

February 2008

ETNO Reflection Document in response to the ERG consultation on best practices in wholesale unbundled access (ULL) and bitstream access (BSA)

Executive Summary

ETNO welcomes the initiative taken by ERG to address the complex matter of best practices in the field of wholesale ULL and BSA. Although complex and technical, the issues analysed in the ERG consultation document are very relevant for the proportionate and effective regulation of broadband markets in Europe.

ETNO has, however, significant concerns on the procedure and the approach adopted in the present consultation.

- On the procedure, ERG invites comments on a large set of detailed operational procedures addressed to a large number of market players, operating in multiple markets and technical contexts. A delay of approximately one month is a very short deadline against this background, making meaningful and detailed consensus views on all recommendations impossible. ETNO believes that some of the best practices described by the ERG document are efficient and operational in several European countries. Others appear disproportionate, inefficient or potentially irrelevant.
- The approach is mainly based on experience in particular countries. Such an approach is unsatisfactory to define a reference system of practices against which each national situation could be benchmarked, with due consideration to national characteristics. A best practice report should therefore provide an overview of different remedies in place and their enforcement, which may have led to competitive outcomes in different Members States and identify the minimal effective intervention by an NRA for remedying a specific market failure.
- It is questionable whether a sufficiently in-depth *"evidence-based analysis of the impact on investment, penetration, competitive development and innovation"* of the identified best practices has been carried out as stated on p. 2 of the

consultation document. Such analysis is largely missing from the consultation document and, in many respects, also from the Annex.

- Finally, ETNO's previously noted concerns with the 'objectives' identified by ERG in earlier best practice documents, which also guide the present work on remedies harmonisation, remain valid.

1. A lack of thorough analysis in the approach to consistent remedies implementation

While ETNO has expressed its support for the theoretical framework of ERG for harmonisation laid out in ERG (06) 68,¹ this document has been hardly applied in practice. The present document is only the latest in a series of ERG 'best practice' documents on remedies harmonisation which mainly aggregate regulators' or specific market players' priorities for the design of access regulation without sufficiently reflecting the principle of proportionality in particular. We refer to our detailed analysis of previous ERG documents and the objectives identified therein in the light of the objectives of the EU regulatory framework.²

The new element in the present consultation document is that it contains partly very detailed and operational recommendations. The way these are derived risks leading to arbitrary and potentially disproportionate results.

Our main concerns regard:

1. The analytical and empirical basis for the ERG to issue 'best practices',
2. A number of the recommended best practices are disproportionate and/or not justified in view of the objectives of the EU regulatory framework
3. The risk of conflicts of the ERG approach with the framework's ex-ante regime of market analyses and the embedded proportionality principle and the resulting risk of further 'micro management' of already successful national market conditions.

2. Analytical basis for the ERG to identify 'best practices'

The ERG report on best practices is building on the work by the ERG project team on WLA/WBA which aims to identify regulatory models best achieving the aim of effective and proportionate regulation and to deliver "clear and concrete input towards harmonisation" which now has lead to the release of this report.

¹ ERG (06) 68, Effective harmonisation in practice

² S., also for further references, ETNO Reflection Document RD255 on ERG common position on best practices in BSA and Wholesale ULL

In this context, it is questionable whether an in-depth “*evidence-based analysis of the impact*” in view of the identified ‘best practices’ “*on investment, penetration, competitive development and innovation*” has been carried out as the document claims on p. 2. Such analysis is largely missing from the consultation document and, in many respects, also from the Annex.

That does not mean that ETNO disagrees with all of the solutions suggested, some of which are standard implementation practice in Member States and can contribute to addressing an identified market failure, e.g. to counter non-price discrimination where so required. But we are strongly concerned with the way they have been derived, by proclaiming specific and sometimes novel solutions as ‘best practice’ without an in-depth analysis of their role in the regulatory system and without consideration of their impact on markets with different market conditions.

A least, one could expect from such a report to provide a summary of different remedies in place and of their enforcement by NRAs, which may have lead to competitive outcomes in different Members States. Unfortunately, such an overview is missing.

This creates the perception that in all cases new, possibly more intrusive regulatory solutions are needed for achieving a competitive situation while often an efficient and proportionate implementation by NRAs of the tools from the regulatory framework for electronic communications and services exists.

3. Best practices in the light of the EU regulatory framework

As previous ERG remedies documents, the consultation document makes extensive use of terms or concepts which are not derived from the EU Directives. As highlighted in previous ETNO comments on best practice in LLU and WBA³, the principles of a “level playing field”, “avoidance of unfair first mover advantage” and countering “foot dragging behaviour” are not well-defined concepts under EU law which cannot in themselves form the basis for regulatory intervention by NRAs.

The following concerns over specific ‘best practices’ are not exhaustive and should not signal agreement with other parts of the document (as highlighted above, ETNO does not disagree with all the recommendations, which are partly common and efficient regulatory practice):

- ETNO contests the claimed need for a best practice of “passive connectivity solutions” (p. 21). The issue needs more analysis and the consultation document does not assess the evolving conditions of competition in the delivery of higher-speed broadband services. The claim that such solutions are “the only way to allow competitors to address the need [for more bandwidth]”

³ Idem

is not substantiated and appears contradictory in view of the EU framework's objective to promote efficient investment in infrastructure and encourage infrastructure-based competition. In any case, such recommendations should reflect the principle that access obligations can only be imposed based on a national market analysis and in response to a concrete market failure identified in the analysis.

- Order forecasts (p. 11-13) are an essential element of planning security for an investing network operator and should provide for a fairer sharing of risk than currently proposed. The provision of wholesale products requires significant effort, sometimes involving external workforce and investment by the regulated operator. It appears counterproductive to state detailed rules in this context, e.g. with respect to tolerance levels, where NRAs already have a more precise and predictable regime in place. To set a general figure at the levels proposed in the consultation document may turn out excessive in the concrete situation as tolerance levels depend a lot on the status of market development.

On the other hand, compensation to the SMP player for lines forecasted by OLOs and not ordered are applied in some Member States. This type of measure should be analysed by ERG and included as a "best practice", as it contributes to planning security.

In the entire process, business secrets need to be adequately protected.

- Rules for collocation of equipment need to be in line with the established operator's requirement of network integrity. Therefore, in order to be implemented, it is essential that any system has to comply with the integrity requirements; otherwise quality might not be guaranteed. Moreover, as room close to the MDF is a scarce resource, only equipment which inevitably needs to be located there should be allowed.
- Regarding the non-tolerance on respecting service level agreement (SLA) conditions, it should be pointed out that a 100% guarantee level is non-realistic in a day-to-day operational reality, which deals with large numbers (several thousands) of installations. Placing the consequences of such events entirely with the access provider which in many cases does not benefit from contractual protection appears disproportionate and could even constitute a discrimination vis-à-vis other operators regarding its retail activities.

4. Countering the risk of further increase of unwarranted regulation

It is noteworthy that the ERG approach, as developed in the ERG Common position (06) 70⁴, has not been reconsidered in the present report. Last year, ETNO pointed at the risk that *"NRAs, especially those with still limited experience and resources, might be tempted to be perceived as "good" or "efficient" regulators by*

⁴ ERG common position on Best practices in wholesale unbundled access including shared access.

*applying all elements of the ERG's proposed regulatory toolbox available. Experience shows that NRAs have not proved selective in the use of remedies, systematically "ticking" all the available boxes in the catalogue of obligations".*⁵

Along these lines, ETNO is worried that the ERG is introducing no reference to the need of an regulatory impact assessment, as recommended in earlier ERG common position, whereby NRAs were invited to *"balance the burden of the remedy imposed on the undertaking with SMP and other costs which the imposition of a remedy may entail against its prospective benefits."*⁶

From a practical point of view, ETNO maintains that such an assessment should be included in any report on any best practice on remedies implementation to a) prevent the need for detailed regulation becoming the "default setting", b) ensure a proportionate and least burdensome level of regulation on each national market.

⁵ RD 255, s. fn. 2 above

⁶ ERG (06) 33, Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework, Final Version May 2006, p. 56