



ERG Report on the Summary of the consultation responses to the Draft ERG Common Position on Wholesale Leased Lines

Summary

This document (ERG (07) 54 b final) provides a summary of the consultation responses to the ERG WLL Draft Common Position (ERG (07) 54). The public consultation ran from 18 October 2007 to 23 November 2007.

Responses to the consultation were received from four respondents: ETNO, Arcor, ECTA and Bouygues Telecom.

The responses are summarised and then the issues raised are reviewed and separated into general comments covering the scope of the document, objectives and remedies, and more specific comments regarding the objectives and remedies in the draft CP. For each issue raised by the respondents we provide a brief response which sets out our position in relation to the issue raised and the impact it has had on the formulation of the final proposals contained in the final CP.

Summary of responses

Arcor, ECTA and Bouygues Telecom strongly support ERG's initiative and the need for detailed remedies to open up wholesale leased line markets. ECTA suggests in particular adding an introduction which underlines the significance of leased lines in the context of the ladder of investment for new entrants, hence the importance of ensuring the market is effectively competitive. Bouygues supports the document but strongly emphasise the need to maintain regulation in this market as well as to increase the level of remedial action taken in this area. Like Bouygues, ECTA welcomes the document and makes a number of additional proposals to complement the draft guidelines in particular in connection with the objectives of level playing field and reasonable quality of access products with a suggestion to add a detailed annex on KPIs in the CP. Arcor also supports the document and agrees in particular with the objectives of level playing field, transparency of terms and conditions and fair and coherent access pricing. With regard to the latter, Arcor proposes a number of detailed remedies which would help it address competition issues in Germany.

ETNO on the contrary is critical of the whole approach and of the document in terms of its objectives which it considers do not relate to the aims and principles of the EU Framework. ETNO believes the combination of best practice remedies and the set of stated objectives will promote an excessively interventionist regulatory approach. On the scope of the document ETNO disagrees with the definition of wholesale leased line product chosen by ERG giving it the status of a relevant market warranting ex-ante regulatory action. It also criticizes ERG's approach to producing best practice by pointing out the similarity of the remedies in the WLL CP with those in the WBA-WLA CP and the contradiction, that this approach highlights, with ERG's statement about the irrelevancy of one size fits all in ERG (06) 68. ETNO also insists on the fact that the CP should reflect the new Recommendation on Relevant Markets and in particular the removal of Market 14 (wholesale trunk segments of leased lines); on this issue ECTA, who disagrees with the Commission's decision on this, draws attention to Section 5 of the explanatory memorandum which accompanies the Recommendation and which stipulates that markets currently subject to regulation should not be deregulated before the NRAs in question have completed a new analysis of the market. ETNO calls for the CP to be redrafted so as to better reflect the EU regulatory framework, the limited scope of future regulation and the principle of proportionality of regulation.

General comments on the objectives and scope of the CP

Importance of wholesale leased lines for competition

ECTA proposes to have an introduction to the Wholesale Leased Lines Common Position which reaffirms the importance of having competition in wholesale leased lines for the telecom sector.

ERG agrees with ECTA's view that competition in wholesale leased lines is important, but notes that this is not within the scope of this CP, which focuses on remedies. For a more general discussion of the framework's objectives for NRAs, the types of potential competition problems that could arise, and the remedies that can be used to address them, ERG invites ECTA to refer to ERG (06) 33 "Revised Common Position on the approach to Appropriate remedies in the ECNS regulatory framework"¹.

Scope of the ERG common position vs. List of relevant markets

Definition of wholesale leased lines

In its response, ETNO argues that wholesale leased lines do not appear on the list², and it therefore is not clear where in the EC framework they are coming from. ETNO does not agree with the definition ERG gives in the CP.

ERG considers that its definition is appropriate to the scope of this CP. Wholesale leased lines encompass a wide range of different wholesale inputs into retail leased lines and other markets offered across EU countries. With respect to the relationship with the list of recommended markets from the EC, ERG feels that the term wholesale leased lines should be interpreted for the purpose of this CP as including at least terminating and trunk segments of leased lines.

¹ http://erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf.

² List of recommended markets as per the EC's Second Edition of the Recommendation on relevant markets, http://ec.europa.eu/information_society/policy/ecom/doc/library/proposals/rec_markets_en.pdf.

Markets covered in the CP

ETNO argues that the CP should make it clear that it is not intended to apply to trunk segments markets. It would like an explicit reference as to exclude these services from the scope of the CP.

ERG does not agree that it should remove trunk segments from the scope of the CP. Clearly, the CP is of no relevance to a Member State where trunk segments have been deregulated. However, a number of NRAs have already reviewed trunk segments markets in their countries and, where SMP exists and remedies are in place, are under the obligation to review them in the future in order to assess whether or not any existing remedies can be removed. If an NRA decides to regulate such a market, the CP would be relevant.

Objectives of the CP

ETNO argues that the objectives seem to lack any reference to the EC framework, and therefore any legal grounding.

This CP, like others being produced by ERG, expands on the work done in the ERG Common Position on Remedies (June 2006), which provides a link between competition problems, instruments at NRAs' disposal, and objectives for policy makers. While the work of the ERG is not legally binding, it contributes to the consistent application of the EC Framework. Its recommendations have a strong value for its members, who are recommended to take them into the utmost account when reviewing their national markets.

Objective of proportionality of intervention

ETNO argues that proportionality of regulatory intervention, which is a prime objective stated in the EC Framework, is not considered in the draft CP.

ERG agrees with ETNO that proportionality of regulatory intervention should always be a key factor to be considered when reviewing national markets. ERG has therefore revised its final CP to give more visibility to the objective of proportionality of regulatory intervention.

Specific comments on the objectives and remedies**Assurance of supply objective**

ETNO argues that the assurance of supply objective can not be justified as an objective under the framework as the latter is based on market analyses determining the removal or imposition of remedies.

ERG disagrees with ETNO with respect to this point, and believes that, in a market characterised by SMP, the objective to assure supply of wholesale leased lines is a legitimate one, in consideration of the structural characteristics of leased lines markets across Europe. Without such assurance, the prospects of achieving efficient market entry and effective competition downstream are poor. ERG has therefore not considered it appropriate to amend its position with respect to this issue in the final CP.

Level playing field objective

Price and non-price discrimination

ECTA proposes to add under the “level playing field” heading an additional bullet point in the second column that points to the importance to “avoid price and non price discrimination”.

ERG agrees with ECTA’s suggestion, and has revised the final CP to account for that.

Requirement for the publication of KPIs

ECTA feels the reference to KPIs is not strong enough. In particular, it laments that it does not make it a more explicit requirement; it suggests reformulating the text to strengthen the requirement for KPIs to be published.

ERG feels that KPIs are very important, especially to support commercial or regulated SLAs/SLGs. It has redrafted the final CP accordingly.

Guidelines on the interpretation of non discrimination

ETNO argues that the burden of proof regarding non discrimination rests with NRAs, no matter what the ERG CP might recommend. ETNO also calls for a discussion of the accompanying remedies which would have an effect on the enforcement of a non discrimination obligation like transparency and accounting separation.

On the other side, Bouygues argues that there should be guidelines from NRAs on how they would interpret non discrimination obligation.

ERG disagrees with ETNO on this point. ERG believes that greater clarity as to how a non discrimination obligation might be interpreted helps the market by bringing about more certainty over which criteria it might consider relevant in interpreting a non discrimination obligation. ERG has therefore not considered it appropriate to amend its position with respect to this issue in the final CP.

With respect to Bouygues Telecom’s point on the interpretation of non discrimination, ERG already refers to the possibility of NRA guidelines on the interpretation of non discrimination. ERG feels this recommendation in its current form is suited to the objective of this Common Position.

Avoidance of first mover advantage objective

ETNO considers the avoidance of unfair first mover advantage objective as unjustifiable regulation of retail services and puts forward the revised Recommendation which the ERG CP does not take account of and instead seems to call for continuing ex ante regulation of the removed retail market.

ERG does not find this comment relevant to this CP. This objective relates to the structure of the wholesale market, and the presence of legacy infrastructures. The CP does not call for continuing regulation of retail markets. ERG therefore sees no need to reflect this issue in the final CP.

Transparency of terms and conditions

Greater transparency

Bouygues calls for a greater degree of transparency in the market by ensuring SMP operators publish, for example on the web through a database and/or a map, all of their leased lines offers with specific information to provide comparability of offers for customers.

With respect to Bouygues Telecom's proposal for the creation of a database where purchasers of wholesale leased lines can compare offers, ERG believes this is a point better dealt with at the national level by the relevant NRA, in the light of national transparency obligations and practices.

Terms of the Reference Interconnect Offer

Bouygues proposes that incumbents should keep updated RIOs to reflect service developments and technology evolution.

With respect to Bouygues Telecom's point on the terms of reference for the incumbent's Reference Interconnect Offer, ERG notes that the obligation to publish a RIO can be as prescriptive as necessary in terms of what the incumbent needs to publish, and the frequency of the updates. In some countries, for example the UK, the terms of the RIO are detailed by the NRA in its market review. Regarding the reference to the service developments, these need to be reflected in the market definition, as the RIO publication obligation then applies to all the services found to be in the market where the incumbent has SMP. We believe therefore that the current Common Position already provides for a framework to address these issues, and that any additional concerns should be left to the NRA to deal with.

Reasonableness of parameters of access

Interconnection fees

Bouygues claims that in terms of tariffs, fees for connection to the SMP player's site should decrease when numerous operators use it.

With respect to Bouygues Telecom's point that fees for interconnection links should decrease when the link is used, or will be used, by numerous operators, ERG notes that a cost orientation obligation, accompanied where appropriate by a charge control, is sufficient to provide NRAs with a framework to address the cost of interconnection links. If an NRA feels a different approach might be appropriate, it has the power and freedom to adopt it within the current set of obligations.

Obligation to resize capacity

Bouygues proposes an obligation to resize capacity to allow new entrants to supply services to customers with minimum delay.

With respect to the suggestion that an incumbent should be obliged to re-size beforehand its network capacity to accommodate new future requests, ERG believes this is covered by the assurance of supply, and that NRAs have the freedom and powers to adapt more prescriptive solutions if the national market conditions demand it.

Fair and coherent access pricing objective

Greater fairness and coherency in access pricing

Arcor calls for a greater degree of coherency and fairness in access pricing for wholesale leased lines. Arcor calls, in particular, for greater level of pricing transparency and put forward a set of minimum requirements in this respect (for new entrants to know how the price of a leased line accrues, be able to control the prices they are charged and not pay more than they get when being charged by the kilometre).

With respect to the specific points raised by Arcor, ERG believes that the Common Position already provides an adequate framework to deal with these issues, specifically by requiring cost orientation for access products and by use of transparency obligations. Specific situations are better dealt with by national NRAs within the framework already in place.

Price regulation

ETNO is opposed to pricing regulation in the context of the fair and coherent access pricing objective on the grounds that markets are sensitive to price setting by NRAs and this can have a negative effect on investments and the further development of competition.

Price regulation is a key instrument available to NRAs under the EC Framework, and has proven in recent years successful in delivering greater competition. While price setting by NRAs might have some short term detrimental effects on the price setting mechanism, these are outweighed by the long term benefits of the increased competition that price regulation brings about.

Objective concerning reasonable quality of access products

Objective too general and far reaching

ETNO considers ERG's objective of reasonable quality of access products as too general and far reaching, saying it could have a detrimental effect by creating uncertainty in the market and stress that compensation mechanisms should be driven by commercial agreements and not by NRA intervention.

ERG considers that an obligation to provide a reasonable quality of access is a key instrument to guarantee a level playing field in the presence of upstream dominance. In addition, such an obligation is not intended to suppress commercial agreements, rather to support them.

Minimum time to repair

Bouygues asks for specific requirements to be imposed on the SMP operator in terms of quality of service, namely minimum time for outage fixing.

With respect to Bouygues Telecom's comment that a quality of service obligation should prescribe the terms for repairing an outage, ERG notes that the identification of an appropriate set of Service Level Agreements for wholesale leased lines should reflect the national condition of supply at the retail level. ERG thinks therefore that this issue is best left to NRAs to decide.