



BEREC's review and update of the Common Positions on wholesale local access, wholesale broadband access and wholesale leased lines

27 September 2012

1. Introduction

This document is a general introduction to BEREC's consultation on its Common Positions in Markets 4, 5 and 6 providing best practice remedies. BEREC's review and consultation initiative is prompted by technology induced changes in the relevant markets (particularly the roll-out of NGA networks) and regulatory developments, in particular the "Better Regulation Directive"¹ and "Citizens' Rights Directive"² adopted by the European Parliament and Council in 2009.

In 2006 and 2007 the European Regulators Group (ERG) developed three **Common Positions** (CPs) covering the following key wholesale access products: wholesale local access (WLA)³, wholesale broadband access (WBA)⁴ and wholesale leased lines (WLL).⁵

In 2009, ERG also set out its methodology for monitoring compliance with and reviewing these CPs.⁶ This methodology set out a three step process by which ERG would:

- Monitor and report on the conformity of NRA remedies with each relevant CP;
- Use the results of such a monitoring exercise in a second phase as a basis to review the continuing relevance of each CP; and
- Where the CP remains relevant, undertake an exercise to update and, where appropriate, clarify and strengthen the CP.

The process described above has now been taken over by BEREC.

In 2010, BEREC undertook a **monitoring exercise** to review NRA conformity with the above mentioned three CPs and summarised the results in a report it published in 2011 (the Monitoring Report).⁷ One of the overall conclusions of this exercise was that NRA conformity with the current CPs was quite good. Nevertheless, as part of its commitment to drive consistency and dissemination of best practices (BPs), BEREC also identified the key areas where the CPs could be improved. One of the key improvements identified was the need to strengthen the CPs and make them more specific.

In 2012, and as set out in the BEREC Work Programme (WP),⁸ BEREC started the process of **reviewing and updating** these CPs, with two key objectives in mind: first, take on board the lessons as set out in the Monitoring Report and, second, bring the CPs up to date with latest technological and market developments (e.g., in relation to NGA deployment).

After adoption of the CPs at the end of 2012 the next important step in this process would be for BEREC to monitor how NRAs have implemented the best practices recommended in the revised CPs. Given that market analysis is performed every two to three years, BEREC considers that such monitoring exercise should be undertaken in 2014 (at the earliest), so as to ensure that as many NRAs as possible have had the opportunity to take on board the

¹ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

² Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

³ ERG (06) 70 Rev 1 Common position on Wholesale local access.

⁴ ERG (06) 69 Rev 1 Common position on Wholesale broadband access.

⁵ ERG (07) 54 Common Position on Best Practice in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines.

⁶ ERG (09) 36 ERG Report on the elaboration and monitoring of common positions.

⁷ BoR (11) 20 BEREC monitoring report on Broadband Common Positions.

http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/219-berec-monitoring-report-on-broadband-common-positions

⁸ BoR (11) 62 2012 BEREC Work Programme (WP).

relevant recommendations. In 2013, BEREC will pave the way for such monitoring exercise by developing an appropriate approach and methodology.

2. Role of BEREC and its Common Positions in the context of the new European regulatory framework for electronic communications

ERG was established to enable, amongst other things, the consistent application of the European regulatory framework for electronic communications, networks and services (the Framework). BEREC was established in 2009, replacing and augmenting the functions of ERG, in order to further enhance cooperation and coordination among NRAs and to further develop the internal market in electronic communication networks and services.⁹

Article 2(a) of Regulation 1211/2009¹⁰ requires BEREC to “*develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework.*” Such best practices would be based on the shared experience of NRAs in implementing the Framework in individual MSs and on additional analysis undertaken by BEREC (for example, as set out in its reports and supporting questionnaires). These best practices would also reflect work carried out by BEREC when preparing its opinions pursuant to Article 7 and 7a Phase II investigations (as set out in the Framework Directive),¹¹ as well as through studies and surveys conducted as part of BEREC’s annual WPs.

The CPs adopted by BEREC have considerable significance for NRAs and this reflects the enhanced role and responsibilities of BEREC. Pursuant to Article 3(b) and (c) of the Framework Directive, MSs must ensure that the goals of BEREC - promoting greater regulatory coordination and coherence - are actively supported by NRAs¹² and that NRAs take utmost account of opinions and common positions adopted by BEREC when adopting regulatory decisions for their national markets.

BEREC CPs have the clear objective of ensuring the consistent application of the Framework in all MSs, thereby contributing to the development of the internal market and complementing the harmonisation guidance provided by the Commission through Article 19 Recommendations.

In addition, economic and technical expertise provided by NRAs is essential in supporting the analysis carried out by the Commission in its functions regarding the electronic communications markets. This is reflected both in the Better Regulation Directive (Recital 19) and in the BEREC Regulation (Article 3.3). Both NRAs and the Commission are therefore required to take the utmost account of any opinions, recommendations, guidelines, advice or regulatory best practices adopted by BEREC.

Application of the best practices contained in the CPs will assist NRAs in designing effective remedies in line with the objectives of the Framework. At the same time, the CPs are not a substitute for any of the legal tests which NRAs must carry out before imposing SMP remedies, in particular the requirement for NRAs to show (among other things) that SMP

⁹ Recitals (4) and (5) of the Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (BEREC Regulation).

¹⁰ Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

¹¹ Directive 2002/21/EC as amended by Directive 2009/140/EC.

¹² It is a policy objective for NRAs, under Article 8 of the Framework Directive, to cooperate with each other, with the Commission and BEREC so as to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.

remedies are based on the nature of the problem identified, proportionate and justified in light of the policy objectives laid down in Article 8 of the Framework Directive.¹³ However, the CPs are an important instrument that NRAs and the Commission must take utmost account of, in the same manner as for Commission Recommendations (such as the NGA Recommendation). Therefore, BEREC expects NRAs to explain in their notified draft measures the steps they have taken to:

- (a) analyse the objectives identified in the CPs and the related competition issues with reference to the market analysis performed by the NRAs;
- (b) to the extent consistent with applicable national law, provide an effective and proportionate regulatory solution to those issues and;
- (c) explain transparently how those competition issues have been addressed and give reasons when their regulatory solutions depart from the best practice remedies identified in the CPs.

With the above context in mind, it is essential that BEREC updates the CPs in a timely manner and ensures that they are fit for purpose and well founded. The CPs need to focus on the consistent application of the Directives across MSs, rather than solely on the uniformity of the remedies imposed, in order to allow NRAs to take into account national market circumstances and differences in national legislations.¹⁴

3. History of ERG/BEREC CPs

BEREC (as well as ERG in the past) is too aware of the important role CPs play in contributing to the harmonised application of remedies across MSs. This is the reason why ERG/BEREC have always committed time and resources to develop such CPs in relevant areas (dating as far back as 2004). After the adoption of the new Framework, through the 2002 Directives, ERG agreed a first CP on regulatory remedies in 2004.¹⁵ This was intended to ensure *“a consistent and harmonised approach to the application of remedies by NRAs in line with the Community law principle of proportionality, and with the new framework’s key objectives of promoting competition.”*

In November 2005, ERG consulted¹⁶ on revisions to this first CP. The consultation was focused on a small number of topics *“based on the experiences of NRAs so far and some suggestions by the services of the European Commission.”*¹⁷ The revisions were thus quite limited in scope and were adopted in May 2006.¹⁸

Since 2006, ERG work focused on market specific CPs. In 2006, ERG first published the CPs on Markets 4¹⁹ and 5.²⁰ These CPs describe the best practices for imposing proportionate and appropriate remedies in those specific markets, when a position of SMP had been identified. These CPs complement the general guidance given on choice of SMP remedies included in ERG (06) 33.

¹³ Article 8(4) of the Access Directive.

¹⁴ See, by instance, ERG (06) 68 Effective Harmonisation within the European Electronic Communications Sector, and ERG (06) 67 Harmonisation – The proposed ERG approach.

¹⁵ ERG (03) 30 rev1: ERG Common Position on the approach to appropriate remedies in the new regulatory framework.

¹⁶ ERG (05) 70 rev 1: Revised Draft ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework - Version prepared for public consultation November 2005

¹⁷ ERG (05) 70 b rev1: Consultation On Revised ERG Common Position On Remedies - Explanatory Memorandum.

¹⁸ ERG (06) 33: Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework.

¹⁹ ERG (06) 70 Common Position on Wholesale Unbundled Access.

²⁰ ERG (06) 69 Common Position on Wholesale Broadband Access.

Based on further analysis,²¹ in 2007 ERG published revised version of the WLA and WBA CPs.²² In addition, in late 2007 ERG published a CP for WLL.²³ It is these CPs that BEREC is now reviewing and updating.

In 2007, ERG also published a CP on Regulatory Principles of NGA which sets out the *ladder of investment principle* in an NGA environment, as well as regulatory principles for NGA wholesale products.²⁴ These principles were further developed in a number of documents in the following years.²⁵

The CPs on WLA, WBA and WLL are now being updated according to the 2012 BEREC WP.²⁶ BEREC's intention is to ensure that the CPs remain relevant, especially in an NGA environment. Moreover, the CPs need clarification and strengthening in light of the enhanced legal role of BEREC under the new Framework, ongoing market developments and the findings of BEREC's 2011 Monitoring Report.²⁷

4. The revised BEREC CPs

4.1 *The structure of the CPs*

BEREC has adopted a systematic approach²⁸ to the review and update of its CPs in order to ensure their continuing currency and relevance. The structure of the CPs, as presented for the current consultation process, reflects that employed in previous CPs issued by ERG.

The CPs are laid out in a tabular structure which aids clarity by discussing the most likely *competition objectives/issues* that NRAs may need to address following their market analysis and by providing guidance on the *best practice remedies*.

The CPs are structured around three key **competition objectives**:

- Assurance of network access and co-location, in recognition that SMP operators may have an incentive to deny access to alternative operators.
- Assurance of a level playing field, in recognition that SMP operators may have an incentive to discriminate (on price and non-price matters) in favour of their downstream operations. BEREC specifically recognises the importance of the following three competition objectives, namely: avoiding unjustified first mover advantage, ensuring reasonable quality of access products and ensuring efficient wholesale switching processes.
- Assurance of a fair and coherent access pricing, in recognition that SMP operators may have an incentive to price their services excessively or engage in margin squeeze.

²¹ "Report on ERG Best Practices on Regulatory Regimes in Wholesale Unbundled Access and Bitstream Access", ERG (07) 53: WLA WBA BP final 080604, which were intended to the task of "analysing different regulatory models in place for different items, identifying those who best achieve the aim of effective and proportionate regulation [according to national specificities], suggesting them as best practice across ERG members."

²² ERG (06) 70 rev1 and ERG (06) 69rev1/ERG/IRG Work Program 2007, ERG (07) 01.

²³ ERG (07) 54: ERG Common Position on Best Practice in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines

²⁴ ERG (07) 16rev2: ERG Opinion on Regulatory Principles of NGA. This ERG Opinion constitutes at the same time the ERG Common Position on NGA.

²⁵ ERG (08) 38, 38rev2 ERG Response to Commission's draft Recommendation on NGA, ERG (09) 17, Report on NGA – Economics Analysis and Regulatory Principles, BEREC (10) 08, BEREC Report on NGA wholesale products, BEREC (10) 25 rev1, BEREC Opinion to the Draft Recommendation on regulated access to Next Generation Access Networks (NGA), BEREC (11) 06, BEREC Report: Next Generation Access – Collection of factual information and new issues of NGA roll-out. BEREC (11) 43, BEREC Report on the Implementation of the NGA Recommendation.

²⁶ BoR (11) 62 Work Programme 2012 BEREC Board of Regulators

²⁷ BoR (11) 20 BEREC monitoring report on Broadband Common Positions, May 2011.

²⁸ ERG (09) 36 ERG Report on the elaboration and monitoring of common positions.

BEREC has also added a new competition objective around the need for “efficient migration processes” to recognise its importance in the context of migration from copper to fibre based NGA networks.

4.2 The approach BEREC adopted when updating the CPs

As mentioned above, one of BEREC’s key roles is to develop and disseminate best practices and through this support the harmonised application of remedies amongst NRAs. In doing this BEREC needs to balance two main objectives, namely:

- ensure the revised CPs meaningfully contribute to **both the consistency and quality of the remedies** imposed by all European NRAs; and
- at the same time maintain an adequate level of **flexibility for NRAs** to be able to reflect their national circumstances when designing their remedies.

BEREC has retained the competition objectives listed in the current CPs as these are still relevant. BEREC has instead updated the competition issues NRAs are most likely to face (relying on the experience of its members) and the list of best practice remedies that they should use when dealing with any competition concerns.

When updating the *best practice remedies* BEREC has used varied *sources of evidence*:

- In relation to **non-discrimination**, and as a first step in the process to review and update the CPs, on 1st March BEREC published a consultation on these issues.²⁹ During the one-month consultation period, BEREC also held a public workshop with interested stakeholders. The consultation closed on 30th March and BEREC received 12 responses. BEREC has now incorporated these principles as best practices in the revised CPs and has also, at the same time, taken into account stakeholder comments.³⁰ BEREC’s consultation on non-discrimination and the revised CPs are also consistent with BEREC’s response to the Commission’s questionnaire on this issue³¹.

BEREC also considered the detailed findings of the Monitoring Report, issued further questionnaires to NRAs (for example one relating to the implementation of Article 10 of the Access Directive) and also held numerous workshops with its members (in order to further explore the likely competition issues faced in various MSs and the remedies imposed by NRAs when dealing with these).

- In relation to the CPs on **WLA and WBA**, BEREC relied on a number of its previous reports which discuss the regulatory principles it developed on NGA and which report on NGA wholesale products drawing extensively on NRAs’ experiences (BEREC also consulted stakeholders on these issues). The CPs also draw upon BEREC’s 2011 report on the Implementation of the Commission’s NGA Recommendation (where BEREC undertook a first assessment of how various NRAs implemented the Recommendation).³²
- In relation to the **pricing** issues, the CPs draw on BEREC’s 2011 Implementation Report as well as BEREC’s input to the Commission’s consultation on “Costing methodologies for key wholesale access products”.³³

²⁹ http://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/67-berecs-review-of-the-common-positions-on-wholesale-unbundled-access-wholesale-broadband-access-and-wholesale-leased-lines-stage-1-high-level-principles-on-on-discrimination

³⁰ Alongside the revised CPs, BEREC has also published a short document summarising the stakeholder responses to BEREC’s consultation. In this document, BEREC briefly explains how it has taken stakeholder comments into account with reference to the revised CPs and the best practices listed therein.

³¹ BoR (11) 64 BEREC’s response to Commission’s questionnaire on non-discrimination.

³² BoR (11) 43, BEREC Report on the Implementation of the NGA Recommendation.

³³ BoR (11) 65, BEREC’s response to the Commission’s public consultation on costing methodologies.

Finally, and in relation to the content of the CPs, BEREC:

- Ensured the CPs are clearer and stricter. This is especially evident in the language used where each BP summarises an approach NRAs “should” take.
- To the extent relevant and appropriate, used the same BPs across all three CPs. For example these include the BPs on non-discrimination (relating to the objectives of “level playing field”, “avoiding unjustified first mover advantage”, “reasonable quality of access products” and “efficient wholesale switching process”), migration and pricing.
- Was mindful of other work it carried out in the past. In particular BEREC built upon its previous work on NGA, remedies and non-discrimination and “distilled” best practices from the regulatory approaches of its members as described in the documents listed above.

5. Relationship of BEREC Common Positions to Commission Recommendations

There are a number of Commission Recommendations which are relevant in this context:

- The Commission Recommendation on NGA. Following close cooperation with BEREC in September 2010, the Commission adopted the NGA Recommendation, which was build on the early experiences of NRAs in dealing with regulation of NGA networks.
- The Commission’s upcoming draft Recommendations on non-discrimination and NGA costing methodologies both of which were recently announced by Vice-President Kroes. BEREC shares the Commission’s goal of creating a seamless set of ideas across the CPs and the Recommendations. BEREC’s draft CPs on WLA, WBA and WLL are consistent with BEREC’s responses to the Commission’s questionnaires in these two areas and reflect the extensive work BEREC carried out in 2011/2012.

In addition, the updated BEREC CPs on WLA and WBA complement the Commission’s NGA Recommendation, of which NRAs should also take utmost account of. These updated CPs are based on earlier BEREC work on NGA, including BEREC’s Opinion on Commission’s draft NGA Recommendation and BEREC’s own report on the Implementation of the NGA Recommendation³⁴ The amended CPs further develop the concepts and principles included in the NGA Recommendation (e.g. on migration, non-discrimination and pricing) by reference to the experience individual NRAs have since accumulated.

The NGA Recommendation and the BEREC CPs on WLA/WBA cover mainly the same issues, although the presentation of some points may differ (e.g. access to the unbundled local loop and access to the terminating segment are treated in the same section).

Finally, the structure of all CPs follows the competition problems that frequently arise and BEREC considers that NRAs do not have to impose all of the best practice remedies listed, but a proportionate combination of these (in Markets 4, 5 and 6) in the light of the Framework objectives, reflecting the actual competitive situation and addressing the specific competition issues that arise in individual MSs.

³⁴ ERG (07) 16 Rev 2 (ERG Opinion on Regulatory Principles of Next Generation Access), ERG (09) 17 (Report on NGA - Economic Analysis and Regulatory Principles), BoR (10) 08 (BEREC Report NGA – Implementation Issues and Wholesale Issues), BoR (10) 25rev1 (BEREC Opinion to the Draft Recommendation on regulated access to Next Generation Access Networks), BoR (11) 06 (Next Generation Access – Collection of factual information and new issues of NGA roll-out), BoR (11) 43 (BEREC Report on the Implementation of the NGA-Recommendation).

6. How to respond to this consultation

BEREC has published the following documents for public consultation:

- The revised CP on WLA ([BoR \(12\) 104](#));
- The revised CP on WBA ([BoR \(12\) 88](#));
- The revised CP on WLL ([BoR \(12\) 83](#)); and
- The Glossary of terms ([BoR \(12\) 89](#)).

The BEREC consultation on the revised CPs will close on **18 October 2012**. BEREC is keen to hear from stakeholders, especially with regards to the competition issues which are likely to arise and the best practice remedies recommended. As BEREC has not provided specific consultation questions, we ask stakeholders to relate their comments to the specific best practices listed in each of the three CPs.

Alongside the revised CPs, BEREC has also published a short document summarizing the stakeholder responses to BEREC's consultation on issues relating to non-discrimination ([BoR \(12\) 103](#)). In this document, BEREC briefly explains how it has taken stakeholder comments into account with reference to the revised CPs and the best practices listed therein. We are therefore not expecting stakeholders to comment again on issues relating to non-discrimination, as these have been already consulted on.

In the meantime if stakeholders would like to get in touch with BEREC in relation to this consultation they should get in touch with the BEREC Office which would put them in contact with the relevant group tasked with the preparation of this consultation document. The BEREC Office contact details are as follows:

- For submitting responses to the BEREC consultation on the CPs: pm@berec.europa.eu
- For any questions/clarifications needed: pm@berec.europa.eu

Once the consultation closes, BEREC will analyse all stakeholder responses and prepare a summary document and finalise the CPs.