



# **BEREC monitoring report on Broadband Common Positions**

May 2011

## MONITORING OF ERG COMMON POSITIONS ON SMP REMEDIES IN RESPECT OF WHOLESALE UNBUNDLED ACCESS, WHOLESALE BROADBAND ACCESS AND WHOLESALE LEASED LINES

### Introduction

In 2006 and 2007 ERG developed Common Positions (CPs) covering key wholesale access products – wholesale unbundled access, wholesale broadband (bitstream) access and wholesale leased lines<sup>1</sup>.

ERG undertook this work as part of its responsibility for promoting consistent application of the European Regulatory Framework. Members of ERG undertook the following commitment:

*“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).”*

More recently, ERG set out its methodology for monitoring and reviewing Common Positions<sup>2</sup>. From time to time, the conformity of NRA remedies with each relevant CP will be monitored and a report published. This will be followed up by a review of the continuing relevance of that CP and, where the CP remains relevant, an exercise to update and, where appropriate, clarify and strengthen the CP.

This responsibility and process has been taken over by BEREC. A monitoring exercise was undertaken in 2010 to review the above three Common Positions. This paper reports on that exercise and the next steps envisaged by BEREC.

### Monitoring exercise

Monitoring of these CPs is not straightforward and cannot be carried out by “ticking boxes”. This is because the CPs, while prescribing the regulatory principles to be followed, do not prescribe the detailed remedies which should be employed to put those principles into effect. NRAs have discretion, as required by the Framework, to devise remedies which best fit national market

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ERG (06) 69 Rev1 Common position on Wholesale broadband access, ERG (06) 70 Rev1 Common position on Wholesale local access, ERG (07) 54 Common Position on Best Practice in Remedies imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines

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ERG (09) 36 ERG Report on the elaboration and monitoring of common positions

circumstances. A degree of judgement is therefore required in interpreting the extent of conformity of any national set of remedies.

To assist in this task, a detailed questionnaire was devised corresponding to each CP. Since the CPs are constructed along similar lines, the monitoring questionnaires are also similar, with variations to reflect the specificities of each market. For the most part, “yes” answers would create a presumption of conformity with the CP. “No” answers would often be inconsistent with conformity. However, as noted above, such conclusions need to be treated with care, especially in the case of “no” answers. For that reason, the opportunity was provided on the questionnaire to provide comments to explain the presence or absence of a particular approach.

Moreover, several questions were added of a forward-looking nature. Their purpose was not so much to test conformity with the CP (since the services in question were not generally available at the time the CP’s were formulated) but to provide information which might be useful to the forthcoming review. An example of this approach is the question related to fibre unbundling in section 5 of the questionnaire.

Finally, to state an obvious point, the CP applies only where a position of SMP has been found in the relevant market following a market analysis. It cannot override the provisions of the Framework regarding imposition of remedies.

### **Approach to analysis**

For CPs to be credible tools for promotion of consistent regulatory approaches, it is necessary that there should be a high degree of conformity of national decisions with those CPs. Regular monitoring is therefore necessary to test conformity. As BEREC is not an enforcement body responsibility for national measures rests with each NRA who have the local knowledge about market circumstances which BEREC collectively does not have. These two considerations suggested that the right approach to analysis and reporting is:

- (a) To provide a clear summary of the general state of conformity and the areas where there appear to be conformity issues to be addressed by several NRAs; and
- (b) To provide the maximum possible degree of transparency about individual national regimes, so as to facilitate comparisons; and
- (c) To identify areas which need particular attention during the subsequent review of the CPs;

but not

- (d) To carry out a detailed forensic examination of whether individual national measures are in conformity or not.

## Monitoring results

The report deals only with remedies in markets where SMP has been established by the NRA. National markets which have been partly deregulated (e.g. geographically for bitstream access in the UK or on the basis of the nature of bitstream product in Netherlands) do not form part of the overall picture.

Each CP is divided into sections, reflecting different types of competition problem which would be expected to arise in the absence of appropriate regulation. Most of the problems are common to all markets. In each case, the CP articulates a regulatory principle which is to be applied by the NRA and identifies one or more suitable approaches for dealing with the competition problem in line with the regulatory principle identified.

An annotated questionnaire is attached to this report corresponding to each CP. The questionnaire includes a summary for each question of the various responses. The following sections of the report deal with the general issues which have emerged from the analysis. Unless otherwise stated, the conclusions apply to all 3 CPs.

Most NRAs in the 30 EU/EEA states required to implement the Framework responded to the monitoring questionnaire, together with some from BEREC observers Unbundled access – 24 EU/EEA plus 3 observers

Wholesale leased lines – 26 EU/EEA plus 1 observer

### ***Assurance of access***

All NRAs considered that there was reasonable certainty of ongoing unbundled access for the time being although several noted that nothing was guaranteed beyond the lifetime of the current Market Review. This is inherent in the Regulatory Framework and beyond the control of NRAs.

A similar picture emerged for bitstream access except in 2 Member States (LT, RO) where there is no regulation of Market 5. For leased lines, all but 2 NRAs considered that there was reasonable certainty of ongoing access.

With regard to the different technology options for bitstream access, a variety of practices was reported. While some technology options are specifically mentioned, the CP does not explicitly cover Next Generation Access (NGA) options which will become increasingly significant. A review of the implications of technology developments on the CPs (especially in respect of NGA) will therefore be undertaken.

### ***Level playing field, avoidance of unfair first mover advantage***

These are some of the key sections where the remedies are relevant to the avoidance of discrimination by the SMP player. The basic requirement under this section is a level playing field so that those players with a competing service can reasonably expect to gain customers and have the opportunity to enter the downstream market at the same time as the SMP player.

A non-discrimination obligation is almost universal where SMP remedies are in place. A big majority of NRAs couple this obligation with complementary measures in the form of:

- Explicit guidance to indicate to the market how the non-discrimination obligation will be interpreted in practice. This could be either within the wording of the non-discrimination obligation or published in separate guidelines.
- Prohibition, via the wording of the non-discrimination obligation, of certain forms of behaviour considered to be discriminatory.
- Specific obligations concerning timeliness, fairness and reasonableness.
- Explicit obligation to ensure that services provided to SMP player's own business are identical to those provided to access seekers.
- For bitstream services, explicit obligation to prevent or delay the SMP player from offering a downstream service before a bitstream access service is available which would allow competitors to offer an equivalent downstream service.

Taken together, this should be a powerful set of rules for deterring discriminatory behaviour and suggests a very high degree of conformity with the CP. The fourth of the obligations in the above list could in principle be either an "equivalence of input" condition or an "equivalence of output" condition. Although the questionnaire did not ask NRAs to distinguish, the latter is believed to be much more frequently applied as the classical form of non-discrimination.

### ***Transparency of terms and conditions***

Remedies under this section are meant to provide complete clarity for market players of terms and conditions of access

A requirement for a reference offer to be available for which the key elements are specified or approved by the NRA is near-universal. NRAs have a variety of approaches to development of the reference offer. Many take responsibility for approving it before issue. Others evaluate it after issue. Yet others rely on a process of formal or informal engagement by the market players to identify the key requirements. A priori, it is not clear which approach would work better; it may be possible to identify some best practices during the review of the CPs.

Most but not all NRAs are empowered to specify the content of the reference offer and/or to require modification following a dispute or complaint. These seem to be necessary powers. Even if the reference offer is satisfactory at the outset, market circumstances may develop so as to justify a revision. It would not be appropriate for such a revision to have to await the next Market Review. It would be still less appropriate if the reference offer proved unsatisfactory at the outset, for whatever reason, and could not be changed for some time.

### ***Reasonableness of technical parameters***

This section is relevant mainly to bit stream access and leased lines. Its intention of this section is to ensure the provision of a range of access products suitable for meeting a variety of end

user needs. The CP specifies that access should be sufficient to allow competitive provision of bitstream access in both the business and residential market segments.

The bitstream questions investigate the extent of the range in three different ways:

- Whether a choice of bandwidth is available;
- Whether different contention ratios are available; and
- Whether there is an option for the access seeker to exercise a degree of configurability over the technical parameters,

Although some business customers are well served by “mass-market” products, others require a higher specification bitstream products, as established in the ERG investigation into business service remedies<sup>3</sup>. While to some extent these products can often be substituted technically either by unbundled loops or by leased lines, there are many cases where this is not commercially feasible.

Most national regimes provided at least one of the above options but responses were mixed. A few NRAs reported that their regulatory regime dealt only with remedies suitable for the mass market.

The final bullet above is also relevant to leased lines. Configurability is provided for in about half the member states.

There was also a mixed response in relation to the availability of Ethernet wholesale leased lines. About two thirds of NRAs reported that the reference offer provided for such services. The CP calls for NRAs to assure themselves that third parties can compete effectively with the SMP player. In this context, since SMP players make frequent use of (generally much more economical) Ethernet connections to provide their own customers, absence of a wholesale product on non-discriminatory terms could be a severe handicap to competition.

This section of the CP will be reviewed in order to assess whether further specification of the CP on the question of configurability of technical parameters is needed in order to fully achieve the objective of provision of a range of access products suitable for meeting a range of end-user needs. While the bitstream monitoring questionnaire asked about contention ratios and bandwidth, BEREC notes that these are not the only factors (and may not be the most suitable) on which any such further guidance could be based. Special attention to the needs of the business segment, as concluded by BEREC in taking forward the ERG Report on business services<sup>4</sup> and also in the Report on market definition for business services, will be made<sup>5</sup>.

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

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### ***Fair and coherent access pricing***

This section deals a complex and inter-related set of issues, in particular:

- the coherence of access pricing across a range of wholesale access products;
- the use of regulatory pricing policies to incentivise efficient investment at all levels; and
- reasonable certainty for new entrants concerning how a margin squeeze would be assessed.

The responses indicated a range of approaches. The majority employed some method for guaranteeing coherence of pricing, for example cost orientation across the board or, if not, some form of ex-ante margin squeeze test. For bitstream and unbundled access, different approaches to incentivisation of efficient investment were reported. And not all NRAs provided guidance on margin squeeze ex ante. Further work would be needed to assess the relative merits of these different approaches and to identify best practices.

### ***Reasonable quality of access products***

Remedies in this section are intended to guarantee that wholesale access services are fit for purpose and that services levels provided to third parties are comparable with those experienced by the SMP player's own downstream arm. Different levels of service should also be available, reflecting the needs of different end users. Although not exclusively concerned with discrimination, remedies of this nature do provide tools for NRAs to monitor and enforce non-discrimination obligations.

Responses to the questionnaire were variable and raised doubts about the conformity of some national measures with the CPs. In particular, a number of NRAs reported one of the following:

- Service level agreements not in place;
- Service level agreements in place but service levels defined by the SMP player; and
- Service level agreement in place, but no service level guarantees (i.e. compensation payments for poor service).

In any of these circumstances, SMP players may find it relatively easy to escape sanctions for poor or discriminatory service.

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BoR (10) 11 - BEREC report of the consultation on the ERG Report on the regulation of access products necessary to deliver business connectivity services - ERG (09) 51

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BoR (10) 46 Rev1: "BEREC attaches to the high end business segment, and acknowledges that the specific issues pertaining to this segment may be worth considering, on the basis of national circumstances, either at the market definition or at the remedies stage."

Where service level agreements are in place, the specification of key performance indicators is likely to be necessary to promote and monitor compliance. To test non-discrimination such indicators would need to provide a comparison between the levels of service provided to third parties and that provided to the downstream arm of the SMP operator. More than half the national regimes require KPIs.

Finally, a substantial (for leased lines, less so) minority of national regimes do not provide for different levels of service according to the needs of the end-user. This gives rise to a reasonable suspicion of non-conformity. However, a firm conclusion would require a comparative analysis of the nature of “standard” and “premium” SLAs in the different countries as the standards may be different.

As a general rule, remedies of the above type were more frequently imposed in leased lines markets than in markets for bitstream or unbundled access. This may reflect a perception by NRAs that the issues are more critical to the supply of services to business customers.

### ***Assurance of efficient and convenient (wholesale) switching processes***

Efficient switching (“migration”) processes are essential to the achievement of an effective competitive environment. Customers are unlikely to consider switching supplier if the switch cannot be accomplished smoothly and without loss of service. This requires efficient switching processes at both wholesale and retail level. The CPs deal only with the wholesale processes. They need to provide for switching to and from the network of the SMP player so as to provide a solution:

- (a) For switches from the SMP player (or a service provider “rebadging” the service of the SMP player) to a third party provider;
- (b) For switches to the SMP player (or rebadged) from a third party provider; and
- (c) For switches between two third parties, each buying some access service from the SMP player. This needs to deal with the scenario where the two third parties use different wholesale access services from one another (e.g. one using shared loop, another using bitstream access; or, in the case of leased lines, where the two competitors use different points of connection to the SMP network ).

Responses to the questions were varied. Several NRAs recognised that their remedies were not in conformity with the CPs. In some cases, not all the relevant migration processes were available. In cases where migration processes were available, migration prices were not set by the NRA. In further cases, it appeared that control of the timing of migration was completely in the hands of the SMP player. This may not be a problem in the case of mass market customers where the precise time chosen for the switch is less important than the period of downtime. For business customers however, both parameters could be critical. Finally practices vary concerning bulk migrations (relevant to unbundled and bitstream access) where a number of end user connections undergo the same switch at about the same time. Third party providers would reasonably expect to benefit from any cost savings but this is often not the case in practice.



### ***Assurance of backhaul to the point of connection***

There should be a reasonable degree of choice over where physical interconnection takes place between the networks of the SMP player and the competitor. Otherwise, there could be a substantial barrier for new entrants who can only justify at the outset a relatively sparse network. To meet this need, there may be a demand for backhaul services between the point of handover of the access service and the third party network. Most NRAs reported that such services were readily available, sometimes (the great majority, in the case of leased lines) regulated and sometimes on commercial terms.

### ***Assurance of co-location and other associated facilities***

This section covers remedies in relation to services ancillary to the main wholesale service which may be necessary for effective provision. No significant issues emerged.

### **Plans for review of the Common Positions**

BEREC believes it is evident that these Common Positions are still required. The markets remain very important and it is therefore an important part of BEREC's role to identify and promote application of best regulatory practices in the specification of SMP remedies.

However, there is clearly a need for review, both to take on board the lessons of the monitoring exercise and to bring the CPs up to date. There are 3 broad areas where review is required:

#### **a) Issues which are specific to or closely related to next generation access**

As noted above, although drafted largely in generic terms, the CPs on wholesale unbundled access and wholesale broadband access were conceived for an access network dominated by copper connections. They need to be reconsidered for their relevance to next generation access. This work is closely related to the BEREC Work Programme workstream on implementation of the NGA Recommendation and will be integrated into that workstream.

#### **b) Fair and coherent access pricing**

These issues have a large overlap with those which will be considered by the Commission in its proposed guidance on access costing and pricing methodologies. BEREC already has a workstream to co-operate with the Commission on the development of such guidance and it is expected that it will be convenient for the relevant aspects of the CPs to be reviewed in parallel.

#### **c) Non-discrimination and other issues**

Many of the remaining issues in the CPs have a strong connection with non-discrimination. The sections concerning level playing field and avoidance of unfair first mover advantage are important aspects of non-discrimination. Efficient and convenient switching processes contribute towards a level playing field, as do SLAs, KPIs and reasonable technical access parameters. In some cases, non-discrimination is only one

concern; another is to ensure a reasonable basis for provision of all downstream products. BEREC had already planned a non-discrimination workstream in order that it could make a full and constructive input to the Commission's planned guidance on non-discrimination. This workstream will be given priority in order to deliver both BEREC advice to the Commission on its planned guidance and proposals for review of non-discrimination aspects of the CPs. Review of the remaining issues identified in this Report will follow closely.

BEREC will engage with stakeholders informally as its work proceeds and will consult in due course on any proposals to modify the CPs at key stages. In taking the work forward, it will pay due regard to the views already expressed by stakeholders in the public workshop held on 31 March and briefly summarised in the Annex.

## **ANNEX - Stakeholder views expressed at informal public workshop on 31 March**

To provide insights for its analysis, BEREC held an informal public workshop on 31 March 2011 at which it summarised its analysis so far and offered stakeholders the opportunity to comment. The main contributors were ECTA and ETNO. The ECTA presentation is available on the BEREC website.

ETNO emphasised some general points, including the need to respect the limitations on NRA powers set out in the legal framework, in particular the need to impose only those remedies required to solve the problem identified. In ETNO's view, remedies which required SMP players to deliver services which go beyond those which would be relevant to the retail services delivered by the SMP player itself are unlikely to be justifiable. ETNO also emphasised the need for a level playing field between SMP players and other providers relying wholly or mainly on their own infrastructure (notably cable operators). A number of other detailed points were made.

ECTA's presentation mainly looked forward to the forthcoming review of the CPs. It referred to the need for CPs to provide for adequate wholesale access using Ethernet services and over "next generation" access networks. It pointed to the lack (significant, in ECTA's view) of any provisions relating to wholesale services necessary to deliver multi-play retail bundles. In contrast to ETNO, ECTA asked for provisions which allowed third party providers not only to replicate the SMP player's service but also to differentiate itself. Noting the Commission's intention to issue guidance on non-discrimination, ECTA asked for tougher remedies to enforce non-discrimination, in particular routine use of "equivalence of input" obligations and much greater use of KPIs. Finally, ECTA asked for significant development of the CPs in relation to "business-grade" remedies.