

Overview of remedies and European Commission Comments Letters

9 December 2011

1. Introduction

According to Point 3.1.2 of the BEREC Work Programme for 2011 (Capturing remedies proposed by NRAs and Commission concerns about remedies expressed in comments letters systematically) BEREC should, in order to ensure the development of consistent regulatory practice, begin to capture in a more systematic way the remedies proposed by the NRAs in their notifications, the Commission's concerns as expressed in their comments letters, both of comments letters looking back and also tracking comments letters going forward and set up a database. A BEREC overview should be provided in the 2nd half of 2011.

2. Draft Notifications in 2011, before 26 May

In 2011, before May 26th 18 European countries submitted 68 notifications of market analysis and remedies. 39 of those notifications were related to relevant markets 4, 5 and 7 of the 2007 Recommendation. The European Commission commented on 54 notifications and in 40 of those cases the Commission had comments on the remedies proposed by the NRAs.

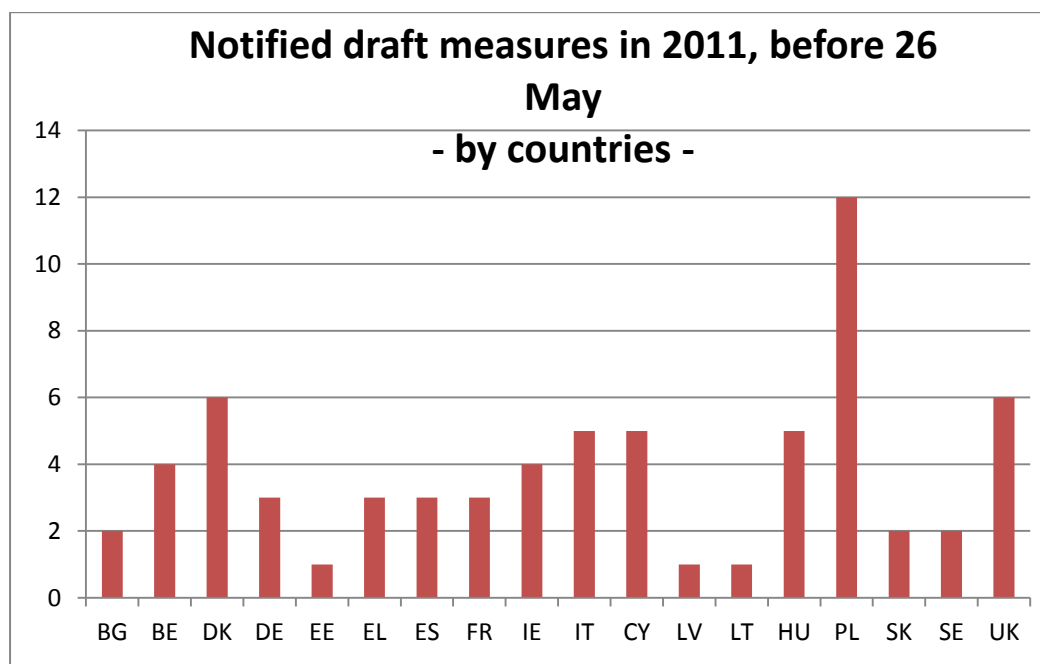


Figure 1: Notified draft measures in 2011, before 26 May, by countries

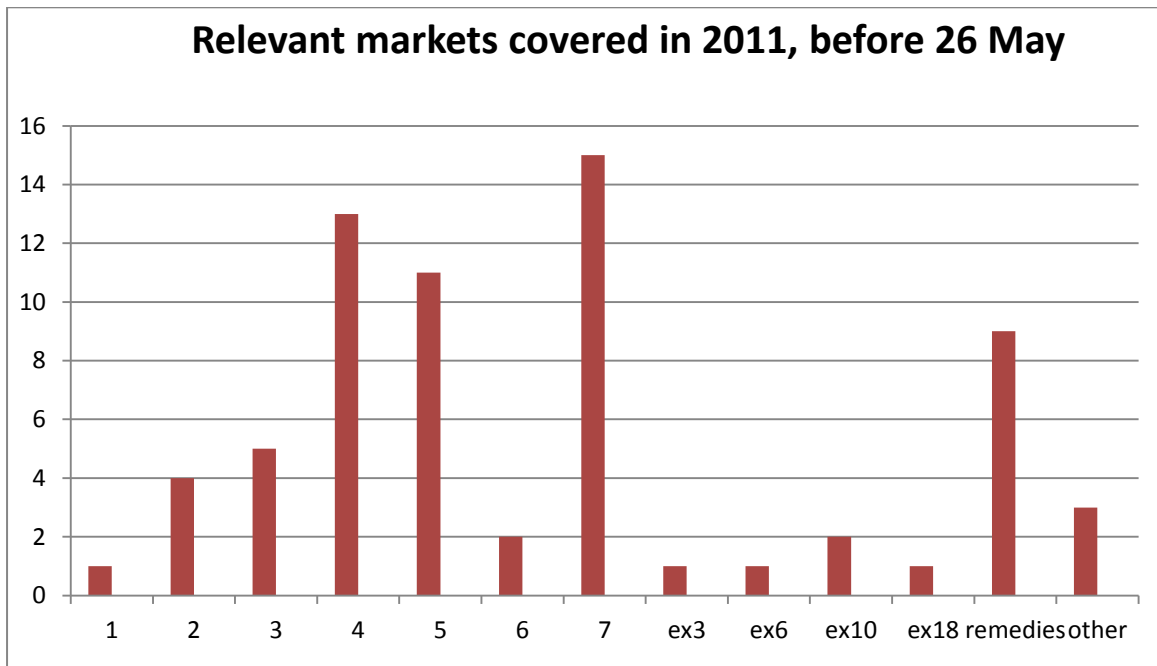


Figure 2: Relevant markets covered in 2011, before 26 May

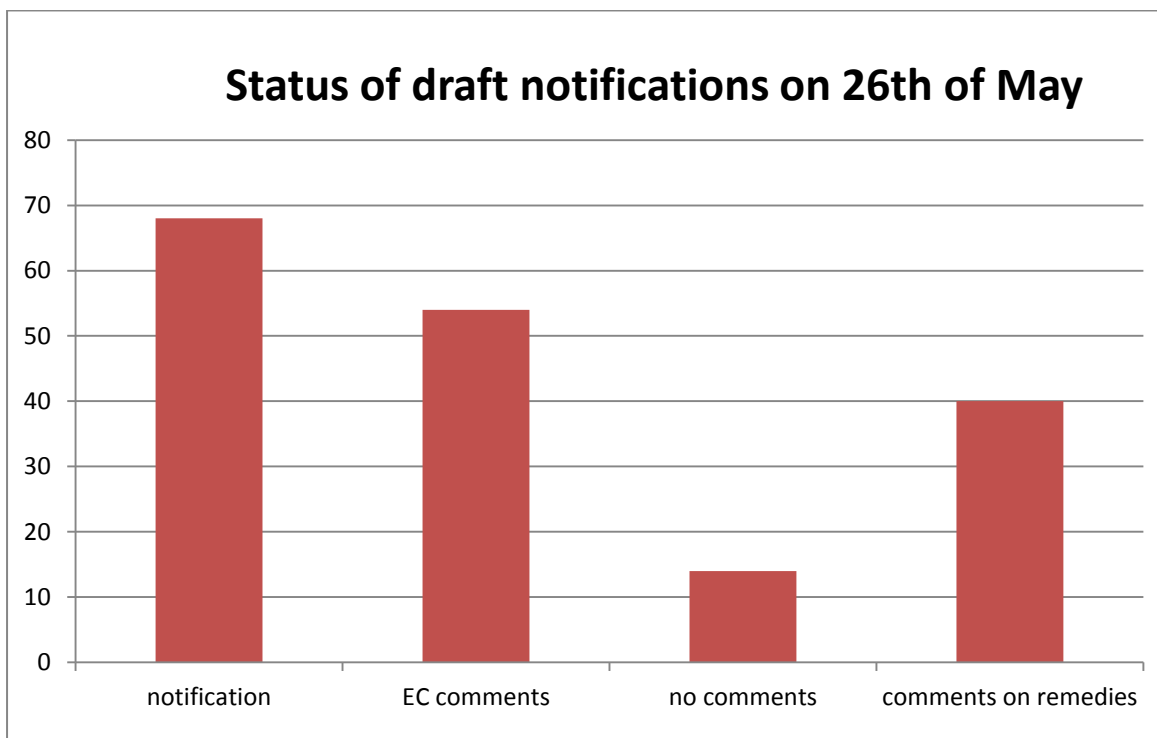


Figure 3: Draft notifications in 2011, status on 26th of May

3. Tracking of Draft Notifications as of 26 May 2011

3.1. Overview of draft notifications

Since 26 May 2011, BEREC Office keeps formal track of new notifications during Phase I of the article 7 procedure according to the new regulatory framework, in accordance with Art.13 of the Rules of Procedure of Board of Regulators.

In the last 7 months, 40 notifications from 16 countries have been registered.

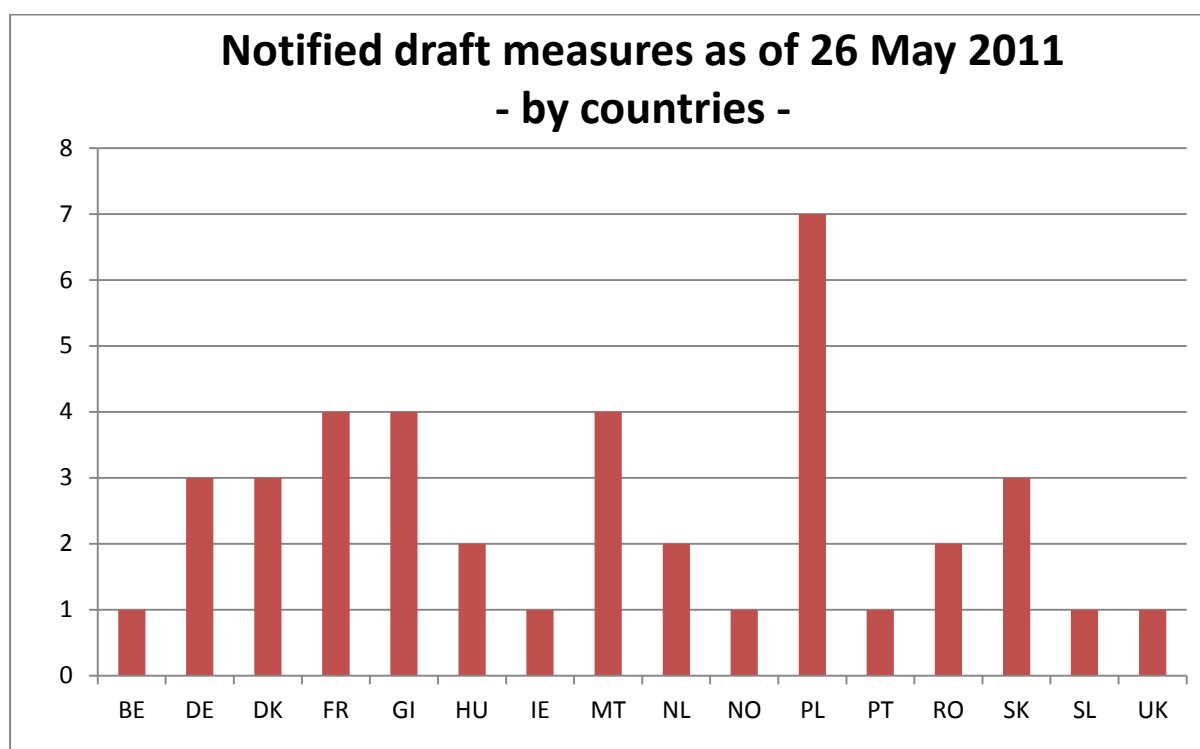


Figure 4: Notified draft measures as of 26 May 2011, by countries

The notifications submitted starting 26 May 2011 cover

- all seven markets in the Recommendation, focusing however on the two wholesale markets for termination (fixed network and mobile network);
- markets seven and ten of the 2003 Recommendation (Minimum set of leased lines and market for transit services in the fixed public telephone network);
- markets not mentioned in the Recommendation (e. g. market for wholesale SMS termination);
- modification of remedies on several markets.

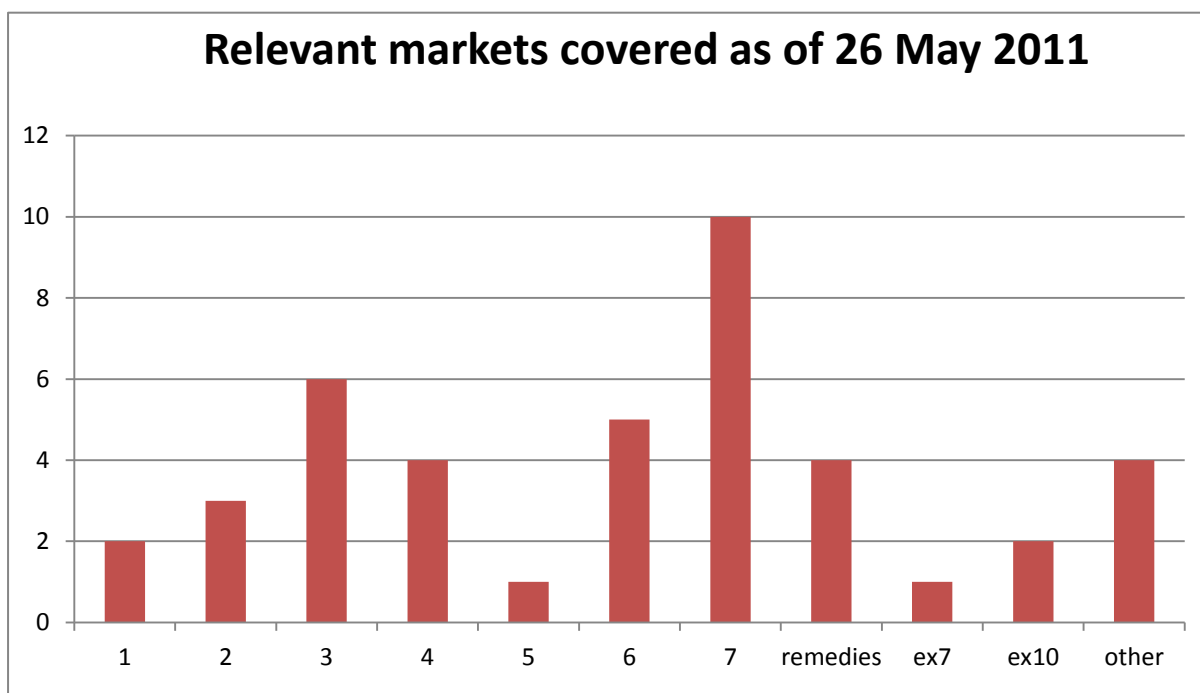


Figure 5: Relevant markets covered as of 26 May 2011

Following 26th of May three notifications have been withdrawn: two of them were withdrawn two days after the date of notification so that these cases are not included in the charts, and the third was withdrawn close to the end of the evaluation period.

Up to now (28.11.2011), 24 cases out of 40 have been closed, all of them in Phase I. In 13 cases out of 24 the European Commission sent out comment letters. 10 cases are still under investigation. In 5 cases (combined Polish cases PL/2011/1255-1256-1257-1258 and Polish case (PL2011/1260) the Commission opened a phase II. They all refer to remedies on market 7.

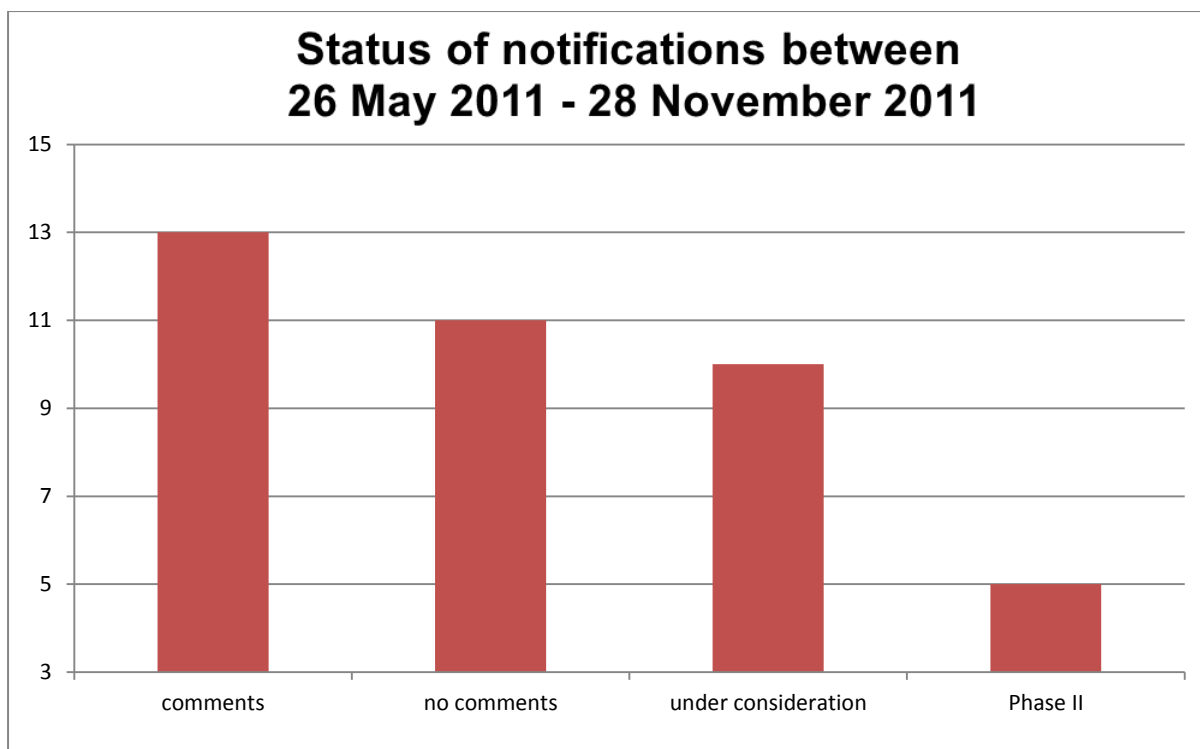


Figure 6: Status of draft notifications, period 26 May 2011 – 28 November 2011

The “No comments” letters of European Commission were either related to market 6 of the Recommendation (both market 6 notifications - wholesale terminating segments of leased lines - have been closed with no comments), notification modifying existing remedies only or markets not mentioned in the Recommendation.

3.2. Summary of Phase II cases

The first 2nd Phase case under the revised framework (combined Polish cases PL/2011/1255-1256-1257-1258) was opened on 4 November 2011, when the Commission sent a Serious Doubts Letter to the Polish NRA UKE.

The serious doubts expressed by the Commission relate to issues regarding UKE not adopting legally binding decisions for MTR on the market for voice call termination on individual mobile networks:

- the Commission considered that the fact that UKE does not adopt legally binding and immediately feasible measures creates significant barrier to the development of a single market.
- the Commission states that UKEs approach not to formally impose MTRs does not create predictability in accordance with Article 8 (5) (a) of the Framework Directive.
- the Commission did not consider the proposed price control by publishing MTRs on UKE’s website in the form of non-binding statements to be in accordance with the

Article 16(4) of the Framework Directive, which requires the NRAs to impose appropriate specific regulatory obligations on the SMP operators.

- the Commission considered that the publication of MTRs in non-binding statements are not in accordance with the procedural requirements of Article 16(6) in conjunction with Articles 6 and 7 of the Framework Directive.
- the Commission raised concerns about the lack of possibility for the concerned parties to effectively challenge the level of MTRs in national courts, which is required under Article 4 of the Framework Directive.

The second 2nd Phase case under the revised framework (Polish case PL/2011/1260) was opened on 17 November 2011, when the Commission sent a Serious Doubts Letter to the Polish NRA UKE.

- The Commission's serious doubts are related to the fact that UKE plans to impose obligation without having first defined and analysed a market for mobile call termination in the network of the relevant mobile operator, and without designating the operator as having significant market power (SMP)
- The Commission considers furthermore that UKE failed to justify higher MTRs for AERO2 and consequently, the proposed measures are not in line with the principles and objectives of Article 8(5) of the Framework Directive and of Article 5 of the Access Directive.
- The Commission pointed out that the imposition of far-reaching price control remedies on an undertaking, in the absence of its designation as SMP operator, may limit that undertaking's ability to act on the market is – in the absence of UKE's decision to the contrary - deemed to be competitive and may create barriers to entry.

3.3. Summary of comments of the European Commission

13 cases were closed with comments from the European Commission. All expressed comments were related to issues concerning remedies.

The majority of comments issued after 26 May 2011 are related to remedies on market 3, wholesale termination in fixed networks (6).

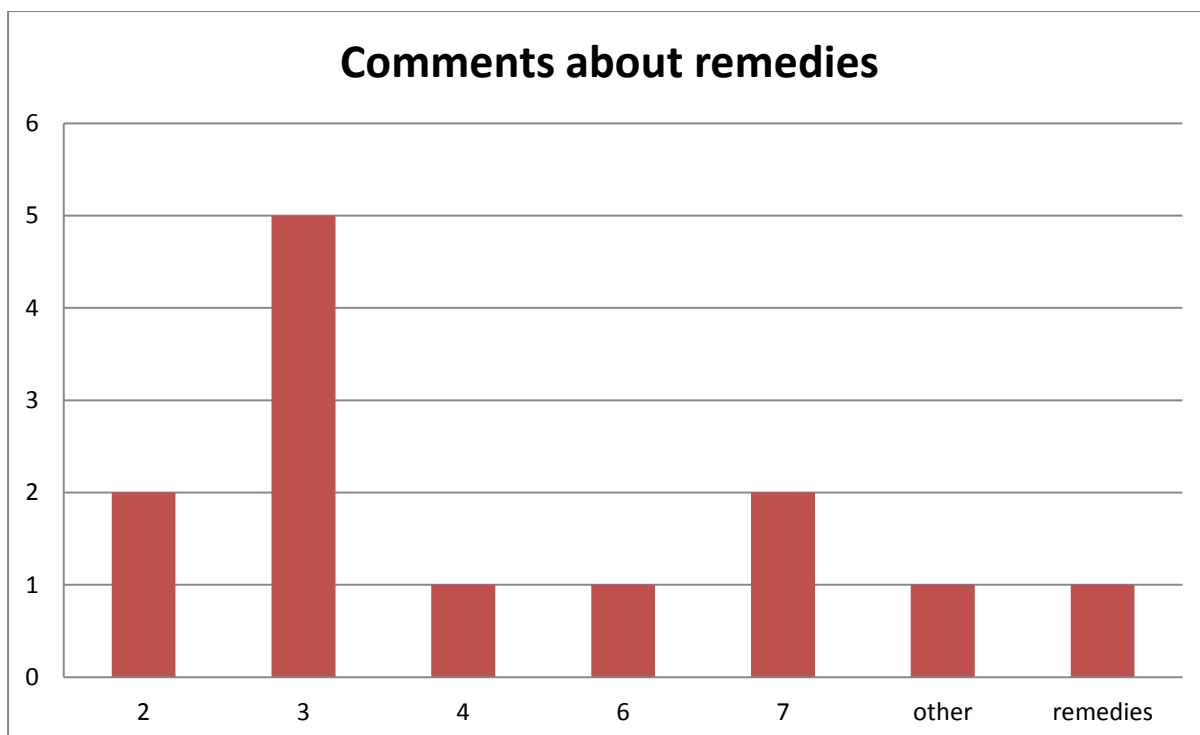


Figure 7: Comments about remedies, markets concerned

There have been only two comments that were not related to price control remedies:

- In the French Cases FR/2011/1234-1235-1236, ARCEP proposed on the SMP operator the obligation to provide IP interconnection at a reduced number of interconnection points on request. The Commission welcomes this obligation and invites ARCEP to specify clear migration rules in order to encourage a timely migration towards IP.
- In the Slovenian Case SI/2011/1237 the Commission criticised APEK's intention to specify the wholesale access obligations imposed on operators with SMP by means of a Recommendation and urged APEK to specify the details of the access obligation in a legally binding measure.

All other comments were related to price control obligations.

- In one comment concerning the French cases FR/2011/1234-1235-1236 the Commission was concerned by ARCEP's position that costs no longer recovered through the fixed termination fee could eventually be recouped through other products (retail and wholesale). The Commission was of the opinion that shifting costs from the wholesale call termination market to another regulated wholesale market may create additional barriers to enter the retail telephony market, thus hindering competition. Commission urged ARCEP therefore to specify the products

on which costs no longer recovered on the call termination market would be recouped.

- The Commission urged one NRA to undertake the necessary steps in order to be able to apply termination rates based on the pure LRIC methodology upon the deadline 31 December 2012 (Gibraltar case GI/2011/1248). A similar comment was issued by ESA in respect to a Norwegian case.
- The Commission invited NRAs to use a benchmark model taking into account only such member states that have already introduced pure LRIC rates or are currently working towards them (Maltese Case MT/2011/1241 and Gibraltar cases GI/2011/1244-1245).
- In the German case DE/2011/1243 Commission invited BNetzA to align its cost accounting methodology and its price control obligation, which had not been imposed on alternative operators, with the recommended cost accounting principles of the Termination Rates Recommendation.
- In the Gibraltar cases GI/2011/1244-1245 the Commission encouraged the Gibraltar regulator to start working, together with BEREC and its related working groups, on an appropriate glide path and adequate price regulation, thereby overcoming any limitations with regard to resources or the size of the market concerned. The cooperation with BEREC was also proposed in the case GI/2011/1248 as “BEREC might be able to provide other practical support and guidance to overcome the GRA’s limitation of resources and, in particular, the cost of implementing the recommended methodology.”
- In the Gibraltar case GI/2011/1249 the Commission urged the GRA to impose cost orientation as the appropriate remedy in the SMS termination markets in form of a glide-path, preferably aligned with the voice call termination glide-path.
- In the German case DE/2011/1254 concerning market 4 the Commission invited BNetzA to review the usage of current costs upon entry into force of any relevant recommendations on costing methodologies for NGN networks. Furthermore, the Commission encouraged BNetzA to monitor the development of the market and to ensure that there is a sufficient margin to compete for all access seekers, and not only for those who bundle beyond a basic product.

4. Analyses of European Commission Comments and Serious Doubts Letters for the period of 2010 – 25 May 2011

BEREC Office has analysed European Commission Comments Letters in Phase I from years 2011 and 2010, focusing on letters related to markets M4, M5 and M7- 86 comment letters in total including “No comments” letters. Also, some cases related to other markets seemed interesting as they refer to certain triggering criteria for an in-depth analysis of the remedies.

On the basis of the Commission's comments in analysing the notifications in Phase I, Commission's key Recommendations and ERG/BEREC Common Positions, BEREC Office in cooperation with the Remedies EWG has identified some common main issues for key areas on markets M4, M5 and M7.

In the analysed period it was only one Phase II Case in January 2010, LT/2010/1035, on market 4 and the Commission's Serious Doubts were related to the definition of markets, but also implementation and/or lack of NGA remedies have been assessed in a significant way.

For Market 4 and Market 5, the identified main issues are the following:

- **Remedies criteria**
 - **Non-discrimination:** in providing new broadband products based on NGA, also from the timing of availability point of view;
 - **Access to NGA products:** NGA remedies are proposed by the NRA, but EC has comments about some of their aspects (e.g.: not enough detail, conditionality of duct access or dark fibre, fibre unbundling, sub-loop unbundling, etc.)
 - **Switching/Migration processes in a NGA context:** certain NGA remedies to be imposed, set of rules and provision of information by SMP that guarantees a transparent framework for the migration from copper to fibre-based networks;
 - **Fair and coherent access pricing:** explaining the methodology used and resulting prices, appropriateness of LRIC input data; application of retail-minus is resulting in charges below the cost-oriented following FL-LRAIC; details on setting wholesale prices; price control for fibre access; cost-orientation for access;
 - **Reasonable quality of access products:** there should be assurance that access products will be of reasonable quality and that service levels will be comparable with that provided to SMP player's own business.
- **Market assessment and definition:** need to appropriately assess the differences in competitive conditions between geographic areas; cases of exclusion of cable from the WBA market, exclusion of FTTH lines or wholesale products from the relevant market; inclusion of cable solutions, wireless solutions or self-supply in the market definition on the basis of indirect constraints; imposition of obligation outside the

scope of market definition such as ancillary backhaul services/ backhaul access obligation;

- **Procedural issues:** need for transparency and coherence in the notification of remedies under the EU consultation procedure; notification requirements; need for ensuring a coherent approach of NGA Recommendation by doing analysis for markets 4 and 5 together.

For Market 7, the identified common issues refer to:

- **Non-discrimination:** potential discriminatory nature of tariff differentiation, discriminatory pricing and cross-subsidization at different steps of a glide-path;
- **Symmetric termination rates:** termination rates should normally be symmetric and asymmetry, acceptable in some cases, requires an adequate justification; implementation of LRIC;
- **Use/revision of cost model, cost-oriented/efficient termination rates:** need for a consistent European approach for termination rates by aligning glide path with deadline in TR recommendation; delayed imposition of cost orientation and high levels of MTR; need for cost-oriented termination rates also for new entrant mobile operators; use of appropriate benchmark; implementation of cost model; allocation of costs of spectrum; allocation of additional roll-out costs;
- **Procedural and market definition issues:** coverage of MVNO; dispute settlement instead of market analyses; analyses of new comer markets; notification of additional SMP.

As a conclusion regarding the comments in Phase I issued by European Commission for the notifications on markets M4 and M5 in 2010 and 2011 before 26 May, most of the comments were related to market assessment and definition, cost methodology and procedural issues.

As regards market 7 from the new Recommendation, most of the comments in Phase I refer to cost orientation for achieving efficient termination rates, symmetric termination rates and procedural issues.