

Conclusions of the eleventh plenary of the European Regulators Group

Date: December 2 – 3, 2004
Location: Brussels

Information from the Commission

The Commission provided information on the following.

Cocom (October 13):

Written procedures regarding the draft Recommendations on powerline communication and leased lines part II will begin as soon as translations are finalized. An advisory procedure was held on the Draft Commission Decision pursuant to Article 7(4) of Directive 2002/21/EC regarding the Austrian transit market. The next Cocom meeting is on the 15 of December – highlights include a discussion on ENUM and the draft Recommendation on Accounting separation and cost accounting. The Commission reminded the Group that the current draft Recommendation of December 1 may still change in the light of Cocom- and inter-service consultations.

10th implementation report: A press conference with Commissioner Reading in conjunction with the release of the report will be held Monday, December 6. The report will consist of a brief Communication supplemented by a Commission Services working paper with annexes for each country and regulatory benchmarks.

Follow-up on the facilitation of mobile payments/the e-money Directive consultation:

On November 24 the Commission (DG MARKT) presented the conclusions of the public consultation to the Banking Advisory Committee. The national banking regulators from most Member States generally supported the idea that mobile operators should not be overregulated and that very few mobile operators' payment services (for prepaid mobile services) fulfil the definition of e-money so as to fall within the scope of the e-money Directive. The Commission proposed to use the possibility for waivers contained in the Directive. The Committee in addition supported that the Directive should be revised in 2005. In the meantime, the Commission plans to publish guidance in line with the conclusions.

Report on Art. 7-notifications: The paper ERG (04) 40, a report on recent developments related to notifications according to Art. 7 of the Framework Directive, was presented. Notably, veto decisions regarding the Finnish wholesale mobile access and call termination market and the Austrian transit market were issued. The Commission has also commented on the UK market definition case concerning the inclusion of cable networks in the ULL market and the details of cost orientation obligations. It is also currently examining another UK notification regarding collective dominance in a submarket of the wholesale broadcasting transmission market.

Information on a revision of the Recommendation on relevant markets: A revision is planned to begin in late 2005 in the form of a call for input. There will be a public consultation in the first half of 2006.

FCC proceeding on foreign mobile termination: The Commission will respond to the FCC enquiry regarding foreign mobile termination rates in the “reply comments” phase before the February 14, 2005 deadline. It will describe the market development, the new regulatory regime and actions already taken by regulators.

Regulatory aspects of Voice over IP (VoIP)

Rauni Hagman of FICORA (Finland) presented a working document in the form of a draft Common Position on VoIP (ERG (04) 41). The plenary reaffirmed the importance and urgency of the subject in particular from the point of view of legal certainty. The overall objectives, to encourage innovation and new services for the consumers, are shared within the Group and by the Commission. The main issues agreed to be further developed in the short term are numbering rights and obligations, in particular in relation to the ECS and PATS definitions, and access to emergency services. Based on Ms. Hagman’s proposal, the Group agreed that the document was not yet complete and as such not ready for publication.

In addition, the Group agreed that a basic regulatory approach with thresholds for new entrants should be investigated. The approach should allow an initially more lenient regulation of smaller operators in particular regarding numbering and emergency services. It was agreed that the working group should start working on the basics of such an approach and that a smaller voluntary group of Heads and a Commission representative would meet in early January to provide the VoIP workgroup with further instructions. According to the agreement, other regulatory approaches to encourage the development of VoIP services should also be investigated by the workgroup, as well as difficulties and possible consequences of any approach. The goal is a draft Common Position for consideration at February’s plenary meeting.

Wholesale international roaming (WIR)

Marianne Treschow of PTS (Sweden) assisted by Mauro Martino of AGCOM (Italy) presented three working documents with positions on market definition and joint and single dominance respectively for the Group’s information. An action plan for a coordinated Europe-wide project for the market analysis along with a timeplan were also proposed and accepted by the Plenary.¹ The project foresees that the NRAs will send out a questionnaire for market data collection with at least a basic set of questions in their respective countries on the 10th of December. Ten national regulatory authorities will send a more detailed questionnaire and will be conducting a joint analysis, sharing the data collected. It was also agreed that a press release with information on this initiative will be issued on the same date.

¹ This will be reflected in the draft 2005 Work Programme, which will be subject to a public consultation.

Wholesale broadband issues:

The Commission presented its discussion note (ERG (04) 32rev1) on wholesale broadband markets. The discussion focused on the definition of market 12 in the Commission's Recommendation on relevant markets and in particular to what extent networks other than the PSTN may be included. The methods for applying retail minus as a remedy for the wholesale broadband market and its consequences were also discussed.

RegTP (Germany) gave an oral progress report on work with the addition of a cable network access chapter to the Common Position on wholesale bitstream access. The document does not deal with market definition but only the remedy stage of the market review and the technical possibility of imposing wholesale access obligations regarding cable networks. A new integrated draft Common Position on bitstream access, taking into account comments from the Commission, should be able to be subject to a public consultation regarding the added chapter after the ERG plenary meeting February 10-11 2005.

Reports addressing particular implementation issues

Ofcom (UK) presented the following documents.

Framework for measuring and evaluating regulation: A progress report on the groundwork done for creating a framework for measuring the state and intensity of regulation and evaluating its effectiveness (ERG (04) 45) was tabled. The work undertaken so far shows that the further efforts needed to achieve usable results are not in proportion to NRAs' views on the work item's priority as an ERG collective effort. The Group therefore agreed not to carry out any further work on this issue.

Analysis of remedies application to operators in the same market or termination markets: The progress report ERG (04) 50 was presented. As a number of NRAs have not completed the relevant market reviews, there is insufficient evidence so far to identify any trends. The Group noted that the European Commission has identified asymmetric regulation in the mobile sector as one of its priorities for a review of the Remedies Common Position, and decided that any further work on the remit should be carried out in that context.

Analysis of the application of Article 5.1 AD: The working document ERG (04) 51 was tabled. The document examines the ability of a common approach to the application of Article 5 of the Access Directive, possibly produced in cooperation with Commission Services.

Incentive compliant behavior/NRA powers to fine: A progress report (ERG (04) 52) on NRAs powers to fine, with some initial findings, was presented. As the issue was not highly prioritised by NRAs, it was decided to postpone work on this item and not include it in the draft 2005 Work Programme.

Working document on the concept of SMP

Carlos Bustelo of CMT (Spain) presented a revised working document on the concept of SMP (ERG (03) 09rev1) accompanied by an explanatory note (ERG (04) 57). The working document is a revised version of an earlier document (ERG (03) 09) published on the ERG website. The document now includes more detailed economic explanations for some of the criteria and incorporates the experience of NRAs' application of the criteria. The document clarifies that it does not necessarily reflect the position of the Commission. The Commission stated that they have reservations about the document, given the existence of the Commission's SMP Guidelines. The plenary decided to subject the document to a public consultation.²

Transitional measures pursuant to Article 27 of Directive 2002/21/EC

The Commission presented a report to ERG (ERG (04) 58) serving to clarify under what circumstances regulatory action taken by NRAs after the date of application of the regulatory framework may fall within the scope of the transitional provisions contained in Article 27 of the Framework Directive.

It was noted that that the Swedish regulatory framework transposition act does not allow the application of rules based on the old (ONP) framework in Sweden after July 24, 2004. In those areas where market analysis has not yet been concluded there is therefore a legal vacuum. It was also noted that OPTA has in effect been instructed by a Dutch court to disapply national rules if they are unclear and instead directly apply the rules of the Directives.

Work Programme 2005

The Secretary outlined the draft Work Programme for 2005 (ERG (04) 46). The draft is a result of an internal consultation exercise with members and observers, indicating their highest priorities and their willingness to devote resources in reference to a list with a number of projects identified in a previous stocktaking exercise. The issue of the organisation of the work for 2005 was also discussed.

In conjunction with discussing the foreseen work on broadband issues, Ofcom offered to present their forward-looking work on IP interconnection at the Bled seminar, May 26. AGCOM also offered to hold a presentation at the same seminar on developments in *triple play* consumer broadband services in Italy. RegTP offered to chair the work combining the broadband market analysis and the competitive effects of VoIP services.

ERG decided to subject the draft 2005 Work Programme to a public consultation, following agreed modifications resulting from the plenary discussion.³ The plenary

² This consultation will coincide with the consultation on the draft 2005 Work Programme (see below).

³ The consultation is foreseen to take place between December 10 2004 and January 18th 2005. The relevant documents will be published on the ERG website. A public hearing will take place on January 14th 2005 in Brussels.

asked the Chairman and Vice Chairman to provide an introductory statement on the key priorities of the 2005 Work Programme. AGCOM of Italy agreed with the publication of the draft Work Programme for consultation, adding that the issue of accounting principles should be taken into account in the Work Programme.

Maastricht seminar on interacting legal systems

The Commission gave an oral account of the October 28 – 29 seminar in Maastricht on interacting legal systems in the context of the regulatory framework in particular from a harmonisation perspective. The Commission stressed the importance of EU-wide guidance to ensure a maximum of harmonisation of court decisions based on the rules of the regulatory framework.

“Early warning system” for serious doubts-letters according to Art. 7 FD

The Secretary presented a proposal to alert, involve and support NRAs at the earliest possible stage when the Commission issues a letter of serious doubts according to Article 7 of the Framework Directive (ERG (04) 49). The Group accepted the proposal.

A.O.B.

Carlos Bustelo of CMT gave an account of the recent meeting in Cusco, Peru with Regulatel. ANACOM volunteered to host the next such meeting.

Nikolaj Simic of APEC presented Slovenia’s current mobile market situation with focus on the rising difference between on-net and off-net mobile termination prices, possible effects on market performance and the impact and role of regulation.

The 2005 Chairman, Jørgen Abild Andersen, informed the Group of the plenary meeting dates in 2005: 10-11 February (Brussels), 25-27 May (Bled, Slovenia), 22-23 September (Copenhagen) and 24-25 November (Brussels).

The plenary decided to publish the following documents, subject to agreed adjustments where applicable:

- ERG (03) 09rev1 – Working document on the concept of SMP
- ERG (04) 40 – Commission update on notifications according to article 7 FD
- ERG (04) 46 – draft 2005 Work Programme
- ERG (04) 58 – Commission report on measures according to Art. 27 FD
- ERG (04) 60 – summary of the annex of ERG (04) 15rev1

The next plenary meeting will take place in Brussels on the 10th and 11th of February 2004.