

## **ERG COMMON POSITION ON BEST PRACTICE IN BITSTREAM ACCESS REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE MARKET FOR WHOLESALE BROADBAND ACCESS**

This document describes one of several Common Positions which ERG intends to develop for specific markets. Each will set out a methodology for dealing with remedies in respect of key wholesale access products in markets where a position of SMP has been identified. It complements the general guidance given on choice of SMP remedies given in the revised ERG Common Position on Remedies<sup>1</sup> and provides illustrative remedies.

As mentioned in the paper “Harmonisation – the Proposed ERG Approach” (ERG (06) 67), this ERG Common Position was consulted upon at the end of 2006 and comments from stakeholders were taken into account, where appropriate, in the revision of the document.

In accordance with ERG’s Statement of 12 October 2006 (ERG(06)51), while ERG Common Positions shall not be binding, ERG members shall be recommended to take the utmost account of them. ERG members commit to provide reasoned regulatory decisions, by reference to the relevant ERG Common Position(s).

A member of ERG taking the utmost account of this Common Position would in practice:

- (a) analyse the objectives identified in this common position and the related competition issues
- (b) to the extent consistent with applicable national law, provide an effective regulatory solution to those issues unless market forces can reasonably be expected to be sufficient to guarantee a solution
- (c) explain transparently how those competition issues have been addressed

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

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Objective	Competition issue which arises frequently	Illustrative remedies
Assurance of access	<p>There should be reasonable certainty of ongoing access on reasonable terms in order to give competitors confidence to enter the market.</p> <p>Access should be sufficient to allow competitive provision of bitstream services in both the business and residential market segments.</p> <p>Any restrictions placed on the uses which can be made of the access provided should be objectively justifiable. (See in particular “technical parameters of access” below.)</p>	<p>A formal access obligation is likely to be necessary.</p> <p>To the extent that it is reasonable and relevant, access should be available at the regional delivery handover point when possible for all efficient technology options: for example, IP, ATM, Ethernet.</p>
Level playing field	<p>There should be reasonable certainty that entrants will be able to compete on a level playing field. This implies that measures are in place:</p> <p>(a) to ensure that the SMP player does not have an unfair unmatchable advantage, by virtue of its economies of scale and scope, especially if derived from a position of incumbency</p> <p>(b) to provide an effective deterrent to obstructive and foot-dragging behaviour.</p>	<p>A traditional obligation not to discriminate against third parties may be sufficient to alleviate the concern opposite but NRAs should not rely on an assumption that it will be sufficient (even in combination with an access obligation), unless there is evidence of this. NRAs should therefore consider whether additional measures are necessary to ensure that a strong incentive for compliance is provided as it will often prove unsatisfactory to plan to deal with each new problem by enforcement or dispute settlement. A number of techniques for achieving this are available.</p>

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		<p>For example, NRAs could attempt to clarify, as far as possible, how a non-discrimination remedy will be interpreted in practice, via identification of forms of behavior which will be considered to be discriminatory. This may be implemented either through explicit wording of the SMP obligation or via explanatory guidance which provides clarity as to the NRA's interpretation of the obligation.</p> <p>NRAs should also consider the case for attachment of obligations concerning fairness, reasonableness and timeliness to any access obligation imposed in accordance with Article 12 Access Directive, in order to deter obstructive and foot dragging behaviour.</p> <p>In addition to or instead of the above two illustrative approaches, NRAs should also consider the merits of setting reasonable time frames through a Service Level Agreement imposed in accordance with article 9 of the Access directive.</p> <p>In justified cases, NRAs may also consider the imposition of a tighter form of non-discrimination obligation such as an</p>

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		<p>“equivalence of input” condition to ensure that the conditions faced by third parties are as similar as possible to those faced by the SMP operator's own downstream business.</p> <p>National arrangements – either voluntarily or imposed under other legislation – may have the practical effect of achieving “functional separation”<sup>2</sup> of the business of the SMP player, thus minimising incentives to tilt the playing field against the entrants.</p> <p>The effect of any such arrangements (or of the tighter forms of non-discrimination obligations mentioned above) will need to be taken into account in deciding whether (and, if so, which) which other SMP obligations of the types discussed in lower rows of this table are required</p>
Avoidance of unfair first-mover advantage	Competitors need assurance that, as downstream markets develop, suitable wholesale products will be available in time to permit them to offer an enhanced downstream service (e.g. Higher speed internet access) at the same time as introduction	NRAs may conclude that a non-discrimination obligation provides sufficient assurance. They may find it useful to clarify (e.g. through published guidance) that the

<sup>2</sup> “Functional separation” means organisational separation of business units supplying upstream and downstream services together with associated controls to ensure that the units operate in practice on an “arm’s length” basis. It does not of itself require different legal ownership, as would result from “structural separation”.

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	by the SMP player	<p>introduction of a new or enhanced downstream services would be considered a serious breach of the non-discrimination obligation where the wholesale service components required to deliver an equivalent competitive downstream service are not available to third parties.</p> <p>Where this approach is judged insufficient, NRAs should consider whether a special form of non-discrimination obligation, namely ex-ante controls on the introduction of downstream services by the SMP player, should be imposed in order to ensure that the bitstream services which would permit effective competition in the downstream market are made available and are fit for purpose in a timely way. An appropriate method of control could be an obligation not to make available to itself the wholesale inputs which permit introduction of a new or enhanced downstream service until the corresponding wholesale service components required to deliver an equivalent competitive downstream service are available and fit for purpose</p>
Transparency of terms and conditions	Complete clarity of terms and conditions of access is required.	Publication of a reference offer which covers key elements (which should be specified or approved by the NRA) is likely

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		to be necessary.
Reasonableness of technical parameters of access	<p>Access should be available on a technical basis which makes commercial sense and which maximises the scope of competition in downstream markets. This implies that SMP player should not arbitrarily be permitted to limit forms of access (e.g. to whatever suits its own business) or to forms of access which are over-specified for many players</p> <p>In particular, alternative network operators need to know the quality of service levels that can be provided to their customers.</p>	<p>Appropriate methods of control include:</p> <p>(a) an obligation to publish a reference offer which includes the technical parameters of access and which is periodically evaluated by the NRA and/or</p> <p>(b) an obligation to meet all reasonable requests for access</p>
Fair and coherent access pricing	<p>There should be a guarantee that prices for bitstream access are set in a way which is coherent with the prices for other (broadband and narrowband) related services so as to incentivise efficient investment by both SMP player and competitors and avoid arbitrage opportunities.</p> <p>Whether or not there is an explicit pricing obligation, assurance of protection against downstream margin squeeze (or eviction pricing<sup>3</sup>) is necessary. There needs to be reasonable certainty in advance of how a margin squeeze would be assessed and confidence that any complaint could in practice be resolved</p>	<p>The choice of price control method should be based on the considerations opposite and on market circumstances and is fully explored in the “Remedies Common Position” - paper ERG (06) 33</p> <p>NRAs may need to take additional steps to guard against margin squeeze or eviction pricing. Where cost-based access is imposed, this should alleviate concerns about downstream margin squeeze.</p>

<sup>3</sup> Terminology in use can be confusing. Some NRAs distinguish between a “margin squeeze” (or “price squeeze”) which is assessed on the basis of the SMP player’s own costs and “eviction pricing”. An eviction price is one which would allow the SMP player to be reasonably profitable on the downstream level but would severely restrict entry by virtue of pricing below the costs of competitors (who will not generally be able to match the SMP player’s economies of scope and scale). Others would describe either form of behaviour as “margin squeeze”.

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	<p>quickly.</p> <p>The minimum margin with relevant downstream services regarded as acceptable needs to make commercial sense for an entrant which is efficient but does not currently enjoy the economies of scope and scale of the incumbent.</p>	<p>Where judged necessary to facilitate downstream entry, specific forms of ex-ante margin control could be necessary. Suitable forms of control include advance publication of the methodology for assessment of margin squeeze (or eviction pricing). In considering the minimum acceptable margin, NRAs will have 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.<sup>4</sup></p> <p>As a consequence of economies of scope and scale, cost-based bitstream pricing may give rise to an eviction price in respect of the upstream (unbundled loop and shared access) services. Consequently, NRAs may need to impose additional</p>

<sup>4</sup> This issue is explored in some depth in the Remedies Common Position (ERG(06)33).

<sup>5</sup> ERG established a specific Project Team (WBA-WLA PT) for providing further specific guidance to the NRAs as to the regulation of these key access markets. We refer to the results of that assessment on pricing issues.

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		<p>controls to ensure the maintenance of a margin sufficient to avoid this. In principle, such controls could be imposed as a remedy to SMP in either market<sup>5</sup>.</p>
<p>Reasonable quality of access products</p>	<p>There should be assurance that access products will be of reasonable quality and that service levels will be comparable with that provided to SMP player’s own business. Different levels of service should be available, to reflect differences in customer demand.</p>	<p>A simple obligation not to discriminate against third parties may help to provide such assurance. Where the NRA is satisfied that it is not sufficient by itself, it may therefore need to be complemented with a combination of tools such as the following:</p> <ul style="list-style-type: none"> <li>(a) a requirement to offer a service level agreement at least sufficient to allow effective competition in the downstream markets with the SMP operator’s retail offers and otherwise comparable with agreements which would be available in a competitive market; and</li> <li>(b) a requirement to pay appropriate compensation for service below the level agreed. This compensation should be of a</li> </ul>

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		<p>sufficient level to create an incentive for the SMP-player to comply to the service level agreed. A NRA can for instance consider compensation which properly reflects the loss borne by the alternative network operator in the downstream market. (While compensation for losses resulting from poor service may be sought through the courts, the process can be lengthy and uncertain, and cannot be relied upon by entrants for business planning purposes.); and</p> <p>(c) a requirement to publish key performance indicators (including indicators relating to downstream services) which allow service to third parties to be compared with service provided to SMP player’s own business<sup>6</sup>.</p>
Assurance of efficient and convenient switching processes	It should be possible for a competitor to transfer retail customers from the SMP player (or other provider) without undue delay or break in service due to change of wholesale access service.	A requirement to provide a suitable network migration process (between different wholesale customers using the same access product – <u>and</u> between different wholesale

<sup>6</sup> ERG established a specific Project Team (WBA-WLA PT) for providing further specific guidance to the NRAs as to the regulation of these key access markets. We refer to the results of that assessment on quality of service.

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	<p>Similarly, it should be possible to transfer existing customers between bitstream products without undue delay or break in service due to change of wholesale access service.</p> <p>Charges for migration should be reasonable and should not deter acquisition of existing customers or climbing of the ladder of investment.</p>	<p>access products) is likely to be necessary in practice<sup>7</sup>. This migration process should include synchronisation.</p>
Assurance of backhaul from the point of delivery of the bitstream service to a reasonable point of handover to the alternative provider	Where necessary to permit access at the delivery point, there should be a guarantee of suitable connectivity (either interconnecting wholesale leased lines or access to dark fibre) between bitstream delivery point (ATM/Ethernet switches or IP BAS) and handover point to the alternative provider (e.g. point of presence) on terms which permit an efficient alternative provider to offer a competitive bitstream service. Arbitrary restrictions on the points at which the SMP player will provide connectivity should be avoided.	Unless the NRA is satisfied that such connectivity is commercially available on reasonable terms throughout the relevant geographic market, it should be guaranteed on regulated terms (although not necessarily covered by the same market review).
Assurance of co-location at delivery points (e.g. ATM switches or IP BAS) (where necessary) and other associated facilities	A Network Operator providing broadband services to end users on the basis of bitstream service may need co-location and other associated facilities in order to make the offer effective.	Where the NRA judges them to be necessary for the effective provision of a bitstream service, co-location and other associated facilities should be provided on a cost-oriented basis under clear rules and terms approved by the regulator

<sup>7</sup> ERG established a specific Project Team (WBA-WLA PT) for providing further specific guidance to the NRAs as to the regulation of these key access markets. We refer to the results of that assessment on migrating issues.