

BEREC report on the public consultation on relevant market definition for business services

February 2011

1. This document provides a summary of the consultation responses to the BEREC report on relevant market definition for business services. The consultation period ran between 11 October 2010 and 19 November 2010.
2. Responses to this consultation were received from 7 respondents:
 - British Telecom (BT)
 - Colt Technology Services Group Limited (Colt)
 - ECTA
 - ETNO
 - INTUG
 - Orange France Telecom Group
 - Telecom Italia
3. The following summary is not exhaustive. This document addresses the most commonly mentioned inputs. But BEREC would like to emphasize that all the inputs are duly taken into consideration and where possible have been used to improve the report.
4. Almost all operators refer to the work undertaken by BEREC on this field as an important topic that is worth reflecting upon. There are however important divergences in the contributions submitted. While for a number of stakeholders the present report as well as the ERG Report on the regulation of wholesale access products necessary to deliver business connectivity services (ERG(09)51) confirm that there is no evidence of a need for additional regulatory intervention in view of the provision of business services, for other stakeholders both reports are a step (in some cases, viewed as insufficient) towards recognition of the need to deal specifically with the problems arising in the (high end) business segment.
5. In particular, ECTA, Colt and INTUG have claimed that the document submitted to public consultation deviates from their view on the main objective, which should be to acknowledge that there is a uniform demand from business customers and thus define the best practices for NRAs in this area of regulation, also giving clear guidance to NRAs on how to achieve a consistent approach regarding the needs faced by operators providing business services. This consideration is reflected in the final report adopted by BEREC.
6. The summary of contributions is presented on the basis of the structure set out in the document submitted to public consultation. BEREC's general conclusions and its proposal for further steps are set out at the end of the document.

1. Introduction

7. ECTA considers that BEREC should lead the process towards a consistent regulatory approach to the competitive problems faced in the provision of business services across the EU. In the same sense, Colt considers that the necessary reconciliation between the discretion of NRAs and the development of consistent regulation is included in BEREC's founding act, and thus should guide the conclusions reached in the report.
8. ECTA, INTUG and Colt consider that the document submitted to public consultation represents little progress with respect to the document already approved by BEREC

in December 2009 (ERG Report on the regulation of wholesale access products necessary to deliver business connectivity services (ERG(09)51)).

2. Principles of market definition

9. ETNO refers to the importance of applying a consistent set of principles in the context of ex ante regulation. In this regard, ETNO welcomes BEREC's suggested starting point, which is to follow the existing SMP Guidelines adopted by the European Commission¹, when delineating separate or common markets for business and residential services.
10. ECTA stresses that BEREC should consider also the problems that could arise in the context of market 6, and not only in market 5.

3. Retail and wholesale markets

11. According to ETNO, the market review process should start with the possible delineation of separate markets for business services at the retail level before the corresponding wholesale markets are analyzed. ETNO states that the finding of two or more separate retail markets for the provision of services to residential and business customers is a relevant but not sufficient criterion for identifying the corresponding wholesale markets.
12. In the same line, Telecom Italia and Orange France Telecom Group stress that the first step of a market review should be an evaluation of the competitive features at the retail level.
13. ECTA, INTUG and Colt consider that the document submitted to public consultation seems to deny the findings already recognized in the BEREC report mentioned above, in particular the fact that specific cross border demand of high end users was identified although the wholesale markets were clearly national.
14. INTUG concludes that there exists a business market which fulfills the 3 criteria test established by the Commission to justify ex ante regulation.

4. Evidence and analysis for high end business services

4.1. High end business services distinguishing factors

15. ETNO expresses concerns about the suggested method of data gathering. The report notes that gathering reliable data may be difficult due differing market delineations by different operators. Paragraph 77 suggests to rely on data from the CPs. According to ETNO this should not be allowed.
16. Colt suggests that there are no clear boundaries between high end users and Small and Medium Enterprises (SMEs). In fact, the services demanded by both categories of users are increasingly overlapping. According to the operator, countervailing buyer power is the relevant characteristic to differentiate the high end business market and the mass market. INTUG submits that potential difficulties to draw these boundaries should not prevent BEREC from defining a business market.

¹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C165/6 of 11 July 2002.

4.2. Product market definition

17. ETNO refers to a number of cases (market 6 in The Netherlands, market 5 in Germany) that would come to show that implementation of a distinction between high end and standard needs is in some instances impracticable. In ETNO's view, the issue of business regulation appears to have been considered by NRAs in the relevant market reviews with a sufficient degree of consistency to suggest refraining from further guidance on the issue. In similar terms, Orange France Telecom Group points out that, in its view, there is no case for identifying a high-end business market.
18. ETNO and Telecom Italia refer to the fact – highlighted in the report submitted to public consultation – that residential and business services are in many instances provided over the same infrastructure. In this regard, ETNO notes that the factors listed in § 115, such as the necessity to undertake additional investments for a supplier to provide wholesale products for business services, may not in themselves be evidence of a lack of supply side substitutability as alternative suppliers may, in the presence of a price increase for the related product, overcome such barriers.
19. According to Telecom Italia, the differentiating factors between high end business customers and other segments might in fact be attributed to the difference in the way the services are contracted. At the retail level access products offered to (high end) business customers by means of tenders could represent a separate market which is not susceptible to ex ante regulation (or should at least be made subject to more lenient regulatory treatment) due to the presence of factors such as the specific technical skills and capabilities of the customers or the existence of countervailing buyer power. All other access services that are provided to high end business customers and SMEs (but not through tenders), as well as to residential customers, are part of the same relevant market, characterized by homogeneous competitive conditions.
20. At the wholesale level, according to Telecom Italia there appears to be no justification for the definition of separate access markets. Telecom Italia stresses that, on the basis of current regulation in Italy, there is evidence of demand and supply side substitution. New and dedicated SLAs that might be required by alternative operators could be successfully and efficiently covered by the parties' own contractual arrangements.
21. BT refers to an alleged "vacuum" in the Commission Recommendation on relevant product and service markets², which does not specifically consider Virtual Private Network (VPN) services. This service is enabled by a combination of location-independent virtual infrastructure and location-specific physical infrastructure, and consists of the provision of managed data connectivity between specified network termination points (both fixed and mobile). According to BT, VPN is characterized by a unique feature: since it consists in assurance of end-to-end management, it must by definition be delivered simultaneously at multiple sites. VPN therefore differs fundamentally from provision of access to the best-efforts Internet.
22. On this basis, BT notes that the potential role of the products and services covered by market 5 definition, both in view of provision of best-efforts Internet and VPN, should be taken into account. BT does not believe that regulation of this specific type of high-end service should be left for individual NRAs to decide. BEREC should instead concentrate on ensuring that treatment of relevant wholesale access inputs is

² Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, OJ L344/65 of 28 December 2007.

harmonized to an extent which is sufficient to lift current trade barriers and to avoid situations where inadequate regulation in one Member State distorts competition across the EU. Orange France Telecom Group also refers to the need for European harmonization on the issue of regulated access products for business connectivity, both from the point of view of the reference offers and KPIs that have to be made available by incumbent operators in Member States and from the perspective of implementation of remedies and offers which take the international nature of the business service offers into account.

23. Whereas a chain of substitution of services only differentiated on the basis of bandwidth may be deemed to exist, ECTA considers that quality requirements, such as jitter and delay, could easily break such a chain. INTUG concludes that the factors included in § 75 of the report, like different technical parameters and different SLAs provide a sound justification of the existence of a separate business market.
24. The Report intends to set out some factors which may be relevant to the analysis of possible demand and supply substitution, including the degree to which a chain of substitution might be deemed to exist. If the chain actually breaks, this could be a possible outcome of the market review undertaken by the NRAs. Moreover the Guidelines under the Framework anticipate that market definition will be undertaken on a forward looking basis, with the consequence that it is not possible to identify in an ex ante manner the full set of factors and parameters which might be relevant for market definition. This rather will be a task for any NRA to take a view on, in the light of relevant national and market circumstances³.
25. BEREC welcomes these contributions with insights on the analysis of chains of substitution, but does not propose to alter its approach to the analysis of chains of substitution as set out in the draft Report submitted to public consultation.

4.3. Geographic market definition

26. On the issue of geographic market definition, ETNO points to the relationship between LLU regulation and the possibility to delineate WBA geographically on the basis of WBA offers based on LLU. In ETNO's view, high levels of demand within metropolitan areas can lead to substitute and competitor networks being provided, a factor that should inform the market review undertaken by NRAs. Telecom Italia also stresses that the (non homogeneous) differences in competitive conditions between LLU and non-LLU areas should be reflected in the definition of the relevant WBA geographic market, in order to allow, where appropriate, de-regulation or at least differentiation of regulatory obligations, with lighter remedies in LLU areas that are characterized by a higher level of competition. The development of NGA infrastructure would further support this trend.
27. According to BT, however, since VPN providers must serve widely dispersed sites they will rarely be able to achieve the economies of scale needed to justify investment in their own local access infrastructure – not even where LLU is available. Also regarding the consideration of LLU as a suitable wholesale service, ECTA observes that business operators rarely will achieve sufficient scale to employ this wholesale service. Colt notes that LLU/WLA services are targeted to provide services

³ It should also be noted that the Commission has expressed doubts in its Explanatory Note to the Recommendation on relevant product and service markets that in market 5 bandwidth or access speeds are relevant for market definition in the case of ex ante regulation, since speeds for example evolve continuously and depend on network topology. Again, the definite conclusions on this issue will in any event depend on the specific, case-by-case analysis undertaken by each NRA, on the basis of its national circumstances.

to the mass market whereas business customers require upgraded wholesale products.

28. ECTA points out that although §§ 126-127 correctly highlight the problems of Communications Providers in supplying telecommunications services on a specific location, the document fails to provide a solution. ECTA notes that cross border demand of business customers is real and is increasing, and thus regulation should provide appropriate answers where SMP endures. INTUG considers that the definition of sub-national markets increases the complexity of providing a coherent technical solution to those customers with cross border demand.

5. Conclusions and next steps

29. BEREC is grateful for all the contributions received, which address both broad strategic issues and points of detail.
30. This Report should be assessed in conjunction with the earlier work undertaken by BEREC in this field, and in particular the Report on the regulation of wholesale access products necessary to deliver business connectivity services (ERG(09)51). This document did not reach any definite conclusions on how provision of wholesale products for business customers should be regulated. It is important in this respect to bear in mind that NRAs have the mandate, according to the regulatory framework, to establish the appropriate remedies according to the market failure identified at national level.
31. The document approved last December also stated that BEREC should pay attention to the special needs of high end users. The adoption of this report, as well as the earlier Report on the regulation of access products necessary to deliver business connectivity services, reflect the importance that BEREC attaches to the high end business segment. In particular, it is acknowledged that there may be supply and/or demand conditions different from the residential segment, which depending on national circumstances, may need to be taken into account either at the market definition or at the remedies stage. This consideration is reflected in the final report adopted by BEREC⁴, which also notes that issues related to potential remedies appropriate to solve the issues raised by the provision of business services are outside the scope of the report.
32. In contrast to what some stakeholders have claimed, BEREC has not reached any definite conclusion on the issue of whether international operators have different needs from national business operators which develop their whole activity in a single Member State. Therefore, the approach taken in this document relates to market definition issues directly controlled by NRAs, which means assuming that relevant markets are national. This means, irrespective of the fact that the retail market is national or international, they both make use of the same national wholesale inputs.
33. Given the above, this BEREC document provides guidance to those NRAs that have reached or may reach the conclusion that provision of retail services to high end users is subject to some market failures.
34. As noted by a number of stakeholders, the needs of business communications service providers may be considered at different levels, including at the stage of crafting the remedies that are most appropriate to solve the competition problems that have been identified. This approach could be straightforward, in particular, in

⁴ BEREC has acknowledged that the market conditions for business services may be different from residential services. Where the consultation document was not explicit enough on this point, the report has been adjusted to emphasize this, notably in paragraph 7 of the final report.

those markets where all the services included are, by definition, aimed at business customers (i.e. market 6).

35. However, in other cases, such as in market 5 (analyzed in this document), there could be additional elements preventing NRAs from providing adequate solutions from the pure remedies perspective, as it would be the case in instances of geographic market segmentation. In this regard, this document aims to provide a useful and consistent methodology to define in a proper manner a potential high end business market.
36. In any event, as the Report emphasizes, it will be up to each NRA to decide on its preferred approach to the issues discussed here. NRAs may in particular also reach the conclusion that, on the basis of its specific experience and market knowledge, a detailed analysis of this segment is not warranted. At this point, it is important to recall that a consistent approach to regulatory measures could not end up in a “one size fits all” solution. Therefore, the document provides guidance to NRAs whenever they decide that the most appropriate approach to address the competitive problems identified at national level is through the market definition process.
37. Regarding the methodology of analysis, BEREC believes – as stressed by a number of stakeholders – that the general principles of market definition, as set out in particular in the Commission Guidelines on market analysis and the assessment of significant market power and the Notice on market definition⁵, are robust and provide a clear framework for undertaking an analysis that takes into account the competitive dynamics of the high-end business segment. The possible means for conducting such analysis, on the basis of the methodological tools at the disposal of NRAs, are set out in detail in the Report. In particular, and in line with the principles of market definition as applied to the electronic communications sector, it is deemed advisable – as noted in the Report, § 68 – that NRAs undertake an assessment of the retail markets prior to engaging in the market definition exercise at the wholesale level.
38. On the issue of the gathering of data (§ 76-78) the Report does not set a preferred approach towards the use of information directly gathered from electronic communications providers or the use of more tailored data, but merely points out the strengths and weaknesses of both options. As noted by some stakeholders, any market delineation will need to be based on sound data. Nothing in the Report suggests that the use of incomplete or distorted data should be envisaged.
39. On product and geographic market definition, a number of stakeholders refer to the limited experiences up to date regarding the regulation of the high-end business segment, suggesting that there is no case for identifying a separate high-end business market. Some of the factors listed in the Report (e.g., the fact that services are generally provided over the same infrastructure) would reinforce this view. On the other hand, a number of stakeholders mention other factors also listed in the Report (in particular, the multi-site nature of demand) to justify the definition of a separate market for high end users and stress the importance of specific regulation in this segment.
40. In this regard, it is important to reiterate that the purpose of the Report is not to set a sort of “binding” checklist of factors NRAs must abide by, or to set out general recommendations about the need (or no need) of specific regulation for the high-end business segment. It will be up to each NRA to decide, with the toolkits at its disposal, on the best approach taking into consideration its specific national circumstances.

⁵ Commission Notice on the definition of relevant market for the purpose of Community competition law, OJ C372/3 of 9 December 1997.

41. Regarding the way forward, BEREC's 2011 Work Programme (BoR (10) 43 Rev1) notes that business communication services are increasingly offered on an international scale. Stakeholders claim to experience inefficiencies in offering data communication services because of inconsistent regulation of building blocks and other barriers, such as administrative ones.
42. In 2011 BEREC will thus shift its focus on the inefficiencies market players claim to experience due to administrative barriers. BEREC will analyse the substance of these inefficiencies and if substantial, search for ways on how to resolve these.