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ETNO Reflection Document on the draft ERG Common Position on best practice remedies for relevant markets for “wholesale leased lines”

(ERG (07) 54)

Executive Summary

ETNO calls into question the “objectives” identified in the draft Common Position. It is unclear how these objectives have been established and how they relate to the aims and principles of the EU Regulatory Framework for electronic communications and, in particular, to the relevant articles of the EU Access Directive.

We are greatly concerned with a number of the specific proposals for remedies to be applied on the markets for wholesale terminating and trunk segments of leased lines. We note that the specific proposals are similar to and sometimes identical with the proposed remedies for the local access and broadband access markets, raising doubts as to the value added of this specific Common Position for leased lines.

ETNO is also concerned with the ERG’s presenting a definition of “wholesale leased lines,” apparently for determining the scope of the ERG position, i.e. the domain for the potential application of regulatory remedies. By doing so, the ERG risks giving this product the status of a relevant market warranting *ex ante* regulation.

The Common Position would also need to reflect the recently issued European Commission Recommendation on Relevant Markets, which removes the market for wholesale trunk segments of leased lines from the recommended list.

Against this background, ETNO invites the ERG to formulate a new draft more closely linked to the EU Regulatory Framework and better reflecting the limited scope of future regulation and the principle of proportionality of regulation, one of the key principles of the Framework’s Directivesⁱ.

I. Introduction ¹

Under the current EU Regulatory Framework and the original *European Commission Recommendation on Relevant Product and Service Markets*ⁱⁱ (“the 2003 Recommendation”), national regulatory authorities (NRAs) had a duty to analyse the “wholesale terminating segments of leased lines” and the “wholesale trunk segments of leased lines” and, in the absence of effective competition, to apply appropriate and proportionate remedies.

The proportionality of remedies under the Framework is assessed on a case-by-case basis based on national market conditions, subject to Commission comments under Art. 7 (3) Framework Directive and subject to effective judicial review. ERG recalled in 2006 (ERG (06) 68):

*“A one size fits all”-approach to regulatory remedies [...] is sup-optimal where national market differences demand different solutions in order to ensure a good deal for consumers across Europe*ⁱⁱⁱ.

ETNO notes that content and wording of the present draft Common are often similar or identical to ERG (06) 70 Rev 1 Common Position on Wholesale local access and ERG (06) 69 Rev 1 Common Position on Wholesale broadband access. The fact that ERG recommends identical approaches to remedies -- not only across EU Member States but also across different wholesale markets -- is a strong indication that the approach to produce “Best Practice” Common Position for specific markets offers little value-added.

As with the earlier ERG documents on “best practice” remedies,^{iv} ETNO has grave concerns whether the proposed draft will result in appropriate guidance on proportionate remedies to enable retail competition.

II. Relevant markets vs. scope of ERG Common Position

- **Scope of ERG document**

In the opening paragraphs of this Common Position, the ERG states:

“This document is relevant to all wholesale leased lines remedies imposed as a consequence of a finding of SMP, whether the relevant market defined by the NRA is a market for trunk segments, terminating segments or a backhaul market. For the purposes of this document, a “wholesale leased line” means the provision of transparent transmission capacity between 2 termination points, at least one of which must be a point of connection with the SMP provider’s network. It does not include non-transparent services such as VPNs.” [our emphasis]

ETNO is concerned with the ERG’s presenting this definition, apparently for determining the scope of the ERG position, i.e., the domain for the potential application of regulatory remedies. By doing so, the ERG risks giv-

¹ BT does not support this document

ing this product the status of a relevant market warranting *ex ante* regulation.

As mentioned above, under the 2003 Recommendation, NRAs were under a statutory duty to analyse the wholesale terminating- and wholesale trunk segments of leased lines – not so-called “wholesale leased lines.”

- **Relevant markets under 2007 Recommendation**

Under the revised *European Commission Recommendation on Relevant Product and Service Markets*^v(the “2007 Recommendation”) adopted and in force from 13 November 2007, there is only one leased line market included in the list of relevant markets potentially susceptible to *ex ante* regulation: “wholesale terminating segment leased lines, irrespective of the technology used to provide leased or dedicated capacity.” The Commission has recognised that in a number of Member States the market for trunk segments of leased lines has been found to be effectively competitive as a number of parallel networks have been established. This trend is likely to continue and the second criterion of the Recommendation is not met. Therefore, the market for wholesale trunk segments of leased lines was withdrawn from the recommended list. This draft Common Position currently does not address this important change and the resulting limitations to the imposition of remedies on leased lines markets.

The Commission has mandated that NRAs analyse the markets in the new list as soon as possible or re-examine the market at the appropriate review point (in cases where the market had already been analysed). At a minimum, ETNO calls upon the ERG to thoroughly revise and possibly re-consult this draft Common Position in light of the 2007 Recommendation.

III. “Objectives” in the ERG drafts vs. objectives of the Framework

ETNO fears that the “best practice” remedies illustrated in document ERG (07)⁵⁴ will promote an interventionist regulatory approach, positioning a number of “objectives” which NRAs are encouraged to pursue.

- **The set of objectives of ERG (07) 54**

As was the case for the previous remedies PIBs of ERG, it is regrettable that the document which is meant to guide the application of the EU Regulatory Framework starts from objectives that are neither contained in the Framework nor explicitly or directly derived from it. This concern for instance:

1. “Assurance of supply^{vi}” – there is no such principle/objective within the Framework as claimed by ERG. The role of NRAs is not to provide “certainty of ongoing going of wholesale leased lines on reasonable terms in order to give competitors confidence”; rather, the Framework foresees regular market analyses based on competition law methodology and imposition of remedies in line with the principle of proportionality. As a consequence, proportionate access remedies can be imposed which have to be withdrawn as soon as they are no longer war-

ranted to remedy an identified market failure (principle of proportionality).

2. “Level playing field”: this regulatory construct put forward as an objective by the ERG is not stated within the Framework. Nor does the Framework give NRAs a legislative mandate to remedy “an unfair advantage by virtue of economies of scale and scope, especially derived from a position of incumbency”. Scale advantages can play a role in the determination of entry barriers and significant market power (SMP). However, depending on its interpretation this principle would amount to a disproportionate approach by eliminating advantages derived from scale or vertical integration by way of regulatory intervention. Also, the current Framework does not refer to incumbency (or ‘original sin’) as a relevant factor for the choice of remedies.
 3. “Avoidance of unfair first-mover advantage”: The approach of the EU Directives is to foster innovation and investment by in principle not subjecting new and emerging markets to ex-ante regulation. At the same time, foreclosure of markets in the long-term should be avoided, either by means of competition law or sector specific regulation. This so-called “objective” and its consequences stipulated by ERG are in fact an inversion of the Framework’s regulatory philosophy which aims at safeguarding investment incentives in new networks and services. The focus in the draft on a provision of innovative retail products at the same time by all operators are dangerously intrusive, potentially damaging innovation for consumers. The proposed approach moreover seems irreconcilable with the principle of the Framework to focus on wholesale regulatory measures and contradicts the deregulation of retail services markets in the new Recommendation on relevant markets.
 4. “Reasonable technical parameters of access” – remedies imposed in connection with this objective should consider not only “commercial” sense and maximization of scope of competition but also should refer to the economic possibilities of the SMP operator.
- **Framework objectives and principles: proportionality and interest of the end-user**

Under the Framework, NRAs are supposed to impose appropriate and proportionate remedies on relevant markets where a position of SMP has been found. The proportionality of a remedy is assessed in the light of the objectives of the framework laid down in Art. 8 Framework Directive as well as the specific provisions of Art. 8 ff. of the Access Directive and the Universal Service Directive Art.17 (2).

The Commissions Guidelines on market analysis and the assessment of SMP highlight “the respect for the principle of proportionality” as a “key criterion” to assess measures proposed by NRAs under the procedure of Article 7 of the Framework Directive and as well-established in Community law. Thus it is a prerequisite for the imposition of remedies that the means used to attain a given end “should be no more than what is appro-

priate and necessary to attain that end". The means employed to achieve the aim must be the least onerous, i.e., the **minimum** necessary.

ETNO fears that the broad and unspecified objectives of the draft CP further dilute the principle of targeted remedies to remedy identified market failures in the interest of end-users in favour of a policy which aims at facilitating market access and supporting business models of access-based competitors, thereby reflecting only a fraction of the goals of the Framework.

The focus of competition policy should be on the consumer as highlighted with regard to Art. 82 EC-Treaty in a speech by the Commissioner for Competition, Neelie Kroes:

"I like aggressive competition – including by dominant companies – and I don't care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective [...] is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market."^{vii}

IV. Discussion of perceived problems and "illustrative remedies"

Without prejudice to the above view that the approach of the document is questionable in its entirety, ETNO comments on specific elements within.

1. "Assurance of supply"

As highlighted above, the objective as such is not justifiable under the Framework, which is characterised by a regular market analysis procedure that is followed by the imposition or withdrawal of remedies in the light of the market failure identified.

A decision on possible mandated access has to be taken in the light of the criteria of Art 12 (2) of the Access Directive, namely:

- "a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;*
- (b) the feasibility of providing the access proposed, in relation to the capacity available;*
- (c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;*
- (d) the need to safeguard competition in the long term;*
- (e) where appropriate, any relevant intellectual property rights;*
- (f) the provision of pan-European services."*

To impose a justified and proportionate access obligation, a market analysis has also to take into account the availability of LLU in particular areas, which influences the viability of installing competing facilities for providing terminating segments of leased lines.

2. “Level playing field”

As stated above, it is regrettable that this objective is not clearly derived from the EU Directives. Instead of talking about “unfair unmatchable advantages” and “obstructive behaviour” it would have been helpful to use established terms such as “undue discrimination”.

ERG assumes in this chapter that “unless there is evidence” that a non-discrimination obligation is sufficient to alleviate the problems described -- which ETNO understand are problems of undue discrimination, NRAs should consider whether additional measures are necessary. However, this is not a justified assumption:

- Firstly, it appears to reverse the principle of the Framework that NRAs have to justify regulatory intervention in the light of market conditions (as reflected in the market analysis procedure of the Framework Directive and proportionality). If regulatory measures to ensure non-discrimination are deemed necessary, under the Framework accompanying measures can only be imposed if and to the extent that otherwise a non-discrimination obligation is insufficient to remedy the market failure identified. The burden of proof for imposing regulatory measures stays with the NRA, no matter how ERG words its recommendations.
- Secondly, the draft does not contain a full discussion of accompanying remedies which would affect the enforcement of a non-discrimination obligation such as transparency - which is mentioned - and, as an already very costly and burdensome remedy, accounting separation.

3. Avoidance of unfair first-mover advantage

The draft Common Position states,

“... ex-ante controls on the introduction of downstream services by the SMP player, should be imposed in order to ensure that the wholesale leased lines services which would permit effective competition in the downstream markets are made available and are fit for purpose in a timely way. An appropriate method of control could be an obligation not to make available to itself the wholesale inputs which permit introduction of a new or enhanced downstream service until the corresponding whole-sale service components required to deliver an equivalent competitive downstream service are available and fit for purpose.”

ETNO is concerned that this supposed regulation of wholesale services is effectively - but unjustifiably -- regulating retail services. Despite the fact that retail leased lines have been removed from the 2007 Recommendation, the ERG is advocating the continued ex ante regulation of this retail market. The possibility of introducing obligations “not to make available to itself the wholesale inputs, which permit introduction of new downstream services” is in effect intended to constrain retail offers being made, not to regulate wholesale offers.

Instead, the ERG should be supporting regulation in which SMP players offer a finite set of wholesale products in response to reasonable requests to remedy an identified market failure at retail level.

4. Reasonableness of parameters of access

ETNO accepts under the Framework “an obligation to meet all reasonable requests for access” where an operation has been deemed to have SMP in a relevant market and an access remedy is justified. ETNO, however, rejects any definition of “reasonableness,” which is made without reference to the “technical and economic viability of using or installing competing facilities.” [s. “Assurance of supply” section above]

On the aspect of reasonable terms of supply, ETNO maintains that the SMP-operator should be in the position to negotiate contract conditions for its regulated wholesale offers which also cover its risks, for example, forecasting of demand is a crucial element to spread the risk adequately between access seeker and network operator.

4. “Obligation to supply wholesale leased lines”

As highlighted above, ETNO rejects the illustrative remedy:

“An obligation to supply wholesale Ethernet leased lines, as well as traditional leased lines, is likely to be necessary so as to satisfy demand for maximum economy for applications.” [our emphasis]

5. “Fair and coherent access pricing”

As prices have signalling functions for investments and the further development of competition, markets are particularly sensitive to price-setting by regulators. Guidance on price-regulation should therefore be especially cautious and flexible to accommodate the conditions of competition in those markets where price regulation is still deemed necessary by NRAs.

6. “Reasonable quality of access products”

The concept proposed by ERG in this passage is both far-reaching and overly general to have any relevance. The principles under this heading risk causing uncertainty regarding regulatory decisions in the field of quality of access products. In particular, compensations for failure to deliver a certain quality of service should be governed by commercial agreements. The concept of “appropriate compensation” remains vague and should not be guiding regulatory decisions in this field.

7. “Assurance of effective and convenient switching processes”

As argued above, ETNO believes that any access obligations to provide end-to-end wholesale leased lines is redundant and thus disproportionate given the existence of access obligations to provide terminating segments and, where these exceptionally still warrant regulation, trunk segments of leased lines. Such obligations should be withdrawn accordingly.

Those ETNO members, who have held such an obligation to provide wholesale leased lines, recognise, however, that their competitors currently rely on them for this wholesale product and would need to make alternative arrangements for their customers so as to avoid commercial detriment. ETNO would thus support the establishment of a 'phasing out' or a notice period, the objective of which would be to provide existing wholesale broadband access customers to make alternative arrangements for their customers or to negotiate migrations of leased lines to terminating and trunk segments.

Endnotes

ⁱ Namely, EU 'Framework Directive,' Section 8 (1); 'Access Directive,' Section 8 (4), 'Universal Service,' Directive Section 17 (2).

ⁱⁱ European Commission, Commission Recommendation of 11/02/2003 On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, C(2003)497

ⁱⁱⁱ ERG (06) 68, p.5

^{iv} ERG (06) 70 Rev 1 Common position on Wholesale local access and ERG (06) 69 Rev 1 Common position on Wholesale broadband access

^v European Commission, C(2007) 5406 rev1, Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Second edition), 13 November 2007.

^{vi} Referred to in previous ERG Common Positions, such as ERG(06)68 and ERG(06)69), as "assurance of access."

^{vii} Commissioner Neelie Kroes speech at the Fordham Corporate Law Institute, New York, 23 Sept. 2005