

ETNO Reflection Document on the ERG Draft 2010 Work Programme



November 2009

Executive Summary

ETNO welcomes the ERG Work Programme (WP) consultation. We understand that the 2010 WP is of transitional nature in view of the establishment of the successor Body of European Regulators for Electronic Communications (BEREC) in 2010. ETNO believes that BEREC should consult with stakeholders on its work programme as soon as possible after its establishment in order to define its priorities in a timely and transparent manner.

This will be a timely opportunity to evaluate the relevance of different ERG work streams and the ambitions of BEREC in terms of harmonisation. A key success factor for BEREC will be its transparency. ETNO calls for a direct and transparent stakeholder involvement both in the development of regulatory guidance under the new framework and in the notification process under Article 7 and Article 7a of the new Framework Directive and would be pleased to contribute to the formulation of the rules that will govern these processes.

Introduction

ETNO welcomes the opportunity to comment on the Draft ERG Work Programme (WP) for 2010.

As per the newly adopted “Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office”¹ (the ‘BEREC Regulation’), 2010 will see the establishment of the Body and, as highlighted in the draft ERG WP, BEREC will be obliged to formulate and consult upon its own work programme once the Body and the BEREC Office are established.

¹ PE-CONS 3675/09, 22 October 2009.

ETNO believes that while there should be no disruption in the transition from ERG to BEREC, the new body should consult with stakeholders on its work programme as soon as possible after its establishment in order to define its priorities in a timely and transparent manner. We would expect that the BEREC WP might deviate from the ERG WP as appropriate to reflect changing market and regulatory developments.

Against this background, ETNO's contribution to this transitional ERG WP is limited to three issues of principle that we hope can be reflected in the final ERG WP for 2010

1. Focus on transparency and right to be heard in the procedural rules governing BEREC and the future 'Article 7 process'

The transparency of the work of BEREC, as outlined in the General Provisions (Articles 17-20) of the BEREC Regulation and elsewhere in the Framework, will be a key success factor for the new institution. Thus a key task for the European Commission and the ERG in WP item 3.1, "Transition from ERG to BEREC," should be defining BEREC's obligations regarding its formal consultation with interested parties and the public as well as related internal rules of procedure and practical arrangements.

This transparency should have two dimensions:

- **Firstly, a continued informal and formal exchange between industry, other stakeholders and BEREC to inform and guide BEREC's positions** on key regulatory issues.

BEREC will have a number of competences in the context of issuing regulatory advice to the market and advising the European Commission on its guidance for the sector, such as in the process leading to Commission recommendations and decisions under Article 19 of the revised Framework Directive. The proposed new framework stipulates that this work should be carried out "*in a transparent manner so as to ensure the consistent application, in all Member States, of the provisions of this Directive and the Specific Directives*" (Article 7 (2) Framework Directive).

In the past, an *ad hoc* dialogue with individual ERG project teams (PTs) responsible for specific work streams was particularly

valuable. Some PTs, however, were less prepared to hear the views of stakeholders in formulating a draft common position (CP) or a report for publication. To not solicit input at this stage of the process might preclude early, targeted contributions by stakeholders which in many cases may be desirable, given that many ERG work items are concluded in the form of reports without consultation (see below) and that draft CPs often are very advanced, already representing a compromise between ERG Members. BEREC should be open for contacts with stakeholders also in the preparation phase of draft positions. ETNO hopes that such interaction will be facilitated by the permanent secretariat of BEREC and an according reference to dialogue with stakeholders is included in its rules of procedure.

- Secondly, **the right to be heard of affected companies directly by BEREC and the Commission in phase II of the Art. 7 and 7a-procedures.**

The present ERG project teams for Art. 7 cases which reach 'phase II' under Article 7 (cf. pt. 3.2 of the draft WP) operate on an informal basis and give non-binding advice to the Commission and the relevant IRG/ERG member, or national regulatory authority (NRA). With the entry into effect of the new Art. 7 and 7a, the character and weight of BEREC opinions in the process will differ significantly from those of the ERG, for example, by influencing the nature of the Commission comments on the imposition of remedies (Art. 7a (4) and (5)).

ETNO finds that it is a major omission that no formal right to be heard in the EU procedure under Art. 7 and 7a Framework Directive has been established in the framework, in particular, but not limited to, the so-called 'phase II'. We maintain that the procedural rules of BEREC and/or the Office if appropriate should foresee a right to be heard by the affected parties. Such hearing would allow the affected parties to comment specifically upon internal market aspects of national regulatory procedures which are not always in the focus of national written contributions. They would also allow to take into account market developments and arguments raised in the European procedure. The current Commission practice to solicit comments on phase II proceedings within five working days is a first reaction to the need for such a separate, European involvement of affected parties. This should be developed by providing for a hearing before the BEREC/Office case team and by extending the deadline for interventions, while respecting the time constraints of the procedure. The hearing could at the same time involve the Commission to ensure both an efficient and transparent process. ETNO would be pleased to

follow-up with concrete proposals on how to incorporate such a right to be heard in the Art. 7 process.

As for the broader “3.1 Transition from ERG to BEREC” WP item, ETNO would find it valuable if the ERG and/or Commission would make public the “number of preparations” made in 2009 by the ERG and the “number of tasks” foreseen for 2010. As ETNO members are likely to be interested and affected parties by the Body’s role – from reports to draft decisions as outlined in Art. 2 of the BEREC Regulation, ETNO believes stakeholders should be aware of – if not formally consulted on -- the establishment of BEREC’s governance arrangements, rules of procedure and practical arrangements.

2. Substantive guidance on regulatory issues should be consulted upon and based on a broad market consensus

It is important to ETNO that, in line with the spirit of ERG’s rules of procedure, ERG documents (e.g., “ERG Reports”) and in the future BEREC documents with material impact on regulatory policy continue to be consulted upon. In 2008 and 2009, this principle was unfortunately not adhered to in all cases by the ERG. The choice to issue a report instead of a CP does not change the need for broad stakeholder participation on key regulatory policy issues.

To adopt reports on economically challenging and commercially central items without consultation, as it was for example the case in 2009 with two reports on price regulation (price squeeze in bundles and price regulation in broadband markets), results in less debated, less accepted, and, as a consequence, less effective ERG action. Where consultations are conducted, stakeholders’ contributions should be taken into account in an appropriate and balanced manner in the decision making process. Ideally, a draft document by ERG should open a debate in the sector, leading to a broadly accepted and balanced outcome.

3. Refocus ERG work on key areas for the internal market

As mentioned in the introduction, this submission will not address all the work streams listed in the draft CP. However, we have doubts as to the relevance of some of the reports and work streams for the internal market. A number of items such as 'convergence' have been on the ERG agenda for several years without resulting in any - or at least any broadly accepted - policy guidance (i.e. only reports without market involvement).

In the context of the setting up BEREC's work programme, ETNO therefore encourages an evaluation of the priorities in the field of harmonisation and, more generally, of the approach of BEREC with respect to harmonisation. ETNO would, for example, like to know whether the recent suggestion of the Chairman of ERG that he could imagine a temporarily non-aligned introduction of a far-reaching regime such as Bill&Keep for termination rates would be an indication of BEREC's/ERG's ambitions about harmonisation. In this context we also note that the timeline for implementation of the Commission Recommendation on termination rates conflicts with the proposal for a move to a Bill&Keep regime for interconnection in the ERG draft Common Position ERG (09) 34 (ETNO will contribute to the consultation in a separate submission). Key issues such as an adequate and flexible framework for NGA roll-out which fosters investment and competition and the setting of termination rates in line with the principle of cost-orientation should continue to feature high on the ERG/BEREC agenda.

4. Alignment of ERG WP with the current and revised EU framework

Next to these three issues of principle, we are concerned that certain aspects of the proposed ERG activity may fall out of the scope of the EU framework.

- **"Implementation Issues related to the Commission Recommendation on NGA"**

The draft WP states that the ERG will "consider follow-up actions including how to address issues of standardisation and a definition of open access." ETNO asks for clarification of the terms "standardisation" and "open access" by the ERG in this context,

including references to where these matters are dealt with within the scope of the EU regulatory framework (current or as per proposed revisions).

- **Link of spectrum policy to competition policy**

ETNO welcomes the cooperation between RSPG and ERG and considers that this cooperation is essential to achieve a consistent implementation of spectrum policy. There are undoubtedly links between spectrum policy and market structure. In fact, the inclusion of technological neutrality as an element of spectrum policy will contribute to diversify access technologies and to introduce new competitive elements in the access markets.

We would be concerned, however, if such cooperation would introduce criteria into spectrum policy which are not proper to the provisions of the revised EU regulatory framework. Competition can best be ensured by applying transparent and non-discriminatory criteria for allocation, based on the principle of efficient use of the spectrum. Restrictive criteria for spectrum allocation could be a first step to inefficiency and to limit the development of new services, as well as technological diversity. Such a situation would contribute to jeopardise the objectives of the Regulatory Reform.

- **Business services market work stream**

While the competition conditions for large business customers are per se covered by the framework in force, any investigation of potential market failures should carefully establish:

- the markets under the Recommendation on relevant markets in question – in many markets, wholesale products used for serving multi-site business clients are partly subject to ex ante regulation and partly unregulated. A complaint claiming a problem on what is named a market for communications service to multi-site business customers does not mean that such a market / a corresponding wholesale market exists and should be subject to regulation under the three criteria.
- The exact geographic scope of any problem observed and the proportionality of regulation. If problems exist in certain selected geographies, no across-the-board regulation should be recommended, which would distort competition in areas where unfettered competition exists.

- **Net neutrality**

We note that ERG plans to look into the implementation of the rules of the revised EU framework as concerns quality of service and access to Internet applications and content. We welcome the proposed scope of the assessment, which focuses on the implementation of the rules of the revised framework. ETNO believes that the implementation of these provisions should be cautious of preserving incentives for developing smart, managed networks and quality of service differentiation, which will drive innovation and consumer choice.