



Draft ETNO Reflection Document on the draft ERG 2009 Work Programme

Executive Summary:

- ETNO looks forward to a continued interaction with ERG in 2009. We are confident that ERG, despite its huge workload, will adhere to high standards of quality and transparency in its work, including adequate deadlines for stakeholder consultations.
- As in 2007 in the context of Roaming I, in 2008 in the context of termination rates the ERG has again proven it can play an important role in finding reasonable and facts-based solutions to regulatory challenges. We encourage ERG to continue to act as a counterbalance in case of politically inspired, often short track initiatives which may harm the sector rather than contribute to its sustainable long-term development.
- It is important to ETNO that, in line with the spirit of ERG's rules of procedure, ERG documents with material impact on regulatory policy continue to be consulted upon. In 2008, this principle was unfortunately not adhered to in all cases. The announced document on regulatory measures for NGA – if intended for publication – obviously falls in the category of documents to be put to public consultation even though it is foreseen as a report in the draft WP. The choice of issuing a “report” instead of a CP does not change the need for broad stakeholder participation on vital regulatory policy issues.
- The WP should avoid making substantive statements which may preclude future outcomes of ERG work. E.g., the claim that “Bill & Keep is driving the need for a development of a new long-term IC regime” is probably not correct. Technological and market developments in the transition to IP networks lead to in-depth thinking on future IC regimes, of which Bill & Keep is, however, only one option.

1. ERG work – interaction with stakeholders

ETNO welcomes the opportunity to contribute to the present consultation. Clearly, continued transparency of ERG work is one of the prerequisites for future successful ERG guidance on regulatory challenges in the sector.

A continued exchange between industry and ERG on the main regulatory topics is an important precondition for practicable and effective ERG guidance. In the past a dialogue with individual Project Teams, where this was possible as in the case of termination rates, has been particularly helpful.

As regards public consultations, stakeholders should be given sufficient time to comment on draft ERG positions. Pressure on ERG to act urgently should not result in shortening the deadlines for comments with the effect of less debated, less accepted, and as a consequence less effective positions. Stakeholders' contributions should be taken into account in an appropriate and balanced manner in the decision making process. Ideally, a draft document by ERG should open a debate in the sector, leading to a broadly accepted and balanced outcome. In the past, ERG consultation documents sometimes appeared to be already a quasi definitive result of a debate among NRAs with little scope for changes in the public consultation.

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These concerns are rooted in specific ERG activities over the past year. In particular, **ETNO strongly regrets the adoption of a so-called report on the three criteria test** in 2008 which concerned the fundamental question of the scope of ex-ante regulation.¹ However, the document was not consulted upon, so that industry had no opportunity to point to the obvious discrepancies of the approach with the EU regulatory framework. The report contradicts relevant Commission guidance on the subject and the regulatory provisions of the Directives. ETNO urges ERG to revise or fully distance itself from this document.

Beyond these comments, ETNO looks forward to a continued, intense exchange with ERG on the regulatory challenges for Europe in 2008.

2. Individual work items

The review

ETNO notes that ERG will continue to contribute to different subjects of the framework review. As a starting point for defining priorities for ERG work, it can be noted that different from the situation in early 2008, legislative bodies by now have a wealth of analysis at their disposal and many concepts are better understood.

¹ ETNO was already strongly critical of the proposed ERG activity in this field in its comments on the 2008 WP. These doubts have unfortunately been proven fully correct by the “report”.

The results of the institutional debate on the future design of the ERG's successor Group will clearly be very relevant. ERG should therefore consider opening this work item for consultation.

As regards work on content related issues of the review, the WP rightly mentions that the outcome of the revision in relation with content issues is still uncertain. At this stage of the Review, the general principle that defines the scope of the framework as covering electronic communications networks and services, thereby excluding content issues, is still valid. It is probably advisable to undertake the analysis based on the exact knowledge of the outcome of the review (i.e. rather in the 3rd or 4th Q 2009)

Emerging challenges

As highlighted above, the deliverable of a report on **NGA regulatory measures** including further guidance on the relevant ERG CP – if intended for publication – falls into the category of documents to be put to public consultation. The right solutions to ensure incentives for investment in NGA and open competition in the transition to the new environment is arguably the biggest regulatory challenge in Europe – particularly given the slow deployment of NGA networks in Europe. Any ERG work which could serve as guidance for NRAs in national regulatory procedures therefore has an important material impact on the market and as such should be consulted upon.

On **future IC charges**, we would first like to highlight that as in 2007 in the context of Roaming I, ERG in 2008 in the context of termination rates has again proven it can play an important role in finding reasonable and facts-based solutions to regulatory challenges. We encourage ERG to continue to act as a counterbalance in case of more politically inspired initiatives which may harm the sector rather than being driven by its sustainable long-term development. The critical position of European network operators on regulatory mandated Bill & Keep is well known.² The draft should avoid making substantive statements which may preclude future outcomes of ERG work. The claim that “Bill & Keep is driving the need for a development of a new long-term IC regime” is probably not correct. Technological and market developments in the transition to IP networks lead to in-depth rethinking of future IC regimes, of which Bill & Keep is, however, only one option.

On **convergence, pt. 2.2**, the scope of the analysis proposed should be further clarified. As broadband retail markets are outside of the scope of the recommendation on relevant markets, the issue of margin squeeze in triple play bundles (2.2.1) appears to be primarily the concern of competition authorities. Any work by ERG should fully reflect the competition law principles applicable to the field of bundling and clarify that intervention is only justified in cases where the three criteria test for applying ex-ante regulation is passed. Inappropriate regulation in this field would severely impact on the launch of new innovative services and the incentives to deploy the networks that support enhanced service bundles.

² ETNO RD286 in response to ERG consultation on Regulatory Principles of IP Interconnection / NGN Core.

As in the case of the 3 criteria test, an ERG report on the issue can have a strong impact on the market and wide-ranging consequences such as discrepancies of ERG work with EU law or competition law methodologies. If such report would be for external publication, **a public debate and consultation on this item therefore appears indispensable.**

Regarding the **cooperation with RSPG, 2.3**, we note with interest the issue of market definition in light of wireless access competition, 2.3.1. The substitution possibilities of wireless infrastructures should be fully taken into account both in the market definition and in the market power and remedies analysis under ex-ante economic regulation.

Harmonisation

ETNO maintains that ERG CPs on remedies harmonisation and best practice implementation have not been fully consistent with the underlying EU legal framework, namely with the principle contained in Art. 8 of the Framework Directive to ensure a proportionate level of regulation and encourage competition, investment and innovation. By defining an 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.

Against this background, more room for taking into account national circumstances to promote competition and investment as indicated in the draft WP 2009 seems to be worth exploring. ETNO looks forward to contributing to the corresponding consultation.