

November 2007

ETNO Reflection Document on the draft ERG 2008 Work Programme

Executive Summary:

- ETNO looks forward to a continued interaction with ERG in 2008. We invite ERG, despite its huge workload, to adhere to high standards of quality, impartiality and transparency in its work, including adequate deadlines for stakeholder consultations.
- ETNO encourages ERG to thoroughly review the conception of its Common Positions on remedies harmonisation in order to better reflect the objectives and principles of the EU Directives and to encourage best practice of minimum effective regulation.
- In its work on future regulatory challenges, ERG together with the Commission should fully reflect the impact of technological and market developments and examine whether regulatory principles which are currently considered valid need to be adapted in this light.

ETNO welcomes the opportunity to contribute to the present consultation.

Introduction - ERG work and stakeholder involvement ¹

As an introductory remark, ETNO welcomes the continued efforts by the ERG and its Chairmen in the field of transparency of ERG work. New formats such as seminars hosted by ERG and its Members and bi-lateral meetings ahead of ERG plenaries have in the past year further contributed to a more regular dialogue between industry and NRAs at European level on key regulatory topics.

Improvements are required, however, regarding the time stakeholders are given to comment on draft ERG common positions and the weight attributed to comments in this phase of the ERG decision making process.

A draft document by ERG should open a debate in the sector, leading to an optimal outcome that takes stakeholders' concerns into account in an

¹ BT does not support this document

appropriate and balanced manner. Too often, draft ERG documents appear to be themselves the result of a lengthy debate inside ERG and change little following public consultation. Pressure on ERG to act effectively moreover appears to result in shortening the deadlines for comments – with the effect of less thought-through, less accepted, and as a consequence less effective Common Positions.

Examples of short deadlines include a recent consultation on principles for VoIP of effectively less than 12 calendar day – including a bank holiday - and a consultation on the important regulatory challenge of how to address Next Generation Access Networks in May/ June 2007 of a mere five weeks. Consultations with stakeholders on this topic in Member States usually extend over two months minimum (cf. recent Ofcom and CMT consultations).

Having said that, ETNO looks forward to a continued, intense exchange with ERG on the regulatory challenges for Europe in 2008.

1. The review process

ETNO notes that ERG will continue to contribute expert opinion on different subjects of the framework review. In this context, ETNO would welcome a clarification in the Work Programme on what ERG intends to achieve with the suggested “response to the revision of soft law” (1.4 of draft Work Programme).

In particular in relation to the revised market Recommendation and the three criteria test, guidance is given by the European Commission, both in the Recommendation, the Explanatory Note to the Recommendation and in Art. - 7 notification procedures. It will be of utmost importance to ensure a strict application of the three criteria to ensure an effective and consistent regulatory environment throughout Europe. ETNO encourages ERG to engage with the Commission in order for the Commission to arrive at an appropriate application of the test and give adequate and sufficient guidance on the three criteria where appropriate.

As for the concept of SMP, ETNO encourages ERG to focus potential work on advising the Commission on the SMP-guidelines, and not attempt to supersede or to “interpret” the guidelines in view of the evolving European case law on the concept of dominance.

2. Remedies harmonisation

ETNO in principle welcomes work by the European regulators on key regulatory challenges as planned for 2008 in the present draft WP. At a moment when ERG considers on which issues to focus its work in the next year, we consider it timely, however, to voice our concerns with regard to ERG work in the past.

ERG Common Positions (CP), in particular on remedies harmonisation, and existing positions on 'future challenges' such as NGN Interconnection and Next Generation Access have in ETNO's view not been consistent with the ERG's intention, as expressed in the introduction to this Work Programme, to address low investment levels in Europe and strengthen EU competitiveness.

The ERG approach to harmonisation is backed by a sound understanding of costs and benefits of harmonisation.ⁱ However, the practical implementation in ERG's best practice remedies documents is not in line with the objectives of the Directives, namely to ensure a proportionate level of regulation and encourage competition, investment and innovation. By defining their own set of regulatory objectives and matching potential competition problems on a market with a comprehensive list of remedies that could address these problems, the remedies CPs so far reflect a strong pro-regulation bias. This risks putting pressure on NRAs which might want to adopt a lighter regulatory approach.

ETNO therefore does not support the concept described on p. 7 of the draft WP. We urge ERG to adopt a balanced approach to remedies harmonisation, taking Recital 18 of the new Recommendation on relevant markets as the starting point:

*"Regulatory obligations must be appropriate and be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Directive 2002/21/EC, in particular maximising benefits for users, ensuring no distortion or restriction of competition, encouraging efficient investment in infrastructure and promoting innovation, and encouraging efficient use and management of radio frequencies and numbering resources."*ⁱⁱ

ERG should in particular adopt a process to safeguard and establish as best practice "light" but effective regulatory approaches that individual NRAs may prefer to apply. The most costly outcome of a harmonisation exercise for industry and eventually consumers would be to let 'peer pressure' result in the application of a comprehensive set of standard remedies in all EU Member States (i.e. a harmonisation to the maximum level of regulation).

3. Future challenges - NGN and convergence

- NGN -

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.

Accordingly, ERG should not determine ex-ante regulatory solutions before the market has sufficiently developed and not try to actively 'shape' technology and business decisions. We refer to our concerns with the approach

adopted in the ERG Common Position on Regulatory Principles for NGA.ⁱⁱⁱ ETNO expects that ERG will contribute to future Commission work on the regulatory treatment of NGN investments as announced in the recent review Communication^{iv} and is happy to continue an exchange on this important issue, as well as on IP Interconnection principles.

- ERG work on convergence -

3.1 Convergent bundles

ETNO has consistently taken the view that convergent bundles should not be subject to inappropriate regulation that could cause delays in the launch of new innovative services. To prevent anti-competitive behaviour in the context of bundles of electronic communications and media services, flexible competition law tools appear to be a more appropriate solution as compared to ex-ante controls which were designed for traditional telecommunications services. In this context, ETNO invites ERG to fully reflect in its work on convergence the deregulation of retail services markets under the new Commission Recommendation on relevant markets.

3.2 Effects of convergence on competition in electronic communications

ETNO invites ERG to take into account the effects of the entry of new players on retail services markets in the process of convergence on market power and competition. The new Commission Recommendation on relevant markets underlines that a market may tend towards an effective competition within the relevant time horizon, specifically because of convergence:

“Market dynamics may [e.g.] be caused by technological developments, or by the convergence of products and markets which may give rise to competitive constraints being exercised between operators active in distinct product markets.”^v

Moreover, established electronic communication operators which increasingly need to provide multi-play offers including other than telecommunications services are still new entrants as concerns access to content for new IP-based or wireless media services. In negotiating with content owners, they compete with platforms that are not subject to similar ex-ante regulation and may have preferential access to and in-depth experience in the acquisition and distribution of media content.

4. Concluding remarks – maintain quality of ERG work

ETNO understands that ERG is faced with multiple requests for issuing advice, guidance and opinion, in particular in highly political debates such as the review process. We believe that in meeting these requests, ERG should set itself high standards of quality, accuracy and impartiality.

This implies a full review of existing research and literature in the drafting of ERG documents. Regularly, ERG Common Positions and statements do not address, discuss or indeed list as reference very pertinent and important work carried out for the sector - this sometimes includes work carried out by or for NRAs themselves.^{vi}

Also, the format of an “opinion”, e.g. the recent “Opinion on functional separation”^{vii} appears to be directed at the public rather than to ERG Members, the Commission or stakeholders. The said document does not discuss in depth the major arguments made in the debate on functional separation so far but seems to focus on “making a case” for the introduction of this particular remedy. Irrespective of the position of individual stakeholders on a regulatory issue, this kind of ERG intervention could in the medium term damage the position of ERG as a conscientious and relied-upon source of regulatory expertise in Europe.

Endnotes:

ⁱ ERG (06) 68, Effective Harmonisation within the European Electronic Communications Sector

ⁱⁱ Commission Recommendation on relevant product and services markets, C(2007) 5406 rev1, p. 6

ⁱⁱⁱ ETNO Reflection Document on ERG consultation on Regulatory Principles of NGA ERG (07) 16

^{iv} COM (2007) 696 rev1, Communication from the Commission - Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals

^v S. fn. ii, recital 12

^{vi} For example, the ERG NGA Common Position does not discuss models of Brian Williamson, Indepen, on flexible wholesale regulation of NGA (“Risk, reward and efficient investment in access networks.”, March 2007); the economic model on the effect of NGA price regulation by Philipp

Calmus in Idate/LECG “Telecoms 2015 , a report for the Brussels Round Table”; the expert study on the revision on relevant markets by Cave, Stumpf, Valetti “A Review of certain markets included in the Commission’s Recommendation on Relevant markets”, (2006).for the European Commission; etc.

^{vii} ERG (07) 44 ERG Opinion on Functional Separation