



ERG REPORT

MONITORING OF CONFORMITY WITH ERG COMMON POSITIONS: LESSONS LEARNED FROM BROADBAND QUESTIONNAIRES AND NEXT STEPS

Background and rationale for exercise

In its Statement on the Development of the ERG (ERG (06)51 – October 2006), the ERG has committed to putting in place a system to monitor the application of its Common Positions. This note describes how the ERG has taken this commitment forward.

This monitoring work-stream demonstrates the ERG's commitment to putting in place Common Positions which make a real contribution to consistent application of the regulatory framework. A programme of monitoring conformity with agreed Common Positions (CPs), backed up by remedial action to address non-conformities which cannot be justified, provides an effective mechanism for promoting uniformly effective regulation throughout Europe, even where differences in national circumstances demand national solutions.

Accordingly, the ERG decided at its May 07 Plenary to undertake, on a trial basis, a self-assessment of adherence to the ERG's two new Broadband CPs (ERG (06) 69rev1 and 70rev1). The primary purpose was to test the methodology, but of course it was also hoped that the ERG would be able to draw conclusions about conformity with the broadband Common Positions.

The approach taken

The approach followed was the self-completion by each NRA of a structured questionnaire (attached at [Annex 1](#)) related to the CPs, followed by an analysis of responses by an internal Project Team. This analysis provided a consistency and quality assurance process for the exercise.

Following the May Plenary, the internal Project Team prepared two questionnaires which related to the WBA and WLA CPs and covered the most important areas for which future harmonisation is deemed desirable or even necessary. These questionnaires were sent to NRAs who were able to complete them within a short timeframe. The Project Team subsequently reviewed the responses received from ERG members with a view to deciding whether NRAs complied fully, substantially or not at all with the CPs.

Conformity with broadband CPs

Overall the exercise showed a high level of conformity with the CPs, as well as bringing out some areas where conformity with the Broadband CPs is relatively low. It also raised some generic issues which are likely to apply equally to other CPs.

As this was a pilot exercise aimed at testing the proposed assessment methodology, the ERG did not think it useful on this occasion to carry out a forensic analysis into the reasons for individual non-conformities. This was particularly so given that many of the national decisions assessed were taken before the CPs were adopted, so inadvertent non-conformity was to be expected. However, the ERG considers that an analysis of the reasons for non-conformity will be an important component of future exercises of this kind.

All these points are discussed further below

The area in which relatively few NRAs expressed conformity was that of migration. Efficient and effective network migration processes are very important in facilitating the maximum degree of competition. Where migration processes are absent or do not work well, there is a tendency for end users to keep to their existing service providers, even if another service provider offers superior terms. The inconvenience and other costs of disrupted service, or frustration at slow progress in switching, may well outweigh the longer term benefits of the better deal.

Another problematic area concerns measures designed to prevent unfair first-mover advantage (for example, where a new retail service is launched, such as a higher speed ADSL bitstream service, without making adequate preparation for a corresponding wholesale input which would facilitate retail competition). A number of NRAs reported that they had no specific provisions in place to address this. In practice, those NRAs are mostly relying on a general non-discrimination obligation to prevent such behaviour.

There could be various reasons for this. For example, some NRAs may genuinely believe that a general non-discrimination provision is an adequate deterrent to such behaviour. Others may be sceptical of this but believe that there is no explicit remedy available which could legally be imposed in that Member State. Others still may not yet have encountered a specific instance of the problem. The ERG believes this merits further investigation and proposes to carry this out over the coming months.

The problem of discrimination, especially discrimination on non-price issues, is widely recognised as one of the most important to address and at the same time an area where effective regulation can be extremely difficult¹. While most NRAs were able to answer that they had an effective regime in place, stakeholders had a different perception. ECTA has identified non-price discrimination as one of the areas where its members most frequently

¹ (Cf. also Revised REM CP (ERG (06) 33, new section 5.2.5 on Non-price issues)

experience serious problems (unreasonable delays by SMP players, quality squeeze and so on). Clearly the altnets do not believe that NRAs' anti-discrimination remedies are uniformly effective, even though measures aiming to deal with discrimination are invariably in place. Further investigation is needed to assess which of the 2 perceptions – that attributed above to ECTA, or that of ERG members, is more objective.

The assessment of whether or not remedies are effective requires an understanding of national circumstances. Identical remedies might have very different effects, depending on a host of factors, including the degree of competition faced by an SMP player in the regulated market, the likelihood of a sanction for non-compliance, and the magnitude of such a sanction. No one lacking a fairly good understanding of the national circumstances in a particular market would be able to assess effectiveness without carrying out more analysis than was possible for this exercise. The NRA concerned – and other national players – would be able to make such an assessment, but it could not be guaranteed to be objective.

The problem of assessing exactly what is meant by conformity is not unique to discrimination – but this is where the difficulty may be most acute. The ERG intends to return to the issue in its activities during 2008.

As noted above, an analysis of the extent of conformity is incomplete without an investigation of the reasons for non-conformity, and could lead to false conclusions. An *a priori* framework against which such reasons could be assessed would be very useful. Otherwise, it may be problematic in practice to distinguish between “good” and “bad” justifications”. The ERG proposes to try to develop such a framework during 2008.

How should ERG members address non-conformity?

Under the Framework, no ERG Common Positions can be binding on the members so an action plan to achieve 100% conformity would not be appropriate. On the other hand, Common Positions are of diminished value if there is no commitment by ERG members to review items of non-conformity from time to time and consider whether action is appropriate. This could most easily be accommodated within the next scheduled Market Review but would not necessarily have to be handled in that way.

For aspects of the CPs where national decisions are commonly not in conformity (e.g. migration processes), the ERG recognises that there is evidence of a need for more intensive dissemination of best practice, for example through workshops. The ERG will deal with these needs in its current and future work programmes.

Transparency

The ERG believes in the maximum possible transparency and has therefore considered how much of the detail of the national responses to the monitoring questionnaires could be published. Although some simple checks were made

on the reasonableness of the responses, a full quality assurance procedure would have consumed a much greater level of resource than was available for this exercise. Moreover, while multiple choice responses are useful for getting an overall picture, they do not illuminate the question of justifications for non-conformity (an issue on which the ERG has identified the need for further work, as discussed above). Therefore, under these circumstances, the ERG has concluded that the right course is to publish a statistical breakdown of the responses to each question. This can be found at Annex 2.

For future exercises of this kind, the ERG would consider it preferable to publish individual national responses.

Evaluation

The ERG considers that it would be useful to establish robust benchmarks of some key parameters, notably price of key broadband services. Provided they are well-constructed, benchmarks can be as valuable in practice as more formal evaluations. The ERG plans to pursue this in its 2008 Work Programme.

Lessons learned from this exercise

A number of lessons have been learned from this exercise which can be fed back into future exercises of this kind.

First, the ERG considers that it has established that monitoring exercises of the kind piloted here are practical and will deliver useful results without making unreasonable resource demands. NRAs reported that the questionnaires were readily completed within a few hours and the ERG was able to draw out some clear conclusions without difficulty. In future exercises, the ERG would expect that the analysis would be more subtle and demanding – but sees no difficulty in carrying it out within the constraints of the levels of resource available.

Second, the exercise has underlined the unsurprising result that it is not always easy to assess which decisions are in conformity and which are not. This is related not only to the form of the remedy but also to the effectiveness of the remedy in practice in the national circumstances. As noted above, the ERG is planning further work in this area.

Third, the ERG realises that it will be valuable in future to explore the reasons for non-conformity, particularly where (as in the case of migration) the non-conformity is fairly widespread.

Fourth, the ERG believes that carefully constructed benchmarks will be a valuable complement to any future monitoring exercise.

Summary of further work

As part of its 2008 Work programme, the ERG will:

- (a) consider further the question of how best to assess conformity, particularly in difficult areas such as non-discrimination;
- (b) work on the development of generic criteria for assessment of the strength of the case for any non-conformity in the light of particular national circumstances;
- (c) publish a timetable in accordance with which NRAs will review national non-conformities with the broadband Common Positions. In most cases, such a review is likely to be a component of the national Market Reviews expected to be carried out during 2008;
- (d) publish a timetable for the conduct of future monitoring exercises covering a wider range of ERG Common Positions.