

ECTA Response to BoR (15) 64 - BEREC Public Consultation**Common Characteristics of Layer 2 Wholesale Access Products¹****15 July 2015****A. Introduction and Key Comments**

The European Competitive Telecommunications Association (ECTA) welcomes the opportunity to comment on BEREC's document, published for public consultation, entitled "*Common Characteristics of Layer 2 Wholesale Access Products in the European Union*".

ECTA welcomes the effort made by BEREC to collect and systematise the regulatory rationale developed by the NRAs which have mandated Layer 2 Wholesale Access Products (hereafter 'L2 WAP'). We believe that this exercise could help clarify what constitutes good practice on the justification for mandating L2 WAP, on the technical implementation of L2 WAP, and on aspects such as points of hand-over (hereafter 'PoH'). Conversely, we also wish to express our concern that this exercise could cause the spread of bad practice, in particular in terms of NRAs being unduly tolerant of inadequate technical specifications (especially on bandwidth, QoS, and number of VLANs), and most critically in terms of wholesale pricing.

With regard to the common characteristics identified, we broadly agree with BEREC's list of 9 characteristics and the discussion thereof, but we wish to make the following points:

Common characteristics 4 (Bandwidth) and 5 (Quality of Service): Capacity on the equipment involved in providing L2 WAP with local PoH (including the fibre uplink from FTTC and GPON) is plentiful. Contention is therefore not a material technical issue, and BEREC and NRAs should ensure that they do not accept alleged contention as a justification for tiering the wholesale prices by speed. This is especially critical in case an NRA would position the wholesale input as a substitute or alternative – which it is not – for physical access.

Common characteristic 7 (Number of VLANs): We believe that when an NRA decides to mandate L2 WAP (also with regional PoH), it should also systematically ensure that sufficient VLANs are available to the access taker, in such a manner that: (i) the access taker, (ii) an operator customer of the access taker or a systems integrator, and (iii) the end-user (e.g. a business user) can create and configure sufficient VLANs to meet their requirements. We also believe that the other alternative network operator (ANO) should always be able to choose between a dedicated and a shared VLAN scenario, have a 1:N multicast VLAN option, and that the possibility to enable 4 VLANs per end-user is the absolute minimum. We ask BEREC to include this in its final document.

We also wish to note that nothing prevents the provision of multiple VLANs on L2 WAP with regional PoH and indeed such products exist and have been mandated by NRAs. Similarly, nothing prevents the provision of uncontended L2 WAP with regional PoH, and indeed such products exist and have been mandated by NRAs.

¹ The ECTA response cannot be assumed to represent the views of ECTA members with incumbent interests.

ECTA wishes to stress that *if* L2 WAP with local or quasi-local PoH is positioned as a substitute for physical access (with which we profoundly disagree – it is not a substitute) or as the closest alternative (with which we also disagree – we consider physical access and ‘virtual access’ as complements of one-another), then the maximum speed technically possible should always be offered and the wholesale price should not be bandwidth-dependent. Unfortunately, we observe that this is not always the case in current NRA practice. ECTA and its members are particularly sensitive to this issue, because we fear that undue tolerance of certain practices by NRAs can enable SMP operators to structure downstream markets, in particular by *de facto* determining a price premium placed on speed which would affect the entire market and deprive competitors from the ability to commercially differentiate themselves.

We also ask BEREC to systematically consider not only vertical wholesale-retail relationships, but also wholesale-wholesale relationships, i.e. the access taker might not sell directly to an end-user, but also to another operator or a systems integrator. Note that, as a result of wholesale-wholesale relationship, the downstream retailer might face a two-step helpdesk process which could affect the quality of service.

B. Physical vs. ‘Virtual’ Access / Passive vs. Active Access

ECTA would like to insist on the critical importance of the availability of both physical access and L2 WAP, and indeed also on the parallel availability of L2 WAP with local PoH and L2 WAP with regional PoH. Each of these access solutions is and will remain necessary to enable and promote competition, innovation and investment by alternative operators.

We ask BEREC to reinforce the point it makes on page 5 of the document, for instance by including it in the executive summary as well. We refer to the wording as follows:

“Although the L2 WAP with local PoH can be part of the same market as physical unbundling, the rung “L2 WAP with local PoH” of the ladder of investment is not the same rung as the rung “physical unbundling”. L2 WAP provide a service and no longer a physical medium which means that the technological capabilities in the network of the provider of L2 WAP have to be taken into account. Hence, the rung “L2 WAP with local PoH” is lower (than the “physical unbundling” rung) and the added value that can be achieved by ANOs is to some extent reduced”.

We ask BEREC to go one step further, and articulate fully explicitly in its final document that a L2 WAP product with regional PoH cannot be positioned as a substitute for physical access, and hence cannot be included in a market corresponding to Market 3a of the 2014 EC Recommendation on Relevant Markets Susceptible to *Ex Ante* Regulation. In addition, L2 WAP is used to address a significant part of Market 4.

Please allow us to make the following additional points:

B.1. Physical access is and will remain intrinsically possible

ECTA has serious concerns when regulators use terminology such as:

“L2 WAP with local PoH in the countries analysed are imposed where physical unbundling (LLU/SLU) is no longer technically possible or economically viable due to the NGA rollout by the incumbent operator”.

This wording appears repeatedly in the consultation document. We ask BEREC to revise its text to ensure that the final document in no way indirectly suggests that physical access would be impossible, becoming less relevant, or would become less relevant in the future. Physical unbundling may in some specific circumstances *not yet* be entirely possible, but the right regulatory push can and should make it happen.

1. From a technical perspective, alleging that physical access/unbundling *“is no longer technically possible”* is incorrect. This is notably the case because of the advanced development of multi-operator vectored VDSL2 (evolution of ITU-T G.993.5) and successor technologies, and because of standardisation of multi-wavelength NG-PON2 (ITU-T G.989.2).

2. From an economic perspective, alleging that physical access/unbundling “*is no longer economically viable*” is incorrect. This is directly challenged by large-scale actual competitive network roll-out based on physical copper sub-loop unbundling by ECTA members Fastweb and Vodafone in Italy, by multiple ECTA members in Germany, and smaller-scale alternative operator developments also in the UK. Fibre terminating segment unbundling is in widespread use in France. Fibre unbundling is available and in use in The Netherlands and in Sweden. Received wisdom on the economics of copper SLU cannot continue to drive regulation in light of the actual developing use of copper SLU. Of course, not all operators can pursue the same business model, and the situation varies between countries. For instance operators focused on high-end business services and cross-border services can typically not achieve the economies of density to justify the purchase of physical loop or sub-loop unbundling, and in fact the same applies for L2 WAP with local PoH. Operators focused on consumer markets, or hybrid consumer/business services may also lack the market share and scale to realistically pursue physical access including local loop unbundling and sub-loop unbundling/fibre terminating segment access.
3. From a regulatory perspective, BEREC’s analysis reflects a minority of NRA decisions which in ECTA’s view have mistakenly accepted allegations regarding technology developments on copper and fibre networks, and lack of demand for copper SLU in the past. In this context, we recall that the 2010 EC Recommendation on Regulated Access to Next Generation Access Networks (Article 23) states that:

“NRAs should mandate unbundled access to the fibre loop irrespective of the network architecture and technology implemented by the SMP operator”.

B.2. L2 WAP (bitstream/VULA/VUA/vULL) is not a substitute for physical access

ECTA is on record, with BEREC and with the European Commission, in refuting any alleged substitutability between physical access and any form of active or ‘virtual’ access, including all Layer 2 wholesale access products, regardless of the point of handover. We reiterate this position in this response.

Our position has always been, and remains, that physical access is paramount to enable competition, whilst active access is a relevant and in most cases necessary complement, when/where physical access is not viable (which does not mean not available), which depends on alternative operators’ ability to compete (overall market share, residential/business focus, and indeed regulation).

Annex 1 provides ECTA tables on physical access vs. active access in the EU.

B.3. BEREC’s own data proves the non-substitutability of L2 WAP with physical access

The tables at pages 24-25 of BEREC’s document, combined with the graphic on page 8, provide conclusive proof that, in several cases, wholesale prices for L2 WAP are disconnected from the charges for wholesale physical access/unbundling, and are disconnected from underlying costs by introducing speed tiering. The Austrian case is particularly concerning in this regard. This should be a red light warning signal for all NRAs, for BEREC, and for the European Commission, to the effect that any stepping away from physical access, or unduly tolerant NRA decisions on the characteristics and wholesale pricing of L2 WAP, is likely to enable SMP operators to structure the downstream markets to their advantage, by setting their preferred wholesale bandwidth-related charges.

C. Harmonisation is Justified, to Enable Wholesale and Business User Connectivity

Harmonisation of L2 WAP access products is particularly necessary for the provision of wholesale services to other operators and system integrators, and of retail services to business users.

Business users often provide single connectivity solutions across national borders. Operators providing services to business users acquire wholesale access products at a regional or national level, integrate

them, and then provide their wholesale or retail cross-border services. Traditionally, access is provided through leased lines, which are standardized products. L2 WAP products, on the contrary, are not standardised. As the BEREC consultation document demonstrates, different technical solutions are evolving in the different Member States. It is increasingly difficult for wholesalers and business operators to integrate national access products to be in the position to provide seamless services across Europe. As a consequence, harmonisation is particularly relevant for the business market.

Harmonisation is essential for cross border services and competition. It should follow that all technical capabilities of the SMP operators' infrastructure should be made available, irrespectively of those utilized by the SMP operator's retail arm.

Harmonisation has to address different elements, including:

- (i) Technical conditions: jitter, delay, MTU, etc.;
- (ii) Service Level Agreements: particularly in relation with repair terms, as to ensure similar availability rates;
- (iii) Access points: business-focused operators require access points adapted to their specific characteristics and economies of density; and
- (iv) Underlying technologies: L2 WAP products for business-focused operators have to be available for all access technologies, not only FTTC/FTTH. This is already the case in some national regulated offers. It seems necessary to ensure that this becomes the case in all the Member States.

D. Unbundling of Line Activation and Repair

ECTA has an established position on unbundling of line activation and repair (November 2014 – Annex 2), i.e. on the possibility for ANOs to use their own personnel or external contractors to perform provisioning and maintenance activities on the SMP operators' networks. ECTA's position is that this should be promoted as an additional ancillary remedy to be mandated in particular in the currently defined market 3 (a), market 3 (b) and market 4 and any replacement markets going forward.

We believe that this is entirely applicable to L2 WAP (both local and regional PoH), and we ask BEREC to consider including best practice in this area in its final document. We note in this regard that KPN in The Netherlands has recently made this possible for Wholesale Broadband Access, and concerning not only provisioning but also maintenance activities.

E. Other Specific Points

E.1. CPE/Modem

In order to create a future proof solution it should be clear that the handover interface at the ANO end user should be plain Ethernet delivered as "wire only" or over a modem. The SMP operator should not impose its own router. In case of "wire only", the ANO should be allowed to use its own modem without having to go through an expensive certification process. As an example the vendor restriction imposed in Spain appears to be unjustified.

More generally, ECTA would like to stress how important it is that ANOs are able to select, install and manage their own customer premises equipment, so as to be able to offer a seamless solution to their customers (consumers and businesses, and wholesale customers as well) and not having the SMP operator visiting their customers. We ask BEREC to be more direct in its final document in making this an essential requirement for well-functioning competition.

E.2. VLANs

As already stated above, we believe that the ANO should always be able to choose between a dedicated and a shared VLAN scenario, have a 1:N multicast VLAN option and that the possibility to enable 4 VLANs per end-user is the absolute minimum.

BEREC's examination does not go into great detail on VLAN availability, provisioning, modification, de-activation, and the related processes (degree of automation), costs and wholesale pricing. We believe that this is an important area for further research, and for improvement, because: (i) VLAN restriction is a very real issue which deeply affects competition, and some (wholesale and business customers) require VLANs for specific industry applications, (ii) the fees being charged by SMP operators for such activities are considerable, and have a material impact on alternative operators' OPEX, and (iii) there are considerable risks of discrimination in this specific area between a vertically integrated incumbent and ANOs.

E.3. Multicast

BEREC's examination does not go into great detail on multicast, and seems to suggest that demand for multicast functionality might be limited. Demand might be artificially limited due to the lack of development of reference offers on this specific point, and related uncertainty about wholesale pricing. This state of affairs entails risks of discrimination in favour of the vertically integrated SMP operators and against ANOs. We believe that this is also an important area for further research, and for improvement, and that BEREC may be best placed to examine this matter.

Multicast replication functionality is not applicable if a dedicated 1:1 VLAN concept is used. In such a case, there should be no restrictions on the transmission of multicast traffic. Therefore, offloading the multicast traffic to a separate IPTV platform should not be done by the SMP operator if a 1:1 VLAN concept is used. In case of shared VLANs, a guaranteed level of multicast should be offered by the SMP operator.

E.4. Wholesale Prices

The overview of wholesale prices provided by BEREC is quite revealing of practices that are being, in our view, wrongly tolerated by certain NRAs, with the situation in Austria being the most extreme.

As already discussed in Section A. and B.3. of this ECTA response, our position is that wholesale prices for L2 WAP with local PoH should not be bandwidth-dependent. ECTA and its members are particularly sensitive to this issue, because we fear that undue tolerance of certain practices by NRAs can enable SMP operators to structure downstream markets, in particular by *de facto* determining a price premium placed on speed which would affect the entire market and deprive competitors from the ability to commercially differentiate themselves.

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We hope that our input will be helpful and we remain at BEREC and individual NRAs' disposal should you have any questions.

Yours sincerely,



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Encl. Annexes 1 and 2.