

**BEREC report of the consultation on the ERG Report
on the regulation of access products necessary to
deliver business connectivity services
ERG (09) 51**

March 2010

Introduction

In December 2009, ERG published for consultation a report¹ on its work during 2009 to investigate the availability of wholesale access remedies, especially those particularly relevant to the provision of retail services to “high end” business users. The report did not draw definitive conclusions but found sufficient evidence of concern about the state of competition in this retail market segment to justify further investigation. The purpose of consultation was in particular to seek views on its 4 proposals for follow-up during 2010:

1. ERG plans to investigate whether there are any common principles of market definition which could be applied by NRAs in considering whether to define a business market (or, some variety of “high-end business” market) for the purposes of their Market Reviews. This will include consideration of the effect of geographic segmentation of the market and of the application of differentiated “business focused” and “mass market focused” remedies within the context of an unsegmented market.
2. Pending the outcome of this further work, ERG has noted the absence, to different degrees in different cases, of wholesale access remedies which have considerable potential to be helpful in enforcing non-discrimination. These may in particular prevent SMP players from absolute control over the pace of downstream innovation and improving the underlying conditions for competition, especially in the “high-end” business segment. NRAs have committed to place a special focus on competition in this segment in their forthcoming analyses of the relevant markets, in particular their Market Reviews carried out in accordance with the Framework Directive.
3. ERG postponed its monitoring exercise planned for 2009 into the application of its Common Positions on remedies in broadband and leased line markets, pending this exercise. In carrying out the exercise in 2010, ERG proposes to pay particular attention to the remedies especially relevant to “high-end business” applications.
4. ERG plans to consider further the question of whether – and if so, under what circumstances - NRAs should be entitled to impose on SMP players proportionate and objectively justifiable obligations to supply services which they do not at present supply to themselves. This question is a general one which goes well beyond the scope of regulation of business services.

ERG therefore started a public consultation 15 December 2009, open to all interested parties. The public consultation ended on 1 February 2010. A public hearing was also held in Brussels on 29 January 2010 in which a number of stakeholders participated. Thirteen contributions were received by ERG/BEREC in response to the public consultation. This document summarises the responses. The full texts of the responses are published separately.

¹ ERG Report on the regulation of access products necessary to deliver business connectivity services - ERG (09) 51

CON (10) BS 01 Telefónica

Telefónica noted that the issue of business connectivity services is complex and has to be approached with care. Any adjustments to the regulatory framework in this field are likely to touch upon the more complex and sophisticated measures. Telefónica agreed with ERG's statement on the complexity of this area and would like to point out that the needs of the business segment, apart from being complex, tend to be country-specific and in many instances case-specific.

Telefónica would suggest that the ERG and NRAs try to first look at some parameters (such as BB penetration in the business segment, LAN penetration in the business segment and the percentage of companies that have a web page), which can shed some light on the extent of competition and the quality of the services for business customers.

Telefónica noted that electronic communications services tend to be a minor part of an overall package of ICT services, and that the price of connectivity does not play an excessive role in companies' decision-making processes. Therefore, while analyzing the market, the importance of IT solutions has to be taken into account. In the geographic areas where LLU or alternative infrastructures are available (for example, with 2 or 3 unbundlers and/or cable), there is very little room for obligations to be placed on sophisticated wholesale services. Telefónica suggested that the consultation document should be complemented by an analysis of the satisfaction of final users' needs and a study of the role of LLU and cable for the provision of services to business customers.

CON (10) BS 02 BT

BT welcomed the progress made by ERG, and the commitment made by its members to give specific consideration to the needs of high end users in their future work. BT noted that failure to understand the business services market, and failure to facilitate change, will leave Europe behind in both the supply and exploitation of advanced ICT solutions. Some European NRAs strongly favour a model in which a small number of infrastructure operators supply passive network elements only to themselves and to each other. This approach will not support the provision of competitive VPNs, and therefore represents a serious barrier to Europe's prosperity, because other communications providers will not be able to buy wholesale active access services over the bottleneck facilities.

BT considers that it is very important for NRAs, when they assess the level of competition in a given market, not only to rely on the number of players in that market but to actually check whether or not those players are active in the supply of corporate multi-site networks or have the willingness and capability to supply relevant wholesale services to other CPs. BT would make the point that diversity of approach can in itself be a serious obstacle to providing pan-European business services. Therefore BT believes that the ERG should be much less accepting of national variations.

BT agreed with the view that different wholesale products are needed to serve high end businesses, and would agree that this requires further work. A lack of formal complaints or appeals should not be considered synonymous with a lack of concern, since NRAs may have been less focused on business services, especially as regards high end users. BT noted that it is disappointing that only a minority of NRAs impose mandatory premium SLAs. BT argued that where there is reasonable demand for a service and it can be supplied at a reasonable price (of course it is necessary to define what constitutes reasonable in this context), the SMP operator should have an obligation to meet that demand.

CON (10) BS 03 Orange, France Telecom Group

FT commented that the ERG report has missed the main issue of the business connectivity market, which is the technological transition from leased lines to modern DSL and Ethernet access. Leased lines have become a marginal proportion of the business access market. Therefore FT suggested that ERG should favour a policy fostering migration of the current access offers to ones that are more complete and up to date.

FT believes that market analysis must take into account the availability of business grade unbundling and bitstream access as fully proved substitutes to leased lines and partial circuits. On market definition issues, the analysis shows that there is no case for identifying a high end business market. Market 6 analysis must account for the existence of business grade local loop unbundling and bitstream access services, whenever they are available, as substitutes for leased lines.

FT supports harmonisation as a relevant objective, because harmonised access products throughout Europe lead to streamlined access procurement. To achieve that, harmonization of the reference offers between the various countries is needed. Furthermore, homogeneous implementation of remedies and offers that take the international nature of business service offers into account, are also necessary.

FT supports the systematic publication of rigorously defined KPIs and considers it critical to focus KPIs on actual performance in the field rather than on contractual commitments. The publication of KPIs should be generalized all over Europe. However, their primary role should remain to check non-discrimination in each country.

FT argues that allowing an accumulation of several requests for different access products would be unreasonable. The only case that could be considered differently would be when a wholesale offer is generally available throughout Europe. In such a case, a request in the countries where it is not available could be considered reasonable. Obviously, this reasoning should not apply to obsolete products.

CON (10) BS 04 Telecom Italia

Considering the common principles of market definition, which should be applied by NRAs, TI does not envisage the need to define a separate wholesale business market (or some variety of “high-end business” market). Furthermore, the definition of a separate wholesale business market, if any, shall be investigated by NRAs at the national level.

TI noted that there is no clear-cut evidence of a market failure in the offer of tailored services for business companies. Furthermore, in TI’s opinion, any problem stated by ERG in its report is already managed and possibly solved by NRAs via the market analysis procedures already in place. National Regulatory Authorities’ provisions should be sufficient to avoid competition failures in the downstream markets. Network separation from service provision (i.e. local loop unbundling or terminating segments of leased lines) and the interconnection obligation should be sufficient remedies to allow other operators to provide, for example, business grade XDSL based services.

TI noted that as a direct consequence of European regulatory policies, a wholesale SMP player may be required to deliver wholesale services only if such services are essential to compete in a downstream market where the player itself operates.

TI believes companies are willing to pay higher prices for dedicated SLAs for business customers. So if there is demand for such dedicated SLAs, network operators will generally

offer these services in order to get higher wholesale payments. This is a typical market-driven mechanism.

The ERG assessment shows no conclusive finding of a lack of effective competition in the relevant market segments on the basis of the existing regulation. TI notes that the data collection performed cannot allow ERG to give any evaluation of the definition and identification of national relevant markets, or recommend the definition of a separate market.

CON (10) BS 05 ETNO

ETNO commented that prior input to ERG by selected stakeholders, which is repeatedly referenced in the draft report, has not been made publicly available. Only summaries of the survey results conducted by the ERG are reported. Furthermore the consultation period, effectively four weeks, was very short and insufficient time was foreseen between the date of the ERG public workshop on the consultation and the deadline for submission.

ETNO noted an apparent incoherence in the report: on the one hand, the inconclusive finding of the investigation and on the other hand the concrete guidance on the imposition of business services-specific remedies. ETNO therefore maintains that Annex 2, in absence of a far more thorough empirical analysis and justification, should not be included in the final report. Regulation on a related wholesale market can only be justified if there is a specific market failure on a corresponding retail market, which needs to be tackled. ETNO believes that this should be more clearly recognised in the discussion of market analysis issues.

ETNO argued that NRAs should also take into account that business connectivity services are often already provided by the incumbent to other operators on a wholesale commercial basis. Markets for serving “high-end” business customers are therefore likely to be characterised by lower barriers to entry and tend towards effective competition as entry barriers can be overcome. Any finding is case-sensitive and therefore has to be determined within the individual market analysis in accordance with the framework. On SLAs, ETNO believes if there is demand for such dedicated SLAs, network operators will generally offer such services to benefit from these higher payments.

ETNO recalled that the introduction of new retail products by the market dominant undertaking is also part of the competitive process, driving innovation in the market. Across the board obligations like the ones proposed by ERG could in this respect hold back innovation and competition. ETNO maintains that SMP players cannot be required to deliver services other than those which are the same as – or substantially equivalent to – the services that they supply to themselves.

CON (10) BS 06 QSC

QSC welcomed the ERG Report and supports its findings and the proposed work programme in general. QSC considers that the business services market is currently overlooked by many NRAs due to the very small number of actual network connections (leased lines, bitstream access and mobile) involved. On the other hand, the economic importance of this market segment for the overall economic performance of the European Union is quite significant.

Up to now, the ERG has mainly focused on the fixed markets and their relevant product set. But now the mobile part has to be seen as part of the picture as a complementary but essential ingredient. QSC have seen bundled offers of fixed and mobile components, where termination towards the mobile phones of the particular customer/corporation is already included in the – low – base price. In the case of these bundled offers, which are also used in

the business services market, operators with no affiliated or integrated mobile operator are no longer competitive. In the absence of symmetric termination rates (fixed-to-mobile and mobile-to-fixed), lacklustre enforcement of the non-discrimination obligation in the mobile termination market will have a significant detrimental effect not only on the general business market, but also on business services.

QSC noted that the requirement to implement MVNOs is a necessary part of the solution to the problem, but as long as the MVNO still has to pay regulated termination rates that are different from fixed rates, the potential for discriminatory behaviour remains. QSC therefore proposes that the ERG should include access to this bottleneck not only in its work programme on business services but also in a wider context.

CON (10) BS 07 ECTA

ECTA noted that the development of Ethernet and the move towards virtual private networks (VPNs) has changed the requirements of both end-users and their wholesale suppliers. Users are now more likely to demand advanced integrated services. Business-focused operators that compete at the higher ends of the business market using the current mix of access products may expect their position to worsen in a next generation environment if the access products move closer to the individual customer location.

ECTA believes the ERG should set a framework that recognises the differences in demand and supply for business and residential products and that requires NRAs to take specific account of these factors in their assessment of markets. The current lack of regulatory certainty regarding availability of business-grade access inputs is impeding investment in the virtual infrastructure layer, i.e. in the platforms which operate “above” the basic connectivity layer.

ECTA argued that delivery of harmonised outcomes in this area must therefore be one of ERG/BEREC’s most urgent priorities, and requires a commitment of co-operation between NRAs. As a first test of BEREC’s competence in addressing issues with cross-border implications, it is important to set a clear agenda or work plan, and the definition of clear deliverables within a predefined timeframe.

The extent to which the non-discrimination requirement is backed up by published KPIs is very limited - only 9 of the NRAs require this for WLR, and only 8 for wholesale leased lines. Less than half the countries who responded have any obligation to provide wholesale Ethernet services, despite the requirements of the regime for technological neutrality, and despite the fact that this is the growth area for businesses, especially high end business users. ERG/BEREC should lead in defining best-practices for migration from retail leased lines to all relevant wholesale inputs, i.e. go beyond contract novation and enable effective migration to wholesale terminating segments (of the same or other technology), bitstream and unbundling.

ECTA noted that NRAs also need to be aware that operators will be concerned that a complaint or appeal regarding the behaviour of a monopoly supplier could have counterproductive effects for the complainant (whether ultimately successful or not). ECTA would particularly encourage ERG – and now BEREC – to set clear guidelines and measurable targets by which its regulator members should be expected to assess how they have taken account of the guidance given.

CON (10) BS 08 COLT Telecom

COLT Telecom noted that defining different market sectors by end-user type is a flawed approach. It is much more significant and useful to define the communications needs of customers, whatever their end-user type, and then to seek to address the competitive provision of services to them.

According to COLT, three key requirements should be highlighted: national (at least - preferably EU-wide) availability of consistent wholesale services, provision of wholesale carrier Ethernet services and provision of business grade wholesale services with guaranteed quality of service levels and enhanced SLAs.

COLT believes that defining sub-national markets in respect of wholesale services that are critical to serve business users would be highly damaging to competition. Therefore, the provision of wholesale carrier Ethernet services and the provision of business-grade wholesale services should be considered as (at least) national markets, without any division into sub-national markets. Furthermore, NRAs often presume that a level of competition exists in the market based on over-simplistic metrics, such as the number of competitors providing certain facilities, e.g. the number of LLU providers in an area. For the business market, substantial further analysis is required to assess the true level or extent of competition.

COLT argues that strong transparency rules are critical, therefore KPIs can be a useful tool. At the same time, COLT cautions that attempting to drive out information asymmetries through new KPIs can often fail. Instead, NRAs should consider placing the onus on the SMP operator by assuming that any KPIs offered and achieved by its retail arm are secured by the underlying wholesale services. Regulatory obligations should apply to any new wholesale services for which there is a reasonable business case.

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.

CON (10) BS 09 Afors

Afors noted that the business services market is still dominated by SMP operators. Retail markets are still not competitive enough and the corresponding wholesale products are not adapted to the needs of the buyers of these services. Afors suggests that NRAs should place more emphasis on business services products due to their rather uncompetitive nature. NRAs focussed in the past almost exclusively on residential markets.

Afors mentioned that considering the costs of civil engineering, it would be not viable to duplicate the incumbent's infrastructure. Complementary wholesale reference offers are needed for operators because of the specificities of business services. These characteristics include e.g. the geographically widespread coverage of high end business services.

Finally, Afors noted that it should be up to individual NRAs to decide on the boundaries of the relevant markets, SMP designation and possible remedies.

CON (10) BS 10 INTUG

INTUG noted that there is a strong case for BEREC to recommend consistent business market definitions and, where appropriate, associated remedies, where analysis of these

markets reveals an absence of competition. The limited number of complaints received by NRAs does not reflect an absence of market failure, but is more probably due to the absence of a viable complaints process for needs that are cross border, and thus not the responsibility of a single NRA.

INTUG believes the survey and the work programme currently envisaged focused mainly on fixed network services, but a business market failure exists equally for international mobile services. INTUG strongly rejects the notion that a wholesale market's scope should be defined solely by the products and services the incumbent chooses to provide to its own downstream/retail operation. This would foreclose the NGA market completely, and suppress innovation and efficient ICT investment by customers. Furthermore although not statistically conclusive, the results in Annex 4 reinforce the case that INTUG and EVUA have been making regarding lack of competition.

It remains a concern of business users that sub-national or geographic segmentation can produce a mixture of regulated and non-regulated sites, which makes competitive bidding by alternative network service providers open to partial discrimination, and adds difficulty in ensuring availability of access at all sites required by a customer within a Member State. INTUG noted that remedies arrive too late for the business user. Application of remedies operates to an extremely long timescale, even without delaying factors through appeals, meaning that the damage has already been done. Remedies will be needed to prohibit damaging vertically integrated bundling, although this should not be executed in a way that stifles innovative packages involving content or device developments.

CON (10) BS 11 Cable & Wireless

Cable & Wireless argued that insufficient regard is given to the fact that products for large businesses are often purchased over multi-sites whereas residential products are purchased individually in a single location. So although there may be competition in some locations and the market is deemed competitive in those locations for residential customers, it does not mean the same geographic boundaries are relevant for large business services. Localised geographic competition for residential customers and SMEs does not necessarily translate into competition for nationally required services. Cable & Wireless disagrees that the prospect for local suppliers to wholesale services (which may or may not include relevant business services) is sufficient to ensure the availability of services for business customers.

According to Cable & Wireless, regulators must recall that ancillary services are directly associated with the basic SMP services and in effect they are part of the SMP service. The regulatory rules that apply to the basic SMP access service such as cost orientation and non-discrimination must apply to the associated ancillary service. Large business users remain steadfastly loyal to historic leased line services because these services do have the ancillary services that business customers require and have come to expect.

Cable & Wireless noted that in recent reviews of wholesale broadband markets it is the unavailability of the business components that has led to the conclusion that residential and business users fall within the same market. Furthermore the SMP provider – which has SMP in the provision of leased lines and LLU – does not want to cannibalise its revenues in leased lines by providing a fit for purpose LLU input for downstream business services.

Cable & Wireless agrees entirely that NRAs should need to consider the manner in which remedies can be proportionately applied, while at the same time preventing SMP players from having absolute control over the pace of downstream innovation and improving the underlying conditions for competition.

CON (10) BS 12 SFR

SFR supports ERG's initiative to study business services products and the related markets more deeply. These markets have changed a lot recently with the gradual phasing out of traditional leased lines. Businesses who are end users in this market need specific services especially in terms of QoS, quick repair time and service continuity. Therefore the cost of changing the service provider is high compared to the costs incurred on the residential market. This leads to higher barriers to entry on the business services markets.

SFR notes that current wholesale products have to be changed to better represent the technological evolutions, especially in the case of passive (duct) elements, ULL, active (bitstream) elements and line rental.

On the results of the questionnaires, SFR commented that even if all NRAs applied the non-discrimination remedy this would not be the case for other specific remedies (e.g. SLAs). Furthermore, a lack of complaints does not necessarily mean that there is no competition problem on the given market. It could be the case that buyers of wholesale inputs logged their complaints e.g. with national competition authorities. SFR believes that common implementation of remedies can improve the state of competition in business services.

CON (10) BS 13 IEN

IEEN fully supports ERG's position that any ongoing lack of attention to this market segment would leave Europe behind in both the supply and exploitation of advanced ICT solutions. IEN warmly welcomes ERG's findings on page 4 that in order to serve "high end" businesses, wholesale products are needed that differ from those used to serve the mass market.

IEEN has doubts about the claims by 18 NRAs not to have received any complaints on the provision of business services since their first market reviews. IEN and its members have constantly stressed their concerns about the lack of an efficient regulation for business customer services. NRAs should always choose the best approach to ensure that remedies decisions, especially with a focus on reference offers, also cover the needs of business customers. IEN pointed out that diversity can in itself be a serious obstacle with regard to the provision of pan-European business services.

IEEN alternative network operators often struggle with the conditions of SLAs since they do not permit operators to get the same treatment as the SMP operator's own retail arm. IEN agrees on the fundamental policy question of whether SMP players should be required to provide services that they do not wish to supply to themselves. It is crucial that in the case of reasonable demand for a service, the incumbent operator should be obliged to meet the demand. ERG and now BEREC should also focus on further improvement of cooperation between NRAs to increase the level of standardisation of wholesale services for business users.

Conclusions and next steps

BEREC is grateful for the comments received which addressed both broader strategic issues and points of detail.

The range of comments was considerable from those who considered that the ERG proposals were broadly along the right lines to those who believe ERG produced no firm evidence of any problem and should close down this strand of work. BEREC notes however, that the latter was very much a minority view. Moreover, those who advanced it, while

arguing that there was no competition problem to be solved, did not supply any evidence in support of their view.

There is therefore nothing in the responses which would provide justification for BEREC to take a different view from the one taken by ERG last year. The original proposals will therefore be taken forward during 2010, as planned.

At a more detailed level, few common themes emerged. However, several respondents belonging to both “incumbent”, “competitive provider” and user communities argued for a greater degree of harmonisation by NRAs of wholesale remedies in order to facilitate transnational provision of retail services. These and individual comments relating to availability and design of remedies will be taken fully into account during the ongoing work, in particular if BEREC concludes that the existing ERG Common Positions relating to wholesale access remedies need to be updated or supplemented. Similarly, the comments relating to market definition will be taken into account in the ongoing work in that area.

BEREC does not consider it useful to publish a revised version of document ERG(09)51, as suggested by some. That document will stand as a record of the interim analysis carried out during 2009 but will naturally be superseded by the fruits of the 2010 work.