

BT RESPONSE TO ERG CONSULTATION ON REMEDIES

In an environment where the state of competition and availability of key inputs on a transparent, non-discriminatory, basis differs widely among the member states, this attempt by the ERG to achieve consistency is to be applauded but BT believes that some issues remain inadequately addressed while others have been given excessive weight and attention.

In general the tone of the ERG's document implies an increase in ex-ante regulation rather than the increasing reliance on competition law envisaged when the new regulatory framework was drafted.

Summary

In BT's view, the main issues to be addressed by any harmonised regime may be summarised as follows.

Accounting Separation. BT sees accounting separation as an important means of ensuring transparency and non-discrimination.. In the body of this document BT has outlined accounting separation requirements designed to demonstrate cost orientation and so minimise the risk of failing to discover significant breaches of regulatory rules.

The geographic dimension to market analysis and the setting of remedies. It is essential that regulation is not imposed in geographic areas or on routes where supply is competitive. NRAs must therefore take geographic factors fully into account when defining markets and, as required by Article 15(3) of the Framework Directive, define separate geographic markets within their Member States where appropriate. NRAs must conduct their analysis at the level of geographic granularity appropriate to the market in question.

Emerging Markets. BT believes that the regulatory regime should recognise the need for investors to obtain an adequate return on their investment, in the light of the risks taken, but would point out that the strategy of encouraging an attractive reward for risk is not inconsistent with the need to ensure that, where there is compelling evidence of market power, key wholesale inputs are available to entrants on fair, non-discriminatory terms. However, BT believes that the ERG definition will prevent any market being recognised as emerging and therefore urges a more pragmatic approach based on the likelihood that intervention will be harmful where little data is available.

Consistency. At present NRAs differ in the powers available to them and in the sanctions they can impose. Clearly more could be done to ensure fair treatment throughout the member states. Another example is the appeals process. In some countries, decisions by NRAs are regularly appealed

resulting in delays of up to 6 years. In other countries the maximum delay is a matter of months.

Margin Squeeze Tests. Margin squeeze tests should be performed, only where clearly justified, only to a limited set of products, and in a clearly defined way. Results should not be used to adjust prices retrospectively.

1. *Do you agree that the description of the competition problems provides the requisite level of detail? If not, please highlight areas where you would like more detail to be included in the final document.*

1.1 The analysis is performed at a high level of detail and produces an exhaustive list of potential problems – many of which are rarely if ever encountered in the communications sector. The analysis should contain a realistic assessment of the probability of finding each of these problems.

1.2 The document implicitly attributes anti-competitive motives to a number of difficulties which are more commonly due to genuine technical problems, unreasonable demands by competitors, or reasonable concerns of SMP operators. For balance, the analysis should also highlight the propensity of some market players to enter a regulatory game in which there is substantial advantage to be won from raising the costs of, or imposing delays on, a potential SMP undertaking. Regulatory tolerance for such gaming would not be consistent with the goals of ensuring no distortion of competition, and promoting investment.

1.3 Furthermore, BT questions the assumption that, absent any actual abuses, remedies are nevertheless always needed wherever there are incentives to abuse market power. This is fundamentally at odds with the principles of increasing reliance on competition law, and proportionality.

2. *Are there relevant examples of competition problems that are not covered by this framework? If you believe that there are, please provide details.*

2.1 BT believes that the principle of non-discrimination is key – not only on price but all aspects of service and access to service.

3. *Do you agree with the description of remedies provided, in particular, does it provide the requisite level of detail?*

3.1 The analysis does not discuss the question of geographical deregulation in areas where there are significant increases in the level of competitive supply. Any such deregulation would need to be at a detailed level of disaggregation defined by the local degree of competition.

3.2 BT questions the assertion that remedies from the Access and Interconnection Directive may be applicable in retail markets. Point 108 of the Guidelines on Market Analysis states that the obligations related to wholesale markets are set out in Articles 9 to 13 of the Access Directive and those related to retail markets in Articles 17 to 19 of the Universal Service Directive. NRAs cannot impose a remedy from the Access Directive at retail level to an undertaking with SMP on retail markets. The regulatory controls available are only those covered by Art. 17.2 (regulatory controls on retail services), Art. 18 (minimum set of leased lines) and Art. 19 (carrier selection and pre-selection) of the Universal Service Directive.

4. *Are there any further principles, in addition to those set out in Ch. 3, that you wish to propose? If so, please justify them on the basis of the Directives.*

4.1 The Directives require that any remedies be necessary and proportionate. A cost benefit and sensitivity analysis by the NRA is at the core of this requirement so it is essential that before taking action NRAs can demonstrate that there is a strong probability of a net benefit given the likely risk of error. This is particularly important where a lack of data indicates that a market is an emerging one.

4.2 There is a clear need for harmonisation of remedies at EU level and this should include strong guidance on proportionality.

5. Looking at the objectives in Article 8(2) of the Framework Directive, what are your views about how NRAs can balance short term and long term objectives?

5.1 NRAs should take steps to encourage communications undertakings to provide an adequate range of wholesale products on a voluntary basis – preferably following industry consultation.

5.2 Intrusive micro-management by NRAs insisting that SMP operators provide a very wide range of wholesale products will be highly damaging to investment; particularly, in the broadband/bitstream area, if accompanied by detailed but ill-defined margin squeeze tests applied between a wide range of final and intermediate products. Mandated access must be confined to a limited set of products. Margin squeeze tests should be performed, only where clearly justified, only to a limited set of products, and in a clearly defined way. Results should not be used retrospectively. Option theory, mentioned below, suggests that margin squeeze tests are likely to be highly distortive in the presence of technological uncertainty.

5.3 A further problem with margin squeeze tests (and many other cost assessment methodologies) is that costs may rely heavily on volume assumptions which may prove erroneous – particularly for emerging markets.

It would be a serious regulatory distortion to attempt to revisit or retrospectively amend interconnection rates based on hindsight.

5.4 It may be necessary for NRAs to take a view not on what is potentially replicable *per se* (as suggested in the ERG document) but on what facilities can be economically replicated (or substituted by alternative technologies such as wireless) given the density of target customers for those facilities. In practice, encouragement of a basic set of wholesale products coupled with a verifiable (through published accounting separation information at a sufficient level of detail) non-discrimination obligation should suffice.

6. *Do you think that there are any trade-offs between short-run service competition and long run infrastructure competition? If yes, please highlight potential areas and provide relevant examples. In this context, what are your views on the approach that NRAs should take in relation to (short term) business failures?*

6.1 BT has doubts about the “ladder” theory of investment which the ERG document relies on. It is clear that unless wholesale prices are, or are phased over time to become, sufficiently high, an alternative operator will always choose to buy rather than build infrastructure. The option value of delaying investment is simply given away to a new entrant as a free subsidy. This is particularly the case if the alternative operators are guaranteed access to every network innovation developed by the SMP operator and are moreover allowed to demand a wide range of technical variants on any existing or new service.

6.2 According to dotecon and Criterion Economics¹, there is a danger that cheap access can lead to inefficient churn of resellers. Their report notes “Access based entrants are often highly leveraged or under-financed. Even small adverse shocks can make players unviable given the high level of customer acquisition costs....The unsustainability of access based entry creates regulatory inertia. Once access is granted, especially if access charges are inefficiently low, regulators naturally find it difficult to remove such concessions, owing to the adverse impact on entrants whose business cases may depend on inefficiently low access prices”.

6.3 The dotecon/Criterion report also demonstrates graphically that mass market broadband penetration is highest in countries where there is platform competition and that competition purely based on resale or unbundled loops does not drive increased take-up.

¹ <http://www.dotecon.com/images/reports/BRTfull15-10-03.pdf>

7. Do you agree with the proposed treatment of emerging markets? If not, please provide details.

7.1 The definition of emerging markets is so restricted that in practice none will ever be found. In particular the requirement that no substitution take place in response to a price increase in the emerging service fails to recognise that most emerging markets still have substitutes and implies that the market must have emerged for long enough to allow the compilation of data on price elasticity of demand.

7.2 A better definition might be based on both the lack of knowledge of demand trends and demand elasticity, and the need for ongoing investment. Lack of knowledge will significantly increase the likelihood of inappropriate intervention resulting in substantial error costs.

7.3 Investment in an emerging market is by definition speculative so any controls MUST recognise the need for appropriate levels of reward.

7.4 The ERG analysis appears to suggest that the concept of emerging markets will only be used as an excuse to avoid regulation. This is an extremely dangerous attitude for regulators to take and will seriously threaten European innovation and future competitiveness. Many of the remedies suggested are the opposite of what would be needed to encourage innovative investment.

7.5 Voice over IP is a classic example of an emerging market where regulators must forebear if they are not to stifle innovation. At this stage there remains a high degree of technological uncertainty making investment and innovation risky – and there remains massive potential to stifle the service through over-burdensome economic regulation or the imposition of technical requirements.

8. Are there any special considerations which should be taken into account in designing appropriate and proportionate remedies for the markets in accession countries?

8.1 No – there are no special considerations as the processes of market definition and analysis coupled with the principle of proportionality should be able to take account of any differences.

9. Do you agree with the description of problems and related remedies? If not please provide an alternative analysis.

9.1 There are a number of issues that NRAs need to take into account when considering the imposition of SMP obligations to address an identified problem. These include:

- The need to avoid confusion between SMP remedies and those imposed on other grounds.
- The need to select appropriate remedies and match the level of obligation to the identified problem. (The range of remedies may vary from the prescriptive ex ante provision of information to simple monitoring on an ex post basis.)
- The need to avoid market distortions caused by obligations to supply services.
- The need, laid out in Article 8 of the Framework Directive, to promote competition and ensure that pricing obligations do not deter efficient market entry or the construction of competing infrastructure.
- The need to use price caps sparingly and only where there is little prospect of competition developing in the medium term. (Where a price cap is applied to an individual service, or the absolute price level is set by the NRA, there should be no further obligation to demonstrate that prices are “cost plus” or “retail minus”.)
- The scope for competition law rather than ex-ante regulation to deal with predatory or excessive pricing.
- Avoidance of automatic recourse to “cost plus” approaches, especially for new products, in response to concerns about cost orientation principles leading to too wide a range of prices. (Regulatory tests for cost orientation should be aligned with competition law tests for abusive pricing.)
- The scope for competitive pressures in downstream markets to obviate the need for remedies other than non-discrimination in upstream markets.
- The need for an obligation of non-discrimination to allow SMP undertakings, under certain conditions, to offer different prices or terms to different customers as long as the effect is not anti-competitive.
- The appropriate details of any price transparency obligations.

9.2 BT gives a more detailed commentary on these topics in Annex 1

10. Do you agree that the document offers sufficient guidance concerning the approach on remedies to be taken by NRAs? If not, please highlight those areas where you would wish to see more guidance provided.

10.1 The document fails adequately to address the issues of emerging markets, the design of suitably non-distortive margin squeeze tests, the options benefits from leasing facilities, and the distortive effects of excessive access obligations.

10.2 Further guidance is needed on harmonised outcomes; in particular on proportionate intervention, and avoidance of excessive granularity/detail in cost accounting and accounting separation requirements.

11. Does the document provide sufficient guidance on which particular cost accounting methodology would be appropriate for those competition problems for which NRAs may consider price regulation? If not, please highlight those areas where you would wish to see more guidance provided.

11.1 A key point is that a reasonable “cost plus” price needs to cover at least the incremental costs of the service in question, including the costs of capital, and provide a contribution towards the recovery of the fixed costs of the network. It is important that the methodology of cost allocation is equitable, understood by all market participants, and published at an appropriate level of detail, together with evidence or confirmation of adherence to it, wherever there is any SMP finding.

11.2 The demonstration of non-discrimination, or other forms of anti-competitive abuse, cost orientation of wholesale services, and a more general demonstration of an arms’ length and non-discriminatory relationship between an operator’s network and retail operation is a key requirement wherever SMP occurs, and can be achieved through the implementation of a proportionately established, published, accounting separation regime at the network/wholesale level.

11.3 At wholesale level the NRA should have options ranging from requiring publication of revenue and cost information at service level, to a simple monitoring and reporting obligation where previous behaviour provides evidence of compliance.

11.4 In order to demonstrate a reconciliation to the entity’s statutory accounts, published accounting separation statements would also need to include a single set of data for all non-SMP wholesale, all retail and all non-electronic communications activities taken in total.

11.5 It is also important to ensure that an excessively detailed and burdensome regime of cost accounting is not imposed. Guidance from the ERG that would ensure an appropriate level across all Member States would be welcome.

11.6 BT offers an expanded version of these comments in Annex 2.

12. *Is sufficient guidance provided in relation to mobile call termination in chapter 4. If not, please outline what issues would require further elaboration. Please express your views on the principles that should guide NRAs in dealing with new entrants and/or smaller players in mobile termination markets.*

12.1 BT believes the ERG suggestion, that special treatment may be justified when assessing mobile termination prices on smaller networks / new entrants, risks distorting the market by forcing existing operators to subsidise new ones. This is particularly inappropriate in markets where there may already be 4 or more operators. Where a bottleneck exists, there is no market mechanism to constrain prices, and commercial agreement is impossible, then the same regulatory approach should be applied to all market players.

12.2 Further thought is also needed in the area of basic call termination on 3G mobile networks. Any tendency for 3G operators to exploit their termination monopoly by charging excessive prices for basic call delivery will need to be addressed by NRAs.

12.3 There are significant differences in market power conveyed by bottlenecks in fixed and mobile call termination and market analyses should ensure these are fully taken into account.

12.4 Wherever possible undertakings should negotiate termination rates on commercial terms, with regulatory intervention only on request of either side if it appears that market power is being abused.

13. *Does the document provide sufficient guidance with the text boxes on bitstream, re-selling access lines and international roaming in Ch. 4?*

13.1 The ERG document should offer guidelines to ensure a reasonable, defined, approach to any margin squeeze test. In BT's response in August 2003 we said: *"Regulators should take a light handed approach to price squeeze issues – relying as far as possible on competition law. There should be broad acceptance that failure to satisfy the arithmetic of a price squeeze test may be a consequence of the methodology (particularly where the test is applied to broad vertical and horizontal combinations of products) or represent product differentiation rather than any exclusionary intent. It is important that price squeeze tests be conducted to a standard format and only re-done when there is a significant change in market conditions."*

13.2 The ERG asserts that bitstream access is a means to promote infrastructure competition – but this is only true if the pricing is appropriate and if there remain technical enhancements which competitors can only gain through their own facilities (instead of being granted the authority to make open-ended demands on the SMP operator).

13.3 Where Wholesale Line Rental ("re-selling access lines") is mandated the SMP operator must be allowed to recover its costs. BT believes that this

remedy risks being an excessive intervention in areas where there is already very extensive alternative provision of physical networks.

14. Do you agree that the principles developed also apply in cases of joint dominance? Do you have observations regarding specific remedies that may be appropriate in situations of joint dominance?

14.1 This may be better left to competition law remedies – especially given the legal appeal delays on ex-ante cases in many Member States.

15. Do you think that the discussion in Chapter 4 will assist NRAs in achieving a consistent application of the framework? In particular, is it sufficient to focus on harmonisation of outcomes or should there also be harmonisation of regulatory approaches?

15.1 Further attention should be given to appeals procedures which must be both timely and consistent across Member States. It is utterly unacceptable for an appeal to take up to six years in some countries and for there to be 500+ decisions outstanding in a single Member State. The rights supposedly available to market participants are simply not enforceable in any meaningful timescale – with material impact on the effectiveness of the rules themselves.

15.2 There is little in the document that will assist NRAs to harmonise outcomes in similar situations. Yet this is essential if there is to be a single internal market for communications services. As an example, there is nothing in the document that will harmonise the hugely different levels of financial reporting and publication requirements applied to former incumbent operators.

15.3 In our response on bitstream in August BT said: *“At the wholesale level, the quantity of data supplied should be adequate to ensure compliance with non-discrimination requirements, should not be excessive, and should be published. This is currently not properly applied across Europe and is prejudicing the proper roll-out of pan-EU product sets.”*

Other comments

16. Please provide a concise description of any other issues that you believe the document should address or a critique of any other aspects of the document that you consider relevant. In doing so please refer to actual or potential problems encountered in electronic communications markets, as well as to relevant case law and other precedents.

16.1 BT notes that it would seem that NRAs are not all given an equivalent set of powers by the implementing legislation in each Member State. This is clearly a potential barrier to achieving harmonised outcomes.

16.2 Greater consideration needs to be given to the impact of economics of density in relation to an entrants business model when determining the feasibility of replicating assets. Clearly an entrant aiming at mass markets should be able in due course, and provided interconnection prices are not set too low, to replicate all aspects of a network. Whereas suppliers aiming at a relatively small number of customers spread over a broad geographical area are unlikely ever to achieve the economies of scale needed to make local infrastructure replication viable.

16.3 Large enterprises, whether vertically integrated or not, should not be penalised for having economies of scale. Any regulated interconnection charges should be allowed to reflect genuine differences of cost in handling traffic from different customers.

16.4 BT believes that economies of scale have an ambiguous relationship to market power - they may deter entry but they also reduce the ability of the supplier to profitably raise prices above the competitive level (because price rises will reduce demand and increase unit costs disproportionately). This is an important consideration not only in terms of market analysis but also in the Commission's 3-stage test to decide whether a market is "susceptible" to ex-ante regulation.

Annex 1 – Detailed BT view on Remedies

A1.1 There are a number of issues that NRAs need to take into account when considering the imposition of SMP obligations to address an identified problem. These include:

Ensuring that only SMP remedies are imposed

A1.2 The need to avoid confusion between SMP remedies and those imposed on other grounds is especially pertinent when considering remedies in retail markets, where obligations are possible under three separate chapters of the Universal Service Directive: Chapter II, which deals with “Universal Service obligations including social obligations”, Chapter III on “Regulatory controls on undertakings with SMP in specific retail markets”, and Chapter IV on “End-user interests and rights”.

A1.3 The remedies possible under these different parts of the Directive may be similar, and a market may be liable to regulation under all three. For example, SMP may be found to exist in a market which includes a service covered by the Universal Service Obligation and where “end-user rights” obligations apply. There is, therefore, a risk that regulation addressing these different types of problem could be confused. However, the obligations imposed on these different grounds are distinct and they should be considered according to the relevant criteria. It is essential that any obligations imposed to address problems resulting from the existence of SMP in a market are considered separately from obligations imposed on other grounds. This will ensure that if or when market conditions change, the corresponding necessary changes to regulation can be readily identified.

A1.4 The risk of confusing remedies designed for different purposes can be illustrated with reference to the different provisions of the Universal Service Directive relating to price transparency obligations. In Chapter II of the Directive, Article 9(5) requires full transparency and publication in relation to certain universal service tariffs. In Chapter IV, Article 21 requires transparency in relation to tariffs and standard terms and conditions for access to and use of publicly available telephone services. Chapter III relating to SMP, however, refers to transparency only in the context of retail leased lines². Any consideration of what, if any, further transparency obligation is appropriate in a retail market where SMP is found to exist must be subject to the principles of SMP regulation, namely it must be limited to what is appropriate and proportionate to deal with any competition problem identified in that market.

Selecting appropriate remedies and matching the level of obligation to the identified problem

A1.5 To ensure proportionality, the type and level of SMP obligation to be imposed needs to match the concern arising from the nature of the identified

² i.e. via the reference in Article 18 to Annex VII which sets out “conditions for the minimum set of leased lines”

problem. Although strictly the Directives recognise either the absence or presence of SMP in a market, in reality market power where there is SMP will give rise to different issues under different market conditions. There can be no question of following a “one size fits all” approach: rather the NRA must select the appropriate regulation from the menu of options offered by the Directives.

A1.6 For example, to address a particular competition concern, an NRA could impose an obligation for an undertaking’s wholesale arm to supply all retailers on equivalent terms. In some market circumstances, it could be appropriate to require the undertaking to prove compliance by filing “cost stacks” showing details of charges for wholesale services and of retail costs. In others, it may be sufficient simply to require the undertaking to confirm that it is compliant with the obligation. The range of remedies may vary from the prescriptive ex ante provision of information to simple monitoring on an ex post basis.

Service Obligations

A1.7 Remedies relating to obligations to supply services are particularly likely to introduce distortions. Alignment with competition law should reduce this risk. For example, prohibitions on unreasonable bundling should equate to the prohibition on anti-competitive bundling that would apply under competition law. Ex ante regulations may, therefore, not be necessary. The nature of any mandated processes, SLAs and/or SLGs, and quality of service targets should be very carefully assessed and closely linked to the markets concerned.

Price level obligations

A1.8 The regulatory objective to promote competition in Article 8 of the Framework Directive requires NRAs to ensure that there is no distortion or restriction of competition, to encourage efficient investment in infrastructure and to promote innovation. NRAs must ensure that any price level obligations do not frustrate the fulfilment of these requirements by deterring efficient market entry or making the construction of infrastructure unattractive.

A1.A1 Price caps are particularly likely to have such undesired side effects. They should therefore be used sparingly and only where there is little prospect of competition developing in the medium term. Increasingly, the existence of competition at the retail level, even if only based on the availability of wholesale services on a non-discriminatory basis, should obviate the need for retail price caps. Where a price cap is applied to an individual service, or the absolute price level is set by the NRA, there should be no further obligation to demonstrate that prices are “cost plus” or “retail minus”. In addition, price caps should not be set at a level that prevents undertakings from enjoying adequate rewards for innovation and risk-taking.

A1.10 Cost orientation of prices is closely linked to competition law. Too low a price and there is the potential for a finding that a dominant company has

abused its position under competition law by setting predatory prices; too high a price and the company could be found to have breached competition law through excessive pricing. As competition law is intended to deal with predatory and excessive pricing, any regulatory obligation for cost oriented prices must be subject to a very rigorous cost benefit analysis³.

A1.11 In the past, there has been a concern on the part of some NRAs that the range of prices which could be considered consistent with a requirement for cost orientation is too wide. One response has been to impose a more restrictive interpretation of cost orientation in circumstances where competition is considered to be limited. In many cases, this has entailed a requirement for “cost plus” pricing. Under this methodology, the undertaking concerned recovers its costs of providing a product, including a return on the capital employed as assessed by the NRA. There are a number of economic and financial arguments as to why this may not be a reasonable basis for pricing, especially for new products, and existing requirements for “cost plus” pricing should certainly not be carried over into the new framework by default, without proper review and justification.

A1.12 Regulatory tests for cost orientation should be aligned as closely as possible with the competition law tests for abusive pricing⁴, i.e. a price should not generally be considered to fail the test for cost orientation unless it would be found to be excessive or predatory under the competition rules. To do otherwise would risk over-intervention and market distortion. NRAs must also consider whether ex ante demonstration of cost orientation is necessary, or whether, in line with competition law, it would be sufficient to rely on ex post assessment of prices in the event of a query.

A1.13 Where an NRA is considering the imposition of price level obligations, it is essential that the implications of any interplay between upstream and downstream markets are taken into account. For example, where an undertaking supplies a service as an input to one of its own operations as well as to competitors, competitive pressures in the downstream market may be such that a general obligation for price non-discrimination in the upstream market provides a sufficient constraint on prices in both upstream and downstream markets.

A1.14 Obligations for non-discrimination themselves require careful consideration. An obligation for non-discrimination should not prevent a provider with SMP from offering different prices or terms to different customers as long as the effect is not anti-competitive. When setting an obligation for non-discrimination, an NRA must be clear and transparent on what level of difference will generally be considered discriminatory and justify its view with reference to the aim of promoting competition. Such guidance

³ However, due to the difficulty of proving whether or not prices are abusive, ex ante obligations to implement cost accounting systems and publish methodologies will be justified.

⁴ The assessment of costs needs to take into account the particular nature of the electronic communications environment and the costing of network services, as considered in the EC Access Notice (98/C 265/02).

should highlight any cases where the acceptability or otherwise of a particular practice may vary within a market depending on circumstances: the negotiation of individual tariffs, for example, could be considered acceptable in relation to large business customers but might be considered discriminatory if applied within other customer groups.

Price transparency obligations

A1.15 Where an NRA has determined that price transparency obligations⁵ will provide an appropriate remedy for a problem resulting from the existence of SMP in a market, it must ascertain the proportionate form and level of obligation by considering the following questions in particular:

- (a) What degree of publication should be required? Should headline prices only, key discount schemes, or all possible prices for the services concerned be published?
- (b) Would filing with the NRA, rather than full publication, be sufficient?
- (c) How far in advance, if at all, should new prices be published or filed?
- (d) Are there groups of customers in relation to whom it would not be appropriate to require publication - possibly, for example, major business customers - even if publication of prices for other customer groups was required?
- (e) Would publication promote competition, one of the regulatory objectives set out in Article 8 of the Framework Directive, or would it distort competition by conferring an undue competitive advantage on competitors of the provider/providers with SMP or by facilitating price-following or otherwise lessen competition?
- (f) What degree of publication would be an appropriate remedy in response to a breach of competition law in the market?
- (g) What would be the justification for any regulatory requirement going beyond the appropriate competition law remedy?

A1.16 The length of any required notice period for publishing or filing prices will depend on the nature of the product or service. Longer notice periods may be justifiable for basic interconnection services, while shorter periods are likely to be appropriate for wholesale services which are further downstream and for retail services.

⁵ Price publication in this context refers to a regulatory obligation only, i.e. as distinct from any contractual obligation to notify prices to individual customers.

Annex 2. Detailed BT View on Cost Accounting and Accounting Separation

A2.1 Electronic communications is a capital-intensive industry with many shared costs, and the costing of individual services is complex and difficult. A reasonable “cost plus” price needs to cover at least the incremental costs of the service including the costs of capital and provide a contribution towards the recovery of the fixed costs of the network. There are various approaches to recovering fixed common costs, such as Ramsey pricing and equal proportionate mark up (EPMU). This subject has been widely debated in various texts and will not be repeated here. What is important is that the basis of this attribution and of cost allocations is equitable and understood by all market participants. The methodologies by which costs are attributed to services at both the wholesale and retail levels must be published at an appropriate level of detail, together with evidence or confirmation of adherence to the published methodology, wherever there is any SMP finding.

A2.2 Many of the issues relate to the demonstration of non-discrimination or other forms of anti-competitive abuse. The demonstration of the cost orientation of wholesale services is also a key requirement wherever SMP occurs. Both of these, and a more general demonstration of an arms’ length and non-discriminatory relationship between an operator’s network and retail operation, can be achieved through the implementation of a proportionately established, published accounting separation regime at the network/wholesale level. This should include the publication of financial statements showing the revenue, costs and capital employed of the network activities, with such subdivisions of those activities as are dictated by their SMP position or importance to the interconnect regime. These statements can show the cost of interconnection services and the relationship of this to their prices (cost orientation) and at what prices those interconnection services are sold to the SMP provider’s retail business (non-discrimination), as well as including a confirmation that they have been prepared in accordance with the published methodology (see above). These purposes are clearly at the heart of the regulatory regime wherever there is a finding of SMP at the wholesale level.

A2.3 Depending on the nature of the issue to be addressed, it may be proportionate for the NRA to require at wholesale level:

- publication of detailed revenue and cost information at service level;
- accounting statements covering the whole market in which the provider has SMP, with no granularity within the market; or
- exceptionally, replacement of detailed intervention by a monitoring and reporting obligation consisting of confirmation that the necessary systems and data collection processes have been implemented and that information can be provided on a timely basis when required.

The latter level of obligation may be appropriate particularly where previous behaviour provides evidence of compliance.

A2.4 In order to demonstrate a reconciliation to the entity’s statutory accounts, published accounting separation statements would also need to

include a single set of data for all non-SMP wholesale, all retail and all non-electronic communications activities taken in total; without such a reconciliation, it would not be possible to police regulatory financial obligations.

A2.5 The extent to which consistency in regulatory accounting obligations is achieved under the new Directives will be a key indicator of the effectiveness of the new framework⁶. Concerns over the continued existence of major problems in this area have been raised in authoritative documents such as the Commission's Implementation reports and the report prepared for the Commission by Andersen Consulting in July 2002. A level playing field in regulatory accounting is essential for the development of a single market in electronic communications, and NRAs and the Commission need to pay particular attention to this issue.

A2.6 Notwithstanding the comments earlier in this section, it is also important to ensure that an excessively detailed and burdensome regime of cost accounting is not imposed. BT noted in its response to the Oftel consultation on Financial Reporting that in a number of respects Oftel's proposals were irrelevant, unjustified, unnecessary, and disproportionate. Guidance from the ERG that would ensure an appropriate level across all Member States would be welcome.

⁶ NB The Universal Service Directive does not envisage obligations for accounting separation in retail markets. The only regulatory accounting obligations specified in this Directive are those relating to cost accounting systems to support price controls.