

BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES ON THE MARKET FOR WHOLESALE BROADBAND ACCESS (INCLUDING BITSTREAM ACCESS) IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET

Consistent with Article 2(a) of the BEREC Regulation, one of BEREC's key roles is to develop best practices and disseminate these among National Regulatory Authorities (NRAs). The best way to achieve this and promote consistent regulatory approaches is through common positions. This Common Position provides best practice remedies for dealing with competition issues in respect of bitstream access remedies where a position of SMP has been identified in the market for wholesale broadband access (market 5). It complements the general guidance given on choice of SMP remedies included in the revised ERG Common Position on Remedies¹. Application of this Common Position will assist NRAs to design effective remedies in line with the objectives of the regulatory framework. However, this Common Position does not alter, and is without prejudice to, the powers conferred, and obligations imposed, on the NRAs under the Framework Directive and the Specific Directives. It is therefore not a substitute for the responsibilities on the NRAs to show (among other things) that SMP remedies are based on the nature of the problem identified, proportionate and justified in light of the policy objectives laid down in Article 8 of the Framework Directive².

The CPs dating from 2007³ needs to be updated and extended to take account of NGA roll-out. NGA roll-out leads to a potentially wider scope of the bitstream access product. The revision will be based on BEREC's previous work on NGA, starting with the NGA opinion leading up to the Implementation report of the NGA Recommendation⁴. These documents as well as the CPs are based on the ladder of investment principle. Regulated access at different rungs of the ladder promotes competition and investment, thus fostering a competitive NGA roll-out. In the NGA context, the bitstream rung may involve more access points⁵ than before, ranging from the access point at the beginning of the concentration network to the aggregation level in the middle of the concentration network, up to the parent or distant node in the Ethernet/IP backbone, implying different degrees of own infrastructure used.⁶

¹ ERG (06) 33 (Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework).

² Article 8(4) of the Access Directive.

³ ERG (06) 70 Rev1 (Common position on Wholesale local access)

⁴ ERG (07) 16 Rev 2 (ERG Opinion on Regulatory Principles of Next Generation Access), ERG (09) 17 (Report on NGA - Economic Analysis and Regulatory Principles), BoR (10) 08 (BEREC Report NGA – Implementation Issues and Wholesale Issues), BoR (10) 25rev1 (BEREC Opinion to the Draft Recommendation on regulated access to Next Generation Access Networks), BoR (11) 06 (Next Generation Access – Collection of factual information and new issues of NGA roll-out), BoR (11) 43 (BEREC Report on the Implementation of the NGA-Recommendation)

⁵ Sometimes the access point is also called handover or delivery point.

⁶ See BoR (10) 08

NRAs are required under Article 3(3) of the BEREC Regulation to take the utmost account of any regulatory best practice adopted by BEREC, including the practice set out in this common position. Therefore, in carrying out its tasks (such as commenting on draft measures of NRAs concerning the imposition of remedies), BEREC expects NRAs to explain in their notified draft measures the steps they have taken to:

- (a) analyse the objectives identified in this common position and the related competition issues with reference to the market analysis performed by the NRA;
- (b) to the extent consistent with applicable national law, provide an effective regulatory solution to those issues unless market forces can reasonably be expected to be sufficient to guarantee a solution;
- (c) explain transparently how those competition issues have been addressed and give reasons when their regulatory solution departs from the best practice remedies identified in this common position.

Wholesale broadband access products included in Market 5 are consistent with the classification of relevant markets established by the European Commission in 2007⁷. Therefore this Common Position reflects the product market boundaries as originally set up by the European Commission.

⁷See Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002, on a common regulatory framework for electronic communications networks and services.

Objective	Competition issue which arises frequently	Best practice remedies
Assurance of access	<p>SMP operators may deny access to their networks. There should be reasonable certainty of ongoing access on reasonable terms in order to give competitors confidence to enter the market.</p> <p>SMP operators may refuse to develop new access products on request from an alternative operator. SMP operators may have an incentive to deny access by either charging excessive prices and/or delaying development/implementation of new products and services that are feasible and reasonable (such issues which may arise if SMP operators claim they did not obtain the appropriate information from the alternative operator in relation to the new products/services they are being asked to develop by alternative operators).</p> <p>SMP operators do not grant access in suitable forms to allow competitors to offer broadband services in both the business and residential market segments.</p> <p>SMP operators restrict use of services. SMP operators may put restrictions on how WBA can be used which are not objectively justifiable. (See in particular “technical parameters of access” below.)</p>	<p>BP1 NRAs should impose the appropriate and proportionate combination of access products that properly reflect their national circumstances. This involves reflecting the actual competitive situation including different architectures (e.g. FTTH/B, FTTC). In doing so NRAs should simultaneously look at access products in markets 4 and 5 and take into account the effects of symmetrical regulation if it has been imposed.</p> <p>BP2 NRAs imposition of remedies should be based on the ladder of investment principle</p> <ul style="list-style-type: none"> • The ladder consists of access products at specific access points and wholesale products to reach these access points⁸. • The access products have a geographic/architectural dimension as well as a dimension of product characteristics. • Bitstream access covers a range of products from close to physical unbundling up to close to resale depending on <ul style="list-style-type: none"> • access point (e.g. local, regional or national), • used technology (e.g. IP, Ethernet) • product characteristics <p>BP3 NRAs should encourage infrastructure competition at the deepest level at which it is reasonable to reduce barriers to entry.</p>

⁸ A diagram of the ladder of investment can be found in the glossary.

Objective	Competition issue which arises frequently	Best practice remedies
		<p>BP4 To avoid competitive distortions access should be mandated regardless of the technical solution insofar as it is proportionate, possible and efficient. Different treatment of copper and fibre access should be justified and non-discriminatory, and should be motivated by differences in identified competition problems between copper and fibre.⁹</p>
		<p>BP5 NRAs should impose bitstream access products including the appropriate hand-over level and the efficient technology options and the necessary product characteristics to the extent that it is reasonable and relevant. Technology options and product characteristics may be dealt with in the Reference Offer (RO) (see BP 21).</p>
	<p>SMP operators do not provide suitable wholesale products to connect the bitstream access point (local, regional, national) to the operators infrastructure on terms which permit an efficient alternative provider to offer a competitive broadband service.</p>	<p>Access product to reach the bitstream access point Relevant access products to reach the access point are dark fibre and/or wholesale leased lines (right hand side of the ladder).</p>
	<p>SMP operator put arbitrary restrictions on the points at which the SMP operator will provide connectivity.</p>	<p>BP6 NRAs should impose an obligation requiring that the bitstream access point can be reached with an appropriate remedy on regulated terms (although not necessarily covered by the same market review) unless the NRA is satisfied that such access products are available under competitive conditions on reasonable terms throughout the relevant geographic market.</p>

⁹ BoR (12) 66 and BoR (12) 26.

Objective

Competition issue which arises frequently

Best practice remedies

BP7 Obligations to reach the access point need to be designed in such a way as to prevent strategic withholding of capacity

BP8 NRAs should require SMP operators to provide network access to an alternative operator where that alternative operator reasonably requests it. It is advisable that such requests are formally documented. NRAs should require SMP operators to grant access promptly following receipt of the request from an alternative operator.

BP9 If access to new products and services is not generally included through the review of the Reference Offer (RO), NRAs should impose an obligation on SMP operators requiring them to publish the process specifying how they will deal with requests in relation to such new products and services on existing infrastructure.¹⁰

- **BP9a** The process should detail (amongst other things):
 - how the request should be made,
 - the information the SMP operators require to assess feasibility of the new product being requested (type of product and location of interconnection); and
 - the timescales within which the SMP operator will deal with such requests.
- **BP9b** NRAs should impose an obligation on SMP operators to consider such requests within reasonable

¹⁰ A new product and service could include a new speed, a new (faster) repair service etc.

Objective	Competition issue which arises frequently	Best practice remedies
Assurance of co-location at delivery points (e.g. local, regional or national) and other associated facilities	<p>SMP operators may deny access to co-location and other associated facilities (e.g. energy supply, cooling) which are necessary to make the access offer effective for the entrant to compete effectively on the retail markets on the basis of bitstream service.</p> <p>SMP operators may not provide co-location at a cost faced by themselves and at a scale and quality suitable for the needs of the alternative network operator.</p>	<p>timescales.</p> <ul style="list-style-type: none"> • BP9c If the request for a new product is assessed as feasible, NRAs should require SMP operators to develop and grant access to the new products/services promptly.¹¹ Otherwise, NRAs should require SMP operators to objectively justify their refusal for access to such new products and services. When necessary, NRAs should review the reasonableness of such refusal. • BP9d When new products and services¹² are made available, NRAs should ensure that they are captured by the relevant SMP obligations already imposed on SMP operators (this would mean, amongst other things, that those new products and services are immediately incorporated into the RO unless it is deemed not proportionate to do so, for example, because market driven demand cannot be expected). <p>BP10 NRAs should impose obligations with regard to the provision of co-location and other associated facilities on a cost-oriented basis under clear rules and terms approved by the regulator to support viability of bitstream access products.</p> <ul style="list-style-type: none"> • BP10a NRAs should ensure that the remedies allow the optimised use of alternative operators' existing infrastructures. • BP10b NRAs should ensure that these remedies allow co-location and other associated facilities to be used

¹¹ This is also linked to the competition objective of Avoiding Unjustified First Mover Advantages (see Best Practice 15 below).

¹² For the avoidance of doubt these new products and services fall in the relevant market under consideration (e.g. Market 5).

Objective

Competition issue which arises frequently

Best practice remedies

SMP operators may hinder the reuse of infrastructure or services already deployed by alternative operators. With this practice, SMP operators may raise their competitors' costs, as competitors would be forced to purchase additional ancillary services across different regulated markets (irrespective of levels of utilisation).

efficiently. In particular, NRAs should ensure that usage is not artificially segregated by product or market.

Level playing field

Alternative operators may not be able to compete on a level playing field which result in SMP players

- having an unfair advantage;
- having unmatchable advantage, by virtue of their economies of scale and scope, especially if derived from a position of incumbency;
- discriminating in favour of their own group business (or between its own wholesale customers), either on price or non-price issues;
- exhibiting obstructive and foot-dragging behaviour.

BP11 NRAs should impose a general obligation of non-discrimination.

BP12 NRAs should further clarify how the non-discrimination obligation is to be interpreted on a case-by-case basis.

- **BP12a** In cases where a general non-discrimination obligation (imposed under BP11) proves to be not sufficient to the particular issues faced by a specific market and/or product, NRAs could attempt to clarify, as far as possible, how a non-discrimination remedy will be interpreted in practice, via identification of forms of behaviour which will be considered to be discriminatory. NRAs could implement such clarifications in various ways, for example either through explicit wording of the SMP obligation or via explanatory guidance which provides clarity as to the NRA's interpretation of the obligation.

BP13 NRAs should impose an obligation on SMP operators requiring equivalence, and justify the exact form of it, in light

Objective

Competition issue which arises frequently

Best practice remedies

Avoidance of unjustified first-mover advantage

SMP operators have an incentive to discriminate in favour of their own downstream arms. Alternative operators need assurance that, as downstream markets develop, suitable wholesale products will be available in time to permit them to offer a new, enhanced or cheaper downstream service (e.g. higher speed internet access) at the same time as the introduction by the SMP player.

of the competition problems they have identified.

- **BP13a** NRAs are best placed to determine the exact application of the form of equivalence on a product-by-product basis. For example, a strict application of EOI is most likely to be justified in those cases where the incremental design and implementation costs of imposing it are very low (because equivalence can be built into the design of new processes) and for certain key legacy services (where the benefits are very high compared to the material costs of retro-fitting EOI into existing business processes). In other cases, EOO would still be a sufficient and proportionate approach to ensure non-discrimination (e.g. when the wholesale product already shares most of the infrastructure and services with the product used by the downstream arm of the SMP operator).

BP14 NRAs should consider imposing functional separation as a remedy of last resort and only when all relevant regulatory obligations have failed to create a level playing field.

BP15 NRAs should put in place a regime which ensures the (technical and economic) replicability of the new downstream services introduced by SMP players.

- **BP15a** In relation to economic replicability, NRAs should ensure that the methodology and/or the principles applied to ensure replicability are made public beforehand.
- **BP15b** In cases where (technical and/or economic)

Objective

Competition issue which arises frequently

SMP operators may commission new infrastructure which alternative operators are not able to use. This may be necessary for the provision of new retail services, but may not allow all market players the same opportunity to compete for the new business (especially true if new infrastructure may be deliberately designed to obstruct access and prevent the provision of relevant new wholesale services to alternative operators).

SMP operators may deny access to key information relevant for alternative operators roll-out of NGA. A denial of access to information has a new dimension for NGA roll-out because we deal with access to “newly” rolled out networks instead of existing networks.

Best practice remedies

replicability cannot be achieved by using the available wholesale products, SMP operators should be required either to amend the existing wholesale product or to make a new wholesale product available.

BP16 In cases where SMP operators need to provide a new wholesale product, NRAs should impose an obligation on SMP operators regarding the timely availability of relevant information according to lead times (i.e. notice periods) defined on a case-by-case basis. The relevant information should include information on prices, terms and conditions and technical characteristics of the new wholesale product. The information provided should allow alternative operators to effectively assess the impact on their own processes.

BP17 In relation to NGA 6 months might be a reasonable time scale.

BP18 NRAs should ensure that alternative operators have the ability to influence the decisions regarding characteristics of new wholesale products and new interfaces.

BP19 Where relevant, NRAs should impose a requirement on SMP operators in relation to lead times (i.e. notice periods) regarding the removal of existing wholesale inputs.

BP20 NRAs should consider which information on the SMP-operator’s ‘newly’ rolled-out NGA network is essential to competitors and should be available well in advance on a

Objective	Competition issue which arises frequently	Best practice remedies
Transparency	<p>SMP operators do not provide sufficient clarity or transparency on the terms and conditions of access.</p> <p>SMP operators delays provision of the RO to alternative operators. Doing so would, in turn, delay access to their networks.</p> <p>When developing their RO, SMP operators may not take into account any reasonable views from wholesale customers. As a result the Reference Offer may not be fit for purpose.</p> <p>SMP operators have preferential access to certain key information compared to alternative operators. Certain information which is naturally available to SMP operators (but not to alternative operators) could be used to gain an unfair advantage (for example, SMP operator’s development close off dates).</p>	<p>non-discriminatory basis.¹³ This may include information per geographical area - periodically updated if necessary - on:</p> <ul style="list-style-type: none"> • The planning and status of the network roll-out; • The location of the access points in the network of the SMP operator), the area covered by the access points; and the number of (potential) customers per access point. • Relevant parameters regarding the architecture of the network. <p>BP21 NRAs should require SMP operators to provide clarity of terms and conditions of access (including those relating to relevant ancillary services) by publishing a Reference Offer (RO), the key elements of which should be specified or approved by the NRA. All material contractual terms and conditions which are known or knowable at the time of publication should be covered clearly.</p> <ul style="list-style-type: none"> • BP21a NRAs should require SMP operators to take into account any reasonable views of wholesale customers in their RO, in particular regarding the evolution of the services offered. • BP21b NRAs should require SMP operators to publish the RO (i.e. make it operational) within a reasonable time after NRAs have imposed the obligation to grant access. NRAs should give guidance on the reasonable timeframe on a case by case basis. • BP21c NRAs should require SMP operators to update the RO as necessary, and in a timely manner (see

¹³ See BoR (11) 43, BEREC Report on the Implementation of the NGA-Recommendation, 68/69

Objective

Competition issue which arises frequently

Best practice remedies

SMP operators may deny access to information on existing infrastructure that be used for NGA roll-out by alternative operators.

BP16), to reflect relevant changes such as developments in line with market and technology evolution and/or changes to prices, terms and conditions for existing services or technical and operational characteristics. Where NRAs follow a pre-approval process, NRAs should further require SMP operators to inform them before publishing the necessary amendments to the RO.

- **BP21d** Where applicable, NRAs should impose an obligation on SMP operators in relation to the minimum amount of information to be made available in the RO (for example, see Annex 1).
- **BP21e** After lifting an obligation to apply a RO, NRAs should ensure that SMP operators provide provisions for the change in the contractual conditions which are in place on the basis of that RO for a transitional period to be determined accordingly.

BP22 NRAs should require SMP operators to make certain information available to all operators (publicly or on request) within a reasonable period of time. Such information should include the result of Key Performance Indicators (KPI) measurements (see BP27b below) and planned future changes to the SMP operator's network architecture as far as they are relevant to network access (e. g. future points of access) and which might affect the provision of services.

Objective	Competition issue which arises frequently	Best practice remedies
Reasonable quality of access product – technical issues	<p>SMP operators do not provide access products of reasonable quality.</p> <p>SMP operators arbitrarily limit forms of access (e.g. to whatever suits their own business) or provide forms of access which are over-specified for many players.</p>	<p>BP23 NRAs should choose appropriate methods of control including:</p> <ul style="list-style-type: none"> (a) an obligation to publish a RO (see BP 21) which includes the technical parameters of access and which is periodically evaluated by the NRA and/or (b) an obligation to meet all reasonable requests for access <p>The product characteristics of an active access regulated product can vary depending on the regulatory aims, conditions of the market, and the intended relationship with other remedies in place. Correspondingly Bitstream can fulfil very different purposes depending on</p> <ul style="list-style-type: none"> • access point (local, regional, national); • used technology (IP, Ethernet); • product characteristics . <p>BP24 NRAs should require that detailed information about the characteristics of the access product is available to the alternative operator. When defining the necessary product characteristics NRAs should on the basis of their assessment require some or all of the following product characteristics such as:</p> <ul style="list-style-type: none"> • flexible allocation of VLANs, • control of customers service speeds and symmetry, • security enabling, • flexible choice of customer premises equipment, • multicast functionality, • service agnostic access • ability to support different quality of service levels with regard to

Objective	Competition issue which arises frequently	Best practice remedies
Reasonable quality of access products – operational quality	<p>SMP operators may have an incentive to discriminate in favour of their own downstream operations in relation to the quality of wholesale access products. As a result, access products may not be of reasonable quality and service levels may not be comparable with those provided by the SMP operators to their own downstream businesses.</p>	<ul style="list-style-type: none"> ○ delay; ○ jitter; ○ packet loss; ○ contention ratio. <p>BP25 NRAs should require SMP operators to provide a reasonable defined level of service.</p> <ul style="list-style-type: none"> ● BP25a Service Level Agreements (SLAs) should cover specific service areas. Service areas where SLAs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair). ● BP25b SLAs should be made available to wholesale operators. To ensure maximum transparency and comparability of the terms provided by SMP operators to alternative operators and their downstream arm, all SLAs could be made available to all relevant wholesale customers (including those outside from a specific Member State). For example, SMP operators could make them available on demand or automatically publish these on their web-site (as part of their RO). ● BP25c NRAs should take oversight for the process of setting SLAs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour. ● BP25d SLAs should take into account differences in customer requirements. <p>BP26 NRAs should impose a generic requirement on SMP</p>

Objective

Competition issue which arises frequently

Best practice remedies

operators to provide Service Level Guarantees (SLGs).

- **BP26a** SLGs should cover all necessary specific service areas. Service areas where SLGs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).
- **BP26b** SLG payments should be made without undue delay and should be proactive in nature. That is, with a pre-established process for the payment and billing of the SLGs among operators and without the need for alternative operators to request the intervention of any third party i.e. NRAs or courts.
- **BP26c** NRAs should take oversight for the process of setting SLGs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.
- **BP26d** SLGs should be made available to all alternative operators irrespective of the size of their purchases.

BP27 NRAs should impose a generic requirement on SMP operators to provide Key Performance Indicators (KPIs) as a means to monitor compliance with a non-discrimination obligation and ensure that SMP operators fulfil their SLAs (unless there is evidence that this is unnecessary or would not be cost-effective).

- **BP27a** KPIs should cover all necessary specific service areas. Service areas where KPIs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).

Objective

Competition issue which arises frequently

Best practice remedies

- **BP27b** The results of monitoring KPIs should be made available to all operators in the market. To determine whether they could have been discriminated against, alternative operators would need to be able to compare the levels of service they have received to those provided by the SMP player a) to their downstream businesses and b) the industry average.
- **BP27c** NRAs should take oversight for the process of setting KPIs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.

Objective	Competition issue which arises frequently	Best practice remedies
Assurance of efficient and convenient wholesale switching	<p>SMP operators have an incentive to discriminate in favour of their own downstream operations. This may result in wholesale customers not being able to switch wholesale products and/or wholesale providers with the minimum of delay and/or disruption.</p> <p>Charges for migration should be reasonable and should not deter acquisition of existing customers or climbing of the ladder of investment.</p>	<p>BP28 NRAs should impose obligations on SMP operators in order to ensure wholesale switching processes are speedy and efficient.</p> <ul style="list-style-type: none"> • BP28a NRAs should require that the maximum allowed downtime during wholesale switching is the lowest possible for the different needs of specific wholesale customer segments. • BP28b NRAs should require that the price of the switch does not act as a barrier to the wholesale switching processes happening. • BP28c Where necessary, NRAs should put in place specific measures to facilitate bulk wholesale switching processes and ensure these are non-discriminatory. • BP28d NRAs should require that the transaction time required to process wholesale switching requests is as low as possible based on the nature and size of the request. • BP28e NRAs should require SMP players to introduce SLAs/SLGs and KPIs to ensure the efficiency of the switching process, unless there is evidence that these are unnecessary or not cost-effective.
Assurance of efficient migration processes from legacy to NGN/NGA network	<p>SMP operators may not provide migration procedures enabling the competitors to provide retail services based on new network and to compete with the SMP operators.</p> <p>SMP operators do not clearly announce intended close down of decommissioning / change of</p>	<p>Phasing out of legacy network may relate to:</p> <ul style="list-style-type: none"> • Network infrastructure impacting on locations/decommissioning/changing of access points; • Technologies (e.g. ATM); • Access products; • Active products such as Customer Premises Equipment (CPEs).

Objective	Competition issue which arises frequently	Best practice remedies
	access points.	NRAs should foresee provisions accordingly.
	SMP operators do not provide alternative wholesale products to replace legacy wholesale products.	<p>BP29 NRAs should require that switching procedures equally apply between legacy and NGA wholesale products.</p> <p>BP30 Where an SMP operator intends to phase out its legacy network (e.g. ATM), NRAs should impose specific obligations on the SMP operator in relation to:</p> <ul style="list-style-type: none"> • a framework for migration; • a notice period; • an obligation for the SMP operator to provide all relevant information on network modification such as decommissioning of MDFs, technology, access points and active equipment. <p>BP31 NRAs should require that existing obligations remain in place until a certain migration path is agreed and finished.</p> <p>BP32 When imposing an obligation on SMP operators relating to a notice period for phasing legacy networks out NRAs should take into account that the choice of the appropriate notice period may depend on the following factors:</p> <ul style="list-style-type: none"> • Notice period is likely to be longer for locations than for access products/technologies as a new access product may be available at the same location; • Availability of a full-fledged alternative; • Reasonable migration period for a switch of wholesale products. If a legacy access product will be phased out at an access location at which the NGA access product will also be available the reasonable notice period will

Objective

Competition issue which arises frequently

Best practice remedies

Fair and coherent access pricing

Alternative operators in the market may face uncertainty as to the price of wholesale broadband access.

SMP operator may create arbitrage opportunities between different wholesale inputs. SMP operators may have an incentive to set prices for bitstream access which are not coherent with the prices of other related services. This may dis-incentivise efficient investment by alternative operators by both SMP player and competitors and create arbitrage opportunities.

SMP operators may margin squeeze. Whether or not there is an explicit pricing obligation, SMP operators may still have an incentive to margin squeeze in relation to downstream products. Furthermore, alternative operators may face uncertainty regarding the principles and methodology for the assessment of margin squeeze which in turn could result in

be shorter than in a scenario where the NGA-access product will be available at a different access location, where competitors do not yet have a physical presence.

BP33 NRAs should require that in cases where an active product has been foreseen as an alternative for the legacy access products (either temporarily or as definitive measure) this active product is in operation in adequate advance to the MDF decommissioning as bitstream products are likely to gain in importance in a scenario of MDF decommissioning.

BP34 NRAs should ensure that with reasonable certainty prices for bitstream access will permit an efficient entrant to compete with the SMP player. The access price should also be set in a way which is coherent with the prices for other (broadband and narrowband) related services.

BP35 When determining their price regulation NRAs need to consider that it should incentivise both efficient investment and sustainable competition.

BP36 Where appropriate and proportionate, NRAs should require SMP operators to provide regulated products based on an explicit pricing obligation. Price control obligations can be implemented in different degrees, ranging from a requirement for prices to be cost-oriented and subject to rate approval through to specific charge controls such as a price cap, retail minus etc.

BP37 NRAs should determine the costing methodology taking account of the following two key factors:

Objective	Competition issue which arises frequently	Best practice remedies
	<p data-bbox="416 248 954 280">complaints not being resolved quickly.</p> <p data-bbox="416 360 1200 504">SMP operators offer pricing schemes / prices not allowing alternative operators to compete on a level playing field and/or enabling a viable business case.</p> <p data-bbox="416 507 1200 687">SMP operators offer pricing schemes on a discriminatory basis, or prices which do not allow a sufficient margin. In case of long-run upfront commitments SMP operators offer prices not only reflecting the reduction of the risk for the investor.</p>	<ul data-bbox="1245 248 1980 328" style="list-style-type: none"> • the prioritisation of the regulatory objectives and • prevailing market conditions.¹⁴ <p data-bbox="1211 360 2085 584">BP38 When imposing a cost-oriented price control obligation the NRAs should specify the relevant costing methodology to be used as a reference for setting the charges. Any costing methodology selected must allow the recovery of efficiently incurred costs as the relevant cost standard and follow the principle of cost causality.¹⁵</p> <p data-bbox="1211 624 2085 839">BP39 It is important that the access price sends the right economic signal, i.e. that the price is competitively (and technologically) neutral. This will best be achieved with cost-oriented access seeking to mimic the outcome of a competitive market where the equilibrium price reflects the cost of efficient service provision.¹⁶</p> <p data-bbox="1211 879 2085 991">BP40 The effective price granted by the SMP operator should not be discriminatory and should be offered to all operators that meet the established conditions.</p> <p data-bbox="1211 1031 2085 1211">BP41 An ex ante pricing obligation may not be necessary if there is no risk on excessive pricing due to strong (in)direct constraints and/or because the NRA imposes an effective combination of remedies on markets 4 and 5 guaranteeing equivalence of access and a margin squeeze test.</p>

¹⁴ See BoR (11) 65 BEREK response to the Commission's Questionnaire on costing methodologies for key wholesale access prices in electronic communications

¹⁵ However, ERG (05) 29 (p. 9). points out that when an NRA is considering or determining a cost recovery mechanism or value there are factors to be taken into account, in addition to cost causality principle (normally established in the cost accounting system), such as distribution of benefits, effective competition, cost minimisation, reciprocity and practicality.

¹⁶ BoR (11) 65, page 5

Objective

Competition issue which arises frequently

Best practice remedies

BP42 NRAs should put in place obligations preventing SMP operators from engaging in margin squeeze¹⁷.

- **BP42a** In considering the minimum acceptable margin, NRAs need to strike a balance between short term efficiency, derived from the economies of scale and scope realisable by an SMP player, and the longer term benefits (assessed on a realistic basis) of a more competitive downstream market, brought about by new entrants which should, in due course and to a reasonable extent, be able to match those economies.
- **BP42b** Two imputation tests may be considered¹⁸: (i) the equally efficient operator (“EEO”) test and (ii) the reasonably efficient operator (“REO”) test. Both tests are referred to in the Notice on the application of the competition rules to access agreements in the telecommunications sector¹⁹.
- **BP42c** NRAs should evaluate which imputation test (EEO, REO or a combination of both) is better suited to attain the regulatory objectives pursued.
- **BP42d** The chosen principle and methodology for the assessment of a margin squeeze should be made known in advance (e.g. by advance publication).
- **BP42e** Where cost-based access is imposed, this should help address concerns about downstream margin squeeze.
- **BP42f** The imposition of cost-based access prices does

¹⁷ This is discussed in more detail in the ERG Report on price consistency in upstream broadband markets, ERG(09)21, June 2009.

¹⁸ Report on the Discussion on the application of margin squeeze tests to bundles, ERG (09) 07, March 2009.

¹⁹ European Commission, Notice on the application of the competition rules to access agreements in the telecommunications sector, 98/C 265/02

Objective

Competition issue which arises frequently

Best practice remedies

however not remove the concern for margin squeeze.

- **BP42g** The price squeeze test applied by the NRA should take into account the costs faced by an efficient operator with a minimum scale such that the minimum margin for this operator with relevant downstream services makes commercial sense.

BP43 Moreover, especially where the downstream (bitstream) access price is also cost-based, it is not necessarily guaranteed that a cost-based price for unbundled loops and shared access will permit competitors to extend their networks to take advantage of those services. NRAs may therefore also need to take steps to ensure that the margin between the upstream and downstream services is sufficient to facilitate efficient investment of this nature. In principle, such controls could be imposed as a remedy to SMP in either market to achieve consistency along the ladder of investment.

Bitstream based on NGA-infrastructure

BP44 NRAs should ensure that the pricing of NGA-bitstream products is consistent with the pricing of legacy bitstream products (copper) to set efficient incentives to invest.

BP45 Where NRAs decide that it is appropriate to regulate the prices of NGA-based services on the basis of cost orientation they should consider whether to differentiate the risks borne by the SMP player in operating its NGA access network from other risks of its business. The investment risk

Objective

Competition issue which arises frequently

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should be assessed by taking account of various factors of uncertainties for the time period considered relevant. This includes an assessment of the likely demand for NGA-based services (penetration) and the willingness to pay a pricing premium (ARPU) and how this develops through time. In case this assessment has identified an NGA-specific risk, it should be factored into the cost of capital.

BP46 NRAs should assess pricing schemes proposed by the investor, but price differences should only reflect differences in risk for the investor and must not lead to a margin squeeze (see BP42).

BP47 When assessing long-term pricing contracts NRAs should strike a balance between lowering the overall risk of the investor by transferring part of the risk from the investor to other operators (risk diversification), which may lead to a higher level of investment and possible negative effects on competition and investment of competitors who cannot commit to purchasing over a long period. The effective unit prices implied by the up-front commitment should not in any event suppose a wholesale price below the efficient costs calculated including - if applicable - the risk premium because otherwise the discount overcompensates the risk.

BP48 NRAs should ensure that discounts are not discriminatory. NRAs should ensure that volume discounts comply with their margin squeeze test (see BP42).

BP49 The main objective of volume discounts is not to reduce the risk of the investment as it has already taken

Objective

Competition issue which arises frequently

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place prior to purchasing the volume contrary to the case of upfront commitments. Its main objective is to stimulate network penetration rate and lower unit costs per end user. An indirect effect on investment risk may potentially exist to the extent that the investor has certainty prior to the investment taking place that volume discounts will be allowed in principle, whereby the investor could expect that network penetration rates and total turnover will be higher than in the case when such discounts are ex ante prohibited.

BP50 NRAs may consider accepting volume discount based on total market volume as this stimulates network penetration and benefits smaller operators as well. When assessing volume discount schemes based on the volume of individual operators NRAs should bear in mind that the threshold of the minimum efficient scale may curtail competition and foreclose the market, because in a number of circumstances the minimum efficient scale may not allow more than one additional competitor beside the SMP operator to be eligible for the discount.

Annex 1

The Reference Offer could (amongst other things) include the following information:

- a description of the network access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of network access);
- the locations at which network access will be provided;
- a procedure and conditions to request relevant information for the provision of the relevant regulated wholesale service;
- any relevant technical standards for network access (including any usage restrictions and other security issues);
- the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing), including their usage restrictions and procedures to access those services;
- details of operational processes including, for example:
 - eligibility, ordering and provisioning;
 - migration, moves and ceases;
 - repair and maintenance; and
 - changes to IT systems (to the extent that it impacts alternative operators);
- relevant charges, terms of payment and billing procedures;
- details of interoperability tests;
- specifications of equipment to be used on the network;
- details of quality as follows:
 - specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
 - service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
 - the amount of compensation payable by one party to another for failure to perform contractual commitments as well as the conditions for eligibility to compensations;
 - a definition and limitation of liability and indemnity; and
 - procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- details of any relevant intellectual property rights;
- a dispute resolution procedure to be used between the parties;
- details of duration and renegotiation of agreements;

- rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);
- the standard terms and conditions for the provision of network access;
- glossary of terms relevant to the wholesale inputs and other items concerned.