

## **ERG COMMON POSITION ON BEST PRACTICE IN WHOLESALE UNBUNDLED ACCESS (INCLUDING SHARED ACCESS) REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET**

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 in the revision of this 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 <sup>2</sup>	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. This will include provision of colocation facilities and access to other associated facilities, as necessary.</p> <p>Access should be available in suitable forms to allow competitors to offer either broadband services only or broadband and narrowband services, at their discretion</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>	A formal access obligation is likely to be necessary.
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>	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

<sup>2</sup> This Common Position takes into account the competition problems and the best regulatory solutions currently identified regarding wholesale unbundled access (including shared access). Even though the approach of this document intends to be prospective, future technological changes such as those related to Next Generation Networks (NGNs) may have an impact in the competitive situation as identified today. However, the implications of NGNs – particularly those related to access markets – are currently under study by ERG, which has devoted a Project Team in its 2007 Working Plan, to the assessment of NGNs and its impact from the different regulatory issues of interest. Therefore, this Common Position does not, at present, take into account the possible consequences of NGNs regarding wholesale unbundled access.

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Objective <sup>2</sup>	Competition issue which arises frequently	Illustrative remedies
	(b) to provide an effective deterrent to obstructive and foot-dragging behaviour.	<p>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> <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. It may in particular be appropriate to impose strict time limits for</p>

<sup>2</sup> "Functional separation" means operational 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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Objective <sup>2</sup>	Competition issue which arises frequently	Illustrative remedies
		<p>the granting of access.</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 “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</p>

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Objective <sup>2</sup>	Competition issue which arises frequently	Illustrative remedies
		the types discussed in lower rows of this table are required
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 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 for each site (at MDF level) which technologies are allowed and 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> <p>Detailed site-level technical information should be readily available to prospective alternative network operators.</p> <p>Rules designed to prevent mutual interference of signals should be designed after consultation with alternative network operators and under the oversight of the NRA.</p>

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Objective <sup>2</sup>	Competition issue which arises frequently	Illustrative remedies
Fair and coherent access pricing	<p>There should be a guarantee that the price of access will permit an efficient entrant to compete with the SMP player in a way which is coherent with the prices for other (broadband and narrowband) related services.</p> <p>Pricing policy should incentivise efficient investment by both SMP player and competitors and avoid arbitrage opportunities. It should not foreclose any realistic possibility of the development of alternative local access infrastructure but should also not place weight on speculative assessments of the roll-out of such infrastructure.</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 enjoy the economies of scope and scale of the incumbent.</p>	<p>An explicit pricing obligation is likely to be necessary. Since local access in most cases constitutes an enduring bottleneck, a pricing policy which orients prices to the costs reasonably borne by the SMP player is appropriate, in order to avoid excessive profitability. In calculating a cost-oriented price, NRAs should consider whether to differentiate the risks borne by the SMP player in operating its access network from other risks of its business. Costs which are unnecessary or inefficiently incurred should be disregarded.</p> <p>Where cost-based access is imposed, this should alleviate concerns about downstream margin squeeze.</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<sup>3</sup>). In considering the minimum</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

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		<p>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>Moreover, especially where the downstream (bitstream) access price is also cost-based, it is not necessarily guaranteed that a cost-based price for unbundled loops and shared access will permit competitors to extend their networks to take advantage of those services. NRAs may therefore also need to take steps to ensure that the margin between the upstream and downstream services is sufficient to facilitate efficient investment of this nature. In principle, such controls</p>

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".

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

<sup>3</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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Objective <sup>2</sup>	Competition issue which arises frequently	Illustrative remedies
		could be imposed as a remedy to SMP in either market <sup>3</sup> .
Reasonable quality of access products	There should be assurance that access products will be of reasonable quality and that service levels (e.g. connection times, repair times) will be reasonable and/or comparable with that provided to SMP player's own business. Different levels of service should be available, to reflect differences in customer demand.	<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> <p>(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 best practice in commercially negotiated agreements; and</p> <p>(b) a requirement to pay appropriate compensation for service below the level agreed. This compensation should be of a 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,</p>



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		<p>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>4</sup>.</p>
Assurance of efficient and convenient switching processes	<p>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.</p> <p>Similarly, it should be possible to transfer existing customers between different wholesale access services (e.g. bitstream access to shared loop) 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>	A requirement to provide a suitable network migration process (between different wholesale customers using the same access product – <u>and</u> between different wholesale access products) is likely to be necessary in practice <sup>5</sup> . This migration process should include synchronisation and number portability.

<sup>4</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.

<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 migrating issues.

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Objective <sup>2</sup>	Competition issue which arises frequently	Illustrative remedies
Assurance of backhaul from the point of delivery	There should be a guarantee of suitable connectivity (either interconnecting wholesale leased lines or access to dark fibre) between MDF (or other appropriate point of delivery <sup>6</sup> ) and convenient regional network handover point on terms which permit an efficient alternative provider to offer competitive broadband services. 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 the MDF and other associated facilities	Co-location and other associated facilities (e.g. energy supply, cooling) necessary for the entrant to provide viable broadband or telephony services should be guaranteed on a cost basis equivalent to that faced by the SMP provider and, as far as practicable, of a scale and quality suitable for the needs of the alternative network operator.	Co-location and other associated facilities should be provided on a cost-oriented basis under clear rules and terms approved by the regulator

<sup>6</sup> ERG established a specific Project Team (IP-IC/NGN PT) for assessing the implications for access of the deployment of fibre networks (so called New Generation Access - NGA). We refer to the results of that assessment as a complement to the principles laid down in the NGA consultation document to be developed into a NGA CP ([www.erg.eu.int](http://www.erg.eu.int)).