



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 on issues
relating to non-discrimination*

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Section 1

Analysis of stakeholder responses

Introduction

- 1.1 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. These CPs have now been adopted by BEREC.
- 1.2 In 2012, and as set out in its Work Programme (WP), BEREC started the process of reviewing and updating the above three CPs. 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.⁴ During the one-month consultation period BEREC also held a public workshop with interested stakeholders.
- 1.3 The consultation closed on 30th March and BEREC received 12 responses from the following organisations:
- Bouygues Télécom
 - British Telecom (BT)
 - Deutsche Telecom (DT)
 - ECTA
 - ETNO
 - EWE⁵
 - Federation of Communication Services (FCS)⁶
 - FTTH Council
 - QSC AG⁷
 - Telecom Italia (TI)
 - VATM
- 1.4 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 amending its high level principles. BEREC notes that the high level principles on non-discrimination are now included as best practices (BPs) in its revised CPs (which are published for public consultation at the same time as this report).

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/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

⁵ EWE Tel is a large regional telecommunications company in Germany with more than 600,000 customers. The company provides private and business customers with landline direct connections in Lower Saxony, Bremen, parts of NRW and in Brandenburg.

⁶ 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.

⁷ QSC AG is Cologne based and offers small and medium sized enterprises an extensive range of ICT services.

Summary of the proposed high level principles and analysis of stakeholder responses

1.5 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 BEREC consultation document (the Consultation), this implies that effective measures are in place to ensure four key objectives:

- Objective 1: to ensure level playing field;
- Objective 2: to avoid unjustified first mover advantage;
- Objective 3: to ensure reasonable quality of access products; and
- Objective 4: to ensure efficient and convenient wholesale switching processes.

1.6 Below we provide a summary of the stakeholder responses to BEREC's consultation.

Objective 1: Level playing field

Introduction

1.7 SMP (Significant Market Power) operators may have a commercial incentive to discriminate against their competitors, in particular by exploiting to the maximum any ambiguity about the meaning of a non-discrimination obligation. Such discrimination can take many forms.

1.8 Generally SMP operators may have a commercial incentive to deny access to, delay the provision and degrade the quality of relevant wholesale products.

1.9 In the Consultation (and in order to deal with such competition problems) BEREC proposed the following high level principles:

- **Principle 1** NRAs should impose a general obligation of non-discrimination.
- **Principle 2** NRAs should further clarify how the non-discrimination obligation is to be interpreted on a case-by-case basis.
- **Principle 3** NRAs should justify their decision of whether or not to impose equivalence, and if imposed the exact form of it, in light of the competition problems they have identified.
- **Principle 4** NRAs should consider imposing functional separation only when all other regulatory obligations have failed to create a level playing field.

1.10 We asked stakeholders the following questions:

Question 1 Do stakeholders agree with the high level competition issues BEREC has identified for the achievement of a level playing field? If not, please explain.

Question 2 Do stakeholders agree with the high level principles proposed by BEREC in order to achieve a level playing field? If not, please explain.

Summary of responses

Level playing field – likely competition problems

- 1.11 Most stakeholders agreed with the likely competition problems outlined by BEREC in the Consultation.
- 1.12 ECTA agreed with the highlighted competition problems and supported the high level principles proposed by BEREC to achieve a level playing field.
- 1.13 QSC noted that, in addition to the discrimination cases covered by BEREC principles, it is also possible that not all access seekers are treated in the same way by the SMP operator (who can discriminate between access seekers themselves). QSC asked BEREC to also recognise this type of discrimination in the high level principles.
- 1.14 BEREC agrees with QSC and has recognised the point in its definition of the likely competition problems in this area.⁸

Level playing field – best practice remedies

- 1.15 Overall stakeholders agreed with BEREC's approach to achieving a level playing field. Some also suggest additional improvements to further strengthen BEREC's best practices in this area.
- 1.16 In addition:
- Bouygues Télécom stressed for the need for regulatory action against the asymmetry of information. BEREC agrees with this comment and deals with this issue first under the objective of "Transparency" by requiring SMP operators to make certain information available to alternative operators. BEREC also deals with this issue under the objective of "Fair and Coherent Access pricing". Under this separate objective BEREC sees accounting separation and cost accounting as best practice remedies.⁹ BEREC considers that some information relating to the costs of providing wholesale services could be made public in an aggregate format, but more detailed information could be considered confidential. In any case, NRAs have to strike a balance between the SMP operators' need for confidentiality of business sensitive information and the alternative operators' need for transparency, especially considering that wholesale prices are set using different inputs.
 - One stakeholder particularly stressed the need to distinguish between the fixed and mobile markets and to focus the high level principles only on the fixed market. BEREC notes that the scope of its current review includes the CPs on wholesale local access, wholesale broadband access and wholesale leased lines as defined in the Recommendation 2007/879/CE which relate to fixed markets. This is without prejudice on what BEREC may do in the future.
 - BT suggested the extension of Principle 2 to include further details related to Key Performance Indicators (KPIs), Service Level Agreements (SLAs), Service Level Guarantees (SLGs) and industry switching processes to allow more flexibility by NRAs to introduce measures that are product, industry and country specific. In this sense, BT proposes Principles 9 to 12 to be included as optional and

⁸ BEREC has dealt with this point under the competition objective of "Level playing field" and the relevant competition issues most likely to arise.

⁹ See BP34b in the revised Common Positions on WLL.

implemented on a case by case basis as a sub-set of Principle 2. BEREC has identified the “provision of services of reasonable quality” as an important competition objective on its own merit in ensuring non-discrimination where SLAs, SLGs and KPIs have an important role to play. In addition, in BEREC’s view, the changes proposed by BT are “presentational” in nature: NRAs are expected to take utmost account of the entirety of the BEREC CPs and the best practice remedies contained therein and give reasons for any deviations.

- 1.17 ECTA agreed with Principles 1 and 2, but would like recognition that whilst NRAs should always impose a general non-discrimination obligation, this is unlikely to be sufficient in itself to prevent the discriminatory behaviour of dominant operators. Furthermore, ECTA would like BEREC to recognise the imposition of Equivalence of Input (EOI) in the relevant markets as the regulatory best practice in achieving equivalent access and implementing the requirements of Article 10 of the Access Directive (while at the same time recognising that an Equivalence of Output (EOO) regime that merely requires the provision of comparable products at different prices does not meet the basic requirements of Article 10 of the Access Directive). Finally, ECTA suggested that the CPs indicate the circumstances in which the standard remedies should be considered to have failed and NRAs could justify the imposition of functional separation. ECTA recommends the continued or frequently repeated breach of the non-discrimination obligation to be identified as a clear justification for the imposition of functional separation.
- 1.18 ETNO considered a well functioning non-discrimination obligation as being important in the context of relevant wholesale access market. Such an obligation guarantees EOO where an access provider’s wholesale offer enable access seekers to provide the retail market with offers similar to those of the access provider. Strict equivalence should not come at the expense of proportionality. It therefore sees EOI and functional separation as remedies to be used in exceptional circumstances only.
- 1.19 Other stakeholders (DT, TI) also shared ETNO’s views. DT stated that EOO is a sufficient and proportionate means to meet the objectives of Article 10 of the Access Directive (AD). It also stated that “*all other regulatory obligations must have failed to achieve effective competition on retail markets*” which is a different criterion to that stated by BEREC. In DT’s view “*given the level of infrastructure-based competition achieved already... the remedy of functional separation would be unreasonable and disproportionate*”. TI believes that, with the rollout of Next Generation Access (NGA), “*non-discrimination obligation should apply not only to SMP operator but to all operators*”. In addition, TI noted that EOI is not necessary, as compliance with the non-discrimination obligation can be monitored via the use of KPIs.
- 1.20 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. 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 all 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 has maintained¹⁰ its position on the issue of equivalence.

¹⁰ See BP10, BP19 and BP13 in the revised Common Positions on WLL, WLA and WBA.

- 1.21 Whether, in the context of NGA, the non-discrimination principle should apply equally to all operators BEREC notes that the CPs and the best practice remedies listed in them only apply in light of a finding of SMP.

Objective 2: Avoidance of unjustified first mover advantage

Introduction

- 1.22 As discussed in the Consultation, SMP operators may have the incentive to seek unjustified first mover advantage in the provision of new services, in particular by making new retail services available in advance of providing the corresponding wholesale service to alternative operators such that downstream retail competition is facilitated. In cases where there are no objective reasons justifying such a behaviour, this is a form of discrimination which could be detrimental to competition, if the SMP operator captures the majority of the downstream (retail) market, increasing the barriers to entry for an alternative operator who cannot access the relevant wholesale products in a timely manner.

- 1.23 In the Consultation (and in order to deal with the above competition problem) BEREC proposed the following high level principles:

- **Principle 5** NRAs should put in place a regime which ensures the (technical and economic) replicability of the new downstream services introduced by the SMP player.
- **Principle 6** In cases where the SMP player needs to provide a new wholesale product, NRAs should ensure timely availability of relevant (technical) information according to lead times (i.e. notice periods) defined on a case-by-case basis.
- **Principle 7** NRAs should ensure that alternative operators have the ability to influence the decisions regarding characteristics of new wholesale products and new interfaces.
- **Principle 8** Where relevant, NRAs should impose a requirement on the SMP player in relation to lead times regarding the removal of existing wholesale inputs.

- 1.24 We asked stakeholders the following questions:

Question 3 Do stakeholders agree with the high level competition issues BEREC has identified which may rise in case of a first mover advantage? If not, please explain.

Question 4 Do stakeholders agree with the high level principles proposed by BEREC in order to avoid first mover advantages which may be detrimental to competition? If not, please explain.

Summary of responses

Avoidance of unjustified first mover advantage – likely competition problems

- 1.25 Four respondents did express an opinion on the competition issues identified by BEREC.
- 1.26 TI raised doubts as to whether the identified issues should be dealt with under the non-discrimination obligations rather than under the access obligations. BEREC stresses that, in any case, access granted by SMP operators must be non-discriminatory, and therefore the provisions of Article 10 of the AD should be read in

combination with those of Article 12 of the AD. BEREC acknowledges that many of the competition issues involving SMP operators could be ultimately (but not restrictively) considered as access issues. The boundary between the various obligations may appear unclear, but this is largely because they intermingle. In any event, BEREC believes the best practice remedies that are derived from the proposed Principles are properly grounded in the current regulatory framework.

- 1.27 Bouygues Télécom and VATM broadly agreed with BEREC's perception of the likely competition issues. On the other hand, DT does acknowledge the symptoms described in the Consultation, but does not recognise the identified competition concerns as issues to be considered by NRAs. In this respect, it is useful to remember that NRAs impose remedies to effectively solve the identified competition issues. In this context, the purpose of BEREC is to analyse the likely competition issues and to adopt best practice remedies that best deal with them.
- 1.28 In its contribution, DT tends to assimilate first mover advantage and innovation. Thus, DT argues that first mover advantages should not be seen as competition issues by NRAs.
- 1.29 BEREC does not share the general view that first mover advantage could be automatically assimilated to innovation. While duly taking into account exceptional circumstances which may be considered as innovation justifying legitimate first mover advantage, BEREC restates that in cases where there are no objective reasons justifying such a behaviour, first mover advantage from SMP operators is a form of discrimination which could be detrimental to competition.

Avoidance of unjustified first mover advantage – best practice remedies

- 1.30 Several respondents declared that they broadly agree with the high level principles proposed by BEREC (BT, ECTA, ETNO, FTTH Council). They also suggested (together with other stakeholders) additional measures or improvements.
- 1.31 Two respondents proposed to enhance Principle 5 (ECTA, QSG AG). In order to ensure new downstream services introduced by SMP operators are replicable, they suggest BEREC recognises that NRAs should prevent SMP operators from launching a new downstream service when the underlying wholesale offers have not been made available.
- 1.32 Although most of the NRAs make use of this instrument, or consider the merits of its use to incentive SMP operators to comply with their obligations (and avoid harm to competition due to late actions by the NRA), in BEREC's view it 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. Therefore, as this measure will be considered only when other less intrusive measures would not be effective to avoid the potential harm to competition, BEREC does not recommend it as a best practice.
- 1.33 In relation to Principles 5 and 6 and the need to ensure replicability and prior notification, two groups of stakeholders have different views on BEREC's proposals which are related to their perception of innovation.
- 1.34 On the one hand, DT, ETNO and TI, consider that first mover advantage may be the results of innovation, which should be protected. They consequently ask BEREC to alleviate obligations set up to avoid unjustified first mover advantage. DT and ETNO argue that innovation is an objective reason to justify a first mover advantage. ETNO says that, based on this assumption, new services should be analysed on a case-by-

case basis. TI adds that first mover advantage is the counterpart of high-risk investment in network developments.

- 1.35 BEREC does not disregard innovation, however, in its view, innovation is by nature limited to exceptional circumstances and cannot automatically serve as justification for a first mover advantage. BEREC restates that unjustified first mover advantage could constitute a market power and its impact should be analysed from a consumer perspective and by considering its long-term effect on competition when the new service is launched by an operator which already has SMP. BEREC would also like to stress that investments in infrastructure cannot only be recovered directly from retail markets, but also at the wholesale level when alternative operators purchase access to the new infrastructure.
- 1.36 On the other hand, VATM and another respondent doubt that removing the SMP operators' first mover advantage would decrease innovation. A confidential respondent would like the case-by-case analysis mentioned by BEREC to be better monitored and therefore asks BEREC to require NRAs to define the characteristic of the innovative products. This task seems hardly feasible to BEREC since by definition innovation is intimately linked to novelty and therefore the characteristics of innovative products cannot be defined in advance.
- 1.37 In relation to Principle 6, many respondents have expressed strong views regarding the length of lead times (i.e. notice periods defined on a case-by-case basis). Time is recognised as a key factor to ensure replicability for the majority of these respondents. Some of the stakeholders have requested BEREC to define such lead times and propose various notice periods linked to the degree of maturity of relevant wholesale products (QSC AG, TI, VATM and a confidential respondent). On the contrary, one stakeholder is concerned by the impact of defining lead times a priori (FTTH Council).
- 1.38 BEREC understands the need for certainty and clear-cut notice periods by market players. Yet, BEREC still believes that it is not possible for BEREC to define lead times in advance with any degree of reasonableness given the high number of individual products across Member States (MSs). In addition, BEREC notes that there is no agreement amongst stakeholders themselves on what a reasonable lead time could look like. On this basis, BEREC leaves it to individual NRAs to give guidance on such lead times to the extent that they believe this is reasonable and proportionate.
- 1.39 Regarding the provision of information on new wholesale products *per se*, one respondent (FCS) insisted on making information available for both copper and fibre access products. Another respondent (ETNO) suggested keeping every offer confidential, without a notice period applied to the winning bidder, as long as the relevant reference offer is promptly updated following the closing of the tender process.
- 1.40 BEREC shares the former proposal and has reflected this in the context of the best practice remedies to ensure the objectives of "Access/Transparency".¹¹ On the other hand, 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,

¹¹ See revised Common Positions on WLL, WLA and WBA.

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 administrations 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.

- 1.41 In relation to the implementation of Principle 7, one confidential respondent proposes that the industry fora mentioned by BEREC be assigned concrete goals.
- 1.42 BEREC identified industry fora as a best practice which is already put into place by some NRAs. Their role and functioning may vary from one MS to another. Moreover, BEREC considers such fora to already have a concrete purpose in ensuring alternative operators are duly informed and have the ability to influence the decisions regarding the characteristics of new wholesale products and new interfaces.

Objective 3: Reasonable quality of access products

Introduction

- 1.43 As stated in the Consultation, unless specified through commercial agreements, SMP operators may generally have no particular incentive to deliver good quality wholesale products to alternative operators which compete with them at the retail level. Such behaviour would put alternative operators at a clear disadvantage, especially when the relevant wholesale services are not available from any other supplier on a national basis.
- 1.44 In the Consultation (and in order to deal with the above competition issues) BEREC proposed the following high level principles:
- **Principle 9** NRAs should ensure that the SMP player is required to provide a reasonable defined level of service.
 - **Principle 10** NRAs should impose a generic requirement on the SMP player to provide SLGs.
 - **Principle 11** NRAs should impose a generic requirement on the SMP player to provide KPIs as a means to monitor compliance with a non-discrimination obligation unless there is evidence that this is unnecessary or would not be cost-effective.
- 1.45 We asked stakeholders the following questions:

Question 5 Do stakeholders agree with the high level competition issues BEREC has identified in relation to the quality of wholesale access products? If not, please explain.

Question 6 Do stakeholders agree with the high level principles proposed by BEREC in order to ensure reasonable quality of wholesale access products? If not, please explain.

Summary of responses

Reasonable quality of access products – likely competition problems

- 1.46 In general, respondents agreed with the competition problems identified by BEREC. However:
- DT did not agree with all of the high level competition issues raised by BEREC. DT disagreed with the statement that SMP operators have no incentive to provide quality wholesale products believing this to be a historical problem which will be absent from NGA implementations. TI disagreed that poor quality disproportionately affects alternative operators because many of these operators have high market shares and solid reputations.
 - BT agreed with BEREC's identified competition issues but believes a generic approach across Europe would undermine national regulatory and market conditions.
- 1.47 BEREC notes that the competition issues it has listed are those most likely to arise (given past experience), and even if not immediately relevant, may become so in the future. BEREC also notes that to the extent a competition issue is not recognised in a particular national market, NRAs do not need to impose any of the recommended best practice remedies. On this basis, BEREC has not changed the competition issues it has listed.

Reasonable quality of access products – best practice remedies

- 1.48 Principle 9 finds general support from respondents, although ETNO is opposed to generic SLAs because of the specifics of individual wholesale offers and BT believes it would be difficult to create a standard set of KPIs/SLAs/SLGs which could be applied in all MSs. DT favours decisions on SLA content being made by individual NRAs in each MS, while TI is opposed to an SLA for ordering processes because the complexity of order validation would require an overly complicated SLA. BT and DT are keen to ensure that commercial negotiation remains a key element in determining the content of SLAs.
- 1.49 ECTA wishes to see a strong commitment in the CPs to SLAs which address the minimum service areas identified in the consultation.
- 1.50 BEREC remains of the view that appropriate SLAs are necessary to ensure delivery of minimum service quality by SMP operators. These should apply to the processes identified in the Consultation. BEREC appreciates the point raised by TI in relation to validation of orders, rejection of an order may reflect discrepancies in the order submitted. However, it must be demonstrated that order validation criteria are necessary.
- 1.51 Respondents generally supported Principle 10. DT and TI have reservations about pro-active payment of SLGs stating that such payments need to be properly audited prior to payments being made. TI believes that SLGs should not be seen as a punishment but rather as a means of incentivising SMP operators. It is also keen on the extension of SLGs to the supply of all regulated services, not just those of SMP operators. An example of one such relevant service would be Number Portability.
- 1.52 TI also made the more general point that SLA/Gs are primarily tools to regulate access quality and that it is possible for poor quality products to be provided on a non-discriminatory basis i.e. where the same quality is provided internally. Therefore

NRAs might use SLAs in the case of wholesale products and Universal Service Regulations for retail products in order to ensure minimum standards. BT stated that Principles 9, 10 and 11 are overly prescriptive and are too detailed to be principles. It suggests that they be subsumed into Principle 2 for consideration by individual NRAs.

- 1.53 BEREC believes that SLGs should be paid and that a clear procedure for quick payments by the SMP operators should be pre-established (in order to make payments without delay and without intervention by the NRA or national courts).¹² BEREC accepts that such payments may need to be audited but is of the view that this auditing be done prior to payments being made, as is already the case in a number of countries.
- 1.54 Principle 11 enjoys wide support. ECTA proposed that 13 separate KPIs should be collected by all NRAs and published on a monthly basis by BEREC. It says that collection of such data should not be technically complicated or costly because they relate to basic data which would be recorded in all SMP operator systems. Other respondents have greater concerns about costs and believe that the imposition of KPIs should be justified in the face of these. DT noted that KPIs must be both necessary and cost-effective. TI also raised cost issues and noted that KPIs should be based on data already gathered by SMP operators. TI further believes KPIs should be confidential and restricted to industry players.
- 1.55 BEREC accepts ECTA's point that much of the necessary data for KPIs may be already gathered by SMP operators. However, processing and auditing this data to provide KPIs would be an additional cost borne by SMP operators who would also be required to publish KPIs for their own downstream self-supply and partly allocate them to the alternative operators through the wholesale prices. Regarding TI's suggestion that KPIs be kept confidential, BEREC is of the view that placing evidence of non-discrimination in the public domain would be beneficial to all stakeholders, including consumers, as well as supporting independent verification of measurements.

Objective 4: Efficient and convenient wholesale switching processes

Introduction

- 1.56 Wholesale switching processes can take many forms and go under different names. The key characteristics are that the SMP provider needs to make one or more changes at network level relating to the service of a particular end user. The change could be a connection, disconnection (or both), change of grade of service; change from one wholesale service to another.
- 1.57 In the Consultation (and in order to deal with the above competition issues), BEREC proposed the following high level principles:
- ***Principle 12*** *NRAs should impose obligations on the SMP player in order to ensure wholesale switching processes are speedy and efficient.*
- 1.58 We asked stakeholders the following questions:

Question 7 Do stakeholders agree with the high level competition issues BEREC has identified in relation to wholesale switching processes? If not, please explain.

¹²See BP23b, BP33b and BP26b in the revised Common Position on WLL, WLA and WBA.

Question 8 Do stakeholders agree with the high level principles proposed by BEREC in order to ensure efficient and convenient wholesale switching processes? If not, please explain.

Summary of responses

Efficient and convenient wholesale switching processes – likely competition problems

- 1.59 Respondents broadly agreed to this high level competition issue. QSC emphasized efficient switching processes in the context of NGN expansion, where switching and bulk switching need to be carried out without barriers. FCS argued that SMP providers should also have the obligation, on a wholesale basis, to ensure that speedy and efficient retail switching processes are made available for end customers and other market participants to use.
- 1.60 BT noted that switching processes have an impact across several markets and that the assessment of competition issues needs to be carried out at industry level, and not just focus on the SMP operator. BT noted that, for example, in the UK Ofcom has taken a very different approach to that proposed by BEREC. Switching processes are controlled at an end user (consumer) level, through General Conditions applicable to all Communications Providers supplying broadband services (all high speed DSL services) and/or fixed line telecommunications services (narrowband call and/or line rental services) to domestic and small business customers. There is no linkage to SMP.
- 1.61 BEREC agrees that switching processes can have an impact across several markets. However, the methodology of regulation on the basis of market reviews does not allow NRAs neither to assess nor to address competition problems other than those related to SMP. Therefore BT's suggestion cannot be adopted by BEREC. Individual NRAs should check how their proposed obligations relate to the Citizen's Rights Directive under the new regulatory Framework.

Efficient and convenient wholesale switching processes – best practice remedies

- 1.62 DT, ECTA, the FTTH Council, QSC and a confidential respondent agreed with BEREC's proposals in order to ensure efficient and convenient wholesale switching processes. DT especially welcomes the intention to only implement KPIs, if they are necessary and cost-effective. QSC AG argued that the obligation to provide efficient processes has to be imposed in all regulatory obligations and NRAs should monitor whether the BEREC principles are realised. A confidential respondent believed that this principle is very important and its non-application can lead to inefficiency, especially on the highest customer segment.
- 1.63 BT, TI and ETNO pointed at the joint responsibilities of SMP operators and alternative operators. ETNO agrees on the fact that an efficient switching mechanism must exist, but reminds BEREC that related performance (from the end user perspective) is due to numerous factors which are also under the responsibility of the alternative operators. BT and TI believe that efficient switching processes should be equivalent and applied by all operators.
- 1.64 BT suggested that Principle 12 should be removed and added to Principle 2 as one of a selection of measures. *"NRAs should consider imposing obligations on the SMP player if necessary in order to ensure wholesale switching processes are speedy and efficient"*.

- 1.65 Wholesale switching is a high level competition objective in itself. Therefore a high level principle addressing the related issue, according to BEREC, is appropriate and consistent with the CPs.
- 1.66 FCS proposed that NRAs should be able to spread the costs of individual switches over the general wholesale access charges rather than targeted at the particular switching transaction – particularly at retail level. This is a pro-competitive approach and is justified on the basis that all customers (even those who do not take advantage of the opportunity to switch) benefit from markets where switching costs are low. This can be seen by considering how much harder retail providers must work to provide good service to their customers if they know that there is a low cost and hassle-free option for them to move to a rival retailer.
- 1.67 BEREC shares the view that low switching costs contribute to the competitiveness of the market. Spreading the costs of individual switches over the general wholesale access charges may have some drawbacks as well. Allocating costs to other services than those causing them might give adverse incentives by increasing the wholesale prices of all other access products. Lower wholesale switching prices may not result in lower retail switching prices.
- 1.68 A confidential respondent emphasized its support for Principle 12b where “NRAs should ensure that the maximum allowed downtime during wholesale switching is the lowest possible and takes into account the different needs of specific customer segments”.
- 1.69 ECTA has doubts about BEREC’s suggestion under Principle 12b that a “premium switching service” (at a premium charge) may be defined to reduce downtime in the context of switching. According to ECTA this entails risks of gaming by the SMP operator, who could overstate (to alternative operators and to the NRA) that considerable downtime would be inevitable or legitimate “as a rule”, to which exceptions are possible. Furthermore, the SMP operator could deliberately fail to optimize switching processes, in order to be able to collect premium charges from alternative operators who need fast switching in order to be able to attract customers. The target, and related principle, should be standard seamless instantaneous or quasi-instantaneous switching, as has been achieved already in some cases (e.g. number portability no longer tends to involve any significant downtime for the end user in the countries where number portability is efficient).
- 1.70 BEREC recognises the interaction between this Principle and the requirements in the respective SLAs. In BEREC’s view switching processes should reflect the needs of different customers and such products should be made available to all operators in a non-discriminatory manner. To the extent that gaming may be a concern, NRAs should develop a procedure to minimize such gaming. With respect to the seamless or quasi-instantaneous switching it is BEREC’s opinion that in practice this would not be a feasible option in all situations, and could therefore not serve as a best practice approach.
- 1.71 ETNO noted that switching processes are industrial processes which are the daily job of operators. As long as there is a non-standard process to manage (such as bulk wholesale switching), tailored proposal are made. They can be made in advance, as it is done in several countries, but they cannot be managed by standard processes.
- 1.72 BEREC welcomes ETNO’s contribution as it emphasizes the difference between single and bulk migration. Both types of switching present different challenges. Bulk switching are 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.

- 1.73 ETNO is of the view that special processes falling outside of the usual business, e.g. mass migration projects, should not be covered by KPIs. Indeed, such one-time projects are usually governed by specific agreements, including specific timings, between the SMP operator and the alternative operator based on available operational capacity. For example, a mass migration facility used to deal with a change of wholesale supplier in the merchant market or to migrate end-users from one product to another has the potential to skew KPIs as these activities are project managed and do not relate to end-user transactions.
- 1.74 BEREC agrees that there are exceptional cases that should not be covered by KPIs. NRAs should decide on such exceptions on case-by-case basis.
- 1.75 With regard to Principle 12g, ECTA agrees that visibility is essential, but has doubts about the suggested creation of a specific web interface, as this may suggest the creation of a separate system/overlay/interface rather than EOI in terms of access to the relevant systems of the SMP operator.
- 1.76 BEREC has taken ECTA's comments on board and re-phrased this principle as "*NRAs should require that the transaction time required to process wholesale switching requests is as low as possible based on the nature and size of the request*". BEREC has now put emphasis on keeping transaction times as low as possible recognising that this could be achieved in a number of ways (i.e. creation of web interfaces or equivalent access to the SMP operators' systems).¹³

¹³ See BP25d, BP35d and BP28d in the revised Common Positions on WLL, WLA and WBA.

Annex 1

Glossary

AD: Access Directive

CPs: Common Positions

EOI: Equivalence of Inputs

EOO: Equivalence of Outputs

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