

BEREC's Review of the Common Positions on wholesale local access, wholesale broadband access and wholesale leased lines

BEREC report on the results from the public consultation

26 November 2012

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Review of BEREC CPs on WLA, WBA and WLL – stakeholder responses

Introduction

1. In 2006 and 2007 the European Regulators Group (ERG) developed three Common Positions (CPs) covering the following key wholesale access products – wholesale local access (WLA)¹, wholesale broadband access (WBA)² and wholesale leased lines (WLL).³
2. In 2012, and as set out in its Work Programme⁴ (WP), BEREC started the process of reviewing and updating the above three CPs. BEREC adopted a two stage approach:
 - **Stage 1:** As a first step in the review process, on 1st March BEREC published a consultation on the high level principles relating to issues of **non-discrimination**⁵ (*First Consultation*). During the one-month consultation period BEREC also held a public workshop with interested stakeholders. This consultation closed on 30th March.
 - **Stage 2:** As a second step in the review process, on 27th September BEREC launched a second public consultation which focussed on the **three draft revised CPs**⁶ (*Second Consultation*). Alongside the revised CPs, BEREC also published a short document summarizing the stakeholder responses to BEREC's First Consultation on issues relating to non-discrimination. In this document, BEREC briefly explained how it had taken stakeholder comments into account with reference to the revised CPs and the best practices listed therein.
3. The Second Consultation closed on 18th October and BEREC received **12** responses from the following organisations:
 - Alcatel-Lucent
 - AIIP (Italian Internet Service Providers Association)
 - British Telecom (BT)
 - ECTA
 - ETNO
 - Federation of Communication Services (FCS)⁷

¹ ERG (06) 70 Rev 1 Common position on Wholesale local access.

² ERG (06) 69 Rev 1 Common position on Wholesale broadband access.

³ ERG (07) 54 Common Position on Best Practice in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines

⁴ http://berec.europa.eu/eng/document_register/subject_matter/berec/annual_work_programmes/127-2012-berec-work-programme

⁵ http://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/67-berecs-review-of-the-common-positions-on-wholesale-unbundled-access-wholesale-broadband-access-and-wholesale-leased-lines-stage-1-high-level-principles-on-on-discrimination

⁶ http://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/1010-introductory-document-to-berecs-review-and-update-of-the-common-positions-on-wholesale-local-access-wholesale-broadband-access-and-wholesale-leased-lines

⁷ FCS represents over 320 businesses delivering products and services in the UK via wireless, copper and fibre technology. More than 180 FCS members consume WLR and related wholesale products to deliver services to end user customers.

- KIGEIT
 - SALAR (The Swedish Association of Local Authorities and Regions)
 - Stokab
 - Telecom Italia (TI)
 - Vodafone
 - A confidential respondent
4. The aim of this document is to provide a high level summary of the stakeholder responses and briefly explain how BEREC has taken these into account when finalising its CPs.
5. You can find the final version of the CPs [here](#)

Summary of stakeholder responses

6. For competition to flourish there needs to be reasonable certainty that new and existing operators are able to compete on a level playing field. As discussed in the draft BEREC CPs, this implies that effective regulatory measures are in place to ensure the following key competition objectives:
- Objective 1: Assurance of access;
 - Objective 2: Assurance of co-location;
 - Objective 3: Level playing field;
 - Objective 4: Avoidance of unjustified first mover advantage;
 - Objective 5: Transparency;
 - Objective 6: Reasonable quality of access products – technical issues;
 - Objective 7: Reasonable quality of access products – operational issues;
 - Objective 8: Assurance of efficient and convenient wholesale switching processes;
 - Objective 9: Assurance of efficient migration processes from legacy to NGA/NGN networks; and
 - Objective 10: Fair and coherent access pricing.
7. Below we provide a high level summary of stakeholder responses against the competition objectives and associated best practice (BP) remedies recommended by BEREC in its revised CPs.

General comments

8. Some stakeholders commented on the scope of the CPs: for example, **FCS** noted that it would be helpful to set some high-level definitions of what constitutes Significant Market Power (SMP) and pointed to cases of “micro SMP” (e.g. a provider lays all the access infrastructure in a business park and then enters into a commercial agreement with the landlord to enjoy monopoly status in the provision of

services to subsequent users of that infrastructure). They were also disappointed that the scope of the review was not extended to cover wholesale models for mobile networks.

9. **BEREC** notes that a number of stakeholders have raised comments in relation to market analysis and market definition. **BEREC** reaffirms that the CPs provide best practice remedies for dealing with competition issues in the three relevant markets where a position of SMP has already been identified, complementing the general guidance given on choice of SMP remedies included in the ERG Common Position on Remedies.⁸ On this basis, issues relating to market definition/analysis are outside the scope of the revised CPs.
10. Furthermore, the scope of **BEREC**'s review was set from the outset to only include the three CPs on WLA, WBA and WLL. The reasons for this are two-fold. Firstly, these CPs were originally agreed by **BEREC**'s predecessor (the European Regulators' Group, ERG) in 2006/07 and an urgent review was required to reflect technological and regulatory changes that have happened since. Secondly, and as a matter of priority, the CPs focus on markets susceptible to ex-ante regulation as set out in the Commission's Recommendation 2007/879/CE, which relate to fixed markets.
11. Some stakeholders (**ETNO** and **Vodafone**) also called for **BEREC** to complete the revision of the CPs on the basis of the Commission's upcoming guidance on non-discrimination and costing methodologies to be adopted in 2013.
12. **BEREC** welcomed the Commission's initiatives from the outset and also responded to its questionnaires.⁹ Moreover, during 2012, **BEREC** worked closely with the Commission in order to create a seamless set of ideas across its CPs and the upcoming recommendation. **BEREC** sees great value in the speedy adoption of the revised CPs, which is also supported by the following factors:
 - The revised CPs cover a (wider) range of issues. They capture best practice remedies in additional areas such as assurance of access, transparency and technical quality. They apply equally across current and next generation networks. At the same time, they do not cover costing methodologies in detail, and only contain several best practices on cost orientation and margin squeeze tests.
 - While reviewing the CPs **BEREC** was careful to balance two main objectives: namely ensuring the revised CPs meaningfully contribute to both the consistency and quality of the remedies imposed by all European NRAs; while at the same time maintaining an adequate level of flexibility for NRAs to be able to reflect their national circumstances in the most appropriate way when designing their remedies (taking due account of relevant Commission Recommendations).
 - The revised CPs on WLA and WBA complement the Commission's NGA Recommendation, which NRAs are already expected take utmost account of.

⁸ ERG (06) 33 (Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework).

⁹ **BEREC** response to the Commission's questionnaire on non-discrimination

http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/131-berecs-answer-to-the-commissions-questionnaire-on-non-discrimination

BEREC response to the Commission's questionnaire on NGA costing methodologies

http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/132-berec-response-to-the-commissions-questionnaire-on-costing-methodologies-for-key-wholesale-access-prices-in-electronic-communications

- Most importantly, the revised CPs summarise best practice approaches based on the tried and tested experience of regulators which **BEREC** would like to disseminate amongst all NRAs sooner rather than later (and instead of relying on the current CPs which are outdated).

Objective 1: Assurance of access

Introduction

13. The discussions below cover BPs 1 to 15 (WLA CP), BPs 1 to 9 (WBA CP) and BPs 1 to 6 (WLL CP).

Summary of responses

General comments

General claims on access products

14. Concerning the imposition of an access obligation (BPs 1 to 3 WLA and WBA CPs), **ETNO** suggested that NRA should consider all competitive infrastructures, in particular also those based on cable and LTE. **AIP** considered (BP 2 WBA CP) that resale could not be considered a wholesale access product and that access should always include regional access.
15. **BEREC's** view is that the definition of the services to be covered by the assurance of access obligation should be based on detailed substitutability analyses that are carried out in the market analysis process. **BEREC** agrees that resale is not a bitstream product in Market 5 and BP 2 is drafted in a way which is consistent with this view. **BEREC** does not believe regional access should systematically be included in the wholesale access offers, as this should depend on national circumstances.

The ladder of investment and infrastructure competition at the deepest level

16. **ETNO** rejected the ladder of investment (BP 2 WBA/WLA/WLL CPs) approach, on the basis of the insufficient level of infrastructure based competition it had allowed to achieve. **TI** questioned the relevance of the ladder of investment in an NGA context and mentioned symmetric regulation and co-regulation as better instruments to achieve investment.
17. A **confidential respondent** suggested that BEREC should encourage infrastructure sharing, as well as the deployment of competing infrastructures.
18. Rather than "*infrastructure competition at the deepest level where it is reasonable*", **BT** suggested that infrastructure competition should take place at the deepest level "*at which it will be effective and sustainable*".
19. **BEREC** has consistently been of the view that NRAs need to impose a proportionate set of wholesale access products, which is also relevant in the context of NGA¹⁰. BEREC also considers that the ladder of investment is still valid in an NGA environment. Different steps on the ladder have successfully developed in the

¹⁰ Cf. e.g. to the BEREC Report on the implementation of the NGA Recommendation, BoR (11) 43.

context of different Member States (MSs).¹¹ Regulated access at different rungs of the ladder promotes competition and investment, thus fostering a competitive NGA roll-out.

20. The confidential respondent's comments on infrastructure sharing are substantially covered in BP 2 (WLA CP), according to which the optimal remedy, or set of remedies, to a given competitive situation may not always require the replication of physical assets.
21. Concerning BT's suggestion, **BEREC** does not think a change of wording would be necessary, as "reasonableness" includes all the relevant criteria (e.g. technical feasibility, sustainability, effectiveness).

Restrictions on the type of use of access products

22. As a general claim (BPs 1 to 3 WBA/WLA/WLL CPs) **ECTA** argued that (WLA and WBA) wholesale inputs should be available without any restriction on the type of use made by the alternative operator. Similarly, a **confidential respondent** proposed (BP 1 WLA) that LLU or access to the terminating segment should be available to alternative operators "*for the purpose they may need, whatever this may be*". The same respondent further suggested that BEREC should add the following wording to BP 5 WBA "*In case of bitstream services, it is deemed necessary that the incumbent operator provide Altnets with maximum flexibility in terms of technical parameters*".
23. **BEREC** considers that, in general, access obligations imposed on the SMP operators should not restrict the usage of wholesale inputs by alternative operators, as long as the regulated products are made available to address specific market failures identified in the respective market analysis and are proportionate. The confidential respondent's point on technical parameters is addressed in BPs 17, 23 and 24 in the WLA CP. **BEREC** also notes that any disputes between the SMP operator and alternative operators on these issues can be settled by the NRA.

Access obligations and flexibility for the SMP operator

24. **ETNO** considered that an access obligation should not limit the technical flexibility of the SMP operator (BP 11 WLA CP, BP 7 WBA CP).
25. On this issue, **BEREC** is of the view that this flexibility should be bounded where it prevented the emergence of a level playing field, and considers that non-discrimination is crucial to achieving this objective.

Reasonable access requests

26. **ETNO** claimed that a general obligation to comply with any reasonable access request (BP 14 WLA CP, BP 8 WBA CP and BP 5 WLL CP) may introduce legal uncertainty and cloud the fact that regulated access should and can only be imposed by NRAs where this is necessary and proportionate under Articles 8 and 12 of the Access Directive (AD).

¹¹Cf e.g. to BEREC Report on the implementation of the NGA Recommendation, BoR (11) 43, Report on NGA: Economic Analysis and Regulatory Principles ERG (09) 17 and NGA- Implementation Issues and Wholesale Products BoR (10) 08.

27. Conversely, **ECTA** supported these principles and asked BEREC to stand firm by them. ECTA would like BP 8 (WBA CP) to be strengthened in case of refusal to respond positively to a given product specification request from an alternative operator, such that the SMP operator would be obliged to provide a detailed explanation of the reasons of such refusal, or a detailed description of any costs underlying a given solution (e.g. for double-play services in areas where LLU is not available, the combination of a WBA service and wholesale line rental as a joint alternative solution).
28. **BEREC** maintains that NRAs are best placed to decide whether an access request is reasonable. **BEREC** also remains convinced that a general access obligation ensures access is granted in a timely manner and is not gamed by the SMP operators.
29. As for ECTA's specific request, **BEREC** confirms that new product specification requests are dealt with through BP 9 in the WBA CP (and the relevant BPs in the WLA and WLL CPs).

Access requests for new products/services

30. Regarding access requests for new products/services (BP 14/15 WLA, BP 8/9 WBA and BP 5/6 WLL), a **confidential respondent** suggested that BEREC should specify that the SMP operator "*should anticipate information on capacity deployment*" and that requests for access should be granted in a pre-defined timeframe overseen by NRAs.
31. **BEREC** understands the concern of access seekers, which is partly addressed by BP 25, however providing more prescriptive guidance than those included in BPs 23 and 25 (WLA CP) would unduly restrict the commercial independence of SMP operators. **BEREC** expects incumbents to build adequate capacity, but also recognises that there is a limit to what they can reasonably anticipate.
32. A **confidential respondent** agreed on the proposed process for dealing with requests for new products/ services (BP 15a WLA CP, BP 9a WBA CP and BP 6a WLL CP) but suggested adding a principle that where new services are not yet included in the Reference Offer (RO), the SMP operator should be obliged to give adequate information to alternative operators well in advance.
33. For the avoidance of doubt, **BEREC** confirms that BPs 15a/9a/6a (WLA/WBA/WLL CPs) deal with the information that SMP players will require when asked to develop a new service for alternative operators. Other information requirements are dealt with through BPs 22/26c (WLA CP), BPs 16/21c (WBA CP) and BPs 13/16c (WLL CP).
34. **ECTA** fully supported the incorporation of new product and services into the RO (BP 15d WLA CP, BP 9d WBA CP and BP6d WLL CP). **BT** suggested that the condition "unless it is deemed not proportionate to do so, for example because market driven demand cannot be expected" should be supplemented by "*after due consideration by the NRA*", inserted after "*for example*". **BEREC** finds BT's point to be implicit in the current wording and therefore did not amend the BP in the manner suggested.
35. **ETNO** went further and rejected BP 15d (WLA CP), BP 9d (WBA CP) and BP 6d (WLL CP). **BEREC** confirms that these BPs deal with the provision of new services requested by alternative operators which can only be captured by existing access obligations if they are (part and/or full) substitutes to current wholesale services offered by SMP operators or the new wholesale service is needed to replicate a new

retail/downstream service offered by the SMP player. **BEREC** added a footnote to the CPs to this effect.

Feasibility of new products

36. **BT** believed the criterion of “feasibility” of new products (BP 15c WLA CP, BP 9c WBA CP and BP 6c WLL CP) may be too broad and interpreted as merely “technical feasibility”. According to BT, the list of criteria should therefore be expanded to also include “*commercial viability and related factors such as opportunity cost*”.
37. **BEREC** decided not to amend the wording of the CPs to address this point. The wording of this BP includes the possibility of refusal, on grounds which might include those put forward by BT.

Market specific comments

38. A number of stakeholders raised market specific comments which are dealt with below.

Specificity of CPs

39. Regarding the specificity of the CPs (BP 4, 14, 15c/d in the WLA CP; BP 4, 5, 8, 9c/d, 24 WBA; BP 4, 5, 6c/d), **TI** noted that in the current state of development, it did not find it necessary for the CPs to provide guidance on product characteristics, because they can be misleading, unclear and unfeasible. TI expressed a preference for solutions agreed between operators. **ETNO** further suggested (regarding BPs 6 to 13 WLA CP) that BEREC should not determine at EU level concrete operational details of access to FTTH / FTTN or civil engineering infrastructure.
40. **BEREC** considers that NRAs are best placed to determine the level of detail relating to the access product specifications which best suits their national circumstances.

Access to the unbundled local loop and to the terminating segment

41. On access to the unbundled local loop and to the terminating segment (discussed in the paragraph above BP5 WLA), **ETNO** expressed its concern that the wording “reaching from the end-user premises (including in-house wiring from the network termination point) to the first concentration point” risks extending possible regulation beyond the scope of Market 4.
42. **BEREC** considers that Market 4 is generally understood to include all the elements of the access network that are necessary to reach the end user, as this is generally perceived as the definition that facilitates effective regulation. However, the definition of Market 4 in a given MS depends on the market definition process in the market analysis stage.
43. **ECTA** proposed a different change in the wording of BP 5, as follows: “*BP5 When imposing remedies, implementation should ~~take account of the viability of~~ ensure effectiveness thereof, irrespective of the network architecture and technology implemented by the SMP operator, and consult with potential access seekers on viable access points, taking into account ~~and the remedy. It depends on structural factors such as population density of the area, economic factors and the nature of wholesale demand (for consumer-grade and business-grade services). and the architecture chosen by the SMP operator including the location of the concentration points~~*”

44. **BEREC** considers that ECTA's proposal may not be proportionate. According to the AD, it is not obvious whether NRAs would have the power to impose a specific network architecture. Concerning the consultation process which ECTA requests, this is already included in the regulatory process and constitutes an important stage of the market analysis procedure.

Bitstream access

45. **ETNO** requested that BP 5 in the WBA CP should be modified by replacing "reasonable and relevant" with "*necessary and proportionate*".
46. In **BEREC's** view, ETNO's proposal would just repeat the requirement of proportionality that is already enshrined as a general principle in Article 8 (1) of the Framework Directive (FD). On this basis **BEREC** has not implemented the proposed change.

Unbundled access to the fibre loop in case of FTTH

47. With regard to unbundled access to the fibre loop in case of FTTH (BP 6d WLA CP), a confidential respondent noted that access downstream of MPOP would require a wholesale access product which can reach that access point.
48. **BEREC** considers that this may be adequately covered in BP 10 (WLA CP), which prescribes the existence of some form of access, based either on a product in the WLA market or on a product from another market.

Unbundled access to the copper loop

49. On the issue of unbundled access to the copper loop (BP 7b WLA CP), a **confidential respondent** suggested that sub-loop unbundling obligations should be combined with remedies giving access to the cabinet itself.
50. **BEREC** considers that NRAs are best placed to determine whether the proposed approach would be proportionate taking into account the fact that, in some cases, the product may not be available (e.g. due to capacity constraints) and/or the demand for such products may be insufficient (depending on local circumstances).

In-house cabling

51. Concerning in-house cabling (BP 8 WLA BP), a **confidential respondent** asked BEREC to add the following sentence "*In case of SMP, the in house cabling should be always mandated for access seekers which may request it*" in order to foster competition, arguing that otherwise there would be a strong impediment to NGN development.
52. **BEREC** considers that the way in which BP 8 can be implemented partly depends on the definition of Market 4 and whether it includes the terminating segment. Generally speaking, ownership considerations make it difficult to establish a BP that could apply where the SMP operator does not necessarily own the in-house wiring. In most cases, BP 8 should satisfy the confidential respondent's criteria.

Access products to reach the access point

53. Referring to the access products to reach the access point (BP 9 WLA CP), **ETNO** claimed that there was no rule of thumb that distance alone increases the need for

ancillary obligations in addition to an unbundling obligation, and that the reach of alternative networks, e.g. in a symmetric scenario, could also matter.

54. The aim of ancillary services is to enable effective access to the primary wholesale products. **BEREC** disagrees with ETNO and considers that, although there may be other factors, distance is very important when determining the need for ancillary measures. Regarding symmetric obligations, BP 1 clearly suggests that NRAs should take into account the existence of symmetric obligations when deciding on the need for ancillary obligations.

Availability of passive remedies

55. A **confidential respondent** requested an amendment to BPs 9/10/11 in the WLA CP to ensure that passive (duct/dark fibre) remedies are always made available in all possible technologies. **ECTA** also suggested that passive (duct/dark fibre) remedies should always be available, whilst not excluding optical wavelengths and Ethernet layer 2 availability upon demand.
56. **BEREC** does not believe that it would be proportionate or feasible to impose obligations to systematically provide both types of passive remedies in all cases. ECTA's point is addressed in BP 13 which allows the option to impose dark fibre/leased lines including Ethernet backhaul as an independent measure where necessary.

Different treatment of copper and fibre

57. Several stakeholders commented on the different treatment of copper and fibre (BP 4 WBA and WLA CPs). **ETNO** agreed that remedies on copper and fibre networks may differ. **KIGEIT** noted that a different treatment of the same network (the only difference being the medium: copper or fibre) would be unjustified if SMP were found. A **confidential respondent** also disagreed with the possible different treatment of copper and fibre because SMP is established "*irrespective of which technology is developed*".
58. **BEREC** believes that the competition landscape and the possible existence of symmetric remedies can justify differentiated remedies, as any remedy should be chosen on the basis that it is effective at addressing the specific competition issues that are observed in the market. Those competitive issues may affect differently the parts of the market that are covered by the different technologies.

Backhaul

59. **ETNO** perceived BP 10 in the WLA CP and BP 6 in the WBA CP, on backhaul, as disproportionate, arguing that only a market analysis on the relevant market should determine whether backhaul should be provided on regulated terms.
60. **BEREC** disagrees with ETNO. To reach the MPoP backhaul may often be required as an ancillary service and in that case does not need a specific market analysis. Under BP 10 in the WLA CP and BP 6 in the WBA CP the eventual availability of the product under competitive conditions remains a key consideration, therefore there is no reason to modify the CPs on this point.
61. **ETNO** also noted that there is no justification for imposing Ethernet Backhaul Access (BP 13 WLA) as an independent or subsidiary measure. According to ETNO, the remedy should – if there are no other less intrusive measures – rely on

leased lines, not dark fibre. On the same point, **ECTA** considered that BEREC should explicitly give priority to physical solutions.

62. **BEREC** does not find it appropriate to impose a specific solution on backhaul access, given that NRAs have to impose proportionate decisions, which in this case are likely to vary significantly between MSs.

Cost based duct access

63. Relating to the price of duct access (BPs 9 to 13 in the WLA CP), **Vodafone** would like the CPs to endorse the principle that (in addition to WDM and Ethernet access) the SMP operator should provide “cost-based duct access”. Vodafone asked BEREC to specify in the CPs that physical infrastructure access should be opened for all purposes, and in particular for mobile backhaul. By contrast, with reference to BP 12 in the WLA CP, **ETNO** suggested that price control measures other than cost-orientation should not be excluded.
64. **BEREC** considers that for duct access, cost orientation is a best practice amongst MSs, as ducts are essential but not replicable. However, duct access cannot be imposed if there are no ducts. Dark fibre (BP 13) can be either imposed as an independent obligation or as an ancillary measure, depending on national circumstances. For either remedy, **BEREC** does not think that a change in the BPs is necessary. Whether physical infrastructure access should be opened for all purposes, including backhauling for mobile sites, should be decided by taking into account relevant proportionality considerations and the specific competition problems identified at MS level.

Treatment of M5 vs M4

65. Concerning the respective treatments of Markets 4 and 5, and with a particular reference to BP 2 in the WBA CP, **AIP** noted that the imposition of remedies on Market 5 should be a stand-alone analysis (rather than undertaking a simultaneous analysis of access products in Markets 4 and 5). AIP argued that, otherwise, there would be a risk that no SMP might be found in Market 5, resulting in some situations where operators cannot target the business market, which requires national coverage. In relation to the bitstream access products to be provided under BP 6 (WBA CP), AIP also asked BEREC to clarify that the remedy should be effectively made available to other operators under the same market review as for Market 4.
66. **BEREC** emphasises that remedies can only be imposed on Market 5 following a finding of SMP. This might be the case if the SPM operator owns an infrastructure which is not easy to duplicate and it can use this position to foreclose the WBA market. **BEREC** notes that (BP 9 WLA CP) the closer the access point is to the end-user, the more essential the access product to reach the said access point becomes. Typically, the access point for a bitstream product will not be as close to the end-user than Market 4 access products. Insertion of “*Although not necessarily covered by the same market review*” in BP 6 (WBA CP) refers to the fact that, to reach bitstream access point, various types of regulated access products can be used, which may belong to different markets, e.g. a leased line. For this reason, **BEREC** recognises that it is important to have an effective set of remedies but these need not necessarily be treated within the same market review.

Details of access

67. Concerning the detailed characteristics of bitstream access (BPs 6 to 13 in the WBA CP), **ETNO** suggested that BEREC should not determine at EU level the concrete operational details of access to FTTH / FTTN or civil engineering infrastructure.
68. **ECTA** supported a complete withdrawal of the entirety of BP 6 and expressed a preference for physical solutions. ECTA further requested guarantees against technical constraints around bitstream products in BP 7.
69. Concerning ETNO's point, **BEREC** points to the fact that convergence on a number of consensual principles is the purpose of these common positions. On the other hand, BEREC did not find ECTA's requests on BP 6 and BP 7 in the WBA CP justified. A blanket obligation to provide all types of wholesale access products may not be proportionate, feasible or efficient under all circumstances.

WDM

70. Concerning WDM (implicitly mentioned in BP 6 in the WLA CP), **Vodafone** expressed the opinion that at *"this stage of the market development only P2P topology can be effectively unbundled"* and that where the *"SMP operator rolls out a point to multipoint topology network, the NRA [should impose] the obligation to provide effective unbundling through WDM as soon as it becomes commercially available"*. Vodafone asked BEREC to clearly endorse this *"from the outset in its CPs to steer standards and vendor development for unbundlable WDM to become a reality"*.
71. **BEREC** does not find it would be appropriate to modify BP 6 (WLA CP) in line with Vodafone's proposals. Under the principle of technology neutrality, NRAs are not best placed to require the implementation of a precise technological solution. The unbundling obligations that may be imposed on fibre networks should be decided by the NRAs and on the basis of national circumstances. The CPs already point out, in Footnote 8, that WDM-PON is an alternative to physical unbundling (but not necessarily the only one).

Vectoring

72. **Vodafone** asked BEREC to use the CPs to define a best practice for vectoring (BP 7 WLA CP) cabinet access, whereby operators deploying vectoring equipment should be obliged to publish details of their deployment plans. According to Vodafone, the announcement of a deployment plan should trigger a beauty contest, which may cause interested operators to compete with the plan. Vodafone also added that the CPs should set a standard for VULA.
73. **BEREC's** view is that no change to BP 7 (WLA CP) is required. Best practices around vectoring have not yet been identified and this topic will be covered by BEREC in its 2013 work programme. As suggested in the WBA CP (BP 23 and BP 24), the product characteristics of active products depend inter alia on the regulatory aims and the competition problems they are intended to remedy. These include a VULA type product and are covered in BP 24 in the WBA CP.

Objective 2: Assurance of co-location

Introduction

74. The BPs related with the assurance of co-location in the CPs are BP 16 for WLA, BP 10 for WBA and BP 7 for WLL respectively.
75. Co-location is an ancillary service that is necessary to support viability of the access products.

Summary of responses

General comments

76. **ECTA** stated that SMP operators should not refuse the use of co-location for the delivery of other services such as radio/audio visual and video on demand. **BEREC** supports the efficient use of co-location facilities. For example the sub-principle requires “NRAs should ensure that these remedies allow co-location and other associated facilities to be used efficiently. In particular, NRAs should ensure that usage is not artificially segregated by product or market.” However, in order to take into account the fact that broadband access equipment can be used to provide audiovisual services, the wording of the competition issue on the assurance of co-location in the WLA document is amended to replace “...which are necessary to make the access offer effective for the entrant to provide viable broadband or telephony services on the retail market.” with “...which are necessary to make the access offer effective for the entrant to compete effectively in the retail market”.
77. **Vodafone** indicated that vectoring and other bandwidth enhancing technologies “may require different forms of access to a cabinet in the context of multi-cabinet solutions” and that CPs should support these different forms of access. **BEREC** affirms that vectoring is not, as yet, a best practice amongst the MSs. **BEREC** addresses the issue of vectoring in its future work programme.
78. A **confidential respondent** noted that co-location must always be available with all necessary associated facilities e.g. power, air conditioning etc, with flat-rate or per-use charging schemes. **BEREC** confirms that the wording in BP 16 (WLA CP) refers to “associated facilities” which would include the provision of the specific facilities requested.

Objective 3: Level playing field

Introduction

79. The following discussions relate to BPs 17 to 20 (WLA CP), BPs 11 to 14 (WBA CP and BPs 8 to 11 (WLL CP). Ensuring a level playing field between SMP operators and alternative operators is key to the development of a successful competitive environment.

Summary of responses

General comments

80. A number of respondents commented on the suitability of a general non-discrimination obligation in ensuring a level playing field. **ECTA** noted that a general non-discrimination is no longer sufficient to ensure a level playing field and that

Equivalence of Input (EOI) should be adopted as the best practice. On the other hand, **ETNO** pointed out that in order to achieve a level playing field all processes should be equivalent (but not necessarily the same) to those provided internally. This is because, in most cases, it is economically not attractive to build up completely new systems and processes (even in context of NGA) as there are already usable and established legacy systems.

81. **BEREC** views the achievement of equivalence as an important competition objective and further believes that NRAs are best placed to determine the exact application of it on a product-by-product basis and in a manner which is proportionate to the market failure to be addressed. For example, a strict application of EOI is most likely to be justified in those cases where the incremental design and implementation costs of imposing it are very low (because equivalence can be built into the design of new processes) and for certain key legacy services (where the benefits are very high, despite the material costs of retro-fitting EOI into existing business processes). In other cases, EOO would still be a sufficient and proportionate approach to ensure non-discrimination (e.g. when the wholesale product already shares most of the infrastructure and services with the product used by the downstream arm of the SMP operator). On this basis **BEREC** maintains its position on the issue of equivalence.
82. **BEREC** also believes that a general non-discrimination obligation has a role to play in ensuring a level playing field. Firstly, determining which type of non-discrimination obligation would be appropriate to propose depends on the particular circumstances of the market under review. Secondly, while EOI applies on a product-by-product basis, a general non-discrimination obligation is much wider in scope and would apply to the entirety of an SMP operator's activities which fall into the relevant market. **BEREC** notes that NRAs need to impose a generic obligation on non-discrimination consistent with the AD and then decide on the application of EOI on a product-by-product basis where appropriate.
83. **BT** requested the inclusion of additional guidance on EOI to state that it "*should not be imposed at two different levels in a value chain*" on the principle that it "*should apply to enduring economic bottlenecks only, with no regulation downstream*". It also noted that it should not apply to markets in decline (such as traditional interface leased lines) on the basis that "*limited life-span of the market means that costs of re-engineering products and systems will outweigh any benefits*". In contrast, **ECTA** would like to see EOI applied on all wholesale inputs which would not be phased out during the timescale of the market review.
84. **BEREC** can see some merit in BT's arguments, however does not accept the suggested prescriptive guidance on the application of EOI. Efficiency consideration may point to EOI being imposed at a level in the value chain where efficient and sustainable competition can be achieved downstream of it. However there may be other policy objectives that NRAs would like to promote, which may warrant departure from this approach: for example, taking the ladder of investment into account, NRAs may see considerable benefits in supporting entry at two (or more) rungs of the ladder to promote different types of wholesale competition (for example, by requiring provision of a passive and an active product on an EOI basis which would require different level of investment and therefore facilitate the entry of different players).
85. On the other hand **BEREC** does not agree with ECTA's suggestion that EOI should apply on all wholesale inputs: if the decision to apply EOI is not firmly based on addressing specific market failures this could lead to inefficiencies and give rise to increased costs which would eventually be passed to end users.

86. Some stakeholders also commented on the role that functional separation (FS) should play in ensuring level playing field. **BT** noted that EOI and FS are “*closely linked*” and BPs should be revised to include the need for NRAs to consider whether FS is necessary to make EOI effective. On the other hand, **FCS** disagreed with the assertion that FS should be considered as a remedy of last resort. In their view the onus should be on the SMP operator to demonstrate that there are exceptional reasons warranting vertical integration, rather than on their customers to prove that a failure to separate is resulting in market distortions.
87. **BEREC** is of the view that FS should remain a remedy of last resort, consistent with Article 13(a) of the AD, to be imposed once NRAs have evidence that the appropriate obligations imposed under Article 8 to 13 (of the AD) have failed to achieve effective competition and that there are important and persisting competition problems. **BEREC** is also of the view that EOI can be imposed on a product-by-product basis and independently from FS.
88. **KIGEIT** was concerned that the best practice (BP) recommending NRAs to further clarify how a generic non-discrimination obligation is to be interpreted on a case-by-case basis could be problematic for market players who would not have the right to appeal such guidance. **BEREC** does not share this view. NRAs would be expected to implement any such guidance in their market review and specific dispute determinations, which would be subject to appeal in national courts.
89. Finally, **Vodafone** noted that the CPs will need to reflect Commission’s guidance in relation to non-discrimination and costing methodologies. As discussed above (in paragraph 1.11) **BEREC** worked closely with the Commission to create a seamless set of ideas across the CPs and the Recommendation and therefore sees great value in their speedy adoption.

Market specific comments

WLA CP

90. In relation with access to dark fibre, leased line access and duct access, **BT** commented that the BP “*should highlight that products such as Virtual Unbundled Local Access (VULA) and Passive Infrastructure ... [provided] on an EOI basis, remove the need for further regulatory intervention*”.
91. **BEREC** disagrees with this idea, noting that it runs counter to the ladder of investment. It is up to NRAs to decide on the application of EOI on a product-by-product basis. In accordance with BP 1, NRAs should impose the appropriate and proportionate combination of access products that properly reflect their national circumstances.

Objective 4: Avoidance of unjustified first mover advantage

Introduction

92. The following discussions relate to BPs 21 to 25 (WLA CP), BPs 15 to 20 (WBA CP and BPs 12 to 15 (WLL CP). These BPs deal with the avoidance of unjustified first mover advantage.

Summary of responses

General comments

93. **ECTA** welcomed the positive intent of the BPs supporting the avoidance of unjustified first mover advantage and asked **BEREC** to stand firm on these principles. They were however disappointed that the lead time for the availability of wholesale inputs would remain non-harmonised. On the other hand, **ETNO** requested that lead times should be decided on a case-by-case basis and noted that a regime looking at replicability should ensure that incentives to invest are not distorted. That means that only the same business models with similar risk-profiles should be taken into account when evaluating economic replicability (e.g. in margin squeeze tests).
94. Firstly, and as discussed in the First Consultation, **BEREC** is of the view that the SMP player should be required to provide relevant price and technical information on the characteristics of the new wholesale product, in advance of the commercial launch of any related downstream (retail) product, such that alternative operators can undertake their own network and commercial planning (including the decision of whether they would prefer to buy the wholesale product from somewhere else or to provide it themselves). Lead times are to be decided on a case-by-case basis to better reflect the technical requirements/complexities of the new wholesale product to be introduced. A general non-discrimination obligation will then ensure that the actual wholesale input is provided to the SMP operator's down-stream arm and alternative operators at the same time.
95. On ECTA's specific point, **BEREC** understands the need for certainty and clear-cut notice periods by market players. Yet, **BEREC** still believes that it is not possible for to define lead times in advance with any degree of reasonableness given the high number of individual products across MSs. In addition, **BEREC** notes that, in response to the First Consultation, there was no agreement amongst stakeholders themselves on what a reasonable lead time could look like.¹² **BEREC** also finds it difficult to objectively justify a single blanket lead time, without taking into account relevant product characteristics. On this basis, **BEREC** leaves it to individual NRAs to give guidance (on a case-by-case basis) on such lead times to the extent that they believe this is reasonable and proportionate.
96. On ETNO's points, **BEREC** notes that (economic and technical) replicability of the downstream services offered by the SMP operator is key to the development of effective and sustainable competition. Competitors need assurance that suitable and fit for purpose wholesale products are available in time to permit them to offer new downstream services at the same time as the SMP player (although in some cases there may be special circumstances justifying legitimate first mover advantage).
97. In this context, **BEREC's** view is that NRAs need to be neutral towards all efficient business models and their key task is to ensure that any efficient operator is able to enter the market. Market forces will then decide which business model is the most successful.
98. Regarding the publication of information on wholesale offers, **ETNO** pointed to the possibility to work with Non-Disclosure-Agreements (NDA) in order to avoid confidential or business sensitive information from being spread amongst competitors in the market.

¹² See BoR 12 (81).

99. **BEREC** does not share the views expressed by ETNO and considers it would have discriminatory effects. In the case of public bids, where the SMP operator may have an advantage, the same product/terms should be made available to all operators, as long as *ex-ante* regulation is equally applicable when considering business and government customers. Regarding confidentiality, **BEREC** acknowledges the need of companies to confidentiality during the bidding process, but notes that this can neither constitute a breach of the *ex-ante* obligations imposed on SMP operators nor imply the lack of information to NRAs (when necessary). **BEREC** also notes that, in the case of bids submitted in the context of public administration procedures, public contracts' law requires the accessibility to the basic information contained in the winning bid, if necessary, i.e. to allow the appeal of the award.
100. Regarding prices, **ETNO** noted that the regulated operator should be in the position to decide how to resolve a situation where economic replicability has not been achieved according to the NRA (i.e. whether the adjustment should be made in the retail or in the wholesale market).
101. **BEREC** does not share the views expressed by ETNO. NRAs are best placed to determine the appropriate approach to resolve a situation where economic replicability has not been achieved.
102. **KIGEIT** suggested that NRAs should be able to impose obligations on SMP operators preventing them from launching a new downstream service when the underlying wholesale offers have not been made available.
103. Although most NRAs have the power to suspend or prevent the launch of retail products by an SMP operator in the upstream wholesale market under Article 10 of the AD,¹³ **BEREC** believes that this should be regarded as a measure of last resort. This is because its implementation would delay the provision of new products to the downstream markets and should only be considered in exceptional circumstances when other less intrusive measures have not been effective in avoiding the potential harm to competition. Therefore **BEREC** does not recommend it as a best practice, however leaves it to individual NRAs to consider its implementation in justified cases.

Market specific comments

104. **ETNO** considered that providing information on planning and status of NGA network rollout as required by BP 25 (WLA CP) and BP 20 (WBA CP), appears too far-reaching as a principle, as it includes highly sensitive, business confidential information. Notwithstanding this, ETNO believed that any such measure should be symmetric.
105. **BEREC** considers that information on the SMP operators' "newly" rolled-out NGA network is essential to competitors and should be available well in advance on a non-discriminatory basis.

WLA CP

106. **FCS** requested to incorporate the following additional wording in BP 22 (WLA CP): "*Monopoly operators of loops servicing multiple clients or multiple premises in a distinct geographic area shall be treated as having SMP for the purpose of this section*".

¹³ Annex 2 to BoR (12) 10.

107. **BEREC** confirms that this CP does not deal with how SMP is established, but the regulatory obligations to be imposed after such a finding.

Objective 5: Transparency

Introduction

108. The following discussions relate to BPs 26 to 28 (WLA CP), BPs 21 to 22 (WBA CP and BPs 16 to 15 (WLL CP).

Summary of responses

General comments

109. **ECTA** agreed with the proposed BPs concerning reference offers. However, they also suggested the BPs should be extended to bring them in line with the Commission's NGA Recommendation, which provides for a maximum 6-month lead time on the publication of RO (a point also made by a confidential respondent). On the other hand, **ETNO** agreed that lead times for the publication of reference offers should be decided on a case-by-case basis.
110. As discussed above (paragraph 1.94), **BEREC** is of the view that the lead times on the publication of the reference offers should also be decided on a case-by-case basis. A requirement to publish an RO has two main purposes, namely, to assist transparency for the monitoring of potential anti-competitive behaviour and to give visibility to the terms and conditions on which other providers will purchase wholesale services. This helps to ensure stability in markets and, without it incentives to invest might be undermined and market entry less likely. To ensure the development of a fit-for-purpose RO, the appropriate notice period would need to reflect both the time required by the incumbents to consider the practical and operational issues around the specific form of access being requested and the needs of alternative operators to access this information promptly. Therefore **BEREC** leaves it to individual NRAs to give guidance on notice periods on a case-by-case basis.
111. **ETNO** suggested that the evolution of service offers should be limited to reasons of replicability and not, as suggested by the BP, extend to any other development that may be deemed desirable by the access seeker. **BEREC** agrees (to a limited extent) with ETNO that the RO should only reflect the reasonable views of customers, a point already reflected in the current wording of the BPs (BP 26a WLA, BP 21a WBA and BP 16a WLL). However, **BEREC** does not share the view that the reasonable view of customers can only be restricted to issues of replicability.
112. In relation to planned future changes to SMP operators' network architecture, **ETNO** also pointed out that it remains unclear who will be responsible in case network planning has to be changed. The SMP operator cannot commit to a very long network planning period and therefore flexibility and proportionality is needed. **BEREC** points out that various market players constantly repeat their need for regulatory certainty and predictability so that operators/investors can take long term decisions (by which they commit themselves to long network planning periods). Adoption of a process for accommodating changes in network planning (safeguarding the legitimate interests of access seekers) is also consistent with the proportionality requirement according to Article 8 (1) of the FD.

Market specific comments**WLA CP**

113. With regard to BP 28 (WLA CP) **BT** advised NRAs to consider the relative cost of setting up such a database and take due regard to the risk of releasing sensitive data. **TI** considered that the general database containing information is more suitable as a symmetric obligation. **ETNO** believed that information on free capacity should not be included in such a database as it would be very costly and time consuming.
114. **BEREC** notes that the CP deals with SMP obligations only and holds that the BP should remain unchanged. The BP, as worded, requires NRAs to *consider* imposition of an obligation to set up an infrastructure database at least for the SMP operator if considered proportionate. Alternative operators should have access to the same level of information as the SMP operator. In case an NRA has decided to impose duct sharing, the alternative operator needs information on the availability of ducts to allow the remedy to be effective. **BEREC** notes that a number of MSs have already set up such a database.

Objective 6: Reasonable quality of access products – technical issues**Introduction**

115. The following discussions relate to BPs 29 to 31 (WLA CP), BPs 23 to 24 (WBA CP) and BPs 18 to 21 (WLL CP).

Summary of responses***Market specific comments*****WLA CP**

116. **ECTA** requested that the determination of allowed technologies (BP 30 WLA CP) and, where applicable, decisions on interference mitigation (BP 31 WLA CP), should be taken by the NRA, based on full consultation of all interested parties.
117. **BEREC** considers that these decisions require a deep understanding of the underlying network and therefore need the involvement of market players. NRAs have the option to get involved at any stage e.g. when the RO is being developed.

WBA CP

118. **ETNO** held that, as long as the SMP operator can demonstrate that based on its wholesale offer a competitor can replicate the retail offer, there is no general need for involving the wholesale customer in the process of defining the product/offer (BP 23 WBA CP).
119. While **ETNO** noted that products or product features should only be required if there is a concrete demand for them, particularly referring to the multicast functionality (BP 24 WBA CP), **ECTA** requested that an obligation to meet all reasonable requests for access should be a firm recommendation rather than one of two options.

120. **BEREC** explicitly chose the wording reasonable request considering that it is broader than “concrete demand”. **BEREC** holds that standard offer proceedings usually address the issue of reasonable request.
121. **TI** believed it was not necessary to give guidance on product characteristics (BP 24 WBA CP) and that such indication could be misleading, unclear or not feasible in the network of the SMP operator
122. **ECTA** welcomed the wording of BP 24 WBA CP including its reference to VLAN flexibility, speed and symmetry, choice of CPE, multicast functionality and service-agnostic access. They reinforced the key importance of the parameters mentioned to support innovation and competition particular for WBA and required determination by means of a process involving all interested parties and led by the NRA.
123. Given that the product characteristics of an active access product can vary depending on a number of factors, as indicated in BP 23 and BP 24 WBA CP, **BEREC** considers that detailed information for the alternative operator including specific product characteristic mentioned in BP 24 is of particular importance for active products and has therefore left BP 24 unchanged.

WLL CP

124. **ECTA** were surprised by the reference to “usage restrictions” (BP 18 WLL CP). In their view there should not be any “usage restrictions” on WLL (including in technical terms or in terms of geographic area or line length). **ECTA** called upon **BEREC** to fully remove this reference. **BEREC** notes that any restrictions imposed should relate to technical and/or security issues which may be necessary for the successful running of networks. On this basis **BEREC** has maintained the original wording of BP18.
125. **ECTA** were also concerned that referring to “regional locations” may be interpreted by some as excluding the provision of WLL at a single or at a few “national locations” (BP 20 WLL CP). In their view, this could damage the ability of cross-border operators or new entrants to provide services to their (multi-country or pan-EU) customers, even when it concerns just a few initial customers. **BEREC** agrees with **ECTA** and has removed the reference to “regional” from BP 20.
126. Finally, **ECTA** noted that end-to-end leased lines may be a relevant solution in some marginal cases (BP 21 WLL CP), but were concerned that BP 21 could lead to SMP operators being allowed to maintain requirements to purchase end-to-end leased lines (essentially resale) where an access-based solution is in fact feasible and preferable to promote competition. On the other hand, **TI** mentioned the fact that where the trunk segment market had been deregulated this would guarantee the provision of end-to-end wholesale leased lines through the relevant geographic market and any other provision would not be necessary.
127. **BEREC** agrees with **ECTA** and notes that the original wording of BP 21 includes an exception such that end to end leased lines are only available in circumstances where interconnecting lines would be technically infeasible or uneconomic (for example, in rural areas). As for the point made by **TI**, **BEREC** notes that BP 21 is only relevant for wholesale leased lines services which exclude trunk segments.

Objective 7: Reasonable quality of access products – operational issues

Introduction

128. The following discussions relate to BPs 32 to 34 (WLA CP), BPs 25 to 27 (WBA CP and BPs 22 to 24 (WLL CP).

Summary of responses

General comments

129. **ECTA** supported all the BPs recommended in this section and called upon **BEREC** to collect and publish KPIs for countries in which NRAs are required to take utmost account of CPs. **BEREC** will consider the approach to monitoring KPIs in MSs in the context of its work programme for 2013 and the specific work-stream which aims to develop an appropriate methodology for monitoring the implementation of the revised CPs.
130. **BT** noted that obligations relating to Service Level Agreements (SLAs) and Service Level Guarantees (SLGs) can be mandated in RO which are “*subject to scrutiny by the NRA*” and therefore “*specific SMP remedies for SLA and SLGs are not necessary*”. **BT** requested that the final CP should reflect this and state that SLAs, SLGs and KPIs “*should, where possible, be agreed between the SMP operator and industry*” with NRAs intervening only where this does not reasonably occur. Finally, **BT** noted that SLAs/SLGs and KPIs may have different purposes with SLAs/SLGs supporting “fit for purpose” products and KPIs being concerned with discrimination issues.
131. As discussed by **BEREC** in the First Consultation, SLAs, SLGs and KPIs can be useful in reducing the incentives for discriminatory behaviour. For example, a regime which allows all operators to subscribe to the same SLAs may ensure all operators subscribe to the same terms and conditions (should they choose to). Proactive payment of SLGs (for failures on the part of the SMP player) can also act as a deterrent against discriminatory behaviour. KPIs are a useful measurement and monitoring tool which can detect discriminatory behaviour and in that help reduce the SMP player’s incentives for such behaviour. It is also desirable for KPIs to be designed in a way which are consistent with the relevant SLAs by measuring the SMP player’s performance in service areas which are of importance to alternative operators. The use of SLAs without KPIs makes it harder to monitor non-discrimination. KPIs which are not related in some way to SLAs appear of limited value since they would be measuring something which is apparently not considered to be important. KPIs do not only monitor compliance with relevant SLAs, but they also show differences in the treatment of operators (alternative operators, as well as the downstream arm of the SMP player) which could be an indication of discrimination.
132. On the basis of the above arguments **BEREC** is of the view that it is important for NRAs to impose a generic obligation on SMP operators requiring them to provide SLAs, SLGs and KPIs. This does not preclude the details of the said SLAs, SLGs and KPIs from being agreed between the SMP operator and industry in the first instance, with the NRAs overseeing such a process. **BEREC** is of the view that it does not matter how service levels are defined: these can be enshrined in a document labelled “Service Level Agreement” or set out in the RO.

133. On the basis of the above arguments, **BEREC** did not amend the BPs in the manner suggested by BT.
134. Both **ETNO** and **TI** rejected the BP requiring the SLG payments to be proactive in nature (BP 33b WLA CP, BP 27b WBA CP and BP 23b WLL CP). In their view, this discriminates against SMP operators which are required to compensate wholesale operators in a proactive manner, while these operators themselves do not proactively compensate their end-users at the retail level. Should the service level fall below the agreed standard at market level, the alternative operators should approach the SMP operator and claim compensation if they are entitled to. As discussed by **BEREC** in the First Consultation, for SLGs to provide appropriate financial incentives they need to be challenging, reconcilable to a specific non-compliance on the SMP operator's part and payments made promptly by the SMP player after the event in question. SLG payments should be made without undue delay and should be proactive in nature. That is, with the pre-established process for the payment and billing of the SLGs among operators and without the need for alternative operators to request the intervention of any third party i.e. NRAs or courts.
135. In order to ensure that alternative operators are able to replicate the incumbents' retail offers at the same service levels, **KIGEIT** proposed a new BP requiring SMP operators to provide better wholesale SLAs to alternative operators than to their own down-stream arm. **BEREC** notes that this type of outcome should be the subject of commercial negotiations and cannot be secured though the application of the non-discrimination obligation at the wholesale level.

Objective 8: Assurance of efficient wholesale switching processes

Introduction

136. The following discussions relate to BP 35 (WLA CP), BP 28 (WBA CP) and BP 25 (WLL CP).

Summary of responses

General comments

137. **ECTA** disagreed with the conditional nature of BP 35e (WLA), BP 28e (WBA) and BP 25e (WLL).
138. As discussed in the First Consultation, **BEREC** is of the view that NRAs could consider imposing a requirement on the SMP player to include appropriate SLAs/SLGs and KPIs in relation to some elements of the wholesale switching process, for example the allowed downtime. This may be more difficult in the case of bulk switches which are non-standard and tailored to the requirements of individual customers. Bulk switching is particularly challenging and insisting on minimizing the downtime may not ensure the best outcome in terms of quality (and could result in errors). The constraints put on the switching process by the physical path and the size of the switch need to be taken into consideration when a maximum reasonable downtime is established. The wording of this BP ensures that these additional constraints are taken into account and that it is applied in a proportionate manner.

Objective 9: Assurance of efficient migration from legacy to NGA/NGN networks

Introduction

139. The discussions below relate to BPs 36 to 40 in the WLA CP, BPs 29 to 33 in the WBA CP and BPs 26 to 29 in the WLL CP.
140. These BPs address measures to ensure an efficient competitive market outcome during the transition phase from legacy to NGA/NGN networks. The migration process for WLA mainly relates to the decommissioning of legacy points of interconnection (i.e. MDF), and for WBA and WLL it mainly relates to the transition between old and new wholesale access products (i.e. transition from ATM or TDM to Ethernet/IP technology).

Summary of responses

General comments

141. **BT, ETNO, ECTA** and a **confidential respondent** provided comments on this section. The comments covered the following issues: i) the notice period for phasing out legacy networks; ii) the planning of the migration procedures; iii) the relation between old and new switching procedures. **BT** and **ETNO**'s remarks were common to all the CPs, while the confidential respondent and **ECTA** made comments in relation to the WBA and WLL CPs. **SALAR** provided a more general comment, stressing the importance of phasing out periods/procedures in order to provide incentives for the migration towards fibre networks.
142. **BT** commented on the notice period (BP 39 for the WLL, BP 32 for WBA and BP 29 for the WLL CP). **BT** remarked that notice periods are not necessary *"where the SMP operator has made reasonable, credible and reliable public commitments, which it continues to observe, on notice periods to customers and industry"* or *"where Eol is in place"*.
143. **BEREC** believes that even if reasonable and reliable public commitments and effective mechanisms to provide EOI are implemented by the SMP operator, an obligation to provide a notice period for phasing out legacy network is both necessary and appropriate, as it can provide regulatory certainty and ensure timely and efficient investments by all operators with different scale and investment paths.
144. **ECTA** pointed out that the migration process should be provided to alternative operators with 24 months notice to enable planning and IT system changes/integration, followed by a period of at least 12 months to execute (on a case by case basis) customer migrations, so as to avoid disruptions affecting any end-users. A **confidential respondent** considered that migration procedures to new technologies should be discussed and agreed by all interested parties and must not entail cost for alternative operators.
145. **BEREC** believes, in line with a technology neutral regulatory approach, that specifying a detailed migration process for switching between wholesale products based on different technologies (for WLL and WBA) is outside of the scope of the CPs. **BEREC** believes that the timing of a specific migration path for access products can be better addressed on a case-by-case basis taking into account the specific market situation. Moreover **BEREC** believes that BPs 32, 29 and 39 (of the WLL, WBA and WLA CPs), give inclusive information on how NRAs should address

the issue. With respect to the statement made by the confidential respondent, **BEREC** believes that the actual regulatory framework around the rules for public consultation (as specified in Article 6 of the FD) gives the right assurance around the transparency of the process and the participation of all stakeholders.

146. **ETNO** commented on the equal treatment of the switching procedures between legacy and NGA/NGN wholesale products (BP 36 in the WLL CP, BP 20 in the WBA CP and BP 26 in the WLL CP). **ETNO** noted that migration procedures shall not automatically include the cancellation of existing standard switching procedures (including prices).
147. **BEREC** believes that the best practice commented by **ETNO** does not foresee that the standard switching procedure should be cancelled, but that switching procedures equally apply between legacy and NGA/NGN wholesale products.

Objective 10: Fair and coherent access pricing

Introduction

148. **BEREC** received several comments from stakeholders (a confidential respondent, **BT**, **Vodafone**, **ETNO**, **ECTA**, **KIGEit**) regarding the best practice remedies on pricing (BPs 41 to 59 (WLA CP), BPs 34 to 50 (WBA CP) and BPs 30 to 37 (WLL CP)).

Summary of responses

General comments

Pricing obligation

149. Several stakeholders commented on the pricing obligation. Some stakeholders (**Vodafone**, **ECTA**, **KIGEit**) considered that the CPs leave too much discretion to the NRAs on whether to impose a pricing obligation (BPs 41 to 48 (WLA CP), BPs 34 to 41 (WBA CP) and BPs 30 to 35 (WLL CP)). These stakeholders shared the view that cost-orientation should be the standard. By contrast, other stakeholders (**ETNO**, **BT**) felt that the CPs are too strict with regard to the use of cost orientation, for example BP 47 (WLA CP) on local access. Regarding duct access, **ETNO** noted that pricing obligations other than cost-orientation (BP 12c (WLA CP)) should not be excluded. Other stakeholders (**Vodafone**, **ECTA**) did not agree that NRAs may consider several cost allocation rules for duct access products. Furthermore, **Vodafone** believed that the price of duct access should be based on historical costs.
150. **BEREC** considers that, where appropriate and proportionate, NRAs should apply an explicit pricing obligation. Current best practice is that pricing obligations can be implemented in different degrees (e.g. BP 43 WLA CP) depending on (among other factors) the prioritisation of regulatory objectives and the prevailing market conditions (e.g. BP 44 (WLA CP)). **BEREC** considers cost-orientation a best practice for duct access. **BEREC** leaves it to the NRAs to further develop their policies on the issue. For local access and WBA, cost-orientation is covered in the CPs, but BP 47 (WLA CP) and BP 41 (WBA CP) also contain an alternative if another set of remedies (in combination with strong (in)/direct constraints) could have the same effect of avoiding excessive profitability. In any case, **BEREC** considers it important that a pricing regulation should incentivise both efficient investment and sustainable competition (BP 42 (WLA CP), BP 31 (WLL CP) and BP 35 (WBA CP)). **BEREC**

believes that the CPs provide sufficient flexibility on the pricing principles, which are in line with the Regulatory Framework. Article 13 of the AD already refers to balanced objectives of “efficiency and sustainable competition”, therefore these objectives are integrated in the NRAs’ duties.

151. **BT** thought that BP 44 (WBA CP) and BP 52 (WLA CP) were too strict, because it considered there could be market conditions where it would not be appropriate to have consistent pricing between NGA and legacy products to stimulate the take-up of NGA-products.
152. **BEREC** thinks that no change to the CPs is required on this point. NRAs can, if appropriate, take account of these factors and apply the CPs accordingly.

Margin squeeze test

153. **ECTA** and a **confidential respondent** expressed the view that the Reasonably Efficient Operator (REO) test represents the only approach which assures cost recoupment for a reasonably efficient alternative operator, and that only that test should be used. **BT** pointed out that margin squeeze opportunities may differ between MSs as well as the relative size of downstream competitors that should be protected. According to **BT** these issues should be taken into account by NRAs in applying a margin squeeze test.
154. In line with **BEREC**’s consistent approach on the issue, the CPs recognise that NRAs have to take into account the market’s structure and their regulatory objectives when performing a margin squeeze test. The REO test, the Equally Efficient Operator (EEO) test or an intermediate variant may therefore be appropriate, depending on the circumstances. It is up to the NRA to determine which test is better suited (BP 49 (WLA CP), BP 42 (WBA CP) and BP 36 (WLL CP)). See also ERG (09) 07, footnote 21 WLA.

Risk sharing

155. Several stakeholders commented on the investment risk in NGA (BP 54 (WLA CP)). A **confidential respondent** noted that NRAs should also take into account the technology chosen and the possibility of public funding. When assessing pricing contracts (BP 56 (WLA CP) and BP 48 (WBA CP)), **ETNO** proposed that the NRA should take into account the level of commitment (long-term, volume) of the access seeker into account in determining the risk. According to **ETNO** this type of differentiation is not unduly discriminatory. **ETNO** further proposed that volume discounts should also be accepted as a sensible way to stimulate NGA investment (BP 55-59 (WLA CP) and BP 47-50 (WBA CP)). **Vodafone** suggested a further specification of the pricing structure regarding long-term pricing contracts and volume contracts. **ETNO** considered that it was not clear whether **BEREC** proposes a differentiated WACC per service.
156. **BEREC** considers that the relevant risk factors may depend on national circumstances. **BEREC** further considers that the CPs are not the place to further specify pricing contracts. It is up to the NRAs to ensure that access pricing schemes proposed by an operator with SMP are not discriminatory and that they comply with the margin squeeze test. In response to **ETNO**, **BEREC** considers that the main objective of volume discounts is to stimulate network penetration which in itself could stimulate NGA investment, as it improves the business case for the investor and access seekers to the network. However, volume discounts have the potential to reinforce existing competitive advantages, and therefore should only be allowed to the extent that they are not detrimental to the achievement of a level playing field.

Consequently, volume discounts should only be allowed if they are non-discriminatory.

157. Regarding the WACC (response to ETNO), **BEREC** refers to Article 13 of the Access Directive which states that *“To encourage investment by the operator, including the next generation networks, NRAs shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.”*

Annex 1: Glossary

AD: Access Directive

CPs: Common Positions

EOI: Equivalence of Inputs

EOO: Equivalence of Outputs

FD: Framework Directive

KPI: Key Performance Indicator

MSs: Member States

NGA: Next Generation Access

NRA: National Regulatory Authority

RO: Reference Offer

SLA: Service Level Agreement

SLG: Service Level Guarantee

SMP: Significant Market Power