



## BT's response to the public consultation on the revised BEREC Common Positions on

- Wholesale Local Access – BoR(12)104
- Wholesale Broadband Access – BoR(12)88
- Wholesale Leased Lines – BoR(12)83

17 October 2012

Contact:

Trevor Maguire

BT Centre  
81 Newgate Street  
London  
EC1A 7AJ  
United Kingdom  
+44 771 466 2278  
[trevor.maguire@bt.com](mailto:trevor.maguire@bt.com)

### *Introduction*

1. We support the overarching aim of BEREC's review of best practice common positions in relation to SMP remedies which is to ensure a more consistent application by NRAs across the single European market.
2. BEREC Common Positions have to be taken utmost account of by NRAs, and as such, it is important that Best Practice guidance should not be overly prescriptive as different circumstances prevail in different countries. It is therefore important that the guidance on Best Practice is sufficiently flexible so that NRAs can adapt their approach to the specific market and competition issues that arise in each member state.
3. Furthermore, we believe it is imperative that NRAs recognise and distinguish the needs of the business services market from those of the mass market e.g. QoS, provisioning, repair SLAs etc. when implementing policy based on the Common Positions in order to ensure the maximum benefit accrues from the European regulatory framework.

### *Scope*

4. In the wholesale leased lines common position document, BEREC states that the document is "relevant to all wholesale leased lines remedies imposed as a consequence of a finding of SMP, whether the relevant market is a market for trunk segments, terminating segments or a backhaul market". We are not sure why the reference to trunk segments was included, since the Commission removed trunk segments from the list of markets susceptible to ex ante regulation in 2007 due to the assumed presence of competing infrastructure for these services. We understand that since 2007, most member states have deregulated trunks (although the UK has yet to follow suit, despite the presence of extensive competing core network infrastructure as discussed in our response to Ofcom's latest business connectivity market review<sup>1</sup>).

### *The ladder of investment principle*

5. The ladder of investment principle is one part of the regulatory toolkit and has to date served its purpose reasonably well in promoting competition based on network infrastructure through a chain of access products designed to enable investment in a step-by-step manner. There is though a natural tension in the ladder, amplified by today's trend of transition from established to new infrastructure, between enabling ready entry at the resale level and recognising the significant levels of investment required to build new infrastructure. Therefore when interpreting and applying the ladder of investment principle NRAs should consider very carefully the nature and potential results of their interventions along the ladder.

### *Encouragement of infrastructure competition*

6. BP3 in all three documents state that "NRAs should encourage infrastructure competition at the deepest level where it is reasonable". Since 'reasonable' is open to wide interpretation, we

---

<sup>1</sup> Competing core network infrastructure is discussed in Section 3.1, Section 4.8 and Annex 1 of BT's response to Ofcom's 2012 Business Connectivity Market Review consultation, and in the reports by SPC Network which we provided to Ofcom alongside our response. All of these documents can be viewed on BT's website at <http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Consultativeresponses/Ofcom/index.htm>

suggest this should be re-worded to reflect the principle that regulation should promote competition at the deepest level of infrastructure at which it will be effective and sustainable.

#### *Access obligations*

7. BEREC recommends in BP5 the Wholesale Leased Lines (WLL) paper and BP8 in the Wholesale Broadband Access (WBA) paper, that NRAs should require SMP operators to grant access “as soon as possible following receipt of the request from an alternative operator”. We think it important that the phrase “as soon as possible” be replaced with “as soon as reasonably practicable and without undue delay”. This would be in line with the obligation that Ofcom plans to impose on BT in wholesale leased lined markets where we are found to have SMP.
8. In BP6c (WLL) and BP9c (WBA), BEREC recommends that if a request for a new product is assessed as feasible, NRAs should require SMP operators to develop and grant access to the new product/services promptly”. Here, the word “promptly” should be followed by the phrase “and as soon as reasonably practicable and without undue delay”.
9. BP6a/BP9a and BP6c/BP9c (WLL & WBA respectively) both refer to the feasibility of new products. We urge BEREC to expand these recommendations to refer not just to feasibility (which could be interpreted narrowly to refer to technical feasibility) but also to commercial viability and related factors such as opportunity cost.
10. BP6d (WLL) and BP9c (WBA) refer to the incorporation of new products and services into the Reference Offer “unless it is deemed not proportionate to do so, for example because market driven demand cannot be expected”. To ensure this exception is only made by the NRA following an assessment of the potential consequences, the words “after due consideration by the NRA” should be inserted immediately before the clause beginning “for example”.
11. BP13 (WBA) refers to the imposition of backhaul dark fibre/leased lines (including Ethernet) as an independent/subsidiary measure of duct access, where necessary. To ensure that the backhaul obligation is applied appropriately the Best Practice guidance should highlight that products such as Virtual Unbundled Local Access (VULA) and Passive Infrastructure in the UK, which are offered by Openreach (the functionally separate access organisation in BT) on an EOI basis, remove the need for further regulatory intervention.

#### *Non-discrimination*

12. BT agrees that there are different forms and interpretations of non-discrimination and that NRAs need to select which should apply on a case-by-case basis. However, EOI is the most onerous form of non-discrimination, and an NRA wishing to impose this remedy should identify clearly the market failures it is intended to address and the reasons why lesser forms of non-discrimination are not sufficient. BP10a (WLL), BP13a (WBA) and BP19 (Wholesale Line Access – WLA) should be amended to include this requirement.
13. BP10a (WLL), BP13a (WBA) and BP19 (Wholesale Line Access – WLA) gives some examples of circumstances in which BEREC believes EOI and EOO are appropriate. This should be expanded to cover additional factors and circumstances, in particular:
  - a. EOI should not be imposed at two different levels in a value chain: this adds unnecessary costs to the detriment of customers and runs counter to the principle that EOI should apply to enduring economic bottlenecks only, with no regulation downstream;

- b. EOI should not apply in markets which, like traditional interface leased lines, are in decline, since limited life-span of the market means that costs of re-engineering products and systems will outweigh any benefits.
14. BP11 (WLL), BP14 (WBA) and BP20 (WLA) appear to position functional separation as a separate remedy to EOI. In BT's view, these two remedies are closely linked, in that functional separation is often needed to ensure EOI works effectively. We therefore suggest that BEREC revise these Best Practices to state that where there is a need for EOI, the NRA should consider whether functional separation is also necessary to make EOI effective.

#### *Transparency*

15. BP28 (WLA) recommends NRAs should consider imposing an infrastructure database of civil engineering infrastructure. We urge BEREC to expand these recommendations to advise NRAs to consider the relative cost of setting up such a database and take due regard of the risk of releasing sensitive data.

#### *SLAs/SLGS and KPIs*

16. In BP 22/25/32 and BP 23/26/33 (respectively WLL, WBA and WLA), BEREC recommends that NRAs should impose SMP obligations relating to SLAs and SLGs. We note that such obligations can be incorporated in mandated Reference Offers subject to scrutiny by the NRA (as is the case in regulated wholesale leased lines markets in the UK): if this is the case, specific SMP remedies for SLA and SLGs are not necessary.
17. In our view, the final common position should reflect this and state that SLAs, SLGs and KPIs should, where possible, be agreed between the SMP operator and industry, with regulatory intervention occurring only where agreement is not reached in a reasonable timeframe.
18. We suggest also that there should be greater recognition that the purpose of introducing SLAs/SLGs and KPIs may be different. In particular, SLAs and SLGs may be designed to ensure that the product is fit for purpose and that it is supplied to a reasonable standard (with sanctions if it is not). On the other hand, KPIs may well be imposed as a tool to provide the information necessary to establish whether the service has been supplied on a truly EOI or non-discriminatory basis, or as an indicator of whether there is a discrimination problem.

#### *Notice periods for phasing out legacy networks*

19. BPs 27-29, 30-32 and 37-39 (respectively WLL, WBA and WLA), refer to obligations on SMP operators in relation to notice periods for phasing legacy networks. We believe that formal regulatory obligations are not necessary where the SMP operator has made reasonable, credible and reliable public commitments, which it continues to observe, on notice periods to customers and industry. In addition, specific obligations on notice period are not necessary where EOI is in place since the SMP operator will be obliged to give notice to other providers and its own downstream operations on the same basis and using the same timescales.

#### *Cost orientation*

20. We welcome the acknowledgement in the common positions that it is for individual NRAs to consider the appropriateness and proportionality of imposing explicit pricing obligations. Only if non-discrimination and less intrusive alternative remedies can be shown to be ineffective should a cost orientation remedy be considered. This is particularly important for NGA-based products

where operators and regulators require flexibility to address the specific issues raised by these large investment programmes, to promote consumers' interests and competition and at the same time to put the right investment incentives in place. We also strongly support retaining the principle of full cost recovery. We supported the Commission's confirmation that forward-looking costing methodologies continue to provide the best buy-or-build signals where cost orientation remedies are regarded as necessary and would encourage BEREC to consider this also in the context of their common positions.

21. BP47 (WLA) states that cost-orientation should be imposed where there is an enduring bottleneck, and only where proportionate to impose a combination of remedies to have the same effect. We believe that cost-orientation is only one of a number of non-discrimination remedies and therefore should be positioned as such in the Best Practice Common Position for WLA.

#### *Margin squeeze*

22. We recently provided detailed comments to the European Commission on their proposed Recommendations on Non-Discrimination and Costing Methodologies. These are annexed to this response.
23. BP 36/42/49 (respectively WLL, WBA and WLA), require NRAs to implement obligations preventing SMP operators from engaging in margin squeeze. As they stand, the common positions appear to suggest that the risk of margin squeeze and therefore the need to introduce *ex ante* obligations to prevent margin squeeze are present across all countries.
24. While we agree that *ex ante* margin squeeze tests can be a necessary tool to ensure that downstream operators can obtain access products and compete with the incumbent on fair pricing terms, we believe this is by no means universal and can differ significantly between countries. The presence of strong non-discrimination obligations on the upstream input level, including EOI and functional separation, in combination with effective and sustainable competition from alternative suppliers can make additional *ex ante* margin squeeze obligations disproportionate.
25. This is particularly important in the context of NGA broadband, where an explicit margin squeeze test, if implemented wrongly, can be too blunt an instrument, which could be detrimental to achieving the Commission's objectives of fostering investment in and take-up of high-speed broadband. Therefore the common positions could usefully qualify the need for an *ex ante* margin squeeze test by reference to effective EOI remedies and effective downstream competition.
26. Furthermore, the common positions appear to assume that downstream competitors invariably operate on a smaller scale compared to the SMP operator, necessitating a margin above the efficient margin of the SMP operator, to ensure that operations on a smaller scale remain sustainable. We do not believe this is always the case: in the UK, BT's main competitors Sky, Virgin Media and TalkTalk have gained similar scales in the retail market. In addition, new entrants might also benefit from efficiency gains from operating more modern networks compared to the incumbent's legacy network. Any margin squeeze test, where it is implemented, should fully take these issues into consideration.
27. Another increasingly important consideration, when establishing margin squeeze tests, is the prevalence of bundling of telecommunications and TV services at the retail level. While the SMP operator might have SMP at the upstream level for network access, this might be

counterbalanced, to some degree, by competitors' high degree of market power in the wholesale TV services market. The best practice common position could usefully recognise the importance of these issues.

28. BP37/48/57 (WLL, WBA and WLA) should be amended to state that NRAs should ensure that discounts of all types are not discriminatory and that all forms of discount scheme (and not just volume discounts) are compliant with any margin squeeze tests that are imposed.

*Fair & coherent access pricing*

29. In BP 44/52 (WBA and WLA), BEREC definitively recommends that NRAs should impose pricing of NGA bitstream/access products that is consistent with legacy (copper) pricing. We believe that there are circumstances where NGA take-up will need to be encouraged by not linking prices to legacy products. Therefore Best Practice guidance should indicate that NGA pricing should be consistent with legacy pricing where appropriate to the relevant market conditions by the NRA.