Body of European Regulators for Electronic Communications

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BEREC report on the public consultation of the Draft review of the BEREC Common Position on geographical aspects of market analysis (definition and remedies)

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Contents

The draft review of the BEREC Common Position on geographical aspects of market analysis (definition and remedies) was discussed and approved for public consultation at the BEREC Board of Regulators meeting in Budapest, Hungary, on 5 December 2013. The public consultation ended on 7 February 2014. According to Article 4 of the Decision of the Board of Regulators on the BEREC procedures for public consultations held by BEREC, BEREC *shall publish a summary of all contributions received and an explanation as to how the views expressed were taken into account in the final position, taking into account confidentiality requests submitted (…).*

Fourteen contributions from the following stakeholders have been received in response to the consultation.

1. Belgacom
2. BREKO
3. British Telecom
4. Buglas
5. Cable Europe
6. Deutsche Telecom
7. ECTA
8. ETNO
9. Fastweb
10. FTTH Council Europe (FTTH Europe)
11. KIGEiT
12. Telecom Italia
13. Telefónica
14. One stakeholder — *confidential submission*

Specific contributions and BEREC views on these contributions are summarised by the paragraph of the draft review to which they refer, as submitted to the public consultations.

I. Introduction

Most stakeholders consider the revision of the 2008 ERG Common Position on geographical aspects of market analysis to be timely given the market and technological developments in particular and given several notifications by national regulatory authorities under Article 7/7a of Framework Directive 2002/21/EC concerning market segmentation and geographic differentiation of remedies.

Furthermore, most stakeholders agree that geographical segmentation is helpful in ensuring regulation that is consistent with market needs. The BEREC draft is of great importance as it provides guidance for NRAs on this matter.

Most stakeholders believe that the publication of BEREC's revised Common Position on geographical aspects of market analysis should have been better coordinated with the adoption of the European Commission's recommendation on product and service markets relevant for *ex-ante* regulation. **Cable Europe** is of the opinion that BEREC should postpone the update of its Common Position so that it can fully take into account the final delineations of relevant markets. **Telefónica** wants BEREC's revised Common Position to indicate how the conclusions reached on the current relevant markets could be transferred to the new list of relevant markets.

Regarding the issue of timing, BEREC considers it relevant to NRAs to update the Common Position on geographical aspects of markets analysis to take into account the feedback from the cases of market reviews related to geographical aspects observed since the first version of the Common Position.

Regarding the relationship between the current list of relevant markets and the new list of relevant markets, the European Commission is likely to indicate in the explanatory note accompanying the recommendation which relevant market in the new list corresponds to which relevant market in the current list. Moreover, the revised Common Position is being drafted by the same BEREC EWG (namely the Market and Economics Analysis EWG) that is in charge of drafting BEREC's Opinion on the European Commission's draft recommendation on relevant product and service markets. Therefore, BEREC's EWG has been fully informed of the evolution of the recommendation and is pleased to note that its revised Common Position is in line with the new recommendation.

Fastweb and **BT** stress that NRAs need consistent criteria to assess whether geographical segmentation is appropriate, including on the choice of the relevant geographical unit and on the application of remedies.

BEREC agrees with the need for consistent criteria to assess the need for geographical segmentation, the choice of the relevant geographical unit and the application of remedies. BEREC's revised Common Position on geographical segmentation provides this guidance and takes the view that NRAs are best placed to determine the course of action they should take on the matter, depending on national circumstances.

ETNO, Telefónica, Telecom Italia and **Deutsche Telekom** believe that BEREC and NRAs should be more proactive in reflecting geographical differences within a national territory in their definition of relevant markets. **These stakeholders** and **Belgacom** fully agree with BEREC that the importance of geographical aspects has increased over recent years, affecting the competitive conditions in these markets.

As BEREC emphasised in its previous answer, the guidance should allow different approaches, depending on national circumstances. BEREC also agrees that geographical segmentation has increased in importance over recent years, especially in the context of technological changes (e.g. cable operators becoming strong competitors in broadband markets). From that point of view, the homogeneity of conditions across countries has also changed. Moreover, the adoption of the Recommendation on consistent non-discrimination obligation and costing methodologies, which puts significant focus on geographical segmentation, is a further reason to provide guidance for geographical segmentation.

BT considers the geographical aspect to be one of the most important features in determining competitive conditions and believes that it may surpass factors such as the precise extent of substitutability of different services.

BEREC notes that relevant markets are defined on both product/service dimensions and the geographic dimension in the process of analysing the market. From this point of view, the determination of substitution will always play an important role in determining which services comprise a specific relevant market and cannot simply be surpassed by geographical aspects.

Telecom Italia believes that BEREC's draft review does not provide significant additional guidance beyond the 2008 Common Position following the correct description of the market developments and of the main cases since 2008.

BEREC acknowledges that the main ideas expressed in the 2008 Common Position are still relevant and adequate in relation to copper-driven competition. However, BEREC could not disregard the potential implication of case law since 2008 or the upgrade of current networks and the roll-out of next-generation access (NGA) networks.

FTTH Council Europe believes that geographical differences are an important characteristic of markets that need to be reflected in the regulatory approach dealing with FTTH investments to ensure that these investments are handled appropriately.

BEREC notes that the geographical analysis of markets must abide by the principle of technological neutrality and therefore disagrees with the comment made by FTTH Council.

On the other hand, **Cable Europe** believes that BEREC's analysis understates the significant risks that arise from extensive use of geographically segmented markets. The best option to address the differences in the intensity of competition due to the presence of cable networks is to maintain a broad geographic market definition allowing the remedies imposed in different geographic regions to be adjusted quickly when appropriate.

BEREC believes that NRAs will analyse the necessity and appropriateness of geographical segmentation in the market definition phase or remedy determination phase when performing their market analysis. BEREC believes that NRAs are best placed to determine which approach to use in the context of their national circumstances. Both approaches are left open to NRAs in BEREC's revised Common Position but are not viewed as two equally applicable options in the presence of uneven development of competition across the territory. Guidance on this issue can be found in paragraphs 164 to 167 of BEREC's revised Common Position.

ECTA is of the opinion that the draft Common Position overstates the extent to which geographical segmentation/differentiation actually exists, or would be likely to be found going forward. ECTA and **one stakeholder** stress that the consultation document overstates market and technology developments.

As already stated above, BEREC believes that NRAs will analyse the necessity of geographical segmentation, the correct geographical unit and the best way to implement remedies in the process of conducting the market analysis. During this process, the relevance of geographical segmentation will be properly analysed, including the level of market and technology developments and potential differences between residential and business markets.

II. Basic principles

ECTA and **one stakeholder** welcome BEREC's key message that the assessment of geographical differences is, in principle, a task for the individual NRAs, to be carried out based on competition law, the EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation and national specificities. In this context, ECTA asks BEREC to delete the reference to the Ecorys study, which expresses a priority for consideration of sub-national geographic markets to be regulated on an *ex-ante* basis.

Along the same lines, **Telefónica** states that common guidelines should give enough flexibility to allow NRAs to define the most suitable measures to be adopted, according to the particularities of their countries**.**

BEREC referenced the Ecorys study only to show that this study also recognises the relevance of the geographic dimension of market analyses. However, this reference does not mean that BEREC necessarily supports the findings of the Ecorys study.

III. Main cases since the approval of the 2008 Common Position

BT believes that the summary of cases since 2008 provides a very interesting insight into how other NRAs in member states are conducting their analysis and the factors that the Commission and BEREC are looking for in the context of the Article 7/7a procedure when deciding whether geographical segmentation is appropriate.

ECTA highlights that, although the consultation document contains an extensive list of cases where geographic market segmentation or differentiation of remedies was considered, the final measures adopted by NRAs relating to the overwhelming majority of the cases did not result in sub-national market definitions or geographic differentiation of remedies. ECTA therefore cautions against attaching disproportionate importance to NRA notifications that put forward proposals on geographical segmentation of markets or remedies but that were ultimately withdrawn, modified, vetoed or overturned on national appeal. Consequently, ECTA urges BEREC to fully reflect in its final Common Position that geographical segmentation/differentiation is not the norm, but rather the exception.

BEREC recalls only a few cases of NRAs undertaking geographical segmentation of markets. It appears from these cases, which are described in BEREC's revised Common Position, that most of these NRAs maintained markets that are national in scope without differentiating between separate geographic areas. However, to make it clearer, BEREC will also point this out in the text of its revised Common Position.

IV. Necessity of undertaking a geographical analysis

Regarding the need to undertake a geographical analysis, one set of comments by stakeholders relates to the presence of several infrastructures or operators and how this is taken into account in the preliminary analysis.

ETNO, Telecom Italia and **Deutsche Telecom** believe that when alternative infrastructures and operators are competing in the market, this is clear evidence for the need to conduct a geographical analysis.

ECTA and **Fastweb** caution against attaching disproportionate importance to perceived constraints from alternative technologies other than xDSL (cable, Wi-Fi, mobile broadband etc.) that may be over-stated in terms of their footprint, their capabilities and their resulting constraining ability.

In this regard, **Fastweb** believes that the presence of alternative operators is not, per se, a signal of intense competition. Moreover, the proposed indicators should be considered carefully, even though they are correctly focused on the competitive constraints posed by alternative operators in the retail market.

BEREC's revised Common Position states in paragraphs 47–48 that the preliminary analysis should give an overview of the different networks, active operators and product characteristics in a given geographical area, as well as how the relevant offers are differentiated between neighbouring areas. BEREC however notes that the presence of different operators and networks is not enough to justify a full geographical analysis, because there should be evidence that they exercise different competitive constraints in those areas.

Telecom Italia points out that the European NRAs that have performed a geographical analysis so far did not conduct any preliminary analysis, although this was suggested by the ERG in the 2008 Common Position on geographical analysis.

With regard to this observation, BEREC states in paragraph 46 of the draft Common Position that a preliminary analysis can be considered by the NRA to check the need to undertake a full geographical analysis. This avoids a costly and time-consuming process when the market has a national scope. BEREC proposes a preliminary analysis that is not mandatory. BEREC is aware of several NRAs that have conducted a preliminary geographical analysis, but these have not been publicly documented.

ECTA asks BEREC to consider that the standard set by the European Commission's comment letters on UK Market 5 notifications (Cases UK/2007/0733, UK/2010/1065 and UK/2010/1123) is the absolute minimum standard that should be adhered to by all NRAs considering geographical segmentation of markets, including for Market 4. ECTA therefore urges BEREC to reflect the precise standard set in these cases in the final text of its revised Common Position, while adding the need for effective availability of fit-for-purpose wholesale access (current and forward looking over the time horizon of a market analysis period).

With regard to this observation, BEREC confirms that it has taken into account all the points raised in the European Commission's comment letters from all relevant NRA cases.

According to BEREC, the three bullet points mentioned[1] are the basic principles given by the European Commission in its comment letters.

With reference to the first point, BEREC mentioned in paragraph 48:

"Additionally, the number of operators offering their retail services in a particular geographical area and the (relative) size of these operators, preferably complemented by the local (development of the) retail market share of the operators, may provide factual information about the position of operators in separate geographical areas."

And in paragraph 106:

"BEREC considers that, when deciding on the homogeneity of competitive conditions, NRAs may verify and analyse the geographical differences in the market(s) under analysis at the retail level and at the level of the corresponding (wholesale) market regarding:

the barriers to entry into the market; the number of operators that exert a relevant competitive constraint on the SMP operator; the market shares of the SMP operator and the alternative operators; price differences; other aspects that may derive from relevant competitive differences between the geographical areas (e.g. marketing strategies, commercial offers and functionalities of the offers, nature of demand, etc.)."

With reference to the second point, as cited above, BEREC mentions in paragraph 114:

"As the market definition exercise is required to be forward looking, it is important for NRAs to try to gauge how market shares might be expected to change over the period of the market review and whether any observed variations in current or historic market shares are likely to increase, decrease or remain relatively stable. In this regard, it can be useful for NRAs to classify areas according to the level and the trend of the market share of the incumbent operator (e.g. high and stable or declining slowly, high and declining rapidly, low and stable or declining)."

With reference to the third point, BEREC mentions in paragraph 49: *"Pricing and price differences are relevant criteria for performing a geographical analysis, but should be assessed and interpreted carefully. In particular, the analysis of prices must take place within the relevant context of the specific market analysed."*

Furthermore, from paragraph 115 to 121, BEREC mentioned *'the analysis of pricing'* as a criterion for assessing the homogeneity of the competitive conditions.

[1]According to the Commission:

1. The number of competitors present at a given exchange, even in combination with the size of that exchange, is in itself not sufficient;
2. NRA should analyse the distribution of and evolution market shares;
3. NRA should make a preliminary analysis of (potentially differentiated) wholesale and retail pricing (both of the incumbent and alternative operators).

As mentioned, all the topics requested by the EC have already been covered in the text. Therefore, BEREC sees no need to alter the text.

As to the request for the availability of *fit-for-purpose* wholesale access, a short sentence in paragraph 124 has been added to comply with this request.

ETNO, **Belgacom** and **Fastweb** all, but for different reasons, believe that the existence of price differences is not an effective indicator for performing geographical analysis.

With regard to this point, BEREC states in paragraph 132 *"that a segmentation based on a single criterion will usually not be appropriate*". Moreover, BEREC states in paragraph 49 that *"pricing and price differences should be assessed and interpreted carefully. (In particular, the analysis of prices must take place within the relevant context of the specific market analysed)."*

V. Product markets affected by a geographical segmentation of markets/remedies

Most stakeholders agree with BEREC's focus on Markets 4 and 5. They also agree with BEREC's assumption that additional markets, such as Markets 1, 2 and 6, might show a propensity for geographical segmentation and that it is the task of NRAs to evaluate respective indicators in their member states.

a. Broadband services

ECTA is of the view that, thanks to mandated local loop unbundling, alternative operators have been able to make broadband attractive to customers (in terms of speed, service innovation and pricing at a level that stimulates market demand), and this has been the key driver of broadband penetration. Moreover, ECTA is concerned that BEREC seems to consider that the mere presence of more than one infrastructure represents a potential justification for geographical segmentation/differentiation.

Paragraph 55 has been amended to reflect ECTA's statement concerning the causality in recent developments in member states.

BEREC has underlined in its revised Common Position (see paragraphs 152/153) that a market characterised by two players probably is not necessarily a competitive market as to justify the withdrawal of obligations. Paragraphs 58 and 63 only describe different scenarios that can lead to differences in the homogeneity of competitive conditions. The analysis of the competitive conditions then has to take into account all relevant parameters (e.g. market shares, prices, barriers to entry).

One stakeholder explicitly opposes BEREC's statement about technological changes and progressive investments by altnets principally affecting 'broadband-related wholesale markets and thus confirming that Market 5 is one of the contexts in which geographical segmentation is most likely to be justified' because since the beginning of liberalisation, altnets' investments have also been influenced by the behaviour of incumbents.

In **Deutsche Telekom's** view, geographical aspects play an important role for the upcoming market analysis on Market 5 (wholesale broadband access) in highly competitive markets. Especially in the wholesale broadband access market, the implementation of geographical segmentation has already proven to be adequate and necessary. According to Deutsche Telekom, the approach taken by Ofcom gives a good example of an application of a geographic assessment within the market analysis procedure.

BEREC is of the opinion that any analytical approach chosen by an NRA has to assess the competitive situation in the context of the relevant national circumstances. So far, few countries have geographically segmented Market 5.

b. Other electronic communications services

During the public consultation, stakeholders agreed with BEREC's decision to focus on Markets 4 and 5 within the revised Common Position. In addition, several stakeholders also welcomed BEREC's conclusion that geographical segmentation might be appropriate in other electronic communication markets. Examples given were Markets 1, 2 and 6.

ETNO, Telefónica, Telecom Italia, Deutsche Telecom and **BT** agree with the draft review focusing on the wholesale broadband access market (Market 5) and Market 4 in terms of perspective network evolution and the need to implement geographical segmentation. However, according to some stakeholders, other markets have shown a propensity for segmentation: Market 6 (according to BT, Deutsche Telecom and ETNO), Market 1 (according to ETNO and Deutsche Telecom) and Market 2 (according to BT and Telecom Italia).

Telefónica underlines that NRAs should keep an overall view of the impact of the whole set of regulatory measures on the retail market and avoid isolated analysis of the formally defined wholesale markets.

BEREC has not expressed an opinion that other markets do not show signs that could lead to a thorough analysis to see whether geographical segmentation is necessary (see e.g. (61) and (63)). This chapter only gives a reason for the focus of BEREC's revised Common Position on Markets 4 and 5. The links between wholesale and end-user markets are dealt with in the main chapters.

Whilst **ECTA** agrees that bundling is a significant development in some member states, it suggests that BEREC makes reference in paragraphs 62, 63 and 64 of the draft BEREC revised Common Position to those customers preferring not to take broadband (39% of EU households) and to business users that rely on PSTN/ISDN for quality/reliability/functionality/cost reasons and that are not willing to switch to voice over broadband. These are all elements that should be carefully considered when assessing the links between markets, and related potential geographical segmentation/differentiation of remedies. According to ECTA paragraphs 62, 63 and 64 of the draft BEREC revised Common Position fail to take into account the needs of business users.

BEREC has amended the draft revised Common Position to take into account customers that do not use broadband or switch over to broadband (see paragraph 65).

VI. Proposed analysis to assess differences in the competitive situation

6.1. Importance of retail conditions

In the context of the analysis to assess differences in the competitive situation, for the purpose of a geographical detailed analysis, there is general agreement that the assessment of market conditions on the retail level is important and is a starting point of a market analysis.

Telefónica agrees with BEREC that retail markets should be examined in detail, having regard to the need to regulate the corresponding wholesale markets and to the estimation of the importance and scope of self-supply for these markets.

ETNO and Telecom Italia explicitly agree that the retail market analysis should be the starting point of every market analysis. The retail markets should be examined in detail, in particular as to whether the market exhibits strong and sustainable inter-platform competition. If present, it creates either direct or indirect competitive constraints on the upstream wholesale markets and must not be neglected. **Deutsche Telekom** moreover supports taking account of such competition especially in Market 5.

ETNO agrees with the typical situations described by BEREC that need to be taken into account in the geographical analysis, i.e. i) retail competition driven by wholesale access and/or ii) driven by inter-platform competition. In particular the existence of operators with their own infrastructures, such as cable or fibre, needs to be acknowledged. If the corresponding products are substitutes at retail level, these operators pose direct and indirect competitive constraints that are important for the decision on sub-national markets. According to ETNO, if inter-platform competition poses sufficient competitive constraints at the retail level, there is no need to maintain or introduce regulatory interventions at the wholesale level.

BT and Telefónica agree that the definition of the relevant wholesale market should begin by assessing the relevant product market at the retail level, and that only if an intervention is required, this should first be dealt with by NRAs at the wholesale level and NRAs should only consider intervening at the retail level if potential competition problems still remain.

However, in this regard **BT** underlines that, although this has been the case in the UK, circumstances in other member states may differ, for example the extent of this may rely on the type of wholesale remedy that an NRA has put in place and an intervention in an intermediate market may therefore sometimes be required.

Telecom Italia is of the opinion that in the assessment of the retail market, the level of substitutability should be duly verified across several platforms, including LTE, cable and fibre deployment. Moreover, the impact of legacy cost oriented access regulation, as described by the European Commission Recommendation on costing and non-discrimination, should be taken into account.

ECTA agrees that the analyses of Markets 4 and 5 should be performed together. However, ECTA considers that proceeding as suggested in paragraphs 70, 71 and 72 of the draft BEREC revised Common Position entails the risk that the ladder of investment concept is put into question. In ECTA's view, moreover, regulation in Markets 4 and 5 is complementary rather than alternative. In addition, if no account is taken of the actual availability of upstream merchant supply, especially of physical access and of wholesale broadband access, there is a risk that BEREC's proposals could entrench the incumbent's monopoly or a 'too tight' oligopoly, depriving competitors, and ultimately consumers, from competitive dynamics, and indeed from investment by alternative operators progressively climbing the ladder of investment.

BEREC considers that the regulation of wholesale market(s) is a means to achieve an ultimate objective: to have effective competition on the retail level. As Markets 4 and 5 are interrelated markets, with Market 4 as the more upstream market in the value chain, an NRA might conclude that under certain circumstances the existence of regulation in Market 4 (because the NRA has concluded that there is an SMP operator in that market) is enough to guarantee effective competition both in Market 5 (in the whole market or in specific geographic areas) and in the broadband retail market (in the whole market or in specific geographic areas). In that case, the NRA might conclude that imposing regulation on Market 5 (in the whole market or in specific geographic areas) may not be proportionate and therefore may not be needed.

6.2. Existence of different competitive conditions in the context of Markets 4 and 5

Regarding the existence of different competitive conditions in Market 4 and Market 5, some comments were made about the existence of indirect constraints and about the vertical relationship of these markets.

BT is of the opinion that indirect constraints are not necessarily less important higher up the value chain, and therefore calls for BEREC to provide additional evidence for this statement. ECTA also requires additional explanation regarding this issue.

Regarding the level of indirect constraints along the value chain, BEREC clarifies that the extent to which retail prices would change due to a change in the wholesale price would depend on the proportion of the retail price made up by the price of the wholesale input. Taking into account the vertical relationship between Markets 4 and 5, it is expected that the proportion of the retail price made up by the price of the wholesale input would be greater in the case of Market 5 than in the case of Market 4. Therefore, the pressure of indirect constraints, if these constraints exist, may be considered more evident in Market 5 than in Market 4.

BEREC has amended the draft to clarify this issue (see paragraph 76).

One stakeholder is of the opinion that the vertical relationship between Market 4 and Market 5 should be clarified carefully. In particular where there were no significant alternative infrastructures to the incumbent's infrastructure, such as effective cable and altnets' own access infrastructures, the competitive pressure allowed by local loop unbundling (LLU) on Market 5 should not generally represent a parameter for imposing segmentation.

ECTA stresses that, given the vertical relationship between Markets 4 and 5, careful assessment is needed to avoid de-facto acceptance by NRAs of a market situation that is entirely dictated by the Market 4 SMP operator's strategic choices for its own benefit. A major concern is that the SMP operator in Market 4 could be put in a position where it is able to determine/limit the choices of alternative operators in Market 5 and at the retail level.

BEREC agrees with a careful assessment of the vertical relationship between Markets 4 and 5. However, regulation on these markets does not necessarily guarantee effective competition on the retail level. NGA deployment, through the development of independently owned networks by alternative operators, may also have a significant impact in the determination of the geographic scope of the market, with different levels of competition being observed in different geographical areas.

Deutsche Telekom and **ETNO** estimate that the Ofcom approach of a geographical segmentation of Market 5 is a sustainable approach that could be transferred to other EU countries.

ECTA – strongly supported by its German member **BREKO** – disagrees with a geographical segmentation in Market 4 pointing to the absence of factual evidence and of any precedent in the EU for such segmentation. ECTA also points to the potential regulatory uncertainty due to the test required to proceed to segmentation (duopoly, tight oligopoly).

BEREC understands that Market 4 is a candidate market for geographical segmentation, depending on the competitive conditions that exist in the market. As mentioned in the draft Common Position, one NRA (FICORA) actually refers to different sub-markets in Market 4. Therefore, the case for geographical segmentation of Market 4 is not purely hypothetical and cannot be disregarded as such by BEREC. Paragraph 78 has been modified to better clarify the consequences of lifting the LLU obligation on competition at the retail level.

For Market 5, **ECTA** points out that geographical segmentation is the exception and requires a careful assessment of the vertical relationship between Markets 4 and 5. ECTA disagrees with a segmentation that seems – in its view – implicitly based on self-supply by multiple alternative operators. A major concern is that the SMP operator in Market 4 could be put in a position where it is able to determine/limit the choices of alternative operators in Market 5.

The **FTTH Council** believes that the NGA broadband market should be geographically delineated into urban and non-urban areas.

KIGEiT believes that geographical analysis of Market 4 and Market 5 should be carried out very accurately to avoid delineating competitive areas containing patches with limited or no competition, taking into account the coverage of the specified operators and the topology of the incumbent's network.

Telecom Italia states that if the retail broadband access market is geographically segmented, the same segmentation should be applied to Market 5.

With regard to this observation, BEREC is, however, of the view that the proposed approach of copying a geographical segmentation from the retail market to the wholesale market is too mechanistic, especially if the choices that the end users have at the retail level are not mirrored at the wholesale level.

Telecom Italia believes that the case of competition driven only by LLU should also be contemplated with the aim of geographical segmentation in Market 4.

With regard to this observation, BEREC thinks that taking into account competition based on remedies imposed on the same relevant market is not consistent with the 'modified greenfield approach': Finding effective competition in areas where LLU is strongly developed and consequently lifting the obligation to provide unbundled access in these areas would lead to a remonopolisation.

Telefónica suggests it would be very helpful to include some indications of how BEREC's conclusions should be transferred to the new list of relevant markets. A different segmentation approach for new Markets 3b and 4 risks creating distortions, as there could be wholesale offers that would be *de facto* substitutes and would be regulated differently in different markets.

With regard to this observation, BEREC considers it premature to make references to the new list of relevant markets as the Recommendation on relevant markets has not been finalised and adopted.

6.3. Typical situations to take account of in the geographical analysis

FTTH Council believes that geographical distinction should be based on the intensity of physical network competition. The FTTH Council moreover believes that NRAs' assessment should be forward looking and not strictly related to the current state of competition.

Fastweb is also of the opinion that the NRAs' analysis should be forward looking, but believes that the future developments should be as objective as possible. Only actual competition should be taken into account in the geographical analysis to minimise the risk of under regulation.

BEREC agrees that a forward-looking approach should be applied to market analysis. However, future investment plans, including in the context of NGA upgrade, should be carefully assessed, including in the context of the geographical analysis.

ECTA accepts that national market circumstances differ, including the intensity of infrastructure competition and the success of local loop unbundling. ECTA is of the view that the revised Common Position creates the wrong impression of the extent to which geographical segmentation/differentiation has occurred and would be justified. With regard to upgrading of traditional copper-based networks, ECTA believes that such a key policy and regulatory challenge must be addressed more extensively.

With regard to ECTA's view that the revised Common Position creates the wrong impression of the extent of geographical segmentation/differentiation, BEREC clarifies that the examples presented in its revised Common Position are based on the past experiences of NRAs and take into account the European Commission's reaction to these issues.

Regarding ECTA's comment about the need to address the upgrading of traditional copper-based networks more extensively, it should be noted that this issue is discussed in more detail in section VI.7 of the revised Common Position.

Telecom Italia shares BEREC's view that LLU is an important source of competition that in some cases and in certain areas is completed by the presence of alternative (fixed) infrastructures. However, situation 1 seems to refer only to the coexistence of LLU operators and at least another fixed alternative network and not to the case of competition driven only by

LLU. BEREC should clarify that this latter case also has to be considered with the aim of geographical segmentation.

BEREC clarifies that, taking into account decisions taken by different NRAs, situation 1 refers to a market environment where retail market competition is mainly driven by wholesale access to copper network (through LLU or other wholesale offers) and alternative infrastructures.

6.4. Choice of the relevant geographical unit for subnational markets

A first set of comments received from stakeholders is related to the selection of the most relevant adequate geographical unit to be used in the segmentation of markets.

Fastweb agrees with BEREC identifying the relevant geographical unit according to the type of competition, either services-based or facility-based. In addition, Fastweb suggests that in the case of FTTC deployments, the cabinet area should be considered as the most appropriate geographical unit, since the deployment of NGA by the incumbents and the altnets may, in fact, vary within the same MDF area, based on the cabinets actually reached by the new infrastructure. Moreover, both **ECTA** and **Fastweb** stress that competitive conditions within an administrative unit are never homogeneous, as the areas covered by MDFs or POPs rarely overlap with the actual boundaries of a municipality. Therefore, in no case should the geographical segmentation be based on the administrative unit, even when inter-platform competition is dominant. According to Fastweb, when competition is mainly based on LLU or in case of inter-platform competition, the geographical segmentation should be based on the MDF area, if relevant differences in competitive conditions are observed among the different MDF areas.

ETNO, Telecom Italia and **Deutsche Telecom** agree with BEREC that where competition is based on LLU, areas served by an exchange or main distribution frame are likely to be the appropriate unit. ETNO is of the opinion that, in the case of inter-platform competition, the alternative network’s structure is likely to be appropriate. However, **ETNO** stresses that often there is a mixed situation (i.e. competition on the retail level stems from both wholesale access and the presence of alternative infrastructures). According to ETNO, experiences from advanced broadband markets such as Germany and the United Kingdom show that in those instances the exchange or main distribution frame areas can be an appropriate and sustainable geographical unit.

BEREC recalls that the selection of the most appropriate geographical unit is based on several elements, among them, the geographical distribution of the competing networks.

It is clear that when competition is based on LLU, the network structure of the incumbent is in general the most appropriate reference to be used for the purposes of geographical segmentation, as competition will be based on the areas covered by MDFs or exchanges, which LLU operators must access. However, when competition is mostly driven by services provided in the platform of one or more alternative operators (inter-platform competition), competitive pressure may largely be exerted by the reach of the platform(s) of the alternative provider(s), so administrative units may reflect competition dynamics better than a segmentation based on the network structure of the incumbent, which is not used by the alternative operator.

In any case, BEREC's revised Common Position underlines that the choice of the geographical unit will ultimately depend on the specific conditions prevailing at national level, as evaluated by each individual NRA.

Along the same lines, regarding areas where there is a mixed situation (both inter-platform and intra-platform competition), BEREC believes that the selection of the most appropriate geographical unit will need to be undertaken by the NRA on a case-by-case basis. It may be true that in specific cases the use of MDFs or exchanges for the geographical segmentation may be the most appropriate geographical unit, but this is not necessarily the case for all situations. Factors will therefore have to be balanced before a decision is made on which geographical unit should be used.

A second set of comments is focused on the implications of the cost of collecting data when selecting the most appropriate geographical unit.

ETNO, Telecom Italia, Belgacom and **Deutsche Telekom** emphasise that obtaining the necessary network-related information to define the most appropriate unit does not constitute an insurmountable hurdle. In other words, the costs of gathering data alone cannot justify jumping directly to a national market definition, causing distortions of competition and overregulation of incumbent operators. In most cases, technical data is linked to geographic information for maintenance and billing purposes, and operators have to keep this data available.

In contrast, **Cable Europe** believes that any micro-market approach to market analysis would create an enormous administrative burden for NRAs. In particular, data is not likely to be available and will require additional surveys and data generation. Market boundaries in this sector are also unlikely to be stable. In addition, the suggestion that narrow geographic markets are somehow emerging implies a degree of instability that is difficult to ignore.

Also with regard to the size of the area analysed by the NRA, **KIGEIT** believes that determining very small areas for the purposes of market reviews may affect the analysis of the relevant market due to the scale of the work that the NRA must perform. On the other hand, determining large areas may entail a lack of homogeneity of competition conditions in the market analysed. KIGEIT concludes that it should be compulsory for the analysis of the Market 5 to be carried out taking into account the topology of the incumbent's network.

BEREC's views on data gathering are summarised in paragraph 100 of the revised Common Position. In this paragraph, BEREC notes that NRAs are best placed to decide whether a geographical analysis should be performed on the basis of indicators that are referred to in the revised Common Position.

BEREC's revised Common Position goes on to note that, in line with the observations of some of the contributors to the public consultation, once there is evidence that an analysis of the geographical attributes of the market is necessary, the decision on how to proceed with this analysis should not be determined by the burden of gathering relevant data. BEREC has deleted the first part of paragraph 100 to avoid any misunderstanding on this issue.

Regarding the issues pointed out by Cable Europe, BEREC acknowledges that new data may be required in some cases, but this is not a reason not to perform a geographical analysis if this analysis is considered necessary to reflect underlying competition. BEREC agrees that the stability of market boundaries is an issue that must be considered when selecting the most appropriate geographical unit (as reflected in paragraphs 87 and ff. of the revised Common Position). This does not, however, mean that in the horizon of the market analysis any possible definition of geographical boundaries will not be stable enough to justify geographical segmentation.

Regarding the comments of KIGEIT on the use of the topology of the incumbent's network, BEREC refers to the paragraphs above regarding the selection of the most appropriate geographical unit.

Finally, as an additional point, **FTTH Council Europe** believes that there should be a stronger correlation between the handling of geographical segmentation and the handling of geographic markets in the State Aid Guidelines.

BEREC acknowledges that state subsidisation of specific networks may change the competitive situation in certain areas, and the geographical analysis should be based on the prevailing competition dynamics (as resulting from state aid or direct private investment based on unbundling or competing platforms). In any case, as stated in paragraph 42, according to the state aid framework, publicly funded networks should in theory be neutral and open to third parties, thus facilitating competition at the wholesale level.

6.5. Criteria to assess the homogeneity of competitive conditions

ETNO, **Deutsche Telecom** and **Telecom Italia** agree on the relevance of the criteria listed by BEREC for the assessment of the geographical differences in competition. They all warn that a segmentation based on a single criterion will usually not be appropriate.

BEREC does highlight the fact that an assessment of the homogeneity of competitive conditions should be based on a set of criteria referred to in the revised Common Position.

Stakeholders nonetheless have conflicting views on whether assessment of the homogeneity of competitive conditions should be made on a static basis or using a forward-looking approach. **BT**, **FTTH Council Europe, Telefónica** and **Telecom Italia** stress that NRAs should take into account efficient investments that could be made during the regulatory period. On the other hand, **ECTA** and **Fastweb** argue that only actual and relevant competitive constraints should be taken into account.

BEREC's revised Common Position lists a number of criteria against which the homogeneity of competitive conditions for a particular market should be assessed. However, BEREC considers that NRAs cannot reasonably be asked to know with certainty when or where operators will roll out fixed networks nor can they be expected to predict the impact of new technologies over this period.

At the same time, NRAs must adopt a dynamic approach to competitive conditions and cannot disregard future evolutions of the markets. This is why BEREC's revised Common Position also calls for forward-looking market definition and states that the analysis of the criteria for assessing the homogeneity of competitive conditions should also be forward looking, wherever possible. This aspect has been reaffirmed in the concluding observations (paragraph 182) of BEREC's revised Common Position.

6.6. Thresholds to aggregate geographic areas

Comments received for this section show agreement with views expressed by BEREC in the Common Position.

ECTA agrees with the analysis contained in this section, and in particular with BEREC's assessment of the competitive conditions.

Belgacom believes that, although data delivery needs to be feasible and proportionate, the analysis should start from as small a unit as possible, which should then be clustered and aggregated into bigger groups according to the relevant parameters. Such an approach would enable the NRA to obtain a correct and consistent set of data on which the analysis can be performed. Belgacom understands paragraph 129 of the draft BEREC revised Common Position in that sense.

Telecom Italia shares BEREC's view that the geographical units should be aggregated using a combination of several criteria. For each criterion a certain threshold should be chosen. All the geographical units that meet the chosen criteria and thresholds should be aggregated. It is also important to use sensitivity analysis to test the robustness of the choice made, especially to guarantee a forward-looking approach.

6.7. Implications on the geographical analysis of the upgrade of current networks – Next Generation Access Networks (NGA)

On the issue of the transition from legacy-based infrastructure to NGA, a first set of comments from stakeholders relates to the perceived effects of the transition.

BT notes that if the deployment of NGA networks leads to the closing of exchanges, this would have a generalised impact on all market actors (including incumbents) that have made investments in the exchanges. **BT** stresses that – although the deployment of the NGA network may change the nature and dynamic of competition exercised by LLU operators in Market 5 – the competitive pressure exerted by copper-based access networks will continue, and broadband across copper will remain a principal source of service for Internet access. **ETNO** and **Telecom Italia** also note that a quick transition from the copper-based network to NGA is unlikely to happen, and therefore the closing of MDF sites on a significant scale is not currently foreseeable in most member states, i.e. in markets with LLU-driven competition and high numbers of LLU lines. Also, in **Deutsche Telecom**'s view, NGA developments do not produce sufficient uncertainty to merit refraining from geographical segmentation. In Deutsche Telecom's view, as there is no long-standing experience in NGA transition, it is difficult to foresee whether any MDF reduction will take place in the coming years and how quickly the 'traditional' LLU will disappear.

ECTA stresses that the attractiveness of LLU, which enables alternative operators to develop and control their own services, has not diminished. Maintaining the copper loop and sub-loop unbundling obligation on SMP operators to safeguard and promote the development of open and pro-competitive network architectures is therefore clearly justified in ECTA's view. Moreover, ECTA highlights that NRAs must be active in shaping the regulatory and technical environment, and should not passively accept the technical decisions of SMP operators. ECTA also states that neither bit-stream access nor virtual access is a real alternative to unbundling, despite their regulatory importance. In similar terms, **KIGEIT** notes that virtual access to the NGA network (VULA) is one of the key products associated with the development of the NGA networks. BEREC should therefore explicitly indicate that virtual access, until the time of the development and implementation of technologies enabling physical fibre access, is a full substitute for physical access to fibre networks in Market 4.

More generally, **ECTA** urges BEREC and NRAs to carefully examine the impact of any potential geographic market segmentation/geographic differentiation of remedies on a forward-looking basis. Indeed, geographic market segmentation/remedies differentiation could be defined and implemented on the basis of the characteristics of the infrastructures currently deployed, essentially the legacy copper/coax infrastructure, or of genuine end-to-end fibre roll out. Once geographical segmentation of a market has been put in place and the market situation changes, returning to the previous situation of non-segmentation/differentiation is very complex, even if the objective market situation actually and objectively warrants this change.

BEREC notes that its revised Common Position does not deal specifically with the process of transitioning to an all-NGA environment and when this transition will take place. Nor does the revised Common Position consider a specified set of remedies that may apply in the context of NGA upgrade. This matter has already been addressed by BEREC in its revised Common Positions on WLA and WBA.

BEREC's revised Common Position merely notes – as does the EC NGA Recommendation– that the prospective closing of local exchanges may have an impact on the access products that are available, this in turn also being a factor that will have to be evaluated by NRAs in the context of their market analyses (including the prospects of geographic regulation). BEREC does in any event agree with ECTA that geographical segmentation is a complex issue that may have a significant impact on the economic choices made by the SMP operator as well as alternative operators, and that it should therefore be considered carefully before any decision is made.

Regarding the comment from ECTA, BEREC has extended paragraph 182 to state that a forward-looking approach must be considered when addressing geographical segmentation and to emphasise some situations where fibre-based networks could reduce the potential demand for LLU.

A second set of comments from stakeholders relates to the issue of deployment of several networks.

In this regard, **two stakeholders** agree that the presence of two infrastructure-based players is not enough to justify the withdrawal of access obligations when competition is facility-based. In fact, according to this view, this would be detrimental to the entry of new operators and would contradict the ladder-of-investment principle.

In contrast, **Telefónica** highlights that a two-player market would not necessarily be prone to collusion, since the specific characteristics of the two competitors are relevant to determining the likelihood of collusion. It may be that the mere presence of an alternative operator, especially when analysed prospectively, could ensure competition in a certain area. Telefónica therefore considers that regulation should be forward looking, and that greater emphasis should be placed on assessing the second of the three-criteria test (prospective competition) when facing duopoly situations.

Belgacom agrees with BEREC that NGA deployments will lead to important changes in the economics of broadband services and in the competitive situation. The competitive context will differ significantly between regions with two NGA infrastructures and regions with only one NGA infrastructure, and two subnational geographic markets should therefore be identified.

Regarding the number of networks, BEREC reiterates – in line with earlier statements on this issue – that, in principle, a market characterised by only two players may be deemed not sufficiently competitive as to justify the withdrawal of obligations. This is, however, an issue that will need to be addressed individually by NRAs when setting the regulatory conditions that will apply to the markets under review, and the Common Position on geographical aspects of market analysis is not the document to provide detailed guidance on this issue. To assist NRAs with this task, BEREC intends to prepare a report during 2014 on oligopoly analysis and regulation.

Finally, a third set of comments relates to the prospects of taking into account planned investments when determining the competitive conditions within a geographical unit.

In **Telecom Italia's** view, when the competition is mainly driven by the presence of alternative platforms/networks (e.g. NGAN, LTE etc.), due attention should be given to the investment decisions of the operators. In other words, the relevant geographical unit should be the area where the operator has invested or has planned to invest, which could be a town, for example, and not coincide with the MDF.

However, for **Fastweb**, NRAs' analysis should rely on the actual deployment and commercialisation of NGA services by alternative operators, rather than on their investment plans. According to this operator, the investment plans do not provide any indication of the intensity of competition and are not useful for the purpose of geographical analysis. The prospective NGA roll out should be considered only as a crosscheck, when a competitive area has been identified according to the actual competitive conditions. **ECTA** also agrees that NRAs should carefully consider the credibility of SMP operators' announcements, including based on their historical track record and EU precedent.

BEREC's revised Common Position states (in paragraphs 126–128) that the efficient investments that could be made during the regulatory period under analysis may be taken into account by NRAs when proceeding to a geographical analysis of the markets. This is particularly important, due to the fact that new (NGA) network developments by the incumbent and/or alternative operators will most likely be progressive, and span several years.

In any event, BEREC agrees that, for investment plans to be taken into consideration, the prospects of such investments will need to be likely and credible, and not purely theoretical or based on no real commitment decision by the investor.

VII. SMP analysis and remedies differentiation

7.1. Geographical segmentation of markets versus geographic differentiation of remedies

Some stakeholders believe that BEREC's revised Common Position should discuss the substance of geographic differentiation of remedies **(ECTA)** and clearly indicate how and when the differentiation of remedies should be preferred over geographic market differentiation **(BT)**. ECTA also asks BEREC to expand on the exact nature of the tests that must be conducted by NRAs before proceeding with geographic differentiation of remedies.

BEREC's revised Common Position clearly differentiates between two situations and outlines that, in one case, NRAs are able to distinguish heterogeneous areas. The revised Common Position then concludes that distinct geographical markets have to be defined. In other cases, where heterogeneous areas exist but there are no clear and stable boundaries, the revised Common Position considers differentiating remedies to be appropriate.

The substance of geographic differentiation of remedies is dealt with throughout the document in general terms. Geographical segmentation of remedies relates, among other things, to the strength of the remedy that can vary throughout the territory. It would be difficult to expand further on the substance of these remedies without discussing specific national situations in detail.

Telefónica, ETNO, Telecom Italia and **BT** agree with BEREC that the two possible ways of dealing with geographical differences in competitive conditions across a national territory (segmentation of market/differentiation of remedies) should not be viewed as equal.

In particular, **Telefónica** considers that, whenever possible, the market segmentation approach should be taken, as it is the current way to achieve all the advantages and benefits that de-regulation could bring (promote investment, innovation and as a result improve the quality of service and consumer choice).

Telecom Italia is of the opinion that only geographical segmentation can result in complete deregulation of the areas where effective competition is found on the basis of the SMP analysis. This is not possible in the case of the geographical segmentation of remedies, due to the fact that the SMP finding on the whole market requires the imposition of at least one remedy on each local area. The geographic differentiation of remedies is an option that should be used only in very limited cases, when geographical differences are less pronounced and complete deregulation of any geographical submarkets is not justified. BEREC should clarify that when a wholesale sub-national market is deregulated because there is no SMP, any remedy imposed in vertically related retail markets, such as the *ex-ante* price squeeze test, must also be withdrawn.

FTTH Council Europe believes that BEREC should be much more explicit about the need to geographically segment the market (although this is already apparent in the cost accounting and non-discrimination Recommendation). FTTH Council Europe believes that this is preferable to an alternative approach, i.e. application of different remedies in different parts of a national market. The conditions of competition have been markedly different within certain member states that have found a national market but put different remedies in different geographic parts of that market.

Cable Europe stresses that geographical segmentation would lead to a regulatory patchwork in the single market, and render the imposition of asymmetric access remedies impossible, should NRAs decide this was justified in the light of anti-competitive effects stemming from the manner in which NGA networks might be deployed and used by the formerly SMP-designated operator. A more proportionate way to reflect subtle geographical divergences of competition in an NGA context would therefore be for NRAs to impose differentiated remedies. According to Cable Europe, all evidence therefore suggests that a national market for wholesale broadband access remains the appropriate conclusion.

BEREC believes that the Common Position reflects well and in a balanced way the different issues to be taken into account when deciding on geographical segmentation of markets versus geographical segmentation of remedies.

7.2. Risk and benefits from a geographical analysis

Regarding type 1 and type 2 risks, **Telefónica** considers that, in case of doubt, the correct balance of risk is to always avoid type 2 risks, and to be more willing to accept type 1 risks as a result, particularly where new network investments are ongoing. According to Telefónica, this is due to (1) the principle of regulation proportionality; (2) competition law enforcement providing *ex-post* control for tackling possible type 1 errors; (3) in a context marked by the need for investments, de-regulation should always be preferred to regulation, as it is the best way to promote investment.

ETNO shares Telefónica's position on point 3). **ETNO** and **Deutsche Telecom** appreciate that BEREC classifies geographical segmentation as a means to limit *ex-ante* regulation to the minimum extent needed, allowing the former SMP operator to be more flexible to innovate, invest and to offer better prices and quality.

ETNO, Deutsche Telecom and **Telefónica** agree with BEREC that business customers may have a nationwide demand but that this does not per se require a nationwide market, as business customers can rely on multiple commercial offers within competitive areas and regulated products elsewhere.

In the view of **Buglas,** a generalised geographical segmentation of wholesale markets resulting in a de-regulation of incumbents might be significantly premature, as is the case in Germany, where no evidence would allow identifying areas a) in which the conditions of competition would differ fundamentally from other areas; b) which would be large enough for the purpose of regulatory oversight; and c) which would have stable boundaries.

ECTA believes that reducing the preferences of alternative operators and end-users to a reflection of 'transaction and IT costs' is insufficient. If the technical characteristics of wholesale offers differ, and no operator has SMP and/or no operator has a nationwide commercial wholesale offer, it will in practice be impossible for the alternative operator to satisfy end-users' needs for homogenous service characteristics/quality at the retail level. Given end-users' strong preference for a single supplier, there is a strong likelihood that end-users will select the incumbent operator on account of it being the only company able to offer a nationwide service, which could lead to reduction or even elimination of competition. ECTA urges BEREC to remove the statement that geographic differentiation of remedies in Market 5 would have beneficial effects on innovation/broadband speed/pricing by the (former) SMP operator in the corresponding retail market unless further concrete and thorough substantiation is found and added (including the causal link to wholesale market deregulation).

Cable Europe points out that treating a new entrant on a par with an incumbent in a small geographic area would be a mistake. In a national context, an incumbent may have far greater economies of scale and scope, better access to capital, and other fairly durable advantages over any competitors regardless of how successful they are locally. From an economic perspective, it is important in either approach that the constraints are neither overstated nor understated. Where the constraint is overstated, type 2 errors are likely to occur where no regulation is imposed though such regulation is warranted. Geographical differences will further diminish the attractiveness of WBA access on cable networks. Therefore, with regard to geographical segmentation of markets, the competitive pressures introduced by cable networks and by other alternative network operators should be taken into account normally in a national context.

An approach that focuses on a geographic sub-national market analysis risks missing some broader effects on the market analysis. Wholesale access products are normally delivered on a geographically averaged price that allows operators to deliver products at the same price to end users across the area.

KIGEIT is of the opinion that one of the most important aspects of the geographic market analysis is to examine the potential impact of geographical segmentation on the areas that are considered to be uncompetitive, in particular in terms of the emergence of huge barriers to entry especially for new operators. This issue is extremely important for services such as BSA, where the ability to achieve the scale [of providing services] is important to ensure the profitability of the investment and launching access on the access levels: Ethernet, ATM or Managed IP.

BEREC wants to warn against potential misreading of its revised Common Position. In this section of the revised Common Position, BEREC draws attention to the fact that the conclusion that a geographical analysis of a market is needed leads to recognition that different competitive conditions may exist at a geographical level that could demand different regulatory approaches.

BEREC also points out two types of risks of incorrect assessment of geographical definition of relevant markets and their potential consequences. Stakeholders cannot deduce from this that BEREC is in general terms in favour of the lifting of regulation (or, on the contrary, of strengthening the regulatory regime).

Throughout the process of drafting its revised Common Position, BEREC has been keen to keep a cautious and balanced approach, always based on effective assessment of national and local situations and never on preconceived or general assumptions. For instance, when BEREC's revised Common Position mentions the possible outcomes of deregulation of Market 5 observed in some examples, this cannot be read as indicating that BEREC is generally in favour of deregulating Market 5.

BEREC therefore believes it has fully taken into account the potential consequences of deregulation (or lighter regulation) in terms of price, quality and innovation as well as the main characteristics of business markets (including end-users' preference for dealing with a single supplier and for homogenous services).

Telecom Italia believes that in point 175, BEREC should clarify that where the cost orientation obligation is withdrawn (for fibre, as well as for copper wholesale access services) in sub-national geographical markets, cost-oriented wholesale prices to be applied across the rest of the country should be set on the basis of the costs of the sole areas still subject to price regulation, rather than on the basis of the nationally averaged cost.

ECTA requests the deletion of paragraph 175 of the draft BEREC revised Common Position as it is open to differing interpretations, which could lead to unpredictable and different outcomes in different EU member states.

BEREC‘s revised Common Position is not intended to deal with costs and tariffs and therefore does not need to be more specific on the subject of cost orientation and pricing principles. This does not mean that BEREC’s revised Common Position should not consider the potential impact of geographic differentiations on prices. The fact that uniform pricing (at national level) now seems to be a standard in most member states does not imply that this will still be the case in the future.