

## **AIIP Comments on report on ERG best practices on regulatory regimes in wholesale unbundled access and bitstream access**

### **1. INTRODUCTION**

The *Associazione Italiana Internet Providers* (“AIIP”) is the largest Italian association of OAOs which are active in the fixed network communications services.

AIIP welcomes the opportunity to submit its comments on ERG report on best practices on regulatory regimes in wholesale unbundled access and bitstream access.

AIIP has appreciated the analysis carried out by ERG and agrees on the three main topics relating to wholesale offers (i.e: Quality of Service “QoS”; Products differentiation and Migration; Pricing) which have to face the regulators in order to ensure competitive market.

However, some remarks, especially as to pricing, are worth being carried out in order to enact the most efficient regulation and ensure effective competition in the provision of broadband electronic communications services.

### **2. QUALITY OF SERVICE (“QoS”) AND KEY PERFORMANCE INDICATORS (“KPI”)**

AIIP stresses that QoS, is an issue crucial for the development of new services such as videoconferencing and distance learning (whose diffusion also has positive effects for the environmental policy), IPTV (whose diffusion also has effects on media plurality), etc., which require a given and constant quality at affordable prices.

AIIP fully shares the arguments put forward by ERG with respect to QoS and the need to have “wholesale SLAs” with respect to “delivery time” (with shorter times than retail activation times) as well as to “delivery precision”. AIIP agrees that such “wholesale SLAs” have to be accompanied by increasing penalties, in order to ensure efficacy of SLA, necessary to ensure QoS.

AIIP shares the Key Performance Indicators on the items listed under Best Practice 4a, but stresses the need to have also indicators on QoS (e.g. as to the levels of the bandwidth supplied by incumbent to OAOs with WBA services as well as to the availability thereof, and controls on the effective compliance with non discrimination obligation in this regard).

As a matter of fact, the level of price varies according to the QoS supplied by incumbent. Of course, such controls should be random and continuous and on a periodical basis NRA should assess whether incumbent for WBA services should be adjusted consequently.

### **3. MASS MIGRATION TOWARDS PRODUCTS BASED ON DIFFERENT LAYERS**

As to **migration**, AIIP welcomes the statements by ERG on Bulk Migrations, which are definitely necessary to allow OAOs to switch their retail offers to a different (not necessarily higher) level of the ladder of investments with cut offs of their users reduced to minimum.

As a matter of fact, detailed provisions as to migration are necessary to prevent incumbents to exploit mass migration as a tool to raise rivals' costs by vanishing the latter possibility to recover their investments due to possible cut-offs of their customers.

AIIP welcomes an intervention of harmonization aimed at establishing the parameters for migration set forth by ERG as Best Practice under Best Practice 5.

In this respect AIIP highlights that special regard should be given on maximum cut-off time for users, which should be limited to three hours, but possibly on off-peak times (i.e late at nights) in order to minimize the effects of disruption of services.

Of course, the effectiveness of such KPI provisions should be ensured by adequate system of penalties.

### **4. PRICING – LADDER OF (EFFICIENT) INVESTMENT**

AIIP agrees that the pricing system should be aimed at ensuring the maximum efficiency on the market and the system as a whole and to allow OAOs to recover their investments.

Having this aim in mind, AIIP agrees that *“Prices of wholesale broadband offers are set to create incentives for both SMP player and new entrants to invest in broadband”* (ERG, pag. 25).

However, AIIP wishes this to happen in the most efficient way.

As we shall see the statement by ERG that *“The level at which prices of wholesale broadband offers are set, compared to each other and to the incumbent retail offers, should create incentives for new entrants to climb the ladder of investment”* may in no case deviate from the need of ensuring efficiency and an efficient system of pricing.

A system aimed at *“guarantee[ing] that the level at which prices of wholesale broadband offers are set, compared to each other and to the incumbent retail offers [and] creat[ing] sufficient economic spaces”* between WLA and WBA services, as suggested by ERG under Best Practices 10-11, has no value at all (and may also be detrimental for an efficient allocation of resources) if efficiency is not the main goal and if such system is not aimed at granting efficient allocation of resources.

The aim of regulator in setting prices for WLA and WBA services has not to be the creation or maintenance of a ladder of investments, whose stairs have to be artificially kept steep between each other<sup>1</sup>, but -first of all- ensuring efficiency.

In this regard, AIIP stresses the need to defy the myth that WBA should be secondary with respect to WLA and not necessarily priced at cost oriented conditions in order to preserve viability of WLA investments made by OAOs.

As a matter of fact, under Framework Directive (Dir. 2002/21/CE) the main policy objectives are *‘to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities .. by:*

- 1. Ensuring that users, including disabled users, derive **maximum benefit in terms of choice, price, and quality**;*
- 2. Ensuring that there is no distortion or restriction of competition in the electronic communications sector;*
- 3. Encouraging **efficient investment** in infrastructure, and promoting innovation [...]*

In addition, the Framework Directive provides for technological neutrality, which means that no external intervention (such as the one aimed at artificially keeping a ladder of investment with high stairs) should take place to favour WLA services with respect to WBA competing services.

As we shall see, a truly cost-plus wholesale bitstream offer is a necessary precondition to efficient ULL capital allocation, ensures maximum end-user benefit in terms of price and service availability, ensures competition and does not stifle innovation.

AIIP believes that setting bitstream wholesale prices above Cost-Plus would affect the above referred objectives: it would not encourage efficient investment and unduly starve of capital areas of digital divide.

As a matter of fact:

- setting WBA prices above their cost-plus would create an artificial “price umbrella” that makes it profitable to invest in DSLAM, colocation and backhauling infrastructure, even where the incumbent is already present with these same facilities;
- this would encourage multiple parallel investments (in DSLAMs, colocation and backhauling fiber) by OAOs in the “richest” markets and would divert capital investments in “poor” areas, where even the incumbent may not be present, and where

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<sup>1</sup> According to which it would be requested NRAs intervention in order to prevent a full enforcement of a cost-plus pricing policy for WBA in order to protect and encourage WLA.

real innovation may be truly required to assure coverage, exacerbating the digital divide between “rich” and “poor” areas;

- an incorrect price signal would therefore lead to investments not efficient (duplication) nor sustainable (based on artificial price umbrella);

Therefore, in order to avoid capital misallocation, WLA offers should go hand in hand with truly cost-plus WBA.

Moreover, another MYTH should be defied, that regulation should favor WLA over WBA in order to promote innovation and allow product differentiation.

As a matter of fact, in reality:

- copper based broadband services are based on standards (for example ADSL1, ADSL2+) because CPE and CO equipment must interoperate → No single player can ever hope to offer services that do not follow these standard → Very little room for innovation at this level;
- bandwidth differentiation can be easily achieved without direct access to the DSLAMs. As a matter of fact, with a cost-plus offer the access price is independent of speed → DSLAM ports can be configured at maximum speed → Customer specific Traffic shaping can be performed upstream, and with more flexibility than with direct DSLAM access so to enable to provide multiple CoS VCs to each end-customer and enabling the provision of VOIP, UMA, IP TV and other advanced applications over WBA.

In addition, in countries where no cable TV network is in place, WBA priced at cost oriented conditions would ensure the spreading of IPTV, thus ensuring plurality of TV information.

**Italy is the evidence that low WLA prices and high BWA prices do not allow to reach the objectives of the 2002 Regulatory Framework.** As a matter of fact:

- WLA prices are “among the lowest in Europe” and, according to Telecom Italia, “below cost”. Full ULL is available since 2000 and shared LLU since 2001.
- The BWA wholesale prices have been well above cost-plus for years, as exemplified by the significant difference between the great difference between historic Bitstream prices based on old retail-minus prices and the just approved cost-plus offer, with the following results:
  - broadband penetration is among the lowest in Europe<sup>2</sup>;

<sup>2</sup> <http://www.oecd.org/dataoecd/21/35/39574709.xls>

- broadband geographic coverage “*much lower than the European average, inadequate for the development of advanced applications*” (Viviane Reading to the Italian Senate, 2006). At the same time massive, Italy faces duplication of the incumbent DSLAM and backhauling infrastructure in the rich areas;
- end user prices significantly higher than in other major EC countries<sup>3</sup>;
- incumbent Telecom Italia has the highest retail broadband market share of any other major European country;
- Fastweb FDDH deployment halted;
- the incumbent has the opportunity to price squeeze competitors, discriminate and exclude as determined in several antitrust cases → non level playing field → competitive deficit (see TAR judgment of 26 November 2006 which annulled AGCOM authorization granted to Telecom Italia service named “Alice 20 Mega”);
- without a large diffusion of broadband access (which may be performed also by WBA) the incumbent Telecom Italia may leverage its dominant position from the broadband market to the IPTV market (mkt. 18), undermining the plurality of the future of Television.

**On the other hand, Denmark is the evidence that cost-plus bitstream pricing leads to world-class results and achievement of the objectives of the 2002 regulatory framework.** As a matter of fact:

- Of the countries, surveyed by AIIP, Denmark is the only that has in place a cost-plus Bitstream for the access component as well as ATM transport and IP transport<sup>4</sup>. The Bitstream prices are based on a bottom-up model of the incumbent’s costs that is publicly available on the NRA’s site<sup>5</sup>. These are the **Results in Denmark**:
  - Broadband **penetration highest in the world**<sup>6</sup>
  - End user **prices are the second lowest in the world**<sup>7</sup>
  - No lack of innovative services
  - Limited litigation.

<sup>3</sup> <http://www.altroconsumo.it/map/src/165033.html>

<sup>4</sup> Italy has launched a comparable offer just a couple of weeks ago.

<sup>5</sup> Portugal and Belgium have even lower bitstream access prices, but lack a cost-plus IP based transport cost-plus offer. On the other side, other countries such as Spain have notified the incumbent of market 12 SMP and mandated cost-plus bitstream pricing, but have not yet arrived at calculating costs, so bitstream prices are still retail-minus.

<sup>6</sup> <http://www.oecd.org/dataoecd/21/35/39574709.xls>

<sup>7</sup> <http://www.oecd.org/dataoecd/22/42/39574970.xls>



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ERG REPORT WLA/WBA 2008

## **5. CONCLUSION:**

AIIP encourages ERG to reconsider its position on WLA vs. WBA in the light of the foregoing, by applying a ladder if investment where no steps are “missing” or are too far from each other and where Bitstream and ULL should be available at cost-plus.

As above clarified, cost-plus bitstream offer is a precondition to assuring the efficient capital allocation to ULL. Skipping the bitstream “step” leads to sub optimal market results.

In addition, cost-plus orientation should be pursued also for the Bitstream Naked pricing in order to avoid market distortion and to avoid discrimination against users areas of low population density.

According to AIIP the public bottom-up costing model utilized in Denmark should be set as the best regulatory practice in determining Bitstream cost-plus prices.

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Rome, 25<sup>th</sup> January 2008

Best regards,

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