

Colt Technology Services Group Limited

Comments on

**Draft BEREC report on relevant market definition
for business services**

BoR (10) 46

19 November 2010

This is the response of the Colt Technology Services Group Limited (henceforth entitled "Colt") to BEREC's Draft report BoR (10) 46 on relevant market definition for business services.

1. INTRODUCTION

Colt is the leading information delivery platform for European business, enabling its customers to share, process and store their vital business information. As established leader in delivering integrated networking and IT managed services to major organisations, midsized businesses and wholesale customers, Colt operates a 19 countries, 25,000 km network that includes metropolitan area networks in 34 major European cities with direct fibre connections into 17,000 buildings and 19 Colt data centres. In 2010, the Colt Data Centre Services business was launched to deliver innovative modular data centres which are high quality, rapid to deploy and power efficient. Colt has made a £4 billion pan-European investment in its next generation fibre network infrastructure. Our focus is primarily on serving international enterprises.

2. BUSINESS REQUIREMENTS

Pan-European providers such as Colt and their customers have particular requirements which differ immensely from those of residential customers. Colt therefore highly welcomes the consultation as it recognizes the steadily increasing need for a consistent business customer regulation across Europe which enables providers such as Colt to offer harmonized seamless services to the customers' benefit. As you will be aware, Colt has commented on the report initiated by BEREC's predecessor, the European Regulators' Group, regarding business connectivity services in 2009 ("*ERG Report on the regulation of access products necessary to deliver business connectivity services, ERG (09) 51*") and we would kindly ask you to take this comment which we will reiterate below into account as part of Colt's current position. We draw on many of the previous comments made in our ERG response within this document.

Key requirements as commented on ERG Report (09) 51: BEREC and the NRAs need to secure:

- National (at least - preferably EU-wide) availability of consistent wholesale services to support the provision of communications services for business customers, thus enabling multi-site business users to benefit from choice and competition.
- Provision of wholesale carrier Ethernet services, allowing the provision of flexible, scalable and low-cost communications solutions to business users across a range of different communications technologies and networks.
- Provision of business-grade wholesale services to meet business customers' requirements for low latency and contention, guaranteed quality of service levels and enhanced SLAs (cf. those suitable to serve residential consumers).

The aforementioned report's conclusions ("*BEREC report of the consultation on the ERG Report on the regulation of access products necessary to deliver business connectivity services, ERG (09) 51*" / BoR 10 (11), p. 10) pointed out that businesses wanted consistency across Europe in terms of business services and that half of the EU27 had not mandated SDSL or wholesale Ethernet services on fibre. A lack of efficient wholesale remedies are therefore being experienced across Europe which is a view shared and strongly supported by Colt.

Comment on BEREC Report BoR (10) 46:

In general and overall Colt welcomes the adoption of input given to the ERG Report not just for itself but also for others in the business marketplace also concerned with the urgent need for the rapid creation of a harmonized EU-wide framework for business services. Colt also notes that the BEREC report is unfortunately less determined in terms of EU-wide implementation and does leave binding conclusions regarding the presence of separate markets for business users totally to the NRA's discretion. Subsequently Colt will provide comments on the specific findings of the report.

- **Section 2, No. 13 / p. 4 – Market Sector:** Colt supports BEREC's view that the market sector definition should be determined by customers' communication needs rather than customer end user types. The definition is geared towards more real needs and reflects market realities with more acuity than stereotyped abstractions such as "customer types".
- **Section 2, No. 23 / p. 6 – Geographic Market:** Colt supports BEREC's view that business customers' demand for multinational solutions will have implications on the definition of the geographic market in question and that in defining sub-national markets BEREC could foil the creation of nationally, let alone internationally consistent, harmonized business services. Colt believes that defining sub-national markets for business-critical wholesale services will lead to erosive competition and will potentially undermine investment in next generation networks. As a minimum requirement, the provision of wholesale carrier Ethernet services and business-grade wholesale services should be considered as forming a national, undivided market if not – preferably – an EU-wide market. NRAs often apply a simplified methodology by measuring less significant parameters such as the availability of comparable services from LLU providers in the respective region. The Modified Greenfield Approach as laid out in Section 5, No. 62 / p. 13 to be applied on retail and wholesale markets is in accordance with generally accepted economic and competition law principles as well as a logical consequence of the application of HMT and as such is supported by Colt.
- **Section 4.1, No. 42,45 / p. 9,10 – Product Market:** Colt supports BEREC's relevant product market definition ("All products and/or services which are regarded as interchangeable or substitutable by consumers depending on product characteristics, prices and intended use. In market definition / analysis, NRA should examine – where necessary – prevailing conditions of demand and supply substitution by applying the hypothetical monopolist test, or "HMT"). HMT is a firmly established principle in EU competition law (derived from U.S. Department of Justice Merger Guidelines). As a concept, it assesses whether it can be profitable for the hypothetical monopolist to raise prices which depends on the constraints exerted by demand- and supply-side substitutability. Thus the HMT seeks to gather evidence on demand- and supply-side substitutability into a single framework for defining the relevant market. This approach can be successful if relevant data is available which can be ensured by NRAs conducting thorough analysis, partially based on already gathered data for reporting and/or market analysis purposes.
- **Section 6.2, No. 70-73 / p. 16,17 – High end business services:** BEREC asserts that targeted or bespoke products could be demanded by companies with intensive and complex requirements for data transmission services (high end users) whereas residential and SME customers may demand standard products. This is indeed Colt's experience in serving the enterprise sector. While generally supporting this view, Colt feels the need to point out that boundaries more and more overlap i. e. even standard business users may have specific requirements similar to those of high end business customers. Regarding

the delineation of residential from business products, it is paramount to distinguish between these by applying additional criteria, above all countervailing buying power: If a customer is in the position to effectively negotiate and bargain specific fundamental provisions of his contract with the provider – i. e. not fully subject to predefined terms and conditions – then it can be reasonably assumed that such a customer would qualify as a true (high end) business customer.

- **Section Sections 6.3.2, No. 100 / p. 24 – Wholesale Level:** Colt shares BEREC's view that ULL/WLA is targeted for the retail market rather whilst business services require individual upgrades to available wholesale products which could justify the definition of a separate wholesale market. Especially for pan-European carriers such as Colt, the limited availability of adequate wholesale offers is often a barrier to provide business services. NRAs will have to analyze if indirect substitution could occur when marginal retail customers (SMEs/SoHos) demand cheaper broadband services.
- **Sections 6.5, No. 125 / p. 31 – Product and geographic markets:** Colt generally supports BEREC's assumption of a narrow product market, indicated by limited demand side substitution and limited substitution in response to SSNIP. However, from its experience in several countries Colt cannot support the view that geographically dispersed WBA forms an indication of demand side substitution and a wider product market as the lock-in effect and the willingness to switch providers is relatively high, especially in those countries where WBA has never been a real alternative to xDSL/cable. Therefore it is of central importance to start with and by analyzing the scope of the retail market.

3. TRANSPOSITION

In its conclusion (Section 7, No. 127, p. 31), BEREC offers to provide guidance to assist NRAs in their market definition exercises, if they decide that the issue should be considered in further detail.

According to Recital 18 of BEREC's founding act ("*Regulation (EC) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office*", http://www.erg.eu.int/about/index_en.htm), "*The discretion of national regulatory authorities needs to be reconciled with the development of consistent regulatory practices and the consistent application of the regulatory framework in order to contribute effectively to the development and completion of the internal market. National regulatory authorities should therefore support the internal market activities of the Commission and those of BEREC.*").

Unfortunately, in the past we had to observe in many countries like Germany for instance, that NRAs do often fail to properly recognize business customers' specific requirements, much less perform market analysis and definition procedures on potential markets for business services. Colt believes that having a multiplicity of regulatory approaches and remedies across different EU markets does affect the ability of operators to provide coherent and consistent communications solutions for pan-European business customers and therefore hinders the further development of the Single Market. To be able to deliver consistent business services across Europe it is essential that NRAs adopt the necessary measures and actions, namely to start their market definition exercises without delay.

Although according to Recital 7 of Regulation (EC) No 1211/2009 BEREC has not been equipped with the authority to oblige NRAs to follow its recommendations and findings, we –

especially in the light of the above – feel the strong need to more ensure NRAs publicly commit to performing market analyses and definitions in line with the importance of the transposition of its findings and proposed measures.

Alternatively, BEREC could rethink its strategic approach and employ external experts to analyze and study the national markets for business services according to the needs of business customers, starting with listing best practices across the EU. Such work would need to consider the key segments within the business market.

4. SUPPLEMENTAL APPROACH

As laid out above under 3. *Transposition*, it is questionable if business customers will benefit from the report despite the urgency with which it is required. Therefore we would like to draw BEREC's attention to a set of wholesale products which should alternatively be provided in the short-term to bridge the gap until such time as NRAs will have completed their market analyses and definitions to achieve a harmonized set of business connectivity products across the EU. Please consider that due to a lack of harmonization across Europe, requirements may vary nationally.

Incumbent Operators` Duct Sharing for Business Customer Providers: In most EU member states, a regulatory obligation to offer duct sharing is implemented. The term of "duct sharing" is commonly understood as to mean the sharing of ducts in the local access and backhaul parts of a given network, mostly to connect the incumbent operators` street cabinets with the local exchanges or MDFs (main distribution frames). It does not consider sharing of ducts in the core network though.

Presently, duct sharing is intensively mandated by the European Commission to promote competition in the access network by allowing other providers to build their own fibre networks on which they are enabled to offer NGA products (VDSL/FTTH) to end users more cost effectively. Most national regulatory authorities have already defined models under which competitors are eligible to participate in the incumbent operators` infrastructure such as Ofcom`s proposal "*Enabling a super-fast broadband Britain*" or the German BNetzA`s recent jurisdiction mandating NGA access and pricing conditions.

However, this obligation does not necessarily cover the needs of business customers as can be seen in a recent Ofcom statement. ("*Review of the wholesale local access market – Statement on market definition, market power determinations and remedies*" of Oct 7, 2010, published under http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf) As a new remedy, Ofcom introduced PIA ("*Physical infrastructure access*") which is limited in use to the provision of broadband access to multiple premises (i. e. excluding business usage, base station backhaul and other uses – please see section 1.23, p. 4/5). Ofcom explicitly states that BT will be obliged to provide PIA services for the purposes of deploying of NGA networks to support services such as broadband, telephony and cable TV, but not, at this stage, leased lines although this will be subject to revision with the 2012 Market 6 analysis.

This development which might be shared by other NRAs demonstrates the necessity of having a harmonized EU-wide regulatory approach to oblige operators having significant market power to offer ducts for business customers via duct sharing.

SDSL / E-SDSL based on ULL-EFM: For providers of services to business customers there is a requirement for SDSL and E-SDSL to reflect their customers` need for higher upload

speeds than residential customers. Regulated offers should be provided as a Wholesale DSL service (as available in several countries already) and be based on EFM (*"Ethernet in the first mile"*) for ULL as in Belgium and France, i. e. enabling an end-to-end connection via the Ethernet protocol from backbone to customer, thus not interfering with non-Ethernet transport on ATM-based DSL.

Wholesale Carrier Ethernet Services: There is a multitude of Ethernet variants available across the EU like P2P, E-NNI etc. all important to business customer providers. It is mandatory to have wholesale carrier Ethernet services, allowing the provision of flexible, scalable and low-cost communications solutions to business users across a range of different communications technologies and networks. Services made available to business customers must have Metro Ethernet Forum's (MEF) MEF 9 and MEF 14 certifications to be competitive as these are being regarded as indispensable. (please see http://metroethernetforum.org/page_loader.php?p_id=6)

Some key features such as latency, contention, quality of services, enhanced SLAs are fundamental building blocks for business customers that contribute to create the distinctive characters of the business market compared to the consumers market. As offered within its comment on the ERG Report 09 (51), Colt will be glad to assist in providing BEREC with further details of its proposed specification for business grade Ethernet requirements and interfaces – above all low latency and contention, guaranteed quality of service levels and enhanced SLAs (cf. those suitable to serve residential consumers) to ensure delivery of best in class Ethernet products – if requested.

5. SUMMARY AND CONCLUSION

As stated above, although Colt supports several of the findings appearing in the BEREC Report, Colt at the same time sorely regrets the lack of determination to implement EU-wide standards that could be instrumental in achieving a truly harmonized set of business services sustaining the continued development of truly pan-European business operators. In that respect, Colt regrets that BEREC's report is not keeping with the vision and objectives of the European Digital Agenda nor catering for the needs of key future developments such as (private) cloud computing.

Please feel free to contact the two following contact points should you like to discuss further with Colt:

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We would like to thank BEREC in advance for its kind attention to Colt's contribution.

Yours sincerely,

Colt Technology Services Group Limited