Body of European Regulators
for Electronic Communications

BoR (14) 189

Report on the BEREC public consultation on document “Guidance on the regulatory accounting approach to the economic replicability test (i.e. ex-ante/sector specific margin squeeze tests)”

5 December 2014

Contents

I. INTRODUCTION

On 29 September 2014 BEREC launched a public consultation on the Guidance on the regulatory accounting approach to the economic replicability test (i.e. ex-ante/sector specific margin squeeze test) (In the further text: Guidance document) which run until 24 Oct. 2014.

The Guidance document is analysing the economic replicability test (ERT) included as an ex-ante (sector specific) margin squeeze test to safeguard competition in the Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment 2013/466/EU[1] (in the further text: Recommendation) from a regulatory accounting perspective. As in the Recommendation, the Guidance document focuses on the tests conducted on Market 4 and Market 5 of the Recommendation on relevant markets susceptible to ex-ante regulation 2007/879/EC.

The main purpose of the Guidance document is to set out possible methodologies for NRAs to run economic replicability tests in accordance with both, the Recommendation and also current practice. However, at this moment in time it is too early to suggest best regulatory practice.

Furthermore the Guidance document aims to show the similarities and differences between ERT and ex-ante margin squeeze tests as currently applied by NRAs in practice (describing the common methodologies already used by NRAs).

In the consultation BEREC particularly sought input on the definition of the ERT, the economic rationale and issues regarding the implementation of ex-ante margin squeeze tests in practice, procedural and transparency issues and the final conclusions, reached in the Guidance document.

The consultation was published on the BEREC website, inviting stakeholders to send their replies up to 24 October 2014. A total of 11 replies were received from the following stakeholders (in alphabetical order):

1. Deutsche Telekom
2. ECTA
3. ETNO
4. Fastweb
5. FTTH Council
6. KPN
7. TDC
8. Telecom Italia

[1] Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (C(2013)5761 final), 11/09/2013, OJ L 251 of 21/09/13

9. Telefonica
10. Vodafone
11. Wind

BEREC welcomes all contributions and thanks stakeholders for their submissions. The contributions, received from stakeholders will be published on the BEREC website.[2]

The purpose of this document is to provide a general overview of the comments on the Guidance document, which are published individually on the BEREC website. Comments, submitted by stakeholders are taken into account in modifying the Guidance document where appropriate. A number of adjustments have been made to enhance clarity and comprehensiveness.

II. SUMMARY OF THE STAKEHOLDER RESPONSES

At this point BEREC would like to emphasise the fact that BEREC is not discussing all contributions dealing with the Recommendation as such and that are not directly addressing the Guidance document, they are not taken into account in the Guidance document.

BEREC is summarising the comments and contributions received from stakeholders in the following order. First BEREC summarizes the comments of ETNO and all incumbents and later on the comments received by ECTA and competitors.

1. ETNO

ETNO invites BEREC to clearly define the purpose of the document, and to make a report instead of a guidance document, because of its descriptive approach, where BEREC is clarifying current practice as well as similarities and differences to the Recommendation. Further on ETNO recommends a flexible approach to the Guidance document, since the main purpose of the Recommendation is to leave some discretion to NRAs in the conducting the ERT test.

BEREC rejects the comment, since the purpose of the document is already defined and it is meant to guide NRAs when conducting an economic replicability test. BEREC refers to the Introduction of the Guidance document for further clarification. The flexibility is provided by the consideration of the national circumstances and state of competition, which has to be taken into account when conducting the ERT or any other regulatory measure to achieve the best possible results on the market.

[2] Cf. BEREC website: http://berec.europa.eu/eng/news_consultations/Closed_Public_Consultations/2014/2465-public-consultation-on-the-draft-berec-guidance-on-the-regulatory-accounting-approach-to-the-economic-replicability-test-ex-ante-margin-squeeze-test ; see also 2nd BEREC Stakeholder Forum, http://berec.europa.eu/eng/events/2014/68-2nd-berec-stakeholder-forum-meeting and the summary document BoR (14) 161, http://berec.europa.eu/files/document_register_store/2014/10/BoR%20(14)%20161_Outcome_stakeholder_forum_2014-10-16.pdf.

Ex-ante margin squeeze tests, currently carried out by NRAs may not equal measure aim to enhance pricing flexibility to support NGA investments as does the Recommendation.

BEREC refers to the Introduction of the Guidance document for further clarification. ERT is considered as a specific type of the ex-ante margin squeeze test. ERT is a lighter form that according to the Recommendation applies only to the most relevant NGA wholesale access products and flagship products and therefore is limited in scope to NGA products.

ETNO in the frame of the scope of the Guidance document comments that ERT is not an appropriate measure, where price control remains on one or more wholesale products in the market.

BEREC is rejecting the comment, as it is already clear from the Recommendation that the ERT is to be used in combination with technical replicability and EoI in case of non-imposition of regulated wholesale access prices for NGA networks. However, NRAs pursuing the objectives of Art. 8(2)(b) Framework Directive may use stricter ex-ante margin squeeze tests.

On the efficiency standard ETNO suggest the use of EEO instead of adjusted EEO or REO, because the markets under consideration are competitive enough and the lighter regulation should ensure investments; besides that ETNO argues that the adjustments for inefficient (legacy costs) or economical (special taxation on infrastructure ownership) circumstances, specific to the SMP operator are not taken into account.

BEREC rejects the comment; as already the Recommendation allows both standards and the choice of EEO or REO/adjusted EEO requires an in-depth analyses of the various aspects (e.g. cost structure of the relevant value-added level, market stage etc.), and the targeted scenario (e.g. retail price level, diversity of services – and their availability). The assumptions can differ depending on the underlying national market situation.

Because of the need of the sharing the risk of investment, ETNO sees the problem in the LRIC+ methodology for the access seekers upstream and downstream costs and also the average customer (instead of infrastructure) lifetime. ETNO proposes the LRIC (avoidable cost) standard and elimination of the mark up for joint and common costs. ETNO also suggests that in cases where the risk sharing agreements are concluded, variable part of the access price calculated on the LRIC+ can enter the ERT calculation

BEREC rejects the comment, since the Recommendation is setting LRIC+ as the cost standard for the NGA.

ETNO considers that the relevant time period with a dynamic, multi-period DCF approach as foreseen in the Recommendation is suitable, since it is enabling flexibility and offering of the competitive retail offers- investments in the NGA.

ETNO argues that the most suitable time period used is DCF over the infrastructure lifetime for part of the cost, which considers a longer timeframe and is economically consistent as it provides sustainable and efficient entry since NGA investments have a long payback period.

BEREC refers to the explanation in section 4.3 Time period. Furthermore it is important to note that risk sharing is limited where it would lead to risk shifting as this risks creating a margin squeeze. The choice of the appropriate method is likely to depend on a number of factors, such as the main objectives for carrying out the test, the development stage of the market and the availability of reliable data.

On the breakdown of retail costs ETNO considers BEREC as over inclusive in regard of retail cost categories.

BEREC clarifies that the inclusion of different retail cost categories depends on the decision of the NRA on a case by case basis, regarding the product or a group of products which are subject to the ex-ante margin squeeze test and all other circumstances reflecting the market situation.

On the relevant wholesale product ETNO comments that the relevant wholesale product is the most relevant NGA product and may be different in different geographic areas.

BEREC refers to the sections 4.2.5 (Relevant wholesale products), 4.4.3 (Bundles) and 4.5 (Geographic segmentation) of the Guidance document for further clarification.
The wholesale product, taken into account depends on the examined product or the group of products, especially bundles. As already recommended by the Recommendation, NRAs should examine the replicability of the relevant retail offer by taking into account the wholesale inputs used in the specific geographic areas.

Regarding the level of aggregation ETNO considers product by product as not appropriate, which could also influence the incentives to invest and instead of suggests the portfolio approach.

BEREC rejects the comment, since both approaches can be used and the usage of one or the other depends on various factors and is subject to the analysis of NRA. In any case, the unfair penetration pricing should be blocked.

ETNO agrees that all relevant revenues of downstream services have to be taken into account. In fact, ETNO actually agrees to the BEREC approach.

On the reasonable profit ETNO states that BEREC is introducing the profit indicator, regardless of the fact that Recommendation does not mention any. ETNO understands the guidelines as the same margin has to be applied to each individual product.

BEREC refers to section 4.2.2 (Reasonable profit) and clarifies that the profit indicator is not introduced by the Guidance document, but is by default included into the LRIC+ cost standard.

ETNO states, that the make-or buy decision is wrongly cited (p32)

BEREC thinks that the interpretation provided in the quoted footnotes is the only possible.

Regarding the procedural aspects ETNO states that the ERT should not amount to retail market regulation. The actual application of the test should be complaint based. Parameters should be known ex-ante, enhance transparency and predictability. The process should avoid additional cost of investor.

BEREC refers to section 5 (Procedural and transparency issues) of the Guidance document for further clarification, since ETNO comments are aligned with it.

ETNO suggest that if the period-by-period approach is kept, the ex-post procedure should be sufficient. An additional regulatory process before product launch would severely distort competitive dynamics.

BEREC refers to the Recommendation which designs the ERT as an ex-ante margin squeeze test. BEREC also points to section 6 (Margin Squeeze in the context of competition law differences with the ex-ante approach), where the usage of ex- ante and ex- post procedure is described.

2. Deutsche Telekom

Deutsche Telekom is in most parts sharing the views of ETNO, but puts a strong emphasis on the geographic segmentation, namely the geographically differentiated sub-markets in ERT considerations.

BEREC refers to section 4.5 (Geographic segmentation) of the Guidance document, where the issue is further discussed.

Deutsche Telekom requires pricing flexibility by considering an appropriate mix of geographic and temporary prices of products in view of a product portfolio.

BEREC provides further clarification in the Introduction to the Guidance document. The flexibility is justified in order to take national circumstances and state of competition etc. into account when conducting an ex-ante margin squeeze test or any other regulatory measure to achieve the best possible results on the market.

Regarding bundles, Deutsche Telekom suggests to take into consideration all relevant revenues of downstream services attributable to the bundle, including non-regulated services.

BEREC is taking the comment into account and is adjusting the Guidance document as it follows in section 4.4.3 (Bundles) of the document.

Deutsche Telekom agrees that the relevant wholesale price should be the price effectively charged to the competitor including volume discounts and long term agreements.

Regarding the time period, Deutsche Telekom suggests a DCF approach to evaluate profitability.

BEREC refers to its explanations in section 4.3 Time period. The choice of the appropriate method is likely to depend on a number of factors, such as the main objectives for carrying out the test, the development stage of the market and the availability of reliable data.

On the application of the ERT Deutsche Telekom states that ex post margin squeeze test based under competition law principles is sufficient in markets where the specific conditions of the Recommendation do not apply. ERT is not appropriate where price controls remain for one or more wholesale products. Deutsche Telekom seems to oppose any type of cumulative application of ex ante margin squeeze tests and regulated access prices.

BEREC rejects the comment, because the ERT is designed as an ex-ante margin squeeze by Recommendation. BEREC refers further to section 6 (Margin Squeeze in the context of competition law differences with the ex-ante approach), where the usage of ex-ante and ex-post tests is described.

Regarding the level of efficiency, Deutsche Telekom states that the most appropriate efficiency standard would be EEO without adjustments to the scale of alternative operators; REO/adjusted EEO are not applicable in markets where competition is established/with a long term-tendency towards effective competition; adjustments for inefficient or economical circumstances (e.g. legacy costs) of the SMP-operator should be reflected

BEREC rejects the comment; as the two standards are allowed by the Recommendation and the choice of EEO or REO/adjusted EEO requires an in-depth analyses of the various aspects (e.g. cost structure of the relevant value-added level, market stage etc.), and the targeted scenario (e.g. retail price level, diversity of services – and their availability). The assumptions can differ depending on the underlying national market situation.

Deutsche Telekom rejects the use of BU LRIC+ as the relevant costs of an efficient operator. Instead, the avoidable cost standard as the usual cost standard used in competition law is recommended.

BEREC rejects the comment, since also the Recommendation is setting the LRIC+ as the cost standard for the NGA products.

Regarding the relevant wholesale products Deutsche Telekom argues that the most relevant access products should not be based on an individual mix of different legacy and NGA products, but only on NGA access products.

BEREC refers to section 4.2.5 (Relevant wholesale inputs and the relevant reference prices) of the Guidance document for further clarification.
The wholesale product, taken into account depends on the examined product or the group of products, especially bundles.

On the level of aggregation of retail products, Deutsche Telekom considers a product-by-product approach as not appropriate and suggests the use of a portfolio of retail products.

BEREC rejects the comment, since both approaches are justified to reflect the market situation properly as considered in the Guidance document, while the usage of one or the other depends on various factors and is subject to the analysis of NRAs. In any case, unfair penetration pricing should be blocked.

Deutsche Telekom states that ex-ante communication of discounts to the NRA would prevent commercial flexibility and discriminate the investing operator; ex post control would be sufficient.

BEREC rejects the comment, since promotions and discounts represent the actual retail costs of a product, which are taken into account when conducting an ex-ante margin squeeze test. But as stated in section 4.4.5 (Promotions and temporary discounts), NRAs are free to decide whether the ex-ante notification is needed.

3. KPN

First of all, KPN notes that the document has a descriptive nature, and urges BEREC to promote interpretations that reflect the goal of the Recommendation.

BEREC rejects the comment, since the purpose of the document is already defined and it is meant to guide NRAs when conducting the economic replicability test. BEREC refers to the Introduction of the Guidance document for further clarification.
The flexibility is justified by the necessity of taking into account national circumstances and the state of competition, which has to be taken into account when conducting an ex-ante margin squeeze test or any other regulatory measure to achieve the best possible results on the market.

KPN stresses the different situation in countries with competition between cable and copper networks. KPN urges BEREC to review whether an ERT is an appropriate regulatory tool in this situation. KPN points out that, in a situation with competition from cable, an incorrect ERT can squeeze potential competition out of the market. The ERT should not restrict retail pricing flexibility.

BEREC rejects the comment, since this is not the subject of this document. Besides the fact the comment deals mainly with the issue whether an ERT is proportionate, it does not seem to make sense to expect that an ERT does not restrict retail pricing flexibility in any way.

KPN notes that network competition is also growing for business markets.

BEREC rejects the comment, since it is not a subject of the Guidance document.

KPN considers it more appropriate to use a ‘most efficient operator’ (instead of EEO) in markets with full network competition.

BEREC rejects the comment, since the introduction of a new efficiency standard is not appropriate and the Recommendation provides for the EEO and the REO/adjusted EEO. BEREC refers to section 4.1.2 (Level of efficiency of the operator) for further clarification.

KPN wants a clear definition of the term ‘bundles’. KPN suggests as a guideline ‘a contractual or financial relation’ between the different products in a bundle.

BEREC refers to the section 4.4.3 (Bundles) of the Guidance document for further clarification.

According to KPN sufficient flexibility should be provided for temporary discounts and promotions. In the BEREC guidance document the pay back of promotions is related to the services involved. Instead, it should be possible to earn back the promotions on the total customer base and over a longer time period than the customer lifetime.

BEREC refers to section 4.4.5 (Promotions and temporary discounts) of the Guidance document for further clarification.

4. TDC

TDC comments that since the guidance document only compares ex-ante margin squeeze test already applied, the objective to promote investment in NGA is not fully achieved.

BEREC refers to the Introduction of the Guidance document for further clarification. The ERT is considered as a specific type of the ex-ante margin squeeze test. ERT is lighter, and according to the Recommendation would be applied only on the most relevant NGA wholesale and flagship products and therefore on a limited scope of NGA products.

TDC considers the definition of “reasonable” in relation to REO is not precise enough, both in relation to scale, product portfolio and efficiency.

BEREC is acknowledging the comment, but such detail is left to be decided by the NRA in order to properly take into account the national market situations

TDC is identifying the needs for the possibility to use different retail costs for full scale and discount brand.

BEREC rejects the comment as this would result in different versions of REOs servicing different segments.

TDC also commented on the table on p. 50 of the Guidance document, where the terms LRIC+ and LRAIC are used and they assume that only LRAIC+ should be used.

BEREC rejects the comment, since the distinction is based on the level of aggregation used by NCAs and NRAs (shown in the table included in section 6.2), that is consistent with the definitions for LRAIC and LRIC+ in Annex A of the Guidance document.

5. Telecom Italia

According to Telecom Italia, for some issues BEREC suggest the possible assessment of the relevant test parameters deviating from the Recommendation on the ground that several NRAs currently apply approaches different from what the Commission recommended.

BEREC is rejecting the comment. Current practices described are the ones actually used when conducting ex-ante margin squeeze tests which is justified given that the ERT is designed as an ex-ante margin squeeze.

Telecom Italia makes a distinction between the margin squeeze test (performed on copper-based offers) and ERT (performed on NGA products) and asks BEREC to specify that those tests should be carried out following the same indications given by the Recommendation for the ERT, in order to harmonise the replicability test methodology across the Union and ensure consistency between the ERT methodology and the margin squeeze one.

BEREC refers to section 4.2.5 (Relevant wholesale inputs and the relevant reference prices) of the Guidance document for further clarification. The copper network is in many situations part of the product, and therefore cannot be excluded from the test.

The same as previously stated ETNO, Telefónica and Deutsche Telecom, Telecom Italia states that in presence of an obligation to offer cost oriented wholesale access services, it is not necessary and justified the application of a margin squeeze test.

BEREC is rejecting the comment, as it is already clear from Recommendation that the ERT is used in combination with technical replicability and EoI in case of non-imposition of regulated wholesale access prices on NGA networks. Therefore price control does not remain, while the sections on relevant cost standard and regulated wholesale costs are used as the basis for those wholesale costs, which are normally regulated and give the transparency and orientation to the SMP operator's wholesale offer.

Telecom Italia suggests that the use of benchmark of the retail offers in the market should be taken into consideration.

BEREC is taking the comment into account and is adjusting the Guidance document as it follows in section 5.4 (Request of additional information from the SMP operator about its costs and traffic) of the document, where it states that NRA may benchmark retail prices of innovative offers as a supplementary source of information for cross checks.

Telecom Italia also suggests that the ERT should take into account the most efficient service available at the wholesale level, namely the lowest level in the value chain according to the principle that the operator makes the cheapest technological choice in the long run.

BEREC is rejecting the comment, since it is not in line with the Recommendation, which is recommending the usage of the most relevant NGA products.

As well as Deutsche Telecom also Telecom Italia states that geographical segmentation of the test should include the possibility to differentiate not only the relevant wholesale inputs but also other parameters even in absence of the geographic market segmentation.

BEREC refers to section 4.5 (Geographic segmentation) of the Guidance document, where the issue is further discussed.

Telecom Italia deems that the DCF analysis is the right tool to correctly evaluate ultra-broadband offers, while the period by period test should be avoided since it does not allow sufficient price flexibility.

BEREC refers to the explanations in section 4.3 Time period. The choice of the appropriate method is likely to depend on a number of factors, such as the main objectives for carrying out the test, the development stage of the market and the availability of reliable data.

The retail price parameter of the test formula should be defined as the revenues of the offer in its all different marketing forms: the test should not be applied to a specific marketing form only (e.g. promotions).

BEREC refers to the section 4.4 of the Guidance document for further clarification.

Telecom Italia invites BEREC to better highlight not impose a prior approval obligation on each new retail offer to favour price flexibility and allow the SMP Operator an adequate time to market and suggest the application of the replicability test after the offer launch.

BEREC rejects the comment as further explained in section 5 (Procedural and transparency issues).

6. Telefónica

As ETNO, Telefónica is commenting as well that the ERT does not consider the risk of the investor into the NGA.

BEREC rejects the comment, since the costing methodologies for the test are clearly defined in the Recommendation. Besides that, the aim of an economic replacibility test is to guarantee that an alternative operator is able to replicate the retail products of the SMP operator. The risk should be taken into account mainly in wholesale prices, which are a given element in the test.

And also that the EEO should be the only efficiency standard used.

BEREC rejects the comment; the Recommendation already provides for both and the choice of EEO or REO/adjusted EEO requires an in-depth analyses of the various aspects (e.g. cost structure of the relevant value-added level, market stage etc.), and the targeted scenario (e.g. retail price level, diversity of services – and their availability). The assumptions can differ depending on the underlying national market situation.

On the same hand Telefónica argues that DCF over the infrastructure lifetime for part of the cost, which considers longer timeframe and is economically consistent as it provides sustainable and efficient entry; NGA long payback period.

BEREC refers to its explanations in section 4.3 Time period. The choice of the appropriate method is likely to depend on a number of factors, such as the main objectives for carrying out the test, the development stage of the market and the availability of reliable data.

The reference wholesale service considered for the test must be the only used by the most efficient operator. Telefónica identifies it with that which is present in the lowest level (i.e. ducts).

BEREC rejects the comment, since the introduction of a new efficiency standard is not appropriate. BEREC refers to the section 4.1.2 (Level of efficiency of the operator) for further clarification.

Non-regulated input costs are not clearly delineated in the Guidance document and some of them (i.e international internet connectivity costs) provided by other operators can be lower than the cost for SMP operator.

BEREC considers that the introduction of a new efficiency of the "most efficient operator is not appropriate; the details of the standard to be applied are left to the NRAs to take into account properly the national market situation (see also comment above). Nevertheless all the cost categories are subject to detailed analyses of NRAs that will take into account all relevant factors that may influence the result (also depending on the availability of data).

The value for fiber customer average life should be the highest possible in the market. Telefónica disagrees with the proposal to use the average customer lifetime of copper broadband products.

BEREC rejects the comment as it is further explained in section 4.3. Time period.

Telefónica shares ETNO's view on the level of aggregation, that the ERT should be performed on a portfolio of services, with the highest level of aggregation.

BEREC rejects the comment, see explanation above.

On bundles Telefónica argues that the ERT should give flexibility to accommodate products requiring investments whose return is not achievable in one year (i.e. in IPTV services there some upfront fixed costs).

BEREC refers to section 4.4.3 (Bundles) of the Guidance document for further clarification. The flexibility is justified by the necessity to consider national circumstances and the state of competition, which has to be taken into account when conducting an ex-ante margin squeeze test or any other regulatory measure to achieve the best possible results on the market.

On the procedural issues Telefónica suggests that SMP operator should never be required to wait until the NRA verifies the compliance with the ERT before launching a new retail product.

BEREC is acknowledging the comment, but NRAs need to be sensitive to the importance of time-to-market. However, the possibility of previous notifications is following from the fact that the ERT is designed as an ex-ante margin squeeze test to be conducted before the launch of a product which is a key factor in the application of the test.

The test should not be performed following a trigger-event approach, but conducted once a year.

BEREC is rejecting the comment, since it is incompatible with art. 56 b) of the Recommendation.

The NRA should provide the SMP operator with all the information (procedures and data) about how the test is going to be performed.

BEREC agrees and refers to the section 5 (Procedural and transparency issues) for further clarification. The SMP operator needs to have the maximum amount of information to know in advance how the ERT works, and to predict the result before the launch of a retail product.

Telefónica points out that it is necessary to have a common test for competition and regulatory authorities, and complains that the document focuses on the differences between ERT/ex-ante margin squeeze tests and competition law's margin squeeze test.

BEREC refers to section 6 (Margin squeeze in the context of competition law) of the Guidance document for further clarification. ERT is considered as a specific type of the ex-ante margin squeeze test.

The Recommendation points out that the ERT is applicable without prejudice of the competences of competition law authorities. The scope of the Recommendation is different of the competition law.

7. ECTA

ECTA is in contradiction with ETNO considering that the Guidance document should make clear that rigorous ex-ante margin squeeze testing goes well beyond the ERT and NRAs should be empowered to carry them out.

BEREC refers to the Introduction of the Guidance document for further clarification. ERT is considered as a specific type of the ex-ante margin squeeze test. ERT is lighter, and acc. To the Recommendation would be applied only on flagship products and therefore on a limited scope of NGA products.
NRAs need to balance duties under Article 8 and BEREC's view is that they should have discretion as to how strictly they apply the ex-ante margin squeeze test.

ECTA also states that Guidance document should say that rigorous ex-ante margin squeeze tests can be equally applicable for Market 3 (a) and (b) as for other markets.

BEREC refers to section 2.1 of the Guidance document, where the transmission of the relevant markets 4 and 5 to markets 3a and 3b is described.

Ex-ante MSTs should be complemented by ex-post compliance checks.

BERER acknowledges the argument, and adjusted the relevant paragraph. NRAs are empowered to request operators to provide information in order to verify compliance (as set out in section 5: Procedural and transparency issues) where it is up to NRAs to decide how best to check compliance but we would expect that this would ordinarily be done on an ex-post basis using actual data.

ECTA reminds that section 4.2.2 on reasonable profit is not clear. It appears to be talking about rates of returns in the context of OCPs' own infrastructure investments rather than the appropriate RoR for access to the SMP operator's network.

BEREC is taking the comment into account and provides the clarification in section 4.2.2 of the document.

ECTA wants that section 4.2.4, which refers to an "average user" must be left open for NRAs to consider whether OCPs who tend to have customers with different usages should be accounted for.

BEREC is rejecting the comment, since the document does not discuss the specific costs that could be adjusted under adjusted-EEO/REO, as it is up to NRAs to decide on the best way to deal with it.

In the section 4.2.5., which refers to “most relevant wholesale products” and “flagship products”, ECTA wants to leave this open enough to include business grade products in the scope.

BEREC is rejecting the comment, since neither Recommendation nor BEREC document specify residential nor business, hence leaves it open for NRAs to decide.

ECTA wants the guidance to refer to average customer lifetime for contestable customers only in section 4.3. It argues that ‘non-switchers’ are likely concentrated among customers of the incumbent operator and cable operator.

BEREC s referring to section 4.3 which already mentions the following points in estimating average customer lifetime: (i) churn rates volatile in early stages of market development, (ii) differences in competitive conditions between retail copper and NGA markets. For (ii), propose revising to: competitive conditions in retail markets should be taken into account when estimating the average customer lifetime (ACL), i.e. markets which are less competitive will tend to result in longer ACLs. Similarly, as noted in Recommendation, if copper broadband products are being used as indicator, differences in competitive conditions between copper and NGA should be taken into account.

ECTA welcome that BEREC states that ex-ante margin squeeze testing is mainly used by NRAs as a complementary tool and not as a substitute to wholesale price control, the test should be applied to all relevant products (including downstream wholesale products), not just “flagship products”. ECTA want more prominence to be given to this.

BEREC refers to the section 4.4.1 (Flagship products) of the Guidance document for further clarification.

Regarding the Procedural and transparency issues, ECTA believes that both pre-notification and ex-ante authorisation of downstream products/bundles is essential, and requests BEREC to identify these as best practice. BEREC should identify as best practice (i) NRAs making their margin squeeze models available to stakeholders and (ii) NRAs are fully transparent in their approach to determining cost/revenue values, e.g. Ofcom’s recent consultation.

BEREC refers to the explanations in section 5 (Procedural and transparency issues) which already describes in some detail the types of procedures NRAs are carrying out and why. The purpose of the Guidance document is not to prescribe a ‘best’ way for carrying out margin squeeze test as it is not possible to develop best practice at this stage.

ECTA concludes the document with the request to BEREC to revise the document to include best practices.

BEREC refers to the Introduction of the Guidance document for further clarification and above.

8. Fastweb

Fastweb (see also the Annex – Extract of an Oxera study) invites BEREC to further stress the superiority of the REO/EEO adjusted test for evaluating the downstream costs as it takes into account the scale and scope disadvantages faced by alternative operators.

BEREC is acknowledging the comment, but such detail is not needed. The decision for the efficiency standard is up to the NRAs to decide regarding the state of competition on individual market and national circumstances.

As regard to the cost of non-regulated inputs, Fastweb underlines the importance of evaluating these costs using the available information on costs actually borne by alternative operators or, alternatively, on estimates based on European benchmarks.

BEREC is taking the comment into account and is adjusting the Guidance document as it follows in section 5.4 (Request of additional information from the SMP operator about its costs and traffic) of the document, where it states that NRA may benchmark retail prices of innovative offers as a supplementary source of information for cross checks. Those benchmarks are not necessarily on European level, but on the level, which seems most appropriate to the NRA.

According to Fastweb, the Guidance should give indication to NRAs in terms of cost categories (e.g. marketing costs, customer care, billing, etc.) to be included in the retail costs or in the common costs. Furthermore, the Guidance should provide for instruments to evaluate each element.

BEREC is acknowledging the comment, but leaves the detail of the cost assessment to the NRAs to take into account the national market situation and the state of competition etc.

With regard to the relevant wholesale inputs, Fastweb suggests to test the replicability of the offers against the less infrastructure-based wholesale input, such as NGA bitstream, in order to avoid the exclusion from the market of new entrants.

BEREC is rejecting the comment, since this is not the subject of the Guidance document but other segments of the Recommendation.

Fastweb considers that there are no reasons why the assessment of the average customer's lifetime should be done differently in the ultra-broadband market as it is done in the broadband market, as the features of the services and behavior of the customers could be considered similar.

BEREC refers to the explanations in section 4.3. Time period. The Guidance document leaves the decision for the most appropriate method (in line with view expressed in BEREC common opinion) to the NRA.

As far as relevant retail products are concerned, Fastweb agrees with BEREC position on the inconsistency between the time prescribed by the Recommendation to start the procedure of the test – in the first three months past the launch – and the difficulty of foreseeing in advance if a product is a flagship products or not.

Furthermore, Fastweb considers extremely important to assess the replicability of each specific product through a specific product by product test, in order to avoid cross-subsidiary effects.

BEREC is acknowledging the comment, but leaves the choice of the method to the NRAs to reflect the national market situation etc..

It may be advisable to suggest to NRAs the introduction of an additional ex-post test, on top of the standard ex-ante DCF test as a further tool to check the accuracy of information provided to the NRA by the SMP operator.

BEREC is acknowledging the comment, but leaves the choice of the method to the NRAs to reflect the national market situation etc..

Fastweb agrees with BEREC and invites it to specify that NRAs should put in place detailed procedural rules regarding the obligation to notify to NRA the launch of the retail offers, as well as clarify that the authorization has to be explicitly given by the NRA and adequately publicized.

BEREC is acknowledging the comment, but leaves the decision on the details to the NRAs toreflect the national market situation etc..

Fastweb invites BEREC to stress the necessity to increase the degree of transparency and to make the electronic model (i.e. Excel file) adopted by the NRAs for running the test available to all stakeholders, not only the SMP operator.

BEREC is acknowledging the comment as BEREC is recognizing the importance of transparency for regulatory predictability, but the degree of disclosure must be left to the NRAs as different rules on data protection and other legal issues have to be born in mind. Nevertheless the transparency on the general methodology to be used by the NRA must be assured prior to conducting the test and in all the steps of procedure, the latter subject to confidentiality requirements.

9. FTTH Council

FTTH is sceptical towards margin squeeze tests in general. Margin squeeze tests with regulated and unregulated products risk being complex and potentially send the wrong signal that detailed/complex regulatory management of markets will continue. More general comments, but FTTH Council underscores the risks of softening competition or the potential negative impact on incentives to invest could be highlighted more

BEREC is rejecting the comment, since the ERT is foreseen by the Recommendation. The Guidance document is therefore only giving guidance to NRAs how to conduct ex-ante margin squeeze tests. The comment is not the subject of this document.

10. Vodafone

Vodafone supports the use of an adjusted EEO test. It suggests the following adjustments should be made: average customer lifetimes, bandwidth costs, out of bundle calls, TV content costs and additional costs an access seeker incurs (e.g. colocation). It may also be necessary to adjust the usage profiles of the SMP operator’s customers.

BEREC rejects the comment, since the document does not discuss the specific costs that could be adjusted under adjusted-EEO/REO, but leaves it to the NRAs to decide on the best method.

There may be merit in adjusting the WACC of the SMP operator to better reflect the WACC of a suitably defined hypothetical entrant.

BEREC adjusted section 4.2.2 (Reasonable profit) to clarify the purpose and the way of including a reasonable rate of return. As above, the Guidance document does not comment on individual adjustments NRAs may consider.

NRAs should mandate a third party to audit cost information.

BEREC refers section 4.2 (Relevant cost standard) which already discusses retail costs typically being sourced from audited accounts.

Vodafone wants the Guidance document to provide more detail and guidance on the products/offers that will be subject to the ERT. It considers that defining “flagship products” purely based on revenue and customer market share is not sufficient in the fast changing NGA environment. It should be offers that present a material risk to competition that should be subject to the ERT. Vodafone proposes the use of customer growth in the product segment, relative gross net additions, relative marketing/advertising spend (in addition to market shares).

BEREC is taking the comment into account and is adjusting the Guidance document as it follows in section 4.4.1 of the document, where it says “other criteria to select the flagship products might be possible e.g. advertising costs as suggested by the Recommendation…” to add: customer growth, relative gross net additions, relative advertising spend, as suggested by Vodafone.

Vodafone rejects the use of a portfolio approach as it allows the SMP operator to make lower, none or negative margins on some products. It also argued that it is subject to gaming and skewed in favor of the SMP operator who is likely to have a wider service range than its competitors. It supports the use of a flagship product by flagship product approach.

BEREC rejects the comment, as both approaches are considered appropriate in the Guidance document, while the usage of one of them depends on the state of competition on individual market. Only the unfair penetration pricing should be prohibited.

NRAs should refrain from imputing the value of an element of the bundle from its standalone price as this is arbitrary and is unlikely to be a good proxy of the cost and the price of each individual bundle component.

BEREC refers to section 4.2.5.2 (Non-regulated input costs) of the Guidance document for further clarification. It says: for practical reasons most NRAs use the SMP operator's costs to assess the non-regulated input costs (mostly LRIC+). Alternatively, prices agreed on the carrier market can be used. Change emphasis: Most NRAs use the SMP operator's costs to assess the non-regulated input costs (mostly LRIC+). In cases where these costs are not readily available, the standalone price might be used as a first proxy for cost.

Incumbent market power has remained strong for business offers that rely on the regulated NGA wholesale input. Vodafone requests that BEREC makes it clear in the final Guidance that business offers should be subject to the ERT.

BEREC is rejecting the comment, since neither the Recommendation nor the Guidance document specify residential or business customers, hence leaves it up to NRAs to decide.

Given the drawbacks of the DCF approach, a period-by-period analysis with certain costs spread over the customer lifetime (e.g. customer acquisition costs) should also be included in the ERT.

BEREC refers to the explanations in section 4.3. Time period. The Guidance document leaves the decision for the most appropriate method (in line with view expressed in BEREC common opinion) to the NRA.

The SMP operator must be required to supply pre-launch notification of major price changes and new offers showing compliance with the no margin squeeze obligation. A monitoring system must be in place to ensure compliance based on actual data on an ex post basis. Vodafone proposes that the SMP operator should be obliged to provide compliance information on a quarterly basis.

BEREC refers to section 5 (Transparency and procedural issues) which already describes in some detail the types of procedures NRAs are carrying out and why. The purpose of the document is not to prescribe a 'best' way for carrying out the ex-ante margin squeeze test. BEREC is taking the comment into account as concluded in the section 5.8 (Conclusions and further guidance) and suggests to the NRAs to conduct the compliance tests on the ex-post basis using the actual data.

11. Wind

The replicability tests should be performed with access seekers collaboration, in order to reduce the NRA information asymmetry regarding commercial and technical aspects. An appropriate set of actions should be foreseen if replicability test fails, like a reduction of related wholesales offers.

BEREC is referring to section 5 (Procedural and transparency issues) of the Guidance document for further clarification. NRAs will transparently provide stakeholders with all the information needed to maintain the regulatory predictability and certainty.

Margin squeeze test should be applied in *all* areas of the national country and with regard to *all* kind of retail offers, not only to "flagship offers". Moreover, each test should be referred both on copper-based offers and fiber-based offers.

See above.

Relevant downstream costs should be estimated on the basis of the REO approach, as it guarantees the recovery of the costs incurred by an efficient alternative operator.

BEREC is rejecting the comment since both standards are possible and the decision for the efficiency standard will be left open for NRAs to decide regarding the state of competition on individual market and national circumstances.

Wind disagrees on the statement at page 30 "*The primary…..*" and underlines that ERT and cost orientation are NOT alternatives. In fact, Wind is of the opinion that the ERT and technical test shall be defined by NRA in order to improve effectiveness of cost orientation.

BEREC has clarified that the ERT is a specific type of ex-ante margin squeeze test and that NRAs may need to apply stricter ex-ante margin squeeze tests when pursuing the objectives of promoting sustainable competition and efficient investment. The second comment is rejected as well, since it is not the case of the Guidance document but the Recommendation in general.

With regard to wholesale regulated costs, Wind states that when a mix of relevant wholesale services is used, such a mix shall be defined not only on the basis of the adoption of such wholesale inputs as used by the altnets, but also considering procompetitive measures aimed to promote the NGA market entrance of a large number of altnets.

BEREC is acknowledging the comment, but leaves it to the NRAs to decide on the relevant mix in the light of the national market situation and the state of competition etc.

With regard to non-regulated input costs, Wind believes that the most valuable methodology is the FAC/FDC (Fully allocated/distributed Cost).

BEREC is rejecting the comment, since the decision on the methodology is left to the individual NRA, regarding the national circumstances and data available on the market.

The average customer lifetimes two years to five years it is too long.

BEREC refers to the explanations section 4.3. Time period. Guidance document leaves the decision for the most appropriate method (in line with view expressed in BEREC common opinion) to the NRA.

Promotions and temporary discounts shall be considered *previously* to the commercial launch of the offer in order to prevent they can simply be a tool to by-pass ex ante replicability tests.

BEREC refers to section 4.4.5 (Promotions and temporary discounts) of the Guidance document for further clarification, where the ex-ante communication obligation is possible for the NRA to request from the SMP the necessary information etc.

Regarding the procedural and transparency issues, Wind invites BEREC to specify that the replicability test should have the following feature in order to be effective:

- obligation to communicate to the NRAs the launch of the offers 30 days before its commercial launch;
- SMP Offer can be commercialized *only* if approved by NRA;
- flagship product must be deeply analysed in order to avoid by-pass phenomenon of ex ante replicability test;
- economic test must be performed jointly with a technical replicability test;

replicability should be verified also at a later stage, for example at least after 6 months, in order to verify if ex ante test and hypothesis are confirmed.

BEREC is acknowledging the comment, but leaves the decision on the details to the NRAs in order to properly reflect the national market situation and the state of competition etc.. The technical replicability is not the case of the Guidance document.