AIIP comments on "*Draft BEREC Report on the regulation of physical infrastructure access*" - BoR (24) 178

24 February 2025

Associazione Italiana Internet Provider ("AIIP") has been established in 1995 and represents more than 60 (sixty) Italian ECN/ECS providers, mainly SMEs and a couple of large ones.

Many of AIIP members are operators which install and deploy Very High-Capacity Networks ("VHCN"), with both fibre (FTTH) and wireless access (FWA) technologies. Over such networks, they provide Ultra-Broadband ("UBB") electronic communications services to their retail clients, as well as access to their infrastructures (to both to passive and active components), at wholesale terms and conditions, to other operators.

As "*BEREC's report is focused on the use of physical infrastructure access for the deployment of fixed very high-capacity networks*"[1], AIIP has an interest to participate to this public consultation as many of its associated operators install and provide to the public VHCNs and acknowledge that Physical Infrastructure Access ("PIA"), which is upstream to infrastructure sharing (and similar to the latter), is an efficient tool to develop VHCNs.

1. BEREC noted that "*The access to both telco and non-telco PI was available for the deployment of both fixed and mobile very high-capacity networks (VHCNs) in almost all the countries that contributed to this report (26 out of the 29)*" (Report, p. 3).

This is certainly an important objective achieved; however, to rely uncritically upon such statement might entail an approach of relaxation as to PIA obligations or to focus only on specific tools to introduce and maintain such PIA obligations.

However, **a further analysis is necessary for the most careful assessment of which tools to adopt, if any, and with which level of granularity/detail to proceed with PIA obligations**.

[1] Draft BEREC Report, p. 2.

2. **The ground for the introduction of PIA obligations is twofold, regulatory and legal** and the conditions for applications of each are different, the subjects which are affected are different and, as far as it also results from the Draft Report, they provide for different tools upon which to forge and vest such PIA obligations:

(i) arts. 68 and 72 of the European Electronic Communications Code (EECC)[2] introduce PIA as a possible regulatory measure. This presupposes an accurate market analysis, based upon competition criteria, to assess first whether on a given market there are electronic communications operators with SMP and, in such a case, to define the regulatory measures applicable to the SMP operator, among which, maybe (i.e., if proportionate, etc.) also PIA obligations. Such PIA obligations are also defined "asymmetric" as they are only applicable to SMP operators, if any.

(ii) art. 61, para. 3, and whereas 319 EECC, which grant to NRAs "*the possibility to extend the application of symmetric obligations beyond the first concentration or distribution point*". This provision empowers the NRAs to impose PIA upon all ECN/ECS operators. Such PIA obligations are also defined "Regulatory Symmetric" as they are applicable to all ECN/ECS operators, and have a regulatory nature.

(iii) Broadband Cost Reduction Directive ("BCRD") and Gigabit Infrastructure Act ("GIA"), which provide PIA obligations relating to physical infrastructure for incentivizing VHCNs rollout (this has also the derivate effect of ensuring network redundancy as well as network integrity) and applies to both telco and non-telco (and is not limited to operators designated with SMP), for the use of all network rollout.

3. BEREC Draft Report provides a detailed overview of NRA practices in different countries as to obligations to grant PIA.

However, the **Draft Report analysis is very much unbalanced towards "*Physical infrastructure access under ex ante market Assessments*"** (§§ 3-4 and 6.1) and the "*Remedies*" relating to PIA

[2] Directive 2018/1972/UE

applicable on SPM operators (§ 5), on the one side, and "*Regulatory measures relating to physical infrastructure access for incentivizing VHCNs rollout*" (§6.2), on the other side.

4. AIIP points out that **the introduction and maintenance of PIA obligations on the basis of imposition of asymmetric regulatory measures following to a market analysis is based upon a pillar, SPM, that may soon disappear form the market and render any such obligation no longer applicable**.

As a matter of fact, according to AIIP the ground for regulation, i.e., the existence of an ECS/ECN operator having SPM (i.e., dominant position), solely or collectively, on the market, introduced in 2002 by the New Framework Directive (Dir. 2002/21/EC) and maintained unchanged by the EECC, was an adequate tool at those early days, where on the market there was an incumbent and several competitors.

However, after a quarter of century, it has become obsolete, killed by the very principles underlying itself.

As a matter of fact, due to regulation interventions, the markets have become more competitive and, from monopolistic (or dominated by one firm), became in large part oligopolistic.

The broadband markets are going to have the more and more an oligopolistic structure with two-to-four nationwide (or local, according to the market) networks and appear to tend towards effective competition and therefore would not justify maintaining ex ante regulation.

Therefore, firms operating in a markedly oligopolistic market do not, by themselves, have a collective dominant position, but a careful, time consuming and uncertain economic analysis of the market is required by NRAs in order to decide whether to enact regulatory releases, both from a static standpoint relating to the markets structure and in a dynamic profile, in order to take into account both the reaction of potential competitors and consumers with respect to *tacit collusion* and the possibility of "retaliation" (and its effectiveness) against the firm deviating from *tacit collusion*.

Such an analysis, both because of its intrinsic difficulty (due to the huge number of variables to be analysed) and because of the discretion in assessing the conduct of oligopolists (a price reduction by an oligopolist in response to a previous reduction may constitute a retaliation, but may also be interpreted

as a sign of competition) is full of uncertainties and may lead to an erroneous conclusion as to the absence of SMP operators in an oligopolistic market and/or generate long litigation.

Under a forward-looking analysis it is clear the risk that the introduction and maintenance of PIA obligations on the basis of imposition of asymmetric regulatory measures might soon become no longer applicable.

As a matter of fact, SPM (which is the basis of any symmetric ex ante regulatory obligation) is a concept that might soon become no longer applicable in many ECN/ECS markets, for the reasons clarified at point 4 and could give rise to long litigations)

Therefore, according to AIIP, BEREC should point out to the NRAs (and to the European Commission) that more attention should be given to the symmetric regulation introduced by the BCRD (and, for the future, by GIA), to encourage greater use of existing PI, also by declining harmonised methods and procedure for applying such obligations (see point 6 for a more detailed view on the topic).

5. As stated by BEREC "*Being asked about the perspectives of PIA regulation and whether the GIA would be the right tool to solve competitive issues identified related to wholesale access, most of the respondents to this question (11 NRAs) consider that, for the time being,* ***the BCRD/GIA are deemed a complementary*** *or subsidiary* ***instrument to SMP regulation*** *(see tables AII.45 and AII.46).*

As the two set of provisions granting Physical Infrastructure Access provided for by EU law (PIA asymmetric regulation and PIA symmetric obligations under BCRD/GIA) are deemed as complementary (as they effectively are) according to AIIP it is very important that BEREC focuses on detailing and harmonizing the set of obligations to be applied to the entities controlling the specific infrastructures considered by BCRD/GIA.

6. Non-regulatory symmetric PIA obligations under BCRD/GIA may be imposed upon several subjects, also different from ECN/ECS operators, just due to their ownership of certain specific infrastructures rather than by their SMP (equivalent to dominant position).

AIIP underlines the need of PIA regulation, irrespective whether after an *ex-ante* market analysis or based upon BRCD/GIA, as PIA would ensure more efficiency and speed and a substantial reduction of installation costs as well as redundancy of electronic communications paths.

Therefore, according to AIIP, **BEREC should enhance, also by defining in more details, non-regulatory symmetric PIA obligations under BCRD/GIA** which, in order to be imposed, do not need time-consuming market analyses nor the unequivocal ascertainment of any dominant position.

6.1 As to the **infrastructures falling within the application of non-regulatory symmetric PIA obligation set forth by BCRD/GI**A, according to AIIP **all physical infrastructure suitable for fibre deployment should be considered a strategic priority and shall be subject to PIA obligations**.

In addition to traditional telecom infrastructures, it is essential to ensure effective access to decommissioned gas and water networks, public lighting poles, provincial and regional in-house company networks, third-party electricity infrastructures, and telecontrol system ducts of public or private entities. Moreover, all supporting structures, whether poles, conduits, or other pathways, that can accommodate fibre optic cables, regardless of their primary function, should be made accessible for broadband deployment. These infrastructures represent valuable assets for network expansion and must be fully integrated into regulatory frameworks to foster competition, cost reduction, and deployment efficiency.

6.2 As far as the specific provisions to be enacted and detailed as PIA obligations, in order to ensure effectivity to **non-regulatory symmetric PIA obligation set forth by BCRD/GI**A according to AIIP, the following should be considered:

- **disaggregated access** to PI, in order to minimize the extent of any installation works, and not only for environmental reasons but also to better pursue the aim of granting redundancy and resilience of electronic communications networks;
- **access to passive elements** of fixed ECN, if any, where no physical access to ducts or to infrastructure is not possible (e.g., due to technic reasons or saturation), in order to prevent inefficient or obnoxious to environment duplication of infrastructure, regulation should grant access to dark fibre;
- **transparency provisions** relating to infrastructure and contact points;

- as fa as **litigation** relating to non-regulatory symmetric PIA obligation set forth by BCRD/GIA according to AIIP it would be necessary to reduce the length of litigation procedures and the times for NRAs decisions. In addition, it would be **important to grant NRAs with adequate enforcement powers**, also as interim measures.

According to AIIP the lack of adequate and sufficiently detailed provisions relating to litigations on PIA obligation set forth by BCRD/GIA has entailed complete the reduced number of complaints by ECN/ECS Operators to which the Draft Report refers as follows:

"In terms of the number of complaints concerning access or the delivery of the SMP operator's PIA products received by NRAs in the last years, 5 NRAs reported none, 4 noted less than 5 and the remaining 3 said that they had received more than 5, with just one mentioning more than 10. When asked about the number of serious complaints made by the alternative operators, the registered numbers were lower, with 6 NRAs having reported less than 5 complaints and one having declared over ten" (p. 22)".

7. Finally, although BEREC stated that "*the current report has to be seen in the broader context of the work that the organization is doing, with primary reference … to … the BEREC Report on infrastructure sharing as a lever for ECN/ECS environmental sustainability*" [3] it did not collect any evidence within the topics of its questionnaire, in respect of the **benefits of PIA for ECN/ECS Environmental Sustainability**, which according to AIIP is strictly interconnected, as to these aspects, with the present one.

As a matter of fact, PIA (similarly to infrastructure sharing) would allow the following environmental benefits: (i) reduction in duplicative infrastructure; (ii) resource and building materials conservation; (iii) energy efficiency improvements and consequently (iv) reduction of CO_2 emissions (which would be concentrate dad limited to only one infrastructure) and other similar benefits such as (v) reduction of waste; etc..

[3] Consultation launched by BEREC on its "*Draft Report on Infrastructure Sharing as a lever for ECN/ECS Environmental Sustainability*"- BoR (24) 186, https://www.berec.europa.eu/en/all-documents/berec/reports/draft-report-on-infrastructure-sharing-as-a-lever-for-ecnecs-environmental-sustainability .

AIIP suggests that BEREC considers also PIA as a "*an instrument to reduce the environmental footprint of deployments and encourage increase network efficiency*"[4].

This is a further reason which supports the need to extend and favour as much as possible the PIA obligations with respect to the owner of certain specific infrastructure.

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Should you need any clarification on the above contribution, please do not hesitate to contact us at presidenza@aiip.it, segre@aiip.it and andrea.valli@vallimancuso.it

Kindest regards,

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[4] Consultation cited at fn. 3, p. 37