

BEREC's Review of the Common Positions on wholesale unbundled access, wholesale broadband access and wholesale leased lines

***Stage 1 High Level Principles on issues of non-
discrimination***

1 March 2012

Contents

| Section | Page |
|---|-------------|
| 1 Executive summary | 3 |
| 2 Introduction | 6 |
| 3 BEREC's proposed high level principles in the area of non-discrimination..... | 11 |
| 4 Next steps | 35 |
| | |
| Annex | Page |
| 1 Consultation questions | 36 |
| 2 Questionnaire on legal interpretation of Article 10 | 37 |
| 3 Questionnaire on the use of SLAs, SLGs and KPIs | 42 |
| 4 Questionnaire on the timely availability of wholesale inputs..... | 45 |
| 5 Questionnaire on wholesale switching processes..... | 47 |
| 6 Glossary..... | 49 |

Section 1

Executive summary

- 1.1 In 2006 and 2007 the European Regulators Group (ERG) developed three Common Positions (CPs) covering key wholesale access products – wholesale unbundled access¹, wholesale broadband access² and wholesale leased lines³. These CPs have now been adopted by BEREC.
- 1.2 In 2012 BEREC will review and update the above three CPs in relation to non-discrimination, access (including issues relating to NGA), pricing and other issues. The above mentioned three markets remain very important and there is a clear role for BEREC to continue to identify and promote application of best regulatory practices in the specification of Significant Market Power (SMP) remedies. This role is in effect set out in Article 2 of the BEREC Regulation and is one of the key harmonisation activities to be undertaken by BEREC to support the creation of a single European market.
- 1.3 In this document BEREC discusses the high level principles it proposes in the area of non-discrimination which will be included into the updated BEREC CPs. BEREC will consult separately on the proposed updated text of the CPs (including all relevant issues).

The obligation of non-discrimination is an important regulatory tool

- 1.4 BEREC believes the general obligation of non-discrimination is a very important regulatory tool to ensure a level playing field amongst all operators in the market and that NRAs should impose it (**Principle 1**).
- 1.5 In general, the obligation of non-discrimination seeks to ensure that undertakings with SMP, in particular where they are vertically integrated, do not discriminate against their competitors in favour of their own downstream businesses, thus preventing, restricting or distorting competition. Therefore, the primary consideration under a general non-discrimination obligation is to ensure that SMP operators are required to treat all access seekers (domestic and foreign) on the same terms and conditions as their (internal) downstream divisions. Exceptions from this obligation might be justified for objective reasons only.
- 1.6 In cases where a general non-discrimination obligation proves to be insufficient 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 on a case-by-case basis, via identification of forms of behaviour which will be considered to be discriminatory (**Principle 2**).
- 1.7 For example, NRAs could complement the general non-discrimination obligation with a selection of measures relating to the avoidance of unjustified first mover advantage,

¹ ERG (06) 70 Rev 1 Common position on Wholesale local access

http://erg.eu.int/doc/publications/erg_06_70_rev1_wla_cp_6_june_07.pdf

² ERG (06) 69 Rev 1 Common position on Wholesale broadband access

http://erg.eu.int/doc/publications/erg_06_69rev1_wba_cp.pdf

³ ERG (07) 54 Common Position on Best Practice in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines

http://erg.eu.int/doc/publications/erg_07_54_wll_cp_final_080331.pdf

the availability of wholesale products of reasonable quality and the provision of efficient wholesale switching processes.

The principle of equivalence important in creating a level playing field

- 1.8 BEREC feels the principle of equivalence is important in creating a level playing field and ensuring non-discrimination. This can be implemented to either achieve an equivalence of outputs (EEO) or an equivalence of inputs (EOI). NRAs should justify the form of equivalence they propose in light of the competition problems they have identified (**Principle 3**). A strict application of EOI may not be proportionate in all instances if it is considered that this model might entail a major overhaul of business processes and operational support systems. A general high level principle may be to apply EOI where this is deemed necessary to remedy the competition problems identified and where the incremental design/implementation costs of imposing it are low. In other cases EEO may be an acceptable and proportionate alternative to EOI.
- 1.9 Ultimately the decision regarding the form of equivalence should rest with the NRAs who would need to take into consideration the particular competition problems they are faced with and will need to undertake a cost/benefit analysis.
- 1.10 Finally, NRAs should consider imposing functional separation only when all other regulatory obligations have failed (**Principle 4**).

Avoidance of any unjustified first mover advantage

- 1.11 Competitors need assurance that suitable and fit for purpose wholesale products are available in time to permit them to offer new downstream services at the same time as the SMP player (although in some cases there may be special circumstances justifying legitimate first mover advantage). By itself, the non-discrimination obligation may be insufficient to provide this assurance. In the absence of more definitive measures, the SMP player may unjustifiably delay availability of the wholesale offer and/or delay provision of information which would be necessary to allow competitors to exploit the offer in a timely manner. A more prescriptive non-discrimination obligation would increase the legal certainty for alternative operators on how the SMP operator has to comply with this obligation, even if a general non-discrimination obligation is equally binding and could lead to imposition of sanctions for non-compliance with it.
- 1.12 NRAs should put in place a regime which ensures the (technical and economic) replicability of the new downstream services introduced by the SMP player (**Principle 5**). In cases where products are not replicable and the SMP player needs to provide a new wholesale input, NRAs should ensure timely availability of relevant (technical) information according to lead times defined on a case-by-case basis (**Principle 6**).
- 1.13 NRAs should ensure that alternative operators have the ability to influence the decisions regarding characteristics of new wholesale products and interfaces (**Principle 7**) and in relation to the lead times leading to the removal of existing wholesale inputs (**Principle 8**).

SLAs, SLGs and KPIs⁴ key to ensuring wholesale products of good quality

- 1.14 As for the application and monitoring of the non-discrimination obligation, KPIs and SLAs/SLGs have a role to play in ensuring non-discrimination. KPIs are a useful measurement and monitoring tool which can detect discriminatory behaviour and in that can help reduce the SMP player's incentives for such behaviour. SLAs and SLGs ensure a specific level of service quality is provided and can be used to strengthen the SMP player's incentive to comply with the non-discrimination obligation, since they can also ensure the same level of quality is provided to all alternative operators. The use of SLAs without KPIs makes it harder to monitor non-discrimination. KPIs which are not related in some way to SLAs appear of limited value, since they would be measuring something which is apparently not considered to be important. On the other hand, the existence of SLAs and SLGs without KPIs might be enough or fit for purpose to prevent discrimination in certain cases.
- 1.15 Publication of KPIs is key to ensure transparency and can be a low cost way of verifying the reasonableness of the data reported.
- 1.16 Therefore NRAs should impose a generic requirement on the SMP player to provide SLAs (**Principle 9**), SLGs (**Principle 10**) and KPIs (**Principle 11**).

Efficient wholesale switching processes

- 1.17 Efficient wholesale switching processes are paramount to ensuring an effective competitive environment where wholesale customers can switch between different wholesale products and/or providers without undue delay or break in service. Without such an efficient service, end users will be reluctant to switch and the competitiveness of the retail market will be reduced.
- 1.18 NRAs should impose obligations on the SMP player in order to ensure wholesale switching processes are speedy and efficient (**Principle 12**).

⁴ Service level Agreements, (SLA), Service Level Guarantees (SLGs) and Key Performance Indicators (KPIs).

Section 2

Introduction

Introduction to this section

- 2.1 As noted in its work programme (WP) for 2012, the Body of European Regulators for Electronic Communications (BEREC) will review and update the Common Positions (CPs) on wholesale unbundled access, wholesale broadband access and wholesale leased lines. This is one of the core activities for BEREC, supporting its efforts to increase harmonisation and contribute to the development of the single market. NRAs are obliged under the BEREC Regulation to take these CPs into the utmost account in their national SMP remedies decisions.
- 2.2 In this section BEREC sets out the background to this consultation document and its primary objectives in more detail. BEREC also sets out its approach for the review of the CPs.

ERG developed the initial Common Positions

- 2.3 In 2006 and 2007 the European Regulators Group (ERG) developed three Common Positions (CPs) covering key wholesale access products – wholesale unbundled access⁵, wholesale broadband (bitstream)⁶ access and wholesale leased lines (thereafter referred to as BEREC CPs).⁷
- 2.4 ERG undertook this work as part of its responsibility for promoting consistent application of the European Regulatory Framework. Members of ERG undertook the following commitment:
- “While ERG Common Positions shall not be binding, ERG members shall be recommended to take the utmost account of them. ERG members commit to provide reasoned regulatory decisions, by reference to the relevant ERG Common Position(s).”*
- 2.5 In 2009 ERG also set out its methodology for monitoring and reviewing the CPs.⁸ This methodology sets out a three step process by which ERG would:
- Monitor and report on the conformity of NRA remedies with each relevant CP;
 - Use the results of such a monitoring exercise in a second phase as a basis to review the continuing relevance of each CP; and
 - Where the CP remains relevant, undertake an exercise to update and, where

⁵ ERG (06) 70 Rev 1 Common position on Wholesale local access
http://erg.eu.int/doc/publications/erg_06_70_rev1_wla_cp_6_june_07.pdf

⁶ ERG (06) 69 Rev 1 Common position on Wholesale broadband access
http://erg.eu.int/doc/publications/erg_06_69rev1_wba_cp.pdf

⁷ ERG (07) 54 Common Position on Best Practice in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines
http://erg.eu.int/doc/publications/erg_07_54_wll_cp_final_080331.pdf

⁸ ERG (09) 36 ERG Report on the elaboration and monitoring of common positions
http://erg.eu.int/doc/publications/2009/erg_09_36_report_on_the_elaboration_and_monitoring_or_cps_final.pdf

appropriate, clarify and strengthen the CP.

BEREC is expected to continue to contribute to regulatory best practice

- 2.6 The process described above has now been taken over by BEREC. In 2010 BEREC undertook a monitoring exercise to review NRA conformity with the above mentioned three CPs and summarised the results in a report it published in 2011 (the Monitoring Report).⁹ One of the overall conclusions of this exercise was that NRA conformity with the current CPs is quite good. Nevertheless, as part of its commitment to drive consistency and dissemination of best practices, BEREC has also identified the key areas where the CPs could be improved.
- 2.7 BEREC believes that these CPs are still relevant and required. The above mentioned three markets remain very important and there is a clear role for BEREC to continue to identify and promote application of best regulatory practices in the specification of SMP remedies. This role is in effect set out in Article 2 of the BEREC Regulation and is one of the key harmonisation activities to be undertaken by BEREC to support the creation of a single European market.
- 2.8 BEREC also recognised the importance of developing such CPs identifying best practices in its medium term strategy paper (the Strategy Paper).¹⁰ In the Strategy Paper BEREC further elaborated that such:

“...CPs need to leave no room for unexplained divergent approaches by individual NRAs that form a barrier to the internal market, while permitting necessary flexibility to take full account of national circumstances. BEREC members will exercise due transparency by explaining these national circumstances...”

BEREC needs to review and update the current CPs

- 2.9 As set out in the BEREC WP for 2012,¹¹ the current BEREC CPs will need to be reviewed both to take on board the lessons as set out in the Monitoring Report and to bring the CPs up to date with latest market developments.
- 2.10 The updated BEREC CPs will apply only where a position of SMP has been found in the relevant market following a market analysis. The CPs cannot override the provisions of the Framework regarding imposition of remedies.
- 2.11 There are several broad areas where a review is required:
- issues relating to **non-discrimination**;
 - issues relating to **pricing** (and possibly related to the choice of costing methodologies);
 - issues relating to **access**, including issues relating to Next Generation Access (**NGA**); and
 - other miscellaneous issues (such as transparency).

⁹ BoR (11) 20 BEREC monitoring report on Broadband Common Positions
http://erg.eu.int/doc/berec/bor_11_20.pdf

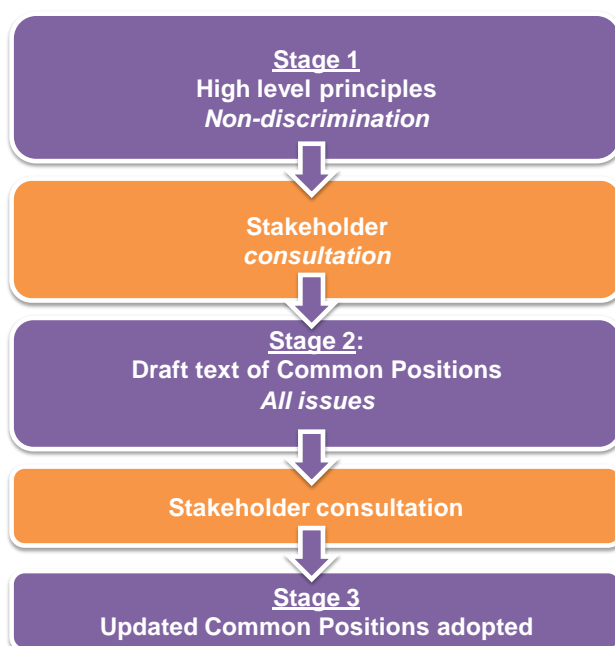
¹⁰ BoR (11) 58 Draft BEREC midterm strategy outlook
http://erg.eu.int/doc/berec/bor/bor11_58_berecstrategy.pdf

¹¹ BoR (11) 62 2012 BEREC Work Programme (WP)
http://erg.eu.int/doc/berec/bor/bor11_62_berec2012wp.pdf

- 2.12 The current CPs will need to be updated to make them more concrete, clear and to also take recent technological developments (e.g. NGA) into account as much as it is realistically possible.

BEREC is consulting on high level principles on non-discrimination

- 2.13 With the above context in mind, the objective of this consultation document is to discuss BEREC's approach to the review of the CPs in relation to non-discrimination issues. This allows BEREC to capitalise on the work it has already done in the area of non-discrimination and to tease out the key high level issues of importance.
- 2.14 In order to update the current three CPs, BEREC will first consult on the **high level regulatory principles on non-discrimination** underpinning the CPs, followed by a consultation on the actual text.



- 2.15 In this consultation, BEREC proposes high level principles that NRAs should adopt in order to increase *ex-ante* compliance with the non-discrimination obligation. In particular BEREC is exploring the importance of the following:
- The creation of a level playing field;
 - The timely availability of wholesale access products.
 - The provision of access products of reasonable quality; and
 - The provision of efficient wholesale switching processes.
- 2.16 BEREC will then use the proposed high level principles for non-discrimination as an input for updating the relevant **text of the current** BEREC CPs.

Link between this consultation and Commission consultation on non-discrimination

- 2.17 On 3rd October 2011 the Commission published a consultation on the application of the non-discrimination obligation under Article 10 of the Access Directive, with the objective of providing guidance to national regulatory authorities (NRAs) on the consistent application, monitoring and enforcement of this remedy.
- 2.18 In the Commission's opinion the scope, exact application, compliance monitoring and enforcement of this remedy vary considerable across Member States (MSs) which gives rise to:
- *“a lack of clarity surrounding the scope of non-discrimination obligation which can result in ineffective regulation at national level;*
 - *a too lenient approach towards implementing and enforcing non-discrimination obligations; and*
 - *significant differences in the regulatory approaches across the EU which have a negative impact on the internal market...”*
- 2.19 As set out in its Digital Agenda for Europe (DAE), an important aim for the Commission is the reinforcement of a single market for telecommunications. In the Commission's view the *"single market logic requires similar regulatory issues to be given correspondingly similar treatment"*. The Commission therefore sees the provision of further guidance on the application of non-discrimination obligation as a priority.
- 2.20 BEREC welcomed the opportunity to respond to the Commission's consultation and submitted its detailed response on 12 December 2011 following approval at the BEREC Plenary in Bucharest.¹²
- 2.21 BEREC's proposed high level principles are consistent with its response to the Commission's consultation on non-discrimination. While taking into account issues raised by the Commission, this document nonetheless explores other issues and it is designed for regulators.

Structure of this consultation document

- 2.22 This consultation document includes the following main sections:
- **Section 3** discusses the details of BEREC's proposed high level principles in the area of non-discrimination; and
 - **Section 4** discusses the next steps following the BEREC consultation.
- 2.23 The above sections are supported by the following Annexes:
- *Annex 1: Consultation questions.* For ease of reference BEREC listed the consultation questions in this annex.
 - *Annex 2: Questionnaire on the legal interpretation of Article 10.* In this annex

¹² BoR (11) 64 BEREC's response to the Commission's public consultation on non-discrimination http://erg.eu.int/doc/berec/bor/bor11_64_nondiscrimination.pdf

BEREC summarised the high level results of its questionnaire on the legal interpretation of Article 10.

- *Annex 3: Questionnaire on the use of SLAs, SLGs and KPIs.* In this annex BEREC summarised the high level results of its questionnaire on SLAs, SLGs and KPIs.
- *Annex 4: Questionnaire on the timely availability of wholesale inputs.* In this annex BEREC summarised the high level results of its questionnaire on the timely availability of wholesale inputs.
- *Annex 5: Questionnaire on wholesale switching processes.* In this annex BEREC summarised the high level results of its questionnaire on wholesale switching processes.

Section 3

BEREC's proposed high level principles in the area of non-discrimination

Introduction

- 3.1 In this section, BEREC sets out its proposed high level principles in the area of non-discrimination.
- 3.2 A vertically integrated undertaking with Significant Market Power (SMP) may have an incentive to discriminate against its competitors on price and non-price parameters (such as quality of service, product characteristics and information). NRAs must therefore specify non-discrimination remedies in a suitable manner to avoid any adverse effects which may be detrimental to competition.
- 3.3 BEREC has followed the below approach to formulate the key high level principles:
- Considered findings of the Monitoring Report;
 - Issued detailed questionnaires to NRAs; and
 - Held workshops with various NRAs to better understand the various national approaches adopted to deal with various issues.

Summary of the proposed high level principles in this section

- 3.4 For competition to flourish there needs to be reasonable certainty that new and existing operators are able to compete on a level playing field. This implies that effective measures are in place (see Table 1):
- to ensure that the SMP player does not have an unfair unmatchable advantage;
 - to prohibit the SMP player from discriminating in favour of its own downstream businesses or between third party providers, either on price or non-price issues;
 - to provide an effective deterrent to obstructive and foot-dragging behaviour; and
 - to ensure that the policies adopted by the SMP player towards the commissioning of new infrastructure which may be necessary for the provision of new retail services, allows all market players the same opportunity to compete for the new business.
- 3.5 In order to achieve the above objectives BEREC proposes the following high level principles in Table 1 below.

Table 1 BEREC high level principles for issues relating to non-discrimination.

| Likely competition issue | Objective to be achieved | Proposed high level principles |
|--|--|---|
| SMP operator(s) discriminating in favour of its downstream businesses | Level playing field | <ul style="list-style-type: none"> • Principle 1 NRAs should impose a general obligation of non-discrimination. • Principle 2 NRAs should further clarify how the non-discrimination obligation is to be interpreted on a case-by-case basis. • Principle 3 NRAs should justify their decision of whether or not to impose equivalence, and if imposed the exact form of it, in light of the competition problems they have identified. • Principle 4 NRAs should consider imposing functional separation only when all other regulatory obligations have failed to create a level playing field. |
| SMP operator(s) does not provide wholesale inputs | Avoidance of unjustified first mover advantage | <ul style="list-style-type: none"> • Principle 5 NRAs should put in place a regime which ensures the (technical and economic) replicability of the new downstream services introduced by the SMP player. <ul style="list-style-type: none"> • Principle 5a In relation to economic replicability, NRAs should ensure that the methodology and the principles applied to ensure replicability are made public beforehand. • Principle 5b In cases where (technical and/or economic) replicability cannot be achieved by using the available wholesale products, the SMP player should be required either to amend the existing wholesale product or to make a new wholesale product available. • Principle 6 In cases where the SMP player needs to provide a new wholesale product, NRAs should ensure timely availability of relevant (technical) information according to lead times (i.e. notice periods) defined on a case-by-case basis. • Principle 7 NRAs should ensure that alternative operators have the ability to influence the decisions regarding characteristics of new wholesale products and new interfaces. • Principle 8 Where relevant, NRAs should impose a requirement on the SMP player in relation to lead times regarding the removal of existing wholesale inputs. |
| SMP operator(s) degrades quality of service to alternative operators in favour of its downstream | Reasonable quality of access products | <ul style="list-style-type: none"> • Principle 9 NRAs should ensure that the SMP player is required to provide a reasonable defined level of service. <ul style="list-style-type: none"> • Principle 9a SLAs should cover specific service areas. • Principle 9b SLAs should be made available to wholesale operators. • Principle 9c NRAs should take oversight for the process of setting SLAs. • Principle 9d SLAs should take into account differences in customer requirements. • Principle 10 NRAs should impose a generic requirement on the SMP player to provide SLGs. <ul style="list-style-type: none"> • Principle 10a SLGs should cover all necessary specific service areas. |

| Likely competition issue | Objective to be achieved | Proposed high level principles |
|---|---|---|
| arm | | <ul style="list-style-type: none"> • Principle 10b SLG payments should be made proactively. • Principle 10c NRAs should take oversight for the process of setting SLGs. • Principle 11 NRAs should impose a generic requirement on the SMP player to provide KPIs as a means to monitor compliance with a non-discrimination obligation unless there is evidence that this is unnecessary or would not be cost-effective. <ul style="list-style-type: none"> • Principle 11a KPIs should cover all necessary specific service areas. • Principle 11b The results of monitoring KPIs should be made available to all operators in the market. • Principle 11c NRAs should take oversight for the process of setting KPIs. |
| SMP operator(s) does not migrate wholesale customers in a timely manner between networks or wholesale access services | Assurance of efficient and convenient switching process | <ul style="list-style-type: none"> • Principle 12 NRAs should impose obligations on the SMP player in order to ensure wholesale switching processes are speedy and efficient <ul style="list-style-type: none"> • Principle 12a NRAs should ensure that all related wholesale switching processes are managed efficiently so that the customer is not left wholly or partly without service for an unacceptable period. • Principle 12b NRAs should ensure that the maximum allowed downtime during wholesale switching is the lowest possible and takes into account the different needs of specific customer segments. • Principle 12c NRAs should ensure the price of the wholesale switch does not act as a barrier to the switching processes happening. • Principle 12d NRAs should ensure specific measures to facilitate bulk wholesale switching processes. • Principle 12e NRAs should ensure the requirements for bulk wholesale switching are non-discriminatory (rules around volumes/prices). • Principle 12f NRAs should ensure the continued availability of the old wholesale product for an appropriate period of time. • Principle 12g NRAs should consider the benefit of requiring the SMP player to introduce wholesale customer interfaces (web interfaces). • Principle 12h NRAs should require the SMP player to introduce SLAs/SLGs and KPIs to ensure the efficiency of the process, unless there is evidence that these are unnecessary or not cost-effective. |

Over-arching principle

- 3.6 NRAs should not readily rely on the assumption that a general non-discrimination obligation (even in combination with an access obligation) will be sufficient to guard against the above listed threats. Where necessary, NRAs should impose more specific measures to ensure a stronger incentive for compliance with a non-discrimination obligation. Such measures can help avoid the necessity to deal with issues on case-by-case by enforcement or dispute settlement, with the consequential regulatory uncertainty and delay. A number of techniques for achieving this are available and NRAs will need to select those which best fit their national circumstances.

Need to take into account requirements in the Framework Directive

- 3.7 When implementing the non-discrimination obligation, NRAs need to take into account the requirements of Article 8.4 of the Access Directive (AD), which requires remedies to be based on the nature of the problem identified, and the requirements of Article 8 of the Framework Directive (FD), which requires such remedies to be proportionate and objectively justifiable in the light of the policy objectives and regulatory principles laid down in the European regulatory framework.
- 3.8 Under particular market conditions and considering the specific competition concerns found, the NRA may find it necessary to enhance the level playing field conditions by imposing a non-discrimination obligation on an operator with SMP.

Formal and informal approaches

- 3.9 Assuming a general non-discrimination obligation has been imposed, not all issues require the imposition of a more specific non-discrimination obligation. For example, NRAs could attempt to clarify, as far as possible, how a non-discrimination remedy could be interpreted in practice. This may be implemented either through explicit wording of the SMP obligation or via explanatory guidance which NRAs may consider providing. NRAs may prefer this approach to a formal obligation in a number of circumstances, in particular where the risks of discrimination appear to be fairly low or where there is a need to maintain flexibility to accommodate expected future market developments.
- 3.10 In other cases, there may be established industry processes which work well in practice for resolving detailed issues, especially technical issues, between market players. If so, it may even be counter-productive for the NRA to impose a formal obligation to deal with an issue which is already being dealt with effectively by less formal means.
- 3.11 The principle here is that an NRA should consider whether a formal obligation or a less formal mechanism (or a combination of both) is the best way to deal with a particular issue of non-discrimination. Where the informal mechanism can be expected to work best, reliance on it is consistent with the principles set out in this paper.
- 3.12 We discuss the proposed high level principles on non-discrimination in more detail in the below paragraphs.

There is a need to take into account the interdependence between various regulatory tools already available to NRAs

- 3.13 In BEREC's view, under Article 10 of the AD, NRAs can specify the form and scope of the non-discrimination remedy to address specific national market issues.
- 3.14 BEREC also notes that there are additional tools available to NRAs in order to give clarity as to the exact scope of the non-discrimination obligation:
- NRAs can give *ex-ante* Directions on how the non-discrimination obligation is to be applied in practice and on a case by case basis, following an own initiative investigation or stand alone project.
 - NRAs can also give more guidance by resolving disputes (*ex-post*) or sanctioning procedures on non-compliance with the non-discrimination obligation.
- 3.15 More importantly, it is also necessary to consider the configuration of other regulatory obligations imposed by NRAs. Imposition of conditions regarding fairness, reasonableness and timeliness under Article 12 (of the Access Directive) can help to address non-discrimination concerns.
- For example, in various MSs, NRAs have imposed remedies on the basis of Article 12 of the Access Directive as the primary instrument to address issues of non-discrimination and as a pre-condition to imposing Article 10 of the AD. More than half of the NRAs use both Articles 10 and 12 of the AD to deal with issues of discrimination (see **Annex 2**).
 - In addition, NRAs have also imposed transparency obligations under Article 9 of the AD to help clarify how the non-discrimination will be interpreted under certain circumstances, particularly through the information requirements to be included in the reference offers (ROs).
- 3.16 As discussed above, when implementing the non-discrimination obligations NRAs also need to take into account the requirements of Article 8.4 (of the Access Directive) which requires remedies to be based on the nature of the problem identified and the requirements of Article 8 (of the Framework Directive) which requires such remedies to be proportionate and objectively justifiable.
- 3.17 Furthermore, ERG has, in its revised Remedies Common Position (ERG(06)33),¹³ developed 4 general principles regarding the application of standard remedies. These generic principles state that:
- *"NRAs must produce reasoned decisions in line with their obligations under the Directives.*
 - *Where infrastructure competition is not likely to be feasible, due to persistent presence of bottlenecks associated with significant economies of scale or scope or other entry restrictions, NRAs will need to ensure that there is sufficient access to wholesale inputs.*
 - *Where as part of the market definition and analysis process, replication of the*

¹³ ERG (06) 33 Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework ("Remedies" document)
http://erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

incumbent's infrastructure is viewed as feasible, the available remedies should assist in the transition process to a sustainable competitive market.

- *Remedies should be designed to be, where possible, incentive compatible. Thus, NRAs should, wherever possible, formulate remedies in such a way that the advantages to the regulated party of compliance outweigh the benefits of evasion...*"

3.18 Therefore, MS conformity with the imposition of a non-discrimination obligation will need to be assessed in the wider context of different regulatory tools available to NRAs and the four general principles regarding the application of remedies agreed upon by ERG.

BEREC's high level approach to the identification of the high level principles on non-discrimination

3.19 In order to review and update the CPs it has been necessary to have a good understanding of the issues faced in various MSs and the approaches adopted by different NRAs in dealing with them. BEREC has therefore:

- **In the first instance considered the findings of the Monitoring Report¹⁴ and issued further detailed questionnaires to NRAs on issues relating to non-discrimination.** For CPs to be credible tools for promotion of consistent regulatory approaches, it is necessary that there should be a high degree of conformity of national decisions with those CPs. Regular monitoring is therefore necessary to test conformity. BEREC undertook the last monitoring exercise of the CPs and published its report in 2011. To assist in this task, BEREC devised a detailed questionnaire corresponding to each CP. BEREC took into account the results of this exercise in order to prepare a more detailed and targeted questionnaire for NRAs. The areas covered by these questionnaires related to the:
 - use of Service Level Agreements (SLAs), Service Level Guarantees (SLGs) and Key Performance Indicators (KPIs);
 - conditions of availability of wholesale inputs;
 - use of wholesale switching processes; and
 - transposition of Article 10 of the Access Directives in various MSs.
- **Held workshop with various NRAs.** The aim of this was to better understand the various national approaches adopted to deal with the different issues highlighted in the more detailed questionnaires.

3.20 The results of these questionnaires are summarised in aggregate format in Annexes 2, 3, 4 and 5 respectively.

BEREC's proposed regulatory high level principles

3.21 The high level principles on non-discrimination under development by BEREC are intended to describe current best practice in the choice of remedies under normal

¹⁴ BoR (11) 20 BEREC monitoring report on Broadband Common Positions
http://erg.eu.int/doc/berec/bor_11_20.pdf

circumstances. These principles will in due course be included in the amended BEREC CPs.

- 3.22 NRAs are obliged under the BEREC Regulation to take these CPs into the utmost account in their national SMP remedies decisions. Accordingly, there will be exceptional cases where departure from these principles is appropriate, given the circumstances under consideration. BEREC believes that these departures require careful objective justification. Accordingly, the principles below are drafted in a form that they have no in-built exclusions, generic or specific. This will assist transparency of the circumstances where, for justified reasons, one or more of the principles is not applied.
- 3.23 BEREC also notes that the scope of this consultation is on non-price discrimination. Issues regarding pricing will be dealt with separately as part of the overall update of the text of the CPs.

Objective 1: Level playing field

Likely competition issues

- 3.24 SMP operators have a clear commercial incentive to discriminate against their competitors, in particular by exploiting to the maximum any ambiguity about the meaning of a non-discrimination obligation. Such discrimination can take many forms.
- 3.25 Generally SMP operators have a commercial incentive to deny access to, delay the provision and degrade the quality of relevant wholesale products. As noted in our response to the Commission consultation, below we list the most common discriminatory behaviours BEREC has so far observed:
- *Delayed availability of wholesale products and/or wholesale tariffs.* SMP player introducing new retail products before making available (equivalent) wholesale inputs to alternative operators. SMP player making available wholesale tariff schedules to its subsidiaries (for use in tenders) before informing alternative operators.
 - *Longer lead times for alternative operators.* SMP player providing the wholesale products to alternative operators within the timeframes prescribed in the SLAs, however such lead times being significantly longer than the ones allowed to its downstream operations.
 - *Intentionally implementing different processes and procedures for the delivery of wholesale products to alternative operators.* The SMP operator might be setting different (potentially discriminatory) conditions relating to the ordering and delivery of wholesale products and access to information between alternative operators and its downstream arm. This could, for example, be the case if the SMP player intentionally (i.e. not as a result of legacy systems or other pre-existing situations) and systematically uses different procedures for delivery of unbundled access and bit stream access products.
 - *Limiting the transparency and the level of detail of access services contractual conditions.*
 - *Lowering the quality of regulated access services granted to access seekers.* This results in a poor quality of services for alternative operators and end users.
 - *Asymmetries of information between the SMP player and alternative operators.*

For example, the SMP operator may have access to detailed information on the characteristics of the loop, coverage area of the central or the existence of space in the conduits which does not make available to alternative operators.

BEREC questionnaire results

- 3.26 As noted in the Monitoring Report, a general non-discrimination obligation is almost universal where SMP remedies are in place. A big majority of NRAs couple this obligation with complementary measures in the form of:
- Explicit guidance to indicate to the market how the non-discrimination obligation will be interpreted in practice. This could be either within the wording of the non-discrimination obligation or published in separate guidelines.
 - Prohibition, via the wording of the non-discrimination obligation, of certain forms of behaviour considered to be discriminatory.
 - Specific obligations concerning timeliness, fairness and reasonableness.
 - Explicit obligation to ensure that services provided to SMP player's own business are identical to those provided to access seekers.
 - For bitstream services, explicit obligation to prevent or delay the SMP player from offering a downstream service before a bitstream access service is available which would allow competitors to offer an equivalent downstream service.
- 3.27 Taken together, this should be a powerful set of rules for deterring discriminatory behaviour and suggests a very high degree of conformity with the CP. The fourth of the obligations in the above list could in principle be either an "equivalence of input" condition or an "equivalence of output" condition. Although the monitoring questionnaire did not ask NRAs to distinguish, the latter is believed to be much more frequently applied as the most familiar form of non-discrimination.
- 3.28 The above conclusions are also supported by the BEREC questionnaire on the transposition of Article 10 of the AD into various national laws (see **Annex 2**).

Proposed high level principles

Principle 1 NRAs should impose a general obligation of non-discrimination

- 3.29 The principle of non-discrimination seeks to ensure that undertakings with SMP, in particular where they are vertically integrated, do not discriminate against their competitors in favour of their own downstream businesses, thus preventing, restricting or distorting competition. Therefore, the primary consideration under a general non-discrimination obligation is to ensure that SMP operators are required to apply equivalent conditions in equivalent circumstances to access seekers (domestic and foreign) providing equivalent services, and to provide services and information to others under the same conditions and of the same quality as they provide to their (internal) downstream divisions. Exceptions from this principle might be justified for objective reasons only.
- 3.30 In BEREC's view NRAs are afforded a wide discretion under Article 10 of the Access Directive in determining the form and scope of the non-discrimination remedy.

Principle 2 NRAs should further clarify how the non-discrimination obligation is to be interpreted on a case-by-case basis

- 3.31 It is possible that a general obligation of non-discrimination will be sufficient, but there is a presumption that complementary measures of some form will need to be taken. In cases where a general non-discrimination obligation 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.
- 3.32 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.
- 3.33 Alternatively, NRAs could complement the general obligation with a selection of measures of the kind described in the paragraphs below relating to the timely availability of wholesale products, availability of access products of reasonable quality and efficient wholesale switching processes.

Principle 3 NRAs should justify their decision of whether or not to impose equivalence, and if imposed the exact form of it, in light of the competition problems they have identified

- 3.34 BEREC regards the principle of equivalence important in creating a level playing field.
- 3.35 In relation to the principle of equivalence it may be useful to distinguish between equivalence of outputs (EOO) and equivalence of inputs (EOI). As described in the BEREC report¹⁵, EOO implies that the wholesale access products the SMP player offers to alternative operators are comparable or identical to those it provides to its downstream arm in terms of functionality and price, but they may be provided using different systems and processes.¹⁶ On the other hand, EOI requires the SMP player to provide the same physical upstream inputs to its downstream arm and alternative operators (e.g. same tie-cables, same electronic equipment, same space exchange etc.). Therefore, under EOI, the product development process is equivalent,¹⁷ as is the provision in terms of functionality and price which means it may result in a tighter form of non-discrimination. In practice, however, under EOO some of the systems and procedures used by alternative operators can also be the same as those used by the incumbent.
- 3.36 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, despite the material costs of retro-fitting EOI into existing business processes). In all 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

¹⁵ BoR (10) 44 Rev 1 BEREC Report on guidance on functional separation, pages 7 and 8
http://erg.eu.int/doc/berec/bor_10_44rev1.pdf

¹⁶ BEREC notes that in Italy, under EOO, exactly the same upstream input is provided by Telecom Italia to its downstream arm and alternative operators, although some business processes or operational support system might not be identical. Over time however they will likely converge or become identical.

¹⁷ Although the product development process is exactly the same, this will require degree of software system separation (i.e. Operational and Support Systems (OSS)) and separate management information to safeguard against issues of confidentiality and consumer data protection.

infrastructure and services with the product used by the downstream arm of the SMP operator).

- 3.37 It may also be desirable for NRAs to issue guidance so that SMP operators who are (or may be) implementing new systems (for supporting new services be offered to alternative operators) design these in a future proof manner. This approach is likely to have important efficiency implications (i.e. less costs incurred when adjusting relatively new systems to fit possible future regulated products) and have a positive impact on the overall profitability of the telecommunications sector.
- 3.38 It is also important to apply EOI at the appropriate level in the wholesale value chain, rather than multiple levels.
- 3.39 In exceptional cases, in order to facilitate effective competition in downstream markets, it may be opportune to consider alternative forms of equivalence for the strict application of the obligation of non-discrimination. Amongst the possible alternative solutions, BEREC will analyse the application of a principle which, when justified and proportionate, will aim at equalising the total wholesale costs faced by both the downstream arm of SMP player and by competitors (while at the same time allowing end customers of all providers to benefit from the economies of scope which arise from the legacy of vertical integration without enduring cost of retro-fitting all processes). BEREC will further investigate the type of situation that could require such an approach and the possible ways to address it (including the possibility of using the powers in Article 13 of the Access Directive to impose an appropriate pricing rule).

Principle 4 NRAs should consider imposing functional separation only when all other regulatory obligations have failed to create a level playing field

- 3.40 In its report on functional separation BEREC¹⁸ highlighted the importance for NRAs to do a comprehensive assessment before imposing functional separation as a remedy. As noted in BEREC's response to the Commission's questionnaire on non-discrimination¹⁹ and given the risks, in BEREC's view functional separation cannot be a justified remedy when there is a lack of sufficient enforcement of other regulatory obligations.

Question 1 Do stakeholders agree with the high level competition issues BEREC has identified for the achievement of a level playing field? If not, please explain.

Question 2 Do stakeholders agree with the high level principles proposed by BEREC in order to achieve a level playing field? If not, please explain.

Objective 2: Avoidance of unjustified first mover advantage

Likely competition issues

- 3.41 SMP operators have the incentive to seek first mover advantage in the provision of new services, in particular by making new retail services available in advance of providing the corresponding wholesale service to alternative operators such that

¹⁸ BoR (10) 44 Rev 1 BEREC Report on guidance on functional separation, pages 15 and 16 http://erg.eu.int/doc/berec/bor_10_44rev1.pdf

¹⁹ BoR (11) 64 BEREC's response to the Commission's public consultation on non-discrimination http://erg.eu.int/doc/berec/bor/bor11_64_nondiscrimination.pdf

downstream retail competition is facilitated. In cases where there are no objective reasons justifying such a behaviour, this is a form of discrimination which could be detrimental to competition, if the SMP operator captures the majority of the downstream (retail) market, increasing the barriers to entry for an alternative operator who cannot access the relevant wholesale products in a timely manner.

BEREC questionnaire results

- 3.42 Answers to the BEREC questionnaire on this issues revealed the following (see **Annex 4**):
- More than half of NRAs who have responded have explicit obligations in place which regulate the lead time between the release of the SMP player's retail products and the availability of the corresponding wholesale product to alternative operators.
 - More than half of NRAs who have responded have imposed lead times which vary according to the type of wholesale product to be made available to alternative operators (for example to take into account the fact that new wholesale products could be the result of network deployment, the introduction of new retail products and/or enhancements to existing wholesale products).
- 3.43 The responses also revealed that prescribed lead times, in some instance, allowed for the development of a generic wholesale product by the SMP operator and in other instances it also allowed for the implementation of necessary systems by alternative operators.

Proposed high level principles

- 3.44 Competitors need assurance that suitable and fit for purpose wholesale products are available in time to permit them to offer new downstream services at the same time as the SMP player (although in some cases there may be special circumstances justifying legitimate first mover advantage). By itself, the non-discrimination obligation may be insufficient to provide this assurance. In the absence of more definitive measures, the SMP player may unjustifiably delay availability of the wholesale offer and/or delay provision of information which would be necessary to allow competitors to exploit the offer in a timely manner. A more prescriptive non-discrimination obligation would increase the legal certainty for alternative operators on how the SMP operator has to comply with this obligation, even if a general non-discrimination obligation is equally binding and could lead to imposition of sanctions for non-compliance with it.
- 3.45 Various approaches can be effective in dealing with this problem. NRAs should choose the method which fits best within the overall national regulatory regime and with national case-law. For example, in some circumstances, it may be effective for NRAs to provide further clarification on how they would interpret the non-discrimination obligation in practice and on a case-by-case basis. In other cases, a more prescriptive approach may be found necessary in order to provide the necessary level of assurance in relation to specific issues of non-discrimination.

- 3.46 In cases where NRAs may prefer a tighter definition of the generic principle of non-discrimination by defining *ex-ante* controls on the introduction of down-stream services by the SMP player, it should be based on the below high level principles.²⁰

Principle 5 NRAs should put in place a regime which ensures the (technical and economic) replicability of the new downstream services introduced by the SMP player

- 3.47 In some cases alternative operators may be able to replicate the new downstream (retail) product(s) with wholesale input(s) already available to them. This can be achieved by requiring the SMP player:
- either itself to undertake the replicability exercise; or
 - to make the necessary economic and technical information (on the new downstream product) available to NRAs and/or alternative wholesale operators.
- 3.48 **Principle 5a. In relation to economic replicability, NRAs should ensure that the methodology and the principles applied to ensure replicability are made public beforehand.** This will ensure that there is utmost transparency and clarity for both the SMP operator and alternative operators on how this approach will work.
- 3.49 **Principle 5b. In cases where (technical and/or economic) replicability cannot be achieved by using the available wholesale products, the SMP player should be required either to amend the existing wholesale product or to make a new wholesale product available.** NRAs may have already imposed a wholesale obligation requiring the SMP operator to amend its wholesale offer²¹ and/or comply with a margin squeeze test before launching the new downstream (retail) service based on a particular wholesale input. In cases where the SMP operator fails to comply with these wholesale obligations, and to avoid damages to downstream (retail) competition, NRAs should also consider whether there would be any merit in stopping the SMP player from launching the corresponding downstream product, where it is appropriate and proportionate to do so.²² This power might, for instance but not exclusively, be allowed under Article 10 of the Authorisation Directive and/or Article 10 of the Access Directive and is usually accompanied with a sanctioning mechanism (national laws permitting). This may provide a strong incentive on the SMP player to make relevant fit for purpose wholesale products available on time (provided there are no special circumstances justifying a different approach) and as such prevent it from capturing the retail market. Moreover, this instrument can be used by the NRA in those circumstances where a sanctioning mechanism alone may not be sufficient to avoid damages to competition or, in any case, NRAs should decide under which circumstances this power (i.e. stopping launch of a retail product) should be exercised.
- 3.50 The main disadvantage of this approach may be the time/resource requirements imposed on the NRAs who may need to verify that all new retail offers are replicable before they are launched. One would also need to consider whether there may be any adverse impact on consumers as a result of the consequential delayed launch of

²⁰ There may be more reliance on these principles for wholesale products in Market 5 (wholesale broadband access) and Market 6 (wholesale leased lines). On the other hand, for wholesale products included in Market 4, timely access to the wholesale inputs may only be relevant in the case when access is first requested to the physical input (i.e. the loop).

²¹ For example, the NGA Recommendation advises the NRAs to adopt these remedies.

²² In some cases this may not be required. For example, in France there is an *ex-post* control from the Competition Authority which has constantly ruled against SMP players launching downstream (retail) products that alternative operators cannot replicate. This in itself acts as a strong deterrent.

new retail offers. In these instances, it is a good practice to require the SMP player to make the relevant wholesale inputs available as soon as possible and even set concrete deadlines in relation to when these are made available.

Principle 6 In cases where the SMP player needs to provide a new wholesale product NRAs should ensure timely availability of relevant (technical) information according to lead times (i.e. notice periods) defined on a case-by-case basis

3.51 A distinction should be made between the following two issues:

- **Phase 1: Provision of information on the charges, terms/conditions and technical characteristics of the wholesale product.** The SMP player should be required to provide relevant price and technical information on the characteristics of the new wholesale product, in advance of the commercial launch of any related downstream (retail) product, such that alternative operators can undertake their own network and commercial planning (including the decision of whether they would prefer to buy the wholesale product from somewhere else or to provide it themselves).

NRAs can further define the details of what information the SMP player should provide and give some guidance when required on specific lead times on a case-by-case basis (by for example including in a reference offer), rather than being too prescriptive from the outset in all cases. This will ensure that the requirements imposed on the SMP player are better tailored to deal with the technical requirements/complexities of the new wholesale product to be introduced.

- **Phase 2: Provision of the actual wholesale product.** The key issue here is not when the wholesale product is made available, but to ensure that it is made available to the SMP player's downstream arm and all other operators at the same time. A generic non-discrimination obligation will ensure this outcome, provided there are no specific circumstances.

3.52 In exceptional circumstances the regulator has the responsibility to balance the principle of equal treatment and the first mover advantage in the case of innovative retail products where the risk of a long-term distortion to competition is minimised.²³ Potential deviations from the general application of the non-discrimination obligation, in case of innovative retail products, should be treated as an exception for justified objective reasons and require careful consideration on a case-by-case basis. Specifically, the interest of the consumer should be at the centre of any such consideration, along with the effects on long-term competition.

²³ An operator wanting to enter a market with an innovative retail product may need an incentive to recover research and development costs as well as gain profits out of it. The prospect of instantly sharing market demand for the new product with competitors may reduce the incentives for innovation. Usually, where an innovative retail service requires a new wholesale input,²³ a technical development at the wholesale level will be necessary. In such a case, retail exploitation of this development by the SMP player can also be maximised (and therefore wholesale profits maximised) through exploitation by multiple players rather than a monopolist. However, in a recent case, the German Federal Administrative Court issued a ruling (6 C 47.06 from 18 Dec 2007) stating that in this case it was justified to offer the respective wholesale product only after the launch of the corresponding retail product of the SMP operator in order to safeguard legitimate first mover advantages. For judging the legitimacy of a first mover advantage in the case of innovative products, it is important to consider whether competition will be able to close up on the SMP operator in the market for the relevant product or not.

Principle 7 NRAs should ensure that alternative operators have the ability to influence the decisions regarding characteristics of new wholesale products and new interfaces

- 3.53 In this respect the NRA should consider the role that an industry forum can play. The SMP player and alternative operators can voluntarily set up an industry forum to discuss the process around the introduction of new wholesale products. NRAs can also attend these on a formal or informal basis. This principle should be applied without prejudice to the powers of the NRAs to specify the characteristics of wholesale products, especially if alternative operators fail to reach an agreement with the SMP player.
- 3.54 In its response to the Commission's consultation BEREC highlighted the industry fora already present and operational in various MSs.

Principle 8 Where relevant, NRAs should impose a requirement on the SMP player in relation to lead times regarding the removal of existing wholesale inputs

- 3.55 All of the above issues will also be relevant in relation to the removal of existing wholesale products (i.e. ensure that new wholesale products are available in time). The one potential difference is in relation to the lead times for the removal of existing products: there may be an argument which supports the fact that lead times for the removal of existing wholesale products should be longer with such information being made available to alternative operators as soon as possible.

Question 3 Do stakeholders agree with the high level competition issues BEREC has identified which may rise in case of a first mover advantage? If not, please explain.

Question 4 Do stakeholders agree with the high level principles proposed by BEREC in order to avoid first mover advantages which may be detrimental to competition? If not, please explain.

Objective 3: Reasonable quality of access products

Likely competition issues

- 3.56 Unless specified through commercial agreements, SMP operators generally have no particular incentive to deliver good quality wholesale products to alternative operators which compete with them at the retail level. Such behaviour would put alternative operators at a clear disadvantage, especially when the relevant wholesale services are not available from any other supplier on a national basis.
- 3.57 Even when there is a commercial agreement setting out the levels of quality the SMP players needs to deliver (for example, through SLAs), alternative operators may still face a disadvantage. For example, the processes for claiming compensation may be cumbersome and onerous (with the result that many of them do not consider that it would be efficient to attempt to claim compensation); and/or the levels of compensation may be insufficient to either compensate the alternative operators or incentivise SMP operators to provide better service.
- 3.58 There may be cases where the SMP operator is providing the same level of service quality to its downstream arm and all alternative operators, however the service levels provided are very low. Such an occurrence, although not classed as discrimination, can have discriminatory effects. For example, it could be argued that in these cases the SMP operator has an advantage over alternative operators. This is because the

SMP operator has an established reputation and could be regarded by the general public as being better able to cope with issues of quality when compared to alternative operators (who have to build their reputations, while having to mitigate the impact of providing services of low quality to their customers).

- 3.59 Finally, in the absence of any information, alternative operators may not know the average level of service quality the SMP operator provides to its downstream arm or to the industry as a whole. As a consequence, alternative operators may not be able to negotiate the best terms for themselves and their own customers.

BEREC questionnaire results

- 3.60 At a high level, the BEREC questionnaire revealed the following (see **Annex 3**):
- The majority of NRAs have imposed SLAs, SLGs and/or KPIs in key service areas such as ordering, service availability and maintenance (repair).
 - In instances where SLAs are not imposed, NRAs ensure that the level of service provided is reasonable either through dispute resolution or own initiative investigations.
 - NRAs are closely involved in the development of SLAs, either by approving the SLAs developed by the SMP player or by leading the process themselves.
 - In the majority of cases, alternative operators can compare the service levels they receive with the industry average.
 - In the majority of cases, KPIs are not formally audited on a systemic basis, mainly due to the high costs involved.

Proposed high level principles

- 3.61 SLAs and SLGs are an essential part of a commercial agreement and have a role in ensuring suppliers provide an acceptable level of service to their customers:
- SLAs set out a supplier's specific commitments to provide services to an agreed quality, for example within a specified timeframe.
 - The associated SLGs specify the level of compensation that the customer would be entitled to should the service not be provided at the agreed quality, for example if delivery of service was late.
 - The associated KPIs (if agreed to) measure the actual level of performance and quality achieved by the supplier when delivering services to its customers.
- 3.62 It may be convenient – but should not be regarded as a pre-requisite – for the defined service levels to be enshrined in a document labelled “Service Level Agreement”. For example, it would be equally effective for the appropriate service levels to be set out in the Reference Offer (RO).
- 3.63 Therefore, SLAs, SLGs and KPIs can be useful in reducing the incentives for discriminatory behaviour. For example, a regime which allows all operators to subscribe to the same SLAs may ensure all operators subscribe to the same terms and conditions (should they choose to). Proactive payment of SLGs (for failures on the part of the SMP player) can also act as a deterrent against discriminatory behaviour. KPIs are a useful measurement and monitoring tool which can detect

discriminatory behaviour and in that help reduce the SMP player's incentives for such behaviour.

- 3.64 It is also desirable for KPIs to be designed in a way which is consistent with the relevant SLAs by measuring the SMP player's performance in service areas which are of importance to alternative operators. The use of SLAs without KPIs makes it harder to monitor non-discrimination. KPIs which are not related in some way to SLAs appear of limited value since they would be measuring something which is apparently not considered to be important. KPIs do not only monitor compliance with relevant SLAs, but they also show differences in the treatment of operators (alternative operators, as well as the downstream arm of the SMP player) which could be an indication of discrimination.

Principle 9 NRAs should ensure that the SMP player is required to provide a reasonably defined level of service

- 3.65 An SLA describes the type and level of service promised by a seller (the SMP player) to the purchaser of its products. In that, it defines the minimum service levels to be delivered on Quality of Service (QoS) parameters which are of utmost importance to wholesale customers and where it would be key to ensure non-discrimination. In this respect SLAs can have an important and complementary role to play in ensuring non-discrimination:
- First, they define the QoS parameters of importance to customers (which KPIs, as a measuring tool, can be modelled on).
 - Second, requiring the SMP player to provide the same SLAs to all operators (including its downstream arm) may help prevent discriminatory behaviours ex-ante by providing the same terms and conditions to all customers in key areas of service (see below).
- 3.66 An SLA may be set out in a separate document which is designed for the purpose. Alternatively, the service levels may be set out in sufficient detail in the RO. In this case, the relevant sections of the RO can collectively be considered to be "the SLA". BEREC finds no need to prefer one over the other. The key issue is that the service levels promised should be clear, capable of being challenged by purchasers who have reason to believe they are not fit for purpose and capable of being measured.
- 3.67 The above approach does not mean "one size fits all". Different levels of service will need to be made available to reflect differences in customer demand, even if these are not used by the SMP operator for its retail products. The important thing is to ensure all customers have the same options and are aware of the options available to them.
- 3.68 As a starting point NRAs need to take into account the absolute need for such remedies, having also taken into account the success of the commercial agreements already in place and other important national circumstances.
- 3.69 Should an NRA decide on imposing a remedy under the framework which requires the SMP player to provide an SLA, it should be based on the below additional principles.
- 3.70 **Principle 9a SLAs should cover specific service areas.** As a starting point NRAs should determine whether certain levels of quality are guaranteed by other means (for example, performance features and certain technical parameters may be covered by

existing technical standards)²⁴. When considered necessary, and in order to ensure a level playing field between the SMP player's downstream arm and alternative operators, the SLAs could cover the following key areas of service:

Service areas where SLAs are most likely to be necessary

- Ordering
- Delivery
- Service (availability)
- Maintenance (repair)

Service areas where SLAs may be beneficial

- Information systems
- Billing

Most of the respondents to the BEREC questionnaire noted the presence of SLAs in the above mentioned service areas, with some areas scoring higher in usage than others (see **Annex 3**). The advantage of having SLAs in all of the above mentioned service areas is to decrease the scope for *ex-ante* discrimination. However NRAs should undertake a cost/benefit analysis of imposing such remedies and ensure they are targeted appropriately.

- 3.71 **Principle 9b SLAs should be made available to wholesale operators.** To ensure maximum transparency and comparability of the terms provided by the SMP player to alternative operators and its downstream arm, all SLAs could be made available to all relevant wholesale customers (including those outside from a specific member state). For example, the SMP player could make them available on demand or automatically publish these on its web-site (as part of its RO).
- 3.72 **Principle 9c NRAs should take oversight for the process of setting SLAs.** Depending on market circumstances and particular concerns for discriminatory behaviour, there may be merit in some cases for the NRA itself to develop "generic" SLAs in consultation with all operators in the market and/or have an oversight of the SLAs developed by the industry players (including all relevant alternative operators). The final SLAs agreed between SMP players and alternative operators are considered to be reasonable, as long as they still follow the non-discrimination principle and unless there is a dispute which the NRA can be called upon to resolve.
- 3.73 **Principle 9d SLAs should take into account differences in customer requirements.** For example, business and residential customers may have different requirements which may need to be reflected in the SLAs.

Principle 10 NRAs should impose a generic requirement on the SMP player to provide SLGs

- 3.74 SLGs define the penalty payments the SMP player has to make to alternative operators in cases where the quality of service (QoS) it has provided is less than the levels specified in the corresponding SLAs. As for SLAs, SLGs can have a complementary role to play in ensuring non-discrimination:
- First, they provide a financial incentive on the SMP operator to deliver the service

²⁴ For example, ISDN30 performance features are guaranteed by ETSI 300 356-1.

levels specified in the SLAs, which, as discussed above, could in principle be the same for SMP player's downstream arm and alternative operators.

- Second, provided this financial incentive is strong enough, they may reduce the number of complaints and disputes which NRAs may be called upon to resolve *ex-post* (which could be time/resource consuming and often giving rise to significant delays).

3.75 Therefore, there is normally merit in complementing SLAs with SLGs. Should an NRA decide on imposing a remedy under the framework which requires the SMP player to provide SLGs, it should be based on the below additional high level principles.

3.76 **Principle 10a SLGs should cover all necessary specific service areas.** As a starting point NRAs should determine whether certain levels of quality are guaranteed by other means (for example, performance features and certain technical parameters may be covered by existing technical standards). When considered necessary, and to ensure compliance with SLAs, the SLGs could cover the same key service areas as for SLAs (although it should not be strictly required to have an SLG for every SLA offered):

Service areas where SLGs are most likely be necessary

- Ordering
- Delivery
- Service (availability)
- Maintenance (repair)

Service areas where SLGs may be beneficial

- Information systems
- Billing

Most of the respondent's to the BEREC questionnaire noted the presence of SLGs in the above mentioned service areas, with some areas scoring higher in usage than others (see **Annex 3**). The advantage of having SLGs in all of the above mentioned service areas is to increase the incentive on the SMP player to deliver to its agreed SLAs. However NRAs should undertake a cost/benefit analysis of imposing such remedies and ensure they are targeted appropriately.

3.77 **Principle 10b SLG payments should be made proactively.** SLG payments can either be claimed by the alternative operators on a per event basis or paid proactively by the SMP player. For SLGs to provide appropriate financial incentives they need to be challenging, reconcilable to a specific non-compliance on the SMP operator's part and payments made promptly by the SMP player after the event in question (rather than requiring alternative operators to claim for compensation which may be gamed by SMP operators who can delay making such payments). Requiring proactive payments of SLGs (in the event of non-compliance by the SMP player) would have better incentive properties on the SMP player, who would need to keep to the service levels in the SLAs in order to reduce/avoid any payments to alternative operators.

3.78 **Principle 10c NRAs should take oversight for the process of setting SLGs.** Depending on market circumstances and particular concerns for discriminatory behaviour, there may be merit in some cases for the NRA itself to develop "generic"

SLGs in consultation with relevant market participants and/or have an oversight of the SLGs developed by the industry players.

Principle 11 NRAs should impose a generic requirement on the SMP player to provide KPIs as a means to monitor compliance with a non-discrimination obligation unless there is evidence that this is unnecessary or would not be cost-effective

- 3.79 KPIs can be designed to measure the SMP player's actual levels of performance, such that alternative operators can compare the levels of service they have received against those agreed through SLAs. KPIs can also be used as a monitoring tool to assist alternative operators in determining whether they could have been discriminated against by comparing the service levels they have received with that provided to the incumbent's down-stream arm and the industry average (provided alternative operators have access to this information). KPIs can also be used to update SLAs based on an investigation of the historic development of QoS on relevant products.
- 3.80 However, differences in the measured levels of KPIs are not an automatic proof of discrimination. Where the results measured by KPIs indicate potential differences in the levels of service provided to different operators there may be legitimate reasons for this (for example, extreme weather conditions could have impacted different parts of a country in different ways).
- 3.81 KPIs can therefore be useful in determining potential non-discriminatory behaviour, however should not be used as conclusive evidence of it. They can also provide a stronger incentive for the SMP player to comply with the non-discrimination obligation.
- 3.82 Finally, the benefits of imposing KPIs need to outweigh the costs of such an approach, especially where compliance with the non-discrimination obligation is already achieved by other means. For example:
- In specific markets the level of service may be measured easily or there have been historically no issues in relation to discriminatory behaviour.
 - In other markets, services may be provided on substantially the same terms (e.g. mobile termination) and therefore this in itself increases the incentives to act in a non-discriminatory way and deliver to the agreed levels of service.
 - Services may be subject to a Universal Service Obligation (USO) which can raise the overall level of network and service quality.
 - The SMP player may already be providing information on KPIs on a voluntary basis and this approach may be successful in itself.
- 3.83 Should an NRA decide on imposing a remedy under the framework which requires the SMP player to provide KPIs, it should be based on the below additional principles.
- 3.84 **Principle 11a KPIs should cover all necessary specific service areas.** As a starting point one needs to determine whether certain levels of quality are defined by other means (for example, performance features and certain technical parameters may be covered by existing technical standards)²⁵ which the relevant contract is referring to and therefore discriminatory behaviour in these instances is unlikely to be an issue. When considered necessary, and in order to ensure a level playing field between the SMP player's downstream arm and alternative operators, the KPIs could

²⁵ For example, ISDN30 performance features are guaranteed by ETSI 300 356-1.

cover key service areas which are essential to the provision and maintenance of a wholesale service:

Service areas where KPIs are likely to be necessary

- Ordering
- Delivery
- Service (availability)
- Maintenance (repair)

Service areas where KPIs may be beneficial

- Information systems
- Billing

Most of the respondent's to the BEREC questionnaire noted the presence of KPIs in the above mentioned service areas, with some areas scoring higher in usage than others (see **Annex 3**).

- 3.85 **Principle 11b 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 its downstream business and b) the industry average. In this way, each alternative operator would have access to three sets of data determining the service levels received by itself, the SMP player's down-stream arm and the industry average (where only the latter two would be in the public domain).
- 3.86 Publication of KPIs can also help with the verification of such information. Independent verification and auditing of KPIs in a systematic way may be considered disproportionate compared to the costs of doing so. Formal verification of the KPIs (calculated by the SMP player) by a third party may not be necessary if KPIs are published as alternative operators will be aware of the service levels they have received and therefore would, at a high level, be able to determine whether the reported KPI data looks reasonable or not.
- 3.87 **Principle 11c NRAs should take oversight for the process of setting KPIs.** Due to the information asymmetries that exist, NRAs may not be best placed to devise detailed KPIs. The structure of KPIs can also be open to gaming by SMP players and alternative operators. In the first instance, and to minimise these risks, all industry players should be encouraged to come together to develop suitable KPIs.
- 3.88 At the same time, NRAs should have sufficient oversight to ensure that the KPIs comprise a reasonable set for the needs of the market. They can achieve this through informal (by, for example, participating in the relevant industry discussions) or more formal means (by for example "approving" the KPIs set and allowing the participation of alternative operators in the process). In cases where the SMP player fails to comply with the set of KPIs agreed with industry or defined through a NRA-led process, alternative operators can bring a dispute to the NRA which will allow NRAs to intervene. NRAs can then direct SMP operators to implement specific SLAs which might require the payment of "daily fines" as a way to incentivise compliance with the non-discrimination obligation.

- 3.89 BEREC does not believe there is a need to set a limited set of comparable KPIs across MSs. A limited set of comparable KPIs could help compare service levels (received by alternative operators and the SMP player's downstream arm) in a single member state and also amongst MSs. Such a comparable set of KPIs across all MSs would have value in identifying those SMP operators currently delivering low quality which should be capable of improvement, however it is not necessary to address discrimination.
- 3.90 In practice, there may also be practical issues which may be impossible to overcome and which would need to be evaluated through an impact assessment:
- The KPIs set in different MSs relate to existing SLAs/SLGs and may be linked to established commercial practices. Therefore determining a (new) set of comparable KPIs may imply a modification to the whole SLA/SLG regime imposed in different MSs. In some instances, implementation of a new set of KPIs may also require modifications to the IT systems and procedures of the SMP players and alternative operators (leading to additional costs).
 - Difficulty in defining a reasonable set of comparable KPIs. For example, is delivery of 98% of orders within 2 days better/worse than delivering 95% of orders in 1 day? Wholesale customers will have different preferences and it is appropriate that KPIs are designed around the preferences of the actual customers in a national market.
 - The KPIs should reflect the aspects of service which are important to the wholesale purchasers. Different purchasers in different MSs may have different preferences as to the detail.
 - The need to set SLAs (and corresponding SLGs/KPIs) to reflect specific national circumstances. For example in some MSs there may be a distinction in service levels between urban and rural areas (if distances are large or terrain is hilly), where such a distinction may not make much sense in other countries.
- 3.91 BEREC will also consider the merits of imposing Key Performance Objectives (KPOs). KPOs may be helpful in defining the minimum levels of quality of service for relevant wholesale products sold to alternative operators. BEREC will consider this issue in more detail as part of its review of the access remedies included in the CPs.

Question 5 Do stakeholders agree with the high level competition issues BEREC has identified in relation to the quality of wholesale access products? If not, please explain.

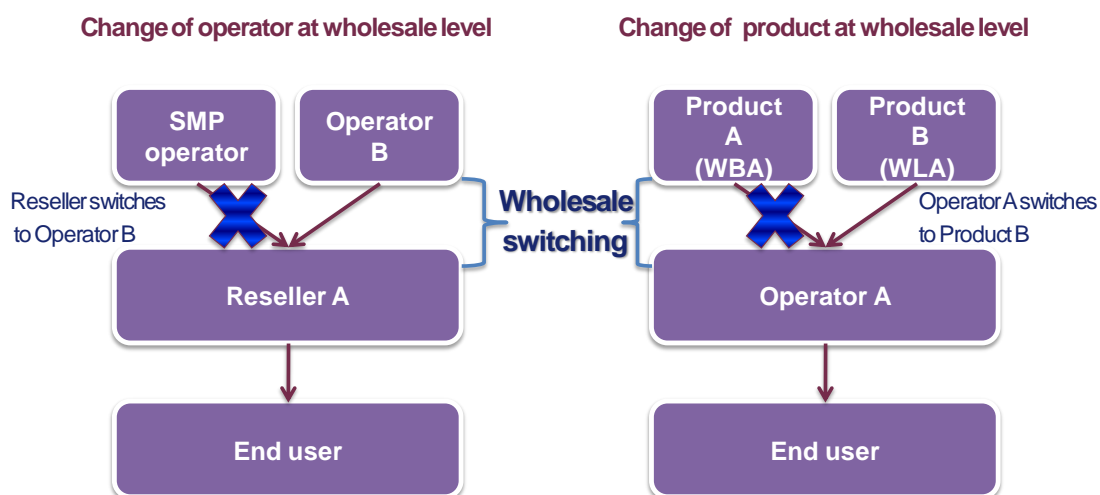
Question 6 Do stakeholders agree with the high level principles proposed by BEREC in order to ensure reasonable quality of wholesale access products? If not, please explain.

Objective 4: Efficient and convenient wholesale switching processes

Competition issue identified

- 3.92 Wholesale switching processes can take many forms and go under different names. The key characteristics are that the SMP provider needs to make one or more changes at network level relating to the service of a particular end user. The change could be a connection, disconnection (or both), change of grade of service, change from one wholesale service to another.

- 3.93 Individual switches normally result from a decision by an end user to change service provider (or possibly choice of retail service). However, not all changes of end-user service give rise to the need for a wholesale switch. Bulk switches arise when a service provider (at the wholesale level) decides to change the method by which it provides service to a number of end users.
- 3.94 Efficient wholesale switching processes are paramount to ensuring an effective competitive environment where wholesale customers can switch between different wholesale products and/or providers without undue delay or break in service. Without such an efficient service, end users will be reluctant to switch and the competitiveness of the retail market will be reduced. An inefficient wholesale switching process may also prevent wholesale customers from changing to wholesale products and providers which are most suited to their needs.
- 3.95 Examples of **wholesale switching** processes can include:
- Switches between the wholesale access products of **different wholesale operators**. For example, reseller A may decide to buy WBA from operator B rather than the SMP player (and vice versa).
 - Switches between **different wholesale access products** of the SMP operator. For example, wholesale operator A may decide to purchase LLU rather than WBA from SMP operator (and vice versa).



- 3.96 In the examples presented above there is no switching process taking place at the retail level, as the end user has not initiated such a process. The switching process is taking place at the wholesale level. Nevertheless, if the switching process at the wholesale level is not efficient this can have a detrimental impact on the end user (for example, loss of service for unacceptable periods of time).

BEREC questionnaire results

- 3.97 The BEREC questionnaire revealed that in the majority of cases wholesale switching processes require the termination of the wholesale customer's old contract (i.e. cease) before the new contract is activated ("cease and re-provide") (see **Annex 5**). In addition, in the majority of cases there are specific rules around the amount of downtime allowed during the wholesale switching process.

Proposed high level principles

Principle 12 NRAs should impose obligations on the SMP player in order to ensure wholesale switching processes are speedy and efficient

- 3.98 NRAs should consider whether a generic requirement to provide suitable switching processes is to be sufficient. If this is not adequate, NRAs should consider whether to impose specific obligations on the SMP operator in relation to switching processes. The more prescriptive the process is, the more this will look and feel like a product. How prescriptive the process should be will also to a certain extent be influenced by the scope of the wholesale switching process. For example, different issues may need to be taken into account depending on whether the switch is between:
- Different wholesale access products (and/or networks) of the SMP operator;
 - Different wholesale operators;
 - Both a) and b).
- 3.99 **Principle 12a NRAs should ensure that all related wholesale switching processes are managed efficiently so that the customer is not left wholly or partly without service for an unacceptable period.** For example, if disconnections and connections are managed independently, a customer whose line was being switched from a bitstream service to an unbundled loop could be left unserved for an extended period. Equally, the process should allow for near-simultaneous switching of telephony and broadband services.
- 3.100 **Principle 12b NRAs should ensure that the maximum allowed downtime during wholesale switching is the lowest possible and takes into account the different needs of specific customer segments.** The SMP player should be required to keep down time to a minimum. More prescriptive lead times should be decided on a case by cases basis depending on the complexity of the switch. Downtime related to a wholesale switching process associated with a retail switch initiated by an end user must also be consistent with the Universal Service Directive. Wholesale operators should also have the ability to request switching with minimal downtime or within specified time parameters where the end user is particularly sensitive about downtime. Where the standard switching rules are of high specification, this may happen automatically. Otherwise, a premium switching service may be required (for a premium charge), for example to guarantee a very short downtime out of office hours.
- 3.101 **Principle 12c NRAs should ensure the price of the wholesale switch does not act as a barrier to the switching processes happening.** NRAs could for example ensure that such prices are cost orientated.
- 3.102 **Principle 12d NRAs should ensure specific measures to facilitate bulk wholesale switching processes.** Bulk switching of products can have benefits to all providers in terms of time and cost savings achieved. NRAs should ensure that the SMP operator implements specific measures to facilitate bulk switching of products, in case this is required by the market.
- 3.103 **Principle 12e NRAs should ensure the requirements for bulk wholesale switching are non-discriminatory (rules around volumes/prices).** Bulk switching processes can offer many advantages to alternative wholesale operators, including the option to switch a number of lines all at the same time and at a lower price. NRAs should consider imposing a requirement on the SMP player to introduce bulk

switching processes where the (price/volume) rules are set in a non-discriminatory manner.

- 3.104 **Principle 12f NRAs should ensure the continued availability of the old wholesale product for an appropriate period of time.** NRAs could consider imposing obligations on the SMP player for the continued availability of the old wholesale product up until the switch to the new product/network has been completed.
- 3.105 **Principle 12g NRAs should consider the benefit of requiring the SMP player to introduce wholesale customer interfaces (web interfaces).** Provided the costs justify the benefits, NRAs could consider imposing an obligation on the SMP player to develop such web-interfaces that wholesale customers can easily use during the switching process.
- 3.106 **Principle 12h NRAs should require the SMP player to introduce SLAs/SLGs and KPIs to ensure the efficiency of the process, unless there is evidence that these are unnecessary or not cost-effective.** NRAs could consider imposing a requirement on the SMP player to include appropriate SLAs/SLGs and KPIs in relation to some elements of the wholesale switching process, for example the allowed downtime.

Question 7 Do stakeholders agree with the high level competition issues BEREC has identified in relation to wholesale switching processes? If not, please explain.

Question 8 Do stakeholders agree with the high level principles proposed by BEREC in order to ensure efficient and convenient wholesale switching processes? If not, please explain.

Section 4

Next steps

Next steps

- 4.1 The BEREC consultation on the high level principles of non-discrimination will close on 30 March 2012.
- 4.2 During the consultation period BEREC will hold a public workshop to discuss these issues in more detail with all interested stakeholders. Details of this workshop will be communicated in due course on BEREC's website.
- 4.3 In the meantime if stakeholders would like to get in touch with BEREC in relation to this consultation they should get in touch with the BEREC Office which would put them in contact with the relevant group tasked with the preparation of this consultation document. The BEREC Office contact details are as follows:
 - **For submitting responses** to the BEREC consultation on the high level principles of non-discrimination: pm@berec.europa.eu preferably in English.
 - **For any questions/clarifications needed:** Gianina Lica, gianina.lica@berec.europa.eu
- 4.4 Once the consultation closes, BEREC will analyse all stakeholder responses and prepare a summary document.
- 4.5 The BEREC high level principles on non-discrimination will be included in the proposed updated text of the BEREC CPs in due course.

Annex 1

Consultation questions

A1.1 For ease of reference below we list the consultation questions.

Question 1 Do stakeholders agree with the high level competition issues BEREC has identified for the achievement of a level playing field? If not, please explain.

Question 2 Do stakeholders agree with the high level principles proposed by BEREC in order to achieve a level playing field? If not, please explain.

Question 3 Do stakeholders agree with the high level competition issues BEREC has identified which may rise in case of a first mover advantage? If not, please explain.

Question 4 Do stakeholders agree with the high level principles proposed by BEREC in order to avoid first mover advantages which may be detrimental to competition? If not, please explain.

Question 5 Do stakeholders agree with the high level competition issues BEREC has identified in relation to the quality of wholesale access products? If not, please explain.

Question 6 Do stakeholders agree with the high level principles proposed by BEREC in order to ensure reasonable quality of wholesale access products? If not, please explain.

Question 7 Do stakeholders agree with the high level competition issues BEREC has identified in relation to wholesale switching processes? If not, please explain.

Question 8 Do stakeholders agree with the high level principles proposed by BEREC in order to ensure efficient and convenient wholesale switching processes? If not, please explain.

Annex 2

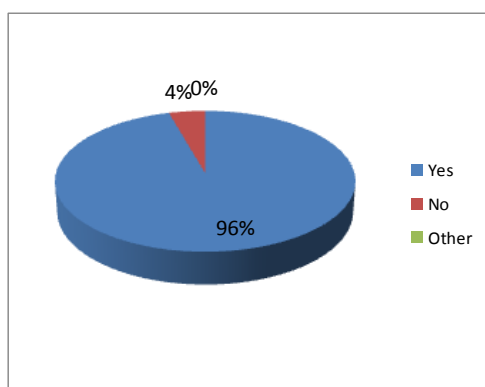
Questionnaire on legal interpretation of Article 10

- A2.1 BEREC, in co-operation with the European Commission, launched a short questionnaire on the legal interpretation of the Article 10 of the Access Directive (AD) in different Member States (MSs).
- A2.2 The questionnaire was circulated to all NRAs on 13 October 2011 and the closing date for responses was 3 November 2011. 23 responses were received in total.
- A2.3 In this Annex BEREC provides a high level summary of the responses, analysed by question.

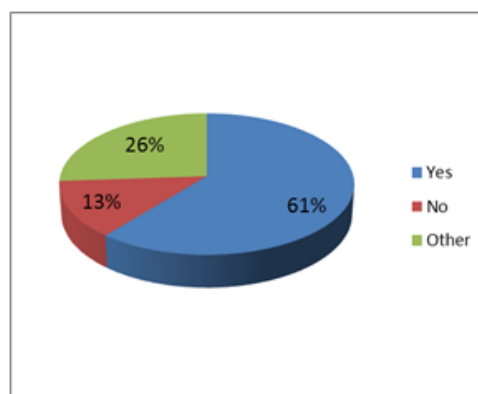
"Equivalence of Input" under Article 10

- *Does the implementation of Art.10 of the Access Directive into your national law allow the NRA to require the SMP operator to provide the relevant wholesale products to all access seekers (including its own downstream / retail arm) on the same timescales, terms and conditions (including price) by means of the same systems and processes (also known as the principle of Equivalence of Inputs)?*
- *Does that include the requirement to grant access to the same commercial information necessary to provide the downstream product²⁶?*
- *If not, what are, in your view, the obstacles to impose any such Equivalence of Input under your national law?*

a) % NRAs that can implement EOI



b) % NRAs that can grant access to commercial information



- A2.4 The majority of NRAs confirmed that they can implement EOI under Article 10 of the AD as transposed into their national law. Only one NRA relies on Article 12 of the AD to do so (Figure a) above).

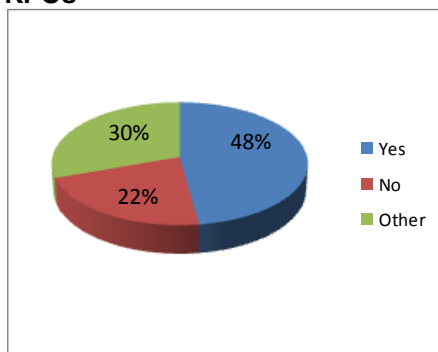
²⁶ Commercial information necessary to provide the downstream product means information of a commercially confidential nature relating to SMP products which an alternative operator would need to replicate the downstream offer of the SMP operator. This includes (but is not restricted to), for example, information on product development, product launch dates, network coverage and capabilities and pricing.

A2.5 Only 14 NRAs (out of 23) confirmed that they can include the requirement to grant access to the same commercial information necessary to provide the downstream product (Figure b) above.

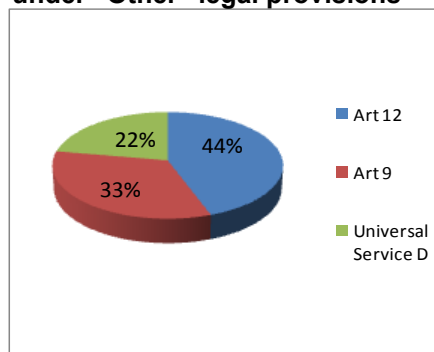
Key Performance Objectives under Article 10

- *Does the implementation of Art. 10 of the Access Directive into your national law allow the NRA to require the SMP operator to provide the relevant wholesale products at a minimum quality of service level even where the quality of service provided to its own downstream arm is not superior to the quality of service provided to its competitors?*
- *That means, is the NRA – under national law implementing Art. 10 of the Access Directive - entitled to impose certain key performance objectives (or KPOs)?*
- *If not, what are, in your view, the obstacles to impose any such KPOs or similar minimum quality of service levels under your national law?*

c) % NRAs that can impose KPOs



d) % NRAs that can impose KPOs under "Other" legal provisions



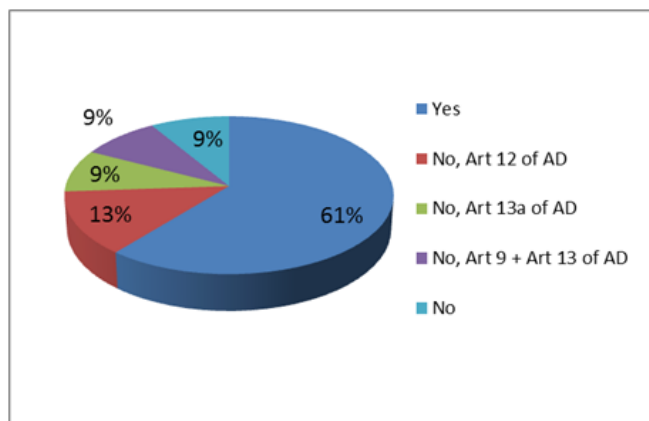
A2.6 11 NRAs can impose KPOs under Article 10 of AD, 7 NRAs can impose KPOs using other legal provisions and 5 NRAs cannot impose KPOs at all. The other legal provisions that NRAs can use to impose KPOs include Article 12 of AD (4 NRAs), Article 9 of AD (3 NRAs) and Universal Service Directive (2 NRAs).

Relationship between Non-Discrimination and Functional Separation

- Which elements of full functional separation do you think you cannot currently impose on an SMP operator under your national law designed at implementing Art. 10 of the Access Directive?*
- For example, do you consider it possible for the NRA to require the SMP operator to grant alternative operators access to its IT systems (operational support systems, ordering systems etc.) or to establish information sharing restrictions (so-called "chinese walls")²⁷ between the upstream and downstream business of the SMP operator on the basis of Article 10 AD?*

²⁷ This could mean legal or technical restrictions on the SMP operator to share certain information (especially customer confidential information) between its wholesale and retail arms.

e) % NRAs that can grant alternative operators access to SMP operators' IT systems (operational support systems, ordering systems etc.) or to establish information sharing restrictions

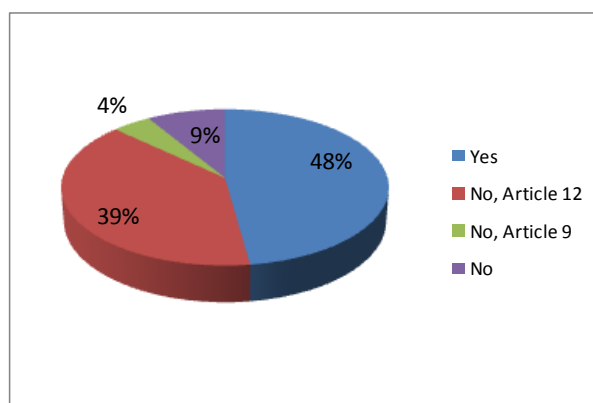


A2.7 14 NRAs can grant alternative operators access to SMP operators' IT systems (operational support systems, ordering systems etc.) or can establish information sharing restrictions relying on implementation of Article 10 in their national law. 7 NRAs rely on different legal provisions which include the use of Article 12 of AD, Article 13/Art 13a of AD.

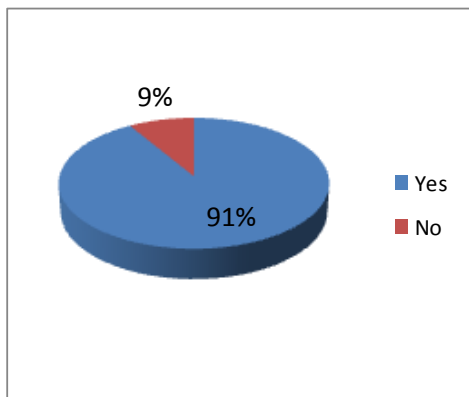
Prescription of specific types of access and interconnection

- *Does the implementation of Art. 10 of the Access Directive into your national law allow the NRA to require the SMP operator to provide access seekers with access and interconnection services at a specific network level (e.g. at IP level)?*
- *If so, is the NRA entitled to request the SMP operator to adapt or modify its network topology or to deploy a certain network architecture in order to avoid that the SMP operator takes advantage of the design of its own network architecture to discriminate between the self-supply and the provision of access and interconnection services to access seekers?*

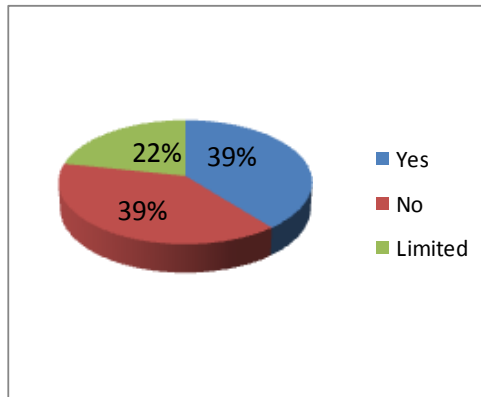
f) % NRAs can require the SMP operator to provide access seekers with interconnection at specific network level using Article 10 of AD or other legal provisions



g) % NRAs that can require SMP operator to provide access at certain points of interconnection



h) % NRAs that can require SMP operator to adapt or modify its network topology

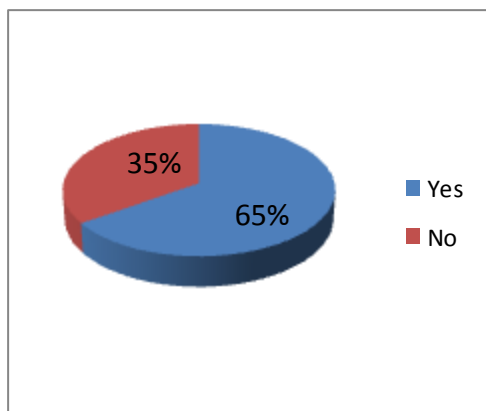


A2.8 The responses indicate that almost all NRAs (who responded) can require the SMP operator to provide access seekers with interconnection at specific network levels : however only about half of the respondents can do so using Article 10 of AD, with the rest using the provisions under Article 12 or Article 9 of the AD. Only a small proportion of NRAs (2) cannot impose such requirements on SMP operators. Also, more than half of the responding NRAs have the power to request some network architecture modification.

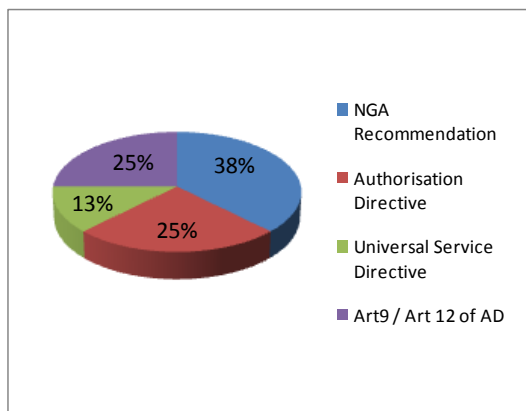
Power to suspend launch of retail products

- *Does the implementation of Art. 10 of the Access Directive into your national law grant the NRA the power to suspend or prevent the launch of a retail product by an operator which has SMP in the upstream wholesale market (i.e. in the market for the wholesale input of the relevant retail product)? If so, under which conditions is the NRA entitled to make use of this power?*
- *If not, does the NRA have a similar power under other legislation?*

k) % NRAs that have the power to suspend the launch of a retail product under Article 10 of AD



l) % NRAs that use other legal provisions to suspend launch of retail product

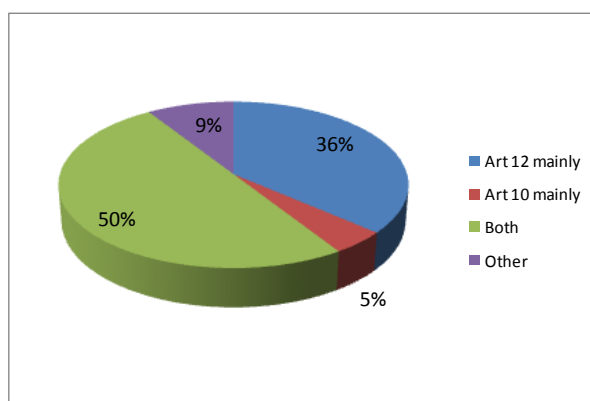


- A2.9 Only 15 (out of 23) NRAs have the power to suspend or prevent the launch of retail products by an SMP operator in the upstream wholesale market under Article 10 of the AD as transposed into their national law.

Relationship between powers under Art. 10 and Art.12 of the Access Directive

- *Some of the above mentioned regulatory interventions may be based on either Art. 10 and/or Art. 12 of the Access Directive. Could you please set out what the difference in application of the relevant power is in your national legislation (i.e. whether the use of Art. 10 faces different pre-conditions than the use of Art. 12 and, if so, what these differences are)?*
- *Could you also please indicate whether you rely predominantly on Art. 10 or Art. 12 when exercising your powers in relation to the above mentioned issues?*

m) % NRAs using different legal provisions when implementing the above mentioned obligations



- A2.10 The responses indicate that most NRAs use Article 12 of the AD to impose the necessary access obligation and use Article 10 of the AD to remedy specific competition issues/problems that may have been identified *ex-ante*. 4 NRAs implement Article 12 of the AD as a pre-condition to Article 10 of the AD.

Annex 3

Questionnaire on the use of SLAs, SLGs and KPIs

Introduction

- A3.1 BEREC launched a short questionnaire on the use of Service Level Agreements (SLAs), Service Level Guarantees (SLGs) and Key Performance Indicators (KPIs) by various NRAs. The consultation closed on 10 June 2011 and 25 responses were received.
- A3.2 In this Annex BEREC provides a high level summary of the responses received, analysed by question. 70% of the responses were provided for the WLA market and the answers were broadly consistent with the other two markets.

High level results

- A3.3 Overall, the responses revealed extensive use of SLAs, SLG and KPIs in various Member States (MSs).

| | Absolute # of countries | | | % of countries | | |
|------------------------|-------------------------|-----------|-----------|----------------|------------|------------|
| | SLA | KPI | SLG | SLA | KPI | SLG |
| All | | | | | | |
| Information (systems) | 12 | 6 | 6 | 48% | 24% | 24% |
| Ordering | 16 | 12 | 12 | 64% | 48% | 48% |
| Delivery | 17 | 17 | 16 | 68% | 68% | 64% |
| Service (availability) | 16 | 11 | 13 | 64% | 44% | 52% |
| Maintenance (repair) | 19 | 16 | 17 | 76% | 64% | 68% |
| Billing | 9 | 3 | 3 | 36% | 12% | 12% |
| Other (specify) | 0 | 0 | 0 | 0% | 0% | 0% |

The use of SLAs

- A3.4 The responses revealed that in the absence of SLAs, NRAs ensure that the level of service provided is reasonable either through the resolution of disputes or by starting own initiative investigations.

| <i>Where SLAs are not in place, how does the NRA makes sure that the level of service provided is reasonable?</i> | | |
|--|-----------|-------------|
| Disputes | 1 | 8% |
| Complaints by operator | 4 | 33% |
| NRA investigates | 5 | 42% |
| KPIs | 2 | 17% |
| No response | 13 | |
| Total responses | 12 | 100% |

- A3.5 NRAs are closely involved in the development of SLAs, either by approving the SLAs developed by the SMP player or by taking the lead in the process.

| <i>How are SLAs developed?</i> | | |
|--|-----------|-------------|
| a) Industry process for provisioning such views to the SMP player | 2 | 9% |
| b) NRA-led process for defining the needs of access seekers on which market players were consulted | 11 | 50% |
| c) The SMP player developed an SLA which was approved by the NRA | 6 | 27% |
| d) Other | 3 | 14% |
| No response | 3 | |
| Total responses | 22 | 100% |

The use of SLGs

- A3.6 The responses revealed that in instances where there are no SLGs, NRAs use different ways to ensure the SMP players have sufficient incentives to provide good levels of services (all equally successful).

| <i>If there are no SLGs how does the NRA makes sure that the SMP player has sufficient incentives to provide good or agreed level of service?</i> | | |
|--|-----------|-------------|
| a) NRA-led process for defining the needs of access seekers on which market players were consulted | 1 | 7% |
| b) NRA can sanction | 6 | 43% |
| c) Complaints by operator | 4 | 29% |
| d) KPIs | 2 | 14% |
| e) USO | 1 | 7% |
| No response | 11 | |
| Total responses | 14 | 100% |

The use of KPIs

- A3.7 The responses revealed that in the majority of cases alternative operators can compare the service levels they receive with the industry average.

| <i>Do the KPIs allow an access-seeker to compare the services it receives with that provided by the incumbent to itself and to other alternative operators?</i> | | |
|--|-----------|-------------|
| a) No | 4 | 20% |
| b) No, but this information is available to the NRA | 3 | 15% |
| c) Yes, but only own data and the aggregate of the rest of alternative operators | 4 | 20% |
| d) Yes, the access seeker can see the incumbent data, its own and the aggregate of the rest of the alternative operators | 9 | 45% |
| No response | 1 | |
| Total responses | 20 | 100% |

A3.8 In the majority of cases KPIs are not verified independently by a third party, however this task is performed either by the NRA or market participants.

| <i>Is the internal measuring system and the reporting system of the incumbent for producing the KPIs approved?</i> | | |
|---|-----------|-------------|
| a) Not independently approved | 11 | 61% |
| b) By the NRA | 4 | 22% |
| c) By an independent third party | 0 | 0% |
| d) Other | 3 | 17% |
| No response | 7 | |
| Total responses | 18 | 100% |

| <i>Is the appropriate use of the measuring system and the outcomes of the KPI report verified?</i> | | |
|---|-----------|-------------|
| a) Not independently verified | 10 | 56% |
| b) No | 0 | 0% |
| c) By the NRA | 3 | 17% |
| d) By the market players and the NRA | 1 | 6% |
| e) Other | 4 | 22% |
| No response | 7 | |
| Total responses | 18 | 100% |

A3.9 In the majority of cases NRAs are able to sanction for infringement of the non-discrimination obligation.

| <i>Are you able to sanction for the infringement of the non-discrimination obligation in any of your markets as a result of data observed through KPI analysis?</i> | | |
|--|-----------|-------------|
| Yes | 19 | 83% |
| No | 4 | 17% |
| No response | 2 | |
| Total responses | 23 | 100% |

Annex 4

Questionnaire on the timely availability of wholesale inputs

Introduction

- A4.1 BEREC launched a short questionnaire on the timely availability of wholesale inputs. The consultation closed on 2nd September 2011 and 25 responses were received.
- A4.2 In this Annex BEREC provides a high level summary of the responses received, analysed by question. 70% of the responses were provided for the WLA market and the answers were broadly consistent with the other two markets.

High level results

- A4.3 The responses revealed that in the majority of cases NRAs have imposed obligations which regulate the lead times between the release of the SMP player's retail products and the availability of the corresponding wholesale product.

| Are there explicit obligations in place which regulate the lead time between the release of the SMP player's retail products and the availability of the corresponding wholesale products to alternative operators? | | |
|--|-----------|-------------|
| Yes, timing obligation | 7 | 33% |
| Yes, non-discrimination | 3 | 14% |
| Yes, prior notification obligation | 2 | 10% |
| No | 9 | 43% |
| No response | 5 | |
| Total responses | 21 | 100% |

- A4.4 The prescribed lead times allow for design and design/implementation of the retail product.

| What do the prescribed lead times allow for? | | |
|---|-----------|-------------|
| Design | 4 | 22% |
| Design and system implementation | 6 | 33% |
| Other | 4 | 22% |
| NA | 4 | 22% |
| No response | 7 | |
| Total responses | 18 | 100% |

- A4.5 The prescribed lead times vary according to the type of the wholesale product made available to ensure that they are fit for purpose.

Do the imposed lead times vary according to the type of wholesale product to be made available to alternative operators (for example new wholesale products could be the result of network deployment, the introduction of new retail products and/or enhancements to existing wholesale products)?

| | | |
|------------------------|-----------|-------------|
| Yes | 9 | 53% |
| No | 8 | 47% |
| No response | 8 | |
| Total responses | 17 | 100% |

- A4.6 In setting the prescribed lead times only a minority of NRAs take into account legitimate first mover advantages.

In setting the prescribed lead times, do you take into account possible legitimate first-mover advantage of the SMP player?

| | | |
|------------------------|-----------|-------------|
| Yes | 2 | 12% |
| No | 15 | 88% |
| No response | 9 | |
| Total responses | 17 | 100% |

- A4.7 In the majority of cases NRAs intervene to ensure that the wholesale product provided is fit for purpose.

How does the NRA ensure that the wholesale product to be provided by the SMP player is fit for its purpose? Please describe.

| | | |
|------------------------|-----------|-------------|
| NRA procedure | 14 | 64% |
| Legal challenge | 3 | 14% |
| Other | 5 | 23% |
| No response | 6 | |
| Total responses | 22 | 100% |

- A4.8 In some instances SLAs/SLGs and/or KPIs have been imposed in relation to the timely availability of wholesale products.

Are there specific SLAs/SLGs/KPIs in relation to the timing of availability of wholesale products?

| | |
|--------------------|----|
| Yes, SLA | 3 |
| Yes, SLA and KPIs | 1 |
| Yes, specific KPIs | 3 |
| No | 17 |
| No response | 4 |

Annex 5

Questionnaire on wholesale switching processes

Introduction

- A5.1 BEREC launched a short questionnaire on wholesale switching processes. The consultation closed on 2nd September 2011 and 17 responses were received.
- A5.2 In this Annex BEREC provides a high level summary of the responses received, analysed by question. 97% of the responses were provided for the WLA market and the answers were broadly consistent with the other two markets.

High level results

- A5.3 In the majority of cases SMP providers developed the relevant wholesale switching processes, with NRA having an oversight. In the majority of cases the process was one of “cease and re-provide”.

| Who was involved in the design of the wholesale switching processes in place? | | |
|--|----------|-------------|
| SMP provider led, NRA had oversight | 5 | 56% |
| Industry led, NRA had oversight | 2 | 22% |
| NRA led, in consultation with industry players | | 0% |
| Other | 2 | 22% |
| No response | 8 | |
| Total responses | 9 | 100% |

- A5.4 In the majority of cases there are specific rules around the length of the down time allowed during the wholesale switching process.

| Are there any rules about how much down time is allowed during a wholesale switching process? | | |
|--|-----------|-------------|
| Yes | 10 | 59% |
| No | 7 | 41% |
| No response | 0 | |
| Total responses | 17 | 100% |

- A5.5 Wholesale switching products with enhanced features are only provided in the minority of cases.

| Are there any wholesale switching products being offered with enhanced features, such as those offered to business consumers? | | |
|--|-----------|-------------|
| Yes | 6 | 35% |
| No | 11 | 65% |
| No response | 0 | |
| Total responses | 17 | 100% |

A5.6 The responses indicated that there are some SLAs, SLGs and/or KPIs in place.

| Are there specific SLAs/SLGs/KPIs in relation to wholesale switching products? | |
|---|---|
| Yes, there is an SLA | 8 |
| Yes, there is an SLG | 5 |
| Yes, there are KPIs | 8 |
| No | 6 |
| No response | 0 |

Annex 6

Glossary

DAE: Digital Agenda for Europe

EOI: Equivalence of Inputs

EOO: Equivalence of Outputs

KPI: Key Performance Indicator

KPO: Key Performance Objective

MSs: Member States

NGA: Next Generation Access

NRA: National Regulatory Authority

RO: Reference Offer

SLA: Service Level Agreement

SLG: Service Level Guarantee

SMP: Significant Market Power

USO: Universal Service Obligation