CONSULTATION SUMMARY ON ERG COMMON POSITIONS ON BISTREAM ACCESS AND WHOLESALE UNBUNDLED ACCESS
(Consultation documents ERG(06) 69Rev1 ; ERG(06) 70Rev1)

May 2007

I. Introduction

This document is a brief report on the answers received within the public consultation on the draft Common Position on bitstream access and the draft Common Position on wholesale unbundled access – document numbers ERG (06) 69 and 70 (hereinafter, the Common Positions).

The consultation period ended on 15 January 2007. During this period [25] contributions were received from 17 stakeholders: IEN, FRANCE TELECOM, BREKO, BT, DEUTSCHE TELEKOM, ECTA, ETNO, FASTWEB, FREENET, GSME, MAGYAR TELEKOM, INFONXX, ONITELECOM, TELE2, TELECOM ITALIA, The 3GROUP, VODAFONE.

This report tries to summarise the answers and also to explain the reaction of ERG to the comments received. It does not substitute the individual responses and does not try to deal exhaustively with all comments. No fundamental changes to the Common Positions were considered necessary.

ERG is grateful to all respondents for their comments.

A) Comments on general issues (CPs methodology – implementation)

ECTA
ECTA welcomed the ERG's proposals for best practice in bitstream access and wholesale unbundled access to the local loop.

Concerning transition to broadband based services (internet access and VoIP), NRAs should act promptly and forcefully to impose the remedies.

BT, Telecom Italia (TI) and IEN are in broad agreement with the ERG proposals, however, they consider that the existing guidance on Broadband Access is fairly abstract and tends to result in the imposition of obligations which lack the necessary level of detail[1].

1 Thus, the ERG should in particular try to define:
a). how many interconnection points must be made available to access seekers and at which level (Ethernet, ATM, IP aggregation, IP concentration);
b). which QoS must be made available to access seekers (e.g. constant bit rate, real-time variable bit rate, unspecified bit rate);
c). the essential parameters of links (including latency, jitter and packet loss);
d). the specification of the xDSL end-customer link to be offered and whether 'naked DSL' should be made available;

In fulfilling ERGs mission to contribute to the development of the internal market and to the consistent application in all Member States of the regulatory framework, the approach of the Common Positions responds to the comments from stakeholders in previous consultations[2] as to the need for more detailed guidance. However, the level of detail requested in some responses to the present consultation would prejudice the sound economic and factual analysis of the market circumstances, as entrusted to the national regulatory authorities (NRAs). This guidance is intended to assist NRAs with that task, yet the concrete prescriptions requested by some stakeholders would amount to a sclerotisation of the guidance. In this sense, the Common Positions need to be designed in a sufficiently flexible and forward-looking manner so as to be applied to all analyses carried out by the regulators in relation to the key markets that the Common Positions address.

On the other hand, ERG believes the competition problems and the commonly accepted solutions covered are extensive and detailed enough (indeed, other stakeholders consider them too exhaustive[3]) to provide suitable guidance.

ETNO

ETNO calls into question the policy "objectives" identified in the ERG draft common positions. It is unclear to it how these objectives have been established and how they relate to the objectives and principles of the Framework and to the relevant articles of the EU Access Directive in particular. The **"**objectives" set out in the CPs are neither contained in the Framework nor explicitly or directly derived from it.

ETNO identifies a lack of economic analysis of the possible conditions of competition, including the interaction between remedies on different wholesale markets and of the effects of the proposed remedies on competition and investment in the field of broadband. DT supports ETNO in criticising ERG for proposing a so-called "check-box" approach to the process of problem identification and the selection of appropriate remedies. Thus, ERGs approach disregards a "thorough examination and proof of market failure".

ETNO invites the ERG to withdraw the proposed drafts and, if at all, continue the process with new proposals that are based on the objectives of the EU Directives in place and that respect the principle of proportionality of regulatory intervention which is one of the main principles of the Framework. DT agrees with this view and further urges ERG to concentrate on the "rather limited cases of proven market failure instead of focusing on a broad number of competition problems which by itself should be subject to general competition law".

ETNO considers a **flawed assumption** that a summary conclusion for proportionate remedies can be reached as if there was a **common market analysis determination** across the 27 Member States' national markets. Further, it contradicts the efforts by the

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e) the meaning of "taking into utmost account". IEN suggested to include a remark whereby member NRAs would provide an appropriate regulatory solution "to the extent consistent with national law and paying due respect to the 'effet utile principle' in Art. 10 of the Treaty.

2 In particular, to the consultation on the Remedies Common Position, now the Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework ("Remedies Common Position") ERG (06) 33.

3 See below.

European Commission to achieve some regulatory relief at retail level in the context of the Recommendation on relevant markets

In this sense ETNO criticises ERG for, in its view, disregard the principle of proportionality and the interest of the end-user[4]. In setting up the "objectives" for its work, ETNO considers **ERG has adopted the perspective of a regulation-based entrant** (not always in line with the Regulatory Framework objectives).

Finally, concerning the **wording** of the CPs, ETNO considers the documents use numerous terms and concepts which are not common to the Regulatory Framework terminology (**fairness, obstructive and footdragging behaviour**[5]).

Magyar Telekom (MT) claims ERG's CPs intend to **limit** the **flexibility** of **NRAs** by recommending the imposition of one or several remedies without regard to the specific results of the relevant national market analyses and national market characteristics. According to MT, this would be contrary to the prevailing EU regulation.

Concerning the policy objectives referred to by ETNO, ERG considers that these are fully in line with the objectives set out in Article 8 of the Framework Directive. In particular, the present Common Positions have been adopted in fulfilment of ERG's mission, namely to contribute to the development of the internal market and to the consistent application in all Member States of the regulatory framework for electronic communications.

ERG wishes to recall that the framework prescribes a broad list of policy and regulatory objectives, ranging from, e.g., ensuring effective competition to encouraging efficient investment in infrastructure. It is for the national regulators to take all reasonable measures aimed at achieving them. The present Common Positions do not substitute the NRAs in striking a particular balance among the objectives, but provide practical assistance in finding the most effective balancing the costs and benefits of a particular regulatory intervention it, on the basis of previous experience and theoretical considerations. They complement the generic guidance set out in the Remedies Common Position ERG (06) 33 by setting out principles for selection of remedies in particular markets.

ERG cannot agree with ETNO's claims that these Common Positions preclude a proper economic analysis by the NRAs. On the contrary, the present guidance is designed to be applied once the necessary market definition and analysis have been completed, with the result of finding the relevant market not effectively competitive. It is at that moment, i.e. when the NRAs have to consider how best to address the problems encountered by identifying the appropriate remedy, that the Common Positions come into play. They assist NRAs in their task to impose obligations based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. Additionally, ERG stresses

4 Thus it is a prerequisite for the imposition of remedies that the means used to attain a given end "should be no more than what is appropriate and necessary to attain that end. The means employed to achieve the aim must be the least burdensome, i.e. the minimum necessary"

5 DT fully shares ETNO positions with regard to the lack of justification of the objectives outlined in the ERG draft, the proportionality of the remedies, and the concepts and terminology used as well as the strong focus on a regulation-based entrant.

For FT, the proposed common position on best practice seems redundant with the existing Common Position on remedies, so it wonders what the concrete usefulness of the production of those new common positions is.

that its Members have committed to provide reasoned regulatory decisions, by reference to the relevant ERG Common Position(s).

The format of this guidance, designed to provide a systematic approach to the selection of remedies, cannot be rejected as a check-box. By analysing the objectives and the related competition issues in the systematic fashion proposed by these Common Positions, the NRAs ensure a more effective result. In this manner, they help NRAs to fulfil the obligations in Article 7(2) of the Framework Directive, thereby contributing to the development of the internal market.

ERG cannot agree with the criticism of the lack of flexibility identified in the Common Positions. On the contrary, this guidance does not prescribe remedies for dealing with the identified problems when they arise, as the regulators will need to take full account of national circumstances and differences in national legislations.

France Telecom (FT) is concerned that the “best practice” approach as considered in this consultation leads to an almost automatic extension of the list of remedies as ERG generally endorses or rationalises all national initiatives ex-post. There is a high risk that extreme, intrusive forms of regulation are legitimated ex-ante, and independently of their context. The major risk associated to the concept of “best practice” is however the inevitable over-regulatory bias it introduces in reversing the fundamental principle of the regulatory framework that NRAs have to justify regulatory intervention in the light of market conditions. The necessity to apply a regulatory measure has to be assessed by a thorough analysis, according to the principle of proportionality, in order to evaluate the advantages of that measure balancing the benefits and the costs of the specific regulatory intervention, including the inevitable market distortions.

ERG considers that the present Common Positions do certainly not amount to an increase of regulatory intervention. Quite the opposite, they contribute to a more effective and focused remedy-selection process, thereby streamlining regulation. As explained above, this guidance does not substitute, nor add to the obligations specified in the regulatory framework, they are a systematic assistance to NRAs when choosing the most effective and proportionate remedy to the competition problems identified during a particular market analysis.

They provide commonly accepted solutions to competition problems that are reasonably likely to arise, based both of theoretical considerations and on practical experience of regulation in these markets and applying the general principles of the Remedies Common Position.

MT supports ERG against the Commission’s intention to extend its veto power to remedies on the basis that national characteristics should be taken into account and a centralised EU institution is not in a position to do so. However, the same rationale should apply to ERG, which according to MT is not in a position to exert any guidance through best practice. Further, MT questions whether there exists a “best practice” of remedies at all.

MT also perceives that the recommended remedies are usually the **most far-reaching** types and/or include the whole set of remedies available under the Regulatory Framework, and even going beyond it (cf. functional separation), the latter case being contrary to the mandate of ERG.

It is generally acknowledged that the NRAs are the repository of years of regulatory experience and first hand information on the electronic communications market. ERG is convinced that NRAs are the best placed actors for implementing the regulatory

framework consistently and, thus, it endeavours to channel and disseminate this experience through the most effective tools available to it, in particular through best practices.

For the present best practice to provide effective guidance, it has to cover thoroughly all key problems and linked solutions. This does not mean they encourage NRAs to adopt the most far-reaching obligations but the most effective ones. National regulators need to assess the competition conditions in their national markets and fully justify their choice of remedy. The obligation to proceed in his manner is placed upon the regulators irrespective of the Common Positions[6], but the latter are designed to assist in this process by sharpening and systematising the regulators choice.

Telecom Italia fully supports the initiative undertaken by ERG of promoting more consistency through the publication of common positions on regulation of specific markets and in particular on wholesale broadband access. Telecom Italia believes that the CPs will prove to be a **useful tool** on hand of NRAs in their endeavour to achieve a higher degree of consistency.

However TI sees some drawbacks in the consistency enhancing mechanism identified by ERG: first of all the lack of a **body responsible of monitoring** the compliance and adherence of NRAs decisions to the agreed upon common positions and the lack of the **necessary legal enforceability**. Telecom Italia believes that alongside the publication of these CPs a **more legally binding** measure favouring consistency should be sought. TI further considers that in many cases the formulation used to outline illustrative remedies is far too general and leaves ample room for **inconsistent** interpretations.

ERG reminds that its Members have undertaken to agree a way of monitoring and comparing their respective regulatory approaches across key markets, with the objective of continually improving their regulatory approaches and implementation of the EU regulatory framework. To that end, ERG is committed to developing a suitable approach.

The regulatory framework already provides for a considerable degree of harmonisation, requiring as it does the alignment of legal processes for authorising networks and services coupled with detailed instructions for national regulators on when, how and where to regulate. ERG believes that its approach on harmonisation, as submitted to consultation, should lead, upon full development, to a fully satisfactory degree of consistency.

In any event, the question of more binding measures is one for the reform of the regulatory framework and is outside the scope of this consultation. In this regard, ERG has responded to the preliminary views of the European Commission on the development of the role of ERG in the context of the reform of the regulatory framework[7]. ERG considers that there will continue to be the need for concerted action to address any remaining unjustified inconsistency in SMP remedies. Further, ERG reminds that it recognised this one year ago, and has put in place a series of mechanisms intended to achieve this. Indeed, if Europe is to play a leading role in the global economy, its 27 NRAs will need to work closely together to ensure that

6 As outlined in Article 8(4) of the Access Directive, remedies “shall be based on the nature of the problem identified, proportionate and justified in light of the objectives laid down” for NRAs in the Framework Directive.

7 See ERG response to the letter by Commissioner Viviane Reding of 30 November 2006 (27th February 2007).

European businesses can take full advantage of the scale of the European market. ERG believes that this is where there is merit in considering the enhancement of the role and duties of the Group for the medium-to-long term.

Fastweb also noted that the adoption of a "best practice" model, might risk exposing national regulators to greater pressure, mostly political, should the regulatory solution chosen by them not be in line with the best/common practice. Such a situation could lead to superficial judgments that may prevent a regulator to adopt proper remedies and thus, paradoxically, delays further the creation of a level playing field.

ERG believes that the best practices it develops will prove to be applicable by a number of NRAs as they are based on experiences drawn in many parts of Europe. Nevertheless, they are not intended to be a straitjacket. While ERG members are recommended to take the utmost account of common positions and have committed to provide reasoned regulatory decisions by reference to the relevant ERG Common Position(s), such Common Positions are not binding. It is implicit in the scenario raised by Fastweb that the NRA would be able to state good reasons for choosing a different approach.

FT noted that although remedies are indeed a key regulatory instrument, they obviously do not guarantee a consistent environment as the overall regulatory outcome is the result of a complex process[8] More harmonisation might even prove illusory as markets develop, competition changes and new technologies emerge at global, European, national or regional level.

This comment appears not to relate explicitly to these Common Positions. It has been considered together with comments received on the "Theory of Harmonisation Papers"[9]

GSM EUROPE focused on transparency and consistency, noting that without transparency there cannot in practice be consistency. Harmonisation should not go beyond guidance on the application of similar remedies in similar circumstances. It is not possible nor is it desirable to attempt to dictate the use of the same remedies in all circumstances. The ERG should therefore concentrate on developing principles in those areas where they can assist NRAs in the consistent application of remedies.

ERG fully agrees with the approach suggested by GSM EUROPE and considers these Common Positions are fully in line with it.

GSM EUROPE considers unclear where the ERG thinks that responsibility lies between the Commission and NRAs in promoting "harmonisation" beyond that which already takes place under the regulatory framework.

See above.

VODAFONE noted how the consultation document presents a useful conceptual framework for thinking about the issues which ERG should address in a harmonisation context. But Vodafone believes the ERG's approach is too conceptual. There are more

8 Namely of different market definition, market analysis, tariffs setting, enforcement and last but not least different approaches in respect of regulatory intervention (impact assessment, alternative to ex-ante intervention, development of sustainable competition, industrial policy etc.).

9 Effective Harmonisation and Harmonisation in practice, ERG Documents (06)67 and (06)68.

pragmatic and useful criteria for determining what the ERG should focus upon (asymmetric call termination and numbering).

ERG wishes to recall that, as set out in its Work Programme for 2007, is already focusing on the issues raised by Vodafone, namely through various Project Teams and refers to the work to be produced by these PTs, which will also be submitted to consultation in due course.

B) Comments on the specific objectives (including remarks specific to Bistream or LLU).

o **Assurance of access**

ETNO

ETNO believes the role of regulators is **not** to provide "certainty of ongoing access on reasonable terms in order to **give competitors confidence**". Rather, the Framework foresees regular market analyses consistent with the principles and approaches of EU **competition law**[10]. The decision concerning access to new networks and services should in principle be up to the investor.

ETNO further considers wholly **unjustified** to simply assume that "competitors **need assurance** of wholesale products to provide enhanced downstream services (eg high-speed internet access)". As a principle, **no** access **regulation** should apply to "**new downstream services**[11]" in line with the principle that newly emerging markets should not be subject to inappropriate regulation.

ETNO remarks that any decision whether to impose an access obligation to new and enhanced infrastructure must **take into account** the criteria listed in Art. 12 (2) Access Directive, namely the **feasibility** of installing competing infrastructures and the **risk** involved in the **investment** as well as the Regulatory Framework objective to promote efficient investment in infrastructure and innovation.

ERG seems to expect access regulation to **automatically cover new** and enhanced **services** and **infrastructures**. This indicates the huge discrepancy that exists between the perception of the authors and of international investors and most market players regarding the current investment challenges facing the European information society.

According to ETNO, "alternative" operators are often already proving they are ready to invest in new and enhanced services and infrastructures rather than seeking regulated access. Thus, NRAs will have to finely **analyse objective entry barriers**, rather than relying on off-the-shelf "best practices". The consumer will otherwise be harmed as investments in new technology will be delayed or limited because of the threat of immediate regulation without an **appropriate analysis of costs** and benefits for the consumer in the medium to long term.

ETNO claims that "**equivalent downstream service" guarantee** for competitors amounts to **excessive** retail regulation. ERG should dismiss that notion[12]. "**Replicability**" for competitors of new downstream products proposed by the ERG would distort investment decisions, hamper service innovation and for the first time **introduce de facto retail controls** on broadband services in Europe.

According to ETNO, such an approach would imply obligatory access even where

10 Additionally "(…) giving competitors confidence (…)" could be understood as imposing on incumbents the obligation to provide additional infrastructure while obligations imposed in the relevant market should relate to existing resources.

11 Wording used in the "illustrative remedies" column on p. 5 of ERG (06) 69).

12 "An appropriate method of control could be an obligation not to make available to itself the wholesale inputs which permit introduction of a new or enhanced downstream service until the corresponding wholesale service components required to deliver an equivalent competitive downstream service".

i) it would be technically and commercially feasible for alternative operators to provide such services themselves;
ii) the SMP operator's incentives for investment in wholesale facilities and its need to make a reasonable return on capital employed are at risk; and
iii) the SMP operator's and others intellectual property rights might be violated;

and thus contrary to Article 12 (2) Access Directive.

By proposing that NRAs can block innovative retail offers of a dominant operator in the wholesale market, ETNO sees that the ERG is effectively proposing an all-encompassing **ex ante regulatory regime for retail broadband services**.–This is to be done **without** requiring **SMP** on the downstream **retail** market, and against the trend set by the EC in its proposal for Markets Recommendation.

ERG believes that ETNO's arguments need to be considered in the context of three important points. First, the remedies under discussion are those which may be applied when a position of SMP has been established in a relevant market susceptible to ex ante regulation. Inevitably therefore, the SMP player has the incentive and the ability to leverage that market power into adjacent markets, especially those downstream. Second, the remedies chosen must be targeted on the competition problems identified. Third, they must be proportionate. NRAs must be satisfied on these matters in the circumstances of the case.

In the face of ETNOs arguments concerning the condition for replicability at wholesale level of the SMP operator's retail services, ERG considers relevant to recall here the consolidated practice under both competition law and ex-ante regulation concerning competition issues in the context of vertical leveraging.

As described by the Remedies Common Position, leveraging, in general, can be described as any behaviour by which an undertaking with SMP on one market transfers its market power to another, potentially competitive market. Vertical leveraging can be defined as '... any dominant firm's practice that denies proper access to an essential input it produces to some users of this input, with the intent of extending monopoly power from one segment of the market (the bottleneck segment) to the other (the potentially competitive segment)'[13].

An undertaking with SMP on the wholesale market may attempt to leverage its market power by denying access to or refusing to deal with undertakings operating downstream and competing with the incumbent's retail affiliate. 'Refusal to deal can create competitive harm when a firm with SMP controls an input or inputs which are essential for other players to be able to operate/compete in (downstream) markets. In particular, a firm which operates in two vertically related markets and which has SMP in the upstream market may (unfairly) strengthen its position in the downstream market if it refuses to supply downstream competitors[14]

Taking into account the effects on retail markets is not only standard in merger analysis but is also emphasized in Art 12 (1) of the Access Directive. Refusal to deal/denial of access can lead directly to foreclosure if the wholesale product is a necessary input, but may alternatively lead to raising rivals' costs if bypass (e.g. in-house production) is possible but associated with higher production costs. Therefore, it is not necessary to

[13] Rey/Tirole (1997, p. 1) Quoted in the Remedies Common Position ERG (06) 33.

[14] Oxera (2003, p. 7). Quoted in the Remedies Common Position ERG (06) 33.

formally establish a position of SMP in the retail market to prohibit exclusionary behaviours at wholesale level which produce foreclosure effects.

ECTA

The formal access obligation should have two aspects:

- Specific: a detailed **description** of the **key products** (and associated facilities) to be provided with specific pricing conditions, terms and conditions.

- Generic: an obligation:

  (a) not to discriminate in relation to the provision of access and associated facilities in general terms (**self supply**)

  (b) to meet reasonable **requests for access** and associated facilities. This should be accompanied by a procedure for a request for adaptations to a product or new products and the handling of such requests by the dominant operator to help avoid repeated refusal and referrals to the regulator. We note that this is currently mentioned under the heading of 'reasonableness of technical parameters of access', but we believe it deserves greater prominence. This could be further elaborated by requiring provision for example 'at any technically feasible point', 'to any reasonable specification'. Competitors should not be restricted to offering identical products to those of the dominant player, but be free to innovate. Equally the dominant player as a wholesale supplier should be responsive to the needs of its customers, as would happen in a competitive environment.

  (c) To comply with other regulatory conditions as specified (e.g. relating to reference offer, cost-orientation)

It is essential – to emphasise the need for **access** obligations to be **independent of the material or technology** used.

The regulatory framework has set upon the NRAs the task of defining and analysing the competition conditions in the relevant electronic communications markets. Further it acknowledges that NRAs must be accorded discretionary powers correlative to the complex character of the economic, factual and legal situations what will need to be assessed[15]. In this sense, it is for the national regulators to carefully analyse, according to national and Community law, the impact of new or upgraded infrastructure and technologies on the structure and functioning of the market. Subsequently, it is also for the NRAs to decide accordingly on the treatment to be applied, in particular in the case pointed out by ECTA, to the regime of access to those infrastructures, acting in accordance with the principle of technological neutrality.

15 Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

In fulfilment of its mission, ERG strives to assist NRAs in the task described above by providing guidance based on common expertise, such as the Remedies Common Position[16] and the work developed by the IP-IC/NGN Project Team[17].

Telecom Italia remarked that SLAs should take into account the capacity constraints of SMP operators. Differentiate between *basic* SLA and *premium* SLA (additional fee). CPs should recommend NRAs to impose sanctions, i.e. an obligation to pay appropriate compensation for breach of SLA in all MS.

TI further suggested a diversification of SLAs according to categories of customers (residential and business) would be beneficial since different categories of customers have different needs in terms of SLAs. BREKO is of this same opinion.

Already addressed under “Assurance of access”.

TELE 2 noted that there should be a formal access obligation not to discriminate in relation to the provision of access and associated facilities in general terms, for example by supplying wholesale products to its downstream arm which are not available to competitors. There should also be an obligation to meet all reasonable requests for access and associated facilities.

Already covered under “Assurance of access”.

It is also of utmost importance to emphasise the need for access obligations to be technologically neutral and hence independent of the material or technology used. This point is key particularly given the announcements concerning deployment of fibre access networks in Europe. Hence, it should be made clear that access obligations should enable full usage of loops of any material found to be in a relevant market for local loops for which the 3 criteria test is satisfied and dominance has been found. It is therefore important that the definitions of the relevant markets reflect this approach, e.g. by removing all references to “metallic”.

Given moves towards access upgrades such as through vDSL, it is vital that regulators take care to ensure that detailed and practicable provisions are available for sub-loop unbundling with the relevant associated facilities.

See above.

Specific comments on Bitstream Access

ECTA
The option should be available for competitors to offer service without the need for the customer to contract with the bitstream provider -whether for voice or for the access line. Need for provision of **naked** wholesale **DSL** in particular is important in enabling the development of and competition in VoB as a substitute for PSTN.

ONITELECOM fully supported this view and noted that whenever the wholesale ADSL service provision is carried out in association with the Fixed Telephone Service (FTS) provided by the incumbent, the ADSL service provision is refused if there is no FTS active in the same loop.

16 See Remedies Common Position (supra), p. 116-118.
17 See, e.g., the Final Report on IP Interconnection ERG (07) 09.

This condition represents therefore a bundling of wholesale and retail services which raises serious concerns in legal terms and limits the offer commercial interest.

According to ONITELECOM, this is an issue which should also be addressed in the document, with appropriate illustrative remedies. Thus, it proposed therefore to add such illustrative remedy, namely consistent the **prohibition of any condition bundling the provision of local access ADSL service with the existence/maintenance of incumbent FTS.**

Already covered under "Assurance of access".

The access obligation should be **technologically neutral**. On the assumption that xDSL technologies are found to be in the same market, obligations should be imposed so as to enable competitors to supply any service feasible via the available xDSL-enabled network (not limited to services offered by incumbent). Bitstream is even more important in cases where the metallic loop is replaced by e.g. fibre.

Where there are plans to upgrade access networks, consideration should explicitly be given to **bitstream** being and **remaining available** at or close to current **MDF** sites, because alternative operators have built backhaul infrastructure to those sites.

More fundamentally, the ERG should maintain and enhance its **position** on the **types** and points at which **bistream access** must be made available, ranging from: DSLAM, parent node and distant node access, including ATM and Ethernet interfaces; managed IP access, and unmanaged IP handover, as long as competition is not effective for the transport services. This view is supported by BREKO.

Telecom Italia
The availability of different handover remedies highly differ from European NRAs. TI identifies five different levels, i.e. bitstream access at the DSLAM level, at the ATM level, at the IP level, or simple resale of broadband Internet connectivity[18].

TI considers individual remedies have in some cases been treated in an uneven fashion – NRAs show a rough consistency for the regulation of offers at the DSLAM level and at the ATM distant level, with only a few exceptions to the general trends, but the degree of inconsistency is much higher for offers at the ATM parent, IP and resale levels. TI believes that the definition of **consistent benchmarks** is the real "core" of the problem related to the harmonization across the Member States.

TI considers that due to necessary market analysis prior to ex ante regulatory intervention, an illustrative remedy of a mandated access fixed at a "regional" delivery point doesn't seem to be sound.

The **"regional" delivery point** may vary in different countries given different topology of networks. Moreover, the "regional" edges are going to vary with the deployment of new technological platforms such as metro Ethernet and/or DWDM[19]. In light of the ongoing developments Telecom Italia believes that ERG's statement should be reformulated to clarify **the criteria** to be followed by NRAs when determining the

18 Considering that bitstream handover at the ATM level can occur at parent node or at the distant node, these options extend to five.

19 A good example for this is given by KPN network evolution in the Netherland, where the deployment of the All-IP project (that is the migration towards the KPN NGN project) will bring the "regional" nodes up to the (2x14) Broadband nodes of KPN, hosting the functionalities of Metro Core networks.

number of mandatory handover levels and the services to be regulated. TI suggests rephrasing the illustrative sentence as follows:

> *A formal access obligation is likely to be necessary, wherever an appropriate market analysis demonstrates that mandated access remedy in the LLU market is deemed not sufficient.*

ERG believes that this statement seems too restrictive considering the need for bitstream access in a dynamic perspective. Under particular national circumstances, bitstream access could be necessary even in cases where LLU is provided in order to promote broadband competition on the whole territory and to allow competitors to climb up the rungs of the investment ladder[20].

The level of the nodes at which handover should me made available has to be chosen on the basis of the competitive conditions and network structures. Moreover, access should be available for all widespread efficient technology options as long as they are in use in the dominant operator network.

ETNO
It is unclear how the recommendation to provide bitstream **access** "at the **regional delivery point** when possible for all efficient technology options" has come about. ETNO **contests** that this will be **justified** and proportionate in most cases. NRAs have to analyse whether access to a specific technology is justified in the light of the competition situation on end-user market(s) for business and residential users.

Magyar Telekom strongly supports ETNOs view. According to it, NRAs will have to examine whether it is justified to impose an obligation of bitstream access at the regional delivery point[21].

Specific comments on LLU

ECTA
For technological neutrality, access obligations should clearly enable **full usage** of **loops of any material** found to be in a relevant market for local loops for which the 3 criteria test is satisfied and dominance has been found. This should extend to sub-loop unbundling (including associated facilities), specifically regarding access upgrades e.g. vDSL.

Access should be available in suitable form (and terms – especially pricing) to offer **narrowband only** (as well as broadband only, or broadband + narrowband).

Already covered under "Assurance of access".

Separate **best practice guidance on** application of **duct access** remedies and a sample best practice reference offer would be useful.

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20 See the section on complementarity of access products under 4.2.3 of the Remedies Common Position, e.g. "Nevertheless, this does not imply that geographical limitation of the bitstream remedy would be appropriate as different players may be relying on national availability".

21 For example, in Hungary there is national access obligation in addition to the local BSA. Under such circumstances it would not be proportionate to require also a "mid-way" access service

ERG fully acknowledges the importance of this issue and intends to give it proper consideration.

- **Level playing field**

ECTA
Concerning non-discrimination (AID art 10), ECTA would welcome, in addition to the brief statement contained in these draft positions, generic **detailed guidance** on non-discrimination with **case studies** showing how it can be effectively defined, applied and enforced ex ante. As a more detailed point, ECTA supports the need for regulators to **specify behaviours** that would be **presumed discriminatory** in order to enable enforcement ex ante. The specific forms of behaviour identified should be presented however as exemplars and not be deemed exhaustive. Tele 2 supports this view.

ERG has noted ECTA's request for additional guidance on non-discrimination. ERG must give priority to the items already in the Work Programme but will return to this topic when it has the capacity to do so.

Tele2 suggested that the ERG considers including writings for the NRAs to impose strict time-frames for the implementation of remedies in order to introduce a quicker process in this regard. The process of today is far too time-consuming and means that it takes far too long before remedies imposed are actually in place in order for the market to benefit from them.

The draft Common Positions already deal with this point to some extent but we have clarified the wording in order to emphasise the point.[22]

ETNO
This "objective" is not stated or implied within the Regulatory Framework. Nor does the Framework give NRAs a legislative mandate to remedy "an unfair advantage by virtue of economies of scale and scope, especially derived from a position of incumbency". It is a sweeping and disproportionate approach to construct an "objective" to **eliminate advantages derived from scale or vertical integration** by way of regulatory intervention. Also, the Regulatory Framework knows no reference to incumbency (or "original sin").

Instead of referring to "unfair advantages" and "obstructive behaviour" it would have been helpful to use the terms "undue discrimination" and/or "abuse of a dominant/SMP-position".

According to ETNO, ERG assumes in this chapter that "unless there is evidence" that a non-discrimination obligation is sufficient to alleviate the problems described - which ETNO understand are problems of undue discrimination – NRAs should consider whether additional measures are necessary. However, this is **not** a **justified assumption**:

i) it appears to **reverse** the principle of the Regulatory Framework that NRAs have to **justify regulatory intervention** in the light of market conditions. Under the Regulatory Framework accompanying measures can only be imposed if and to the extent that otherwise a non-discrimination obligation is insufficient to remedy the market failure identified. The burden of **proof for imposing regulatory measures** stays with the NRA, no matter how ERG words its recommendations.

[22] See the third paragraph of section "Illustrative remedies" under "Level playing field" in the Common Positions.

ii) does **not contain** a **full discussion** of accompanying remedies.
iii) as ERG considers remedies "under other legislation", especially **functional separation**, it **exceeds the scope** of its mandate to advise and assist on the implementation of remedies under the Regulatory Framework

ERG has already dealt in part with these comments by ETNO under "Assurance of Access". ERG agrees that it is not illegal to hold a dominant position. One of the roles of the NRAs, however, is to promote effective competition, in particular by denying the ability to exploit dominant positions, in any market susceptible to ex ante regulation where a position of SMP has been established. In practice, without the achievement of a level playing field, effective competition is most unlikely to be possible. Moreover, NRAs remain obliged to choose remedies which are appropriate to the circumstances of the case.

Also on functional separation, Fastweb noted that the most popular solution is the one that has been adopted in the UK, which is also often being presented as a "best practice" for non-discriminatory access remedy. Such a solution it is indeed interesting mainly for the methodological approach (ignited by the Ofcom's Telecom Strategic Review) underlining it. In fact, one of the main reasons for the adoption of the functional separation was that the UK badly needed to react to the problem of scarce ULL development. On the contrary, the same solution would not necessarily fit the purpose in those countries – such as Italy – which has one of highest rate of ULL lines. Therefore, according to Fastweb, while it would be useful for regulators to be able to contemplate such a solution among the remedies to be imposed, the UK functional separation example (whose effectiveness is still to be proved) cannot be presented as a best practice to other countries, except for its methodological approach.

In this regard, BREKO considers that only specific rules for the assurance of "equivalence of input" or functional separation would be effective against discriminatory behaviour from SMP operators.

Magyar Telekom recalls that **market entry** of a **less efficient player** will not contribute to strong competition and the improvement of customer welfare in the long term, but on the contrary, prices will be maintained artificially high due to regulation[23].

23 In a market situation where there is growing– or in many countries (like in Hungary) even a strong - competition from other technologies like mobile and IP, there is pressure on the incumbents to improve their service offers in terms of price, quality and choice and there is no possibility in the long-term to increase prices after squeezing out fixed line competitors from the market.

In a rapidly changing and converging market environment there is no need to artificially enhance competition within the same platform (i.e. supporting even less efficient players to enter the market) as there is a considerable and increasing competition from other technologies to benefit customers and hinder incumbents in the abuse of market power both in the short- and long term.

- **Avoidance of unfair first-mover advantage**

ETNO noted that in the current Regulatory Framework **there is no such principle** (Avoidance of unfair first-mover advantage). The Regulatory Framework stipulates that new markets should in principle not be regulated, and this should apply to first mover advantages derived from innovation. At the same time, foreclosure of markets in the long-term should be avoided, either by means of competition law or sector specific regulation. This alleged "objective" and its consequences stipulated by ERG are in fact an **inversion of the** Regulatory Framework concept of **"newly emerging markets"**, intended by the legislator to safeguard investment incentives in new networks and services. The focus on retail products of the incumbent is damaging for consumers, in breach of the principle of the Regulatory Framework to focus on wholesale regulatory measures and contradicting the efforts by the European Commission to achieve some regulatory relief at retail level in the context of the Recommendation on relevant markets

ECTA noted that the exploitation of bottleneck facilities is frequently used by dominant players to foreclose downstream (including retail) markets, undermining the position of competitors using existing wholesale products and **creating a new monopoly** which then typically **takes significant time to erode** (as was the case for broadband in many countries). It should be clarified to avoid doubt and address incumbent concerns that an unfair advantage can be assumed when the launch of new downstream products depends on upstream components/inputs that fall within markets found non-competitive under the Framework, but have not been provided on a competitive basis. Clearly if there are no barriers to new services being launched because others could replicate the inputs first-mover advantage would be fair and deserved, but equally, one could expect that advantage to be eroded over time as others entered the market.

In the light of these comments, ERG considers that it has struck a reasonable balance.

- **Transparency of terms and conditions**

DT pointed out that the objective of "transparency of terms and conditions" must not necessarily imply the obligation to submit a regulated reference offer. Depending on the situation, transparency might also be guaranteed by simply making available to access seekers a certain minimum level of information regarding the terms and conditions of access.

For TI, the reference offer should be focused only on the non-replicable elements by alternative operators in coherence with the results on the market analysis.

- **Reasonableness of technical parameters of access,**

ETNO
In analysing technical and commercial terms and conditions for access, NRAs have to strike a balance between different goals of the Framework, such as fostering competition and preserving **incentives for investment**, and to take into **account** the **technical feasibility of access** (art. 12 (2) Access Directive). To focus only on "maximising competition in downstream markets" is therefore only reflecting one of the goals of the Framework.

The imposition of access obligations has to be **justified** in view of the competitive situation on retail markets. A general obligation to meet all "**reasonable**" requests for access, depending on how it is interpreted, will lead to **unnecessary** and /or

disproportionate forms of access which eventually lead to costs born by the consumer.

TI deems the “reasonable request” formula as too general and fears inconsistency in its application by NRAs, thus creating uncertainty to both SMP and non-SMP operators.

ECTA
Competitors should **not** be **restricted to quality levels** offered by the **dominant** player, reference offers should enable quality differentiation (not a mere replication of a small list of standard profiles) and reference offers should contain a system to enable altnets to exercise their freedom to make reasonable requests for **other** (perhaps higher or lower) **forms of quality** control than are offered by the incumbent to facilitate innovation in the market. This should cover provisioning times, repair times, bandwidth profiles, etc.

Already covered under “Assurance of access”.

- **Fair and coherent access pricing**

ETNO was concerned that the proposed approach to **margin squeeze tests** will create additional uncertainty and undermine remaining incentives for investment under the Regulatory Framework. In particular ETNO wondered what relation exists between cost-based pricing and margin squeeze. ETNO noted that the draft proposes the level of access prices should be high enough “not [to] foreclose any realistic possibility of the development of alternative local access infrastructure” and to “incentivise efficient investment by […] the SMP player and competitors (…)”. ETNO supports this statement.

However, the concept of a “minimum margin with relevant downstream services”, related to an efficient new entrant is apparently in conflict with this approach and potentially with the practice of cost-based pricing followed by many NRAs with regard to LLU and Bitstream Access products. ERG seems to go beyond cost-based prices, trying to guarantee the competitiveness of an “efficient entrant”. The draft refers to a “**minimum acceptable margin**” for services: prices should be low enough to allow for an acceptable minimum margin between various upstream services and also for an acceptable margin between downstream and upstream services. As retail prices are usually set by the market, a mechanical application of a set of “minimum margins” throughout the value chain **could** even **produce values** for the beginning of the value chain which are **below cost**. This result would be in breach of Art. 13 Access Directive.

FT was concerned similarly that NRAs might develop margin squeeze test methodologies that would not be consistent with those employed by competition authorities when dealing with a possible abuse of dominant position e.g. on unregulated retail markets. Two approaches indeed co-exist in this respect - the approach of the “**as efficient** operator”, which is used in the European case law as well as in the numerous national competition case law and by certain national regulators (Ofcom for example) and the “**alternative** operator” approach, involving a set of hypotheses. This approach is sometimes used for regulatory purposes in certain countries.

The two approaches substantially differ as the “alternative operator” approach assumes the costs of an alternative operator and faces practical difficulties such as the very assumptions, their justification and their binding character upon third parties. The use of the approach of the “as efficient” operator "takes into account the costs of the

operator subject to the margin- squeeze test and not the costs of an operator with different economies of scale and scope.

BREKO is of the view that the sufficient margin that should be guaranteed should take into account the possibilities for business models of a market entrant, which do not dispose over the same economies of scale and scope of a dominant operator. It further stresses the need for a forward looking approach with regard to competition, based on a long-term interpretation of the concept of investment on infrastructure.

ERG acknowledges the importance of a clear policy regarding margin squeeze tests. In this sense, ERG reminds that it has mandated its WLA/WBA Project Team to focus, i.a., on this topic and produce guidance accordingly.

Again ERG wishes to remind ETNO that the present Common Positions do not imply a "mechanical application" of any obligations, on the contrary, they assist NRAs in the process of identification and reasoning of the most effective and proportionate remedy for their particular market circumstances.

- **Reasonable quality of access products**

ETNO deemed the concept proposed by ERG too vague. In any event, remedies based on this objective should consider not only "commercial" sense and maximization of scope of competition but also should refer to the economic possibilities of the SMP operator.

In particular, compensations for failure to deliver a certain quality of service should be governed by commercial agreements. The concept of "appropriate compensation" remains vague and should not be guiding regulatory decisions in this field. MT supports this view.

ECTA (see under "reasonableness of technical parameters of access")

- **Switching processes**

ETNO observed a contradiction between the 'ladder of investment' concept and the supposedly **separate relevant markets** for broadband access and LLU under the EU regulatory framework. The premise for many NRAs' mandating several forms of network access was that alternative operators would not use them as substitutes for one another. The premise underlying '**migrations'** is, conversely, that wholesale services and LLU are substitutes. This **calls into question NRAs' market review** analyses of the relevant markets and underlines the need for a consistent broadband access regulation that limits access to the remaining non-replicable bottleneck facilities, if any.i

ECTA submitted concerning **Migration** that to facilitate the use of **bitstream** (and in particular naked bitstream) for VoB as a PSTN replacement, the relevant number portability arrangements should be made to **allow seamless transfer** both from a technical and commercial perspective. This means that migration, as well as synchronisation with number portability, must, for example, be available from WLR to bitstream access and to local loop unbundling.

Already covered under "Assurance of efficient and convenient switching processes". Additionally, ERG has included a reference to synchronisation.

- **Assurance of backhaul from the point of delivery of the bitstream service to a reasonable point of handover to the alternative provider**

ETNO recalls that the justification for such an obligation must be **based on the market analysis** of the particular relevant market at issue.

According to **ECTA**, this currently refers to the point of delivery as the MDF, but the MDF may be decommissioned in countries where access upgrades are planned (eg Netherlands). Equally, **sub-loop unbundling** may require **associated backhaul** from the street cabinet. Backhaul should be provided from any available point of delivery where it cannot be provided on a competitive basis. In street cabinet configurations, non-replicability may lead to an increased need to provide DSLAM-level access.

ERG has amended the Common Position in the sense of including a reference to any other appropriate point of delivery (i.e. beyond the MDF reference) so as to assure a forward-looking approach. Concerning the impact of new or upgraded networks and technologies in the current regulation, see ERG's comments above[24].

- **Assurance of collocation at delivery points (e.g. ATM switches or IP BAS) (where necessary) and other associated facilities**.

For **ETNO**, if there is a need for cost-oriented regulation, it has to be decided upon the results from the relevant market analysis and the specific market situation. To limit flexibility of NRAs by recommending the most far-reaching tool available, cost-oriented price regulation, before undertaking a market analysis is something that the EU regulatory framework does not allow.

[i] ETNO has explained this policy in detail in its RD227 ETNO Reflection Document on re-assessing the "ladder of investment" in the context of broadband access regulation (Sept. 2005).

[24] As well as the consultation document on "Regulatory Principles of Next Generation Access" Published on 5 May 2007 on the ERG's website http://erg.eu.int/doc/publications/consult_regprinc_nga/erg_cons_doc_on_reg_princ_of_nga.pdf