



ERG COMMON POSITION

**ON BEST PRACTICE IN REMEDIES IMPOSED AS A CONSEQUENCE OF A POSITION
OF SIGNIFICANT MARKET POWER IN THE RELEVANT MARKETS FOR
WHOLESALE LEASED LINES**

This document describes one of several Common Positions which ERG intends to develop for specific markets. Each will set out a methodology for dealing with remedies in respect of key wholesale access products in markets where a position of SMP has been identified. It complements the general guidance given on choice of SMP remedies given in the revised ERG Common Position on Remedies¹ and provides illustrative remedies. Application of this methodology will assist National Regulatory Authorities (NRAs) design effective remedies in line with the objectives of the regulatory framework. It is not a substitute for any of the legal tests which NRAs must carry out before imposing SMP remedies, in particular compliance with the principle of proportionality.

This document is relevant to all wholesale leased lines remedies imposed as a consequence of a finding of SMP, whether the relevant market defined by the NRA is a market for trunk segments, terminating segments or a backhaul market. Wholesale leased lines are key inputs for providing a wide range of business connectivity services. It is therefore vital that, where they are not supplied under conditions of effective competition, they are regulated effectively. This will promote the competition and choice on which businesses throughout the economy are entitled to expect and thereby make a significant contribution to achievement of the Single Market.

For the purposes of this document, a “wholesale leased line” means the provision of transparent transmission capacity between 2 termination points, at least one of which must be a point of connection with the SMP provider’s network. It does not include non-transparent services such as VPNs.

In accordance with ERG’s Statement of 12 October 2006 (ERG(06)51), while ERG Common Positions shall not be binding, ERG members shall be recommended to take the utmost account of them. ERG members commit to provide reasoned regulatory decisions, by reference to the relevant ERG Common Position(s).

A member of ERG taking the utmost account of this Common Position would in practice:

- (a) analyse the objectives identified in this common position and the related competition issues
- (b) to the extent consistent with applicable national law, provide an effective regulatory solution to those issues unless market forces can reasonably be expected to be sufficient to guarantee a solution
- (c) explain transparently how those competition issues have been addressed

¹ Revised Common Position on the approach to appropriate remedies in the ECNS regulatory framework (ERG(06)33)

Objective	Competition issue which arises frequently	Illustrative remedies
Assurance of supply	<p>There should be reasonable certainty of ongoing supply of wholesale leased lines on reasonable terms in order to give competitors confidence to enter the market.</p> <p>Any restrictions placed on the uses which can be made of the lines provided should be objectively justifiable. (See in particular “technical parameters of access” below.)</p>	A formal access obligation is likely to be necessary.
Level playing field	<p>There should be reasonable certainty that entrants will be able to compete on a level playing field. This implies that effective measures are in place:</p> <p>(a) to ensure that the SMP player does not have an unfair unmatchable advantage, by virtue of its economies of scale and scope, especially if derived from a position of incumbency</p> <p>(b) to prohibit the SMP player from discriminating in favour of its own group business, either on price or non-price issues</p> <p>(c) to provide an effective deterrent to obstructive and foot-dragging behaviour</p> <p>(d) to ensure that the policies adopted by the SMP player towards the commissioning of new infrastructure which may be necessary for provision of new retail services, allows all market players the same opportunity to compete for the new business.</p>	<p>A traditional obligation not to discriminate against third parties may be sufficient to alleviate the concern opposite but NRAs should not rely on an assumption that it will be sufficient (even in combination with an access obligation), unless there is evidence of this. NRAs should therefore consider whether additional measures are necessary to ensure that a strong incentive for compliance is provided as it will often prove unsatisfactory to plan to deal with each new problem by enforcement or dispute settlement. A number of techniques for achieving this are available.</p> <p>For example, NRAs could attempt to clarify, as far as possible, how a non-discrimination remedy will be interpreted in practice, via identification of forms of behavior which will be considered to be discriminatory. This</p>

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		<p>may be implemented either through explicit wording of the SMP obligation or via explanatory guidance which provides clarity as to the NRA's interpretation of the obligation.</p> <p>NRAs should also consider the case for attachment of obligations concerning fairness, reasonableness and timeliness to any access obligation imposed in accordance with Article 12 Access Directive, in order to deter obstructive and foot -dragging behaviour. It may in particular be appropriate to impose strict time limits for supply.</p> <p>The compilation of Key Performance Indicators (KPIs) allows NRAs (and stakeholders, if published) to assess whether the service provided to different customers is broadly comparable, in particular whether the service provided to the SMP player's own downstream service is comparable to that provided to third parties.</p> <p>Other obligations covered below, in particular the availability of co-location, may also be highly relevant to the assurance of a level playing field.</p>

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		<p>In addition to or instead of the above illustrative approaches, NRAs should also consider the merits of setting reasonable time frames through a Service Level Agreement imposed in accordance with article 9 of the Access directive.</p> <p>In justified cases, NRAs may also consider the imposition of a tighter form of non-discrimination obligation such as an “equivalence of input” condition to ensure that the conditions faced by third parties are as similar as possible to those faced by the SMP operator's own downstream business.</p> <p>National arrangements – either voluntarily or imposed under other legislation – may have the practical effect of achieving “functional separation”² of the business of the SMP player, thus minimising incentives to tilt the playing field against the entrants.</p> <p>The effect of any such arrangements (or of the tighter forms of non-discrimination obligations mentioned above) will need to be taken into account in deciding whether (and, if so, which) which other SMP obligations of the types discussed in lower rows of this table are required.</p>

² “Functional separation” means organisational separation of business units supplying upstream and downstream services together with associated controls to ensure that the units operate in practice on an “arm’s length” basis. It does not of itself require different legal ownership, as would result from “structural separation”.

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Avoidance of unfair first-mover advantage	Competitors 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 at the same time as introduction by the SMP player	<p>NRAs may conclude that a non-discrimination obligation provides sufficient assurance. They may find it useful to clarify (e.g. through published guidance) that the introduction of a new or enhanced downstream services would be considered a serious breach of the non-discrimination obligation where the wholesale service components required to deliver an equivalent competitive downstream service are not available to third parties.</p> <p>Where this approach is judged insufficient, NRAs should consider whether a special form of non-discrimination obligation, namely ex-ante controls on the introduction of downstream services by the SMP player, should be imposed in order to ensure that the wholesale leased lines services which would permit effective competition in the downstream markets are made available and are fit for purpose in a timely way. An appropriate method of control could be an obligation not to make available to itself the wholesale inputs which permit introduction of a new or enhanced downstream service until the corresponding wholesale service components required to deliver an equivalent competitive downstream service are available and fit for purpose</p>

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Transparency of terms and conditions	<p>Complete clarity of terms and conditions of access (including those relating to relevant ancillary services) is required, in particular by means of publication of a Reference Offer³, 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.</p> <p>The draft Reference Offer should take into account the views of customers or prospective customers for the services offered.</p> <p>The Reference Offer should be updated as necessary to reflect service developments in line with market and technology evolution. .</p> <p>Reasonable notice should be given of changes to prices, terms and conditions for existing services</p> <p>The prices terms and conditions applicable to new services should be made available a reasonable period in advance of introduction.</p>	<p>Terms and conditions for the following ancillary services are likely to be necessary components of the Reference Offer:</p> <p>co-location (potentially at either end of the line, e.g. street cabinet and MDF site), conditioning, power, ports, central office internal links, interconnection links, multiplexing of circuits, circuit set up/disconnection/transfer</p>
Reasonableness of parameters of access	<p>The technical parameters of the lines supplied should make commercial sense and should maximise the scope of competition in downstream markets. In particular, in the case of Ethernet leased lines, NRA should assess whether alternative operators can compete efficiently with incumbent in the retail market – both from a technical and an economic point of view –</p>	<p>Appropriate methods of control include:</p> <p>(a) an obligation to publish a reference offer which includes the technical parameters of access and which is periodically evaluated by the NRA and/or</p>

³ In practice, provision of any necessary ancillary services may be regulated under the provisions of a separate Market Review

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	<p>on the basis of the wholesale products actually offered by the SMP player.</p> <p>Limitations in the nature of the service, for example:</p> <ul style="list-style-type: none"> (a) limitations of the technical parameters to whatever suits the SMP provider's own business or to forms which are over-specified for certain applications (b) geographical limitations (c) limitations of use to which services can be put <p>should be prohibited unless they are objectively justifiable</p> <p>There should be a requirement to support industry best practice, including adherence to European or global standards, wherever feasible.</p> <p>Interconnection of wholesale leased lines should be possible at a wide range of convenient regional locations.</p> <p>End to end wholesale leased lines should be available throughout the relevant geographic market in circumstances where interconnecting lines would be technically infeasible or uneconomic</p>	<p>(b) an obligation to meet all reasonable requests for access</p> <p>An obligation to supply wholesale ethernet leased lines, as well as traditional leased lines, is likely to be necessary so as to satisfy demand for maximum economy for applications..</p>

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Fair and coherent access pricing	<p>There should be a guarantee that prices for wholesale leased lines are set in a way which is coherent with the prices for other (broadband and narrowband) related services so as to incentivise efficient investment by both SMP player and competitors and avoid arbitrage opportunities.</p> <p>Whether or not there is an explicit pricing obligation, assurance of protection against downstream margin squeeze (or eviction pricing⁴) is necessary. There needs to be reasonable certainty in advance of how a margin squeeze would be assessed and confidence that any complaint could in practice be resolved quickly.</p> <p>The minimum margin with relevant downstream services regarded as acceptable needs to make commercial sense for an entrant which is efficient but does not currently enjoy the economies of scope and scale of the incumbent.</p> <p>Prices should be based on the most efficient means of satisfying the demand. Where, for convenience, the SMP player supplies a line using an “expensive” technology where a cheaper technology would be satisfactory, the price should be based on the use of the corresponding cheaper technology.</p> <p>Any explicit charge for the provision of new infrastructure should be reasonable, taking account of the need to facilitate effective competition in downstream markets. In particular, there should</p>	<p>The choice of price control method should be based on the considerations opposite and on market circumstances and is fully explored in the “Remedies Common Position” - paper ERG (06) 33. Where prices are implicitly or explicitly required to be cost-oriented, an appropriate methodology should be in place so that costs can be justified robustly. In that case, prices for services which are technically similar should be priced similarly to facilitate the maximum degree of competition.</p> <p>NRAs may need to take additional steps to guard against margin squeeze or eviction pricing. Where cost-based access is imposed, this should reduce concerns about downstream margin squeeze.</p> <p>Where judged necessary to facilitate downstream entry, specific forms of ex-ante margin control could be necessary. Suitable forms of control include advance publication of the methodology for assessment of margin squeeze (or eviction pricing). In considering the minimum</p>

⁴ Terminology in use can be confusing. Some NRAs distinguish between a “margin squeeze” (or “price squeeze”) which is assessed on the basis of the SMP player’s own costs and “eviction pricing”. An eviction price is one which would allow the SMP player to be reasonably profitable on the downstream level but would severely restrict entry by virtue of pricing below the costs of competitors (who will not generally be able to match the SMP player’s economies of scope and scale). Others would describe either form of behaviour as “margin squeeze”.

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	<p>be no requirement for costs of provision to be recovered over an unduly short period. Except where there are special circumstances, it should be assumed that the costs would be recoverable over the normal economic life of the infrastructure, even though the customer for the use of that infrastructure may change over time.</p>	<p>acceptable margin, NRAs will have to strike a balance between short term efficiency, derived from the economies of scale and scope realisable by an SMP player, and the longer term benefits (assessed on a realistic basis) of a more competitive downstream market, brought about by new entrants which should, in due course and to a reasonable extent, be able to match those economies.⁵</p>
<p>Reasonable quality of access products</p>	<p>There should be assurance that access products will be of reasonable quality and that service levels will be comparable with that provided to SMP player's own business. Different levels of service should be available, to reflect differences in customer demand. Differences in charges for different levels of service should be objectively justifiable.</p>	<p>A simple obligation not to discriminate against third parties may help to provide such assurance. Entrants will however need tangible guarantees of service quality. Unless the NRA is satisfied that sufficient guarantees will be provided voluntarily, it is likely to need to employ a combination of tools such as the following:</p> <p>(a) a requirement to offer a service level agreement at least sufficient to allow effective competition in the downstream markets with the SMP's operator retail offers and otherwise comparable with agreements which would be available in a competitive market. The agreement should be sufficiently comprehensive, according to the circumstances of the case, to give</p>

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This issue is explored in some depth in the Remedies Common Position (ERG(06)33).

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		<p>entrants confidence to market their services on the basis that the inputs they purchase will be of suitable quality and reliability; and</p> <p>(b) a requirement to pay appropriate compensation for service below the level agreed. This compensation should be of a sufficient level to create an incentive for the SMP-player to comply to the service level agreed. A NRA can for instance consider compensation which properly reflects the loss borne by the alternative network operator in the downstream market. (While compensation for losses resulting from poor service may be sought through the courts, the process can be lengthy and uncertain, and cannot be relied upon by entrants for business planning purposes.); and</p> <p>(c) a requirement to publish key performance indicators (including indicators relating to downstream services) which allow service quality to third parties to be compared with service provided to SMP player's own business</p>

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Assurance of efficient and convenient switching processes	<p>It should be possible for a competitor to transfer retail customers from the SMP player (or other provider) without undue delay or break in service due to change of wholesale access service.</p> <p>Similarly, it should be possible to transfer existing customers between types of wholesale access service without undue delay or break in service.</p> <p>Charges for migration should be reasonable and should not deter acquisition of existing customers or climbing of the ladder of investment.</p>	A requirement to provide a suitable network migration process (between different wholesale customers using the same access product – <u>and</u> between different wholesale access products) is likely to be necessary in practice
Assurance of co-location at delivery points (where necessary) and other associated facilities	<p>A Network Operator providing retail services to end users on the basis of wholesale leased lines may need co-location, in-span or mid-span interconnection, backhaul and/or other associated facilities⁶ in order to make the offer effective.</p> <p>The terms on which co-location is made available should not be restricted more than is necessary for the efficient operation of the SMP player's business. In particular, where it is efficient for the access seeker to use co-location in connection with other services, it should have the right to do so, except for objectively justifiable reasons.</p>	Where the NRA judges them to be necessary for the effective provision of a retail service, co-location and other associated facilities should be provided on a cost-oriented basis under clear rules and terms approved by the regulator

⁶ In practice, provision of any necessary associated facilities may be regulated under the provisions of a separate Market Review