

Draft Telecom Italia comments on the draft ERG 2008 Work Programme

Telecom Italia welcomes the opportunity to comment on the IRG/ERG Work Program 2008 as an important element in ensuring transparency of ERG work in this very moment requiring – as pointed out by ERG in its Consultation Document – harmonization and/or revision of the present regulatory framework in order to face converged electronic communication services and new challenges.

Telecom Italia generally agrees with the picture given and the actions proposed by the IRG/ERG Work Program 2008 but still thinks that other issues may be introduced or reinforced in order to make the proposed IRG/ERG activity more effective. To this extent, Telecom Italia invites ERG to include in its work programme 2008 two additional major issues that are left out from the agenda: 1) the need of an ERG common approach to the identification and the implementation of the non standard remedies and 2) the need of an opinion on the identification of geographic markets and the imposition of diversified remedies.

1. ERG common position on the approach to the identification and the implementation of the non standard remedies

Telecom Italia acknowledges the importance of the ERG common position on the approach to appropriate remedies in the ECNS regulatory framework (ERG (06) 33, May 2006) in guiding the national regulatory authorities in market analyses process and in the final matching of appropriate remedies to the potential competition problems that can arise from the undertakings with significant market power. However, this ERG common position, as acknowledged by ERG itself, has not covered the non standard remedies that were already foreseen in the Access Directive under the exceptional circumstances (ERG(06) 33, page 11).

Since the draft proposals of the Commission on the revision of the EU directives on regulatory framework include an exceptional remedy such as functional separation, a common position on non standard separation remedies covering all the measures stronger than the accounting separation should be carefully considered. Such a common position should be based, in accordance with the philosophy of the EU Regulatory Framework, on the assertion that states *“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.”*ⁱ

On the basis of some EU Member States’ experience, Italy in particular, it is possible to state that functional separation is not the only available non standard remedy to be adopted in case the regulator assesses that the accounting separation and other standard remedies did not solve the competition problems and there is an access market failure. In fact, the Italian case points out that there are other available non standard remedies stronger than the accounting separation to avoid the potential discrimination problems that can derive from the vertical leveraging strategies by the incumbents. The non standard remedy, adopted by Telecom Italia from 2002,

called “administrative separation” has the advantage of being less intrusive than functional separation since it does not change the vertically integrated structure of the network and ensures the equal treatment of the incumbent’s retail units and alternative operators with a series of strong measures involving information systems, processes and employees. As well as the administrative separation model there can be other forms of non standard remedies which can fit appropriately into different competitive situations. The task to address this issue and to provide the necessary EU level guidelines should, in our opinion, be on ERG through a common position document. Thus Telecom Italia invites ERG, in accordance with the EU Directives, to draft a common position to act as a guidance for the single national regulators in identifying the available non standard remedies.

2. ERG opinion on the approach to the identification of geographic relevant markets and the impositions of diversified remedies.

The identification of an ERG opinion on the question of geographic segmentation, which means the possibility of regulatory measures differentiated among different regions of a country depending on the degree of infrastructure competition achieved, is considered by Telecom Italia of major importance in the definition of the ERG 2008 Work Program.

While geographic markets are clearly foreseen by the Framework Directive, the vast majority of the first round market analyses carried out by NRAs, have established a nationwide definition of relevant markets. However, these conclusions appear to strongly contrast with the significant differences in the degree and intensity of competition witnessed in markets and enjoyed by consumers in Europe in recent years. Furthermore, the development of Next Generation Access Networks, points to a renewed flexibility of technical and economic solutions that will vary among countries, from geographic area to area and from operator to operator, making the geographic dimension even more important in the development and intensity of competition.

Actually, in a recent speech at the European Regulatory Group meeting in Athens¹, Commissioner Reding called on ERG to work on this issue as a matter of priority, and to coordinate the efforts, to ensure that such measures “*follow the same principles and are applied in a similar fashion by national regulators*” all over Europe. Furthermore, as a result of the current review of the Regulatory Framework, the Commission is considering the possibility of “*issuing guidance in other areas, in particular on sub-national geographic differentiation*”².

Finally, the recent Recommendation for Relevant Markets calls for a new round of market analyses that should give more emphasis to the geographic dimension of markets. Therefore, Telecom Italia believes that National Regulatory Authorities will benefit from the development by ERG of a common position on geographic markets. In particular, TI envisages an ad hoc role for ERG in contributing to the definition of guidelines to approach in an harmonized way in Europe the characterization of geographic relevant markets by the first semester of 2008. To this extent, the ERG should deliver an opinion – possibly taking into account the national experiences in this field - in order to allow the Commission to issue adequate guidelines on the identification of geographical national markets as stated in the Commission’s Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services..

¹ Viviane Reding, “Better Regulation for Single Market in Telecoms”, Plenary Meeting of ERG, Athens, 11/10/2007

² CEC, “Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions”, page 5.

3. ERG opinion on the application of the three criteria test

Finally, Telecom Italia, would like to show its appreciation for the inclusion in the IRG/ERG Work Program 2008 of an ERG opinion on “guidance on the application of the three criteria test, and on the handling of transitory period topics related to the basis of the new Recommendation on the relevant markets”.

As a matter of fact, the recent adoption of the Commission Recommendation on relevant product and service markets did not mention nine markets previously considered as relevant and – therefore – potentially subject to ex ante regulation having passed by definition the three criteria test.

Being in force the 2002 Recommendation, NRAs were therefore asked to apply the three criteria test only in a limited number of case i.e. when assessing markets being different from the 18 relevant markets. At present the situation is completely different: if NRAs would like to examine the nine relevant markets not any more included in the recommendation they have to apply the three criteria test.

This leads to a far more widespread application of the three criteria test and gives the dimension of the importance that an harmonized approach to this topic will assume in the near future. Therefore we deem of the utmost importance that the ERG could work on this issue aimed at providing an opinion which could represent the cornerstone of the guidance the Commission should timely issue in order to stress the importance of this test and to grant a certain degree of harmonization of the NRAs practice throughout European Union in this way allowing NRAs to proceed promptly and consistently towards the new round of market analyses.

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