSIS]

they can influence deeply the behaviour of the co-investing entity. for example [OMISSIS]

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According to the evolution of co-investment agreement, BEREC should also evaluate the needs to update the report according to the above scenario in order to provide NRAs with best practises and guidelines addressing also such cases.

Going back to the cases addressed in the BEREC report, that is focused on co-investment schemes whereby one of the parties of the co-investment is the operator designed as having SMP in markets 4 or 5 of the 2007 EC Recommendation on Relevant Markets, the following considerations applies to such a "standard" scenario.

One more point to be highlighted is that co-investment agreement **does not necessarily imply** [OMISSIS] .

It should be clearly stated that NRAs should evaluate on a case by case basis the needs for [OMISSIS] that currently seems to be limited to strong bottleneck cases, like the one related to the French model, the so called "building operator ".

Co-investors are not the same

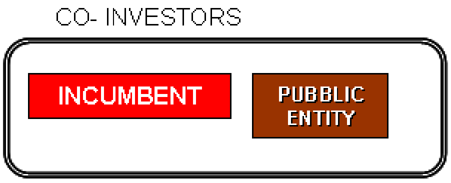
The BEREC report correctly address the issue of the different roles of possible co-investors and the different effects they produce, or potentially could produce, in the Telecommunication market.

To integrate such analysis Wind wants to highlight some points developed in its day by day activity.

Public entities

Co-investment agreements can see a public entity as a co-investors partner.

Even if State Aid or Service of general interest (SGEI) cases are out of the scope of the report, the case in which a public entity operate like a market investor (MEIP) has shown, in some cases, several criticalities.



Agreements involving public entities should be guided by a principle of transparency, ***more than in case of agreements that don't involve a public entity***.

Such transparency requirement is necessary to enable an external entity (i.e. a suitable Authority, according to the MS national legal framework) to properly evaluate, with appropriate procedures, if the co-investing agreement is *really* a MEIP operation or it could hide "state aids".

As an example we can report the [OMISSIS] case where the lack of transparency let Italian Altnet operators to rise some doubts about the features of the agreement that, if improperly implemented, could be configured as state aid.

[OMISSIS]

[OMISSIS]

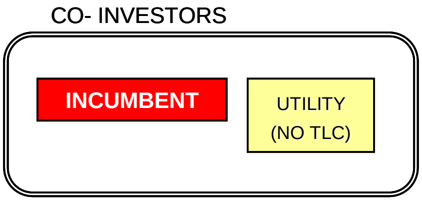
It is for the reasons above that Wind asks BEREC to advice NRAs

- to set up detailed rules of transparency for co-investment agreement involving a public entity and
- that evaluation of such agreements should be conducted through a public consultation involving all the relevant stakeholders, mainly the Altnet involved in the retail and wholesale related markets and the National Competition Authority.
- to define that co-investment project involving public entity **should adopt future proof technical solutions** [OMISSIS] **allowing** [OMISSIS] **non discriminatory conditions** in order to assure the longest life time to the investment, and maximizing overall social benefit.

Such statements are of paramount relevance in this starting phase for co-investment proceedings **in order to avoid dangerous precedents that if implicitly endorsed can hamper significantly the setting of a competitive NGA market**.

Utility entities

Co-investment agreements involving utilities company that **do not** operate in the TLC markets, (retail or wholesale), introduce further complexity in the evaluation of the competitive impacts of the agreement itself.



Theoretically, utility companies not present on the downstream market has a strong incentive to sell access at wholesale level to all access seekers in order to recover its sunk costs, but, on the other hand, [OMISSIS]

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Moreover Incumbent operator should also be inhibited to [OMISSIS]

to incumbent competitors.

The above points shows how the inclusion of a utility company, not competing in the downstream market, is not *per se* a condition that can grant positive impacts on competition, potentially increasing the SMP power of the incumbent, therefore requesting even more attention.

As in the previous case, when co-investment agreement involves companies not operating in the downstream market, Wind requests **BEREC to advice NRAs to introduce:**

- a <u>detailed set rules of transparency addressing in particular commercial relations between incumbent and utility company/ies,</u>
- a continuous monitoring of the wholesale offer conditions for ducts and pipes, which aim is to verify the onset of competitive conditions thorough a full independency of the wholesale offers of the co-investing partners;
- that any evaluation of such co-investment agreements should be conducted through <u>a public consultation involving all the relevant stakeholders,</u> mainly the Altnet which

are involved in the retail and wholesale related markets and the National Competition Authority.

Wind reaffirm that such a statements are of paramount relevance in this starting phase for co-investment proceedings in order to avoid the setting of precedents that, if implicitly endorsed, can hamper significantly the setting of a competitive NGA market.

Annex 3 : Italy Update

Information related to Italy updated according with the Delibera 1/12/CONS introducing NGA obligation.

(in red the added information)

[OMISSIS]