



Associazione Italiana Internet Provider

## AIIP comments on the

### ***“BEREC Common Position on best practice remedies on the market for wholesale broadband access (including bitstream access) imposed as a consequence of a position of significant market power in the relevant market (BoR 12-88)”***

AIIP (Italian Internet Service Providers Association) is a no-profit organization grouping more than 45 companies operating in the field of electronic communication services, new IP services and convergent Internet services.

The articles of incorporation of AIIP provides (article 1) that the objectives of the organization are, among other, “*spreading the use of the Internet, of its applications in every form*”, “*promoting an Internet services market also by removing barriers which prevent its growth*” and “*representing its members in front of authorities, organizations, institutions*” (see also [www.aiip.it](http://www.aiip.it) ).

Some of the operators associated to AIIP are installing their fiber optic infrastructure to access clients (for this purpose some of the associates have incorporated “FòS” S.p.A., a joint venture which has now an option to participate to a project in “Trentino”, one of the Italian Regions), are leasing access infrastructures from the incumbent (through ULL and shared access) and have realized broadband access networks also through wireless (e.g. through Hyperlan, WLL and Wi-Max) also in areas previously digital divided and subject to market failure as to broadband access.

However, all of AIIP associates do also compete with Telecom Italia (the Italian incumbent) especially by using its bitstream access services.

As a matter of fact, the operators associated to AIIP mainly offer their services to SME and SOHO (by satisfying their communication services and system integration needs) which are spread on the Country territory. Therefore, in order to meet the needs of their customers, such providers, are unlikely to have significant network scale (or economies of density) in any region comparable to the scale that a mass market consumer provider might have.

Although some associates to AIIP have invested along the “ladder of investments”, cost oriented *bitstream* access services are vital also for the most infrastructured operators, in order to supply SME and to progressively acquire a critical mass of clients under an area covered by the same node, so to achieve the minimum density economies necessary to recover the whole ladder of investment.

AIIP welcomes the opportunity of submitting to the BEREC its comments on the “*BEREC Common Position on best practice remedies on the market for wholesale broadband access (including bitstream access) imposed as a consequence of a position of significant market power in the relevant market*” and wishes to point out the following comments.

1. First of all, according to AIIP, BEREC should expressly consider specific measures aimed at ensuring the satisfaction of the above business users requirements and demand of communications services by expressly providing on any SMP operator an obligation to provide to in any case bitstream access services, cost oriented prices, neutrally and irrespectively of the access technology and infrastructure used.



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The need of wholesale access services, rather than infrastructures, is likely to become even more important with next generation access network environment, especially if the access products move closer to the customer premises.

As a matter of fact the economies of density relating to the provision of communications service to 100 customers under one and the same cabinet area rather different (and much higher) than those relating to providing service to 100 sites for one customer across 100 different cabinets. Of course, the per loop investment would be much higher in the latter case and, if no NGAN wholesale services at cost oriented prices is provided by SPM, the SME might not being offered the communication and integration services they demand, with a significant prejudice for the whole Member State economy.

It is therefore extremely important that BEREC, in assessing wholesale access remedies to be imposed upon SPM operators, also considers the specific needs of customers of business communications products and services and that requires NRAs to take specific account of these factors in their assessment of markets, in deciding whether or not an operator has SMP, and in the setting of and enforcement of remedies.

**BP1:** BEREC suggests that in assessing remedies for ensuring access “*NRAs should simultaneously look at access products in markets 4 and 5*”.

AIIP deems that the imposition of market 5 remedies should be based on a market analysis of market 5 competitive situation “stand alone”, rather than also on the (simultaneous) basis of market 4 developments.

As a matter of fact, the circumstance that several operators are using market 4 remedies does bear the necessary consequence that there is competition on market 5 (as in most cases ULL operators do not offer market 5 wholesale services) and at the same time several operators (including most AIIP companies) cannot take advantage of market 4 remedies since ULL requires a critical mass that cannot be reached by targeting the business customers market (which, as already clarified, is featured by significant density diseconomies).

However, focusing on the business market is often the only way to provide good services to that segment.

**BP2 - second bullet point:** according to AIIP, when analyzing the geographic dimension, actual competition in market 5 should be considered, not market 4, for the reasons explained above.

**BP2 - third bullet point:** in no way a service which consists of mere reselling SPM products or services may be considered as a wholesale access product or service such as to be a pro-competitive measure. This is clear is one considers that a resale product is a “turn key” service which, by this reason is not a wholesale service or product

As a matter of fact, a wholesale service should be sufficiently disaggregated so to allow competing operators to use, as much as possible, their own network and services. Any different measure of resale would vanish all investments made by competitors.

Italian Courts have clearly stated that a “resale” access service offered by the incumbent Telecom Italia could not be considered as a wholesale service (TAR Lazio, case 12517/06, AIIP vs. AGCOM and Telecom Italia, now final and binding).



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**BP2 - third bullet point, first indent:** Access points should always include regional ones, as operators catering to business customers do not have the critical mass needed to build networks with capillarity to the local level

**BP6: BEREC states that** *“NRAs should impose an obligation requiring that the bitstream access point can be reached with an appropriate remedy on regulated terms (although not necessarily covered by the same market review)”*.

According to AIIP it is necessary to need to clarify that the remedy shall be effectively defined (and available) to OLOs with (and under) the same market review.

**BP14:** functional separation, as implemented in Italy is not effective. There are several serious example of unequal access to the network that can be referred to: the most recent case relates to Italian Antitrust proceeding no. A-428, where it is evident that the functional separation does not prevent Telecom Italia from discriminating its competitors by using control of its access network and services. Due to the seriousness of the contested infringements, the undertakings proposed by Telecom Italia have been rejected by the Italian NAA.

**BP17:** The incumbent should take into account the need to provide market 5 services not only to its internal divisions but also to competitors when designing the network, the provisioning and assurance systems, and competitors should have a say in the design phase. This has not been so in Italy in the case of the Ethernet network that replaces the ATM BS network, and in fact and has been the subject of an ad hoc technical table held by the NRA that highlighted these problems.

**BP19:** According to AIIP, 6 months advance notice it is not sufficient time for a competitor operator to adapt to the incumbent roll out of NGA (as a matter of fact this is due to the minimum time required by SPM operator to supply the infrastructure and services which are necessary to a competing operator for accessing the NGAN).

**BP20:** Competitors should have input in the specifications of the assurance and provisioning systems that the incumbent will provide.

**BP34 and BP35:** according to AIIP the prices of market 5 wholesale access services should be defined according to a cost orientation principle further to a stand alone analysis which is carried out in a procedure to be kept autonomous from the pricing of market 4.

**BP36:** retail minus and price cap should be avoided at all costs since they would leave in the SPM undertakings extra-profits deriving from network and wholesale services thus also allowing the latter to cross-subsidize anti-competitive offers with a price squeeze effect on the market. In this regard, AIIP stresses that the right approach is the one contained in BP42e) .

**BP41:** AIIP strongly disagrees with the approach suggested by BEREC. As a matter of fact, an obligation on the SMP operator to provide cost oriented access services is necessary to allow communications operators already supplying SME in order to continue their activity which would be foreclosed in the event of lack of such measure since they would never reach the economies of density which are necessary to effectively benefit of the market 4 measures (see under point 1, above)



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**BP42g:** According to AIIP the price squeeze tests should consider all costs, including marketing sales and distribution as cost, and should also consider an adequate ROE to the equity holders of the competitor (in other words, should include a fair margin, else there would be no economic return to the competitor)

**BP43:** AIIP disagrees with BEREC statement that “*NRAs may therefore also need to take steps to ensure that the margin between the upstream and downstream services is sufficient to facilitate efficient investment of this nature. In principle, such controls could be imposed as a remedy to SMP in either market to achieve consistency along the ladder of investment*”.

As a matter of fact, no ex post intervention for no reason should be allowed once that a cost oriented price has been set for the wholesale access services to be provided by the SPM operator (under market 5) since any such an intervention would have the effect of an artificial discontinuity into the regulatory remedies with dramatic disruptive effects on the market for SMP competitors.

**BP 44:** disagrees with BEREC statement that “*NRAs should ensure that the pricing of NGA-bitstream products is consistent with the pricing of legacy bitstream products (copper) to set efficient incentives to invest*” and deems that it is very dangerous since it risks to produce severe inefficiencies by remunerating in excess of their right cost orientation bitstream services over NGAN.

AIIP agrees that investment in NGA networks is risky.

However, AIIP warns that the aim of adequately compensating investments in NGA networks should not be achieved by relaxing the regulation obligations: it would be very unwise to let the incumbent to “purchase” a monopoly rental through the investments on the NGA network.

According to AIIP, the reduction of uncertainties which may prevent the take off of NGA networks should be achieved exclusively:

- (i) by ensuring the right compensation to the NGA network investors through a reasonable return on the capital employed, by applying the correct WACC for such a risky activity;
- (ii) by stimulating the growth of new services to be offered on NGA networks.

In this case any relaxation of regulatory obligation would achieve an opposite aim, as it would rapidly push the service providers out of the market.

It should be remained that the latter were the innovating operators that, at the beginning of the liberalization, introduced new services based on IP (such as Internet access, e-mail, web-mail, VoIP), while the incumbents were still concentrated on the more lucrative traditional voice telephony (based on SS7).

Moreover, an approach based on releasing the regulatory obligations would be inconsistent with the European Directive 2002/21/EC, which requires that national regulatory authorities to encourage efficient infrastructure investment as a *means* of promoting competition, not as an end



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in itself, and would allow any amendment to the measures of regulation applied to the incumbent only after a market analysis procedure.

**BP47, BP 48, BP 49 and BP 50:** AIIP is very concerned by BEREC opening to the possibility by the NGA network operators to apply discounts to “long-term or large volume contracts”. According to AIIP, BEREC omits to consider that the typical clients of long-term and volume discounts from incumbents are necessarily their own business divisions or controlled o related parties, which are certainly captive clients not interested in purchasing NGA services(or any other network services) from the market.

From this point of view, to allow any NGA incumbent to make discounts for long-term or large volume contracts with its own business divisions or controlled o related parties would be tantamount to eliminate any non discrimination obligation on it.

Therefore, according to AIIP, volume / long term contract discounts should not be allowed for the above reasons.