

## ETNO response to BEREC draft CP on best practice in remedies on markets 4, 5 and 6; BoR (12) 104, BoR (12) 88, BoR 12 (83)



October 2012

### Executive Summary

- ETNO welcomes the present consultation. We believe, however, that the revision of the Common Positions (CP) for best practices for remedies in markets 4, 5 and 6 should only be completed on the basis of the final Commission guidance on non-discrimination and costing methodologies in 2013. The CPs would otherwise need to be revised very shortly after their adoption to take account of the new Commission guidance. This would undermine legal certainty and predictability for all involved.
- ETNO considers the present consultation period of *de facto* less than three working weeks as overly short, in particular considering the important field of application of the CPs and the length of the overall revision process within BEREC.
- The draft CPs contain a number of recommendations that would risk disproportionate outcomes in national markets and/or that are not yet aligned with the Commission's policy approach to price and access regulation of next generation networks announced on July 12, 2012. The final CPs should ensure that NRAs continue to have appropriate discretion in deciding on appropriate obligations at national level, such as the proportionate set of access products.

## **ETNO response to BoR (12) 104, BoR (12) 88 and BoR (12) 83**

ETNO takes the opportunity to comment on the present draft BEREC Common Positions on best practice remedies on markets 4, 5 and 6.

### **Timing of CP revision in view of planned Commission guidance on remedies**

ETNO fully supports BEREC's role in contributing to the internal market for electronic communications services and does not, in principle, question the need to update the present Common Positions in line with technology and market developments.

The present consultation appears untimely, however, in view of the ongoing preparation of European Commission guidance on non-discrimination and costing methodologies. It therefore risks not leading to stable, meaningful and proportionate EU level guidance on remedies' application.

The Common Positions do not yet fully take into account the important readjustment in EU regulatory policy presented by Commissioner Kroes in her announcement on July 12, 2012. In the announcement, the Commissioner states her intention to provide reliable guidance until 2020 on the regulation of next generation networks (NGA) in order to enhance the broadband investment environment and sets out the main cornerstones of the new regulatory approach.

The adoption of the announced Commission guidance in the beginning of 2013 would necessitate a thorough revision of the present CPs only weeks after their presumed adoption at the next BEREC Plenary in December 2012. The current consultation therefore does not foster certainty and stability of the EU regulatory environment. We encourage BEREC to not adopt any final CPs as a result of the present consultation, but to consult the market on adapted Best Practice remedies CPs based on the forthcoming Commission guidance, once adopted.

### **Overly short consultation period**

ETNO regrets that BEREC chose to consult stakeholders only for a period of *de facto* less than three working weeks on the three documents, an inadequate timeframe to ensure full stakeholder involvement. The short consultation period does not allow a trade association such as ETNO to provide comprehensive input on the draft texts, considering that internal processes need to be respected and the full involvement of members ensured.

The consultation period is well below best practice set by other EU institutions (such as 6 weeks practiced by the European Commission) and is even not in line with BEREC's own rules on public consultations that foresee that *"The period granted for submitting written contributions should normally be 20 working days after the announcement of the consultation."*<sup>1</sup>

The ambition of BEREC to guide its members' application of remedies in the key EU wholesale markets through the present CPs and the fact that work within BEREC on the revision of the Common Positions will overall last for almost 12 months would have called for a considerably longer consultation period.

## **BPs should be adapted to promote investment in NGA infrastructure**

NRAs under Article 8 of the EU Framework Directive need to balance a set of regulatory objectives when imposing access and price control remedies under the Access Directive, in particular the promotion of competition and of investment in enhanced broadband infrastructures. The policy announcement by the Commission on July 12 has emphasised the importance of regulatory conditions for investment incentives of market players and proposed changes to the current regulatory practice. The present draft Common Positions appear to still be enshrined in regulatory practice developed for current generation broadband networks. For example, the 'ladder of investment' concept, interpreted as requiring access at multiple points in the network, still features prominently in the CPs even though it is considered far less relevant in an NGA environment where NRAs should identify the appropriate layer for network access in function of technology, competition and investment conditions.

Furthermore, key elements of a consistent and investment-friendly approach to NGA networks such as risk sharing, pricing flexibility and technology neutrality are not sufficiently reflected in the draft CPs under consultation. For example, BP 41 in BoR (12) 88 that reflects the conditions for pricing flexibility under the new approach to fibre regulation announced by the Commission is not included in a similar manner in BoR (12) 104.

We therefore invite BEREC to at this stage focus on contributing to the forthcoming Commission guidance on non-discrimination and costing methodologies. To not adopt a revised set of CPs now would increase legal certainty (s. above) as well as allow BEREC to better safeguard incentives for NGA investments in its recommendations.

The final CPs should put a stronger emphasis on proportionality and reflect that NRAs need to maintain appropriate discretion when deciding on appropriate obligations at national level, such as the proportionate set of access products.

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<sup>1</sup> [http://berec.europa.eu/eng/news\\_consultations/](http://berec.europa.eu/eng/news_consultations/)

## **Scope of ETNO comments - non-discrimination BPs should also be revised**

Notwithstanding the above, ETNO wishes to as best as possible contribute to the present consultation and comment on best practice recommendations in detail in the Annexes to this consultation response.

We note that BEREC has not invited comments on those issues that have been subject to a consultation on high-level principles for non-discrimination in spring this year.<sup>2</sup> However, the present draft documents contain for the first time detailed recommendations on non-discrimination in the course of the CP revision process.

ETNO therefore considers it important to comment also on these principles - that are still in draft form as is the rest of the documents - and invites BEREC to reconsider the according CPs in any final document in line with the comments made in the Annexes.

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<sup>2</sup> ”BEREC’s Review of the Common Positions on wholesale unbundled access, wholesale broadband access and wholesale leased lines - Stage 1 High Level Principles on issues of non-discrimination”, BoR (12) 10

## ANNEX I

### Comments on draft best practices on the market for wholesale (physical) network infrastructure access, BoR (12) 104

**Remark:** Please consult the draft best practice texts in parallel

Objective	Best Practice	Comments
<u>Assurance of access</u>	BP1	<p>ETNO agrees on the need to adjust remedies to the competitive situation in a national market.</p> <p>We also welcome the inclusion of different architectures in the considerations (e.g. FTTH/B, FTTC). It is important to consider all competitive infrastructures, in particular also those based on cable and LTE, when imposing remedies under the Access Directive.</p> <p>Whether there is a need to impose a “combination of access products”, i.e. multiple products within one market should be subject to a strict proportionality assessment and tied to verifiable demand for these products.</p> <p>The choice of appropriate and proportionate access products should not only reflect the national circumstances but, as the case may be, also the sub-national circumstances and the competitive infrastructures present in the member state.</p>
	BP2	<p>The ladder of Investment principle (LoI), interpreted as requiring access at multiple points in the network to allow entrants to ‘move up the ladder’, is in many cases not an appropriate approach, in particular given the achieved level of infrastructure based competition. Evidence shows that market entry does not necessarily follow the LoI.</p> <p>In an NGA context, network investments are moreover increasingly guided by technological evolutions such as the type of FTTC or FTTH technology deployed, leading to an efficient point of access in the network which may be passive or active, depending on national or local market circumstances.</p>
	BP3	<p>Concerning infrastructure competition, the NRAs should take into account all relevant infrastructures, i.e. where operators with cost-oriented access to the copper network or other infrastructure based operators, e.g. based on cable or LTE, are</p>

		<p>present.</p> <p>The BP should explicitly acknowledge the need for “<u>taking</u> into account technical feasibility in view of necessary network evolutions”.</p>
	BP4	<p>ETNO agrees that remedies on copper and fibre networks may differ, and that the regime in each case should be proportionate and justified. The EU Commission has in its recent announcements clearly indicated that there are valid reasons for treating fibre networks differently from current generation broadband networks as regards access and price regulation. It is unclear how NRAs should impose an obligation which, “<i>regardless of the technical solution used by the SMP operator</i>”, is at the same time and proportionate, possible and efficient.</p> <p>It should be noted that the regulatory treatment of copper and fibre access should be based on the presence (or absence) of an SMP position on the specific relevant market – as defined in accordance with national circumstances. This first, determining stage of the regulatory process should not be pre-empted by assuming that copper and fibre access will be similarly regulated. The analysis of these markets should be based on the individual market situation in the specific Member State and / or area; treating equally all competing technologies provided on the relevant markets.</p>
	<u>Access products at specific access points</u>	<p>The wording “<i>reaching from the end-user premises (including in-house wiring from the network termination point) to the first concentration point</i>” risks extending possible regulation beyond the scope of market 4. It should be clear that the BEREC guidance in this document is without prejudice to an appropriate market definition carried out pursuant to the regulatory framework.</p>
	BP5	-
	<u>Unbundled access to the fibre loop in the case of FTTH</u>	

	BP6	<p>Comments for BP 6 – 13:</p> <p>We suggest that BEREC should not determine at EU level concrete operational details of access to FTTH / FTTN or civil engineering infrastructure</p> <p>If such access will be granted on regulatory terms as a result of a concrete market analysis, detailed remedies will need to be specified taking into account the</p> <ul style="list-style-type: none"> <li>• specific local circumstances of the FTTH/FTTN network / civil engineering (technical specificities, deployment plan, roll-out configuration),</li> <li>• actual market failure identified within that context, and the need to formulate appropriate and proportionate remedies</li> <li>• concrete possible demand for types of FTTH/N access, or access to civil engineering.</li> </ul> <p>For example, whether an “<i>appropriate product between the access point and the MPoP</i>” should be provided by the regulated operator clearly raises questions of proportionality and will depend upon different factors such as the reach of alternative networks, whether such obligations will be necessary to ensure downstream competition etc.</p> <p>ETNO does not support a general preference for physical unbundling as expressed in the BP and fn 9. The most effective and appropriate access remedy to ensure downstream competition and choice may in the long term be an active or passive access product, depending on market circumstances</p>
	BP6a	s. above
	BP6b	s. above
	<u>Unbundled access to the copper loop</u>	
	BP7	s. above
	BP7a	s. above
	BP7b	s. above
	BP8	s.above
	<u>Access products to reach access point</u>	
	BP9	There is no rule of thumb that distance alone increases the need for ancillary obligations in addition to an unbundling obligation. Several other factors such as the reach of alternative networks, e.g. in a symmetric scenario, the economics of access in the specific area etc. need to be taken



		into account.
	BP10	<p>The BP appears clearly disproportionate.</p> <p>Whether backhaul should be provided on regulated terms is a matter of market analysis on the relevant market. If there are geographic differences in the provision of backhaul services this may call for geographic segmentation, but not for an obligation to provide regulated access to such services across the national territory, resulting in over-regulation in large parts of the market.</p> <p>The BP is an example of disregard for the legal basis of regulatory intervention, the market analysis procedure and for a strong bias in favour of imposing obligations even where their necessity is not demonstrated which can be encountered throughout the documents.</p>
	BP11	The access obligation should however not limit the technical flexibility of the SMP operator. This BP should be proportionate, meaning in this context for example to allow for the same spare capacities, e.g. for planning purposes. Such a situation should not be regarded as 'strategic withholding of capacity'.
	<u>Access to civil engineering infrastructure/ducts</u>	
	BP 12	-
	BP12a	-
	BP12b	-
	BP12c	Other price control measures than cost-orientation should not be excluded
	<u>Backhaul dark fibre/leased lines including Ethernet backhaul</u>	
	BP13	<p>There is no justification to impose Ethernet Backhaul Access as an independent or subsidiary measure.</p> <p>The Remedy should – if there are no other less intrusive measures – rely on leased lines, not dark fibre. As the legacy network is still in place, access to the MDF is still possible and not affected by the new NGA networks. Furthermore, NGA is a new investment beyond the legacy network. Relying on an active telecommunications service would acknowledge such investments and assure enough incentives for alternative operators to make the economic viable decision whether to invest in the connection to the MPoP or to rent such a service from the NGA network operator.</p>
	BP14	A general obligation to comply with any reasonable access requests may introduce legal uncertainty and clouds the fact



		that regulated access should and can only be imposed by NRAs where this is necessary and proportionate under Art. 8 and 12 Access Directive.
	BP15	
	BP15a	
	BP15b	
	BP15c	
	BP15d	<p>It is crucial to underline that it is unjustified to impose the development of new wholesale access obligations if no market demand can be reasonably expected.</p> <p>ETNO strongly objects to the BP stating that “NRAs should ensure that they [new products and services] are captured by the relevant SMP obligations already imposed on SMP operators”, Whether a retail product is part of a product and services market is determined by a market analysis. Whether the need for a corresponding wholesale product exists, is in turn determined by a competition analysis. The regulated operator may develop new and innovative services in a fully competitive environment in which case an access obligation would not be justified.</p>
<b><u>Assurance of co-location at the access point (e.g. MDF, street cabinet, concentration point) and other associated facilities</u></b>	BP16	
	BP16a – 16b	
<b><u>Level playing field</u></b>	BP17 – 18a	
	BP19	<p>We note that the revised best practice suggests that NRAs should always impose equivalence, leaving NRAs little scope to decide whether or not equivalence is a proportionate obligation in a given case. Given the potentially far-reaching nature of equivalence obligations, the BP should emphasise the need for a thorough proportionality test in this context.</p> <p>The BP also suggests applying equivalence only to SMP operators. ETNO believes that in the context of symmetric regulation, a symmetric implementation of such an obligation on all access network operators could be appropriate.</p> <p>The paragraph appears to assume that a new retail product automatically gives rise to a new underlying operational</p>

		<p>system or process, and that therefore the related regulated wholesale access products should be based on such new underlying operational system/process.</p> <p>This is however rarely the case.</p> <p>It is not unusual that new retail products are provided by the incumbent based on legacy operational systems. In that case, also the related regulated wholesale access products will be based on such underlying legacy operational systems and therefore no new underlying operational system will be specifically conceived for such products. Even in the context of NGA, new networks do not imply new operational systems. Incumbent operators aim at using existing systems so as to ensure efficient investments.</p> <p>Secondly, we fully support the reasoning on equivalence of output in the last sentence of this paragraph. We would also suggest to add the following wording: "or when markets are characterized by a considerable level of infrastructure competition".</p>
	BP19a	<p>ETNO agrees that NRAs should be responsible for determining the exact form of non-discrimination / equivalence and that evaluation should be on a product-by-product basis.</p> <p>ETNO believes that the concept of EOI is at the moment still open to interpretation and not determined at EU level. This notwithstanding, ETNO also agrees with the general thrust of the 2nd principle laid down in the BP that a "<i>strict implementation of EoI</i>" would only be appropriate where "very low" incremental implementation costs are present, i.e. in case of new processes.</p> <p>Contradicting this principle, however, the draft BP then states that EoI should also be implemented for certain key legacy services. It is unclear which services BEREC is referring to and in which way a service would be classified as a "key service". This BP bears the risk of a disproportionate interpretation and enforcement of EoI.</p> <p>To achieve a level playing field it is important to keep in mind that all processes should be equivalent (but not necessarily the same) to those provided internally. In most cases it is economically not attractive to build up completely new systems and processes (s. above, even in context of NGA) as there are already usable and established legacy systems. BP19a should be adapted in the above sense.</p>
	BP20	-.
<b>Avoidance</b>	BP21	Economic replicability:

<u>of unjustified first mover advantage</u>		Such a regime should ensure that incentives to invest are not distorted. That means that only the same business models with similar risk-profiles should be taken into account when evaluating economic replicability (e.g. in margin squeeze tests). Moreover, the relevant risk-profiles should always reflect the economic conditions of an investing firm, e.g. the price which reflects the full risk should be taken as yardstick for assessing the replicability of retail-offers.
	BP21a	<p>Regarding publication of information on wholesale offers, ETNO observes that the transparency requirement implies that every competitor knows in advance the prices and conditions that the SMP operator plans to use.</p> <p>This may be problematic even from a competition law perspective, i.e. sharing of business sensitive information among competitors. Therefore, ETNO insists that it should be possible to work with Non-Disclosure-Agreements (NDA) in order to avoid that confidential or business sensitive information is spread to competitors in the market based on their own platform.</p>
	BP21b	<p>The decision as to whether wholesale offers should be amended or new wholesale offers made available is governed by Article 12 of the Access Directive. In particular, such imposition must be necessary and proportionate, taking into account, inter alia, the viability of other upstream access products (Article 12 (2) lit. a). This includes offers for passive infrastructure such as ducts that, if sufficiently available, alleviate the need for new offers. The conditions of Art 12 AD apply also where NRAs want to ensure 'replicability' of retail offers. If the market for the provision of a new downstream service is already competitive absent wholesale regulation, no additional obligations should apply. Offers should remain within the limits of what the regulated operator already provides, externally or internally.</p> <p>Regarding prices the regulated operator should be in the position to decide, how a situation where economic replicability cannot not be achieved according to the NRA's opinion is resolved (i.e. on the retail market or on the wholesale market).</p>
	BP22	<p>We fully support the necessity to define appropriate and due lead times on a case-by-case basis.</p> <p>Indeed, these should be determined in function of the concrete nature of the new wholesale product (is it a crucial new launch significantly impacting the alternative operators or is it just an upgrade with a minor impact?) and the relevant information (and thus the concrete time needed for implementation).</p>
	BP23	-

	BP24	-
	BP25	<p>Information on the availability of networks can be considered proportionate for access seekers that want to know if specific loops support certain speeds, quality etc.</p> <p>Providing information on planning and status of network rollout, however, appears too far-reaching as a principle as it includes highly sensitive, business confidential information. This notwithstanding, ETNO believes that any such measure should be symmetric.</p> <p>As a minimum, competitors that are offering retail services based on a competing infrastructure (like CATV operators) should be subject to the appropriate non-disclosure requirements, to prevent undue and asymmetrical disclosure of business-sensitive information.</p> <p>This is necessary not only from a sector specific, but also from a competition law point of view. Uncontrolled distribution of information could constitute a violation of Art. 101 TFEU. We think it would be appropriate for BEREC to add these considerations in its BP document, as this is of paramount importance for the practice of the NRA's in their respective markets.</p> <p>BEREC should clarify the meaning of "periodical update".</p>
<b><u>Transparency</u></b>	BP26	The approval by the NRA of the reference offer is important, the NRA being the interlocutor of the SMP-operator to finalise the reference offer.
	BP26a	The evolution of service offers should be limited to justified reasons and remain proportionate, and not, as the BP seems to suggest, extend to any other development that may be deemed desirable by the access seeker.
	BP26b	-
	BP26c	Information on prices should depend on concrete demand (e.g. if no current and concrete demand for wholesale FttH product exists, prices would have to be fixed only for concrete demands)
	BP26d	
	BP26e	
	BP27	It remains unclear who will be responsible in case network planning has to be changed. The SMP operator cannot commit to a very long network planning period. Flexibility and proportionality is needed.
	BP28	Transparency on all existing civil works infrastructures usable for the deployment of communication networks can result in substantial cost savings. To tap the full synergy potential, such inventories must systematically comprise all relevant

		<p>civil works infrastructures, also of other network-based industries or sectors, be it in public or private ownership, such as energy and water supply, roads, waterways and railway, independent of the finding of SMP. Such rules are currently considered by the EU Commission and fall outside of this consultation. At least a reference to (horizontal) symmetry including utility offers should nonetheless be introduced in the present consultation. With regard to the level of detail, the right balance must be found between a useful and practicable degree of transparency enabling operators to use existing civil works infrastructures for broadband roll-out and the costs involved for data generation, provisioning and updating. Information on free capacity should not be included in such a database as it would not only be very costly and time consuming for owners of civil works infrastructures to generate such information but also updating such information would be extremely cumbersome. It seems sufficient that up-to-date information on spare capacity is shared between the infrastructure owner and the access seeker on a case by case basis.</p> <p>The actual need for such infrastructure database and the actual content of such system should be assessed within the specific local circumstances. Where it is set up, an efficient system must be based on non-discriminatory access to information.</p>
<b><u>Reasonable quality of access products - technical issues</u></b>	BP29	-
	BP30	-
	BP31	-
<b><u>Reasonable quality of access products - operational aspects</u></b>	BP32	<p>As on previous BPs, we would like to underline here the need of a case-by-case definition, this time applicable for the process of setting SLAs.</p> <p>Typically, for example, wholesale access providers active in markets characterized by a multitude of small wholesale access seekers which are procuring relatively small volumes of access products would be much more sensitive to potential “statistical errors”, thus unduly leading to infringements of SLAs while the overall performance level is satisfactory.</p> <p>SLAs should therefore take account of these specificities of the market circumstances.</p> <p>It also needs to be pointed out that high performance levels</p>

		cannot be ensured by a strict interpretation and enforcement of EOI (cf. the example of UK).
	BP32a	-
	BP32b	-
	BP32c	-
	BP32d	-
	BP33	-
	BP33a	-
	BP33b	<p>Proactive payments: Should the service level fall below the agreed standard at market level, the alternative operators can approach the SMP operator and claim compensation if they are entitled to. In this respect, it should be noted that in practice, there is no “proactive” payment: the alternative operator has to claim for it as is the case for the end-user at retail level.</p> <p>Obliging a wholesale access provider to proactively execute Service Level Guarantees payments at wholesale level would be discriminatory against the wholesale access provider. In principle, the latter is typically not proactively paying Service Level Guarantees penalties in case of infringement of Service Level Agreements at retail level. Therefore, no such proactive Service Level Guarantees payments should be imposed at wholesale level.</p> <p>As a matter of fact, in most Member States, penalties need to be claimed by the end-user for the retail services. If operators do not deliver pro-actively on this towards their end-users, why should the SMP-operator do this towards the alternative operators for the wholesale services? We are surprised to find such best practice in a document promoting the non-discrimination principle. BP 33b should be adapted so as to respect this principle.</p>
	BP33c	-
	BP33d	<p>It is unclear if SMP operators are able to differentiate, namely implement risk-sharing models.</p> <p>As currently worded, this sentence should be removed from the document. If the sentence remains in the text, the best practice should explicitly specify that “<i>specific market circumstances should be taken into account</i>”, and a control on proportionality should be added.</p> <p>Indeed, as explained above, wholesale access providers active in markets characterized by a large number of small wholesale access seekers which are procuring relatively small volumes of access products should not be subject to the same SLG for such small access seekers as for larger beneficiaries. If such objective differentiators are not taken into account, this would mean that e.g. when a few orders are missed for a small access</p>

		<p>seeker, the latter would receive a financial compensation whereas a larger beneficiary would not receive such compensation in the same situation of a few missed orders (the overall quality level provided by the incumbent operator being satisfactory).</p> <p>As a result, in such circumstances NRAs should first review whether the applicable SLAs are guaranteed at a satisfactorily level for all aggregated wholesale access volumes of all access seekers grouped together, before imposing SLGs at operator-specific level.</p> <p>In other words, an appropriate assessment of compliance with SLAs and SLGs can only be accurate if, prior to reviewing the achievements of the service levels at operator-specific level, an assessment of the general indicators for the aggregated wholesale volumes has led to a negative aggregate evaluation.</p> <p>Moreover, we would also like to point out that a 100% or near 100% guarantee level is non-realistic in a day-to-day operational reality where the achievement of performance levels is affected by unavoidable human errors and also depends on external factors including the efficiency of the alternative operators.</p>
	BP34	-
	BP34a	-
	BP34b	<p>The published KPIs are aggregated information. The transmission of information related to each operator must be done on a commercial basis.</p> <p>It should be added to this BP that this should only apply “... <i>in case these operators cannot compute themselves such KPIs</i>”.</p> <p>Indeed, if typically wholesale access seekers can themselves prepare their own reporting based on e.g. the detailed XML elements provided proactively by the wholesale access providers, the results of monitoring KPIs should not be made available free of charge to all operators in the market.</p> <p>The latter could however request such results against payment of the appropriate fees.</p> <p>It should be noted that, specifically in markets in which competitors are offering retail services based on their own competing infrastructure (e.g. CATV operators) such disclosures of services provided “<i>a) to their downstream business</i>” are to be done on a confidential basis only to the NRA for business confidentiality reasons.</p>
	BP34c	-



<b><u>Assurance of efficient and convenient wholesale switching</u></b>	BP35	-
	BP35a	-
	BP35b	-
	BP35c	-
	BP35d	-
	BP35e	-
<b><u>Assurance of efficient migration processes from legacy to NGN/NGA network</u></b>	BP36	Migration procedures shall not automatically include the cancellation of existing standard switching procedures (including prices). Risk Sharing elements may be used for differentiation to make migration easier for competitors bearing risks together with the SMP firm offering NGA products.
	BP37	-
	BP38	-
	BP39	-
	BP40	<p>ETNO agrees that it is not appropriate to determine a European wide general period of 5 years as included in the Commission NGA recommendation.</p> <p>NRAs should take account of the specific current and future market circumstances, guided by technological evolutions such as e.g. the choice of and need for vectoring and move to all IP. As a general rule, we consider 5 years as unreasonably long, hampering the flexibility of the network operator to structure its operation cost efficiently and to invest and innovate under favorable circumstances. 5 years is a delay that renders innovation, build-out of NGA and the move to IP more difficult and burdensome.</p> <p>We suggest to align the Best Practice with recent practice, e.g. in the Netherlands and take the common denominator of 2 years as a benchmark practice for BEREC.</p>
<b><u>Fair and coherent access pricing</u></b>	BP41	<p>The BP will have to be revised in the light of the implementation by the Commission of the announcements by N. Kroes made on July 12 (s. also BP 43 below).</p> <p>Access pricing should include the possibility to differentiate prices according to risk shared by the relevant competitor. Furthermore NRAs should take into account market solutions and agreements between the SMP firm and a relevant part of the competitors (relevant number depends on the market share in retail markets).</p>

		<p>Pricing principles should be flexible and not depend on the pricing principles for legacy networks (cf. “coherent”), e.g. if customers are willing to pay for upstream services or bandwidths which were not yet relevant in the legacy networks this should be possible.</p> <p>For competitors bearing equal risks as the SMP firm, a retail-minus principle could be a good way to achieve replicability of the prices for NGA-products.</p> <p>The document refers at several instances to several concepts of “equally efficient operator”, “efficient operator”, “efficient entrant” without indicating on the basis of which criteria this concept will be assessed.</p> <p>In an ex-ante regulatory environment, however, legal certainty requires that the NRAs clearly sets out the criteria of these concepts and the underlying reasoning for their choice for the one or the other concept prior to approving final access prices.</p>
	BP42	See comments on BP 41
	BP43	<p>To recommend cost-oriented prices for NGA-products is not aligned with the regulatory approach on increased flexibility for next generation access networks pricing announced by N. Kroes and basis for the forthcoming Commission guidance on remedies.</p> <p>Pricing principles should be proposed by the investing company and NRAs should have the opportunity to control pricing on the basis of a margin squeeze test under the sector-specific rules (‘ex-ante margin squeeze test’). Such test should apply ex-post in a complaints-driven procedure where appropriate according to the market situation, and may be based on prior guidance on the parameters of such test.</p> <p>Under the new approach, cost-orientation for NGA networks should no longer be applied in almost all circumstances, reflecting the increased competition from other platforms and from regulated copper. The BEREC best practices will have to be adapted in order to reflect these policy choices.</p>
	BP44	NRAs should also take into account market solutions and agreements between the SMP firm and a relevant part of the competitors (relevant number depends on the market share in retail markets).
	BP45	Footnote 19 should be incorporated into BP45 as it is important to acknowledge that there are other principles than cost causation which can be applied for cost-oriented charges. To be consistent with BP 53 it could be stated here that NRAs may consider several cost allocation rules.

	BP46	<p>Firstly, same comments as on BP 43 apply</p> <p>It is unclear what is the “technological neutral price” (does this incorporate value based and penetration pricing?) and who is in charge to evaluate its appropriateness and on what basis?</p> <p>The second sentence is problematic especially for NGA. Rather than referring to “static” equilibrium price it should be in the light of the recent statement of Commissioner Kroes be added that access prices should set the right incentives for investments into new networks.</p> <p>If cost-oriented access is to seek “to <i>mimic the outcome of a competitive market</i>”, one should take account of specific local market circumstances in which substantial parts of the actual market is not based on the regulated wholesale access products.</p>
	BP47	See comments on BP 43: revise in light of new regulatory approach to price regulation of NGA products
	BP48	-
	BP49	-
	BP49a	-
	BP49b	-
	BP49c	-
	BP49d	-
	BP49e	Cost-based access is in general a stricter regulation method than margin squeeze tests and should therefore only be applicable where this is absolutely necessary to address relevant competition problems.
	BP49f	-
	BP49g	-
	BP50	<p>ETNO is very concerned with the present CP, for various reasons. It depicts an overly rigid system of price controls that is not in line with the Commission’s July 12 announcements, undermining the desired pricing flexibility. For example, cost-orientation on market 4 combined with margin squeeze test on market 5 will lead to indirect cost-orientation on market 5 and indirectly also for retail products. In the BP, excessive importance is attached to the principle of the “ladder of investment” in the context of price controls.</p> <p>Setting access prices for regulated wholesale access products at different network levels is becoming increasingly inconvenient in many market circumstances. In current and future market circumstances, network investments are guided by technological and competition choices which make the parallel imposition of access products at price-regulated terms obsolete, instead calling for a focus on the relevant and</p>

		efficient level of network access to ensure downstream competition..
	<u>Pricing applicable to NGA-based wholesale local access only</u>	
	BP51	-
	BP52	Risk sharing elements should be accepted by NRAs to stimulate investments in NGA technology, since risk sharing is one of the key factors for investments in NGA networks. Risk sharing may be also implemented by commitments to purchase a certain amount of lines of networks or the commitment to migrate to NGA networks, as far as available.
	BP53	
	BP54	It is not clear from last sentence whether BEREC would suggest a “differentiated WACC per service” which would then be proposed instead of an “average WACC” (with possible risk premium)
	BP55	See comments on BP 58, 59
	BP56	The need for risk sharing by all users of a specific access network is crucial in setting regulated wholesale access prices, specifically for NGA type of accesses. The NRA must in such cases take into account the level of commitment of the access seeker. The BP should therefore be rephrased to explicitly take this element of risk sharing into account.
	BP57	It is in the nature of risk sharing that a differentiation according to the degree of commitment (in volumes, terms etc.) does not constitute an undue discrimination.
	BP58	The stimulation of network penetration (either before investment or after the investment is made) is always an appropriate way to share risks of the investment. The risk of an investment is usually even higher after the investment is made and penetration is not efficient. Therefore volume discounts should be accepted as an sensible way of stimulating NGA-investments.
	BP59	I line with the aim to reach a fast penetration with NGA broadband services NRAs should define the minimum efficient scale to achieve volume discounts taking into account the market share of one or more relevant competitors on the retail market. Regulation should no longer favor the largest possible number of “ <i>smaller operators</i> ”.

## ANNEX II

### Comments on draft best practices on the market for wholesale broadband access, BoR (12) 88

Objective	Best Practice	Comments
<u>Assurance of access</u>	BP1	<p>ETNO agrees on the need to adjust remedies to the competitive situation in a national market.</p> <p>We also welcome the inclusion of different architectures in the considerations (e.g. FTTH/B, FTTC). It is important to consider all competitive infrastructures, in particular also those based on cable and LTE, when imposing remedies under the Access Directive.</p> <p>Whether there is a need to impose a “combination of access products”, i.e. multiple products within one market should be subject to a strict proportionality assessment and tied to verifiable demand for these products.</p> <p>The choice of appropriate and proportionate access products should not only reflect the national circumstances but, as the case may be, also the sub-national circumstances and the competitive infrastructures present in the member state.</p>
	BP2	<p>The ladder of Investment principle (LoI), interpreted as requiring access at multiple points in the network to allow entrants to ‘move up the ladder’, is in many cases not an appropriate approach, in particular given the achieved level of infrastructure based competition. Evidence shows that market entry does not necessarily follow the LoI.</p> <p>In an NGA context, network investments are moreover increasingly guided by technological evolutions such as the type of FTTC or FTTH technology deployed, leading to an efficient point of access in the network which may be passive or active, depending on national or local market circumstances.</p>
	BP3	<p>Concerning infrastructure competition the NRAs should take into account all relevant infrastructures, i.e. where operators with cost-oriented access to the copper network or other infrastructure based operators, e.g. based on cable or LTE are present.</p> <p>The BP should explicitly acknowledge the need for “taking into account technical feasibility in view of necessary network evolutions”.</p>
	BP4	ETNO agrees that remedies on copper and fibre networks

		<p>may differ, and that the regime in each case should be proportionate and justified. The EU Commission has in its recent announcements clearly indicated that there are valid reasons for treating fibre networks differently from current generation broadband networks as regards access and price regulation. It is unclear how NRAs should impose an obligation which, <i>regardless of the technical solution used by the SMP operator</i>, is at the same time and proportionate, possible and efficient.</p> <p>It should be noted that the regulatory treatment of copper and fibre access should be based on the presence (or absence) of an SMP position on the specific relevant market – as defined in accordance with national circumstances. This first, determining stage of the regulatory process should not be pre-empted by assuming that copper and fibre access will be similarly regulated. The analysis of these markets should be based on the individual market situation in the specific Member State and / or area; treating equally all competing technologies provided on the relevant markets.</p>
	BP5	The BP should be modified by replacing “reasonable and relevant” with “necessary and proportionate”, as the former wording suggests a lower threshold for intervention than foreseen in the Directives (Art. 8 AD)
	<u>Access product to reach the bitstream access point</u>	
	BP6	<p>The BP appears clearly disproportionate.</p> <p>Whether backhaul should be provided on regulated terms is a matter of market analysis on the relevant market. If there are geographic differences in the provision of backhaul services this may call for geographic segmentation, but not for an obligation to provide regulated access to such services across the national territory, resulting in over-regulation in large parts of the market.</p>
	BP7	The access obligation should however not limit the technical flexibility of the SMP operator. This BP should be proportionate, meaning in this context for example to allow for the same spare capacities, e.g. for planning purposes. Such a situation should not be regarded as ‘strategic withholding of capacity’.
	BP8	A general obligation to comply with any reasonable access requests may introduce legal uncertainty and clouds the fact that regulated access should and can only be imposed by NRAs where this is necessary and proportionate under Art. 8 and 12 Access Directive.
	BP9	

	BP9a	
	BP9b	
	BP9c	Access obligations should be imposed only if they are necessary and proportionate in the given case. Whether access is “feasible” is not a sufficient criterion for opening access to a newly requested product.
	BP9d	<p>It is crucial to underline that it is unjustified to impose the development of new wholesale access obligations if no market demand can be reasonably expected.</p> <p>Such a general obligation is not appropriate. NRAs shall assess carefully, whether the remedies of the existing products are necessary for the new products or if other less intervening remedies are more appropriate. ETNO strongly objects to the BP stating that “NRAs should ensure that they [new products and services] are captured by the relevant SMP obligations already imposed on SMP operators”, Whether a retail product is part of a product and services market is determined by a market analysis. Whether the need for a corresponding wholesale product exists, is in turn determined by a competition analysis. The regulated operator may develop new and innovative services in a fully competitive environment in which case an access obligation would not be justified.</p>
<b><u>Assurance of co-location at delivery points (e.g. local, regional or national) and other associated facilities</u></b>	BP10	
	BP10a – 10b	
<b><u>Level playing field</u></b>	BP11 – 12a	-
	BP13	<p>We note that the revised best practice suggests that NRAs should always impose equivalence, leaving NRAs little scope to decide whether or not equivalence is a proportionate obligation in a given case. Given the potentially far-reaching nature of equivalence obligations, the BP should emphasise the need for a thorough proportionality test in this context.</p> <p>The BP also suggests applying equivalence only to SMP operators. ETNO believes that in the context of symmetric regulation, a symmetric implementation of such an obligation on all access network operators could be appropriate.</p>



		<p>The paragraph appears to assume that a new retail product automatically gives rise to a new underlying operational system or process, and that therefore the related regulated wholesale access products should be based on such new underlying operational system/process.</p> <p>This is however rarely the case.</p> <p>It is not unusual that new retail products are provided by the incumbent based on legacy operational systems. In that case, also the related regulated wholesale access products will be based on such underlying legacy operational systems and therefore no new underlying operational system will be specifically conceived for such products. Even in the context of NGA, new networks do not imply new operational systems. Incumbent operators aim at using existing systems so as to ensure efficient investments.</p> <p>Secondly, we fully support the reasoning on equivalence of output in the last sentence of this paragraph. We would also suggest to add the following wording: “or when markets are characterized by a considerable level of infrastructure competition”.</p>
	BP13a	<p>ETNO agrees that NRAs should be responsible for determining the exact form of non-discrimination / equivalence and that evaluation should be on a product-by-product basis.</p> <p>ETNO believes that the concept of EOI is at the moment still open to interpretation and not determined at EU level. This notwithstanding, ETNO also agrees with the general thrust of the 2nd principle laid down in the BP that a “<i>strict implementation of EoI</i>” would only be appropriate where “very low” incremental implementation costs are present, i.e. in case of new processes.</p> <p>Contradicting this principle, however, the draft BP then states that EoI should also be implemented for certain key legacy services. It is unclear which services BEREC is referring to and in which way a service would be classified as a “key service”. This BP bears the risk of a disproportionate interpretation and enforcement of EoI.</p> <p>To achieve a level playing field it is important to keep in mind that all processes should be equivalent (but not necessarily the same) to those provided internally. In most cases it is economically not attractive to build up completely new systems and processes (s. above, even in context of NGA) as there are already usable and established legacy systems. BP13a should be adapted in this sense.</p>

	BP14	-
<b><u>Avoidance of unjustified first mover advantage</u></b>	BP15	<p>Economic replicability: Such a regime should ensure that incentives to invest are not distorted. That means that only the same business models with similar risk-profiles should be taken into account when evaluating economic replicability (e.g. in margin squeeze tests). Moreover, the relevant risk-profiles should always reflect the economic conditions of an investing firm, e.g. the price which reflects the full risk should be taken as yardstick for assessing the replicability of retail-offers.</p>
	BP15a	<p>Publication of information: Regarding publication of information on wholesale offers, ETNO observes that the transparency requirement implies that every competitor knows in advance the prices and conditions that the SMP operator plans to use.</p> <p>This may even be problematic from a competition law perspective, i.e. sharing of business sensitive information among competitors. Therefore, ETNO insists that it should be possible to work with Non-Disclosure-Agreements (NDA) in order to avoid that confidential or business sensitive information is spread to platform competitors in the market.</p>
	BP15b	<p>Amendment of existing wholesale products or make a new wholesale product available: The decision as to whether wholesale offers should be amended or new wholesale offers made available is governed by Article 12 of the Access Directive. In particular, such imposition must be necessary and proportionate, taking into account, inter alia, the viability of other upstream access products (Article 12 (2) lit. a). This includes offers for passive infrastructure such as ducts that, if sufficiently available, alleviate the need for new offers. The conditions of Art 12 AD apply also where NRAs want to ensure 'replicability' of retail offers. If the market for the provision of a new downstream service is already competitive absent wholesale regulation, no additional obligations should apply. Offers should remain within the limits of what the regulated operator already provides, externally or internally.</p> <p>Regarding prices the regulated operator should be in the position to decide, how a situation where economic replicability cannot not be achieved according to the NRA's opinion is resolved (i.e. on the retail market or on the wholesale market).</p>
	BP16	<p>We fully support the necessity to define appropriate and due lead times on a case-by-case basis.</p> <p>Indeed, these should be determined in function of the concrete nature of the new wholesale product (is it a crucial new launch significantly impacting the alternative operators or is it just an upgrade with a minor impact?) and the relevant</p>

		information (and thus the concrete time needed for implementation).
	BP17	-
	BP18	-
	BP19	For BSA BEREC proposes 6 months as an appropriate lead time. Such a general suggestion does not appear meaningful. The appropriate lead time should be defined on a case-by-case basis
	BP20	<p>Information on the availability of networks can be considered proportionate for access seekers that want to know if specific loops support certain speeds, quality, etc.</p> <p>Providing information on planning and status of network rollout, however, appears too far-reaching as a principle as it includes highly sensitive, business confidential information. This notwithstanding, ETNO believes that any such measure should be symmetric.</p> <p>As a minimum, competitors that are offering retail services based on a competing infrastructure (like CATV operators) should be subject to the appropriate non-disclosure requirements, to prevent undue and asymmetrical disclosure of business-sensitive information.</p> <p>This is necessary not only from a sector specific, but also from a competition law point of view. Uncontrolled distribution of information could constitute a violation of Art. 101 TFEU. We think it would be appropriate for BEREC to add these considerations in its BP document, as this is of paramount importance for the practice of the NRA's in their respective markets.</p> <p>BEREC should clarify the meaning of "periodical update".</p>
<b><u>Transparency</u></b>	BP21	The approval by the NRA of the reference offer is important, the NRA being the interlocutor of the SMP-operator to finalise the reference offer.
	BP21a	The evolution of service offers should be limited to justified reasons and not, as suggested by the BP, extend to any other development that may be deemed desirable by the access seeker
	BP21b	-
	BP21c	Information on prices should depend on concrete demand (e.g. if no current and concrete demand for wholesale FttH product exists, prices would have to be fixed only for concrete demands)
	BP21d	
	BP21e	
	BP22	It remains unclear who will be responsible in case network planning has to be changed. The SMP operator cannot

		commit to a very long network planning period. Flexibility and proportionality is needed.
<b><u>Reasonable quality of access product - technical issues</u></b>	BP23	The interaction between wholesale access seeker and regulated operator regarding new wholesale offers varies between member states. As long as the SMP operator can demonstrate that based on its wholesale offer a competitor can replicate the retail offer, there is no general need for involving the wholesale client in the process of defining the product/offer.
	BP24	<p>Products or product features should only be required if there is a concrete demand for them. Such concrete demands should be assured by commitments to buy the product/feature. These commitments are important to avoid complex and expensive product developments by SMP operators, which in the end are not used in the market. It should not be taken for granted that the “product characteristics” of a multicast functionality are to be inserted as a matter of principle in a reference offer of a regulated bitstream access.</p> <p>The regulatory imposition of multicast should be justified by demonstrating a specific market failure that can be remedied in a proportionate way through the multicast remedy.</p> <p>The appropriateness should also be assessed in view of the competitive circumstance related to the underlying retail market for broadcast distribution</p>
<b><u>Reasonable quality of access products - operational quality</u></b>	BP25	-
	BP25a	-
	BP25b	-
	BP25c	-
	BP25d	-
	BP26	-
	BP26a	-
	BP26b	<p>Proactive payments: Should the service level fall below the agreed standard at market level, the alternative operators can approach the SMP operator and claim compensation if they are entitled to. In this respect, it should be noted that in practice, there is no “proactive” payment: the alternative operator has to claim for it as is the case for the end-user at retail level.</p> <p>Obliging a wholesale access provider to proactively execute Service Level Guarantees payments at wholesale level would be discriminatory against the wholesale access provider. In</p>

		<p>principle, the latter is typically not proactively paying Service Level Guarantees penalties in case of infringement of Service Level Agreements at retail level. Therefore, no such proactive Service Level Guarantees payments should be imposed at wholesale level.</p> <p>As a matter of fact, in most Member States, penalties need to be claimed by the end-user for the retail services. If operators do not deliver pro-actively on this towards their end-users, why should the SMP-operator do this towards the alternative operators for the wholesale services? We are surprised to find such best practice in a document promoting the non-discrimination principle. BP 33b should be adapted so as to respect this principle.</p>
	BP26c	-
	BP26d	<p>As currently worded, this sentence should be removed from the document. If the sentence remains in the text, the best practice should explicitly specify that “<i>specific market circumstances should be taken into account</i>”, and a control on proportionality should be added.</p> <p>Indeed, as explained above, wholesale access providers active in markets characterized by a large number of small wholesale access seekers which are procuring relatively small volumes of access products should not be subject to the same SLG for such small access seekers as for larger beneficiaries. If such objective differentiators are not taken into account, this would mean that e.g. when a few orders are missed for a small access seeker, the latter would receive a financial compensation whereas a larger beneficiary would not receive such compensation in the same situation of a few missed orders (the overall quality level provided by the incumbent operator being satisfactory).</p> <p>As a result, in such circumstances NRAs should first review whether the applicable SLAs are guaranteed at a satisfactorily level for all aggregated wholesale access volumes of all access seekers grouped together, before imposing SLGs at operator-specific level.</p> <p>In other words, an appropriate assessment of compliance with SLAs and SLGs can only be accurate if, prior to reviewing the achievements of the service levels at operator-specific level, an assessment of the general indicators for the aggregated wholesale volumes has led to a negative aggregate evaluation.</p> <p>Moreover, we would also like to point out that a 100% or near 100% guarantee level is non-realistic in a day-to-day operational reality where the achievement of performance</p>

		levels is affected by unavoidable human errors and also depends on external factors including the efficiency of the alternative operators.
	BP27	-
	BP27a	-
	BP27b	<p>The published KPIs are aggregated information. The transmission of information related to each operator must be done on a commercial basis.</p> <p>It should be added to this BP that this should only apply “... <i>in case these operators cannot compute themselves such KPIs</i>”.</p> <p>Indeed, if typically wholesale access seekers can themselves prepare their own reporting based on e.g. the detailed XML elements provided proactively by the wholesale access providers, the results of monitoring KPIs should not be made available free of charge to all operators in the market.</p> <p>The latter could however request such results against payment of the appropriate fees.</p> <p>It should be noted that, specifically in markets in which competitors are offering retail services based on their own competing infrastructure (e.g. CATV operators) such disclosures of services provided “<i>a</i>) to their downstream business” are to be done on a confidential basis only to the NRA for business confidentiality reasons.</p>
	BP27c	
<b><u>Assurance of efficient and convenient wholesale switching</u></b>	BP28	-
	BP28a	-
	BP28b	-
	BP28c	-
	BP28d	-
	BP28e	-
<b><u>Assurance of efficient migration processes from legacy to NGN/NGA network</u></b>	BP29	Migration procedures shall not automatically include the cancellation of existing standard switching procedures (including prices). Risk Sharing elements may be used for differentiation to make migration easier for competitors bearing risks together with the SMP operator offering NGA products.
	BP30	-
	BP31	-
	BP32	-
	BP33	-

<p><b><u>Fair and coherent access pricing</u></b></p>	<p>BP34</p>	<p>The BP will have to be revised in the light of the implementation by the Commission of the announcements by N. Kroes made on July 12.</p> <p>Access pricing should include the possibility to differentiate prices according to the risk shared by the relevant competitor. Furthermore, NRAs should take into account market solutions and agreements between SMP operators and a relevant part of the competitors (relevant number depends on the market share in retail markets).</p> <p>Pricing principles should be flexible and not depend on the pricing principles for legacy networks (cf. “<i>coherent</i>”), e.g. if customers are willing to pay for upstream services or bandwidths which were not yet relevant in the legacy networks this should be possible.</p> <p>For competitors bearing equal risks as the SMP operator, a retail-minus principle could be a good way to achieve replicability of the prices for NGA-products.</p> <p>The document refers at several instances to several concepts of “equally efficient operator”, “efficient operator”, “efficient entrant” without indicating on the basis of which criteria this concept will be assessed.</p> <p>In an ex-ante regulatory environment, however, legal certainty requires that the NRAs clearly sets out the criteria of these concepts and the underlying reasoning for their choice for the one or the other concept prior to approving final access prices.</p>
	<p>BP35</p>	<p>See BP 34</p>
	<p>BP36</p>	<p>To recommend cost-oriented prices for NGA-products is not aligned with the regulatory approach on increased flexibility for next generation access networks pricing announced by N. Kroes and basis for the forthcoming Commission guidance on remedies.</p> <p>Pricing principles should be proposed by the investing company and NRAs should have the opportunity to control pricing on the basis of a margin squeeze test under the sector-specific rules (‘ex-ante margin squeeze test’). Such test should apply ex-post’ in a complaints-driven procedure where appropriate according to the market situation, and may be based on prior guidance on the parameters of such test.</p> <p>Under the new EU regulatory approach, cost-orientation for NGA networks should no longer be applied in almost all circumstances, reflecting the increased competition from other platforms such as cable and LTE, and from regulated copper. The BEREC best practices will have to be adapted in order to reflect these policy choices.</p>



	BP37	NRAs should take into account market solutions and agreements between SMP operators and a relevant part of the competitors (relevant number depends on the market share in retail markets).
	BP38	Footnote 14 should be incorporated into BP45 as it is important to acknowledge that there are other principles than cost causation which can be applied for cost-oriented charges. It could be stated here that NRAs may consider several cost allocation rules.
	BP39	<p>Firstly, same comments as on BP 36 apply: revise in light of new regulatory approach to price regulation of NGA products</p> <p>It is unclear what is the “technological neutral price” (does this incorporate value based and penetration pricing?) and who is in charge to evaluate its appropriateness and on what basis?</p> <p>The second sentence is problematic especially for NGA. Rather than referring to “static” equilibrium price it should be in the light of the recent statement of Commissioner Kroes be added that access prices should set the right incentives for investments into new networks.</p> <p>If cost-oriented access is to seek “to <i>mimic the outcome of a competitive market</i>”, one should take account of specific local market circumstances in which substantial parts of the actual market is not based on the regulated wholesale access products.</p>
	BP40	See BP 34, may be critical for SMP operators that are already “ex-post” regulated and cost-orientation was not yet considered as a strict principle.
	BP41	<p>This BP 41 seems to take into account the recent policy statement of Commissioner Kroes. BEREC seems to assume that this new scheme applies only to bitstream remedies, and not to WLA, as this BP does not appear in the WLA document.</p> <p>This BP should be adapted to the policy statement and included as well in the WLA document.</p> <p>Second part of the sentence may be critical, as cost-orientation on market 4 combined with margin squeeze test on market 5 will lead to indirect cost-orientation on market 5 and indirectly also for retail products.</p> <p>We understand this best practice as an alignment with the new policy past summer announced by the European Commission. We welcome this nuanced way of looking into price regulation. As a complement we believe that it should be recommended as a Best Practice for regulators to abandon</p>

		cost orientation for the SMP network if and where at the retail level there is competition from alternative infrastructure.
	BP42	-
	BP42a	-
	BP42b	-
	BP42c	-
	BP42d	-
	BP42e	Cost-based access is in general a stricter method than margin squeeze tests and should therefore only be applicable where this is absolutely necessary to address relevant competition problems.
	BP42f	-
	BP42g	-
	BP43	<p>ETNO is very concerned with the present CP, for various reasons. It depicts an overly rigid system of price controls that is not in line with the Commission's July 12 announcements, undermining the desired pricing flexibility. For example, cost-orientation on market 4 combined with margin squeeze test on market 5 will lead to indirect cost-orientation on market 5 and indirectly also for retail products. In the BP, excessive importance is attached to the principle of the "ladder of investment" in the context of price controls.</p> <p>Setting access prices for regulated wholesale access products at different network levels is becoming increasingly inconvenient in many market circumstances. In current and future market circumstances, network investments are guided by technological and competition choices which make the parallel imposition of access products at price-regulated terms obsolete, instead calling for a focus on the relevant and efficient level of network access to ensure downstream competition.</p>
	<u>Bitstream based on NGA Infrastructure</u>	
	BP44	
	BP45	See BP 36. Risk sharing elements should be accepted by NRAs to stimulate investments in NGA technology, since these are one of the key factors for investments in NGA networks. Risk sharing mechanisms may also be implemented by commitments to certain amounts of capacity of new networks or the commitment to migrate to NGA networks, as far as available.
	BP46	-
	BP47	The need for risk sharing by all users of a specific access network is crucial in setting regulated wholesale access prices, specifically for NGA type of accesses. The NRA must in such cases take into account the level of commitment of the access seeker. The BP should therefore be rephrased to explicitly take this element of risk sharing into account.

	BP48	It is in the nature of risk sharing that a differentiation according to the degree of commitment (in volumes, terms etc.) does not constitute an undue discrimination
	BP49	The stimulation of network penetration (either before investment or after the investment is made) is always an appropriate way to share risks of the investment. The risk of an investment is usually even higher after the investment is made and penetration is not efficient. Therefore volume discounts should be accepted as a sensible way of stimulating NGA-investments.
	BP50	In line with the aim to reach a fast penetration with NGA broadband services NRAs should define the minimum efficient scale to achieve volume discounts taking into account the market share of one or more relevant competitors on the retail market. Regulation should no longer favor the largest possible number of “ <i>smaller operators</i> ”.
<b><u>Annex 1 – Example of Reference Offer</u></b>		

## ANNEX III

### Comments on draft best practices on the market for wholesale leased lines, BoR (12) 83

Objective	Best Practice	Comments
<u>Assurance of access</u>	BP1	<p>ETNO agrees on the need to adjust remedies to the competitive situation in a national market.</p> <p>We also welcome the inclusion of different architectures in the considerations (e.g. FTTH/B, FTTC). It is important to consider all competitive infrastructures, in particular also those based on cable and LTE (though arguably less relevant for very high-speed connections to professional users), when imposing remedies under the Access Directive.</p> <p><u>Whether there is a need</u> to impose a “combination of access products”, i.e. multiple products within one market should be subject to a strict proportionality assessment and tied to verifiable demand for these products.</p> <p>The choice of appropriate and proportionate access products should not only reflect the national circumstances but, as the case may be, also the sub-national circumstances and the competitive infrastructures present in the member state.</p>
	BP2	<p>The ladder of Investment principle (LoI), interpreted as requiring access at multiple points in the network to allow entrants to ‘move up the ladder’, is in many cases not an appropriate approach, in particular given the achieved level of infrastructure based competition. Evidence shows that market entry does not necessarily follow the LoI.</p> <p>In an NGA context, network investments are moreover increasingly guided by technological evolutions such as the type of FTTC or FTTH technology deployed, leading to an efficient point of access in the network which may be passive or active, depending on national or local market circumstances.</p>
	BP3 – 3a	<p>Concerning infrastructure competition the NRAs should take into account all relevant infrastructures, i.e. where operators with cost-oriented access to the copper network or other infrastructure based operators, e.g. based on cable or LTE are present.</p> <p>The BP should explicitly acknowledge the need for “taking into account technical feasibility in view of necessary network evolutions”.</p>

	BP4	<p>ETNO agrees that remedies on copper and fibre networks may differ, and that the regime in each case should be proportionate and justified. The EU Commission has in its recent announcements clearly indicated that there are valid reasons for treating fibre networks differently from current generation broadband networks as regards access and price regulation. It is unclear how NRAs should impose an obligation which, <i>regardless of the technical solution used by the SMP operator</i>, is at the same time and proportionate, possible and efficient.</p> <p>It should be noted that the regulatory treatment of copper and fibre access should be based on the presence (or absence) of an SMP position on the specific relevant market – as defined in accordance with national circumstances. This first, determining stage of the regulatory process should not be pre-empted by assuming that copper and fibre access will be similarly regulated. The analysis of these markets should be based on the individual market situation in the specific Member State and / or area; treating equally all competing technologies provided on the relevant markets.</p>
	BP5	A general obligation to comply with any reasonable access requests may introduce legal uncertainty and clouds the fact that regulated access should and can only be imposed by NRAs where this is necessary, adequate and proportionate under Art. 8 and 12 Access Directive.
	<u>Access product to reach the bitstream access point</u>	
	BP6	-
	BP6a	-
	BP6b	-
	BP6c	-
	BP6d	<p>It is crucial to underline that it is unjustified to impose the development of new wholesale access obligations if no market demand can be reasonably expected.</p> <p>Such a general obligation is not appropriate. NRAs shall assess carefully, whether the remedies of the existing products are necessary for the new products or if other less intervening remedies are more appropriate. ETNO strongly objects to the BP stating that “NRAs should ensure that they [new products and services] are captured by the relevant SMP obligations already imposed on SMP operators”, Whether a retail product is part of a product and services market is determined by a market analysis. Whether the need for a corresponding wholesale product exists, is in turn determined by a competition analysis. The regulated operator may develop new and innovative services in a fully competitive</p>

		environment in which case an access obligation would not be justified.
<u>Assurance of co-location at delivery points (and other associated facilities)</u>	BP7	
	BP7a	
<u>Level playing field</u>	BP8 – 9a	
	BP10	<p>We note that the revised best practice suggests that NRAs should always impose equivalence, leaving NRAs little scope to decide whether or not equivalence is a proportionate obligation in a given case. Given the potentially far-reaching nature of equivalence obligations, the BP should emphasise the need for a thorough proportionality test in this context.</p> <p>The BP also suggests applying equivalence only to SMP operators. ETNO believes that in the context of symmetric regulation, a symmetric implementation of such an obligation on all access network operators could be appropriate.</p> <p>The paragraph appears to assume that a new retail product automatically gives rise to a new underlying operational system or process, and that therefore the related regulated wholesale access products should be based on such new underlying operational system/process.</p> <p>This is however rarely the case.</p> <p>It is not unusual that new retail products are provided by the incumbent based on <u>legacy</u> operational systems. In that case, also the related regulated wholesale access products will be based on such underlying legacy operational systems and therefore no new underlying operational system will be specifically conceived for such products. Even in the context of NGA, new networks do not imply new operational systems. Incumbent operators aim at using existing systems so as to ensure efficient investments.</p> <p>Secondly, we fully support the reasoning on equivalence of output in the last sentence of this paragraph. We would also suggest to add the following wording: “or when markets are characterized by a considerable level of infrastructure competition”.</p>
	BP10a	ETNO agrees that NRAs should be responsible for determining the exact form of non-discrimination /

		<p>equivalence and that evaluation should be on a product-by-product basis.</p> <p>ETNO believes that the concept of EOI is at the moment still open to interpretation and not determined at EU level. This notwithstanding, ETNO also agrees with the general thrust of the 2nd principle laid down in the BP that a <i>"strict implementation of EoI"</i> would only be appropriate where "very low" incremental implementation costs are present, i.e. in case of new processes.</p> <p>Contradicting this principle, however, the draft BP then states that EoI should also be implemented for certain key legacy services. It is unclear which services BEREC is referring to and in which way a service would be classified as a "key service". This BP bears the risk of a disproportionate interpretation and enforcement of EoI.</p> <p>To achieve a level playing field it is important to keep in mind that all processes should be equivalent (but not necessarily the same) to those provided internally. In most cases it is economically not attractive to build up completely new systems and processes (s. above, even in context of NGA) as there are already usable and established legacy systems. BP19a should be adapted in the above sense.</p>
	BP11	-
<b><u>Avoidance of unjustified first mover advantage</u></b>	BP12	<p>Economic replicability: Such a regime should ensure that incentives to invest are not distorted. That means that only the same business models with similar risk-profiles should be taken into account when evaluating economic replicability (e.g. in margin squeeze tests). Moreover, the relevant risk-profiles should always reflect the economic conditions of an investing firm, e.g. the price which reflects the full risk should be taken as yardstick for assessing the replicability of retail-offers.</p>
	BP12a	<p>Publication of information: Regarding publication of information on wholesale offers, ETNO observes that the transparency requirement implies that every competitor knows in advance the prices and conditions that the SMP operator plans to use.</p> <p>This may even be problematic from a competition law perspective, i.e. sharing of business sensitive information among competitors. Therefore, ETNO insists that it should be possible to work with Non-Disclosure-Agreements (NDA) in order to avoid that confidential or business sensitive information is spread to platform competitors in the market.</p>
	BP12b	The decision as to whether wholesale offers should be amended or new wholesale offers made available is governed by Article 12 of the Access Directive. In particular, such



		<p>imposition must be necessary and proportionate, taking into account, inter alia, the viability of other upstream access products (Article 12 (2) lit. a). This includes offers for passive infrastructure such as ducts that, if sufficiently available, alleviate the need for new offers. The conditions of Art 12 AD apply also where NRAs want to ensure 'replicability' of retail offers. If the market for the provision of a new downstream service is already competitive absent wholesale regulation, no additional obligations should apply. Offers should remain within the limits of what the regulated operator already provides, externally or internally.</p> <p>Regarding prices the regulated operator should be in the position to decide, how a situation where economic replicability cannot not be achieved according to the NRA's opinion is resolved (i.e. on the retail market or on the wholesale market).</p>
	BP13	<p>We fully support the necessity to define appropriate and due lead times on a case-by-case basis.</p> <p>Indeed, these should be determined in function of the concrete nature of the new wholesale product (is it a crucial new launch significantly impacting the alternative operators or is it just an upgrade with a minor impact?) and the relevant information (and thus the concrete time needed for implementation). .</p>
	BP14	-
	BP15	-
<b><u>Transparency</u></b>	BP16	<p>ETNO agrees that lead times should be defined on a case by case basis.</p> <p>Information on prices should depend on concrete demand (e.g. no current and concrete demand for wholesale FttH product – therefore prices have to fixed only for concrete demands)</p>
	BP16a	The evolution of service offers should be limited to reasons of replicability and not, as suggested by the BP, extend to any other development that may be deemed desirable by the access seeker
	BP16b	-
	BP16c	Information on prices should depend on concrete demand (e.g. no current and concrete demand for wholesale FttH product – therefore prices would have to fixed only for concrete demands)
	BP16d	
	BP16e	
	BP17	It remains unclear who will be responsible in case network planning has to be changed. The SMP operator cannot commit to a very long network planning period. Flexibility and proportionality is needed.
<b><u>Reasonable</u></b>	BP18	-

<u>quality of access product - technical issues</u>		
	BP19	-
	BP20	-
	BP21	-
<u>Reasonable quality of access products - operational quality</u>	BP22	<p>As on previous BPs, we would like to underline here the need of a case-by-case definition, this time applicable for the process of setting SLAs.</p> <p>Typically, for example, wholesale access providers active in markets characterized by a multitude of small wholesale access seekers which are procuring relatively small volumes of access products would be much more sensitive to potential “statistical errors”, thus unduly leading to infringements of SLAs while the overall performance level is satisfactory.</p> <p>SLAs should therefore take account of these specificities of the market circumstances.</p> <p>It also needs to be pointed out that high performance levels cannot be ensured by a strict interpretation and enforcement of EOI (cf. the example of UK).</p>
	BP22a	-
	BP22b	-
	BP22c	-
	BP22d	-
	BP23	-
	BP23a	-
	BP23b	<p>Proactive payments:</p> <p>Should the service level fall below the agreed standard at market level, the alternative operators can approach the SMP operator and claim compensation if they are entitled to. In this respect, it should be noted that in practice, there is no “proactive” payment: the alternative operator has to claim for it as is the case for the end-user at retail level.</p> <p>Obliging a wholesale access provider to proactively execute Service Level Guarantees payments at wholesale level would be discriminatory against the wholesale access provider. In principle, the latter is typically not proactively paying Service Level Guarantees penalties in case of infringement of Service Level Agreements at retail level. Therefore, no such proactive Service Level Guarantees payments should be imposed at wholesale level.</p> <p>As a matter of fact, in most Member States, penalties need to be claimed by the end-user for the retail services. If operators</p>

		do not deliver pro-actively on this towards their end-users, why should the incumbent operators do this towards the alternative operators for the wholesale services? We are surprised to find such best practice in a document promoting the non-discrimination principle. BP 33b should be adapted so as to respect this principle.
	BP23c	-
	BP23d	<p>It is unclear if SMP operators are able to differentiate, namely implement risk-sharing models.</p> <p>As currently worded, this sentence should be removed from the document. If the sentence remains in the text, the best practice should explicitly specify that <u>"specific market circumstances should be taken into account"</u>, and a control on proportionality should be added.</p> <p>Indeed, as explained above, wholesale access providers active in markets characterized by a large number of small wholesale access seekers which are procuring relatively small volumes of access products should not be subject to the same SLG for such small access seekers as for larger beneficiaries. If such objective differentiators are not taken into account, this would mean that e.g. when a few orders are missed for a small access seeker, the latter would receive a financial compensation whereas a larger beneficiary would not receive such compensation in the same situation of a few missed orders (the overall quality level provided by the incumbent operator being satisfactory).</p> <p>As a result, in such circumstances NRAs should first review whether the applicable SLAs are guaranteed at a satisfactorily level for all aggregated wholesale access volumes of all access seekers grouped together, before imposing SLGs at operator-specific level.</p> <p>In other words, an appropriate assessment of compliance with SLAs and SLGs can only be correct if, prior to reviewing the achievements of the service levels at operator-specific level, an assessment of the general indicators for the aggregated wholesale volumes has led to a negative aggregate evaluation.</p> <p>Moreover, we would also like to point out that a 100% or near 100% guarantee level is non-realistic in a day-to-day operational reality where the achievement of performance levels is affected by unavoidable human errors and also depends on external factors including the efficiency of the alternative operators.</p>
	BP24	-

	BP24a	-
	BP24b	<p>The published KPIs are aggregated information. The transmission of information related to each operator must be done on a commercial basis.</p> <p>It should be added to this BP that this should only apply “... <i>in case these operators cannot compute themselves such KPIs</i>”.</p> <p>Indeed, if typically wholesale access seekers can themselves prepare their own reporting based on e.g. the detailed XML elements provided proactively by the wholesale access providers, the results of monitoring KPIs should not be made available free of charge to all operators in the market.</p> <p>The latter could however request such results against payment of the appropriate fees.</p> <p>It should be noted that, specifically in markets in which competitors are offering retail services based on their own competing infrastructure (e.g. CATV operators) such disclosures of services provided “<i>a) to their downstream business</i>” are to be done on a confidential basis only to the NRA for business confidentiality reasons.</p>
	BP24c	=
<b><u>Assurance of efficient and convenient wholesale switching</u></b>	BP25	-
	BP25a	-
	BP25b	-
	BP25c	-
	BP25d	-
	BP25e	
<b><u>Assurance of efficient migration processes from legacy to NGN/NGA network</u></b>	BP26	Migration procedures shall not automatically include the cancellation of existing standard switching procedures (including prices). Risk Sharing elements may be used for differentiation to make migration easier for competitors bearing risks together with the SMP operator offering NGA products.
	BP27	-
	BP28	-
	BP29	
<b><u>Fair and coherent access pricing</u></b>	BP30	<p>The BP will have to be revised in the light of the implementation by the Commission of the announcements by N. Kroes made on July 12.</p> <p>Access pricing should include the possibility to differentiate</p>

		<p>prices according to risk shared by the relevant competitor. Furthermore NRAs should take into account market solutions and agreements between SMP firm and a relevant part of the competitors (relevant number depends on the market share in retail markets).</p> <p>Pricing principles should be flexible and not depend on the pricing principles for legacy networks (cf. “coherent”), e.g. if customers are willing to pay for upstream services or bandwidths which were not yet relevant in the legacy networks this should be possible.</p> <p>For competitors bearing equal risks as the SMP firm, a retail-minus principle could be a good way to achieve replicability of the prices for NGA-products.</p> <p>The document refers at several instances to several concepts of “equally efficient operator”, “efficient operator”, “efficient entrant” without indicating on the basis of which criteria this concept will be assessed.</p> <p>In an ex-ante regulatory environment, however, legal certainty requires that the NRAs clearly sets out the criteria of these concepts and the underlying reasoning for their choice for the one or the other concept prior to approving final access prices.</p>
	BP31	See BP30
	BP32	<p>To recommend cost-oriented prices for NGA-products is not aligned with the regulatory approach on increased flexibility for next generation access networks pricing announced by N. Kroes and basis for the forthcoming Commission guidance on remedies.</p> <p>Pricing principles should be proposed by the investing company and NRAs should have the opportunity to control pricing on the basis of a margin squeeze test under the sector-specific rules (‘ex-ante margin squeeze test’). Such test should apply ex-post’ in a complaints-driven procedure where appropriate according to the market situation, and may be based on prior guidance on the parameters of such test.</p> <p>Under the new EU regulatory approach, cost-orientation for NGA networks should no longer be applied in almost all circumstances, reflecting the increased competition from other platforms such as cable and LTE, and from regulated copper. The BEREC best practices will have to be adapted in order to reflect these policy choices.</p>
	BP33	NRAs should take into account market solutions and agreements between SMP operators and a relevant part of the competitors (relevant number depends on the market share in

		retail markets).
	BP34	Footnote 12 should be incorporated into BP34 as it is important to acknowledge that there are other principles than cost causation which can be applied for cost-oriented charges. It could be stated here that NRAs may consider several cost allocation rules.
	BP34a	As it is uncertain which types of wholesale leased lines services an NRA would consider to be “ <i>technically similar</i> ”, such obligation for similar pricing should be deleted.
	BP34b	-
	BP35	-
	BP36	-
	BP36a	-
	BP36b	-
	BP36c	-
	BP36d	-
	BP36e	Cost-based access is in principle a stricter regulation method than a margin squeeze test and should therefore only be applicable where this is absolutely necessary to address relevant competition problems.
	BP36f	Relationship to BP 36e is unclear.
	BP36g	
	BP37	
<b><u>Annex 1 – Example of Reference Offer</u></b>		