



II-2.19: The Italian Telecommunications Regulator set access to fixed next generation networks.

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To read AgCom decision (in Italian) click here: <http://www.agcom.it/default.aspx?DocID=7991>

MAIN INFORMATION

The *Autorità per le garanzie nelle comunicazioni* (or “AgCom” – the Italian Regulatory Authority for electronic communications) issued a decision on January 11, 2012, setting regulatory remedies applicable to the Italian incumbent’s fixed next generation networks (NGN).

Italian next generation networks’ regulation complies with pro-competitive and pro-investment objectives provided for by EU sectoral law.

CONTEXT AND SUMMARY

a. Context: Regulatory path intended to promote investments

The *Autorità per le garanzie nelle comunicazioni* (or “AgCom” – the Italian Regulatory Authority for electronic communications) issued a decision on January 11, 2012, setting regulatory remedies for the access to fixed next generation networks (or “NGN”)¹. Those remedies are imposed upon *Telecom Italia* – the Italian incumbent – being it the only operator with significant market power in the relevant markets².

¹ Under EU Electronic Communications Law, “access to” is tantamount to “use of” dominant operator’s specific network elements and associated facilities (*See*, for instance, Article 12 of Directive 2002/19/EC). Access remedies are in principle limited to bottlenecks (*i.e.*, not replicable infrastructures.) In the case at stake, the bottleneck is the terminal segment of next generation networks which reaches customers’ domiciles.

² Under EU Electronic Communications Law, regulatory remedies could be imposed by National Regulatory Authorities (or “NRAs”) only upon dominant operators in certain markets indicated by the EU Commission in an *ad hoc* Recommendation, or defined by NRAs according to a particular proceedings which attributes to the EU Commission a veto power (*See* Article 7 of Directive 2002/21/EC, or Framework Directive). In the case at stake are relevant the markets for wholesale physical network infrastructure access at a fixed location and wholesale broadband access (the difference between the two services comprised in these two relevant markets is that in the first case the dominant is required to provide alternative operators with physical use of its infrastructures, while in the second case it should only provide a network capacity.)

AgCom Decision No. 1/12/CONS is the final step of a regulatory process started by AgCom in 2007 to promote investments and competition in new technologies.

More precisely, AgCom has set up the digitalization of Italy as its “policy objective” since 2006³, noting that Italy was traditionally lagging behind other EU Member States with respect to broadband services’ coverage. AgCom Chairman publicly and repeatedly remarked the negative impact of Italian wide-spread digital analphabetism on overall economic development⁴. The diffusion of next generation networks has been identified as a pre-condition for an increase of advanced services’ demand. With this aim in mind, the mentioned AgCom Decision No. 208/07/CONS started a public consultation on the future regulation applicable to next generation networks.

Pending that consultation and to stop more pervasive regulation, *Telecom Italia* offered some voluntary commitments leading to the so-called functional separation of its copper access network in order to comply with the principle of equality of access. As a condition of their approval, AgCom asked *Telecom Italia* to integrate its proposal with some commitments related to access to next generation networks.

Telecom Italia agreed:

- to publish a reference offer subject to AgCom’s approval with regard to the so-called passive infrastructures (*i.e.*, civil engineering infrastructures like ducts, trenches, *etc.*);
- whether access to passive infrastructures is not feasible, to provide access to its dark fiber (*i.e.*, fiber not used by its customers);
- to publish a plan for co-investments with alternative operators aimed at rolling-on next generation networks;
- to join a committee chaired by AgCom devoted to the analysis of technical issues for the development of next generation networks, and to agree with alternative operators a migration plan from traditional copper networks to next generation networks⁵.

In addition, *Telecom Italia* undertook to extend the application of the other commitments to next generation networks once it has been identified as having significant market power by AgCom with regard to wholesale access services rendered on next generation networks.

³ See, *inter alia*, Speech to the Parliament of the AgCom Chairman on October 18, 2006, and AgCom Decision No. 208/07/CONS.

⁴ Lastly, President Calabrò noted that internet services accounted for 2.5% of Italian GNP, compared with 7% of the UK. He mentioned economic studies from World Bank according to which an increase of 10% of broadband diffusion could increase GNP of 1.21%; and from McKinsey according to which every 2 workplaces rendered obsolete, internet is capable of creating additional 5 (Segnalazione al Parlamento dated January 12, 2012).

⁵ See AgCom Decision n. 718/08/CONS, Annex 1, commitment 9.

On the basis of National Law⁶, AgCom approved these commitments⁷ without formally consulting the EU Commission, as prescribed by Article 7, Framework Directive, in case of remedies' imposition.

This initial step has been fiercely criticized by the EU Commission that – at the time – was drafting a Recommendation on access to next generation networks to promote regulatory consistency across Europe⁸. The EU Commission remarked that *Telecom Italia's* undertakings – insofar as they are aimed at the enforcement of regulatory obligations, modify or replace existing regulatory obligations – must be considered as directly related and/or ancillary to regulatory remedies and, as such, be subject to a consultation both at national and Community level prior to adoption⁹.

To address this criticism, albeit these undertakings were already entered into force, AgCom put them in a formal remedies' decision¹⁰ and notify them to the EU Commission.

The EU Commission criticized the scope of *Telecom Italia's* undertakings (now proposed remedies...) noting that AgCom were proposing not:

- to impose any cost oriented methodology to regulate access to *Telecom Italia's* passive infrastructure (ducts, trenches, etc.);
- to mandate unbundled access to the fibre loop. The Commission was not convinced that access to passive infrastructure and not physical access over optical fibres would be sufficient to safeguard effective competition;
- to define clear rules on migration process which were demanded to operators' negotiations.

⁶ Law No. 148/2006.

⁷ See AgCom Decision No. 718/08/CONS.

⁸ See Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), in OJ L 251 of 25.9.2010 (or “NGN Recommendation”), para. 3 (“*Consistency of regulatory approaches taken by NRAs is of fundamental importance to avoiding distortions of the single market and to creating legal certainty for all investing undertakings. It is therefore appropriate to provide guidance to NRAs aimed at preventing any inappropriate divergence of regulatory approaches, while allowing NRAs to take proper account of national circumstances when designing appropriate remedies*”).

⁹ Immediately after the approval of *Telecom Italia's* commitments, the competent EU Commissioner invited the AgCom to desist from their implementation and publication threatening an infringement procedure under EU Treaty. Actually, AgCom did not desist, albeit subsequently it “transformed” the commitments into remedies and notified them to the EU Commission.
See also EU Commission's decisions of April 14, 2009 and October 29, 2009, SG-Greffe(2009)D/2188 and SG-Greffe(2009)D/8059.

¹⁰ See AgCom Decision No. 731/09/CONS.

Consequently, the EU Commission invited¹¹ AgCom to impose: (i) duly justified cost-orientated access price to passive infrastructure and dark fibre; (ii) unbundled access to the fibre loop irrespective of the network architecture and technology implemented by *Telecom Italia*;¹² (iii) and to supervise the work undertaken in the *ad hoc* Committee and to specify in detail the migration process in the decision. Overall, the EU Commission recommended consistency with the NGN Recommendation, once approved¹³.

AgCom replied to these comments by noting that the diffusion of next generation networks was at the time still embryonic and that, consequently, it was difficult to regulate an infrastructure not yet rolled-out. Thus, it did not modify its decision in order to comply with the EU Commission's comments, but provided to reconsider the situation after the adoption of the NGN Recommendation. Actually, two days after the approval of this Recommendation, AgCom started a consultation on next generation networks' regulation, noting the occurrence of some material changes in the situation considered in 2009.

b. Summary of the Decision

At the end of this proceedings (and after duly consultation of the EU Commission), AgCom approved the Decision No. 1/12/CONS at stake (or the "Decision"). The Decision consolidates all remedies applicable to *Telecom Italia*'s next generation networks since it is identified as dominant in the wholesale access markets.

The Decision has not imposed on *Telecom Italia* the adoption of a particular network typology¹⁴. Albeit suggested by the NGN Recommendation, AgCom did not require the roll-out of a multifiber fiber-to-the-home and point-to-point network¹⁵. AgCom stated that, under current applicable law, it could not impose such a remedy because too invasive. Accordingly,

¹¹ Decision adopted by the EU Commission on the basis of Article 7, Framework Directive, with regard to remedies are not binding (*See* General Court, order of July 12, 2007, case T-109/06, *Vodafone*.) More recently, the Italian administrative judge has stated that, albeit not binding, the ANR could ignore these decisions only on the basis of solid justifications (*See* TAR Lazio, judgment of December 14, 2011 No. 9739.)

¹² Not all network typologies currently allow the provision of unbundled access to alternative operators.

¹³ Cited decision of October 29, 2009.

¹⁴ Depending on the extent of fibre usage in the access network, it is customary to distinguish between: (i) fibre-to-the-home, where fibre is used up to the customers' dwelling; (ii) fibre-to-the-building, where fibre is rolled-out to the building, but copper is used within the building; and (iii) fibre-to-the-cabinet, where fibre is used up to a node in proximity of the building. Only, the first type is all-fibre. Accordingly, it is more expensive, since it does not use any pre-existing infrastructure, but also capable of major speeds.

¹⁵ This network configuration facilitates the provision of wholesale access services to alternative operators.

the Decision regulates the fiber-to-the-node network as being rolled-out by *Telecom Italia* in Gpon technology¹⁶.

More precisely, AgCom has imposed the following remedies:

- all access services are subject to cost orientation under a Bottom Up-Long Run Incremental Cost methodology or “BU-LRIC”¹⁷ (Article 9)¹⁸;
- as soon as technically feasible, *Telecom Italia* should provide the unbundled access to the fibre loop (Article 4);
- in case of a combined copper-fiber network (like the fiber-to-the cabinet typology), *Telecom Italia* should provide unbundling to the copper local loop in addition to access to the cabinet (Article 3);
- during the transitional period (where unbundling is not feasible in Gpon networks), *Telecom Italia* should provide an end-to-end service (or “E2E”), and the virtual unbundling (or “VULA”). The E2E service includes joint provision of co-location at Telecom Italia’s switches, and access to passive infrastructure and to dark fiber (Articles 4-5);
- in line with the ladder of investment principle, *Telecom Italia* should provide the so-called “*Building Blocks*” in order to facilitate alternative operators’ progressive infrastructural investments:
 - access to ducts along the access network, and along upper network layers;
 - access to dark fiber at several network’s layers;
 - access to the terminating segment;
 - co-location and other ancillary services (Article 3.6).

¹⁶ Acronym of gigabit passive optical network. This technology currently does not allow the supply of local loop unbundling to alternative operators. It is anticipated that some technologies, like the Wavelength Division Multiplexing (WDM), would allow the provision of unbundling also on Gpon. The application of WDM to access network is being experienced in Italy.

¹⁷ BU-LRIC is the cost-accounting methodology suggested by the NGN Recommendation. It is already extensively used by NRAs (See, for instance, BEREC Report Regulatory Accounting in Practice 2010, available at http://erg.eu.int/doc/berec/bor_10_48.pdf). In short, BU-LRIC implies that all inputs are considered variable in the long term and that a company has the possibility to adjust them accordingly to the supply of services/goods. Bottom-up implies the use, as a starting point, of the company’s actual costs.

¹⁸ Being bitstream services in the competitive areas and long-distance transport the only exceptions.

- *Telecom Italia* should provide, in any case and any under network typology, bitstream services¹⁹. Supply conditions for this service could depend on the competitive situation of geographical areas (Article 5);
- Migration process would be subject to some deadlines (Article 13).

In addition, *Telecom Italia* is subject also to transparency (with the obligation to publish a reference offer for the above-mentioned services); non-discrimination; and accounting separation in order to implement the cost-orientation²⁰.

The Decision took into account and complied with comments received from the EU Commission²¹ which, in particular, invited AgCom to impose fibre unbundling since other remedies (like access to passive infrastructure and VULA) are “*not sufficient to safeguard effective competition*”. The EU Commission invited AgCom to be “*forward-looking*” and to impose “*an obligation to mandate physical unbundling of existing fibre lines where technically feasible*”.

It is noteworthy to mention that the EU Commission questioned the proportionality of the E2E service. In particular, it noted that this service implies a build-out obligation for *Telecom Italia* which could be “*burdensome*”, especially if the access seeker demands this service outside *Telecom Italia’s “planning mechanism”*.

BRIEF COMMENTARY

AgCom’s attempts to regulate next generation networks in order to promote the digitalization of Italy predate the EU initiatives, and are inspired by its industrial policy views.

AgCom “forced” *Telecom Italia* to offer commitments in order to facilitate the diffusion of next generation networks, when it was not clear that the latter could be regulated under EU sectoral regulation (mainly because it was uncertain whether access services rendered via next generation networks belonged to the same markets of access services rendered via traditional copper networks). In 2006-2007 where AgCom started to “invite” *Telecom Italia* to do “something” to promote next generation networks, there was no next generation networks’ regulatory paradigm in Europe and no ANR had yet regulated those new infrastructures. Even

¹⁹ Bitstream service is a kind of non-physical access. It does not imply any rental of network’s input, as it implies only the provision of capacity.

²⁰ Pricing and other implementation issues are to be defined in a subsequent decision.

²¹ See Decision of June 27, 2001, SG-Greffe(2011)D/10336.

undertakings assumed by British Telecom in 2005 with regard to its access network were limited to traditional copper networks²².

After a tortuous path, the result of the Decision's long gestation is positive.

AgCom has in principle imposed the obligation to supply unbundling of the fiber local loop, without imposing any particular network morphology (*i.e.*, its regulation is technologically neutral.)

During the transitional period, AgCom has imposed a though remedy (the E2E service) aimed at facilitating the diffusion of alternative operators' offerings and their investments (*i.e.*, AgCom excludes even any transitional regulatory forbearance.

As mentioned, AgCom has accepted all the comments received by the EU Commission, but that related to the possible not proportionality of E2E service. In addition, AgCom mandated both E2E service and VULA, where a study for the European alternative operators' association (ECTA) stated that only one of them could be sufficient where physical unbundling of next generation networks is not feasible²³.

Thanks to the general obligation to provide unbundling (once feasible) and the substitute services, Italy is currently one of the only four EU Member States that has mandated unbundled physical access or alternative forms of access to the network local exchange level²⁴.

The Decision shows AgCom's willingness to maintain Italy as a leader in the diffusion of wholesale access services, and its efforts to promote the very poor next generation networks penetration in Italy²⁵.

²² *Undertakings given to Ofcom by BT pursuant to the Enterprise Act 2002*, available at <http://stakeholders.ofcom.org.uk/telecoms/policy/bt-undertakings/>

²³ See WIK-Consult, *NGA Progress Report. Study for ECTA*, March 1, 2012, para. 14.

²⁴ The other three are: the UK; Netherlands and Sweden (*See* mentioned WIK-Consult Study for ECTA, p. 15.)

²⁵ Italy has one of the lowest penetration of fiber-to-the-home and to-the-cabinet next generation networks in Europe (*See* mentioned WIK-Consult Study for ECTA, para. 3.2.6.)