

BEREC work programme 2011: ECTA's response - summary

2011 will provide a real test of BEREC's ability to deliver greater harmonisation and show how regulators can work together to achieve Europe's ambitious broadband targets for 2020. The prize for success could be significant – Analysys Mason has estimated that consumers and businesses could gain €25bn per year in lower charges and significantly higher broadband speeds if an open and competitive single market for telecoms is achieved. We therefore encourage BEREC to prioritise in the work programme key implementation issues where its members hold direct responsibility. Prime amongst these are:

1. Fair and accurate wholesale charges: There is an urgent need for **guidance on cost methodologies** to address excessive charges which are impeding competitive development in some markets, and to ensure appropriate treatment of copper and fibre before, during and after the migration process so as to ensure competition and incentivise efficient investment in fully open fibre networks.
 2. Equal treatment: BEREC should work with the Commission on **guidance on non-discrimination including functional separation** which clearly identifies best practice on service provision and non-price terms. We also encourage BEREC to collect and publish KPIs for service quality EU-wide
 3. A single market for business communications: BEREC should take ownership of this issue by acknowledging that there is a cross-border retail market for business communications and issuing **guidance to ensure the uniform treatment of the national regulated wholesale inputs required to serve business users EU-wide.**
- ECTA fully supports the continuation and updating of **best practice guidance** on wholesale local access, wholesale broadband access and leased lines. WLA and WBA guidance need updating particularly in light of NGA developments, whilst consumer and business-grade remedies should be explored in the context of WBA. The leased line guidance remains relevant today, but BEREC surveys suggest that fewer than half of NRAs have followed it – by failing to mandate wholesale Ethernet terminating segments. BEREC could usefully publish a simple table identifying key best practice recommendations and whether or not these have been followed by NRAs.
 - BEREC should avoid “interpreting” **Commission recommendations** as this could reduce regulatory certainty. However BEREC could usefully elaborate on some of the elements, such as the product definitions in an NGA environment and pricing regimes which may or may not have discriminatory effect.
 - We agree with the three forward-looking topics identified by BEREC although we note that BEREC's members are not in all cases responsible for delivering on these topics.
 1. **Broadband:** BEREC should focus achieving a coherent approach between SMP and publicly funded regimes given the multitude of different projects. BEREC's views on taxes targeting the telecoms sector could also be welcome.
 2. **Net neutrality:** ECTA believes that the best way to address NN issues structurally is by ensuring a competitive market. We globally welcomed the BEREC response to the Commission consultation, and would encourage BEREC to retain a similar focus, and if necessary, also feed into any guidance prepared by the Commission on this issue
 3. **Spectrum:** We agree that BEREC's input on the assignment of digital dividend spectrum could be useful.

General comments

ECTA supports in full the comprehensive work programme that BEREC has proposed for 2011. We believe that all the items deserve attention, and hope this will be possible with the increased resources from the BEREC Secretariat. However, within a broad work programme it is important to identify priorities and we believe that BEREC should prioritise issues that are most likely to deliver tangible results for the European Digital Agenda and for which BEREC's members all hold direct responsibility.

Priority should be implementation

We would particularly encourage BEREC to focus on pricing, non-price issues (non-discrimination) and business services, which are central to achieving effective competition and a functioning single market for communications.

Cost methodologies/regulatory accounting (para 3.3.1): Setting wholesale prices correctly is vital in achieving fair retail prices, competition and efficient investment for both current and next generation services. Yet, despite the importance of this aspect of regulation, ERG/BEREC reports demonstrate that very divergent approaches have been taken by the NRAs. In addition, Commission figures show that the resulting wholesale prices vary more widely than would be expected from cost differences alone. ECTA supports the need for concrete guidance on this issue which covers:

- Best practice for current generation pricing: Studies indicate that in nearly all markets across Europe even leading entrants remain subscale and their profit margins persistently trail those of dominant firms, raising questions about the sustainability of even current levels of competition in the market. Prices for wholesale inputs from SMP operators may be excessive in some countries and this needs to be actively addressed both to strengthen current generation competition and enable entrants to achieve the necessary scale to allow them to invest further.
- A coherent approach between current and next generation network pricing that avoids overcompensation for assets that may have been fully depreciated, ensures that investors can make higher returns for any potentially risky fibre investments than are currently made on the copper network and avoids charging customers/competitors and compensating dominant firms for NGA investments they have not made.
- Rules during the parallel operation of copper and fibre networks to prevent price instability and anti-competitive pricing strategies by dominant firms during the transition to NGA and provide pro-competitive incentives for rapid "switch-off" of the copper network.
- Key principles for margin squeeze tests to avoid market pre-emption and foreclosure strategies both on new and convergent services.
- Key principles for risk premiums and for discount regimes for FTTH networks, to avoid unduly divergent approaches by NRAs.

Non-discrimination (para 3.3.2): Despite non-discrimination being applied as a remedy following nearly every SMP finding, there is significant evidence (including from the ECTA Regulatory Scorecard and the Analysys Mason March 2010 Study "Europe's Digital Deficit") that very few countries have elaborated what it means or enforced it effectively in practice. ECTA supports the

need for guidance on this crucial element of ensuring effective “non-price” regulation, which should cover:

- “Service” non-discrimination: rules to ensure SMP wholesale inputs, whenever adapted or upgraded, are provided at the same time to competitors to enable simultaneous launch. Prevention of non-compliant retail offers by dominant firms.
- Same terms and conditions: identifying a minimum set of “key performance indicators” to measure whether the same terms and conditions have been offered to competitors in practice. In this context, we encourage BEREC to collect and publish internal and external KPIs for all the main parameters such as ordering times, fault incidence, repair times etc.
- “equivalence of input”: identifying circumstances in which the use of the same information and ordering systems would be cost-effective eg when new systems are installed with NGA/NGN
- Functional separation: identifying harmonised core principles for the effective application of functional separation used as a last resort remedy. It is worth noting in this context that we do not believe that the draft BEREC common position on functional separation fulfils this need since it supports very differing applications of the separation approach without assessing whether these different approaches delivered results in practice. A last resort remedy should be unequivocal in scope, and have dissuasive effect. BEREC should identify best practice in this area.

Business services (para 3.5):

Europe’s major corporations have specific needs that are fundamentally different from the needs of residential users. First, many business customers operate out of multiple locations, across multiple countries. All these locations need to be connected and to be able to communicate with each other. Second, in order to rationalise the management of their communication requirements and to minimise transactional costs, business users in the EU tend to procure their communication needs from a single provider able to provide the full range of services they need. Third, business users regard communication services as a key production input performing mission-critical functions. Accordingly they demand highly reliable, scalable, consistent, customised services so that IT applications can work effectively across different sites. Whether in the financial services sector, ICT, logistic, e-commerce, manufacturing, petro-chemical or retail sector, all multinational business customers rely on cross-border communication services to increase efficiency, improve productivity, manage supply chains and compete on global markets. At present, however, European markets for Business Service providers are fragmented by diverging regulatory environments in the Member States.

Through its survey of business users (primarily large multi-national companies) in January 2010, BEREC clearly confirmed that there was a problem with the provision of services to high-end business customers in Europe. In particular, the survey found that less than half of the respondents had a choice of more than 2 credible suppliers (even less where companies sourced services from multiple suppliers) and that more than half of regulators had failed to ensure the availability of access products demanded by business users and providers across Europe (Ethernet leased lines and premium SLAs on services such as bitstream). It is extremely disappointing therefore that in its recent consultation on market definition issues for business services, BEREC fails to refer to its own

survey or acknowledge the existence of a problem, and that BEREC suggests that no substantive common approach is needed in this area.

ECTA's business service provider members unanimously state that there is a retail market for the provision of high-end services to businesses which is cross-border in nature, and that, whilst the wholesale market is national due to the fragmentation in the ownership of essential infrastructure across Europe, they demand identical wholesale inputs in every country across Europe. We call on BEREC in 2011 to deliver guidance on a harmonised approach by regulators for this important market (worth more than €60bn pa according to Gartner and with an even greater impact on the European economy). This guidance should include EU-wide parameters for business-grade products and a common approach to market analyses and remedies relating to businesses including, but not limited to markets 5 (bitstream) and 6 (terminating segments of leased lines). We will provide more details in our upcoming response to the BEREC consultation.

Whilst there is a clear access problem for multi-national business providers, ECTA members believe that this issue is not only cross-border in nature. BEREC should also encourage NRAs to look more closely at their national markets for services to business clients where incumbents usually retain substantially higher market shares than for residential broadband – often more than 70 to 80%.

Administrative barriers to multi-national business provision should also be addressed

In addition to addressing competition issues, BEREC should also seek greater consistency in administrative arrangements for Business Services as complying with 27 different General Authorisation regimes represents an unnecessarily onerous barrier to doing business in the Single Market.

Indeed, the amended version of Article 3 of the Authorisation Directive states that "undertakings providing cross-border electronic communications services to undertakings located in several Member States shall not be required to submit more than one notification per Member State concerned".

BEREC should work to review the current authorisation arrangements for providers of business services (or cross-border services provided to businesses), and to prepare recommendations for improving the harmonisation of those arrangements across Member States. The emphasis should be on streamlining authorisation arrangements and keeping associated compliance obligations to a minimum.

In addition to these three priority items, we agree that BEREC will play a vital role in establishing a framework for roaming regulation and access to value added services. On these latter points we would appreciate if the following could be taken into account:

- **Roaming (para 3.4):** ECTA agrees that continued action is needed to ensure that roaming functions properly in the interest of consumers. However, the particular focus of BEREC should be to support the Commission in identifying solutions that will address structural problems that are preventing the creation of a fully competitive market from which consumers can benefit. We will separately submit a paper on roaming that focuses on wholesale barriers that, if addressed, could help to enable later entrants in mobile markets to

make more attractive retail offers, and facilitate the delivery of pan-European mobile services.

- **Access to value added services (para 3.6).** ECTA agrees that this technical issue deserves more attention at a European level.

Best practice documents should be updated, properly monitored (para 3.1)

ECTA strongly supports the best practice documents issued by BEREC and would like to see the continuation, strengthening and, where necessary, updating of this guidance, preferably with a focus on the following:

- **Wholesale local access:** adjustment to reflect next generation access remedies (ie duct access and fibre unbundling), and availability of business-grade SLAs
- **Wholesale broadband access:** adjustment to reflect next generation developments (ie that remedies should cover all applicable speeds within the relevant market where SMP has been found), and to reflect the need for differentiated consumer and business-focused remedies. In particular creation or replication of triple-play offers is necessary in the residential segment, whilst high grade low contention services are more relevant in the business segment. Aggregation points also differ for consumer and business due to the differing economies of scale.
- **Leased lines:** Current guidance is still relevant. However, it could be clarified that remedies should include all applicable speeds in the market where SMP has been found, and more detail could be given on the specifications of the Ethernet interface to facilitate a common approach across Europe.

There is an urgent need, for all the best practice documents, to step up efforts to ensure that they are being effectively followed by regulators. For example, the January 2010 survey concerning business provision found that fewer than half of regulators had mandated Ethernet interfaces for wholesale leased lines despite the fact that this was included in ERG best practice guidance since 2007. BEREC could consider publishing tables on certain key best practice principles clearly showing whether these have been followed or not by each regulator.

BEREC should also examine whether it would be useful to provide best practice guidance on the treatment of VoB within NRA's market analyses especially in relation to call origination and fixed access markets.

Focus should be on complementing and implementing rather than interpreting Commission recommendations (para 3.2)

We note that BEREC proposes to issue internal guidance concerning the application of Commission Recommendations on termination rates and Next Generation Access. ECTA is concerned that such guidance, particularly if unpublished, could weaken regulatory certainty. Instead of producing guidance on interpretation which could potentially conflict with the Recommendation itself, we

believe that it would be more useful for BEREC to focus on clarifying practical elements of the Recommendations such as product definitions in the case of the NGA Recommendation or practical examples of where pricing and discounting regimes may or may not be discriminatory or otherwise inappropriate, also to avoid undue differences in the approaches taken by NRAs to risk premiums and volume and term discounts.

Concerning cost methodologies used for fixed termination rates, it is important that fixed origination rates (for carrier selection, pre-selection and access to non-geographic numbers) are calculated consistently with the addition only of such additional costs as may be relevant to the origination of the service. It is unclear why origination should attract more common costs than the directly comparable termination service.

BEREC has correctly identified emerging challenges, but these should not overshadow Framework implementation issues

We agree that the three issues raised under “emerging challenges” are the most relevant for BEREC’s review in 2011. However, because BEREC members may not all have full control or responsibility over the deliverables in these areas, we believe that it is important that these policy questions do not overshadow BEREC’s focus on key implementation issues. We nonetheless offer the following observations on the subjects concerned:

- **Promotion of broadband (para 4.1):** Of all the forward-looking initiatives, this is one where we believe attention from BEREC would be most useful. In particular, we would welcome guidance on how SMP and publicly funded “open access” regimes could be better aligned and co-ordinated. For example, we have previously advocated that publicly funded schemes should fall under the remit of the NRA to ensure that open access is coherently provided. We also agree that the impact of retail schemes and discounts on competition in the broadband market should be assessed. Lastly, it is important for BEREC to give its independent view on the effect on telecoms development of telecoms-specific taxes that have been proposed or introduced in several countries such as France, Spain and Hungary. Such taxes can also have a disproportionate effect on competitors due to, eg. the high outpayments made by competitors for wholesale access as a proportion of their revenues, tax instruments which are independent of revenue (e.g. tax per base station), disproportionately affecting competitors, etc. so these aspects could usefully be examined.
- **Network neutrality (para 4.2):** ECTA strongly supports the 5 principles advocated by Vice-President Kroes, namely: freedom of expression; transparency (re. practices of operators); fair competition (i.e. not allowing traffic management practices to discriminate in ways that harm competition); promotion of investment in efficient and open networks; and support for innovation (ensuring opportunities for new efficient business models and innovative businesses). We also agree with statements made by Vice-President Kroes that the best “structural” solution to ensure that consumers are not disenfranchised is to address upstream bottlenecks so there is effective competition and choice in the retail market. In this context, we would see the key role for BEREC as delivering effective competition in telecoms markets. In addition, if the Commission decides following its consultation that EU-wide guidance is necessary, BEREC will play a valuable role in contributing to this guidance on the subjects mentioned.

- **Spectrum management (para 4.3):** Whilst observing that – unfortunately – not all NRAs have responsibility for spectrum management, ECTA supports BEREC’s proposal to assess conditions for attribution of the digital dividend spectrum. Given the remit of NRAs to promote efficient investment and competition, we would encourage BEREC to examine these issues from that perspective. In addition, BEREC could usefully highlight to the Council and Parliament the importance of retaining in the RSPP measures to ensure that spectrum is assigned in a pro-competitive manner.