

## **BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES**

Consistent with Article 2(a) of the BEREC Regulation, one of BEREC's key roles is to develop best practices and disseminate these among National Regulatory Authorities (NRAs). The best way to achieve this and promote consistent regulatory approaches is through common positions. This common position provides best practice remedies for dealing with competition issues in respect of wholesale access products in the leased lines market (Market 6), where a position of Significant Market Power (SMP) has been identified. It complements the general guidance given on choice of SMP remedies included in the ERG Common Position on Remedies.<sup>1</sup> Application of this common position will assist NRAs to design effective remedies in line with the objectives of the regulatory framework. However, this common position does not alter, and is without prejudice to, the powers conferred, and obligations imposed, on the NRAs under the Framework Directive and the Specific Directives. It is therefore not a substitute for the responsibilities on the NRAs to show (among other things) that SMP remedies are based on the nature of the problem identified, proportionate and justified in light of the policy objectives laid down in Article 8 of the Framework Directive.<sup>2</sup>

This document is relevant to all wholesale leased lines remedies imposed as a consequence of a finding of SMP, whether the relevant market defined by the NRA is a market for trunk segments, terminating segments or a backhaul market. Wholesale leased lines are key inputs for providing a wide range of business connectivity services. It is therefore vital that, where they are not supplied under conditions of effective competition, they are regulated effectively. This will promote the competition and choice on which businesses throughout the economy are entitled to expect and thereby make a significant contribution to achievement of the Single Market. This best practice is also based on the "Ladder of Investment" principle, as regulated access at different rungs of the ladder promotes both competition and investment.

For the purposes of this document, a "wholesale leased line" means the provision of dedicated transmission capacity between 2 termination points, at least one of which must be a point of connection with the SMP provider's network.

---

<sup>1</sup> ERG (06) 33 (Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework)

<sup>2</sup> Article 8(4) of the Access Directive.

## **BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES**

NRAs are required, under Article 3(3) of the BEREC Regulation, to take the utmost account of any regulatory best practice adopted by BEREC, including the practices set out in this common position. Therefore, in carrying out its tasks (such as commenting on draft measures of NRAs concerning the imposition of remedies), BEREC expects NRAs to explain in their notified draft measures the steps they have taken to:

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

Wholesale leased lines services included in Market 6 are consistent with the classification of relevant markets established by the European Commission in 2007.<sup>3</sup> Therefore this Common Position reflects the product market boundaries as originally set up by the European Commission.

---

<sup>3</sup>See [Commission Recommendation 2007/879/EC of 17 December 2007](#) on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
<b>Assurance of access</b>	<p><b>SMP operators may deny access to their network.</b> There should be reasonable certainty of on-going supply of wholesale leased lines on reasonable terms in order to give competitors confidence to enter and/or continue operations in the market.</p> <p><b>SMP operators may restrict use of services.</b></p> <ul style="list-style-type: none"> <li>• SMP operators may put restrictions on how the leased lines provided can be used which are not objectively justifiable.</li> <li>• SMP operators may influence how competition develops by granting access only to specific form of wholesale leased lines.</li> </ul> <p><b>SMP operators may refuse to develop new products and services on request from an alternative operator.</b> SMP operators may have an incentive to deny access by either charging excessive prices and/or delaying development/implementation of new products and services that are feasible and reasonable (such issues may arise if SMP operators claim they did not obtain the appropriate information in relation to the new products/services they are being asked to develop by alternative operators).</p>	<p><b>BP1</b> NRAs should impose the appropriate and proportionate combination of access products that properly reflect their national circumstances.</p> <p><b>BP2</b> NRAs imposition of remedies should be based on the ladder of investment principle.</p> <ul style="list-style-type: none"> <li>• The ladder consists of access products at specific access points and wholesale products to reach these access points.<sup>4</sup></li> <li>• The access products have a geographic/architectural dimension as well as dimension of product characteristics.</li> </ul> <p><b>BP3</b> NRAs should encourage infrastructure competition at the deepest level where it is reasonable, reducing barriers to entry.</p> <ul style="list-style-type: none"> <li>• <b>BP3a</b> Where necessary, NRAs should specify specific forms of access to promote infrastructure competition.<sup>5</sup></li> </ul> <p><b>BP4</b> To avoid competitive distortions access should be mandated regardless of the technical solution insofar as it is proportionate, possible and efficient.<sup>6</sup> Different treatment of copper and fibre based wholesale leased lines should be justified and non-discriminatory, and should be based on the differences in identified competition problems between copper and fibre.</p>

<sup>4</sup> A diagram of the ladder of investment can be found in the glossary.

<sup>5</sup> For example, in order to promote infrastructure competition NRAs could require the SMP operator to provide wholesale Ethernet services on a disaggregated basis (i.e. access and backhaul services are sold separately and cannot only be purchased together).

<sup>6</sup> BoR (12) 66 and BoR (12) 26.

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
		<p><b>BP5</b> NRAs should require SMP operators to provide network access to an alternative operator where that alternative operator reasonably requests it. It is advisable that such requests are formally documented. NRAs should require SMP operators to grant access promptly following receipt of the request from an alternative operator.</p> <p><b>BP6</b> If access to new products and services is not generally included through the review of the Reference Offer (RO), NRAs should impose an obligation on SMP operators requiring them to publish the process specifying how they will deal with requests in relation to such new products and services on existing infrastructure.<sup>7</sup></p> <ul style="list-style-type: none"> <li>• <b>BP6a</b> The process should detail (amongst other things): <ul style="list-style-type: none"> <li>○ how the request should be made,</li> <li>○ the information the SMP operators require to assess feasibility of the new product being requested (type of product and location of interconnection); and</li> <li>○ the timescales within which SMP operators will deal with such requests.</li> </ul> </li> <li>• <b>BP6b</b> NRAs should impose an obligation on SMP operators to consider such requests within reasonable timescales.</li> <li>• <b>BP6c</b> If the request for a new product is assessed as feasible, NRAs should require SMP operators to develop and grant access to the new products/services promptly.<sup>8</sup> Otherwise, NRAs should require</li> </ul>

<sup>7</sup> A new product and service could include a new speed, a new (faster) repair service etc.

<sup>8</sup> This is also linked to the competition objective of Avoidance of Unjustified First Mover Advantage (see Best Practice BP12 below).

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
		<p>SMP operators to objectively justify their refusal for access to such new products and services. When necessary, NRAs should review the reasonableness of such refusal.</p> <ul style="list-style-type: none"> <li>• <b>BP6d</b> When new products and services<sup>9</sup> are made available, NRAs should ensure that they are captured by the relevant SMP obligations already imposed on SMP operators (this would mean, amongst other things, that those new products and services are immediately incorporated into the RO, unless it is deemed not proportionate to do so, for example, because market driven demand cannot be expected).</li> </ul>
<p><b>Assurance of co-location at delivery points and other facilities</b></p>	<p><b>SMP operators may deny access to associated facilities which are key to the provision of leased lines.</b> An alternative operator providing retail services to end users on the basis of wholesale leased lines may need co-location, interconnection (such as incumbent sited, customer sited or mid-span), and/or other associated facilities in order to make the offer of access effective.<sup>10</sup></p> <p><b>SMP operators may artificially restrict the usage of co-location and other associated facilities.</b> With this practice, SMP operators may raise their competitors' costs, as competitors would be forced to purchase additional ancillary services across different regulated markets (irrespective of the levels of utilisation).</p>	<p><b>BP7</b> NRAs should impose obligations with regard to the provision of co-location and other associated facilities on a cost-oriented basis under clear rules and terms approved by the regulator to support viability of the access products mentioned above.</p> <ul style="list-style-type: none"> <li>• <b>BP7a</b> NRAs should ensure that these remedies allow co-location and other associated facilities to be used efficiently. In particular, NRAs should ensure that usage is not artificially segregated by product or market.</li> </ul>

<sup>9</sup> For the avoidance of doubt these new products and services fall in the relevant market under consideration (e.g. Market 6).

<sup>10</sup> In practice, provision of any necessary ancillary services may be regulated under the provisions of a separate Market Review.

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
<b>Level playing field</b>	<p><b>Alternative operators may not be able to compete on a level playing field which may result in SMP players</b></p> <ul style="list-style-type: none"> <li>• having an unfair advantage;</li> <li>• having unmatchable advantage, by virtue of their economies of scale and scope, especially if derived from a position of incumbency;</li> <li>• discriminating in favour of their own group business (or between its own wholesale customers), either on price or non-price issues;</li> <li>• exhibiting obstructive and foot-dragging behaviour.</li> </ul>	<p><b>BP8</b> NRAs should impose a general obligation of non-discrimination.</p> <p><b>BP9</b> NRAs should further clarify how the non-discrimination obligation is to be interpreted on a case-by-case basis.</p> <ul style="list-style-type: none"> <li>• <b>BP9a</b> In cases where a general non-discrimination obligation (imposed under BP8) proves to be not sufficient to the particular issues faced by a specific market and/or product, NRAs could attempt 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. 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.</li> </ul> <p><b>BP10</b> NRAs should impose an obligation on SMP operators requiring equivalence, and justify the exact form of it, in light of the competition problems they have identified.</p> <ul style="list-style-type: none"> <li>• <b>BP10a</b> NRAs are best placed to determine the exact application of the form of equivalence on a product-by-product basis. For example, a strict application of EOI is most likely to be justified in those cases where the incremental design and implementation costs of imposing it are very low (because equivalence can be built into the design of new processes) and for certain key legacy services (where the benefits are very high compared to the material costs of retro-fitting EOI into existing business processes). In other cases, EOO would</li> </ul>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
		<p>still be a sufficient and proportionate approach to ensure non-discrimination (e.g. when the wholesale product already shares most of the infrastructure and services with the product used by the downstream arm of the SMP operator).</p> <p><b>BP11</b> NRAs should consider imposing functional separation as a remedy of last resort and only when all relevant regulatory obligations have failed to create a level playing field.</p>
<p><b>Avoidance of unjustified first mover advantage</b></p>	<p><b>SMP operators may have an incentive to discriminate in favour of their own downstream arms.</b> Alternative operators need assurance that, as downstream markets develop, suitable wholesale products will be available in time to permit them to offer a new, enhanced or cheaper downstream service at the same time as the introduction by the SMP player.</p> <p><b>SMP operators may commission new infrastructure which alternative operators are not able to use.</b> This may be necessary for the provision of new retail services, but may not allow all market players the same opportunity to compete for the new business (especially true if new infrastructure may be deliberately designed to obstruct access and prevent the provision of relevant new wholesale services to alternative operators).</p>	<p><b>BP12</b> NRAs should put in place a regime which ensures the (technical and economic) replicability of the new downstream services introduced by SMP players.</p> <ul style="list-style-type: none"> <li>• <b>BP12a</b> In relation to economic replicability, NRAs should ensure that the methodology and/or the principles applied to ensure replicability are made public beforehand.</li> <li>• <b>BP12b</b> In cases where (technical and/or economic) replicability cannot be achieved by using the available wholesale products, SMP operators should be required either to amend the existing wholesale product or to make a new wholesale product available.</li> </ul> <p><b>BP13</b> In cases where SMP operators need to provide a new wholesale product, NRAs should impose an obligation on SMP operators regarding the timely availability of relevant information according to lead times (i.e. notice periods) defined on a case-by-case basis. The relevant information should include information on prices, terms and conditions and technical characteristics of the new wholesale product. The</p>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
		<p>information provided should allow alternative operators to effectively assess the impact on their own processes.</p> <p><b>BP14</b> NRAs should ensure that alternative operators have the ability to influence the decisions regarding characteristics of new wholesale products and new interfaces.</p> <p><b>BP15</b> Where relevant, NRAs should impose a requirement on SMP operators in relation to lead times (i.e. notice periods) regarding the removal of existing wholesale inputs.</p>
<p><b>Transparency</b></p>	<p><b>SMP operators may not provide sufficient clarity or transparency on the terms and conditions of access.</b> This may have a detrimental impact on alternative operators wishing to enter and/or remain operational in the wholesale leased lines market (and its downstream market) or to use leased lines for services in other markets.</p> <p><b>SMP operators may delay provision of the RO to alternative operators.</b> Doing so would, in turn, delay access to their networks.</p> <p><b>When developing their Reference Offer, SMP operators may not take into account any reasonable views from wholesale customers.</b> As a result the RO may not be fit for purpose.</p>	<p><b>BP16</b> NRAs should require SMP operators to provide clarity of terms and conditions of access (including those relating to relevant ancillary services) by publishing a Reference Offer (RO), the key elements of which should be specified or approved by the NRA. All material contractual terms and conditions which are known or knowable at the time of publication should be covered clearly.</p> <ul style="list-style-type: none"> <li>• <b>BP16a</b> NRAs should require SMP operators to take into account any reasonable views of wholesale customers in their RO, in particular regarding the evolution of the services offered.</li> <li>• <b>BP16b</b> NRAs should require SMP operators to publish the RO (i.e. make it operational) within a reasonable time after NRAs have imposed the obligation to grant access. NRAs should give guidance on the reasonable timeframe on a case by case basis.</li> <li>• <b>BP16c</b> NRAs should require SMP operators to update the RO as necessary, and in a timely manner (see BP13), to reflect relevant changes such as developments in line with market and technology</li> </ul>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
	<p><b>SMP operators may have preferential access to certain key information compared to alternative operators.</b> Certain information which is naturally available to SMP operators (but not to alternative operators) could be used to gain an unfair advantage (for example, SMP operator's development close off dates or network coverage/technical characteristics of leased lines circuit).</p>	<p>evolution and/or changes to prices, terms and conditions for existing services or technical and operational characteristics. Where NRAs follow a pre-approval process, NRAs should further require SMP operators to inform them before publishing the necessary amendments to the RO.</p> <ul style="list-style-type: none"> <li>• <b>BP16d</b> Where applicable, NRAs should impose an obligation on SMP operators in relation to the minimum amount of information to be made available in the RO (for example, see Annex 1).</li> <li>• <b>BP16e</b> After lifting an obligation to apply a RO, NRAs should ensure that SMP operators provide provisions for the change in the contractual conditions which are in place on the basis of that RO, for a transitional period to be determined accordingly.</li> </ul> <p><b>BP17</b> NRAs should require SMP operators to make certain information available to all operators (publicly or on request) within a reasonable period of time. Such information should include the results of Key Performance Indicators (KPIs) measurements (see BP24b below) and planned future changes to the SMP operators' network architectures as far as they are relevant to network access (e. g. future points of access) and which might affect the provision of services.</p>
<p><b>Reasonable quality of access product – technical issues</b></p>	<p><b>SMP operators may try to restrict usage of leased lines.</b> The technical parameters of the lines supplied should make commercial sense and should maximise the scope of competition in downstream markets. This may not be possible if SMP operators introduce limitations in the nature of the service, for example:</p>	<p><b>BP18</b> NRAs should require that SMP operators provide a RO which includes relevant information on technical issues such as (see Annex 1):</p> <ul style="list-style-type: none"> <li>• a description of the network access, including technical characteristics which should include information on network configuration where necessary to make effective use of network access; and</li> </ul>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
	<ul style="list-style-type: none"> <li>• limitations of the technical parameters to whatever suits the SMP provider's own business or certain applications;</li> <li>• geographical limitations (which are not objectively justified in the market definition); and</li> <li>• limitations of use to which services can be put.</li> </ul>	<ul style="list-style-type: none"> <li>• any relevant technical standards for network access (including any technical usage restrictions and other security issues).</li> </ul> <p><b>BP19</b> Consistent with Article 17 of the Framework Directive,<sup>11</sup> NRAs should encourage SMP operators to adhere to European or global technical standards, wherever feasible.</p> <p><b>BP20</b> NRAs should require that interconnection of wholesale leased lines is possible at a wide range of convenient locations. For efficiency considerations, such access should be granted at locations where there is interconnection for other existing services within and outside the relevant market.</p> <p><b>BP21</b> For wholesale leased lines services which exclude trunk segments, NRAs should ensure that end to end wholesale leased lines are available throughout the relevant geographic market in circumstances where interconnecting lines would be technically infeasible or uneconomic (for example, in rural areas).</p>
<b>Reasonable quality of access product – operational issues</b>	<b>SMP operators may have an incentive to discriminate in favour of their own downstream operations in relation to the quality of wholesale access products.</b> As a result, access products may not be of reasonable quality and service levels may not be comparable with those	<p><b>BP22</b> NRAs should require SMP operators to provide a reasonable defined level of service.</p> <ul style="list-style-type: none"> <li>• <b>BP22a</b> Service Level Agreements (SLAs) should cover specific service areas. Service areas where SLAs are most likely to be</li> </ul>

<sup>11</sup> [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002, on a common regulatory framework for electronic communications networks and services.](#)

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
	provided by the SMP operators to their own downstream business.	<p>necessary are ordering, delivery, service (availability) and maintenance (repair).</p> <ul style="list-style-type: none"> <li>• <b>BP22b</b> SLAs should be made available to wholesale operators. To ensure maximum transparency and comparability of the terms provided by SMP operators to alternative operators and their own downstream arm, all SLAs could be made available to all relevant wholesale customers (including those outside from a specific Member State). For example, SMP operators could make them available on demand or automatically publish these on their web-sites (as part of their RO).</li> <li>• <b>BP22c</b> NRAs should take oversight for the process of setting SLAs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.</li> <li>• <b>BP22d</b> SLAs should take into account differences in customer requirements.</li> </ul> <p><b>BP23</b> NRAs should impose a generic requirement on SMP operators to provide Service Level Guarantees (SLGs).</p> <ul style="list-style-type: none"> <li>• <b>BP23a</b> SLGs should cover all necessary specific service areas. Service areas where SLGs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).</li> <li>• <b>BP23b</b> SLG payments should be made without undue delay and should be proactive in nature. That is, with a pre-established process for the payment and billing of the SLGs among operators and without</li> </ul>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
		<p>the need for alternative operators to request the intervention of any third party i.e. NRAs or courts.</p> <ul style="list-style-type: none"> <li>• <b>BP23c</b> NRAs should take oversight for the process of setting SLGs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.</li> <li>• <b>BP23d</b> SLGs should be made available to all alternative operators irrespective of the size of their purchases.</li> </ul> <p><b>BP24</b> NRAs should impose a generic requirement on SMP operators to provide Key Performance Indicators (KPIs) as a means to monitor compliance with a non-discrimination obligation and ensure that SMP operators fulfil their SLAs (unless there is evidence that this is unnecessary or would not be cost effective).</p> <ul style="list-style-type: none"> <li>• <b>BP24a</b> KPIs should cover all necessary specific service areas. Service areas where KPIs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).</li> <li>• <b>BP24b</b> The results of monitoring KPIs should be made available to all operators in the market. To determine whether they could have been discriminated against, alternative operators would need to be able to compare the levels of service they have received to those provided by the SMP operators a) to their downstream businesses and b) the industry average.</li> <li>• <b>BP24c</b> NRAs should take oversight for the process of setting KPIs. NRAs should determine the level of their involvement in this process</li> </ul>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
<b>Assurance of efficient and convenient wholesale switching</b>	<b>SMP operators may have an incentive to discriminate in favour of their own downstream operations.</b> This may result in wholesale customers not being able to switch wholesale products and/or wholesale providers with the minimum of delay and/or disruption.	<p>by taking into account specific market circumstances and particular concerns for discriminatory behaviour.</p> <p><b>BP25</b> NRAs should impose obligations on SMP operators in order to ensure wholesale switching processes are speedy and efficient.</p> <ul style="list-style-type: none"> <li>• <b>BP25a</b> NRAs should require that the maximum allowed downtime during wholesale switching is the lowest possible for the different needs of specific wholesale customer segments.</li> <li>• <b>BP25b</b> NRAs should require that the price of the switch does not act as a barrier to the wholesale switching processes happening.</li> <li>• <b>BP25c</b> Where necessary, NRAs should put in place specific measures to facilitate bulk wholesale switching processes and ensure these are non-discriminatory.</li> <li>• <b>BP25d</b> NRAs should require that the transaction time required to process wholesale switching requests is as low as possible based on the nature and size of the request.</li> <li>• <b>BP25e</b> NRAs should require SMP players to introduce SLAs/SLGs and KPIs in order to ensure the efficiency of the switching process, unless there is evidence that these are unnecessary or not cost-effective.</li> </ul>
<b>Assurance of efficient migration processes from legacy to new</b>	<b>SMP operators may not provide migration procedures enabling the competitors to provide retail services based on new network and to compete with SMP operators.</b>	<p>Phasing out of legacy network may relate to</p> <ul style="list-style-type: none"> <li>• Network infrastructure impacting on e.g. location of access products.</li> <li>• Technologies.</li> <li>• Access products.</li> <li>• Active products such as Customer Premises Equipment (CPEs).</li> </ul>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
NGA/NGN network	No clear announcements by SMP operators of intended close down of Time Division Multiplexing (TDM) technology and access points.	<p><b>BP26</b> NRAs should require that switching procedures equally apply between legacy and NGN/NGA wholesale products.</p> <p><b>BP27</b> Where an SMP operator intends to decommission its legacy network NRAs should impose specific obligations on the SMP operator in relation to:</p> <ul style="list-style-type: none"> <li>• a framework for migration;</li> <li>• a notice period;</li> <li>• an obligation for the incumbent to provide all relevant information on network modification such as decommissioning of access points.</li> </ul> <p><b>BP28</b> NRAs should require that existing obligations remain in place until a certain migration path is agreed and finished.</p> <p><b>BP29</b> When imposing an obligation on SMP operators relating to a notice period for phasing out legacy networks NRAs should take into account that the choice of the appropriate notice period may depend on the following factors</p> <ul style="list-style-type: none"> <li>• Notice period is likely to be longer for locations than for access products/technologies as a new access product may be available at the same location.</li> <li>• Availability of a full-fledged alternative.</li> <li>• Reasonable migration period for a switch of wholesale products. If a legacy access product will be phased out at an access location at which the NGA access product will also be available the reasonable notice period will be shorter than in a scenario where the NGA-access product will be available at a different access location, where</li> </ul>

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
<b>Fair and coherent access pricing</b>	<p><b>Alternative operators in the market may face uncertainty as to the price of wholesale leased lines. SMP operators may create arbitrage opportunities between different wholesale inputs.</b> SMP operators may have an incentive to set prices for wholesale leased lines which are not coherent with the prices of other related services. This may dis-incentivise efficient investment by alternative operators and create arbitrage opportunities.</p> <p><b>SMP operators may margin squeeze.</b> Whether or not there is an explicit pricing obligation, SMP operators may still have an incentive to margin squeeze in relation to downstream products. Furthermore, alternative operators may face uncertainty regarding the principles and methodology for the assessment of margin squeeze which in turn could result in complaints not being resolved quickly.</p> <p><b>SMP operators may engage in predatory pricing.</b></p>	<p>competitors do not yet have a physical presence.</p> <p><b>BP30</b> NRAs should ensure that with reasonable certainty the price of access will permit an efficient entrant to compete with the SMP player. The access price should also be set in a way which is coherent with the prices for other related (wholesale leased lines) services.</p> <p><b>BP31</b> When determining their pricing regulation NRAs need to consider that it should incentivise both efficient investment and sustainable competition.</p> <p><b>BP32</b> Where appropriate and proportionate, NRAs should require SMP operators to provide regulated products based on an explicit pricing obligation. Price control obligations can be implemented in different degrees, ranging from a requirement for prices to be cost-oriented and subject to a rate approval, through to specific charge controls such as a price cap, retail minus etc.</p> <p><b>BP33</b> NRAs should determine the costing methodology taking account of the following two key factors:</p> <ul style="list-style-type: none"> <li>• the prioritisation of the regulatory objectives and</li> <li>• prevailing market conditions.<sup>12</sup></li> </ul> <p><b>BP34</b> When imposing a cost-oriented price control obligation the NRAs should specify the relevant costing methodology to be used as a reference for setting the charges. Any costing methodology selected</p>

<sup>12</sup> See BoR (11) 65 BEREC response to the Commission's Questionnaire on costing methodologies for key wholesale access prices in electronic communications.

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
		<p>must allow the recovery of efficiently incurred costs as the relevant cost standard and follow the principle of cost causality.<sup>13</sup></p> <ul style="list-style-type: none"> <li>• <b>BP34a</b> Prices for services which are technically similar should be priced similarly to ensure effective competition.</li> <li>• <b>BP34b</b> When prices are required to be cost orientated, in order to check how prices relate to the underlying costs of provision, NRAs should impose on SMP operators' obligations in relation to cost accounting and/or accounting separation.<sup>14</sup></li> </ul> <p><b>BP35</b> The effective price granted by the SMP operator should not be discriminatory and should be offered to all operators that meet the established conditions.</p> <p><b>BP36</b> NRAs should put in place obligations preventing SMP operators from engaging in margin squeeze.<sup>15</sup></p> <ul style="list-style-type: none"> <li>• <b>BP36a</b> In considering the minimum acceptable margin, NRAs need to strike a balance between short term efficiency, derived from the economies of scale and scope realisable by an SMP player, and the longer term benefits (assessed on a realistic basis) of a more competitive downstream market, brought about by new entrants which should, in due course and to a reasonable extent, be able to match those economies.</li> </ul>

<sup>13</sup> However, ERG (05) 29 (p. 9). points out that when an NRA is considering or determining a cost recovery mechanism or value there are factors to be taken into account, in addition to cost causality principle (normally established in the cost accounting system), such as distribution of benefits, effective competition, cost minimisation, reciprocity and practicality.

<sup>14</sup> Cost accounting obligations may already stem from national law on the rate approval process and thus need no special imposition.

<sup>15</sup> This is discussed in more detail in the ERG Report on price consistency in upstream broadband markets, ERG (09) 21, June 2009.

## BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES

Objective	Competition issue(s) which arise frequently	Best practice remedies
		<ul style="list-style-type: none"> <li>• <b>BP36b</b> Two imputation tests may be considered<sup>16</sup>: (i) the equally efficient operator (“EEO”) test and (ii) the reasonably efficient operator (“REO”) test. Both tests are referred to in the Notice on the application of the competition rules to access agreements in the telecommunications sector.<sup>17</sup></li> <li>• <b>BP36c</b> NRAs should evaluate which imputation test (EEO, REO or a combination of both) is better suited to attain the regulatory objectives pursued.</li> <li>• <b>BP36d</b> The chosen principle and methodology for the assessment of a margin squeeze should be made known in advance (e.g. by advance publication).</li> <li>• <b>BP36e</b> Where cost-based access is imposed, this should help address concerns about downstream margin squeeze.</li> <li>• <b>BP36f</b> The imposition of cost-based access prices does however not remove the concern for margin squeeze.</li> <li>• <b>BP36g</b> The price squeeze test applied by the NRA should take into account the costs faced by an efficient operator with a minimum scale such that the minimum margin for this operator with relevant downstream services makes commercial sense.</li> </ul> <p><b>BP37</b> NRAs should ensure that discounts are not discriminatory. NRAs should ensure that volume discounts comply with their margin squeeze test (see BP36).</p>

<sup>16</sup> Report on the Discussion on the application of margin squeeze tests to bundles, ERG (09) 07, March 2009.

<sup>17</sup> European Commission, Notice on the application of the competition rules to access agreements in the telecommunications sector, 98/C 265/02.

## **BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES**

### **Annex 1**

The Reference Offer could (amongst other things) include the following information:

- a description of the network access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of network access);
- the locations at which network access will be provided;
- a procedure and conditions to request relevant information for the provision of the relevant regulated wholesale service;
- any relevant technical standards for network access (including any usage restrictions and other security issues);
- the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing), including their usage restrictions and procedures to access those services;
- details of operational processes including, for example:
  - eligibility, ordering and provisioning;
  - migration, moves and ceases;
  - repair and maintenance; and
  - changes to IT systems (to the extent that it impacts alternative operators);
- relevant charges, terms of payment and billing procedures;
- details of interoperability tests;
- specifications of equipment to be used on the network;
- details of quality as follows:
  - specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - the amount of compensation payable by one party to another for failure to perform contractual commitments as well as the conditions for eligibility to compensations;

## **BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR WHOLESALE LEASED LINES**

- a definition and limitation of liability and indemnity; and
- procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- details of any relevant intellectual property rights;
- a dispute resolution procedure to be used between the parties;
- details of duration and renegotiation of agreements;
- rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);
- the standard terms and conditions for the provision of network access;
- glossary of terms relevant to the wholesale inputs and other items concerned.