

## **Telecom Italia comments on the draft ERG 2010 Work Programme**

Telecom Italia welcomes the opportunity to comment on the IRG/ERG Work Program 2010 and thus allow to contribute to the ERG Agenda, taking into account the future institutional development from ERG to BEREC.

We have the following general remarks:

The public consultation is the appropriate tool to express our commitment in contributing to the ERG agenda, for this reason we suggest a strengthened role for public consultations.

We think that a more detailed agenda in terms on the timing envisaged for each topic should be developed.

We support ERG initiatives hoping in a stronger commitment in catching and thus analyzing the new dynamics characterizing the European communications market. In order to better evaluate the upcoming context from a business and regulatory point of view, we expect ERG to analyze the wider border of such market already including nowadays other players, different from Telco operators, who provide services in direct or indirect competition to traditional players. We recognize the attempt made by ERG on data protection in order to address the cross border enforcement, but we deem it not sufficient to tackle wider competition problems for cross-border markets.

We eventually hope that:

- a. ERG will suggest the appropriate/proportionate approach on NGN pricing mechanism
- b. The institutional setting of BEREC will increase transparency in pursuing harmonized decision
- c. The reform on Universal Service will take into account the balanced option to foster new investments
- d. Cooperation between RSPG and ERG will develop in a framework of increased transparency

In our answer, we are following the Work Program structure and we are proposing our comments in the boxes provided after the “deliverables” proposed by the Program.

At the end of our document you will find our proposals for an extension of the Draft Work program to the following relevant issues:

- **Access Separation end Equivalence**
- Geographic segmentation

### **1. Improving Harmonisation**

#### **1.1. International Roaming**

In 2009, the Roaming Regulation 717/2007/EC was revised to extend its scope and duration. ERG will continue to monitor the implementation of the Regulation through preparing a report on its operation in Member States as requested by the Commission. Taking into account the trans-European aspect of roaming, it is necessary to coordinate the regular data collection and monitoring exercises of the NRAs on the legal basis of various articles of the Roaming Regulation. ERG has performed this task since the 2007 Regulation came into effect.

*Deliverable: ERG Report/ERG Opinion*

*Consultation: No*

Under the 2009 revision to the Roaming Regulation, the Commission is required to assess methods other than price regulation which could be used to create a competitive internal market for roaming. In doing so it is required to have regard to an independent analysis carried out by a body of European regulators. ERG will, on the basis of its analysis of data collected as part of the monitoring exercise, assess the continued need for regulation and analyse alternatives to price regulation.

*Deliverable: ERG Report/ERG Opinion*

*Consultation: No*

Telecom Italia supports further work by the ERG on monitoring the implementation of Roaming Regulation.. Specifically, we deem it relevant to monitor the effectiveness of the transparency measures on data roaming services envisaged in the current Roaming Regulation, because it is unclear if these rules will produce effective benefits for customers and all Industry. This also in the light to the fact that the dimension of consumers complaints related to transparency is not yet well known – or it is negligible in markets with high penetration of prepaid contracts - and the implementation of such measures is extremely difficult for the Industry.. Telecom Italia proposes to assess if any of the phases of the process may be discussed with the industry via a public consultation or a public hearing.

## **1.2. Next Generation Networks – Access**

In May 2009 ERG published a report on the economic analysis of Next Generation Access in light of developments, including on-going roll-out and the draft Commission Recommendation on NGA. An Annex to the report contained extensive information on actual and planned NGA roll-out in 22 countries. ERG plans to update this Annex during 2010 in order to continue to monitor developments and to inform possible further consideration of Next Generation Networks in 2011. ERG also plans, as part of this project, to consider the situation of Multi-Fibre networks.

*Deliverable: ERG Report*

*Consultation: No*

We support the monitoring in the NGN roll out. We would like to underline that this collection of information should take into account also the development of the investments made by alternative operators in access and backbone network.

We welcome the ERG plans to take into account multifibre solutions and we suggest to monitor also every alternative technology/architecture deployment consistently with the principle of technological neutrality.

As far as the deliverable is a mere collection of data we support that a public consultation is not needed. We suggest to interact with the Industry in order to define the nature of the data collected and how to aggregate them.

We are also suggesting to verify the impact of regulatory development on the investments decisions from SMP operators as well as from alternative operators.

### **Implementation Issues related to the Commission Recommendation on NGA**

The Commission conducted a second round of public consultation on Next Generation Access networks in July 2009 and the resulting Recommendation is expected to be published late 2009/early 2010. ERG participated in both public consultations and will, once the Recommendation is published, consider follow-up actions including how to address issues of standardisation and a definition of open access.

Taking into account that the adoption of the Recommendation appears to have been postponed to February/march 2010 and that the Commission is engaged in the evaluation of the second round of public consultation, we suggest that, in case the ERG will submit further opinions on the revised draft, these opinions should be published to ensure transparency in the final steps of adoptions.

### **1.3. Conformity with ERG Common Positions**

ERG is committed to a regular programme of monitoring of the conformity of national regulatory practices with its Common Positions, both as a tool for encouraging consistency in regulation across Europe and in order to keep the Common Positions relevant and up to date.

In 2010 ERG will review conformity with Common Positions on wholesale broadband access, wholesale unbundled access, and wholesale leased lines, and will consider practical implementation issues regarding geographic differentiation.

The above-mentioned Common Positions relating to wholesale access remedies are highly relevant to the question of the competitive supply of business services (see below). These exercises were originally expected to be conducted in 2009 but it became clear that it would be appropriate to take into account the lessons of ERG's work in this area. If the monitoring exercises lead to the conclusion that any Common Position needs to be updated, there would of course be a consultation on the relevant changes.

*Deliverable: ERG Reports*

*Consultation: No*

The initiative undertaken by ERG of monitoring the consistency of national regulation with the Common Position has Telecom Italia's full support. However, Telecom Italia auspicious is that all NRAs will favour a higher degree of conformity as far as the common positions implementation is concerned, in particular in relation with remedies. For this reason, Telecom Italia believes that

alongside the monitoring activities a more NRAs' coordinated approach favouring consistency should be sought. In addition, Telecom Italia believes that the monitoring assessment should be open to public consultation.

#### **1.4. Benchmarking Activities**

In 2010 ERG will continue to collect data to support the calculation of benchmarks on a range of indicators. ERG will also consider methodologies and continue to provide input where appropriate into external benchmarking development.

*Deliverable: ERG Reports, Snapshot, etc.*

*Consultation: No*

Telecom Italia underlines that the benchmark activities should be based on indicators which could face the issue of defining a common frame for comparable and reliable benchmarks for the equivalent services offered across the Member States. In other terms, it is required a deep analysis in order to “normalize” the relevant factors influencing the benchmark results: i.e both “tangible factors” (i.e. pricing of the services, information on network access by specific database) as well as “intangible factors” like, for instance, different interconnection architectures or network/service functionalities.

#### **1.5. Regulatory Accounting**

The Regulatory Accounting Report will continue to be updated regularly to assess the level of harmonisation achieved by NRAs. 0

To this end it will also investigate the extent to which further alignment among Member States might be achievable. This could include carrying out additional analysis of NRAs’ regulatory accounting approaches in key wholesale markets, aiming in particular at identifying the rationale behind different price control methods and modelling choices, taking into account that some parameters are set at different values, generally for reasons related to national circumstances. Subject to our findings, this could be the basis for the development of more consistent regulatory approaches across the internal market.

The pricing/costing issues raised by NGA wholesale products (in particular duct access, but also dark fibre) will be analysed in more detail from a cost accounting perspective. The proposals regarding costing principles made in the Commission’s Draft Recommendation on NGA will be analysed in detail for their implications on pricing.

*Deliverable: ERG Report.*

*Consultation: No*

As far as the regulatory accounting Report is concerned we suggest that the update of the report should mention which NRAs are implementing the specific methodologies monitored. In the current draft it is also possible to evaluate the number of NRAs opting for a particular methodology, nevertheless this information is treated anonymously.

We think that the comparison would be more relevant with the identification of the specific NRAs taking into account the policy adopted by them in relation with the market analysis next review.

Regarding the pricing costing issues for NGA products we think that this matter should be treated as a separated item. We also deem it relevant to mention which NRAs have imposed and also effectively implemented a certain methods.

The Draft Recommendation addresses the NGAN pricing/ cost accounting, as well as the margin squeeze test methodology, in a new and innovative perspective, but does not envisage specific methods on these regards. The emerging principles of BaK, the way to implement the forward looking model for charging purposes, the possibility to adopt for the cost of capital calculation criteria different from the traditional Capm envisaged by the recommendation represent such a complexity that they call for a deep and separate analysis. The NGN new pricing methods cannot be compared and thus analyzed at level of consolidated cost accounting benchmarks.

## **2. Emerging Challenges**

### **2.1. Business services market**

In 2009, ERG accepted a proposal by ECTA, EVUA and INTUG to investigate the state of competition for the supply of communications services to large multi-site businesses. Those stakeholders argue that there is in practice a limited choice of supplier to this segment, in particular because of problems of availability and specification of wholesale services on which competitive suppliers would to some extent need to rely. Depending on the outcome of the investigation (which is expected in December 2009), ERG may continue this work in 2010.

On Business service market we think it is very relevant that the deliverable envisaged will take into account the legal implementation issues related with the regulation of these services.

A description of the situation of market failure should be proposed. At the same time we think that indications on the need to apply the 3 criteria test should be envisaged accordingly with the 2007 Recommendation on the relevant markets.

### **2.2. Convergence**

The development of new convergent networks and services raise new regulatory challenges. ERG will analyse new convergent services and consider if and how these may be subject to regulation as Electronic Communications Services under the regulatory framework. The work will focus initially on market developments, and then consider whether these developments require new regulatory instruments or adjustment of existing ones

*Deliverable: ERG Report.*

*Consultation: Yes*

“Convergence” is a formulation of extensive application in a NGN environment. A more detailed indication on the scope of action and the objective pursued would be relevant for a more comprehensive understanding of this item of work.

Furthermore, in order to better evaluate the upcoming context from a business and regulatory point of view, we expect ERG to analyze the wider border of such market already including nowadays other players, different from Telco operators, who provide services in direct or indirect competition to traditional players

### **2.3. Cross-border enforcement**

Traditionally consumer protection issues in the electronic communications sector have been limited to within the consumer’s own Member State borders, largely because service providers were based within the Member States, using national networks. However, new technology (especially the Internet) means that there is increasing scope for consumers to consume services provided from Member States other than their own. This has already created some new consumer protection challenges for NRAs.

It is expected that cross-border consumer protection challenges will increase as service providers are increasingly able to provide services to consumers outside their own national borders.

ERG began in 2009 to consider the scope of the problem and possible strategies to address these. This work will continue during 2010.

*Deliverable: ERG Report.*

*Consultation: No*

TI recognizes that national borders for data protection issues and in relation to certain aspects of the consumer protection, in particular in the business to consumer contract field, constitute de facto a barrier to an effective consumer protection and at the same time, to a level playing field for companies. TI therefore fully endorses the inclusion of this new challenge among ERG priorities for 2010 programme.

Owing to the complexity and the relevant impact on the business, TI would welcome an ERG public consultation for this issue.

### **2.4. ERG-RSPG Co-operation**

Starting from the very good work carried out in cooperation during 2009, the ERG and the Radio Spectrum Policy Group (RSPG) will maintain and further develop the newly created joint working group. This working group is focused on intertwined issues in market regulation and spectrum policy.

Spectrum management and market regulation increasingly impact on each other and also have a mutual dependence. The main drivers are, in particular, that

- ☐ the distinction between different access methods is becoming less important given that similar services can be provided over a number of different electronic communications platforms;
- ☐ there is growing convergence in infrastructure and services;

□ the introduction of more flexible spectrum usage and the increased opportunities for trading spectrum usage rights are expected to reduce spectrum scarcity and lower barriers to entry. While this is expected to be beneficial for competition and promote innovation, it is important to ensure that the move to a more market-driven approach does not have negative consequences for competition in electronic communications services and networks, especially over the transitional period.

For the 2010 Work Programme some areas have been identified by ERG where further analysis may be beneficial. These are ERG's proposals and have not as yet been reviewed and agreed by RSPG.

The first workstream could be based on reporting on the possible effects on competition of electronic communications infrastructure sharing between wireless broadband operators, including spectrum sharing, noting that this may provide some scope for increasing the capacity of networks and addressing potential spectrum shortages.

A second workstream could be the continuation of the work on competition (transitional) issues including the impact of legacy spectrum distribution and how to avoid competition distortions between incumbent users and newcomers resulting from the transition to a liberalised spectrum management regime.

*Deliverable: ERG/RSPG Joint Reports*

*Consultation: No*

TI welcomes an increasing cooperation between European bodies. TI auspicious is that ERG-RSPG relations, in the future BEREC-RSPG, will ensure the adequate transparency to all processes involved. In addition, Industry would welcome to be involved in the relevant phases of processes.

## **2.5. Future of Universal Service Obligation**

In 2010, the Commission is expected to publish proposals for legislative changes to the scope and funding of the Universal Service Obligation. As part of the 2009 Work Programme, ERG has been examining issues surrounding Universal Service and this work will continue. ERG will be in a position to contribute to the debate on all relevant aspects of the proposals.

TI believes that ERG should provide a deep analysis on the alternatives services able to meet consumer needs.

When assessing a possible revision of US obligations, utmost account should be taken of the level of competitiveness reached at retail level in both fixed and mobile markets.

A risk associated with extended US obligations is to divert investments from strategic and priority areas and markets by implement services that do not meet customers' needs and that may therefore be underutilized.

Telecom Italia also suggests to involve the industry in evaluating the application of the Universal Service Principles in order to: a) take into consideration the actual differences in network and service development across Member States, b) to assess the real needs and expectations of the



customers as regards electronic communication services mechanisms that still now are ineffective in some Member States.

## **2.6. Accessibility Services for disabled end-users**

An issue related to Universal Service is the question of ensuring that disabled users have equivalent access to and choice of electronic communications services to that enjoyed by the majority of end-users. The revised Citizens' Rights Directive contains a provision which would empower NRAs to set requirements as a general obligation where this would be appropriate. Where such requirements are not set, Member States are required to take specific measures as part of the Universal Service Obligation.

ERG will review how accessibility services are currently provided, conduct a high-level analysis of the costs and benefits associated with different accessibility services and produce a report to facilitate consideration of the issues at the national level.

*Deliverable: ERG Report.*

*Consultation: Yes*

## **2.7 Net Neutrality**

During 2010, the debate on enhancing net neutrality is likely to develop further. The revision to the regulatory framework will make important revisions to strengthen requirements in this area. ERG will contribute to this debate and examine issues which fall within the scope of the electronic communications regulatory framework.

*Deliverable: ERG Report/ERG Opinion.*

*Consultation: No*

The revised framework (Citizens' Rights Directive) provides for a new tool to deal with net neutrality issue, by giving national NRAs the power to set quality of services requirements with a precise set of objectives. We think that such provision - linked with the wide range of wholesale obligations provided by the Access Directive – provides a set of tools that are able to place the EU market in a very different position in comparison with the US situation, where access regulation for broadband services is not envisaged by the regulatory model.

Further regulation dealing with net neutrality appears disproportionate at this stage of market development.

A deliverable on this issue should be proposed with the provision of a public consultation.

## **3. Changes to the legal regulatory framework**

### **3.1. Transition from ERG to BEREC**

The BEREC Regulation comes into effect 20 days after publication in the Official Journal. It is likely therefore that BEREC will come into being early in 2010. In the course of 2009 ERG has made a number of preparations in anticipation of an early adoption of the revised regulatory package, including the BEREC Regulation. When the Regulation comes into effect, a number of tasks must be undertaken including governance arrangements for BEREC in accordance with the Regulation and the establishment of the Office as a support to BEREC.

In addition, ERG will engage directly with the Commission on procedural issues related to some of the new provisions in the revised regulatory framework

*Deliverable: Timely establishment of BEREC in accordance with the Regulation, appointment of Administrative Manager and recruitment of staff for Office*  
*Consultation: No*

### **3.2. Article 7 Expert Reports**

As a consequence of the success of the IRG's voluntary commitment to assist its member NRAs upon request during the second phase procedure of the Framework Directive's Article 7, it was decided during 2007 that a team of independent experts would be set up automatically upon the launch of every second phase procedure. The establishment of the relevant team, the study of the details of the case and draft the report, including recommendations, within a maximum of 60 days is quite a challenging and resource-intensive exercise for the experts of the NRAs.

When the new provisions of the Framework Directive become operative, BEREC will be responsible for delivering opinions under Art 7 and 7a. As part of the transition process from ERG to BEREC, ERG will set in motion arrangements to transform the existing procedure of considering Phase II cases to the procedures required to comply with the new provisions while noting that some aspects of the revised Framework Directive will not come into effect until the required date for national transposition.

*Deliverable: Expert Reports of Article 7 Expert Team*

The transition from ERG to Berec is a very sensitive step in the regulatory landscape.

The role of the ERG within the framework of BEREC is not a mere transfer of the same range of powers and activity to a different institutional setting.

On the contrary Berec is meant to play a relevant role in the notification procedure according with the revised art. 7 of the Framework Directive.

This change is entailing a larger revision of the current ERG set of work and cannot be limited to governance arrangements as it is highlighted by the work Program 2010.

In particular are relevant the conditions of implementation related with the following issue:

1.the transition period from the entry into force of the BEREC Regulation and the entry into force of the Better Regulation Directive. How is it planned to be arranged the notification procedure once the BEREC is established but the new art. 7 is not yet implemented at national level?

2.Is the BEREC involved in the transitory period? In this case its opinion would be public?

3. Which role and level of transparency are foreseen for the industry during the notification period?

It is foreseen a procedure of interaction with Berec (with letters/meetings) before the deadline for Berec to provide its opinion on the notified decision to the Commission?

At the same time we acknowledge that the current ERG practice for monitoring is providing a very flexible tool for regulators in order to deal with the issue of harmonization.

Once the Office is established the power of BEREC in coordinating the implementation of Common Position would be enforced or differently managed from the current status?

These appear as relevant legal issue to be solved along with the administrative establishment as defined in the deliverable foreseen at point 3.1 of the current Draft Work Program.

On these issues we think that a distinct deliverable from the one reported at point 3.1 should be envisaged by the Work Program..

### 3.6. Switching Providers

In 2009, ERG began to consider issues related to the ability of consumers to switch service providers, taking advantage of competition by selecting a service provider which best meets their needs in terms of price and range and quality of service. Issues of consumer protection also arise through the marketing process e.g. through “slamming”. The ability of consumers to switch providers also has a direct bearing on the development of competition, as foreclosure of the market may result from customers being locked into contracts with existing suppliers for lengthy periods. ERG will review the current experience of NRAs and identify key principles for facilitating switching and ensuring effective consumer protection in accordance with the new provisions in the draft Citizens’ Rights Directive

*Deliverable: I/ERG report*

*Consultation: Yes*

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### **Proposals for an extension of the Work Program to the following issues:**

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#### **1. Access Separation and Equivalence**

Article 13a of the revised Access Directive has introduced the possibility for NRAs, as an exceptional measure, to impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity. This new exceptional obligation is usually referred as Mandatory Functional Separation and in order to be adopted the application of art. 8.3 Access Directive is required..

Art. 8.3 Access Directive, as revised by the legislative process in the Better Regulation Directive, provides that the **Commission shall take utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC)**. In parallel, art. 3 “Tasks of BEREC”, of the Regulation establishing BEREC, provides the power to deliver opinions on draft decisions authorising or preventing an NRA from taking exceptional measures, in accordance with Article 8 of Directive 2002/19/EC (Access Directive).

At the same time, Article 13b of the revised Access Directive has introduced the voluntary separation by a vertically integrated undertaking. According to Article 13b , the SMP operator shall inform the national regulatory authority that the local access network assets or a substantial part of it shall be transferred to a separate legal entity under different ownership, or that a separate business entity shall be established in order to provide to all retail providers, including its own retail divisions, fully equivalent access products.

**These two new articles are clearly of the utmost importance in the implementation of the revised regulatory framework. However, the new concepts of “separation of the access network” and “fully equivalent access products” are not fully addressed by the revised Access Directive and, as a consequence, it may be expected a difficult and not harmonised implementation of the new provisions at the member states level.**

In particular, Telecom Italia points out that there are currently a variety of access separation and equivalence models: as a matter of fact, models of vertical separation of the access networks are currently implemented in five OECD countries, including the UK, Italy, Sweden, Australia and New Zealand. It is important to stress that it is also recognized by the EC that there are “*...countries currently moving towards different forms of separation, such as Sweden, Poland and Italy, ...*” (see EC MEMO 09/219). Clearly, there exists a need to address the different models of vertical separation: an ERG common position on vertical separation models of the access network and the related equivalence models would undoubtedly promote a harmonized interpretation and implementation of new Articles 13a and 13b of the Access Directive.

In addition, Telecom Italia also contends that there exists a more general need of guidance about the implementation of article 8.3 of the Access Directive as regards additional non standard remedies. This issue deserves a specific attention since exceptional remedies may be given by mandatory functional separation (the new article 13a) as well as by other non standard remedies (including a variety of forms of separation which may imply fundamental changes in the governance of the separated legal/business entity – not covered by the traditional access remedies).

We also point that the area of non standard remedies was not covered by the ERG “Common Position on Regulatory Remedies”. We maintain that such an approach is not anymore justifiable: non standard remedies have de facto entered in the regulatory tools and they deserve an investigation at the ERG level.

Accordingly, Telecom Italia strongly supports the introduction in the IRG/ERG Work Programme 2010 of an additional area of activity on “Access Separation and Equivalence”. This new area of activity should be considered among the emerging challenges.

## ***2. Market segmentation based on the geographic dimension.***

Telecom Italia would like to invite ERG to include in its work programme 2010 an additional issue left out from the agenda: the need of an opinion on the identification of geographic markets and the imposition of diversified remedies.

The development of Next Generation Access Networks points to a renewed flexibility of technical and economic solutions that will vary among countries, from geographic area to area and from operator to operator, making the geographic dimension even more important in the development and intensity of competition.

The legislative revision of the Framework Directive is underlying that the geographic dimension is very relevant in the settings of a proportionate regulatory intervention in the NGA deployment.