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IEN response to ERG Consultations

- **ERG (06) 67 – Harmonization: The Proposed ERG approach**
- **ERG (06) 68 – Effective Harmonization within the European Electronic Communications Sector**
- **ERG (06) 69 – Bitstream Access Remedies**

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IEN is the trade association representing the largest pan-European telecommunications network operators in Germany, including BT, Cable & Wireless, Colt, Verizon Business (former MCI) and Airdata. All members are committed to long-term investments made in Germany, and thus share a common interest in fair investment conditions and in a level playing field across all Member States. For the reason of being pan-European providers of broadband products and services, IEN members are particularly dependent on access products complying with international standards.

IEN welcomes that ERG recognizes harmonisation as a key theme for 2007. Indeed the operation of a detailed, consistent and harmonised regulatory framework by all NRAs in the EU is the only way to ensure a level playing field for competition in electronic communications markets. IEN can only agree with the observation Commissioner Reding made in her speech in Brussels at the Telecom Italia reception on December 11th. Mrs Reding said there was a deplorable state of fragmentation of regulation across the 25 Member States and came to the conclusion that “delays in applying remedies, problems caused by inefficient remedies – all these findings are truly appalling after more than 4 years since the entry into force of the EU's regulatory framework for electronic communications.”

IEN believes ERG is absolutely right to address these issues – particularly because a failure from ERG side to ensure harmonization would require other, more centralized harmonization activities. That said, IEN is grateful for the opportunity to comment on Consultation Documents 67, 68 and 69.

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I. ERG (06) 67 – Harmonization: The Proposed ERG approach

1. General Remarks

In the “Christmas Consultation” documents, ERG recognizes harmonization as key issue for 2007 and consults on the nature of harmonisation, its necessary depth and the top priorities for attention.

IEN agrees that a consistent and harmonized regulatory framework is key to ensure a level playing field for competition in electronic communications markets, and this for three reasons:

- Pan-European customers demand homogeneous service across the piece. Vice versa, pan-European operators need the homogeneous wholesale inputs across the piece.
- Pan-European providers want a single product set across Europe, to achieve economies and efficiency. Providers can't reap the benefits of a pan-European product factory if they can't sell their products everywhere. This scenario is the opposite of an internal market.
- A minimum level of control over market power through commonly adopted Best Practice is required, to ensure

(1) all competitors have a fair start in the market and

(2) upstream products that pan-European business customers demand are actually available. Distortions exist e. g. because Wholesale Broadband Access is available in some jurisdictions while unavailable in others. At the same time, this means some players enjoy the benefits of regulation abroad, while being protected at home.

At present, member states and their NRAs seem to pursue different harmonization concepts: Some NRAs are after a fully integrated internal market and a level playing field through harmonized wholesale regulation. Others aim to achieve mere national markets that allow for cross-border trade by means of compatible interfaces and end-to-end connectivity of services across borders, but not for a level playing field.

Such an approach however is deteriorating market conditions, as studies show patchy availability of certain inputs means that customers are forced into sub-optimal national information and management solutions.

On a wider note, IEN would like to refer the presentation on the same subject given at the ERG harmonization workshop on 15 Sep 2006. IEN welcomes that its suggestions have widely been picked up by the Consultation document.

2. Methodology

ERG proposes a general methodology for best practice in remedies: Identify competition problems which commonly arise in the relevant market, then suggest an illustrative list of suitable remedies. ERG calls upon NRAs to systematically check whether the competition problems listed in the Common Positions arise; if so, these should be addressed through remedies. ERG maintains that Common Positions do not prescribe remedies for dealing with certain market failures, but provide guidance on commonly accepted solutions to those problems.

IEN generally agrees with this approach, though noting that this proposal is a mere repetition of the ‘appropriateness’ principle laid out in the Directives.

IEN understands that ERG is not in a position to give binding directions to members. IEN however believes there is necessity to implement safeguards: Today, a significant degree of inconsistency is caused by NRAs (and ERG members) arguing “specific national circumstances” made their respective market completely different from others, and as a consequence carve out of ERG Common Positions.

Example: In Germany, analysis of the Wholesale Broadband Access market found that DT enjoyed SMP on the sub-market for ATM Bitstream, and that DT had refused to supply ATM Bitstream. When BNetzA consulted on their remedies proposal six months later, they however did not propose to mandate an access obligation, saying ATM Bitstream was only a niche product.

This is a prime example how disregarding best practice on remedies (which suggests a “refusal to supply” type market failure should be remedied by imposing an access obligation) distorts the internal market through lack of harmonization. IEN suggests ERG uses this example as a touchstone for the harmonization efforts proposed in the consultation package.

3. Role of ERG Common Positions

ERG suggests Common Positions retain their recommendation status and as such remain non-binding as in the past. ERG members as such should continue to take the utmost account of these. ERG members should commit to provide regulatory decisions reasoned by reference to the relevant ERG common positions. As such, NRAs should (1) analyse the objectives identified in ERG Common Positions and related competition issues, (2) then provide an effective regulatory solution to those issues to the extent consistent with national law, unless market forces can be reasonably expected to be sufficient to guarantee a solution, (3) then explain how these competition issues have been addressed.

IEN believes it is a matter of fact ERG will not be able to give binding directions to member NRAs (“take into utmost account”). Concerns however remain that the process proposed in the Consultation document (“reasoned by reference to ERG common position”) is insufficient to deliver on this objective, mainly because quoting ERG documents – as happened in the past – has brought insufficient results to that extent. As such, the minimum ERG should aim to achieve is

- a voluntary **self-commitment of all ERG members** to obey to Common Positions, even in the absence of a legal obligation to do so;
- a duly described process to bar the “national circumstance” backdoor unless there are tangible, severe and objective reasons why a certain market failure can not be remedied in the way proposed by the Common Position. This goes **much further than just quoting ERG documents** which is a lip service to harmonization. Deviating from common positions should require an in-depth and robust line of arguments that outlines (1) the market situation under review, (2) the standard situation described in the ERG Common Position and (3) an analysis why the remedy proposed by the ERG is inappropriate in the context of the market review carried out by the NRA.
- a commitment of all ERG members to open and honest cooperation for better regulation – which includes benchmarking market results and constructive criticism among members.

IEN would like to emphasize it truly believes in the ability of ERG to foster harmonization – and remind ERG members that ERG harmonization efforts will find their natural limit in the weakest link in the chain. This means it is the responsibility of all ERG members to live up to their harmonization commitments given in ERG.

4. Priorities

ERG is asking for views on the priorities defined above. ERG would also welcome views (a) whether there are topics where existing generic guidance does not deal sufficiently with the specifics of broadband access and (b) whether there are topics specific to broadband access which need to be addressed by detailed guidance.

In IEN’s view, the harmonization priorities put forward by ERG seem to be addressing the right aspects – access first, because this is where the bottleneck is existent. However, ERG should make clear that – following a common understanding of the importance of the subjects mentioned and following the ladder of investment concept – ERG’s priorities are broadband access (including Bitstream and Ethernet Access), then LLU then mobile termination and finally fixed termination.

IEN would also like to point out that the existing guidance on Broadband Access is fairly abstract. While this is in the nature of any ex-ante recommendation, it should be noted that the variation in implementation is caused by a **lack of precision in remedies decisions** – in some countries, remedies decisions tend not to deal with a great level of detail, pushing necessary specifications to disputes that are settled outside the remedies process. This has become a problem particularly in the Broadband area, because the question whether a wholesale broadband product is a useful input for access seekers depends on a large amount of detail to be provided.

As such, ERG should aim to **define a certain level of detail** which ideally should be contained in the remedies decision. Regarding the wholesale broadband access markets, NRAs should particularly define –

- how many interconnect points must be made available to access seekers (minimum and maximum number of interconnection points) and at which level (Ethernet, ATM, IP aggregation, IP concentration);
- which Quality of Service must be made available to access seekers (e. g. constant bit rate, real-time variable bit rate, unspecified bit rate);
- how the essential parameters of the links should look like (particularly latency, jitter, packet loss parameters); and
- which specification of the xDSL-based customer link must be offered (particularly which type of DSL and whether a ‘naked DSL’ type service must be made available).

5. Gaps in the consultation document

IEN believes that at least three additional broader issues should be addressed by the ERG common position on harmonization, as they constitute generic issues that require further work alongside the more detailed work on specific markets:

- **Harmonization of market data gatherings.** The market data gathered by NRAs across Europe shows a great degree of variance in terms of quality and in terms of detail: While some NRAs ask market participants to provide a reasonable degree of market data, others require market players to fill in very detailed questionnaires. While a higher degree of detail normally improves robustness of the analysis, it has to be noted that the variance in detail makes it hard for other ERG members as well as the Art 7 task force to easily understand the content and the results of the analysis, and additionally increases the likelihood that the NRA carrying out the analysis loses track of the wider picture.

Example: A very detailed review of Wholesale Leased Circuits in Germany (with data gathered per bandwidth) delivered the surprising result that there allegedly was effective competition at all bandwidths above 2 Mbit/s – which disregarded the obvious issue that DT is the only supplier for all bandwidths in 61% of the country.

Additionally, a great level of detail normally also means a lengthy analysis process while reducing the possibility to compare like for like.

Example: In Germany, Market data gathering for the purpose of reviewing Retail and Wholesale Leased Line markets (M7, 13, 14) took place in early 2004, but it wasn't before late 2006 (ie 2½ years later) before BNetzA saw itself able to draw conclusions.

As such, ERG should issue a Common Position regarding which set of figures and what market data should be gathered by NRAs in specific markets – and NRAs should commit to notifying market reviews on the basis of a “minimum set of market data” defined by the ERG common position.

Example: Regarding markets 13 and 14, NRAs should gather (1) sales figures from the supply side to evaluate the size of the market, (2) cost figures from the demand side to sanity-check the data set (3) number of interconnection points offered by market players at the border between the two markets (4) demand developments per bandwidth and (5) price development per bandwidth.

- **Harmonization of SMP assessment criteria.** In assessment of SMP, there is a great degree of variation when it comes to interpretation of factors limiting SMP – despite guidance given through the EU commission through the Market Review Guidelines. This variation needs to be addressed.

For example: The financial power of market players is a factor limiting the SMP operator's ability to apply anti-competitive practices. However, some NRAs look at the financial power of the access seeking entity, while others look at the financial power of the group access seekers belong to. This means that for example in Germany, DT's financial strength is regarded as 'neutral' by the NRA because 'other players exist which have a financially strong parent'. In short, this means DT's financial strength does not play a role in SMP assessments because other international players can be expected to fund loss-making businesses in Germany against price squeeze practices from DT.

- **Harmonization of Post Remedies Developments (“Implementation Best Practice”).** Effective harmonization doesn't stop when a



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remedies decision is issued. NRAs should not entrench in their academic ivory tower once a remedies decision is out of the door – they should constantly monitor the implementation of the decision on the market, to see whether the remedies deliver on their objectives. As such, the NRA's work should be focused much more on the effect a remedies decision has on the market, and less on making a tick in a box for having successfully completed the review. The ERG should develop ideas on best practice in this field, eg by publishing **guidelines on implementation guidance** for NRAs. ERG members should self-commit to sticking to these guidelines.

Seite 7 | 18
15.01.2007

II. ERG (06) 68 – Harmonization: The Proposed ERG approach

ERG asks for comments on its thinking on the nature of harmonisation, its necessary depth and the top priorities for attention. IEN has addressed most of these issues in responding to document (06)67 but would offer the following additional observations. Generally, it has remained unclear to IEN members why there is a difference in ERG (06) 68 and ERG (06) 69. IEN believes that both documents should be harmonized.

1. Definition of harmonization

ERG examines the question what harmonization means and what the criteria for prioritizing further harmonization projects are. IEN shares the view these are important points. ERG is right to raise and highlight the importance of constant harmonization.

In IEN's view, harmonization means to achieve a world-class competitive environment in ECS markets for the benefit of both market participants and consumers by treating similar market failures in similar ways and in a similar timeframe.

As such, IEN suggests harmonization should be seen from four different angles:

- **The choice of remedies**, ie the way remedies are being applied (“which tools do NRAs use to address similar competition problems”).
- **The relevance of wholesale remedies to downstream markets.** In this context, NRAs should safeguard the purpose wholesale input services can be used for – and pay respect particularly to the fact that experience shows the investment ladder requires many rungs. As such, ERG should consider that the ability of wholesale remedies to encourage competition at retail level widely depends on the business model pursued by retail operators.

Example: A regulatory regime biased towards local loop unbundling, for example, will inevitably produce some degree of competition at residential telephony and internet access markets, but due to different customer densities LLU will most likely be pretty useless to operators serving business or corporate customers. So while LLU may be the answer for residential providers, it may at the same time not be the right response for downstream corporate markets such – simply because customer densities do not allow viable unbundling of local exchanges.

- **The timing of market reviews** – and there is reason to add that effectiveness of harmonization has got a timing component: While

some NRAs have finished the first round of market reviews relatively quickly, others are lagging behind significantly.

Example: While failures on market 12 (WBA) have been remedied in the UK in 2003/2004, the German NRA BNetzA has to date end of 2006 failed to see any Bitstream Access being made available in Germany. This may or may not be the NRAs fault – it is however unacceptable from a harmonization perspective to have working remedies in place in one country and nothing in other countries.

- **Implementation harmonization**, ie harmonization of the „book to bill time“, between application of remedies and availability of input at wholesale market: Effective harmonization doesn't stop when a remedies decision is issued. NRAs should not entrench in their academic ivory tower once a remedies decision is out of the door – they should constantly monitor the implementation of the decision on the market, to see whether the remedies deliver on their objectives.

For example, an NRA practising a slanted focus towards local loop unbundling (market 11) will soon notice that other important access markets such as wholesale trunk and access segments of leased lines (13, 14) or wholesale broadband access don't deliver results.

IEN believes the first bullet is generally addressed by the consultation document, whereas the remaining three need to be picked up by the ERG.

2. Role of best practice

ERG concludes that in most cases rapid and widespread dissemination of best practice is the correct route to the appropriate degree of harmonization. IEN believes best practice is certainly the objective, but the implementation of “best” practice provokes the question what is “good”. ERG should adopt a process to make **harmonization measurable**, i.e. market results should be captured and measured – not to name and shame but rather to help NRAs constantly improve the robustness of their analyses at the example of other NRAs.

3. Harmonization priorities

ERG proposes to prioritize harmonization particularly with respect to VoIP, wholesale broadband access, wholesale local broadband access (ULL, Shared Access), mobile termination and fixed termination. As outlined above, the harmonization priorities put forward by ERG seem to be addressing the right aspects – access first, because this is where the bottleneck sits. However ERG should make clear that – following a common understanding of the importance of the subjects mentioned and following the ladder of investment concept – ERG's priorities are more precisely broad-

band access (including Bitstream and Ethernet Access), followed by LLU, followed by mobile termination, and finally fixed termination.

4. Harmonization put into a wider ECS framework context

IEN would like to point out it is not entirely correct the directives didn't mention harmonization: Article 19 FD allows the Commission to propose harmonisation procedures in order to achieve the objectives of Article 8. Additionally, harmonization is a core concept of the internal market; cf. Art 94, 95 of the Treaty, which is underpinned by single market objectives being outlined in Art 8 Para 3 of the Framework Directive. As such, Art 7 Para 2 of the Framework Directive needs to be construed in the light of the overarching objective to achieve an internal market – which in itself implies some degree of minimum harmonization.

In IEN's view, the questions raised in section 2.2 anticipate there is a strong case for consistency and harmonization. IEN support ERG in the underlying tacit assumption that harmonization – as discussed in Annex A – can be key to progressing competitiveness of the electronic communications markets and to pursue the objectives of the Lisbon agenda.

IEN agrees that the ability of market players to deliver pan-European services should be key to setting priorities for further harmonization – not because these were “tetherless”, but rather because the ability to invest and innovate strongly depends on the **size of the addressable market**.

Additionally, Art 7 of the Framework Directive (and the overarching Art 94, 95 of the Treaty) imply this needs to be made a priority. IEN agrees that the promotion of efficient investment and market entry is another criteria to identify harmonization priorities.

IEN also agrees that market entry is undoubtedly deterred by lack of available inputs – **and the unavailability of Wholesale Broadband Access and Partial Private Circuits in Germany is a good example how a lopsided regulatory regime can hamper business cases** that are successful virtually everywhere else in Europe. It goes without saying that this removes incentives for further investment.

5. Consistency versus uniformity versus harmonization

Where the consultation document tries to **delimit 'consistency' from 'uniformity'**, IEN believes the document is missing the point.

The consultation document tends to exaggerate the case for uniformity in order then to dismiss it. IEN is not aware, for example, of any suggestion that local loop prices should be identical in all Member States. Yet if **consumers, particularly business consumers, desire uniformity** of product

offerings, it would be unwise to rule this out by definition, unless an NRA can provide a detailed explanation of why national circumstances make it impossible to offer a product specification that is commonly available elsewhere. And in such cases there should always be the minimum (!) ability for competitors to replicate a dominant player's retail offerings if these rely on a bottleneck facility.

Additionally, the ERG will not be able to change the ECS regulatory Framework itself, which stipulates it is the responsibility of the NRA to apply the appropriate remedy. As such, there is no danger of "one size fits all" type uniform results anyway.

The problem rather is that there is a great degree of variation among ERG members as to what "appropriate" means, and IEN would like to invite ERG to continue addressing this issue – particularly because recourse to 'national circumstances' has become favourite carve-out for some ERG members who have in the past happily used this lever as a **welcome excuse** to disregard ERG common positions, recommendations and best practice.

As such, IEN believes "uniformity" is a non-problem, as long as ERG members share the view that **similar market failures should be treated in similar ways and in a similar timeframe**. 'National circumstances' are less a question of harmonization (ie what remedy should be applied) but rather a question of implementation (ie how should a remedy be implemented in practice).

In IEN's view, the primary purpose of harmonisation is to achieve a single market at retail level through the creation of a level playing field at the wholesale (access) level. Whether this requires uniformity of remedies will depend on the details of the market – but it may do. IEN agrees that broadband access (including leased lines) is a top priority and believes that it is key to the development and roll-out of innovative services across Europe, particularly to business customers.

Regarding section 2.4.b), IEN believes the consultation document is missing the point too, as it unduly confuses retail and wholesale level requirements. In IEN's view, the purpose of harmonization as laid out in the Framework is to achieve a single market to the benefit of the customers – which means to achieve an effect at the retail side of the market by means of addressing the upstream wholesale markets (cf. Art 17 USD). Achieving a single retail market in this concept means creating a level playing field at the wholesale (access) level – because this enables market players to compete for retail level customers fairly.

As such, **there is a case for streamlining remedies at the access level** – not as an end in itself, but to support creation of a single market at retail level. The fact that an ULL in London is not substitutable to an ULL in War-

saw is true but irrelevant in this context – the customer at retail level doesn't ask for LLU but rather for the best service at the best price delivered to him, and he doesn't care whether the service creation point is based in London or Warsaw, even though he may physically sit in the Netherlands.

IEN however agrees that the priority focused on broadband access markets is correctly identified. Broadband access will be key to the development and roll-out of new and innovative services particularly to corporate customers across Europe as early adopters, and the ERG would not only miss on harmonization but rather miss its entire purpose if broadband access wasn't part of the harmonization list.

Regarding fixed termination markets, IEN believes this is more a question of academic interest. IEN would like to raise the question whether ERG has identified any market problem at retail level that justified prioritizing this item.

7. Generic issues – Gaps

IEN agrees the “horizontal harmonization requirements” are core but would like to add two further points:

Firstly, there is a generic need for monitoring best practice achievements through ERG. ERG should adopt a process to make **harmonization measurable**, i.e. market results should be captured and measured – not to name and shame but rather to help NRAs constantly improve the robustness of their analyses at the example of other NRAs.

Secondly, IEN would also like to point out that there also is need for an **implementation best practice**, i.e. a requirement to NRAs to monitor and support implementation of remedies once these are adopted. The reason is that effective harmonization does only start (not stop) when a remedies decision is issued. As such, NRAs should constantly monitor the implementation progress made on the market, to see whether the remedies deliver on their objectives. As such, the NRA's work should be focused much more on the effect a remedies decision has on the market, and less on making a tick in a box for having successfully completed the review. The ERG should develop ideas on best practice in this field, e. g. by publishing **guidelines on implementation guidance** for NRAs. ERG members should self-commit to sticking to these guidelines.

III. ERG (06) 69 – Bitstream Access

1. General Approach

IEN welcomes the opportunity to comment on the ERG (06) 69 consultation on Bitstream Access. IEN agrees that a consistent and harmonized regulatory framework is key to ensure a level playing field for competition in electronic communications markets, particularly in the wider field of broadband access.

IEN welcomes ERG's harmonization activities in this field, as previous attempts have not removed competitive distortions across the piece. This is not acceptable to IEN customers and providers: Pan-European customers demand homogeneous services (e.g. selling MPLS to retail customers requires same wholesale inputs everywhere).

At the same time, providers want single product set across Europe, to realize economies of scale and scope and to increase efficiency. IEN members are not able to enjoy the benefits of a pan-European product factory if they can't sell products everywhere.

2. What does „take into utmost account“ mean in practice?

While IEN considers it generally positive that a process is defined to describe what “taking into utmost account” means, it should be noted that it is certainly insufficient that the NRA “provides an effective solution to the extent consistent with applicable national law”. Though it is correct that the directives apply in member states through their transposition into national laws, there may be situations where national and EC legislation contradict each other – and the significant number of infringement proceedings launched by the Commission under the Framework indicates this is correct.

IEN would like to remind ERG members that under the “**effet utile**” principle stipulated in Art 10 of the Treaty, member states have to take all measures required to comply with their obligations under the Treaty. As such, IEN suggests to include a remark in step (b) whereby member NRAs would provide an appropriate regulatory solution “to the extent consistent with national law and paying due respect to the *effet utile* principle in Art 10 of the Treaty”.

3. Assurance of access – Level of Detail

IEN welcomes the consultation document identifies competitive provision of broadband services for both residential and business customers as a market problem.

IEN however would like to point out that those customer segments have different requirements mainly with regard to quality of service – while “quick internet access” may be sufficient for residential demand, it should be noted that Bitstream services for business and corporate customers fulfil much wider requirements (e.g. real time transmission, guaranteed bandwidth etc, traffic prioritization etc). As such, the statement that “a formal access obligation is likely to be necessary” is **correct but not sufficient**.

IEN believes NRAs would – where an access obligation is being imposed – need to specify a **minimum list of detail**. An “isolated” access obligation without further specification is likely to run idle. As such, ERG should propose through the list of illustrative remedies that NRAs apply a certain level of detail when imposing an access obligation, unless there are objectively justifiable reasons why the incumbent should be able to set the details of the access obligation.

IEN would also like to point out that the existing guidance on Broadband Access is fairly abstract. While this is in the nature of any ex-ante recommendation, it should be noted that the variation in implementation is caused by a **lack of precision in remedies decisions** – in some countries, remedies decisions tend not to deal with a great level of detail, pushing necessary specifications to disputes that are settled outside the remedies process.

This has become a problem particularly in the Broadband area, because the question whether a wholesale broadband product is a useful input for access seekers depends on a large amount of detail to be provided.

As regards wholesale broadband access, ERG should through a Common Position **define a certain level of detail** which ideally should be contained in the remedies decision. Regarding wholesale broadband access markets, NRAs should particularly define –

- how many interconnect points must be made available to access seekers (minimum and maximum number of interconnection points) and at which level (Ethernet, ATM, IP aggregation, IP concentration);
- which Quality of Service must be made available to access seekers (e. g. constant bit rate, real-time variable bit rate, unspecified bit rate);
- how the essential parameters of the links should look like (particularly latency, jitter, packet loss parameters); and
- which specification of the xDSL-based customer link must be offered (particularly which type of DSL and whether a ‘naked DSL’ type service must be made available).

4. Assurance of access – Missing competition issues

IEN would additionally like to point out that the list of illustrative remedies for the objective of assuring access seems to be missing two important competition issues.

Must allow provision of own services. Where an access obligation is imposed on an SMP undertaking, it should additionally be worded in a way that does not allow the SMP undertaking to predetermine the service the access seeker can offer to his customers.

For example, BNetzA in Germany imposed an unspecified “access obligation to the IP Bitstream”. Per result, DT offered a resale product that is restricted to internet access only, while onward wholeselling is prohibited for the access seeker. While these restrictions certainly mean DT has failed to offer Bitstream Access, it will be hard to demonstrate an infringement of the access obligation – simply because the obligation is not specific enough.

As such, ERG should include an obligation to offer access for whatever downstream purpose into the list of illustrative remedies. This illustrative remedy should be applied unless there are objectively justifiable reasons why the incumbent should be able to predetermine the access seeker’s business model.

No rate shaping. Where an access obligation is imposed on an SMP undertaking, NRAs should consider wording it in a way that prevents the SMP undertaking from offering “rate shaped” downlinks, i.e. broadband links between the CPE and the DSLAM that are restricted to a subset of those offered by the SMP operator himself. As such, ERG should include an obligation to offer whatever bandwidth and xDSL service is technically feasible on a specific local loop into the list of illustrative remedies, which should be applied unless there are objectively justifiable reasons why the incumbent should be able to define wholesale products alongside his own retail product set.

5. Level Playing field

IEN welcomes that ERG considers achieving a level playing field to be among the objectives of Bitstream Access. IEN believes the consultation document rightly describes the need for remedies to address this competition issue. IEN particularly welcomes that the consultation document highlights different levels of non-discrimination obligations can be appropriate to deter obstructive and foot dragging behaviour.

IEN however feels the ERG should provide some guidance on the most contentious element of this question, which is the relation between access obligation (Art 12 lit a FD) and the combination of an obligation not to with-

draw granted access (Art 12 lit d FD) and a non-discrimination obligation. Reason is there has been some uncertainty in the past under which circumstances the latter is sufficient. IEN believes that particularly in an environment where the incumbent is likely to reap first mover advantages from new access infrastructure, it will normally not be sufficient to combine the “don’t withdraw” remedy in Art 12 d) FD with a non-discrimination obligation, because inertia of regulatory intervention procedures normally means discrimination can only be remedied ex post, thus inviting the incumbent to curtail competition through “*new retail without new wholesale*” type behaviour.

6. Avoidance of unfair first-mover advantage

IEN welcomes the consultation document’s conclusion that timely (synchronous) availability of suitable wholesale products is critical to competition at both wholesale and retail level, in particular relating to evolving services.

IEN would however like to remind ERG that the non-discrimination obligation used as the first illustrative remedy is **likely to run idle unless the NRA is sufficiently resourced** and capable to enforce infringements within a reasonable timeframe (i.e. days rather than weeks). Otherwise the mere inertia of administrative process in reviewing the retail offers de facto would grant first mover advantage despite the obligation.

As regards the “no-retail-without-wholesale” obligation given as an illustrative remedy, IEN thinks ERG should additionally highlight in the Common Position that such obligation can safeguard but not replace an access obligation – which thus has to be imposed separately. Otherwise, access seekers choice at wholesale level would be restricted to what the SMP undertaking **uses itself**, rather than what the SMP undertaking **could use**. This restriction would effectively rule out deployment of innovative services, because the access seeker could not use what is available but only what the incumbent uses itself.

7. Transparency of Terms and Conditions; Reasonableness of technical access parameters

IEN welcomes the consultation document highlights the key importance of transparent terms and conditions, and the subsequent need for a reference offer. As outlined above, IEN believes NRAs would – where an access obligation is being imposed – need to specify a minimum list of detail: how many handover points need to be available and at which network layer (Ethernet, ATM, IP), which service classes need to be offered (CBR, UBR, VBR etc), which customer links must be made available (ADSL, SDSL, VDSL etc). An isolated access obligation without further specification is likely to run idle. As such, ERG should make clear the obligation to publish

a reference offer does not replace a detailed access obligation, as a reference offer serves the objective to achieve transparency on access terms only.

8. Fair and coherent access pricing

IEN welcomes the consultation document highlights that consistency of price levels is key element of the ladder of investment concept. As such, IEN agrees the price for Bitstream services needs to be set in a way that is coherent to prices for other related services. As the concept of a transparent margin squeeze test has been disregarded by many NRAs, IEN however invites ERG to provide guidance on how such a margin squeeze test can be applied in a way that is foreseeable for market participants. IEN feels that some reference to the Common Position on Accounting Separation and Cost Accounting could be helpful to underpin how a set of accounting rules can support achieving a coherent access pricing.

9. Reasonable quality of access products

IEN welcomes the consultation document acknowledges the importance of quality of service levels being made available. ERG is right to highlight that different customer groups require different service levels. ERG should additionally consider obligations preventing a “service level squeeze” situation as illustrative remedies, i.e. a non-discrimination obligation whereby the SMP undertaking must not provide quicker service at retail level than at wholesale level (logically not the other way round).

10. Assurance of efficient and convenient switching processes

IEN would like to highlight that migration and switching processes are key for the promotion of infrastructure competition. Without such migration processes, it is impossible for access seekers to climb the ladder of investment, which will significantly curtail the ability of new entrants to move towards the customer and thus increase their own value-add, while reducing usage of the incumbent’s infrastructure.

Some NRAs have in the past completely failed to address this issue – for example, the German NRA has constantly assumed that broadband products served simple internet access only and subsequently neglected the need for switching processes between the different rungs on the ladder of investment.

IEN thus recommends ERG should extend the assumption that such a migration process was likely to be necessary by a clear outline which products (LLU, SLU, ATM Bitstream, IP Bitstream, Wholesale Line Rental, DSL resale) were part of the investment ladder. Additionally, NRAs should – again – provide details of how an acceptable migration process should look



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like, in particular which service breakdown periods would be acceptable. ERG should also define under which circumstance “national specialities” can and can not prevent a migration and switching concept to be mandated. In this context, ERG should make sure that a switching concept is mandated, unless there are tangible and objective reasons why a certain market failure can not be remedied the way proposed in the Common Position. IEN believes this requires an in-depth and robust line of arguments that outlines (1) the market situation under review, (2) the standard situation described in the ERG Common Position and (3) an analysis why the switching concept proposed by the ERG is inappropriate in the context of the market review carried out by the respective NRA.

Seite 18 | 18
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