



ETNO Reflection Document on the draft ERG 2007 Work Programme

Executive Summary:

- ETNO welcomes the very significant improvements under the outgoing ERG Chairmanship in the field of transparency of ERG work.
- The ERG's efforts to act in a more transparent and accountable fashion risk being undermined by the blurring of IRG and ERG activity respectively, which under the proposed Work Programme for 2007 would again become a concern.
- ETNO invites the ERG and the European Commission to develop a clearer idea of what kind of harmonisation is desirable to ensure an adequate and proportionate implementation of the framework in EU Member States. The objectives of further ERG work on harmonisation are not clearly outlined in the Work Programme and should be transparent before embarking on harmonisation measures in specific areas.
- Work on innovative and emerging market areas should be guided by a bias against intervention, in order not to freeze technological developments and hamper new forms of competition.

1. Transparency

Transparency has been a main issue in prior ETNO comments to ERG Work Programmes. Therefore we wish to acknowledge the significant advancements of ERG in improving its transparency and interaction with stakeholders in the past year.

Small improvements such as more meaningful debriefing sessions, increased availability for meetings with industry and industry associations throughout the process together have helped to keep the ERG informed of stakeholders' views and at the same time to disseminate information to market players. We invite ERG to continue this approach.

Consultation channels that have not proven successful should be abandoned, notably the format of an *ad hoc* 'workshop' in June which was - despite addressing a rather technical, partly operator-specific issue - limited to industry associations and did not allow sufficient time for preparation and possibility for interaction.

To conclude, ETNO invites the ERG to ask for consultation input on policy issues at the most relevant time in the policy making process. Several of the recent consultation documents published by the IRG/ERG appear to be already completed and widely agreed documents. In one case¹, e.g., the document includes a few questions with no specific reference to the policy-making positions forwarded. In another case², potential consultation respondents are not presented consultation questions and were asked for general comments on an agreed draft document.

2. Relationship between IRG and ERG

The ERG's efforts to act in a more transparent and accountable fashion risk being undermined by the blurring of IRG and ERG activity. At the beginning of ERG's activity, some stakeholders requested to phase out IRG leaving only one transparent institution for cooperation among national regulatory authorities (NRAs) at EU level. These concerns appeared to become less relevant with time as ERG consulted and adopted most positions.

With the Review debate and in particular with the WP 2007 proposed by the ERG/IRG in the present consultation, IRG activity again becomes a concern. If issues that are not covered by the ERG Decision³ - as they do not consist in assisting the EU Commission in the implementation of the current 2003 'New Regulatory Framework' (NRF) - are simply referred to IRG and are driven and externally communicated with IRG/ERG resources, this constitutes a circumvention of the ERG Decision. This is for instance the case for IRG/ERG work on the EU legislative process on the Review of the NRF, as the draft WP acknowledges.

To explain the need for further work on the Review, the draft WP points out that monitoring of the legislative process is of utmost interest to NRAs. ETNO questions whether influencing the legislative process at EU level, which creates the policy framework for future regulation, should be a priority field of action for NRAs. Once that NRAs' concerns and experience have fuelled the Commission's deliberations on the Review, it would be the Commission's role to include them where appropriate in their legislative proposals and subsequently ensure that they are taken into account within the legislative process.

¹ For example, „Consultation Document on IP interconnection,“ ERG (06) 42 (October 2006).

² For example, „IRG WG Regulatory Accounting Principles of Implementation and Best Practice for WACC calculation,“ ERG (06) 46 (September 2006); and „Broadband market competition report,“ ERG (05) 23rev1 (October 2006).

³ Commission decision 2002/627/EC on the creation of a Group of European Regulators for electronic communications networks and services, s. Art. 3

3. Harmonisation

3.1 Lack of sound objectives of further harmonisation

ETNO invites the ERG and the Commission to present a clearer idea of what kind of harmonisation is desired to ensure an adequate and proportionate implementation of the Framework in EU Member States.

The objectives of further ERG work on harmonisation are not spelled out in the Work Programme and should be transparent before embarking on concrete 'harmonisation measures' in specific areas. At a recent ERG workshop on harmonisation, experts have highlighted that pursuing harmonisation of objectives, principles or 'mindsets', and suitable processes should be a priority under the NRF.⁴ The workshop has helped to raise important questions that have to be addressed in assessing regulation in different Member States such as the impact of differences in competition on regulation in individual national markets and the degree to which innovative regulatory solutions may be possible or even beneficial under the Framework.

The draft WP does not indicate that this principle work will be completed before the relevant IRG Working Groups will deal with new measures regarding remedies, to be applied in specific market areas such as ULL, bitstream access and termination.

This should however be the case, so that one is aware of the desired and possible level of harmonisation as a starting point for all measures and thereby avoid arbitrary results in a specific field.

Furthermore, we suggest that ERG work on new, more specific guidance for intervention should be based on a steer from the European Commission on regulatory policy in the field of remedies, in particular on safeguards for ensuring proportionality of remedies in individual markets in the areas targeted by the IRG/ERG Work Programme for 2007.

ETNO notes that a number of proposals by ERG on the review of the EU legal framework could prove detrimental for harmonisation in the internal market. This concerns in particular the possible introduction of a functional separation remedy in the Directives and the 'free reign' ERG claims for NRA measures under Art. 5 of the Access Directive with regard to intervention in non-SMP-markets (cf. ETNO RD 248 - Contribution to the consultation on the Review of the legal framework).

3.2. Best practice indicators for effects on competition: not fit for purpose

There is no explanation given in the draft Work Programme of the idea of "best practice indicators against which the results of regulation in terms of

⁴ Regulatory innovation and harmonisation, presentation at the European Regulators Group Harmonisation Workshop, 27 September 2006, by Brian Williamson, Director of Indepen.

competitive levels can be measured.” (p. 4). *Prima facie*, such an exercise looks unlikely to be informative:

- Competition is influenced by a number of factors, only one of which is regulation.
- Moreover, competition is a means to an end, namely to derive maximum benefits for EU citizens. A standardisation of competition indicators therefore addresses the wrong type of market result.
- There is no ‘one size fits all’ threshold for effective competition across EU Member States. For instance, depending on the size of a given Member State’s market and various other economic factors, there will be varying degrees of economies of scale and scope to be achieved. Attempting to define a common set of competition indicators therefore may be a futile task.
- Also, to link competition to regulation creates the risk of claiming causation where only correlation can be found between regulation and competitive outcomes. Moreover, such linkage disregards factors outside regulation that influence business and investment plans of individual operators.

Any analysis regarding market performance to inform regulatory decisions should focus on the outcome for the consumer in terms of price, quality and high-potential services such as those enabled by high-speed broadband access lines. As the ERG states in its response to the Review of the regulatory framework, changes to the regulatory environment need to be evidence-based. This should equally apply to the introduction of new harmonisation measures.

4. New issues and innovation

Technological progress and innovation are market-driven processes. The move to NGNs entails fundamental changes in technology and business models which have not yet fully emerged and are only partly foreseeable. Any regulatory policy in this environment should be guided by a bias against intervention. The main challenge for regulatory policy in the context of NGNs is that of creating a framework that will enable investment and innovation and allow a market-driven process of developing the most effective commercial and technical solutions in the new technology and business environment.

ERG should resist calls to establish ex-ante regulatory solutions before the market has fully developed and not try to actively ‘shape’ technology and business in a perceived interest to foster competition. Premature or otherwise inappropriate regulatory intervention can freeze dynamic processes, hold back investments and hamper new forms of competition that would otherwise emerge. In line with the ERG Decision, ERG work on the subject should mainly serve to assist the European Commission in developing regulatory policy guidance for IP-networks and subsequently act within the limits of this Commission guidance.

As far as NGN access investments are concerned, the ERG proposal for the year 2007 “to list and describe the potential technical, economical and legal problems which could continue to exist in an NGN environment” risks to be premature due to the fact that NGN access networks to support innova-

tive high speed broadband services are not yet available across Europe on a wider basis.

The ERG work item on **convergence** should include an analysis of the competitive constraints on the electronic communications sector stemming from neighbouring sectors such as the media and internet businesses. These constraints risk being overlooked in the market analyses under the current NRF.

The scope of the work item on *“access to content, related to access to not the content itself”* is unclear. We would expect it to be clearly defined in the final Work Programme. In this context, also the wording *“related consumer protection issues”* is ambiguous. We understand that NRAs are dealing with customer complaints but many aspects of consumer protection are outside their field of expertise and guaranteed by horizontal legislation as well as competition law (typically the case for bundled and/or tied offers).