

Comments on the draft ERG Work Programme for 2005

I. Introduction

Deutsche Telekom welcomes the opportunity to comment on the draft ERG Work Programme (WP). The revision of the ERG Work Programme comes in a decisive phase for the implementation of the New Regulatory Framework. Work by ERG and Commission and subsequent action by national regulatory authorities (NRAs) will substantially determine the course of European electronic communications markets. It will impact on the ability of European e-communications operators to compete in an increasingly global market place, to contribute to growth in the EU's Lisbon reform process and to innovate for the benefit of the EU citizen. These elements are acknowledged in the preface to this year's WP by the ERG chairmen of 2004 and 2005.

A major obstacle to growth and competitiveness of the EU's ICT-sector is the threat of regulatory intervention in markets where new networks and services are now being developed and delivered to the customer. So far, the implementation of the New Regulatory Framework (NRF) has not led to an ease of the regulatory burden for providers of electronic communications networks and services that EU policy makers had aimed at when the Directives were adopted. In particular, last year's work on implementation by ERG and NRAs has not yet provided the conditions for a more dynamic (de-)regulatory approach to e-communications markets, e.g.:

- Under the newly emerging market chapter of the ERG common position on remedies, new networks and services risk being regulated from the outset once they are - even if only partly - comparable to existing ones.
- Strict price controls, conceived as a measure of last resort in the Directives, have, in combination with further obligations, been recommended in the ERG remedies common position as an adequate solution to virtually every market problem identified.
- Market analyses in some Member States have produced 'checklist' assessments to justify regulatory intervention which have overlooked tendencies towards effective competition and technological quantum leaps.

2005 brings a chance to reshape guidance for NRAs at EU level. *Inter alia*, a review of the ERG remedies paper should further develop core concepts like the replicability of assets and also add clear guidance when and where less intrusive instruments would suffice in line with the Directives' proportionality principle. Also, guidelines on

the definition of emerging markets in the remedies common position (CP) should be revised as they have proven too restrictive for the concept to become effective.

Crucially, the review of the Commission Recommendation on relevant markets beginning in the 2nd half of 2005 must lead to a radical reduction of the scope of sector-specific regulation and a major move towards the sole application of general competition law. The current list of markets, originating from an Annex to the Framework Directive in 2002, was too extensive from the outset, due to the fact that obligations under the old framework needed to be revised in the first market analysis under the NRF. Moreover, the dynamic market development on electronic communications markets has led to a lowering of entry barriers in many market areas since then.

Against this background, the ERG WP 2005 presents an opportunity to refocus and redirect the activity of the ERG.

II. Scope of the draft Work Programme

Deutsche Telekom welcomes the stronger focus on a limited set of strategic issues as presented in the draft WP. The division into three types of tasks also clarifies the priorities of the ERG work.

- Where the ERG has identified priority issues ('first-category items'), we would welcome an early involvement by market participants. Often, draft common positions submitted for consultation are results of an in-depth debate within ERG and may already constitute a compromise of ERG Members' views. At that stage, comments by stakeholders are harder to integrate than in the drafting phase. ERG could use industry to contribute to the debate within ERG itself, e.g. by inviting industry representatives to meetings of ERG working groups. In appropriate cases, calls for input such as in the case of remedies can be a way of early industry involvement. However, care should be taken that questions concern well-defined topics and are carefully drafted to produce focused input by market participants.
- In fields where the Commission asks the ERG for assistance, e.g. in preparation to Commission Recommendations ('second category items'), a clear distinction between the role of ERG and that of the Commission is vital. The Commission must be solely responsible and accountable for its legal acts. This also implies that the consultations and a possible call for input on a Commission Recommendation should be carried out by the Commission itself in order to steer the debate with the market. The ERG can, in these cases, contribute valuable expertise on national regulatory practice. It should not be burdened with drafting policy guidelines in the place of the Commission as has recently been the case with the Recommendation on cost accounting and accounting separation.
- For supporting activities ('third category items') which include such important topics as retail minus pricing, care should be taken that transparency and accountability in the ERG / IRG work is nevertheless maintained.

III. Comments on chosen work items

Further work on remedies

- We note that the ERG plans to postpone an overall revision of the remedies paper until further experience with the imposition of remedies at national level has been gathered. Given the very sceptical reception of the paper by the large majority of market participants and academics, Deutsche Telekom would welcome a quick revision including firm guidance on when to make use of less intrusive instruments than price regulation. If a general revision is postponed to later this year, guidance at least on those issues which require further conceptual work should be produced as soon as possible. This concerns in particular the two following topics:

1. Ladder of Investment and replicability

- The ERG has repeatedly underlined the benefits of sustainable infrastructure competition. At the same time, after the publication of the remedies CP in April 2004 the ERG chairman acknowledged that further work on the notion of replicability and the concept of a ladder of investment was needed. In order to create a common understanding of a one-way-access regime that encourages infrastructure competition, criteria concerning the underlying notion of replicability should be developed and data on replication in fact in and outside the EU should be gathered.
- Academic work is already available which describes an operational step-by-step approach of how price-regulation of replicable assets can be rolled back or adapted in order to create an enabling framework for infrastructure competition. This concept should be quickly implemented at European and national level to avoid that overregulation stifles incentives for possible infrastructure-based competition. In line with academic findings, it should also be underlined that the ladder concept is not suited for newly emerging markets.

2. Emerging markets

- Further work on emerging markets by Commission and ERG should include the issue of the definition of an emerging market which has not been successfully tackled in the ERG CP on remedies. In the whole of Europe, to our knowledge no market or market segment so far has been classified as a new market and therefore exempted from regulation. The NRF clearly lacks an effective mechanism to protect next generation networks and services from premature regulatory intervention. Under the current remedies CP, the principle of forbearance on emerging markets is limited to those new networks and services which create an entirely new market of their own. This is very rarely the case as innovation gradually transforms markets and creates new customer needs. Instead, a fixed timeframe for non-intervention should be established during which new networks and services are not touched by ex-ante SMP-regulation.
- It remains unclear what element of the newly emerging market concept the ERG plans to include in the revision of the remedies paper. The draft WP speaks of “*a situation where a market, emerging or not, has been defined and an SMP operator has been identified for which remedies are considered that affect competition*”

on an emerging market.” It is not clear what is meant here. The ERG states one phrase before that in principle there should not be an imposition of regulatory obligations on emerging markets. Does this change when another newly emerging market is affected, i.e. when regulators deal with two emerging markets? Either way, a ‘precautionary’ intervention on a newly emerging market would not be compatible with the NRF.

3. Different treatment of operators in the same market and termination markets

- Finally, the issue of regulation of different operators on the same market or in termination markets is of high importance. Deutsche Telekom will be happy to contribute to this discussion in order to help avoid any market distortions by an unjustified unfavourable treatment of established operators vis-à-vis late-comers on the market.

Voice over IP

- The draft WP includes the untested idea of “lenient” regulation of “smaller” operators in the field of public policy obligations for VoIP-providers which - as no further explanation is given - appears inconsistent with basic principles of the New Regulatory Framework. Instead of possibly prematurely indicating solutions to perceived market problems, we feel the Work Programme should concentrate on presenting the basic work items which require further elaboration in an open manner. Already the mentioning of a possible “lenient regulation”-approach in the WP can undermine legal certainty and may discourage market entry by “larger” operators due to fear over an unequal treatment by regulators. Typically, large operators drive new markets in the penetration phase and should not be discouraged from entering a market by a risk of discriminatory regulatory obligations.
- Moreover, guidelines on the scope of public policy obligations for VoIP such as access to emergency calls should be governed by the principle of technological neutrality.

Report on broadband issues

- The ERG foresees a report on competition issues in the context of broadband and IP-services. In this context, the notion of “naked DSL” is introduced. We suggest that a report should carefully analyse possible consequences of any new broadband regulation for past as well as future investments by operators operating on the basis of the local loop (ULL or own network), in view of the goal of the NRF to foster sustainable infrastructure-based competition. The report should take into account that continuous investment in infrastructure is the necessary precondition for innovation and the provision of next generation services. Also, consequences for availability of emergency services and other public policy goals will have to be evaluated.

ERG Common Position on wholesale international roaming

- In its work programme the ERG foresees common positions on the market definition and the need for regulation of wholesale international roaming as well as a report with a proposal for joint further action.
- The ERG should take notice of the already strong competition on the market for wholesale international roaming as illustrated by declining IOT charges on the basis of traffic steering and discount agreements. T-Mobile is a net exporter of roaming traffic, i.e. our mobile customers more frequently make calls abroad than foreign users use our national networks for Roaming. Accordingly, T-Mobile has always been at the forefront of bringing roaming prices down by negotiating discount agreements and passing on these benefits to consumers via attractive and transparent retail roaming offers.
- Regulatory intervention would be detrimental to the existing incentives for competition on the wholesale roaming market as well as to innovation and investment. A regulation of IOTs would leave little to no room for future discount agreements thereby making competition on the wholesale roaming market less attractive, if not impossible.
- In addition the role of the ERG in the market analysis procedure remains questionable with regard to transparency and the principle of proportionality. If, however, the ERG continues to pursue an in-depth analysis of national markets for wholesale international roaming, the operators concerned should be consulted and involved at an early stage.