

Response from FCS to BEREC's review and update of the Common Positions on wholesale local access, wholesale broadband access and wholesale leased lines.

Introduction

1. The Federation of Communication Services represents 358 companies across the United Kingdom. Of these, 57% are engaged in supplying services within the market segments covered by this review. Almost all of these member businesses are engaged in providing communications services to business and public sector users. Resilient communications, choice of providers and transparent pricing are especially important to this sector as market segments converge, and as new technology offers opportunities to improve operating efficiencies and control costs. The need for open and fair competition with incumbent SMP providers is therefore particularly important to our members.

General observations

2. The true nature of the distortions caused by anti-competitive behaviour in wholesale markets can easily be overlooked by policy-makers because they are disguised by the very much larger number of retail transactions in many sets of industry statistics. We are encouraged that this timely review clearly demonstrates BEREC's understanding of the very real issues business-to-business communications providers currently face in their business life. And we are satisfied the principles and mechanisms BEREC proposes to deal with these issues are realistic and proportionate, and need not incur any additional costs by NRAs to implement.
3. The principle of reviewing wholesale access en-bloc, and of drawing frameworks of equivalence between fibre and copper networks is especially welcome. But ***we are disappointed wholesale models for mobile networks are not specifically included in this review***, for reasons we detail below. While FCS believes the UK market has a good track record of regulation, we are currently witnessing a number of distortions caused by the different regulatory histories and the different rates of growth of competing transmission technologies.

Regulatory concerns

4. Common Positions necessarily have to allow room for different local interpretations. But some more prescriptive guidance would be useful in some areas.
5. We fundamentally disagree with the assertion that functional separation of the utility operations of a national comms provider from those of its wholesale and retail operations should be considered only as a last resort. Experience across many utility sectors, over many years and in many MSs suggests that monopoly thinking and cultural presumptions in favour of the status quo will always remain the norm unless a full functional separation of utility operations from resales operations is required. This may be as simple and invidious as the career path for senior individuals within the utility subsidiary of a larger corporate whole.

6. For this reason, we believe the default position should be that a full structural separation is required. The onus should be on the SMP operator to demonstrate that there are exceptional reasons in their particular case why this path should not be followed. Not on their customers to prove that a failure to separate is resulting in distortions.
7. It would be helpful to have some guidance regarding the point at which 'all relevant regulatory obligations have failed to create a level playing field' and functional separation therefore has to be considered. What tests could reasonably be devised to determine whether this stage has been reached? Without benchmarks of some kind, the default presumption is always towards the status quo. And the burden of proof falls upon those who are least likely to be able to afford it – the disadvantaged customers of the SMP player.
8. On the same principle, it would be helpful to set some high-level definitions of what constitutes SMP. We have known instances where a company with national market share in excess of 50% is deemed not to have SMP. Or where three competing mobile companies control over 90% of the market and jointly fund research to inform their individual submissions to NRA consultations, but are deemed not to require regulatory intervention.
9. SMP no longer applies purely to certain technologies or certain geographic catchment areas. We are now seeing cases of 'micro SMP' where one provider not only lays all the access infrastructure in, say, a business park, an urban improvement area or a new retail development, but enters into a commercial agreement with the landlord to enjoy monopoly status in the provision of services to subsequent users of that infrastructure. This can have unforeseen consequences for tenants who operate common systems across multiple, geographically diverse operating sites. It also has long-term implications for tenants' freedom to port their numbers to alternative providers, or to avail themselves of new technologies which may not be offered cost-effectively by the incumbent.
10. For this reason, we urge Paragraph BP22 (in the WLA document BoR(12)104) be reviewed to guarantee freedom of choice to business clients by incorporating the following additional wording: "Monopoly operators of loops servicing multiple clients or multiple premises in a distinct geographic area shall be treated as having SMP for the purpose of this section".

Restricted scope

11. The scope of the current review is restricted to the wholesale markets for fixed-line telephony. But we are already seeing strong market entry activity into these segments of the business-to-business communications market from companies whose core competence is in operating mobile phone networks. This is an important new dynamic, with urgent implications for competition.

12. Compared with fixed-line products, where principles of equivalence are well established, wholesale access to mobile calls is generally far harder for small communications providers to obtain. Typically it requires a significant up-front commitment to purchase extremely large volumes of minutes, backed by a substantial cash bond as a guarantee against payment default. For this reason, most business-to-business communications providers are forced to purchase wholesale mobile access via a third-party aggregator. This means margins are low, there is no direct control over product development, and the provision of mobile calls is often regarded as a 'service' element of the package the provider offers his customer.
13. On the other hand, mobile phone companies are free to offer attractive mobile tariffs to potential business customers, and to bundle them with wholesale fixed line products whose prices are already freely available in the market.
14. BEREC is already well aware of the dynamics of fixed/mobile substitution within the business market (Paper BoR (11) 54). But we believe the market has already moved on significantly since this important survey, which mostly looked at the market from the business end-user's point of view.
15. The entry of the mobile phone operators into the fixed telephony market has the potential to seriously threaten free competition. The mobile operators already have a long history of engaging in litigation with NRAs, at a level of cost and complexity which would be completely unsupportable by their SME competitors. The imminent availability of 4G functionality is already strengthening the mobile operators' market position still further, in areas which are simply not available to the fixed line market operators.
16. Without urgent action to create Common Positions to ensure a transparent, equivalent and price-efficient wholesale market in the mobile segment, we fear BEREC's current work on the fixed line market may be overtaken by events

FCS therefore recommends BEREC include an urgent intervention into the wholesale market for mobile calls as part of its 2013 work programme.