

**BEREC Response to the
EC Questionnaire on the Revision of the
State Aid Guidelines**

October 2011

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1. General questions

1.1 **Have you been involved in projects of public funding for broadband deployment (for example, as aid recipient, access seeker, customer of the subsidised network, etc.)? If yes, please highlight what you consider to be the main achievements, challenges and issues which would be relevant in relation to the revision of the Guidelines. If you are familiar with more State aid Broadband projects, please highlight what you consider the main strengths and weaknesses of the different projects.**

Promoting the roll-out of NGA networks has been a major issue in the agenda of the ERG/BEREC for the past years. ERG/BEREC has extensively investigated the principles underlying regulated access with regard to NGA roll out in a number of documents since 2007, such as:

- ✦ the ERG Opinion on Regulatory Principles of NGA (ERG (07) 16rev2)¹,
- ✦ the Report on Implementation Issues and Wholesale Products (BoR (10) 08)²,
- ✦ the Opinion to the Draft Recommendation on regulated access to Next Generation Access Networks (NGA) (BoR (10) 25rev1)³,
- ✦ the Report on guidance on functional separation (BoR (10) 44rev1)⁴,
- ✦ and the Collection of factual information and new issues of NGA roll-out (BoR (11) 06)⁵.

As to the implementation of the State aid Guidelines (“Guidelines”), BEREC published the Report on “Open Access” (BoR (11) 05)⁶ addressing the interpretations and implications of open access in the field of public funding and its relation to the regulatory framework.

The State Aid Guidelines states that Member States (MS) should consult with the NRA in relation to State aid applications. The report stated that *“while some NRAs actively participate in the design of State Aid measures prior to their notification to the Commission, it is important to recognise that in many MS NRAs lack the legal basis to provide such a formal view or decision on*

¹ http://erg.eu.int/doc/publications/erg07_16rev2_opinion_on_nga.pdf

² http://erg.eu.int/doc/berec/bor_08.pdf

³ http://erg.eu.int/doc/berec/bor_10_25.pdf

⁴ http://erg.eu.int/doc/berec/bor_10_44rev1.pdf

⁵ http://erg.eu.int/doc/berec/bor_11_06.pdf

⁶ http://erg.eu.int/doc/berec/bor_11_05.pdf

*these access conditions. Therefore, NRAs across the EU do not have a consistent approach to this, partly due to differences in national legislation*⁷.

The individual experiences of different NRAs will be communicated in separate responses to the Commission's consultation by each MS.

1.2. *What is your assessment of the Commission's policy in the field of State aid to broadband in general? In your view, were the Guidelines able to achieve the Commission's policy objectives as detailed in section 2.2 above? In your view, did the Guidelines strike the right balance between promoting investment in basic broadband and NGA networks and limiting the distortion of competition arising from public intervention?*

In general, the Guidelines were very relevant in bringing a higher level of legal certainty to stakeholders. The revised Guidelines should keep pursuing the same goal.

State Aid – public funding – could play an important role to extend basic broadband and NGA coverage to areas where operators are unlikely to invest on commercial terms in the near future and to achieve the above-mentioned goal. The Digital Agenda calls upon MS to use public financing in line with EU competition and State Aid rules in order to meet the coverage, speed and take-up targets defined in the Digital Agenda. This should, however, not be taken to imply, that State Aid should necessarily be used in all MS. Emphasis should primarily be on reaching the targets set in the Digital Agenda through a market based approach to broadband and NGA roll-out.

As to the right balance between promoting investments and limiting the distortion of competition, it should be noted that the effects of the Guidelines are not easy for BEREC to assess, since many NRAs do not have sufficient visibility of the State Aid granting process and the outcome of the subsidies that have been granted. Furthermore, the Guidelines have been in place for two years only and the tender process tends to be lengthy so that the long-term effects cannot be judged at this point.

1.3. *In your view, what are the main technological, market and regulatory developments in this field since 2009 that should be considered and*

⁷ Report on Open Access, BoR (11) 05, p. 15.

should have an impact on the content of the revised Broadband Guidelines?

Considering the technological developments BEREC believes that the increasing importance of wireless broadband infrastructures should be taken into account when revising the State Aid Guidelines. Furthermore, it should be taken into account that the mechanism by which “open access” is guaranteed is dependent on the particular (NGA) deployment. Consequently, BEREC encourages the Commission to ensure that subsidised network architecture and infrastructures are constructed as future proof and as pro-competitive as possible. The public investment decision therefore should reflect the long-term social welfare considerations, in relation to the service provided and the ability of the architecture and infrastructure to enable competition.

As to the market developments the demand side has become more relevant. Customers’ willingness to pay a premium for very high-speed services may be limited. This is particularly important if customers perceive that they can use current applications and services (including IPTV) with sufficient quality using existing broadband access services. While the parallel use of applications increases the demand for capacity, in fact, applications that strictly require speeds of 100 or even 50 Mbps do not exist so far.

Even though other exogenous factors such as the financial crisis may also have played a role, these demand side factors are likely to feed back onto the viability of NGA broadband projects from a supply side perspective, possibly impacting on rollout plans. Thus they need to be taken into account when assessing the achievement of possible national broadband targets and may require an adjustment of expectations.

Finally, the main developments in the regulatory area are related to the revised Regulatory Framework (Directive 2009/140/EC), the Digital Agenda and the Commission Recommendation on regulated access to Next Generation Access Networks (NGA) (2010/572/EU), which primarily addresses, in various NGA scenarios, the obligations to be imposed upon operators designated with significant market power on the basis of a market analysis procedure.

Besides these developments in the European regulatory area, the various national regulatory regimes may have to be considered, especially the Market 4 and 5 analysis and the access obligations imposed by the NRAs hereafter.

The revised Guidelines should also take into account any developments linked to the Universal Service.

2. Subject of the aid

The current version of the Broadband Guidelines distinguishes between basic broadband and NGA networks as subjects of State aid measures.

2.1. Do you consider that distinction is justified in light of current economic, technological and regulatory developments in this field?

BEREC believes that the differentiated State Aid rules for basic broadband and NGA networks are currently justified and expects NGA networks to continue to evolve. The different technological and market developments of basic broadband and NGA networks can be covered best by applying different standards.

As there is no clear cut distinction between basic broadband networks and NGA, the Commission should clarify that this distinction only applies for the purposes of the State Aid Guidelines and should be open to different national approaches. Furthermore, such a distinction does not pre-empt a single (wholesale or retail) market for the purpose of market definition. In addition considering the lack of a clear-cut distinction between basic broadband and NGA it would be beneficial if the Commission outlined the approach that it might take to ambiguous situations.

However, for the purpose of the State Aid Guidelines, the distinction is very valuable, since basic broadband services are provided over infrastructures that are mostly already in place, while NGA services will be provided over infrastructures that are mostly still to be deployed. This implies that the objectives that are pursued through State Aid measures aimed at extending the availability of traditional services (e.g. social inclusion) are different from the objectives that are pursued through State Aid measures aimed at developing NGA networks (e.g. modernisation of the country). Similarly (and for the same reasons) the instruments to reach those objectives and the associated financial needs differ as well.

2.2. *Would you consider it useful to devote specific sections of the Guidelines to the rules and conditions applying to the use of public funding to subsidize specific infrastructure elements (for instance,*

ducts, dark fibre, backhaul networks etc.) or to other activities related to broadband network roll-out (such as civil engineering costs, upgrade of in-house cabling, etc.)?

BEREC believes that a modular approach to the different infrastructure elements or activities could be a flexible tool to cover the specific issues linked to infrastructure elements as well as to give the necessary flexibility in order to cater for the variety of scenarios which may arise in different MS and impose the most appropriate obligation for each specific project. Nonetheless, it is doubtful whether such differentiation should be included in the revised Guidelines. On the contrary, it seems more appropriate and flexible to address the general and basic issues at the European level while specific rules are drafted on a national level, according to the specific local and (technological and market) demands, taking into account that the current situation regarding availability of specific infrastructure elements (e.g. ducts, dark fibre or in-house wiring) is very diverse across MS.

2.3. In line with the NGA Recommendation, the Broadband Guidelines define very high speed Next Generation Access (NGA) networks in paragraph 53 as follows: “NGA networks are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over existing copper networks.”

Do you think that this definition is still adequate? In other words, at this stage of technological and market development, besides fixed, mainly fibre based networks, would you consider any other broadband technologies as falling into the definition of NGA networks? Please provide detailed justification and examples of commercial utilization to motivate your answer.

BEREC understands that the current NGA definition aims at providing broadband access services with enhanced characteristics, which exceed what is generally available today. Therefore, strictly speaking and in line with technological neutrality, any technology that is able to support the required NGA capabilities could be included.

This being said, BEREC recognises that, at the current time and with regard to NGA networks, the guidelines are largely an instrument to facilitate the roll-out

of wired networks, in particular the deployment of fibre in the access network, while wireless technologies can be subsidised as basic broadband technologies. In this regard BEREC understands that using a fibre deployment in conjunction with a wireless technology would be compatible with the guidelines. Given this there seems to be no pressing need to modify the definition at this time.

Where possible it is also desirable to maintain consistency and with this in mind BEREC notes that the guidelines' definition is consistent with the definition in the NGA Recommendation. Therefore any change to the definition here would need to be carefully considered not only in the guidelines but also potentially elsewhere.

Whilst BEREC does not believe that the definition needs to be modified at this time it may be considered to modify the definition in the future, for example to explicitly open up the possibility of using other technologies which are able to support the required NGA capabilities, which could possibly be wireless technologies. However, there are several aspects that have to be considered when extending the current NGA definition to wireless technologies in the future:

- ✦ The impact on the classification of target areas as white, grey and black for basic broadband.
- ✦ The potential danger of crowding out, when unsubsidised licensed wireless high speed broadband operators – potentially having to face additional rollout obligations – (i.e. LTE) have to compete with a subsidised wired operator
- ✦ The fact that it isn't possible to grant passive access to wireless networks.
- ✦ Considering that subsidised network architecture and infrastructures should be constructed as future proof and as pro-competitive as possible it has to be considered whether and to what extent – compared to state of the art wireline NGA – wireless networks can offer future proof broadband services in the same manner.

2.4. In your opinion, shall the Commission change the current qualitative definition of NGA (i.e. mainly fibre based solutions) to a more quantitative one (for instance by setting explicit thresholds for download/upload speeds or defining any other technology criteria)? Please motivate your answer.

As already stated before, BEREC believes that in the regulatory area and especially for definitions consistency and clarity is of utmost importance to support investment and to foster effective competition. Accordingly, in order to ensure consistency BEREC supports that the definition of NGA networks within the State Aid Guidelines remains in line with the definition under the NGA Recommendation and the principle of technological neutrality.

3. Areas of public intervention

The Broadband Guidelines identify so-called “white”, “grey” and “black” areas depending on whether there are already adequate private infrastructures in place.

3.1. *According to your experience with State aid broadband schemes, would you consider other criteria (for instance download/upload speeds or other technology, regulatory or market criteria) as relevant to identify areas with non-adequate broadband coverage? Do you consider an adequate criterion that if a minimum (download) speed of 2 Mbps is not available at affordable prices the area shall be considered as “white area”?*

BEREC acknowledges that the existing classification depending on the existence of adequate private, competing infrastructures in place is completely in line with the spirit of the Guidelines – that is in order to foster effective competition in the field of broadband and NGA networks. It remains doubtful whether the proposed technology criteria would be equally effective in achieving this policy objective.

Furthermore it has to be noted that a specific numeric criteria carry the potential to interfere with the MSs’ competence to decide on whether, and to what extent, broadband services are to be included in Universal Service Obligations.

Finally, BEREC understands that when the Commission refers to competing infrastructures for blacks areas it means competing access infrastructures (in terms of parallel access networks rollout). It would be beneficial if the

Commission could provide clarity in this regard and further describes whether it aims at dealing with backhaul or access infrastructures.

- 3.2. *The Guidelines distinguish between different types of "white NGA areas" - depending on the existing basic broadband infrastructures in place (white NGA/basic white in paragraph 79, white NGA/basic grey in paragraph 73 and white NGA/basic black in section 3.4.4. of the Guidelines) to ensure that distortions of competition are limited. In your experience, has this distinction – and the ensuing differences in the applicable compatibility conditions – helped preserving competition and private incentives to invest?***

This distinction obliges the State Aid Granting Authorities (SAGAs) to pay attention to the different networks deployed (and not only the NGA ones) in the area where State Aid is considered for NGA networks. BEREC considers that the distinction is very relevant and has helped national authorities to choose the targeted areas more accurately.

- 3.3. *The guidelines request that the investment plans of private operators in the next 3 years shall be taken into account when defining the target areas for publication intervention. Do you consider that the defined 3 years period is still an adequate time horizon? In your view, what proofs private operators can put forward to demonstrate their investment plans in a certain area?***

BEREC believes that an adequate time horizon is important to allow consideration of possible investment plans of private operators to ensure that public subsidies do not replace or phase out private investments. Thus it has to be ensured that there will be no equivalent private investment in the area in question. On the other hand the rapid development of market and technology means that it is difficult to predict with certainty whether or not the operator will execute its investment plans. In this regard a 3 year period seems to strike the right balance between these two policy objectives as it allows a more fact based evaluation of private investment plans at least in the medium term.

Similar issues arise when one considers the level of proof that private operators could put forward to demonstrate the authenticity of their investment plans in a particular area. In order to prevent any potential distortion of competition by the granting of State Aid, a substantially detailed investment plan is needed. On the other hand, it is doubtful whether operators have

already assessed their long-term strategies on broadband deployment, especially in white areas.

Hence, BEREC agrees that the Commission should place the appropriate burden of proof on the operator, which claims that it intends entering the market, in order to prevent against gaming or cherry-picking. This proof should include supporting documentation that demonstrates, *ex ante*, that there is a genuine plan to roll out broadband infrastructure in the area in question, however evidence of more concrete investments are not likely to be available. BEREC proposes therefore that the revised Guidelines specifies that the three-years period starts with the date of the consultation with the private operators prior to tender procedures and also indicates the extent to which a delay in the (proposed private) roll out would be considered acceptable.

4. General compatibility

4.1. *The Guidelines list the general compatibility criteria in paragraph 51 that all State aid broadband measures have to comply with.*

In your experience, have these conditions reached their objective to foster investments, preserve private incentives to invest and to support effective competition on the subsidized networks?

BEREC believes that regulatory consistency is crucial to foster investments and to support effective competition. In this regard, the criteria in paragraph 51 form an important step towards ensuring consistency in relation to the minimum requirements necessary for State Aid scheme. They are required in order to achieve better competitive conditions in the area where a subsidised network is deployed, be it a basic broadband or NGA.

However, it has become clear, that there are some uncertainties in the implementation of the paragraph 51 criteria that arise either from the use of vague terms or from practical experience.

Paragraph 51 (c) establishes that the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid compared to other bidders at similar if not identical quality conditions. In this context it should be clarified that the cost criterion only applies to qualitatively comparable infrastructures. Thus the – probably less costly – deployment of P2MP-infrastructure does not necessarily take

priority over the deployment of competitive open P2P-infrastructures (or VDSL-based project versus FttH project).

Equally, looking specifically at wholesale pricing (paragraph 51(g)) it should be noted that especially for NGA networks, there might not yet be any published or regulated prices available to benchmark against. Prices in other MS for similar schemes could be a suitable alternative benchmark in that scenario. However, in situations where the regulatory prices are changed after the State Aid contract has been awarded, BEREC has a concern that a consistency problem may arise between (national) regulated prices based on SMP-regulation and prices which factor(ed) in the State Aid subsidy.⁸

4.2. *In paragraph 51(e), the Guidelines encourage Member States to use existing infrastructure to avoid duplication of resources and to reduce the aid amount but without giving an undue advantage to the existing incumbents (who typically have significant existing infrastructure in place).*

Do you have experience or examples on the implementation of such condition? In your opinion, how should such condition be implemented in practice to be effective in achieving its objective? Under what circumstances do you consider that access to the incumbent's infrastructure in line with the applicable regulatory framework is a sufficient safeguard?

It should be noted that with respect to certain NGA deployments it may not be possible to use all existing infrastructures as would be the case for basic broadband networks (i.e. the use of copper cables). In this regard, for NGA networks the Guidelines should always encourage the use of existing civil engineering infrastructure (e.g. ducts), to reduce the net public costs, while other infrastructure elements probably could not be used.

5. *Aid to Next Generations Access Networks*

5.1. *The Guidelines require that the subsidized NGA networks shall support effective and full unbundling and satisfy all different types of network access that operators may seek (see paragraph 79).*

⁸ For further details see BoR (11) 05 p. 17.

Do you have experience with the implementation of the "open access" (i.e. full and effective access) requirement of the Guidelines in case of subsidized NGA networks? Do you have examples for difficulties or disputes and for good practices?

BEREC acknowledges that the implementation of the "open access" requirement faces the problem that the term "open access" is not clearly understood.

Although access obligations can arise from a variety of legislative provisions, , namely the State Aid Guidelines, the EU Regulatory Framework, national legislation, the TFEU and the EC Merger Guidelines, the term "open access" is neither defined in the Regulatory Framework, nor in any other legal document. Generally, it is understood as referring to a form of wholesale access whereby operators are offered transparent and non-discriminatory wholesale access, thereby enhancing competition at the retail level.⁹

Since access conditions vary in different MS, and changes are currently happening for NGA networks, it would have been impossible for BEREC to define all the possible types of wholesale access products that could be potentially requested under the State Aid rules. Some MS will provide their experiences with possible (combinations of) access products in national answers.

For the purpose of the Commission's Guidelines the term "open access" is understood to refer to mandated wholesale access whereby operators are offered effective, transparent and non-discriminatory wholesale-access to the subsidized network(s). BEREC suggests replacing the term "open access" with the term "mandatory wholesale access".¹⁰

5.2. Do you consider it adequate that all technologically possible access products are requested from the aid beneficiary to compensate for the advantage obtained by the public funds? Would you consider that certain access remedies could under certain circumstances be deemed to be redundant (e.g. duct access and dark fibre access) and therefore there is no need to request them in all circumstances to ensure a sufficient level of competition? Do you consider that a proportionality analysis shall also be carried out in analogy with the existing Telecoms

⁹ BoR (11) 05, p. 7.

¹⁰ BoR (11) 05, p. 7f.

Regulatory Framework and that only a minimum set of access remedies should be imposed to meet the objective of increasing competition and reducing distortion of competition arising from public intervention? If yes, please explain in detail.

BEREC notes that, particularly regarding SGEI missions in white areas, there may be concerns regarding the appropriateness of imposing “all possible forms of network access” (Paragraph 27). A similar reasoning applies to State Aid as a NGA network architecture should satisfy all different types of network access (Paragraph 79). The concern primarily relates to the potential impact of imposing such a comprehensive obligation on the business case for network roll-out in areas where there is evidence of a long-term lack of competitive provision.¹¹

However, BEREC also outlined in its report on “Open Access” that State Aid Guidelines and the regulatory framework are underpinned by different rationales, although both are intended to deliver benefits to end users. Whereas State Aid access obligations are imposed in exchange of receiving public funds for rolling-out network infrastructures, SMP obligations are imposed to achieve a level-playing field and enhance competition.¹²

A proportionality approach would require at least a market research to know what kind of wholesale products are expected by retail operators both in the short and particularly in the long runs and should also describe the margin of discretion, the criteria on which the proportionality analysis should be based as well as the control that the Commission intends to carry out when appraising a project.

Moreover, it would require a case-by case analysis, which on the one hand gives the chance to tailor the access obligations to the specific aspects of the subsidised project. In this regard, a proportionality approach could ensure that a subsidised operator of passive-only infrastructure would not have to offer active access products by itself; but that it would have to ensure that open access is offered on the active network if needed.

On the other hand such a case-by case analysis is work-intensive and could not be easily handled by Guidelines, thus inconsistencies with regard to the

¹¹ BoR (11) 05 p. 14.

¹² BoR (11) 05 p. 17.

definition and implementation of regulated access products could occur. Furthermore, a case-by-case analysis would require extensive expertise.

Therefore, whether application of proportionality is appropriate or not depends heavily on who is the State Aid granting authority and whether it has the expertise to carry out a proportionality decision properly and what control the European Commission would keep of the process.

Given that a well informed authority would carry out a proportionality analysis, such an approach might be useful in assuring that access obligations fit the area in which the beneficiary is investing. At the same time, a well informed authority would recognise that access obligations aim at guaranteeing that competition is promoted in a non-discriminatory way and that it is certainly not legitimate to subsidise closed networks.

However, if the proportionality analysis were carried out by a poorly informed authority it is unlikely to recognise the importance of long term openness. While it might be true, in the short run, that competitors hardly seek all forms of access in a remote area where there is already a retail operator in place, this situation might change fundamentally within NGA networks as competitors can offer different, and probably more attractive applications and thus are reliant on open and non-discriminatory access to the network. This incentive to preserve open networks may not be strong enough for local SAGAs. Moreover, long-term promises of openness should guarantee the market remains contestable at all relevant layers.

Carrying these aspects in mind, if the European commission wished to introduce some flexibility for the required wholesale access products for subsidized networks, it would have to make sure that the SAGA has the necessary knowledge to carry out such a proportionality decision properly and to describe clearly the process to be followed.

Finally, it has to be underlined that access obligations that are imposed on the basis of a – assumed – proportionality analysis shall not go below the access obligations currently imposed on a SMP operator.

5.3. Pursuant to paragraph 79, the wholesale access obligations on the aid beneficiary should last for at least seven years - without prejudice to any other regulatory obligations.

Do you consider this 7 year period adequate to ensure competition in the areas concerned without discouraging private investments? Would it be justified to require a longer period, for instance in case of passive access products (e.g. ducts)? If yes, please explain in detail.

BEREC considers that when an operator benefits directly or indirectly from a State Aid subsidy an obligation of non-discriminatory access is essential. Therefore the proposed 7 year period would appear to be the minimum period during which access obligations should be imposed.

The State Aid Guidelines states that, when the State Aid contract terminates, the NRA should “extend the access conditions accordingly”. However, it should be clear that access obligations imposed on the beneficiary of the aid can only be (re-)imposed by the NRAs under the applicable Regulatory Framework.¹³ This may or may not occur at the same time as the State Aid requirements come to an end and the regulatory obligations may or may not be the same as the State Aid ones. Therefore, it should be equally considered whether the subsidy related access obligations have to be prolonged. The extent to which obligations should be prolonged may vary between active and passive infrastructure elements.

Finally when assessing the period of specific State Aid access obligations it should be noted SMP-based access obligations and State Aid-based access obligations can be imposed in parallel because they follow separate processes and are underpinned by different rationales, although both are intended to deliver benefits to end users¹⁴.

5.4. The Guidelines expresses its preference for multiple fibre networks: "In this respect it should be noted that "multiple fibre" architecture allows full independence between access seekers to provide high-speed broadband offers and is therefore conducive to long-term sustainable competition. In addition, the deployment of NGA networks based on multiple fibre lines supports both "point-to-point" and "point-to-multipoint" topologies and is therefore technology neutral."

What is your experience with multiple fibre infrastructures? Do you share the view that it may not be economically justifiable to deploy multiple fibre networks in rural areas? Or would you see multiple fibre

¹³ For more detail see BoR (11) 05 p.17.

¹⁴ BoR (11) 05 p. 17.

infrastructures as an essential investment to achieve competition in the concerned area in the long run?

Subsidised infrastructures in unprofitable areas are relevant when they allow effective competition on retail markets. The Guidelines are right to put access conditions at the heart of the output criteria of publicly subsidised initiative in electronic communications.

Multifibre in itself is not a necessary condition to allow competition; on the contrary, the size of the access point (i.e. the number of lines that can be used from that network point) is a primary condition to allow facilities-based competition for both PON and P2P operators. Hence, the access point, i.e. the node from which access is given should always allow an economically feasible unbundling. Indeed, the size of the access point is the most important criterion for an operator to decide to install its active equipments in a network node and to invest in backhaul networks when none is available, as it allows amortising its investment on more potential subscribers. Multifibre can allow a superior degree of competition in the retail market only if operators are, in the first place, able to reach the access point to unbundle a single fibre optic per premise and that there is, in the second place, a business case for multiple fibre to be unbundled by different operators at the same time for a same premise.

Thus, though the cost of adding one extra fibre may be negligible when there is enough room in existing civil works, it may not be economically justifiable to rollout multifibre in remote areas. When the access costs are already high, multifibre only increases the complexity of pricing such an access since the costs to access a given end user have to be equally shared among multiple fibres to prevent discrimination.

Finally, BEREC believes that multifibre may not necessarily ensure technology neutrality and allow retail competition, as the size of the access point is a much more important criterion to meet these objectives. The revised Guidelines should put emphasis on such a criterion for subsidised networks to allow competition in the long run.

5.5. Certain types of network architectures (e.g. FTTH/P2P networks) are argued to be better in promoting competition as they allow full and effective unbundling (as compared for instance to FTTH/GPON

infrastructure), albeit being generally regarded as more costly technological choices.

Have you been involved in NGA projects? Do you have experience with requesting effective unbundling, perhaps on different technology architectures? Do you have examples of good practices using one or the other technology?

The feasibility of local loop unbundling has been a topic of the ERG opinion on Regulatory Principles of NGA (ERG (07) 16rev2, p. 32), where ERG took a differentiated view on possible unbundling solutions in P2P and P2MP-architectures. Furthermore, the "Report of Implementation Issues and Wholesale products "(BoR (10) 08, p. 23 ff.), published in March 2010 deals extensively with unbundling solutions in NGA-networks Finally, BEREC is currently working on a project dealing with the implementation of the NGA Recommendation which generally requires fibre unbundling.

- 5.6. Besides the conditions specified in paragraphs 75 and 79, do you consider any other conditions that beneficiary companies constructing subsidized NGA networks shall comply with in order to increase competition and reduce the distortion to competition arising from the public intervention?**

6. *The Role of the National Regulatory Authorities ("NRAs")*

*The Guidelines foresee an important role of the NRAs in helping granting authorities to set the wholesale access conditions. According to paragraph 79, "in setting the conditions for wholesale network access, Member States should consult the relevant NRA. NRAs are expected in the future to continue either to regulate *ex ante* or to monitor very closely the competitive conditions of the overall broadband market and impose where appropriate the necessary remedies provided by the applicable regulatory framework. Thus, by requiring that access conditions should be approved or set by the NRA under the applicable Community rules, Member States will ensure that, if not uniform, at least very similar access conditions will apply throughout all broadband markets identified by the NRA concerned."*

6.1 *In your opinion, how could NRAs help (national or local) authorities with their State aid broadband measures? Do you consider appropriate that access conditions should always be approved by the NRAs? Do you consider any limitations for the involvement of the NRAs in State aid broadband measures? If you have been directly involved in aid projects, did you experience any difference when the access conditions were imposed as a regulatory measure as opposed to an access obligation deriving from the State aid rules?*

BEREC already stated in its Report on “Open Access” that by virtue of its position and role as a regulatory body, the NRA will certainly have knowledge and experience of a range of aspects of the electronic communications market. This broad sector specific experience is likely to inform the interaction between the SAGA and the NRA to the benefit of the overall process.

However, although the current Guidelines refer to the role of the NRAs within the State Aid process, they do not clearly specify it. In State Aid cases regarding NGA networks, the Guidelines state that Member States should consult the NRA for setting the conditions for wholesale network access or that they could require that NRA approve or even set the access conditions under the applicable Community rules in order to ensure some regulatory uniformity across the market. As indicated in decisions, the Commission appears to value the involvement of the NRA during the design of the measure prior to notification¹⁵.

Nevertheless, when considering the requirement for NRAs to approve or set access conditions for subsidized networks, there are a number of potentially significant barriers to this role¹⁶.

Firstly, certain practical challenges might limit NRA’s ability to contribute to State Aid decisions¹⁷. For instance, the NRA may not be made aware of State Aid cases, and it may not be clear to which extent the SAGA takes the view of the NRA into account when formulating the State Aid contract. Additionally, some NRAs may not have the capacity or resources to monitor all the regional and local deployments involving State Aid or to contribute to the assessment of access remedies.¹⁸

¹⁵ BoR(11)05, p.15.

¹⁶ BoR(11)05, p.15.

¹⁷ BoR(11)05, p.15.

¹⁸ BoR (11), 05, p 39.

Secondly, with regard to legal aspects, BEREC already stated in its report on “open access”, that there are a number of potentially significant barriers to this role. While some NRAs actively participate in the design of State Aid measures prior to their notification to the Commission, it is important to recognise that in many MS NRAs lack the legal basis for an active involvement, partly due to differences in national legislation¹⁹., partly due to the fact that the regulatory framework itself does not provide such a legal basis

In any event and besides these more general aspects the future involvement of NRAs has to be consistent with other possible changes within the Guidelines and has to be based on a proper legal basis within the Regulatory Directives. In this regard it is of utmost importance that – given a proportionality approach were introduced – such a rationale would relate with the conferment of power to an authority with the necessary expertise and experience.

6.2. *In several State aid cases, the NRAs undertook to solve disputes between the operator of the subsidized network and the access seekers, should any such dispute emerge.*

Do you have experience with such procedure? How do you see the role of NRAs to solve disputes between the access seekers and the operator of the subsidized network?

Article 20 of the Framework Directive reads that NRA shall solve “*dispute arising in connection with existing obligations under this Directive or the Specific Directives between undertakings providing electronic communications networks or services*”. An operator, in the meaning of the Framework, of a subsidised network may indeed be a party of a dispute resolution. As a wholesale operator, the most frequent dispute may arise when a third party retail operator seeks access to this network. The NRA may solve the dispute considering both operators as “standard” operator.

However, if the access conditions imposed as a counterpart of the State Aid were found not to be met during a dispute before the NRA, the NRA may lack the legal basis to enforce access conditions not set under the Framework. If this were the case, the NRA would be turned into a *de facto* judge of the

¹⁹ BoR (11) 05, p. 15.

proper implementation of the State Aid access rules,²⁰ the enforcement of which may be the role of other jurisdictions.

Such an intervention would be a rational solution in those Member States where there is the legal basis for an involvement of the NRA in the State Aid granting process on the one hand and a legal basis for a dispute settlement before the NRA, on the other hand. However, it remains uncertain whether the NRA has the legal basis to do so in any Member State.

Therefore, BEREC considers that the responsibility for dispute settlement should be linked to the responsibility to enforce the access obligations on the subsidised network. Consequently, the authority that is supposed to enforce the access conditions should equally take a primary role in the process of dispute settlement.

7. Transparency of State aid measures

7.1. According to the Commission's case practice in this field, granting authorities shall share all the important information of the schemes with stakeholders. Inter alia, they have to publish on a central webpage the mapping information on the target areas, the planned State aid measure, and all information shall remain public for minimum 1 month to allow all third parties to comment. The tender procedures for granting aid have to be conducted in line with the principles of EU Public Procurement Directives, respecting all conditions for transparency and non-discrimination.

Do you consider that the information made available in the described ways is adequate to ensure transparency? Do you have suggestions on how the transparency of State aid broadband schemes could be further improved? Can you provide examples of good practice when it comes to information provided on the State aid broadband measures in different stages of the procedure?

The availability of relevant information at an early stage both for third parties and SAGAs is an important key driver for the success of the State aid scheme. Consequently, BEREC believes that the availability of information on a central webpage as provided by the current Guidelines is adequate to ensure

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BoR (11) 05, p. 16.

transparency. Such a webpage should provide all relevant economic and technological aspects of the scheme and, additionally, should include a public consultation with private operators concerning their investment plans in the next 3 years.

8. Other points

8.1. Several Member States requested vertical separation on the subsidised networks (the wholesale operator of the network shall not engage in retail service provision) to avoid risk of discrimination, support competition and push take-up rates as a result of public intervention.

In your view, what would be the costs and the benefits of requesting this condition? In what circumstances would you consider vertical separation to be an effective remedy?

Regarding market-driven regulation, it is important to see that a remedy of functional separation might trigger very different market reactions. For example, an SMP operator with a relatively weak retail market share (e.g. in broadband) may have a higher incentive to invest in NGA if it perceives functional separation to offer a higher degree of certainty for its wholesale business than would otherwise be the case.²¹ Equally, functional separation could be an effective remedy, where multiple access seekers are expected and where the wholesale supplier might have the incentive to discriminate against competing operators in favour of its retail arm. On the other hand, incentives to invest by the SMP operator could be deterred if it anticipates that the new assets could be transferred to a separate entity. This might even lead to non investment in certain areas.

Given these circumstances, BEREC believes that functional separation under the new Regulatory Framework should only be considered in exceptional cases in a context of transition to NGA networks after a careful assessment of the potential impact on investment. The NRA should consider individually the imposition of functional separation of assets related to NGA. It should be noted that such an assessment is not simple or straightforward.

However, when considering the rollout of a new network thanks to subsidies, the setting of an *ad hoc* company (which may be a subsidiary of a vertically

²¹ Report on guidance on functional separation, BoR (10) 44, p. 16.

integrated operator) to operate (or roll out) the subsidised network and whose role is limited to the wholesale market may help ensuring non-discrimination and fostering competition in the retail market.

- 8.2. *Some public authorities argue for a need of "strategic role" of the State in the broadband sector to achieve their social and economic objectives. In most cases, that is translated in the choice of retaining public ownership of the subsidised broadband networks (mainly passive infrastructure elements, like ducts, manholes, dark fibre) while the wholesale and retail operation of the networks is tendered out to private operators.***

In what circumstances would you consider that public ownership is justified? What are in your view the advantages/disadvantages of public ownership of the infrastructure?

One has to be aware that public ownership might hold a significant risk to market based deployment of broadband infrastructure. Consequently, the question whether infrastructure elements should become public property has to be carefully assessed. In this regard, public ownership should be considered for passive infrastructure elements that have been publicly financed or deployed (e.g. municipalities, regional governments, etc.).

9. *Non-aid measures: MEIP and SGEI*

- 9.1. *The Guidelines provide clarifications on broadband measures falling outside the scope of State aid rules, in particular when public funding for the roll-out of broadband is carried out at market terms ("MEIP" Section 2.2.1. of the Guidelines) and when Member States consider that the provision of a broadband network should be regarded as a service of a general economic interest ("SGEI" Section 2.2.2. of the Guidelines). Do you have any experience with "MEIP" or "SGEI" instruments used in European countries?***

BEREC knows that some member states have relied on MEIP and SGEI instruments to roll out broadband networks.

9.2. Do you consider that the current level of detail provided in the Guidelines on MEIP and SGEI is sufficient? Do you have any comment on the applicability of these provisions?

The revised guidelines should explicit the special characteristics of SGEI in electronic communications, especially regarding the universal and compulsory nature of the SGEI mission.

The revised guidelines could make clear that a public authority may rely on different technical solutions to connect all households and businesses (e.g. FttH, subloop unbundling and wireless technologies) through a SGEI network.

The revised Guidelines should also put emphasis on the costs for wiring all households and business when using the SGEI instrument; it should make clear whether there are conditions where such costs may prevent the universal provision of the SGEI.

9.3. The Guidelines insist on a strict definition of what constitutes an SGEI in the liberalised telecom sector (universal and compulsory nature, open and neutral network, separation of wholesale and retail operations etc.). Have you experienced special difficulties with the implementation of this type of measures?

BEREC has not been involved in the implementation of SGEI project.

9.4. Do you consider it adequate that for SGEIs all technologically possible access products are requested or would you consider that certain access remedies could under certain circumstances be deemed to be redundant (e.g. duct access and dark fibre access) and therefore there is no need to request them to ensure a sufficient level of competition? If yes, please explain in detail.

BEREC is of the view that there seems to be no rationale for requiring different wholesale access obligations for SGEI and State Aid regimes. The current identity in the two regimes seems effective.

10. Final remarks

10.1. You are invited to highlight and explain any other relevant points related to the *Broadband Guidelines*.

At a very general level, it may be considered whether NRAs should be involved in the investment conditions of the production of the infrastructure they regulate in the long term. While an information role for the NRA is likely to contribute to consistency of sector-specific and competition policies, they might not have to advocate or oppose the production of infrastructures.²²

More importantly, BEREC's report on open access discusses extensively aspects of the Guidelines, including additional areas that have not been explicitly addressed in the questionnaire, such as the relation between State Aid and SMP regulation. During the duration of the State Aid contract the obligations which the subsidized operator is subject to, as a result of the State Aid process, coexist independently from any regulatory obligations which have been applied through the regulatory process.

The State Aid Guidelines state that access obligations introduced through contract as conditions of State Aid, should be extended accordingly by NRA once the initial contract period has ended. However, this does not mean that the access remedies imposed by the NRA must necessarily replicate the open access obligations introduced under the State Aid requirements. This is because, when acting under the SMP framework, NRAs will need to assess whether the State Aid recipient involved has SMP, using the required criteria in the Regulatory Framework, and which access obligations are appropriate and proportionate to address SMP. The relationship between access obligations imposed under State Aid rules and SMP access obligations following a market analysis (or imposed under article 12 FD and article 5 AD of the framework) will likely be focused more in the upcoming revision of the State Aid Guidelines. This would include clarification of pricing issues.²³

Finally, the new Guidelines should make clear that when the SMP operator is subsidised to modernise its network, for example when rolling fibre out to the cabinet, SMP obligations have to be replicated on the new access points and

²² This may also relate to the principle of the separation of regulatory and operational functions as referred to in the Framework Directive at whereas 11 and at Article 3...

²³ BoR (11) 05, p. 39.

that the subsidy should also indirectly benefit to third party operators, for example in incentivising current (and future) unbundlers at a node to unbundle the new lower access points, in order to preserve the current level of competition and third party investments and to foster competition in the retail market