

Report on the consultation of the Work Programme 2006, written procedure

1. INTRODUCTION

On 28 September 2005, the ERG issued a draft of its 2006 Work Programme for consultation by stakeholders. Ten written responses were received in response from the following :

British Telecom
Colt
Deutsche Telekom (DT)
ECCA
ECTA
ETNO
Fastweb
France Telecom (FT)
INTUG
Telefonica

The following particular questions were posed :

- Are stakeholders content with the overall direction ERG is proposing?
- Do stakeholders agree with the priorities ERG has identified?
- Are there any other priority activities or issues which stakeholders think ERG should be addressing?
- What are the most important aspects of the Review of the Regulatory Framework that ERG should consider?
- Are there any other technical and market issues that ERG should address?
- Has ERG given sufficient weight to consumer or citizen issues? If not, what else should ERG address?

2. SUMMARY OF CONTRIBUTIONS

Are stakeholders content with the overall direction ERG is proposing?

Most respondents agree with the broad proposed overall direction of ERG's Work Programme (Colt, Fastweb, ECTA, ECCA). A number of comments remind ERG of the objectives of NRAs to promote competition and protect consumer interests and of the importance of facilitating achievement of the Lisbon Goals.

Several remark that there should be a greater degree of transparency of ERG activities. DT and ETNO comment that all ERG reports and all ERG documents with important policy observations should be consulted on before finalisation. They cite the ERG Broadband market competition report, ERG (05) 23, as an example of a report which should have been consulted on before finalisation. FT regrets that certain ERG working documents are not made available. Telefonica proposes close co-operation between the industry and ERG Working Groups at early stage of the development of ERG documents and want a fuller explanation of the policy options considered by ERG in the resulting outcome of consultations. Nevertheless, most contributors comment favourably on the publication of the

WP 2006 as an example of transparency. Telefonica would like more specific descriptions of work items in the Work Programme in order to understand better the work proposed.

BT and Telefonica consider the clarification of the roles of ERG/IRG useful but BT and Fastweb point out that ERG has a particular institutional role.

There are many comments on the potential for deregulation. ETNO invites ERG to adopt a deregulatory agenda, FT disagrees with the overall tone of the Work Programme as too intrusive and Telefonica regrets that the more specific work items are not coupled with a lesser degree of intervention. DT suggests that ERG should focus on the following as priority topics : abolition of retail regulation, abstaining from regulation of newly emerging markets and limitation of sector specific regulation on truly non replicable assets in the legacy network. ETNO suggests that deregulation should be a priority

On the other hand, ECTA supported by COLT, say that the Regulatory Framework is already designed to target regulation where necessary and to forebear/ deregulate elsewhere so that appropriate regulation and deregulation is already ‘built in’ to the framework which ERG follows. INTUG notes that regulatory requirements should only be withdrawn on the verifiable basis of market conditions.

ERG response

ERG notes the general endorsement of the proposed overall direction. ERG notes the requests for greater transparency of ERG work particularly during the course of development of work items. ERG will actively consider ways of providing further transparency and cooperation with all stakeholders. However, there is a need to strike an appropriate balance between openness and allowing for the work to be conducted effectively. On deregulation, ERG considers that NRAs should actively look for opportunities to roll back regulation but with a clear reference to market conditions. In practice, as ECTA observes, the ERG is no more or less deregulatory than the currently applicable regulatory framework. However, the issue of deregulation will be one which is relevant to the review of the Regulatory Framework.

Do stakeholders agree with the priorities ERG has identified?

Most of the contributors agree with the identified priorities. COLT suggests that work items of the second priority should all be upgraded to first priority. ECCA and BT comment that the proposed focus of broadband is too narrow. DT doubts the appropriateness of ERG examining broadband competition between fixed and wireless access as they believe it should be left to market dynamics.

ERG response

Having reviewed the comments, ERG proposes to retain the identified priority work items. However, it has reviewed the scope of broadband work and broadened it to an update of the 2005 report on the development of broadband competition. The ERG intends to retain the work item on broadband competition between fixed and wireless access as this is a fact finding exercise intended to assist a harmonised approach but dropped the proposed report on spectrum related issues.

Are there any other priority activities or issues which you think ERG should be addressing?

ECTA proposes to add two additional projects: economic regulation of VoIP and competitiveness of mobile markets. ECTA and ECCA suggest that a wider examination of the economic regulation of VoIP is needed to ensure that a consistent approach is taken both to current incumbent VoIP offers (typically bundled with broadband), and longer term VoIP issues in the context of NGN. In particular, issues of market definition, dominance assessments and remedies should be explored, with particular evaluation of possible leverage of SMP dominance from access into VoIP, preventing the emergence of effective competition.

ECTA also advocates that ERG should carry out further work to produce a common position on other VoIP issues such as allocation of numbers (geographic and nomadic), access to emergency services and number portability in the light of market developments, and assess the extent to which this is effective in various countries.

Fastweb and INTUG consider that ERG should examine the competitiveness of mobile access markets and the costs of mobile termination. COLT queries the value of the benchmarking of mobile termination rates.

ECCA seek ERG/EU best practice guidelines to determine the objectives for 'must carry' in the digital distribution environment and COLT would like wholesale leased lines to be addressed.

BT consider that ERG should report on national appeal procedures and seeks a greater consistency to the approach to cost accounting.

ERG response

ERG has added the competitiveness of VoIP (subject to plenary approval) to the Work Programme as a priority item. ERG has also added the issue of competition in mobile markets as a second category item. ERG is already studying mobile termination rates and issuing a snapshot of mobile termination rates across EU member States. However, ERG will no longer continue the mobile termination benchmarking report.

ERG recognises BT's concerns on the differences of appeal procedures across the EU. However, this is a matter over which ERG has no control and believes that it is best considered as part of the 2006 Framework Review.

ERG notes the additional items proposed by ECCA and COLT. However, ERG regrets that it does not have the resources to examine these areas at present but will bear them in mind as possibilities for future work.

What are the most important aspects of the Review of the Regulatory Framework that we should consider?

ETNO and DT raise questions about ERG's legitimate role in the 2006 Regulatory Review. INTUG, however, believes that ERG has a valuable role to play and COLT and ECCA support ERG's decision to make the Review its top priority in 2006.

ECCA believes that there is minimal need to focus on the dominance assessment as this is covered by the SMP test and Community case law. ECCA also believes that the market

analysis process is highly effective and that the ‘three criteria’ test is a sufficient tool for the task of market definition. However, it believes that the Commission should have the power in the Art. 7 process to veto remedies and a more systematic process of sharing best practice on market reviews. ECCA also stresses the need for effective appeals procedures.

ECTA supports the current alignment of SMP with competition-law concept of dominance and opposes the use of other tests ‘e.g. super-dominance, enduring bottlenecks’. However, ECTA would support the clarification of the joint dominance concept to make it clearer and more telecoms-relevant. It also asks for an evaluation of the leverage concept.

ECTA points out the possible emergence and importance of remedies based on non discrimination, including functional separation as well as the prevention of margin/price squeezes as a means to substitute for price control. ECTA noted that an input for the Review might come from proposed legislation requiring member States to put in place measures that ensure that the appeals body genuinely has the necessary expertise (eg through use of a competition or other specialist tribunal) and concludes cases within a given reasonable timescale specified by statute.

FT recommends the development of guidelines explaining the consistent application of the three criteria test for the revised definition of relevant market in the course of the review of the “Recommendation” and advocates a shorter list of relevant markets in the revised “Recommendation”.

Fastweb and COLT believe that powers to enforce non-discrimination should be toughened. Fastweb seeks lighter touch remedies for alternative operators and for modernisation of the rules access to content. COLT suggests a focus on the need to introduce safeguards to preserve a competitive environment when a decision to remove regulation is made and for attention to be given to bundling, leverage and margin squeeze.

Telefonica suggests that the Review should reflect upon how to undertake the process of replacing existing ex ante regulation with ex post regulation.

ERG response

ERG believes that it has a unique role to offer advice to the Commission in relation to the Review of the Framework because of its direct experience of applying the framework. However, ERG recognises that other institutions and stakeholders also have a valid contribution to make from their own perspective.

Having taken into account the representations received, ERG will now structure its work on the 2006 Review on three specific areas: broad review of the regulatory framework, Commission consultation on regulatory cooperation (Article 7 processes and review of the Recommendation on relevant markets. The specific issues raised in consultation will be taken up in the course of the work of the ERG Project Team.

Are there any other technical and market issues that we should address?

Transparency of end user markets

INTUG welcomes the proposed work on increased transparency in the broadband market, as the offers grow ever more complex, and seeks similar studies in relation to VoIP as this is often bundled with broadband.

Mobile markets and International Roaming

INTUG welcomed also the continued attention the ERG is giving to the issue of international mobile roaming prices.

Next Generation Networks (NGN)

ETNO believes that the development of interconnection agreements in an all-IP world will develop in a competitive environment, not warranting ex-ante regulatory intervention. ETNO encourages ERG to carefully assess whether there is a need for regulatory guidance when it examines IP-IP Interconnection as foreseen in the WP. DT goes even further in its critical evaluation of this work item by stating that a less interventionist stance will lead to increased investment into new infrastructure resulting in better services for the consumer.

In contrast, ECTA and COLT support ERG work in this area and ask for the deadline for this item to be brought forward. ECTA proposes that ERG publish an interim Recommendation which identifies how NRAs should take pro-active steps to better understand plans for NGNs in their national markets and the potential impact on competition. This would include understanding network topologies and timing.

Fastweb believes ERG should elaborate clear definitions of NGNs and VoIP, to provide regulatory certainty, and the promotion of competition in the broadband environment. NRAs should examine incumbents' plans for NGNs in national markets, including aspects related to network topologies, roll-out timing and expected implementation costs.

Fastweb support an assessment of the impact on competition of NGNs, paying particular attention for those areas where uncompetitive behaviors may emerge. Fastweb suggests that ERG should undertake specific work in relation to market definition taking into account NGNs and VoIP.

INTUG agrees with the need to consider the potentially anti-competitive risks that follow from the introduction of NGNs by dominant operators.

ECTA proposes that ERG should, in tandem with consideration of core network NGNs, develop a position on access developments including V-DSL and fibre to the home, with a view to analysing wholesale broadband markets and LLU in particular.

Fixed-wireless competition in broadband

ETNO, supported by DT, considers that competition between fixed and wireless broadband platforms may not be a really significant issue. It believes that the emergence of alternative broadband platforms next to DSL and cable will increase competition in the broadband market.

ETNO believes that NRAs can contribute to a positive framework for competition by not unduly restricting access to frequencies for new technologies. It says that they should also create incentives for investment in new technologies by not subjecting them to legacy broadband access regulation.

INTUG welcomes the proposal for work on encouraging market entry from the increasing array of wireless technologies, through the assignment of spectrum. INTUG further

comments that ERG should consider how to permit and to encourage the introduction of WiMAX, UWB (Ultra – Wide Band) and other innovative technologies.

On broadband competition generally, Fastweb notes how access to incumbents' networks still represents a key issue. LLU, in particular, continues to play an essential role in favoring access and in consolidating the alternative operators' position in the market. To this respect, it is important to confirm that economic regulation is still an essential driver of competition and therefore for investments. Regulation will not deter investments and innovation as long as it is clear, targeted and returns are adequate and reflects risks.

Cost of capital

ETNO makes a number of observations on the proposed review of the regulated returns applied by regulators in cost-based pricing models and other analyses. It notes that estimating a reasonable rate of return is a critical element of an NRA's remit in regulating the communications industry, and the financial implications for the firms concerned may be significant.

ETNO notes that in view of the significant differences in interest rates and credit conditions among the member states, application of benchmarks or any other standard/normative indicator would not be justified. In addition, ETNO and DT suggest that the work should incorporate the theory of real options.

Fastweb supports the inclusion of an assessment of WACC. Setting an appropriate cost of capital is important in ensuring that regulated operators continue to have incentives to invest whilst not being overcompensated for those products, which involve minimal levels of risk.

ERG Response

ERG has reviewed the individual proposed work packages in the light of the comments received, many of which support ERG's original proposals. As indicated above, changes have been made to the NGN and broadband items in the Work Programme. The detailed comments will be passed to the Working Group Chairs for their further consideration.

Have we given sufficient weight to consumer or citizen issues? If not, what else should we address?

COLT notes that analysis by both NRAs and commentators often focuses on consumer markets and not on business markets for communications services. COLT regrets this focus as it believes that the consumer/residential markets and the business markets merit the same level of attention.

INTUG remarks that in some cases it would be desirable for ERG to reach out to the broader public instead of limiting consultation to specialist circles.

ERG response

*ERG is grateful for these comments. (In fact, ERG has added one further explicit consumer item as a priority item to the Work Programme (**dependent on Plenary decision**) in relation to retail VoIP services.*

CONCLUSIONS:

The written and oral contributions show broad support for the ERG Work Programme 2006, its general orientation, the chosen priorities and most of the individual topics. In general, the discussion in the individual representations focuses not on the detail of the proposed work items themselves but rather on how to tackle these items and what results to be expected.

The message for transparency and greater cooperation has come across strongly in the representations albeit it is a process issue rather than a work item. ERG will examine ways to improve cooperation and transparency, but will have to strike a fair balance between openness and effectiveness of work. For example, ERG is considering holding a public hearing mid-way during 2006 to report progress on the work programme and to get feedback.

ERG has taken note of the detailed comments and has made a number of changes to the Work Programme as a result, as indicated above.

ERG believes that the amended Work Programme 2006 now represents a full and challenging agenda for its work next year that focuses on priority and relevant issues. ERG is very grateful for the contributions received.