



Krajowa Izba Gospodarcza Elektroniki i Telekomunikacji

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Body of European Regulators
for Electronic Communications

Polish Chamber of Commerce for Electronics and Telecommunications (hereinafter referred to as “KIGEiT”) is grateful for possibility to present our position about revised Common Positions (“**CP**”) on:

- wholesale local access (WLA) (BoR (12) 104),
- wholesale broadband access (WBA) (BoR (12) 88),
- wholesale leased lines (WLL) (BoR (12) 83)

and Glossary of terms (BoR (12) 89), prepared by BEREC.

We agree with the opinion, that CPs are useful for NRAs in preparing effective remedies and choosing proper regulatory approach. CPs also promote consistent regulatory approach in the whole European Union.

Though CPs are not binding for NRAs, they shall be taken into account while imposing regulatory obligations on SMP and introducing amendments into SMP Reference offer.

CPs published by BEREC give useful guidance to NRAs how to regulate electronic communications market and how to promote both development of infrastructure and development of competition on that market.

Below we would like to present our comments to the CPs. We indicate, that those comments come from difficulties arising around cooperation of AOs with SMP in Poland. Though they touch very detailed issues, those issues often unable to provide services by AOs.

KIGEiT would like to emphasize main problems occurring while performing abovementioned wholesale services in Poland and necessary statements in CPs:

Results of Margin Squeeze and Price Squeeze Tests according to polish NRA are non-claimable. In our opinion it should be stresses that all players on the market shall be able to appeal results of MS and PS Tests performed by NRA.

Decisions in which Polish NRA decides whether wholesale services of SMP operator service shall be regulated, according to Polish NRA, are non-claimable. In our opinion such important issues (but also all other decisions made by NRA) shall be claimable (according to the art. 4 of Framework Directive).

It shouldn't be allowed for SMP operator to launch new retail service without providing equivalent wholesale service (with all necessary information) at least 6 months before launching that new retail service by SMP operator.

In our opinion provisions about SLG shall explicitly state that AOs are allowed to deduct payments in case when SMP operator fails to provide proper service (e.g. and possibility of demanding contractual penalties occur).

While discussing KPIs, we want to emphasize, that KPIs should monitor the whole process of delivering service to AOs – always with comparison to the services provided by SMP operator downstream arm.

Until today, in case of building FttH networks in P2MP architecture by SMP operators, there is no proper infrastructure solution how to provide access to AOs. In our opinion, solution already in use in a few Member States, VULA (Virtual Unbundled Local Access), should be promoted both by BEREC and EC.

In case of providing access to the street cabinet, SMP operator shall be obliged to provide power supply for AOs. If not, access to the street cabinets would be only illusory, as building and preparing whole infrastructure for power supply may cause the whole project for AOs uneconomic.

BOR(12)104 BP4, BOR(12)88 BP4, BOR(12)83 BP4

In CP, BEREC stated that *„Different treatment of copper and fibre access should be justified and non-discriminatory, and should be motivated by differences in identified competition problems between copper and fibre.”*

We cannot agree with that opinion. Different treatment of the same network (the only difference would be medium: copper or fibre) would be unjustified in case of implementing obligations on SMP on the telecom market.

In our opinion enabling SMP operator to provide access on different conditions may cause problems in providing access at all. In fact, such abovementioned general clause generates risk of introducing regulatory holidays for fibre investments.

BOR(12)104 BP6b

In this point BEREC noticed problems arising around P2MP solution in FttH architecture. We agree that providing access in traditional meaning for P2MP (e.g. GPON) may be problematic.

That is why we agree with proposition of BEREC of possibility of imposing an active remedy providing access at the MPoP for AOs on Market 4. In our opinion such solution is VULA (Virtual Unbundled Local Access). VULA is remedy in UK and Austria.

In our opinion BEREC shall consider pointing out example (VULA) in indent 3 in BP6b. Together with adding proper definition in “Glossary of Terms”, VULA solution may become popular and effective solution for NRAs that are regulating NGAs – especially when many SMP operators want to build FttH networks in P2MP architecture.

BOR(12)104 BP16

While discussing colocation, BEREC proposed that NRAs shall ensure that imposed obligations (remedies) allow colocation and other associated facilities at the access point (that includes street cabinets). In our opinion, this point shall be expanded by open catalogue of those facilities (as e.g. proper space, power supply).

BOR(12)104 BP18, BOR(12)88 BP12, BOR(12)83 BP9

BEREC stated that NRAs shall have power *“to clarify, as far as possible, how a non-discrimination remedy will be interpreted in practice, via identification of forms of behaviour which will be considered to be discriminatory (e.g. providing lines at minor technical quality to alternative operators). NRAs could implement such clarifications in various ways, for example either through explicit wording of the SMP obligation or via explanatory guidance which provides clarity as to the NRA’s interpretation of the obligation.”*

In our opinion such interpretations may cause problem of *de facto* issuing new decisions by NRA without proper administrative proceeding. Such interpretation by NRA may cause another problem: according to the Framework Directive *“any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved.”* (art. 4). In case of providing only *“explanatory guidances”* by NRAs, abovementioned Right to Appeal may be violated, as players on the telecom market would not have right to sue or appeal such guidance (in legal meaning).

Unfortunately in Poland recently occurred such problem. NRA publishes *“Statements”* where NRA decides whether new wholesale service of polish SMP shall be regulated or not. AOs, according to NRA, are not able to appeal those Statements – decisions of NRA.

BOR(12)104 BP19, BOR(12)88 BP13a, BOR(12)83 BP10a

BEREC in CP stated that NRAs should impose an obligation on SMP operators requiring equivalence. BEREC allowed two approaches: EOI and EOO. In our opinion EOO shouldn’t be used by NRAs as effective remedy for discriminatory activities of SMP operator.

EOO approach may cause situation when AOs would not be able to provide to subscriber similar service as SMP (example in point BOR(12)104 BP33 below).

We state that the aim of regulation shall be to allow AOs to prepare equivalent retail services as SMP operator basing on SMP operator wholesale services. Using EOO approach may put AOs in worse position than SMP operator downstream arm.

BOR(12)104 BP25, BOR(12)88 BP20, BOR(12)83 BP15

In our opinion, while discussing “*Avoidance of unjustified first mover advantage*”, it shall be indicated that NRA should be able to impose on SMP operator obligation preventing him from launching new retail service that has no equivalent in wholesale services.

Unfortunately in Poland SMP operator launches retail services that has no equivalent in wholesale services. Such situation in longer period of time is unacceptable and may distort development competition in Poland. We think that in such situations NRA shall have clear possibilities to intervene and force SMP operator to stop providing those new services.

BOR(12)104 BP33, BOR(12)88 BP26, BOR(12)83 BP23

In CP BEREC propose a set of rules about SLA. As we agree with them we think that there should be provided one more: “*NRA may oblige SMP to provide AOs SLA that enable AOs to provide retail services with the same SLA as SMP operator to its subscribers. In some situations it means that SLA for AOs is better than SMP operator SLA for its subscribers.*”

As example justifying abovementioned proposal, we would like to present procedure of reporting failures in services by AOs subscribers.

Firstly, AOs subscriber report failure to the AO, then AO to SMP operator, then SMP operator reports solution to AO, then AO reports solution to subscriber.

In case when failure occurs to the SMP operator subscriber, subscriber reports it to the SMP, and SMP reports solution to the subscriber.

As we can see, in abovementioned example, in case of SLA (for SMP operator subscriber) is 6 hours to report solution of the failure and SLA (for AOs) is 6 hours to receive solution of the failure from SMP operator, AOs are unable to provide information about failure in the same period of time (6 hours) as SMP operator to its subscribers.

BOR(12)104 BP48

In our opinion it shall be indicated that AOs shall receive information about price of the new wholesale service as soon as it is only possible. In our opinion NRAs shall ensure that AOs receive information about the wholesale price at least six months before launching retail service by SMP operator.

We indicate that AO needs some time to analyse any new wholesale offer and prepare retail offer (including marketing preparations). Without knowledge about wholesale price AO cannot make a business decision about implementing new service.

BOR(12)104 BP49, BOR(12)88 BP42, BOR(12)83 BP36

NRAs (also in Poland) perform Margin Squeeze Tests (in Poland NRA also performs Price Squeeze Test).

In our opinion BEREC should put into CP provisions about performing MS Tests. It shall be indicated that NRA performs MS Tests in all situation when SMP operator is preparing new retail service – without distinction whether at the moment equivalent wholesale service is in the Reference offer. NRA shall verify whether AO, basing on the wholesale price and AO costs of providing service.

BOR(12)104 BP54, BOR(12)88 BP45, BOR(12)83 BP15

In CP BEREC allowed NRAs to “*consider whether to differentiate the risks borne by the SMP player in operating its NGA access network from other risks of its business.*”

In our opinion such approach is incorrect. It is hard to regard as correct information that investing in new technologies brings risk to the business, especially that:

- i) fiber is equivalent as copper medium for subscribers;
- ii) operator may provide better services on fiber than on copper;
- iii) costs of maintenance of fiber network are less than copper network.

BOR(12)104 Annex 1, BOR(12)88 BP45 Annex 1, BOR(12)83 BP15 Annex 1

In our opinion it would be necessary to add to the scope of the Reference offer following provisions:

SMP operator is not allowed to launch retail service for six months since providing equivalent service for AOs.

All prices for wholesale service are set in Reference offer. SMP operator is not allowed to charge any additional rates for access to the wholesale services.

First of abovementioned provision would prevent SMP operator from implementing new retail services with using first mover advantage. If such provision were in contract between SMP operator and AO, AO could intervene in court about not keeping regulatory obligations by SMP operator.

Secondly, we think that all rates connected with wholesale services shall be set in Reference offer. Recently in Poland occurred situation that SMP operator wanted to charge AOs additional charge for providing access to one of the wholesale services – it was exaggerated and prevented AOs from providing new service to the subscribers.



Stefan Kamiński
President of The Executive Board