

## **BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES ON THE MARKET FOR WHOLESALE (PHYSICAL) NETWORK INFRASTRUCTURE ACCESS (INCLUDING SHARED OR FULLY UNBUNDLED ACCESS) AT A FIXED LOCATION IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET**

Consistent with Article 2(a) of the BEREC Regulation, one of BEREC's key roles is to develop best practices and disseminate these among National Regulatory Authorities (NRAs). The best way to achieve this and promote consistent regulatory approaches is through common positions. This Common Position provides best practice remedies for dealing with competition issues in respect of key wholesale access products in the market for wholesale (physical) network access (market 4) where a position of SMP has been identified. It complements the general guidance given on choice of SMP remedies included in the revised ERG Common Position on Remedies<sup>1</sup>. Application of this Common Position will assist NRAs to design effective remedies in line with the objectives of the regulatory framework. However, this Common Position does not alter, and is without prejudice to, the powers conferred, and obligations imposed, on the NRAs under the Framework Directive and the Specific Directives. It is therefore not a substitute for the responsibilities on the NRAs to show (among other things) that SMP remedies are based on the nature of the problem identified, proportionate and justified in light of the policy objectives laid down in Article 8 of the Framework Directive<sup>2</sup>.

The CP dating from 2007<sup>3</sup> needs to be updated and extended to take account of NGA roll-out which raises some new dimensions. The multiplicity of architecture has led to a number of different and complex access products imposed in the market for wholesale (physical) network infrastructure access, namely ducts, in house cabling, dark fibre, terminating segment, fibre unbundling and, sub-loop-unbundling. The revision will be based on BEREC's previous work on NGA, starting with the NGA opinion leading up to the Implementation report of the NGA Recommendation<sup>4</sup>. These documents as well as the CPs are based on the ladder of investment principle. Regulated access at different rungs of the ladder promotes competition and investment, thus fostering a competitive NGA roll-out.

NRAs are required under Article 3(3) of the BEREC Regulation to take the utmost account of any regulatory best practice adopted by BEREC, including the practice set out in this common position. Therefore, in carrying out its tasks (such as commenting on draft measures of NRAs concerning the imposition of remedies), BEREC expects NRAs to explain in their notified draft measures the steps they have taken to:

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<sup>1</sup> ERG (06) 33 (Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework).

<sup>2</sup> Article 8(4) of the Access Directive.

<sup>3</sup> ERG (06) 70 Rev1 (Common position on Wholesale local access)

<sup>4</sup> ERG (07) 16 Rev 2 (ERG Opinion on Regulatory Principles of Next Generation Access), ERG (09) 17 (Report on NGA - Economic Analysis and Regulatory Principles), BoR (10) 08 (BEREC Report NGA – Implementation Issues and Wholesale Issues), BoR (10) 25rev1 (BEREC Opinion to the Draft Recommendation on regulated access to Next Generation Access Networks), BoR (11) 06 (Next Generation Access – Collection of factual information and new issues of NGA roll-out), BoR (11) 43 (BEREC Report on the Implementation of the NGA-Recommendation)



**BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES ON THE MARKET FOR WHOLESALE (PHYSICAL) NETWORK INFRASTRUCTURE ACCESS (INCLUDING SHARED OR FULLY UNBUNDLED ACCESS) AT A FIXED LOCATION IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET**

Objective	Competition issue which arises frequently	Best practice remedies
Assurance of access	<p><b>SMP operators may deny access to their networks.</b> There should be reasonable certainty of ongoing access on reasonable terms in order to give competitors confidence to enter the market.</p> <p><b>SMP operators may refuse to develop new access products on request from an alternative operator.</b> SMP operators may have an incentive to deny access by either charging excessive prices and/or delaying development/implementation of new products and services that are feasible and reasonable (such issues which may arise if SMP operators claim they did not obtain the appropriate information from the alternative operator in relation to the new products/services they are being asked to develop by alternative operators).</p> <p>SMP operators do not grant access in suitable forms to allow competitors to offer either standalone broadband services or combined</p>	<p><b>BP1</b> NRAs should impose the appropriate and proportionate combination of access products that properly reflect their national circumstances. This involves reflecting the actual competitive situation including different architectures (e.g. FTTH/B, FTTC). In doing so NRAs should simultaneously look at access products in markets 4 and 5 and take into account the effects of symmetrical regulation if it has been imposed.</p> <p><b>BP2</b> NRAs imposition of remedies should be based on the ladder of investment principle.</p> <ul style="list-style-type: none"> <li>• The ladder consists of access products at specific access points and wholesale products to reach these access points<sup>6</sup>.</li> <li>• The access products have a geographic/architectural dimension as well as a dimension of product characteristics.</li> </ul> <p><b>BP3</b> NRAs should encourage infrastructure competition at the deepest level where it is reasonable, to reduce barriers to entry.</p>

<sup>6</sup> A diagram of the ladder of investment can be found in the glossary.





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access at the MPoP replicating as much as possible physical unbundling (for details on the product see CP on Bitstream access remedies).

**BP7 Unbundled access to the copper loop**

- **BP7a** NRAs should impose unbundled access to the copper loops at the MDF.
- **BP7b** In the case of FTTN, the copper sub-loop is properly accessed at a concentration point downstream of the MPoP (mostly the cabinets). NRAs should consider copper sub-loop unbundling in combination with an appropriate product to reach the cabinet when choosing the appropriate combination of remedies.
- **BP7c** NRAs may consider imposing an active remedy providing access at the MPoP replicating as much as possible physical unbundling (for details on the product see CP on Bitstream access remedies) in the case of FTTN.

**BP8** In case access to in-house cabling is not included in the unbundled loop it should be granted if applicable under private law.<sup>10</sup>

**SMP operators do not provide suitable wholesale products to connect the access point to the MPoP (right side of the ladder of investment).**

***Access products to reach access point***

**BP9** The closer the access point is to the end-user the more essential the access product to reach the access point becomes. NRAs should impose an obligation for an access

<sup>10</sup> However, it might be reasonable to use symmetrical regulation (Art 12 AD). For example, at the time of writing access to in-house cabling is imposed on a symmetrical basis by national law or transposition of Art 12 AD in Croatia, under consideration in Italy.



**BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES ON THE MARKET FOR WHOLESALE (PHYSICAL) NETWORK INFRASTRUCTURE ACCESS (INCLUDING SHARED OR FULLY UNBUNDLED ACCESS) AT A FIXED LOCATION IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET**

**Ethernet backhaul**

Where necessary NRAs should impose dark fibre/leased lines including Ethernet backhaul as an independent measure or as a subsidiary measure of duct access (i.e., in case there are no ducts, there is no space in the ducts or duct access is not viable) supplementing the FTTH and FTTN access remedies to connect the access point to a point higher in the network, e.g. MPoP.<sup>12</sup>

**BP14** NRAs should require SMP operators to provide network access to an alternative operator where that alternative operator reasonably requests it. It is advisable that such requests are formally documented. NRAs should require SMP operators to grant access promptly following receipt of the request from an alternative operator.

**BP15** If access to new products and services is not generally included through the review of the Reference Offer (RO), NRAs should impose an obligation on SMP operators requiring them to publish the process specifying how they will deal with requests in relation to such new products and services on existing infrastructure.<sup>13</sup>

- **BP15a** The process should detail (amongst other things):
  - how the request should be made,
  - the information the SMP operators require to assess feasibility of the new product being

<sup>12</sup> For example, in Italy the NRA regards access to the splitter as a bundle with dark fibre access (from the splitter to a concentration higher in the network (e.g. the MPoP)) as in an 'end to end access product'.

<sup>13</sup> A new product and service could include a new speed, a new (faster) repair service etc.





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cabinet, concentration point) and other associated facilities

necessary to make the access offer effective for the entrant to compete effectively on the retail markets.

**SMP operators may not provide co-location at a cost faced by themselves and at a scale and quality suitable for the needs of the alternative network operator.**

**SMP operators may hinder the reuse of infrastructure or services already deployed by alternative operators.** With this practice, SMP operators may raise their competitors' costs, as competitors would be forced to purchase additional ancillary services across different regulated markets (irrespective of levels of utilisation).

Level playing field

**Alternative operators may not be able to compete on a level playing field which may result in SMP players**

- having an unfair advantage;
- having unmatched advantage, by virtue of their economies of scale and scope, especially if derived from a position of incumbency;
- discriminating in favour of their own group business (or between its own wholesale customers), either on price or non-price issues;

the regulator to support viability of the access products mentioned above.

- **BP16a** NRAs should ensure that the remedies allow the optimised use of alternative operators' existing infrastructures.
- **BP16b** NRAs should ensure that these remedies allow co-location and other associated facilities to be used efficiently. In particular, NRAs should ensure that usage is not artificially segregated by product or market.

**BP17** NRAs should impose a general obligation of non-discrimination.

**BP18** NRAs should further clarify how the non-discrimination obligation is to be interpreted on a case-by-case basis.

- **BP18a** In cases where a general non-discrimination obligation (imposed under BP17) 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



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Avoidance of **SMP operators may have an incentive to discriminate in favour of their own downstream arms.** Alternative operators need assurance that, as downstream markets develop, suitable wholesale products will be available in time to permit them to offer a new, enhanced or cheaper downstream service (e.g. higher speed internet access) at the same time as the introduction by the SMP player.

**SMP operators may commission new infrastructure which alternative operators are not able to use.** This may be necessary for the provision of new retail services, but may not allow all market players the same opportunity to compete for the new business (especially true if new infrastructure may be deliberately designed to obstruct access and prevent the provision of relevant new wholesale services to alternative operators).

**SMP operators may deny access to key information relevant for alternative operator's roll-out of NGA.** A denial of access to information has a new dimension for NGA roll-out because we deal with access to "newly" rolled out networks instead

field.

**BP21** NRAs should put in place a regime which ensures the (technical and economic) replicability of the new downstream services introduced by SMP players.<sup>16</sup>

- **BP21a** In relation to economic replicability, NRAs should ensure that the methodology and/or the principles applied to ensure replicability are made public beforehand.
- **BP21b** In cases where (technical and/or economic) replicability cannot be achieved by using the available wholesale products, SMP operators should be required either to amend the existing wholesale product or to make a new wholesale product available.

**BP22** In cases where SMP operators need to provide a new wholesale product, NRAs should impose an obligation on SMP operators regarding the timely availability of relevant information according to lead times (i.e. notice periods) defined on a case-by-case basis. The relevant information should include information on prices, terms and conditions and technical characteristics of the new wholesale product. The information provided should allow alternative operators to effectively assess the impact on their own processes.

**BP23** NRAs should ensure that alternative operators have the ability to influence the decisions regarding characteristics of new wholesale products and new interfaces.

<sup>16</sup> For purely passive products timely access to the wholesale inputs may only be relevant in the case when access is first requested. See also BoR (12) 10

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of existing networks.

**BP24** Where relevant, NRAs should impose a requirement on SMP operators in relation to lead times (i.e. notice periods) regarding the removal of existing wholesale inputs.

**BP25** NRAs should consider which information on the SMP-operator's 'newly' rolled-out NGA network is essential to competitors and should be available well in advance on a non-discriminatory basis.<sup>17</sup> This may include information per geographical area - periodically updated if necessary - on:

- The planning and status of the network roll-out;
- The physical locations of access points (e.g. MPoPs), the area covered by the MPoP and the number of (potential) customers per MPoP;
- Relevant parameters regarding the architecture of the network.

Transparency

**SMP operators may not provide sufficient clarity or transparency on the terms and conditions of access.**

**SMP operators may delay provision of the RO to alternative operators.** Doing so would, in turn, delay access to their networks.

**When developing their RO, SMP operators may not take into account any reasonable views from wholesale customers.** As a result the Reference Offer may not be fit for

**BP26** NRAs should require SMP operators to provide clarity of terms and conditions of access (including those relating to relevant ancillary services) by publishing a Reference Offer (RO), the key elements of which should be specified or approved by the NRA. All material contractual terms and conditions which are known or knowable at the time of publication should be covered clearly.

- **BP26a** NRAs should require SMP operators to take into account any reasonable views of wholesale customers in their RO, in particular regarding the evolution of the services offered.

<sup>17</sup> See BoR (11) 43, BEREC Report on the Implementation of the NGA-Recommendation, p. 68/69



**BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES ON THE MARKET FOR WHOLESALE (PHYSICAL) NETWORK INFRASTRUCTURE ACCESS (INCLUDING SHARED OR FULLY UNBUNDLED ACCESS) AT A FIXED LOCATION IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET**

<p>Reasonable quality of access products - technical issues</p>	<p><b>SMP operators do not provide access products of reasonable quality.</b></p> <p><b>SMP operators arbitrarily limit forms of access (e.g. to whatever suits their own business) or provide forms of access which are over-specified for many players.</b></p>	<p>access) and which might affect the provision of services.</p> <p><b>BP28</b> NRAs should consider imposing an obligation to set up an infrastructure database for the use of civil engineering infrastructure at least containing all ducts of the SMP operator. The database should contain organisation and technical characteristics of civil engineering infrastructure, their geographic location. Available space in ducts may be considered to be part of such a database.</p> <p><b>BP29</b> NRAs should choose appropriate methods of control including:</p> <ul style="list-style-type: none"> <li>(a) an obligation to publish a RO (see BP26) which includes the technical parameters of access and which is periodically evaluated by the NRA and/or</li> <li>(b) an obligation to meet all reasonable requests for access.</li> </ul> <p><b>BP30</b> NRAs should require that detailed information about the characteristics of the access product is available to the alternative operator (such as length of the access loop, type of cabling and/or attenuation). For each site (at MDF level, street cabinet or concentration point) this includes which technologies are allowed.</p> <p><b>BP31</b> NRAs should require that appropriate rules are in place to prevent mutual interference of signals.</p>
<p>Reasonable quality of access products – operational aspects</p>	<p><b>SMP operators may have an incentive to discriminate in favour of their own downstream operations in relation to the quality of wholesale access products.</b> As a result, access products may not be of</p>	<p><b>BP32</b> NRAs should require SMP operators to provide a reasonable defined level of service.</p> <ul style="list-style-type: none"> <li>• <b>BP32a</b> Service Level Agreements (SLAs) should cover specific service areas. Service areas where SLAs are</li> </ul>

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reasonable quality and service levels may not be comparable with those provided by the SMP operators to their own downstream businesses.

most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).

- **BP32b** SLAs should be made available to wholesale operators. To ensure maximum transparency and comparability of the terms provided by SMP operators to alternative operators and their downstream arm, all SLAs could be made available to all relevant wholesale customers (including those outside from a specific Member State). For example, SMP operators could make them available on demand or automatically publish these on their web-site (as part of their RO).
- **BP32c** NRAs should take oversight for the process of setting SLAs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.
- **BP32d** SLAs should take into account differences in customer requirements.

**BP33** NRAs should impose a generic requirement on SMP operators to provide Service Level Guarantees (SLGs).

- **BP33a** SLGs should cover all necessary specific service areas. Service areas where SLGs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).
- **BP33b** SLG payments should be made without undue delay and should be proactive in nature. That is, with a pre-established process for the payment and billing of the SLGs among operators and without the need for



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alternative operators to request the intervention of any third party i.e. NRAs or courts.

- **BP33c** NRAs should take oversight for the process of setting SLGs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.
- **BP33d** SLGs should be made available to all alternative operators irrespective of the size of their purchases.

**BP34** NRAs should impose a generic requirement on SMP operators to provide Key Performance Indicators (KPIs) as a means to monitor compliance with a non-discrimination obligation and ensure that SMP operators fulfil their SLAs (unless there is evidence that this is unnecessary or would not be cost-effective).

- **BP34a** KPIs should cover all necessary specific service areas. Service areas where KPIs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).
- **BP34b** 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 their downstream businesses and b) the industry average.
- **BP34c** NRAs should take oversight for the process of setting KPIs. NRAs should determine the level of their

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**BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES ON THE MARKET FOR WHOLESALE (PHYSICAL) NETWORK INFRASTRUCTURE ACCESS (INCLUDING SHARED OR FULLY UNBUNDLED ACCESS) AT A FIXED LOCATION IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET**

		<p>involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.</p>
<p>Assurance of efficient and convenient wholesale switching</p>	<p><b>SMP operators have an incentive to discriminate in favour of their own downstream operations.</b> This may result in wholesale customers not being able to switch wholesale products and/or wholesale providers with the minimum of delay and/or disruption.</p> <p>Charges for migration should be reasonable and should not deter acquisition of existing customers or climbing of the ladder of investment.</p>	<p><b>BP35</b> NRAs should impose obligations on SMP operators in order to ensure wholesale switching processes are speedy and efficient.</p> <ul style="list-style-type: none"> <li>• <b>BP35a</b> NRAs should require that the maximum allowed downtime during wholesale switching is the lowest possible for the different needs of specific wholesale customer segments.</li> <li>• <b>BP35b</b> NRAs should require that the price of the switch does not act as a barrier to the wholesale switching processes happening.</li> <li>• <b>BP35c</b> Where necessary, NRAs should put in place specific measures to facilitate bulk wholesale switching processes and ensure these are non-discriminatory.</li> <li>• <b>BP35d</b> NRAs should require that the transaction time required to process wholesale switching requests is as low as possible based on the nature and size of the request.</li> <li>• <b>BP35e</b> NRAs should require SMP players to introduce SLAs/SLGs and KPIs to ensure the efficiency of the switching process, unless there is evidence that these are unnecessary or not cost-effective.</li> </ul>
<p>Assurance of efficient migration processes from legacy to</p>	<p><b>SMP operators may not provide migration procedures enabling the competitors to provide retail services based on new</b></p>	<p>Phasing out of legacy network may relate to</p> <ul style="list-style-type: none"> <li>• Network infrastructure impacting on e.g. locations of access products (e.g. MDF)</li> </ul>



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will also be available the reasonable notice period will be shorter than in a scenario where the NGA-access product will be available at a different access location, where competitors do not yet have a physical presence.

**BP40** A notice period of 5 years for decommissioning MDFs may be appropriate. A shorter period may be appropriate if:

- all investments by alternative operators are already written off, or
- the phase out was known at the time of investment or
- the stranded investment is compensated by the incumbent, or
- an alternative is available which is equivalent to the legacy access product on NGA network.

Fair and coherent access pricing

**Alternative operators in the market may face uncertainty as to the price of wholesale network access.**

**SMP operator may create arbitrage opportunities between different wholesale inputs.** SMP operators may have an incentive to set prices for wholesale local access which are not coherent with the prices of other related services. This may dis-incentivise efficient investment by alternative operators and create arbitrage opportunities.

**SMP operators may margin squeeze.** Whether or not there is an explicit pricing

**BP41** NRAs should ensure that with reasonable certainty the price of access will permit an efficient entrant to compete with the SMP player. The access price should also be set in a way which is coherent with the prices for other (broadband and narrowband) related services.

**BP42** When determining their price regulation NRAs need to consider that it should incentivise both efficient investment and sustainable competition.

**BP43** Where appropriate and proportionate, NRAs should require SMP operators to provide regulated products based on an explicit pricing obligation. Price control obligations can be implemented in different degrees, ranging from a requirement for prices to be cost-oriented and subject to rate approval through to specific charge controls such as a price

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obligation, SMP operators may still have an incentive to margin squeeze in relation to downstream products. Furthermore, alternative operators may face uncertainty regarding the principles and methodology for the assessment of margin squeeze which in turn could result in complaints not being resolved quickly.

### **SMP operators offer pricing schemes / prices not allowing alternative operators to compete on a level playing field and/or enabling a viable business case.**

SMP operators offer pricing schemes on a discriminatory basis, or prices which do not allow a sufficient margin. In case of long-run upfront commitments SMP operators offer prices not only reflecting the reduction of the risk for the investor.

cap, retail minus etc.

**BP44** NRAs should determine the costing methodology taking account of the following two key factors:

- the prioritisation of the regulatory objectives and
- prevailing market conditions.<sup>18</sup>

**BP45** When imposing a cost-oriented price control obligation the NRAs should specify the relevant costing methodology to be used as a reference for setting the charges. Any costing methodology selected must allow the recovery of efficiently incurred costs as the relevant cost standard and follow the principle of cost causality.<sup>19</sup>

**BP46** It is important that the access price sends the right economic signal, i.e. is that the price is competitively (and technologically) neutral. This will best be achieved with cost-oriented access seeking to mimic the outcome of a competitive market where the equilibrium price reflects the cost of efficient service provision.<sup>20</sup>

**BP47** Since local access in most cases constitutes an enduring bottleneck, NRAs should impose effective regulatory remedies in order to avoid excessive profitability. This implies directly imposing cost-orientation or where proportionate indirectly imposing a combination of remedies having the

<sup>18</sup> See BoR (11) 65 BEREC response to the Commission's Questionnaire on costing methodologies for key wholesale access prices in electronic communications

<sup>19</sup> However, ERG (05) 29 (p. 9). points out that when an NRA is considering or determining a cost recovery mechanism or value there are factors to be taken into account, in addition to cost causality principle (normally established in the cost accounting system), such as distribution of benefits, effective competition, cost minimisation, reciprocity and practicality.

<sup>20</sup> BoR (11) 65, page 5



**BEREC COMMON POSITION ON BEST PRACTICE IN REMEDIES ON THE MARKET FOR WHOLESALE (PHYSICAL) NETWORK INFRASTRUCTURE ACCESS (INCLUDING SHARED OR FULLY UNBUNDLED ACCESS) AT A FIXED LOCATION IMPOSED AS A CONSEQUENCE OF A POSITION OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKET**

in advance (e.g. by advance publication).

- **BP49e** Where cost-based access is imposed, this should help address concerns about downstream margin squeeze.
- **BP49f** The imposition of cost-based access prices does however not remove the concern for margin squeeze.
- **BP49g** The price squeeze test applied by the NRA should take into account the costs faced by an efficient operator with a minimum scale such that the minimum margin for this operator with relevant downstream services makes commercial sense.

**BP50** Moreover, especially where the downstream (bitstream) access price is also cost-based, it is not necessarily guaranteed that a cost-based price for unbundled loops and shared access will permit competitors to extend their networks to take advantage of those services. NRAs may therefore also need to take steps to ensure that the margin between the upstream and downstream services is sufficient to facilitate efficient investment of this nature. In principle, such controls could be imposed as a remedy to SMP in either market to achieve consistency along the ladder of investment.

**Pricing applicable to NGA-based wholesale local access only**

**BP51** NRAs should ensure that the pricing of inputs to NGA-access products (e.g. ducts) is in line with the pricing of the same product when used as inputs to legacy access products (copper).









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### Annex 1

The Reference Offer could (amongst other things) include the following information:

- a description of the network access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of network access);
- the locations at which network access will be provided;
- a procedure and conditions to request relevant information for the provision of the relevant regulated wholesale service;
- any relevant technical standards for network access (including any usage restrictions and other security issues);
- the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing), including their usage restrictions and procedures to access those services;
- details of operational processes including, for example:
  - eligibility, ordering and provisioning;
  - migration, moves and ceases;
  - repair and maintenance; and
  - changes to IT systems (to the extent that it impacts alternative operators);
- relevant charges, terms of payment and billing procedures;
- details of interoperability tests;
- specifications of equipment to be used on the network;
- details of quality as follows:
  - specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - the amount of compensation payable by one party to another for failure to perform contractual commitments as well as the conditions for eligibility to compensations;
  - a definition and limitation of liability and indemnity; and
  - procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- details of any relevant intellectual property rights;

