



ERG (09) 36

**ERG Report
on
the Elaboration and Monitoring of Common Positions**

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INTRODUCTION

As the market situation becomes more complex as a result of the increase in competition, and NRAs gain experience in regulating their national markets, there is greater pressure on ERG to produce high-quality work and fulfil its role more efficiently. As a response to this, ERG has focused its attention in the last years on how to harmonise more effectively, robustly and in a more targeted manner, through increasing the number and improving the quality of common positions (CPs), which adequately respond to the specificities of this complex environment.

In addition, in order to promote the adherence of NRAs' regulatory practices to the ERG CPs, ERG adopted the Madeira Statement¹, in October 2006, whereby NRAs committed to take utmost account of the ERG CPs and agreed to put in place a monitoring procedure aimed at measuring the level of compliance of national decisions with the common positions.

In its 2009 Work Programme, ERG has again given a central role to harmonisation. In this sense, ERG has committed to continue the intensive work on the delivery of ERG opinions, ERG reports and ERG common positions, continuing the cooperation among its member NRAs and with the European Commission in the promotion of the internal market for electronic communications.

In this context, this paper is presented as a report on how the ERG will elaborate and monitor ERG Common Positions. It is particularly relevant to those Common Positions which relate to current regulatory practices. Building on the practical experience gained so far by ERG, it describes procedures intended to ensure that none of the essential components of any such exercise are overlooked, thereby ensuring better and more effective harmonisation. The specification and publication of the processes followed by ERG in its day-to-day activity dealing with common positions is also part of ERG's commitment to promoting transparency and predictability of its activity.

This report describes model procedures which ERG will use in future as the basis of its work:-

- (A) on the elaboration of Common Positions
- (B) to monitor the extent of conformity of national regulatory approaches with those Common Positions

The paper also explains by means of a diagram how both procedures are integrated in the "ERG harmonisation cycle". This diagram seeks to highlight the fact that the regulatory activity of ERG consists of a continuous cycle rather than a series of static pictures, where common positions are required to be adapted to the changing competitive situation of the markets in question (ensuring the maximum possible match between market needs and regulatory responses). This is achieved through the periodic review of common positions, taking into account the results of the monitoring exercises. These will be used in particular to reveal those areas where there may be good reasons for individual NRAs to depart from a Common Position in some respects or to demonstrate that a CP is no longer fully in line with market realities..

¹ ERG(06)51, Statement on the Development of the ERG.

MODEL PROCEDURE FOR THE ELABORATION OF COMMON POSITIONS

PHASE 1 – FRAMEWORK OF THE ERG INTERVENTION

Prior to the elaboration of a new common position, it will be necessary to clarify the framework for the ERG intervention. In particular, the following aspects should be addressed:

- (i) **Need** for the elaboration of the common position
 - Competition problems that need an ERG harmonised response?
 - Priority area for ERG?
- (ii) **Scope and feasibility** of the ERG action
 - What is the market/service to be addressed?
 - Can NRAs intervene?
- (iii) **Detailed harmonisation objectives** to be achieved by the common position

PHASE 2 - ANALYSIS

BENCHMARK ANALYSIS

An investigation of the baseline situation is needed in order to help define the common solutions at a later stage. Two kind of studies will usually be needed:

- (i) Benchmark of the relevant country- and market-specific indicators
- (ii) Benchmark of current national regulatory practices

GATHERING OF INPUT FROM RELEVANT ACTORS

Informal input from relevant actors (European Commission, operators, consumer organisations, etc.) can be very valuable at this stage in order to help define the specific ERG solution.

In particular, the Commission's comment letters (in the context of the Article 7 procedure) should be considered by ERG when determining the criteria and the principles of its common positions, as they should provide insights into the Commission's views on the areas under investigation.

ASSESSMENT OF THE SCOPE FOR HARMONISATION

An analysis of the reasons put forward by the NRAs explaining their approaches will be made, in order to assess the extent to which the harmonisation objectives can be attained in the light of the market realities across Member States. To this end, the following should be identified:

- (i) regulatory differences that cannot be justified by objective differences in national circumstances and therefore must be removed as soon as possible;
- (ii) regulatory differences that can be explained, but could be removed in the future;
- (iii) regulatory differences that result from inherent differences in national circumstances and are therefore likely to remain in the future.

IDENTIFICATION OF THE COMMON REGULATORY APPROACH

- (i) After the different regulatory approaches have been assessed, the ERG will define the common line that the CP will develop in more detail bearing in mind the overall objective of promoting the internal market as effectively as possible.

In order to ensure a clear understanding of this step and a high level of adherence to the CP, this process should include an explanation of the reasons why the ERG has selected a particular regulatory approach.

PHASE 3 – ELABORATION OF THE COMMON POSITION

ELABORATION OF THE DRAFT ERG CP

Based on the conclusions drawn in the previous steps, the draft common position will be produced at this stage.

In order to facilitate the monitoring process, the ERG common principles for regulation should be specified in a way that is as concrete and structured as possible.

PUBLIC CONSULTATION

Formal consultation to gather input from stakeholders and other interested parties.

PUBLICATION

Preparation of final ERG common position, taking into account the contributions to the public consultation, and publication.

MODEL PROCEDURE FOR THE MONITORING EXERCISE

PHASE 1. MONITORING QUESTIONNAIRE

- (i) Is the national situation/regulation in line with the ERG CP? [YES (conformity) / NO (non-conformity)]

In case of non-conformity, ask for:

- (ii) NRA's reasons for non-conformity;
- (iii) Plans to bring national regulation into conformity:
- a. Has NRA specified a date to achieve conformity?
 - b. If no, has a definite date been identified? Has the NRA announced a policy to move towards conformity?

PHASE 2. ELABORATION OF MONITORING REPORT

ANALYSIS OF THE QUESTIONNAIRE RESULTS

The information about NRAs' reasons for deviation and about their intentions to reduce non-conformities is key as it provides ERG with a sense of anticipated regulatory convergence and of the scope for further harmonisation.

It will be useful to assess:

- (i) non-conformities that cannot be justified by objective differences in national circumstances and therefore must be removed as soon as possible;
- (ii) non-conformities that can be explained, but could be removed in the future;
- (iii) non-conformities that result from inherent differences in national circumstances and are therefore likely to remain in the future.

MONITORING REPORT

The monitoring deliverable will in general include:

- (i) a report on the level of conformity
- (ii) conclusions on the foreseen level of conformity, considering NRAs' plans to bring their regulation into line with the CP
- (iii) conclusions about the need to revise specific areas of the CP

ERG HARMONISATION CYCLE

