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"AIIP" VIEWS AND COMMENTS ON THE QUESTIONNAIRE FOR THE PUBLIC CONSULTATION ON THE REVISION OF THE RECOMMENDATION ON RELEVANT MARKETS

I. PURPOSE OF THE DOCUMENT. PRELIMINARY REMNARKS.

The appropriate identification of relevant markets susceptible of *ex ante* regulation is a key to the overall functioning of the EU Regulatory Framework.

According to Article 15.1 of the Framework Directive the Commission shall regularly review the Recommendation on relevant markets and the list of pre-identified relevant markets for *ex-ante* regulation.

I.1 In the current Recommendation the Commission seems to assess the effects of technological developments and convergence of products and markets as "*per se*" capable of promoting effective competition under an always potentially positive test, irrespective of certain features of the markets concerned which may suggest a quite different markets dynamic. As a matter of fact, the communications markets are featured by:

(a) ***high fixed costs and growing economies of scale***, which would give the biggest operator, usually the incumbent, a clear advantage in term of efficiency; this makes necessary, to ensure sustainable competition in the long run, that the efficiencies due to large volumes be shared with other competitors through wholesale offers.

This is relevant for:

(i) assessing the degree of competition in a given market, and dominance on such markets, as well as for

(ii) understanding that, since operators will have increasing marginal returns for each additional client added to their customer basis, they will be dramatically pushed to abuse their market power in order to maximize profits so that regulatory measures are necessary to prevent such scenario;

(b) ***large scope economies***, nowadays especially relevant as Internet Protocol is the "common factor" of voice and data (fixed and mobile) services, which are sold in bundled offers.

Bundle offers, on one side, allow to benefit of scope economies and are -in principle- efficient. However, on the other side, bundles may have a twofold negative effect for competition, since: (i) they would introduce high switching costs for operators and customers and (ii) may be exploited by integrated operators in fixed and mobile communications by offering retail bundled offers containing also services based on bottlenecks they own, without adequate wholesale offers (apt to replicate on technical terms and economic conditions such bundled offers).

Therefore, scope economies should be considered for assessing:

(i) the degree of competition in a given market, and dominance on such markets, as well as for

(ii) regulatory measures are necessary to prevent both such negative scenarios due to the possibility of bundled offers;

(c) ***density economies***, since the unit costs of the communications infrastructure and services decrease with the higher customer density.

This is relevant for:

(i) the purpose of market definition. As a matter of fact if a market is featured by a specific class of customers substantially different from others (such as business clients, which need a supplier with necessary resources and know-how to integrate their communications services and private network systems, and have several sites spread over the whole national territory to be served by the same supplier) the Commission and the NRAs should define such a market as a separate and relevant one; as well as

(ii) for defining regulatory measures, if dominance is ascertained, which are specifically relevant to "business" customers (such as *bitstream* access for business customers always overlapping with any existing physical regulatory measures such as ULL);

(d) ***direct and indirect network effects*** (both present in communications markets and, noteworthy for the technological developments of the market, simultaneously present in IP based services which are "two-sided" markets).

An economic analysis shows clearly that Internet is a two sided market, contemporarily featured by direct and indirect network effects, pursuant to which:

- customers are attracted by the access provider maximizing the services available on/through its network; such is the case where certain services (e.g. VoIP native and terminating communications, with video and IM) or certain contents (e.g., IPTV, videos) are available or may be benefited only through the access services offered by that operator (because of lack of standardisation for such services, now based upon proprietary protocols) or with better quality than the one perceived when having access with other operators;
- content and service providers are interested in offering contents to the largest customer basis and, in the event that the networks are not fully interoperable, through the services of the operator having the largest number of clients for access services.

As we shall see, this has the following main consequences:

(i) network effects may result in high and not transitory barriers to entry for newcomers, such to be considered when applying the first criteria of the "triple test";

(ii) the markets dynamic is not necessarily pro-competitive, but may rather be a concentrative one (this should be considered when applying the second criteria of the "triple test"). This is especially true as to the "perverse" dynamic of broadband access and IP services rendered and/or benefited through such access: as a matter of fact, by leveraging on either of them an operator may strengthening its market position on the other (in this regard, AIIP refers to the "*Rosso Alice*" case, which took place on the

Italian market and was dealt with by the European Commission - DGCOMP[1]);

(iii) *ex post* antitrust intervention is not adequate in networked markets since any amendment of the competitive position on such markets by the incumbent would have a structural and non restorable nature and could not be promptly faced nor resolved by applying fines: for the purpose of applying the third criteria of the "triple test" in such markets an *ex ante* intervention is of the essence.

Therefore, a careful economic analysis may reveal that technological developments (such as those relating to IP based applications and services and convergence between fixed and mobile networks and services) conceal a concentrative trend rather than a pro-competitive dynamic of the market and further deregulation may lead to fast (and non revertible) market concentration bringing back to monopoly, thus undermining the investments and efforts made since liberalization.

I.2 In addition to the above economic features, a relevant aspect to be considered for the purpose of the three criteria test is the ***lack of standardization of services based on IP*** *(e.g.: VoIP, OTT and other IP based services)*, which constitute a relevant barrier to entry in a downstream market and might be used to foreclose access (e.g., by refusing to provide any necessary information to ensure interoperability on retail services) and to strengthen dominance on an upstream wholesale (e.g., access) market. In addition, lack of standardization would allow incumbents to benefit of a first mover advantage which may not be easily overcome by competitors. It is also noteworthy that the lack of standardization of IP services might also prevent the development of the European internal market.

I.3 Eventually, the triple test should be applied also by having in mind the need to reach the ambitious ***Industrial Policy Aims of the Broadband Digital Agenda for Europe*** (DAE), according to which by 2020 there shall be 30 Mbps access coverage for all EU citizens and 50 % or more of EU households shall have access exceeding 100 Mbps.

Therefore, AIIP deems necessary that the Commission: (i) provides ANRs with specific guidelines for applying the triple test by taking into account the above points, based on an economic analysis of the electronic communications markets (see answers to questions 4 and 5), (ii) revises the scope definition of some identified market (see answer to questions 1 and 7) and (iii) revises the Recommendation by integrating it with the markets identified hereunder (see answers to questions 1, 11 and 13).

II. BACKGROUND

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[1] In the fairly recent past (2003), the European Commission had the chance to intervene in a claim filed by AIIP (COMP/C1/38807–*AIIP+6/Telecom Italia*) for certain practices aimed at creating a walled garden by Telecom Italia and at affecting network neutrality:

1. In June 2003 Telecom Italia integrated its Internet access services offered to the public with other innovative services/contents and thematic channels realized by the main Italian and foreign content providers (information, music, sport, games, etc.), accessible only from the web site "La Casa di Alice" –controlled by Telecom itself In practice, Telecom broadband access clients could access to sites/contents/services -located on TI Content Delivery Network-, to which they could get an easier access than to other sites/contents/services outside the Network. Furthermore, a large part of the contents available to Telecom BB access clients were garnet to Telecom under exclusivity, so that the user of another access service provider was be excluded from those contents. This encouraged the users to choose Telecom Italia access services.
   The represents TI's attempt to strengthen its dominance in the market of broadband Internet access based on xDSL technology, with the intent to monopolize the new markets of convergence.
   Thanks to the Commission moral suasion, Telecom Italia changed its own content distribution model in order to make them available also to clients of third parties operators.
2. In addition, Telecom also launched an IP video-communication service ("Telefono di Alice") reserved only to its Internet access clients without any interoperability with the competitors offers, so to further strengthen the network effects in its favour. At AIIP request to provide to the competitors all necessary technical information to grant full interoperability with competitor services, Telecom opposed a refusal and stopped marketing of the service, with detriment of consumers and technical progress.

In the light of the above, there is a strong evidence that the freedom of users to get access to services, content and applications of their choice, without undue discrimination (which is summarised in the concept of network neutrality), is more and more put at risk.

The current list of relevant markets

Retail level

1. Access to the public telephone network at a fixed location for residential and non-residential customers

Wholesale level

2. Call origination on the public telephone network provided at a fixed location
3. Call termination on individual public telephone networks provided at a fixed location
4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location
5. Wholesale broadband access, i.e. Bitstream access
6. Wholesale terminating segments of leased lines
7. Voice call termination on individual mobile networks.

III. MAIN ISSUES FOR CONSULTATION

III.1. Relevant technological and commercial trends including technological developments in the electronic communications sector that have an impact on the definition of the relevant markets, from an *ex ante* perspective.

Question 1: What are the technological developments in the electronic communications sector at the EU level as of 2007 that have an influence on how the markets should be defined in the revised Recommendation from an *ex ante* perspective?

1.1. The most relevant technological developments, which may affect markets definition, are the following:

(i) with regard to fixed networks and services:

a. the progressive replacement of the incumbents' copper network with Optic Fiber and the implementation of VDSL - vectoring;

b. Internet Protocol has emerged as the main protocol for both data and voice services;

(ii) with regard to mobile networks and services:

a. deployment of 4G LTE "all-IP" mobile technologies;

b. evolution of mobile handsets;

c. Internet Protocol has emerged as the main protocol for both data and voice services;

1.2. The replacement of copper network is a very slow process that started in the '80s with regard to the core part of the network and has gradually developed closer to end users premises. It is even not new with regard to access lines for specific business users. This process it is now simply more spread, involving local access, also driven by the ambitious aims laid down by the Digital Agenda for Europe.

Such gradual process should not affect the definition of markets 4 and 5 provided by the

Recommendation, which should remain technologically neutral with respect to the physical support (as any remedy such as wholesale offers) and be extended also to NGAN access either supplied through optic fiber or through vectoring implemented VDSL.

Access networks, regardless of their physical infrastructure, are an enduring bottleneck and have in general the features examined at the above preliminary remarks.

Gatekeepers of copper access networks may leverage their advantage also in the fiber network arena, as any analysis demonstrates that copper access network switch-off is a prerequisite for the financial sustainability of FTTH investments. As a matter of fact, since copper switch-off cannot be mandated by NRAs or governments (as it would be seen akin to expropriation), only operators owning existing copper networks can implement extensive FTTH deployments. Asking regulatory holidays for FTTH investment is not only unjustified, but would take competition backward.

The concern in this context should rather be to ensure that market definitions and associated remedies are technologically neutral so that regulation does not lag market developments.

The Commission has already underlined that migration to NGA should not mean deregulation as it is important to prevent incumbents from taking advantage of the process (*i.e.* by foreclosing access to competitors and/or delaying wholesale offers or by raising rivals costs and/or imposing to their competitors margin squeeze practices on NGAN services). AIIP shares the need to extend *ex ante* regulatory measures on market 4 and 5 also to NGAN. The best policy option to balance competition issues with the necessity to promote network investments, if any, is to cope NGAN access obligations with a “risk premium” reward (see Commission Recommendation on regulated access to NGA, 20.09.2010).

1.3. The Commission should consider that since 2007 Internet Protocol has emerged as the main protocol for communications services, common for both data and voice services, both on fixed and mobile networks, thus also allowing convergence of fixed and mobile services.

This is one of the main development in technology, which certainly affects market definition, as it has blurred the concept/market definition of “*voice call*” and, in general of “*calls*”, as distinguished from data transmission (as the former in 2007 were mainly based on SS7 protocol, while data were already mainly based on IP).

The definition of “voice call” and, in general of “calls”, which still appears in several of the defined markets, and at the present state is clearly anachronistic. Probably the correct definition should relate to “*communications*”, irrespective whether they are pure voice or VoIP ones (which are data communications translated into voice calls).

In addition, such development also affects the definition of current relevant market as follows.

1.3.1 Namely, the definition of the retail “market 1” of “*access to the public telephone network*” is today obsolete and should be amended n order not to be limited to traditional copper access capable of providing only narrowband services, as of nowadays, it should also expressly include broadband access, capable of providing IP based services (such as VoIP). Also the need to reach the objectives of broadband coverage set forth by the European Digital Agenda suggests the need to amend such definition to expressly extend it to broadband access, so to grant to any user such a right.

1.3.2 The same comments under point 1.3.1 shall also apply to wholesale markets 2 and 3, respectively “*Call origination on the public telephone network provided at a fixed location*” and

"*Call termination on individual public telephone networks provided at a fixed location*", where *the definiti*on of "calls" is now anachronistic and should be repealed by "*communications*", irrespective whether they are pure voice or VoIP ones (which are data communications translated into voice calls).

1.4. With regard to the deployment of 4G LTE "all-IP" mobile technologies and the technological developments in the mobile handsets market, we believe that such technological development is rather impressive since 2007 analysis and, in spite that the relevant wholesale broadband access may not be integrated as to include also mobile broadband services (since BB reail fixed services are not substitutes of BB retail mobile services, as shown hereinafter), mobile BB services should be considered to constitute a specific relevant market for which purpose according to AIIP it is necessary to integrate the existing list.

Fixed and mobile wholesale broadband services should not be included in the same market because they belong to different markets as to prices, bandwidth and other technical features which imply usage limitations for mobility services so that they are perceived to satisfy different customers need and are not substitute to each other:

(i) It is noteworthy that, historically, the peak speed of BB fixed services has increased in parallel with the speed of mobile BB services, always remaining 100 times above the latter (e.g. 10 Kbit/sec for mobile services *versus* 1 Mbit/sec for fixed services; 1Mbit/sec for mobile services *vs.* 100 Mbit/sec for fixed BB services, etc.). The permanent large gap between mobile access speed and fixed access speed together with the development of new IP services (electronic communication services and OTT services) encouraged and based on the increases of bandwidth, and the quality of which depends also from low rate of *ping* (loss of packet) and *jitter* (delay in packet transmission) implies permanent limits of mobile BB services with respect to fixed BB services.

(ii) in addition to the above, prices for mobile BB services are not comparable to fixed ones with regard to intensive use. Significant use for high bandwidth (such as video) services and applications increases costs of mobile services dramatically.

The above technical and economic limits of retail mobile BB services with respect to retail fixed BB services implies a different perception of such service by customers, as regards to their functionality and usage, so that the pertinent wholesale access services cannot be included in the same market.

On the over hand, due to the success of all IP services and to the convergence and bundling tendency stressed above, mobile access to IP services is getting day by day more important as necessary complement to fixed access and vice versa.

In this contest, entry barriers on the mobile services might increase, due to the economic features of the electronic communication market above listed. Therefore it would be appropriate to define at EU level a new market for mobile broadband access services, together with the restoration of former "market 15" (see answer to question 13 for more details).

Eventually, once the Commission has integrated the list of relevant market for regulation with the above mobile wholesale (broadband and narrowband) access markets, the NRAs shall assess whether one or more operators have dominance on such a market and, if so, shall determine the applicable regulation obligations.

In this last regard, attention should be kept also in defining measures apt at ensuring network and /service neutrality upon MNOs to prevent discriminatory and exclusionary conducts by MNOs with respect to other communications operators and OTT independent and not integrated with MNOs.

Mobile access gatekeepers should also be prevented from discriminating fixed operators in the development of F2M integrated communication services (e.g. F2M SMS services). Not taking into account such risks could restrain innovation and moreover could reduce fixed operators margins and the capacity of fixed operators to invest in fiber infrastructure in contrast with the need to reach the objectives of broadband coverage set forth by the European Digital Agenda.

Question 2: What are the changes in structure and functioning of the relevant markets (e.g. supply and demand side developments, bundles, convergence, geographic scope), which should be reflected in the revised Recommendation from an *ex ante* perspective?

2.1. The following are the main changes in market structure AIIP has noticed in last couple of years on the Italian market, which could also apply for an analysis on the European market:

(a) *Demand side*: due to the lasting global economic crisis, still pending in the medium run, which was even harder in South European Countries, demand is no longer growing.

We notice a trend toward increasing specialization / customization and bundling and the increasing differentiation between services demanded by business customers compared to those demanded by consumers. There is a trend toward take up of bundle offers (voice and data, including entertainment services such as IP TV; fixed and mobile services) by residential customers. In addition, there is a trend toward specialization (as to tailored communication services), multisite services and communications services integrated with IT ones, as well as an increasing demand for guarantees of high level quality services, by business customers.

(b) *Offer side*:

Given the increasing marginal returns from the "n" clients (*see* introductory remarks, lett. a), such a situations is incenting incumbents and, in general, gatekeepers (including mobile operators, which are competing also on the fixed market due to convergence) to adopt aggressive behavior on the market to subtract the customers from their competitors.

In the medium run, therefore, due to the above economic conditions which directly affect as well as demand and offer on the market, the dynamic trend of market conditions in the medium run (i.e., in the next two years) should, as a principle, be assessed as a concentrative one.

According to AIIP, the Commission should integrate its Recommendation by requesting the NRAs to keep into account, in applying the second criteria set forth the "triple test", the above referred foreseeable concentrative effects due to general economic conditions on both demand and offer side.

Providers serving business customers may need to offer service to dispersed sites nationwide simultaneously and the overall poor density of business customers often does not make it possible to rely on market 4, but rather on market 5. To define a specific wholesale market on the basis of data not relevant to businesses (e.g. the number and market share of residential broadband providers) would advantage incumbents.

(c) *Bundle and convergent offers*: since Internet Protocol has emerged as the main protocol for both data and voice services and for both fixed and mobile services, providers developed convergent and bundled offers of voice/data services as well as of fixed/mobile services (with mobile operators such as Vodafone entering fixed markets and fixed only operators unsuccessfully -at least in Italy- seeking to access mobile market; not also F2M substitution) it is necessary to assess how they may affect the market structure.

As clarified in the "Preliminary Remarks" bundle and convergent offers are capable of increasing the overall network effects of the retail offers and the customer switching costs and make more difficult and expensive for competitors to win a client. The continuous proliferation of bundle and convergent offers of communications services, with the above examined concentrative effects on the market, should therefore be considered for the purpose of applying the first and second criteria of the triple test.

These developments tend to benefit integrated operators and incumbent operators with both fixed and mobile infrastructure are likely to be able to leverage these to their best advantage in both residential and business market.

2.2 With regard to F2M substitution as possible consequence of convergence, we already excluded under answer to question 1 above any F2M substitution for both broadband retail services and related *wholesale* markets. The above trend toward bundling on the demand side and the related trend toward network integration on the supply side both confirm that mobile services are complementary to fixed services.

AIIP also believes that any degree of FMS at the voice services retail level would be in any case limited to residential users, and would not be sufficient to reduce the market power of the fixed incumbent operator at the retail level if such operator (currently notified as SMP) is integrated in the mobile market and has a strong position in the (oligopolistic) mobile market, as more often occurs.

Therefore not only it would not be appropriate to remove on the base of F2M voice substitution the retail market "1" from the current list of relevant market, but AIIP requests that the Commission also defines also the following markets in addition to the existing ones:

(i) wholesale market for "*communications origination on the public mobile communications network*" (see reasons under par. III.1.3.1.ii of answer to question 1 and answer to question 13);

(ii) as well as wholesale mobile broadband access market (see reasons under par. III.1.3.1.ii of answer to question 1 and answer to question 13); as well as

(iii) SMS wholesale mobile termination services (see answer to question 11).

Therefore, the Commission should define such markets for the purpose of regulation and remit the assessment of the degree of competition and the existence of any dominance to NRAs at the national level[2].

2.3 On the other hand, according to AIIP, by virtue of the effects of the density economies and the existence of specific groups of end users (see preliminary remarks and par. 2.1, above) in the present review of the Recommendation it could be appropriate to integrate the definition of "market 1" by

(a) distinguishing the retail market in access for *residential customers*, and access for *business customers*, and

[2] As also suggested by BEREC, in defining whether mobile voice was a substitute for fixed voice telephony, in a Report on impact of fixed-mobile substitution in market definition, 8.12.2011 (according to which, on the base of data on increase/decrease of fixed/mobile voice traffic volumes and fixed/mobile number of access lines, one may conclude that fixed and mobile access are generally regarded by customers as complementary and not as substitutes, and that looking at each country separately, the general picture is highly heterogeneous the general picture is highly heterogeneous)

(b) including access to the public network also for voice electronic communication services entirely based on IP protocol and broadband services.

2.4 With regard to changes in the geographical scope of markets, AIIP underlines that it should not be an issue for the review of the Recommendation which aims to review the definition of relevant *product* markets: none of the markets in the current list has become trans-European and any sub-national definition of the markets would be exclusive competence of the single NRA (e.g. as already recognized by the Commission in the 2010 NGAN Recommendation).

2.5 With regard to broadband access services the Recommendation's review should take into account the increasing importance of "applications" and OTT services which could facilitate the exploitation of network externalities by the bottleneck access network keepers (see hereunder).

Question 3: Can you identify any market bottlenecks which in your view cannot be addressed by *ex ante* regulation via a revision of the Recommendation alone? How in your view can such market bottlenecks be addressed?

According to AIIP, by applying the economic reasoning developed above, any market bottleneck in markets featured by network effects should be considered as a relevant market for *ex ante* regulation.

This is the more true if said markets are featured by the simultaneous presence of both direct and indirect network effects such as broadband access provision, where any operator with significant market power on such a market would be pushed to use its market power on access service to strengthen markets neighbors to the latter (such as housing, hosting, etc.) or use the latter to strengthen its power over access (see mentioned Italian case "Rosso Alice").

Need to impose the traditional regulatory requirements rather than relieving.

According to AIIP such market bottlenecks should be addressed by imposing the traditional regulatory requirements (i.e., obligation to provide access, both logical and physical, at disaggregated and cost oriented conditions with accounts to be duly revised by NRAs; obligation not to discriminate and specific measures implementing such an obligation as to keep separate network and commercial divisions -or, preferably, to act with structurally separated companies-; obligation of transparency and to publish all the necessary technical and economic conditions; etc.).

As an example, the current deployment of NGAN increases the need of virtual access services as in the case of PON deployments market 5 access is the only technically feasible option, and because these are at a lower level of the scale of investment and are fundamental to achieve the scale and density economies necessary to compete with the incumbent at the national level (e.g. offering BB services to business multi-site customers).

As a further example, the emerging of all-IP services and of convergent and bundle offers, increases the need of a strict imposition of the obligation not to discriminate (e.g. with regard to bundling of broadband services and contents by the incumbents).

Need to proceed to standardization.

However, due to the diffusion of IP services (including voice services on IP such as VOIP) which are very often based upon proprietary protocols varying between the different operators, AIIP stresses the need that the Commission acts to define specific standards to prevent opportunistic and anticompetitive behaviors by gatekeepers and, in any case, to impose interoperability obligations (which are especially necessary for IP services and applications), in order to ensure that the retail residential communication services and related OTT services, and services neighbors to communications ones (such as hosting, etc.) remain competitive.

III.2. Three criteria test

Relevant markets should be defined in accordance with the principles of competition law. The identification and selection of defined markets susceptible of the imposition of *ex ante* regulation is based on the following three cumulative criteria:

1. The presence of high and non-transitory barriers to entry;
2. A market structure which does not tend towards effective competition within the relevant time horizon; and
3. The insufficiency of competition law alone to adequately address the market failure(s) concerned.

The three criteria test is partially based on the Framework Directive.

Recital 27 of the Framework Directive stipulates that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and EU competition law remedies are not sufficient to address the problem.

Question 4: In your opinion, is the three criteria test, as defined in the Recommendation, an appropriate instrument in defining the relevant markets susceptible to *ex ante* regulation or would alternative means to identify relevant markets be more suitable?

AIIP deems that the three criteria test is still an appropriate instrument to define the relevant markets susceptible to *ex ante* regulation.

However, AIIP has noted that very often the approach taken in applying the “triple test” is not satisfactory, since no correct economic analysis (or no analysis at all) is carried out when applying the three criteria. E.g.:

- the removal of former market 15 form the list of the relevant wholesale markets, and AGCOM decision n. 65/09/CONS to note regulate such market were a mistake in the light of a correct economic analysis (for more details see answer to question 13);
- whilst current AGCOM’s draft decision n. 420/12/CONS on the wholesale SMS termination market, no doubt should be with regard to the relevance of such market in Italy and the need of its regulation (since, inter alia, wholesale rates are twice to retail rates, and retail and wholesale rates are both highly above the underlines real costs);
- it should be clarified that that the future deployment of infrastructures is not relevant as to the second criteria as well as, in any case, the mere presence of operators utilizing market 4 offers

does not mean that there is effective (if any) competition in market 5.

AIIP deems of the essence that the Commission carry out a more detailed economic analysis either to assess whether to confirm those markets already identified as susceptible of *ex ante* regulation as well as to evaluate any perspective markets by keeping into account the points made by AIIP in the initial remarks.

Obviously, the Commission should request that also the NRAs, on their side, carry out a similar economic analysis.

Therefore, AIIP suggests the Commission to integrate its Recommendation as far as the relevant markets for regulation are concerned (see answers to question 1, 7, 11 and 13) as well as to adopt specific Guidelines by expressly requesting the NRAs to consider the presence, in a given market of the following features (for more details see: introductory remarks, par I above):

(a) high fixed costs and growing economies of scale, relevant for assessing:

- (i) the degree of competition in a given market as well as the likely concentrative dynamic of such a market; as well as
- (ii) the existence of any dominance on such market, as well as
- (iii) gatekeepers attitude to maximize profits by abusing their market power (as in such case the margins for each additional client added to their customer basis would be substantially higher than their average operating margins: see introductory remarks, par I above), as well as
- (iv) the need of regulatory measures necessary to prevent such scenario.

(b) large scope economies and presence of bundled offers, for assessing:

- (i) the degree of competition in a given market, also expressed by switching costs for final customers and operators as well as
- (ii) the existence of any dominance on such market, as well as
- (iii) gatekeepers attitude to maximize profits by abusing their market power on one of the bundled goods or services;

(c) density economies, relevant for defining:

- (i) a specific relevant market, by considering the requirements of certain class of customers substantially different from others (such as business customers: see introductory remarks par I above), as well as for
- (ii) defining regulatory measures, if dominance is ascertained on such a market, which are specifically relevant to such specific class of customers.

(d) Direct and indirect network effects, relevant for defining:

- (i) the degree of competition in a given market as well as the likely concentrative dynamic of such a market; as well as
- (ii) the existence of any dominance on such market, as well as

(iii) gatekeepers attitude to maximize profits by abusing their market power by not granting interconnection or interoperability of services, as well as

(iv) the need of regulatory measures necessary to prevent such scenario.

In order to give market certainty, AIIP suggests that the Commission integrates its Recommendation with specific Guidelines for the market analysis which should help the ANRs to carefully assess the impact of technological developments and convergence on the development of competition in the relevant markets, in the light of their potential implication with regard to the above economic criteria (scale, scope and density economies and network externalities based on direct and indirect network effects). The Commission should then expressly request the NRAs to consider the market as not enough competitive, also from a dynamic perspective, if all the criteria are met.

Of course, this would be a presumption that NRAs may rebut, with the prior approval of the Commission, with serious arguments which would lead to such conclusion beyond any reasonable doubt.

Question 5: Should, in your view, criteria be added or removed from the list or should the criteria be formulated in a different manner? Should additional guidance be given to the existing criteria?

As clarified above (answer 4) AIIP deems that the three criteria test is an appropriate, albeit too restrictive instrument to define the relevant markets susceptible to *ex ante* regulation at a national level.

However, as already stated, AIIP has noted that very often the approach taken in applying the "triple test" is not satisfactory, since no correct economic analysis (or no analysis at all) is carried out when applying the three criteria (see answer to question 4 above).

Therefore the new Commission's Recommendation should be integrated to carry out a more detailed economic analysis (taking into account the points made by AIIP in the initial remarks) and request the NRAs to apply the triple test in the light of a more careful economic analysis.

E.g., with regard to the second criteria (a market structure which does not tend towards effective competition within the relevant time horizon) AIIP suggests that it should be better to clarify that:

(i) evidences of such tendency towards effective competition should be actual and undisputed and NRAs should not ascertain such tendency only on the base of mere hypothesis;

(ii) the market trend should be so strong that effective competition will be deemed to be reached even in the absence of regulation before the next analysis (within 1-3 years);

(iii) such trend should be confirmed by a complete analysis of all the relevant factors: present lowering of entry barriers by taking into account scale, scope and density economies, no direct and indirect network effects; present coverage of networks; market shares trend excluding concentration; margin trends rather than prices alone and their causes (market segmentation and discrimination practices, external pressures to lower retail prices, etc.).

Question 6: How, in your view, can legal certainty be best ensured in identifying the markets susceptible to *ex ante* regulation?

As clarified under answer to question 4, AIIP deems that the best solution is a revision and integration of the list of markets susceptible to *ex ante* regulation.

Any further withdrawing of regulation would result in considerable uncertainty for non SMP operators and their investments relying on regulation of the bottlenecks.

III.3. Changes in the **scope of the markets listed in the Recommendation** on the basis of competition law principles in order to reflect relevant trends in the electronic communications sector from an *ex ante* perspective

Question 7: In your opinion, should the scope of any relevant market(s) identified in the Recommendation be changed? If yes, please explain why, referring to the relevant market(s) concerned.

As clarified under answer to question 1 (par. 1.3.1, 1.3.2., 1.3.3) according to AIIP the following amendments and integration should take place:

(A) the definition of "*access to the public telephone network*" of the former "**Market 1**" should be amended in order not to be limited to traditional copper access capable of providing only narrowband services, as of nowadays, it should also expressly include broadband access, capable of providing IP based services (such as VoIP).

Also the need to reach the objectives of broadband coverage set forth by the European Digital Agenda suggests the need to amend such definition to expressly extend it to broadband access, so to grant to any user such a right.

By virtue of the effects of the density economies and the existence of specific groups of end users (see under answer to question 2, above) in the present review of the Recommendation it could be appropriate to integrate the definition of "market 1" by distinguishing the retail market in access for *residential customers*, and access for *business customers*;

(B) the definitions of wholesale **Markets 2 and 3**, now respectively "*Call origination on the public telephone network provided at a fixed location*" and "*Call termination on individual public telephone networks provided at a fixed location*", should be amended in order to substitute the wording "calls" (now anachronistic) with the wording "*communications*".

Question 8: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of such changed scope on consumers (users), competition, and development of the internal market. Please provide separate reasoning for each market subject to a new scope.

III.4. Relevant markets listed in the Recommendation

Question 9: On the basis of the three criteria test carried out at EU level, should any of the markets listed in the Recommendation be removed from the list in the revised Recommendation? If yes, please provide comprehensive reasoning thereof.

According to AIIP, for the reasons explained in the introductory remarks, none of the markets listed in the Recommendation could be removed from the list in the revised Recommendation.

Question 10: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of such removal of markets on consumers (users), competition, and development of the internal market. Please provide separate reasoning for each market you propose to delete from the list.

Not Applicable.

III.5. Further markets regulated at national level (on the basis of national circumstances by carrying out the three criteria test at national level)

Question 11: On the basis of the three criteria test carried out at EU level, should any of the markets regulated by NRAs on the basis of national circumstances (such as SMS termination or broadcasting transmission services) be added to the list in the revised Recommendation from an *ex ante* perspective? If yes, please provide comprehensive reasoning thereof.

The market for SMS wholesale termination services is regulated in Denmark, France, Poland and Gibraltar. The Italian NRA has just started a public consultation on this issue, but it is proposing to not regulate the market since prices are decreasing and, according to such draft proposal, this could be the result of the presence of indirect constraints (thus to the growing of different retail mobile messaging services such as e-mail and instant messaging) and could *ex se* exclude the fulfillment of the second criteria of the triple test.

AIIP deems that such decision would be a big mistake by the Italian NRA in the implementation of the triple test criteria. Both retail and wholesale prices in Italy are highly above the underlines costs (at least four times if real costs are around 1 cent/SMS as stated by other NRAs, but AIIP believes that costs are lower) and there is no evidence that such a gap will be removed within 1-3 years; the wholesale prices for SMS termination are constantly highly above the medium retail prices for the whole SMS itself (double) and in some cases are increasing, and there is no evidence that such a gap will be removed within 1-3 years; moreover there are evidences of mobile network operators excluding fixed operators from the market of F2M SMS for retail business clients on the base of technical impediment to terminate SMS originating from their network; as a matter of fact the mobile users that can receive e-mails and instant messaging is and will continue to be a minority (less than 20%) during the relevant period; e-mails and instant messaging have different objective features which exclude substitutability from an usage point of view for business customers and for specific segment (see over fifty) of consumer users; decreasing of prices is also due to AGCOM intervention in order to align domestic and roaming SMS retail tariffs (decision 696/09/CONS and

326/10/CONS) in order to avoid the absurdity of domestic services being more expensive than cross-borders ones[3].

The market for SMS wholesale termination services (either originated by fixed or mobile network) should be added at the Recommendation list because of its features in order to clearly empower NRAs to address such issue. The Commission should define such market for the purpose of regulation (since it has the same general features of voice call termination markets) and remit the assessment of the degree of competition and the existence of any dominance to NRAs at the national level. The Guidelines provided by the Commission should exclude incorrect implementation of the second criteria.

In most European countries mobile network operators (MNOs) are allowed, in the absence of regulation, to charge SMS termination fees well above the real cost rewarding the termination service. Such extra-profits are used by MNOs either to keep retail prices at unreasonable levels (to the detriment of consumers) or to distort competition and affect new entrants, in particular virtual mobile operators (MVNOs) but also fixed operators seeking to offer F2M SMS services to their clients.

The European Commission should therefore add the SMS termination market to the list of the relevant markets.

The following background should be taken into-consideration in order to proceed as suggested.

<u>Unreasonable level of unregulated SMS termination fees</u>

Comparison between regulated termination fees (applicable in the few countries where such market is regulated, such as France, Poland and Danemark) and commercial unregulated practices shows that in the absence of regulation MNOs are clearly induced to overcharge SMS termination fees. In "regulated" countries the price for SMS termination is around or less than 1 Eurocent,[4] while in non-regulated countries the average price is around 4/5 Eurocent.[5] According to independent expert studies,[6] the real cost for SMS termination should not exceed 0,15 Eurocent.

The absurdity of unregulated termination tariffs is also showed by the comparison with both wholesale caps under the Roaming III regulation (2 Eurocent as from July 2013) and wholesale voice caps under the Termination Recommendation (1 Eurocent/minute).

Finally, the constant practices of MNOs consisting in offering for free large packages of on-net SMS is a clear evidence that real costs for SMS termination are well below commercial unregulated tariffs.

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[3] The decisions of AGCOM have been confirmed by administrative courts (TAR Latium, sentence of November 21, 2012).

[4] The efficient level of SMS termination has been fixed to 1 Eurocent in France; 0,26 Eurocent in Denmark; 1,18 Eurocent in Poland.

[5] Cullen International, October 2012.

[6] Prof. S. Keshav The Costs of Text Messaging, 2009: http://blizzard.cs.uwaterloo.ca/keshav/home/Papers/data/09/smscostv4.pdf (http://blizzard.cs.uwaterloo.ca/keshav/wiki/index.php/Papers-area)

Non-substitutability between SMS, mail and IM

Large MNOs tend to maintain that regulation of SMS termination is unnecessary because at retail level such services may compete with other communication tools like mail and instant messaging (IM). This development should be due to the expansion of mobile Internet access as well as the increasing availability of smart-phones.

By contrast to the above, we do not believe that it can be assumed that SMS fall within the same market of mail and IM, for the following reasons:

- smart-phones are still a minority, the increase of smart-phones does not entail automatically usage of mail and IM, because only a share of these smart-phones are enabled with data-SIM cards and regularly produce Internet traffic volumes[7], and only a share of the customers using smart-phones and mobile Internet connection downloads the necessary clients and applications (unlike SMS, the usage of mail or IM in mobility underpins the download of a specific client or application in the smart-phone);
- moreover, unlike SMS, IM applications are normally non-interoperable; sender and receiver should have the same client/application for IM;
- (sender, if mobile, and) receiver must be under coverage of mobile Internet access and such coverage may be smaller than the one for GSM/SMS services;
- therefore, unlike SMS (massive market for mobile users), the sender of an e-mail and IM should previously know/verify that the receiver undermines all the necessary conditions to receive his message; SMS are aimed to satisfy immediate and real-time communications needs, while the same need is not necessarily satisfied by e-mail and IM, being subject to the above plurality of simultaneous conditions;
- unlike SMS, mail/IM or not used by the generality of users, but only by some categories: mail are more used by professionals (people who need to be online constantly, unlike residential users), while IM services is used by consumer users (some more secure IM applications might be used by business customers but only for intercom communications) e-mail and IM are both mostly used by younger customers (people normally using social platforms also on the fixed network and other similar applications, unlike elderly people);
- there is no clear evidence that possible decrease of SMS revenue at national level may be related to the use of increased usage of mail and IM. By contrast, figures in the Italian market[8] show that the usage of SMS is constant or even increasing, therefore the potential decline of prices is only a result of decrease of costs;
- unlike SMS, e-mail and IM are OTT services.

Remarkably, the non-substitutability between SMS and mail/IM is confirmed by the Roaming III regulation (recital 70).

Question 12: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of adding those market(s) on consumers (users), competition, and development

[7] Only 20% of mobile users according to AGCOM draft proposal decision n. 420/12/CONS.

[8] AGCOM's decision 420/CONS/2012, according to which from 2008 to 2011 off-net SMS volumes are increasing, on annual basis, by 6% (§73).

of the internal market. Please provide separate reasoning on the impacts for each market you propose to add to the list.

Effects on competition and consumers welfare

The high level of commercial SMS termination fees is seriously distorting competition between larger and smaller mobile operators (in particular MVOs) and between fixed and mobile operators (the latter with regard to the provision of F2M SMS services to business customers, as already occurred in Italy with F2M voice termination rates; see case A357 before the Italian antitrust Authority).

MNOs are normally vertically integrated operators and are naturally induced, by leveraging high termination tariffs, to discriminate non-integrated operators and providers. MNOs are taking unlawful advantage from their position of gatekeepers and direct and indirect network effects, in the provision of M2M SMS and F2M SMS services, and in the provision of related content and OTT services via SMS.

MNOs may use extra-profits from SMS termination to subsidize on-net communications so as to reinforce network externalities and boost the natural tendency of the market structure toward a narrow oligopoly. As a matter of fact, in Italy, on-net SMS amount to around 85% of the entire SMS figures,[9] which create a serious barrier to entry for MVO and fixed operators. The same figures may be found in other European countries.

As a result of the above, MVOs become net-payers of larger MNOs, with serious effect on their capability to survive in the market.

As a result of the above, innovation is restraint to the detrimental of customers.

This situation is detrimental also on customers due to pay higher and unreasonable charges for off-net SMS (even if the underlines costs are the same of on-net termination), which are unlikely to compensate potential benefits for on-net discounts (still highly above real costs).

In this respect, one should also consider that on-net discounts may have the negative effect to reduce the possibility for customers to switch from a provider to another .

III.6. Markets to be added to the revised Recommendation (since they now meet the three criteria test at EU level and are therefore susceptible to *ex ante* regulation).

Question 13: On the basis of the three criteria test carried out at EU level, can any other markets be indentified that should be added to the list in the revised Recommendation, from an *ex ante* perspective? If yes, please provide comprehensive reasoning thereof.

In addition to the amendments/integrations to the existing list of markets for regulation already examined, AIIP deems necessary to add the list with the following wholesale markets.

The European Commission should consider whether (i) to restore former "market 15" of the 2003 Recommendation (mobile wholesale narrowband access and origination services) and

[9] AGCOM's decision 420/CONS/2012, scheme n. 2.

(ii), given the technological developments towards all-IP services as well as the development of convergence and bundle offers, whether to introduce a mobile wholesale broadband access market.

According to AIIP the Commission should define such mobile wholesale markets for the purpose of regulation due to their economic features and remit the assessment of the degree of competition and the existence of any dominance to NRAs at the national level (or least launch an investigation/enquiry to better understand the effective competitive conditions of these markets).

This is necessary not only for domestic services, but also for roaming services. Fact is, article 4 of the Roaming III Regulation[10] is interpreted[11] in a way the LBO access is not available, under regulated terms, to MVOs, but only to MNOs. Under such interpretation, MVO would be subject to a bizarre situation, whereby they may lose customers via LBO but they cannot acquire them. The only solution, in order to address an absurd asymmetric situation damaging a new entrants and favoring incumbents MNOs, would be to recognize an LBO access right under domestic rules.

<u>a) Absence of a virtuous circle – fragility of competition in the mobile access market</u>

It is worth-noting that rather than to competition, the emergence of the MVO business in many European countries was due to the imposition or simple threat[12] of regulation[13], to antitrust pressure,[14] or in any case to a legal basis present in the GSM licenses[15] or in the old framework.[16] Up to 2007 the simple fact that mobile access (market 15) was still susceptible of ex-ante regulation was *per se* a circumstance inducing MNOs to grant mobile access at commercial conditions. By contrast, only in few countries commercial MVOs have started spontaneously and as a consequence of a truly competitive environment, while in many others (especially in Eastern Europe) MVO access did not develop at all.

In any case, whatever may be the incentive for MNOs to grant mobile access, one should not conclude[17] that once the an MVO business is launched, then a virtuous circle will start and MNOs will be naturally induced to offer more and more competitive conditions to access seekers because:

- competition in this market is a fragile and temporary condition rather than a irreversible achievement (see below, §a)
- MVO may not solve competitive problems by simply upgrading the business from resale to full-MVNO (see below, §b);
- Switching hosting operators is just a theoretical option, it does not work in practice (see below, §c).

[10] Regulation 531/2012 of 13 June 2012.
[11] Berec, International Roaming Guidelines.
[12] Cyprus, Slovenia, Malta
[13] France, Spain, Finland, Ireland.
[14] Italy
[15] Germany. UK.
[16] Denmark, Netherlands, Sweden.
[17] EXPLANATORY NOTE to the 2007 Commission Recommendation on Relevant Product and Service Markets, p. 45.

Currently, the MVO business is declining throughout Europe. A study of GSMA[18] reports that recently 84 MVOs closed the business, while 44 were acquired by MNOs. Considering that the number of MVOs in Europe is around 500, this means that over 20% of the undertakings left the market. If this trend will continue, the MVO business will be strongly reduced in Europe. A report from AnalysysMason shows that decline is well consolidated in Nordic countries.[19] Another report (Informa[20]) considers that "the mortality of MVO is very high" and that since 2006 the number of launches of MVO is constantly declining. In Italy almost [50]% of MVO has left the market after 2007. These figures suggest the idea that, while an important number of MVO have been launched in the last 10 years, the cycle is now coming to an end.

In addition, one should note that market shares owned by MVOs are negligible in most of the markets. With the exception of a few countries, such as Netherlands, France and Germany, the average market share throughout the EU is 4,1%. In Italy MVNOs own [4%] of the mobile market. There is no evidence that such market shares may be increasing in the future.

As regards profitability, there are no official sources in the market. However, the business trends visible in the market (as showed above) gives a clear evidence that MVNOs are not profitable and may survive in the market only thanks to financial support of a parent company. Truly independent MVNOs are rare in the market. Most of them survive because they find niche-markets or they are able to develop valued added services neglected by MNOs.

In addition, the dependence from the parent companies may frequently affect the capability of the MVOs to operate competitively in the market. When, as in most of the cases, the parent company is a MNO, the MVOs is not free to launch aggressive retail offers, because the business of the mother company could be cannibalized. In other cases, when the mother company is a MNO, a cable operator or a fixed incumbent, the MVO will not be free to fight for better access conditions, because this request may jeopardize the regulatory interests of the mother company (which prefers to maintain an unregulated environment for its access network, whether fixed or mobile).

All the above conditions lead to think that the virtuous competitive circle is not working for MVO, this business is generally declining and MVOs are not able to exercise competitive constraints over MNOs. The Commission should be worried about this decline which is a clear symptom of decreasing competitiveness in the mobile market.

b) Absence of real mobile access agreement in the market

The large amount of commercial MVOs (around 500) existing in the EU, does not mean that the mobile access at national level could be understood to be featured by effective competition. One should note that the vast majority of such MVOs deals cannot be considered as "access" in technical terms, because they are pure resale/rebranding agreements. The scarcity of real access agreements is due to the commercial conditions imposed by MNOs: fact is, the airtime is normally sold with a

[18] Wireless Intelligence "The MVNO model, global footprint and outlook", Joss Gillet, May 2012
[19] http://www.analysysmason.com/About-Us/News/Newsletter/Is-there-a-glass-ceiling-for-MVNOs/
[20] Informa 2011, Global MVNO Forecasts to 2015.

bundled price comprising all wholesale and resale functions. Should a MVO decide to internalize any functions (HLR, billing, ecc), there is no legal basis to reduce the cost of airtime. Under such circumstances, escalating from resale to full-MVNO is not a rentable solution.

Therefore, before concluding that the wholesale mobile is competitive, one should investigate:

(i) about the exact nature of the variety of commercial deals offered by MNOs, whether they consist in real access agreements or pure resale deals. The regulatory practice developed in the fixed market should help to this extent. In the fixed sector pure resale agreements are not deemed sufficient to consider a market to be competitive;

(ii) about the economic conditions of access/resale in the market and the concrete incentive for MVNO to migrate from resale to full-MVNO business. In other words, whether the scarcity of full-MVNOs in the market is due to the anticompetitive attitude of MNOs rather than to scarce inclination by MVOs to invest and "climb" a sort of mobile ladder of investments.

It is worth-noting that, once a pure resale agreement is operational, the upgrade to a full-MVNO model is very problematic, since in addition to the mentioned problems (excessive and bundled access prices) one should consider further issues like the change of SIM-cards and the full migration process (see below).

<u>c) No realistic switching capability</u>

One could believe that once a MVOs have been granted access and starts to operate, then they can freely renegotiate access conditions and eventually migrate towards another hosting MNO to get a better deal. The reality is different.

Once the MVO agreement is started and become operational, the hosting operator becomes a sort of monopolist vis-à-vis the MVO, because the latter cannot realistically switch to another operator. A change of hosting operator is only possible from pure theoretical point of view, however the economical, procedural and technical implications are so detrimental for the MVO that it is better to avoid such a solution; this solution is not a realistic option that a MVO could take in consideration to improve his market position. The European Commission should not be surprised about this, because the impact of switching costs has been largely analyzed in the fixed sector (when examining the factual possibility for altnets to switch from a telecom incumbent to a cable operator, for instance).

The switching costs and implications may be summarized as follows:

- changing the SIM cards: normally (a part the rare cases of full-MVNO) MVOs do not own SIM-cards and numbering resources, therefore changing hosting MNO would imply the replacement of all SIM cards of the customers. This process is particularly lengthy and difficult, especially when the customer-base consists of prepaid subscriptions (the norm for MVNs): each customer should be contacted multiple times (initial information, replacement of the SIM cards, resolution of problems, ecc) with complexities and costs out of the norm. Considering that the migration from a MNO to another should not last too much (otherwise the duplication of interconnection costs - both with old and new MNOs - would make the process even more unsustainable), the result would be that a considerable part of the customer-base will not migrate and will be lost.

- Migrating MVO numbers and SIM cards toward a new MNO underpins a massive process that is even more complicated than standard number portability among mobile operators. Currently, Italian MNOs are equipped to deal with a range of 15.000-25.000 ported numbers per day, and their capability is normally saturated. Adding the charge of migrating in a short time a customer-base of 500.000/1 million units represents an extraordinary challenge that has not yet experienced in any market. Massive migration also boosts investments for the MNOs interested by the switch and an accurate coordination is also required among all network operators to ensure migration roll-out. In the absence of regulation (unlike MNP) and considering the natural reluctancy of the abandoned MNO to let the MVO customer-base to migrate to other networks, the entire operation is destined to be a disaster for the MVNO.
- Interconnection between hosting MNO and a MVNO is largely based on non-standard protocols of communication and new entrant is obliged to develop customized IT infrastructures in order to “communicate” with hosting network. This dedicated IT platform requires relevant investment by MVNO and it takes several years to amortize this up-front cost. As an immediate result of switching to a different MNO, MVNO should incur in additional high costs to interwork with new hosting network; it also risk to lose a part of the investments already made to interconnect with the original hosting operator.
- Since agreements between MNOs and MVNOs are based on non-regulated terms and conditions some limitations and penalties are set by hosting operator in order to discourage new entrant to envisage such switching as a viable option.

- To conclude, the European Commission should carry-out a deep analysis about hosting switching for MVOs and consider, on the basis of the concrete cases verified in the market, whether this is a realistic possibility. Should the number of switching cases verified in the market be ZERO or insignificant, then the Commission should re-consider switching as a criterion to assess the competitiviness of the wholesale mobile access market.

<u>d) technological development and convergence could boost market concentration, even reducing the number of MNOs due to an increasing relevance of network effects in favor of largest MNOs.</u>

As a matter of fact, since Internet Protocol has emerged as the main protocol for both data and voice services and for both fixed and mobile services, providers developed convergent and bundled offers of voice and data services as well as of fixed and mobile services.

As extensively clarified in the preliminary remarks and previous answers, bundle and convergent offers are capable of increasing network effects and make more difficult for competitors to enter the market and keep their low market shares, giving also further advantages to the mobile incumbents and to fixed incumbents integrated with mobile network (e.g. in Italy).

Question 14: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of the relevant markets(s) you propose to add on consumers (users), competition, and development of the internal market. Please provide separate reasoning on the impacts for each market you propose to add to the list.

See answer above.

III.7. Transnational markets that might be identified at EU level as susceptible to *ex ante* regulation, subject to a Decision under Article 15(4) of the Framework Directive.

Question 15: On the basis of the three criteria test carried out at EU level, can any transnational market(s) be identified in the revised Recommendation, from an *ex ante* perspective? If yes, please provide comprehensive reasoning thereof.

We do not believe that one transnational market should be identified in the revised Recommendation, from an *ex ante* perspective.

However, with regard to remedies the necessity of standardization above underlined should be achieved at EU level (e.g. for VoIP interconnection and for F2M SMS termination).

Question 16: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of the relevant market(s) you propose to introduce on consumers (users), competition, and development of the internal market. Please, provide separate reasoning on the impacts for each market you propose to introduce

Not applicable.

III.8. Other issues relating to the subject of the consultation that AIIP might wish to address

As stressed in the preliminary remarks, Internet is a two sided market, contemporarily featured by direct and indirect network effects, pursuant to which:

- customers are attracted by the Internet access provider maximizing the services available on/through its network; such is the case where certain services (e.g. VoIP native and terminating communications, with video and IM) or certain contents (e.g., IPTV, videos) are available or may be benefited only through the access services offered by that operator (because of lack of standardisation for such services, based upon proprietary protocols) or with better quality than the one perceived when having access with other operators;

- content and service providers are interested in offering contents to the largest broadband access customer basis and, in the event that the networks are not fully interoperable, through the services of the operator having the largest number of clients for access services.

The emerging of all IP services and of OTT services and application based on IP fosters the above direct and indirect network effects in the advantage of fixed and mobile incumbents.

With specific regard to fixed incumbents, AIIP believes that the Commission should seriously take into account the 14.11.2012 BEREC position on ETNO proposal "*to include an explicit reference in the International Telecommunications Regulations (ITRs) to a specific interconnection charging mechanism (Sending Party Network Pays, or SPNP) and to the concept of end-to-end QoS delivery* *(operating in parallel to a best efforts Internet)* ". The BEREC believes that " *the elevation of these approaches ... runs the real risk shifting the balance of negotiating leverage between market participants and inducing an abuse of market power by telecoms carriers in relation to terminating traffic (much as occurred historically in traditional telephony) ... ... runs the real risk shifting the balance of negotiating leverage between market participants and inducing an abuse of market power by telecoms carriers in relation to terminating traffic (much as occurred historically in traditional telephony) ... "*.

It is noteworthy that Telecom Italia (with broadband access users more than 52% of the Italian fixed broadband market) has already begun a free public de-peering policy which could damage competitors, including AIIP members: (i) in providing hosting and housing to OTT and CDN providers, (ii) in providing communication services based on broadband connectivity the quality of which depends on ping and jitter rates (e.g. video communication) as such rates could be prejudicated in case of indirect interconnection and in case of traffic management by Telecom, which could more easily differentiate IP traffic with regard to its private interconnection origin (iii) in providing broadband access services as a result of network effects, direct and indirect, that Telecom Italy may unfairly exploit with the creation of a walled garden, thanks to the new peering policies and differentiation of IP traffic.

Therefore any new policy as to peering and traffic management/differentiation should undergo to the careful supervision of EU Commission and/or NRAs as to exclude the risk here mentioned with regard to the Italian case.

Marco Fiorentino

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