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EuroISPA's response to the ERG Consultation on the draft ERG/IRG 2008 Work Programme

EuroISPA is the world's largest association of Internet Service Providers, representing approximately 1000 ISPs across the EU. Below is our response to the ERG Consultation on the draft ERG/IRG 2008 Work Programme.

General observations

EuroISPA welcomes this public consultation on the 2008 work programme and thanks the ERG for the opportunity to respond and comment.

In addition to substantive comments on the draft work programme below, EuroISPA urges the ERG to organise its public consultations to allow sufficient periods for respondents to express their views. EuroISPA, for example, is a large umbrella association that must give its own members sufficient time to give their input to, and consideration of draft papers. Some important draft ERG papers have given us an unrealistic amount of time to digest, consider, consult internally and formulate a response on the content. EuroISPA strongly believes that the consultations would benefit from longer response deadlines.

The issue of Investment

The introduction to the paper describes the need to address the issue that "...ICT investments in the EU are determinedly relatively low." The following paragraphs imply that this relates as much to the e-Communications sector as much as the ICT sector overall. However, EuroISPA would like to note that some EU countries are actually experiencing the highest levels of investment per capita in telecoms in the world, according to 2007 OECD figures (examples include the UK, the Nordic countries and France), while others are effectively in delay (Germany, Poland). Therefore, the issue of further raising investment across Europe should focus on following best practice to bring all Member States up to the same high standard.

In addition, we believe that it is efficient investment, rather than investment for its own sake, that is the objective for regulators in their implementation of the Framework. By this we assume that the objective is to encourage as much (but not more) infrastructure-based competition as is economically rational whilst, ensuring that service competition is ensured even where there are economic limitations on duplicating

infrastructure. This is particularly important for NGA roll-out, due to the fact that increased economies of scale make traditional bottlenecks even less replicable.

EuroISPA agrees that there is a need to provide better and clearer guidance for consumers concerning quality of service in an environment where products are increasingly being differentiated not only by price, but also by quality.

EuroISPA welcomes and encourages the ERG's intention to further strengthen cooperation with the IRG and amongst national regulators. The creation of a permanent secretariat will be extremely helpful in this respect.

EuroISPA however notes that the concrete and final objective of this co-operation should be the identification of, and adherence to best practices around Europe, in order to achieve and implement full consistency of application and thereby to support countries with enduring competitive problems. EuroISPA urges information collection and monitoring exercise to become more focused on guiding national regulators towards the most efficient regulatory solutions.

Framework Review

EuroISPA welcomes the ERG's intention to produce guidance on the harmonised application of the three criteria test, and a common view on the planned new SMP Guidelines. However, this plan should now take into account the strong deregulation process resulting from the new Relevant Market Recommendation adopted on November 13, 2007, which contrasts with the views expressed by ERG itself and many other stakeholders, including EuroISPA.

In particular, there are important issues that need to be assessed in some Member States following the removal of several wholesale markets from the old list (such as markets 10, 14, and 15). Some EuroISPA members report that in their countries (for example, Austria and Italy) these markets remain affected by competition problems that justify continued regular analysis by NRAs. In addition, EuroISPA notes that Section 5 of the Explanatory Note relating to the new Recommendation states that markets currently subject to regulation should not be deregulated before the NRA in question has completed a new analysis of the market.

In light of the above, EuroISPA believes that further work to ensure harmonised treatment of these markets would be more than justified.

Another issue is raised by the removal of most retail markets from the old list. Formulation of general ERG guidance on mechanisms to address margin squeeze (already covered to some degree under specific 'best practice' guidance for broadband and leased lines) and anti-competitive bundling issues has been made more urgent by those markets' removal from the Recommendation.

Further harmonisation of the internal market

Wholesale Broadband Access: accounting methodologies

While EuroISPA welcomes the ERG's commitments, it is of paramount importance to raise the issue of lack of harmonization in the EU with regard to accounting methodologies. As a matter of fact, there are strong differences within Europe and, although ERG is monitoring this field on yearly basis, there is no evidence that NRAs are sufficiently encouraged to follow best practices and adopt harmonised and consisted models.

This problem is particularly dramatic for Wholesale Broadband Access, a wholesale product essential for ISPs, many of which - due to their limited size in comparison with incumbents – must invest selectively and not on a national basis. One could note that wholesale broadband access prices vary from country to country as a result of the different accounting methodology used and irrespective of objective differences in costs. In some countries, a bottom-up approach is implemented (like Belgium and Denmark) with affordable and pro-competitive prices, while in others the traditional and non-transparent, top-down approach still remains. Different accounting methodologies for the same service – without objective justifications – produce unreasonable fragmentations and a lack of harmonization, as well as wholesale prices that do not reflect actual costs. EuroISPA therefore encourages the ERG to develop a best practice for bottom-up methodology, in order to provide new entrants operators and ISPs with more certainty and transparency vis-à-vis the wholesale costs applied by incumbents.

Fixed-mobile convergence

The ERG's work on fixed and mobile termination rates also appears particularly critical. In this respect, recent Commission interventions state that asymmetric rates as a temporary measure might prove an effective incentive to build alternative fixed broadband infrastructures. EuroISPA supports this balanced and pro-competitive approach, ensuring that (fixed and mobile) termination rates be gradually reduced in coherence with their cost recovery process.

In addition to what constitutes efficient cost for termination, we urge the ERG to examine the perhaps more competitively fundamental issue of discrimination in setting termination rates – which has an anti-competitive effect, particularly when practiced by operators with a comparatively large customer base. This has been a problem in the mobile environment for some time, affecting the ability of smaller mobile operators to gain market share and for business service providers to compete effectively in offering telephony packages, but is now becoming increasingly critical with the move towards fixed mobile convergence for consumer as well as business services. It may also increasingly be an issue in the fixed environment following the relaxation of retail price controls for calls.

EuroISPA has serious concerns that the competitive development of fixed mobile converged services could be undermined at a national level and any competitive problems from mobile transferred into the fixed environment, unless attention is paid to certain issues in mobile markets that prevent a level playing field between fixed and mobile operators. These include discrimination in the rates set for mobile termination by large mobile operators and the absence in many markets of real MVNO agreements that would allow competitive entry in fixed mobile service provision. In addition, the issue of competitive failure

in access to value added (including Directory services) has been raised in a number of countries and has been recognised in the Commission's explanatory memorandum to the Relevant Market Recommendation.

We encourage the ERG to set a deadline to publish guidelines which should include:

- a consistent definition of 'real' MVNO access and other forms of access to mobile networks with guidance to regulators on issues that should be considered and data that should be collected when reviewing mobile markets to assess their competitiveness;
- recommendations concerning non-discriminatory provision of frequencies to intensify mobile competitiveness;
- a proposed common approach to addressing high and discriminatory charges for access to value added services over mobile phones.

We believe the issue is not necessarily to develop a new approach to regulation, but rather for the ERG and national regulators to prevent distortion of competition in the development of converged services through ensuring that there are no bottlenecks in any of the essential components that are needed to drive convergence. The emergence of a market for convergent fixed-mobile offers could be addressed, although the main attention should be paid to the risk of foreclosure.

Next Generation Access Networks

A further issue which we support to be included in ERG's agenda is any follow-up on policy concerning NGA, particularly in light of recent developments at a national level and the plans for the ERG to issue a Recommendation on this subject. As NGA developments are no longer an 'emerging' challenge, but a reality in many markets, EuroISPA believes it would be helpful to translate the broad ERG guidance into a 'best practice' template that can be monitored and can also be used to feed into Commission guidance on this subject.

About EuroISPA:

EuroISPA is the world's largest association of Internet Service Providers, representing approximately 1000 ISPs across the EU. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet. Its secretariat is located in Brussels. EuroISPA is predominantly funded by its member and associate member associations and the members of the EuroISPA Industry Forum.

For further information on this and other matters concerning EuroISPA, please contact Richard Nash, Regulatory Affairs Manager and Secretary General, at the address set out below.