

Cable Europe response to the ERG consultation on WP 2007

15 November 2006

Cable Europe (formerly known as ECCA) welcomes the ERG consultation on their working programme (WP) for 2007, recognising its importance in maintaining a continual dialogue between industry and NRAs on critical regulatory issues. Cable Europe would also like to reiterate its support for the work of the ERG and its various working parties and looks forward to continued interaction in 2007. In light of this interaction, we would welcome early involvement in the working groups assigned to the priority areas we identify and believe the cable industry can bring valuable insight into infrastructure competition issues.

In this context we would like to offer the following comments.

Generally speaking, we would like to offer some brief comments on the broader institutional arrangements in place. To a large extent the work priorities of the ERG are, and should continue to be, shaped by the Commission and its legislative priorities and processes. Whilst the ERG undoubtedly has a key role to play in advising the Commission and in promoting consistent application, it is the Commission that retains a right of initiative in policy terms. The ERG's most valuable contribution will, in our view, be to ensure that the rules set in Community law are applied effectively and that best practice is efficiently promoted between NRAs engaged in its application.

I - Challenges

1a. The Review of the Regulatory Framework

On the Programme proposed by the ERG, Cable Europe supports the steps the ERG will take in the context of the Review of the Regulatory Framework. We agree with the ERG's decision to make it its first priority and very much welcome the ERG's will to further encounter stakeholders early in the decision-making process and in advance of ERG Plenary meetings.

Cable Europe would also wish to underline the importance and value of infrastructure based competition in driving broadband uptake and the development of new, innovative content offerings to consumers. We believe the promotion of sustainable infrastructure based competition should be given greater emphasis in the NRF review and in the contributions from ERG to Commission during this process. In this context Cable Europe finds it instructive to recall that a review of broadband competition and deployment takes into account the broad Lisbon and i2010 objective of promoting infrastructure competition. In particular, it is important to bear in mind the clear evidence that demonstrates broadband deployment is most advanced precisely where infrastructure competition is most developed.

2a. Functioning of the article 7 process

In general terms Cable Europe believes that article 7 procedure and its notification requirements on NRAs, although somewhat lengthy and bureaucratic, have aided consistency in regulatory decision and provided much needed regulatory stability.

In light of this we believe the proposals to reduce the administrative burden - by no longer requiring the current level of detail for notifications of markets which were found to be competitive in a previous review or where only minor changes to previously notified measures are proposed – are welcome.

With respect to simplified notifications from NRAs, we would make the following observations:

- Introducing a minimum standard for notifications is a positive means to increasing efficiency in the market review procedure. In particular, we welcome the proposal to require NRAs to notify to the Commission all three elements of a regulatory package (market definition, finding of SMP and relevant remedies) at the same time.
- In order to promote certainty of the initial national proposal, and ensure a more consistent review at European level, we also request the Commission to require NRAs to complete in their entirety the national consultations on proposed measures prior to formal notification to the article 7 task force. This will allow the Commission to comment on the substance of a final proposal rather than a draft version.
- With respect to the economic data used by an NRA in a market analysis procedure, we believe it is imperative that in today's fast moving convergence markets NRAs are obliged to ensure that the timing between data collection and data analysis is as rapid as possible so as to avoid deficient assessment of prospective competition and market entry.

2b. Review of the relevant markets recommendation

Cable Europe believes it is also important to offer specific comments on the broadcasting transmission services market, comments which support our submission made to the Commission in the context of the review of the list of relevant markets, and which underline the findings of an independent economic study conducted in the name of Cable Europe. We do so, not only in the context of shaping ERG advice to the Commission during its review of the list of markets, but also share cable's considerable and long-term market place experience in delivering content packages to consumers notably with respect to ERG's stated ambition to consider convergence issues (see section III, 2).

Cable Europe is of the view that the "broadcasting transmission services for end-users" should not be regarded as a market susceptible to ex-ante regulation on a European level and should be removed from the revised recommendation of markets susceptible for regulation.

We believe that the three criteria test is not met with respect to cable infrastructures.

The Broadcasting Transmission Market is rapidly evolving:

- Firstly, the evolution of service delivery from analogue to digital across a range of platforms is reducing scarcity of bandwidth, and strengthening the relative bargaining power of broadcasters
- Secondly, new forms of video delivery are entering the marketplace. Take-up of IPTV and of video over mobile are limited today, but IPTV is already having a disproportionately large impact on the negotiations between broadcasters and Broadcasting Transmission Service Providers;
- Thirdly, it becomes increasingly common for a household to have multiple televisions accesses over different Broadcasting Transmission networks.

All of these changes alter relationships between Broadcasting Transmission Service Providers and broadcasters, generally to the benefit of the latter. Cable operators market power is already constrained by regulation beyond the scope of the SMP regime, notably must carry rules.

On this basis we feel that it is far more appropriate that the Commission refrain from identifying Broadcasting Transmission Services as a market susceptible to ex ante regulation, at least insofar as that market relates to cable, the focus of the economic analysis undertaken by Cable Europe. Furthermore, should the Commission define such a market, the risk of inappropriate or unnecessary regulation would be substantial, clearly running against the better regulation imperative outlined by this Commission.

Much of the focus of this review is to streamline and improve the focus of regulation of the sector. In our view, extending SMP style broadcast regulation on cable is unnecessary and disproportionate. We believe the risks and costs are likely to be far higher if the Commission defines such a market, than if it declines to do so.

II - Harmonisation

Cable Europe welcomes the ERG plan to work on a Common Position on VoIP. We agree that additional work by the ERG to enhance consistency in the application of regulation on VoIP based services and to enhance legal certainty in operation would be helpful.

VoIP remains at the heart of the cable operator's ability to effectively compete with existing traditional providers of voice telephony. Cable Europe remains keen to ensure that incumbent operators do not claim grounds for regulatory relief by using a particular technology used for the delivery of telephony services, nor similarly, that access based services are permitted to operate free from regulatory restraint and consumer protection measures.

We believe the NRF remains flexible enough to continue to consider the regulatory treatment of VoIP based services. Accordingly, proposals from NRAs that focus solely on the legal aspects of VoIP will be wide of the mark. We therefore recommend the ERG to examine the economic regulation of VoIP so as to promote best practice and

consistency in regulatory intervention. This analysis should carefully examine both questions of market dominance and a careful examination of the type of remedies necessary to promote sustainable competition.

Cable Europe would also welcome that the ERG carry out further work to produce a Common Position on other VoIP issues such as allocation of numbers (geographic and nomadic), access to emergency services and number portability in the light of market developments, and assess the extent to which this is effective in various countries. This would be helpful in guiding investment decisions by operators and is vital to those planning to offer services on a pan-European basis.

III - New issues/Innovation

1. Must carry

Cable Europe would see value in ERG action in the area of the functioning and application of the rules on must carry. In particular, and given the varied and largely incomplete and in some cases inconsistent implementation of article 31 of the Universal Service Directive, Cable Europe believes it is necessary for guidance and exchange of best practice to be issued in close cooperation with the Commission services. The need for action is more acute given the growing range of platforms delivering digital content packages to end-users and the use of must carry as a tool for introducing new platforms. In short, our request would be for joint ERG/EU best practice guidelines¹ to determine the objectives for must carry in the digital distribution environment that should focus on the proportionality of continuing rules designed for the analogue environment.

2. Access to content

Cable Europe would request clarification from ERG as to the nature of their concerns, and the scope of their proposed consultative activity in this area. If the ERG intends to examine this matter under the angle of the application of the NRF to the transmission platforms, we believe that existing legal and regulatory regimes in place and under review (the TvWF directive, the e-commerce Directive, and the Satellite and Cable retransmission Directive) should first be examined.

By way of example, we would caution against making premature revision to the wholesale broadband market definition – for example adding IPTV network elements and technical interfaces to the scope of the market - so as to bring practical effect to the regulation of emerging content delivery networks from network operators, as such intervention is likely to stifle investment in these new transmission platforms, consequently slowing roll-out of new services. Furthermore, Cable Europe believes regulating content delivery networks is of questionable benefit to new entrants who are investing to develop such modern communications infrastructures, notably in those markets where unbundling and bit-stream access are more advanced. Finally we also believe issues relating to content interoperability should not be treated

¹ The Analysys report on 'Public policy treatment of digital terrestrial television (DTT) in communications markets, 26th August 2005, Final Report for the European Commission, presented to the European Commission at a public hearing in Brussels on 27th September 2005, calls for 'guidance and exchange of 'best practice' concerning must carry' rules. See page 14.

within market 12, or under the non-SMP based provisions of article 5 of the Access Directive as these issues are highly scrutinised, and frequently regulated, by national competition authorities and DG COMP.

In this respect, we would also use the review as an opportunity to delete elements of article 5.1 which have become outdated. Notably we believe that paragraph 1 (b) of article 5 which provides NRAs with the possibility to impose obligations to provide access to APIs and EPGs should be deleted.

To date, as these obligations have seldom been used, this clearly demonstrates that they need not feature in the future access Directive. In our view, regulatory intervention to ensure accessibility to digital radio and content is adequately already provided for in must carry legislation. Furthermore, cable operators, in order to remain competitive, must continue to conclude commercial carriage agreements with a range of content providers so as to provide a high quality content service offering to end-customers. In the era of multi-platform broadcast distribution environment, this competition becomes more intense again negating the need for regulatory provision.

In addition, in the context of simplifying and removing unnecessary regulation that the Commission is committed to, we believe these provisions if maintained over the next review period would clearly represent an example of over-regulation.

Finally, in general terms we believe that access to content issues should in the main be treated under competition law controls. There are exceptions to this within the NRF, notably with respect to the must carry provisions (see above section) and consideration of the necessity for ex ante regulation flowing from the relationship between broadcaster access to content transmission platforms (market 18 of the current EU relevant market list). However, in our view these existing regulatory safeguards – updated and amended in light of our comments above - provide sufficient scope for intervention with respect to access to content issues.

3. Bundling

Cable Europe is not convinced of the need for ERG to examine the bundling of broadband services in its WP for 2007. Furthermore we are concerned at a perceived assumption that the competitive bundling of products engaged in by large network operators automatically raises concerns with respect to issues of potential leveraging, margin squeeze and other anti-competitive practices. In our experience of deploying bundled packages of services comprising a triple play of voice, video and broadband data products, we see that such product bundling results in improved consumer welfare due to a number of effects. Some of the key benefits:

- Complementary products: where products are complements, prices can be lower, and output higher, if they are owned by the same firm and sold together
- Cost savings. When there are significant distribution, marketing or installation costs, it may be more efficient to sell a number of products at a lower price as a bundle rather than to sell as individual products. That is, the reduction in price from offering the bundle is outweighed by cost savings.

- Quality assurance. For complex products that need to interact, firms may prefer to sell the bundle in order to ensure the quality of performance of the overall system is maintained
- All of these benefits may be relevant in the context of cable bundled services².
- Tying (bundling where the products must be purchased together) can be used to generate a “virtuous circle” between products by using ongoing revenues from sales of the tied product to lower the price of the tying product, ultimately boosting demand for both.

Cable Europe would also like to underline that potential anti-competitive conduct flowing from bundling practices by cable operators is extremely unlikely to emerge. In general, the core concern regarding potential anticompetitive effects of product bundling is that a firm with a dominant position in one market (the “tying” market) may be able to leverage that position into another market (the “tied” market). One way this might happen is when the effect of tying is to lower the remaining demand in the tied market to the extent that either a firm producing only that product can no longer continue to operate, or a firm considering entry will not do so as it is unlikely to be profitable. This scenario relies on the tied market exhibiting scale economies, and the tying practice reducing demand to the extent that competitors are no longer viable. Another related potential anticompetitive effect of bundling is that it may increase the costs and risks of entry, and hence deter competition, by making it necessary for potential entrants to attempt to supply all of the products in the bundle.

The key requirements for anticompetitive harm in bundling are therefore a position of market power in one market that can be leveraged by way of tying into another market in such a way that competition is significantly reduced.

It is difficult to see that these conditions would hold in the case of bundling by cable operators in most European markets. Cable operators’ traditional product market is TV broadcast. Cable operators are either currently, or in the process of, expanding into telephony and broadband. It is debateable whether cable operators have a position of market power that they are able to leverage in any market in Europe, particularly given the range of potential entry in triple play services as content delivery platforms proliferate.

However, even if it were assumed that the requisite market power existed in TV, it is difficult to see how cable operators could reduce competition in either telephony or broadband Internet. Telephony competitors remain in the main the former incumbent telecom operators. Given the fixed and sunk nature of telephony networks, there is no realistic possibility of inducing exit or even reducing the ability of the incumbent operators to compete. This is also the case for broadband access,

² See European Cable Communications Associations response (the predecessor to Cable Europe) to the ERG Consultation on draft document about appropriate remedies in the new regulatory framework – A report produced by Charles Rivers Associates, chapter 2. Available at http://erg.eu.int/doc/publications/call_input_draft_appropriate_remedies/ecca_charles_river_report.pdf

which is an incremental product, particularly for the fixed networks employing DSL technologies. In contrast, cable operators incur substantial investment costs in upgrading their networks to support bi-directional services and face ongoing costs in increasing capacity on nodes as a result of the shared access nature of the technology.

Finally, we would also underline that the Commission itself does not see the need to examine the issue of bundling within its revision of the list of relevant markets as it has taken the view, that a distinct market for "triple play" or "multiple play" offerings does not exist.³ Whilst there may be some marketing advantages to offering the three services bundled together, it is very clear that each of those individual services competes in its own market: cable television products compete with satellite television products; cable telephony products compete with incumbent and new entrant telephony products etc. Consequently, it cannot be said that the advantages a combined product may offer to customers are such as to render the conditions of competition so distinct as to form a separate market.

Conclusion:

Cable Europe welcomes the opportunity to comment on the WP for 2007, and the clear emphasis given to supporting and advisory actions to the Commission's NRF review process.

However, we do believe that the draft WP may well be over extending the resources of the ERG in its proposal to look at access to content, bundling of broadband services and content interoperability, issues which we believe do not require new or additional regulatory focus as these are adequately covered by the existing NRF and by national and EU competition law safeguards.

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³ Working Document recommendation (SEC 2006, 837), June 28, 2006, par. 32.