

**BEREC Report on the outcome of the public
consultation on the draft BEREC Report on
Pricing for access to infrastructure and
civil works according to the BCRD**

07 March 2019

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Executive Summary

This report summarises the responses received to the public consultation on the draft BEREC Report on Pricing for access to infrastructure and civil works according to the BCRD. The public consultation was organised from 10 October until 7 November 2018 with the objective to gather stakeholders' comments and observations on the content of the draft BEREC Report.

In response to the consultation on the draft report, BEREC received 6 contributions from the following stakeholders:

1. ECTA;
2. Liberty Global;
3. Open Fiber;
4. Telefónica;
5. TIM;
6. Vodafone.

One contribution was considered confidential and is therefore omitted in this report.

In general, stakeholders welcomed the opportunity to comment on the draft BEREC Report on Pricing for access to infrastructure and civil works according to the BCRD. The following sections provides further comments, observations and recommendations expressed within the contributions during the public consultations.

During public consultation BEREC is seeking stakeholders' views regarding the BEREC draft preliminary report on Pricing for access to infrastructure and civil works according to the Broadband Cost Reduction Directive (BCRD) set out to provide guidance to National Regulatory Authorities (NRAs) on the challenging topic of price setting in the areas of access to existing physical infrastructure, coordination of civil works and access to passive in-building infrastructure. The focus of the draft report is on pricing of existing infrastructure, in particular duct and poles as this area is most relevant for the most Member States (MS).

1. ECTA

1.1. Comments from ECTA

ECTA considers that regulatory consistency in determining the price of access to existing infrastructures is of primordial importance to the creation of an investment-friendly regulatory environment and, therefore, ECTA suggests clarifying this in the report. Indeed, the BCRD does not provide any grounds for departing from the principle of promoting regulatory predictability through the promotion of a consistent regulatory approach, as laid down in Article 8(5) (a) of the Framework Directive, which is a hallmark of the regulatory framework for electronic communications.

ECTA believes that operators would be significantly less likely to rely on the BCRD if price setting under that instrument were to majorly and unforeseeably depart from well-established principles of price setting. At the same time, consistency thus understood does not mean, in ECTA's view, the undifferentiated application of uniform pricing standards to the infrastructures of all operators. Whilst the two means that for promoting consistency already suggest that the consistency of results is likely to vary according to whether a purely abstract normative (principles) or a concrete empirical (benchmark) approach is chosen, ECTA wishes to underline that the promotion of regulatory consistency must notably remain appropriately sensitive to objective differences of market power and business model. In this respect, ECTA wants to suggest two important points for improving the discussion set out in the draft report:

- 1) While there is some limited recognition of the implications of significant market power, ECTA does not consider the draft report to sufficiently succeed in delineating a coherent and well-articulated framework for setting prices for infrastructure access, which takes proper account of SMP. In particular, the scale efficiencies that historical operators enjoy generally merit a presumption of lower average (and possibly also marginal) costs of deployment than for challenger entrants and other alternative operators that have more limited scale. Dispute settlement practice must take account of this difference. Unfortunately, this consideration is essentially absent from the draft report.
- 2) Regulatory consistency must naturally also extend to non-ECN operators to avoid that unjustified price differentials block existing market momentum, notably from alternative operators, to widen their physical market presence in the interest of competition and societal benefits. While the report on multiple occasions refers to the distinction between electronic communications network operators and operators of other networks (termed 'ECN/non-ECN'), ECTA would also here suggest more detailed discussion and some principled guidance on how this distinction can be interpreted in accordance with EU law to achieve consistent regulatory practice. In particular, ECTA believes that the report pays unbalanced attention to the question to what extent undertakings perceived as operating networks other than electronic communications actually would not have to be qualified as electronic communications network operators. ECTA emphasizes that it is not material in this respect whether the communications networks in question are *de facto* operated as

public communications networks, but solely whether a corresponding authorization exists. In practice, ECTA estimates this to apply to essentially all undertakings providing electronic communications, irrespective of their specific business model. Therefore, the ECN/non-ECN distinction may substantially be less relevant in practical terms than what the draft report suggests. ECTA recommends BEREC to develop an approach that appropriately accounts for market power and cross-market leveraging of such power by mixed and other network operators and at the same time integrates the economic cornerstone parameters of the (re)financing of those physical infrastructure assets to avoid disproportionate pricing outcomes.

ECTA thinks that unlike SMP regulation, where the price control obligation regularly concerns only the established network operator/s, the possibility for regulatory price setting by dispute settlement bodies in the context of the BCRD adds an additional layer of complexity by potentially extending to market participants in a structurally much weaker role, for whom the imposition of such access obligations may have a significant impact on their business model. Regulation under these circumstances must, on the one hand, ensure an adequate measure of regulatory consistency, and continue to send appropriate build-or-buy signals, notably for new market entrants, on the other. ECTA believes that by addressing the concerns set out in this response and establishing a regular monitoring approach across future work program, BEREC can help price setting for infrastructure access develop into a direction consistent with SMP regulation, while respecting its primacy, as required by the BCRD.

ECTA wishes to explicitly underline that it does not consider the draft report to provide an appropriate basis for drawing any conclusion as to specific pricing approaches being comparatively preferable over others or even designated as best practice examples. ECTA believes that continued monitoring of emerging regulatory practices across access regimes needs to become an integral element of BEREC's further work on the BCRD and encourages continued reporting on ongoing developments in Member States as well as release of relevant information as a publicly available dataset.

ECTA thinks that here could indeed be a common ground between the BCRD and other access regimes in terms of sharing same principles. Without clear enumeration of these principles and a discussion of their importance to the process of price setting, however, ECTA fears that such a statement remains purely declaratory and thus without concrete effects. For ECTA, the proposed compromise formula of acknowledging that the same principles might give rise to different pricing methodologies according to circumstances, remains, at this level of generality, hypothetical and provides little orientation to promote greater consistency of regulatory practice.

In **ECTAs** view, it would be beneficial for the report to clarify the basis for a number of assumptions about the importance of certain provisions of the BCRD and of certain infrastructure elements to the regulatory practice of the bodies charged with the administration of the pricing powers under the Directive, this concerns notably the assertions that Article 3 would constitute 'the most relevant Article for most MSS' and that ducts and poles represent the main field of application of the BCRD.

ECTA considers that if the principal reason for scoping the analysis in this way was a lack of available information, this should be clearly identified as a point of attention. In turn, this should give rise to a more systematic reflection on means of how to achieve a maximum of relevant guidance even for those domains that, based on the responses received, did not appear to have become predominant areas of regulatory concern at the time of data collection. ECTA notes that the report does not yet allow for a clear identification of developments over time in this respect. As administrative practices in this field are still to a large extent evolving, such a principled approach would have seemed appropriate. This would allow authorities in those countries without prior experience of regulating passive infrastructure access and its various components under the BCRD to benefit to the greatest possible extent from this work. The prioritization of one dimension at the expense of the other two suggests that links between dispute settlement under the BCRD and general regulatory practice under the framework might be limited to that dimension when, indeed, the interactions are more numerous. Finally, an approach treating all of the dimensions of the BCRD equitably may also be opportune as significant deployments still remain to be done. Yet in a number of countries, deployment cannot rely on pre-existing physical infrastructure assets; in fact, both pole and duct availability is skewed across Member States. Therefore, a wider emphasis, in particular on civil works access and associated pricing questions, would have been useful to support deployment.

ECTA believes that the final version of this report should include a clear articulation of BEREC's understanding of the overall normative framework for price setting in the context of the BCRD. This should notably include explicit recognition of the legal relationship of subordination of the BCRD to the regulatory framework and, upon adoption, the European Electronic Communications Code. ECTA underlines that price setting under the BCRD neither can nor may imply any type of relaxation of cost-oriented access obligations on designated SMP operators. Likewise, decisions under the BCRD must not displace SMP obligations, as the purpose and modalities of both types of intervention are fundamentally different. Furthermore, the final report should incorporate concrete guidance elements on how to avoid adverse effects on competition and competitive investment. Considering the scarcity of experiences that NRAs have gathered with the BCRD until now, the report should propose a schedule for follow-up activities to further harden the basis for developing consistent regulatory practice in this domain.

While **ECTA** agrees that extant regulatory practice under other infrastructure access regimes may play a role in shaping evolving practices under the BCRD, notably where both fall under the NRA's responsibility, ECTA remains sceptical about the value of report's focus on so-called path dependence. In particular, it remains unclear how documenting such likely, perceived or expected continuities might help to develop a more consistent regulatory practice. The attention dedicated to this aspect appears somewhat disproportionate, to the extent that the underlying drivers are not explored, and a more balanced approach might therefore be beneficial. ECTA would encourage future BEREC work to rather focus on developing an economically sound and legally well-substantiated approach to promoting regulatory consistency across the different access regimes. This should occur in full respect for the primacy of the rules of the regulatory framework for electronic communications and also be informed by continuous monitoring of the evolving case practice.

1.2. BEREC's response:

BEREC agrees with **ECTA** that asymmetric regulation prevails where SMP regulation is applicable in line with Recital 17 as spelled out in the report on p. 12 of the report.

BEREC understands **ECTAs** request to explicitly recognize the legal relationship of subordination of the BCRD to the regulatory framework and, upon adoption, the European Electronic Communications Code. As mentioned in the report (p. 11-12), **BEREC** is of the opinion that asymmetrical access obligations should not be impaired by access according to the BCRD and as long as the former obligations are stricter, either in their scope or in their terms and conditions, including price, they need to be applied in cases where access to an SMP operator's regulated physical infrastructure is requested.

BEREC agrees with **ECTA** that this report does not provide an appropriate basis for designating best practice examples.

BEREC points out that this report is solely of descriptive nature and aims to collect information on pricing in the context of the BCRD. **BEREC** wishes to outline that path dependency has to be understood as a concept to describe the experiences gathered so far.

BEREC acknowledges **ECTAs** request for follow-up activities considering the scarcity of experiences that NRAs have gathered with the BCRD until now.

BEREC recognises that up until the time of data collection for this report only little information on concrete pricing decisions had been available, the publication of a follow-up report including monitoring tasks once more pricing decisions have been taken in the MS might be discussed in the future.

BEREC understand **ECTAs** concern about the importance of certain provisions of the BCRD. In this context **BEREC** reiterates that in the 2017 BEREC report on the „Implementation of the BCRD“¹ one of the challenges identified in some Member States (MSs) relates to the price setting for access to existing physical infrastructure as foreseen in Article 3 para 5, which is one of the reason for the focus on this topic. Another reason indeed relates to the availability of information on this topic as **ECTA** has reasoned.

BEREC understands **ECTA's** position on the need to rather focus on developing an economically sound and legally well-substantiated approach to promoting regulatory consistency across the different access regimes. On this point, **BEREC** underlines again that this report is solely of descriptive nature and aims to collect information on pricing in the context of the BCRD; assessment of regulatory consistency across the different access regimes might be still developed in the future.

¹ BoR (17) 245: Implementation of the Broadband Cost Reduction Directive

2. Liberty Global

2.1. Comments from Liberty Global

Liberty Global agrees that there should be differentiation in pricing between ECN and non-ECN providers. For ECN providers, we consider, in accordance with the BCRD, that prices should take into account the need to incentivize investment in new infrastructure. For non-ECN providers, however, we consider that the price of access should be solely based on the ascertainable costs of providing access to the relevant infrastructure as they can recoup costs for network investment with other services. There are currently significant issues for several of our operating companies for gaining access to physical infrastructure of non-ECN operators, particularly electricity providers. These issues do not appear to have been addressed by the transposition of the BCRD. For example, in Poland, our experience is that contracts with electricity providers for access to poles are non-negotiable and that prices are seemingly excessive. Similarly, in Romania, contracts with electricity providers are limited to short term access agreements (1-3 years), with tariffs being raised significantly for each new period. This would go against the purpose of the BCRD making the BCRD illusory.

Liberty Global welcomes the focus on incentivizing investment in new infrastructure when setting price methodologies (e.g. by setting an appropriate cost of capital), whilst also ensuring that the price of access is not unreasonably high. Liberty Global considers that EU-level guidance on elements of pricing under the BCRD would be desirable to ensure consistency across Europe, but reflecting national circumstances, and to ensure that the best practice pricing methodology is adopted. Any methodology should be easy to apply and should be related to the costs of providing access. Moreover, in circumstances where regulators set access pricing under the BCRD, operators should be provided with the data necessary to assess the correctness of the decision.

Liberty Global welcomes the views of NRA's that a case-by-case approach to pricing is preferable. Whilst consistency in pricing is desirable, pricing for access to physical infrastructure varies depending on many factors that are specific to the relevant network asset in question, and any pricing methodology should be designed to take this into account. Due to limited experience on the pricing under the BCRD of the market and NRAs, Liberty global, doubts whether the timing is right to review of pricing methodologies for access to existing physical infrastructure under the BCRD.

Liberty Global welcomes the view that pricing under the BCRD should provide incentives for investing in new infrastructure. However, this should be done in technology-neutral manner as is one of the cornerstones of the Code. Prices which favour a particular technology are likely to chill investment in cheaper and faster-to-deploy technologies. A mixed technology approach will not only maximize scope for innovation, and infrastructure competition, but can also serve as the most cost-effective means to achieve Gigabit Society objectives.

2.2. BEREC's response

BEREC acknowledges **Liberty Global's** comments regarding relevant factors that need to be taken into account when defining pricing principles or setting concrete prices according to the BCRD.

BEREC takes note of **Liberty Global's** description of multiple issues that currently arise in the context of the BCRD in several countries. Furthermore, **BEREC** acknowledges **Liberty Global's** suggestions regarding pricing principles and the need for the adherence to best practices across Europe. However, **BEREC** notes that it is not the purpose of this report to assess specific national pricing decisions, pricing principles or issues that are not related to pricing itself and arise in specific countries. This report is solely of descriptive nature and aims to collect information on pricing in the context of the BCRD.

BEREC recognises **Liberty Global's** doubts regarding the timing of the report. **BEREC** agrees that up until the time of data collection for this report only little information on concrete pricing decisions had been available. Therefore, the publication of a follow-up report once more pricing decisions have been taken in the MS might be discussed in the future.

Regarding technology neutrality, **BEREC** is of the opinion that no aspect of this report indicates a shift away from this principle, which also is a central part of the EU framework for telecommunications regulation.

BEREC understands **Liberty Global's** consideration on the need of having an EU-level guidance on elements of pricing under the BCRD, in order to ensure regulatory consistency across Europe; on this point, **BEREC** confirms the considerations reported in the previous answer to **ECTA** considerations.

3. Open Fiber

3.1. Comments from Open Fiber

Open Fiber on necessity to have clear guidelines on access pricing and, preferably, the definition of ex-ante access prices for all Network operators, which may require higher prices in specific cases in which they provide evidence that the price doesn't cover their costs or doesn't allow a reasonable return on the capital employed. For these reasons we strongly believe that BEREC should conclude that the dispute resolution mechanism is not proving effective in defining access pricing and should suggest that the NRA should publish ex-ante binding guidelines on access price (and other conditions) to physical infrastructures owned by Network Operators or, preferably, define a Reference Offer applicable to all cases in which the infrastructure is already remunerated through tariffs that allow a full recovery of costs. In these cases the pricing should be reasonably based on incremental costs incurred to provide access to the access seeker. NRAs should lead the drafting of the guideline, supported by other sectoral national regulators involved (e.g., power distribution, gas distribution, heating and water distribution etc.). Based on a benchmark and on other studies and techniques for the assessment of incremental costs, NRAs should establish a cap to the maximum applicable price per each type of network infrastructure. Moreover, the binding guidelines should set a maximum price for each network element such as the horizontal network, the in-bundling infrastructure, infrastructure for the entry into the building, the vertical ducts etc. Also, this proposal would be able to reduce the administrative burden related to dispute settlement or at least the related uncertainties abovementioned. Although parties should have the right to negotiate access conditions freely, a harmonization among infrastructural sectors on access conditions is urgently needed.

Open Fiber on dispute resolution. Even though the national law embodies AGCOM as a Dispute Resolution Body (DSB), the dispute resolution process is uncertain in time and results. The only dispute brought in front of AGCOM was decided after 14 months. Affording several disputes without any guarantee of solving the issue in due time puts at risk whatever business plan a company may make. In case the dispute isn't solved within the time frame that the Directive defines as an upper limit (2 months), the effect would be postponing network building until the dispute is solved, that in turn may also have an impact on the commercial relations with customers that expect that the network is realized according to the plans. This is particularly true, and is becoming crucial, in areas where public money funds the construction of the network: in this case, the operator is bound to realising the network within the time frame indicated in the tender. It is therefore impossible to open a dispute with every Network Operator without seriously risking to finish very late the building of the network. Especially in case of fibre deployment in rural areas, the number of potential Network Operators whose infrastructure can be used to deploy fibre sums up to more than 200. It is easy to understand that a telecom operator cannot face such a significant number of dispute resolution processes or not even a small share of them. As a result the recourse to the dispute resolution mechanism is very limited.

Open Fiber believes that when an operator decides to enter the market and to build a new VHC Network, competing with the infrastructure of the incumbent operator, it has all incentives to re-use the most part of existing physical infrastructures that are subject to the provisions of Directive 61/2014. For this reason it is in its best interest to receive all information about existing infrastructures and use this information in order to define an efficient project that maximises the recourse to existing infrastructure. The optimisation process that characterizes the projecting activity also requires prices to be known *ex-ante*, since the price represents the most relevant criterion to choose, where multiple infrastructures are available.

Open Fiber thinks that quite often network operators claim an exclusive control of in-building infrastructure, since they have been for a very long time the only users of these infrastructures. This makes difficult accessing in-building infrastructure and represents a barrier to entry much more relevant than its pricing. Open Fiber suggest that BEREC should provide guidelines on this topic and we endorse the *superficies solo cedit* as the property principle to apply. This principle makes the access to the infrastructure easier, since the incentives of property owners (who are also beneficiary of the network connection) are much different from the incentives of existing telecom operators, who are keen to arise economic and technical barriers.

Open Fiber states that although the Italian law sets incremental costs as a criterion for access pricing to physical infrastructure in all cases in which infrastructures are already remunerated by tariff structures that guarantee a full recovery of the costs incurred, several Network Operators request a price largely above incremental costs, while the Directive clearly states that assets and operating costs already remunerated by an existing tariff shall not be charged to telecom operators.

Open Fiber believes that although BCRD's aims are largely backed by the telecom sector, its market functioning is frequently flawed. In particular, terms and conditions imposed by Network Operators within the same Member State are far from being harmonized, creating high costs and technical barriers for potential users. A significant share of Network Operators imposes burdensome (unnecessary) conditions to the access seekers and/or asks unfair economic conditions.

3.2. BEREC's response

BEREC agrees with **Open Fiber** that network operators which plan to deploy high-speed electronic telecommunications networks have incentives to re-use existing physical infrastructures. These infrastructures are addressed by the BCRD to significantly reduce the cost of such network deployments. Furthermore, information on the existence of such information is crucial for the functioning of the BCRD, which is the main reason for implementing a single information point as designed by the BCRD in Art. 10(4).

BEREC acknowledges that **Open Fiber** makes several suggestions on how to make the BCRD and its national implementations more effective. **BEREC** also takes note of **Open Fiber's** description of several aspects that are specific to the national implementation in Italy

and issues that currently arise in the context of the BCRD. However, the report focuses on questions regarding the pricing of Art. 3, 5 and 9 of the BCRD and thus discusses issues regarding other aspects unrelated to pricing only indirectly. Furthermore, **BEREC** notes that it is not the purpose of this report to assess specific national pricing decisions or pricing principles. This report is solely of descriptive nature and aims to collect information on pricing in the context of the BCRD.

4. Telefónica

4.1. Comments from Telefónica

Telefónica believes that the ducts access obligation included within the SMP designation and called MARCo (in place since 2008), has eased the wide and steady fiber deployment in the country and letting the “Spanish fiber miracle” bears fruit. But prices under the MARCo obligation are cost oriented and no longer under “fair or reasonable terms” and far away from the investment incentives criteria for NGN covered within the BCRD. Such asymmetric obligation which is only imposed over the SMP operator (Telefonica), provides an unbiased framework for a national and fair infrastructure access in the country. As soon as the SMP operator request access to 3rd parties’ infrastructure, this reverse attempt access which is not regulated, is usually ruled under commercial terms which as a rule of thumb, are high above regulated prices. In this regard, Telefonica considers that access to 3rd parties’ infrastructure should be ruled by fair and non-discriminatory prices but taking into account regulated prices as an initial reference price.

Telefónica thinks that it is worth to mention that the Spanish regulator has applied the criteria that ducts and access up to EEBS are considered as NGA networks and consequently supported and included under the BCRD scope. According to this consideration, Telefonica proposes to update the Spanish approach in the rest of Member States extending the application of the BCRD to these infrastructures, which should ease providing a future-proof backhaul solution for 5G.

Telefónica thinks that from their main conclusions it is worth to mention the great heterogeneity observed not only in different regimes but also in methodologies and discretion applied. Despite the fact that the BCRD establishes as a general principle the application of “fair, reasonable and non-discriminatory prices” for infrastructure access, the real application of this principle varies enormously depending on the country but also on the type of operator subjected to these measures.

Telefónica believes that, according to BEREC’s report, Telefonica Spain is considered among all, the operator with the toughest and strictest regime for infrastructure access compared with the rest of the countries, as a consequence of the SMP regime applied previous to the BCRD entering into force.

4.2. BEREC’s response

BEREC acknowledges **Telefónica’s** comments regarding the duct access obligation that originates from the Spanish SMP regulation and its relationship with access obligations connected to the BCRD. However, **BEREC** notes that it is not the purpose of this report to assess specific national pricing decisions or pricing principles. This report is solely of descriptive nature and aims to collect information on pricing in the context of the BCRD.

BEREC agrees with **Telefónica's** assessment that the application of the BCRD's general pricing principle regarding access to existing physical infrastructure ("fair and reasonable terms and conditions, including price") varies between MSs. One of the aims of this report is to describe this kind of heterogeneity in pricing principles and decisions.

5. TIM

5.1. Comments from TIM

TIM believes that the same pricing principles should apply to ECN and non-ECN operators, given that their physical infrastructures are both usable to deploy UBB networks.

TIM agrees with the approach adopted by AGCOM, based on the application of the cost orientation principle, and specifically, aimed at ensuring the recovery of only the incremental costs incurred by the operator for providing the access to its physical infrastructure. With Decision 88/17/CONS of August 9, 2017, subsequently integrated with Decisions 131/17/CIR and 167/17/CIR, AGCOM substantially upheld TIM's claims and stated that all the operators subject to the BCRD regime have to provide access on the basis of fair, reasonable, transparent, non-discriminatory and cost oriented pricing. AGCOM deemed that the pricing should be set only on the basis of the additional costs related to the access provision. AGCOM excluded the principle of the "double remuneration" of the infrastructure, which means that the price of access should not include the costs of infrastructures where these are already covered by the provision of the main service.

TIM thinks that there is the need, as recommended by the European Commission, to "*enhance regulatory certainty in relation to terms and conditions, including prices and cost apportionment*". A greater regulatory certainty could be reached through the (*ex-ante*) adoption by AGCOM of pricing guidelines which may be taken as reference also for future negotiations. This would reduce litigations, which inevitably hamper investments given the length of the proceedings.

TIM agrees with BEREC that the determination of pricing terms is one of the more complex issues addressed by the BCRD. For TIM, the efficient and timely implementation of the BCRD is fundamental to foster UBB roll-out.

5.2. BEREC response

BEREC agrees that the efficient and timely implementation of the BCRD is one of the cornerstones for the deployment of high-speed electronic communications networks.

BEREC acknowledges **TIM's** suggestions regarding the differentiation between ECN and non-ECN operators and the wish for greater regulatory certainty. Furthermore, even though information on specific pricing decisions and their rationale has been collected and described by BEREC in this report, **BEREC** notes that it is not the purpose of this report to assess specific national pricing decisions or pricing principles for the application of the BCRD at the national level. This report is solely of descriptive nature and aims to collect information on pricing in the context of the BCRD.

6. Vodafone

6.1. Comments from Vodafone

Vodafone on pricing principles: The Directive defines the general principle for pricing only at a very high level. We would call upon BEREC, NRAs, DSBs and the Commission to define the principles more clearly. In our view, this could be achieved by defining such principles on the basis of consistency, proportionality, predictability, transparency whilst recognising that some price differentiation may be objectively justified. These principles are explained in more detail below.

Vodafone on hierarchy of access regimes: We support BEREC's findings and position that the BCRD regime should be complementary to other access regimes, and that access provided under either SMP regulation or state aid rules should in general take precedence over BCRD based access. While we note that this might not be fully shared by all BEREC's Members, we encourage BEREC to be unconditionally supportive of the more established (and well-tested) regimes of SMP regulation and the application of state aid rules also in the future.

Vodafone on consistency between access regimes: We propose the approach for access under BCRD to be such that when the price for access to ducts and poles is regulated based on SMP and it has enabled investments in Very High Capacity networks, the price level should be used as a reference price for access to ducts and poles under BCRD from operators with similar scale. For providers with more limited civil engineering assets, appropriate price adjustments should be applied. These adjustments could be based on e.g. size or regional cost differences (see also points below). These adjustments should be objectively justifiable.

Vodafone on consistency within a Member State, notes that BEREC emphasizes the importance of case-by-case assessments due to dispute resolution mechanisms being the primary method for NRAs to set prices under BCRD. Whilst we understand this to be the main approach in the BCRD, we would emphasize the importance of setting prices in a sufficiently harmonized manner within a Member State to ensure that all regions and municipalities can benefit equally from the provisions and mechanisms of BCRD. This would avoid situations where excessively high prices might prevent deployment of VHC networks in a specific area and where unsustainably low prices might jeopardize investments in new civil engineering assets in another area in the same Member State, resulting in increased regional fragmentation.

Vodafone on consistency across Member States: Whilst we fully understand the differences in costs of building and maintaining civil engineering assets in different Member States, we would like to refer to a study by Wik-Consult on "Best-practice for passive infrastructure access"¹ which identifies stricter forms of access regulation being more effective and beneficial to the deployment of VHC networks than more relaxed regulatory and price setting approaches. The stricter forms of regulation and price setting in access to PIA are in general cost-orientation on the basis of historic costs, strict forms of non-discrimination (Equivalence

of Inputs), effective information and capacity management systems and processes and maximisation of access seekers' operational capabilities. We believe that all EU Member States would benefit significantly from applying stricter forms of access to ducts and poles regimes. This would also lead to higher consistency across Member States and a step further to harmonisation of competitive conditions for all operators in the EU.

Vodafone on predictability: Pricing on the basis of BCRD is inherently uncertain due to the dispute mechanism being applied as the primary regulatory pricing mechanism. This increases uncertainty in investment calculations leading to diminished incentives to invest in VHC networks based on BCRD access. To enhance predictability, we encourage BEREC, NRAs, DSBs and the European Commission to identify best-practice approaches and enshrine them in appropriate legal and regulatory instruments. BEREC's report on pricing for access to infrastructure and civil works according to the BCRD is a crucial first step in the process to define a sufficiently harmonized and unified approach in order to maximize usage of the BCRD. Appropriate legal and regulatory instruments could be in the form of Commission Recommendations or BEREC Guidelines.

Vodafone on objectively justifiable price differentiation between regions. Vodafone supports a harmonized approach to set prices within national markets. We acknowledge that in certain cases there are justifiable cost differences within national markets, e.g. excavation costs might be significantly different due to terrain, topology or population density. In these situations, we support approaches where the justified differentiation across different costing dimensions would be approved by NRAs based on a transparent process.

Vodafone would like to emphasize the importance of the BCRD's aim when assessing the pricing of access to existing infrastructure and in-house wiring as well as sharing of costs of co-deployment as defined in Article 1 "to facilitate and incentivize the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out at lower cost". This aim should be clearly articulated, interpreted and kept in mind for the identification of best-practices and efficient pricing approaches with a view to maximize the investments in Very High Capacity networks by all operators willing to invest.

Vodafone on Proportionality: It is likely that only a very small number of legal entities will own an extensive volume of civil engineering assets. Most legal entities will own only a limited volume of civil engineering assets. Applying BCRD based access might thus lead to situations where extensive dispute resolution processes and price setting are applied to smaller players imposing an extensive and unjustified regulatory burden on them. To avoid this and to avoid an extensive and unnecessary burden on NRAs and DSBs we encourage BEREC, NRAs, DSBs and the Commission to take an approach where the prices for larger players would act as a reference point for the market, and smaller players would be allowed to make appropriate adjustments for their smaller scale.

Vodafone on Transparency: Predictability for investing operators would be increased by ensuring sufficient transparency of pricing under BCRD, and duct and pole access in

general. Transparency could be increased by collecting and publishing pricing information to ducts and poles by the NRAs and by BEREC.

6.2. BEREC's response

BEREC takes note of the emphasis **Vodafone** puts on defining pricing principles on the basis of consistency, proportionality, predictability and transparency. Furthermore, **Vodafone** makes several suggestions on how to define pricing principles that are based on the aforementioned factors. However, the report prepared by **BEREC** is solely of descriptive nature and aims to collect information on pricing in the context of the BCRD.

BEREC understands **Vodafone's** request to unconditionally support the precedence of SMP regulation or state aid rules over the BCRD regime. As mentioned in the report (p. 11-12), it is the opinion of BEREC that asymmetrical access obligations as well as access according to State aid rules should not be impaired by access according to the BCRD.

BEREC agrees that the BCRD's aim "to facilitate and incentivize the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out at lower cost" should also be kept in mind regarding the pricing of Art. 3, 5 and 9 of the BCRD.

BEREC recognises **Vodafone's** suggestion to increase transparency by collecting and publishing pricing information to ducts and poles. Pricing information regarding dispute settlements should be publicly available when DSBs publish their binding decisions in specific cases. As **BEREC** recognises that up until the time of data collection for this report only little information on concrete pricing decisions had been available, the publication of a follow-up report once more pricing decisions have been taken in the MS might be discussed in the future. Furthermore, to increase the understanding of market participants in general, transparency on pricing national level might be helpful.