



2nd public consultation on a revised draft Recommendation on regulated access to Next Generation Access networks

– Wind Telecomunicazioni comments –

Wind is a leading Italian alternative telecommunications operator offering mobile, Internet, fixed-line voice and data services to consumer and business subscribers. Wind mobile business is the third largest in Italy based on number of subscribers, with 17.2 million subscribers as of March 31, 2009 whilst the fixed-line business, which includes Internet, voice and data services, is the second largest in Italy based on revenue.

Wind is the largest LLU operator in Italy, with 1.8 million direct fixed-line voice subscribers as of March 31, 2009 and markets fixed-line services primarily through the “Infostrada” brand and offers Internet services through the “Libero” brand.

Wind has invested approximately €2.3 billion from January 1, 2006 to December 31, 2008 and owns an extensive, integrated telecommunications network supported by approximately 19,270 kilometres of fiber optic backbone in Italy and approximately 3,725 kilometres of fiber optic cable Metropolitan Area Networks, or “MANs,” in 39 Italian cities.

Wind welcomes the EU Recommendation on NGA since it constitutes a first logic and coherent regulatory approach to NGA which is particularly needed to increase confidence of Alternative operators in the sustainability and profitability of further investments in fixed telecommunication networks. Wind appreciate the significant activity performed by the Commission staff producing the relevant improvement introduced in this second draft of the recommendation and hope that the final version may benefit from a further refinement also thanks to Wind observations.

Wind response includes, in addition to this letter, a specific document where the text of the Recommendation is deeply analysed and detailed amendments are proposed according to Wind views. Below a summary of the main relevant aspects of the Recommendation split between those particularly positive principles which should be strengthened and between those issues which should be subject to further elaboration from the European Commission.

POSITIVE ISSUES

With respect to those positive aspects of the Recommendation, Wind finds the **following principles particularly relevant and invites the Commission to confirm its position** suggesting certain minor amendments to avoid any potential misinterpretation:

1. **Duct access and access to civil engineering** can, in certain cases, be an effective regulatory tool to promote NGA investments of Alternative operators by facilitating FTTx unbundling backhauling and direct connection of specific corporate buildings and business areas. **Generally, it will not be sufficient to safeguard competition.**
2. **The principle of equivalence should be extended to all wholesale services included in the Recommendation** since the relevance of a given wholesale product will even greatly change from one country to another due to national markets specific characteristics in terms of geographic distribution of the population, topography and historic development of the monopolistic copper network.
3. **Full and detailed information about NGA plans** of the SMP operators and about the **changes to the copper network** should be **provided to Altnets** . In this respect Wind invites the **Commission not to limit the disclosure of information** to those plan which directly impact copper network architecture since this would be artificially exploited by SMP operator to reduce the disclosure of information thereby hindering Altnets investments.
4. **No retail NGA services should be offered by SMP operator in absence of a cost effective and fully operative NGA wholesale offer 6 months in advance** (i.e. NRAs should strongly fight market pre-emption strategies). In this respect Wind invites the Commission to better rephrase this principle in order to avoid any misinterpretation.
5. Multiple fibre FTTx solution should be preferred since allow FTTx unbundling. In this respect Wind invites the Commission to give guidance to NRAs in **case of SMP operators chooses to roll out a single fibre network to foreclose infrastructure competition** thus NRAs should treat the **NGA network as a monopoly essential facility** (i.e. no risk premium or need to consider risk sharing options) and imposing, among the others, the obligation to **grant equality of input and equal access** to the essential facility. The same **should apply in case the SMP operator receives public funding.**
6. **Existing SMP obligations in relation to markets 4 and 5 should continue and should not be undone by changes to the existing network architecture and technology,** unless agreement is reached on an appropriate migration path between the SMP operator and operators currently enjoying access to the SMP operator's network. In Wind view such paragraph should give further guidance to NRA regarding the need to avoid that NGA investments are strategically used by SMP operators to reduce competitiveness of Alternative operators using copper access products. **Wind invites the Commission to specify that existing access obligation on market 4 and 5 should not deteriorate in terms of quality or economic competitiveness until cost effective NGA wholesale access products and a full functioning and customer transparent migration process are not in place.**
7. **A migration period of 5 years before de-commissioning of points of interconnection seems to Wind reasonable** but the 5 years **transitory period should start once the NGA access network is in place and NGA wholesale access product are defined and fully operative.** Unfortunately current wording of the Recommendation seems to suggest that the 5 year period before de-commissioning should be counted starting from the information given to the Alternative operator irrespective to the effective presence of a NGA network and irrespective to the availability of NGA wholesale services. Clearly **in such a scenario** any incumbent would immediately inform all Altnet of its intention to **de-commission all LLU**



collocated sites + LLU prospect sites just in order to avoid any further expansion of LLU based competition without any commitment to develop a NGA network.

ISSUES WHICH NEED TO BE FURTHER ASSESSED

With respect to those aspects that could hinder the competitive process and that, in Wind view, have not yet been duly taken into consideration by the Recommendation below some considerations and suggestions:

1. Recommendation should acknowledge that in certain countries, due to simple industrial economy reasons, no investment in NGA can take place without the inclusion of the former monopolist operator and without incorporating the operative benefits coming from the substitution of the copper access network with a fibre one. For example, in cases where:

- the copper access network is the only existing access network in a country (i.e. cable operators are not present); and
- it does not exist a market demand for NGA services which may justify, on stand alone basis, NGA investments; or
- public funding will be granted to the former monopolist operator to roll out a single NGA network;

than the only operator which can profitably invest in NGA is the former monopolist operator.

Only the former monopolist operator can in fact:

- assess the relevance of profit from the operative savings from progressively and efficiently substituting the copper access network and its high maintenance costs; and
- efficiently avoid any sort of value destroying competition between two parallel access networks in a scenario where market value does not allow the remuneration of two access network.

In such a scenario:

- i. no other operator would be in the position to invest in NGA but the former monopolist .
- ii. the possibility that the former monopolist operator will exploit NGA investments to gain first mover advantages and to shape the competitive process to reduce competitive pressure from the unbundlers is particularly probable if NRAs and the Commission itself do not send appropriate signals.

In this light Wind, invites the Commission to explicitly require NRA to assure that in case of:

- i. former monopolist operator is the only operator investing in NGA on a relevant scale;

and

- ii. **FTTx architecture chosen by former monopolist operator do not allow for a cost efficient open LLU-like environment** (e.g. fibre unbundling at MPoP not available or not cost effective to replicate retail offers);

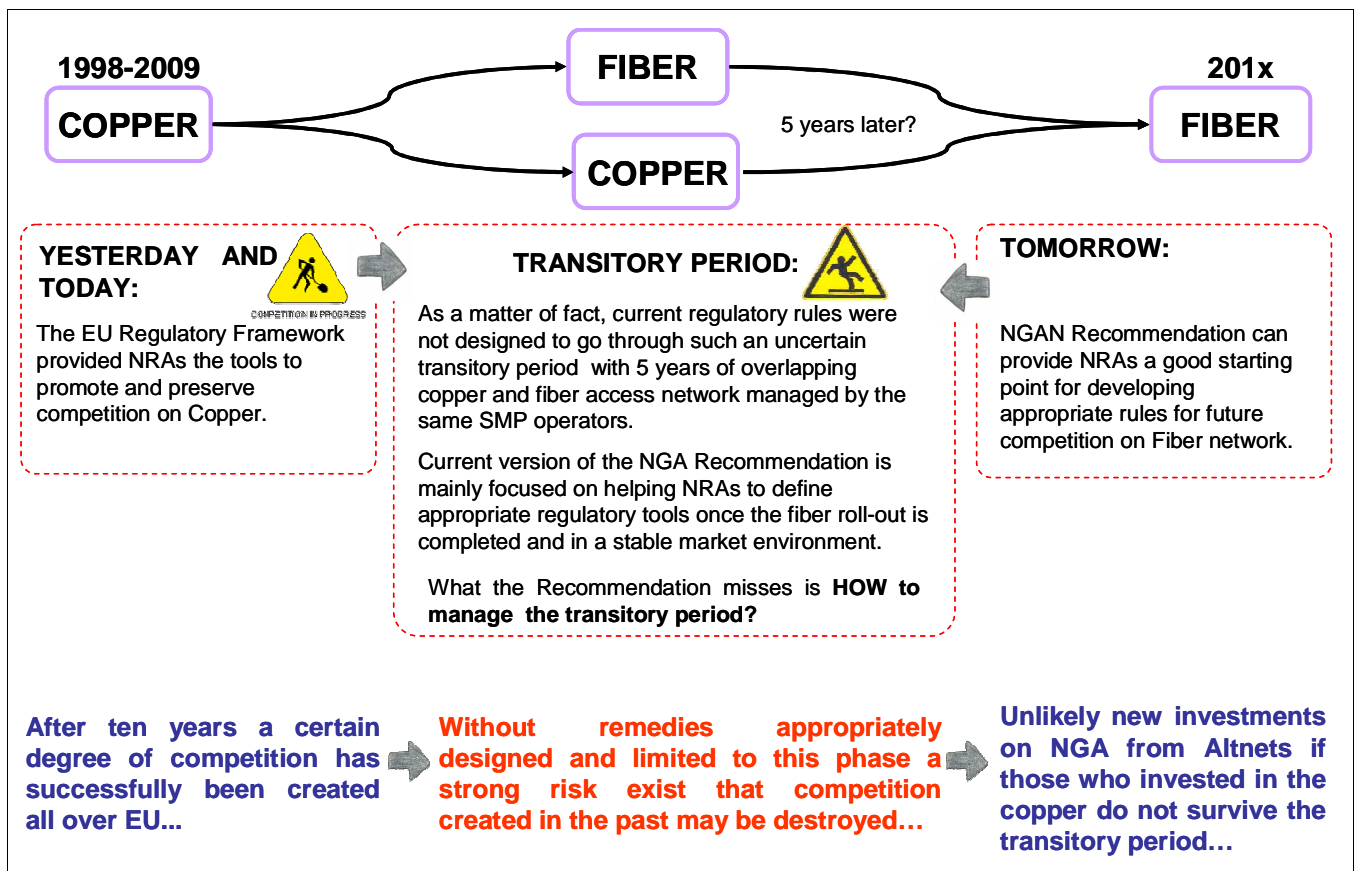
and

- iii. **no alternative comparable access infrastructure exist in the country;**

Or in case the SMP operator receives public funding,

than **NGA investments** should be treated by NRAs as a **simple technology substitution** of a natural **monopoly infrastructure** and alternative operators investments and **competitiveness should be safeguarded especially during the transitory period** (i.e. fibre and copper access network run in parallel). Accordingly NRA should:

- a. carefully **monitor wholesale pricing of LLU-copper** services which **should not be strategically raised until a cost and quality equivalent solution** is not fully in place and operative.
 - b. **develop an NGA access product to allow for effective competition** and service diversification (i.e. pricing and operative issues should allow for full replicability of incumbent retail offers) **under the principles the equality of input and equal access** since the wholesale offer should be developed under the assumption of a monopoly network.
 - c. **develop a transparent, cost efficient and customer friendly migration** process to grant that customers of the Alternative operators can efficiently and transparently be migrated onto NGA services at the same economic and operative conditions of those of the former monopolist operator.
 - d. assure that the 5 year transitory period before decommissioning of copper network should start only after the NGA network is in place and NGA wholesale access product have been designed.
 - e. **assure that retail pricing of NGA services by the former monopolist is coherent with available NGA wholesale services** effectively used by Altnets and with copper based wholesale services.
2. **Recommendation should acknowledge** the **risks for competition** during the **transitory phase** from current stable “copper” market environment to a future stable “NGA” market environment as showed in figure below.



As a matter of fact, during such transitory phase most of the “common” regulatory tools appropriate in a stable copper and/or NGA context may result inappropriate mainly due to the relevance of information asymmetries between SMP operators and Altnets but also due to swift changes to relevant business parameters such as scale and scope economies, operative expenditures, wholesale processes and costs, interconnection architectures, access technologies.

In Wind view, NRAs should be prepared to deal with three general anticompetitive strategies which could be put in place in different times and geographic combination depending on each national market specific and evolving circumstances:

- a. **raising rivals costs on copper based services.** SMP operators may strategically anticipate migration of their customer bases from copper to NGA in order to dramatically reduce scale economies on copper (i.e. asking for higher fees for copper based products) thereby pushing Altnets to accept a progressive deterioration of their economics on copper or invest to migrate on the SMP operator available NGA wholesale services with unclear and unstable wholesale costs.
- b. **retail market pre-emption on new NGA services to foreclose competition for high value customers.** SMP operators may choose to postpone large investments due to lack of market demand and prefer a more slower and more “stealth” roll out of an overlay NGA network in order to avoid regulatory pressure from NRAs to exploit time to market advantages and retail freedom on selected group of customers. In this case the SMP would rather choose the areas to roll out the NGA network in order

to foreclose competition for high value customers which also means that the NGA technology and architecture will not allow for cost effective wholesale access (i.e. MPoP strategically chosen as well as reduced scale economies to maintain high wholesale prices).

- c. **hindering consumers confidence over Altnets on NGA products.** SMP operators obliged to grant cost effective NGA wholesale access products will inevitably try to exploit the operational complexities of a network migration process which entails different interconnection points, technologies and new and not tested wholesale products to reduce Altnets competitiveness and damage customer confidence in Alternative operators for what concerns advanced NGA services.

In Wind view, the Recommendation should acknowledge that the **transitory phase**, for objective and unavoidable reasons, risks to be **exploited by former monopolist operators to heavily reduce Altnets competitiveness** in a forward looking view. Accordingly the Recommendation should transparently and simply require that NRAs closely monitor market dynamics at retail and wholesale level and that, in case of anticompetitive strategies by SMP operators, have the powers to promptly and appropriately intervene both at retail and wholesale level to preserve competition. Moreover the possibility for NRAs to adopt transitory regulatory tools to safeguard competition during the transition period should be explicitly foreseen. For example in the first phase of NGA deployment an obligation to offer NGA bitstream wholesale access products under a retail minus obligation could in some cases be preferred to complicated methodologies for strict cost orientation whose results may not be related to real dynamics on retail markets. At the same extent a general obligation not to increase prices for copper based wholesale products during the transitory phase seems logic and appropriate to safeguard competition.

3. **Recommendation should acknowledge the prominent role played by bitstream products** in the NGA environment and explicitly admit that, **especially during the transitory phase** (but in many cases also after), such service will be **those allowing for competition** on a nationwide basis and hence should be **always available** subject to **equal access and quality of input** obligations and should be **priced, accordingly with the ladder of investment principle**, in order to allow for **full replicability of retail offers**.

Relying on wholesale offers for FTTx unbundling and for terminating segments and access to ducts and civil engineering to preserve competition is, in Wind view, **not realistic**.

First, the presence or **effective availability of such services on a nation wide basis should not be given for granted** in all countries since much will depend upon complex country specific investment decision which are not under the control of the European Commission.

Second, even in any case such services are effective available on a nation wide basis, those will **not play a relevant role during early years of NGA roll out** due to the relevance of operative complexities which require time to be adjusted, information asymmetries as well as the relevance of scale economies to justify relevant investment decision in the current deteriorated financial market scenario.

4. Finally, **Wind invites the Commission to further reflect on the likely anticompetitive impacts of** the hypothesis currently included in the Recommendation to allow for a **reduction of wholesale provisions** in case of SMP **jointly investing** or granting equivalent access to **only one Alternative operator**. In Wind view **such condition should be deleted** from the Recommendation since:
- **It does not reflect the different market power of former monopolist operators in entering into such agreement** (it is not realistic to assume, for most of EU countries, that NGA investments may be decided without the inclusion of the former monopolist operator).
 - **Warrants SMP operators an extraordinary and unjustified power** in negotiating the agreement with Altnets since only the first joining the SMP would benefit from it (i.e. **Altnets would face a “prisoner dilemma”**).
 - **Allows for a collusive duopoly strategy or an incumbent pick competitors strategy;**
 - **Has no sound economic basis** and risks to create a chaotic “ladder of competition scenario” in case the SMP operators decides for each different geographic region in a given country to jointly invest with a different Alternative operator (the only operator with same and best access conditions on nationwide basis would be the former monopolist).

Wind trusts the above comments provide useful insights and remains available to provide further clarifications.

In the attached document Wind makes specific comments and proposes amendments to the text of the Recommendation.

Any question regarding these comments may be addressed to:

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