

BEREC draft workplan 2010: ECTA comments

Summary

ECTA thanks BEREC for the opportunity to comment on its draft work programme for 2010. In what promises to be a busy year institutionally as well as for policy and implementation, it is important for BEREC to focus on delivering a few concrete results for core issues that will affect the sector and support the Commission in identifying their key actions as well as finalising the NGA Recommendation.

We suggest to prioritise the following six issues that are particularly relevant for the coming year because they will impact the industry significantly as well as influencing initiatives high on the agenda of the European Commission:

- **Guidance on fixed access costing methodologies**

Despite 10 years of liberalisation significant differences remain in most countries in the market positions and financial situation of incumbents compared with entrants and progress towards competition in broadband has halted with incumbents maintaining an average of nearly 50% share of the market. In order to ensure a level playing field and incentivise fibre investment consistent fixed access costing methodologies should be applied across Europe, which eliminate any excessive returns made on legacy copper networks and thereby provide appropriate forward-looking incentives for dominant firms to upgrade networks. Prevention of margin squeeze including in bundled environments should also be addressed.

- **Guidance on non-discrimination and functional separation**

Detailed guidelines on the enforcement of the key concept of non discrimination including circumstances where the new power of functional separation may be appropriate.

- **Next generation access**

BEREC should provide continued input to ensure the publication of an effective Commission Recommendation and should rapidly prepare guidelines on NGA-based wholesale products for the consumer and business segments.

- **Business services**

BEREC should issue specific guidelines to ensure the availability of consistent fit-for-purpose business products across the EU given the economic importance of this segment of the market.

- **Conformity with ERG common positions**

BEREC should carry out its conformity exercise in a manner that provides sufficient incentives for compliance in circumstances where surveys show that best practice recommendations have not been adopted.

- **Convergence**

BEREC should continue working on convergence and in particular examine the impact of bundles on retail markets and the corresponding consequences on market definition and appropriate remedies to ensure competition and innovation in converged services.

More detailed comments are provided below on each subject.

1 Improving Harmonisation

International Roaming

ECTA welcomes that BEREC will be analysing methods other than price regulation which could be used to create a competitive internal market for roaming. ECTA's mobile challenger and fixed members would encourage BEREC explicitly to examine measures which could increase competition in pan-European mobile services and improve entry to the mobile market and consumer choice in roaming services. Such measures would help existing and new operators to build a greater cross-border footprint enabling them to compete more effectively in the provision of roaming services.

Next Generation Networks – Access

The ERG's work on the developments of NGA networks has been very useful and we support that BEREC plans to continue this monitoring and updating exercise. In this context it would be useful to include data on the development of multifibre networks.

Multi-fibre is in principle a positive architecture which can provide further options for competitive development. However, the existence of multi-fibre does not affect the dominance of the firm which has installed the multi-fibre. Moreover, economic models from WIK suggest that, even where costs are shared perfectly between operators on a regional basis, multi-fibre is unlikely to lead to economically viable and effective competition except between multiple operators with similar penetration prospects in dense areas. In this context, multi-fibre should be pursued where it delivers clear benefits but without assuming a competitive outcome in advance.

Implementation Issues related to the Commission Recommendation on NGA

Whilst ECTA is pleased that BEREC plans to work on the implementation of the NGA Recommendation we encourage BEREC to prioritise providing input to the Commission before the NGA Recommendation is finalised in order to make sure that it takes into account existing ERG positions. In particular the NGA Recommendation

- should be in line with the market analysis process and not include pre-defined presumptions on the effectiveness of competition,
- should not promote discriminatory pricing regimes and
- co-investment scenarios that are capable of reducing the existing level of competition.

Conformity with ERG Common Positions

ECTA welcomes and supports BEREC's initiative to take into account the needs of competitive business service provision when reviewing the ERG Common Positions (CP) on wholesale broadband access, wholesale unbundled access, and wholesale leased lines and update these CPs accordingly.

It would be also useful to understand the more concrete consequences of this exercise, in particular with regard to those cases where divergences and non-conformity to the ERG's Common Positions is found. Are the non-conforming NRAs going to be named and requested to bring their decisions in line with the ERG CPs within a given deadline? ECTA suggests the following approach:

- Report publicly on the degree to which there has been conformity with common positions, consult stakeholders on whether they agree with this assessment, and

explain what measures BEREC proposes to take to reduce non-conformity including for example setting deadlines by which it expects NRAs to be in conformity or encouraging action by the Commission should conformity not be achieved.

Regulatory Accounting

Under current approaches, cost-orientation of remedies such as unbundling has made a substantial contribution to competition, but still failed to achieve fully competitive markets in many markets or to enable competitors to make a fair return on broadband that is comparable with that achieved by incumbents. Now, with clarity that copper networks will not be renewed, except with fibre, it is particularly important to ensure that pricing has been correctly and consistently set, with asset lifetimes that genuinely reflect the longevity of the networks, which can average 40 years. Measures to prevent excessive returns on copper are also vital to ensure that the correct investment incentives (ie relative returns between copper and fibre) are provided for deployment of fibre by dominant firms and to ensure that competitors are able to achieve sufficient cashflows in broadband provision to enable them to make further investments in an NGA environment. This exercise could also usefully encompass costing across the value chain with a particular focus on prevention of margin squeeze, including in situations where the retail product may be bundled. Whilst costing is mentioned in the context of 'regulatory accounting', the scope appears relatively narrow, insufficient priority and attention has been given and no concrete recommendations are envisaged during the course of 2010.

We encourage BEREC to adopt detailed guidelines to improve the accuracy and coherence of costing methodologies across Europe for copper and copper relative to fibre.

In conjunction with ensuring consistent costing methodologies, a coherent approach by NRA's regarding regulatory accounting rules is needed, especially in key wholesale access markets. We would strongly recommend much greater attention on providing guidance, monitoring and enforcement on important accounting mechanisms including publication within a reasonable timeframe.

2 Emerging challenges

Business services

ECTA represents a significant number of operators which specialise in the provision of services to multi-national businesses. These operators unanimously highlight that unavailability or inadequate provision of access products suited to businesses across Europe hampers their ability to cost-effectively meet the demands of their customers for secure networks connecting multiple sites nationally and across Europe. We therefore urge BEREC to go beyond reporting and:

- Include in the 2010 work programme specific deliverables including a consultation with guidance on how NRAs should approach business service issues when considering markets for broadband and calls in addition to ensuring the availability of Ethernet-based leased line terminating segments.
- Specifically ECTA's members request the specific (nationwide and pan-European) nature of business services to be taken into account in the market definition and the availability of business-grade services with appropriate service level guarantees and in the case of broadband, technical characteristics which allow low contention rates, greater symmetry and the provision of multiple VLANs. These requirements apply equally for NGA.

In particular differentiated remedies are needed for business service provision in the Wholesale Broadband Access (WBA) and Wholesale Line Rental markets tailored for high end business use.

Where the mass market segment of these markets is found competitive, NRAs should assess whether that finding applies both to the consumer and business segments of the market and maintain regulation in the business segment if it is not effectively competitive.

Convergence

Convergence is indeed an important topic, which should be further examined by BEREC. In particular, we would urge the ERG to:

- Examine trends towards bundled products which may involve two (VoB and broadband), three (VoB, broadband and TV) or four (VoB, broadband, TV and mobile) services and assess and ensure the replicability of each element included in the bundle.
- Highlight the implications for such developments on:
 - The definition of wholesale broadband access including the need for multicast capability
 - Margin squeeze tests when conducted in a bundled environment (this could alternatively be addressed in the context of wider guidelines on costing methodologies as suggested above). In this context examine the impact of the wholesale pricing method used on the practicability of carrying out margin squeeze tests on bundles. It seems to be increasingly difficult to apply a margin squeeze test on bundled products if the wholesale prices are not cost based.
 - Innovation and competition in converged services and the possibility for competitors to meaningfully differentiate their products rather than merely resell the offers of the SMP operator. NRAs should therefore take a bottom up approach instead of top down when assessing and regulating bundles.
 - Potential knock-on competitive effects of exclusive television rights on neighbouring sectors

3 Changes to the legal regulatory framework

Functional separation

ECTA welcomes BEREC's new work item on guidelines regarding the implementation of the functional separation provisions of the revised Telecoms Framework.

We encourage BEREC to broaden the scope of this exercise to the enforcement of the non-discrimination obligation and elaborate on the implementation of functional separation in this context as a new enforcement tool.

Discrimination remains a core problem in most wholesale markets and is becoming even more pronounced with incumbents merging their fixed and mobile arms and increasingly offering bundled products. The non-discrimination obligation is imposed by NRAs on most SMP operators, but the effectiveness of its enforcement is diverging across Europe.

Therefore it would be helpful for BEREC to issue specific guidelines on how the concept of non discrimination should be elaborated and effectively enforced, in which circumstances functional separation may be appropriate and if so, what may be effective means to apply it.