Summary of the consultation on the Update of the BB market competition Report

A total of 7 comments were received in the consultation of the "Update of the Broadband market competition report" (doc. ERG (05) 23rev1, hereafter The Report") which run from 12 Oct. to 13 Nov 2006:

- BT;
- Deutscher Kabelverband;
- ECTA;
- ETNO;
- Telefónica;
- Tele2;
- TeliaSonera.

This document summarizes the main arguments and explains the reaction of ERG. Factual errors were corrected and updates of data provided mostly in the summaries and in 2 case studies (Germany, Romania) in Annex II. Adjustments in the Report have been made where deemed appropriate as explained below. No fundamental changes of the Report were considered necessary.

BT

BT agrees by and large with the Report, and points out the importance of looking separately at the needs of B2B services and the business market. BT is disappointed that no study of the UK broadband market was provided.

Deutscher Kabelverband

DKV deals mainly with the broadband market situation in German and more particularly with the influence of cable on the market situation. While admitting that the data is correct, DKV thinks that the evaluation is too harsh. The critic has been reflected in the German case study as the regulator agrees that intensified intermodal competition would further contribute to develop the German broadband market as well as the broadband penetration.

ECTA

As BT ECTA agrees broadly with the concept of the ladder of investment and the conclusions of the Report. It is important to mention that ECTA points out that not investment per se should be promoted, but that *efficient* investment should be in the focus of effective and targeted regulation. ECTA also asks for expanding more on the needs of business customers and stresses the importance of consistent pricing in order to avoid margin squeeze both between the wholesale and the retail level, but also between different wholesale products. This is already reflected in the text as it stands. ECTA notes the importance of reference offers as the most efficient instrument of ensuring effective access. Finally ECTA points to the need of developing the "next generation ladder of investment" and of proper migration from the existing to this future ladder.

Regarding the criticism of specific countries, it has to be said that the German situation will surely improve with IP Bitstream access having been imposed in September last year and the notification of ATM Bitstream access currently being scrutinized by the Art. 7 Taskforce. Concerning Hungary, the regulator does not see a problem as all access products are regulated and the new RUO issued in autumn 2006 will further improve the situation with the shared access price coming down. For Belgium the regulator has developed a new bottom up model for bitstream which has been used to decide upon the tariffs applicable to bitstream from 1st January 2007 onwards. Further a new cost model for the tie cabling pricing was developed, which has lead to a decrease of ar. 20% of prices for the tie cable types mostly used compared to previous decisions (applicable as from the 1st of December 2006). This resolves one of the main concerns of LLU operators. Tie cabling costs can be amortized over a long period, because tie cables can be reused for a new customer in case of churn. Further, the BIPT is currently developing a new bottom up cost model for unbundling and collocation prices. The sector has been consulted on the methodology. The outcome of the model is expected in the first quarter of 2007.

In Belgium bitstream is a full VP switching ATM offer with the possibility to manage the capacity, the contention and the quality in the same manner as ULL allows, consequently operators migrate from bitstream to ULL when a sufficient number of customers are connected to the MDF. The 2% on fully unbundled lines should be read in conjunction with the 18% of lines based on bitstream. 50% of unbundling is full unbundling and 34% of bitstream is naked DSL.

<u>ETNO</u>

As ETNO rejects the ladder concept, it also disagrees with most of the statements of the Report, but it seems to miss sometimes the point and to answer more ideologically than analytically. The proposals made to regulate only remaining non-replicable assets is outside the ECNS framework that foresees regulation when SMP is found in a market listed in the Recommendation on relevant markets susceptible to ex-ante regulation.

ERG does not agree with the statement that the analysis and the conclusions are not fact-based. ERG has based its analysis and conclusions on different sources of data, which all point in the same direction. The Report does not say anywhere that competition through regulation is the only reason to explain broadband penetration, however the relationship between more competitive markets (through more effective regulation) driving broadband penetration can be seen as the main (not the sole) factor, explaining European broadband market developments quite well. This is shown by the various quotations of the 11^{th} Implementation Report where the Commission clearly states the validity of the ladder concept to explain European broadband trends. The Report also states the importance of inter-modal competition, however not all countries have strong competition from cable and overall the DSL share is growing on the detriment of the cable share.

ERG believes that what ETNO asks regulators to do, namely “fostering investment in broadband infrastructure” can and is best achieved by regulating according to the concept of the ladder of investment and thus does not understand this critic. ERG also wants to reiterate its point that migrations are clearly covered by the current ECNS regulatory framework.[1] Also, in countries with fit-for-purpose migration processes properly functioning, competition is more intensive.

Regarding the criticism of specific countries, the regulator does not agree with the remark on market 12bis in France as this market was not created by regulatory fiat, but existed prior to the decision on a commercial basis. Besides, market 12bis passed the 3-criteria test. Furthermore, regulatory obligations have now been lifted as stated in the country case study of France. The statement made on mobile broadband connections in Austria does not hold. The regulator dealt with this fact in the market analysis and concluded that mobile broadband connections are not strong enough to be a competitive constraint.

In relation to the country case study on Ireland, comments where received from ETNO member, eircom Ltd. The Ireland country case study had referred to the fact that concerns that had been raised by LLU operators about existing LLU processes and that ComReg had been working with industry to ensure that an effective and efficient LLU process is in place. In its response eircom requested it noted that “LLU has been offered by eircom and availed of effectively and efficiently by altnets since 2001.” The regulator agrees that the product has been on offer since 2001 however improvements are required. The need for improvements in many of the processes associated with the product provision and repair and the removal of some limitations is also the feedback that ComReg has received from altnets who have made commitments to LLU as they state that current processes and limitations. Such improvements include the availability of a mass market number portability product for LLU, improved end to end delivery processes and improved service assurance.

In relation to migrations eircom Ltd also noted in its response that ‘eircom’s position consistently has been that “migrations are not accommodated by the current SMP regime governing mandated access to eircom’s network – namely, ComReg D12/03, D3/05, D1/06 and D8/04 -- because that regime was devised without reference to them. Migrations thus are new forms of access, which eircom has no existing obligation to provide.” This is not the view of ComReg who has written to eircom setting out clearly and unambiguously that access seeker requests should be dealt with in the context of eircom’s existing regulatory obligations as prescribed in Decision Notice D8/04.

Regarding the Belgium market, it is true that in Flanders cable-DSL competition has started earlier than intra-DSL competition and that the cable-DSL competition is stronger in Flanders than in Wallonia where the cable companies do not push as much the broadband service selling as in Flanders. Nevertheless, there is no doubt about the fact that today there are a multitude of DSL players, offers and prices available, based on the regulated products. The regulator points to the fact that in Belgium 37% of broadband lines are based on cable, 63% based on DSL, from which 24% are offered by alternative operators.

[1] For further details on that point we refer to the Updated Remedies CP (ERG (06) 33) of June 2006.

Telefónica

Telefónica regrets that the Report does not touch upon the negative effects of access regulation on infrastructure competition. ERG is of the opinion that a properly implemented access regulation according to the ladder concept accompanied by consistent price regulation, does not have negative effects on infrastructure competition, but quite the opposite allows intra-modal infrastructure competition as competitors climb the ladder when investing in own infrastructure. ERG also argues in the Report that intra- and inter-modal competition can reinforce each other. ERG therefore does not agree with the statement that access regulation limits inter-modal competition. It is interesting that Telefónica confirms the view expressed in the Report regarding the complementary use – even of cable operators of LLU. As ERG explained in the Report as well as in the Updated Remedies CP, bitstream access and LLU are geographical complements enabling altnets to offer services nationwide. Regarding the general remarks of Telefónica on the need and the phasing out of ex-ante regulation, we refer to the comments made above on the ETNO position.

TELE2

In general TELE2 welcomes the conclusions of the Report and supports the use of the ladder concept. It also sees the dangers of inconsistent pricing and stresses the need for a level playing field and migration processes. Regarding incentives to move up the ladder, TELE2 wants to go further than the line taken in the Report and suggests that increased profits ("at least slightly higher") are required to make the next step. TELE2 also expresses the need for adjusting the ladder to the next generation, i.e. to reconsider the steps when fibre is rolled out further to the customer. This is mentioned at the end of the Report[2] and will be looked at by ERG in the course of 2007.[3] In this context TELE2 suggests to adapt and widen the definition of the LLU market in the revised Recommendation by removing all references to "metallic loops".

Regarding the criticism of Germany, Hungary and Belgium, we refer to the comments made above on the ECTA position. Regarding the situation in Portugal, the regulator does not know of such problems.

TeliaSonera

TeliaSonera refers to the Swedish and Norwegian market. Updated figures have been included in the Report. ERG is surprised that given the data and market situation Sweden should be considered as a country where the ladder of investment does not work. It seems that TeliaSonera is itself doubtful whether this statement holds as it is immediately watered down by saying that at least it is not necessary to have a regulated bitstream access rung. Contrary to the statements of TeliaSonera, ERG considers Norway also as a good example of the working of the ladder of investment.

[2] Cf. ch. IV.4. – Outlook.
[3] Cf. NGN – Regulatory Principles project, WP 2007 (doc. ERG (07) 01).