

Commission Recommendation on relevant product and service markets susceptible to *ex ante* regulation

BEREC's OPINION

5 June 2014

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1 Executive summary

This document represents BEREC's Opinion regarding the European Commission's draft Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation ('the draft Recommendation'), and the accompanying Explanatory Note ('the draft Explanatory Note'). BEREC's Opinion was requested by the European Commission on 24 March 2014 and is provided in accordance with Article 15(1) of the Framework Directive and Article 3(1)(c) of the BEREC Regulation.

The draft Recommendation and Explanatory Note, once in force, will supersede the European Commission's 2007 Recommendation on relevant markets ('the 2007 Recommendation'), and therefore has significant implications for National Regulatory Authorities ('NRAs') when fulfilling the regulatory duties that have been assigned to them under the European Commission's electronic communications regulatory framework.

BEREC welcomes the European Commission's review of the list of relevant markets susceptible to *ex ante* regulation, particularly in light of the continued developments that have taken place across Member States since the previous review. These developments, while not uniform across Member States, have included technological innovation, trends towards increased bundling and convergence, as well as growth in over-the-top ('OTT') services.

BEREC is generally supportive of the European Commission's draft Recommendation and Explanatory Note. However, in order to more effectively enable NRAs to achieve their regulatory objectives as set out in the Framework Directive, in particular to encourage effective competition to the benefit of end users, BEREC requests a number of improvements, with the main ones being summarised below.

Emphasize the difference between the short term and the long term competitive conditions on the market (or markets) for wholesale line rental and call origination (current Markets 1 and 2): BEREC agrees with the long term trends in these markets identified by the European Commission. However, wholesale line rental and call origination will continue to be important drivers of competition in downstream retail markets in the short to medium term in the majority of Member States and it is premature to remove Markets 1 and 2 from the list of markets susceptible to *ex ante* regulation. While BEREC welcomes the acknowledgement by the European Commission that Market 2 will remain susceptible to *ex ante* regulation for another review period in some Member States, it requests that the European Commission mirrors this acknowledgment with respect to Market 1 and includes a transitional period.

Allow NRAs flexibility in defining broadband markets: BEREC welcomes the degree of flexibility given to NRAs in the draft Recommendation and Explanatory Note for the market definition and analysis of the broadband markets (proposed Markets 3a, 3b and 4).

However, when finalising the draft Explanatory Note, BEREC requests the European Commission to provide some clarifications, and makes suggestions in this regard.

Provide further clarity on horizontal, methodological and transitional issues: BEREC requests the European Commission to clarify a number of points that are contained in the draft Explanatory Note.

BEREC looks forward to continuing to work with the European Commission as it finalises the draft Recommendation and Explanatory Note.

2 Introduction

BEREC welcomes the opportunity to respond to the European Commission's draft Recommendation 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 communication networks and services and to the European Commission Staff Working Document – Explanatory Note to the European Commission Recommendation.

As requested by the European Commission on 24 March 2014, BEREC hereby submits its Opinion in accordance with Article 15(1) of the Framework Directive and Article 3(1)(c) of the BEREC Regulation ('the Opinion').

2.1 The Recommendation and Explanatory Note

On 24 March 2014, the European Commission provided BEREC with its final draft Recommendation and Explanatory Note. The final versions of these documents are intended to supersede the European Commission's 2007 Recommendation on relevant markets susceptible to *ex ante* regulation ('the 2007 Recommendation').

The draft Recommendation and Explanatory Note are the culmination of a review process undertaken by the European Commission that started in October 2012. The review process involved several phases, including the issuing of a questionnaire to which BEREC and other stakeholders responded, as well as the preparation of a report by European Commission consultants, published in September 2013, entitled 'Future electronic communications markets subject to *ex ante* regulation'. BEREC has been involved throughout this review process.

According to Article 15(1) of the Framework Directive, the main purpose of the Recommendation is to '... identify [...] those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law.' Therefore, the Recommendation has very significant implications for the tasks that NRAs must undertake in accordance with the electronic communications regulatory framework.

In particular, according to Article 15(3) of the Framework Directive, NRAs must define relevant markets appropriate to national circumstances, taking the utmost account of the Recommendation.

BEREC notes that market definition is a means to an end as, according to Article 16(3) of the Framework Directive, specific regulatory obligations are only to be imposed or maintained in those markets that are not deemed to be effectively competitive in light of a market definition and competition analysis. Taking the Recommendation as a starting point, the identification of product/geographic markets within individual Member States and the assessment of competition within these markets is, therefore, a necessary pre-condition to trigger SMP-based regulatory intervention.

By referring to a pre-defined list of candidate markets susceptible to *ex ante* regulation, the Recommendation thus ensures that broadly the same markets will be reviewed throughout the European Union and can be subject to regulatory intervention, as appropriate. This, in turn, furthers the aim of developing the European internal market and provides increased legal/regulatory certainty for electronic communications providers, ultimately to the benefit of consumers.

At the same time, as noted in the draft Recommendation, one of the aims of the regulatory framework is to progressively reduce *ex ante* sector-specific regulation as effective competition evolves, instead relying on the sufficiency of *ex post* competition law principles alone to govern the development of the electronic communications markets.

In this respect, the draft Recommendation proposes further reducing the list of relevant markets susceptible to *ex ante* regulation from 7 to 4¹. In particular, according to the draft Recommendation, Markets 1 and 2 of the 2007 Recommendation² would no longer be subject to *ex ante* regulation at a pan-European level. In addition, according to the draft Recommendation, boundaries between current Markets 4, 5 and 6³ are to be redefined as new Markets 3 and 4. New Market 3 is subdivided into Market 3(a), 'Wholesale local access provided at a fixed location', and Market 3(b), 'Wholesale central access provided at a fixed location for mass-market products'. The proposed new Market 4 is defined as 'Wholesale high-quality access provided at a fixed location'.

2.2 Overview of BEREC's Opinion

BEREC welcomes the European Commission's review of the Recommendation and Explanatory Note. The review is timely, given the changes that have occurred over recent years in the characteristics of products and services (e.g. due to technological innovation); the evolving conditions of demand and supply (e.g. due to the increased importance of convergence); and the potential benefits that could be gained from refining the regulatory methodologies on the basis of the practical experience acquired since the adoption of the 2007 Recommendation.

¹ The 2007 Recommendation already reduced the list of relevant markets from 18 to 7.

² Respectively, the retail market for access to the public telephone network at a fixed location for residential and non-residential customers; and the wholesale market for call origination on the public telephone network provided at a fixed location.

³ Respectively, wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location, wholesale broadband access and wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity.

In presenting this Opinion, BEREC is mindful of the purpose of *ex ante* regulation – as set out in recital 2 of the draft Recommendation, namely to ultimately provide benefits to end users, by seeking to ensure that retail markets are effectively competitive on a sustainable basis.

BEREC notes that the European Commission's efforts to engage with BEREC, and with other stakeholders, throughout its review process have contributed to the delivery of draft documents that are, in general, well-reasoned and comprehensive. BEREC also considers that these documents duly take into account recent market trends and technological developments. BEREC nonetheless points out that the European Commission does not adequately evaluate the effective competitive conditions in the EU for the short term evolution of Markets 1 and 2.

Furthermore, in line with the spirit of cooperation that has guided the path towards the adoption of the revised Recommendation, BEREC's Opinion will continue to focus on those aspects of the draft documents that, in its view, require further attention. In particular, BEREC's Opinion will address the following issues:

- **Clarification on horizontal and methodological issues:** BEREC requests that a number of clarifications be provided within the draft Explanatory Note. BEREC also highlights issues that could potentially arise for NRAs if the draft Explanatory Note is implemented without these clarifications (e.g. likely difficulties faced by NRAs when collecting information from OTT providers to support their analysis of the retail market). BEREC also requests the European Commission to provide specific guidance on the treatment of oligopoly situations⁴.
- **The proposed removal of current Markets 1 and 2:** While BEREC recognises the European Commission's long-term ambitions, it considers that the draft revised Recommendation does not properly take into account short to medium term market conditions within Member States with respect to current Markets 1 and 2. At present and in the foreseeable future, market conditions in a number of Member States for these markets continue to display significantly different competitive conditions to those identified for these markets in the draft Recommendation. BEREC argues that competitive conditions in a good number of Member States justify the continuation of WLR and CS/CPS regulation. In this regard, BEREC notes the European Commission's effort to emphasise, in the Explanatory Note, the difference to be expected in competitive situation in the short term, compared to the situation in the long term, and requests the European Commission to define a clear transitional period.

⁴ BEREC acknowledges that, in some cases, its comments could be more appropriately addressed within separate and future Commission documents (e.g. a revision of the SMP guidelines or of the Framework). Nonetheless, BEREC considers it important to highlight these matters, which are linked to the Draft Recommendation and Explanatory Note, in this Opinion.

- **Termination markets:** In general, BEREC agrees with the European Commission's assessment of the termination markets. However, in the context of carrying out reviews and implementing regulatory measures in these markets, BEREC considers that there is scope to lower the administrative burden faced by NRAs. BEREC would also appreciate recognition in the Explanatory Note of the potential competition problems related to the provision of value-added services.
- **Broadband markets:** BEREC welcomes the degree of flexibility given to NRAs in the draft Recommendation and Explanatory Note with respect to the market definition and analysis of broadband markets (new Markets 3a, 3b and 4). However, BEREC requests that certain aspects of the draft Explanatory Note be clarified, and, in this respect, it makes a number of suggestions where improvements could be made to provide increased regulatory clarity.
- **New markets:** BEREC concurs with the European Commission that no new markets should be added to the list of relevant markets in addition to those already identified in the draft Recommendation.
- **Transitional issues:** BEREC welcomes the inclusion in the definitive text of a reference regarding the relationship between new Markets 3a, 3b and 4, and current Markets 4, 5 and 6.

The remainder of this Opinion is structured along these lines.

3 BEREC's Opinion on the draft Recommendation on relevant markets

3.1 Horizontal issues

The draft Explanatory Note identifies several horizontal issues considered by the European Commission to be relevant to the conduct of market reviews, namely technological developments that have occurred since the adoption of the 2007 Recommendation, the issue of self-supply and several other observed market trends.

BEREC agrees in general with the European Commission's analysis regarding technological developments and market trends. Nevertheless, BEREC presents some remarks that it would like the European Commission to take into consideration.

3.1.1 Technological developments

BEREC agrees with much of the European Commission's assessment regarding technological developments relating to LTE, copper, fibre and cable networks. BEREC also agrees that the transition from the public switched telephone networks (PSTN) to IP-based networks is starting to take place, resulting in a growing use of Voice over IP (VoIP) services by end users. Nevertheless, in BEREC's view this transition will take time.

BEREC therefore suggests that the text in Section 3.1 of the European Commission's Explanatory Note be modified to reflect the likelihood that, in many Member States, the transition to VoIP will take place in phases, and that narrowband voice services (based on PSTN or ISDN) are likely to remain necessary in the meantime.

Furthermore, BEREC considers that the European Commission has underestimated the current and foreseeable number of 'captive users' in some Member States (see Section 3.3.1 of this Opinion). In these Member States, a significant number of customers still demand single-play fixed telephony offers independently of broadband, and BEREC believes that, for these customers, VoIP services will not represent a suitable substitute for narrowband voice services from an economic point of view in the foreseeable future.

BEREC therefore recommends that the text in Section 3.1 of the European Commission's draft Explanatory Note be modified to reflect the likelihood that, in many Member States, for the time being at least, there will be a significant segment of customers (principally those retail customers who do not purchase fixed broadband) who are unlikely to consider VoIP services a suitable substitute for narrowband voice services (principally those retail customers who do not purchase fixed broadband).

3.1.2 Trends

OTT services

As previously pointed out by BEREC⁵, over-the-top (OTT) service providers have contributed to the increased dynamism of telecommunications markets across Member States. OTT services are making inroads into segments that until recently had been supplied by traditional electronic communications operators (such as voice, text messages or broadcasting), and are placing a degree of competitive pressure on the retail services provided by these operators. The upgrading of broadband access networks is likely to encourage this trend, as services provided over-the-top could be enhanced by higher bandwidths.

BEREC agrees that the impact of OTT services on the competitive process should be considered by NRAs when undertaking market reviews. In particular, by analysing whether consumers consider OTT services to be effective substitutes for traditionally-provided services.

However, BEREC notes that NRAs have limited powers under the legislative framework to request market data from OTT players (although this will depend on the way the Directives have been transposed nationally). This is because, in many instances, services and applications provided by OTT players are not considered under the Framework to be electronic communications services. This limitation may impair the capacity of NRAs to gain access to information that is relevant when analysing the impact of OTT services.

In this context, BEREC would welcome an acknowledgement in the Explanatory Note of the fact that NRAs have limited power under the current regulatory framework to obtain data from OTT undertakings. BEREC also requests the European Commission to consider this matter when it next reviews the regulatory framework.

Nevertheless, BEREC understands, as does the European Commission, that these services, by their nature, are provided over an underlying infrastructure. OTT services are therefore typically positioned downstream from the relevant markets. For this reason, BEREC's point of view is that these products do not replace the need for some form of wholesale network access products.

Bundling

BEREC agrees with the European Commission's assessment, in Sections 2.6 and 3.2 of the draft Explanatory Note, of the increasing prevalence of retail bundles, and the importance of ensuring that alternative operators are able to replicate the bundles supplied on the retail market by using one or more wholesale products.

In several Member States, bundling of broadband retail services is gradually becoming the primary form of providing electronic communications services. For example, according to the

⁵ BoR (13) 22 – BEREC's response to the European Commission's questionnaire for the public consultation on the revision of the Recommendation on relevant markets (March 2013).

latest Eurobarometer⁶, more than 64% of households in the EU purchased broadband services as part of a bundle, and 55% of households purchased fixed telephony as part of a bundle.

This trend appears set to continue, with the emergence of commercial quadruple play offers (which include fixed, mobile and audiovisual content) taking place in some Member States.

3.1.3 Self-supply

BEREC welcomes the inclusion in the draft Explanatory Note of a reference to the possibility of including an alternative operator's self-supply in the relevant market. In particular, the European Commission notes in Section 3.3 of the draft Explanatory Note that alternative operators' self-supply could be included in the relevant market 'due to the strong direct pricing constraints they exert on the incumbent operator'.

BEREC suggests the addition of further text in Section 3.3 stating that alternative operators' self-supply should also be included in the market when strong indirect pricing constraints are present (or the existing sentence could simply be extended to read 'due to strong direct or indirect pricing constraints').

BEREC also seeks clarification of the text that is included in Section 3.3 of the draft Explanatory Note, which states that 'Even where there is an alternative potential supplier, it may share the same strategic interests as the incumbent regarding supply to third parties'. BEREC notes that the European Commission should specify, within the text, the meaning of 'strategic interests' in this context.

3.2 Methodological issues

In general, there are no significant changes between the Explanatory Note to the 2007 Commission's Recommendation and the draft Explanatory Note regarding the principles and mechanisms that NRAs should apply in the definition, analysis and competitive assessment of the markets susceptible to *ex ante* regulation (both the SMP analysis and the three-criteria test).

BEREC does, however, welcome the clarification in the draft Explanatory Note of the methodology for defining the relevant markets. In particular, the European Commission has set out the sequence of analytical steps, starting from the analysis of the retail markets and moving on to the relevant wholesale markets.

In this section, BEREC requests clarification on the following elements featured in the draft Recommendation and Explanatory Note: (i) joint dominance and oligopolies; (ii) geographical market definition/analysis of the markets; (iii) the three-criteria test; and (iv) the relationship between retail markets and wholesale markets.

⁶ Special Eurobarometer 414 – 'E-Communications and Telecom Single Market Household Survey, January 2014' – http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/209-berec-report-on-impact-of-bundled-offers-in-retail-and-wholesale-market-definition.

3.2.1 Joint SMP and oligopolies

Duopolistic/oligopolistic market scenarios are likely to become a frequent occurrence in some of the relevant markets in Member States. This trend has significant implications and is creating increasing challenges for NRAs, when assessing SMP in the relevant markets.

The current draft Recommendation and Explanatory Note are based on the presumption of a single SMP operator in the market, and do not address the possibility that there may be more than one SMP operator in a relevant market. BEREC is concerned that failure to adapt the regulatory framework to account for a duopoly scenario might, in some cases, lead to a situation where NRAs are unable to find a single SMP operator (and therefore to impose regulation) in the relevant market that would be, in fact, subject to joint dominance.

This is especially relevant in the market for data services, where the case of duopoly situations with only two infrastructure-based competitors may be more likely. In particular, BEREC would like to stress the impact that infrastructure competition is having on the regulatory activities of NRAs, with the situation becoming more complex due to NGA roll-out (and where alternative operators also invest in fibre networks).

Therefore, BEREC is of the view that duopolistic/oligopolistic communications markets may face a high risk of evolving in a non-competitive manner⁷, and is not a market structure that would be likely to support efficient and sustainable competition.

BEREC acknowledges that the European Commission gave some guidance in its 2002 Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services ('the SMP Guidelines')⁸. However, the SMP Guidelines do not cover the most recent decisions on joint dominance that have been adopted by the courts, and which provide relevant parameters for determining the creation, or strengthening, of a jointly dominant position in *ex post* and merger scenarios.

BEREC considers that the European Commission should explicitly take into account the potential for joint dominance to arise in future revised SMP Guidelines and the Explanatory Note to the draft Recommendation. The European Commission may, for example, do so by providing guidance on how NRAs should treat joint dominance when assessing SMP within the relevant markets. This guidance should be drawn from recent case law, and from other relevant economic references.

BEREC itself intends to produce a report for NRAs on how to assess oligopolies in a market analysis. This work is scheduled to begin in BEREC's 2014 Work Programme, and would be a useful reference for the European Commission when it ultimately reviews its SMP Guidelines.

⁷ See in particular BEREC's Report on Co-investment and SMP in NGA networks, BoR (12) 41 and a paper addressing this question ('Is two enough?') where the Dutch regulator OPTA concludes that 'it is unlikely that competition is effective with only two firms in the market'.

⁸ 2002 OJ C165/6

3.2.2 Geographical market definition/analysis of the markets

BEREC welcomes the guidance provided in the draft Explanatory Note in relation to geographical aspects of market definition. BEREC notes that the European Commission's proposed methodology is generally in line with the forthcoming 'BEREC Common Position on geographic aspects of market analysis (definition and remedies)'⁹.

However, BEREC provides the following minor suggestions regarding the draft Recommendation and Explanatory Note.

When analysing the geographic boundaries of wholesale markets, the assessment of upstream retail market(s) is only a means to an end. In particular, the purpose is to inform the wholesale market definition. For that reason, BEREC suggests the following amendment to recital 7 of the draft Recommendation: 'For both the European Commission and the national regulatory authorities the starting point for the identification of (wholesale) markets susceptible to *ex ante* regulation is the analysis of corresponding retail markets. This retail analysis is done by taking into account demand-side and, where appropriate, supply-side substitutability from a forward-looking perspective over a given time horizon.'

BEREC also proposes that Sections 2.5, 4.2.2.1 and 4.2.2.2 of the draft Explanatory Note, which describe the methodology for defining geographic boundaries of a market, should adopt an analogous approach to that used to define the relevant product market(s). On that basis, barriers to entry should be considered. For example, Section 2.5 could be edited as follows: 'This means that NRAs should look at the barriers to entry, number and size of potential competitors, distribution of market shares, price differences or variation in prices across geographical areas, and other related competitive aspects, which may result from relevant competitive variations between geographic areas (nature of demand, differences in commercial offers, marketing strategies etc.)'

In that case, Sections 4.2.2.1 and 4.2.2.2 should also be modified to include barriers to entry as one of the factors that are relevant when assessing the geographic boundaries of a market.

3.2.3 The three-criteria test

BEREC considers that the three-criteria test remains a valid conceptual tool for examining markets that are susceptible to *ex ante* regulation, and welcomes the clarification provided in the draft Explanatory Note concerning the relationship between this test, and the SMP assessment.

However, BEREC is concerned by the following text in Chapter 2.4 of the draft Explanatory Note: 'Where an NRA conducts the three criteria test specifically applied to national circumstances, either with the objective of not regulating a specific market or with the objective of regulating a market not identified in the Recommendation, both tests should be carried out and notified, although conceptually both the three criteria test and the SMP analysis have much in common, and will often draw on the same evidence and competition indicators.'

⁹ BoR (13) 186.

This paragraph requires that, even where an NRA proposes not to regulate a specific market, it must carry out (and notify) both the three-criteria and SMP tests for that market.

BEREC would also like to highlight a potential inconsistency between Section 2.4 'Relation between the three criteria test and the assessment of significant market power' of the draft Explanatory Note and Article 3 (page 8) in the draft Recommendation, which stipulates that: 'When considering that any of the markets set out in the Annex does not require *ex ante* regulation in the specific national circumstances, national regulatory authorities should demonstrate, and the European Commission will verify, that at least one of the three criteria set out in point 2 is not met.'

In BEREC's view, this paragraph is inconsistent with Section 2.4, which distinguishes between the three-criteria test as a determinant of susceptibility to *ex ante* regulation and the SMP assessment as being an assessment of whether a market 'should be made subject to *ex ante* regulation'. A market that meets the three-criteria test may not necessarily require regulation in cases where there is no finding of SMP either in the relevant market or in the corresponding retail markets.

BEREC proposes that Article 3 should instead be modified to require that: 'When considering that any of the markets set out in the Annex are not susceptible to *ex ante* regulation in the specific national circumstances, national regulatory authorities should demonstrate, and the European Commission will verify, that at least one of the three criteria set out in point 2 is not met.'

BEREC also proposes that the following text in Section 2.2 (on page 11) of the draft Explanatory Note should be removed: 'NRAs should consult with the National Competition Authority (NCA) that has competence for the territory subject to the proposed *ex ante* regulation, and take into account that body's opinion when deciding whether use of both complementary regulatory tools is appropriate to deal with a specific issue, or whether competition law instruments are sufficient.'

BEREC notes that this procedural matter is dealt with sufficiently in Article 16(1) of the Framework Directive which makes it clear that NRAs should collaborate with the NCA 'where appropriate'.

3.2.4 Relation between retail markets and (the relevant) wholesale markets

The draft Recommendation (recital 8) states: 'Once the retail markets are defined, it should be assessed whether they are effectively competitive from a forward-looking perspective in the absence of regulation based on a finding of significant market power.'

Wholesale markets are then to be analysed following the same process.

As noted previously, BEREC welcomes the clarification of these analytical steps within the draft Recommendation, and the further explanation provided within the draft Explanatory Note. However, BEREC feels that the current draft puts slightly too much emphasis on formally defining the retail market. While BEREC believes that in some cases it is

appropriate to analyse the relevant upstream retail market(s), it is not necessary to formally define retail markets when the focus of the market review is on a wholesale market.

In particular, the draft Explanatory Note proposes that NRAs should define the geographic retail markets, and then translate that geographical segmentation to the wholesale market. BEREC considers that this approach may be too mechanistic, especially if the choices available to the users in the retail market are not equivalent to those available at the wholesale level. This is, for example, the case where the wholesale market corresponds to more than one retail market.

Mobile call termination may provide another example of where it is sufficient to consider the retail market, but is not particularly useful to formally define it. Firstly, doing so would involve defining retail markets around complex retail mobile service bundles. Secondly, the competitive conditions arising in retail mobile markets are unlikely to be closely related to those prevailing in mobile termination markets, where a separate market is defined on each network. BEREC suggests that the European Commission amend the draft Recommendation (especially recital 7) and Explanatory Note in certain places to reflect these points.

BEREC agrees with recital 10 which states that in most cases, if the retail market is competitive (absent regulation), there is no need for wholesale market regulation. However, BEREC recommends that the draft Explanatory Note be amended to specifically refer to the case of termination markets, where there may be a need for regulation, even where there is effective competition in the downstream retail market¹⁰.

As a further minor procedural point, BEREC proposes a change to recital 10 of the draft Recommendation, which states that: '[...] if the retail market concerned is effectively competitive from a forward-looking perspective in the absence of *ex ante* wholesale regulation on the corresponding relevant market(s), this should lead the national regulatory authority to conclude that regulation is no longer needed at wholesale level. In such a case, the corresponding relevant wholesale market(s) should be assessed with a view to withdrawing (or not imposing) ex ante regulation'.

As it is formulated, recital 10 suggests that an NRA should, in principle, carry out an assessment of the relevant wholesale market(s) even when the downstream markets are competitive.

BEREC's view is that (with the exception of the call termination markets) where (1) downstream retail markets are found to be competitive, (2) no remedies have been previously imposed in the corresponding wholesale market(s); and (3) the NRA does not propose to regulate those market(s), NRAs should not be required to assess the corresponding *wholesale access* market(s). Requiring an NRA to carry out an assessment of the relevant wholesale market, in this case, would place an undue burden on the NRA. On that basis, BEREC proposes that the text in recital 10 be amended as follows: '[...] if the

¹⁰ Because of the Calling Party Pays principle, in the absence of wholesale regulation, a competition problem at the retail level can be identified only if one considers a notional retail market, rather than the actual access and calls retail markets.

retail market concerned is effectively competitive from a forward-looking perspective in the absence of *ex ante* wholesale regulation on the corresponding relevant market(s), this should lead the national regulatory authority to conclude that regulation is no longer needed at wholesale level.’

In wholesale markets where *ex ante* regulation is already in place, if the downstream retail markets are found to be competitive, NRAs’ assessment and findings on wholesale regulation should take utmost account of the competitiveness of the corresponding retail markets.

3.3 Access to voice and voice services

3.3.1 Removal of Markets 1 and 2 from the new list of relevant markets

According to the draft Recommendation, Markets 1 and 2 are not considered in principle susceptible to *ex ante* regulation. This means that once the new Recommendation enters into force, any NRA considering the need for wholesale remedies such as WLR must demonstrate that the three criteria test is met, as well as finding one or more undertakings to have SMP.

BEREC acknowledges the significance of the trends cited by the European Commission as reasons for removing Markets 1 and 2 from the list of relevant markets. BEREC also recognises that these trends are ultimately likely to lead to significant changes that may, in the long term, justify the deregulation of Markets 1 and 2. However, BEREC is not able to predict the timing of these changes. At present, Markets 1 and 2 are still regulated by a large majority of NRAs based on findings of SMP across Member States. In this regard, BEREC is of the view that the justifications given by the European Commission need cautious analysis.

Firstly, BEREC agrees that there is the potential for competitive pressure arising from other services or technologies on retail voice services provided over narrowband networks. However, given that the markets in each country have different degrees of development and maturity, BEREC considers that these services or technologies cannot be seen as a direct constraint on operators of traditional public telephone services in all Member States, and therefore justify deregulation of access to these services either at present or in the foreseeable future. BEREC notes that some services (like mobile phones and OTT services) must still be considered as complements rather than substitutes from the consumers’ point of view in many countries. Furthermore, new technologies will probably not be available in the coming years on a scale that would result in direct competition for traditional technologies. In particular, transition from PSTN to all-IP networks is moving at a slower and more gradual pace and the phasing out of the PSTN is more uncertain than was initially envisaged. It should also be noted that there are only few Member States with VoIP standalone offers today. In many Member States, where LLU is not available (or is not widespread), a WLR remedy will normally be needed to promote competition in the market. Indeed, in areas with a low density of users, LLU investments may not be viable from an economic point of view.

Secondly, BEREC is of the opinion that the situation of captive users should not be underestimated. The proportion of captive users varies significantly across Member States. It can reasonably be assumed to exceed a half of the customers' bases in some cases¹¹. In some Member States, these captive users are unable or unwilling to change from a PSTN-based fixed voice standalone offer. This can be because there are simply no other offers available or because the available offers are not seen as substitutes to the current services. This situation does not only concern elderly people or low income households, but it is also of major importance for small businesses. Therefore, it cannot be dealt with by social policy measures alone, even those included in the universal service obligations. Universal service obligations are usually¹² not likely to be suitable for addressing these issues as they have a different aim from the SMP remedy, with the former focusing on affordability at the retail level rather than aligning prices with costs, and focused on upstream regulation where possible. Extending retail market requirements could be difficult, would be highly interventionist and could result in possible distortions. For example, it could discourage consumers from migrating to bundled products, even where they are able to afford this, which would be detrimental to competition.

In some Member States, many business customers are still structurally dependent on PSTN services, as their migration towards VoIP is progressing at different rates. This behaviour can be explained by both technical and financial reasons. Some services (fax, remote maintenance, alarm and remote monitoring applications) are not yet compatible (or seen as such) with VoIP. Equally, legacy customer premises equipment cannot be operated with IP-solutions, either for technical reasons or due to high switching costs (replacing PSTN-based PABX equipment is seen as too costly or unnecessary by final customers). Although this situation does not occur in all Member States, it should be noted that some businesses are afraid of losing the resilience they see as guaranteed with PSTN services.

Thirdly, BEREC notes that even in cases where competition on the retail market has reached a satisfactory level, this is, in most cases, due to the availability of regulated offers on wholesale markets such as wholesale call origination that still plays a significant role in the development of competition in the retail markets, since some operators still rely on the wholesale inputs of the SMP operator to enhance their coverage of the national territory and thus compete in more similar conditions with larger operators. In a large majority of countries, PSTN is operated by the incumbent operator. A significant number of NRAs therefore fear that removing the regulatory obligations imposed under Market 2 would leave the incumbent operator with significant market power in Market 1, without incentives not to abuse this market power (applying market foreclosure or higher pricing strategies), as alternative operators would no longer be able to compete with the same underlying offers.

¹¹ Although it is difficult to assess the exact number of 'captive users', BEREC collected data from NRAs of 21 Member States accounting for 93% of the European Union's population to provide a proxy of this number. There are around 130 million accesses to traditional fixed voice services in these countries (3/4 being residential). A sometimes significant number of these services are bought from the incumbent operator (according to the available data, i.e. in 11 Member States accounting for 60% of the population, on average 44%).

¹² This may for instance not be the case in Portugal, where the universal service is provided by an operator which is not the incumbent operator, with the consequence that at least two operators compete at the retail level, one of them being subject to a price cap.

As a consequence of the above, it is likely that a large number of NRAs will still propose to regulate Markets 1 or 2 for the next round of market analysis¹³. Indeed, as stated above, most NRAs are currently regulating both or one of these markets, and imposing wholesale obligations on the SMP player to provide WLR offers and CS/CPS, as they believe that this is necessary for the provision of retail offers equivalent to those based on the incumbent's PSTN.

There is thus uncertainty about when it can be deemed that there are sufficient competitive constraints in Markets 1 and 2 to remove regulation in most Member States. Therefore, BEREC believes that it is premature to remove Markets 1 and 2 from the list.

However, in the event that the European Commission maintains its proposal to remove Markets 1 and 2 from the list of relevant markets, BEREC does at least appreciate the fact that the European Commission has recognised that the competitive situation in Market 2 might differ in the short and in the long term, as stated in the draft version of the Explanatory Note that when 'NRAs will not yet identify a sufficiently clear tendency towards effective competition in their national markets combined with a sufficiently pronounced lowering of entry barriers, Market 2 can be seen as (remaining) susceptible to *ex ante* regulation for another review period'. BEREC understands that this sentence is not intended to enable NRAs to regulate Market 2 without demonstrating that the three criteria are met, but welcomes the European Commission's effort to take into account the fact that many NRAs will still conclude, at least in the short term, that these markets require *ex ante* regulation.

In BEREC's view, however, this text should be extended to Market 1, focusing on wholesale remedies (mainly WLR) that NRAs may need to impose to solve competition problems: indeed, most NRAs impose WLR or CS/CPS on the grounds of a Market 1 analysis.

Moreover, BEREC requests that the European Commission define a transitional period should the European Commission choose to remove the markets from the list.

3.3.2 Termination markets

BEREC agrees with the European Commission's conclusion that the markets for mobile and fixed termination should remain in the list of relevant markets. These markets are significantly different from other access markets, because each network constitutes a separate product market. Therefore, each provider offering termination services on its network is a *de facto* monopolist.

Termination markets typically feature the same competitive conditions across different Member States and *ex ante* regulatory intervention is pretty much standard. Given that this

¹³ BEREC understands this might not however be the case for some Member States due to specific national situations (for example, in Finland, there is a market structure where several local incumbent operators run their own local networks and where voice mobile services are considered a substitute to traditional voice fixed services; or in Portugal, where universal service providers other than the incumbent have recently been designated following an auction procedure, and are subject to a price cap which exerts a competitive pressure on the incumbent operator).

situation is unlikely to change in the foreseeable future, BEREC considers that a more simplified regulatory approach can be formulated, on the basis of guidance provided by the European Commission.

BEREC believes that the Recommendation on relevant markets is not the appropriate vehicle to implement this change to the regulatory approach. However, BEREC recommends that the European Commission considers the disproportionate burden of undertaking a whole market analysis every three years when next reviewing the Framework.

As a further point, BEREC notes that competition in the market for origination services supplied to value-added service providers may be insufficient. Willing to ensure the widest accessibility to their services, value-added service providers in some Member States may have to negotiate interconnection on a non-equal footing with operators providing origination services. Therefore, BEREC considers that it would be useful for the Explanatory Note to acknowledge these potential competition problems, as well as the possibility of regulating the corresponding market, in line with earlier work undertaken by BEREC on this topic¹⁴.

3.4 Access to data and related services at a fixed location

The European Commission's draft Recommendation and draft Explanatory Note have revisited the previous boundaries that defined the current Markets 4 (wholesale physical network infrastructure access, for any type of customer), 5 (wholesale broadband access products, for any type of customer) and 6 (terminating segments of leased lines). According to the draft Explanatory Note, retail market segmentation would now essentially be premised on the different types of products demanded by end users, in particular products sought by mass-market customers and high-quality products (the latter being included in new Market 4, with services such as leased lines or 'carrier-grade' Ethernet services, and where appropriate high-quality wholesale access products).

With regard to the current Markets 4 and 5, the European Commission proposes a move from the current active-passive distinction (which is the basis for the differentiation between physical and non-physical access products in Markets 4 and 5), to a distinction based on the characteristics of products (local-central point for handling traffic, contention and control over the transmission network). This redefinition in particular leads to the explicit incorporation of virtual forms of unbundling within the new Market 3a.

The redefinition of the current Markets 4, 5 and 6 (new Markets 3a, 3b and 4) raises some methodological issues, which are addressed in the sections below. Regarding the adequacy of proceeding with this revision of the access to data markets, it is fundamental to stress that this question depends to a great extent upon the product portfolios of the market providers, the existing network structures and the competitive situation prevailing in each of the Member States.

¹⁴ See in particular BEREC Report on special rate services, BoR (12) 55.

Thus, several countries hold the view that the wholesale remedies available to date, imposed on the current Markets 4, 5 and 6, are sufficient to tackle the specific needs of the high-quality services at end-user level. In their view, the design of the reference offers is an adequate tool to ensure that the specific ad hoc requirements of high-quality services are met by available wholesale access products. Those countries need the flexibility granted by the draft Explanatory Note to delineate the new Markets 3b and 4 accordingly, if the analysis shows, for instance, that low- and high-quality bitstream services are substitutes.

Other Member States believe that the competitive landscape at retail level may be different for the mass market and the high-quality market, thus justifying a fine-tuning of the broadband wholesale markets, in line with the European Commission's proposal. According to this view, the conditions of competition prevailing in the mass WBA market and in the high-quality market would be different, in particular due to the specific business segment operators requirements (e.g. in terms of guaranteed availability and service, access at different network points, etc.).

How the proposed new delineation of current Markets 4, 5 and 6 will be applied will thus to a great extent depend upon: (i) the specific market situation prevailing in each Member State and (ii) the specific design of the wholesale products used (if any) to provide high-quality services (e.g. more technically or at the level of contracts by SLAs in the reference offers).

BEREC is of the view that a 'one-size-fits-all' approach, whereby the proposed redefinition of the broadband access to data markets would apply regardless of national circumstances, would have been ill-suited to ensuring the development of efficient competition, and would have been in contradiction with the approach followed in practice in other markets (such as Market 18 of the 2003 Recommendation, where the different conditions of competition prevailing at national level have led to very different regulatory outcomes); it should be left to NRAs to define which products are sufficient for satisfying the demand in Markets 3a or 3b.

However, BEREC acknowledges that the Recommendation has successfully avoided such a 'one-size-fits-all' approach, and it provides enough flexibility for NRAs to adapt to different national situations, as well as to take into consideration different needs = for high-quality products from access seekers to provide services demanded by both residential and business customers.

Taking these remarks into account, the following sections highlight some issues to be considered when applying the proposed redefinition of the broadband markets in the different national contexts. In particular, the following issues need to be addressed:

- 3.4.1. Boundaries between the WLA market (new Market 3a) and the WCA market (new Market 3b);
- 3.4.2. Characteristics of wholesale high-quality access products (new Market 4);
- 3.4.3. Links with the NGA Recommendation and the Recommendation on non-discrimination and costing methodologies;
- 3.4.4. Constraints stemming from cable.

3.4.1 Boundaries between the WLA market (new Market 3a) and the WCA market (new Market 3b)

The draft Commission's Recommendation and Explanatory Note no longer rely on the distinction between physical access (current Market 4) and non-physical access (current Market 5). The Explanatory Note suggests that NRAs should differentiate between a wholesale local access market and a wholesale central access market on the basis of the point where the wholesale service is being provided, the contention rate and the control over the transmission network for access seekers.

According to the Explanatory Note, this redefinition makes it appropriate to also include non-physical or virtual access products within the scope of the WLA market, where such access functionally replicates the key features of physical unbundling. Virtual WLA would thus be provided at a local level, with its main feature being its generic and uncontended nature, which would enable the access seekers to have sufficient control over the transmission network, and allow for product differentiation and innovation similar to LLU.

BEREC agrees with the general statements contained in the Explanatory Note, according to which bitstream-type products and unbundled access (and related fibre inputs) are expected to remain complements, rather than substitutes, in the foreseeable future. However, switching from active-passive to local-central differentiation may cause some methodological and legal difficulties in terms of product market definition and the exact substitution differences.

Regarding this issue, BEREC considers that the European Commission's Recommendation allows NRAs to decide on the specific delineation of the boundaries between the WLA and WCA markets, as well as to assign the different wholesale products to specific markets on the basis of competition law principles. This individual assessment will be particularly important when deciding, following a demand and supply substitutability analysis, whether a specific virtual access product (e.g. to be provided to allow for VDSL vectoring) should, for instance, be distinguished from more traditional bitstream-type access products, and should thus be considered as part of the same or a different market as bitstream.

3.4.2 Wholesale high-quality access market (new Market 4)

As noted above, the European Commission's draft Recommendation and Explanatory Note refines the boundaries between the current wholesale broadband access market (current Market 5) and the market for terminating segments of leased lines (current Market 6). The new delineation between new Markets 3b and 4 is based on quality and location considerations: Market 3b corresponds to (i) WCA for mass market products (i.e. standardised products with comparatively low quality requirements), and Market 4 corresponds to (ii) wholesale high-quality access, the issue of the handover being left open. This Market 4 includes high-quality wholesale access products that predominantly target a high-quality business segment (notwithstanding the use of any other wholesale products from other markets for business services), including leased lines and Ethernet carrier-grade wholesale services (currently in Market 6).

In BEREC's view, any wholesale differentiation between the mass market and the high-quality market should be based on the specific characteristics of the wholesale products being offered, and not on the type of retail customer who requests the product.

In this regard, as stated in the draft Recommendation and as evidence shows, large companies may still purchase best-effort bitstream services (e.g. if they do not require advanced telecommunications services when carrying out their activities, or if they have secondary sites). Likewise, a small company with highly sophisticated IT needs may require advanced telecommunications services, which in many cases may even need to be individually adapted to its particular requirements.

Taking this into account, in BEREC's view, features such as the size of the company using the services, its location, its revenues, etc. would not necessarily ensure a consistent and clear differentiation between the wholesale mass market and the wholesale high-quality market, as these factors do not relate directly to the type of wholesale products that may be requested by each customer.

This is also important from the perspective of data gathering. The data collection process requires precise definitions, which will normally be based on product characteristics, not on usage by end users (as the wholesale operator does not necessarily know how the customers will use the derived products, and the categorisation of usage can vary between the different operators along the value chain).

BEREC welcomes the fact that this approach (wholesale markets defined on the basis of product characteristics, not usage by end users) is also the one being followed in the draft Explanatory Note.

In this regard, while it is true that business customers may require tailor-made products (in the sense of individual solutions which are not only characterised by technical conditions, but also by additional features such as SLA), the existence of such tailored solutions does not necessarily justify the separation of markets. In order to separate markets, it should be shown that mass market products are not substitutes for tailor-made products. Furthermore, in some Member States, operators provide off-the-shelf services with advanced options for some (or all) of the high-quality characteristics mentioned by the European Commission in the draft Explanatory Note.

Likewise, supply-side substitution is possible in at least some Member States, as the same wholesale inputs (supplied by LLU and VULA) can be used to supply both business (high-quality) and residential products. In this regard, in some countries, providers of mass-market bitstream are already supplying higher-quality business services (so would already be present across the mass and business bitstream markets) or could easily do so. Nevertheless, the draft Recommendation¹⁵ appears to discount the relevance of supply-side substitution in defining the boundaries between the mass market and the high-quality

¹⁵ 'It seems likely, that based on such differences in demand NRAs find that there is no substitutability between products intended for residential/SME users and large business users. In such cases NRAs should define two separate retail markets'. Section 4.2.1, page 33 of the draft Recommendation.

market. BEREC recommends that the European Commission explicitly analyse supply-side substitution when assessing the boundary between the mass market and the high-quality market.

Apart from this, BEREC considers that the Explanatory Note provides enough flexibility to cope with different situations in different Member States, according to the results of the substitutability analysis.

It might also be the case that there is asymmetric substitution between leased lines and other wholesale access products such as any high-quality bitstream. While high-quality bitstream might be a substitute for leased lines in some cases, the other way round may not be true in some Member States, given the very specific features of leased lines. Therefore, a substitution analysis starting from two different points (e.g. bitstream and leased lines) might yield different results as to the products that are part of the relevant market.

Taking these issues into account, BEREC considers that the Recommendation should recognise that all products which provide high-quality access services at the wholesale level are not necessarily in the same chain of substitution. Depending on national situations and the type of high-quality products in question, different submarkets may in fact be identified by NRAs. In this context, it should be specified that the quality characteristics listed on page 48 of the draft Explanatory Note are only indicative, and that the market definition will always be the result of a demand-side and supply-side substitution analysis of different wholesale products.

3.4.3 Link between the redefined access to data markets and the NGA Recommendation and the Recommendation on non-discrimination and costing methodologies

In 2010 and 2013, the European Commission adopted two Recommendations (the NGA¹⁶ and the Non-Discrimination¹⁷ Recommendations), which deal with the existing markets for wholesale (physical) network infrastructure access (current Market 4) and wholesale broadband access (current Market 5). The Recommendations refer to a set of remedies that NRAs should consider when regulating wholesale broadband, and which must be duly taken into account by NRAs in the context of their national analyses.

Due to the significant implications that the NGA and Non-Discrimination Recommendations have for the activity of NRAs at national level, BEREC believes that a reference to the way the future Relevant Markets Recommendation should be read in conjunction with those earlier legal instruments, in particular taking into account the fact that they deal with different sets of markets, is missing.

BEREC sees a need for clarification by the European Commission, in particular with regard to certain bitstream access products that belong to current Market 5 and are therefore

¹⁶ NGA Recommendation: Commission Recommendation (2010/572/EU) of 20 September 2010 on regulated access to Next Generation Access Networks.

¹⁷ Non-Discrimination and Costing Methodologies Recommendation: Commission Recommendation (2013/5761/EU) of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.

covered by the NGA and Non-Discrimination Recommendation. Indeed, if part of those products falls under the new Market 4 (rather than under the new Market 3b) in the future, it is uncertain whether they will still be covered by these Recommendations.

3.4.4 Constraints stemming from cable

BEREC welcomes the methodological approach followed in the draft Explanatory Note, which contains relevant guidance on the way constraints stemming from cable can be integrated into the broadband markets analysis. However, BEREC believes this could be clarified further.

With regard to indirect constraints, the Explanatory Note states that these must be investigated during the analysis of Market 3b, whereas they are hardly mentioned in Market 3a. However, in BEREC's view, the direct and indirect constraints should be investigated in both markets.

Regarding Market 4, the European Commission considers that competition from cable technology in the wholesale high-quality access market and the retail business market is unlikely to be relevant. According to the draft Explanatory Note: '... due to these high-end demands, the retail high quality market is not normally expected to include services provided over wireless and cable platforms. Services provided over these platforms would normally not be able to meet the specific needs of business customers, such as dedicated capacity and symmetrical bandwidth'. The draft Explanatory Note further notes that 'The competitive dynamics are not expected to change on a national scale in the short to medium term, since even the development of alternative technologies such as cable TV or LTE would not be able to constrain the incumbent, as these are not currently capable of offering high quality ubiquitous services'.

In this regard, BEREC would like to note that in some Member States, cable operators nowadays provide broadband services not only for residential customers, but also for business clients (small companies and large ones). These high-quality products are supported by additional guarantees, SLAs, and may be based on fibre or HFC. Taking these features into account, an explicit exclusion of cable technology from the high-quality market may make it more difficult for some NRAs to properly reflect and assess the situation prevailing in their country.

3.5 Transitional issues

BEREC welcomes the European Commission's clarification that every market in the current Recommendation corresponds to a market already listed in the 2007 Recommendation, which results in the application of the three-year market review cycle as laid down in Article 16(6) of the Framework Directive.

However, BEREC considers that further clarification could be provided by the European Commission regarding one particular instance, described below.

The Explanatory Note does not cover the case where an NRA plans to notify the European Commission of a draft measure applicable to a market that has been delineated on the basis of the new Recommendation (e.g. Market 3b), while the NRA conducted the relevant public consultation in line with the previous Recommendation (i.e. current Market 5).

BEREC considers that in this case, a reasoned explanation as to why the newly delineated market, notified as such to the European Commission (e.g. Market 3b), should be deemed equivalent to the market covered by the public consultation (i.e. current Market 5) would be sufficient to conclude that an NRA has fulfilled its regulatory obligations under the framework.