

*Via email*

6<sup>th</sup> November 2007

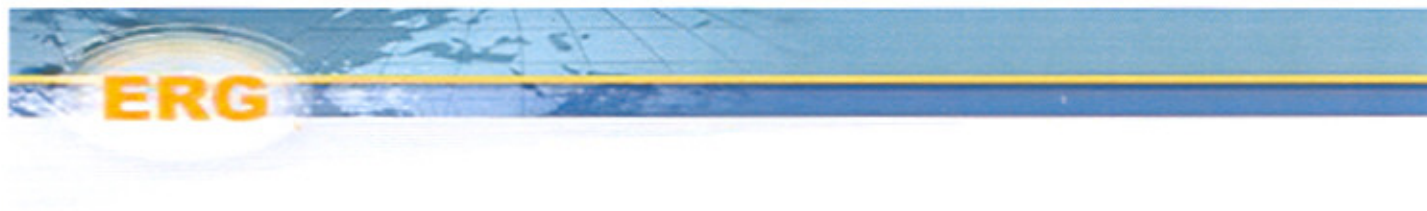
Commissioner Viviane Reding  
Member of the European Commission  
Brussels

*Dear Commissioner,*

the ERG was pleased to welcome you at our recent Plenary in Athens and encouraged by your positive assessment of our achievements to date. We were very pleased to hear that you fully share our view that the Commission and the ERG should be working in partnership, building upon the strong foundation of the independent regulators in every Member State.

As the 13<sup>th</sup> of November approaches, when the Commission's proposals on the reform of the EU Framework will be published, and taking up your invitation in Athens for further inputs from the ERG and its members, we would like to take this opportunity to share with you our views on the Group's future development.

As you know, the ERG strongly supports a number of elements covered by the package, in particular the provisions on NRA independence, which we believe to be essential to an effective regulatory framework. We also strongly support the Commission's objective of strengthening the internal market in electronic communications, by continuing to improve the consistency and quality of regulation and reinforcing cooperation between NRAs, and between the ERG and the Commission.



Indeed, since the ERG's establishment in 2002, and even before that, the European regulators have been fully committed to the promotion of competition and the internal market in electronic communications, in order to advance the interests of European consumers and citizens. As you noted in Athens, the ERG has achieved much more than anyone could have expected when it was created. The current level of accountability and transparency of the ERG is well beyond what is expected from a consultative group. We hold regular hearings and consultations on all issues and decisions and we are open to the scrutiny of the European institutions. The ERG web site contains all the relevant documentation about our activities.

A detailed list of the ERG's achievements to date is annexed, including, most recently, the development of NGN, functional separation and the implementation of the International Roaming Regulation, where the ERG's close cooperation with the Commission as its advisory body and its coordinating role among the NRAs have been of great value.

However, despite the considerable progress made so far, we share your view that there are no grounds for complacency. We agree with the Commission that we should continue to work to improve the quality of national regulation, regulatory coordination between our members, and collaboration between the Commission and the ERG. However, in our letter of the 27<sup>th</sup> February the ERG has already expressed the view that is not in favour of the creation of either a new Commission veto on remedies or new layers of unnecessary centralism. Rather, we believe in the merits of strengthening the ERG model by enhancing the cooperation between national regulators.

For this reason, we have embarked on a major step-change to our organisation and operations, injecting a higher level of resource and dynamism into the Group and enabling it to operate as a more effective coordinating body and generator of regulatory best practices. This includes improvements to our governance model and the



incorporation of the IRG as a Belgian law legal entity to enable us to increase the resources we can make available to the Group quickly and simply.

The ERG is seeking to reinforce its ability to continue to improve the quality of regulation and drive further consistency and coordination across Europe, while promoting the objectives of the Framework and respecting regulators' independence, along with their ability to take decisions suited to national market circumstances. In our letter to you of 27<sup>th</sup> February, we had already called on the Commission to use the ERG to its fullest potential. In this vein, we now invite the Commission to give its serious consideration to the following proposals:

- A formalisation of the cooperation between the Commission's Article 7 Task Force and our Article 7 Expert Groups in relation to market analyses and notifications. For example, the Task Force could engage with the Expert Group during the Commission's initial analysis *prior* to the issuance of a Phase II letter to the notifying NRA. This could also involve a "pause for reflection" procedure, whereby the Commission could request an ERG opinion on an NRA's notification and the NRA would be urged by the Commission not to finalise its decision until it had analysed and responded to the ERG opinion. NRAs' record of taking into account the views of our Article 7 Expert Groups to date provides grounds for confidence that such a procedure would have a positive impact.
- Another way of engaging formally with the ERG would be for the Commission to consult the ERG on key regulatory issues. Systematic publication of the resulting ERG opinions would enhance regulatory certainty for stakeholders.



- The Commission could invite the ERG to work closely with it on the drafting of implementing measures under the Framework (e.g. Recommendations and Guidelines). For example, we understand that the Commission is considering issuing a Recommendation on remedies, and the detailed applications of the ERG's original Remedies Common Position, which we have been developing for several priority markets, could form the basis of our contribution to such a document.
- Finally, the ERG would like to involve the Commission at an earlier stage in the development of its Work Programme, in order to ensure that the ERG is fully responsive to the Commission's agenda, and that the Commission is able to take full advantage of the pool of expertise the ERG provides. This should enable the Commission to mandate the ERG to develop proposals for any instruments it might seek to adopt (e.g., a Recommendation on mobile termination rates, which we understand the Commission is considering issuing in the first quarter of 2008 or the Commission's proposed guidelines on NGA).

We were pleased to note in your Athens speech that you are open to discussing the continued evolution of the ERG, and that you would welcome a review of the ERG Decision. We believe that a strengthened ERG, continuously informed and guided by the day-to-day regulatory experience of its members, is well placed to serve the interests of European consumers and citizens. An amendment to the ERG Decision could reflect the proposals outlined above with minimum delay, and at minimum cost and bureaucratic impact, and in particular without the need for a complex and lengthy legislative process.

In the short term, the ERG Decision could be amended to formalise our current system of majority voting (agreed by the Plenary last December) and to reflect the improvements to our governance model mentioned above.





In the longer term, the full scale of the ERG's (current and potential) contribution to the implementation of the Regulatory Framework, and the Commission's own commitment to seek and take utmost account of the views of its advisory function, could be reflected in the relevant legislative instruments. We invite the Commission to take this into account in developing its forthcoming legislative proposals.

The aims of our proposals are, we believe, closely in line with your own objectives to improve consistency, underpin the independence of national regulatory authorities, promote the internal market, reinforce cooperation between NRAs and the Commission, and develop a centre of regulatory expertise and best practice. At the same time, an ambitious enhancement of the ERG model fully reflects the principles of proportionality and subsidiarity, and a commitment to progressive deregulation, principles which are also at the heart of the Framework.

We look forward to working closely with the Commission as we continue to develop our plans for a strengthened ERG to achieve these shared aims. We firmly believe that the interests of European consumers and citizens, as well as industry, are best served where we combine our efforts and resources, working in close cooperation.

We look forward to discussing our plans with you and your officials at your earliest convenience.

Yours sincerely,



Roberto Viola  
ERG Chairman

Cc Fabio Colasanti

## **European Regulators' Group: Consistency & Cooperation October 2007**

In October 2006 the ERG<sup>1</sup> agreed to a series of regulatory disciplines aimed at delivering an increasingly harmonised approach to the regulation of electronic communications markets in the EU. This programme of commitments has come to be known as the Madeira Declaration<sup>2</sup>, and has formed the basis of the ERG's ambitious work programme over the last twelve months. This paper reviews the activities of ERG members, operating under the terms of the Commission's ERG Decision.<sup>3</sup> A lot has been achieved since the creation of the ERG in terms of ensuring the consistent application of the 2002 Regulatory Framework. We are proud of our achievements, but conscious that there remains much to be done. This paper details some of the key activities of the ERG since the Madeira Declaration was agreed one year ago.

### **A Permanent Secretariat**

Recognising the growing demands on the organisation, this year we have taken a first step towards increasing our resources and established a permanent secretariat based in Brussels. The secretariat is initially staffed by three experts seconded from NRAs. The secretariat will work to support the Chair of the ERG but will also coordinate the Independent Regulators' Group (IRG) working groups. We hope that this investment in the Group's future will enable us to continue to build upon our recent achievements.

### **Common positions on best practice in bitstream access remedies (WBA) and in wholesale unbundled access remedies (WLA)**

NRAs have developed, through implementation of the regulatory Framework, an extensive knowledge of the effectiveness of remedies in key markets. The Madeira Declaration included a commitment to develop best practice guidance (based on the ERG's Remedies Common Position) in respect of individual markets, setting out detailed methodologies to be followed by NRAs in formulating remedies for these markets. This approach attempts to steer a balanced course between over-prescription of the detail, and over-generality. NRAs are recommended to take utmost account of common positions,

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<sup>1</sup> The ERG represents the national regulatory authorities (NRAs) from each of the 27 Member State. The NRAs also participate in the Independent Regulators' Group (IRG) which includes 33 NRAs from the European Union, EFTA countries and EU candidate countries.

<sup>2</sup> [http://erg.eu.int/doc/whatsnew/erg\\_06\\_%2051\\_statement\\_erg\\_development\\_final.pdf](http://erg.eu.int/doc/whatsnew/erg_06_%2051_statement_erg_development_final.pdf)

<sup>3</sup> [http://erg.eu.int/doc/legislation/com\\_dec\\_2004\\_3445\\_cc\\_14\\_09\\_2004\\_en.pdf](http://erg.eu.int/doc/legislation/com_dec_2004_3445_cc_14_09_2004_en.pdf);  
[http://erg.eu.int/doc/legislation/erg\\_establish\\_decision\\_en.pdf](http://erg.eu.int/doc/legislation/erg_establish_decision_en.pdf)



and commit to provide reasoned regulatory decisions by reference to them. The intention is that NRAs will (in future decisions in these markets) consider all the competition problems which commonly arise (and which are listed in these common positions), consider the list of best practice remedies (also listed) for each of those problems, and, if they choose to depart from such list, to explain transparently why they have done so, and why their chosen course of action is preferred. Such guidance should make it easier for NRAs to select effective and appropriate remedies. The increased transparency should make it easier to monitor the effectiveness of the remedies.

Following requests from Commission and altnets for much more definitive guidance in respect of specific markets, the first two such “applied” common positions were adopted, for WBA and WLA markets, in June 2007. Follow-up work aimed at identifying best practices is near completion, and will further assist NRAs in formulating effective remedies.

The ERG Remedies Project Team is currently developing the third “applied” common position, in relation to the wholesale leased line market, which has just been published for consultation.

#### **Draft common position on approaches to MTR/FTR regulation**

The aim of this common position is to agree a consistent approach across Europe to the regulation of termination rates (in both fixed and mobile markets). This is an area where practice across Europe has admittedly varied significantly in the past (though despite this, MTR benchmark indicators show a marked levelling in rates across Europe over the last 2-3 years). The common position is expected to include common approaches to asymmetrical regulation (one of the areas most often commented on by the Commission). A draft Common Position should be ready for consultation in December 2007. An extension of the project which examines the question of best practices in costing and accounting methodologies relevant to the setting of regulated MTRs is planned for delivery in mid-2008.

#### **Opinion on regulatory approaches to NGA**

In May 2007 Commissioner Reding asked the ERG for a formal opinion on regulatory approaches to NGA. Within the space of 4 months the ERG produced an agreed statement of regulatory principles on this topical issue. The Commission has indicated its intention to issue guidelines on NGA regulation during the first half of 2008, and it is hoped that it will base any such guidelines on the expert analysis carried out by the ERG.



### **Common position on VoIP**

In February 2007 the ERG agreed to the creation of a task force to develop common approaches to VoIP regulation, and a draft common position has just been published for public consultation. The common position will lead to much closer alignment of authorisation conditions for VoIP service providers across Europe, covering, in particular, numbering (and the nomadic use of geographic numbers), number portability, and 112 access (and CLI).

### **Monitoring of common positions**

Another of the commitments made by the ERG in the Madeira Declaration was to put in place a regime to monitor the extent to which the Group's adopted common positions are used in practice by NRAs in their regulatory decisions. An early proposal for such a regime was tabled for the consideration of the Plenary in June 2006, based on a combination of self-assessment and a quality assurance check by a project team drawn from other NRAs. The monitoring exercise in relation to the application of the WBA and WLA common positions will be reported on in December 2007. Initial analysis suggests that regulatory remedies consistent with the methodology set out by the relevant common position are mostly in place, although further work is needed to assess the effectiveness of these remedies.

### **Regulatory accounting report**

The ERG published in June 2007 an updated report on regulatory accounting in practice across the EU, the results of which clearly show trends towards greater consistency and harmonisation in the application of key accounting methodologies across Europe. In particular, this year's report shows a significant movement towards the general adoption of "current cost accounting", and increasing use of "long-run incremental costing" as the primary costing methodology.

### **International roaming**

Since the plans for a regulation on international roaming in February 2006, the ERG has had a working group of experts working on this issue. Over the last 18 months, the ERG has worked very closely with the Commission, starting with the development of the regulation. Most recently, following publication of the regulation, the ERG agreed on the need for close coordination between NRAs in order to monitor the development of the roaming markets. It recently issued a set of implementation guidelines, to enable a common approach to the interpretation of the regulation across Europe. It has also developed, in close cooperation closely with the Commission, a common methodology



for NRAs to use in data collection, which in turn is intended to enable a common approach to reporting and compliance monitoring. The international roaming experience is seen by both the Commission and the ERG as an excellent example of cooperation between these two bodies.

### **Knowledge sharing**

The ERG has identified NRAs with relevant experience and knowledge in relation to particular regulatory issues or areas, which will make themselves available to other ERG members for practical advice on the implementation of the EU regulatory Framework. The ERG also serves as a forum through which individual NRAs are able to seek advice at any time from other NRAs with more experience in particular markets, and several NRAs have sought informal peer review of their analysis prior to the finalisation and notification of their market reviews. A clear example of this is the creation of the Article 7 Expert Groups, which are created following the issuing of a "serious doubts" letter from the Commission.

### **Article 7 Expert Groups**

A key aspect of the Article 7 process is the ability of NRAs to comment on other NRAs' market reviews. Notifying NRAs have for some time had the ability to request the creation of an ad hoc ERG Expert Group to provide them with advice in relation to market notifications which become subject to a Phase II procedure. During 2006, two such groups were requested, one by OPTA (Netherlands) in relation to its broadcast transmission market notification, and one by BNetzA (Germany) in relation to its leased lines market notification. In February 2007, the Plenary agreed that Expert Groups should be automatically constituted when any member NRA's notification becomes subject to a Phase II procedure, or where the Commission proposes to issue a serious doubts letter. In the subsequent 4 months, four Expert Groups were constituted in response to the following notifications entering Phase II:

- MCA (Malta) notification of joint dominance in the wholesale broadband access market
- AGCOM (Italy) notification of SMP in the market for mobile call origination to non-geographic numbers
- UKE (Poland) notification of retail access to the public telephone network
- UKE (Poland) notification of wholesale leased lines (trunk)

In five out of these six cases, the Expert Group found against the notifying NRA, and recommended the withdrawal (and eventual amendment) of the notification, which recommendation was followed by the NRA in question. This provides clear evidence of

the ERG's ability to act objectively in accordance with regulatory best practice, and that the ERG is both able and willing to take a view independent of the view of the NRA concerned. This process has the added benefit of enabling the further dissemination of best regulatory practice in the application of competition methodology. Notably, since February 2007, the Commission has also requested a copy of the Expert Group reports, with a view to informing its own thinking and the preparation of its draft veto proposals.

### **Conclusions**

The close cooperation of NRAs within the constitution and working group structures of both the IRG and ERG has led to tangible benefits for the internal market. The effectiveness of the ERG working groups in producing high-quality expert reports and the ability of ERG members to respond quickly on issues like NGA and Article 7 serious doubts is evidence of the increasing professionalism of the Group and of NRAs' commitment to the promotion of the internal market and the adoption of best practice regulation across Europe.