

ETNO Reflection Document commenting on draft BEREC Report on relevant market definition for business services



November 2010

Executive Summary

- ETNO welcomes this public consultation by the Body of European Regulators for Electronic Communications (BEREC) on its draft report on relevant market definition for business services, BoR (10) 46.
- ETNO concurs with many of the principles identified in the report and encourages BEREC and national regulatory authorities (NRAs) to continue to refer to the SMP-guidelines of the European Commission¹ when delineating separate or common markets for business and residential services.
- A market analysis should start with the possible delineation of separate markets for business services at retail level before the corresponding wholesale market is analysed. ETNO agrees with BEREC that the finding of two or more separate retail markets for services to residential and business customers is a relevant but not sufficient criterion for identifying the corresponding wholesale markets.
- Any business-customer-specific market delineation -- and potential subsequent remedies -- must be driven by a thorough market analysis. ETNO is concerned that the draft report considers basing market analyses on a summary data collection which would not allow a detailed analysis of conditions of competition but would be limited to input by specific operators on how they delineate business services (paragraph 76 f.). Clarification on this point is needed urgently.

¹ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03),

- ETNO encourages BEREC to prioritise its work, taking into account the political goals of the “Digital Agenda for Europe.” In the light of these objectives and of the results of previous reports in this field, we encourage BEREC to reassess the relevance and scope of further work on ‘business-services’-related remedies in 2011.

1. Introduction

As a general comment, ETNO encourages BEREC to prioritise its work, taking into account the political goals of the “Digital Agenda for Europe” and to assess the necessity of individual work streams in the light of these objectives.²

ETNO would like to recall that the “ERG Report on the regulation of wholesale access products necessary to deliver business connectivity services,” ERG(09)51, did not provide evidence for a need for additional regulatory intervention in view of the provision of business services. As ETNO pointed out in its consultation response³, the 2009 report lacked sufficient justification for specific remedies recommended across member states. In fact, the report noted a lack of reported problems in the field across a significant number of Member States. Evidence for the report was based on a survey carried out by a single stakeholder, reporting alleged competition problems in a very limited number of Member States.

As the present draft report on market definition for consultation, the 2009 ERG report referred to existing Commission guidance and ongoing market analysis procedures. Both reports reflect the importance of applying a consistent set of principles in view of varying market conditions when NRAs impose proportionate remedies in broadband markets, as opposed to a uniform set of regulatory outcomes.

Although national circumstances and developments can vary, ETNO in principle supports BEREC guidance in the perspective of helping to ensure more consistency of regulation on the fast-developing telecoms market. Against the background of the present report and the above-mentioned previous work on business services, however, we encourage BEREC to reconsider its planned activity on remedies for business services in 2011, as foreseen in the draft BEREC Work Program 2011.BoR (10) 43. The subject appears to be considered by

² See ETNO RD 334 on the draft BEREC Work Program for 2011, November 2010, p. 1ff.

³ See ETNO RD 319 Response to the consultation on the ERG Report on the regulation of access products necessary to deliver business connectivity services, February 2010

NRAs in the relevant market analyses with a sufficient degree of consistency of regulatory approaches.

2. Comments on BEREC's principles and guidance for market definition

Need for fact-based market definition, taking into account parallel infrastructures

ETNO supports BEREC's starting point to follow the existing SMP-guidelines of the Commission⁴ as the basis for delineating markets under Article 15 of the Framework Directive, 2002/21/EC. ETNO also shares the observation that any business-customer-specific market delineation - and potential subsequent remedies - should be driven by an in-depth market analysis.

As underlined in chapter 5 of the report, an analysis should start with the possible delineation of separate markets for business services at retail level before the corresponding wholesale markets are analysed.

As the report underlines, the finding of two or more separate retail markets for service to residential and business customers is a relevant but not sufficient criterion for the finding for corresponding separate wholesale markets. NRAs have identified a single wholesale access markets for the wholesale (physical) network infrastructure access (including shared or full unbundling access) at a fixed location (market 4) and for wholesale broadband access (market 5), despite the identification of two separate markets at the retail level for residential and non residential customers⁵.

Market definition should fully take into account relevant self-supply by vertically integrated operators at the level of market definition. ETNO agrees with the finding of BEREC that residential and business services are often provided over the same infrastructure. Network operators are building next generation networks (NGNs), which are characterised by a packet switched IP-based core network and are supplemented with access networks to deliver business connectivity services from the edge of the core to the customer premises. As fibre roll-out progresses, it will allow higher bandwidth and more symmetric bandwidth to be provided to customers, which may have an impact upon market definitions in the field of business services. On pt. 114 specifically, ETNO notes that the factors listed therein, such as the necessity to undertake additional investments for a supplier to

⁴ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

⁵ For example, AGCOM, Identificazione e analisi dei mercati dell'accesso alla rete fissa (mercati n. 1, 4 e 5 fra quelli individuati dalla Raccomandazione 2007/879/CE, 18 June 2009.

provide wholesale products for business services, are not in themselves evidence of a lack of supply side substitutability as suppliers may, in the presence of a price increase for the related product, overcome these barriers.

ETNO is concerned with the alternatives considered by BEREC as regards the gathering of data for market analyses laid out in paragraph 76 f. Clearly, any market delineation must be based on sound data, allowing for a thorough analysis of the competitive conditions in the market. Where this requires a detailed data request, informed by preliminary views of the NRA, to alternative operators and to the regulated operator, other considerations, such as whether relying on the data of alternative operators may be “pragmatic and fast,” should not be allowed. We encourage BEREC to clarify this in its final guidance. The ‘price’ of an incomplete or distorted data collection for a market analysis will otherwise be paid by end-users: for example, unjustified regulatory obligations on the SMP-operator create both unwarranted direct costs and distort the competitive conditions on the market, limiting choice for end-users.

Observations on national market analyses

The December 2009 ERG report noted that conceptually it is possible to distinguish between high end business and standard users. By way of example, the analysis of market 6 in the Netherlands shows that practically a distinction between high end and standard needs can be very difficult. Like BEREC quotes in its draft report, the Dutch NRA, OPTA, arrived in its latest market 5⁶ analysis at the conclusion that wholesale bitstream access (WBA) consists of two separate relevant product markets: high-quality WBA and low-quality WBA. But the delineation in its latest market 6 analysis (a wholesale market for high capacity leased line >20Mb and a wholesale market for low capacity leased line <20Mb) was rejected by a Dutch Court (College van Beroep voor het bedrijfsleven (CBb)). In this case, the evidence and analysis were deemed insufficient to justify a delineation of two separate markets.

Other cases show that the issue of “business customer market delineation” in practice may have little relevance. In its delineation of market 5, the German NRA, BNetzA, defined two separate markets for business and residential broadband at retail and wholesale level, and defined a business-service-specific remedy in several different product specifications (an ‘ATM-based bitstream’ in line with a national exception of the network setup of the SMP-operator). To date, however, there is not a single line that is rented by competitors. In this case, calls for imposing additional business-service specific regulatory

⁶ The numbers refer to the markets in the Annex to the Commission Recommendation on relevant product and service markets pursuant to Article 15(1) of the Framework Directive.

obligations on the incumbent were apparently motivated by regulatory 'gaming', rather than by actual demand.

In Italy, the NRA, AGCOM, has recognised that the "market" for tenders (i.e., public competitive tenders and public procedures called by private customers for the service provider selection) presents specific features and has imposed different remedies for tenders with respect to the other access services provided to residential and non residential customers. However, it has not identified a separate market for retail access services offered in tenders.

Geographic market definition

ETNO welcomes, that BEREC refers to the downstream relation of WBA to local loop unbundling (LLU) and the possibility to delineate WBA geographically on the basis of WBA offers based on local loop infrastructure. The UK NRA, Ofcom, successfully implemented such an approach and acknowledged the geographic segmentation of market 5 in its recent market review.

As stated in earlier submissions to BEREC, competition within wholesale markets for services offered to multi site businesses may well vary within a Member State because, for example, high levels of demand within metropolitan areas can lead to additional, substitute and competitor networks being provided. These networks may include cable TV networks and new entrant fibre networks. The presence of such competing infrastructure should inform, among other factors, market analysis and the geographic sub division of the market for SMP designation.