



IRG/ERG Work Programme 2009

*Adjusting regulation to a changing market environment and
preparing for legal and institutional change*

Chairman's Introduction

The Work Programme 2009 as set out below aims to achieve a high degree of continuity with the work done in 2008 while at the same time preparing for the challenges to be responded to in 2009, including the upcoming legal and institutional changes and the need to adapt regulation to the changing market environment.

This IRG/ERG Work Programme 2009 (hereinafter WP 2009) was discussed and adopted at the ERG Plenary in Budapest on 4th and 5th December, and it contains the main considerations and expected outputs from the IRG/ERG in 2009.

According to the good practice of the recent years, the Draft WP 2009 was subject to public consultation with the stakeholders. The public consultation run from **17th October – 7th November 2008**, an oral hearing was held on **6th November 2008**.

The role of public consultation is to increase transparency and to provide us with valuable feedback from the stakeholders. All 10 comments from the stakeholders were welcome and carefully considered by the IRG/ERG. This led to the addition of a new WP item – Analysis of business services markets suggested by several respondents.

The 2009 deliverables will to some extent build upon the achievements of the WP 2008. To ensure consistency and continuity, nearly every item that is planned for 2009 is related to items in the previous work programme.

Dániel Pataki, NHH
Chair 2008

Matthias Kurth, BNetzA
Chair 2009

Background

2009 will be a year of transition. Market change is accelerating, whether as a result of technology (e.g. convergence) or investment (e.g. in NGNs and NGAs). This, in turn, is contributing to changes in market definitions, competitive conditions, and business models, all of which require the attention of regulators. At the same time, while the current regulatory Framework will remain in force during 2009, the future legal and institutional framework currently in legislative process in the European institutions, is likely to come into force in 2010/11.

This means that regulation will need to be applied in a dynamic way. Fast-changing market conditions may require quick interventions and regulatory adjustments to support and promote the development of competition. Moreover, as competition increases, the framework's deregulatory agenda means that regulation should – where possible – be gradually phased out in favour of general competition law oversight. Regulators will also have to take account of the future legal and institutional frameworks that they will face in a few years' time; managing today's market conditions with an eye on tomorrow.

NGN/NGA provides a good illustration of the current regulatory challenges. While growing investment and rollout may lead to greater economies of scale and scope, the particular mix of technologies will increasingly depend on regional characteristics and may therefore differ within and across national territories. A more differentiated regulatory approach (e.g. geographically segmented markets) might be required, and regulation may become more complex in the coming year/s in order to be phased out later once SMP positions have disappeared. Despite network deployment being in its relative infancy in Europe, its likely success will depend not only on regulatory action taken today but on the regulatory conditions to which both incumbents and access-seekers will be subject over the coming years.

Meeting the challenges of this transitional period will require a high standard of performance from NRAs, acting both individually and collectively through the I/ERG, in the pursuit of the internal market in electronic communications services and networks for the benefit of European consumers and industry alike.

The I/ERG Work Programme 2009 set out below seeks to deal with the challenges described above and is focused on the following priority areas:

- Framework Review
- International Roaming Regulation
- NGN/NGA evolution
- Scope of the Universal Service
- Monitoring of conformity with Common Positions.

The remainder of this document sets out the framework and provisional timing for the planned outputs of the I/ERG for 2009.

The key issues are grouped into the following themes. The first relates to the *review process*, the second is designed to respond to *innovations* and challenges stemming from *convergence* in various markets, and items in the third area are aimed at *better harmonisation*. Finally the I/ERG's work on *consumer empowerment* will be continued and broadened.

Deliverables

1. Framework Review

During 2009, the Framework Review process may be in its final phase and the ERG is likely to continue to receive requests for technical advice. The analysis of the ongoing legislative proposals and the preparation of I/ERG position papers therefore will continue. The following major work-streams, although closely interlinked, can be identified.

1.1 Analysis of the ongoing legislative proposals

The focus should be on the harmonisation provisions (including, most notably, Article. 7 of the Framework Directive), as well as the provisions relating to regulatory remedies (including functional separation). The I/ERG's work will be forward-looking, with an eye on implementation of forthcoming provisions at national level.

<u>Deliverable:</u>	I/ERG position papers if/as appropriate in relation to some aspects of the legislative proposals
Deadline:	1 st and 2 nd quarter of 2009 (depending on the timeframe of the legislative process)
Consultation:	No

1.2 Analysis of proposals and implementation issues of forthcoming institutional set up

Analysis of legislative proposals will continue also on the institutional design of the ERG's successor group. Whatever the outcome of discussions on the institutional design and possible formalisation of the ERG in the framework, it will be important to analyse in detail the future role of ERG (or its successor), as well as its governance structure.

<u>Deliverable:</u>	I/ERG position papers if/as appropriate in relation to some aspects of the legislative proposals
Deadline:	1 st and 2 nd quarter of 2009 (depending on the timeframe of the legislative process)
Consultation:	No

1.3 Analysis of the new content provisions and implications for regulation

The framework review proposals contain a number of provisions related to content issues. Viewed against the background of increasing convergence it might be of interest (if they are adopted) to analyse these provisions and their impact on regulation in more detail.

<u>Deliverable:</u>	ERG Report
Deadline:	2 nd quarter of 2009.
Consultation:	No

2. Responding to emerging challenges in the market

2.1. Next Generation Networks

Given the ongoing investments in NGN and NGA, the ERG will need to take a comprehensive regulatory view of the way this process should be managed in order to preserve competitive conditions achieved to date (based on the model of the ladder of investment and the promotion of efficient investment in broadband infrastructure in both access and core next generation networks).

2.1.1. Next Generation Networks – Access

The economic analysis of NGA in the ERG NGA CP/Opinion will need to be looked at again in light of ongoing rollout as well as the possible NGA Recommendation.¹ This analysis will consider how regulatory measures should be framed in order to provide the conditions for the development of NGA, while promoting both competition and efficient investment. This work might include an update of the NGA CP/Opinion.

<u>Deliverable:</u>	ERG Report
<u>Deadline:</u>	2 nd quarter of 2009.
<u>Consultation:</u>	No

The ERG will also consider practical implementation issues relating to NGA products (both active and passive). Passive products include duct access/sharing, as well as access to dark fibre, ODF access and backhaul access. The ERG will also look at active wholesale products in an NGA world including enhanced bitstream access products such as Active Ethernet line access (including considering the relevance of multicasting).

<u>Deliverable:</u>	ERG Reports (or CPs)
<u>Deadline:</u>	3 rd quarter of 2009.
<u>Consultation:</u>	Only in case of CPs

2.1.2. Next Generation Networks Future Charging mechanisms / Long term termination issues

With the different charging mechanism currently governing PSTN/Mobile and IP-networks, and discussions over future mechanisms, this topic continues to be on the ERG's agenda.

In its Common Statement on Regulatory Principles of IP-IC/NGN core – A work program towards a Common Position (see ERG (08) 26rev1) published in October 2008, the ERG laid the basis for this work by providing an economic analysis of different charging mechanism (CPNP versus bill & keep, “B&K”) and concluded that B&K has a number of attractive properties, but needs further study. A workplan on charging mechanisms for IP interconnection with the following items has been identified:

- Implications for different business models
- Practical implementation issues:
 - Migration issues;

¹ The Commission published the Draft Recommendation on regulated access to NGAs on 18th September 2008, http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/nga/dr_recomm_nga.pdf

- Defining the border for application of the Bill & Keep regime;
- How to treat traffic from outside the Bill & Keep area;
- Other long term forms of regulation.

Currently different regimes for different types of networks prevail (PSTN/mobile vs. IP). As the separate networks are expected to converge towards a multi-service (including voice) IP network such differences may not be sustainable or efficient in the long run. This migration is considered an important factor particularly with regard to B&K driving the need for the development of a new long term interconnection regime.

The issues mentioned in the workplan arise equally for fixed networks as well as for mobile networks. Factors like the convergence of fixed and mobile networks could lead to consider new regulatory approaches for current-generation networks as well, taking into account that B&K is generally considered to require less regulatory intervention than CPNP combined with cost based termination regulation. Taken together these convergence developments require a technological neutral and consistent regulatory regime.

This work will analyze more specifically all aspects of future interconnection charging mechanisms trying to break down the abstract analysis on charging mechanisms like B&K done so far in the IP-IC/NGN Common Statement to concrete areas including an assessment of the various effects for different operators and business models as well as the competitive situation in the markets and the effects on different consumers and practical implementation issues. Studying migration issues requires carefully looking at the status quo of interconnection regulation in different networks.

As ultimately in an NGN world, multi-service networks will overcome the current separation between services and likely also between fixed and mobile networks, the CP on Future IP interconnection charging mechanisms / Long term termination regime would need to cover all aspects of a future interconnection regime and aims to identify the most appropriate long term regulatory regime for termination as well as regulatory recommendations (differentiated for IP networks and mobile networks if necessary).

<u>Deliverable:</u>	ERG CP on future IP-IC charging mechanisms / long term termination regime
Deadline:	4 th quarter of 2009.
Consultation:	Yes

2.2. Convergence

In the field of convergence, the ERG aims to continue the work it began in 2007 and continued during 2008 which looked at the drivers for change and their impact on regulation in a converging world. It has now identified two specific areas worthy of further investigation.

2.2.1. Margin squeeze in bundles (in particular for broadband products)

Bundled services are increasingly being offered by service providers and taken up by consumers. However, bundled offers, in particular broadband triple play offers (from both telecoms and cable operators), increase the risk of margin squeeze,. In 2008 the ERG began to look at the issue of margin squeeze in bundles and this work will be continued in the 1st quarter of 2009.

<u>Deliverable:</u>	ERG Report on margin squeeze in bundles
<u>Deadline:</u>	1 st quarter of 2009.
<u>Consultation:</u>	No

The work in this area will be broadened to include an analysis of the replicability of bundles. This can be considered from two main perspectives:

- Access to the different services/products included in the bundle. This perspective requires an assessment of the incentives and possibility for alternative operators to have/buy their own inputs or the need for them to have a wholesale offer.
- Price of the bundle. This perspective relates, mostly, to the margin squeeze tests and is thus a natural follow-up of the work started in 2008.

The goal is to identify best regulatory practices.

<u>Deliverable:</u>	ERG Report on Best Regulatory Practices regarding replicability of bundles
<u>Deadline:</u>	4 th quarter of 2009.
<u>Consultation:</u>	No

2.2.2. Fixed-mobile convergence

This work also began in 2008 and will be finalised in early 2009. It will look at products, substitution trends and regulatory implications (particularly for MVNOs and VoIP), including issues of numbering stemming from fixed-mobile convergence.

<u>Deliverable:</u>	ERG Report
<u>Deadline:</u>	1 st quarter of 2009.
<u>Consultation:</u>	No

2.3. Cooperation with RSPG

As part of the ERG's contribution to the promotion of the single market through harmonisation, the WP 2009 proposes to explore an area where closer cooperation with other regulatory bodies and/or joint project work on specific topics can contribute to the development of Europe's electronic communications markets.

In February 2008, the ERG and the RSPG held a joint session and agreed to cooperate in a joint working group. This working group began to study issues intertwining in market regulation and spectrum policy.

In 2009 this work should continue and be expanded to include the issue of the digital dividend and how NRAs should best handle this important spectrum item to reap the benefits of innovative services. In addition, the group should look at new technologies, such as femtocells, which have the potential to cover the last mile and might therefore be relevant to market 4 in the Commission's list of relevant markets.

Many of the issues on the agenda for the ERG are directly or indirectly related to spectrum, and the reverse is also true (i.e. many of the issues on the RSPG's agenda are competition-related). Spectrum management and market regulation increasingly intertwine. Broadband (and wireless broadband in particular) is at the centre of this crossroads, where market regulation and spectrum policy have to be discussed not only in parallel but jointly. The main drivers are in particular:

- the distinction between different access methods is becoming less important given that similar services can be provided over a number of different platforms;
- there is growing convergence in infrastructure and services;
- the introduction of more flexible spectrum usage, the recourse to unlicensed spectrum and the increased opportunities for trading spectrum usage rights are expected to reduce spectrum scarcity. At the same time this development will have an impact on competition in services and networks.

The resulting regulatory challenges generate a number of questions. In particular four areas have been identified where further analysis is necessary.

2.3.1. Market definitions

We have to ask whether we have reached a state of infrastructure competition and what effects this might have.

- What is the impact on competition from substitution possibilities between spectrum-based delivery and wired infrastructures (e.g. wireless access vs. fixed copper/fibre)?
- Is there a need to revisit market definitions?
- Are the services provided over these platforms substitutes?

2.3.2 Transitional issues

We have the issue of lasting structural competition imperfections in new markets and services resulting from legacy spectrum distribution. There is also a need to look at how to avoid competition distortions between incumbent users and newcomers resulting from the transition to a liberalised spectrum management regime (including the issues of windfall gains or losses, new competition created by greater amounts of unlicensed spectrum etc.).

- What is the net effect on competition of liberalised spectrum management?
- What possible remedies could be used to avoid competition distortions?
- Is there a need for EU-wide consistency?

2.3.3. *Information symmetry*

Another important issue for investigation is market/transaction transparency and the need to ensure equitable access to information on spectrum usage.

2.3.4. *Use of spectrum to dominate markets*

Safeguards need to be established against the use of spectrum ownership to establish or maintain a dominant position in a downstream market (e.g. via hoarding, M&A, price squeezing, etc.).

- What role does "ex-ante" regulation play in this respect?
- If it is necessary, how should it be applied and by whom should it be applied (institutional set-up)?

3. **Further harmonisation of the internal market**

The ERG proposes to follow previous years' good practice and present its deliverables in the form of ERG Opinions, ERG Reports or ERG Common Positions. The ERG's work relating to the promotion of regulatory harmonisation and the single European market in electronic communications will focus on monitoring the application of the ERG's Common Positions by its members.

3.1. *Monitoring of conformity with Common Positions*

Continuing the work begun at the end of 2006 and further developed since, the ERG will continue to monitor the implementation of its Common Positions (CPs) on remedies in the priority markets, in particular broadband and termination markets. Adherence to and conformity with ERG Common Positions is key to the promotion of targeted harmonisation. The ERG will also seek to increase its transparency in relation to its members' conformity with Common Positions.

Deliverable: ERG Reports on conformity with CPs

Deadline: Continuous

Consultation: No

The ERG will also look at ways to improve the effectiveness of regulation in a rapidly changing market environment, where the conditions of competition may become differentiated (e.g. geographically – or as between domestic and business users), which might in turn create risks for harmonised implementation. The ERG will therefore continue to contribute to the consistent application of the regulatory framework through the development of general principles of best practice, allowing regulators sufficient flexibility to tailor regulation to national market situations, while promoting shared regulatory principles. It is of utmost importance to target harmonisation to the key priority areas and to maintain the balance between the two pillars of the regulatory framework – greater harmonisation for the promotion of the single market in electronic communications (on the one hand) and the flexibility of NRAs to take account of national circumstances to promote competition in their national markets (on the other). Effectively regulated and competitive national markets will contribute to the development of the internal market.

In order to best pursue this aim, ERG has begun to examine the extent to which it is possible to draft common positions which allow for distinct national solutions which are demanded by national circumstances while minimising divergent national practices which detract from the development of the internal market. This should in turn promote *uniformly effective* regulation, thereby contributing to the development of the internal market.

Deliverable: ERG Report on effectiveness of regulation in a rapidly changing market
Deadline: Q2/2009
Consultation: Yes

The ERG will also analyse the business services market to explore its specificities and assess its functioning in more depth.

3.2. Benchmarking activities

In 2009, the ERG will continue its data collection exercises with a view to further developing methodologies for sound regulatory benchmarking, e.g. on broadband prices.

Deliverable: ERG Reports, Snapshot, etc.
Deadline: Continuous
Consultation: No

The work regarding “Methodology proposal for comparison of broadband retail prices” will be continued. The focus lies on comparing the existing different methodologies (e.g. of the Commission, OECD, ITU, etc.) and developing a benchmarking method measuring the effects of regulation in terms of market outcome. This work is also related to the work item 2.2.1. on “Margin squeeze in bundles” dealt with in the section “Convergence”. Furthermore it should be linked with the work currently undertaken by the Commission on the Broadband Performance Index.²

Deliverable: ERG Report (or CP) on Principles for a benchmarking methodology on BB pricing comparison
Deadline: Q2/2009
Consultation: Only in case of a CP

3.3. Roaming regulation

The Commission has already published its legislative proposals for the extension of the Roaming Regulation 717/2007/EC. This will include an extension in time for voice services, as well as an extension in scope to include SMS and data roaming services.³ The ERG will provide an economic analysis of the effects of the proposed changes and be ready to provide technical advice to the European institutions as and when requested.

² Cf. the Commission Staff Working Document “Indexing Broadband performance” (SEC(2008)2507) published on 29th September 2008, http://ec.europa.eu/information_society/eeurope/i2010/docs/future_internet/swp_bpi.pdf

³ Cf. the Commission’s proposal published on 23th September 2008, http://ec.europa.eu/information_society/activities/roaming/docs/regulation/reg08_prov.pdf

It might also be necessary to continue the monitoring of the implementation of the Regulation, and to prepare a report as and when the Commission may request it. Taking into account the pan-European aspect of roaming, the regular data collection and monitoring exercises of the NRAs needs to be coordinated.

<u>Deliverable:</u>	ERG study / ERG Opinion
<u>Deadline:</u>	Continuous (upon request)
<u>Consultation:</u>	No

3.4. Follow-up on the Termination Rates Recommendation

The ERG will follow-up its contributions to the Commission ahead of the Commission's publication of the TR Recommendation, considering the practical impact of the Recommendation on, and its implications for, national regulation.

3.5. Article 7 Expert Reports

As a result of the early success of the IRG/ERG's Article 7 expert groups (which notifying NRAs could trigger to advise them when their notifications became subject to the second phase procedure under Article 7), the ERG decided that these groups would be triggered automatically upon the start of a second phase, providing an independent assessment of the NRA's notification.. The establishment of a team, their consideration of the details of the case and the drafting of the report (including recommendations), all within a maximum of 60 days, is both a challenging and very resource-intensive exercise for the NRA experts who constitute the groups.

This workstream will relate to any second phase procedure that the Commission might initiate in 2009. It should be noted that a substantial number of NRAs are currently working on second-round market analyses decisions, following the revision of the Commission's Recommendation on Relevant Markets at the end of 2007.

<u>Deliverable:</u>	Expert Report of Article 7 Expert Group (IRG)
<u>Deadline:</u>	automatically, in every second phase case
<u>Consultation:</u>	No

3.6. SMP Analysis

The ERG's ongoing work on markets 4 and 5 will be continued with a view to margin squeeze issues upstream on the broadband value chain, between market 4's offers and market 5's offers as it has been considered in the Best practice n°10 of the WLA/WBA Report other issues arising in this area in the 1st quarter of 2009 based on the ongoing work with regard to the definition of markets 4 and 5 of the Recommendation on relevant markets susceptible to ex-ante regulation (2007/879/EC). The ERG will investigate the issues arising from the transition from sector-specific regulation to competition law, particularly in markets removed from the list of relevant markets will be analysed in more detail. Furthermore the ERG will look closer into the concept of self-supply in market analysis. Finally, the ERG will consider practical implementation issues arising from geographical segmentation in the second half of 2009. In all areas of work it is envisaged to deliver ERG Reports.

3.7. Regulatory Accounting

The Regulatory Accounting Report will continue to be updated regularly. It may also become more detailed in the future. The pricing/costing issues raised by NGA wholesale products (in particular duct access, but also dark fibre) will be analysed in more detail from a cost accounting perspective. The proposals regarding costing principles made in the Commission's Draft Recommendation on NGA (e.g. proposal to use historic costs, with no mentioning of LRIC etc.) will be analysed in detail for its implications on pricing.

4. Consumer empowerment

Consumers should benefit from greater competition in the electronic communications markets, in terms of choice, price and quality. The regulation of retail markets may decrease, but issues of importance to consumers remain which need regulatory attention, such as obstacles to switching, transparency (of tariffs and terms and conditions generally) and number portability.

- The ERG began work on tariff transparency in 2008 and will continue this work in 2009.
- The Commission's Communication on the scope of universal service was released on 25th September 2008.⁴ This draft will have to be analysed by the ERG and an ERG Opinion may be produced.
- The length of contract terms, as well as conditions for termination, are two issues which can prevent consumers from switching between suppliers. This has not only consumer protection implications but also an impact on competition in retail markets. Markets may become sticky when customers are locked in, which may in turn result in foreclosure. This is a particularly important issue at a time when the economic regulation of retail markets is being rolled back. The ERG will therefore take a closer look at measures to facilitate switching and aims at identifying best regulatory practices. This includes assessing the implications of the Review proposals in the field of consumer rights and protection (e.g. number portability within one day).
- VoIP is a service which can be provided from one Member State and used by a consumer in another. It therefore raises practical issues of cross-border enforcement, particularly in relation to consumer protection. The ERG will look at practical mechanisms of regulatory coordination to address these issues, which may also arise in the context of other cross-border services (e.g. premium rate numbers called between countries).

⁴ COM (2008) 572final,
http://ec.europa.eu/information_society/policy/ecomm/doc/library/communications_reports/universal_service/572_final_en.pdf