

## ECTA Comments on the ERG / IRG Work Programme 2007

November 2006

### Summary

- ECTA welcomes the ERG's proposed focus on harmonisation, and believes that successful delivery of this project will define ERG's role as an effective harmonising body. However, we would like to see more emphasis given not just on identifying the issues for which harmonisation may be appropriate, but on how implementation of best practice will be monitored. ECTA would in particular welcome the **establishment of an independent Secretariat** (or some other independent party) who could undertake this exercise from an objective standpoint.
- Concerning the issues on which best practice guidance may be appropriate: we would advocate the addition of the following issues:
  - **leased lines, including Ethernet interfaces** in view of the currently divergent approaches taken across Europe.
  - **interpretation of and enforcement against discrimination, bundling, margin squeeze and other forms of leveraging**. This should for example include discussion of safeguard measures such as pre-notification and ex ante margin squeeze/replicability tests and the prohibition of launch and bundling when not replicable by competitors. In view of the current policy debate it may also be helpful to examine discrimination and leverage issues from an organisational perspective (ie **functional separation**)
- Concerning those aspects already identified, we would suggest a **focus in termination on 'cost recovery'** and fair return rather than 'symmetry'. Consideration should be made of **linkages between remedies** such as LLU and bitstream to take account of the business and residential ladders of investment. Finally, detailed practical horizontal best practice guidance and examples would be helpful on the
- ECTA looks forward to the outcome of the **NGN project**, a very important element on the ERG's agenda, and suggests that it would be helpful for the output also to be **translated into a 'best practice' format** and incorporated within the harmonisation programme. In addition, it would be useful, ahead of the completion of this project, for the ERG to send out a **general call for all NRAs to request information about their incumbents' plans** and, where appropriate, establish processes for discussion about these plans amongst all stakeholders.
- ECTA supports IRG's continued role in advising on the **Communications Review** process taking advantage of its substantial practical experience – this **role should extend to providing advice to national Governments and MEPs** as well as the Commission. It will also be vital for ERG in 2007 to assist in **managing any transition created through the removal of markets** from the Recommendation, in a manner which maintains certainty and protects the development of competition.

## 1 Introduction

ECTA welcomes the opportunity to comment on the Draft ERG-IRG Work Programme for 2007 (hereafter “the Work Programme”). ECTA would like to take advantage of this opportunity to thank the ERG-IRG for the public hearing it organised in Brussels to discuss this document on the 7<sup>th</sup> of November and more generally to support the **ongoing dialogue** consistently maintained between market players and the ERG-IRG in 2006. ECTA hopes that at this critical stage of the regulatory and market developments, this dialogue will be strengthened and enhanced through even more regular engagement with the ERG-IRG's working groups early in the decision-making process to assist in addressing the key priorities of industry and consumers. If handled constructively as ECTA would aim to do, we believe this interaction could alleviate some of the burden of the quite challenging work programme the ERG-IRG has set itself.

As regards the three pillars of the work programme, ECTA considers that the ERG has successfully identified the key high-level issues for 2007. Our comments therefore largely concern the focus of the proposed work items and specific aspects which should be considered within the context of those items. In particular, ECTA would like to highlight the importance of including the three following issues clearly within the work programme.

- De-regulation: Beyond the principles and scope for de-regulation, ECTA believes that the ERG-IRG should also focus on the safeguards that should be put in place once the decision to remove regulation partially or totally from a market is taken. Past practice, notably shows that, as the analysis of the state of competition on a regulated market is by essence flawed due to the fact that the regulation in place has been a factor in achieving or increasing this competition, there is a need to monitor closely the impact of the removal of regulation on that market. ECTA believes therefore that a specific “post-deregulation” methodology should be adopted by the ERG-IRG, including steps such as a six-monthly market analysis in terms of market share evolution, possible leveraging of the incumbent's “newly found freedom” into other markets, bundling practices, etc.
- Non-discrimination: ECTA believes that this remedy should form the cornerstone of regulator's intervention and believes that it would benefit from a more detailed approach as regards the practical implications of such a principle, including at organisational level.
- Bundling, Leveraging and Margin Squeeze: ECTA believes that these practices need increased attention from the ERG-IRG as they are too often used to bypass or render ineffective regulation at this stage and will be even more important to consider with the deployment of VoIP and NGNs.

## 2 Comments on the Specific Questions Arising from the Consultation Process

### 1. Challenges: the Review

ECTA supports the priority given to the Framework Review and considers that the ERG has a vital role to play in ensuring that practical experience is brought to bear in the development of the legislation and Recommendation and that they can be implemented swiftly and effectively

### **1a) Responses to proposed legislation**

ECTA considers the view taken by the ERG of its role in this process overly narrow, i.e. *“ERG mandate is to advise and assist the Commission and that such advisory duty formally ends up when the power of legislative initiative has been exercised by the Commission itself. At that stage, ERG will no longer be requested to provide advice and opinions on final legislative proposals issued by the Commission”*. ECTA agrees that this mission is accurate as regards the enabling instruments that created the ERG, but strongly believes that the ERG-IRG has a role to play beyond that mission, stemming from the fact that it has a unique sum of pan-European practical experiences that it can share with the different institutions involved in the entire legislative process leading to the adoption of a new regulatory framework.

ECTA would therefore recommend that the ERG-IRG engage in dialogue not only with the European Commission but also with the other EU institutions involved in the co-decision procedure leading to the adoption of the reviewed regulatory framework.

#### **1b) Implications of changes for the application of the legislation by NRAs and processes**

ECTA considers it vital for legal certainty that the ERG reviews and where appropriate agree at EU level the implications in applying any directly applicable EU Regulations, and consults stakeholders on such implications as well as the planned process and timescales. NRAs should also engage closely with national Governments in developing national implementing measures for EU Directives.

### **2a) Functioning of the Art. 7 process**

ECTA has so far been supportive of the ERG-IRG in their efforts to spread best practice on the application of remedies (and strengthening their role as a harmonising body). It is hopeful that this role will be further developed following the Madeira Declaration and the ERG Plenary in Bratislava, including as regards the binding nature of the Positions adopted by the ERG-IRG and the monitoring of compliance tools set in place, in order to render an extension of the Commission's article 7 right of veto to remedies unnecessary. We provide more comments on this below.

As regards other aspects of the article 7 process, ECTA considers that the Commission's current role relating to SMP designations has been useful, but understands that NRAs have found some aspects of the process burdensome.

ECTA would thus support the use of simplified notifications from NRAs to the Commission in three cases:

- For markets which were found to be competitive in the previous review, unless substantial changes in competitive conditions have occurred since that review;
- For notifications where only minor changes to previously notified measures are proposed (such as the details of a remedy), and
- For SMP analysis notifications in circumstances where dominance has consistently been found to be entrenched unless substantial changes in competitive conditions have occurred.

ECTA would also support simplified market review procedures at national level in the circumstances described. However, this would only meet the requirements for due process if NRAs consulted to determine whether there had been a material change in market

circumstances or not and whether any proposed “minor” change were proportionate. The NRAs decisions subsequent to any such consultation would need to be subject to the appeal processes set out in the Directive.

Other aspects that ECTA would consider vital to provide further certainty and streamlining to the article 7 process are the simultaneous notification of SMP and remedies (rather than separate as has been the case in some countries), the notification to take place following the national consultation process so that the measure represents the final proposals, and a timeline for renotification following withdrawal or veto.

ECTA considers **improving national market analysis processes** to be equally if not more important than streamlining the article 7 process, as we note that in many countries the full set of notifications has still not been completed more than 3 years following the entry into force of the Directives. ECTA believes the ERG, working together with the Commission, could play a valuable role in supporting NRAs to complete the process more swiftly and effectively for example through **identifying the data sets that are likely to be relevant to reviews, sharing best practice examples and developing a template format for Reviews**. ECTA also supports the establishment of binding timescales for Reviews in the Framework although recognises that after a first SMP assessment, it should be necessary to review mechanistically but only after some material change has occurred. **Reviewing the effectiveness of remedies** is however something that ECTA considers does need to be carried out on a regular basis against identified measurables (such as take-up of the wholesale product, market share of competitors etc). Again, it would be helpful for the ERG, working together with the Commission, to identify the high level measures likely to be useful for such an assessment.

## ***2b) Relevant Markets Recommendation***

Although not currently included in the work programme, ECTA would also like to stress the importance of the ERG-IRG’s continued input in the process for agreeing the revised relevant markets Recommendation, which could extend into 2007, depending on the Commission’s timetable. ECTA encourages the ERG-IRG not to feel constrained by some of the pre-judgements made in the initial Recommendation or by Commission interventions to date. The same applies to the issue of definition and regulation of so-called emerging markets: any analysis of this issue should be driven by the practical reality combined with scientific parameters derived from competition law and not by political agendas. The ERG has a valuable role to play in helping to clarify this issue from an objective standpoint.

Once the Recommendation has been adopted, a particularly critical role for ERG will be the **management of the transition to any revised recommendation, particularly where deregulation is proposed**. ERG could usefully help to identify the steps that NRAs should take ahead of concluding that deregulation is appropriate, and the monitoring and safeguard measures that may be appropriate thereafter. In particular, it remains vital for regulators to take all measures necessary to ensure that wholesale remedies can be effectively enforced (through addressing discrimination and margin squeeze for example) and that retail markets are not foreclosed ahead of such remedies being enforced (eg through prohibiting the launch of new products or bundles until others in the market are capable of offering them).

## ***4) Implementation of the proposed Regulation on International Roaming.***

ECTA’s fixed members welcome the attention given by the ERG to this important issue. ECTA hopes however that this specific attention given to international roaming will not distract the ERG from its continuing duties to ensure that other dysfunctions in the mobile

sector, such as difficulties in some cases with agreeing MVNO arrangements and the enforcement of non-discrimination in mobile termination, are addressed.

## 2. Harmonization

ECTA welcomes the introduction of this very important work programme, but believes that in order to be truly effective, it needs to be segmented into two parts – topics to be addressed, and monitoring and enforcement.

### 2(a) Regarding the **topics to be addressed**:

ECTA considers the topics identified to be relevant and important. We list below further aspects which we would like to see covered within those topics.

- Broadband (LLU and bitstream): ECTA urges the ERG to assess linkages between these topics through the 'ladder of investment' and to do so taking account of the differences that might apply for business and residential-oriented services (both in the SMP assessment and the specific products provided (in terms of throughput, contention, latency, jitter, service quality including repair time, etc.)). The ladder should be designed so as to maximise the opportunity for real innovation by competitors rather than being tied to 'replication' and include the means to migrate from one rung to the next.

The bitstream project should also encompass (where appropriate reflecting input from the NGN project)

- The application of bitstream requirements in a technologically neutral manner eg not excluding application to vDSL or other variants that may evolve – and the need for connection points to allow full use of competitor's networks.
- Avoiding the roll-out of xDSL technologies in a manner that prevent or degrades the possibility of utilisation of other xDSL technologies, and future generations of xDSL technologies; prohibitions on worthwhile xDSL technologies;
- Naked bitstream best practice

The assessment of local loop unbundling should also include

- The need for neutrality in terms of material and technology
- Sub-loop unbundling
- Backhaul for LLU and sub-loop unbundling

Should there be a policy recommendation towards **duct sharing**, a best practice recommendation should also be developed by the ERG including measures for transparency, reference offer, and examination of practical issues.

- VoIP: ECTA welcomes the inclusion of a specific work item on VoIP. We would suggest that in addition to identifying differences in classification and 'consumer protection' requirements, it should also (following from the ERG's policy development on this subject) cover issues of market definition, dominance assessment – and importantly – an analysis of which remedies would be suitable in circumstances where dominance is found. We consider this a key issue to ensure that industry has regulatory certainty when making investment decisions about VoIP.

A particular concern for ECTA members is to ensure that, in countries where the incumbent is dominant in retail broadband and/or wholesale remedies are not properly implemented, that the incumbent does not leverage its dominance from access into VoIP, preventing the emergence of effective competition. This is a current issue, although will also become increasingly important with the move to NGNs.

ECTA advocates also that the ERG carry out further work to produce a unified 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. Again, a common approach to these issues is helpful in guiding investment decisions by operators and is vital to those planning to offer services on a pan-European basis. The existing ERG common statement is welcome, but demonstrates that the approach to these issues remains extremely divergent across Member States.

- Mobile Termination Rates: ECTA suggests a complete review of the current status including tariff information which reflects not only an average per country, but also shows peak/off-peak tariffs, and the peak/off-peak hours of distinct operators, and notably includes a benchmark of the lowest retail rates for calls to mobiles (with specific attention for on-net mobile to mobile call rates as well as leased line from PABX into mobile network call rates).

As regards recommendations for pricing mobile termination, ECTA is uncomfortable with the wide use of benchmarking. By relying in some cases nearly exclusively on benchmarks, regulators run the risk of relying too much on cost-accounting methods and cost-accounting data that is several years old, and dates back to times when mobile penetration was much lower than it is now, network investment was more recent (and HCA was used), retail marketing expenditure could be included as a cost item for the calculation of call termination charges (justified by the perceived need to drive mobile penetration), etc. In essence, ECTA very much favours a new LRIC cost model being developed rather than a simple benchmark of decisions that were themselves often based on previous benchmarks. As regards the treatment of entrants mobile termination rates, the comments below relating to fixed termination are to some extent valid.

- Fixed Termination: ECTA agrees that more harmonization would be welcome in this field in terms of guiding principles for the correct calculation of termination rates. This is certainly true as regards the termination rates charged by incumbents, but equally applies to those charged by alternative players. Regarding the latter, ECTA encourages the ERG-IRG to conduct a very in-depth analysis of the methodologies used in light of the realities of the market. ECTA notes that the workplan proposal is to examine and presumably aim for 'symmetry'. However, alternative players cannot be looked at in the same manner as incumbents, as they incur fixed costs spread over much lower quantities than the incumbent, and their bargaining power is much weaker than that of the incumbent, for instance with equipment suppliers, financial institutions, towards sophisticated customers, etc. These issues, which relate to economies of scale should be taken into account by the ERG-IRG and may mean that rather than aiming for symmetry, even taking into account efficiencies there may still be differences in Alternative operators' cost basis for termination, due to differences in historical deployment, footprint, scale, cost of capital, etc. It should be remembered that 8 years after liberalisation incumbents retain >90% of the lines used to terminate calls. This huge scale differential is not easily or quickly overcome.
- Regulatory Accounting Systems: ECTA welcomes the ongoing efforts made by the ERG-IRG to harmonize and clarify the complex but indeed crucial issue of cost accounting. ECTA would like to emphasize that accounting separation and cost

accounting must be implemented speedily, the objective of getting the perfect CCA system versus an imperfect HCA system not becoming a hurdle to the implementation of any form of cost accounting at the end. We therefore commend the work done on this issue by the IRG and ERG but equally recommend that pressure be put on implementing a step-by-step approach to this issue, especially in the great number of countries where the first step has sadly still not been taken. Moreover, ECTA believes that an important element in this field is the calculation of the Weighted Average Cost of Capital (or WACC) in order to properly establish sound cost allocations and calculations. The establishment of the WACC of incumbents should be refined and differentiated between the access network and the rest of the incumbent's infrastructure, in order to reflect the varying levels of risk involved.

In addition we would strongly advocate the addition of the following topics, which are not currently proposed to be included:

- Leased lines: ECTA regrets that **Leased Lines** do not seem to be on the ERG-IRG radar screen and encourages the ERG-IRG to scrutinise the supply conditions of PPCs and the effects of limited regulation of incumbent operators in their supply of certain types of retail leased lines, which still present important dysfunctions in certain Member States. Moreover, ECTA believes the ERG-IRG could specifically look at ensuring that leased lines are clearly identified as being technologically neutral so as to include alternative interfaces such as Ethernet. ECTA notes that analysis by both regulators and commentators often focuses on consumer markets and not on **business markets** for communications services. It is vital that the European communications sector remains highly effective when serving business customers since business efficiency is one of the primary engines for economic growth and delivery of the Lisbon Agenda objectives.
- Discrimination, margin squeeze and anti-competitive bundling: The ERG will be well aware of the importance of addressing these issues as a means of ensuring that remedies really can be made effective, and we understand that some of these issues will be examined in the context of the 'convergence' work programme. ECTA would nonetheless welcome the addition of this subject as a horizontal component to the 'harmonisation' agenda with the aim of setting clear best practice guidelines for the definition of these concepts, means for detecting and addressing these practices.
- Other mobile issues: ECTA's fixed members hope that in focusing on mobile termination, other important issues such as those relating to encouraging best practice in competitiveness of mobile origination markets will not be neglected. MVNO is an important aspect, which could be covered within the convergence work item. Additionally, as the Italian regulator currently investigates so-called market 15bis (mobile origination of calls to non-geographic services) ERG should discuss this approach and its potential outcomes in order to guarantee as much consistency among national regulators as possible in this field. ECTA is currently considering this issue and may present more detailed proposals in due course.

2(b) Regarding **monitoring and enforcement:** ECTA considers it vital for the ERG to build on the success of the Madeira plenary to develop a robust system to monitor the application of best practice across the EU and take steps to address divergences where these are clearly against the interests of competition. ECTA believes that a vital component of this will be some independent means of auditing the application of regulatory remedies which could be carried out with the assistance of an independent Secretariat, or other independent assessor.

The **benefits of an independent Secretariat**, in ECTA's view, could also facilitate the exchange of best practice and resource-sharing, as well as offering a means to reap further benefits that may accrue from the collective nature of the organisation. If proven to be effective, such a structure could obviate the need for further Commission involvement in harmonising remedies, and need not be overly bureaucratic, if carefully designed. It could also **form the basis for any more formal co-ordinating structure** that may be proposed by the Commission under the Framework Review.

### 3. New Issues / Innovation

ECTA welcomes the attention given by the ERG to this important topic, and notes, as suggested above, that one of the outputs from these policy exercises should be clear best practice guidance in line with the format developed for the harmonisation project.

#### 1) NGN

In the context of NGN, the following issues require a specific attention from the ERG-IRG:

- IP interconnection: the critical issue of the number and type of points of interconnection requires specific work by the regulators aimed at avoiding structural reduction of interconnection possibilities, and stranding of investments in interconnect capillarity. A dialogue must also be put in place between the regulator, the incumbent and the rest of the industry in each country to discuss in an open and transparent manner the products the dominant operator will offer over its upgraded network.
- FTTH: ERG should in tandem with consideration of core network NGNs, develop a position on access developments including vDSL and fibre to the home. This is as important as consideration of the core network issues as all operators (incumbent and new entrant) need clarity over the regulatory treatment of these access networks. For example, if regulators' approach is not made clear in analysing wholesale broadband markets and LLU, and incumbents subsequently upgrade access networks, there is a risk of a regulatory vacuum which will undermine investments in wholesale broadband and LLU.
- Migration: alternative operators such as ECTA have invested to roll-out their network and must be assured that, when incumbents unilaterally decide to upgrade their network for their own benefit, this is not done to the detriment of the incumbent's competitors/main customers (process issues, compensation for stranded assets, outages, etc)

ECTA also reminds the ERG of its opening comment to the effect that both the residential AND the business segments need to be examined when looking at this issue, as IP-IP interconnection models will need to fit varying business models.

At a practical level, ECTA believes that the ERG-IRG should set as a top priority for each of its members the **proactive request for information** from their national dominant operators as regards their NGN plans, including the topology/architecture, suppliers to be used, roll-out milestones, etc. Where such plans exist, a transparent mechanism for managing the transition in a pro-competitive manner in collaboration with all stakeholders should also be established. This deliverable should be a Q1 2007/Q2 2007 objective.



The outcome from the analysis should also be presented in the form of detailed best practice guidance and we have also suggested in the section on 'harmonisation' above, those issues which may warrant urgent attention in this respect.

## **2. Convergence**

We welcome the addition of this important work item. ECTA's fixed members suggest in particular that it takes account of issues relating to access to all types of network (including **MVNO**), in cases where a lack of competition is found in the market. Addressing **bundling and margin squeeze in a converged environment** are also significant challenges, hence our suggestion that detailed best practice guidance be prepared in line with the ERG's harmonisation programme. ECTA will also be further developing its views on the issue of access to content.

## **4. Carry-over from WP 2006**

ECTA acknowledges the fact that the ERG-IRG faced a heavy Work Programme for 2006. However, as every item on that Programme was of critical importance, ECTA is pleased to see that it will be finalised as soon as possible in 2007.

ECTA also recognizes that the ERG-IRG also need to be realistic in setting their priorities and listing the issues which they will address in order to take full account of the limitations in resources of the national regulatory authorities. ECTA re-iterates its offer to work closely together with the ERG-IRG Working Groups in order support a full realisation of the WP constructively.