

# Creating a brighter future

Response to the consultation on the 'BEREC Guidance on the regulatory accounting approach to the economic replicability test (i.e. ex-ante/sector specific margin squeeze tests)'

24 October 2014

## **Introduction**

The FTTH Council Europe welcomes the opportunity to comment on the draft BEREC Guidance on the regulatory accounting approach to the economic replicability test (i.e. ex-ante/sector specific margin squeeze tests).

The FTTH Council Europe is an industry organisation with a mission to accelerate the availability of fibre-based, ultra-high-speed access networks to consumers and businesses. The Council promotes this technology because it will deliver a flow of new services that enhance the quality of life, contribute to a better environment and increase economic competitiveness. The FTTH Council Europe consists of more than 150 member companies. [www.ftthcouncil.eu](http://www.ftthcouncil.eu)

## **Observations**

The FTTH Council recognises that BEREC is essentially interpreting the Economic Replicability Test (ERT) provisions in the Commission's Recommendation on Non-Discrimination and Costs Accounting Principles and so has limited room for manoeuvre in terms of when or where ERT tests can and should apply.

However, there almost appears to be a contradiction in the very basis of that original Commission Recommendation which is proposing a lightening of regulatory obligations, in particular in the form of no price controls on retail or wholesale products, but makes the retail products subject to an ERT. That ERT is interpreted as being the same as margin squeeze and with it comes a range of examinations and obligations which, de facto, result in a wholesale price being set.

If there is no regulated wholesale charge how is a margin squeeze to be applied? It does not make sense and so we are told that NRAs must calculate a wholesale cost to use as a basis for making the margin squeeze calculation. Whether the price at the wholesale level is explicit or not is moot, an effective price (equal to cost) effectively exists in the proposed regime.

Therefore, while there is nominally no price control, de facto there is a price control which not only applies at the wholesale level but also applies at the retail level by implication.

Any ERT or indeed any margin squeeze test performed by NRAs will still be subject to EU Competition Rules and these markets have in the past thrown up contradictory conclusions<sup>1</sup> which however justifiable, creates a particular context in which this guidance and DG Connect's ambitions must be viewed.

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<sup>1</sup> Case C 280/08 P, Deutsche Telekom AG vs. the Commission, Judgment of the court 14.10.2010 and Case COMP/38.784, Wanadoo España vs. Telefónica, Commission decision of 04.07.2007

In particular, the use of LRIC+ pricing standards whereby the SMP fibre costs are ‘audited and sufficiently disaggregated’ is a very heavy requirement in the broader context of new network investments.

The FTTH Council would note that often entrants can have lower costs to an SMP operator since specialised and targeted entry in areas where there is lowest cost particularly where average prices are the norm in the market. For that reason an EEO approach is most likely to be appropriate.

With respect to the relevant retail markets, the FTTH Council notes that the use of bundled products and the preponderance of non-regulated products make margin squeeze tests more complicated. Such margin squeeze tests also risk constraining competition in the market since the threat of sanction and the lack of clarity about the scope of the test makes pricing even more difficult.

Adding promotions which may be geographically based (and thereby subject to a radically different cost function in a FTTH context) and the risks of pricing so as to promote new networks and services the level of complexity rises exponentially.

The FTTH Council is concerned that the whole approach in this area is creating uncertainty particularly relating to new products and services. Market operators are told that the pricing flexibility will facilitate ‘penetration pricing’ in order to promote new networks and services but the FTTH Council believe that it simply creates a kind of double jeopardy since both an ex-ante and ex-post pricing regimes will apply.

In the face of such uncertainty and in particular in the context of the double jeopardy that exists by virtue of two relevant supervisory authorities, the likelihood that market operators will develop innovative and radical pricing solutions to drive NGA take-up looks weakened rather than strengthened. In a context where all the relevant research point to take-up<sup>2</sup> rates as the determinative metric in determining the success or otherwise of FTTH projects, this is particularly problematic.

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<sup>2</sup> See for example

[http://www.ftthcouncil.eu/documents/Reports/2012/NGA\\_Services\\_Study\\_2012.pdf](http://www.ftthcouncil.eu/documents/Reports/2012/NGA_Services_Study_2012.pdf)