

20.10.14

**TDC comments on the BEREC's consultation on the draft:
*Guidance on the regulatory accounting approach to the economic replicability test***

TDC welcomes that BEREC provides guidance on how to apply *the Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment* C(2013) 5761, in particular the provisions on the Economic Replicability Test (ERT).

In general we believe the Guidance paper will be helpful for the NRAs to achieve a harmonised application of the ERT that supports the objectives of the Recommendation, i.e. to further investment in NGA, and we have only a few brief comments below.

We acknowledge the inductive approach taken by the Guidance paper to the high-level description of the ERT in the Recommendation, i.e. to build on the current practice of the NRAs in order to provide practical guidance.

However we see a risk that this 'bottom-up' approach may blur the clear distinction made in the Recommendation between on the one hand use of an ex-ante based standard margin squeeze test, where retail cost are calculated on the basis of a REO, and on the other hand the Recommendation's ERT approach, relying on an EEO. So even if the stated objective of the Guidance paper is to compare ex-ante the margin squeeze tests applied by some/many NRAs with the Recommendation's ERT to promote investment in NGA this objective is not fully achieved

Furthermore at a general level we are missing reflections on the size of the REO and the product portefeuille of the REO. Since 'reasonable' can be interpreted in different ways (as described p. 31), it is important that some constraints are introduced to ensure that the an economical sustainable understanding of 'effective' is applied if/when adjustments for scale advantages are made.

An overriding challenge for the NRAs when it comes to the use of ex-ante margin squeeze test but in particular concerning the implementation of the ERT is to avoid a reintroduction of regulation of retail markets. The basic role of margin-squeeze tests is to verify ex-post if a certain behaviour has constituted an abuse of market power in markets where no ex-ante regulatory measures are in place and thus sanctions should be imposed. To use ex-post control of behaviour in retail markets also in markets where main upstream inputs are ex-ante regulated implies a considerable risk that a certain market structure and product structure is frozen and that the competitive dynamics are taken out of the market. In the ERT context this should preferably leads to some caution when:

- Identifying products beyond the 'flagship' products
- Defining 'bundles'
- Putting restrictions on promotion/temporary discounts that often will be the drivers for new innovative services.

Specific comments:

- Chapter 2.1, p. 8:

There should for a REO calculation be a distinction between adjustments for scale and the degree of efficiency. A small operator might lack scale whereby retail cost are high. An analysis for efficiency should however be carried out in order to – potentially – make an adjustment for efficiency compared to other operators of similar scale/product mix.

- Chapter 4.2.5, p.33

The Guidance fails to include the possibility to use different retail costs for a full scale premium operator and a discount brand, which otherwise could provide a more true picture of the actual degree of competition.

- Chapter 6.2, p. 50:

The distinction between 'Long Run Average Incremental Cost' and 'Long Run Incremental Costs+' should be clarified as the LRAIC+ might lead to inclusion of additional costs on products.