

CONSULTATION SUMMARY ON HARMONISATION (Consultation documents ERG (06) 67, ERG (06) 68)

May 2007

I. Introduction

This document is a brief report on the answers received within the public consultation on the draft Theory of Harmonisation and the draft proposed ERG approach to Harmonisation – document numbers ERG (06) 67 and 68 (hereinafter, the Harmonisation documents).

The consultation period ended on 15 January 2007. During this period 25 contributions were received from 17 stakeholders: IEN, FRANCE TELECOM, BREKO, BT, DEUTSCHE TELEKOM, ECTA, ETNO, FASTWEB, FREENET, GSME, MAGYAR TELEKOM, INFONXX, ONITELECOM, TELE2, TELECOM ITALIA, The 3GROUP, VODAFONE.

This report tries to summarise the answers and also to explain the reaction of ERG to the comments received. It does not substitute the individual responses and does not try to deal exhaustively with all comments. No fundamental changes to the Harmonisation documents were considered necessary.

ERG is grateful to all respondents for their comments.

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II. ERG approach on Harmonisation

Introduction – General Comments

ECTA

ECTA broadly endorses the content of these documents.

Consistency and continuity of the objectives and approach taken by all regulators in the European Union is vital to provide certainty and predictability for all players investing in the market. ECTA can thus only agree with the emphasis put by the ERG on harmonisation. Harmonisation must not however mean agreeing on the lowest common denominator and ECTA supports the Best Practices approach advocated by the ERG in its various harmonisation consultations.

The fundamental questions that need to be answered, beyond the definition of harmonisation per se, are: Why harmonise? Which priorities? How? The ERG papers provide elements answering these questions but ECTA would like to offer some additional comments and suggestions.

ECTA agrees with the stance taken by the ERG that specific topics such as VoIP require a real commitment from regulators to take a common approach. However, **special efforts are needed not just for VoIP**, but for all priority areas of telecommunications which influence economic development and consumer welfare. ECTA submits that **broadband**, and **business services** are areas in which special efforts are needed as a matter of priority.

ERG wishes to point out that broadband has already been identified as a priority area for the current work programme. Accordingly, a double Project Team (Wholesale Broadband Access/Wholesale Local Access - WBA/WLA PT) has been created for the common analysis of issues arising within these key markets (e.g. margin squeeze, quality of services, migration).

ERG acknowledges the importance of business services and reminds that it has also included in its work programme for 2007 the question of wholesale leased lines, which is going to be analysed by a specific Project Team (WLL PT).

ECTA considers further that the issue of harmonisation of regulatory approaches and tools cannot be addressed on a stand-alone basis, without addressing in parallel the problem of diverging and even **inadequate implementation**, as shown in the Commission's Implementation Reports and ECTA's Regulatory Scorecard. Although regulators are not necessarily best habilitated to induce changes to the legislation in their countries, more work needs to be done in cooperation with the European Commission and the relevant authorities in each Member State to ensure that the basis by which a regulator is given its powers and the ground rules for the electronic communications represent a coherent set of rules and takes into consideration the harmonisation goal set out under Article 1 of the Framework Directive.

ECTA identifies the need for more clarity **in the legal status** of the guidance issued by the ERG and reinforcement of its powers. (ECTA has interpreted the recent announcements

following the Bratislava Plenary, notably in terms of voting rules, as a positive sign that clearer and bolder guidance will be issued by the ERG).

ERG has responded to the preliminary views of the European Commission on the development of the role of ERG in the context of the reform of the regulatory framework¹. ERG considers that there will continue to be the need for concerted action to address any remaining unjustified inconsistency in SMP remedies. Further, ERG reminds that it recognised this one year ago and has put in place a series of mechanisms intended to achieve this. Indeed, if Europe is to play a leading role in the global economy, its 27 NRAs will need to work closely together to ensure that European businesses can take full advantage of the scale of the European market. ERG believes that this is where there is merit in considering the enhancement of the role and duties of the Group for the medium-to-long term.

Concerning ERG's proposition to set in place **Centres of Knowledge**, ECTA suggests that its Regulatory Scorecard could help to identify areas of good practice. More generally, ECTA hopes that the many initiatives suggested by the ERG in terms of "Centres of Knowledge" and Best Practices will be transparent and take into account the feedback of market players.

ERG acknowledges ECTA's readiness for cooperation in this area and is grateful for providing its views on identification of areas of good practice and monitoring. ERG refers to the numerous consultations, workshops and contacts that regularly take place and are conceived as a substantial part of its activities, as a token of its commitment to transparency. In this sense, ERG values this input highly, and devotes time and resources to obtaining and analysing this information, in order to reinforce the basis upon which to establish its initiatives and develop best practice.

ETNO

ETNO considers the consultation document on effective harmonisation (ERG (06) 68) contains important input to the harmonisation debate. ETNO believes that the implementation of the EU Regulatory Framework should follow a consistent set of principles across the Member States. These principles should be derived directly from the Regulatory Framework.

No one-size-fits all approach should apply with regard to regulatory measures. NRAs have an EU legislative mandate to base the imposition of remedies on a market analysis and a proportionality assessment in each individual case. This view is supported by GSM Europe, also by Magyar Telekom. For them, regulation needs to be proportionate to the particular circumstances it is trying to address, in nearly all cases this relates to the local market and local market conditions.

ETNO is very concerned with the approach chosen by ERG in its development of so-called "Principles of Implementation and Best Practice" (PIBs) for individual remedies. It is in conflict with the principle of proportionality and would lead to a further increase of unwarranted regulatory intervention on national markets.

¹ See ERG response to the letter by Commissioner Viviane Reding of 30 November 2006 (27th February 2007).

ETNO encourages ERG to develop PIBs for the imposition of remedies which take as best practice the minimal intervention adopted by an NRA within the EU to effectively remedy a specific market failure. NRAs which wanted to impose remedies going beyond this practice should be obliged to specifically justify any additional remedies.

The idea of uniformly available access remedies on certain conditions or even covering certain technical parameters in all EU markets would be a one-size-fits-all, over-regulatory approach.

ETNO does not subscribe to a view that a ‘trail and error’ process between different regulatory solutions. Instead, ERG should include regulatory guidance on principles at a European scale. Otherwise, the common market for electronic communications would be at risk.

Concerning the policy objectives referred to by ETNO, ERG considers that these are fully in line with the objectives set out in Article 8 of the Framework Directive. In particular, the present Common Positions have been adopted in fulfilment of ERG’s mission, namely to contribute to the development of the internal market and to the consistent application in all Member States of the regulatory framework for electronic communications.

ERG wishes to recall that the framework prescribes a broad list of policy and regulatory objectives, ranging from, e.g., ensuring effective competition to encouraging efficient investment in infrastructure. It is for the national regulators to take all reasonable and proportionate measures aimed at achieving them. The Common Positions submitted to consultation alongside this document do not substitute the NRAs in striking a particular balance among the objectives, but provide practical assistance in finding the most effective balancing the costs and benefits of a particular regulatory intervention it, on the basis of previous experience and theoretical considerations. They complement the generic guidance set out in the Remedies Common Position ERG (06) 33 by setting out principles for selection of remedies in particular markets.

Telecom Italia (TI) welcomes the ERG’s proposal to ensure a better coordination among National Regulators in order to increase consistency.

TI is particularly concerned that the interpretation of “taking in the utmost account of the Common Position” does not include any reference to the illustrative remedies identified in the common position documents.

According to TI, if NRAs do not have to endeavour to adhere to the “illustrative remedies” (last column of the common position papers) the effects of agreeing upon common positions on the achievement of consistency, if any, would be negligible. Moreover if when the same competitive issues arise in different countries NRAs are nonetheless not even slightly discourage from adopting different remedies to the same problem then we hardly comprehend what the whole consistency enhancing process aims at.

Therefore, TI thinks that a “best practice” system alone, as a description of examples of “best implementation” could lack accountability whereas the assumption of a role of guidance by the Commission (namely through the extension of notification process to remedies), through a legislative act at EU level, could ensure legal certainty to the process.

As for all ERG Common Positions, while they shall not be binding, Members shall be recommended to take the utmost account of them and they commit to provide reasoned regulatory decisions by reference to the relevant ERG Common Position(s).

In order to take the utmost account of one of these methodological Common Positions, ERG notes that NRAs would need to analyse the relevant competition issues in the light of the objectives identified in the common positions (unless market forces can reasonably be expected to be sufficient to guarantee a solution). It is in this latter part of the process that the illustrative remedies come into play. Given that NRAs would ultimately have to explain transparently how those competition issues have been addressed, the illustrative remedies are the key guidance tool, as well as an integral part of the Common Position.

This systematic approach is designed to ensure that: (i) the set of remedies is complete and effective; (ii) no significant problems have been overlooked; while (iii) no individual remedies are either ineffective or redundant; and (iv) the overall package of remedies is proportionate.

While ERG recognises the concerns raised by some as to the perceived lack of consistency, the work conducted by the ERG (including through extensive consultation with a whole range of stakeholders) highlights that some variation in regulatory remedies is in fact desirable, given the very different national market circumstances that exist throughout the EU today. As already stated by ERG, a balance must be struck between the promotion of national efficiency (which may require specific remedies to be imposed) and trade reciprocity (which may demand that these specific remedies be consistent with a level playing field between countries), as both are needed to ensure efficient competition on a European scale. Complete homogenisation of remedies is economically undesirable, and this will remain the case for the foreseeable future i.e. as long as national markets exist.

GSME believes that there is a need for improved consistency in the application of remedies and that the ERG can help to facilitate that developing best practice and by communicating its views to the Commission.

For GSME, the key issue remains the appropriate application of the regulatory framework in each market. Improving consistency through the transparent application of regulation should have long term benefits but it has not been shown that there are significant issues that cannot be addressed by the use of the current regulatory framework. GSME believes that full transparency is an essential prerequisite of consistency. There are a number of areas where the ERG could investigate the possibility of improved high level principles that would assist NRAs in improving consistency within Member States.

ERG broadly agrees with the views expressed by GSM EUROPE and considers the Common Positions object of this consultation are a good example of the commitment of ERG to transparency and dissemination of good practice.

Magyar Telekom (MT) agrees with the ERG's objective to promote the application of best practice as soon and as widely as possible instead of the implementation of uniform ex-ante regulatory obligations.

General methodology for best practice in remedies in SMP markets

ECTA

ECTA broadly agrees with the proposed methodology in terms of identification of usual competition problems arising in specific markets and associating these with the set of remedies required to solve them. ERG should make clear recommendations where remedies should be mandated in tandem, in cases where they can only be efficient if imposed together (e.g. transparency and cost accounting) or, as stated in pg 3 of the consultation document, to ensure that “the set of remedies is complete and effective.”

ECTA specifically welcomes the linkage made on page 2 between the common positions on broadband access markets and the ‘broadband market competition report’. Similar studies could usefully be carried out for other aspects of the telecoms sector (e.g. business services, mobile) to give insights into best practice regulation, which could then be incorporated into common positions. Such studies may also be valuable in helping to monitor application of best practice by NRAs.

Deutsche Telekom (DT) agrees with ERG in that widespread dissemination of best practice might indeed be a practical way to spread knowledge and expertise among NRAs and thus contribute positively to the overall level of regulatory decision making.

However, it criticises that what “best practice” actually means is left rather vague. If not clarified, DT fears there will be the inherent risk that best practice might be interpreted as the most intrusive and extensive regulatory regime.

France Telecom (FT) also goes along these lines and considers that the mere notion of best practice may constitute a direct incitation to regulate, independently, or with superficial analysis of the given situation.

MT questions whether a „best practice” can be elaborated by ERG at present considering that most NRAs have not yet finished the second round of market analyses and some are still carrying out the first round. Further, it considers that exchange of information between NRAs should be restricted to the mechanisms foreseen under Framework Directive and national rules on confidentiality.

For MT ERG’s requirement that NRAs should „take the utmost account of one of these [ERG’s] methodological Common Positions” results in a kind of secondary – not legally binding - regulation for NRAs in addition to the comments of the European Commission (Article 7 (5) of the Framework Directive). This increases the administrative burden of the NRAs as well as other stakeholders. NRAs will refer to the relevant ERG document in their regulatory decisions. It is difficult to interpret how to “take the utmost account of” a legally not binding document. In addition, availability and knowledge of ERG Common Positions by all stakeholders is more restricted (due to linguistic reasons) than in case of EU directives or national legislation and this contradicts the principle of legal certainty.

MT fears that NRAs will soon have to take account of more ERG PIBs than community legislation during the market analysis procedure.

ERG considers that the present Common Positions do certainly not amount to an increase of regulatory intervention. Quite the opposite, they contribute to a more effective and focused remedy-selection process, thereby streamlining regulation. This guidance does not substitute, nor add to the obligations specified in the regulatory framework, they are a

systematic assistance to NRAs when choosing the most effective and proportionate remedy to the competition problems identified during a particular market analysis.

The Common Positions provide commonly accepted solutions to competition problems that are reasonably likely to arise, based both of theoretical considerations and on practical experience of regulation in these markets and applying the general principles of the Remedies Common Position.

British Telecom (BT) supports ERG harmonisation proposals but is concerned that they may not in practice lead to significant improvements unless:

- a) ERG common positions are more detailed and prescriptive than they have been in the past;
- b) ERG members give credible voluntary commitments to adhere to such common positions;
- c) "National circumstances" are used as a reason to depart from common positions only rarely, and only after an in-depth market analysis accompanied by a detailed explanation of why the remedy proposed by the common position is inappropriate in that particular national context;
- d) There is commitment to co-operation for better regulation via benchmarking of market results coupled with frequent constructive criticism between ERG members.

Finally BT endorses the proposal for the ERG to deepen its understanding of a range of generic issues and suggests a focus on making harmonisation measurable and on monitoring best practice in the art of implementation (i.e. the activity that starts once a remedies decision has been made).

In fulfilling ERG's mission to contribute to the development of the internal market and to the consistent application in all Member States of the regulatory framework, the approach of the Common Positions responds to the comments from stakeholders in previous consultations² as to the need for more detailed guidance. However, the level of detail requested in some responses to the present consultation would prejudice the sound economic and factual analysis of the market circumstances, as entrusted to the national regulatory authorities (NRAs). The guidance provided by the Common Positions is intended to assist NRAs with that task, yet the concrete prescriptions requested by some stakeholders would be excessive. In this sense, the Common Positions need to be designed in a sufficiently flexible and forward-looking manner so as to be applicable to all analyses carried out by the regulators in relation to the key markets that the Common Positions address.

Indeed, other stakeholders, consider them too detailed³. ERG recognises that access providers and access seekers will tend to have different views on how much detail is useful. Its task is to strike the right balance between over-prescription and sufficient clarity. In the light of the various comments received, it does not intend to change that balance materially at present.

2 In particular, to the consultation on the Remedies Common Position, now the Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework ("Remedies Common Position") ERG (06) 33.

3 See Consultation Report on the WBA/WLA Common Positions.

ERG notes that while its Common Positions shall not be binding, Members shall be recommended to take the utmost account of them. ERG members commit to provide reasoned regulatory decisions, by reference to the relevant ERG Common Position(s).

Priorities for Harmonisation of SMP Remedies

ECTA agrees with the list of markets identified as priorities. ECTA believes that some attention should also be brought to the wholesale leased lines or PPC market, in particular to recognise and address the fact that Ethernet is becoming the dominant technical platform to deliver services to businesses (replacing traditional interface leased lines).. Specific remedies are needed to make wholesale Ethernet an operational reality.

BT fully supports ECTA's view.

TI believes that ERG work on specific markets should be prioritised also on the basis of the degree of inconsistency currently observable. In other words TI believes that ERG should give priority to those markets that show a higher degree of inconsistency.

TI further recommends that, in relation to the market of call termination on individual public telephone networks provided at a fixed location (market 9 of the current recommendation) it would be useful to publish a benchmark on the maximum price for call termination allowed by NRAs of member states.

As stated above, ERG has already addressed the suggestion on the leased lines by including this area in its work programme for 2007 and has set up a specific Project Team (WLL PT) is going to analyse it.

Further, ERG points out that other key areas identified for the development of best practice include fixed and mobile termination rates, for which two different Project Teams (PTs) have been set up. These PTs are developing Common Positions concerning the transition towards symmetry of FTRs and MTRs respectively.

Monitoring and evaluation

ECTA looks forward to a consultation in terms of "Monitoring and Evaluation" as it believes these two steps are critical in ensuring that the Common Positions adopted by the ERG become at least de-facto binding instruments that create certainty. ECTA has indeed in the past regretted that, even where detailed and well-argued positions have been developed by ERG, it is not clear that all national regulators have taken full account of them.

ECTA suggestions in this area:

- The ERG should identify common Key Performance Indicators (KPIs) both for the success (or otherwise) of application of measures (e.g. unbundled lines/total lines, unbundled exchanges/total exchanges, population addressable by LLU) and of outcomes (retail service differentiation, broadband penetration, retail price basket, incumbent retail market shares, concentration). For convenience and consistency, the collection of data for these KPIs could perhaps be made in collaboration with the European Commission through the annual Implementation report exercise or other benchmarking studies such as the half yearly Cocom Broadband report.

- The responsibility for co-ordinating the monitoring and evaluation of Best Practices or other harmonisation tools adopted by the ERG should be taken by the independent Secretariat to ensure an objective evaluation.
- The Secretariat should be financially incentivised on the basis of their performance in effectively monitoring implementation of best practice and contributing to a harmonised outcome. For example, part of the bonus could be linked to measureable improvements by NRAs in agreed KPI indicators.
- Members of ERG should commit to including in their objectives and workplan, specific actions relating to application of consistent best practice regulation with reference to ERG guidance and KPIs.
- The ERG should put in place a regular audit of regulators' decisions against agreed best practice and KPIs perhaps with the support of external consultants. This could for example be in the form of separate reports on broadband, business services etc or a comprehensive annual report.

Finally, ECTA considers that third party assessments such as ECTA's Regulatory Scorecard could also provide helpful input in comparing the application of regulation across different countries.

Concerning monitoring, ERG members have committed in the Statement on Development of ERG (ERG (06) 51 - October 2006) to undertake to agree a way of monitoring and comparing their respective regulatory approaches across key markets, with the objective of continually improving their regulatory approaches and implementation of the EU Regulatory Framework. To that end, ERG is developing a suitable approach and will consult stakeholders in due course.

As stated above, ERG is grateful to ECTA for its readiness for cooperation in this area and for providing its views on identification of areas of good practice and monitoring.

III. Effective Harmonisation

A Means to an End: Harmonisation of the internal market(s)

ECTA

ECTA has reservations on the introductory statement made on pg 2 of this paper that the new Framework is characterised by “the close alignment of national regulatory mechanisms with one another (...) in particular those governing the application of regulatory remedies...”. **The new Framework is mainly characterized by the fact that it has been less prescriptive**; it has also increased the scope for inappropriate divergence and has been slow in delivering measurable results and improvements of competition and benefits for consumers and business customers.

ERG considers it is worth remembering, as stated in its response to Commissioner Reding, the achievements of the last three years, particularly given the significant differences in institutional and market conditions that existed at a national level when the current Framework came into force. Despite the magnitude of the task, the evidence suggests that significant progress has been made over the last four years – the 12th Implementation Report, the Commission consultation documents and the recent Eurobarometer e-communications household survey all point towards positive trends in competition and investment in EU communications markets. There is both (a) a narrowing of the differences between Member States on a number of wholesale indicators regulated by ERG members, including prices for key access products, and (b) a general decrease in prices.

This room given to regulators is one of the justifications for a need for increased harmonisation in terms of best practices. ECTA's view is that the role of the Commission was established to act as a form of counter-weight to the greater flexibility given to NRAs, but as the Commission's power does not extend to remedies (and indeed we do not believe that the Commission is necessarily best placed to opine on the detail of remedies), a gap has been left – hence the need for a stronger role for the ERG and efficient coordination mechanisms.

As already stated, ERG is of the view that possible scenarios of ERG enhancement could be developed which would fruitfully address the concerns about the need for regulatory coordination in relation to cross-border/pan-European services in the medium-to-long term. In this respect, and only to the extent that it is feasible, legally and practically, to transfer powers to the ERG is something the ERG would welcome in principle.⁴ In the shorter term, ERG remains committed to the actions set out in the Statement on Development (ERG (06) 51). ERG has more recently also urged the Commission to make full use of existing possibilities with regard to Art. 7 procedures, namely to discuss Phase-II-cases with ERG in order to overcome the lack of consistency perceived by the Commission.

ETNO

Whereas ETNO agrees generally with the need for regulatory consistency as discussed in ERG (06) 68, its members are extremely concerned with the substantive direction – namely the advocacy of unwarranted regulatory intervention -- that further work by ERG on

⁴ Cf. ERG Answer of 27 February to the VR-Letter, available on www.erg.eu.int.

harmonising remedies is taking, judging from the two “Principles of Implementation and Best Practice” (PIBs) on individual remedies published together with these documents.

According to ETNO the approach proposed by ERG in its PIBs will almost certainly result in an increase in unwarranted regulatory intervention both on the markets covered and on neighbouring markets.

ETNO believes that this approach is inadequate. Regulatory intervention, which imposes costs on end-users, market participants or society in general and affecting the property rights of private market participants, requires a thorough examination and a demonstration of market failure, together with a justification of the proportionality of the measures in the individual case to remedy the market failure identified. This generalisation of competition problems follows the much-criticised approach of the ERG remedies paper, which focuses on the potential for anti-competitive behaviour on the part of an SMP-operator, instead of focusing on the consumer interest and the identified market failure that is harming consumers, e.g., limited choice, excessive prices or lack of new and innovative services.

Further, ETNO sees a bias for regulatory intervention as compared to market solutions. ETNO maintains that the burden of proof for imposing regulatory measures should in each case stay with the individual NRA. When taking a decision, it has to substantiate why commercial solutions, such as the existence of voluntary access offers, are deemed insufficient to remedy the identified market failure. In short, for ETNO best practice should imply minimum regulation necessary.

Although DT agrees with ERG that harmonisation is a means to an end, it shares ETNO's concern that the ERG's proposed approach seems to be generally biased towards regulation.

Finally, ETNO claims that the definition and codifying of “best practices” should not be the pretext for unduly prolonging regulation, thus delaying the transition to sustainable competition. The accelerated - although not everywhere equally advanced - development of alternative networks further calls into question the merit of further obligations and rather points to the need to engage in a process of de-regulation wherever possible.

ERG considers that the present approach does certainly not amount to an increase of regulatory intervention. Quite the opposite, the proposed Common Positions contribute to a more effective and focused remedy-selection process, thereby streamlining regulation. As explained above, this guidance does not substitute, nor add to the obligations specified in the regulatory framework, they are a systematic assistance to NRAs when choosing the most effective and proportionate remedy to the competition problems identified during a particular market analysis.

According to the principle of proportionality, any measure chosen should be both necessary and appropriate in the light of the objectives sought. In this respect, the guidance provided by the Common Positions does not substitute the NRAs in establishing a particular level of regulation. On the contrary, NRAs are fully responsible throughout the whole process for substantiating their decisions as to the most effective yet proportionate remedies.

Services with Pan-European potential

ECTA regrets that no mention has been made of services to multi-national customers which require consistent service offering/quality to multiple sites across borders.

When ECTA's members have to meet a variety of regulatory requirements, it is very difficult to create an attractive and homogeneous package for their business customers across Europe. This means that a failure to regulate appropriately in one Member State does not have a unilateral effect only.

BT fully supports ECTA on this regard⁵. In fact its submission revolves mainly around the necessary availability of a common portfolio of electronic communications services across the EU. In particular one of BTs main requirements is the availability in each Member State of a common set of wholesale access and interconnection products that will enable competitive retail supply of the products that end-user businesses want their systems to be built around.

Thus, for BT it seems clear that the main priority for harmonisation should be pan-European services; not only because they are "tetherless" (as noted by the ERG in the consultation document) but also because the ability of undertakings to invest and innovate depends on the size of their addressable market.

For example, without consistency of access regulation, incumbents in Member States with no or poor access regulation will be able to complete their own multi-national corporate networks by purchasing access in Member States where these are mandated, whilst refusing to grant access to competitors in their home country who need the same access products.

According to ECTA, those telecommunications suppliers with unregulated or poorly regulated access networks would be granted a hugely advantaged position as against those suppliers with a tightly regulated domestic access network. This situation is not hypothetical, it is reality today in the EU.

In respect to ECTA's concern on current state of the access regulation, ERG notes the Staff working document, Annex I to the EC 12th Implementation Report⁶, where it is stated that NRAs have generally determined that the relevant markets are not effectively competitive and have generally imposed access obligations. Furthermore, almost all NRAs that have notified market 11 have imposed some sort of price control and cost accounting obligation; in addition, the majority of regulators that have notified market 12 have imposed price control and cost accounting obligations, albeit mainly using retail-minus formulas.

ETNO

ETNO points out that the notions of "services with pan-European potential" and "services with a significant cross-border dimension" are still vague and do not in themselves justify

⁵ "NRAs should consider whether there are customers for whom there is an internal market, cross-border, dimension".

⁶ At p.33.

further harmonisation of outcomes. With regard to the examples given by ERG, they are concerned about its arguments relating to international roaming; those arguments are still lacking reference to sound economic analysis.

Services with significant cross-border dimension

ECTA notes that the ERG mentions termination as a possible instance, but does not believe the effect material. However on the contrary, evidence suggests that inconsistent wholesale call termination regulation is material as can be seen for example in the history of international accounting rates, which were kept artificially high in some cases. This is because a country (or operators inside a country) has no incentive to lower its termination rates for international inbound as they do not affect purchases of services by consumers within that country.

ERG notes that it has identified fixed and mobile termination rates as areas for the development of best practice, for which two different Project Teams have been set up (FTR and MTR PTs respectively). This work will be submitted to consultation in due course.

Promotion of efficient investment and market entry

ECTA

The ERG's proposal contains two clear, but separate, examples:

- differences which increase administrative costs; and
- inadequate or ineffective application of remedies.

ECTA considers the second as most critical. An example which combines both is the ease with which an operator can apply the same business model in different countries to effect entry.

ETNO

ETNO claims that consistency across the EU Member States is not required "to facilitate investment and market entry by overseas players" but to create the best conditions for effective competition in the EU single market, investment and innovation for all market players active in Europe to the ultimate benefit of consumers.

ERG believes that efficient national measures for competition reinforces the development of the internal market by enabling market entry and investment from external stakeholders. Promoting competition is the best way to facilitate investment.

Consistency or Uniformity?

ECTA agrees with the ERG's analysis that the application of identical remedies in all situations this is not necessarily what is meant by harmonisation and that a "one size fits all approach" is neither appropriate nor realistic.

However, ECTA considers that there is no justification for market reviews that come to identical conclusions in different member states resulting in remedies that are in

principle completely different. (Some of the details of the remedies as opposed to the type of remedy will of course vary because, inter alia, the networks and systems of the market participants in one country will be different from the networks and systems of market participants in another country).

ERG believes that differences in the effect of remedies are often overstated. Some variation in regulatory remedies is in fact desirable, given the very different national market circumstances that exist throughout the EU today. A balance must be struck between the promotion of national efficiency (which may require specific remedies to be imposed) and trade reciprocity (which may demand that these specific remedies be consistent with a level playing field between countries), as both are needed to ensure efficient competition on a European scale. Complete homogenisation of remedies is economically undesirable, and this will remain the case for the foreseeable future – i.e. beyond 2010.⁷

.Concerning the area of technological standards, notably as regards broadband, ECTA wonders why some of the upgrades to existing DSL technologies are deemed acceptable and promoted in certain Member States, whilst others prohibit them, pending discussions on interference/compatibility on the copper access network of the fixed incumbent. For example, some ECTA members find this to be notably an issue to roll-out enhanced SHDSL⁸, a will which was met with the approval of the Belgian regulator BIPT but is still blocked in most other Member States. Similarly, the timeframe for approval of ADSL2+ has varied widely among Member States. ECTA submits that the ERG should examine regulatory best practice in the area of the rules governing the authorisation of new technologies on the metallic access network (it is clear that the role of the NRA in this respect varies very widely between Member States). In any event NRAs should ensure the introduction of any new technologies is not carried out in such a way as to jeopardise the previous investments of competitive operators.

ERG notes ECTA's concerns. The fact that the technology is not explicitly authorised in some MS does not generally mean it is forbidden. ERG will nevertheless consider whether this is an area on which it could usefully develop best practice.

ERG wishes to stress that the regulatory framework has set upon the NRAs the task of defining and analysing the competition conditions in the relevant electronic communications markets. Further it acknowledges that NRAs have been accorded discretionary powers correlative to the complex character of the economic, factual and legal situations what will need to be assessed⁹. In this sense, it is for the national regulators to carefully analyse, according to national and Community law, the impact of new or upgraded infrastructure and technologies on the structure and functioning of the market. Subsequently, it is also for the NRAs to decide accordingly on the treatment to be applied, in particular in the case pointed out by ECTA, to the regime of access to those infrastructures, acting in accordance with the principle of technological neutrality.

In fulfilment of its mission, ERG strives to assist NRAs in the task described above by providing guidance based on common expertise, such as the Remedies Common

⁷ Cf. ERG Answer of 27 February to the VR-Letter, available on www.erg.eu.int.

⁸ E.SHDSL is the DSL technology enabling up to 40Mbit/s symmetrical and guaranteed bandwidth due to bonding (intrinsic in the protocol) of up to 8 copper pairs.

⁹ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

Position¹⁰, the Common Positions on remedies for Wholesale Bitstream Access and Wholesale Local Access (ERG(06) 69Rev1 and ERG(06) 70Rev1) and the work developed by the IP-IC/NGN Project Team¹¹.

ETNO

For ETNO, the Best Practice should imply minimum regulation necessary.

NRAs, especially those with still limited experience and resources, might be tempted to be perceived as “good” or “efficient” regulators by applying all elements of the ERG’s proposed regulatory toolbox available.

In order to counter such possible tendency, ERG should make it clear that best practice under the NRF always implies that the minimum, or least onerous, regulation necessary is best and that less regulation should be the benchmark against which the decisions of all other NRAs should be judged. DT supports ETNO in this view.

ETNO suggest that ERG should establish a rule, stating that NRAs which deviate from the ‘least interventionist’ regulation line in the presence of SMP in a given relevant market, need to explain and defend their decision vis-à-vis ERG.

ETNO invites the ERG to reiterate the recommendation for a regulatory options assessment (as it did in its earlier CP on Remedies) to ensure the proportionate and least burdensome level of regulation on each national market. The assessment of costs should include direct costs resulting from regulation implementation (e.g., regulatory product development; IT, systems and gateways development; SLAs; KPI measurement; etc.¹²).

See ERG’s comments under section *A Means to an End: Harmonisation of the internal market(s)*, above.

DT agrees with ERG’s differentiation between consistency and uniformity. However, they understand there is no final judgement on how best to regulate and neither is this knowledge incorporated in a single person or entity. However, advancements can only be made if different approaches compete on the market for ideas in order to prove their worth. Thus, DT recommends the ERG devote much more thought on the topic of competition for deregulatory approaches.

ERG acknowledges DT’s advice and agrees with DT on this point. Regulatory experimentation can indeed bring forward valuable new techniques which can later be disseminated more widely but a balance has to be struck.

GSME believes that the dominant issue concerning harmonisation is transparency, as without transparency there cannot in practice be consistency.

¹⁰ See Remedies Common Position (supra), p. 116-118.

¹¹ See, e.g. the Final Report on IP Interconnection ERG(07) 09 and consultation document on Regulatory Principles of NGA (ERG (07) 16), May 2007.

¹² ETNO also points out that these can be relatively more important in relation to the expected regulatory benefits in smaller markets and micro-states, cf. Ovum and Indepen, “Applying the EU Regulatory Framework in microstates,” a report to the CYTA, EPT and Maltacom, June 2005.

For GSME, harmonisation should not go beyond guidance on the application of similar remedies in similar circumstances. It is not possible nor is it desirable to attempt to dictate the use of the same remedies in all circumstances. The ERG should therefore concentrate on developing principles in those areas where they can assist NRAs in the consistent application of remedies.

In this sense, GSME generally supports the need for improved consistency in both analysis and the application of remedies. This should however be approached with care because it is not immediately obvious what the impact of changes to the current approach would be.

GSME Overall the case for a major change to current practices to increase “harmonisation” has not been made. The current approach followed by the ERG of developing and sharing best practice is still in its early days and, providing there is appropriate transparency in the processes at both ERG and national level, should improve the level of consistency between NRAs. It is not clear that any consistency issues cannot be addressed with in the current regulatory framework.

GSME Any review of regulatory harmonisation should start from the premise that overall, ex ante regulation in the sector should be decreasing over time and not increasing. Thus all proposals should be subject to a test as to whether they increase regulation overall or decrease it. This is important to avoid the simplistic but superficially attractive approach of associating “consistent” with the most interventionist regulatory regimes i.e. raising the overall regulatory burden by making the highest level of regulatory intervention the test of consistency.

GSME Consistency can be a way to deliver improvements in proportionality and fairness but should not be an end in itself. It is not clear that a lack of consistency is a material issue in the application of the NRF. There has been variation in the approach of some NRAs but this has not been shown to be a major issue that would require significant intervention. Most markets remain geographic and under the control of individual regulators who should be best placed to assess those markets and apply remedies. The application of similar remedies does not necessarily mean the application of the same remedies.

GSME points out it is unclear from the consultation where the ERG thinks that responsibility lies between the Commission and NRAs in promoting “harmonisation” beyond that which already takes place under the regulatory framework.

France Telecom is not convinced that the harmonisation of regulation as considered by ERG is a sound instrument in this respect as it is rather conducive to over-regulation and thus cannot be regarded as an element of European competitiveness.

TI fully shares ERG’s view that the regulatory approach need to be flexible and tailored with national circumstances.

BT proposes the following possible definition of harmonisation:

“The achievement of a world class competitive environment in electronic communications services markets for the benefit of both market participants and consumers by treating similar market failures in similar ways in a similar timeframe.”

For BT, this seems to suggest at least three dimensions to the issue:

- The choice of remedies for particular problems;
- The timing of market reviews - which should be performed in a similar timescale in all Member States;
- The implementation timescale (from a remedy being imposed to the wholesale input becoming available) – which should be as soon as is reasonably possible.

Concerning the third dimension mentioned by BT, i.e. implementation timescale, ERG points out that the draft Common Positions subject to consultation along the Harmonisation papers already deal with this point to some extent. However, we have clarified the wording in order to emphasise the point¹³.

BT further considers that ERG tends to exaggerate the case for uniformity in order then to dismiss it. BT 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 out such uniformity in advance unless an NRA can provide a detailed explanation of why their national circumstances make it impossible to offer a product specification that is commonly available elsewhere. And in such cases there should always be the ability for competitors to replicate a dominant player's retail offerings if these rely on a bottleneck facility.

In the face of the contrasting views expressed by other stakeholders, ERG considers it has struck a reasonable balance.

Preliminary views on harmonisation priorities

a) Regulation of VoIP:

ECTA hopes that in reviewing its Common Statement on VoIP, the ERG will be able to create more clarity and reasonableness in this area to promote the development of innovative offerings, especially in light of the voting rules adopted at the Bratislava Plenary.

MT would greet an enhanced version of the former ERGs Common Position on VoIP of 2005.

b) Regulation of key wholesale access services:

As regards the specific priorities identified by the ERG, ECTA would like to add that:

- The areas covered should ensure technological neutrality. Ideally therefore examination of local loops and broadband should be without reference to the technology or material used for provision, but rather focus on the 'capabilities' of the service.
- The ERG should add leased lines including Ethernet interfaces (for technological neutrality). ECTA recommends that the ERG examine in this context markets for trunk and terminating segments including the delineation between the two.

¹³ See the third paragraph of section "Illustrative remedies" under "Level playing field" in the Common Positions. Cf. also to consultation document on Regulatory Principles of NGA (ERG (07) 16), May 2007.

As to the first point, ERG refers to its reaction to ECTA's comments under section Consistency or uniformity, above.

As to leased lines, as stated above, ERG has already addressed this suggestion by including this area in its work programme for 2007 and has set up a specific Project Team (WLL PT), which is going to analyse it.

Whilst ECTA would not consider it a top priority for 2007, in relation to broadcasting markets, there may be a place for a better common understanding of the access and interconnection offers and of best practice guidance on the technical and economic conditions for such access and interconnection.

c) Vital generic issues:

ECTA agrees with the vital generic issues identified as key areas for the dissemination of Best Practices.

ECTA would just like to add two major issues that need to be addressed in the short term:

- To the “avoidance” of margin squeeze, the ERG should add the issue of “penalties” in those cases where the squeeze did occur but was stopped by the regulator.
- Non-discrimination (including ex ante enforcement and prevention of foreclosure). Anti-competitive bundling should also be included in this context on the basis that such bundles are those which are not replicable by competitors. More generally, greater attention is needed, and greater resources must be devoted, in most Member States to effective policing of non-discrimination obligations that were imposed through the market analysis process.

ERG believes that the question of penalties for non compliance of the law is not one which it can deal with in the context of its Remedies work. It is a matter of national law.

ERG notes the importance of achieving non discrimination and devoted a lot of time to this issue in 2005 when revising the Remedies CP. Nevertheless we recognise this is a key issue and ERG will continue to address it in the future.

With regard to anti-competitive bundling, ERG notes that it is already devoting resources to analyse the matter, namely in the context of the work of the Convergence PT.

TI fully agrees with the choice made by ERG of the three generic issues on which ERG intends to continue to deepen its understanding and to disseminate best practices. However alongside “Costing methodologies”, “Differentiation of access remedies, as between new and existing infrastructure” and avoidance of margin squeeze” TI proposes to further deepen the issue of the circumstances under which NRAs may legitimately ex-ante forbid a bundling offer. In other words TI advises ERG to publish a Common Position document aimed at defining the criteria to be employed in the assessment of the “legality” of a bundle.

ERG refers to the results of the analyses currently being carried out by the Project Teams mentioned immediately above, which will be submitted to consultation in due course.

In BT's view there are three areas which require further work:

- The level of market data detail to be collected for a market analysis – where the practice of NRAs differs widely today. Insufficient data can clearly lead to poor decisions but over-detailed data collection can lead to excessive delays, a lack of cross-country comparability, and on occasion a failure to grasp the bigger picture.

ERG notes that there is a balance to be struck here between early analysis based on limited information and potentially delayed analysis on the basis of ideal information. Moreover, additional information, if extraneous, can confuse an analysis rather than illuminate it. In addition, the analysis must be tailored to the resources available to carry it out. For those reasons, ERG believes that this would be a difficult area in which to develop harmonised practices as the national circumstances will certainly vary.

- SMP assessment and in particular the significance of the financial strength of access seekers as a counterweight to the financial strength of a potential SMP undertaking. The ability of access seekers to potentially withstand anti-competitive behaviour in the short term should not be taken as an indicator of the absence of SMP.

ERG notes that the Commission has developed substantive guidelines on SMP assessment and this point seems to fall within this area.

- The role of the NRA after a remedies decision has been promulgated. There may be an argument for the NRA to remain focused on the evolution of the market in order to check that its remedies are having the desired effect. Yet it would be inappropriate for an NRA to intervene frequently to micromanage a market. The ERG could usefully examine this area.

ERG recognises its responsibility for keeping abreast of market developments. ERG is committed to monitoring the effectiveness of remedies by relating it to the extent feasible to market outcomes.

GSME points out some areas that the ERG may wish to examine to see whether the development of high level principles may lead to improvements in consistency could be numbering, market entry, symmetry and VoIP. However, it has to be clear that all remedies provided for in the Directives should be applied according to national circumstances.

Comments on the Annex

ETNO

ETNO welcomes the ERG's proposal to consider the aims, benefits and possible disadvantages or costs of further harmonisation under the EU Regulatory Framework in more detail. ETNO agrees with ERG that harmonisation should be understood as a means to an end, not an end in itself.

ETNO considers that it is important to recognise the trade-off between the application of uniform remedies in different national markets and the application of common principles and consistent application of EU law to varying national market conditions. The latter will not necessarily imply the former.

Arguments in favour of harmonisation:

ECTA

- A major missing heading is 'consumer welfare' and economic benefits.
- Facilitation of cross-border trade.

ERG takes the view that this is dealt with by assuring effective competition hence there are no missing elements to the analysis.

Arguments against harmonisation:

ECTA

- It is suggested that 'the case for infrastructure competition being superior to services competition is strong'. However, the focus should not be on infrastructure competition for its own sake, but rather on efficient infrastructure investment. The cost of inefficient investment – with the accompanying loss to shareholders (including pension funds) is likely to far outweigh the administrative cost of regulation that would otherwise have been required to support competition over the efficient amount of network infrastructure.
- ECTA would hope that the principles underlying SMP and stimulating competition remain the same. Some countries in Europe (not only among the new Member States) also suffer from the least developed regulatory regimes, and a major benefit of harmonisation should be to allow such countries to benefit from experience elsewhere without needing to reinvent the wheel.
- Regarding the responses of national courts, we believe that some (although clearly not all) of divergences in reactions may arise from a lack of adequate information. We note that the Commission has been making efforts to run seminars for judges to help address unjustified discrepancies.
- Whilst only 6% of respondents to the London Economics paper may have indicated a desire for greater harmonisation, we find substantial support from across ECTA's member-base of pro-competitive operators for greater harmonisation. We wonder also, if the question had been asked about whether such operators favoured more effective application of the Framework and better practice regulation, the answer would have been the same – from competitive operators at least. Conversely, we note that the position of many (but not all) of Europe's incumbents is against harmonisation, which could indicate that fragmentation is more advantageous for them in retaining their dominant position.

In response to the first point, ERG takes the view that infrastructure competition, where economically efficient, is more likely to be sustainable than pure services competition and should stimulate more innovation. It does not support infrastructure competition at any cost, but in line with the objectives of Art. 8 FD encourages **efficient** infrastructure investment.¹⁴

ETNO

¹⁴ Cf. REM CP (ERG (06) 33), in particular section 4.2.3 – Supporting feasible infrastructure investment and also consultation document on Regulatory Principles of NGA (ERG (07) 16); May 2007.

For ETNO the idea of uniformly available access remedies on certain conditions or even covering certain technical parameters in all EU markets would be a one-size-fits-all, over-regulatory approach. While this might benefit the specific interest of certain pan-EU stakeholders by reducing their transaction costs, it could both harm EU consumers, by creating artificial and excessive regulation, and damage the shared principles at the heart of the internal market, such as effectiveness of EU rules, proportionality and the respect of fundamental rights of undertakings.