



**BEREC Opinion on the draft revision of the EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks**

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## A. Introduction

1. BEREC welcomes the opportunity to submit its input regarding the Draft Revision of the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (hereinafter: “Draft Guidelines”).
2. In recent years promoting the roll-out of next generation access (NGA) networks has been a major issue in the agenda of ERG/BEREC. 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<sup>1</sup>,
  - the Report on Implementation Issues and Wholesale Products<sup>2</sup>,
  - the Opinion to the Draft Recommendation on regulated access to Next Generation Access Networks<sup>3</sup> (NGA),
  - the Report on guidance on functional separation<sup>4</sup>
  - the Collection of factual information and new issues of NGA roll-out<sup>5</sup>
  - the Report on the Implementation of the NGA-Recommendation<sup>6</sup>.
3. With regard to the implementation of the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (hereinafter: “2009 Guidelines”) BEREC published the Report on “Open Access”<sup>7</sup>. This addressed the interpretations and implications of open access in the field of public funding and its relation to the regulatory framework. BEREC further participated in the public consultation exercise conducted by the Commission in 2011, with a BEREC Response to the Commission’s Questionnaire<sup>8</sup>.
4. At this stage, BEREC understands that the Commission recognises a close link between the coverage targets defined in Digital Agenda and the Europe 2020, on the

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1 ERG (07) 16rev2.  
 2 BoR (10) 08.  
 3 BoR (10) 25rev1.  
 4 BoR (10) 44rev1.  
 5 BoR (11) 06.  
 6 BoR (11) 43.  
 7 BoR (11) 05.  
 8 BoR (11) 42.

one hand, and the need for public support for the rapid deployment of future-proof broadband networks, on the other hand. BEREC agrees in so far that 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. This should not, however, be taken to imply that State aid should necessarily be used in all Member States. Emphasis should primarily be on reaching the targets set in the Digital Agenda through a market based approach to broadband and NGA roll-out.

5. Furthermore BEREC would welcome clarification from the Commission on the legal status of the DAE targets when assessing State aid measure.
6. BEREC welcomes the Commission's intention to ensure that State aid measures do not unnecessarily distort competition and support infrastructures that are pro-competitive. BEREC also supports the Commission's policy that "any state intervention should limit as much as possible the risk of crowding out private investments, of altering commercial investment incentives and ultimately of distorting competition to an unacceptable extent" (paragraph 4 of the Draft Guidelines).
7. Any State aid intervention aims to improve a market outcome by reducing the prices of certain services in the market such that demand for these services is stimulated. The purpose of State aid rules is to ensure that such an intervention is designed to minimise distortions to commercial investments/competition and trade between Member States - on the basis that the intervention should be targeted and proportionate, and combined with measures that maximise its benefits.
8. The above implies that any State aid scheme should be designed in such a way as to optimise its cost-benefit outcome, in the appropriate time horizon. For a State aid scheme in the telecom sector, the key trade-off is to be considered between:
  - The level of state aid required.
  - The positive impacts that the State aid measure has; on consumers, in the market (this includes considerations about the degree of sustainable downstream competition that can be achieved depending on the access products imposed) and in the wider economy.
  - The negative impacts that the State aid measure has on existing commercially investments and competition and likely future commercial investments and

competition (this includes considerations about how future-proof the investment is).

9. BEREC considers that any State aid schemes should have wholesale access obligations attached to them, designed to ensure the best outcomes in terms of delivering sustainable downstream competition. These are the efficient long-term outcomes, defined as the welfare-maximising resource allocation, in the time horizon in which the most important investment decisions are made. When designing the State aid scheme, long-term efficiency should be sought by imposing the right set of wholesale access obligations, i.e. the set of wholesale access obligations that ensures the best trade-off between promotion of sustainable downstream competition, the level to which the type of network being rolled out is future-proof, and additional cost.
10. BEREC welcomes the Commission's intention to ease administrative burdens and to increase legal certainty. BEREC shares the aim of the Commission to foster the development of the single market by contributing to regulatory certainty and improving consistency in the application of the European Regulatory Framework. In this regard, BEREC sees the use of the sector-specific regulatory vocabulary, when not directly referring to the regulatory framework (*market analysis (paragraph 41 of the Draft Guidelines)*, *cost orientation (paragraph 67h of the Draft Guidelines, etc.)*), as a potential source of serious confusion (see also Rec. 27). BEREC strongly recommends not using this vocabulary outside of its original context.
11. It has to be noted that all references made to the draft guidelines are to the English PDF version submitted by the European commission. BEREC draws the Commission's attention to the inconsistencies found between digital file formats and between languages (e.g. numbering of footnotes and section).

## **B. Regarding the role of NRAs' in State aid cases**

1. Regarding the potential role of National Regulatory Authorities (NRAs) within State aid measures, BEREC already stated in its Report on "Open Access" that, by virtue of its position and role as a regulatory body, the NRA will 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 State Aid Granting Authority (SAGA) and the NRA, to the benefit of the overall process.<sup>9</sup>

2. While some NRAs actively participate in the design of State aid measures prior to their notification to the Commission or under the existence of notified State aid framework schemes, it is important to recognise that in many Member States NRAs lack the legal basis for an active involvement, partly due to differences in national legislation, partly due to the fact that the regulatory framework itself does not provide such a legal basis.<sup>10</sup>
3. In its Response to the Questionnaire, BEREC noted that, although the 2009 Guidelines refer to the role of the NRAs within the State aid process, they did not clearly specify it. In State aid cases regarding NGA networks, the 2009 Guidelines state that Member States should consult the NRA for setting the conditions for wholesale network access or that they could require that the 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 notification<sup>11</sup>.
4. When considering the requirement for NRAs to approve or set access conditions for subsidized networks, BEREC raised some aspects (other than the lack of a legal basis) that might appear as potentially significant barriers to this role<sup>12</sup>:
  - A lack of visibility of State aid cases to NRAs and the fact that the extent to which the SAGA takes the view of the NRA into account is unclear.
  - Lack of suitable resource to monitor all the regional and local deployments involving State aid or to contribute to the assessment of access remedies.<sup>13</sup>
  - The NRAs' independence is essential to their effectiveness, and could be put at risk by an excessive involvement in investment-related decisions and in adjudication processes outside of their exclusive remit.

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<sup>9</sup> BoR (11) 05, p.19.

<sup>10</sup> BoR (11) 05, p.15; BoR (11) 42, p.20.

<sup>11</sup> BoR (11) 05, p.15.

<sup>12</sup> BoR (11) 05, p.15.

<sup>13</sup> BoR (11) 05, p.39.

- The need to ensure consistency between the future involvement of NRAs and the design of the revised Guidelines<sup>14</sup>.
5. BEREC recognises that the Draft Guidelines took into account some of these issues. However, there are still some uncertainties or inconsistencies with regard to the revised role of NRAs. In this document BEREC will give further input to:
- The general legal and practical implications of any NRA involvement (rec. 6 following)
  - NRA involvement with regard to the identification of target areas (rec. 14 following)
  - NRA involvement with regard to the design of wholesale access conditions (rec. 18 following)
  - NRA involvement with regard to the design wholesale access prices (rec. 31 following)
  - NRA involvement with regard to dispute settlement (rec. 42 following)
  - Guidelines as a best practice (rec. 46 following)

#### I. General legal and practical implications of any NRA involvement

6. From paragraph 41 of the Draft Guidelines BEREC understands that the Commission believes that NRAs should be involved in State aid measures in relation to broadband, regardless of whether the measure aims at the deployment of basic broadband or NGA. The Draft Guidelines suggest that NRAs shall assume a role with regard to the identification of target areas, the design of wholesale access and prices and the settlement of disputes.
7. In its Response to the Questionnaire, BEREC drew attention to the fact that such an involvement can be highly resource-consuming, especially when State aid measures take place on a very regional or even local level. Against this background BEREC is pleased to see that the Commission encourages Member States to provide NRAs with adequate staffing and resources (paragraph 41 of the Draft Guidelines).
8. The New Guidelines further encourage Member States to provide an appropriate legal basis for the involvement of NRAs in State aid broadband projects where necessary (paragraph 41 Draft of the Guidelines).

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<sup>14</sup> BoR (11) 42, p.20.

9. If the Commission wants NRAs to be materially and effectively involved in the Design of State aid Schemes, it is of utmost importance for NRAs to have a legal basis. A proper legal basis is a *condicio sine qua non* for NRAs to issue binding opinions that SAGAs would have to take into account. Furthermore without a proper legal basis NRAs may face severe difficulties in receiving the information and data needed for a proper assessment of the State aid measure.
10. Given that a legal basis is necessary for any NRA involvement, BEREC understands the need to provide NRAs with an appropriate legal basis “where necessary” (paragraph 41 of the Draft Guidelines). It is a concern, however, that a mere encouragement to provide a legal basis might not be sufficient to achieve an effective and consistent NRA involvement throughout the Member States. Therefore, BEREC suggests considering the integration of such a mandate for NRAs in the next framework revision.
11. Regarding the lack of awareness of State aid cases, BEREC considers the sharing of information between the Commission, the NRA and Member States to be of utmost importance. BEREC believes that the NRAs must be made aware of all the schemes that are in progress in their own Member State, irrespective of whether they have competences in the scheme or not. However, it should be clear that where the NRA doesn’t have any legal role to play within a scheme, it will not be required to act upon such notification.
12. Closer collaboration between the European Commission and Member States requires more coordination between both parties. BEREC considers that the Commission should make sure that Member States inform their independent NRAs concurrently to the notification to the Commission on a broadband scheme (either basic or NGA). If the NRAs have the legal basis thereto, they will send their point of view on the given scheme to all relevant parties.
13. BEREC would also welcome a confirmation that the National Regulatory Authorities mentioned in the Guidelines are effectively the National Regulatory Authorities in the sense of article 3.3.a of the Framework Directive (FD). As authorities in charge of ex ante market regulation, the NRAs possess a specific expertise with regards to setting wholesale access conditions and prices, and with regard to solving disputes between operators.

## II. NRA involvement with regard to the identification of target areas

14. BEREC understands that the Draft Guidelines envisage NRA involvement with regard to the identification of target areas (paragraphs 41, 67a-b of the Draft Guidelines). In this sense, Member States are held to clearly identify the target areas whenever possible and in cooperation with the competent national bodies, such as the NRAs.
15. In its Response to the Questionnaire BEREC stressed that any future involvement of NRAs should be consistent both with the Draft Guidelines and with the Regulatory Directives.<sup>15</sup> According to Draft Guidelines it is the SAGA – not the NRA – who is responsible for the definition of target areas. While the NRAs' broad sector-specific experience is likely to inform the interaction between the SAGA and the NRA, to the benefit of the overall process<sup>16</sup>, it is important to understand that NRAs often have no expertise with regard to the design of target areas. Therefore the appropriateness of NRA involvement depends on the national institutional context. BEREC already stressed that, 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 will regulate in the long term. While an information role for the NRAs is likely to contribute to the consistency of sector-specific and competition policies, they might not have to advocate or oppose the production of infrastructures.<sup>17</sup>
16. It is also in this context that the Draft Guidelines inappropriately use sector-specific regulatory vocabulary, such as 'market analysis' (paragraph 41 of the Draft Guidelines). The definition of target areas is not comparable with the market analysis as implemented in the Regulatory framework. The two concepts follow different approaches and methodologies. A market analysis, according to the regulatory framework, contains a definition of relevant markets and the designation of an SMP operator, if applicable, - in order to impose proportionate remedies on the basis of present market conditions and their foreseeable evolution in the near future. By contrast, the definition of target areas would require an assessment of the future demand for capacity.

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<sup>15</sup> BoR (11) 42, p.20.

<sup>16</sup> BoR (11) 42, p.19.

<sup>17</sup> BoR (11) 42, p.25.

17. Furthermore, NRAs often have no specific expertise in gathering data for defining areas as “white”, “grey” or “black”. Such an assessment on behalf of the SAGA would require data on regional or even very local coverage which not all NRAs hold. Since SAGAs know the local circumstances and stakeholders, they may in many cases be in a good position to gather such local data. Altogether, the practicability of NRA involvement depends heavily on the national legal context and on the size of the actual target area.

### III. NRA involvement with regard to the design of wholesale access conditions

#### *Design of wholesale access conditions*

18. The Draft Guidelines hold third parties’ effective wholesale access to be an indispensable component of any State aid measure in relation to the deployment of broadband infrastructure (paragraph 67g of the Draft Guidelines). BEREC agrees with this view and holds it as essential to achieving the objective of developing sustainable competition in the target areas. In this regard, the Guidelines should aim at fostering on subsidised networks the level of competition already achieved on existing (basic broadband) networks. Therefore, the migration of current access seekers is important for the success of State aid measures. BEREC assumes that an alignment of State-aid-related access products to access products that are already used in the particular area or imposed by the NRA on the basis of the regulatory SMP framework might facilitate the migration of operators to the subsidised network. Furthermore, such alignment shall ensure that if not uniform, at least very similar access conditions will apply throughout all broadband markets identified by the NRA<sup>18</sup>.
19. BEREC shares the objective of the Draft Guidelines to require full and effective unbundling (paragraph 76b of the Draft Guidelines) and invites the Commission to remain ambitious in its pursuit. However, BEREC would like to point out the fact that the effectiveness of full unbundling strongly depends on the number of lines that can be accessed from the access point, where physical unbundling is offered.
20. BEREC notes that, while keeping an ambitious requirement of full and effective unbundled wholesale access, in paragraph 67g the Draft Guidelines recognise the importance of proportionality, and in particular that “in rural areas with low population density, where there are limited broadband services, the imposition of all types of

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<sup>18</sup> Formerly laid down in paragraph 79 second indent 2009 Guidelines.

access products might disproportionately increase investment costs without delivering significant benefits in terms of increased competition.” BEREC approves the logic of proportionality, in accordance with the principles of the European Union. In this regard, the Commission and SAGAs must ensure that all the rights and obligations of State aid beneficiaries are proportionate. In the most ‘typical’ cases, a standard (proportionate) range of obligations may be imposed, which will serve the sustainable competition objectives best. In some cases, however, a formal proportionality analysis will have to be conducted by the SAGA (see rec. 22). This requires clear criteria and a high level of expertise.

21. BEREC notes that it is important for the subsidised operator to have a clear understanding of the range of access products to be offered. Therefore, any State aid decision of the SAGA has to impose a definite range of access products on the subsidised operator. BEREC believes that it may be operational for SAGAs to take the relevant subset of the list of access products in Annex 2 of the Draft Guidelines as their standard set of access products. This should take into account both the possible set of access obligations that could be imposed under the sector specific SMP regulation and certain limitations deriving from specific technologies or architectures, where in fact the access obligations may be by default lower than the access obligations imposed on the SMP operator.
22. Where the standard set of access products does not appear to be proportionate to a project’s circumstances, the Draft Guidelines suggest that (in rural areas with low population density) the SAGA might consider limiting the set of access products imposed on the beneficiary within a formal proportionality analysis. Yet, BEREC notes that State aid measures supporting broadband rollout will in most cases be targeting such rural areas with low population density. Therefore, it is suggested to further clarify what kind of criteria the Commission envisages that would justify the reduction of access products within the SAGA’s State aid decision when assessing proportionality.
23. BEREC believes that in typical cases the access obligations imposed should not go below the access conditions currently imposed on a SMP operator, for a comparable network. However, specific circumstances in rural areas will sometimes justify imposing access obligations that differ from what the operator with SMP has to provide in the particular Member State. A proportionality analysis would be necessary

to assess whether the access products still allow for an effective competition on the retail market. In BEREC's view, it can generally be assumed (in absence of evidence of the contrary) that competition can only be effectively ensured if the set of access obligations includes, at least, a passive and an active product in order to benefit to a variety of competitors. Additionally, given the high level of expertise required by a formal proportionality assessment and the importance of uniform or at least similar access conditions throughout broadband markets, BEREC suggests that SAGAs should consult NRAs when conducting the proportionality assessment

24. BEREC is also aware of the fact that when the subsidy is given to a passive-only network, it may be justified that the operator of the passive-only network would not have to offer an active product by itself. However, in order to ensure effective competition on the retail market, BEREC believes it to be crucial that, in these situations, an active product is offered when the passive-only network is activated. Since such a transfer of access obligations can be considered to be highly valuable in strengthening effective competition, it would be preferable, if the Commission also included it in the main text and not in footnote 105 Draft Guidelines. However, BEREC believes that the final guidelines should state more precisely that these access obligations should apply only to operators directly benefitting from access rights to a subsidised passive infrastructure (i.e. operators granted access to ducts or passive lines), and not to operators relying on *bitstream* access provided by another third-party operator (as might be implied by paragraph 12 of the Draft Guidelines).
25. It is also important to see that the actual choice of access products can have significant impact on the effectiveness of competition on the retail market. The assessment of these impacts requires an extensive expertise in this sector. Furthermore, any non-standard set of access obligations carries the risk of strongly interfering with the consistency of the national access regime. Therefore, BEREC considers it as a necessary condition that the NRA checks (on a proper legal basis), whether the non-standard set of access conditions foreseen in the SAGA's State aid decision would be acceptable under the terms of effective competition and consistent with national access regimes.
26. Furthermore, BEREC holds it crucial that the actual range of access obligations possible has to be foreseeable for the subsidised operator. Therefore, in such rural areas the SAGA's State aid decision could legitimately impose a limited set of access

obligations including a certain set of access obligations that have to be provided in any event<sup>19</sup> and access products that have to be offered on reasonable demand only. The latter could only be imposed under the following conditions:

- The State aid decision includes a corresponding caveat that clearly describes which access product could be subject to such a demand.
- In addition to the conditions proposed by the Draft Guidelines the request is only deemed to be reasonable if (i) the costs incurred by the network operator (including a fair share of common costs, after deduction of subsidies) are fairly recovered and if (ii) the access product will effectively lead to more competition on the market where there has been a market failure addressed by the State aid measure and without excessive distortions to adjacent markets.

27. Since that State Aid Guidelines and the regulatory framework can be imposed in parallel, BEREC holds that the NRA may impose access obligations, independently from the subsidy, if justified according to the regulatory framework, regardless of the fact whether these obligations have been included in the SAGA's State aid decision or not.<sup>20</sup>

*Duration of wholesale access conditions*

28. With regard to the duration of wholesale access obligations, to both basic broadband and NGA infrastructures, the Draft Guidelines (paragraphs 67g, 76b) foresee that wholesale access should be granted as early as possible before starting the network operation thus generally implying that access should be granted at least 6 months before the launch of retail services (footnote 93 Draft Guidelines) and should last for a period of at least seven years for active infrastructure components and without any limitation in time for access to passive infrastructure elements (footnote 90 Draft Guidelines).
29. 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 7 year period would appear to be the minimum period for which access obligations should be

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<sup>19</sup> According to the formal proportionality assessment described above.  
<sup>20</sup> BoR (11) 42, p.25.

imposed<sup>21</sup> but would also allow for a longer period of access obligations. In order to ensure legal certainty, BEREC considers it to be important that the State Aid decision gives a clear notion of the duration of the access obligation (i.e. 7 years or others).

30. The Draft Guidelines further state that, when the State aid access obligations terminate the NRA should extend the access conditions if the operator is found having a SMP (paragraphs 67g, 76b of the Draft Guidelines). BEREC welcomes the improvements introduced by this new wording, which takes into account previous BEREC's statements, where BEREC underlined that access obligations imposed on the beneficiary of the aid can only be (re-)imposed by the NRAs under the applicable Regulatory Framework.<sup>22</sup> This may or may not occur at the same time as the State aid requirements come to an end. In theory, SMP obligations may even be imposed during the state aid obligations period, BEREC suggests to remove the assertions "at the end of the seven years period" (paragraph 67g of the Draft Guidelines) and "after the expiry of that period" (paragraph 76b of the Draft Guidelines). Furthermore, 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<sup>23</sup>. Consequently, regulatory obligations need not necessarily replicate (and thus "extend") the State aid obligations introduced under the State aid requirements.

#### IV. NRA involvement with regard to the design wholesale access prices

31. In paragraph 67h the Draft Guidelines make provisions for the pricing of wholesale access in order to ensure the compatibility of a subsidised network with the internal market. The Draft Guidelines follow several methodological approaches when assessing the reasonable wholesale access price, implying that the main goal of subsidies is to "replicate market conditions like those prevailing in other competitive broadband markets". Therefore, a price reference is needed; the Commission describes three situations for the SAGA to find the correct reference:
- The first situation is a reference to prices available in more competitive areas for comparable access products (in the whole European Union), a benchmark of

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<sup>21</sup> BoR (11) 42, p.16.

<sup>22</sup> For more detail see BoR (11) 05 p.17, BoR (11) 42, p.16.

<sup>23</sup> BoR (11) 42, p.25.

such publicly available prices should be the upper limit of wholesale prices (see footnote 97 Draft Guidelines).

- In a second scenario, where there are no published prices available, the Commission proposes the “prices already set or approved by the NRA (that is the regulated price) as the reasonable reference when setting wholesale access prices. In addition, according to the Draft Guidelines, in grey areas the wholesale price should not be lower than the regulated prices set by the NRA (see footnote 98 Draft Guidelines).
  - Finally, the Commission considers a third scenario where neither references could be found and states that in such cases, the design of wholesale prices should “*follow the principle of cost orientation*” (paragraph 67h of the Draft Guidelines).
32. Firstly, at a very general level, BEREC is concerned that there is no flexibility for Member States to choose the proper methodological approach to reach the goals of non-discriminatory wholesale access prices and a frugal use of state money that fits its national situation. It is important to see that the Draft Guidelines are built upon a collection of specific notified State aid measures that may not cover all specific national situations. The Guidelines should therefore refrain from establishing national solutions in addressing these three scenarios as a best practice since this may significantly reduce the options for Member States to find a design of State aid measures that fits best the regulatory, technological and economical situation on the national electronic communications sector.
33. Furthermore, BEREC believes that, the Draft Guidelines should provide the necessary means to ensure that the design of wholesale access prices consider the following rationales:
- to be both non-excessive and non-discriminatory;
  - to avoid unnecessarily distorting/undermining commercial investments;
  - to have a coherent system of prices for the various access products;
  - to reflect both the costs of roll out and the amount of state aid needed.

Regulated prices or publicly available market prices could be important indicators for determining the appropriate wholesale access prices, nevertheless other proper methodological approaches and the concrete procedure for setting the prices (i.e. as part of the tender, the State aid decision, dispute settlement) may also be relevant. In order to ensure both consistent and fair, non-discriminatory prices, BEREC considers that SAGAs should have to consult the NRA when they set wholesale access prices.

34. Furthermore, it must be stressed that the envisaged provision on wholesale access prices may still be unclear on a number of important points and thus might not be sufficient to provide greater legal clarity. These concerns primarily relate to the use of the term of “cost orientation”, the consistency of access prices and the suitability of the price limits introduced in the first two scenarios and the actual players and process of the price setting.

*The term “cost orientation”*

35. While it is certainly true that wholesale access prices have to consider the actual costs of roll-out, it is important to see that the term “cost orientation”, within the EU regulatory framework, refers to a methodological approach of cost accounting and/or cost modelling of a given network. BEREC believes that, for small, subsidised networks serving only some hundred end-users, such a requirement could be an inappropriate burden. Therefore BEREC suggests not using the term “cost orientation” in the Draft Guidelines but instead to emphasise that, in the absence of reference prices, the wholesale access prices should reflect both the costs of rolling out and the level of State aid received.

*The consistency of access prices*

36. Another issue that should be addressed in the Guidelines is the importance of a consistent price system. Paragraph 67h of the Draft Guidelines simply stresses that “wholesale access prices should be based on the pricing principles set by the NRA”. Firstly, when strengthening effective competition, it is important to ensure that potential access seekers do not face different pricing regimes. Instead, in order to make their business cases predictable and reliable, prices would have to be consistent on a national level. This gains considerable importance in the context of today’s remedies which are increasingly (explicitly or implicitly) differentiated between different geographical areas. This is due to the variety of local market conditions and,

most importantly, the divergence between densely populated and less densely populated areas in terms of access points and prices<sup>24</sup>.

37. Equally, wholesale access prices should be part of a consistent system in itself, according to the ladder-of-investment principle. This implies a consistent application of costing methodologies and pricing principles across different wholesale products as otherwise margin squeeze situations or inefficient entry may occur. This applies equally between wholesale products as well as between wholesale and retail products.<sup>25</sup> It would be valuable that the final Guidelines explicitly underline this point.
38. Finally, if no specific wholesale prices were set in the State aid decision, the SAGA should introduce a general obligation on the subsidised undertaking to offer wholesale access at fair and non-discriminatory prices that allow the efficient third party operator to replicate the retail prices of the infrastructure operator. Such a fair and non discriminatory price could then be negotiated by the selected undertaking and the access seeker in the first place. In case of conflict, the access seeker would still be able to turn to the entity in charge of dispute settlement (i.e. SAGA or NRA, if there is legal basis) and to ask for a final decision on the appropriate access price. Such a process would allow for a mutually agreed price and would create administrative burdens only in those situations where there is an actual conflict between the undertaking and the access seeker.

#### *The suitability of the price limits introduced*

39. BEREC is also concerned about the price levels introduced for the first two scenarios mentioned in rec. 31; where there are reference prices against which the actual wholesale price could be benchmarked. BEREC understands that the rationale is to limit, to the minimum, the required level of subsidy on the one hand and to care for non-excessive wholesale prices on the other. In many cases these goals may be effectively reached by the footnotes-proposed pricing limits.
40. However, there may be situations where these aims are contravened by the limits set in the Draft Guidelines. For example, the actual costs of rolling out might be higher than what is currently allowed for by publicly available wholesale prices (footnote 97

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<sup>24</sup> See BEREC Report on the Implementation of the NGA-Recommendation BoR (11) 43, p.106.  
See ERG Report on Next Generation Access - Economic Analysis and Regulatory Principles ERG (09) 17, p.17.

Draft Guidelines). Therefore, considering the early stage of market-driven NGA rollouts, these prices may not necessarily describe the highest efficient price market players could absorb. Consequently, prices higher than this upper limit may still be efficient prices and contribute to diminishing the level of State aid required. Furthermore where State aid has been approved by the Commission, in order to solve an established wholesale market failure, for networks providing no more than the same qualitative features as the existing SMP network, a regulated price, as a minimum price level (footnote 98 Draft Guidelines), would set no incentives to use the subsidised wholesale network in grey areas. In such exceptional cases the price may need to be below the regulated price.

41. Finally, neither the process nor the player that has to design the access pricing is sufficiently clear. While paragraph 67h of the Draft Guidelines seems to oblige the SAGA to set the access prices, it also suggests that the benchmarking criteria should be clearly described in the tender process, thus shifting the design of the access products and pricing to the bidders. It is important to see that such approach would only lead to effective pricing, if a competitive tender could be expected. BEREC is worried that the Guidelines do not cover situations where only one bidder participates in the tender process. Against this background it remains unclear at what stage the prices would have to be set, by which player the prices would have to be set and what role the NRA actually is supposed to play. BEREC invites the Commission to discuss how it plans to deal with a situation in which the tender would not be competitive.

#### V. NRA involvement with regard to dispute settlement

42. With regard to the involvement of NRAs in the settlement of disputes, BEREC notes that the Draft Guidelines merely foresee a certain involvement within paragraph 41 of the Draft Guidelines. BEREC therefore would like to reiterate that, according to Article 20 of the Framework Directive, NRAs 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.

43. 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 proper implementation of the State aid access rules,<sup>26</sup> the enforcement of which may be the role of other jurisdictions.
44. 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.
45. 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.

#### VI. Guidelines as a best practice

46. In paragraph 41, the Draft Guidelines propose that NRAs should, as best practice, publish guidelines for local authorities (including recommendations on 'market analysis', wholesale access products and pricing) to increase transparency and ease the administrative burden on local authorities. Furthermore, once having released Guidelines it is suggested that NRAs would not have to analyse each State aid case individually (see footnote 53 Draft Guidelines).
47. BEREC understands that a clear communication process between SAGAs and NRAs could help the SAGA to benefit from the specific expertise that NRAs have achieved in the broadband sector and that such a communication process could take place in certain cases by using general NRA recommendations. However, they should not be considered as a "best practice" :
- In the context of framework schemes there are already several general recommendations deriving from both the Commission's State aid Guidelines

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<sup>26</sup> BoR (11) 05, p.16.

and the framework scheme, which should have been designed with the assistance of the NRA. The benefit of an additional set of general Guidelines from the NRA might therefore be lower compared to an individualised communication process on a case by case basis between the SAGA and the NRA where BEREC has considered a NRA involvement to be needed (see rec. 23 and 33).

- Equally, if SAGAs are expected to abide by their NRA's Guidelines, these NRA Guidelines would have to be grounded on a proper legal basis either on a national level or within the next framework's revision.

## **C. Further Remarks**

### **I. NGA definition**

48. 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.
49. 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.

### **II. Use of Existing Infrastructures and Infrastructure Mapping**

50. Paragraph 67f of the Draft Guidelines expands on the provisions of paragraph 51e of the 2009 Guidelines. The new proposals introduce an obligation for any bidder, successful or not, to inform the SAGA of any existing infrastructure in their possession and to grant the successful bidder access to this infrastructure, along with all the

relevant information and assistance. The paragraph also asks Member States to set up geographic databases on this type of infrastructure.

51. Making existing assets available to all bidders would contribute to making the investment more efficient, potentially reducing the need for State aid. BEREC notes that this desirable effect is only achievable if the process does not deter the owners of re-usable assets from bidding. In some Member States comparable obligations are already imposed on the incumbent on the basis of SMP obligations. Other operators, however, might be reluctant to enter into tendering proceedings when this is tied to access obligations they would not have to fulfil otherwise.
52. BEREC also notes that the proposals may pose implementation difficulties, especially because they may imply transfers of property rights, including rights to information, for which the legal basis does not necessarily exist in all Member States.
53. Regarding the information of any existing infrastructure (paragraph 67a), the Draft Guidelines follow the idea of an infrastructure database as mentioned within the NGA Recommendation. While BEREC generally agrees that a database containing information relating to the SMP operator's civil infrastructure is quite valuable<sup>27</sup>, it has to be noted that the Draft Guidelines go too far when saying that Member States "should" build up such databases (paragraph 67f of the Draft Guidelines). If the Commission introduced a *de facto* obligation to implement a national infrastructure database by its decision making practice in State aid measures, this might disregard the principle of subsidiarity. Instead, the imposition of such obligation would require a change of the legal framework. BEREC therefore recommends that the Draft Guidelines do not go beyond the Commission's NGA Recommendation.
54. Furthermore, the Draft Guidelines suggest that the result of the infrastructure mapping exercise should be submitted to a public consultation (paragraph 67b of the Draft Guidelines), which might raise serious confidentiality concerns: the location of an undertaking's physical assets would usually be trade secrets. Again it is unclear what impact such an obligation might have on the willingness of undertakings to participate in a tender.

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<sup>27</sup> BoR (11) 43, p.24 ff.

III. Regarding the impact of the Draft Guidelines on existing notification measures

55. In paragraphs 83 and 84 of the Draft Guidelines, Member States are encouraged to amend existing and notified framework schemes “in order to bring them into line with the provisions on transparency and wholesale access provisions (...) of these Guidelines within twelve months after its publication”. BEREC notes that, while such an adaption may be sensible for future State aid measures under the notified schemes, it is unclear on what legal basis such adaption of already notified measures could be justified. Equally, with regard to pending State aid measures, it would have to be ensured that such adaption should never distort investment decisions or even ignore concluded contracts that may already made at this time.

IV. Regarding the format of the draft guidelines

56. The Draft Guidelines express many material aspects in footnotes only. While BEREC recognises that this leads to a shorter version of the Guidelines, it also doubts whether such a structure improves the readability and clarity of the document. It is therefore strongly recommended to use the footnotes for reference purposes only and to include the material messages in the main text.
57. BEREC notes that the Commission's document main division remains (I) “basic broadband networks and (II) “NGA networks”, but NGA networks are now subdivided in (a) “interim NGA networks” and (b) “future-proof NGA networks. Furthermore within the latter are distinguished “ultra-fast broadband networks” (which simply relates to FttP networks). Each of these categories or subcategories is associated with different definitions and different constraints. They are also located in different parts of the document. BEREC appreciates that the different categories correspond to different market situations that need to be addressed appropriately. However, BEREC notes that the resulting text is somewhat complex and open to interpretation, suggesting that it would perhaps be possible to improve the text’s consistency and practicality. BEREC recommends that when assessing, the throughput characteristics of each given technologies on the one hand, the Commission should, on the other hand, equally assess the corresponding wholesale competitive virtues.
58. BEREC would therefore encourage the Commission to improve the structure of the document. A possible way to do this would be by making more explicit what constitutes

a "step change" (paragraph 48 of the Draft Guidelines) and by referring more clearly to that notion. The different categories could therefore be presented as applications of that notion which would clarify the State aid criteria attached to them.

59. Finally, BEREC would welcome if the Draft Guidelines explicitly stated that a SGEI network bears the same obligations as a comparable State aid network, including the role of the NRA. In addition, BEREC suggests discussing SGEI provisions after the State aid section. This would even more clarify that excepted the general exemption of notification, SGEI should verify the same criteria as those verified for ensuring the compatibility of a comparable State aid network (paragraphs 67, 72, 78 of the Draft Guidelines).